

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

children back, at this time and in these circumstances, would almost certainly “impair their physical, emotional, intellectual and social development.” *Id.* at 292.

In adopting these findings, Judge Chin limited his rulings to the facts presented by this case. He explained that the effects of the earlier abuse distinguished the risks to these children from any ordinary “adjustment problem” associated with returning a child to the home country after forming bonds in this one. *Id.* at 297. Similarly, he acknowledged that uncertainty attends any custody determination. *Id.* at 296. But here that uncertainty was “not an isolated issue”: Marie-Eline is particularly sensitive to this insecurity as there have been several occasions where she has experienced a temporary peace during her parents’ multiple reconciliations. *Id.*

Appellant questions Dr. Solnit’s “agenda” (*Appellant’s Br.* at 31-33) and makes a feeble attempt to question the factual basis for his findings.⁴ But there is no serious question presented here of either Dr. Solnit’s qualifications, his ability to opine on this subject, or the factual basis for his conclusions. Those conclusions were supported as well by Judge Chin’s own observations of Marie-Eline and other testimony about her. Neither the United States nor Appellant presented any

⁴ Appellant argues that Dr. Solnit had not examined Marie-Eline until it became necessary to do so for purposes of this case. *Appellant’s Br.* at 16. Such an attack proves too much since it applies to any court related psychiatric evaluation.

contrary report or testimony either to rebut Dr. Solnit's findings (which stand un rebutted) or to cast them in some different light (*i.e.* as exaggerated or typical of every abuse case). In sum, the district court well-understood the question for its determination. The district court's findings are supported by the record and should be affirmed by this Court.

A. The District Court's Fact-finding Is Subject To Review Under The Clearly Erroneous Standard

Unhappy with the district court's findings, the United States suggests that this Court may disregard them. It argues that the lower court's findings are actually "legal precepts and [the] application of those precepts to the facts" (*U.S. Amicus Br.* at 13), and urges the Court to undertake a "plenary" (*i.e. de novo*) review. *Id.* It thus suggests that this Court might substitute its own judgment for that of the district court on the ultimate question of whether these children would be at grave risk of psychological harm if returned to France. There is no basis in law for the Government's approach.

As the Government appears to concede, on the face of things the decisive issue in determining whether Article 13(b) applies in a particular case is factual: whether return would expose the children to a "grave risk . . . [of] physical or psychological harm." Hague Convention, art. 13(b). This inquiry has all of the earmarks of a classical, factual determination of the type understood to be best resolved by the person or persons who actually hear the evidence, and upon which

the courts of appeals should be reluctant to intrude. *See Pullman-Standard v. Swift*, 456 U.S. 273, 287 (1952) (“Rule 52(a) . . . does not . . . exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court’s findings unless clearly erroneous.”) The finding bears none of the earmarks of the kind of mixed question under which legal and factual aspects of the determination *cannot* be disentangled, for the ultimate determination involves some specialized legal matter.⁵

This Court may, of course, reverse or vacate a lower court’s judgment in an Article 13(b) case if the lower court misunderstood the legal standard or failed to conduct the proper inquiry. These are matters of law. But the Court is not free to reject findings of fact either because it might have viewed the evidence differently, or because it wishes to defer to the expressed wishes of the Executive Branch about how it would like this case to come out. Apart from vaguely suggesting that domestic violence is somehow too common to warrant exceptional treatment, the Government suggests no specific way to view the determination that return of Marie-Eline and Francois to France “would trigger this post-traumatic stress disorder” and almost certainly “impair their physical, emotional, intellectual

⁵ *Cf. Strickland v. Washington*, 466 U.S. 668, 698 (1984) (“[I]n a federal habeas challenge . . . ineffectiveness [of counsel] is not a question of basic, primary, or historical fact [but] . . . it is a mixed question of law and fact.”)

and social development,” as something other than a finding of fact. *Blondin III* at 291-292.

