No. _____

IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

—v.—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The primary purpose of The Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention") is to protect children from international abduction by returning an abducted child to the nation of habitual residence for adjudication of custody rights under that nation's laws. To further that purpose, Article 12 of the Convention mandates that an abducted child *must* be returned if the left-behind parent's petition for the child's return is filed within one year of the abduction. In doing so, the Convention deters international child abductions by removing the benefit an abducting parent would otherwise obtain or perceive under the laws of the nation to which he or she has abducted the child. If the left-behind parent is unable, or otherwise fails, to determine the situs of the child and meet this one-year filing deadline, the court must still order the return of the child unless the abducting parent demonstrates one of four affirmative defenses, including that the child is "settled" in her new environment.

The circuit courts of appeal are split over whether equitable tolling may apply to the one-year period. While the Fifth, Ninth, and Eleventh Circuits all hold the one-year period may be equitably tolled, the Second Circuit held in this case that the one-year period is not subject to equitable tolling and the settled defense is still available even where, as here, the abducting parent conceals the location of the child. The Second Circuit also held the fact that the child and abducting parent lack legal immigration status is not dispositive on the issue of whether a child is settled under Article 12, but, rather, is merely

one of several factors to consider. The questions presented are:

1. Whether a district court considering a petition under the Hague Convention for the return of an abducted child may equitably toll the running of the one-year filing period when the abducting parent has concealed the whereabouts of the child from the left-behind parent.

2. Whether an abducted child can be "settled" in the United States, within the meaning of Article 12, where it is undisputed that both the abducting parent and the child are residing illegally in the United States, and the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in their immigration status.

PARTIES TO THE PROCEEDINGS

Petitioner, Manuel Jose Lozano, was the appellant in the court below.

Respondent, Diana Lucia Montoya Alvarez, was the appellee in the court below.

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION, STATUTES, AND RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Manuel Jose Lozano respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 697 F.3d 41, and reproduced at Petition Appendix ("Pet. App.") 1a. The underlying final order of the Second Circuit is not reported and is included in the Appendix. The opinion of the United States District Court for the Southern District of New York is published at 809 F. Supp. 2d 197, and reproduced at Pet. App. 39a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on October 1, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2, Clause 1 of the United States Constitution provides, in pertinent part, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1.

Relevant provisions of the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C.

§ 11601–11610 (2005), are reproduced at Pet. App. 117a.

Relevant provisions of the Hague Convention are reproduced at Pet. App. 129a.

INTRODUCTION

The primary purpose of the Hague Convention is to protect children from international abduction by providing a procedure to return an abducted child to the nation of habitual residence for adjudication of custody rights under that nation's laws.

Abducting parents should not be allowed to thwart this purpose by concealing the whereabouts of the abducted child. Allowing district courts to equitably toll the one-year filing period in cases where an abducted child's whereabouts have been concealed advances the Hague Convention's purpose by eliminating the practical and juridical benefit of abducting and concealing children, and by facilitating the return of abducted children to their home countries. By ruling that equitable tolling cannot be applied to the one-year filing period, the Second Circuit undercuts a significant deterrent that the majority of federal courts—including the Fifth, Ninth, and Eleventh Circuits—recognize as vital to achieve the purpose of the Hague Convention. The Second Circuit's holding that district courts may not toll the one-year filing period even in cases where, as here, the abducting parent conceals the child's whereabouts rewards the abducting parent by allowing her to raise defenses to the left-behind parent's petition that otherwise would not be available. And the decision allows an abducting parent to eviscerate by his or her wrongful conduct the protection Article 12's one-year standard provides

to the left-behind parent, who is constrained from taking action due to, on one hand, a lack of knowledge as to where to file properly and, on the other hand, procedural strictures like Rule 11(b) that preclude the left-behind parent from filing claims without a proper evidentiary basis in fact. As a result, the Second Circuit's decision will encourage other abducting parents to conceal their children's whereabouts in order to delay for as long as possible the filing of a Hague Convention petition in the country to which the child has been taken. In turn, it punishes left-behind parents by placing the burden on them to speculate, for purposes of filing a Hague Convention petition within the one-year filing period, whether their abducted children have been taken from the country, and to where.

The Second Circuit's decision goes one step further in undermining the fundamental purpose of the treaty. The Second Circuit ruled that an abducted child's illegal immigration status does not preclude a finding that the child is "settled" within the meaning of Article 12 even when the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in status. In effect, the court's treatment of the abducted child's illegal immigration status shields abducting parents from the consequences of their wrongdoing and encourages them to take their abducted children to live illegally in the United States. This Court's review of the Second Circuit's decision is clearly warranted.

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

Manuel Jose Lozano and Diana Lucia Montoya Alvarez, both of whom immigrated to England from Colombia, met and began dating in London in 2004. They soon began cohabitating, although they never married. On October 21, 2005, Diana gave birth to the couple's daughter. For more than three years, Manuel, Diana, and their daughter lived together in London. On November 19, 2008, Diana abducted the child from the family home, without notice or warning, never to return. Despite his constant and diligent efforts, Manuel has not seen his daughter since.

When Diana failed to return home with the child, Manuel took immediate steps to locate his daughter, but his efforts were frustrated by Diana's willful concealment of the child's whereabouts. On November 22, 2008, three days after Diana had abducted their daughter, Manuel reached Diana by telephone. She refused to disclose their whereabouts and instead claimed falsely to have filed a police report against him and hung up. Shortly thereafter, in December 2008, Manuel reached Diana's sisters in London. The first sister told him not to attempt to contact his daughter or Diana if he did not "want trouble" or "want to be sorry." The second sister told Manuel that Diana and the child were living in a shelter in London. He retained counsel, was unable to locate his daughter, and heard nothing further from them until shortly after March 27, 2009, when Diana's English solicitors sent a letter to Manuel's English counsel stating that Diana would not allow Manuel to have any contact with his daughter. Based on all of these events, particularly his being

contacted by Diana's English solicitors, Manuel reasonably believed that Diana had abducted their daughter to a location somewhere within the United Kingdom.

In fact, Manuel's belief was correct. Diana remained in the United Kingdom for almost eight months after abducting the child, and in May of 2009, applied for permanent public housing in England. Because Diana led Manuel to believe she abducted the child to somewhere within the United Kingdom, all of his diligent efforts to locate his daughter were focused in the United Kingdom. On July 23, 2009, Manuel, through his English solicitors, filed an application under the Children Act of 1989 to obtain "a prohibited steps" order and a "defined contact" order to "ensure that he obtains regular contact with his child." At this time, information indicated that the last known whereabouts of Diana and Manuel's daughter was the Croydon's Women's Shelter in London.

As Manuel continued to search for his daughter within the United Kingdom and made progress on determining her whereabouts, Diana removed their daughter to Paris, France on July 3, 2009 without Manuel's knowledge or consent. On July 8, 2009, Diana took their daughter from France to New York, where they have been living ever since. As of October of 2009, Diana and Manuel's daughter had overstayed their visas and currently reside illegally in the United States.

Meanwhile, Manuel continued to search for his daughter in England because neither he nor his solicitors received any indication from Diana, her solicitors, her family, or any third parties indicating that she had left the United Kingdom. On September

16, 2009, Manuel applied for § 33 Family Law Act of 1986 disclosure orders to be served on Diana's sisters in England, the Metropolitan Police that Diana falsely claimed to have contacted, the Child Benefit Office, Diana's solicitors, his daughter's doctor, and the Croydon's Women's Shelter. Nothing from this first round of disclosure orders gave Manuel any reason to believe Diana was taking the child to the United States or had already done so. The Family Court served another series of disclosure orders, the last of which was returned on February 22, 2010. Only then, after exhausting the British court system, did Manuel and his solicitors conclude that Diana likely had removed the child from the United Kingdom.

On March 15, 2010, Manuel filed a Central Authority for England and Wales Application Form seeking to have the child returned to the United Kingdom. On March 23, 2010, the International Child Abduction and Contact Unit (the Central Authority for England and Wales) sent that application to the United States Department of State Office of Children's Issues. After several months of searching for pro bono counsel in the United States, the U.S. Department of State located the undersigned counsel to undertake Manuel's cause on July 27, 2010. Only with the assistance of the U.S. Department of State, a private investigator, and retained pro bono counsel was Manuel able to discern the whereabouts of his daughter within the United States.

On November 10, 2010—well within one year of having grounds to reasonably believe that his daughter had been abducted internationally from England, and after (within that same period of less

than a year) having obtained counsel, hired an investigator, and properly determined the jurisdiction within which the child was being held—Manuel filed a Petition for Return of Child pursuant to Article 2 of the Hague Convention and the International Child Abduction Remedies Act, 42 U.S.C. § 11603 (2005) ("ICARA"), in the United States District Court for the Southern District of New York. Manuel's Petition requested an order requiring that the child be returned to London to have a British court determine custody.

II. DECISION OF THE DISTRICT COURT

After a hearing, the District Court held that although Manuel established his prima facie case of wrongful removal under the Hague Convention, Diana proved by a preponderance of the evidence that the child had become settled in her current environment, and that this settled exception was sufficient to not order the child and mother to return to the United Kingdom to determine a proper custody arrangement. The District Court rejected Manuel's tolling argument on the grounds that the one-year filing period is not a statute of limitations and does not bar a petitioner from filing a petition after that period has elapsed. The District Court analyzed the factors that weighed both for and against allowing Diana to retain the child in the United States for a custody determination, and, with regard to the illegal immigration status of both Diana and the child, stated: "There is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and the Respondent is likely to upset the stability of the child's life here in New York."

The District Court rejected Diana's second defense—that returning Manuel's daughter to the United Kingdom would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation.

On May 27, 2011, Manuel filed a timely notice of appeal from the District Court's denial of his petition.

III. THE BRIEF OF THE UNITED STATES

By letter dated July 11, 2012, the Second Circuit requested that the Secretary of State submit her views concerning: (1) whether equitable tolling applies to the one-year period that triggers availability of the "settled" defense under Article 12 of the Hague Convention; and (2) what significance should be given to a child's lack of legal immigration status in the United States when determining whether a child is "settled" within the meaning of Article 12.

On August 20, 2012, the United States submitted a memorandum brief as *amicus curiae* and responded to the Second Circuit's request, in pertinent part, as follows:

(1) Equitable tolling does not apply to the one-year period under Article 12; instead the court retains equitable discretion to order a child's return at any time. A court may do so even if the child is "now settled." . . . [And] (2) The child's immigration status should not be dispositive standing alone, but may be one factor in a court's determination of whether the child is now settled in her new environment.

Amicus Br., at 2.

This position reflected a complete reversal of the Government's prior position on equitable tolling.

Prior to the initiation of Manuel's petition, all of the State Department's public statements indicated that abducting parents who conceal their children's whereabouts should not benefit from their wrongdoing.

As far back as 1986, for example, the State Department addressed the one-year filing deadline and stated that

> [t]he reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

See "Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction," 51 Fed. Reg. 10,503 (1986).

And twenty years later, in 2006, the State Department reiterated its support for the application of equitable tolling in Hague Convention cases. In response to a formal Hague Conference questionnaire concerning the practical operation of the Convention, the State Department stated that the U.S. Government

> supports the concept of equitable tolling of the one-year filing deadline in order to

> prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the untimely filing of a Hague petition.

See Hague Conference on Private International Law, "Collated Responses to Questionnaire," at p. 577.

In its *amicus* brief in this case, however, the Government took a 180-degree turn and adopted the position that equitable tolling does not apply to Article 12 because courts retain "equitable discretion" to order a child's return at any time. Ignoring the plain meaning of its own prior statements, the Government asserted that its 2006 statement did not concern equitable tolling at all, but should be "understood in the sense of the availability of the exercise of equitable discretion." *Amicus* Br., at 11, n.11.

Examination of the Questionnaire, however, reveals that the Government plainly endorsed "equitable tolling" and not "equitable discretion" in its answer. In the sentence immediately prior to voicing its support for "the concept of equitable tolling," the Government wrote to "see response to question #13(f), where we discuss *equitable tolling* of the filing deadline under the Convention." *See* "Collated Responses to the Questionnaire," p. 577 (emphasis added). Question 13(f) of this document solicited feedback regarding "important developments" relating to the one-year period under Article 12. *Id.*, at p. 149. In response to this question, the State Department wrote the following with regard to equitable tolling of the one-year filing deadline:

> The U.S. Supreme Court has stated that, unless Congress states otherwise, equitable

> tolling should be read into every federal statute of limitations … Several courts have held that equitable tolling may be applied to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking the return. The courts reason that if they did not permit equitable tolling, the parent who abducts and conceals children for more than a year will be rewarded for this misconduct by creating eligibility for an affirmative defense not otherwise available. The Eleventh Circuit has held that the one-year limitation period begins on the date the petitioner discovers the new residence of a child whose whereabouts have been concealed by the other parent.

Id., at p. 217. The Government's *amicus* brief did not attempt to explain its change in position. Therefore, the Government's new position does not merit the *Skidmore* deference granted by the Second Circuit. Op. at 19 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

IV. DECISION OF THE SECOND CIRCUIT

The Second Circuit affirmed the decision of the District Court, holding that (1) district courts lack authority to equitably toll Article 12's one-year filing period prior to which an abducted child must be ordered returned, and (2) illegal immigration status does not, standing alone, preclude a court from finding a child is "settled" within the meaning of Article 12.

The court reasoned that the one-year filing period in Article 12 does not operate as a statute of

limitations because a court retains discretion under Article 18 of the Convention to order a child's return at any time, i.e., even if the child is found to be settled in his or her new environment. Op. at 14. The court found equitable tolling to be an "unnecessary" form of relief because "the Convention expressly provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct"—the court's own discretion to order the return of a child, even when a defense is satisfied. Op. at 14.

According to the court's interpretation of the history and purpose of the Article 12 "settled" exception, the one-year filing period was designed to allow courts to consider a child's interests in remaining in the country into which she has been abducted after a certain time has passed. Op. at 18–19. Based upon this finding, the court concluded that equitable tolling was inconsistent with the treaty's purpose. Op. at 19.

REASONS FOR GRANTING THE PETITION

There are two reasons why this Court should grant the petition for writ of certiorari and review the Second Circuit's decision. First, as the Second Circuit acknowledged, its decision creates a distinct split among the circuit courts of appeal as to whether equitable tolling applies to the one-year filing deadline under Article 12 of the Hague Convention. Second, the Second Circuit's ruling hinges on an additional question concerning the proper interpretation of Article 12 of the Hague Convention that has not been, but should be, resolved by the Supreme Court—namely, whether an abducted child can be "settled" within the meaning of Article 12 where it is undisputed that both the abducting parent and the child are residing illegally in the United

States, and the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in their immigration status.

I. THE CIRCUITS ARE SPLIT

A. There Is an Acknowledged Split of Authority Between the Second Circuit and the Fifth, Ninth, and Eleventh Circuits Regarding Whether Courts Can Equitably Toll the One-Year Period Before a Parent Can Assert the Settled Defense.

The Second Circuit is the first and only circuit court of appeals to reach the conclusion that equitable tolling does not apply to Article 12's one-year filing deadline. It did so while recognizing that it was departing from the decisions reached by the Fifth, Ninth, and Eleventh Circuits. Op. at 20. *See Dietz v. Dietz*, 349 Fed. App'x 930, 933 (5th Cir. 2009); *In re B. Del C.S.B.*, 559 F.3d 999, 1014–15 (9th Cir. 2009); *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004). For the reasons discussed below, the Second Circuit's opinion undermines the purpose of the Hague Convention and should be reversed.

Contrary to the Second Circuit's position, the Ninth and Eleventh Circuits have found equitable tolling of the one-year filing deadline necessary to further the Convention's overarching aim of deterring child abduction. *Duarte*, 526 F.3d at 570; *Furnes*, 362 F.3d at 710, 715. This Court recognizes that the purpose of the Convention is to deter child abduction. *Abbott v. Abbott*, 130 S. Ct. 1983, 1996 (2010) (observing that to "interpret the Convention to permit an abducting

parent to avoid a return remedy, even when the other parent holds a *ne exeat* right, would *run counter to the Convention's purpose of deterring child abductions* by parents who attempt to find a friendlier forum for deciding custodial disputes") (emphasis added).

The Eleventh Circuit, which first adopted the principle of equitable tolling in the context of Article 12, holds that equitable tolling may apply to petitions for the return of a child "where the parent removing the child has secreted the child from the parent seeking return." *Furnes*, 362 F.3d at 723. The Ninth Circuit has adopted a similar test, applying equitable tolling when circumstances suggest that the abducting parent took steps to conceal the whereabouts of the child from the parent seeking return and such concealment delayed the filing of the petition for return. *Duarte*, 526 F.3d at 570.

These courts reasoned that failing to provide for tolling in the face of concealment by the abducting parent not only would encourage child abductions, but also would incentivize an abducting parent to conceal the child. *Furnes*, 362 F.3d at 723 (citing *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1362–63 (M.D. Fla. 2002) (holding that equitable tolling applies to ICARA petitions because otherwise "a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available"); *Duarte*, 526 F.3d at 570 (citing *Belay*, 272 F. Supp. 2d 553, 561 (D. Md. 2003) ("[T]o reward the abductor as such would be to condone the exact behavior the Convention seeks to prevent")).

In reaching its conclusion, the Ninth Circuit noted that the Government expressed these same concerns

in the State Department's public notice on the Hague Convention, which states:

> If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

Id. (citing Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,494, 10,505 (Dep't of State March 26, 1986) (Pub. Notice)).

In *Duarte*, the Ninth Circuit recognized the serious concerns with uprooting a potentially settled child regardless of whether the abducting parent concealed that child, and that both the Hague Convention and ICARA are silent on whether equitable tolling applies. Nevertheless, the court reasoned that it was necessary to toll the one-year filing deadline through equitable principles in order to further the Convention's goal of deterring child abduction. *Id.*

The Ninth Circuit affirmed the holding of *Duarte* in a subsequent case, stressing the two related conditions that need be met in order for tolling to apply: (1) the abducting parent must have concealed the child from the petitioning parent, and (2) that concealment must have caused the petitioning parent's filing delay. *In re B. Del C.S.B.*, 559 F.3d 999, 1014–15 (9th Cir. 2009).

Contrary to the Second Circuit's assertion that this case "suggests that there may be limits to the *Duarte* holding," *In re B. Del C.S.B.* instead underscores the

Ninth Circuit's cognizance that competing interests need to be balanced carefully under the Convention. *Id.* (observing that the court must "ensure that the Convention's concern over uprooting children is not sacrificed to its aim of deterring child abductions"). The court found that tolling did not apply to the facts of the case because there was no evidence of concealment, and thus the second necessary condition of the *Duarte* test was not met. *Id.* at 1015 (discussing evidence that the left-behind parent knew exactly where his child was, even sending presents to her home address).

The Second Circuit found the decisions of the Ninth and Eleventh Circuits unpersuasive on the ground that those circuits wrongly treated the one-year filing period in Article 12 as a statute of limitations. Op. at 21. But both the Ninth and the Eleventh Circuits explicitly have recognized that the one-year period is not a traditional statute of limitations. The Ninth Circuit observed that the district court below distinguished the one-year period from a statute of limitations, yet nonetheless found the principle applies, not just vaguely as a general matter, but specifically to Article 12:

> As one district court explained, "the evident import of [Article 12's one-year period] is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but rather to put some limit on the uprooting of a settled child."

In re B., 559 F.3d at 1014.

The Eleventh Circuit, in a decision pre-dating *Furnes* that did not directly address equitable tolling

on appeal, noted similar logic in the decision on review:

> The district court first determined that this one-year time limit, which in some respects is similar to a statute of limitations, may be equitably tolled. In doing so, the district court found that it is difficult to "conceive of a time period arising by a federal statute that is so woodenly applied that it is not subject to some tolling, interruption, or suspension, if it is shown or demonstrated clearly enough that the action of an alleged wrongdoer concealed the existence of the very act which initiates the running of the important time period."

Lops v. Lops, 140 F.3d 927, 946 (11th Cir. 1998).

In fact, this Court's decision in *Young v. United States*, which was cited by both *Duarte* and *Furnes*, supports the argument that equitable tolling applies beyond the context of a traditional statute of limitations. *Duarte*, 526 F.3d at 570 (citing *Young v. United States*, 535 U.S. 43, 43 (2002)); *Furnes*, 362 F.3d at 723 (citing the same). In *Young*, this Court held that a three-year lookback period under the Bankruptcy Code, which affects the dischargeability of certain tax debt,

> is a limitations period subject to equitable tolling principles. It prescribes a period in which certain rights may be enforced . . . Thus, it serves the same basic policies furthered by all limitations periods: repose, elimination of stale claims, and certainty about a plaintiff's opportunity

> for recovery and a defendant's potential liabilities.

Id., 535 U.S. at 43 (2002) (internal quotations omitted).

The one-year filing deadline under Article 12 prescribes periods in which certain rights may be enforced and is intended to provide certainty about the parties' rights and liabilities after one year has elapsed. As with the lookback period in *Young*, equitable tolling of Article 12 prevents abducting parents from taking advantage of a "loophole" created by strict adherence to the time period. *See Young*, 535 U.S. at 46–47 (stating that "[p]etitioners took advantage of [the] loophole" created by the three-year period because the three-year period technically allowed parties to discharge tax debts by filing and then dismissing another bankruptcy proceeding after the three-year period had passed). Moreover, the tests adopted by the Ninth and Eleventh Circuits for applying equitable tolling explicitly recognize that the principle applies only where a petitioner has made diligent efforts to locate his or her child and where extraordinary circumstances—the abduction and concealment of the child—cause a delay in filing. *Cf. Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (holding that a litigant seeking equitable tolling generally bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way).

In addition to the Ninth and Eleventh Circuits, the Fifth Circuit holds that equitable tolling applies to Article 12 of the Convention, having found that a district court did not err in applying equitable tolling to the one-year filing deadline until the date the left-

behind parent definitively located her children. *Dietz v. Dietz*, 349 Fed. App'x 930, 933 (5th Cir. 2009). The court stated that while both ICARA and the Convention make no mention of equitable tolling, it is well-established in caselaw that it applies. *Id.* (citing *Van Driessche v. Esezeoboh*, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006) (applying equitable tolling where the abducting parent did not reveal her location to the petitioning parent, which could have precluded him from filing his Hague Petition)).

Whether tolling applies to Article 12 is an issue that is ripe for this Court's consideration because it arises in federal and state courts across the nation and has been analyzed by the lower courts for well over a decade. Federal district courts within the jurisdiction of at least ten circuit courts of appeal have directly addressed the issue, and the overwhelming majority of these courts hold that equitable tolling or an analogous equitable principle applies to Article 12, particularly where the abducting parent conceals the child and the concealment causes a delay in filing of the petition for return. *See Sita-Mambwene v. Keeton*, 2009 U.S. Dist. LEXIS 77446 (E.D. Mo. Aug. 29, 2009) (tolling where the abducting parent concealed the child's location); *In re Hague Child Abduction Application*, 2008 WL 913325, at *10 (D. Kan. Mar. 17, 2008) (same); *Wasniewski v. Grzelak*, 2007 U.S. Dist. LEXIS 59762, at *5 (N.D. Ohio Aug. 15, 2007) (same); *Ibarra v. Garcia*, 476 F. Supp. 2d 630 (S.D. Tex. 2007) (same); *In re Giampaolo*, 390 F. Supp. 2d 1269, 1282 (N.D. Ga. 2004) (same); *In re Cabrera*, 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004) (same); *Belay v. Getachew*, 272 F. Supp. 2d 553, 562–64 (D. Md. 2003) (same); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002) (same); *Mendez Lynch v. Mendez*

Lynch, 220 F. Supp. 2d 1347, 1362–63 (M.D. Fla. 2002) (same); *see also Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006) (finding concealment based largely on the mere fact that the abducting parent did not disclose the child's location to the left-behind parent).

In other cases, courts recognize the applicability of equitable tolling principles to the one-year standard but decline to apply it where the left-behind parent knew the exact location of the child, even visiting or sending presents to the child. *See Castillo v. Castillo*, 597 F. Supp. 2d 432, 439 n.11 (D. Del. 2009) (declining to toll where the left-behind parent knew the exact location of the child); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) (same); *In re Robinson*, 983 F. Supp. 1339, 1346 n.10 (D. Colo. 1997) (same).

Courts also decline to toll where the left-behind parent did not make diligent efforts to locate the child. *See Giles v. Bravo*, 2012 WL 704910, at *7 (D. Nev. Jan. 27, 2012) (noting that petitioner "exhibited a consistent attitude of acquiescence over a significant period of time"); *Garza-Castillo v. Guajardo-Ochoa*, 2012 WL 523696, at *4 (D. Nev. Feb. 15, 2012) (finding "little evidence" that left-behind parent engaged in efforts to locate the child other than his own testimony); *Edoho v. Edoho*, 2010 U.S. Dist. LEXIS 83786, at *18 (S.D. Tex. Aug. 17, 2010) (declining to apply equitable tolling where left-behind parent waited six months before filing a missing persons reports and only searched for the child by calling the abducting parent's former place of employment once a month); *In re Wojcik*, 959 F. Supp. 413, 420 (E.D. Mich. 1997) (declining to apply equitable tolling where the left-behind parent waited

eight months before contacting the French Central Authority and took no steps to locate his children other than filing for divorce in France).

Certain courts addressing the issue of equitable tolling have noted that it is especially appropriate where it is "shown or demonstrated clearly enough that the action of an alleged wrongdoer concealed the existence of the very act which initiates the running of the important time period." *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002); *see also Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998).

This Court should grant certiorari to resolve the split between the Courts of Appeals on this important issue.

B. Tolling is necessary to give force to the underlying principles and purposes of the Hague Convention.

Article 18 of the Convention provides that the authority hearing the case may order the return of the child "at any time." *See* Convention, Art. 18. While courts have always retained the power of equitable discretion to repatriate abducted children, every court of appeals except the Second Circuit—as well as the majority of federal district courts—that has considered the issue has nonetheless concluded that equitable tolling or a similar tolling principle is necessary under Article 12, with good reason. Unlike equitable discretion, equitable tolling deters child abduction before it occurs.

Equitable tolling provides a clear guideline to lower courts and, in turn, sends a clear message to a would-be abducting parent: If you abduct your child to the United States and conceal that child's whereabouts, and your concealment causes a delay in the filing of a

petition for return, you will not benefit from your wrongful action. Equitable tolling deters abduction and concealment by completely removing the incentive for and benefit of concealing an abducted child.

The Second Circuit's vision of equitable discretion as the lone deterring mechanism for Article 12 sends a very different message to a would-be abducting parent: If you abduct your child to the United States and conceal that child's whereabouts, and your actions succeed in causing a delay in the filing of a petition for return, there is a reasonable chance you will benefit from your actions because you will be able to raise the Article 12 settled defense and avoid return of the child. Day after day, the longer your child remains in the United States—and the better you are at concealing the child's whereabouts from the left-behind parent—the more settled the child will become in the eyes of the court, and the better your chances at gaming the system and obtaining a custody determination by a court in the United States.

