Facing honorary judge Sary Jayyoussi

Plaintiff **S. S. B.H.**

By his representative attorney Gal Tores and/or Ran Arnon

Respondent **O. B.H.**

By her representative attorney Tal Itkin

In the matter of the minor: O. B.H. (minor)

Court ruling

Preface

1. A father's prosecution according to Hague Convention (returning of abductees children) 1991 (hereinafter: "**the Convention**"), in which the court was asked to order the immediate returning of the minor to her habitual residence, in her parents' house in Fair Lawn, New Jersey, USA.

   Within this case, the respondent, the minor's mother and the plaintiff's wife, has raised every possible defense available on the Convention.

   First the respondent pleaded that "the habitual residence" of the minor is in Israel and not in USA, and that alternatively, the three defenses of the law stand:

   a. Defense of Consent;

   b. Defense of Acquiescing;

   c. Defense of Harm.

2. During the proceedings came about the question of the parents' status in USA, meaning, are they staying there legally or are they illegal and unwanted? Does the plaintiff have a visa, and isn't there an expulsion danger from the USA?

   The respondent claimed that the plaintiff resides in USA illegally, because the visa he had up until recently (of type F2) expired since it was granted to him based on being married to her, and based on the visa she had had being a student. Her plea, which turned out to be truthful, was that as her visa expired when she quit her school, so

did the plaintiff's visa. Hence the respondent claimed that both parents do not have an American visa, both can't and may not work there, and that fact has a direct impact of the question of highly likely harm that can be caused to the minor, if the court would order to return her there.

3. Within this case, both parties have submitted main testimony depositions. The plaintiff has submitted a deposition signed by him and other people's depositions – his sister Mrs. S. B.H., Mr. E.B. – a mutual friend, and rabbi A. E. – community rabbi in USA.

   The respondent has submitted main testimony depositions, one edited by her and the other by accountant Mr. Y. S..

   Before evidence sitting, the plaintiff has submitted an announcement and request, under which he had petitioned to allow him to testify and be interrogated about his deposition via Skype software, and not being called up to Israel and be interrogated in the court room.
   I've declined this request since I wasn't presented with persuasive reasons, such as medical hindrance or other objective hindrances, why he can't attend a sitting set for his testimony on such a crucial issue for him.

   The respondent and her witnesses presented themselves in the evidence sitting, whereas on the plaintiff side, only his witnesses presented themselves. Therefore, only those witnesses were interrogated, but later on, after an appeal submitted by the plaintiff on court's decision to not allow his testimony to be taken via Skype, and although the regional court has declined his request, the plaintiff was allowed the opportunity to come to Israel within a specified period in order to present his testimony in front of this court, even though the hearing of the respondent and her witnesses has rested.

   Therefore, and after the plaintiff has presented himself in Israel, the parties were summoned to a sitting in which he was counter-interrogated about his deposition.

   Duly noted, the plaintiff's deposition was collectively submitted with the other main testimony depositions on his behalf, and although the hearing of parties' evidences and interrogating their witnesses was not conducted in the proper order, by which the plaintiff testifies first, the hearing of the plaintiff's deposition at a later phase did not cause any distortion of justice. This conclusion is imperative also because the plaintiff's deposition remained the same, and the plaintiff was not asked, for example, to adjust or complete his statements.

Normative Framework

4. The purpose of the Convention and the many exceptions it presents, have been discussed lengthily in courts' ruling. The Convention sets a fast track to returning a minor to the state from which he was taken – from which he was abducted and not returned to.

   The fundamental basis of the Convention is that the best interest of the minor requires his immediate return to the state from which he was abducted. This Convention has become a part of Israel's internal law.

   Honorary judge Yitzhak Amit, in f.a. no. 4646-11-08, L.M. Vs. M.M., from January 13th 2009, described the basic concepts of the Convention, and he writes as follows:

> **"Hague Convention was purposed to address the issue of children being abducted across states. The Convention addresses two kinds of cases: abduction and non-return – see article 1(a), determining that the purpose of the Convention is to ensure the immediate return of children who have been wrongfully 'moved away to a related state or have not been returned from it'. In the case in question, no one disagrees that the minor was not 'abducted' since his arrival at Israel has been under knowledge and consent of the respondent, but he claims it was for the purpose of visiting Israel and for the birth of a second child.**
>
> **The Convention was destined to provide a quick and efficient aid, as 'first aid' or 'fast track' to the returning of the abducted child to the state from which he was abducted, while the custodial issues be addressed at the authorized court of that state – c.a. 7206/93 Gabay Vs. Gabay I.r. 51(2) 241 (1997) (hereinafter: 'Gabay'); c.a. 5532/93 Gonzburg Vs. Grinvald I.r. 49(3) 287 (1995) (hereinafter: 'Gonzburg'). The rule is that a child who have been wrongfully moved away by one of his parents has to be returned immediately, and article 12 of the Convention uses a categorical language of direction: 'the relevant authority will order the immediate return of the child'. It is the court in the state of habitual residence that will deal and decide on the custodial issue – c.a. 4391/96 Ran Vs. Ran, I.r. 50(5) 338, 345 (1997). The basis for the abovementioned rule is the principle of mutual respect between the member states of the Convention and also the principle of the best interest of the child, whereas the implication of the abduction is severing the minor of the other parent – Gonzburg pp. 294 and 298; c.a.a. 3052/99 Shevach Vs. Shevach [published in Nevo] (given on June 1st 1999). The general assumption is that the best interest of the child obliged him not being smuggled by one parent, and the best interest of the child**

> **obliged his return to parental custody in the state from which he was abducted – aforementioned Gabay.**
> **A number of exceptions to this rule are anchored in articles 12-13 and 20 of the Convention. Concerning the rational of the exceptions and their terms of applicability, see r.a. 672/06 anonymous Vs. anonymous [published in Nevo] (given on February 2nd 1996). The ruling has interpreted these exceptions by way of reduction and literally – aforementioned Gonzburg, otherwise the Convention might be deprived of its meaning – aforementioned Ran pp. 347. Burden of proof of the applicability of the exceptions rests on the abductor – c.a. 1372/95 Stegman Vs. Burk, r. 49(2) 451(9) (1995)."**

As for the burden of proof in prosecutions according to the Convention, the plaintiff has to prove that the preliminary conditions set in the Convention for aiding the return are valid. The plaintiff has to prove that the habitual residence of the minor is the state of relevance (see articles 3-4 of the Convention).
If the plaintiff managed to do so, than the burden of proof goes to the parent resisting the return, who has to prove that at least one of the defenses in the Convention apply. This burden weighs heavily and substantial clear evidence is required of that parent.
On the other hand, if the resisting parent proves one of the defenses, "**the judicial or administrative authority of the respondent state is not obligated to order the return of the child…**", and the matter is subjected to its discretion.

The Factual System

5. The parties are Jewish, citizens of the state of Israel, and have legally married each other in Israel on June 19th 2008, after dating for a few years.
   The parents are young: the plaintiff about 31 years old and the respondent about 29 years old. Both parties stayed in USA most of the time since 2004 up until the prosecution was administered.
   The respondent arrived at USA on February 2004 as a tourist after her release from IDF, shortly after which the plaintiff has also arrived from Israel and they've travelled across USA together.

6. On 2005, the respondent returned to Israel for a few months while the plaintiff remained in USA and worked there. After a few months the respondent returned to USA, and as of February 2006 the parties resided together as a couple for all intents and purposes. At the beginning of 2007 the respondent began studying there, while the plaintiff worked in carpentry.

7. On June 19th 2008 the parties returned to Israel for their wedding, shortly after which they had returned to USA. As a result of the marriage they gave birth to their minor daughter [O.], who was born on September 10th 2009.
   The respondent had a visa to stay in USA since she was a nutrition student, and the plaintiff had a visa by force of the respondent's status. The parties resided in a rented apartment in Jew Jersey and the minor was born in USA, and therefore has an American passport.
   Before [O.]'s birth, the respondent came alone to Israel, for a few weeks' vacation, and returned to USA where she had delivered [O.].

8. On November 29th 2009 the respondent came to another vacation in Israel in order to introduce her family with her daughter [O.], and stayed in Israel until January 13th 2010 – when she returned to USA to the rented apartment. On the same month, January 2010, the plaintiff came to Israel and the parties open up a shared business – a clothing shop in [home-town] called [---], after receiving financial, taxational and legal consultancy regarding the appropriate way to establish the abovementioned business. This consultancy was provided by a joint acquaintance – accountant Mr. Y. S., who had later acted as a kind of conciliator and mediator between them and was even summoned to give a testimony in this case.
   The founded shop was and is still run by the plaintiff' sister, whereas the parties bought equipment and supplies of baby ware in USA, packed and sent it to Israel, to the business they own.

9. The plaintiff had started to become newly religious and tightened his relations to the religious community in USA. From the evidence brought upon before me it appears that the couple' lives around the time [O.] was born were characterized with arguments and conflicts. Gradually their lives had reached a fundamental crisis, and the evidence shown suggest that at some point the plaintiff considered ending the couple' relationship in divorce, as indicated by the letter written by rabbi A. E., who served as rabbi of the Jewish community on the parties' place of residence in USA and had known both of them very well.

