United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 22-50203

ABIGAIL GRAMILLO GALAVIZ,

Plaintiff—Appellant,

versus

LUIS ENRIQUE REYES,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:21-CV-286

Before RICHMAN, *Chief Judge*, and HO and ENGELHARDT, *Circuit Judges*.

PRISCILLA RICHMAN, *Chief Judge*:

The opinion issued October 11, 2023,[1] is WITHDRAWN, and the following opinion is SUBSTITUTED.

Abigail Galaviz and Luis Reyes had a son and daughter while living in Mexico. The young children remained in that country with Galaviz when their parents separated. In July 2021, Reyes took the children to El Paso,

[1] *Galaviz v. Reyes*, 84 F.4th 389 (5th Cir. 2023).

Texas and refused to return them. Galaviz filed an action in federal district court requesting the return of the children to Mexico under the Hague Convention on the Civil Aspects of International Child Abduction[2] (to which we will refer as the Hague Convention). Reyes raised affirmative defenses under Articles 20 and 13(b), asserting that returning the children would violate a fundamental right to an education and would expose them to a grave risk of harm or an intolerable situation. The district court ruled in favor of Reyes and denied Galaviz's request for return of the children. Galaviz appealed. We reverse and remand.

I

After Galaviz and Reyes separated, the children remained in Juarez, Mexico under Galaviz's care. Reyes moved out of the home and relocated to El Paso, Texas. In July 2021, Reyes took the children to El Paso for an appointment with a physician and refused to return them to their mother or to Mexico. In August, Galaviz filed a petition for custody of the children with the Seventh Family Court for Hearings in the Judicial District of Bravos, Chihuahua, Mexico.

In October 2021, Galaviz submitted an Application for Return of her Children to the United States Department of State, the Central Authority of the United States under the Hague Convention. The United States Department of State sent a letter via email to Reyes requesting that he voluntarily return the children. In November, Galaviz filed a Verified Petition for the Return of the Children under the Hague Convention and the International Child Abduction Remedies Act (ICARA)[3] in the Western District of Texas, El Paso Division. At the time of the proceedings in district

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[2] Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

[3] 22 U.S.C. § 9001 *et seq.*

court, Galaviz had not obtained service on Reyes, and there were no formal custody or possession court orders in place governing the parents' custodial rights. The son was five years old, and the daughter was four years old.

The district court held a trial and heard two days of testimony. Reyes conceded that Galaviz met her burden of establishing a prima facie case of wrongful removal by a preponderance of the evidence. The burden then shifted to Reyes, who opposed the return, to establish an exception.[4] Reyes raised exceptions set forth in Articles 20 and 13(b) of the Convention.

As to Reyes's Article 20 defense, the district court concluded that "[Galaviz's] inability to be present with the children, as required so that they can attend school, effectively denies the children the fundamental right to an education," and "[t]he denial of an education to two special needs children in their most formative years utterly shocks the conscience of the court." As to Reyes's Article 13(b) defense, the court concluded that "[t]he incidents of abuse and neglect collectively and the strong suggestion of sexual abuse constitute a grave risk of physical and psychological harm and an intolerable situation should the children return to Juarez." The court concluded that Reyes had established the exceptions upon which he relied by clear and convincing evidence[5] and denied Galaviz's request for the return of the children to Mexico. This appeal followed.

II

The Hague Convention "requires that a child wrongfully removed from her country of habitual residence be returned there upon petition" unless the removing parent can establish an affirmative defense to mandatory

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[4] 22 U.S.C. § 9003(e)(2).

[5] *See id.* § 9003(e)(2)(A) (providing that the exceptions set forth in Articles 13b and 20 of the Convention must be established by clear and convincing evidence).

return.[6] "The Convention's primary aims are to 'restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.'"[7] "The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence."[8] ICARA is the United States' implementing legislation of the Hague Convention.[9] Under ICARA, once a petitioner has established by a preponderance of the evidence that the child was wrongfully removed or retained, the burden shifts to the respondent to establish an affirmative defense.[10]

III

We first consider Article 20. "The Article 20 defense allows repatriation to be denied when it 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.'"[11] A parent resisting repatriation of a child based on Article 20 has the burden of establishing by clear and convincing evidence that this exception applies.[12] Article 20 is to be "restrictively interpreted and applied."[13] It "is not to be used . . . as a vehicle for litigating

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[6] *England v. England*, 234 F.3d 268, 270 (5th Cir. 2000).

[7] *Id.* at 271 (quoting *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996)).

[8] *Abbott v. Abbott*, 560 U.S. 1, 20 (2010).

[9] 22 U.S.C. § 9001(b)(1).

[10] *Id.* § 9003(e).