Equitable discretion incentivizes abducting parents to take a gamble—a gamble they are likely to win. Indeed, consider that, with the exception of courts that have applied tolling to the one-year filing period of Article 12, only two courts in published decisions have ever ordered the return of a child after making a well-settled finding. *See F.H.U. v. A.C.U.*, 48 A.3d 1130, 1146–47 (N.J. Super. 2012); *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 815 (N.D. Iowa 2003). The existence of general "equitable discretion" is insufficient to deter the abduction and concealment of children when it is so

seldom invoked and will be only one of many factors considered by courts.

The Second Circuit is now the only United States Court of Appeals to reject the concept of equitable tolling and allow abducting parents to raise the well-settled defense. Far from deterring child abduction and concealment, the Second Circuit's ruling creates a strong incentive for abducting parents to conceal children within its jurisdiction to bolster their chances of a settled finding.

II. THE PETITION RAISES AN IMPORTANT QUESTION CONCERNING THE PROPER INTERPRETATION OF "SETTLED" WITHIN ARTICLE 12

A. Where an abducted child and abducting parent are residing in the United States illegally and present no evidence of a viable basis to change the child's status, as a matter of law, the abducted child cannot be "settled" in the United States under Article 12.

The Second Circuit interpreted the term "settled" as meaning that the child has significant emotional and physical connections demonstrating security, stability, and permanence in that child's new environment. Op. at 23 (citation omitted). It endorsed the view that the settled inquiry is "concerned with the present" only, so a child's immigration status should be relevant to the settled analysis only to the extent that there is an "imminent threat of removal." Op. at 24, n. 16 (quoting *In re B. Del C.S.B.*, 559 F.3d at 1001–02).

The court held that, when deciding whether a child is settled under Article 12, that child's lack of legal immigration status is not dispositive. Instead, it should be one of many factors to be considered, including, for example, the child's age, the stability of her residence, whether she attends church and school consistently, whether she has friends and relatives nearby, and whether the abducting parent is employed and financially stable. Op. at 21–22. As a threshold matter, the Second Circuit's holding runs counter to the fact that the purpose of the Convention is to deprive the abducting parent's actions of "practical or juridical consequences." Op. at 24 (quoting Perez-Vera Report 429 ¶ 13). The Convention's official explanatory report advises that in order to accomplish the Convention's goal of effectively deterring abducting parents, competent authorities in the State of refuge should not render lawful the wrongful actions of those abducting parents. Perez-Vera Report 429 ¶ 16. In effect, the Second Circuit's decision shields abducting parents from facing negative consequences for their wrongdoing, thereby encouraging them to abduct their children into the United States and conceal them within the jurisdiction of these courts.

Moreover, the Second Circuit's myopic focus on the "present" time is essentially outcome-determinative. In stark contrast to other factors that courts can weigh respectively and collectively to assess whether a child is settled, the "unsettling" effects of a lack of legal immigration status (including the lack of a legitimate basis under law for changing that status) are inherently more severe over the long-term. To focus on the risk of immediate deportation, which concededly remains remarkably low, misses the mark. For a young child, the lack of legal

immigration status may appear to have negligible impact on his or her present life—he or she is not at all likely to be deported, may attend public schools, may obtain certain public benefits and is as likely to be supported by a community and social network as a legally resident child. But it is equally true that a child who lacks legal immigration status—including prospects for obtaining legal status under the law—is rendered "unsettled" by that status in ways that become debilitating over time and, to a degree, that ultimately render the child perpetually "unsettled." By way of example: A child lacking legal immigration status cannot obtain a driver's license, will not be able to vote, and even if (s)he attained extraordinary academic success through elementary and high school, would face severe financial aid restrictions for college and post-graduate education. And, even if (s)he overcame this financial obstacle to higher education, (s)he would complete her studies only to encounter the fact that employers are barred by federal law from offering him/her any legitimate employment with appropriate benefits, *see* 8 U.S.C. § 1324(a)(1)(A) and (a)(2), let alone employment commensurate with the skills and abilities (s)he has developed. In perpetuity, the child could not leave this country to visit the left-behind parent or extended family outside the country, or travel internationally for business or pleasure, and reasonably expect re-entry. In this case, as perhaps in many others, the child would face no such restrictions in her former home, England.

Each year, hundreds of petitions are filed pursuant to the Hague Convention in federal and state courts in the United States. In 2009, for example, left-behind parents filed 324 petitions for return of child in the United States, involving 454 children. *See*

"Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction," United States Department of State, April 2010, p. 15. Many of these petitions implicate the well-settled defense under Article 12, and most courts considering the issue in the last decade have utilized the same multi-factor test employed by the Second Circuit.

Because nearly two-thirds of children abducted into the United States are not citizens, a significant number of these petitions concern persons who lack any legitimate pending or existing basis for obtaining legal immigration status (e.g., a well-founded application for residence, citizenship, and/or political asylum). *See* Hague Conference on Private International Law, "A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction," Preliminary Document No. 3, Part II of October 2006, p. 485 (2007 Update) (observing that 36% of abducting parents bringing children to the United States are U.S. citizens, compared to a global average of 55% who are citizens of the country to which children are abducted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2, 2013

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

Argued: August 22, 2012

Decided: October 1, 2012

Docket No. 11-2224-cv

MANUEL JOSE LOZANO,

Petitioner-Appellant,

—v.—

DIANA LUCIA MONTOYA ALVAREZ,

Respondent-Appellee.

Before:

KATZMANN, WESLEY, AND LYNCH,
Circuit Judges.

Manuel Jose Lozano appeals from an April 29, 2011 order of the United States District Court for the Southern District of New York (Karas, J.), denying his Petition for Return of Child under the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2005), in accordance with the Findings of Fact and Conclusions of Law stated on the record on April 28, 2011, the judgment issued on May 2, 2011, and the written opinion entered on August 22, 2011 further setting forth the district court's reasoning. We hold that while district courts retain discretion to order the return of a settled child to his or her country of habitual residency, the "now settled" defense available under Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986), is not subject to equitable tolling. We further hold that when deciding whether a child is settled under Article 12, his or her lack of legal immigration status is not dispositive, but is one of several factors district courts should consider. Finally, we conclude that, in this case, the district court did not err in finding that the child was settled in the United States, and in declining to order her to be returned to the United Kingdom for custody proceedings. Accordingly, for the reasons stated below, the district court's decision denying Lozano's petition is **AFFIRMED**.

JOHN R. HEIN, New York, N.Y. (Shawn Patrick Regan, Amos R. Barclay (to be admitted), Kristin Kramer (to be admitted), New York, N.Y., Sharon M. Mills (to be admitted), Washington, D.C., Fran R. Aden, Houston, Tex., on the brief), Hunton & Williams LLP, *for Petitioner- Appellant*.

LAUREN A. MOSKOWITZ (Rachel G. Skaistis, on the brief), Cravath, Swaine & Moore LLP, New York, N.Y., *for Respondent-Appellee*.

ELLEN BLAIN, Assistant United State Attorney (Benjamin Torrance, Assistant United States Attorney, Geoffrey M. Klineberg, Counselor, Department of State, Harold Hongju Koh, Legal Adviser, Department of State, Mark B. Stern, Adam C. Jed, Attorneys, Appellate Staff, Civil Division, Department of Justice, Stuart F. Delery, Acting Assistant Attorney General), for Preet Bharara, United States Attorney for the Southern District of New York, *for Amicus Curiae United States of America*.

KATZMANN, *Circuit Judge*:

Two now-separated parents dispute whether courts in the United States or the United Kingdom should decide who has custody of their five-year-old child.[1] To resolve this case we must address

[1] The subject child is referred to throughout the district court's decision and the Parties' filings as "the child" to protect her identity. In addition, pursuant to a confidentiality order entered by the Parties, with the district court's consent, information that could be used to identify the iden-

two questions of first impression for this Court regarding the interpretation of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, *reprinted* in 51 Fed. Reg. 10,494 (Mar. 26, 1986) ("Hague Convention" or "Convention"): (1) whether the "now settled" defense[2] to the return of an abducted child is subject to equitable tolling; and (2) whether a child who lacks legal immigration status in the United States can nevertheless be found to be settled here within the meaning of the Convention. We hold that courts cannot equitably toll the one-year period before a parent can raise the now settled defense available under Article 12 of the Convention, and that when making a now settled determination, courts need not give controlling weight to a child's immigration status. We also consider and reject the petitioner's objections to the district court's (Karas, J.) findings of fact.

BACKGROUND

A. Factual Background

Diana Lucia Montoya Alvarez ("Alvarez") and Manuel Jose Lozano ("Lozano") (collectively, the "Parties"), who are both originally from Colombia,

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tity or location of the child, as well as privileged medical or mental health information, was withheld.

[2] As described further *infra,* the Hague Convention requires that a child wrongfully removed from a country be returned to that country in order to undergo a custody determination, unless the child is "now settled in its new environment." Convention, art. 12.

met and began dating in London in early 2004. *In re Lozano,* 809 F. Supp. 2d 197, 203 (S.D.N.Y. 2011). They never married. *Id.* at 203-04. The Parties' descriptions of their relationship differ. Lozano acknowledges that he and Alvarez had "normal couple problems," but claims that they were generally "very happy together." *Id.* at 204 (internal quotation marks omitted). In contrast, Alvarez asserts that Lozano"treat[ed] her badly." *Id.* She testified that, among other things, Lozano "tried to kick her in the stomach when she was pregnant, . . . called her a prostitute, and raped her four times." *Id.* Lozano denies all of these allegations. *Id.* The district court found that Lozano's claims that he never insulted or mistreated Alvarez in any manner were not credible, but also concluded that there was insufficient evidence from which to conclude that Lozano had physically or sexually abused either Alvarez or the child. *Id.* Accordingly, apart from finding that Lozano mistreated Alvarez in some way, the district court declined to make precise findings regarding what abuse occurred. *See Id.*

From the child's birth on October 21, 2005, until November 19, 2008, Lozano, Alvarez, and the child lived together in London. *Id.* at 206-07. In October 2008, Alvarez spoke with the child's doctor regarding a host of concerns, including the child's silence at the nursery, frequent crying, nightmares, and bed-wetting. *Id.* The child's nursery manager also noted the child's unusual behavior and concluded that the "home 'environment obviously had a negative effect upon [her].'" *Id.* at 207. Based on the foregoing, the court found that the child had been exposed to, and negatively

affected by, the problems in the couple's relationship. *Id.*

On November 19, 2008, shortly after visiting her sister Maria in New York, Alvarez "left [the couple's apartment] to bring the child to nursery school and never returned." *Id.* at 209. For the next seven months, Alvarez and the child resided at a women's shelter. *Id.* In early July of 2009, Alvarez and the child left the United Kingdom, eventually traveling to New York, where they have lived since that time. *Id.* at 210.

In New York, Alvarez and the child live with Alvarez's sister Maria, along with Maria's partner, daughter, and granddaughter. *Id.* at 211. Alvarez has not had a job in the United States, but Maria has been employed as a nanny for the same family for four years and her partner owns a grocery business. *Id.* "Because [Alvarez] and the child have British passports, they were allowed to enter the United States without a visa" for a stay of ninety days or less. *Id.* This period, however, expired in October 2009. *Id.* Alvarez testified that she has spoken with immigration authorities about the possibility of being sponsored by Maria, who is a United States citizen. *Id.* Since her arrival in New York, the child has attended the same school and, at the time of the proceedings before the district court, was enrolled in kindergarten. *Id.* The child's Academic Standards Reports from the 2009–2010 school year indicate that the child has been making progress both socially and academically. *Id.* Outside of school, in addition to spending time with members of her extended family, the child has friends whom she meets at the park and the library. *Id.* The child is

also enrolled in ballet classes and, on the weekends, attends church with Alvarez. *Id.* at 212.

After arriving in New York, both the child and Alvarez began receiving therapy from a psychiatric social worker at a family medical clinic. *Id.* The therapist testified that "when she first met the child, the child was unable to speak, make eye contact, or play in the therapist's office." The therapist further noted that the child "would wet herself, was hypervigilant, and had a very heightened startle response." *Id.* By February 2010, the therapist diagnosed the child with post-traumatic stress disorder ("PTSD") caused by her "experience living in the United Kingdom before coming to New York, including living in a shelter system, having to move to a new country, and knowing that her mother had been harmed or threatened." *Id.* Within six months of arriving in New York, however, Alvarez reported that the child's behavior had improved. *Id.* The therapist agreed with this assessment, describing the child as "'completely different.' " *Id.* In particular, the child had stopped bed-wetting, had made friends at school, was excited to play, and was able to speak freely regarding her feelings. *Id.*

After Lozano filed his petition for return in December 2010, Alvarez and the child resumed meeting with the therapist. *Id.* In a December 9, 2010 meeting, "the child 'stated that she was scared because her mommy seemed so worried.' " *Id.* (internal quotation marks omitted). The therapist's notes from a January 31, 2011 session indicate that when asked, out of Alvarez's presence, whether she wanted to see Lozano, the child responded "no." *Id.*

After Alvarez's departure, Lozano took a number of steps to attempt to find his child. Immediately after Alvarez left, he reached out to her sister in London, who denied any knowledge of Alvarez's whereabouts. *Id.* at 209. In the summer of 2009, Lozano filed an application with a British court to "ensure that he obtains regular contact with his child." *Id.* at 210 (brackets omitted). He also, via court filing, submitted orders to Alvarez's sisters and her former counsel, as well as the child's nursery and doctor and various police and government offices, seeking information on the child's whereabouts. *Id.* "After . . . 'exhaust[ing] all possibility that [the child] was still in the [United Kingdom],' on March 15, 2010, [Lozano] filed a Central Authority for England and Wales Application Form seeking to have the child returned to the United Kingdom."[3] *Id.* at 210. The application was sent to the United States Department of State Office of Children's Issues on March 23, 2010. *Id.*

B. Proceedings Before the District Court

On November 10, 2010, Lozano filed a Petition for Return of Child (the "Petition") pursuant to Article 2 of the Hague Convention and the International Child Abduction Remedies Act, 42 U.S.C.

[3] Article 6 of the Convention specifies that each "Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities." These duties include "discover[ing] the whereabouts of a child who has been wrongfully removed or retained" and "initiat[ing] or facilitat[ing] the institution of judicial or administrative proceedings with a view to obtaining the return of the child." Convention, art. 7(a), (f).

§ 11603 (2005) ("ICARA"), in the United States District Court for the Southern District of New York, requesting an order requiring that the child be returned to London to have a British court make a custody determination. *Id.* at 202. Accompanying the Petition was an Emergency Petition for Warrant in Lieu of Writ of *Habeas Corpus* ("Emergency Petition").

Both parties subsequently retained experts to examine the child and determine whether returning the child to the United Kingdom would pose a risk of causing her psychological harm. Alvarez's expert, Dr. B.J. Cling, concluded that "the child was 'potentially at risk' " of " 'another psychological breakdown' " if she "were to be forcibly returned to the [United Kingdom] for custody evaluation." *Id.* at 214. Lozano's expert, Dr. Michael Fraser, concluded that the child was at an " 'increased risk for some degree of psychological maladjustment if she is required to move again; but the potential negative effects depend on many factors.' " *Id.* at 216.

The Court held an evidentiary hearing on February 2 and 3, 2011, at which it admitted both parties' proffered expert reports, received exhibits into evidence, and heard testimony from Lozano, Alvarez, the therapist, Dr. Cling, and Dr. Fraser. *Id.*

On February 18, 2011, the Parties submitted post-trial memoranda of law upon which oral argument was held on April 28, 2011. *Id.* At the end of oral argument, after reciting its findings of fact and conclusions of law, the court denied Lozano's Petition. *Id.* The next day, the court issued an order dismissing the Petition and enter-

ing judgment for Alvarez. *Id.* On August 22, 2011, the court filed a written opinion further setting forth its reasoning.

In a thorough opinion, the district court first held that Lozano had made out a *prima facie* case of wrongful retention under the Hague Convention because: (1) the child was a habitual resident of the United Kingdom; (2) Alvarez's unlawful removal of the child breached Lozano's custody rights under English law; and (3) Lozano exercised parental rights at the time the child was removed. Accordingly, the court noted that the child must be returned to the United Kingdom *unless* Alvarez established an affirmative defense. *Id.* at 219-20. Before the district court, Alvarez raised two of the affirmative defenses available under the Convention. On appeal, however, only the now settled defense is at issue.[4] With regard to Alvarez's raising of the now settled affirmative defense, Lozano noted that this defense is unavailable until "one year has elapsed from the date of the [child's] wrongful removal or retention," Convention, art. 12, and argued that the one-year period should be tolled until the time Lozano reasonably could have learned of his child's where-

[4] The district court rejected Alvarez's second defense —that "there is a grave risk" that the child's return to the United Kingdom "would expose [her] to physical or psychological harm or otherwise place the child in an intolerable situation." *Id.* at 220 (quoting Hague Convention art. 13(b)). Specifically, the court found that there was "simply insufficient evidence that merely returning to the United Kingdom—even if the country was the site of some of the child's trauma, whether caused by the child witnessing Petitioner's abuse of Respondent or by being in the shelter—in and of itself would present a grave risk" to the child. *Id.* at 225.

abouts. *Lozano*, 809 F. Supp. 2d at 226. The district court disagreed, concluding that the

> one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling. A petitioner is not barred from bringing a petition after the one-year period has lapsed; rather, after that point, a court must consider the countervailing consideration that the child may now be better served remaining where he or she is currently located.

Id. at 228. Citing the Convention's text, history and purpose, the district court found that the "settled defense is not [intended] to give petitioners a reasonable amount of time in which to bring their claims," but "to take into account that if the child has become settled, its interests have to be weighed." *Id.* As an alternative basis for its decision, the district court held that "even if equitable tolling could apply to Convention petitions," it was not "warranted in this case." *Id.* at 229.

Having rejected Lozano's tolling argument, the district court next held that the now settled defense applied and was a sufficient reason to have a United States court, as opposed to an English court, decide the child's custody. *Id.* at 234. The district court engaged in a detailed analysis of various factors that weighed both for and against the child remaining in the United States for further proceedings, including that: (1) the child has been in the same location for the duration of her time in the United States; (2) the child has shown social and academic progress; (3) Alvarez appropriately cares for the child; (4) Alvarez is unemployed; (5) the child is too young

to form certain types of connections; and (6) both Alvarez and the child have overstayed their visas and thus are not legally residing in the United States. *Id.* at 231-34. With respect to the final factor, Judge Karas rejected Lozano's argument that the child could not be settled (as a matter of law) so long as she lacked lawful immigration status. Instead, he stressed that "[t]here is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and Respondent is likely to upset the stability of the child's life here in New York." *Id.* at 233.

Finally, the district court considered whether to exercise its discretion to order repatriation despite its finding that the child is settled in New York. *Id.* at 234-35. Judge Karas declined to do so, focusing largely on the "specific impact of returning to the United Kingdom on this particular child" who "[b]y all accounts . . . is much improved since arriving in the United States, but . . . is clearly more vulnerable than an average five-year-old child who has never experienced trauma." *Id.* at 234.

On May 27, 2011, Lozano filed a timely notice of appeal from the district court's denial of his petition.

C. The Government's Brief as *Amicus Curiae*

By letter dated July 11, 2012, this Court notified the United States Department of State (the "Department") that oral argument in this case was scheduled to take place on August 22, 2012, and requested that the Secretary of State submit her views concerning: (1) whether the one-year period before a party can raise the "now settled" defense

in Article 12 of the Convention is susceptible to equitable tolling; and (2) what significance should be given to a child's lack of legal immigration status in the United States when determining whether a child is settled within the meaning of Article 12.

On August 20, 2012, the United States submitted a memorandum brief as *amicus curiae* recommending that this Court find, in pertinent part, that:

> (1) Equitable tolling does not apply to the one-year period under Article 12; instead, the court retains equitable discretion to order a child's return at any time. A court may do so even if the child is 'now settled.' . . . [And,] (2) [t]he child's immigration status should not be dispositive standing alone, but may be one factor in a court's determination of whether the child is now settled in her new environment.

Amicus Br. At 2.

DISCUSSION

On appeal, Lozano raises three principal objections to the district court's decision. First, he argues that, as a matter of law, the district court erred in permitting Alvarez to raise the now settled defense because the one-year period in Article 12 should have been equitably tolled until such time as he could have reasonably located his child. Second, Lozano contends that the district court erred in finding that the child is settled in New York despite the fact that neither the child nor

her mother have legal status in the United States. Finally, even if lack of legal immigration status "does not preclude a well-settled finding as a matter of law," Lozano avers that "the District Court erred in finding that Alvarez proved by a preponderance of the evidence that the parties' daughter is well-settled in the United States." Pet'r's Br. at 46. Specifically, Lozano takes issue with the district court's factual finding that there is "stability in [the child's] family, educational, social, and most importantly, home life." *Id.* at 51 (internal quotation marks omitted). After stating the applicable standards of review and the relevant law of treaty interpretation, we address each of Lozano's arguments in turn.

I. Standard of Review

"In cases arising under the Convention and ICARA, we review a district court's factual determinations for clear error." *Mota v. Castillo*,— F.3d—, 2012 WL 3330176, at *3 (2d Cir. Aug. 15, 2012). Interpretation of the Convention, however, is an issue of law, which we review *de novo*. *Blondin v. Dubois*, 238 F.3d 153, 158 (2d Cir. 2001) ("*Blondin IV*"). We also review *de novo* "the district court's *application* of the Convention to the facts it has found." *Gitter v. Gitter,* 396 F.3d 124, 129 (2d Cir. 2005) (internal quotation marks and brackets omitted)[5]

[5] In *Blondin IV*, this Court relied on precedent from the Third and Ninth Circuits to hold that the "*application* of the Convention to the facts . . . like the *interpretation* of the Convention, is subject to *de novo* review." 238 F.3d at 158 (citing *Feder v. Evans-Feder*, 63 F.3d 217, 222 n.9 (3d Cir. 1995) and *Cree v. Flores*, 157 F.3d 762, 768 (9th Cir. 1998)).

II. Law of Treaty Interpretation

"In interpreting a treaty, it is well established that we begin with the text of the treaty and the context in which the written words are used." *Swarna v. Al-Awadi,* 622 F.3d 123, 132 (2d Cir. 2010) (internal quotation marks omitted). "The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 180 (1982) (internal quotation marks omitted). "General rules of statutory construction may be brought to bear on difficult or ambiguous passages, but we also look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the signatory parties in determining the meaning of a

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In at least two additional opinions, we have confirmed that a *de novo* standard of review applies to an appeal from a district court's application of the Convention. *See, e.g., Mota,* 2012 WL 3330176, at *3; *Gitter*, 396 F.3d 124.

We think an abuse of discretion standard might be more apt where, as here, the treaty provision being applied requires the district court to engage in an equitable balancing of a multitude of factors. Cf. *Zerilli-Edelglass v. N.Y. City Transit Auth.,* 333 F.3d 74, 81 (2d Cir. 2003) (holding that this Court will review for abuse of discretion a district court's decision to deny a plaintiff's request for equitable tolling of a filing deadline). It is, however, unnecessary for us to decide this issue because, apart from Lozano's purely legal arguments that the one-year period in Article 12 is subject to equitable tolling and that lack of valid immigration status precludes a settled finding, Lozano challenges only the factual findings underpinning the district court's decision. These we review only for clear error.

treaty provision." *Swarna,* 622 F.3d at 132 (internal quotation marks and brackets omitted); *Medellín v. Texas,* 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the . . . postratification understanding of signatory nations." (internal quotation marks omitted)). Additionally, "while the interpretation of a treaty is a question of law for the courts, given the nature of the document and the unique relationships it implicates, the 'Executive Branch's interpretation of a treaty is entitled to great weight." *Swarna,* 622 F.3d at 133 (quoting *Abbott v. Abbott,* 130 S. Ct. 1983, 1992 (2010)).

III. Courts cannot equitably toll the one-year period before a parent can assert the now settled defense.

Lozano argues that the district court "should have applied equitable principles to toll the commencement of Article 12's one-year filing period until the date [Lozano] reasonably could determine that [Alvarez] had removed their daughter from the United Kingdom to the United States." Pet'r's Br. at 15.[6] Alvarez counters that the district court properly found that the one-year period in Article 12 is not subject to equitable tolling. Resp't's Br. at 23-33. We agree with the district court and hold that while an abducting parent's

[6] In particular, Lozano contends that the one-year period should not have commenced until February 22, 2010, the date when he received the final responses to the orders of disclosure regarding his daughter's whereabouts. Pet'r's Br. at 18.

conduct may be taken into account when deciding whether a child is settled in his or her new environment, the one-year period set out in Article 12 is not subject to equitable tolling.

A. *The Text of the Convention*

Neither Article 12 of the Hague Convention nor its implementing legislation, ICARA,[7] explicitly permit or prohibit tolling of the one-year period before a parent can raise the now settled defense.[8] Article 12 provides, in relevant part:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date

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[7] The ICARA specifies that "[i]n the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing— . . . (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies." 42 U.S.C. § 11603(e)(2)(B).

[8] While the text of the Convention does not explicitly address the issue, we note that the text does provide one clue that tolling was not anticipated. The language of Article 12 expressly starts the running of the one-year period "from the date of the wrongful removal or retention." It would have been a simple matter, if the state parties to the Convention wished to take account of the possibility that an abducting parent might make it difficult for the petitioning parent to discover the child's whereabouts, to run the period "from the date that the petitioning parent learned [or, could reasonably have learned] of the child's whereabouts." But the drafters did not adopt such language. As discussed below, the drafting history demonstrates that this was a conscious choice, and that the drafters specifically rejected a proposal to have a different date trigger the start of the one-year period when the child's whereabouts had been concealed. *See infra* at 17-18.

> of the commencement[9] of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the proceeding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Id. Accordingly, the default presumption under the Convention is that a child *shall* be returned to the state from which she originally was wrongfully removed unless both of two conditions are met: (1) one year has elapsed between the date of wrongful removal and the date proceedings commence; and (2) the child is found to be "now settled in its new environment." *Id.*

Even if these two conditions are met, Article 12 does not bar the Central Authority of a Contracting State from ordering the return of a settled child. As we explained in *Blondin IV,* Article 12 allows—"but does not . . . require—a judicial or administrative authority to refuse to order the repatriation of a child on the *sole* ground that the

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9 The ICARA provides that "the 'commencement of proceedings,' as used in Article 12 of the Convention," does not occur until a person files a petition in a civil action for the return of the child in a court that has jurisdiction in the place where the child is located at the time the petition is filed. 42 U.S.C. §§ 11603(b), (f)(3).

child is settled in its new environment, if more than one year has elapsed between the abduction and the petition for return." 238 F.3d at 164. Put differently, "if more than one year has passed, a 'demonstra[tion] that the child is now settled in its new environment' may be a sufficient ground for refusing to order repatriation." *Id.*[10] Thus, while the text of Article 12 does not prohibit equitable tolling, the way the provision functions renders this sort of equitable relief unnecessary. Unlike a statute of limitations prohibiting a parent from filing a return petition after a year has expired, the settled defense merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency. *See Lozano,* 809 F. Supp. 2d at 227-28 (reasoning that the one-year period in Article 12 is not analogous to a statute of limitations); *Matovski v. Matovski*, No. 06 Civ. 4259 (PKC), 2007 WL 2600862, at *12 (S.D.N.Y. Aug. 31, 2007) (same); *Anderson v. Acree,* 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002) (same); *Toren v. Toren,* 26 F. Supp. 2d 240, 244 (D. Mass. 1998) (same), vacated on other grounds, 191 F.3d 23 (1st Cir. 1999).