   These are the main facts the parties agree upon. Hereinafter they divide as regarding to the facts and the chain of events, especially from the moment in which they have decided to come to Israel on March 25th 2010.

10. Rabbi E. gave a main testimony deposition (D/1) on behalf of the plaintiff, attached by a letter written by him addressed to the Rabbinate court in Haifa.
    In this letter, the rabbi displays in detail the history of the dispute between the two partners. The letter states, among other things, that the first appeal to him was made by the plaintiff during January 2010, during which he was ready to get a divorce while the respondent objected.

The letter also reveals that the couple's dispute, as described to him by the plaintiff, is a result of a religious gap between the partners. For example, the respondent struggled at maintaining Shabbat from her husband's point of view. The rabbi specifies in his letter other reasons for that dispute as described to him by the plaintiff himself, according to which the respondent's parents have exhibited excessive involvement in the couple's joint lives to the point it weighed in on their relationship.
The rabbi states in his letter the measures he had taken in the attempt to bridge the gap and rehabilitate the couple's joint lives.

11. Rabbi E.'s deposition is purposed mainly to refute the respondent's claim, according to which the dispute's background is a violent and aggressive behavior on the plaintiff's part, when according to the respondent, he did not stand still, and more than once had pressed her against the wall while tearing and breaking her credit cards and while deciding, one-sidedly, to make her quit school which was paid mostly by him, etc. etc. The rabbi states in his letter and in his deposition that the respondent had never mentioned even one case of physical or verbal violence, as well as never made any claim before him regarding imprisoning her in USA against her will or that the plaintiff had limited her overall actions in any way, since he was the financial provider and there for possessed the power to decide on expenditures.

    In any regards, the dispute between the parties regarding the background of the tear in the couple's joint lives isn't relevant to the issue discussed here. However, it can be determined, in high probability, based on the evidence brought upon before me, that it was the plaintiff who had suggested the idea of ending the couple's joint lives via divorce first.

12. As for the purpose of their arrival at Israel, it also seems that although various claims have been made later on, the evidence brought upon before me, and perhaps mainly the various pleadings served by the respondent, amongst others, to the Rabbinate court, clearly show that it was a visit for the Passover holiday, and that both parties' intent was that both respondent and the minor will return to USA after being in Israel until June 20th 2010 in order to allow the respondent to have a vacation with the minor in Israel, getting to know the whole extended family and spending time together.

    On that day, June 20th 2010, the respondent was supposed to return with the minor to USA, as implied also by the plane tickets back to USA. We learn this, as I have said, from the version told by the respondent herself before the return claim came to be, as was included in a pleading to issue a court order detaining the plaintiff's departure out of the country, issued to the Rabbinate court in Haifa, in which she states:

> **"8. Duly noted, the respondent's behavior towards the plaintiff has gotten worse as they had arrived at Israel, in order to celebrate Passover holiday with the extended family…"**

Thus, even according to the respondent herself (the plaintiff in the abovementioned pleading to court), we are discussing a visit to Israel, meaning a limited period of stay in Israel, at the end of which, according to the agreement between the partners, she and the minor were to return to USA.

13. On that basis, it's difficult to comprehend why was the abovementioned pleading to detain the plaintiff's departure out of the country issued, and how can the respondent claim in that pleading, that "there is a real concern that her husband will make use of the minor's passport which is in his possession and take the minor away from Israel…". it is also difficult to understand what is the legal cause upon which the respondent based her pleading to detain the plaintiff's and the minor's departure out of Israel, while she herself fully acknowledges the fact that the parties came to Israel for a "visit" only and not for a prolonged stay or for establishing a permanent residence in Israel.
And if that's not enough, and there remains a doubt in our minds about the purpose of that arrival at Israel, indeed the pre-purchased plane tickets, including back and forth flights, abates such doubt.

Therefore it is clear: the evidence pull the rug from beneath the respondent's feet in her later version, in which she wished to "slide it" and adjust it to the purposes of the proceeding. According to this later version, the one-way plane tickets to Israel are very expensive, and therefore were purchased two-way. As for the purpose of arriving at Israel, she had stated:

> **"q: And you didn't mean to stay in Israel?**
> **a: We've said we might stay in Israel. [S.S.] can return and he told me he doesn't need me to also go and it's enough that he goes. He said he will arrange everything. We don't have millions of dollars' worth of possessions or a lot of funds. We needed two or three days to close up everything.**
> **q: If it was that simple and [S.S.] had to go back, why did you issue a detaining warrant against him?**
> **a: Because he started threatening me and saying he'll take my girl. The day we arrived at Israel, just as the relationship started to weaken in USA, when we arrived at my mother's house, the differences of opinion started again, I told him I'll take some of the toys to my mom's and he told me, the worst ever evil look in his eyes, 'nothing will get out of here…'".**

On the basis of all that was presented thus far, I accept the plaintiff's version, according to which it was only a visit to Israel and not a return in order to establish a permanent residence in Israel, and prefers his version over the respondent's.

