United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 00-6066

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FELIX BLONDIN,

Petitioner-Appellant,

- v. -

MARTHE DUBOIS,

Defendant-Appellee.

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**BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA**

**SUPPORTING PETITIONER-APPELLANT AND SUPPORTING REVERSAL**

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**Preliminary Statement**

Pursuant to 28 U.S.C. § 517 and Rule 29 of the Federal Rules of Appellate Procedure, the United States submits this brief as amicus curiae to express its views on the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, implemented by the International Child Abduction Remedies Act (the "ICARA"), 42 U.S.C. §§ 11601-11610.

**INTEREST OF THE UNITED STATES**

The Hague Convention is designed to “protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.” Hague Convention Preamble. The Department of State has long been involved in the difficult human, legal, and diplomatic problems surrounding international parental child abduction. The Department of State represented the United States at the negotiation of the Convention, and was instrumental in proposing its implementing legislation to Congress. (A237). The Department of State has also attended periodic international meetings to review the operation of the Convention. (A237-38).

The Hague Convention requires each party State to designate a "Central Authority" to cooperate with its counterparts in other party States to "secure the prompt return of children and to achieve the other objects of this Convention." Hague Convention, arts. 6, 7. The Department of States' Office of Children's Issues is the designated Central Authority in this country. 22 C.F.R. § 94.2.\* To facilitate the proper functioning of the Convention, the Office of Children's Issues carries out an active program of communications with private applicants, other Central Authorities, and, where appropriate, courts in the United States and abroad. (A238).

The Department of State has a strong interest in promoting the proper operation of the Convention to ensure that the United States complies with international treaty obligations. (Id.). To the extent that other party States consider erroneous the United States courts’ application of exceptions to return under the Convention, the United States may find its views on questions of Convention interpretation accorded less weight. Blondin v. Dubois, 189 F.3d 240, 248 & n.7 (2d Cir. 1999) ("Blondin II"). As succinctly stated by the Hague Convention's official reporter, in language adopted by this Court, any "'systematic invocation of [these] exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.'" Id. at 246 (quoting Elisa Perez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session 426 (1980) ("Perez-Vera Report")). The standards applied in United States courts will thus inevitably influence the standards we can demand from other countries with respect to returning children to the United States.\* (A238).

In sum, the United States Department of State has a substantial interest in ensuring that the Convention is interpreted correctly in the courts of this country. Moreover, in light of the Department of State's involvement in the negotiation and operation of the Convention, the Department's interpretation is entitled to substantial deference. See Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982).

**Issues Presented for Review**

The United States will address the following:

1.Whether, in refusing to return two abducted children to France, the district court misconstrued the exception to return under Article 13(b) of the Hague Convention.

2.Whether the district court erred in taking into account the views of one of the children, who is eight years old.

**STATEMENT OF THE CASE**

**A. The Hague Convention**

The Hague Convention was adopted to deter parents from abducting children across international boundaries in the hope of securing a court sympathetic to their position regarding custody. H.R. Rep. No. 525, 100th Cong., 2d Sess. 1-2 (1988), reprinted in 1988 U.S.C.C.A.N. 386, 386-87; see also Blondin II, 189 F.3d at 246. The Convention applies to all children under sixteen habitually resident in any of the party States. Hague Convention, art. 4. Both the United States and France are partiBlood Products Advisory Committee MeetingDecember 12, 2002Issue Summary: (1 of 3 for the BPAC Bacterial contamination topic) Quality Control (QC) Measures for Aseptic Collection and Processing of Platelets and Platelets PheresisBackground:Although blood collection and processing procedures are intended to produce non-infectious blood components, bacterial contamination still may occur. Surveillance studies have found rates of contamination as high as 0.4% in single donor platelets, although rates at or below 0.2% are more reported. The causes include occult bacteremia in the donor, inadequate or contaminated skin preparation at the phlebotomy site, coring of a skin plug by the phlebotomy needle, and breaches of the closed system from equipment defects or mishandling. Platelet products are more likely than other labile components to be associated with sepsis due to their storage at room temperature, which is permissive of bacterial growth. For the same reason, bacterial cultures of platelets provide the best indication of the rate of contamination, provided that the sample for culture is obtained on a suitable sample volume and at a suitable time post-collection.A variety of procedures may be used to obtain a valid platelees to the Convention. Blondin II, 189 F.3d at 244.

Under the Convention framework, "'a United States District Court has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim.'" Blondin II, 189 F.3d at 245 (quoting Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993) ("Friedrich I"), and citing Hague Convention, arts. 16 and 19); see also 42 U.S.C. § 11602(b)(4). To obtain return of a child to its country of habitual residence, the person seeking return must prove only that the abduction was "wrongful" within the meaning of the Convention. Blondin II, 189 F.3d at 245 (citing 42 U.S.C. § 11603(e)(1)(A)). Once wrongful removal is established, the child must be promptly returned unless one of four narrow exceptions set forth in the Convention applies. Id. (citing Friedrich v. Friedrich, 78 F.3d 1060, 1067 (6th Cir. 1996) ("Friedrich II"), and 42 U.S.C. § 11601(a)(4)).