In truth, the subtext of the Government’s plea for *de novo* review is a different notion: that this is a “Hague Convention” case, raising issues with important implications for international relations, giving the Circuit Court more justification than usual to superimpose its judgment for that of a trial court. Thus, the Government intimates that Article 13(b) involves policy judgments, not matters of law.

In this respect the Government errs, for the Hague Convention provision at issue in this case is amenable to factual resolution and determination. *See Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir. 1999) (“In a case brought under the Hague Convention, we review the district court’s findings of fact for clear error and its conclusions about United States, foreign, and international law *de novo*.”) Article 13(b) requires a factual determination. And this indeed is precisely what Congress must have had in mind when it assigned the responsibility for the determination to the district courts. Federal courts are well-suited to fact-finding. They are far less able to make diplomatic judgments, and should not presume that such judgments have been thrust upon them in the first instance.

As the Government acknowledges, of the circuits that have addressed the proper standard of review in Convention cases all but one applies the clearly

erroneous standard to the trial court's findings of ultimate or intermediate fact. The Government's effort to garner support for plenary review from the Third Circuit's footnote in *Feder v. Evans-Feder*, 63 F.3d 217, 222 n. 9 (3d Cir. 1995) is misplaced. *Feder* applied a broader standard to the undefined phrase "habitual residence." *Feder* did not purport to state a standard of review applicable to all determinations of ultimate fact that arise under the Convention. Rather, the court found that interpreting "habitual residence" involved a range of considerations, but no clear legal or factual standard. In this respect, the Third Circuit regarded the term in a manner similar to the term "domicile," which has been historically viewed as presenting a legal question, or a mixed question of law and fact. *See, e.g., Coury v. Prot*, 85 F.3d 244, 251 (5th Cir. 1996) ("Most courts regard domicile as a mixed question of law or fact.") But whatever contrary approach the Third Circuit endorsed in *Feder* with respect to "habitual residence," the findings required by Article 13(b) and rendered here are factual in nature and require the kind of assessment of evidence and testimony that the judge who actually heard the testimony should make. His determination may only be reviewed under the clearly erroneous standard.

B. Appellant And The Government's Efforts To Identify Legal Errors Are Without Merit

1. The District Court Did Not Err In Considering The Stable Environment In Which The Children Now Live Or The Uncertainty Associated With Return

Dr. Solnit noted that if removed from the United States the children would be taken from a “place where they are beginning to feel safety and trust” *Blondin III* at 291. The stabilizing bonds that they have finally begun to form after years of turmoil would be torn apart. *Id.* Citing Article 12 of the Convention, Appellant objects to any consideration of how well-settled the children are in the new environment, arguing that “such a factor may only be considered if the return proceeding is commenced more than one year after the abduction.” *Appellant's Br.* at 20. Appellant is wrong.

Article 12 of the Convention specifically overrides the requirement of return if the application is made more than a year after abduction and the child is well settled in her new environment. Hague Convention, art. 12. Unlike Article 12, however, Article 13 is not primarily concerned about the timeliness of an application. Article 13(b) frames an inquiry into harm in more general terms. That the child has become settled in the new environment is simply one of many facts that might affect the psychological condition of the child and the risk of returning the child to its country of origin. The orientation of Article 13(b) is plainly humanitarian, focusing on the effect on the child. *See Explanatory Report* at ¶ 116

("[Article 13(b) deals with] situations where . . . abduction has . . . occurred, but where the return of the child would be contrary to its interests.") The framers of the Convention could *not* reasonably have wanted to allow a child to be gravely harmed merely because one of the factors contributing to that harm was the disruption of a beneficial attachment developed in the country of adjudication.