14. Hereinafter I'll specify the main chain of events since the time the pleading to issue a warrant detaining the plaintiff's departure out of the Israel was issued, up until today.

As stated, the parties arrived at Israel on March 25th 2010, about a week prior to Passover holiday.
During Passover' vacation, the parties had hardly spent any time together; the plaintiff stayed at his mother's house and the respondent stayed with the minor at her parent's house.
The depositions show that this development was not planned or coordinated between them. According to the plaintiff, the respondent closed herself up at her parent's and starting that day didn't allow him to see their daughter, while according to the respondent, the relationship faltered during the vacation, the problems and difficulties had resurfaced, and each of them stayed with his parents.

The plaintiff was due to return to USA on April 19th 2010. The respondent initiated legal proceedings against the plaintiff at the regional Rabbinate court, where she submitted on April 7th 2010 a claim for divorce including the wage issue, and even petitioned as mentioned above to detain the plaintiff's and the minor's departure out of Israel.
Later on, the parties had reached an understanding that their joint lives must part, and with the help a mutual acquaintance accepted by both of them, accountant Mr. Y. S., had prepared a draft for a divorce agreement, after converging for an entire day in the accountant's office. This draft did not become a binding agreement since both parties didn't sign it, while the respondent claims it was she who refused to sign it.
Anyway, since the draft has not become a binding agreement, and both parties didn't sign it, the parties' claims and demands must not be addressed here, whether they are the wife's, who regards the draft as supporting her claims by which the parties agreed to settle in Israel, or they are the plaintiff's claims, according to which the same draft shows that returning to Israel did not even come up for discussion. In other words, the draft should be addressed as a non-binding paper, and therefore cannot lead to a conclusion on behalf of either side.

15. Later, following a request made by the plaintiff to cancel the warrant to detain his departure from Israel, which was issued against him in Rabbinate court, the warrant was cancelled on April 4th 2010 under agreement of both parties.

On April 19th 2010 the plaintiff returned to USA, and he claims to have expected his wife to join him later, during June 2010, in accordance with the plane tickets back they have purchased together. When she didn't, he turned on July 2010 to the main authority in USA, and on August 31st 2010 administered the current prosecution.

16. Of all mentioned thus far, a conclusion is obligated: the minor was not returned to USA, albeit the agreement between her parents, **prior** to the visit to Israel, according to which the minor and the respondent should have returned to USA by June 20th 2010.
    As the abovementioned date has passed and the minor was not returned to USA, it appears, allegedly, as an abduction as defined by the Convention.
    Allegedly, since according to the respondent, the plaintiff later consented to or acquiesced with the "abduction" or the non-return.
    This claim will be tested with other respondent's claims according to article 13(a) of the Convention.

17. Being here, we must examine whether USA has been the minor's habitual residence, since it is a preliminary condition of the Convention's applicability, and the plaintiff must prove it as defined on article 4 of the Convention.

Habitual residence

18. [O.] was born on September 9th in USA, and was only about 7 months old at the time she came to visit in Israel. Up until that visit she had resided with her parents in their rented apartment in New Jersey.
    The question is, how can we determine in a case of a new born infant, what is her habitual residence?

19. In a main court ruling on f.a. (Haifa) 4646-11-08 and also on f.a. 9802/09 **anonymous Vs. anonymous**, honorary judge Amit reviews and concludes the two approaches, one called "factual school" and the other called "intentional school", to address the issue of "habitual residence" according to the Convention.

    Honorary judge Amit believes that the most crucial aspect should be the factual test from the minor's point of view, when that point of view tends towards the "abducted" state, as required explicitly by article 3(a) of the Convention, stating:

> **"Removal or retention of a child is 'wrongful' whenever:**
> **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…".**

Honorary judge Amit states that up until a few years ago, the rule in this issue was clear, and a number of court rulings determined that it is intended to be the physical place of residence, and the court does not address the issue of the parties' intent or future intent. Therefore we're dealing with a geographic test – only physical, not influenced by parties' intent or future plans. As for a very young minor, the court ruled that the place of residence is tested, among other things, by the habitual residence of his parents (see for example, c.a. 7206/93 **Gabay Vs. Gabay**, I.r. 51(2) 241, in which the emphasis was the place the child had resided in prior to the abduction).

