Commentary: Appellate Court Cases

Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002)
Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289 (1st Cir. 2004)

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)

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

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)

Grave Risk | Sexual Abuse of Child

The *Danaipour* cases deal with the responsibilities of trial courts to hear and rule on defenses to return as opposed to relying upon the courts or services of the habitual residence to inquire into allegations of abuse.

Danaipour I

Mother and father lived in Sweden, where they raised two daughters. When the children were aged six and two, the parents filed an action for divorce in Sweden but continued to cohabit with one another. Mother began to suspect that father, a child psychologist, was sexually abusing the children. After mother sought the advice of a child psychologist, a complaint was made to social services in Sweden, which resulted in a criminal investigation. After interviewing the children, the investigation was terminated. Mother requested social services perform a complete investigation; however, this could not be done without the father's consent, which he withheld. Mother requested that the court order such an investigation, but the request was denied. In violation of Swedish court orders, mother subsequently left Sweden with her daughters and came to the U.S. Father commenced a Hague petition for return in Massachusetts state court, but mother had the matter removed to federal district court. The district court denied mother's motion for a full sexual abuse evaluation to be performed in the U.S. At trial, the children's treating physician testified to her opinion that the younger child had been abused by father, and was suffering from PTSD. It was corroborated by (1) a medical expert in the field of child trauma, who indicated that it would be devastating to return either child to their father, and (2) a professor of pediatrics and expert in sexual abuse evaluations that the younger child had been sexually abused. Father denied the

abuse and produced a clinical social worker to testify that the children did not suffer from PTSD.

The trial court was concerned that sexual abuse had occurred, but also found that a forensic evaluation was required. The court ordered the return of the children in mother's custody along with ordering twelve conditions regarding their return, including that a forensic evaluation be conducted in Sweden, that the Swedish court determine the implications of the evaluation in deciding custody of the children along with other orders limiting father's contact with the children. While appeal was pending, it appeared that some of the undertakings that were contemplated to be contained in a "mirror image" order could not be legally ordered by the Swedish court.

On the facts of this case, and "[w]ithout deciding that there could never be a situation in which a district court could properly decline to make a finding on sexual abuse allegations or defer such a finding to the courts of the country of habitual residence," the First Circuit reversed the district court.

First, the court held that sexual abuse is the equivalent of an "intolerable situation" within the meaning of Article 13(b). Second, the question whether there is a grave risk is one for the court that is hearing the case, not a court of the habitual residence. In this case, the court should not have ordered the children returned without making factual findings necessary to evaluate the nature of the risk, that is, had the children been sexually abused. Without a determination that the children had or had not been abused, the court was without a basis to determine the question whether the children could be safely returned to the habitual residence. Third, the question whether a forensic evaluation in Sweden would have been effective was problematic in light of subsequent events, and in light of the evidence that a return order would be devastating to the children. Fourth, the undertakings that the trial court imposed were beyond the ability of the Swedish court to comply with, and as such, it was beyond the authority of the U.S. district court to impose those conditions on a foreign court. In the final analysis, the First Circuit found that it was error, inter alia, for a court to order the children's return before it knew whether sexual abuse had occurred.

The case was remanded back to the trial court to conduct additional proceedings to determine if the sexual abuse occurred.

On remand, the district court found that the younger child had been sexually abused by her father, and that the older daughter had not been abused. The court further found that it would be an intolerable situation for the children to be returned to Sweden, and the father's request for return was denied. Father appealed.

Danaipour II

In *Danaipour II*, father challenged the sufficiency of the evidence, and further argued that the trial court erred by failing to determine whether Swedish courts could address the issue of protecting the children from grave risk. The court rejected father's assertion that a grave risk under Article 13(b) does not exist unless the court examines the measures or remedies available in the habitual residence that could be accompanied by undertakings. The court underscored the limited use of undertakings in connection with

returns ordered despite the showing that a 13(b) defense has been found true, and reasoned that

> [Father] also relies heavily on a footnote in *Blondin* for the proposition that assessing the capacity of the courts of the country of habitual residence is a prerequisite to an Article 13(b) exception. 238 F.3d at 163 n.11. We do not read *Blondin* to require the court to make findings about the institutional capacity of the home country in all cases. To the extent that *Blondin* does stand for such a proposition, we disagree that Article 13(b) requires such findings in all cases.[1]
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> If the requested state court is presented with unequivocal evidence that return would cause the child a "grave risk" of physical or psychological harm, however, then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request. The development of extensive undertakings in such a context would embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(b) exception.[2]

1. Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289, 303 n.5 (1st Cir. 2004).
2. *Id*. at 303.