[11] *Souratgar v. Lee*, 720 F.3d 96, 108 (2d Cir. 2013) (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10510 (Mar. 26, 1986) (Convention Text and Legal Analysis)).

[12] 22 U.S.C. § 9003(e)(2)(A).

[13] Convention Text and Legal Analysis, 51 Fed. Reg. at 10510.

custody on the merits or for passing judgment on the political system of the country from which the child was removed."[14]

A

We must first determine the applicable standard of review. Galaviz asserts in her briefing that we should review the district court's factual findings for clear error and reverse if, based on the entire record and in light of the heightened burden of proof, we are left with the definite and firm conviction that a mistake has been committed. Galaviz further asserts that a district court's conclusions of law that certain facts establish a defense to the return of a child to her home country are reviewed de novo. Reyes's briefing states that in resolving disputes under the Hague Convention, factual findings are reviewed for clear error and conclusions of law de novo. Neither party expressly discusses the standard of review applicable to "mixed" questions of law and fact, and our initial opinion in this case did not do so either.

In recent years, the Supreme Court has held in a Hague Convention case[15] and in a bankruptcy proceeding[16] that "[m]ixed questions [of law and fact] are not all alike."[17] The Court has explained that, "[i]n short, the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work."[18] The Court held in *Village at*

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[14] *Id*.

[15] *Monasky v. Taglieri*, 140 S. Ct. 719 (2020).

[16] *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 583 U.S. 387 (2018).

[17] *Id.* at 395-96.

[18] *Id.* at 396.

Lakeridge[19] that a bankruptcy court's determination whether a person was a non-statutory insider, which often turns on if the person's transactions with the debtor (or another of its insiders) were at arm's length, should be reviewed for clear error.[20] In *Monasky v. Taglieri*,[21] the Court held that the location of a child's "habitual residence" within the meaning of the Hague Convention "depends on the totality of the circumstances specific to the case," and the district court's determination of "habitual residence" "is subject to deferential appellate review for clear error."[22]

It appears to us that whether repatriation of a child should be denied because "it 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'" presents a question that is quite different from the location of a child's "habitual residence."[23] History provides useful information regarding Article 20. In October 1985, President Reagan sent the 1980 Hague Convention on the Civil Aspects of International Child Abduction to the United States Senate, recommending its ratification.[24] In early 1986, the State Department provided what it described as "a detailed Legal Analysis of the Convention designed to assist the Committee and the full Senate in their consideration of the Convention."[25] The State Department expressed

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[19] *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 583 U.S. 387 (2018).

[20] *Id*. at 389.

[21] 140 S. Ct. 719 (2020).

[22] *Id.* at 723.

[23] *See Souratgar v. Lee*, 720 F.3d 96, 108 (2d Cir. 2013) (quoting Convention Text and Legal Analysis, 51 Fed. Reg. 10494, 10510 (Mar. 26, 1986)).

[24] 51 Fed. Reg. at 10494.

[25] *Id.*

its belief that "the Legal Analysis will be of considerable help also to parents, the bench and the bar, as well as federal, State and local authorities, in understanding the Convention, and in resorting to or implementing it should the United States ultimately ratify it."[26] That Legal Analysis recounts that negotiating countries were divided over whether a "public policy" exception should be included, and that the Hague Convention "might never have been adopted without" Article 20.[27] A public policy exception had at one point been adopted by a one-vote margin, which was apparently extremely divisive.[28] "To prevent imminent collapse of the negotiating process engendered by the adoption of this clause, there was a swift and determined move to devise a different provision that could be invoked on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process,"[29] which led to the current iteration of Article 20. The use of the terms "utterly shock the conscience of the court or offend all notions of due process" connote well-understood legal principles.

The Supreme Court has applied a "shock the conscience" standard to determine—as a question of law not fact—whether, for example, the Due Process Clause was violated in questioning a witness,[30] and whether an

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[26] *Id.*

[27] *Id.* at 10510.

[28] *Id.*

[29] *Id.*

[30] *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (Thomas, J., concurring) (explaining that "[c]onvictions based on evidence obtained by methods that are 'so brutal and so offensive to human dignity' that they 'shoc[k] the conscience' violate the Due Process Clause"); *see also Rosales-Mireles v. United States*, 585 U.S. 129, 137 (2018) (observing that "[t]he 'shock the conscience' standard typically is employed when

officer's conduct during a high-speed chase violated the Fourteenth Amendment's guarantee of substantive due process and would therefore be actionable under § 1983.[31] In those cases and other cases cited in those opinions, it appears that whether particular conduct occurred was a question of fact, but whether that conduct shocked the conscience was a question of law.