Similarly, the ruling in f.c. (Kfar-Saba) 13400/09 A.M. Vs. A.K. (published in Nevo) of honorary judge Zvi Weizman, concluded the legal ruling on the issue of "habitual residence":

> **"The test of physical place of residence applies on a very young minor too. The habitual residence of such minor is tested, among other things, by the habitual residence of his parents. So, for example, honorary judge Granit clarifies the way by which to determine the habitual residence of a one year old infant –**
> **'even the minor before us, even though he was one year old prior to the "abduction", has an habitual steady place of residence, despite the fact that he is just a baby and his entire world consists of his parents raising him (and his father's parents leaving close by) and of the daycare he has been going to since he was 4 or 5 months old… the term "habitual residence" must not be narrowed down to apply only on older children who have extended their life's circle… even a baby, who is mainly attached to his parents, has an habitual residence and it is, as stated, the house in which he had leaved with his parents in practice…".**

There is no dispute that according to this test, the only state in which the minor had leaved, up until that visit to Israel, was USA, and therefore this is her habitual residence according to the "factual school".
We must remember that the minor was born in USA and is an American citizen, and by the evidence brought upon before me – appendix 16 and 17 of the plaintiff's deposition, a health insurance was paid for her in USA as required and she had enlisted to a daycare there.
It also seems that the respondent admits that applying this test to the current case' circumstances according to the "factual school" should lead us to the same result, by which USA is the habitual residence of the minor, only she claims that a different test should be made, as required by the approach called the "intentional school".

20. This school was described by judge Y. Amit in the abovementioned ruling, and he believes a joint test may be required on special cases, and so he writes on f.a. 4646-11-08:

> **"… therefore I'm willing to assume that in order to determine the 'habitual residence' a geographical-physical test is not enough, and a joint test of facts and of parties' intents is needed. Naturally, the line between the two tests is unclear. We learn of the parties' intents from the facts, and interpret the facts by the parties' intent, and the court is required to go back and forth examining the facts and deducting the intents accordingly, examining the intents and interpreting the facts accordingly and so forth.**
> **However, in the framework of the joint test, I believe the crucial weight should be upon the factual test…**
> **Furthermore, and although the burden is on the plaintiff to prove that the preliminary conditions for the applicability of the Convention exist, I believe that when the doubt stems from applying the joint test, it should tend towards the abducted parent. And the reason behind it is that in order to meet the purposes of the Convention, one must aspire to a unified and harmonious interpretation in all the courts of the member countries…".**

21. The respondent claims that the parties intended to stay in USA only for schooling, and that the parties had no intention to reside in USA permanently. Therefore, in her opinion, USA is not the habitual residence of the minor.
I cannot accept such argument, since the facts as brought upon before me, which testify to parties' intent, lead to the unequivocal conclusion that USA is the habitual residence of the minor. And why is that?

    The parties resided in USA for about 4 years. They have lived there before the respondent starting her schooling there during 2007. Furthermore, when the parties wished to get married, they returned to Israel and got married there, but immediately after the wedding returned to USA. In their rented apartment they have hosted friends, such as the accountant who testified before me and stated that the apartment was furnished though small – two bedrooms. Furthermore, the respondent confirmed that she and the plaintiff have founded a company in USA in which both of them were shareholders.

22. Indeed, the plaintiff still keeps a bank account in Israel, has an active credit card and pays insurance fees for a life insurance policy and also medical insurance fees.

Likewise it was proven, and the plaintiff did not disagree, that both of them opened a children's clothing shop called [---] and regarded it as a first step to founding a chain of children's clothing shops in Israel.
However, all of the above does not revoke USA from being the habitual residence of the minor. Even if we'll accept the respondent's version by which the parties intended to return at some point to Israel and opened the shop as means to prepare for it, that intent was a future plan only, which depends, among other things, on the success and thriving of the business. So, for example, the defense' witness – the accountant, stated in his interrogation that the plaintiff told him he wants to open a business in Israel in order for him to have an "alternative" to return to Israel. Duly noted, he did not mention in his deposition that the plaintiff had told him that, but that this was what he had understood. Either way, according to this witness' version too, it is only a desire of the plaintiff to maintain an option of returning to Israel.
Not only this but also the "alternative" of returning to Israel depended, according to the respondent too, on how well the business would succeed and thrive. This business was founded only several months prior to the visit to Israel, it is not even one year old and no evidence had been brought before me that suggest that back in March-April 2010 or any time later, the business was profitable and could have ensured the parties' livelihood in Israel.

