

00-6066

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

FELIX BLONDIN,

Petitioner-Appellant,

- against -

MARTHE DUBOIS,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR AMICUS CURIAE NOW LEGAL DEFENSE AND
EDUCATION FUND SUPPORTING RESPONDENT-APPELLEE
AND AFFIRMANCE OF THE DECISION BELOW**

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Pursuant to Federal Rule of Appellate Procedure 29, *amicus curiae* NOW Legal Defense and Education Fund (“NOW LDEF”) respectfully submits this brief in support of Appellee, Marthe Dubois, seeking affirmance. Both parties have consented to the filing of this brief. Letters of consent have been filed with this Court.

INTEREST OF AMICUS CURIAE

NOW LDEF is a leading national non-profit civil rights organization that provides a broad range of legal and educational services in support of women’s efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women.

NOW LDEF is engaged in many efforts to eliminate and respond to gender-motivated violence. NOW LDEF chaired the national task force instrumental in developing the Violence Against Women Act (“VAWA”) and maintains a national clearinghouse that tracks legal developments under VAWA. Further, NOW LDEF’s Immigrant Women’s Program (“IWP”) co-chairs the National Network on Behalf of Battered Immigrant Women and is responsible for the Network’s Washington based advocacy efforts to enhance legal protections and access to services for battered immigrant women and their children. In particular, IWP focuses on child custody protections for battered immigrant women, parental

kidnapping, and international parental abduction. NOW LDEF has participated as counsel and as *amicus curiae* in numerous cases in support of the rights of women who have been the victims of sexual assault, domestic violence and other gender-motivated violence.

STATEMENT OF THE CASE

Based on a well-developed record, the district court found the evidence to be clear and convincing that return of the children to France would expose them to a “grave risk . . . [of] physical or psychological harm or otherwise place [the children] in an intolerable situation.” *Blondin v. Dubois*, 78 F. Supp. 2d 283, 285 (2000) (“*Blondin III*”). Thus, the facts of the case fell squarely within an express exception to the return requirements of the Hague Convention on the Civil Aspects of International Child Abduction (“Convention” or “Hague Convention”), as implemented by the International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. §§ 11601-11610.

SUMMARY OF ARGUMENT

The judgment of the district court is plainly supported by the record evidence. Amicus United State’s (“the Government”) invitation to this Court to ignore the trial court’s factual findings reflects a subtle bias: an empirically unsupportable assumption that domestic violence and its effect on children are matters so mundane that they do not rise to the level of extraordinariness or

exceptionality that could warrant a finding of “grave risk of . . . psychological harm.” Hague Convention, art. 13(b). The Government suggests that applying Article 13(b) to what it apparently views as a “run-of-the-mill” case of domestic abuse undermines the basic policy of return embodied in the Convention.

As shown below, while exceptions to the Convention are to be narrowly construed, the district court, based on clear and specific testimony, distinguished the grave risk of harm to the children in this case from the adjustment problems that might attend “ordinary” cases under the Convention. Although the United States seeks to raise the bar of the Article 13(b) exception, that exception expressly applies to the “grave risk . . . of *psychological* harm” that, on the basis of clear, competent and unrefuted evidence, was found to be present here.

The Government and Appellant’s effort to diminish the significance of the district court’s findings reflect an unfortunate tendency to normalize domestic violence, treating it as a common, albeit unpleasant, occurrence.¹ Thus, it is easy to unthinkingly dismiss the effects of that violence – effects that can be dramatic and substantial as it bears on the lives of children forced to experience it.

¹ While the Government seems to consider the occurrence of domestic violence “ordinary,” *Brief of Amicus Curiae United States* at 19 (*U.S. Amicus Br.*), Appellant apparently contends that the abuse never occurred. *Brief of Appellant Felix Blondin* at 28 n. 13 (*Appellant’s Br.*).

Domestic violence can, and often does, produce physical harm, psychological harm, and a grave risk of trauma that in a given case may result in a post-traumatic stress disorder susceptible to exacerbation by return of the child to the home country. Therefore, where the record shows, and the court has found as fact, that a child will likely suffer a grave risk of psychological harm if returned to the state of habitual residence, there is no basis in law to suggest that *if* this harm is the result of “run-of-the-mill” domestic violence, it should be discounted or dismissed.

We explain in Part I that the trial court properly applied Article 13(b) and that Appellant and the United States’ technical arguments are without merit.

In Part II, we explain that the bias reflected in the brief of Amicus United States is unjustified and inconsistent with the Convention: the very real psychological effect on children of domestic abuse can produce a situation in which there is grave risk in returning a child to the country of habitual residence.