The Legal Analysis of the Hague Convention supplied by the State Department relies on two sources in providing guidance as to how Article 20 is to be interpreted and applied. One is the report by the official Hague Conference reporter (the "Elisa Pérez-Vera Report"), which the State Department said is "recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the Convention available to all States becoming parties to it."[32] The Pérez-Vera Report explained that Article 20 "is concerned only with the principles accepted by the law of the requested State, either through general

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determining whether governmental action violates due process rights under the Fifth and Fourteenth Amendments").

[31] *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998) (holding that "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation"); *see also id.* at 846-47 (citing cases in which the Court applied a shocks-the-conscience standard).

[32] 51 Fed. Reg. at 10503-04; *see also Sanchez v. R.G.L.*, 761 F.3d 495, 504 n.5 (5th Cir. 2014) ("We have previously relied upon the Explanatory Report 'as the official history, commentary, and source of background on the meaning of the provisions of the' Convention (quoting *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 343 (5th Cir. 2004))).

international law and treaty law, or through internal legislation."[33] That report continued,

> Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles.[34]

An inquiry of that nature would be a legal one, once the underlying facts were determined. The second source cited by the State Department regarding Article 20 was an article written by A.E. Anton, the Chairman of the Commission on the Hague Conference of Private International Law that drafted the Convention.[35] That reference source opined that Article 20 "states a rule which many States would have been bound to apply in any event, for example, by reason of the terms of their constitutions."[36] Here again, this strongly indicates that those who crafted Article 20 thought that it would be applied by courts as a matter of law to the facts at hand.

We conclude that determining whether "the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" would not permit return of a child entails primarily legal work. Accordingly, we review the district court's findings of fact

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[33] 51 Fed. Reg. at 10511 (quoting Elisa Pérez-Vera, *Explanatory Report*, *in* 3 ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION: CHILD ABDUCTION 426, 462 (Permanent Bureau trans., 1982) (ACTES ET DOCUMENTS)).

[34] *Id.* (quoting Pérez-Vera, *Explanatory Report*, *in* ACTES ET DOCUMENTS at 462).

[35] *Id.*

[36] *Id.* (quoting A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMPAR. L.Q. 537, 551-52 (1981)).

regarding Reyes' invocation of Article 20 for clear error, bearing in mind that the heightened clear-and-convincing-evidence burden applies, and we review de novo whether the circumstances permit a United States court to decline to return a child under Article 20.

B

Article 20 is to be "restrictively interpreted and applied."[37] It "is not to be used . . . as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed."[38]

The district court found that while in Galaviz's care, the children did not attend preschool or kindergarten due to the school's requirement that Galaviz attend school with them to help with their special needs. Because Galaviz did not comply with this requirement, the children did not attend school. However, the district court did not find that the children would be entirely deprived of an education if returned to Mexico. The court acknowledged that "the law in Mexico may provide for special education."

These findings do not establish an Article 20 exception. The district court focused primarily on Galaviz's actions or inactions regarding the children's education, not on laws or policies of the United States that would prohibit return of the children. Neither the parties nor the district court point to laws of the United States that would prohibit the return of a child to another country if the child's educational opportunities in that country are severely limited, either by a parent's shortcomings or because of that country's educational system. By focusing on Galaviz's actions or inactions,

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[37] *Id.* at 10510.

[38] *Id.*

the district court essentially made an impermissible *custody* decision. Reyes did not present clear and convincing evidence demonstrating that, as a matter of law, the return of the children would utterly shock the conscience or offend all notions of due process.

IV

Article 13(b) of the Hague Convention provides that a court is "not bound" to return a child if one opposing the 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."[39] ICARA requires that this exception must be established by clear and convincing evidence.[40]

A

We first consider the standard of review to be applied to an Article 13(b) defense. The determination is a mixed question of law and fact.[41] As discussed above, the Supreme Court has provided guidance. The Court has explained that, "[i]n short, the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work."[42] In *Monasky v. Taglieri*, the Court held that the location of a child's "habitual residence" within the meaning of the Hague Convention "depends on the

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[39] Hague Convention on the Civil Aspects of International Child Abduction art. 13(b), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

[40] 22 U.S.C. § 9003(e)(2)(A).

[41] *See, e.g.*, *da Silva v. de Aredes*, 953 F.3d 67, 72 (1st Cir. 2020) (recognizing that the Article 13(b) defense poses a mixed question of law and fact); *Salame v. Tescari*, 29 F.4th 763, 767 (6th Cir. 2022) (same); *Acosta v. Acosta*, 725 F.3d 868, 874 (8th Cir. 2013) (same); *Silva v. Dos Santos*, 68 F.4th 1247, 1253 (11th Cir. 2023) (same).