Anyway, out of the many later versions the respondent gave about the intent to return to Israel, it remains unclear how long did the parties agree to stay in USA and how long was she supposed to study there. Keep in mind that the respondent did not graduate from school in USA, but chose to quit her schooling after arriving at Israel. That fact, in itself, shows that the decision to stay in Israel was made by her after arriving at Israel. And so she states during the counter-interrogation:

> **"q: Can you tell us what did you say at school when you flew to Israel?**
> **a: I said that my father was very sick (god forbid), and that I wanted to take some time off because I didn't know what's going on, and we don't want to make any haste moves so I said at school that I want six months off to be with my daughter… and I told them that I have personal issues with my family in Israel and I have to go there and they said 'no problem'.**
> **q: You had to lie to them?**
> **a: What could I have done? That doesn't make me a liar.**
> **q: Did you also show them your plane tickets so they'll know how long you're going for?**

> **a: Even if I was going for a month, it's either cancelling the whole semester or nothing. I took as much time off as they have decided for me. I've told the counselor that I will send her the tickets…**
> **q: Did you tell them you're planning to return?**
> **a: They understood something is going on. When I arrived at Israel I've talked to the counselor several times even before I had cancelled my visa and she asked what's going on, and I said I have some problems and she understood and I shared with her a little and they didn't pressure me and she just asked me to let them know.**
> **q: Before you flew to Israel, did you inform them that you are taking some time off because of a situation in the family and asked to give you credit or forward it to the next semester?**
> **a: Yes. I wanted them to give me my money back."** (p. 24 r. 31 – p. 25 r. 1-19)

And later on, she confirms that it is she who decided to quit school according to D/6 – a letter sent by e-mail to the college during her stay in Israel. In that letter she had asked to cancel her and her husband's visa because, as written there, she cannot return to USA (p. 26 r. 10-32).

23. In order to illustrate, hereby noted that in contrast to the obvious joint address in USA – the couple's rented apartment in New Jersey, the respondent did not mention where did the parties intended to reside regularly or casually in Israel, not even in which city.

    In this case I was persuaded that opening the business in Israel, maintaining social right and possessing real-estate or bank accounts etc., as the parties did, do not attest their intentions to return to Israel at some point, and at least do not attest an immediate intent, in the foreseeable future, even more so not during March-April 2010. It is understood that the parties did it out of anticipation to return to Israel some day, after utilizing to the fullest all of their options in USA, including the respondent's schooling, as many Israelis who live abroad do.

    The respondent's answer in the counter-interrogation attests to that:

> **"q: You didn't know whether you're returning to Israel?**
> **a: We came to see how thing will go."** (p. 28 r. 2-3)

Meaning, future plan on one hand and present life on the other, and what the honorary judge Ziller had said on f.c. (Jerusalem) 507/95 **Goldman Vs. Goldman** applies here beautifully:

> **"When a family anchors, even for a few years, abroad, its habitual residence, and hence the children's, is abroad. I believe I will not wrong the judgmental knowledge of the court if I said it is not uncommon among many who immigrate away from Israel to state… that they had moved abroad only for a few years, to study, to succeed financially, to acquire some capital, connections, knowledge and experience and to return to Israel afterwards. In the meantime, the years go by, and some return to Israel and some don't… the will and intent to return… do not diminish the fact that their habitual residence, until they'll return to Israel, is abroad. An habitual residence is examined in actuality and not by intentions…".**

24. In conclusion, even according to the "intentional school", USA is viewed as the habitual residence of the minor.

    From here on, the burden of proof goes to the respondent to prove the defenses she demands according to articles 13(a)-(b) of the Convention.

<u>Article 13(a) of the Convention – Consent and Acquiescing defenses</u>

25. The respondent claims that the defenses of Consent, Acquiescing and Harm apply to the current case.
    As for the first two defenses, the defense of Consent regards events that happened prior to the abduction or removal while the defense of Acquiescing regards the events that happened after the abduction.

26. As shown on previous articles, both parties wished to come to Israel for a visit only and not with the intent of settling down there, and the plaintiff had never consented, prior to the arrival at Israel, to moving his daughter to Israel.
    Even after the parties arrived at Israel, no such consent was granted, at least not in the first two of three weeks, as we can learn from the requests the respondent issued to the Rabbinate court to detain his and the minor's departure from Israel.
    We must remember that these requests were issued on April 7th-8th, in which the respondent had stated her concern that the plaintiff would "abduct" the minor and return to USA. That concern of hers was based on statements made by the plaintiff, according to which he had intended to return to USA with the minor.
    Up until this date, it is clear that the plaintiff did not give any consent or acquiescing to not return the minor to USA.