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[10] This interpretation of Article 12 is further bolstered by Article 18, which provides that none of the provisions in the Convention "limit the power of a judicial or administrative authority to order the return of the child at any time." Convention, art. 18.

B. *The History and Purpose of the Article 12 Now Settled Exception*

Tolling the time before a parent can raise the settled defense is also inconsistent with the treaty's purpose. A report prepared by the official Hague Conference reporter for the Convention, Elisa Pérez-Vera,[11] provides an overview of the Convention's goals and a detailed analysis of each of its provisions. Elisa Pérez-Vera, *Explanatory Report,* in 3 Conférence de la Haye de droit international privé, Actes et Documents de la Quatorzième session, Enlèvement d'enfants 426 (1982) ("Pérez-Vera Report"), available at www.hcch.net/upload/expl28.pdf. Both the Convention's text and the Pérez-Vera Report state that the treaty's primary aim is to deter family members from removing children to jurisdictions more favorable to their custody claims in order "to obtain a right of custody from the authorities of the country to which the child has been taken." Pérez-Vera Report at 429 ¶ 13; Convention, art. 1 ("The objects of the present Convention are—(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of

[11] Elisa Pérez-Vera was "the official Hague Conference reporter for the Convention." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,503. "Her explanatory report [was] recognized by the Conference as the official history and commentary on the Convention," *id.*, and we have previously held that "it is an authoritative source for interpreting the Convention's provisions," *Croll v. Croll,* 229 F.3d 133, 137 n.3 (2d Cir. 2000) (citation omitted), abrogated on other grounds by *Abbott*, 130 S. Ct. 1983; *see also Gitter,* 396 F.3d at 129 & n.4.

access under the law of one Contracting State are effectively respected in the other Contracting States."). To that end, the Convention "places at the head of its objectives the restoration of the status quo, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting state.' " *Id.* at ¶ 16.

It is true that nothing in the text of the "dispositive part of the Convention . . . reference[s] . . . the interests of the child to the extent of their qualifying the Convention's stated object." *Id.* at 431 ¶ 23. But the Pérez-Vera Report cautions against construing the Convention's "silence on this point" as "lead[ing] one to the conclusion that the Convention" suggests that children's interests should be "ignore[d]" when "regulating all the problems which concern them." *Id.* Instead, the Pérez-Vera Report states that a concern for children's "true interests" was the primary reason the signatory states "drew up the Convention." *Id.* ¶¶ 23-24; see also Blondin IV, 238 F.3d at 161 (noting that while the Hague Convention is not "designed to resolve underlying custody disputes," "[t]his fact . . . does not render irrelevant any countervailing interests the child might have."). Simply put, the Convention is not intended to promote the return of a child to his or her country of habitual residency irrespective of that child's best interests; rather, the Convention embodies the judgment that *in most instances*, a child's welfare is best served by a prompt return to that country. The signatory states, however, were aware that there are situations where "the removal of the child can . . . be justified by objective reasons which have to do either with [the child's] person,

or with the environment with which [the child] is most closely connected." Pérez-Vera Report at 432 ¶ 25. Accordingly, the Convention "recognizes the need for certain exceptions" to the signatory states' "general obligation[ ] . . . to secure the prompt return of children who have been unlawfully removed or retained." *Id.* Pérez-Vera describes these "exceptions" as "concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area." *Id.*; see also *Blondin IV,* 238 F.3d at 164 (noting that the Convention's drafters recognized that, despite the general aim of "ensur[ing] the return of abducted children," there "could come a point at which a child would become so settled in a new environment that repatriation might not be in its best interest." (internal quotation marks and citations omitted)).

The Convention constrains Central Authorities' discretion to decline to order a child's return to his or her country of habitual residency when return would not be in that child's best interests. Article 12 establishes that a Central Authority cannot even consider the child's interest in remaining in the country to which she has been abducted until after a year has elapsed. See Pérez-Vera Report at 458 ¶ 107 ("In the first paragraph [of Article 12], the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith."); *Amicus* Br. at 9 ("As described by the United States, the Convention thus provided for a one-year period in which 'no assimilation of the child was presumed to have occurred' and 'return could be refused only on the

grounds set forth' expressly, e.g. severe risk to the child. After this initial one-year period, 'assimilation became an open question.'" (internal citation omitted)).

The Pérez-Vera Report acknowledges that the one-year period set forth in Article 12 is somewhat "arbitrary." *Id.* ("[T]he difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard."). However, the drafters of the Convention saw value in agreeing to a "single time-limit of one year" and setting aside "the difficulties encountered in establishing the child's whereabouts." *Id.* at ¶ 108. Indeed, the drafters considered and rejected an alternative proposal: A preliminary draft of the Convention included two time-periods in Article 12, depending on whether the child had been hidden. Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 Fordham Int'l L.J. 409, 434 (2010). The Pérez-Vera Report explains that the framers jettisoned this approach to eliminate "the inherent difficulty in having to prove the existence of those problems which can surround the locating of [a] child." Pérez-Vera Report at 459 ¶ 108.[12]

In sum, the Convention's drafting history strongly supports Alvarez's position that the one-

[12] The Government's brief notes that after the drafters had settled on a single time-limit, the United States "urged a longer period in light of the difficulty of locating the child . . . a suggestion that presupposes that the single period would not toll at least for that reason." *Amicus* Br. at 9 (internal citation omitted).

year period in Article 12 was designed to allow courts to take into account a child's interest in remaining in the country to which she has been abducted after a certain amount of time has passed. If this understanding of the second paragraph of Article 12 is correct, allowing equitable tolling of the one-year period would undermine its purpose. A child may develop an interest in remaining in a country in which she has lived for a substantial amount of time regardless of her parents' efforts to conceal or locate her.

C. *The Executive Branch's Interpretation of Article 12*

As noted, courts give "great weight" to the "Executive Branch's interpretation of a treaty" given "the nature of the document and the unique relationships it implicates." *See Swarna*, 622 F.3d at 133. Moreover, while the Convention is not a statute that the Department is charged with implementing, it has played a critical role in its adoption and day-to-day operation.[13] Accordingly,

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[13] In its *amicus* brief, the Government states that

> The Department of State represented the United States at the negotiation of the Convention, recommended that the President transmit it to the Senate for approval, was instrumental in proposing its implementing legislation to Congress, has attended periodic international meetings to review the operation of the Convention, and is designated pursuant to the Convention as the United States' "Central Authority," with responsibility for cooperating with its counterparts in other states parties to "secure the prompt return of children and to achieve the other objects of the Convention."

deference to the Department's interpretation of the treaty is warranted to the extent it is persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Here, we derive further support for our interpretation of the Convention from the Department's well-reasoned and thorough interpretation of Article 12, as presented in the Government's amicus brief. Employing an interpretive process entirely in line with our own, the Government reached the same conclusion, that is, that "tolling does not apply to the one-year period under Article 12." *Amicus* Br. at 2, 6-11.[14]

Amicus Br. at 2 n.1 (quoting Convention, arts. 6,7); *see also* 22 C.F.R. § 94.2 (designating the "Office of Children's Issues in the Bureau of Consular Affairs . . . as the U.S. Central Authority to discharge the duties which are imposed by the Convention and the International Child Abduction Remedies Act upon such authorities.").

[14] The Government's amicus brief in this case is not the first occasion on which the Department has considered whether the Convention permits equitable tolling of the one-year period in Article 12. See *Skidmore*, 323 U.S. at 140 (the weight to be accorded an agency's judgment "in a particular case will depend upon," *inter alia*, "its consistency with earlier and later pronouncement"). In its "Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction," 51 Fed. Reg. 10,503 (1986) ("*Legal Analysis*"), the Department opined that "[t]he reason for the passage of time, which may have made it possible for the child to form ties to the new country, is . . . relevant to the ultimate disposition of the return petition." More recently, in response to a 2006 questionnaire on the practical operation of the Convention, the Department noted that certain United States courts have equitably tolled the one-year period in Article 12 and, expressed its support for "the concept of equitable tolling of the one year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in

D. *Decisions of Our Sister Circuits*

At least three of our sister Circuits have permitted the one-year period in Article 12 to be equitably tolled. *See Dietz v. Dietz,* 349 F. App'x 930, 932-33 (5th Cir. 2009) (summary order); *Duarte v. Bardales,* 526 F.3d 563, 569-70 (9th Cir. 2009);

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order to prevent the timely filing of a Hague petition." Hague Convention on Private International Law, "Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction," Prel. Doc. No. 2 of October 2006, at 217, 577, available at http://www.hcch.net/upload/wop/abd_pd02efs2006.pdf ("*Questionnaire Responses*").

The Department's position as articulated in the Government's *amicus* brief is not inconsistent with these prior statements. As early as 1986, the Department maintained that courts may consider whether an abducting parent has concealed the child's whereabouts when deciding whether to grant a return petition. *Legal Analysis*, 51 Fed. Reg. 10,503. It has never, however, taken the position that courts should be precluded from considering whether a child is settled exclusively because of a parent's wrongful conduct. Indeed, in response to the 2006 questionnaire on the Convention's practical operation, the Department noted that some United States courts had equitably tolled the one-year period in Article 12, but only endorsed the concept that courts should consider whether denying a return petition will create an incentive for a parent to conceal his child's location. *Questionnaire Responses*, 577. This statement fully aligns with the Department's position in this case, that

> equitable tolling, in the traditional sense, of Article 12's one-year period to preclude consideration of the child's settlement is not warranted. But the court considering a petition filed more than a year after the child's wrongful removal may still exercise equitable discretion to require the child's return.

Amicus Br. at 13.

Furnes v. Reeves, 362 F.3d 702, 723-24 (11th Cir. 2004). In particular, the Eleventh Circuit held in Furnes that equitable tolling is justified where a parent secrets the child from the parent seeking return because: (1) otherwise, a "parent who abducts and conceals [a child] for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available"; and (2) "[u]nless Congress states otherwise, equitable tolling should be read into every statute of limitations." 362 F.3d at 723-24 (internal quotation marks omitted). As for the first argument, the Convention expressly provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct—a Central Authority's discretion to order the return of a child, even when a defense is satisfied. See *Blondin v. Dubois*, 189 F.3d 240, 246 n.4 (2d Cir. 1999) ("[E]ven where the grounds for one of these 'narrow' exceptions have been established, the district court is not necessarily bound to allow the child to remain with the abducting parent."). The second argument is also unpersuasive as it wrongly treats the one-year period in Article 12 as a statute of limitations.[13]

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[13] The Ninth Circuit's decision in *Duarte* relies mainly on the Eleventh Circuit's faulty reasoning in *Furnes*. See 526 F.3d at 569-70. Moreover, a subsequent Ninth Circuit decision—*In re B. DEL C.S.B.*, 559 F.3d 999 (9thCir. 2009) —suggests that there may be limits to the *Duarte* holding. Id. at 1014 ("Given that equitable tolling may permit the return of children otherwise settled in their new environment, we adhere closely to the parameters set by *Duarte* so as to ensure that the Convention's concern over uprooting children is not sacrificed to its aim of deterring child abductions."). Further, in *Dietz*, the Fifth Circuit assumed that it

IV. Lack of legal immigration status does not preclude a court from finding a child to be settled.

Having determined that the district court properly permitted Alvarez to raise the Article 12 now settled defense, we must consider whether the district court erred in finding the child to be settled in New York. On appeal, Lozano primarily asserts that "[w]here an abducted child resides in the abducted-to country illegally, a well-settled finding should be barred as a matter of law." Pet'r's Br. at 36. We disagree. Given the Convention's text and purpose, immigration status should only be one of many factors courts take into account when deciding if a child is settled within the meaning of Article 12. Additionally, we hold that, in any given case, the weight to be ascribed to a child's immigration status will necessarily vary.

Neither the Convention nor ICARA defines "settled" or states how a child's settlement is to be proved. See Pérez-Vera Report at 459 ¶ 109. Where a term is undefined in a statute, "we normally construe it accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). In this regard, the use of the term settled suggests a stable and permanent relocation of the child. See Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/settled (last

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could equitably toll the one-year period without offering any legal basis for its view, likely because the respondent did not challenge it. 349 F. App'x at 933 ("[Respondent] does not attack the use of equitable tolling as such. Indeed, he does not appear to question the court's application of tolling to the summer of 2006."). Accordingly, the Fifth Circuit's decision holds limited persuasive power.

visited September 26, 2012) (defining "settled" as "to establish or secure permanently"); Dictionary.com, www.dictionary.reference.com/browse/settled?s=t (last visited September 26, 2012) (defining "settled" as "to make stable; place in a permanent position or on a permanent basis").

Statutory terms are also to be interpreted in light of their "placement and purpose in the statutory scheme." *Holloway v. United States,* 526 U.S. 1,6 (1999). Although one of the primary objectives of the Convention is to ensure the "prompt return" of abducted children without reaching the merits of underlying custody disputes, *see* Hague Convention, art. 1, the settled exception recognizes that there may come a point at which "repatriation might not be in [the child's] best interest." *Blondin IV*, 238 F.3d at 164. The Explanatory Report provides that exceptions to the return of the child, such as Article 12, "are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter" and that "a systematic invocation of [the] exceptions . . . would lead to the collapse of the whole structure of the Convention." Pérez- Vera Report at 434-35 ¶ 34. To this end, the State Department concluded that to be "settled" requires "nothing less than substantial evidence of the child's significant connections to the new country." *Legal Analysis*, 51 Fed. Reg, at 10,509 (1986).

In light of these considerations, "settled" should be viewed to mean that the child has significant emotional and physical connections demonstrating security, stability, and permanence in its new environment. *See, e.g., In re N.,* [1990] 1 FLR 413 (Eng. High Court of Justice, Fam. Div.), *available*

at www.hcch.net/incadat/fullcase/0106.htm. In making this determination, "a court may consider any factor relevant to a child's connection to his living arrangement." *Duarte,* 526 F.3d at 576. Such an approach is in line with the Convention's overarching focus on a child's practical well-being. Factors that courts consider should generally include:

> (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.

Duarte, 526 F.3d at 576; *see also Matovski,* 2007 WL 2600862, at *13 (same); *Reyes Olguin v. Cruz Santana,* No. 03 CV 6299 (JG), 2005 WL 67094, at *8 (E.D.N.Y. Jan. 13, 2005) (same); *Koc v. Koc,* 181 F. Supp. 2d 136, 152-54 (E.D.N.Y. 2001) (same). Even as Lozano advocates a categorical rule or strong presumption that lack of lawful immigration status bars a settled finding as a matter of law, he acknowledges that to determine whether a child is settled in his new environment, courts are "permitted to consider any relevant factor surrounding the child's living arrangement—without limitation." Pet'r's Br. at 42 (internal quotation marks omitted). While courts have consistently found immigration status to be a factor when deciding whether a child is settled, no court has

held it to be singularly dispositive.[14] Indeed, the fact-specific multi-factor test that we formally adopt is consistent with the Government's understanding of Article 12 as expressed in its amicus brief. *See Amicus* Br. at 13-15.[15]

Retreating from his initial position that lack of legal immigration status altogether bars a settled finding under Article 12, Lozano next argues that the district court failed to give the child's undocumented status adequate weight. Pet'r's Br. at 46. In particular, Lozano contends that the district court erred because it discounted the significance of the child's lack of immigration status once it found that the child did not face an immediate threat of deportation. *Id.* For example, a child might be ineligible for certain government-conferred benefits. We are not persuaded. The importance of a child's immigration status will

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[14] Lozano claims that his position has been adopted by the "majority" of those courts that have considered it. Pet'r's Br. at 37. This assertion is incorrect. District courts across the country have taken into account a child's immigration status when deciding if she is well-settled. *See, e.g., In re Hague Convention*, No. 08-2030-CM, 2008 WL 913325, at *11 (D. Kan. Mar. 17, 2008); *In re Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004). However, only one court of appeals—the Ninth Circuit—has directly addressed "whether a court may find that a child is not 'settled' for the purposes of Article 12 of the Hague Convention for the reason that she does not have lawful immigration status." *In re B. Del C.S.B.,* 559 F.3d at 1001-02. And, in that case, the Ninth Circuit concluded that "the answer is no." *Id.* at 1002.

[15] Citing cases from Canada and the United Kingdom, the Government's brief also notes that "[f]oreign courts have given varying weight to immigration status, depending on the circumstances of the case." *Amicus* Br. at 14.

inevitably vary for innumerable reasons, including: the likelihood that the child will be able to acquire legal status or otherwise remain in the United States, the child's age, and the extent to which the child will be harmed by her inability to receive certain government benefits. Moreover, rather than considering the weight to be given to a child's immigration status in the abstract, courts deciding whether a child is settled must simultaneously balance many factors which, as in this case, may not support the same determination.[16]

Here, the district court's analysis was largely compatible with the approach we prescribe. After noting the array of factors that are relevant to a settled determination, the district court observed that "a number of these factors support a finding that the child is now settled, and there are some that do not." 809 F. Supp. 2d at 231. The court then examined these factors—including the child's immigration status—both independently and in relation to each other. *Id.* at 231-34. The district

[16] The Ninth Circuit has held that because the settled inquiry is "concerned with the present, and not with determining the best interest of the child in the long term," a child's immigration status should only be relevant to the settled analysis to the extent that there is an "imminent threat of removal." 559 F.3d 1013-14. We agree with the Ninth Circuit's observation that the now settled analysis should not be conflated with the custody determination which will follow. *See* Pérez-Vera Report 429 ¶ 13 (noting that Convention's purpose is not to decide custody but to "deprive" an abductor's actions of "practical or juridical consequences"). However, because we can imagine instances where immigration status may be important even if the threat of removal is negligible, we decline to impose a categorical rule that the weight to be given a child's immigration status varies only in accordance with the threat of deportation.

court expressly referenced that the child and Alvarez had overstayed their visas, but observed that there is "nothing to suggest that, at this moment, or in the near future, the immigration status of the child and [Alvarez] is likely to upset the *stability* of the child's life here in New York." *Id.* at 233 (emphasis added). Given the child's psychiatric history and documented "fragility," the district court's focus on "stability" in the near future seems particularly appropriate.[17] Even on *de novo* review, we are not inclined to upset the district court's careful balancing of these many fact-based considerations.

V. The district court's factual findings were not clearly erroneous.

Finally, Lozano contends that the district court's finding are not backed by a preponderance of the evidence because "most of the evidence on the well-settled issue should not be given much weight because it came from [Alvarez's] own self-interested hearsay testimony, and to a lesser extent, from the therapist and child's school records." Pet'r's Br. at 49-50. Relatedly, Lozano claims that Alvarez should have provided "corroborating testimony . . . and other evidence of the child's connections to her new environment." *Id.* at 51. These arguments can be swiftly rejected.

The district court conducted a two-day hearing, after which it made factual findings with respect

[17] At oral argument, Lozano's attorney acknowledged that he had not brought to the district court's attention the ways in which the child's lack of legal immigration status could affect her life in the long-term. Accordingly, we see no error in the district court's failure to consider them.

to each of the now settled factors. At the hearing, Judge Karas not only reviewed a significant amount of evidence but also had the opportunity to observe the Parties' demeanor and assess their credibility. Far from glossing over inconsistencies in the evidence, the district court fully engaged with all of the information that had been presented to it before announcing its determinations. None of Lozano's challenges to these findings leave us with a "definite and firm conviction that a mistake has been committed." *United States v. Kilkenny,* 493 F.3d 122, 125 (2d Cir. 2007) (internal quotation marks omitted)

CONCLUSION

We have considered Lozano's remaining arguments and conclude that they are without merit. For the foregoing reasons we AFFIRM the district court's May 2, 2011 judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 10-CV-8485 (KMK)

In re the Application of Manuel Jose Lozano

MANUEL JOSE LOZANO,
Petitioner,

—v—

DIANA LUCIA MONTOYA ALVAREZ,
Respondent.

ORDER

KENNETH M. KARAS, District Judge:

The Court held oral argument in the above-captioned matter on April 28, 2011. For the reasons stated on the Record, the Petition is denied. The Clerk of Court is respectfully directed to enter judgment for Respondent and close this case. The Parties shall inform the Court within two weeks of the date of this Order what they would like the

Court to do with the travel documents of Respondent and the child.

SO ORDERED.

Dated: April 29, 2011
White Plains, New York

/s/ KENNETH M. KARAS
KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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10 CV 08485 (KMK)

In Re: The Application of Manuel Jose Lozano

MANUEL JOSE LOZANO,
Petitioner,

—against—

DIANA LUCIA MONTOYA ALVAREZ,
Respondent.

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Kenneth M. Karas, U.S.D.J., and the Court thereafter on April 29, 2011, having handed down an Order (Docket #39), denying plaintiffs petition, it is,

ORDERED, ADJUDGED AND DECREED: that for the reasons stated on the record on April 28, 2011,

the Petition is denied, Judgment is entered in favor of respondent, and the case is hereby closed.

Dated: White Plains, N.Y.
May 2, 2011

/s/ RUBY [ILLEGIBLE]
RUBY [ILLEGIBLE] Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 10-CV-8485 (KMK)

In re the Application of: Manuel Jose Lozano

MANUEL JOSE LOZANO,
Petitioner,

—v—

DIANA LUCIA MONTOYA ALVAREZ,
Respondent.

OPINION AND ORDER

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KENNETH M. KARAS, District Judge:

I. Background

This case involves a dispute between two parents, Manuel Jose Lozano ("Petitioner") and Diana Lucia Montoya Alvarez ("Respondent"), regarding their five-year-old child.[1] On November 10, 2010, Petitioner filed in this Court a Petition for Return of Child to Petitioner (the "Petition") pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, art. 2, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986) ("Hague Convention" or "Convention") and the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11611 (2005) ("ICARA"), requesting that the Court issue an order requiring that his child be returned to London, United Kingdom, to have a British court make a custody determination. Accompanying the Petition was an Emergency Petition for Warrant in Lieu of Writ of

[1] The subject child is referred to as "the child" to protect her identity. In addition, pursuant to a confidentiality order entered into by the Parties with the consent of the Court, information that could be used to identify the identity or location of the child, as well as privileged medical or mental health information, has been withheld.

Habeas Corpus ("Emergency Petition"). The Emergency Petition sought an order from the Court directing that the child be removed from Respondent and delivered into the temporary protective custody of Social Services while the matter was pending. In the alternative, Petitioner requested that the Court issue an order to show cause: (1) prohibiting the removal of the child from the Court's jurisdiction; (2) requiring Respondent to post a bond; and (3) ordering Respondent to appear before the Court with all passports and travel documents for Respondent and the child. In support of the Petition, Petitioner submitted several exhibits.

On November 12, 2010, the Court held an ex parte telephonic hearing with counsel for Petitioner. Following this hearing, the Court issued an order: (1) ordering Respondent to appear before the Court for a hearing on November 16, 2010; and (2) directing the United States Marshal for the Southern District of New York ("Marshal") to (i) serve Respondent with a copy of the Court's Order, the Petition, the Emergency Petition, and all attachments, and (ii) seize all passports and travel documents for Respondent and the child. (Dkt. No. 11.) On November 15, 2010, the Marshal served Respondent and retrieved the requested passports. On November 16, 2010, Respondent and counsel for Petitioner appeared before the Court. After the hearing, the Court issued an order stating that Respondent would not be required to post a bond and prohibiting Petitioner, or anyone acting on behalf of Petitioner except for his counsel, from contacting Respondent or the child. (Dkt. No. 5.)

On November 23, 2010, counsel for Petitioner and newly obtained counsel for Respondent appeared before the Court at a telephonic conference.[2] Although the Parties and the Court were cognizant of the need to adjudicate Hague Convention matters expeditiously, the Parties agreed to discuss a proposed schedule that would allow both sides an adequate opportunity to conduct discovery, obtain experts, and prepare for a hearing on the merits (the "Evidentiary Hearing"). On December 6, 2010, the Court agreed to the proposed schedule submitted by the Parties. (Dkt. No. 16.) The Parties submitted in limine motions and responses on January 28 and 31, and February 1 and 2, 2011, regarding certain testimony and evidentiary issues. Specifically, each Party sought to exclude the other Party's expert report. In addition, counsel for Respondent expressed concern over revealing the identity of one proposed witness, a therapist who has treated Respondent and the child in New York. The Court held a telephonic conference on January 31, 2011, to discuss these issues. At the conference, the Parties agreed that the therapist's name would not be disclosed and that she would be referred to throughout the proceedings as "the therapist." The Court informed the Parties that it would rule on the motions in limine at the Evidentiary Hearing.[3]

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[2] Counsel for both Petitioner and Respondent have represented their clients on a pro bono basis. The Court noted on the record and repeats here the excellence of their work in this case, and expresses its gratitude for their exemplary efforts.

[3] At the hearing, the Court concluded that both experts were qualified and that the proffered expert testi-

The Court held the Evidentiary Hearing on February 2 and 3, 2011. At the hearing, the Court heard testimony from: (1) Petitioner; (2) Respondent; (3) Dr. B.J. Cling, an expert retained by Respondent for purposes of this proceeding ("Dr. Cling"); (4) a therapist who has treated Respondent and the child in New York (the "therapist"); and (5) Dr. Michael Fraser, an expert retained by Petitioner for purposes of this proceeding ("Dr. Fraser"). Petitioner testified and observed the hearing via videoconference in the London office of his counsel. At the hearing, both Parties also submitted exhibits. On February 18, 2011, both Parties submitted Post-Trial Memorandum of Law. (Dkt. Nos. 32-33.) The Court held oral argument on April 28, 2011 (the "Oral Argument") and, at its conclusion, the Court informed the Parties that it would be denying the Petition. On April 29, 2011, the Court issued an Order dismissing the Petition and entering judgement for Respondent. (Dkt. No. 39.) At the Oral Argument, the Court recited the full procedural history of this case and issued its Findings of Fact and Conclusions of Law on the record. This written opinion further sets forth the Court's Findings of Fact and Conclusions of Law.