[42] *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 583 U.S. 387, 396 (2018).

totality of the circumstances specific to the case," and the district court's determination of "habitual residence" "is subject to deferential appellate review for clear error."[43]

It is not clear-cut that a conclusion whether a "grave risk" or "an intolerable situation" has been established should be reviewed on appeal in the same way as a determination of "habitual residence." In *Village at Lakeridge*, the Supreme Court said: "some [mixed questions] require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard. When that is so—when applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*."[44] The Court also observed that de novo review may be appropriate when there is a "need to further develop 'norms and criteria,' or to devise a supplemental multi-part test, in order to apply the familiar term."[45] It may be that a defense under Article 13(b) falls into one or both of these categories. It can certainly be argued with some force that without guidance from appellate courts as to what factual circumstances present clear and convincing evidence of a "grave risk" or "an intolerable situation," district courts, faced with virtually indistinguishable facts, can come to opposite conclusions.

The Supreme Court said in *Monasky* that "[i]n selecting standards of appellate review, the Court has also asked whether there is 'a long history of appellate practice' indicating the appropriate standard."[46] Six Circuit courts have applied de novo review to a district court's conclusion whether

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[43] 140 S. Ct. 719, 723 (2020).

[44] 583 U.S. at 396.

[45] *Id*. at 398.

[46] 140 S. Ct. at 730.

particular facts establish an exception under Article 13(b).[47] However, relying on *Monasky*, the First Circuit has held that a determination under Article 13(b) is reviewed for clear error.[48]

There is also the question of how a clear-and-convincing-evidence burden of proof factors into the proper standard of review. In *Pullman-Standard v. Swint*,[49] the Supreme Court discussed precedent explaining that "the significance of the clear-and-convincing-proof standard 'would be lost' if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a 'fact' of the same order as all other 'facts not open to review here.'"[50]

Because we conclude that the district court's finding that Reyes established an exception under Article 13(b) cannot stand under either de novo or clear error review, we do not resolve which standard of review is

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[47] *See, e.g.*, *Ermini v. Vittori*, 758 F.3d 153, 160 (2d Cir. 2014) (holding "[t]he district court's factual findings are reviewed for clear error, while its application of the Convention to its factual findings is reviewed *de novo*"); *Salame v. Tescari*, 29 F.4th 763, 767 (6th Cir. 2022) ("Whether a child would be exposed to a 'grave risk' of harm or returned to an 'intolerable situation' are mixed questions of law and fact that we also review de novo."); *Ortiz v. Martinez*, 789 F.3d 722, 728 (7th Cir. 2015) ("We review the district court's factual findings for clear error and its conclusion that those facts establish a grave risk of harm de novo."); *Acosta v. Acosta*, 725 F.3d 868, 874 (8th Cir. 2013) ("A determination of a grave risk of harm under the Hague Convention is a mixed question of law and fact that we review *de novo*."); *Cuellar v. Joyce*, 596 F.3d 505, 509 (9th Cir. 2010) ("We review the district court's factual findings for clear error, but determine de novo whether those facts establish a grave risk of harm."); *Silva v. Dos Santos*, 68 F.4th 1247, 1253 (11th Cir. 2023) ("Whether a grave risk of harm to a child exists under the terms of the Hague Convention is a mixed question of law and fact, which we review de novo." (quoting *Baran v. Beaty*, 526 F.3d 1340, 1345 (11th Cir. 2008))).

[48] *da Silva v. de Aredes*, 953 F.3d 67, 72 (1st Cir. 2020).

[49] 456 U.S. 273 (1982).

[50] *Id.* at 286 n.16 (1982) (quoting *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)).

required. In conducting a review under a clear error standard, we must bear in mind the evidence had to be clear and convincing.[51] Clear and convincing evidence is a "weight of proof which 'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'"[52] It is "evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts."[53] Mere speculation does not meet the clear and convincing burden.[54]

B

Courts are not without guidance as to how Article 13(b) is to be interpreted and applied. "Under Article 13(b), a court in its discretion need not order a child returned if there is a grave risk that return would expose the child to physical harm or otherwise place the child in an intolerable situation."[55] "The person opposing the child's return must show that the risk to the child is grave, not merely serious."[56] "The grave risk involves not only the magnitude of the potential harm but also the probability that the harm will materialize."[57] "The alleged harm 'must be a great deal more than

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[51] *See* 22 U.S.C. § 9003(e)(2)(A).

[52] *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992) (quoting *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 285 n.11 (1990)).

[53] *Id.* (quoting *Cruzan*, 497 U.S. at 285 n.11).

[54] *See Kinnear-Weed Corp. v. Humble Oil & Refin. Co.*, 441 F.2d 631, 636 (5th Cir. 1971).