Of the four narrow exceptions to return, the exception relevant to this action permits a court to refuse return where the abductor demonstrates by clear and convincing evidence that "'there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'" Blondin II, 189 F.3d at 245 (quoting Hague Convention, art. 13(b), and citing 42 U.S.C. § 11603(e)(2)(A) for "clear and convincing" standard). In addition to the four stated exceptions, the Convention also permits a Court to "'refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.'" Id. at 246 n.3 (quoting Hague Convention, art. 13).

Each of the four exceptions to return, as well as the provision for taking account of an older child's objection, must be construed narrowly to avoid frustration of the Convention's purpose. Id. Thus, even if an action falls within an exception to return, the court may nonetheless order return t sample for bacterial culture. Aseptic techniques are required in order to minimize the risk of false positive cultures due to contamination at the time of sampling or upon inoculation in culture. Additionally, it is prudent to retain a sample that can be used for repeat culture to validate a positive result. Large volume samples removed from a several unit platelet pool or single donor apheresis unit can be cultured any time post-collection. However small volume samples (e.g. 2-5 ml removed from a single whole blood unit) should be obtained only after a 24-48 hour delay post-collection. The delayed sampling of a small volume permits bacterial growth to a level that subsequent assays will reliably detect, thereby overcoming sampling errors at low contamination levels.High-Throughput Sampling Using a Sterile Connecting Device (SCD) Sampling solely for quality control purposes can be accomplished by an aseptic, but open method (e.g. needle aspiration) for units at the time of issue (i.e. for use within four hours) or on outdating units. Conversely, sampling of platelets for the purpose of establishing a criterion for issuance of platelets as "culture negative to date" based on a negative result of bacterial cultures requiif return is consistent with the interests represented by that exception, and the court should look for ways to order return. Id. at 246 n.4, 249-50.

**B.Prior Proceedings**

**1.Facts**

As initially found by the district court, the facts regarding the children's lives in France are in substance as follows: Marthe Dubois and Felix Blondin, French nationals who have never married, began living together in France after 1990. Blondin v. Dubois, 19 F. Supp. 2d 123, 124 (S.D.N.Y. 1998) ("Blondin I"). Marie-Eline was born to them in 1991, id., and Francois in 1995, id. at 125. Both children were born in France and resided in France with Dubois, her older son, Crispin, and Blondin, until Dubois brought them to the United States in August 1997 without the knowledge or consent of Blondin. Id. at 124-25.

From 1991 through 1993, Blondin beat Dubois on various occasions, including when she was holding Marie-Eline, and at one point wrapped an electrical cord around Marie-Eline’s neck and threatened to kill Marie-Eline and Dubois. Id. at 124. During 1992 and 1993, Dubois and Marie-Eline periodically lived in a series of battered women’s shelters. Id. at 124-25. In 1993, apparently during a separation from Dubois, Blondin applied for custody of Marie-Eline in a French court. Id. at 125. In December 1993, Blondin and Dubois reconciled, and the French court terminated the custody case with an order giving custody rights to both parents, and indicating that the principal residence of the child would be with the father, while the mother would have visiting and sheltering rights. Id.

After the reconciliation, Dubois started living with Blondin again, the physical abuse resumed, and Francois was born. Id. Dubois once threatened to throw Francois out the window and often threatened to "kill everyone." Id. In August 1997, Dubois forged Blondin’s signature on passport applications for the children and brought the children to the United States without informing Blondin. Id.

**2.Court Proceedings**

On June 19, 1998, Blondin filed a petition under the Convention seeking the children's return to France. Blondin I, 19 F. Supp. 2d at 126. On August 17, 1998, the district court dismissed Blondin’s petition, denying return of the children to France under Article 13(b) of the Convention. Id. at 127-29. The holding denying return was based primarily on a "grave risk of harm" of abuse by Blondin. Id. at 127-28. In addition, the district court noted that the children appeared to be well-settled in the United States. Id. at 123. Without making a finding whether Marie-Eline had reached a sufficient age and maturity to have her views considered, see Hague Convention, art. 13, the district court also noted that the child expressed a preference for remaining in the United States, id. at 128-29.

On August 17, 1999, this Court vacated the district court's judgment and remanded the action with the direction that, in applying the Article 13(b) exception to return based on grave risk of harm, the district court consider "the range of remedies that might allow both the return of the children to their home country and their protection from harm, pending a custody award in due course by a French court with proper jurisdiction." Blondin II, 189 F.3d at 249. This conclusion was premised on the Court's review of the Hague Convention's purposes, and, in particular, the Convention's goal of having children returned to their place of habitual residence for custody determinations. This Court thus held that, in cases under the Hague Convention, courts should make every effort to explore ways to protect children from harm "while still honoring the important treaty commitment to allow custodial determinations to be made -- if at all possible -- by the court of the child's home country." Id. at 248.