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mony and reports were admissible and did not run afoul of either the requirements of the Federal Rules of Evidence or *Daubert*. The Court informed the Parties that it believed the objections went to the weight of the evidence, not its admissibility and, accordingly, the Court would keep the objections in mind when evaluating the evidence. (Tr. 157-58.)

"Tr." cites refer to the transcript of the February 2-3, 2011 Evidentiary Hearing.

II. Findings of Fact

The Parties present vastly different accounts of their relationship and many of the events that transpired between them. As described below, the Court is unable to conclude that one party is entirely credible and truthful and the other completely incredible and untruthful. Instead, in many instances, the actual picture is somewhat murky.

A. The Parties' Relationship

Petitioner and Respondent, who are both originally from Colombia, met and began dating in early 2004 in London. (Ct. Ex. 1 ¶ A1.)[4] Petitioner moved into Respondent's flat about two or three months after they began dating. (Tr. 10.) At the time they met, Respondent was not working and received government benefits; Petitioner worked in maintenance for a tax office and also had a nighttime cleaning job. (*Id.* at 11-12.) The Parties never married. After the Parties moved in together, Petitioner mainly financially supported the household, while Respondent was responsible for cooking, cleaning, and taking care of their child after her birth. (*Id.* at 55-56, 121.) Respondent received incapacity benefits because she suffered from depression. Respondent testified that when she arrived in London, she became very depressed because she missed her family and was unable to obtain a professional job like she had in Colombia; after she resigned from the job that she

[4] Court Exhibit 1 is a document labeled "Stipulations or Agreed Statements of Fact and Law," which the Parties jointly submitted to the Court at the Evidentiary Hearing.

did have, she was very frustrated and became more depressed, and her doctor prescribed her Prozac. (*Id.* at 99, 172.) Respondent took Prozac for several years, but stopped when she first became pregnant with Petitioner's child; however, she started taking it again in 2008 before she left Petitioner. (*Id.* at 171-72.) Respondent received incapacity benefits from approximately 2003 until early 2006, when she did not renew the application because she "was fine" and felt she did not need to renew. (*Id.* at 173-74.)

The Parties' description of their relationship is dissimilar. Petitioner claims that although they had normal couple problems, generally they were "very happy together" and had a good relationship. (*Id.* at 13-14, 52, 58.) Although Respondent agrees that they were very happy at the beginning and describes Petitioner as charming, kind, fun, and spontaneous when she initially met him, she testified that after a month of living together, he began to treat her badly, insult her on a regular basis, and be generally very controlling. (*Id.* at 101-04.) Respondent describes a pattern of physical and emotional abuse. She testified that Petitioner tried to kick her in the stomach when she was pregnant, pulled her out of bed one night when she received a wrong number phone call and called her a prostitute, and raped her four times. (*Id.* at 109, 114-17.)[5] In addition, Respondent

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[5] Respondent described one of the rapes at the hearing. According to Respondent, on a night when she had told Petitioner that she did not want to have sexual relations, she awoke to find that her clothes had been removed and Petitioner penetrating her; afterwards, she told Petitioner that he had raped her, and he apologized. (Tr. 114-15.) Peti-

maintains that Petitioner repeatedly told her that she was stupid and useless and that her friends and family hated her, often told her to kill herself, and threatened to take the child away from her. (*Id.* at 110-11, 174.) Petitioner denies ever hitting or raping Respondent, forbidding her from speaking to her family or friends, or pushing her while she was pregnant, and testified that he never insulted, threatened, or raised his voice to Respondent. (*Id.* at 16-17, 59, 62-63, 72). Respondent also testified that Petitioner drank heavily and watched pornography. (*Id.* at 104-05.) In contrast, Petitioner testified that he did not watch pornography (*id.* at 62), and denied that he drank a lot or had ever been so drunk that he did not know what he was doing, although he admitted that he sometimes has drunk about three beers in an evening, (*id.* at 51, 75-76).

In 2006, the Parties obtained a loan, in Respondent's name, to buy a flat in Colombia, but the money was lost when it was transferred to Colombia. (*Id.* at 14-15.) This led to a court case which was not resolved until November 2008. (*Id.* at 15-16.) According to Petitioner, the Parties' relationship started to have problems during this time. (*Id.* at 14-16.) Petitioner also testified that during this time he asked Respondent to find a job to help address their financial problems, but Respondent did not obtain employment. (*Id.* at 16,

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tioner denies that any such conversation took place, and maintains that he never raped Respondent nor attempted to have sex with her while she was asleep. (*Id.* at 64-65.) According to Respondent, the child was also in the room two of the times that Petitioner raped her (*id.* at 116-17), although Petitioner testified that they never had intercourse with the child in the room, (*id.* at 66).

60-61.) Respondent, however, says that she did try to find a job but Petitioner did not want her to work and that she did get a nighttime job as a cleaner between 2006 and 2008 to help pay their debts. (*Id.* at 105-06, 168.)

There is insufficient independent evidence to fully corroborate either Party's version of events. Respondent explains that she did not tell her family or friends about the abuse because she was a very private person and she wanted her family to believe that she was still a successful person. (*Id.* at 103.) Respondent did testify that she told the manager of the child's nursery about Respondent's problems with the Petitioner—and the negative effect Respondent believed this was having on the child—and that the manager referred her to solicitors. (*Id.* at 122.) Respondent also testified that she reported the problems to the police but they declined to become involved in what they termed a custody issue; she also sought help from the Latino American Women's Rights Service ("LAWRS"). (*Id.*)

In May 2009 (when Respondent and the child were living in a shelter, which is explained *infra*), Respondent applied for permanent housing. In connection with this application, the manager of the child's nursery sent an email to the shelter stating that the child had attended the nursery from July to December 2008 and that, during that period, Respondent told the manager that Petitioner "was very controlling and was emotionally abusive towards [Respondent]," including making "derogatory comments" about Respondent in front of the child and other family members and threatening to take the child away from Respondent.

(RX6 at R0036.)[6] The manager also indicated that she "often saw Respondent very upset because of the way [Petitioner] treated her." (*Id.*) Respondent also requested a letter from LAWRS to support her application for permanent accommodation. (RX5 at R0034.) LAWRS submitted a letter, dated May 15, 2009, explaining that in August 2008, Respondent had contacted the organization "to report the domestic violence she was been [sic] subjected to by her then husband" and that she feared for her and her child's safety. (*Id.* at R0035.)[7] The letter states that Respondent was offered an appointment to come and see the domestic violence support and prevention worker at LAWRS, but that Respondent was unable to attend. (*Id.*) Respondent called LAWRS again a few weeks later to report that the situation had worsened and that she needed to move out; after the organization to which she was referred, the Latin Women's Refuge, was unable to assist her, Respondent contacted the police who helped her find first a hotel and eventually a shelter. (*Id.*)

After Respondent left Petitioner and took the child with her, Petitioner attempted to locate Respondent and the child through the United Kingdom court system, as explained in more detail *infra*. As part of these attempts, he submitted disclosure orders to, inter alia, the police station Respondent had contacted when she left. (PX1 at

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[6] "RX" cites refer to the exhibits submitted by Respondent at the Evidentiary Hearing.

[7] Although the letter from LAWRS refers to Respondent's "husband," the Court assumes that Respondent was reporting claims of abuse by Petitioner, her partner at the time.

Petitioner000069.)[8] The response letter submitted by the police indicates that when they interviewed Respondent in 2008, she alleged that Petitioner "had mentally abused her and may have subjected her to sexual assaults during the relationship[;] [s]he had therefore fled their home address and sought accommodation in a refuge." (*Id.* at Petitioner000072.) However, the "[p]olice could not make out any offences from the evidence that [Respondent] gave and were therefore unable to pursue a criminal investigation against [Petitioner]." (*Id.*)

When Respondent moved to New York, she was treated by the therapist who diagnosed her with post-traumatic stress disorder ("PTSD") based on her symptoms, which included heightened startle response, hypervigilance, nightmares, tearfulness, and flashbacks. (Tr. 230-32.) The therapist testified that when she first met Respondent, Respondent was panic-stricken and worried that Petitioner was going to find and harm her and potentially the child, and she seemed in fear for her life. (*Id.* at 231.) PTSD is exhibited by people who experience a traumatic event; in Respondent's case, the therapist based her diagnosis on Respondent's statements that she: "fled her home because she had been sexually assaulted and physically and emotionally abused by her ex-partner;" had been in a shelter for domestic violence in the United Kingdom; and feared that Petitioner would find and harm her. (*Id.* at 232.) According to the therapist, Respondent told the therapist in their

[8] "PX" cites refer to the exhibits submitted by Petitioner at the Evidentiary Hearing.

early treatment sessions that Petitioner had hit and raped her, although that information did not appear in the therapist's formal notes until December 2010; however, the therapist explains that she often included only symptoms, and not the details of a person's situation, in her notes for confidentiality reasons. (*Id.* at 240-42, 248.) The therapist denies that she did not mention the physical and sexual abuse in her notes because she felt it was unimportant; instead, she maintains that the failure to include it may have been an oversight. (*Id.* at 249.)

The Court finds that Petitioner's claims that he never insulted or mistreated Respondent in any manner are not credible. Although presented in a hearsay format, there is evidence from third parties that Respondent contemporaneously reported that Petitioner was emotionally abusive towards her. Additionally, it is extremely unlikely that Respondent would choose to flee her home with her child, and live in a shelter environment that she described as very unpleasant and stressful, for absolutely no reason. Moreover, the therapist's diagnosis of Respondent with PTSD, and the therapist's description of Respondent's symptoms, also indicate that Respondent suffered trauma. However, there is no evidence, other than Respondent's testimony and the testimony of the therapist and Dr. Cling based on Respondent's self-reporting, that Petitioner physically abused or raped Respondent. Therefore, the Court cannot—and, in light of the Court's conclusion, explained infra, that Respondent has not established that returning the child to London for a custody determination would pose a grave risk to the child,

need not—make more precise findings regarding the abuse that may have occurred.

B. Petitioner's Relationship with the Child

The Parties' first pregnancy resulted in a miscarriage in October 2004, but Respondent became pregnant again in January 2005. (Tr. 107-08.) On October 21, 2005, the subject child was born in London. (Ct. Ex. 1 ¶ A3.) Petitioner and Respondent are listed as parents on the child's birth certificate. (*Id.* ¶¶ A4-5; Pet. Ex. E.) Petitioner, Respondent, and the child all lived together in London from the child's birth until November 19, 2008. (Ct. Ex. 1 ¶ A6.) According to Petitioner, after the child was born, "everything was happiness for everyone." (Tr. 14.) Although he was unable to spend much time with the child on weekdays because of his work schedule, Petitioner believes that he had a very good relationship with the child, and tried to spend whatever free time he had with her. (*Id.* at 17, 74-75.) Petitioner testified that the child laughed and was happy, but acknowledged that the child was not speaking when at the nursery. (*Id.* at 77-79.) In contrast, Respondent testified that while living with Petitioner, the child was very quiet and depressed, did not smile, and would have tantrums. (*Id.* at 120.)

The child began to have a series of problems, including refusing to speak at the nursery, crying a lot, not smiling, having nightmares from which she woke up screaming, bed-wetting, and clinging to Respondent; Respondent testified that in October 2008, she spoke to the child's doctor about these issues because she was very worried. (*Id.* at 127, 176.) The doctor's records state that the child

"talks, laughs and dances in front of parents[ ] but is withdrawn in the nurse[r]y"; the cause was unknown and the nursery wanted Respondent to consult a specialist. (RX1 at R0003.) However, Respondent testified that when Petitioner was not around, the child was talkative and had fun with Respondent but denied that the child laughed and talked in front of Petitioner. When showed the doctor's notes, Respondent stated that she told the doctor the child behaved normally at home but did not specify in front of both parents. (Tr. 176-77.) In the email sent by the nursery manager in connection with Respondent's application for permanent housing, the manager wrote that the home "environment obviously had a negative effect upon [the child] and [she] became an elective mute at the nursery ([she] chose not to speak, although [she] had the language) and became very withdrawn." (RX6 at R0036.) The therapist testified that being withdrawn can be a symptom of trauma. (Tr. 251.)

At the Evidentiary Hearing, Petitioner denied that he and Respondent often argued in front of the child, although he acknowledged that the child was sometimes present in the home during, and thus aware of, these arguments. (*Id.* at 71-72.) Yet, in papers Petitioner submitted in July 2009 in London in connection with his attempts to locate the child, he stated that he and Respondent "would often argue in front of the child[ ]"; however, he "always tried to avoid this so that his [child] would not be distressed." (PX1 at Petitioner000047.) He also indicated that Respondent had mental health issues and that she would "verbally abuse [Petitioner] in front of the child and

call [Petitioner] abusive names" to try and "turn the child against" Petitioner, including telling the child that Petitioner "was evil like the devil," which "resulted in the child pointing to bad objects and calling them Daddy." (*Id.*)

In light of his earlier statements, Petitioner's testimony that he and Respondent never argued in front of the child, and that he "never raise[d] [his] voice to [Respondent] in any argument that [they] had" (Tr. 72), is not credible. Yet, the Court is cognizant of the desire of the Parties to portray themselves in the best light possible and, therefore, does not infer from these statements that Petitioner is incredible with respect to all of his testimony, as Respondent has asserted.

Respondent also claims that Petitioner may have inappropriately touched the child. According to Respondent, when she and the child were living in a domestic violence shelter in London after leaving the Petitioner, the child pointed to her genital area and said that Petitioner had touched her there. (*Id.* at 129-30.) Respondent claims that she reported this to the shelter, but was told that there was nothing she could do because she had no evidence; she did not report it to the police. (*Id.* at 130, 178.) Respondent also describes an incident where Petitioner's mother told Respondent not to let Petitioner bathe the child. (*Id.* at 128-29.)

Respondent also testified that she told the therapist about the child saying that Petitioner had touched her genitals. (*Id.* at 181-82.) Yet, according to the therapist, Respondent said that she did not think that Petitioner would have inappropriately touched or done anything to the child, but she did not know whether he had or not, which

worried Respondent. (*Id.* at 242.) The child never told the therapist that Petitioner touched her but the therapist opined that the child's actions indicated that the child was afraid of Petitioner. According to Respondent, the child has exhibited encropesis (soiling herself with a bowel movement) since the possibility of seeing Petitioner again has been raised, which the therapist explained is often a symptom of terror and trauma; the therapist has not witnessed the encropesis, but believes Respondent's account. (*Id.* at 242-43.) However, in February 2010, the child also told the therapist the she missed Petitioner. (*Id.* at 243-44.) Respondent also told the therapist about two incidents at school where the child said that a female teacher had touched her inappropriately and that a classmate had kissed her, which led to the child being assigned to a new classroom. (*Id.* at 244-45; PX3 at R0108.) Respondent did not mention the possibility that Petitioner had inappropriately touched the child when Respondent relayed these incidents to the therapist. (Tr. 245-46.) For his part, Petitioner denies ever yelling at, hitting, slapping, or inappropriately touching the child. (*Id.* at 70.)

The Court finds that there is insufficient evidence to conclude that Petitioner either sexually or otherwise physically abused the child in any manner. Respondent's account suffers from insufficient corroborating evidence and, indeed, is inconsistent with some other evidence in the record. Given her self-interest in the matter, the Court therefore finds that there is insufficient evi-

dence to support a finding that Petitioner sexually or otherwise abused the child.

C. Respondent Leaves Petitioner with the Child

In November 2008, Respondent came to New York to visit her sister Maria and attempt to gather evidence to support Respondent's and Petitioner's case regarding the problematic loan. (*Id.* at 19, 119, 167-68.) During this time, the child stayed in London with Petitioner and Petitioner's mother who was visiting from Colombia. (*Id.* at 74, 168.) Petitioner claims that when he picked Respondent up at the airport upon her return, Respondent "was a completely different person" than when she left London a week earlier and she demanded that Petitioner and his mother leave their house immediately. (*Id.* at 20-22.)[9] Respondent testified that when she returned from New York, Petitioner and his mother were acting very suspicious and the child was acting fearful and strange around Petitioner; Respondent became extremely scared, and decided to leave. (*Id.* at 134-35.)

On the following day, November 19, 2008, Respondent left to bring the child to nursery school and never returned. (Tr. 22; Ct. Ex. 1 ¶ A7.) Respondent testified that she went to the police station and reported that Petitioner had been abusing her; the police asked Respondent if she

[9] Respondent testified that prior to November 2008 she had asked Petitioner to leave many times but that he always threatened her in response (Tr. 134); Petitioner denied that Respondent ever asked him to move out before November 2008, (*id.* at 85).

wanted to have Petitioner arrested but she declined out of concern for Petitioner's mother and, instead, asked the police to remove Petitioner from their house. (Tr. 135-36.) However, according to Respondent, when she told the police that she did not work and that Petitioner did work, the police said that they could not "do anything for [her]," but they did give her a personal alarm and helped her find a hotel. (*Id.* 136-37.) The next day, Petitioner saw Respondent and the child while he was driving; Respondent ran away. (*Id.* at 23.) Respondent testified that after seeing Petitioner in the car she filed another police report; the police did not do anything for them but sent Respondent and the child to a domestic violence shelter. (*Id.* at 137-39.) Petitioner testified that when he called Respondent after seeing them in the car, Respondent informed him that she had reported him to the police; however, when he went to the station, the police had no records of Petitioner. (*Id.* at 23-24.) Petitioner has not seen the child since.

Petitioner testified that right after Respondent left, he called Respondent's sister Gloria, who lived in London and who denied knowledge of Respondent's whereabouts. (*Id.* at 23.) In December 2008, Respondent's sister Nancy called Petitioner and told him it would be better if he stayed away from Respondent and the child if he didn't "want trouble" or "want to be sorry." (*Id.* at 25-26.) Right after that call, Petitioner received another call from Gloria regarding Respondent's belongings and informing Petitioner that Respondent was living in a refuge and protected by the police. (*Id.* at 26; PX1 at Petitioner000009.) Subse-

quently, Petitioner's solicitors told him to refrain from speaking with any member of Respondent's family. (Tr. 27.)

Respondent and the child resided at a shelter, Croydon Women's Aid, from November 24, 2008, until July 3, 2009. (Ct. Ex. 1 ¶ A8.) Before entering the shelter, Respondent was interviewed by the shelter and submitted forms and a statement describing her claims of abuse. (Tr. 139.) Respondent also signed a license agreement upon entering the shelter. (RX2.) The agreement states that the objective of the organization is to provide "[s]afe emergency temporary accommodation where women and children can find refuge from violence in the home." (*Id.* at R0006.) The length of stay at the shelter was not expected to exceed six months and the original license was from November 24, 2008, until February 23, 2009. (*Id.* at R0005, R0007.) Respondent testified that the shelter was not healthy for her or for the child; therefore, she tried to obtain alternative housing. (Tr. 131-32.) In connection with this attempt, she requested a letter from LAWRS to support her application for permanent accommodation. (RX5 at R0034.) The LAWRS letter describes Respondent's interactions with LAWRS, as discussed *supra*, and states that Respondent wanted a permanent accommodation to start a new life with more stability because the "unsuitable and overcrowded conditions" of the shelter, with other domestic violence victims under a lot of stress, were hindering the development of both Respondent and the child. (*Id.* at R0035.) Respondent testified that before she left Petitioner, she would sometimes go to her sister Gloria's house for the

weekend when Respondent and Petitioner had problems; Gloria had a son about the same age as the child and the child and Gloria's son were friends. (Tr. 174-75.) However, Respondent and the child were only able to see Gloria and her son once while living in the shelter because the shelter did not want Respondent at her family's homes. (*Id.* at 175.)

On July 3, 2009, Respondent and the child left the United Kingdom, traveling first to France and then to New York, where they have lived since July 8, 2009. (Ct. Ex. 1 ¶¶ A12-14).

Petitioner describes a multitude of channels that he pursued in an attempt to find his child and resolve the situation. He contacted the Citizen Advice Bureau in London, where he was referred to Family Mediation; after Family Mediation sent several letters to Respondent without response, Petitioner was referred to solicitors in London. (Tr. 24-25.) On July 23, 2009, Petitioner submitted an application under the Children Act of 1989 (PX1 at Petitioner000030-Petitioner000049), to obtain from a court "a defined contact order to ensure that he obtains regular contact with his [child] and plays an active role in [her] life," (*id.* at Petitioner000037). At the same time, Petitioner submitted orders to disclose the child's whereabouts, under Section 33 of the Family Law Act of 1986, to Respondent's sisters in London, Respondent's previous counsel, the police station that Respondent had contacted, the Child Benefit Office, the child's nursery, and the child's doctor (*id.* at Petitioner000050-Petitioner000067); however, they all denied knowledge of Respondent's and the child's location, (*id.* at Peti-

tioner000068-Petitioner000076). After having "exhausted all possibility that [the child] was still in the [United Kingdom]," on March 15, 2010, Petitioner filed a Central Authority for England and Wales Application Form seeking to have the child returned to the United Kingdom; the application was sent to the United States Department of State Office of Children's Issues on March 23, 2010. (Tr. 33; Ct. Ex. 1 ¶ A15.) The application details more of the steps that Petitioner undertook to find Respondent and the child and indicates that Petitioner believed that Respondent and the child were in Manhattan. (PX1 at Petitioner000005-Petitioner000009.)[10] At the hearing, Petitioner explained that he thought Respondent would bring the child to the United States at some point but he did not know when or how quickly she would be able to do so; therefore, he wanted to first make sure that Respondent and the child were not in the United Kingdom before taking action pursuant to the Hague Convention. (Tr. 90-91.)

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[10] Petitioner had previously told his solicitors that he believed Respondent was in New York with her sister Maria because Respondent "wasn't very happy in London." (Tr. 27.) On July 23, 2009 (weeks after Respondent and the child had already left the United Kingdom), Petitioner indicated on an application that "when the Parties separated in November 2008, the Respondent threatened to take the child to the USA permanently" because she had siblings in the United States who would be able to support her; thus, Petitioner stated he was worried that Respondent might remove the child from the United Kingdom without his knowledge. (PX1 at Petitioner000048-Petitioner000049.) At the same time, Petitioner also believed that Respondent would possibly return to live in Colombia because she was born there and still had family there. (*Id.* at Petitioner000048.)

D. The Child's Life in New York

Since arriving in New York, Respondent and the child have lived with Respondent's sister Maria, Maria's partner, Respondent's niece (Maria's daughter), and the niece's two-year-old daughter. (*Id.* at 144.)[11] Maria has worked as a nanny for the same family for four years; Maria's partner owns a grocery business. (*Id.* at 144-45, 169.) Maria financially supports Respondent and the child and, in return, Respondent cooks, cleans, and takes care of the children. (*Id.* at 145.) Respondent has not had a job since she came to the United States. (*Id.* at 168.) Because Respondent and the child have British passports, they were allowed to enter the United States without a visa; however, Respondent testified that they are currently over-

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In addition, Petitioner stated in his application that he did not have the address of Respondent's sister in New York but did have two contact phone numbers. (*Id.* at Petitioner000005.) However, at the hearing, Petitioner testified that when Respondent visited Maria in November 2008, Respondent left Maria's name, address, and phone number in writing with Petitioner. (Tr. 88.)

[11] Petitioner has expressed concern that Respondent's sister and family members had drug problems because Respondent had told him that the police found cocaine in the garden and that Social Services had been involved. (Tr. 34.) Respondent testified that she had told Petitioner about an incident ten years ago when her niece's boyfriend was incarcerated for selling cocaine. The niece's involvement is unclear because Respondent testified that the niece was not charged, but also that she has a felony in her past. However, Respondent emphasized that neither her niece, nor any other family member, currently has a substance abuse problem. (*Id.* at 149-50.) The Court finds that there is insufficient evidence to determine that anyone residing in the home currently has any involvement with drugs.

stayed, and have been since October 2009. (*Id.* at 165-66.) Respondent testified that she is consulting with immigration authorities about the possibility of being sponsored by Maria, who is a United States citizen. (*Id.* at 150.)

The child has attended the same school since she and Respondent arrived in New York and currently is enrolled in kindergarten; according to Respondent, the child is doing very well in school. (*Id.* at 147.) On the child's 2009-2010 mid-year pre-kindergarten Academic Standards Report, the child's teacher commented that she "is a quiet child who enjoys playing with [her] friends at school[; she] is participating more now and [the school is] encouraging her to write more and develop all skills." (RX10 at R0045.) On the Academic Standards Report at the end of that school year, the teacher wrote that the child "has made a lot of progress socially [and] is beginning to assert herself more[; she] is progressing academically as well." (RX11 at R0048.)

However, in a March 2010 session with the therapist, Respondent expressed concern that the child's school had overreacted to the child's statements regarding the incidents where the child claimed a teacher and student had inappropriately touched and kissed her; the therapist told Respondent that the school might involve Child Protective Services ("CPS") and that Respondent would need to be compliant, to which Respondent agreed. (PX3 at R0108, R0110.) The following week, Respondent told the therapist that she and the child were interviewed by the school but were not contacted by CPS; however, Respondent was still upset with the school. (*Id.* at R0112.)

Respondent testified that the child has friends at school who she sometimes meets at the park or at the library. (Tr. 148.) The child plays with her cousin's two-year old daughter with whom they live, and is close with Maria and Maria's partner. (*Id.* at 148-49.) Respondent also testified that her other niece also lives nearby with her two children and the child spends time with this extended family, particularly on weekends. (*Id.* at 149.) Respondent and the child also attend church on the weekends and the child takes ballet classes. (*Id.* at 150.)

After arriving in New York, Respondent and the child began receiving therapy from a psychiatric social worker at a family medical clinic in July 2009. (*Id.* at 230.) When they first arrived in New York, Respondent testified that the child was very quiet, had nightmares and bed- wetting problems, and became "very sexually talking." (*Id.* at 145-46.) At the hearing, the therapist testified that when she first met the child, the child was unable to speak, make eye contact, or play in the therapist's office, which the therapist characterized as "very unusual for a normally developed three-year-old child"; in addition, the child would wet herself, was hypervigilant, and had a very heightened startle response. (*Id.* at 233.) In addition, the therapist's notes from a November 17, 2009 session indicate that the child had been having temper tantrums at home and yelling and slamming doors when she did not get what she wanted; as a result, the therapist sought "to lower [the child's] anxiety when she's separated from her mother and decrease [the child's] aggressive behavior when [her] personal needs are not met." (PX3 at R0095.)

Although the therapist testified that the child showed symptoms of trauma in their initial meeting, she progressed through several diagnoses, including adjustment disorder with anxiety/ depression, adjustment disorder with mixed emotional features, adjustment disorder not otherwise specified, undetermined diagnosis, and undiagnosed, before ultimately being diagnosed with PTSD in February 2010; the therapist explained this is often done because a diagnosis such as PTSD can be stigmatizing in children. (Tr. 233-34; PX3 at R0087-R0104.) When asked at the Evidentiary Hearing what traumatic event formed the basis of the PTSD diagnosis, the therapist said it was the child's experience in the United Kingdom before coming to New York, including living in a shelter system, having to move to a new country, and knowing that her mother had been harmed or threatened because, as the therapist explained, being in the presence of abuse is considered trauma to the child, even if the child herself is not abused. (Tr. 234-35.) The therapist declined to say definitively that the traumatic event was witnessing domestic violence, although she said that could cause the trauma. (*Id.* at 239.)