27. As for the defense of Acquiescing, the fact that the plaintiff' first appeal to the main authority in USA about his daughter's abduction was made on July 1st 2010 cannot

be held against him, since even though he was concerned prior to that about his wife intention to stay in Israel and not return to USA on June 20th 2010, as expected due to the plane tickets back, according to the agreement between the parties prior to arriving at Israel, she was supposed to return only on June 20th 2010.
Furthermore, the respondent admitted (p. 27 r. 13-17) to have received a letter from the plaintiff's lawyer on June 1st 2010, stating that if she will not return to USA it will be regarded as abduction.
The respondent claims that a reasonable parent would have been expected to initiate expedited legal proceedings facing an alleged claim of abduction, and instead the plaintiff chose to fly as soon as possible to USA, and the proceedings under the Convention had began about 6 months after the minor had arrived at Israel.
As stated, this claim is declined, since in my opinion the plaintiff didn't linger with initiating the proceedings, and either way the ruling determines that the defense of Acquiescing does not apply even if there has been a 10 months delay from the time of removal to the time of administering the plea, when the delay has probable explanations (c.a. 5532/93 **Gonzburg Vs. Grinvald**, I.r. 49(3) 282).

28. The respondent claims that the agreement's draft conducted by the accountant teaches of consent to or acquiescing with leaving the minor in Israel with her mother. I cannot accept such claim, for a number of reasons:

First, this draft didn't become a binding agreement;

Second, the plaintiff was under stress as he had a detention warrant against him leaving Israel, which would have disrupted his plans to return to USA on April 19th 2010. The plaintiff had to act fast in order to cancel that warrant and in order to minimize the harm caused to him and return to his job and other obligations in USA. Even if the plaintiff had agreed to the terms enlisted on the draft, and the parties would have appealed jointly to the Rabbinate court in order to cancel the detention warrant, the plaintiff's willingness to negotiate with the respondent and reach some agreements cannot be viewed as consent to or acquiescing with the abduction act.
Reading the draft, one can't help but wonder whether it was written under the heavy shadow of the detention warrant, and even if the plaintiff's consent would have been granted in the draft, indeed it would have been granted under the pressure laid upon him by the detention warrant.

The draft also emphasizes that the detention warrant and its cancellation were key elements in the draft, having been mentioned on the first article of the agreement.

I accept the plaintiff's claim that in the pressure he was under he had turned to a mutual friend – the accountant, to try and mediate between him and the

respondent, but that willingness on his part must not be interpreted as a consent to or acquiescing with leaving his daughter in Israel.
I also accept his claim that a decision meant to be made by each parent on such a crucial and important issue – where will their daughter stay, should be made after each of them has been given the proper opportunity and time to consider that issue carefully.

It is not reasonable to make such a fundamental and critical decision about their daughter, which have the potential to transform their lives all together, hastily and under pressure, and an indication of consent to leaving the daughter in Israel, as far as it appears in the draft, must not be held against the plaintiff.

What was written in c.a. 7206/93 Gabay Vs. Gabay I.r. 51(2) 241 applies all the more forcefully to the current case:

> **"There is no consent or acquiescing whenever it is based upon flaws in decision making, such as mistake, deception, coercion or exploitation, which according to law allows the right to revoke an agreement".**

Thirdly, the draft does not mention anything about the identity of the custodian parent or the residence of the child. As a matter of fact, the respondent wrote by hand "return to Israel" while commenting on the financial agreement's draft, which indicates that the parties had never agreed to return to Israel, and that the respondent wished to reform the draft by including this term in the agreement.

29. In conclusion, the burden of proof laid upon the respondent is similar to that needed in criminal proceedings, and the respondent did not carry out that burden.

Article 13(b) of the Convention – Harm defense

30. The respondent claimed, alternatively, that returning the minor to USA will harm her and put her in an intolerable situation. First and foremost she had asked the court to emphasize that the minor is a one year old baby and therefore the court should be twice as cautious as to the harm and the situation in which the minor will find herself if she were to be moved to USA.
This defense claim revolves around two axes: first, as the minor will be returned to USA, she will be abruptly disconnected with the environment to which she had gotten used to over the past 6 months and be forced to live in a strange place without the support of a family, while wandering back and forth between different homes and in a stressful atmosphere. She claims it applies especially in light of the plaintiff's ignoring his daughter for about 8 months, as even during his current visit to Israel he refuses to provide for the minor.

This argument aims at the "best interest of the minor" in the wider sense, and not the narrow sense as defined by the Convention. The alleged expected harm to the minor was she to be returned to USA in this case does not belong with the harm that provides defense under article 13(b). It also seems that this claim may apply to many cases of abduction, since in these claims there is always a demand to return the minor to his habitual residence while meanwhile he got accustomed to leaving in the foreign state.
These claims get to the roots of the custodial question between the parties, an issue to be addressed in the proper court in USA.