Indeed, this Court seems to have recognized that attachments formed in the country of adjudication may sometimes be taken into account in analyzing grave risk of harm:

We do not rule out the possibility of a case in which a petition seeking a child's return is filed less than a year after the child's abduction, but it is nevertheless established "by clear and convincing evidence" on the child's behalf that he or she is so deeply rooted in the United States that "there is a grave risk that [the child's] return would expose the child to . . . psychological harm." The child might then be excepted from return under Article 13(b).

Blondin II at 248.

Appellant's concern that the reasoning of the court below would effectively allow every child who remains here for a period of time to avoid return (*Appellant's Br.* at 27) is misplaced. The district court took careful note of the cases in which courts have *rejected* the *general* psychological impact of breaking bonds formed in the adjudicating country as satisfying the "grave risk" standard. *Blondin III* at 297. The district court contrasted the special situation presented here, noting that because of "the likely recurrence of the children's traumatic

stress disorder, caused by Blondin's abuse, . . . any return to France will surely result in long-term or permanent harm and is not the typical 'adjustment problem' that attends the usual Convention return." *Id.* The courts have little difficulty distinguishing between the "typical" case of disruption arising from return to the home country and the very special difficulties that may arise in cases involving a history of serious domestic violence. *Compare Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (ordinary case of attachment results in return); *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995) (same); *Freir v. Freir*, 969 F. Supp. 436, 442 (E.D.Mich. 1996) (same) with *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 462 (D. Md. 1999) (no return in case of trauma from abuse) and this case.

The Government also complains that the trial court erred in acknowledging the effects of the uncertainties associated with a custody determination on the children's psychological state. The Government believes that in doing so, the court "fail[s] 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 [risk of] 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." *U.S. Amicus Br.* at 19.

The Government is wrong on two counts. *First*, the district court carefully noted that the effect of uncertainty on these children was quite different from the ordinary case. Thus, the uncertainty “stands against the backdrop of serious physical abuse,” and further, “Marie-Eline is particularly sensitive to this insecurity as there have been several occasions where she has experienced a temporary peace during her parents reconciliations only to have it violently interrupted by a recurrence of her father’s abuse.” *Blondin III* at 296.

Second, and more importantly, Article 13(b) provides no basis for nullifying a finding of grave risk of harm to the children because a particular factor contributed to that risk. Article 13(b) determinations focus on the harmful consequences of returning the children to their country of origin. In *this* case that question involved an assessment of the children’s psychological state. The trial court is *not* charged with adding up factors, so that it might arbitrarily exclude some factors and consider others. Rather, the court must make a psychological assessment of the impact of return on the children. There is no basis for disregarding a proper finding of grave risk of harm because the Government would prefer to declare something that contributed to the children’s mental state off-limits.

2. The District Court Did Not Improperly Consider Marie-Eline's Wishes

Finding Marie-Eline to be a “remarkably mature eight-year-old,” the district court concluded that she had attained a sufficient level of maturity to consider her views – albeit, “not . . . exclusively or extensively”— in determining whether to apply Article 13(b). *Blondin III* at 296. The Government asserts error. *U.S. Amicus Br.* at 22. But evaluation of maturity and the degree to which the views of the child can be credited is a judgment properly left to the trier of fact. One can hardly imagine a subject less appropriate for an appeals court to substitute its predilections for the evaluation of the trial court. As Appellee notes, other courts have considered the wishes of children of similar age under Article 13(b). *Brief of Appellee Marthe Dubois* at 47. Courts often consider the wishes of children as young as Marie-Eline in family relations matters, including those involving domestic violence (e.g. *Jelenic v. Jelenic*, 690 N.Y.S.2d 782, 784 (1999) (“Family court properly considered the children’s preferences with respect to where they desired to live.”)), regarding such evaluations to be within the sound discretion of the trial court. *Id.* (such determinations are “clearly within the province of Family Court”). Children of Marie-Eline’s age have been found capable of communicating “the effects of domestic violence on their emotional and mental state.” *In re Lonell J., Jr.*, 673 N.Y.S. 2d 116, 118 (1998). If Marie-Eline was unaware of the difference between the two countries or unhesitatingly desired

to return to France, Judge Chin could have credited those factors to find no grave risk— and Appellant assuredly would not have objected.⁶