[55] Convention Text and Legal Analysis, 51 Fed. Reg. 10494, 10510 (Mar. 26, 1986).

[56] *Soto v. Contreras*, 880 F.3d 706, 710 (5th Cir. 2018) (quoting Convention Text and Legal Analysis, 51 Fed. Reg. at 10510).

[57] *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013) (citing *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005)).

minimal' and 'greater than would normally be expected on taking a child away from one parent and passing him to another.'"[58]

The State Department said in its Legal Analysis of the Hague Convention that "[a]n example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child."[59] Article 13(b) "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests."[60] The Supreme Court has admonished that "courts in Hague Convention cases 'must strive always to avoid a common tendency to prefer their own society and culture'; the Hague Convention 'deter[s] child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes.'"[61]

A district court's factual finding is clearly erroneous "when 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"[62]

C

The district court's conclusion that evidence of neglect established a grave risk of harm under the clear and convincing standard was clearly erroneous. Because "courts in Hague Convention cases 'must strive always to avoid a common tendency to prefer their own society and culture,'" courts making Article 13(b) determinations based on allegations of neglect must be

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[58] *Madrigal v. Tellez*, 848 F.3d 669, 676 (5th Cir. 2017) (quoting *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000)).

[59] Convention Text and Legal Analysis, 51 Fed. Reg. at 10510.

[60] *Id.*

[61] *Soto*, 880 F.3d at 711 (quoting *Abbott v. Abbott*, 560 U.S. 1, 20 (2010)).

[62] *Sneed v. Austin Indep. Sch. Dist.*, 50 F.4th 483, 489 (5th Cir. 2022) (quoting *Guzman v. Hacienda Recs. & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015)).

especially cautious.[63] Article 13(b) focuses on the risk of harm posed by the child's repatriation.[64] It is not an invitation to determine whether custody with one parent would be in the best interest of the child.[65] The question is whether there is clear and convincing evidence that return would expose the child to a grave risk of harm, not whether a parent is a worthy custodian.

The evidence Reyes presented that Galaviz neglected the children's medical care was not sufficient to support a finding under the clear-and-convincing burden of proof that returning the children to Mexico would present a grave risk of physical harm. Reyes presented evidence that the children had "rotten molars" when in Galaviz's care and when brought to the United States. He also presented evidence that, when brought to the United States, the children were behind on their vaccinations, their daughter had hearing loss requiring hearing aids, and their son had an astigmatism requiring eyeglasses. However, the record also reflects unrebutted testimony that Galaviz sought and obtained some dental treatment for their son, including obtaining crowns for his molars, attending the dentist five times, and asking Reyes for money for dental treatment. On this record, it was clearly erroneous for the district court to conclude that there was clear and convincing evidence that a grave risk of physical harm arose from the medical care the children would obtain if repatriated to Mexico.[66]

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[63] *See id.* (quoting *Abbott*, 560 U.S. at 20).

[64] *See* Convention Text and Legal Analysis, 51 Fed. Reg. at 10510.

[65] *See Abbott*, 560 U.S. at 20 ("The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence.").

[66] *Cf. Cuellar v. Joyce*, 596 F.3d 505, 511 (9th Cir. 2010) ("A parent may be able to defeat or delay return by showing that it would disrupt an ongoing course of medical treatment and severely impact the child's health. But the parent would have to provide

Similarly, it was clearly erroneous to base a grave risk finding on Reyes's evidence with respect to the allegations of unsuitable childcare, poor hygiene, and lack of educational opportunities. That evidence did not clearly and convincingly demonstrate a grave risk of physical or psychological harm. Courts have concluded evidence the child "was frequently left unsupervised in the street, had lice, and was often dirty" did not clearly and convincingly establish a grave risk of harm.[67] Neither did a situation where the child "had frequent ear infections and had unexplained burns behind her earlobes."[68] Here, Reyes and his sister testified that the children were dirty, smelled, and not groomed. Relatedly, Reyes expressed a concern that Galaviz often left the children with her older daughters, and that they did not adequately care for the children. Reyes, however, presented no evidence that these hygiene issues or the older daughters' supervision of the children would expose the children to a grave risk or intolerable situation. If a child's standard of living provided clear and convincing evidence of a grave risk of harm, "parents in more developed countries would have unchecked power to abduct children from countries with a lower standard of living."[69] This is precisely the reason the Ninth Circuit concluded poor living conditions—such as "no indoor

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clear and convincing evidence both of the child's serious medical needs and of the home country's inability to provide the necessary care.").