The second axis refers to the harm that is claimed to be brought upon the minor as a result of the plaintiff's status in USA.
In regards to this issue, the respondent claims that the plaintiff has avoided fulfilling the court's order, and for a good reason, and did not present any written proof of his legal status in USA. She claims, and as I have stated – truthfully, that as her and the plaintiff's visa expired, they both cannot stay any longer in USA and that has a direct impact on the minor.
Indeed, the plaintiff did not present any written proof from the certified authorities in USA regarding the legality of his stay there, and hence the conclusion must be that he currently has no stay visa even though he claims to have a work visa.

Likewise, the respondent is probably correct when she claims that she no longer has any legal status in USA having quit her school, and as a result, the plaintiff's visa is obviously cancelled, since it was issued by the power of his wife's student visa.
Indeed, in the current case one might ask: May we return a one year old baby to USA while the danger of expulsion hovers over her parent?
A number of regional rulings determine that the issue of parent's legal status in the state to which the return is required is irrelevant as long as the minor has a possibility to enter that state.
For example, so was ruled in r.a. (Tel-Aviv) 3/98 **B. Vs. B.** (statutes – regional 32(2)):

> **"The issue of parent's legal status in the state to which the return is required (USA) is relevant to the question of whether the minor will be able to obtain a visa that will allow her entry to the state (otherwise, the term by which the return puts the child in an intolerable situation applies), but not beyond that".**

Furthermore (Ibis.):

> **"As for the mother's ability to obtain a visa that will allow her entry to the state, the possibility to receive a special visa for**

entering and staying in USA, if only for the custodial proceedings, suffices to eliminate this fact as a defense by the Convention…".

Not only this but I also believe that in the current case, the legal status of the plaintiff in USA and the problematic situation it involves were a result of the respondent's one-sided behavior and decision, whereas she now tries to harvest the fruit of her actions in the proceeding in question.
In contrast to the parties' agreed upon life style in USA, the respondent asked to cancel the visa she had as a student, by announcing she quit school. As a result, the plaintiff's visa was automatically cancelled, which left him facing a new, glum and harsh reality, without having the opportunity to prepare for it.
The evidence brought upon me and the testimonies heard clearly show that the respondent was well aware of the consequences of her actions, and they were made with a clear intention of laying obstacles under the plaintiff's feet and maybe even force him to stay in Israel against his will or to sabotage his chances of succeeding in returning the minor to USA.

In the current case it was proven that the plaintiff works for some time to obtain a visa, and that the alleged danger of expulsion isn't relevant in the near future, as can be learned from the appeal made by the main authority in USA to bring back the minor.

In light of all of the above, the respondent failed to prove the applicability of the defense of "grave risk of harm", not proving that the situation in question is extreme and raises a grave risk of psychological harm to the minor or otherwise puts her in an intolerable situation as a result of returning to USA, or that the weight of such risk diverts the scale towards keeping her in Israel or overcomes the fundamental purpose of the Convention – returning the abducted minor immediately.

Conditions to returning the minor

31. The evidence brought upon before me show that the parties' residence in USA and their livelihood was provided solely by the plaintiff, it is he who worked and provided for the family and for his wife's education, whereas the respondent was a student in college and worked from time to time in odd low-income jobs.

    Therefore, and as a condition to returning the minor to USA and for providing her alimony, including her and the respondent's livelihood for the near future, the plaintiff will deposit, within 7 days, a sum of 6,000$ in the trusty hands of the wife's representative, to be included in the alimony as will be awarded by an authorized court in USA.

This amount will be delivered to the respondent as soon as she will arrive with the minor at USA.

Likewise, the plaintiff must ensure accommodations for the minor and her mother, in the apartment they had lived in prior to the abduction or in a different apartment he will rent on their behalf, in the same area and as long as that apartment will include furniture and appliances required for a reasonable proper living, similar to what they had had prior to the abduction.

The accommodations will be ensured in advance for a period of 6 months, starting from the day in which the minor arrives at USA.

Conclusion:

32. **I order the returning of the minor to USA, to her habitual residence in her parents' apartment in Luna Pier, New Jersey, within 14 days.**

    The conditions to the returning of the minor are as specified in the abovementioned article 31.

33. I order the respondent to pay the plaintiff his legal expenditures in the sum of 10,000 NIS.

    These expenditures were determined while considering the delay in the hearings caused by the plaintiff.

    The respondent is also required to purchase on her expense plane tickets back to USA, for herself and for the minor.

May be published without the parties' names or any reviling details.

Given today, December 21st 2010, in the absence of the parties.

Sary Jayyoussi, Judge