Respondent testified that within six months of arriving in New York, the child's behavior improved. (*Id.* at 146.) The therapist echoed this assessment, describing her as "a completely different child now," who has stopped wetting herself, has made friends at school, is excited to play, and is able to speak very freely about how she is feeling and talks about being happy. (*Id.* at 235-36.) In August 2010, Respondent and the therapist decided to terminate therapy because the child

was doing well and agreed that they would return if any of the child's symptoms related to trauma reoccurred. (PX3 at R0120.) In her notes, the therapist indicated that the child was "symptom free, happy, content, [and] normal." (*Id.*)

However, the child resumed therapy in September 2010 when Respondent and the child again met with the therapist because the child was acting out regarding Respondent's new boyfriend. (*Id.* at R0122.) The next week, Respondent informed the therapist that the child was still having problems with wetting herself; the therapist recommended that the child continue therapy until the problem was resolved. (*Id.* at R0124.) By October 25, 2010, Respondent and the therapist agreed that the child was again symptom free; the child was not wetting herself, "reported 'being happy' and was markedly more verbal than during last visits." (*Id.* at R0128.) Accordingly, the child would cease therapy, but return if any problems resumed. (*Id.*) Respondent and the child again resumed meeting with the therapist in December 2010, after the instant Petition was filed. (*Id.* at R0130.) In January 2011, the therapist noted that the child "expressed she is 'happy' in school," was not wetting herself and, when playing with dolls, "talked about how she was happy like the dolls who got to live in the dollhouse with their cousins." (*Id.* at R0134.) Respondent and the therapist determined that the child and Respondent would continue therapy through the duration of the instant proceedings. (*Id.* at R0135.)

E. Possibility of Return to United Kingdom and Expert Evaluations

According to Respondent, when she brings up going back to London, the child says "that she's not going." (Tr. 147.) Respondent testified that when the child is asked if she wants to see Petitioner, she says "no" and, on four occasions after being asked this question, the child has become encropetic. (*Id.*) The therapist testified that when she asked the child about Petitioner, she would remain silent and did not want to talk about him. (*Id.* at 236.) The child also did not talk very much about her time in the United Kingdom in general and did not recall it. (*Id.*) The therapist's February 17, 2010 notes state that the child was able to speak for the first time directly with the therapist about missing her father; the notes from that same session also indicate that the child was much more verbal in play with the therapist (PX3 at R0105), whereas previously she still had been taciturn and communicated by pointing, (*id.* at R0103.)

Although the child had stopped attending therapy by the end of October 2010, Respondent and the child met with the therapist again on December 9, 2010, after the instant Petition had been filed. At this session, the child "stated that she was scared because her 'mommy seemed so worried.'" (*Id.* at R0130.) The therapist's notes from a January 31, 2011 session state that after refraining from asking the child direct questions regarding Petitioner for several months, the therapist did ask the child if she wanted to see her father; the child, outside the presence of Respondent, said

"no." The therapist did not probe the issue further in order to avoid distressing the child. (*Id.* at R0144.)

Respondent's expert Dr. Cling submitted a report and testified at the Evidentiary Hearing based on her examination of Respondent and the child. Dr. Cling testified that during her evaluation, Respondent told her that Petitioner had abused her and that the child witnessed the abuse. Dr. Cling explained that witnessing domestic abuse is "considered to be abuse in and of itself." (Tr. 196.) Dr. Cling did not directly observe any symptoms of trauma in the child, but spoke with the therapist regarding the child's condition when she first arrived in New York. (*Id.* at 204.) When Dr. Cling met with the child, the child stayed with Respondent but was generally willing to talk, moved readily towards the provided toys, and related well. (*Id.* at 197-98.) Dr. Cling testified that when she tried to speak with the child about her time in London or Petitioner, the child "had a very bad reaction"; after initially saying in very short answers that she remembered London and Petitioner, the child said she did not want to talk about it and refused to discuss the subject. (*Id.* at 188-89, 206-07.) Dr. Cling viewed this as the child setting a limit where she felt safe and, therefore, Dr. Cling did not push the child "to an extreme response." (*Id.* at 208.) The child did not wet or soil herself when Dr. Cling brought up Petitioner; however, Dr. Cling stated that such a response "would be psychotic behavior" that even a scared five-year-old would not exhibit unless in "extreme distress." (*Id.* at 207.) When asked about Respondent's testimony that the child had exhib-

ited such a response after being asked about Petitioner and returning to London, Dr. Cling clarified that such behavior would have been surprising in the setting of her interview of the child because Dr. Cling did not push her hard, so the child was in a safe situation. (*Id.* at 207-08.) Dr. Cling testified that if in their meeting the child had been able to speak more about Petitioner—as the child was able to do with Dr. Fraser, when Respondent was not present in the room, as explained *infra*—it "might soften [her opinion in this case] a little." (*Id.* at 211-12.)

Dr. Cling concluded the child was "potentially at risk if she were to be forcibly returned to the [United Kingdom] for custody evaluation of another psychological breakdown" and that such a move "could cause serious psychological harm." (*Id.* at 190.) Removing the child from her "stable environment in the United States . . . might have a catastrophic effect" because, while "it's not generally good to move children, . . . if they have a fragile history, then . . . you want to keep them as stable as possible . . . [and] more or less doing the same thing," particularly because here the child would be taken from her present stable, comfortable environment and returned to the site of the trauma. (*Id.* at 198-99.) This assessment was based on Dr. Cling's discussion with the therapist, who indicated that the child was in "pretty bad shape" and suffering from PTSD when she arrived in New York, as well as Dr. Cling's own observation that the child was now a "normal five-year-old" who is doing very well, "with the exception that there was this difficult psychological area" involving Petitioner and London. (*Id.* at 190-91.)

When asked if there were any arrangements in the United Kingdom that could prevent the child's re-traumatization, Dr. Cling stated that it is "hard to imagine the kind of stable environment that she's already in existing there," particularly because the child has been in New York for over a year and a half at a sensitive age. (*Id.* at 199-200.) However, Dr. Cling did not provide any basis for her belief as to the child's situation in the United Kingdom. When asked by the Court if traumatization would result from moving the child from her current situation to anywhere, as distinct from moving the child to the United Kingdom under arrangements that would allow her to live with people with whom she might be comfortable, Dr. Cling opined that both situations would contribute to the child suffering trauma. (*Id.* at 200-01.) When pressed by Petitioner's counsel, Dr. Cling said she believes it is "very likely" that the child is at risk for another psychological breakdown if returned to the United Kingdom but she cannot predict with certainty what will happen if the child is returned. (*Id.* at 205-06.)

Petitioner's expert Dr. Fraser also submitted a report, based on his psychological evaluation of Respondent and the child, and testified at the Evidentiary Hearing. Dr. Fraser met with Respondent and the child both together and separately. (*Id.* at 283; PX2 at Fraser000001.) Dr. Fraser testified that he met with the child one-on-one in order to observe how the child interacted both with and away from Respondent. (Tr. 283.) Dr. Fraser testified that Respondent seemed very appropriately able to care for the child and was very attuned to her needs. (*Id.* at 260.) Respon-

dent told Dr. Fraser that: Petitioner had raped Respondent four times, twice in the presence of the child; the child had told Respondent in the shelter that Petitioner had touched the child's genitals; and the child had previously exhibited symptoms such as fearfulness, anxiety, emotionally shutting down, refusing to talk, bed-wetting, and clinging to Respondent. (*Id.* at 260-61.) Dr. Fraser testified that the child seemed "to be a very well-adjusted, sweet child," who engaged in very organized, healthy, creative, age-appropriate playing by herself and with Respondent and Dr. Fraser and did not show any distress. (*Id.* at 265-66, 284.) The child told Dr. Fraser that she loves where she lives and that she likes school. (*Id.* at 298; PX2 at Fraser000004.)

Dr. Fraser had Respondent fill out a trauma symptom checklist for young children for the child's trauma symptoms during the past month. (Tr. 261-63.) According to Dr. Fraser, Respondent reported extremely high PTSD avoidance and sexual concern symptoms for the child, which were inconsistent with: (1) Dr. Fraser's own interview with the child, (2) Respondent's description of the child's current condition to Dr. Fraser and Dr. Cling, and (3) Respondent's discussion of the focus of the child's therapy. (*Id.* at 264-65; PX2 at Fraser000005-Fraser000007.) Dr. Fraser opined that this discrepancy "calls into question the accuracy and consistency of [Respondent's] reporting of events," particularly regarding her claims of potential sexual abuse of the child. (PX2 at Fraser000007.) Respondent testified that in filling out the questionnaire, she forgot that it was only supposed to be for the past month and thought it

related to the child's symptoms upon arrival in New York. (Tr. 151-52.) However, the questionnaire responses indicate that Respondent did answer some of the questions with the past-month time frame in mind; for example, she answered "not at all" to the questions of whether the child looked sad or had nightmares, when those were in fact some of the symptoms for which Respondent had sought therapy for the child upon arrival in New York. (PX2 at Fraser000014-Fraser000015.)

Dr. Fraser also had Respondent take a personality test known as the MMPI-2. (Tr. 261.) This test has two components: (1) validity scales, which provide information regarding the subject's test-taking attitude and approach, and (2) clinical scales, which provide information about the individual's personality style and psychiatric symptoms they may be experiencing. (*Id.* at 267-69; PX2 at Fraser000003.) Dr. Fraser testified that Respondent's validity scores indicated that she tended to portray herself in an overly positive light with few shortcomings; people with high scores often "have a difficult time admitting to minor faults that typically most human beings would admit to." (Tr. 281-82.) According to Dr. Fraser, Respondent's "unrealistic claims of personal virtue," "unwilling[ness] to admit faults that might be detrimental to her case," and "extreme level of defensiveness . . . made it difficult to interpret her clinical scores" (PX2 at Fraser000003), and thus called into question the accuracy of the rest of the reported information, (*id.*; Tr. 281-82.) In contrast, Dr. Cling did not administer any written tests to Respondent or the child because Dr. Cling believes that the MMPI-2

is often invalid in custody evaluations because "[p]eople who are undergoing custody evaluations have a very strong, perhaps uncontrollable, urge to present themselves in a very positive light." (Tr. 221.) However, Dr. Cling acknowledges that this test is very often given in custody disputes. (*Id.* at 226.)

Dr. Fraser testified that the child did not exhibit any traumatized or sexualized behavior in his presence, nor did she show any signs of incontinence. (*Id.* at 284-86.) When he brought up Petitioner, the child was able to answer questions regarding her father while continuing to play with a dollhouse and did not seem frightened of her father. (*Id.* at 284-85.) When asked how she feels about being away from Petitioner, the child replied "happy; I'm staying with my mommy." (*Id.* at 297-98.) The child was also able to talk about living in the United Kingdom without being afraid. When Dr. Fraser asked the child if she remembered the United Kingdom with her mother and father, the child said that she played with toys; at that point, she did not want to talk anymore and said she was hungry. (*Id.* at 286.) Dr. Cling categorized the child saying she was hungry as avoidance behavior to get out of talking about Petitioner (*id.* at 225); however, according to Respondent, after speaking with Dr. Fraser, Respondent actually did take the child to McDonald's to get something to eat before returning to Dr. Fraser's office to complete the MMPI-2 questionnaire, (*id.* at 154). Respondent testified that when she took the child to McDonald's, the child did not want to go back to the office and said that Dr. Fraser made her think a toy was her father,

that she killed the toy, and there was "blood all around." (*Id*.) However, Dr. Fraser testified that the child did not identify any of the dolls or toys as representing her father, nor discuss her father in an aggressive way. (*Id*. at 267, 297.)

Dr. Fraser agreed with Dr. Cling that "'it is impossible to say what trauma [the child] was reacting to'" when she exhibited trauma symptoms upon arriving in New York, particularly without investigation into Respondent's claims that Petitioner may have sexually abused the child. (PX2 at Fraser000006.) He believes that several of the child's reported symptoms, such as bed-wetting, excessive clinging to her mother, and avoiding talking about her father, "could also have been reactions to several types of other traumas," such as being uprooted from her home and her father to live in a shelter while in the United Kingdom and then being uprooted from the United Kingdom to move to the United States, still away from her father. (*Id*.) Dr. Fraser acknowledged that given "the level of disruption and stress" in the child's life over the past couple of years, the child "is at increased risk for some degree of psychological maladjustment if she is required to move again; but the potential negative effects depend on many factors." (*Id*. at Fraser000007.) However, he opined that returning to the United Kingdom would not put the child at a grave risk of harm (*id*.), and that, based on his observations of the child, her answers to his questions, and the description of her symptoms from other sources, he did not think that the child would be traumatized, or that it would be a problem, for the child to return to the United Kingdom for the purposes

of conducting a custody hearing. (Tr. 287-88.) In his report, Dr. Fraser did state that if the child was told that returning to the United Kingdom meant going back to her father, she "may react by regressing" and showing previous symptoms; however, Dr. Fraser believes there are "other, more positive ways" to frame moving back to the United Kingdom to the child. (PX2 at Fraser000007; Tr. 304.) When asked if the child would suffer trauma if she was returned to Petitioner, Dr. Fraser cautioned that whenever allegations of abuse have been made, he believes "all efforts need be made to investigate the validity, the accuracy of those allegations prior to returning any child to that home." (Tr. 303.)

II. Conclusions of Law

A. General Principles

The Hague Convention on the Civil Aspects of International Child Abduction, as implemented through ICARA, was created with the stated purpose "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, pmbl., *reprinted in* 51 Fed. Reg. 10,495, at 10,498. The Hague Convention was designed to restore the pre-retention status quo and to discourage parents from crossing international borders in search of a more sympathetic forum. *See Gitter v. Gitter*, 396 F.3d 124, 129-30 (2d Cir. 2005) (citing Paul R. Beaumont &

Peter E. McEleavy, *The Hague Convention on International Child Abduction* 1-3 (1999)). To dissuade family members from removing children to jurisdictions perceived to be more favorable to their custody claims, the Hague Convention attempts "to deprive [their] actions of any practical or juridical consequences." *Id.* at 130 (quoting Elisa Perez-Vera, *Hague Convention on the Civil Aspects of Int'l Child Abduction: Explanatory Report*, ¶ 16, in 3 Acts and Documents of the 14th Session (1982) ("*Perez-Vera Report*")).[12]

A court considering a Hague Convention petition has jurisdiction only over the wrongful removal or retention claim. See Hague Convention, art. 16, *reprinted in* 51 Fed. Reg. 10,495, at 10,500; 42 U.S.C. § 11601(b)(4); *Diorinou v. Mezitis*, 237 F.3d 133, 140 (2d Cir. 2001). The merits of any underlying custody claim are of no concern in a Hague Convention case. See *Blondin v. Dubois*, 189 F.3d 240, 245 (2d Cir. 1999) ("*Blondin II*") (citing *Friedrich v.Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) ("*Friedrich I*")); see also Hague Convention, art. 19, *reprinted in* 51 Fed. Reg. 10,495, at 10,500. "Put differently, the focus of a court's inquiry in a Hague Convention case is not 'the best interests of the child,' as it typically is in a state custody case; rather it is the specific claims and defenses under the Convention,

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[12] "Perez-Vera served as the official Hague Convention reporter for the Convention and [] her explanatory report is recognized . . . as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." *Blondin v. Dubois*, 189 F.3d 240, 246 n.5 (2d Cir. 1999) (alteration and internal quotation marks omitted).

namely whether a child has been wrongfully removed to, or retained in, a country different from the child's habitual residence and, if so, whether any of the Convention's defenses apply to bar the child's return to his habitual residence." *Hazbun Escaf v. Rodriquez*, 200 F. Supp. 2d 603, 610-11 (E.D. Va. 2002), *aff'd sub nom. Escaf v. Rodriguez*, 52 F. App'x 207 (4th Cir. 2002).

The United States has implemented the provisions of the Hague Convention through ICARA. *See Abbott v. Abbott*, 130 S. Ct. 1983, 1989 (2010). ICARA allocates the burdens of proof for various claims and defenses under the Convention. *See* 42 U.S.C. §§ 11601-11611; *Koc v. Koc*, 181 F. Supp. 2d 136, 146 (E.D.N.Y. 2001). Specifically, ICARA requires that a petitioner establish, by a preponderance of the evidence, that the child whose return is sought has been "wrongfully removed or retained within the meaning of the Convention." 42 U.S.C. § 11603(e)(1)(A). In this respect, the Convention reflects "a strong presumption favoring return of a wrongfully removed child." *Danaipour v. McLarey*, 286 F.3d 1, 13 (1st Cir. 2002). If a petitioner makes out a prima facie case of wrongful removal or retention, the court must return the child unless the respondent can establish one of the Convention's enumerated defenses. *See Hazbun Escaf*, 200 F. Supp. 2d at 611. The presumption favors return because "[r]equiring a return remedy in cases [brought under the Convention] helps deter child abductions and respects the Convention's purpose to prevent harms resulting from abductions." *Abbott*, 130 S. Ct. at 1996. As the Supreme Court has explained, such abductions are traumatic for children and are consid-

ered by some child psychologists to be "one of the worst forms of child abuse"; as a result of an abduction, the child may experience depression, PTSD, identity-formation issues, or other psychological problems, and may be prevented "from forming a relationship with the left-behind parent." *Id*. (internal quotation marks omitted).

To establish a prima facie case of wrongful retention under the Hague Convention, a petitioner must show by a preponderance of the evidence that: (1) the habitual residence of the child immediately before the date of the alleged wrongful retention was in a foreign country; (2) the retention is in breach of custody rights under the foreign country's law; and (3) the petitioner was exercising custody rights at the time of the alleged wrongful retention. *See* 42 U.S.C. § 11603(e)(1)(A); *Gitter*, 396 F.3d at 130-31. If the petitioner satisfies this burden, then the child must be returned to his or her state of habitual residence unless the respondent can establish one of the following affirmative defenses: (1) the proceeding was commenced more than one year after the removal of the child and the child has become settled in his or her new environment (the "settled defense" or "Article 12 defense"); (2) the person seeking return of the child was not actually exercising custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention; (3) there is a grave risk that the return of the child would expose it to physical or psychological harm (the "grave risk defense"); or (4) the return of the child would not be permitted under the fundamental principles of the requested State relating to the protection of

human rights and fundamental freedoms. *See Blondin II*, 189 F.3d at 245-46. The first two affirmative defenses require proof by a preponderance of the evidence, while the latter two affirmative defenses require clear and convincing evidence. *See id.*

However, as is clear from ICARA, these affirmative defenses are meant to be narrow. *See id.* at 246 (citing 42 U.S.C. § 11601(a)(4)). Indeed, these defenses "do not authorize a court to exceed its Hague Convention function by making determinations, such as who is the better parent, that remain within the purview of the court with plenary jurisdiction over the question of custody." *Id.; see also Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) ("It is not relevant to this Convention exception [the "grave risk defense"] who is the better parent in the long run . . . ."). To view the defenses more broadly would frustrate the core purpose of the Hague Convention—to preserve the status quo and deter parents from seeking custody of their child through, in effect, forum shopping. *See Perez-Vera Report, supra*, ¶ 34.

Moreover, "[e]ven where the respondent meets his or her burden to show that an exception applies, the court may nevertheless exercise discretion to order repatriation." *Matovski v. Matovski*, No. 06-CV-4259, 2007 WL 2600862, at *7 (S.D.N.Y. Aug. 31, 2007); *see also Blondin II*, 189 F.3d at 246 n.4 ("[E]ven where the grounds for one of these 'narrow' exceptions have been established, the district court is not necessarily bound to allow the child to remain with the abducting parent."); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) ("*Friedrich II*") ("[A] federal

court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention.").

B. The Prima Facie Case of Wrongful Retention

In the instant matter, Petitioner has adequately established a prima facie case of wrongful retention under the Hague Convention. Indeed, as Petitioner points out, Respondent has not attempted to argue otherwise. (Post-Hearing Mem. of Law in Supp. of Pet. for Return of Child ("Pet'r Mem.") 5.)

1. The Habitual Residence

Petitioner can invoke the protection of the Hague Convention only if the subject child is "habitually resident" in a State signatory to the Convention and has been removed to or retained in a different State. *See Holder v. Holder*, 392 F.3d 1009, 1014 (9th Cir. 2004); *Diaz Arboleda v. Arenas*, 311 F. Supp. 2d 336, 341 (E.D.N.Y. 2004). The Hague Convention itself does not provide any definition of "habitually resident." *See Gitter*, 396 F.3d at 131; *Perez-Vera Report, supra* ¶ 53 ("Following a long-established tradition of the Hague Conference, the Convention avoided defining its terms . . . ."). However, its text does direct courts to the time "immediately before the removal or retention." Hague Convention, art. 3, *reprinted in* 51 Fed. Reg. 10,495, at 10,498. In focusing on the pre-retention period, the relevant inquiry is the shared intention of those responsible for fixing the child's place of residence, which typically will be

the child's parents. *See Gitter*, 396 F.3d at 132. However, the Court may also look to other factors in determining the child's habitual residence. *See id.* at 133-34.

Here, the Court concludes that the child was a habitual resident of the United Kingdom.[13] The child resided there from its birth until Respondent and the child left on July 3, 2009; thus, at the time immediately before the removal, the child resided in the United Kingdom.

2. Removal in Breach of Custody Rights Under Foreign Law

Under the Convention, "rights of custody" may arise, inter alia, by operation of law, *see* Hague Convention, art. 3, and "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence," *id.*, art. 5(a), *reprinted in* 51 Fed. Reg. 10,495, at 10,498. United Kingdom law provides that "[w]here a child's father and mother were not married to each other at the time of his birth . . . the father shall have parental responsibility for the child if[, inter alia,] he becomes registered as the child's father." Children's Act of 1989, c. 41, § 4(1)(a). Here, Petitioner is listed as the father on the child's birth certificate (Ct. Ex. 1 ¶ A4); accordingly, he has parental responsibility for and custody rights of the child under U.K. law. In addition, U.K. law provides that absent a

[13] Both the United Kingdom and the United States are signatories to the Hague Convention. *See* Hague Convention (Multilateral Treaty) on International Child Abduction Enters into Force on July 1, 1988, 53 Fed. Reg. 23,843 (June 24, 1988).

court order, it is a criminal offense for one parent to take a child under sixteen years old out of the United Kingdom for more than one month without the consent of the other parent. *See* Child Abduction Act 1984, c. 37, §§ 1, 4(b); *see also Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 203 (E.D.N.Y. 2010). Therefore, Respondent's removal of the child to the United States, without Petitioner's consent, breached Petitioner's custody rights.

3. Petitioner was Exercising Custody Rights at the Time of the Removal

Lastly, to establish that Respondent's removal of the child was wrongful, Petitioner must establish that at the time of removal his custody rights "were actually exercised, either jointly or alone, or would have been so exercised but for the removal." Hague Convention, art. 3(b), *reprinted in* 51 Fed. Reg. 10,495, at 10,498. At the time Respondent removed the child from the family home in November 2008, Petitioner was clearly exercising his custody rights, as he lived with and provided financial support and other care for the child. During the seven months between when Respondent removed the child from the home and when Respondent and the child actually left the United Kingdom, Petitioner would have exercised his custody rights if not for Respondent's retention of the child without Petitioner's knowledge of their whereabouts. Respondent has not argued to the contrary.

Accordingly, Petitioner has established a prima facie case of wrongful retention under the Hague Convention.

C. Affirmative Defenses

Because Petitioner has established a prima facie case under the Convention, the child must be returned to the United Kingdom as her place of habitual residence unless Respondent can establish one of four narrow defenses. *See Blondin II*, 189 F.3d at 246. Respondent argues that two defenses apply here—the grave risk defense and the settled defense. (Post-Trial Mem. of Law in Opp'n to Pet. for Return of Child to Pet'r ("Resp't Mem.") 2.) Petitioner asserts that Respondent has failed to establish that either exception applies. (Pet'r Mem. 7.)

1. The Grave Risk Defense

The Convention provides that the Court "is not bound to order the return of the child if the person . . . which opposes its return establishes that . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, art. 13(b), *reprinted in* 51 Fed. Reg. 10,495, at 10,499. Respondent must establish this defense by "clear and convincing evidence." 42 U.S.C. § 11603(e)(2)(A). This defense recognizes that "[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 or being placed in an intolerable situation." *Blondin v. Dubois*, 238 F.3d 153, 161 (2d Cir. 2001) ("*Blondin IV*") (second alteration in original) (internal quotation marks omitted). However, "[t]he level of risk and danger required to

trigger this exception has consistently been held to be very high." *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 640 (E.D.N.Y. 2000).

The Second Circuit has explained that when the grave risk defense is asserted, a court must determine what type of harm might result from repatriation:

> [A]t one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.

Blondin IV, 238 F.3d at 162. Indeed, Article 13(b) "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests." Public Notice 957, Hague International Child Abduction Convention; Text and Legal Analysis, app. C ("State Dep't Legal Analysis") § III(I)(2)(c), 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986). "Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious." *Id.; see also Friedrich II*, 78 F.3d at 1069 (holding that the grave risk exception is narrow and should only

apply either: (1) when return would place the child in imminent danger, such as returning the child to a war-zone, place of famine, or site of disease; or (2) in cases of serious abuse or neglect when courts in the home country would be incapable or unwilling to adequately protect the child). For instance, the Department of State has noted that a parent sexually abusing a child would clearly be an example of an "intolerable situation" and, if the other parent removed the child to protect it from further abuse, a court could deny a petition brought by the abusing parent for the child's return because "[s]uch action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm." State Dep't Legal Analysis § III(I)(2)(c), 51 Fed. Reg. at 10,510.