[67] *See, e.g.*, *Guerrero v. Oliveros*, 119 F. Supp. 3d 894, 913-14 (N.D. Ill. 2015) (concluding that evidence that the child "was frequently left unsupervised, had lice, and was often dirty" fell "far short of proving that the Children will face a serious, let alone grave, risk of harm if returned," rather, this evidence went to the issue of custody); *Bernal v. Gonzalez*, 923 F. Supp. 2d 907, 922 (W.D. Tex. 2012) (concluding that although there was evidence that the mother failed to provide a clean house for the children and failed to rid the children of lice infestation, "Respondent failed to present any evidence of serious neglect or abuse to satisfy the grave risk of harm exception").

[68] *Cuellar*, 596 F.3d at 510.

[69] *Id.* at 509.

running water," using "a nearby creek and outhouse for waste disposal," and "no climate control, no refrigeration, and very little furniture"—"c[ame] *nowhere close* to establishing a grave risk of harm."[70] In this same vein, "the State Department took care to emphasize that grave risk doesn't 'encompass . . . a home where money is in short supply, or where educational or other opportunities are more limited.'"[71]

The district court also clearly erred in concluding that Galaviz was the cause of the children's regression. If there are "equally plausible explanations" for the outcome, a party did not sustain its burden of proving clear and convincing evidence.[72] *Charalambous v. Charalambous*[73] is instructive on this point. In *Charalambous*, the court concluded that "[t]o the extent that [the child] has exhibited some behaviors and reactions . . . that may be consistent with sexual abuse, those behaviors may also be explained by some other event, such as the stress of being brought to the United States and being separated from his Father with whom he has an undeniably close relationship."[74]

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[70] *Id.* (emphasis added).

[71] *Id.* (quoting Convention Text and Legal Analysis, 51 Fed. Reg. 10494, 10510 (1986)).

[72] *See N.L.R.B. v. Koenig Iron Works, Inc.*, 681 F.2d 130, 143 n.20 (2d Cir. 1982) (concluding that a party did not sustain its burden of showing clear and convincing evidence because of "the existence of equally plausible explanations" for the outcome); *see also Cuellar*, 596 F.3d at 509 (concluding that testimony stating that the child was "kind of small and thin" and that "*perhaps*" the child was malnourished "plainly does not amount to clear and convincing evidence of a grave risk of harm").

[73] No. 10-cv-375, 2010 WL 4115495 (D. Me. Oct. 12, 2010), *aff'd*, 627 F.3d 462 (1st Cir. 2010).

[74] *Charalambous*, 2010 WL 4115495, at *10.

The behavioral regressions by the children could be attributed to the fact they are very young, have special needs, and were separated from their father—an "equally plausible explanation[]" that undermines the district court's finding.[75] The evidence was not clear and convincing that Galaviz was the *cause* of regression.

Finally, the district court also clearly erred by concluding Reyes presented clear and convincing evidence that the children's return to Mexico would pose a grave risk of harm by impeding their development. The evidence presented in this case stands in contrast to *Ermini v. Vittori*.[76] In that case, the Second Circuit affirmed the district court's conclusion that a child who had autism faced a grave risk of harm if he was removed from his therapy in the United States and returned to Italy.[77] The respondent in *Ermini* presented evidence (credited by the district court) that "any hope for [the child] to lead an independent and productive life depended on his participation of a program such as the CABAS program that he attended on a daily basis, and that this particular program was not available in Italy."[78] An expert testified that if the child were to be removed from the program, "he would cease to be able to learn to write or talk and would most likely never learn to read."[79] The Second Circuit acknowledged this evidence was

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[75] *See Koenig Iron Works, Inc.*, 681 F.2d at 143 n.20; *see also Slagenweit v. Slagenweit*, 841 F. Supp. 264, 266, 269 (N.D. Iowa 1993) (concluding that the respondent had not established a grave risk although an epileptic child had shown significant progress following her removal and her "developmental progress may be set back somewhat").

[76] 758 F.3d 153 (2d Cir. 2014).

[77] *Id.* at 165.

[78] *Id.* at 166 (internal quotation marks omitted) (quoting *Ermini v. Vittori*, No. 12 Civ. 6100, 2013 WL 1703590, at *9 (S.D.N.Y. Apr. 19, 2013)).

[79] *Id.* (alterations and internal quotation marks omitted).

"unrebutted."[80] Unlike the evidence in *Ermini*, there was no evidence before the district court that programs, classes, or educational opportunities for autistic children are unavailable in Mexico. Nor was there evidence that returning to Mexico would irreversibly impede the children's development.