II. THE GOVERNMENT IS IMPROPERLY AND UNTHINKINGLY DISMISSIVE OF THE VERY REAL TRAUMA AND DANGER TO CHILDREN ARISING FROM DOMESTIC VIOLENCE

A. This Situation Faced By These Children Falls Squarely Within Article 13(b) And Is, Therefore, Sufficiently “Extraordinary” To Provide A Basis For Declining To Return Them To Their Country Of Habitual Residence

The Government appears to be of the view that the district court’s decision, based on the conclusion that past trauma from domestic violence may contribute to psychological harm if the children are returned to their home country, may open the floodgates to denials of return in a raft of cases. The Government presumably would credit war, sexual and other physical abuse as an appropriate basis for application of the Article 13(b) exception, but is unabashedly skeptical of the district court’s decision to credit the grave psychological harm at issue here. Thus, we find in the briefs the notion that this case is too “ordinary” and not “exceptional” enough (*U.S. Amicus Br.* at 19) to warrant the application of Article 13(b): If harm rising to the standard necessary under Article 13(b) is found in this case, harm will be found in every case alleging abuse, undermining the purpose of

⁶ Also unavailing is the Government’s suggestion that Francois should be returned because he has no recollection of France. *U.S. Amicus Br.* at 17. We daresay that it is by now a commonplace that separating children this closely connected and of this age would be gravely harmful to both and would itself be “intolerable.”

the Convention by enlarging the exception to the point where it becomes the rule.

Id. at 21.

The Government's concerns are unjustified. First, Judge Chin clearly recognized that Article 13(b) was intended to apply narrowly. As shown above, both in terms of the nature and the severity of the harm at issue, he distinguished this case and the harm to these children from the typical adjustment difficulties that a child might experience in being returned in an ordinary abduction situation.

Blondin III at 297. See discussion above at I.B.1.

Second, the Government's conception of exceptionality is misguided. Exceptions to the return provisions of the Convention are narrowly construed. *Blondin II* at 246. This would arguably preclude a court from adopting a definition of grave risk of harm so artificially broadened that it would apply in an ordinary case. Article 13(b), however, expressly includes exposure to grave risk of *psychological* harm as a basis for denying return. It thus describes a specific limitation on the reach of the Convention's return provisions, arising from psychological harm, that is as much a part of the Convention as the return provisions. The exception plainly focuses on the protection of the children whose return the Convention seeks to secure. *Explanatory Report* at ¶ 25 (“[The] exceptions are . . . illustrations of the . . . principle whereby the interests of the child are stated to be the guiding criterion in this area.”) Therefore, where, as here,

the facts of the case show a grave risk of harm to the children from return to their country of habitual residence, there is no requirement for the district court to consider how many such cases might arise, or, if there are too many such cases, what the effect of too many cases might be on diplomatic relations.

Therefore, we may concede for purposes of argument that the exceptions, properly applied, should apply exceptionally. But exceptionality cannot revolve around the relative numbers of cases of a particular type that make their way to the federal court. The background against which exceptionality is judged involves comparison with an “ordinary” abduction, where a parent seizes a child hoping for a more favorable custody ruling in a different country. That is the “ordinary” case upon which the Convention focuses. *Explanatory Report* at ¶ 15 (“The problem with which the Convention deals” is preventing a parent from fleeing to a different country to obtain “a judicial decision favorable to him.”) Against that background of the “ordinary” abduction, an abduction involving children traumatized by domestic violence, whose return to their home country would trigger post-traumatic stress disorder, with the likelihood of permanent debilitating effects on the children, is itself plainly exceptional and extraordinary.