The Second Circuit laid out the contours and requirements of the grave risk defense in the case of *Blondin v. Dubois*. The district court had determined that the evidence clearly established that the petitioner father had physically abused the respondent mother, often in the presence of their children, and that he had also beaten one of the children; therefore, returning the children to their father in France would place them at grave risk of physical or psychological harm. *See Blondin v. Dubois*, 19 F. Supp. 2d 123, 127-28 (S.D.N.Y. 1998) ("*Blondin I*"). On appeal, the Second Circuit remanded for consideration of whether any arrangements might mitigate the risk of harm to the children and allow them to safely return to France. *See Blondin II*, 189 F.3d at 248 (stating that "it is important that a court considering an exception under Article 13(b) take into account

any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation"). The Second Circuit emphasized that even if a district court finds a grave risk of harm, it also must consider whether it could protect a child from that harm "while still honoring the important treaty commitment to allow custodial determinations to be made—if at all possible—by the court of the child's home country." *Id.*

On remand, the district court consulted with French and American authorities and child psychology experts and found that there was clear and convincing evidence that returning the children to France, under any arrangement, would expose them to a grave risk of harm. *See Blondin v. Dubois*, 78 F. Supp. 2d 283, 285 (S.D.N.Y. 2000) ("*Blondin III*"). The court was presented with expert testimony that while in France, the older child had suffered from a severe traumatic disorder caused by her father's physical and verbal abuse of her and her mother; since coming to the United States, she had significantly, but not fully, recovered. *See id.* at 290-91. Accordingly, the expert believed that "removing the children from [their current] 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.* at 291. The court accepted these findings, and concluded that "[a]ny return of [the children] to France, the site of their father's sustained, violent abuse, including even a temporary

one-to- three month return in the custody of their mother, would trigger this post-traumatic stress disorder." *Id.* at 295 (emphasis in original). While the court acknowledged that returning a child is likely to present adjustment concerns in almost every Convention case, it concluded that Blondin differed from the typical case because of the specific evidence of severe abuse suffered by the children, therefore making it far more likely that they would suffer long-term permanent harm if returned. *See id.* at 297. Thus, no measure could mitigate the grave risk of harm because returning to France, by itself, would cause the children psychological harm. *See id.* at 297-98.

On appeal, the Second Circuit held that absent any contravening evidence, it would not disturb the district court's finding that even with all possible mitigating arrangements in place, "the children face an almost certain recurrence of traumatic stress disorder on returning to France because they associate France with their father's abuse and the trauma they suffered as a result"; thus, there was "nothing the French authorities could do to protect the children from the harm they face in this particular situation, because their mere presence in France, the site of their trauma, would create the risk." *Blondin IV*, 238 F.3d at 161.[14] However, the court reiterated that

[14] The Second Circuit also found that the district court did not err in considering evidence that the children had become well-settled in the United States as a non-dispositive factor in analyzing whether returning them to France would pose a grave risk to their psychological harm, because removing them from their current safe environment where they had begun to recover from their trauma would add to

"[i]n cases of serious abuse, before a [district] court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b), it must examine the full range of options that might make possible the safe return of a child to the home country." *Id.* at 163 n.11.

Applying these standards after *Blondin*, district courts within the Second Circuit that have denied repatriation under the grave risk exception have done so in cases involving very serious abuse. *See, e.g., Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 408-09 (E.D.N.Y. 2005) (denying repatriation because the petitioner had physically abused the respondent and the children and had repeatedly threatened the respondent and her family since the respondent came to the United States, and there was uncontroverted expert testimony that the children would suffer relapse of their PTSD symptoms by merely returning to Israel, even if they had no contact with the petitioner); *Reyes Olguin v. Cruz Santana*, No. 03-CV-6299, 2005 WL 67094, at *2-4, *11-12 (E.D.N.Y. Jan. 13, 2005) (denying petition to order return of children to Mexico because the record showed that the petitioner frequently and viciously beat the respondent in front of the children, the children told a psychiatrist that their father hit them as well, and there was uncontroverted expert testimony that a return to Mexico would exacerbate the PTSD suffered by the older child).[15]

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the harm they would suffer upon returning to the site of the original trauma. *See Blondin IV*, 238 F.3d at 165.

[15] Courts outside the Second Circuit have also applied a high threshold to the grave risk exception, finding that the defense was established in situations of extreme physical

However, the Second Circuit cautioned that its decision in *Blondin* "by no means implies that a court must refuse to send a child back to its home country in any case involving allegations of abuse, on the theory that a return to the home country poses a grave risk of psychological harm"; instead, a court must look at the "specific facts presented in th[e] case" at issue. *Blondin IV*, 238 F.3d at 163 n.12 (emphasis in original). And, in fact, several courts within the Second Circuit have granted a petition for return despite some evidence of abuse. *See, e.g., Rial v. Rijo*, No. 10-CV-1578, 2010 WL 1643995, at *2-3 (S.D.N.Y. Apr. 23, 2010) (ordering the return of the child to Spain, despite evidence that the petitioner was verbally and sometimes physically abusive to the respondent, including at times in front of the child, because the court concluded that the risk of harm to the child was not grave if the child returned with the respondent, and the petitioner agreed to rent an

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abuse. *See, e.g., Van De Sande v. Van De Sande*, 431 F.3d 567, 569-70 (7th Cir. 2005) (reversing repatriation order where the petitioner had severely and repeatedly beaten respondent in front of their children and threatened to kill the children); *Danaipour v. McLarey*, 386 F.3d 289, 301-03 (1st Cir. 2004) (affirming district court's refusal to return children where there was clear and convincing evidence that the petitioner sexually abused one child and that both children would suffer psychological harm if returned to Sweden); *Walsh v. Walsh*, 221 F.3d 204, 219-21 (1st Cir. 2000) (reversing repatriation order where petitioner severely beat respondent in front of children and undertakings would be insufficient because petitioner had a history of disobeying court orders); *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 459-60 (D. Md. 1999) (denying petition for return where petitioner belt-whipped, punched, and kicked the child, and choked and broke the respondent's nose).

apartment and provide financial support for the respondent and the child until a Spanish court determined custody and support); *Lachman v. Lachman*, No. 08-CV-4363, 2008 WL 5054198, at *9 (E.D.N.Y. Nov. 21, 2008) (concluding that evidence that the petitioner previously had been arrested, but found not guilty, on domestic abuse charges in England was insufficient to establish that returning the child to England would pose a grave risk of harm to the child, where there was no evidence that the petitioner had ever harmed the child); *Laguna v. Avila*, No. 07-CV-5136, 2008 WL 1986253, at *8-9 (E.D.N.Y. May 7, 2008) (concluding that there was insufficient evidence to establish that the child would be at grave risk if returned to Colombia, where the petitioner had been violent to the respondent but there was no evidence that the petitioner physically abused the child).

Moreover, "[i]n th[e] [Second] Circuit, . . . even incontrovertible proof of a risk of harm will not satisfy the Article 13(b) exception if the risk of harm proven lacks gravity." *Laguna*, 2008 WL 1986253, at *8 (citing *Blondin IV*, 238 F.3d at 162). "Courts have recognized that a child's observation of spousal abuse is relevant to the grave-risk inquiry . . .[, as is] [a] parent's general pattern of violence." *Elyashiv*, 353 F. Supp. 2d at 408; *see also Rial*, 2010 WL 1643995, at *2 ("Prior spousal abuse, though not directed at the child, can support the grave risk of harm defense."). However, courts that have invoked the grave risk exception "have focused on evidence of a sustained pattern of physical abuse and/or a propensity for violent abuse[, whereas] [e]vidence of sporadic or isolated

incidents of abuse, or of some limited incidents aimed at persons other than the child at issue, have not been found sufficient to support application of the 'grave risk' exception." *Laguna*, 2008 WL 1986253, at *8 (citation omitted).

Applying these principles to the present case, Respondent must establish by clear and convincing evidence that the child would be exposed to a grave risk of harm if returned to the United Kingdom. However, "subsidiary facts need only be proven by a preponderance of the evidence." *Elyashiv*, 353 F. Supp. 2d at 404 (alteration and internal quotation marks omitted). As noted *supra* in the Findings of Fact section, the Court finds that a preponderance of the evidence indicates that Petitioner engaged in emotionally abusive conduct towards Respondent. Although Respondent may not have proven that Petitioner made all the statements that she attributed to him (in terms of both frequency and content), Petitioner's claim that he never mistreated Respondent through any verbal abuse is simply not credible in light of: (1) the supporting evidence that Respondent had contemporaneously mentioned the psychological abuse to other people in the United Kingdom; (2) Respondent's actions in fleeing to the domestic abuse shelter, which the Court finds that a person would not do for no reason whatsoever; and (3) Respondent's PTSD diagnosis upon arriving in New York.

However, the Court is presented with much less evidence regarding any physical abuse by Petitioner; these allegations are less specific and much less corroborated by additional evidence. Indeed, the only references to physical abuse prior

to the initiation of these proceedings are statements Respondent allegedly made to the therapist; however, the therapist's contemporaneous notes do not mention physical abuse and her explanation for its absence was not sufficiently persuasive to establish that any such abuse had occurred. And, the evidence is entirely insufficient to find that Petitioner abused the child physically, sexually, or psychologically. Although the therapist testified that the child clearly showed signs of trauma when they first met, the therapist was unable to pinpoint the source of that trauma. Before arriving in New York, the child frequently witnessed her parents argue, fled her home with no warning, ceased contact with her father, her grandmother, and her mother's family with whom she often spent time, and lived for seven months in a shelter that Respondent described as very stressful and unpleasant. Thus, there is reason to believe that, whether in combination or in isolation, the time the child spent at the shelter, as well as being uprooted from her life in the United Kingdom, certainly could have been the cause, or the primary cause, of the trauma that the child was suffering upon her arrival in the United States. The Court therefore agrees with Dr. Fraser's conclusion that based on the record before the Court, it is impossible to determine, by even a preponderance of the evidence, that the child's trauma was caused by anything Petitioner did to the child. *Cf. Reyes Olguin*, 2005 WL 67094, at *7 (rejecting the petitioner's suggestion that the child's PTSD may have been caused by something other than the abuse, such as separation from his father and the escape to the United States,

because the expert "ruled out any other source for the PTSD except for [the petitioner's] violent behavior").

Moreover, the courts that determined that the Article 13(b) exception applied have done so when presented with uncontroverted expert testimony and other credible evidence that the child would face grave risk if returned. For example, in *Blondin*, the only expert testified that a return to France would almost certainly trigger the child's PTSD; the Second Circuit held that "[a] grave risk of psychological harm, even construed narrowly, undoubtedly encompasses an almost certain recurrence of traumatic stress disorder." *Blondin IV*, 238 F.3d at 163 (alterations and internal quotation marks omitted). Here, Dr. Cling testified that removing the child from her stable United States environment could have a "catastrophic effect" and that the child would very likely be at risk for another psychological breakdown. In contrast, Dr. Fraser agreed that the child should not be returned to her father's custody without further investigation (as he believes is true in any case involving abuse allegations), but testified that if the move was properly framed to the child, the child could return to the United Kingdom with her mother for a custody evaluation without suffering trauma or being at grave risk of harm.

The Court therefore agrees with Petitioner that Respondent has failed to carry her burden of establishing by clear and convincing evidence that returning to the United Kingdom would pose a grave risk of harm to the child. There is simply insufficient evidence that merely returning to the United Kingdom—even if that country was the

site of some of the child's trauma, whether caused by the child witnessing Petitioner's abuse of Respondent or by being in the shelter—in and of itself would present a grave risk. By all accounts the child is doing quite well now; in fact, she had stopped therapy because it was determined that it was no longer needed. Respondent has two sisters in the United Kingdom with whom the child had spent time prior to leaving that country. In his post-trial memorandum and at the Oral Argument, Petitioner suggested several undertakings that could help ensure the child's safe transition to the United Kingdom. Petitioner is not suggesting that either the Respondent or the child would live with him in London and he in fact represented that he would not want to have any contact with Respondent outside the courtroom. Moreover, there is no evidence that Petitioner would not comply with any court orders that would allow for, or require, such arrangements. Petitioner made use of the United Kingdom's legal system to try and locate the child. Given the narrowness of this exception, and the presumption of the Hague Convention in favor of returning the child, the Court concludes that there is insufficient evidence to support the application of the grave risk defense in this case.

2. The Settled Defense

The Convention provides that where a period of more than one year has elapsed between the dates of the wrongful removal of the child and "the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is," the judicial or admin-

istrative authority "shall [ ] order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Hague Convention, art. 12, *reprinted in* 51 Fed. Reg. 10,495, 10,499. For this defense to apply, Respondent must persuade the Court, by a preponderance of the evidence, that the child should not be returned to the United Kingdom because the child has been in New York for more than one year and has become settled. *See* 42 U.S.C. § 11603(e)(2)(B). Article 12 does not define "settled" or state how this defense is to be proved, but the burden falls upon the party opposing the return of the child to establish the defense, while at the same time, preserving the discretionary power of a court to determine whether or not the defense justifies refusing to repatriate the child. *See Perez-Vera Report, supra*, ¶ 109.

"To the extent that Article 12 permits [a] court[ ] . . . to deny repatriation on this basis, it effectively allows [the court] to reach the underlying custody dispute, a matter which is generally outside the scope of the Convention." *Blondin IV*, 238 F.3d at 164. "Although there is nothing magical about one year, its basic purpose is designed to serve the best interests of the child . . . ." *In re Robinson*, 983 F. Supp. 1339, 1345 (D. Colo. 1997) (footnote omitted). Thus, although the Convention's aim is to return the child without considering the custody merits, the Convention realized that at some point, a child may become so settled in his or her new country that repatriation might no longer be in the child's best interests. However, given the Convention's underlying goals, "nothing less than substantial evidence of the child's sig-

nificant connections to the new country is intended to suffice to meet the respondent's burden of proof." State Dep't Legal Analysis § III(I)(1)(c), 51 Fed. Reg. at 10,509. In addition, the Court must also consider evidence concerning the child's contacts with and other ties to her State of habitual residence, in this case the United Kingdom. *See id.*

In discussing the selection of the one-year period, the Convention's Reporter explained that "the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard." *Perez-Vera Report, supra*, ¶ 107. The Convention acknowledged the potential difficulties in establishing a child's whereabouts but concluded that a "single time-limit of one year" was the best option. *Id.* ¶ 108. The date is measured based on when proceedings under the Hague Convention were commenced. *See id.*[16]

[16] In his Memorandum of Law, Petitioner also points out that he filed his ICARA application in March 2010, well less than a year after Respondent and the child left the United Kingdom. (Pet'r Mem. 19.) However, the date of the filing of the application is irrelevant; the one-year period is measured from when the Petition was actually filed in this Court. *See Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) ("The petition must be filed with the court of record, not the Central Authority, to file within the one-year [period]."); *Belay v. Getachew*, 272 F. Supp. 2d 553, 561 (D. Md. 2003) (noting that courts "have uniformly held that the filing of a petition in the courts 'commences' the judicial proceedings under the Convention," not applying to a Central Authority (emphasis in original)).

a. Equitable Tolling

In the instant case, the Petition was filed more than a year after the wrongful removal of the child. The child was removed from the United Kingdom in July 2009 and Petitioner did not file his Petition in this Court until November 10, 2010. However, Petitioner asserts that the one-year period should be equitably tolled because Respondent concealed the whereabouts of the child from Petitioner, preventing him from timely filing his Petition. Accordingly, Petitioner maintains that the Article 12 defense is not available to Respondent and that the Court must order the child's return.

Neither the Hague Convention nor ICARA mention equitable tolling, and the Second Circuit has not considered whether the one-year period in Article 12 may be tolled. However, a number of courts outside the Second Circuit have applied equitable tolling, concluding that refusing to toll the one-year period would create incentives for abducting parents to conceal the child's whereabouts until after one year had lapsed and thus reward the behavior the Convention seeks to prevent. *See, e.g., In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009) ("[A] court may equitably toll the one-year period where . . . (1) the abducting parent concealed the child and (2) that concealment caused the petitioning parent's filing delay."); *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008) (concluding that "applying equitable principles to toll the one-year filing period in circumstances where the abducting parent hides the child is consistent with the purpose of the

Convention to deter child abduction" because, although there are "serious concerns with uprooting a child who is well settled regardless of whether the abducting parent hid the child," giving an affirmative defense to parents for hiding a child would encourage both child abductions and hiding children from parents seeking return); *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) ("[E]quitable tolling may apply to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking return."); *Wasniewski v. Grzelak-Johannsen*, No. 06-CV-2548, 2007 WL 2071957, at *6 (N.D. Ohio July 13, 2007) (weighing concern for "rewarding an abductor for concealing a child long enough for the child to become 'well-settled'" against the harm "associated with a 'second removal,' uprooting the child from the place to which he now has developed ties," and concluding that "[a]lthough not a statute of limitations, Article 12's proscribed time frame should not be considered" where a parent absconds with the child "without prior notice or post-abduction contact"); *Belay v. Getachew*, 272 F. Supp. 2d 553, 563 (D. Md. 2003) (concluding that although "Article 12 may not be a statute of limitations per se, it should be subject to some form of equitable tolling" because "where the actions of the abductor in concealing the child may have abetted the child in forming roots in the new country, [courts] must have the flexibility to take into account those actions in determining the outcome of the case under Article 12"); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) ("If equitable tolling does not apply to

ICARA and the Hague Convention, a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available.").[17]

However, the only court within the Second Circuit to consider this issue determined that equitable tolling does not apply to the Article 12 settled defense. *See Matovski*, 2007 WL 2600862, at *11. The *Matovski* court concluded that "the one-year period in Article 12 is not a limitations period, nor is it analogous to a limitations period [because] . . . '[a] petition for return of the child *is not barred if it is filed over one year from the date of removal*.'" *Id.* at *12 (quoting *Anderson v. Acree*, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002)) (emphasis in *Matovski*). Instead, the *Matovski* court concluded that the settled defense "is a recognition that, after the passage of a sufficient period of time, the child's interests in remaining in an established environment may be superior to the interest of the petitioning parent [and thus,] [e]quitable tolling, if accepted, would place the interests of the petitioning parent above those of the potentially settled child simply because the petitioner may have had good reason for failing to

[17] Some of these courts have also noted that limitation periods are usually subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute. *See, e.g., Duarte*, 526 F.3d at 570 ("'It is hornbook law that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle.'" (quoting *Young v. United States*, 535 U.S. 43, 49-50 (2002))); *Furnes*, 362 F.3d at 723 (same).

file sooner." *Id.* Therefore, in the court's view, "[e]quitable tolling would be inconsistent with the Convention's careful balancing of interests" and, therefore, concluded that it does not apply to Article 12. *Id.*

A few other courts, although far less than the majority, have agreed. *See, e.g., Anderson*, 250 F. Supp. 2d at 875 ("[T]he drafters of the Hague Convention decided that after the passage of a year, it became a reasonable possibility that the child could be harmed by its removal from an environment into which the child had become settled, and that the court ought to be allowed to consider this factor in making the decision whether to order the child's return. This potential of harm to the child remains regardless of whether the petitioner has a good reason for failing to file the petition sooner, such as where the respondent has concealed the child's whereabouts."); *Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass. 1998) ("The language of the Convention is unambiguous, measuring the one-year period from the date of the wrongful retention. It might have provided that the period should be measured from the date the offended-against party learned or had notice of the wrongful retention, but it does not. That is not surprising, since the evident import of the provision is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitation does, but rather to put some limit on the uprooting of a settled child." (alteration, citation, and internal quotation marks omitted)), *vacated on other grounds*, 191 F.3d 23 (1st Cir. 1999).

The Court agrees with the conclusion reached in *Matovski*. The one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling. A petitioner is not barred from bringing a petition after the one-year period has lapsed; rather, after that point, a court must consider the countervailing consideration that the child may now be better served remaining where he or she is currently located. It is clear, from both the wording of Article 12 and the *Perez-Vera Report*, that the purpose of the settled defense is not to give petitioners a reasonable amount of time in which to bring their claims, as is the function of most statutes of limitations. Instead, the purpose is to take into account that if the child has become settled, its interests have to be weighed. And the Convention decided that after one year had passed, the child's interests would almost presumptively carry more weight than the interest of a petitioner.

The Court acknowledges that in some respects, this seems to be inconsistent with the goals of the Convention because, of course, there is a concern that this defense could reward or encourage abducting parents to hide their children from the other parent in such a way, and for a sufficient length of time, that the children are allowed to become settled. However, presumably the drafters of this exception were aware of that concern and, nevertheless, balanced the competing interests at stake and decided to include a defense providing for the reality that even if a child is wrongfully removed, after a certain amount of time has passed, it could be too harmful to a child to order that he or she be removed once again. They could

have chosen a longer length of time, but, for whatever reason, they decided on one year.

Moreover, the Convention does provide a mechanism to account for the principles underlying the equitable tolling argument—the court's discretion. As the Second Circuit has explained, "if more than one year has passed, a demonstration that the child is now settled in its new environment may be a *sufficient* ground for refusing to order repatriation." *Blondin IV*, 238 F.3d at 164 (emphasis in original). But, a court is not required to return a settled child. *See Blondin II*, 189 F.3d at 246 n.4 (noting that even if a defense has been established, "the district court is not necessarily bound to allow the child to remain with the abducting parent"); *see also Matovski*, 2007 WL 2600862, at *12 ("Because the denial of a petition pursuant to Article 12 is discretionary, equitable tolling is unnecessary to deter an abductor from concealing the whereabouts of a wrongfully removed or retained child."). A court may take into consideration efforts by the abducting parent to conceal the child, or by the searching parent to find the child, in determining whether to repatriate the child even though the child was deemed to be settled. While the Convention and ICARA do not mention equitable tolling, the Department of State, in its public notice explaining the Convention, did state:

> The reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating

> a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

State Dep't Legal Analysis § III(I)(1)(c), 51 Fed. Reg. at 10,509. The courts that have tolled the one-year period have cited this passage as evidence that equitable tolling should apply to petitions brought under the Convention. *See, e.g., Duarte,* 526 F.3d at 570. However, the Court believes that instead of turning the Article 12 one-year period into something that it was not intended to be—a statute of limitations—concealment of a child is simply one factor for the Court to consider in making its ultimate determination.

In any event, even if equitable tolling could apply to Convention petitions, the Court does not believe that tolling would be warranted in this case. The record makes clear that Petitioner made certain efforts to locate the child using the United Kingdom's legal system. He was uncertain that the child was in the United States, or had even left the United Kingdom, until well after Respondent and the child were living in New York; although Petitioner suspected that Respondent might come to her sister in New York, he also contemporaneously indicated that Respondent might have taken the child to Colombia. And, Petitioner testified that he wanted to make absolutely sure that the child was not in the United Kingdom before bringing this Petition.

Yet, it remains the case that Respondent took the child to her sister Maria in New York, the same sister that Respondent had visited immediately before leaving Petitioner in November 2008. At the Evidentiary Hearing, Petitioner testified that when Respondent took that trip to New York, she gave him the phone number and address of where she would be staying.[18] Petitioner emphasizes that he did not call Maria because he was following the legal advice of his solicitors not to contact Respondent or her family and that Respondent's family in London had told him to stay away if he did not want trouble. While Petitioner's attempts to follow the proper legal channels are laudable, there is no reason why his solicitors could not have contacted Maria in New York to see if Respondent and the child were there, as they contacted Respondent's family in London. Petitioner had reason to believe that this very location might be one of the places to which Respondent would bring the child and had contact information; accordingly, his failure to file the Petition until November 2010 is not excused.

At the Oral Argument, Petitioner's counsel proposed February 22, 2010, as the date that Petitioner knew that the child was probably in New York. (Oral Arg. Tr. 11.) In his Memorandum of Law, Petitioner also asserts that he could not file his Petition until November 2010 because he was unable to obtain legal counsel in the United States

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[18] As previously noted, in the disclosure applications Petitioner submitted in the United Kingdom, he indicated that he only had the sister's phone number in New York, and not her address. Regardless, he did have some contact information for the sister in New York.

until that time. (Pet'r Mem. 19.) The Court recognizes that Petitioner's difficulty in obtaining counsel to submit his Petition is unfortunate and might explain part of the delay, but reiterates that the purpose of the Article 12 exception is not to serve as a limitation period; instead, the exception focuses on the importance of the interest of the child who is now settled in the new environment. Therefore, although the delay in filing the Petition may not be entirely Petitioner's fault, the Court cannot conclude that his efforts to locate the child and bring the Petition within the one-year period outweigh the interests of the child, if the child is deemed to be settled in New York.

Moreover, although Respondent did not tell Petitioner where she and the child were—and admittedly did not want him to find them—she also did not conceal the child to an extent that would warrant equitable tolling, if it was available. In this case, unlike many of the cases where equitable tolling was applied, Respondent did not go to a place that Petitioner could not have imagined she would go, nor did she move the child from one location to another or take other steps to remain hidden. *Cf. Mendez Lynch*, 220 F. Supp. 2d at 1363. Instead, Respondent took the child to New York to live with the same sister that Respondent had visited in November 2008, right before leaving Petitioner. Upon arriving in New York, Respondent enrolled the child in school, did not change either her or the child's names, and has stayed in the same place. Thus, Respondent

simply has not engaged in egregious conduct to ensure that Petitioner could not find the child.[19]

b. The Merits of the Settled Defense

Therefore, because the child had been in New York for approximately sixteen months at the time the Petition was filed, the Court must consider whether the child has become settled in her new environment. To establish the merits of this exception, Respondent "must show by a preponderance of the evidence that the child is in fact settled in or connected to the new environment so that, at least inferentially, return would be disruptive with likely harmful effects." *Koc*, 181 F. Supp. 2d at 152 (internal quotation marks omitted); *see also Matovski*, 2007 WL 2600862, at *13 ("Respondent must marshal substantial evidence of the child's significant connections to New York." (internal quotation marks omitted)). Among the factors that courts have considered in determining whether or not a child has become settled are: "the age of the child[;] the stability of the child's residence in the new environment[;] whether the child attends school or day care consistently[;] whether the child attends church [or other religious institutions] regularly[;] the stability of the mother's employment[;] and whether the child has friends

[19] There is evidence in the record, particularly in the therapist's notes from Respondent's early sessions, that Respondent was concerned that Petitioner would find out where she and the child were living and considered hiding. (PX3 at R0066, R0068-R0070, R0077.) But, she did not; she stayed living with the very sister that she knew that Petitioner knew she had previously visited and could have gone to stay with when she left the United Kingdom.

and relatives in the new area." *Koc* 181 F. Supp. 2d at 152; *see also Matovski*, 2007 WL 2600862, at *13 (same); *Reyes Olguin*, 2005 WL 67094, at *8 (same).

Here, a number of these factors support a finding that the child is now settled, and there are some that do not. As Petitioner pointed out during the Oral Argument, most of the evidence on this issue came from Respondent herself and, to a lesser extent, from the therapist and from the child's school records that were submitted into evidence. However, Respondent is correct that much of the evidence of the child's connections to her new environment is undisputed. It is true that Petitioner himself is not in a position to contradict the evidence, as he has not seen or spoken to the child since she moved to New York, but the Court does not believe there is any reason to doubt its veracity.