This Court did not disturb the factual findings regarding Blondin's abuse, and acknowledged the district court's conclusion that returning Marie-Eline and Francois to Blondin's custody would expose the children to a "grave risk of harm" under the Convention. Id. However, this Court made clear that the "other two ancillary considerations" articulated by the district court, namely, that Marie-Eline expressed a preference to remain here, and that both children appeared well-settled, were not appropriately relied upon under Article 13(b). Id. at 247. With respect to Marie-Eline's views, this Court held that consideration of a child's views on return was a separate matter that was not part of a "grave risk" analysis, and stated that, before considering such views, a court would have to make a finding that the child had obtained an appropriate degree of age and maturity. Id. Similarly, this Court found that a child's becoming "well-settled" was a separate exception, governed by Article 12 of the Convention and requiring as a predicate that the children be in the receiving State more than one year before the filing of a petition for return. Id. The Court commented that it would not rule out the possibility that a child could become so deeply rooted in the United States that return would then pose a "grave risk" of harm within the meaning of Article 13. Id. However, the Court also noted that the record before it did not present such a case. Id.

The case was then remanded to the district court with instructions to explore ways in which the children could be returned to France yet still be protected from abuse. Id. at 250. In its concluding paragraph, this Court made plain that the district court should deny the petition for return of the children to France only if there were no reasonable means of repatriation that would not effectively place the children in Blondin's immediate custody. Id.

Following remand, the district court sought information on available options in France if the children were returned there. (A60-61). In addition, the district court determined that it would receive evidence on whether the children in this case had now become so "deeply rooted" in the United States that return would subject them to a "grave risk of harm" under Article 13(b), and on whether Marie-Eline had now obtained an age and degree of maturity such that it would be appropriate to take account of her views. (A69-71). On December 20, 1999, the district court held a hearing during which it received evidence as to all of these issues. (A270-409).

On January 12, 2000, the district court issued its opinion. Blondin v. Dubois, 78 F. Supp. 2d 283 (S.D.N.Y. 2000) ("Blondin III"). The district court acknowledged that Blondin, in enforceable undertakings, had agreed not to enforce his right to custody pending new proceedings in France (which could take between one and three months), and had offered to pay for the return of the children and their mother. Blondin III, 78 F. Supp. 2d at 288-89. In addition, Blondin undertook to absorb the cost of temporary lodgings while the mother and children applied to the French government for more permanent housing, financial support, and other social services, and for free legal assistance (all of which Dubois is eligible for). Id. The district court also found that, if there were immediate danger to the children, Dubois could seek an immediate protective order from a juvenile justice in France, granting her temporary custody. Id. at 288 n.5. In addition, the district court noted an agreement by the French government that, if Dubois returns to France, she will not be criminally prosecuted for the abduction. Id. Based on these facts, the district court stated that it had "every confidence in the ability of the French administrative and judicial systems to protect and support [the children] pending the adjudication of the custody case." Id. at 299.

Nonetheless, the district court again refused return based on the "grave risk" exception in Article 13(b). The district court openly questioned the wisdom of the narrow reading given to the "grave risk" provision in this Court's prior opinion. Id. at 297-98. The district court then concluded that, even if it were to apply that narrow interpretation, the standard would be satisfied here because "any repatriation arrangements, including even the return of the children in their mother's temporary custody with financial support by Blondin and French social services, would expose Marie-Eline and Francois to a 'grave risk' of psychological harm." Id. at 285. This conclusion was based on the testimony and report of psychiatrist Dr. Albert Solnit -- accepted by the court in full, id. at 290 -- that separation from their new home and extended family, and return to a country where they were abused, amidst the uncertainties of custody proceedings, would exacerbate the trauma suffered by the children due to the abuse, and would interfere with their psychological healing. Id. at 291-92, 295-96. In addition, "as one of the several reasons why I am invoking Article 13(b)," id. at 296, the district court found that Marie-Eline, at age eight, "'has attained an appropriate age and degree of maturity at which it is appropriate to take account of her views,'" id. at 296 (quoting Article 13 of the Convention). The court added that, "[a]lthough her views are by no means dispositive," Marie-Eline did not want to return to France "because she does not want to be subjected to further physical and emotional abuse at the hands of her father," id.

