Commentary: Appellate Court Cases

Da Silva v. De Aredes, 953 F.3d 67 (1st Cir. 2020)

Other First Circuit Cases

Mendez v. May,
778 F.3d 337 (1st. Cir. 2015)

Mauvais v. Herisse,
772 F.3d 6 (1st Cir. 2014)

Sánchez-Londoño v. González,
752 F.3d 533 (1st Cir. 2014)

Neergaard-Colon v. Neergaard,
752 F.3d 526 (1st Cir. 2014)

Darin v. Olivero-Huffman,
746 F.3d 1 (1st Cir. 2014)

Yaman v. Yaman,
730 F.3d 1 (1st Cir. 2013)

Patrick v. Rivera-Lopez,
708 F.3d 15 (1st Cir. 2013)

Felder v. Wetzel,
696 F.3d 92 (1st Cir. 2012)

Charalambous v. Charalambous,
627 F.3d 462 (1st Cir. 2010)

Nicolson v. Pappalardo,
605 F.3d 100 (1st Cir. 2010)

Kufner v. Kufner,
519 F.3d 33 (1st Cir. 2008)

Rigby v. Damant,
486 F.3d 692 (1st Cir. 2007)

Danaipour v. McLarey (*Danaipour II*),
386 F.3d 289 (1st Cir. 2004)

Whallon v. Lynn,
356 F.3d 138 (1st Cir. 2004)

Danaipour v. McLarey (*Danaipour I*),
286 F.3d 1 (1st Cir. 2002)

Defenses | Settlement and Immigration Status | Grave Risk | Motions for New Trial

In this case, the First Circuit determined whether a district court committed clear error[1] in denying a mother's defenses of grave risk and settlement of the child, and whether the district court's denial of her motion for a new trial was an abuse of discretion.

Holdings

The First Circuit affirmed the district court order for the return of a child to Brazil, denying the defenses of grave risk and settlement of the child for lack of sufficient evidence, and denying the motion for a new trial based on the continuance of an immigration hearing for three years.

Facts

A couple, both Brazilian citizens, lived together from 2007 to 2016. In 2010, the mother gave birth to A.C.A., their child. She had another child, M.A., from a previous relationship. The couple separated in February 2016. That December, the mother removed both children to the United States without the father's knowledge. When she and the children entered the United States, immigration authorities released them on their own recognizance and ordered an immigration hearing in Boston, Massachusetts.

In November 2018, the father filed a petition for the return of A.C.A. to Brazil. The mother's response alleged the defenses of grave risk under Article 13(b) and settlement of the child under Article 12. At the trial in July 2019, the district court tentatively ruled that the father's petition for return would be

1. Da Silva v. De Aredes, 953 F.3d 67, 72–73 (1st Cir. 2020) (citing Monasky v. Taglieri, 140 S. Ct. 719, 730 (2020)).

Other First Circuit Cases (*cont'd.*)

Walsh v. Walsh,
221 F.3d 204 (1st Cir. 2000)

Toren v. Toren,
191 F.3d 23 (1st Cir. 1999)

Zuker v. Andrews,
181 F.3d 81 (1st Cir. 1999)

granted. A formal order was entered on October 29, 2019, ordering the child to be returned on January 2, 2020. Two days later, on October 30, 2019, the mother and her two children attended an immigration hearing. At that hearing, she formally filed an application for asylum for herself and the two children, alleging that if they all returned to Brazil, the father would kill her and sexually abuse her other child. Immigration proceedings were continued to February 16, 2023.

On November 6, 2019, the mother moved for a new trial in district court, alleging that the three years before her next immigration hearing would provide her and the children with interim legal immigration status, eliminate the risk of imminent deportation, and provide new evidence of her defense that A.C.A. was well settled. The district court denied her motion for new trial. The First Circuit issued a stay of the removal order and expedited the appeal.

Discussion

The First Circuit found that the district court did not err in denying the mother's defenses of grave risk or settlement of the child.[2]

Grave Risk. The mother alleged that returning A.C.A. to Brazil would expose her to grave risk because the child witnessed conflict between her parents, and if returned, was at risk of physical abuse herself. The district court had found that although there was "some degree" of physical abuse by the father, the facts presented were insufficient to establish grave risk to the child. The First Circuit ruled that the abuse alleged was not as severe as that found in *Walsh v. Walsh*,[3] noting that the incidents did not result in hospital visits, complaints to law enforcement, or arrest of the father. The court also observed that there was no evidence that the father ever sexually abused the child.[4]

The mother also alleged that both her children were at risk of being sexually abused by the father, based on her first child revealing in therapy that she used to sit on the father's lap and move her hips around to massage him. The therapist, however, would not testify that her suspicion of sexual abuse was made with a "reasonable degree of medical certainty."[5]

The First Circuit found that the district court did not abuse its discretion in finding that the mother did not establish a sufficient defense of grave risk of domestic violence or sexual abuse.[6]

Settlement of the Child. Since the father's petition was filed more than one year after the wrongful removal of the child, the mother attempted to prove that the child was

2. *Id.* at 73.
3. 221 F.3d 204, 220 (1st Cir. 2000).
4. *Da Silva*, 953 F.3d at 74–75.
5. *Id.* at 74.
6. *Id.* at 74–75.

settled within the meaning of Article 12.[7] The district court had considered facts relevant to the child's degree of settlement and found that A.C.A. had developed "meaningful relationships and lasting emotional bonds with a community in East Boston."[8] But the district court had also found that the child's resilience and ability to form bonds would not "wrench her out of a well-settled position if returned."[9] As part of its analysis, the district court had considered the child's unsettled immigration status. The First Circuit also noted that the evidence before the district court showed a pattern of absences from school and many tardies (40 days out of 167 in 2017–2018, and 41 during the first half of 2018–2019), facts against a finding of settlement.[10]

Motion for New Trial. The mother asserted that the three-year delay of her immigration hearing stabilized the child's immigration status by removing the possibility of immediate removal. The district court had disagreed, finding that the evidence of a continuation of the mother's immigration hearing was cumulative in nature and not new evidence of settlement. The district court had also found that she could have filed an application for asylum before her first immigration hearing instead of waiting until after, but she did not. The First Circuit affirmed the denial of the mother's motion for a new trial.

> A motion for new trial on the basis of newly discovered evidence requires the movant to show that:
>
> > (1) The evidence has been discovered since the trial; (2) The evidence could not by due diligence have been discovered earlier by the movant; (3) The evidence is not merely cumulative or impeaching; and (4) The evidence is of such nature that it would probably change the result if a new trial is granted.[11]

7. Hague Convention on the Civil Aspects of International Child Abduction art. 12, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501.

8. *Da Silva*, 953 F.3d at 75.

9. *Id.*

10. *Id.* at 76 (citing Lozano v. Alvarez, 697 F.3d 41, 54 (2d Cir. 2012) (noting that courts generally should consider as a now-settled factor "whether the child attends school or day care consistently")).

11. *Id.* at 76 (quoting Duffy v. Clippinger, 857 F.2d 877, 879 (1st Cir. 1988)).