At the time Petitioner initiated this action, by all indications, the child had been living in one place for sixteen months, which is a long period of time in the life of a five-year-old. Since they arrived in New York, Respondent and the child have lived in the same location with Respondent's sister, the sister's partner, Respondent's niece, and the niece's daughter; the child has become close to this family, and also sees other extended family who live nearby on the weekends. Her school records show that she was enrolled in pre-kindergarten last year, and currently attends kindergarten at the same school. The child's pre-kindergarten report cards state that she was progressing socially and academically. Petitioner points out that the child missed fourteen days of

school in her first semester, but young children can often get sick and miss a lot of school; the absences do not lead to a conclusion that the child is not settled. Respondent testified that the child has made friends at school with whom she sometimes plays after school and meets at the park or library, goes to ballet class, and attends church. Both experts testified that Respondent appropriately cares for the child, and the child told Dr. Fraser that she loves where she lives and is happy here in New York. The therapist also testified that the child has improved dramatically since she began seeing her and seems to be doing very well here in her current environment.[20]

However, Respondent is unemployed and she and the child are entirely dependent on Respondent's sister Maria and Maria's partner for financial support. In *Matovski*, the court concluded, in similar circumstances to here, that the mother's inconsistent employment history was not a major factor because the children and mother were financially supported by the children's grandparents, with whom the children and mother lived, rendering their overall financial stability "reasonably assured." *Matovski*, 2007 WL 2600862, at *14 (determining that overall, there was "substantial, persuasive evidence" that the children had significant connections to their new environment because they had lived in the same home since arriving in New York, consistently attended

[20] Petitioner argues that the child's current residence is not stable because of potential drug issues (Pet'r Mem. 20); however, as noted *supra*, the Court finds there is no evidence indicating that anyone living in the house, or anyone the child is in contact with, currently has a drug problem.

school and activities with the same classmates, socialized and played with many friends, and were attached to their large extended family in New York). In contrast, in *Koc*, the court viewed the mother and child's financial dependence on the mother's parents as a negative factor, *see Koc*, 181 F. Supp. 2d at 154, but there they also received support from public services, *see id.*, and had only lived with the child's grandparents for the first three months of the twenty-seven months that they had been living in New York prior to the filing of the petition, *see id.* at 140-41. Under the circumstances presented in the instant case, the Court finds that there is nothing to suggest that the financial and other support that the child and Respondent are receiving from Maria's family is in jeopardy, or is unlikely to continue for the foreseeable future.

At the Oral Argument, Petitioner, while acknowledging that a five-year-old can be well settled, argued that it is harder for a young child to build the same types of connections as an older child and asserted that Respondent had not presented enough evidence of connections. While the child is only five years old, she is old enough to form attachments, but also young enough that her involvement in extracurricular and community activities is somewhat limited. However, there is uncontroverted testimony that the child has made friends and is engaged in some activities. Indeed, a number of courts have found that children of similar ages to the child here were settled in very similar factual circumstances. *See Edoho v. Edoho*, No. 10-CV-1881, 2010 WL 3257480, at *6 (S.D. Tex. Aug. 17, 2010) (concluding that four-

and six-year-old children were settled where they had lived in Houston for almost two years, had significant contact with extended family who lived close by, participated in activities, attended church and Sunday school, and the older child was enrolled in school, even though respondent was unemployed but looking for employment); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) (determining that three-year-old child was settled where she was performing at two to three age levels above her own, was well-liked and had a core group of friends, often attended community cultural events, and had many relatives in the region); *Zuker v. Andrews*, 2 F. Supp. 2d 134, 141 (D. Mass. 1998) (explaining that four-year-old child was settled because he had attended the same daycare center for over a year even though he had moved once, the center's director said that the child had thrived academically and socially, he had relationships with teachers and children, attended birthday parties and play dates at his home and friends' homes, saw his grandmother often, and no contrary evidence was introduced); *Robinson*, 983 F. Supp. at 1346 (finding that there was significant, undisputed evidence that children ages five and ten were settled in their new environment where they had lived in the same area for twenty-two months, had relationships with the respondent's extended family, were doing well in school and had made friends, and were involved in extracurricular activities).

There is also some concern as to the immigration status of Respondent and the child. They have both overstayed their visas and thus are not legally in the United States. In *Koc*, the court, in

determining that the child was not settled, took into account that she and her mother had overstayed their visas and were in the country illegally, which the court noted would make it virtually impossible for the child to see her father if she remained in the country. *See Koc*, 181 F. Supp. 2d at 154. However, the Ninth Circuit has rejected the idea that immigration status should render an otherwise settled child not settled, concluding that immigration status should only be a significant factor in the settled analysis if there is an immediate, concrete threat of deportation. *See B. del C.S.B.*, 559 F.3d at 1010-14. Here, there is no indication that Respondent and the child face an imminent, or any, threat of deportation, and there is unrefuted testimony from Respondent that she is looking into methods to gain legal status, including having her sister Maria, who is a United States citizen, sponsor Respondent and the child for citizenship. There is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and Respondent is likely to upset the stability of the child's life here in New York.

It is true that the child's life is not perfect. Although the child has, by all accounts, vastly improved through therapy, she still has some struggles, including a recurrence of wetting herself and having tantrums. The therapist's notes indicate that in the fall of 2010, the child had difficulties regarding her mother's new boyfriend (PX3 at R0122), although no mention was made of this relationship at the Evidentiary Hearing. The child also apparently had two issues at school where she claimed a teacher and another student

had kissed and inappropriately touched her; following these incidents, Respondent was unhappy with the school's response.

However, the child's life does not have to perfect for her to be settled. Viewing the totality of the circumstances, the description of the child's life, as presented to the Court, suggests stability in her family, educational, social, and most importantly, home life. Courts that have found that a child was not settled have tended to do so in cases where, unlike here, a child has moved frequently and therefore not had a stable living situation. *See, e.g., Lutman v. Lutman*, No. 10-CV-1504, 2010 WL 3398985, at *5-6 (M.D. Pa. Aug. 26, 2010) (declining to find that nine-year-old child was settled despite evidence that he was doing well in school because the child had resided in three different locations and attended three different schools in the two years since he was wrongfully retained, had far more family in Israel than in the United States, had a limited network of friends, did not engage in extracurricular or community activities, and the respondent father had been with his current employer for only fifteen months and had a history of financial and employment instability); *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1282-83 (N.D. Ga. 2004) (ten-year-old child who had lived in the United States for two-and-a-half years was not well settled despite regularly attending and performing well in school, participating in extracurricular activities, and having friends because, since arriving, she had moved three times, attended three different schools, had almost no family in the United States, and was here illegally); *In re Ahumada Cabrera*, 323 F.

Supp. 2d 1303, 1313-15 (S.D. Fla. 2004) (nine-year-old child was not settled even though she had lived in the United States for two-and-a-half years, consistently attended and performed well in school, played soccer, and had friends, because she had changed residences five times and schools once, had only her mother and her aunt in the United States, could be deported, and was subject to her mother's uncertain immigration status and employment prospects); *Koc*, 181 F. Supp. 2d at 153-55 (finding that eight-year-old child was not settled because she had lived in three locations and attended three different schools in the two-and-a-half years she had been in the United States, did not regularly participate in extracurricular school or religious activities, did not socialize with school friends outside of class or have friends in the neighborhood, had many friends and family back in Poland, and had uncertain immigration status and financial support, although she was doing well in school and saw some family in the area).

After considering all of these factors, the Court concludes that the preponderance of the evidence demonstrates that the child is settled in her current environment. To uproot her once again would be extremely disruptive; she has reached the "point at which [she has] become so settled in [her] new environment that repatriation [is] not . . . in [her] best interest." *Blondin IV*, 238 F.3d at 164. Accordingly, the Court finds that the elements of the Article 12 defense have been met.

D. Discretion

As already noted, a finding that the child is settled does not end the analysis. The Court must consider whether to exercise its discretion and repatriate the child even though she is now settled in New York. Thus, the Court has considered the points discussed earlier regarding the efforts of Petitioner to locate the child, the fact that Respondent—regardless of whether she hid the child—did abscond with the child and leave the United Kingdom in violation of Petitioner's parental rights, and Petitioner's compelling interest in having his child returned to the United Kingdom. But the Court is persuaded that it should not exercise its discretion in this case to return the child. As explained above, there is strong evidence that the child is quite settled in New York. Although Petitioner was fairly diligent in searching for her, his efforts do not outweigh the child's interest in remaining in her current, stable environment. Nor does Respondent's conduct, although clearly inconsistent with the Convention, justify such an exercise of discretion in this case.

In reaching this conclusion, the Court has also considered the specific impact of returning to the United Kingdom on this particular child. By all accounts the child is much improved since arriving in the United States, but she clearly is more vulnerable than an average five-year- old who has never experienced trauma—regardless of the source of the trauma. Even though the Court has concluded that the child would not be at a grave risk of harm if returned, the expert testimony did indicate that such a move, at this time, would be

difficult for the child. This particular child does seem, in the Court's view, to be more fragile than other children, and ordering that she be forced to leave her present stable environment, where she is currently doing well, and returned to the United Kingdom for a custody proceeding would not be appropriate at this time. Such an uprooting potentially would be traumatic enough that, in the exercise of discretion, it outweighs Petitioner's arguments regarding the equities.

Furthermore, the Court reiterates that its decision to deny the Petition is not a custody determination; nor does it mean that Petitioner should not have contact with the child or that Respondent can keep the child away from Petitioner. *See Muhlenkamp*, 521 F. Supp. 2d at 1153 ("The district court cases that have found in favor of the respondent clearly demonstrate that a temporary order on custody should not be issued."); *Wojcik v. Wojcik*, 959 F. Supp. 2d 413, 421 (E.D. Mich. 1997) ("The Court's decision [to deny the petition because the child is settled] is not a decision on who should have custody of the children, or where the children should ultimately live, or even that the children are settled in the United States for the purposes of determining custody."). Instead, this ruling is merely a decision that the custody determination should be made by a court in New York, as opposed to one in the United Kingdom. *See Matovski*, 2007 WL 2600862, at *15 (declining to exercise discretion to grant petition where the Article 12 defense was established, because the courts of the United States and Australia were both competent to consider issues of custody and visitation, travel to Australia for a custody deter-

mination would disrupt the children's schooling, social relationships, and routines, and the father could participate in a New York state court case as he had done in the Hague Convention petition case; therefore, it was "more sensible that any judicial proceedings over custody and visitation occur where the children ar[e] now settled"). Accordingly, the child should not be returned to the United Kingdom at this time and the custody arrangement of the child should be determined by a New York court.[21]

III. Conclusion

For the reasons stated herein, Petitioner has established a prima facie case of wrongful removal under the Hague Convention. Respondent has failed to establish that sending the child back to the United Kingdom for a custody determination would expose the child to a grave risk of harm or place her in an intolerable situation. However,

[21] The Court acknowledges that this outcome is in many ways unfair to Petitioner, who has been denied access to his child for over two years now. And the Court recognizes that because neither Petitioner nor Respondent appears to have the finances or immigration status to be able to travel easily between the United Kingdom and New York for a custody hearing, this outcome does disadvantage Petitioner (and his opportunities to have a meaningful relationship with his child). But the Convention provides for the settled defense, the merits of which the Court has determined have been established here. And, in the end, given that she is now settled in New York, the Court believes the child is simply too fragile to justify forcing her to return to the United Kingdom at this time.

Respondent has demonstrated that at the time the Petition was filed, the child had been in New York for more than a year and has become settled in her new environment. Lastly, the Court chooses not to exercise its discretion to order the child returned even though she is now settled. Accordingly, the Petition is denied.[22]

SO ORDERED.

Dated: White Plains, New York
August 22, 2011

/s/ KENNETH M. KARAS
KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

[22] Because the Court is denying the Petition, Petitioner's request for an order directing Respondent to pay Petitioner's legal costs and fees is also denied.

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International Child Abduction Remedies Act (ICARA)

42 U.S.C. § 11601–11610 (2005)

Sec. 11601. Findings and Declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

Sec. 11602. Definitions

For the purposes of this chapter—

(1) the term 'applicant' means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term 'Convention' means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term 'Parent Locator Service' means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term 'petitioner' means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term 'person' includes any individual, institution, or other legal entity or body;

(6) the term 'respondent' means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term 'rights of access' means visitation rights;

(8) the term 'State' means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term 'United States Central Authority' means the agency of the Federal Government designated by the President under section 11606(a) of this title.

Sec. 11603. Judicial Remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter—

(1) the term 'authorities', as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms 'wrongful removal or retention' and 'wrongfully removed or retained', as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term 'commencement of proceedings', as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pur-

suant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

Sec. 11604. Provisional Remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

Sec. 11605. Admissibility of Documents

With respect to any application to the United States Central Authority, or any petition to a

court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

Sec. 11606. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act (42 U.S.C. 301 et seq.), obtain information from the Parent Locator Service.

Sec. 11607. Costs and Fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

Sec. 11608. Collection, Maintenance, and Dissemination of Information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority—

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which—

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13; shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or

(2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

Sec. 11609. Interagency Coordinating Group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central

Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the inter-agency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies.

Sec. 11610. Authorization of Appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

[LETTERHEAD OF HCCH]

28. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION[1]

(Concluded 25 October 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

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[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Child Abduction Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where—

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organi-

sations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a

proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by—

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the

Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it

has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

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.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV—RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V—GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is

not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as

between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI—FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference

on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or rati-

fication, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force—

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Explanatory Report by Elisa Perez-Vera

First Part—General characteristics of the Convention

9 The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (article 19), but on the other hand it is equally clear that the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent.

I. OBJECT OF THE CONVENTION

10 The title of this chapter alludes as much to the problem addressed by the Convention as to the objectives by which it seeks to counter the increase in abductions. After tackling both of these points, we shall deal with other connected questions which appreciably affect the scope of the Convention's objectives, and in particular the importance which has been placed on the interest of the child and on the possible exceptions to the

rule requiring the prompt return of children who have been wrongfully removed or retained.

A *Definition of the Convention's subject-matter*

11 With regard to the definition of the Convention's subject-matter,[10] we need only remind ourselves very briefly that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child. The variety of different circumstances which can combine in a particular case makes it impossible to arrive at a more precise definition in legal terms. However, two elements are invariably present in all cases which have been examined and confirm the approximate nature of the foregoing characterization.

Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed. What is more, in this context the type of

[10] See in particular the *Questionnaire and Report on international child abduction by one parent,* prepared by Mr. Adair Dyer, Prel. Doc. No 1, August 1977, *supra,* pp.18-25 (hereafter referred to as the 'Dyer Report'), and the Report on the preliminary draft Convention, adopted by the Special Commission, Prel. Doc. No. 6, May 1980, *supra*, pp. 172-173.

legal title which underlies the exercise of custody rights over the child matters little, since whether or not a decision on custody exists in no way alters the sociological realities of the problem.

Secondly, the person who removes the child (or who is responsible for its removal, where the act of removal is undertaken by a third party) hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother.

14 It frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about. However, if he is uncertain about the way in which the decision will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative. Now, even if the latter acts quickly, that is to say manages to avoid the consolidation through lapse of time of the situation brought about by the removal of the child, the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims.

15 To conclude, it can firmly be stated that the problem with which the Convention deals—together with all the drama implicit in the fact that it is concerned with the protection of children in international relations—derives all of its legal importance from the possibility of individuals

establishing legal and jurisdictional links which are more or less artificial. In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision, especially one coexisting with others to the opposite effect issued by the other forum, will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to 'legalize' a factual situation which none of the legal systems involved wished to see brought about.

B *The objectives of the Convention*

16 The Convention's objects, which appear in article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the *status quo,* by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'. The insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules[11] indeed

[11] Such an option was rejected in the course of the first meeting of the Special Commission. *Cf. Conclusions drawn from the discussions of the Special Commission of March 1979 on legal kidnapping,* prepared by the Permanent Bureau, Prel. Doc. No 5, June 1979, *supra,* pp. 163-164.

resulted in this route being followed which, although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal.

17 Besides, although the object stated in sub-paragraph *b,* 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States' appears to stand by itself, its teleological connection with the 'return of the child' object is no less evident. In reality, it can be regarded as one single object considered at two different times; whilst the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor, effective respect for rights of custody and of access belongs on the preventive level, in so far as it must lead to the disappearance of one of the most frequent causes of child abductions.

Now, since the Convention does not specify the means to be employed by each State in bringing about respect for rights of custody which exist in another Contracting State, one must conclude that, with the exception of the indirect means of protecting custody rights which is implied by the obligation to return the child to the holder of the right of custody, respect for custody rights falls almost entirely outwith the scope of the Convention. On the other hand, rights of access form the subject of a rule which, although undoubtedly incomplete, nevertheless is indicative of the interest shown in ensuring regular contact between

parents and children, even when custody has been entrusted to one of the parents or to a third party.

18 If the preceding considerations are well-founded, it must be concluded that any attempt to establish a hierarchy of objects of the Convention could have only a symbolic significance. In fact, it would seem almost impossible to create a hierarchy as between two objects which spring from the same concern. For at the end of the day, promoting the return of the child or taking the measures necessary to avoid such removal amount to almost the same thing.

Now, as will be seen below, the one matter which the Convention has tried to regulate in any depth is that of the return of children wrongfully removed or retained. The reason for this seems clear: the most distressing situations arise only after the unlawful retention of a child and they are situations which, while requiring particularly urgent solutions, cannot be resolved unilaterally by any one of the legal systems concerned. Taken as a whole, all these circumstances justify, in our opinion, the Convention's development of rules for regulating the return of the child, whilst at the same time they give in principle a certain priority to that object. Thus, although theoretically the two above-mentioned objects have to be placed on the same level, in practice the desire to guarantee the re-establishment of the *status quo* disturbed by the actions of the abductor has prevailed in the Convention.

19 In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provi-

sions of article I, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken—in which case the violated custody rights were exercised *ex lege*—as to a removal in breach of a pre-existing custody decision.

C *Importance attached to the interest of the child*

20 Above all, one has to justify the reasons for including an examination of this matter within the context of a consideration of the Convention's objects. These reasons will appear clearly if one considers, on the one hand, that the interests of the child are often invoked in this regard, and on the other hand, that it might be argued that the Convention's object in securing the return of the child ought always to be subordinated to a consideration of the child's interests.

21 In this regard, one fact has rightly been highlighted, *viz.* that 'the legal standard 'the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture?

The word 'ultimate' gives rise to immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the 'interests' of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age'.[12]

22 On the other hand, it must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignore the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.

23 For these reasons, among others, the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which

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[12] Dyer Report, *supra,* pp. 22-23.

concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'.

24 These two paragraphs in the preamble reflect quite clearly the philosophy of the Convention in this regard. It can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child. In this regard it would be as well to refer to Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe, the first general principle of which states that 'children must no longer be regarded as parents' property, but must be recognized as individuals with their own rights and needs'.[13]

In fact, as Mr. Dyer has emphasized, in the literature devoted to a study of this problem, 'the presumption generally stated is that the true vic-

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[13] Parliamentary Assembly of the Council of Europe. 31st Ordinary Session, *Recommendation on a European Charter on the Rights of the Child*. Text adopted on 4 October 1979.

tim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and un-known teachers and relatives'.[14]

25 It is thus legitimate to assert that the two objects of the Convention—the one preventive, the other designed to secure the immediate reintegration of the child in to its habitual environment—both correspond to a specific idea of what constitutes the 'best interests of the child'. However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.

26 What is more, the rule concerning access rights also reflects the concern to provide children with family relationships which are as comprehensive as possible, so as to encourage the development of a stable personality. However, opinions differ on this, a fact which once again throws into relief the ambiguous nature of this principle of the

interests of the child. In fact, there exists a school of thought opposed to the test which has been accepted by the Convention, which maintains that it is better for the child not to have contact with both parents where the couple are separated in law or in fact. As to this, the Conference was aware of the fact that such a solution could sometimes prove to be the most appropriate. Whilst safeguarding the element of judicial discretion in individual cases, the Conference nevertheless chose the other alternative, and the Convention upholds unequivocally the idea that access rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child.

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Article 2—General obligation of Contracting States

62 Closely related to the objects stated in broad and flexible fashion in article 1*b* is the fact that this article sets forth general duty incumbent upon Contracting States. It is thus a duty which, unlike obligations to achieve a result which are normally to be found in conventions, does not require that actual results be achieved but merely the adoption of an attitude designed to lead to such results. In the present case, the attitude and behaviour required of States is expressed in the requirement to 'take all appropriate measures to secure within their territories the implementation of the objects of the Convention'. The Convention also seeks, while safeguarding the 'self-executing' character of its other articles, to encourage Con-

tracting States to draw inspiration from these rules in resolving problems similar to those with which the Convention deals, but which do not fall within its scope *ratione personae* or *ratione temporis*. On the one hand, this should lead to careful examination of the Convention's rules whenever a State contemplates changing its own internal laws on rights of custody or access; on the other hand, extending the Convention's objects to cases which are not covered by its own provisions should influence courts and be shown in a decreasing use of the public policy exception when questions concerning international relations which are outwith the scope of the Convention fall to be decided.

63 Moreover, the last sentence of the article specified one of the particular means envisaged, while stressing also the importance placed by the Convention on the use of speedy procedures in matters of custody or access rights. However, this provision does not impose an obligation upon States to bring new procedures into their internal law, and the correspondence now existing between the French and English texts rightly seeks to avoid such an interpretation, which the original French text made possible. It is therefore limited to requesting Contracting States, in any question concerning the subject-matter of the Convention. to use the most expeditious procedures available in their own law.

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Articles 12 and 18—Duty to return the child

106 These two articles can be examined together since they complement each other to a certain extent, despite their different character.

Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return. That is why it is appropriate to emphasize once again the fact that the compulsory return of the child depends, in terms of the Convention, on a decision having been taken by the competent authorities of the requested State. Consequently, the obligation to return a child with which this article deals is laid upon these authorities. To this end, the article highlights two cases; firstly, the duty of authorities where proceedings have begun within one year of the wrongful removal or retention of a child and, secondly, the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.

107 In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it—something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child ' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard.

108 Several questions had to be faced as a result of this approach: firstly, the date from which the time-limit was to begin to run; secondly, extension of the time-limit; thirdly, the date of expiry of the time-limit. As regards the first point, *i.e.* how to determine the date on which the time-limit should begin to run, the article refers to the wrongful removal or retention. The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence. Secondly, the establishment of a single time-limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission. In fact, the application of the Convention was thus clarified, since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated. Thirdly, as regards the *terminus ad quem,* the article has retained the date on which proceedings were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention.

To sum up, whenever the circumstances just examined are found to be present in a specific case, the judicial or administrative authorities must order the return of the child forthwith,

unless they aver the existence of one of the exceptions provided for in the Convention itself.

109 The second paragraph answered to the need, felt strongly throughout the preliminary proceedings,[41] to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted[42] plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.

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41 See Report of the Special Commission, No 92.

42 See Working Document No 25 (Proposal of the delegation of the Federal Republic of Germany) and *P.-v.* Nos 7 and 10.

110 One problem common to both of these situations was determining the *place* to which the child had to be returned. The Convention did not accept a proposal to the effect that the return of the child should always be to the State of its habitual residence before its removal. Admittedly, one of the underlying reasons for requiring the return of the child was the desire to prevent the 'natural' jurisdiction of the courts of the State of the child's residence being evaded with impunity, by force. However, including such a provision in the Convention would have made its application so inflexible as to be useless. In fact, we must not forget that it is the right of children not to be removed from a particular environment which sometimes is a basically family one, which the fight against international child abductions seeks to protect. Now, when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the latter's present place of residence.

111 The third paragraph of article 12 introduces a perfectly logical provision, inspired by considerations of procedural economy, by virtue of which the authorities which are acquainted with a case can stay the proceedings or dismiss the application, where they have reason to believe that the child has been taken to another State. The reasons by which they may come to such a conclusion

are not stated in the article, and will therefore depend on the internal law of the State in question.

112 Finally, *article 18* indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time. This provision, which was drafted on the basis of article 15 of the Preliminary Draft, and which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, *i.e.* where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment.

Excerpts from the Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Question 13 (page 149)

Please indicate any important developments since the Special Commission of 2001 in your jurisdiction in the interpretation of Convention concepts, in particular the following:

a) rights of custody (Articles 3 a) and 5 a));

b) habitual residence (Articles 3 a) and 4);

c) rights of access (Article 5 b));

d) the actual exercise of rights of custody (Articles 3 b) and 13(1)a));

e) the settlement of the child in his/ her new environment (Article 12(2));

f) the one year period

United States Response (page 217)

f) The U.S. Supreme Court has stated that, unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations. *Young v. U.S.*, 535, U.S. 43, 122 S.Ct. 1036, 1040, 152 L.Ed. 2d 79 (2002). Several courts have held that equitable tolling may be applied to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking the return. The courts reason that if they did not permit equitable tolling, the parent who abducts and conceals chil-

dren for more than a year will be rewarded for this misconduct by creating eligibility for an affirmative defense not otherwise available. The Eleventh Circuit has held that the one year limitation period begins on the date the petitioner discovers the new residence of a child whose whereabouts have been concealed by the other parent. *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337 (S.D.Fla. 2002); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347 (M.D.Fla. 2002). In *In re Cabrera*, the father had given the mother permission to take their child from Argentina to the United States for one year. After one year, the father realized that the mother was not returning the child and he began Hague proceedings. The court found that Article 12's statute of limitations should be equitably tolled to the time when the left-behind parent becomes aware of the taking parent's intent to remove or retain the child, providing the child is not settled in its new environment. *In re Cabrera*, 323 F. Supp. 2d 1303 (S.D.Fla. 2004).

In *Belay v. Getachew* a mother abducted her child from Sweden to Colorado and concealed her whereabouts. The father searched for three years before he located them and filed for a return under the Hague Convention. The court determined that the mother wrongfully removed the child, but that she had established that the child was well-settled in its new environment. The court held that although the mother had established the "well-settled" defense, equity mandated that the child be returned because the child only became well-settled as a result of the mother's conceal-

ment of their whereabouts. The court held that to allow the Article 12 defense to apply in such a case would essentially be rewarding the behavior that the Convention specifically seeks to deter. *Belay v. Getachew*, 272 F.Supp. 2d 553 (D.Md. 2003).

Question 67 (page 568)

States are invited to comment on any other matters which they may wish to raise concerning the practical operation of the 1980 Convention or the implementation of the 1996 Convention.

United States Response (page 577)

United States:

See response to question # 30 on our concern over the use of excessive undertakings. Also, see response to question # 13(f), where we discuss equitable tolling of the filing deadline under the Convention. The USCA supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition.

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE]

August 20, 2012

By Electronic Mail

Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the
Second Circuit
500 Pearl Street
New York, New York 10007

Re: *Lozano v. Montoya Alvarez*,
Docket No. 11-2224

Dear Ms. Wolfe:

By invitation of the Court and pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States (the "Government") respectfully submits this memorandum brief as *amicus curiae*, regarding the proper interpretation of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11,670, S. Treaty Doc. No. 99-11, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (Mar. 26, 1986) (the "Hague Convention" or the "Convention").

Interest of the United States

The questions presented in this case concern the proper interpretation of Article 12 of the Hague Convention. The United States has a substantial interest in the manner in which the Convention is

interpreted by the courts of this country. Moreover, "the Executive Branch's interpretation of a treaty is entitled to great weight," *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010), particularly in light of the Department of State's involvement in the negotiation and implementation of the Convention,[1] *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

Questions Presented

By letter dated July 11, 2012, this Court requested the State Department's views on two questions: (1) whether equitable tolling applies to the one-year period that triggers the availability of the "now settled" defense under Article 12 of the Convention; and (2) in determining whether a child is "now settled" within the meaning of Article 12, what significance should be given to a child's lack of legal immigration status in the United States.