# Summary of Argument

The standard of review to be applied on this appeal should be plenary, as the issues present mixed questions of fact and law, and there is no dispute with regard to the district court's findings of historical and narrative fact. Moreover, appellate clarification not only of the legal standards, but also of their application to the facts, is appropriate. See Point I.A., infra. However, regardless of whether the Court considers the issues to be pure questions of law or mixed questions of fact and law, the result should be reversal of the district court's decision, as it contravenes the purposes of the Hague Convention and the specific direction of this Court. Instead of following this Court's mandate to seek to facilitate return, and in contravention of its own finding that the French authorities could protect the children from future abuse upon their return, the district court adopted testimony to the effect that the children's "best interests" and long-term psychological well-being counseled against their return to the country of France (as distinguished from return to the custody of their father). On that basis, the district court again incorrectly applied Article 13(b) and refused to order the children returned to France. See Point I.B., infra. Moreover, the district court included in its Article 13(b) analysis an erroneous interpretation of the separate Convention provision allowing a court to refuse return based on an explicit objection to return by a child of "appropriate age and maturity." That provision does not make a child's objection part of a "grave risk" analysis, but provides a separate basis to deny return if the requirements of the "objection" provision are met. Those requirements were not met here, as the child did not state an objection to return to France distinct from return to her father's custody. Moreover, the child was not of sufficient age and maturity independently to interpret her own interests and make the sort of determinative decision to which a court might give conclusive effect under Article 13. See Point I.C., infra.

**ARGUMENT**

**THE DISTRICT COURT’S FINDINGS REGARDING THE**

**FRENCH SYSTEM'S ABILITY TO PROTECT THE CHILDREN**

**FROM FUTURE ABUSE SHOULD HAVE LED TO AN ORDER OF RETURN**

**A.Standard of Review**

In Blondin II, this Court did not address the standard of review to be applied in a case such as this, brought under the Hague Convention. In the United States' view, the appropriate standard of review is that applied by the Third Circuit in such cases: "plenary review of the [district] court's choice of legal precepts and its application of those precepts to the facts," with the clearly erroneous standard applied only to "the district court's historical or narrative facts." Feder, 63 F.3d at 222 n.9. Application of this standard would comport with this Circuit's practice in other types of cases raising mixed questions of fact and law.

Ordinarily, this Court reviews the factual findings of the district court under the "clearly erroneous" standard, see Fed. R. Civ. P. 52(a), while legal conclusions are reviewed de novo, see United States v. McCombs, 30 F.3d 310, 316-17 (2d Cir. 1994). This has been the approach of all the courts of appeals to address the standard of review in Hague Convention cases, other than the Third Circuit. See Shalit v. Coppe, 182 F.3d 1124, 1127 (9th Cir. 1999); Lops v. Lops, 140 F.3d 927, 935 n.6 (11th Cir. 1998); Friedrich II, 78 F.3d at 1064.\* However, "[i]n a bench trial, . . . 'where the functions of fact-finding and exposition of law are performed by the same person, the line between the functions is not always distinct.'" McCombs, 30 F.3d at 317 (quoting American Society of Composers, Authors and Publishers v. Showtime/The Movie Channel, 912 F.2d 563, 569 (2d Cir. 1990)). Moreover, "'findings made in the context of a bench trial might be derived from legally impermissible factors, the failure to consider legally relevant factors, the application of incorrect legal standards, or the misapplication of correct legal standards.'" Id. (quoting American Society of Composers, Authors and Publishers, 912 F.2d at 569). Thus, while the reviewing court "'must respect findings of the trial judge as to what in fact happened and in addition . . . give due weight to his superior opportunity to acquire the true feel of the case,'" id. (quoting In re Hygrade Envelope Corp., 366 F.2d 584, 588 (2d Cir. 1966) (emphasis added in McCombs)), "'when the issue is [the trial court's] application of a legal standard to facts undisputed or reasonably found,'" id. (quoting In re Hygrade, 366 F.2d at 588 (brackets added in McCombs)), the reviewing court "will not shy away from plenary review" to ensure that the result is consistent with the applicable rule of law, id.; see also Muller v. Committee on Special Educres that the integrity of the closed system should be maintained. This is because platelets may continue to be stored for a variable period after sampling and before use. Suitable methods of sampling in this case would include the use of integral satellite containers, or stripping, refilling, and then pinching off duplicate pigtails. Sampling also may be done into collection containers via the use of sterile connecting devices.The FDA Guidance for Industry (Use of Sterile Connecting Devices in Blood Bank Practice, November, 2000) (1) describes an SCD as a functionally closed system for component preparation. However, given the room temperature storage of platelet preparations, current regulations do not permit extension of the 4 hour outdate for pooled random donor platelets pending submission of supporting data to ensure that sterility is not compromised by multiple SCD connections. While published US data support the sterility of SCD procedures when combined with visual inspection of the welded joint(2,3), a single European study described a 1.4% product contamination rate when an SCD was used to obtain samples for culture (4). Recent clearance of two semi-automated culture systems for QC of platelet components has gene., 145 F.3d 95, 102 (2d Cir. 1998) (application of statutory and regulatory definitions to particular facts of case is mixed question warranting de novo review).

Moreover, plenary, or de novo, review of mixed questions is particularly appropriate in cases brought under the Hague Convention, because of the need for uniform interpretation, see 42 U.S.C. § 11601(b)(2)(B), and the importance of properly applying the Convention in the spirit of trust and cooperation between States necessary for the Convention's proper functioning, see Blondin II, 198 F.3d at 248 n.7. Where, as here, a court of appeals is as well positioned as the district court to assess whether the facts satisfy the standards of the Convention, and the Court's decision on these issues may have value in clarifying the law, plenary review of mixed questions should be applied. See Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (independent appellate review necessary where appellate court in at least as good position as district court and decision may clarify law).