The Government intimates that there are many abduction cases that involve allegations of domestic violence.⁷ Thus, the Government cautions this Court that “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.’” *U.S. Amicus Br.* at 19.⁸ (We assume that the Government is using the phrase “more ordinary” to mean “more frequent.” We would hope that domestic violence would not, in any legal context, properly be regarded as “ordinary.”)

We have no way of knowing whether the Government is correct that such charges are “becoming more ordinary” and whether, if “more ordinary,” they are true or untrue. Regardless of their number, even if allegations of violence are credited by the trial court, under this Court’s ruling in *Blondin II* such allegations may not be enough to stave off repatriation. Rather, return is not precluded by past

⁷ It seems unlikely that a high percentage of abductions involve domestic violence. Flight often requires financial resources unavailable to battered women. Further, creating a safe and stable environment outside a home country requires assistance and support from family members and friends that many battered women will not have.

⁸ The Government’s language presents the image of parents lying about domestic violence to prevent return. It ignores the *reality* that domestic violence has been recognized by the U.S. Government and experts as an epidemic and the reasonable assumption that at least some of the parents who flee their home country with their “abducted” children do so because of domestic abuse. *See* NANCY CROWELL AND ANNE BURGESS, EDs., *UNDERSTANDING VIOLENCE AGAINST WOMEN* 1 (1996). The Government assuredly does not suggest that Appellant did not engage in serious abuse *in this case* or that the abuse did not affect the children in a most serious way.

abuse alone, but requires a finding that return of the child to the home country will – under the precise circumstances presented – expose the child to a grave risk of further psychological or physical harm.

In this respect, the Government's argument seems to go further, suggesting that domestic violence is so common a reason for abduction that in order to avoid overuse of Article 13(b) the court must find that the case involves an exceptional instance of domestic violence for it to seriously consider that the psychological harm resulting from that violence might qualify under Article 13(b). Thus, the Government is concerned that similar findings of harm flowing from return might conceivably be rendered in many cases involving domestic violence.

Whether that concern is empirically justifiable is not apparent from the record evidence. It is possible similar findings will be warranted in a large number of cases involving young children and persistent domestic violence. But even if it were true (1) that a very high percentage of cases seeking return of abducted children arise out of circumstances of domestic violence, and (2) such violence would traumatize the children who experience it in a way that would make it especially harmful to return the children to their home country after achieving some measure of security in the United States, the mandate of the Convention that children *not* be returned if they would suffer harm must still be respected. There is no room under Article 13(b) for creating special hurdles to

overcome in domestic violence cases merely because there may be many such cases and the harm to children from return in those case may often be severe.

B. The Trauma Associated With Domestic Violence Is Real

Both Appellant and the Government seem eager for the Court to adopt the standards suggested by the Sixth Circuit in *Friedrich*, where the court appeared inclined to narrow Article 13(b) to cases involving such things as war or famine.⁹ Conversely, they are dismissive of the view that domestic violence could result in the kind of psychological harm that would warrant application of Article 13(b).

The Government's skepticism is unreasoned, reflecting a common but unfortunate predisposition: there is an obvious tendency to regard domestic violence as mundane and commonplace. It is all too easy to become acclimated to its existence and inured to its consequences. But while it is obviously beyond the role of the courts to address that attitude outside the courtroom, where the facts concerning specific harm caused by domestic violence have been proven in the trial court, the trial court's findings control. Predispositions about domestic violence, whatever their nature, cannot be permitted to override those findings.

⁹ Such an approach reflects a classic error: viewing the circumstances that harm a child through the eyes of an adult, and not the child. War, through the eyes of an adult, may appear more terrible than domestic violence. But from a child's perspective domestic violence may be every bit as devastating as war, if not more so because the perpetrator of violence is not a faceless enemy, but a supposed caregiver.