The record did contain evidence that Galaviz obtained a "boob job" instead of continuing therapy for her son. But the district court also found that Galaviz attempted to enroll her children in a special needs school in Mexico, which required Galaviz to be present during the children's classes. The district court concluded that Galaviz's inability to be present at the school effectively denied the children their right to an education. The district court failed to consider that a court in Mexico adjudicating custody issues might order Reyes to pay child support to be used for special education or to retain an aid to accompany the children to school. Although Galaviz's inability to accompany her children to school is a consideration relevant to custody, it does not provide clear and convincing evidence that returning the children to Mexico would pose a grave risk of harm physical or psychological harm.

D

The district court clearly erred in concluding the evidence related to physical abuse clearly and convincingly established a grave risk of harm.

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[80] *Id.* at 167. The Second Circuit further observed: "In light of Dr. Fiorile's 'unrebutted testimony' that Daniele's hope for 'an independent and productive life' rested on his continued participation in the CABAS program, as well as the fact that 'no evidence' was presented at trial to support that such a program was available to Daniele in Italy, we do not [have a 'definite and firm conviction that a mistake has been committed.']" *See id.* at 165 n. 11 (citation omitted) (first quoting *Ermini*, 2013 WL 1703590, at *9; then quoting *id.*; and then quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 523 (1993)).

"Sporadic or isolated incidents of physical discipline directed at the child, or some limited incidents aimed at persons other than the child, even if witnessed by the child, have not been found to constitute a grave risk" under the clear and convincing burden.[81] Cases concluding that the grave risk exception has been met often involve the use of physical force that is repetitive or severe.[82] In *Simcox v. Simcox*,[83] the Sixth Circuit concluded that the grave risk exception was met because "[t]he nature of abuse . . . was both physical (repeated beatings, hair pulling, ear pulling, and belt-whipping) and psychological."[84] The court stated that "[i]mportantly, these were not isolated or sporadic incidents."[85] The Sixth Circuit concluded that based on "the serious nature of the abuse, the extreme frequency with which it occurred, and the reasonable likelihood that it will occur again absent sufficient protection[,] . . . [respondent] ha[d] met her burden of establishing, by clear and convincing evidence, a grave risk of harm in this case."[86]

Contrast cases in which the exception has not been met. In *Altamiranda Vale v. Avila*,[87] the Seventh Circuit concluded that the "contested assertion that [the father] once struck his son with a video-game

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[81] *Souratgar v. Lee*, 720 F.3d 96, 104 (2d Cir. 2013).

[82] *See, e.g.*, *Simcox v. Simcox*, 511 F.3d 594, 608-09 (6th Cir. 2007); *Blondin v. Dubois*, 189 F.3d 240, 243, 250 (2d Cir. 1999) (concluding that the grave risk exception had been met because there was evidence that, among other things, the father had beaten the children, including twisting a piece of electrical cord around one of their necks).

[83] 511 F.3d 594 (6th Cir. 2007).

[84] *Id.* at 608.

[85] *Id.*

[86] *Id.* at 609.

[87] 538 F.3d 581 (7th Cir. 2008).

cord[] fell short of meeting th[e] demanding burden."[88] Similarly, in *Saldivar v. Rodela*,[89] the mother testified that she struck the child with a stick on three occasions and on one other occasion struck him with a belt.[90] The father testified that the child "freezes" presumably because of the psychological harm done to him by his mother.[91] The court concluded that this evidence failed to meet the "demanding burden" for establishing the grave risk exception.[92]

The district court in the present case found that the children had been physically abused based on the children's behavior and on the testimony of Galaviz's former friend. The court found that the children cowered and protected their heads when bathing, that the son reacted to protect his sister when she spilled her beverage, and that he covered her mouth to quiet her when she cried. Reyes testified that he never saw Galaviz hit the children, but that he observed her yell at them. Reyes stated that he would attempt to conduct video conferences between Galaviz and the children, but that they would become very upset and cry and throw the phone at him. None of this evidence rises to the level of clear and convincing evidence of a grave risk of physical or psychological harm if the children are returned to Mexico.

There are also other plausible explanations for the children's behavior.[93] Reyes's sister acknowledged that it was possible the children did

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[88] *Id.* at 587.

[89] 879 F. Supp. 2d 610 (W.D. Tex. 2012).

[90] *Id.* at 630.