**B. Article 13(b) Was Not Appropriately**

**Invoked to Deny Return**

Article 13(b) of the Convention permits, but does not require, non-return where “there is a grave risk that [a child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Hague Convention, art. 13(b). This exception is to beconstrued narrowly, and must be harmonized with the Convention’s central purpose of, wherever possible, deterring abductions by returning abducted children promptly, and honoring the treaty commitment to allow custodial determinations to be made by the court of the child’s habitual residence. Blondin II, 189 F.3d at 248. Thus, it is important that a court consider not only whether return would subject the child to a grave risk of harm, but also whether the State to which the child would be returned can and will take steps to ameliorate any potential harms. Id. at 248-49.

Consistent with the above, this Court explicitly directed the district court to consider on remand whether the abducted children could be reasonably protected from the "grave risk" posed by Blondin's abusive behavior "while still honoring the important treaty commitment to allow custodial deterated momentum within industry to culture in-date apheresis products followed by either product quarantine for a defined culture interval, or recall of a culture-positive distributed product. In part due to the absence of published data supporting SCD for sampling from in-date products, FDA has previously taken the position that the cleared culture systems should carry special labeling prohibiting their use as pre-release screening tests, due to a) possible risk of increased extrinsic contamination from SCD sampling and b) absence of data for the cleared devices when used for pre-release testing c) concern about off-label use of platelets older than the current 5 day shelf life (5). Similar concerns regarding extrinsic contamination may also exist if SCD procedures are used to collect a culture sample from many (or all) platelet products prior to release for transfusion. The Committee will hear a summary of available data on this issue. Quality Control StrategiesThe goal of quality control testing for bacterial contamination should be to assure that blood collection and processing procedures conform to defined standards. Statistically-based sampling of platelets for culture (or analogous testing) by a validated method will prminations to be made -- if at all possible -- by the court of the child's home country." Blondin II, 189 F.3d at 248. Because the district court on remand found that the children would not have to stay with their father pending the new determination, that the French system could support Marie-Eline and Francois pending the adjudication of the custody case, and that the French system could protect the children from further abuse, Blondin III, 78 F. Supp. 2d at 288-89, 299, the type of "grave risk" contemplated by the Convention was ameliorated, and return to France should have been ordered, see Blondin II, 189 F.3d at 249-50.

Instead of following this mandate, the district court refused return on the ground that France could not "protect [the children] from the trauma of being separated from their home and family and returned to a place where they were seriously abused, amidst the uncertainties of court proceedings and being on public assistance." Id. at 298. This conclusion was based on testimony from a psychiatrist that any return of the children to France, even for a one-to-three-month period during which a French court would determine custody, would cause them to experience post-traumatic stress disorder due to the prior abuse. Id. at 295. The psychiatrist was of the opinion that psychological harm would be caused by "return[ing] them to the scene of their original trauma" and by placing them in an insecure position based on the uncertainties surrounding a custody proceeding in France. Id.\*

As this Court held in Blondin II, issues of past abuse should not constitute a grave risk of future harm under Article 13(b) without the additional finding that there is a likelihood of, and no adequate option to prevent, future abuse upon return. Blondin II, 189 F.3d at 248-49; see also Tabacchi v. Harrison, No. 99 C 4130, 2000 WL 190576, at \*12-13 (N.D. Ill. Feb. 10, 2000) (return ordered where Italy can protect child from alleged abuse); Croll v. Croll, 66 F.rovide a reliable indication of the rate of contamination for all the labile products. However, the number of samples tested must be very large. (For example, based on Poisson statistics, it would require 0 failures out of 750 samples to be 95% confident that the contamination rate did not exceed 0.4%.) For very large blood collection centers, sampling on this order of magnitude may be possible by culturing platelets only at outdate. Conversely, small centers should consider testing of all units older than 24-48 hours by a process of sterile sampling at the time of issue or outdate. Daily (or, if frozen, weekly) samples can be pooled to reduce the number of cultures. Individual samples contributing to positive pools should be retested singly to determine the identity of the contaminated units, thereby permitting a prompt investigation of potential correctable causes. Correlations with common causal factors such as operator errors, shift, reagent batch, or procedure should be considered. Retained duplicate samples should be used to confirm or reevaluate the initial bacteriological findings. The following will be presented by FDA for consideration as a minimal quality control program for all platelet products collected Supp. 2d 554, 561 (S.D.N.Y. 1999) (same with respect to Hong Kong), appeal pending, No. 99-9341 (2d Cir.); In re Walsh, 31 F. Supp. 2d 200, 206-07 (D. Mass. 1998) (same with respect to Ireland); compare Turner v. Frowein, FA 970084450, 1998 Conn. Super. LEXIS 3781, at \*17-21 (Sup. Ct. Conn. June 25, 1998) (refusing return where court found sexual abuse of child by father, and Dutch authorities were not responsive to mother).