In Part III we explain that the general diplomatic concerns expressed by the United States and Appellant are misplaced. The trial court’s findings reflect no disrespect for the good offices of the French government because the risk of psychological harm upon which the district court focused cannot be vitiated. The trial court was required to make a factual finding under Article 13(b); diplomatic issues are not part of the Article 13(b) determination.

I. THE DISTRICT COURT'S FINDINGS ARE FULLY SUPPORTED BY THE RECORD EVIDENCE

The Hague Convention and its implementing legislation generally contemplate the return of an abducted child to its country of habitual residence. But the Convention is also concerned with safeguarding children from the risk of harm. The Convention thus sets forth a clear exception to the provisions requiring return of a child to its country of habitual residence where “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 v. Dubois*, 189 F.3d 240, 245 (1999) (*Blondin II*) (quoting Hague Convention, art. 13(b)).

After considering the undertakings of French officials, and after recognizing that Art. 13(b) must be construed narrowly, the district court found the evidence clear and convincing that return of Marie-Eline and Francois to France would expose them to a “grave risk . . . [of] physical or psychological harm or otherwise [place the children] in an intolerable situation.” *Blondin III* at 294. The district court properly understood the applicable legal standard. Its factual findings are, therefore, controlling.

The district court began by recounting its earlier findings that Appellant “repeatedly physically abused both Dubois and Marie-Eline and had threatened to kill them on numerous occasions, and thus the children would face a ‘grave risk’ of physical and psychological harm at the hands of Blondin if they

were repatriated.”² *Blondin III* at 286. While acknowledging that “[a]mple record evidence support[s] the District Court’s factual determination regarding the risk of physical abuse that the children would face upon return to Blondin’s custody,” *Blondin II* at 247, this Court remanded for further determinations. *Id.* at 249. The Court noted that there were *two* interests about which the trial court was to be mindful: (1) the broader purposes of the Convention to secure the return of an abducted child; and (2) the goal of “safeguarding the children from ‘grave risk’ of harm” encapsulated in Article 13(b). *Id.* at 242. Thus, the district judge was to determine whether undertakings by Blondin or France could reduce the risk that return presented, allowing the court to both return the child *and* safeguard the child from grave risk of harm.³

The district court did precisely as instructed. It found that undertakings by France and Blondin would reduce the direct threat of physical and psychological abuse from Appellant Blondin and otherwise reduce some of the

² Blondin “beat [Petitioner], often in the presence of the children. He also beat Marie-Eline . . . and twisted an electrical cord around Marie-Eline’s neck.” *Blondin v. Dubois*, 19 F. Supp. 2d 123, 127 (1998) (*Blondin I*). Moreover, “while she was pregnant [with Francois], Dubois saw doctors for injuries inflicted by Blondin,” and “after Francois was born Blondin . . . threatened to throw Francois out the window.” *Id.* at 125.

³ Where the two interests conflict, grave risk of harm to the child trumps the general policy of return. “[T]he interest of the child in not being removed from its habitual residence . . . gives way before the primary interest of any person in not being exposed to physical or psychological danger” Elisa Perez-Vera, *Explanatory Report to the Convention* at ¶ 29 (“*Explanatory Report*”).

risks presented by return to France. Thus, the district judge credited the willingness of French officials to provide physical protection to Appellee and her children. *Blondin III* at 298.

That did **not**, however, end the inquiry under Article 13(b) for Appellee presented expert testimony on the grave risk of psychological harm that would flow from returning the children to France at this time. *Id.* at 291. Dr. Albert Solnit described the manifestations of traumatic stress disorder in Marie-Eline, caused by witnessing and experiencing abuse, which included “difficulty in eating, nightmares, interrupted sleeping and fearfulness of being away from her mother.” *Id.* He emphasized the children’s stabilization in the “‘secure environment of their home and extended family’ in the United States.” *Id.* In Dr. Solnit’s “clinical judgment, removing the children from this secure environment to return them to France would ‘almost certainly’ trigger a recurrence of the traumatic stress disorder they suffered in France – *i.e.*, a post-traumatic stress disorder.” *Id.*

Given their earlier trauma, post-traumatic stress disorder was the expectable product of (1) forcing the children to go “back to the scene of their original trauma [France]”; (2) forcing them to leave the “place where they are beginning to feel safety and trust . . .”; and (3) thrusting them into a situation marked by “uncertainty [and] insecurity.” *Id.* at 291-92. Thus, sending the