The Government's responses, as further explained below, are as follows. (1) Equitable tolling does not apply to the one-year period under Article 12; instead, the court retains equitable dis-

[1] The Department of State represented the United States at the negotiation of the Convention, recommended that the President transmit it to the Senate for approval, was instrumental in proposing its implementing legislation to Congress, has attended periodic international meetings to review the operation of the Convention, and is designated pursuant to the Convention as the United States' "Central Authority," with responsibility for cooperating with its counterparts in other states parties to "secure the prompt return of children and to achieve the other objects of this Convention." Hague Convention, arts. 6, 7; *see* 22 C.F.R. § 94.2.

cretion to order a child's return at any time. A court may do so even if the child is "now settled." And in appropriate circumstances, a court may determine that it need not consider whether a child is "settled" because the court would, in any event, exercise its equitable discretion to order the child's return.[2] (2) The child's immigration status should not be dispositive standing alone, but may be one factor in a court's determination of whether the child is now settled in her new environment.

Background

A. The Hague Convention

The Hague Convention, implemented by the United States through the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11611 ("ICARA"), was "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott*, 130 S. Ct. at 1989. The Convention provides that a child abducted in violation of "rights of custody" must be returned to the child's country of habitual residence, unless certain exceptions apply. Convention, art. 1.

A child who is "wrongfully removed"[3] from a country must be returned to the child's country of

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[2] As explained more fully below, the term "equitable tolling," which applies in the statute-of-limitations context, is a poor fit under Article 12 of the Convention. By using the phrase "equitable discretion," we mean to invoke broadly a court's inherent equitable authority.

[3] Removal is "wrongful[ ]" if it is "in breach of rights of custody . . . under the law of the State in which the child was habitually resident," and "at the time of removal or

habitual residence, unless certain exceptions apply. Convention, art. 1; *accord* 42 U.S.C. § 11601(a)(4); *Blondin v. Dubois* ("*Blondin II*"), 189 F.3d 240, 245 (2d Cir. 1999). As relevant to this case, when more than one year has elapsed between the wrongful removal and "the commencement of the proceedings" where the child is located, the judicial authority "shall . . . order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Hague Convention, art. 12.[4] The party opposing the child's return must establish that the child is settled by a preponderance of the evidence, 42 U.S.C. § 11603(e)(2), but a finding that the child is settled does not, by itself, result in the denial of a petition, as the court retains discretion to order the child's return, *Blondin v. Dubois* ("*Blondin IV*"), 238 F.3d 153, 164 (2d Cir. 2001).

B. The District Court's Decision

On November 10, 2010, Manuel Jose Lozano filed a petition in the district court for the Southern District of New York, pursuant to the Hague

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retention those rights were actually exercised." Convention art. 3.

[4] Other exceptions to mandatory return exist when the person seeking return of the child "was not actually exercising custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention," *id.*, art. 13(a); "there is a grave risk" that the return of the child "would expose it to physical or psychological harm," *id.*, art. 13(b); and the return of the child "would not be permitted under the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms," *id.*, art. 20.

Convention and ICARA, requesting that the court issue an order requiring that his daughter be returned to London. *Lozano v. Montoya Alvarez*, 809 F. Supp. 2d 197, 202 (S.D.N.Y. 2011). After an evidentiary hearing and oral argument, the district court denied the petition. *Id.* at 203. Because the petition was filed more than one year after the child's removal, the court held that the respondent, Diana Lucia Montoya Alvarez, could assert the "now settled" defense under Article 12. *Id.* at 226-28.[5] The court rejected petitioner's argument that the one-year period should "toll," but noted that even if the child is now settled, it is still in the court's discretion to order the child returned. *Id.* at 228-29 (citing *Blondin IV*, 238 F.3d at 164, and *Blondin II*, 189 F.3d at 246 n.4). "A court may take into consideration efforts by the abducting parent to conceal the child, or by the searching parent to find the child, in determining whether to repatriate the child even though the child was deemed to be settled." *Id.* at 229.

The court thus considered whether the child is "now settled" and concluded that she was. *Id.* at 231. As part of the analysis, the district court considered "the immigration status of [Montoya Alvarez] and the child." *Id.* at 232. The court rejected Lozano's argument that because Montoya Alvarez and the child have overstayed their visas,

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[5] The court held, in the alternative, that even if it could extend the one-year period, such "tolling" would not be warranted. 809 F. Supp. 2d at 229. The court found that although Montoya Alvarez "did not tell" Lozano of her whereabouts, "she also did not conceal the child," and Lozano had good reason to know Montoya Alvarez's whereabouts. *Id.* at 229-30.

the child cannot be "settled." *Id.* at 232-33. Because "there is no indication that [Montoya Alvarez] and the child face an imminent, or any, threat of deportation," and Montoya Alvarez "is looking into methods to gain legal status," the court reasoned, "there is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and [Montoya Alvarez] is likely to upset the stability of the child's life here in New York." *Id.* at 233.

Finally, the district court declined to exercise its discretion to order the child's return to the United Kingdom, reasoning that the "child's interest in remaining in her current, stable environment" outweighed other considerations. *Id.* at 234.

ARGUMENT

POINT I

Equitable Tolling Does Not Apply to Article 12's One-Year Period, but the Court May Exercise Equitable Discretion at Any Time to Order the Child's Return, and in Appropriate Cases May Do So Without Determining Whether the Child Is Now Settled

Article 12's one-year period is not subject to "equitable tolling." Equitable tolling would have the effect—unintended by the Convention—of foreclosing a district court's analysis of whether a child is now settled in all cases where equitable tolling is applied, regardless of the length of time a child may have lived in her new environment. Instead, a district court retains equitable discre-

tion at all times to consider all factors and order that a child who is now settled should nonetheless be returned. A court may also consider all equitable factors and determine it will decline to undertake the now-settled inquiry. In exercising that equitable discretion, however, the court should remain cognizant that the degree to which the child has become settled is relevant to whether she should be returned.[6]

A. Equitable Tolling Principles

Because Article 12's one-year period is not a statute of limitations, it is not subject to equitable tolling. That doctrine "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (cited in *United States v.*

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[6] It may not be necessary for the Court in this case to reach the question of whether the one-year period is subject to equitable tolling, because the district court held that "even if equitable tolling could apply, tolling would not "be warranted in this case." 809 F. Supp. 2d at 229. That alternative holding was well supported by the district court's findings. The two courts of appeals that have permitted equitable tolling have done so when the abducting parent actively concealed the child's whereabouts, *see In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009); *Furnes v. Reeves*, 362 F.3d 706, 723 (11th Cir. 2004), though in this brief, the Government does not address whether grounds other than concealment would warrant the exercise of equitable discretion. In this case, the district court found that respondent "did not conceal" the child. 809 F. Supp. 2d at 230. Indeed, the district court's findings suggest that for much of the one-year period, petitioner suspected or even knew the child's whereabouts. *See id.*at 210 n.11, 229.

Ibarra, 502 U.S. 1, 4 n.2 (1991)). Limitations periods and equitable tolling thus both balance "the right to be free of stale claims" against "the right to prosecute them," *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quotation marks omitted), the latter taking into account one party's "misleading conduct . . . responsible for the [claimant's] unawareness of his cause of action," *Dillman v. Combustion Engineering, Inc.*, 784 F.2d 57, 60 (2d Cir. 1986).

But unlike a statute of limitations, Article 12's one-year period expiration does not preclude a petitioner from filing a claim or concern only the parties' rights. Rather, it determines whether a court should automatically order the return of a child without regard to her current circumstances, by setting a threshold criterion for whether a respondent may assert a defense that the child has become settled in her new environment. *See Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27 (1989) (60-day notice provision is not statute of limitations). Applying equitable tolling would entirely preclude district courts, once they have concluded that equitable tolling is appropriate, from considering whether the child is settled and would obligate those courts to order the child's return "forthwith." Foreclosing in all such cases consideration of a third party's interests would not serve the purposes of the equitable tolling doctrine, and, as explained below, would not comport with the text and history of the Convention.

B. Text of the Convention

"'The interpretation of a treaty, like the interpretation of a statute, begins with its text.'"

Abbott, 130 S. Ct. at 1990 (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)).

Article 12's text does not suggest that the one-year period is subject to equitable tolling. Article 12 provides that "[w]here a child has been wrongfully removed," if "a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." It further states that "even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Nothing in the text indicates that the period can be extended. Given that the Convention addresses conduct that is by definition "wrongful" and often surreptitious, the drafters presumably considered the possibility of concealment by the abducting parent, yet they made no provision for an extension of the one-year period. In context, that silence is compelling.

The Convention's text, however, leaves a district court with equitable discretion that may, in appropriate cases, yield a similar result. As this Court has recognized, the "now settled" provision is an "exception" which "allows . . . but does not . . . require" a district court to refuse to order the child's return. *Blondin IV*, 238 F.3d at 164. Article 12 thus does not purport to limit the court's equitable discretion to order return, even in cases filed more than a year after the abduction, if the facts justify that remedy. Even when the court has concluded that the child is now settled in the new country, the court could ultimately hold that the

abducting parent's conduct in concealing the child's whereabouts (and any other equitable factors) justify returning the child to her habitual residence. Nothing in Article 12, moreover, suggests that a court must perform the "now settled" inquiry before it decides that the child should be returned. Given that Article 12 contemplates that a finding of settlement could be outweighed by other equitable factors, it follows that Article 12 also permits the court to forgo the "settled" inquiry when the court concludes that the facts justify ordering return regardless of whether the child is "now settled." This interpretation is consistent with Article 18, which provides that "[t]he provisions of this Chapter [enumerating defenses] do not limit the power of a judicial or administrative authority to order the return of the child *at any time*." Convention, art. 18 (emphasis added). Accordingly, in an appropriate case, *e.g.*, where a parent's behavior is so egregious as to warrant a return order irrespective of the child's degree of assimilation, a court may order a child's return without determining whether the child is now settled. The court thus possesses "equitable discretion" not simply to balance the various interests once they have all been explored, but to make the antecedent determination whether a "now settled" inquiry is necessary to its determination.[7]

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[7] Presumably, a district court's exercise of this discretion would be reviewed on appeal for abuse of discretion. *See Baran v. Beaty*, 526 F.3d 1340, 1349 (11th Cir. 2008) (abuse-of-discretion review of decision to deny return after grave-risk defense established); *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007) (discretion vests in court upon establishment of defense, and court should be permitted

C. History of the Convention

The Convention's drafting history confirms that equitable tolling is inapplicable. "Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, [courts] have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (citation omitted); *accord Air France v. Saks*, 470 U.S. 392, 396, 400 (1985) ("In interpreting a treaty it is proper . . . to refer to the records of its drafting and negotiation."); *see also* Vienna Convention on the Law of Treaties, concluded on May 23, 1969, Art. 32, 1155 U.N.T.S. 331, 340.[8]

The drafters recognized that after enough time elapses, it may not be prudent to return the child automatically. A preliminary report studying the problem of one-parent kidnapping indicated that "[t]ime is an important factor in the adjustment of the child to his new situation" and that a "court may find it more difficult to send back a child who has been forced to adjust to his new situation for a period of six months or more." Adair Dyer,

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adequate discretion in ordering or declining return); *In re Adan*, 437 F.3d 381, 398 n.9 (3d Cir. 2006) (suggesting abuse-of-discretion review of return order following establishment of grave-risk defense).

[8] Although the United States has not ratified the Vienna Convention on the Law of Treaties, the United States generally recognizes the Convention as an authoritative guide to treaty interpretation. See, *e.g., Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001).

Report on International Child Abduction by One Parent, in *3 Actes et Documents, Quatorzième Session* 12, 23-24 (1982). And the Special Commission formed to address the issue initially suggested that while a child should be returned to its home country immediately, if "an application has been made more than six months after the removal" of the child and the child has been "habitually resident" in the new country for more than one year, then the court will "assume jurisdiction to determine" the proper custody arrangement rather than simply returning the child. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping*, in *3 Acts et Documents* 162, 164.

The drafting history also reflects an understanding that a parent who wrongfully removes a child may attempt to conceal the child's whereabouts. *See, e.g., Replies of the Governments to the Questionnaire*, in *3 Acts et Documents* 61, 88 ("There is a sixth problem which is becoming all too common—the taking and concealment of a child by a parent before or after a custody decree."). The preliminary draft thus sets out a two-tier time-period for requiring immediate return, depending on whether the child's location was known. *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Perez-Vera*, in *3 Actes et Documents* 166, 168 (providing that if fewer than six months had elapsed, the authority had to "order the return of the child forthwith"; if the child's location "was unknown," the six months would "run from the date of discovery," but the "total period" could not exceed one year).

In response to the preliminary draft, certain delegates expressed concern that determining when the parent discovered, or should have discovered, the child's location could cause "considerable difficulty." *Procès-verbal No. 7, Procèsverbaux et Documents de travail de la Première commission* in *3 Actes et Documents* 290, 291 (United Kingdom comment). After extensive debate about the structure and length of the time period, the delegates voted for a single, one- year period. *See Procès-verbal No. 7*, at 291-93. The United States urged a longer period in light of the difficulty of locating the child, *see Procès-verbal No. 7*, at 292, a suggestion that presupposes that the single period would not toll at least for that reason.

In response to "the consequences" of "a short time-limit of one year," Germany proposed that for two additional years after the one-year period elapsed, a country still be required to return a child, unless "the child was now settled in his new environment." *Id.* at 295. That proposal led to the "now settled" language of Article 12. As described by the United States, the Convention thus provided for a one-year period in which "no assimilation of the child was presumed to have occurred" and "return could be refused only on the grounds set forth" expressly, *e.g.*, severe risk to the child. *Procès-verbal No. 10*, *Procèsverbaux et Documents de travail de la Première commission* in *3 Actes et Documents* 312, 315. After this initial one-year period, "assimilation became an open question." *Id.*

The Convention's Explanatory Report describes this compromise and suggests that that the one-

year period was not intended to toll.[9] See Elisa Pérez-Vera, *Explanatory Report*, in *3 Actes et Documents* 426, ¶¶ 107-09, at 458. The Report explains the drafters' understanding of Article 12, that ordinarily "return of the child is regarded as being in its interests," but after "a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights." *Id.* ¶ 107. Because of "difficulties" in "stat[ing] this test of 'integration of the child' as an objective rule," the Convention's drafters used a one-year time limit to trigger whether a court may consider such matters. *Id.* In adopting that time limit, the drafters were cognizant of "the difficulties encountered in establishing the child's whereabouts," yet still chose a "single time- limit of one year" and thereby "eliminated" the "inherent difficulty in having to prove the existence of those problems which can surround the locating of the child." *Id.* ¶ 108.

More generally, the Report notes that the Convention "recognizes the need for certain exceptions to the general obligations assumed by the States to secure the prompt return of children who have been unlawfully removed or retained," as "con-

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[9] While the Supreme Court has declined to decide what weight to give the Explanatory Report, *see Abbott*, 130 S.Ct at 1995, it is the "official history" and commentary on the Convention and "a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it," 51 Fed. Reg. at 10,503. Accordingly, it is proper to look to the *Explanatory Report* to illuminate the meaning of the Convention's text. *See Saks*, 470 U.S. at 400; *Croll* v. *Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000) (*Explanatory Report* is "authoritative" interpretive guide).

crete illustrations" of the principle that the child's interests are to be the "guiding criterion." *Id.* ¶ 25. Article 12 is one of those exceptions, constituting an acknowledgment that the interests of the child may be served by examining her settlement into her new environment if at least one year has passed before the petition is filed. *Id.* ¶¶ 107-09.[10] The rationale of permitting that examination related to the child's interests further suggests that tolling the one-year period due to the parent's actions would not be consistent with the Convention.

Due to these concerns, in the lead-up to the 2006 Special Commission meeting on the practical operation of the Convention, the United States' written response to the Questionnaire from the Hague Conference on Private International Law expressly stated that "[t]he [United States Central Authority] supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition."[11] During the discussion of

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[10] The Convention's drafters understood that the examination of settlement would have an impact on achieving the prompt return of a wrongfully removed child. Article 12's first paragraph (regarding proceedings commenced before the one-year period) requires the court to "order the return of the child forthwith." But, as the Report notes, the Convention's omission of the word "forthwith" from the second paragraph of Article 12 results from the drafters' acknowledgment that the urgency of proceedings diminishes after a year has passed. *Id.* ¶ 109.

[11] Consistent with the discussion above, use of the phrase "equitable tolling" here should be understood in the

this issue in the Special Commission, no delegation disagreed.

D. Case Law of Other Signatory States

Other signatory countries have generally agreed that the one-year period is not subject to equitable tolling, but that courts have equitable discretion to return a child who is now settled and may consider an abducting parent's conduct when exercising that discretion. When interpreting the Hague Convention, the "views of other contracting states" are "entitled to considerable weight." *Abbott*, 130 S. Ct. at 1993 (quotation marks omitted). "The principle applies with special force" to the Hague Convention, "for Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Id.* (quoting 42 U.S.C. § 11601(b)(3)(B)).

For example, in *Cannon v. Cannon*, the Court of Appeal for England and Wales stated that even where the "abductor may have caused or contributed to the period of delay that triggers [Article 12's 'now settled' defense]," it "would not support a tolling rule." [2004] EWCA (Civ) 1330 (Eng.) ¶¶ 39, 51. "[D]isregard[ing]" the "period gained by concealment," would be "too crude an approach which risks . . . produc[ing] results that offend what is still the pursuit of a realistic Convention outcome." *Id.* Instead, the court reasoned that because of the "emotional and psychological" effects of concealing a child, when there is concealment "the burden of demonstrating the necessary elements of emotional and psychological

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sense of the availability of the exercise of equitable discretion.

settlement were much increased." *Id.* ¶ 61. And "even if settlement is established," the court still could "order a return under the Convention." *Id.* ¶ 62; *see also In re M*, [2007] UKHL 55, [2008] 1 A.C. 1288; *In re C* (2005) 1 F.L.R. 938, 948-949 (Fam. 2004).

Courts in Canada, Hong Kong, and New Zealand have not tolled Article 12's one-year period but several have noted that concealment may nonetheless factor into a court's ultimate determination of whether to order a child's return. *See Kubera v. Kubera*, [2010] 2010 B.C.C.A. 118 (Court of Appeal for British Columbia) ¶¶ 64-69; *A. v. M.*, [2002] 209 N.S.R.2d 248 ¶¶ 74-82 (Nova Scotia Court of Appeal); *A.C. v. P.C.*, [2005] H.K.C. 839 (Hong Kong Court of First Instance); *Secretary for Justice (New Zealand Central Authority) v. H.J.*, [2006] N.Z.S.C. 97 (Supreme Court of New Zealand) ¶¶ 60-70, 86-88.[12]

E. Decisions of United States Courts

A number of courts in the United States have held that Article 12's one-year period may be tolled, including two federal courts of appeals in published decisions and one in an unpublished decision. *See Duarte v. Bardales*, 526 F.3d 563, 569-71 (9th Cir. 2008);[13] *Furnes v. Reeves*, 362

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[12] A Swiss court has also assessed the now-settled defense even in a case of concealment. *Justice de Paix du Cercle de Lausanne*, July 6, 2000, No. J 765 CIEV 112E (Magistrate's Court Switzerland). However, no official English translation appears available.

[13] Another Ninth Circuit panel, however, has expressed doubt about this rule. See *In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009). The latter panel noted that Article 12's

F.3d 702, 723-24 (11th Cir. 2004); *see also Dietz* v. *Dietz*, 349 Fed. App'x 930, 933 (5th Cir. 2009). These courts did not have the Department of State's views. They also mistakenly began with the premise that Article 12's one-year period is a limitations period that is presumed to toll. *See, e.g., Duarte*, 526 F.3d at 570; *Furnes*, 362 F.3d at 723.

Some of these courts reasoned that "awarding an abducting parent an affirmative defense if that parent hides the child from the parent seeking return" would "encourage child abductions" and "encourage hiding the child from the parent seeking return." *Duarte*, 536 F.3d at 570. However, a court's equitable discretion means that a parent who conceals a child will not necessarily be rewarded. Although incorrectly placing this discretion under the rubric of "equitable tolling," case law in the United States reaffirms the courts' discretion to order a child's immediate return even after the one-year period has elapsed.

F. Purposes of the Convention

Finally, it is consistent with the overriding purposes of the Convention to recognize that courts have equitable discretion to decide whether to consider the "now settled" defense. Otherwise, judges would have no discretion to decline to consider the

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one-year period "is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but rather to put some limit on the uprooting of a settled child." *Id.* Thus, the panel stated that they must "adhere closely to the parameters set by *Duarte* so as to ensure that the Convention's concern over uprooting children is not sacrificed to its aim of deterring child abductions." *Id.*

defense, no matter what the particular facts of the case may be. Absent any kind of equitable authority to limit the impact of the one-year trigger period, the abducting parent's incentives to engage in bad behavior, such as concealing the child, to reach the one-year trigger could undermine the overarching purpose of the Convention. Because "now settled" inquiries are often highly fact-intensive, undertaking that inquiry could turn what should be a swift examination under the Convention of whether there was a wrongful removal or retention into a drawn-out evidentiary proceeding. This is the type of delay that the Convention seeks to avoid, particularly where the equities of the case would dictate against providing the abducting parent with the possibility of such a time-consuming defense. The Convention is most effective if parents know they cannot benefit from abducting a child.

* * *

In sum, "equitable tolling," in the traditional sense, of Article 12's one-year period to preclude consideration of the child's settlement is not warranted. But the court considering a petition filed more than a year after the child's wrongful removal may still exercise equitable discretion to require the child's return. The court may exercise that discretion to forgo an inquiry into whether the child is now settled in her current environment.

POINT II

Immigration Status May Be Considered in the "Now Settled" Analysis as One of Several Factors, but Standing Alone Should Not Be Dispositive

A child's or parent's immigration status may be considered in determining whether the child is settled under Article 12, but the proper weight accorded to it rests with the court's discretion and varies from case to case. In general, however, the mere fact that the child or her parent lacks lawful immigration status should not be independently dispositive of the "now settled" question.

The text and history of the Convention are silent regarding immigration status. Neither the Convention nor ICARA defines "settled" or states how a child's settlement is to be proved, *see* Pérez-Vera Report ¶ 109, and the term itself suggests substantial discretion to consider the facts of each case. The Convention's overarching focus on a child's well-being suggests that this inquiry concerns a child's practical circumstances. Courts have accordingly looked to numerous factors pertaining to a child's attachments and stability.[14]

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[14] Among the factors that courts have considered when conducting the "now settled" analysis are: "(1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability." *In re B. del C.S.B.*, 559 F.3d at 1009.

The degree to which a child's immigration status affects whether the child is settled will necessarily vary. A child who does not currently have lawful immigration status may nonetheless soon obtain lawful status or, in any event, continue to live in the United States with little threat of removal. *See Plyler v. Doe*, 457 U.S. 202, 226 (1982); *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("[a] principal feature of the removal system is the broad discretion exercised by immigration officials" considering "immediate human concerns" and that "[i]f removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country"). Conversely, some aliens may have permission to remain temporarily in the United States but nonetheless be at risk of being removed—for instance, an alien may be granted "deferred action," which may be terminated by the Government in its discretion at any time, or "temporary protected status," which must be terminated when country conditions improve.

Foreign courts have given varying weight to immigration status, depending on the circumstances of the case. *See, e.g.*, *A. v. M.* (2002), 209 N.S.R. 2d 248, ¶¶ 79-85 (Nova Scotia Ct. App. 2002) (child had lived in Canada for several years and established roots through friends, schooling, and activities, but mother's "illegal presence" "raises the question of whether she will be able to remain" in the country and "makes it difficult, if not impossible, to work"); *In Re C (A Child)* [2006] EWHC (Fam) 1229, 2006 2 F.L.R. 797 ¶¶ 54-57 (Eng.) (child living in England for 5 years and integrated into a small community of friends, rel-

atives, and school, is settled despite threat of deportation).

American courts have widely agreed that immigration status may be considered only as one factor in the broader "now settled" inquiry. The Ninth Circuit has expressly rejected the argument that immigration status alone is dispositive. *In re B. del C.S.B.*, 559 F.3d at 1009-14. District courts, including the one in this case, have agreed. *See Demaj v. Sakaj*, No. 09-cv-255, 2012 WL 476168, at *4-5 (D. Conn. Feb. 14, 2012); *Etienne v. Zuniga*, No. C10-5061, 2010 WL 4918791, at *3 (W.D. Wash. Nov. 24, 2010); *Edoho v. Edoho*, A. No. H-10-1881, 2010 WL 3257480, at *4 (S.D. Tex. Aug. 17, 2010).[15]

Thus, immigration status may be considered by the court in the now-settled inquiry, but should not be independently dispositive. Particular immigration- related circumstances may cast doubt on the stability of the child's residence—for instance, as the Ninth Circuit has recognized, "an immediate, concrete threat of removal can . . . constitute

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[15] Others have considered immigration status in finding a child not to be "now settled," but, consistent with the Government's view, only as one factor in a broader inquiry. *E.g.*, *Castillo v. Castillo*, 597 F. Supp. 2d 432, 439-40 (D. Del. 2009); *In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001); *Lopez v. Alcala*, 547 F. Supp. 2d 1255, 1260 (M.D. Fla. 2008); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004); *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1282 (N.D. Ga. 2004). *Cf. Asuncion Mota v. Rivera Castillo*, F.3d , No. 12-180, 2012 WL 3330176, at *7 (2d Cir. Aug. 15, 2012) (considering immigration status as one factor among others in determining whether child had "acclimatized" to new location thus acquired new habitual residence, i.e., outside "now settled" context).

a significant factor with respect to the question whether a child is 'settled.'" *In re B. del C.S.B.*, 559 F.3d at 1010. A court in weighing the evidence may consider other particular reasons to find that lack of lawful immigration status renders the child unsettled. However, standing alone, the child's lack of lawful immigration status should not be considered dispositive of the question whether a child is "now settled."

Conclusion

The Court should adopt the interpretation of Article 12 of the Hague Convention as described above.[16]

Dated: New York, New York
August 20, 2012

[16] Petitioner suggests that the State Department was obligated to locate or secure legal representation for him. *See* Appellant's Brief at 27-28; Appellant's Reply Brief at 10. That is mistaken. The State Department has no obligation to locate or secure *pro bono* representation for Hague Convention petitioners. The United States took a reservation to the Convention requirement that would require otherwise. *See* Hague Convention, art. 26 (allowing states to make a reservation declaring that it "shall not be bound to assume any costs . . . . resulting from participation of legal counsel or advisers or from court proceedings").

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