The district court criticized this Court's interpretation of Article 13(b) as "unduly narrow" and "unwarranted." Blondin III, 78 F. Supp. 2d at 298. In support of this criticism, the district court analogized this case to a portion of a State Department legal analys at blood centers.As a quality control for aseptic collection and processing of labile components, blood collection centers should determine the rate of bacterial contamination in platelets at least yearly by culturing 1,500 or more units (about 30 units per week or 5% of units released after 24 hours of storage, whichever is larger.) Standard statistical methods should be used to identify significant deviations from a baseline contamination rate not to exceed 0.2%. The chosen method should be based on a predetermined level of confidence to exclude a maximum tolerated rate of contamination, and an action limit should be established.All instances of a positive culture should be investigated promptly to facilitate identification of a correctable cause. Whenever the observed rate of bacterial contamination exceeds the defined action limit, a comprehensive investigation into potential causes of contamination should be undertaken and all collection and processing procedures should be revalidated.Example: A blood center wishes to establish surveillance to detect bacterial contamination rates significantly in excess of 0.2%. The following chart is derived from binomial statistics:CandidateAction LimitConfidence in Power to detecis that was published when the Convention was first adopted here. Id. at 298 (citing 51 Fed. Reg. 10,494, 10,510 (1986)). Under that analysis, sexual abuse of a child by one parent is an example of an "intolerable situation" permitting a court to deny a petition for return. This analogy was flawed. The Department of State has confirmed to us that the example assumes (as did the district court in its initial ruling in this case, 19 F. Supp. 2d at 127-29) that the return would be to the custody of the abusive "custodial parent." 51 Fed. Reg. at 10,510. The example did not consider the additional possibility of return in the custody of the non-abusive parent, or of other alternative arrangements to protect the child in that situation.

The district court also erroneously concluded that, even under what it regarded as this Court's "unduly narrow" standard, a grave risk of harm had been established. Blondin III, 78 F. Supp. 2d at 299. The district court believed that its findings of past abuse made this case exceptional, and warranted its acceptance of expert testimony regarding the children's emotional ability to adjust to a return to France. Id. at 297. Both portions of this conclusion were incorrect. First, while allegations of abuse are not always made, invocation of such allegations is becoming more ordinary as "parents attempt to stave off return orders in the name of the child's welfare." Linda Silberman, Hague International Child Abduction Convention: A Progress Report, 57 LAW & CONTEMP. PROBS. 210, 267 (Summer 1994). Moreover, much of the testimony credited by the district court was primarily addressed to the psychological harm that may flow to the children based on the uncertainties of custody proceedings in France. See 78 F. Supp. at 295-96. The district court acknowledged that uncertainties are inherent in any custody proceeding, id., but then failed to appreciate that crediting such uncertainties, even those existing against a background of past abuse, as a basis for non-return under the Convention expands the "grave harm" exception to the point where it threatens to undermine the central goal of the Convention, namely, the prompt return of abducted children to their country of habitual residence.

While expert testimony addressing whether grave psychological harm might follow from return to a particular custodian or specific living situation may be relevant under Article 13(b), the type of testimony credited by the district court in this case was addressed to which country the children would fare better in for purposes of their long-term psychological health, even on the assumption that the French courts would protect them from future abuse by their father. Indeed, the psychiatrist giving this testimony described his own view of his role as follows: “We were here to deal with the children’s best interests at the Court’s request.” (A367). Such evidence is addressed to the issue of custody, and is for the courts of the country of the children's habitual residence. It has little relevance to the question of whether children should be returned under the Convention, even where allegations of abuse are present. See Friedrich II, 78 F.3d at 1067, 1069; In re Walsh, 31 F. Supp. at 206; Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 850-51 (Ky. Ct. App. 1999), petition for cert. pending, No. 99-1496 (U.S.)\*; Tahan v. Duquette, 259 N.J. Super. 328, 333-35 (N.J. Super. 1992); compare Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 461-62 (D. Md. 1999) (relying on similar type of psychological evidence to find exception to return, but relying on now-vacated opinion in Blondin I); Krishna v. Krishna, No. C 97-0021, 1997 U.S. Dist. LEXIS 4706, at \*9-10 (N.D. Ca. Apr. 11, 1997) (refusing return that would put child back into psychologically damaging environment of prior abuse, but also finding that removal was not "wrongful" where father acquiesced in child's leaving country).