Children in violent homes face the dual threats of witnessing violence against others and being subjected to physical assault themselves. Children may be injured during an incident, traumatized by fear, and blame themselves for not preventing or for causing the violence. J.J. Gayford, *Wife Battering: A Preliminary Survey of 100 Cases*, 1 BRITISH MED. J. 194-197 (1975). The consequences of such experiences are well documented. Children frequently suffer psychological, as well as physical, harm from exposure to domestic violence either as a direct victim or as a witness to the abuse of a parent or sibling.¹⁰ Numerous studies have examined the effects of domestic violence on children and concluded that trauma can be both immediate, resulting in shock, fear, and guilt, and long lasting, resulting in post-traumatic stress disorder, impairment of cognitive, verbal, and motor abilities, anxiety, depression, and deviancy. Amy B. Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*,

¹⁰ Appellant argues that the record evidence does not support a finding that Marie-Eline was repeatedly abused by her father. *Appellant's Br.* at 28 n. 13. Even if it were true that Petitioner did not abuse Marie-Eline, both Marie-Eline and Francois witnessed their mother's abuse by Petitioner. *Blondin III* at 298. *Witnessing* violence often causes severe psychological trauma. See, e.g., ANNE L. GANLEY, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, DOMESTIC VIOLENCE IN CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION 19, 49 (1992). Moreover, even if Francois does not remember his father's abuse because of his age (*U.S. Amicus Br.* at 17) infants exposed to family violence often suffer later psychological trauma. See, e.g., GANLEY, *supra* this note, at 50-51; MILDRED PAGELOW, *Children in Violent Families: Direct and Indirect Victims*, YOUNG CHILDREN AND THEIR FAMILIES 55 (1982).

47 UCLA L. REV. 813 (2000); Linda Keenan, Note, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407, 419 (1985). “Domestic violence affects children cognitively, emotionally, and physically.” Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1055-58 (1991). “Witnessing domestic violence, no matter how frequent or intense, can produce trauma rising to the level of diagnostic significance in children.” Catherine C. Ayoub et. al., *Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM. & CONCILIATION COURTS REV. 297, 300 (1999).

A brief review of the literature reveals a catalogue of disorders that children raised in violent homes may suffer from: “depression, anxiety . . . withdrawal . . . aggression, ‘acting out behaviors’ . . . substance abuse or suicide.” Levin, *supra*, 47 UCLA L. REV. at 832-833. Even when children do not directly witness attacks, they may be “deeply affected by the climate of violence in their home.” Keenan, *supra*, 13 HOFSTRA L. REV. at 419; see Honorable Sheila M. Murphy, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 283-285 (1999). Unfortunately, in many instances domestic violence “is not taken seriously” by the judicial system (Cahn, *supra*, 44 VAND. L. REV. at 1072) because “judges are uninformed about domestic

violence and its effects on victims and children.” Levin, *supra*, 47 UCLA L. REV. at 829.

Given the violence which Marie-Eline and Francois suffered as a result of their father’s attacks, and the unstable environment caused by Ms. Dubois’ efforts to free herself from Appellant’s abuse, it is perhaps not surprising that the trial court found clear evidence of trauma in this case. In light of the evidence of prior abuse, and because the children have begun to heal in their current, more secure environment, it is also not surprising that the children were found to be susceptible to a recurrence of post-stress trauma triggered by return to the site of prior abuse. But whether surprising or predictable, the fact remains that the evidence supports the findings of the trial court that these children, in this case, would suffer from their return to France at this time, placing them in grave risk of harm. *Blondin III* at 295.

