

Commentary: Appellate Court Cases

Gomez v. Fuenmayor, 812 F.3d 1005 (11th Cir. 2016)

Other Eleventh Circuit Cases

Seaman v. Peterson,
766 F.3d 1252 (11th Cir. 2014)

Baran v. Beaty,
526 F.3d 1340 (11th Cir. 2008)

Pielage v. McConnell,
516 F.3d 1282 (11th Cir. 2008)

Hanley v. Roy,
485 F.3d 641 (11th Cir. 2007)

Ruiz v. Tenorio,
392 F.3d 1247 (11th Cir. 2004)

Furnes v. Reeves,
362 F.3d 702 (11th Cir. 2004)

Pesin v. Rodriguez,
244 F.3d 1250 (11th Cir. 2001)

Lops v. Lops,
140 F.3d 927 (11th Cir. 1998)

Grave Risk | Domestic Violence

Even though the child is not directly harmed by violent conduct against a parent and his or her family, the child may be subjected to grave risk of physical and/or psychological harm as a result of that violence.

Facts

A mother petitioned for the return of her four-year-old daughter to Venezuela. She, the father, and the child are all citizens of Venezuela. The district court found that Venezuela was the child's habitual residence but that an Article 13(b) defense (grave risk of physical or psychological harm) had been established by the father, and the mother's petition for return to Venezuela was denied. The Eleventh Circuit affirmed.

Discussion

The evidence of grave risk in this case consisted of the mother's acts of violence directed toward the father, his girlfriend, his mother, and other members of his family. The violence included (1) verbal threats by the mother to kill the father; (2) a shooting attack on a car driven by the father's girlfriend (after she had dropped off him, his sister, and the child) resulting in the father's girlfriend being wounded in three places; (3) an attack directed at the father's parents' home; (4) two instances of drugs being planted in the car of the child's paternal grandmother; and (5) five instance of armed men showing up at a school where the father's sister worked, seeking information concerning her and the father's whereabouts. Despite the existence of a nonremoval order from a Venezuelan court, the father left Venezuela with the child in February 2014. The district court had found that the acts of violence by the mother and her husband directed toward the father and the members of his family placed the child in a situation involving a high risk of danger even though the violence was not directed toward the child.

Relying on its holding in *Baran v. Beaty*¹ and on decisions from the First, Second, and Seventh Circuits,² the Eleventh Circuit held that violence directed toward a parent may

1. 526 F.3d 1340 (11th Cir. 2008).

2. See generally *Ermini v. Vittori*, 758 F.3d 153, 164 (2d Cir. 2014); *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000); *Van De Sande v. Van De Sande*, 431 F.3d 567 (7th Cir. 2005).

give rise to a grave risk defense where that violence may “threaten the well-being of a child.”³ The court further noted that “as we held in *Baran*, the inquiry under the Convention is not whether the child had previously been harmed. Rather, the question is whether returning the child to Venezuela would expose her to a grave risk of harm going forward.”⁴

The Eleventh Circuit rejected the mother’s argument that acts of domestic violence directed toward a parent are irrelevant to whether those acts constitute a grave risk to the child. The court found that children could be subject to grave risk from repeated and substantial acts of domestic violence directed at a parent.⁵ The court held that the return of the child to Venezuela would expose her to a grave risk of harm as a result of the violence directed toward her father and the members of his family.

The court focused not only on the aspects of physical danger to the child that resulted from the mother’s violent campaign against the father, but also noted that the grave risk defense applied to the threat of both psychological and physical harm:

Even setting aside the risk of physical harm, the Convention’s exception also applies to the grave risk of psychological harm. It seems almost self-evident that a child raised in an environment where one parent is engaged in a sustained campaign of violence (including the use of deadly force) against the other parent faces just such a grave risk.⁶

Note: Some courts have pointed to the lack of violence directed toward the child as a factor in denying a grave risk defense based upon domestic violence. In *Gomez*, the court distinguished those cases, pointing out that the facts involved levels of violence.⁷ The court’s holding that domestic violence directed toward a parent can support a finding of grave risk to the child is supported by decisions from other courts.⁸

3. *Gomez*, 812 F.3d at 1013.

4. *Id.* at 1015.

5. *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995).

6. *Gomez*, 812 F.3d at 1015.

7. See, e.g., *Whallon*, 230 F.3d 450; *Nunez-Escudero*, 58 F.3d 374; cf. *McManus v. McManus*, 354 F. Supp. 2d 62, 70 (D. Mass. 2005) (district court found that even when “serious” violence was directed toward the children, the level of violence was not sufficient to establish the grave risk that Article 13(b) envisions).

8. *Danaipour v. McLarey*, 286 F.3d 1, 17 (1st Cir. 2002) (child suffering from PTSD as a result of domestic violence); *Blondin v. Dubois (Blondin II)*, 238 F.3d 153, 161 (2nd Cir. 2001) (finding of grave risk of psychological harm affirmed because return of children to France would trigger recurrence of PTSD); *Walsh v. Walsh*, 221 F.3d 204, 211–212, 219–220 (risk of future psychological harm due to past domestic violence); *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 401–402 (PTSD, children’s severe emotional distress due to domestic violence, children also physically abused).