Commentary: Appellate Court Cases

Alcala v. Hernandez, 826 F.3d 161 (4th Cir. 2016)

Other Fourth Circuit Cases

Padilla v. Troxell,
850 F.3d 168 (4th Cir. 2017)

Smedley v. Smedley,
772 F.3d 184 (4th Cir. 2014)

Reyes v. Jeffcoat,
548 Fed. Appx. 887 (4th Cir. 2013)

White v. White,
718 F.3d 300 (4th Cir. 2013)

Maxwell v. Maxwell,
588 F.3d 245 (4th Cir. 2009)

Bader v. Kramer (*Bader II*),
484 F.3d 666 (4th Cir. 2007)

Bader v. Kramer (*Bader I*),
445 F.3d 346 (4th Cir. 2006)

Cantor v. Cohen,
442 F.3d 196 (4th Cir. 2006)

Humphrey v. Humphrey,
434 F.3d 243 (4th Cir. 2006)

Miller v. Miller,
240 F.3d 392 (4th Cir. 2001)

Settlement | Immigration Status | Return Despite Existing Defense

This case deals with what factors may establish the Article 12 defense of delay plus settlement. Here the parties conceded that father's petition for return of his two children was filed more than one year after the children were removed. The Fourth Circuit affirmed the district court's finding that the children were settled. The court also examined immigration status and whether return should be granted despite proof of a valid defense.

Facts

Mother, father, and their two children were all Mexican nationals living in Cosolapa, Oaxaca. In June 2013, mother surreptitiously left Mexico with the children, then eight and two years of age, and illegally entered the United States two weeks later.

She and the children settled in South Carolina close to her family members, including her mother and two sisters. Her sisters had also entered the United States illegally eight to nine years before, and they now owned and operated two small businesses in Florence, South Carolina; they also participated in the Deferred Action for Childhood Arrivals (DACA) program. Neither mother nor the children spoke English when they arrived in the United States. Mother enrolled her eight-year-old son in elementary school upon arrival in Florence, and over the next fourteen months she changed his school twice to accommodate short-distance moves she made to improve their living conditions.

Sixteen months after the children's removal from Mexico, father filed a petition for their return. By May 2015, at the time of trial, the parties' older son spoke English in school, was getting mostly As and Bs on his report card, and was performing "exceptionally well" in school according to school officials. The mother and children had family ties nearby. The son had made friends at school, church, and within the family. Mother was gainfully employed and able to provide for the children's needs. After a two-day bench trial, the district court found that although mother and the children were present illegally

in the United States, the children had become well settled in their new environment, and the court denied father's petition for return to Mexico. The Fourth Circuit affirmed.

Discussion

Settlement Generally. The issue of settlement of a child under Article 12 presented a case of first impression for the Fourth Circuit. The court adopted a definition of settlement consistent with *Lozano v. Montoya Alvarez*[1] and the Second and Fifth Circuits' standards.[2] Citing these, the court reasoned that "for a child to be settled within the meaning of the Convention, the child must have significant connections demonstrating a secure, stable, and permanent life in his or her new environment."[3]

Although approving the district court's consideration of the factors set forth by the Second Circuit,[4] the Fourth Circuit found that the ultimate purpose of the settlement inquiry is to determine, from a "holistic" standpoint, whether a child has significant connections demonstrating a secure, stable, and permanent life; it is not an inquiry into the child's "best interests," which is relevant when determining custody. The circuit court found sufficient evidence to sustain the district court's determination that the older child was well settled, rejecting father's objections to mother's financial security and son's degree of settlement.

Immigration Status. The court also agreed with three other circuits[5] in adopting a rule that immigration status should be considered along with the totality of circumstances and "is neither dispositive nor subject to categorical rules."[6] Here, the district court had found nothing to suggest that the child was likely to be deported in the near future and had found no indications that ineligibility for government benefits would upset his stability. Taken as a whole, the degree of the settlement of the child compensated for any impact caused by his immigration status.

The Fourth Circuit confirmed these findings, holding that

> [n]either the Hague Convention nor ICARA makes a lack of immigration status a bar to finding that a child is settled. Indeed, it runs counter to the purpose of the exception to read such a categorical bar into the treaty. If a child is functionally settled, such that ordering his or her return would be harmfully disruptive, it would be odd to nevertheless order that disruption based on a formal categorization.[7]

---

1. 134 S. Ct. 1224 (2014).

2. Lozano v. Alvarez, 697 F.3d 41, 56 (2d Cir. 2012); Hernandez v. Pena, 820 F.3d 782, 787–88 (5th Cir. 2016).

3. Alcala v. Hernandez, 826 F.3d 161, 170 (4th Cir. 2016).

4. *Id.* at 171 ("The district court here looked to . . . '(1) the age of the child; (2) the stability of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child attends church [or participates in other community or extracurricular school activities] regularly; (5) the respondent's employment and financial stability; (6) whether the child has friends and relatives in the new area; and (7) the immigration status of the child and the respondent.'") (quoting *Lozano*, 697 F.3d at 57).

5. The Second, Fifth, and Ninth Circuits. *See In re* B. Del C.S.B., 559 F.3d 999, 1009 (9th Cir. 2009); *Lozano*, 697 F.3d at 56; and *Hernandez*, 820 F.3d at 787–88.

6. *Alcala*, 826 F.3d at 174 (citing *Lozano*, 697 F.3d at 56–57).

7. *Id.* at 173.

Return Request Despite Establishment of Defense. Father urged the circuit court to return the children regardless, citing Article 18, a provision that gives courts discretion to order a child's return despite the demonstration of a valid defense to return.[8] The Fourth Circuit acknowledged that it retained the power to order the children's return despite the establishment of an Article 12 defense;[9] however, the exercise of discretion to return a child in the face of an established defense is grounded in equitable principles,[10] and by itself, a mere wrongful removal would not suffice to justify such a return, since wrongful removal is prerequisite to the establishment of the defense itself.[11]

8. "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, Article 18.

9. *Alcala*, 826 F.3d at 175.

10. *Id.* at 175 (citing Yaman v. Yaman, 730 F.3d 1, 4, 21 (1st Cir. 2013).

11. *Id.* at 175.