III. DIPLOMATIC CONCERNS HAVE NO PLACE WITHIN THE ARTICLE 13(b) FACTUAL ANALYSIS

We note that the record reflects concern by officials of France about the court’s ruling, as well as vaguely expressed diplomatic concerns by the Government. But there is simply no reasonable method by which diplomatic concerns might be injected into an Article 13(b) determination. Congress assigned Article 13(b) determinations to a district court, which required facts, found by a court of law, to be controlling. Indeed, Congress seems to have rejected an

administrative approach in favor of a judicial approach.¹¹ Congress' decision to assign the task to the judiciary reflects the type of determination for which the judicial branch of government is suited. Article 13(b) requires a factual determination involving a singular focus on the child; political/diplomatic considerations are not well-suited for judicial determination. While the policies underlying the Convention may inform the *legal standards* to be applied, the Article 13(b) determination should not be corrupted by injecting diplomatic concerns directly into the *factual* analysis.¹²

The Government, as the Central Authority, may properly present its views about how the facts should be viewed.¹³ Moreover, the Government and Appellant are free to argue that Article 13(b) should be narrowly construed to effect the objectives of the Convention. But neither they, nor the French Government, ought to imply that the district court's ruling *here* will somehow give

¹¹ The Convention does not require a court to adjudicate Hague petitions. It specifically refers to *both* the judicial or administrative authority enforcing the provisions of the Convention. *See, e.g.*, Arts. 11, 13 and 15. An administrative approach arguably might have encompassed a more political judgment.

¹² In this respect, the Hague Convention process may be quite different from immigration decisions that are the subject of administrative proceedings.

¹³ If there is to be a broader role for taking diplomacy or international relations into account in implementing the Convention, Congress must describe that role and create a method for taking it into account. Thus, whatever role diplomatic considerations might play in implementing the Hague Convention, they have not been and are not now a proper part of *this* case.

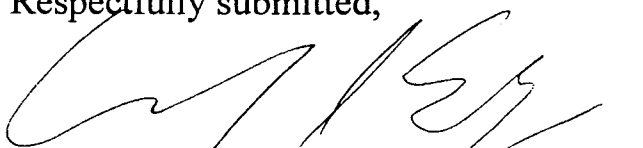
rise to diplomatic offense. Diplomatic issues are beyond the scope of the fact-finding process assigned by Congress to the courts.

In any event, the district court's decision displays no disrespect for the French government; the district court was at pains to credit France's undertakings. *Blondin III* at 298. The district court found, however, that it was not feasible to protect the children from the injury that they would suffer from return to France at this time. *Id.* at 294. This finding – that there are some things beyond the power of government to guard against – casts no aspersions on the *bona fides* of the French judicial system or French officials who would have some role in the care of the children. The decision is based on the facts of this case and a desire to guard children from a risk of harm that any signatory to the Convention should appreciate and encourage.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,



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Dated: July 5, 2000

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FELIX BLONDIN,)

Petitioner-Appellant,)

- against)

MARTHE DUBOIS,)

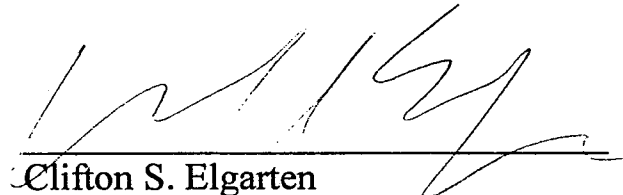
Respondent-Appellee.)

Docket No.: 00-6066

**CERTIFICATE OF
COMPLIANCE**

CLIFTON S. ELGARTEN, under penalty of perjury, affirms pursuant to
FRAP 32(a)(7)(c):

1. I am an attorney at Crowell & Moring LLP, counsel for Amicus Curiae NOW Legal Defense and Education Fund.
2. Pursuant to Rules 29(c), (d), and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for Amicus Curiae NOW Legal Defense and Education Fund 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 6,890 words in the brief.



Clifton S. Elgarten

Dated: July 3, 2000

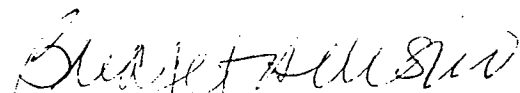
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July 2000, I caused two copies of the Brief for Amicus Curiae NOW Legal Defense and Education Fund Supporting Respondent-Appellee and Affirmance of the Decision Below to be served by Federal Express upon:

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