In sum, the district court relied on testimony that the children would suffer grave psychological harm not from return to any specific abusive or otherwise intolerable situation, but merely from return to the country of France, where past abuse had occurred, and from custody proceedings there. 78 F. Supp. 2d at 296-97. Such a finding cannot alone justify relief under the narrow exception to return contemplated by Article 13(b).\*

In comparable circumstances, the United States would expect the French courts to return children to our system for an appropriate custody determination in our courts. The district court’s failure to return the children to France in this action erodes the system of trust and cooperation essential to the functioning of the Hague Convention and potentially opens the door to unregulated and uncontrollable international abductions in child custody matters.\*\*

**C.The District Court Incorrectly Analyzed, as a Legal Matter,**

**Whether Marie-Eline Objected to Return and Whether**

**She Has Attained a Sufficient Age or Degree of Maturity**

**to Have Any Such Objection Given Effect**

At the December 20, 1999 hearing, the district court heard evidence to determine whether Marie-Eline had, at age eight, attained an age and degree of maturity such that it would be appropriate to take account of her objection to return. The district court then played with Marie-Eline and Francois in Chambers. Based on that playtime, the district court reported: “Marie-Eline explicitly stated that she does not want to return to France because she does not want to be subjected to further physical and emotional abuse at the hands of her father.” Blondin III, 78 F. Supp. 2d at 296. The district court considered this an “objection to being returned to France.” Id. The court then noted that it considered the child's "views" as only one of several reasons why it was invoking Article 13(b). Id. This was an erroneous application of the standard for taking account of an older child's objection to return.

**1.Marie-Eline Did Not Express an “Objection to Return” Within the Meaning of the Convention**

As this Court stated in its initial opinion, that Marie-Eline may have expressed a preference to remain in the United States is not appropriately relied upon by a court when applying the exception to return under Article 13(b) of the Convention. Blondin II, 189 F.3d at 247. Rather, "[t]he Convention includes a separate provision allowing the court to take into account a child's objection to being returned 'if [the court] finds that the child . . . has obtained an age and degree of maturity at which it is appropriate to take account of its views.'" Id. (quoting Hague Convention, art. 13) (emphases added). This provision does not contemplate a general airing of a child's "views" as part of an Article 13(b) analysis of "grave risk"; rather, it permits, although does not require, a court to refuse return based on the separate ground of an older child's maturely considered objection to return. The district court correctly recognized that Marie-Eline's views were not sufficiently "dispositive" to permit non-return under that provision alone. Id. at 296.

Moreover, Marie-Eline did not express an "objection" to return within the meaning of the "age and maturity" provision. The district court concluded that Marie-Eline did not want to return to France “because she does not want to be subjected to further physical and emotional abuse at the hands of her father.” Id. This is not an objection to returning to France; rather, it is an objection to returning to the custody of her father. Indeed, the record contains ample evidence that Marie-Eline may want to return to France if she is not with her father. For example, the psychiatrist stated that Marie-Eline “loved France and if she could go back to France safely someday, she would love to do so . . . .” (A328). When asked to elaborate on that comment, he stated, “She loves France, but she separates it from the France with her father and the France without her father.” (A335). Similarly, when Marie-Eline was herself asked, “And would you mind going back to France if you did not have to live with your daddy,” she responded, “Yes, I wouldn’t mind.” (A383). When asked if she preferred New Jersey or France, she replied New Jersey, but when asked why, she stated, “because I don’t want to live with my daddy.” (Id.) Again, her focus was on avoiding her father, not France. This is simply not the type of “objection” envisioned by the Convention.

**2.The District Court Incorrectly Applied the**

**“Age and Maturity” Standard**

Even if a child articulates a firm objection to return, a court should nonetheless proceed with extreme caution, and carefully consider whether the child actually has reached the age and maturity threshold required by the Convention. That threshold can be satisfied only where the child has attained sufficient maturity independently to express her own interests in the manner necessary to make a determinative decision for herself. Perez-Vera Report at 433.

In this case, Marie-Eline, now eight years old, was abducted to the United States at the age of six, and has been in the exclusive care of her abducting parent since that time. The Convention applies to children up to sixteen years of age, and Marie-Eline therefore was far below the age of the older children that the drafters of the Convention had principally in mind in drafting this provision. Id. (citing fifteen-year-old as example). At the outset, therefore, there is substantial reason to doubt whether any eight-year-old could satisfy the "age and maturity" standard. Indeed, at least one court has found that this standard “does not apply to a 9-year-old child.” Tahan, 259 N.J. Super. at 335.

This substantial doubt is reinforced in this case by the testifying psychiatrist, who described Marie-Eline’s ability to testify as follows:

I believe that her view can be given great weight when it emerges in a clinical play situation. I believe that the French are correct formally. If you put her on the stand and say do you swear to tell the truth, the whole truth and nothing but the truth, her concept of truth is not as fully developed yet as it will be when she is 12 or 13. . . . [I]n a spontaneous clinical interview I believe you can get valid impressions . . . . Usually what I advise is to do it at the child’s home where the child feels safe, and to take with them some crayons . . . and then to either sit on the floor or sit on a little chair or stool like I do now . . . and to ask them what they would like to play with. As they are playing find out -- for example, one of my favorite ways of doing it is to pretend.

(A336). Similarly, in his report, the psychiatrist stated:

Though we could, and at times did, raise direct questions with Marie-Eline, we were aware that an interview limited to questions and answers could easily go beyond Francois's and Marie-Eline's expected, age-appropriate cognitive capacity. Furthermore, from our clinical experiences, and from published literature, we were aware that direct questions from friendly strangers can be experienced by young children as a test for which the interviewer has a correct answer in mind. The child then tries to please the adult interviewer by providing the "correct" answer . . . .