[91] *Id.*

[92] *Id.*

[93] *See Charalambous v. Charalambous*, No. 10-cv-375, 2010 WL 4115495, at *10 (D. Me. Oct. 12, 2010), *aff'd*, 627 F.3d 462 (1st Cir. 2010).

not want to be bathed by someone they didn't know. The children could have behaved fearfully because of prior actions by Reyes—Galaviz testified that Reyes had punched her, tried to strangle her, caused swelling, bruises, black eyes, a busted lip, and a broken nose. As previously discussed, if there are "equally plausible explanations" for the outcome, a party did not sustain its burden of providing clear and convincing evidence.[94]

Galaviz's former friend testified that she witnessed Galaviz hit the children "[n]ot in their face, but in their . . . thigh." She stated that Galaviz hit her son with a foam slipper to reprimand him for climbing a kitchenette. She saw Galaviz slap her adult daughter when the latter was confronted about spanking her young brother. She also testified that Galaviz would hit the children because they would cry. This is not evidence of the kind of repetitive or severe abuse seen in cases like *Simcox*. This evidence represents the type of "[s]poradic or isolated incidents of physical discipline" that courts have rejected as establishing an Article 13(b) exception.[95] Without more, the district court clearly erred in concluding this evidence established a grave risk of harm by clear and convincing evidence.

E

Lastly, the district court clearly erred in determining that there was clear and convincing evidence of sexual abuse. In fact, even the district court characterized the evidence as indicating merely a "*strong suggestion* of sexual abuse." This "strong suggestion" was based on a finding that Reyes received anonymous text messages stating that the children had been sexually abused with Galaviz's knowledge, a police report filed by Reyes, and a police-report

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[94] *N.L.R.B. v. Koenig Iron Works, Inc.*, 681 F.2d 130, 143 n.20 (2d Cir. 1982).

[95] *Souratgar v. Lee*, 720 F.3d 96, 104 (2d Cir. 2013).

narrative in which a physician expressed their belief that the son could have been sexually abused.

The district court, however, did not admit the text messages or the police reports for the truth of the matter asserted therein, and their content was not presented in an otherwise admissible form. The district court noted: "I'm going to consider [the messages and the police reports] for the very limited purposes that [Reyes reacted to the messages]." The local authorities did not testify regarding their investigation. According to the police report, the authorities observed that the treating physicians did not provide a Sexual Assault Nurse Exam (SANE). Moreover, the treating physicians at El Paso Children's Hospital did not testify. The only evidence offered to establish the alleged sexual assault was Reyes's own testimony.

This evidence does not meet the clear and convincing evidence burden. *Danaipour v. McLarey,*[96] *Ortiz v. Martinez*,[97] and *Kufner v. Kufner*[98] exemplify the rigor of the clear and convincing standard in the sexual abuse context. In *Danaipour* and *Ortiz* the courts concluded the clear and convincing burden was met when there was eyewitness testimony of the abuse. In *Danaipour*, the evidence included: vaginal redness on one child after her return from visits with her father, the child's statements that her father had caused the redness, statements by the child that her father had hurt her "pee pee," and that she had exhibited symptoms of abuse.[99] In *Ortiz*, the mother described that she had seen the father molesting the child in the shower and that she had overheard the child tell her father not to touch

[96] 286 F.3d 1 (1st Cir. 2002).

[97] 789 F.3d 722 (7th Cir. 2015).

[98] 519 F.3d 33 (1st Cir. 2008).

[99] *Danaipour*, 286 F.3d at 5-7.

her anymore, and an expert testified that the child exhibited behavior consistent with having suffered sexual abuse.[100] In contrast, the district court in *Kufner* concluded—and the First Circuit affirmed—the respondent did not establish the Article 13(b) exception despite evidence the father took graphic photographs of his children and the children began exhibiting physical symptoms such as bed-wetting, nervous eye twitching, sleeplessness, and nighttime crying and screaming after a vacation with the father.[101]

Simply put, the only evidence of sexual abuse is the father's testimony that he suspected sexual abuse. The court in *Kufner* rejected more. Accordingly, the district court clearly erred in concluding this was clear and convincing evidence of sexual abuse.

While we are sympathetic to the sensitive issues presented, "[a] court that receives a petition under the Hague Convention may not resolve the question of who, as between the parents, is best suited to have custody of the child."[102] In the present case, we leave the question of custody to the Mexican courts.[103]

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The district court erred in concluding that Reyes established Article 20 and 13(b) defenses by clear and convincing evidence. The judgment of the district court is REVERSED, and the case is REMANDED with

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[100] *Ortiz*, 789 F.3d at 729.

[101] *Kufner*, 519 F.3d at 36, 41.

[102] *Cuellar v. Joyce*, 596 F.3d 505, 508 (9th Cir. 2010).

[103] *Id.* ("[T]he court must return the abducted child to its country of habitual residence so that the courts of *that* country can determine custody.").

instructions that the court enter an order that the children be returned to Mexico.

JAMES C. HO, *Circuit Judge*, concurring in the judgment:

I understand and respect how the district court approached these difficult and troubling issues. I nevertheless agree that the governing precedents require that these issues be resolved in a custody hearing. Accordingly, I concur in the judgment.