(A121-22). In sum, her own expert testified that Marie-Eline is not old enough to testify under oath, or even in a question-and-answer format. A fortiori, the child could not be viewed as having a “sufficient age and maturity” under the Convention.

In addition, in weighing the testimony of a younger child, a court should consider carefully whether it reflects the child’s views, or an attenuated version of the abducting parent’s. 51 Fed. Reg. at 10,510. Applying this standard, courts have found that children aged nine and ten have been sufficiently influenced by their abductors that their views on return should not be taken into account. See Sheikh v. Cahill, 546 N.Y.S.2d 517, 521-22 (Sup. Ct. Kings County 1989); In re Robinson, 983 F. Supp. 1339, 1343-44 (D. Colo. 1997).

In August 1998, the district court concluded that Marie-Eline, then seven, had been “prepared, to a degree,”t actual contamination rate @#(+)/# sampledPositive Result0.4%0.6%0.8%1.0%>3 per 40095.3%22%43%62%76%>5 per 80097.6%22%52%77%90%>7 per 160095.5%46%84%97%99.6%The blood center collects 12 units of platelets per day, five days per week. Cultures of units released after 48 hours, plus outdated units, number 30 units per week that are processed as 6 weekly cultures of five unit pools. An action limit is set to revalidate the collection procedures if the observed contamination rate exceeds 0.42% for yearly samples of 1,560 units. The action limit was established based on an expected contamination rate of 0.2%, a sample size of 1,560, and a cut-off determined as baseline plus 2-sigma variation. For this scheme, the likelihood of rejecting a conforming process is 4.5% (once every 22 years). The confidence levels (i.e. power) to exclude actual contamination rates of 1%, 0.8% and 0.6% are 99.6%, 97% and 84% respectively.Over a one-year period, 7 positive platelet pools are identified, traceable to 7 individual units. The individual cases were investigated, but no attributable cause was identified. The observed contamination rate of 7/1,560=0.45% exceeds the action level. Confidence that the actual contamination rate exceeds 0.2 for a conversation with the court concerning her views on return. Blondin I, 19 F. Supp. 2d at 128. Moreover, in December 1999, the psychiatrist readily admitted that some of Marie-Eline’s “spontaneous” expressions of abuse, such as a fear of her father strangling her, or living in a shelter, could have come only from descriptions of abuse given to her by her mother, since such incidents occurred when Marie-Eline was too young to remember them. (A348-50). Notwithstanding this testimony, the district court summarily concluded that it did not believe Marie-Eline's statements were influenced by her mother. Given the circumstances, it is extremely unlikely that Marie-Eline's views could have been sufficiently free of her abducting parent’s influence to amount to an objection properly cognizable under the Convention.

We do not suggest that the testimony of a younger child cannot be considered as evidence that abuse has occurred or that return to the immediate custody of an abusive parent would pose a grave risk of harm. That is different, however, from giving effect to a carefully considered “objection” by an older child to returning to her former country of residence, based on her independent and mature ass% is greater than 95%. An intensive review is conducted, and all collection and processing procedures are revalidated. Questions for the BPAC:Do available data on the sterility of the sterile connecting device procedure support the use of this procedure to collect samples for bacterial detection from in-date platelet products?Does the Committee concur with FDA’s proposed statistical approach to providing quality control for platelet contamination?References:FDA Guidance for Industry (Use of Sterile Connecting Devices in Blood Bank Practice, November, 2000)AuBuchon JP, Pickard C, Herschel L Sterility of plastic tubing welds in components stored at room temperature Transfusion 1995 35:303-307.AuBuchon et al. Experience with universal bacterial culturing to detect contamination of apheresis platelet units in a hospital transfusion service. Transfusion 2002; 42, 855-861.Mertens G, Muylle L, Goossens H. Possible implication of sterile connecting device in contamination of pooled platelet concentrates. Trans Sci 1997, 18(3),387-392 Wagner SJ, Moroff G, Katz AJ, Friedman LI, Comparison of bacteria growth in single and pooled platelet concentrates after deliberate inoculation and storage. Transfusion 1995; 35; 298-302.essment of her own interests.

**CONCLUSION**

T**he judgment of the district court should be reversed.**

Dated:New York, New York

May 8, 2000

Respectfully submitted,

MARY JO WHITE,

United States Attorney for the

Southern District of New York,

Attorney for Amicus Curiae

United States of America.

WENDY H. SCHWARTZ,

GIDEON A. SCHOR,

Assistant United States Attorneys,

Of Counsel.

**Certificate of Compliance**

Pursuant to Rules 29(c), (d), and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for the United States hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6964 words in the brief.

MARY JO WHITE,

United States Attorney for the

Southern District of New York,

By:WENDY H. SCHWARTZ,

Assistant United States Attorney