January 20th 2011

Family Case Appeal No. 44293-12-10 B.H. vs. B.H.

Facing honorary vice president Avraham Avraham

honorary judge Yonatan Avraham

honorary judge Dani Tsarfati

Appealer O. B.H.

vs.

Respondent S. S. B.H.

Appealing the ruling of Family court in Nazareth (honorary judge S. Jayyoussi) given on December 21st 2010.

Court ruling

Vice president A. Avraham:

A summary of the dispute

1. The parties, Israeli Jews who grew up both in [---], got married in Israel on June 19th 2008. For some time (before and after their marriage) they have lived in USA, and on September 10th 2009 their daughter was born there. On March 2010 they have arrived at Israel together, and decided to separate. The appealer decided to stay in Israel, with her daughter. The respondent wishes to return to USA, and to take his daughter with him. Hence his prosecution to the Family court, under the Hague Convention Act (returning of abductees children) 1991 (hereinafter: "**the Convention Act**" or "**the Act**"). The Family court sided with the prosecution and ordered the returning of the daughter to USA. The appealer wishes to appeal this ruling, and this is the matter discussed here.

The facts

2. The parties (the respondent was born on 1979, the appealer on 1981), are both Jews who were born in Israel and grew up in [---], where they have met.

   On 2004 the appealer toured in USA, met the respondent there, and they have continued touring together. At the end of the tour the appealer returned to Israel (2005). The respondent stayed in USA. A few months later the appealer came to USA, and as of February 2006 they have lived together as life partners.

3. At first, they stayed in USA with a tourist visa. The respondent worked in odd jobs (carpentry). On 2007 the appealer started studying, and both of them received student visa by the power of her schooling.

4. On June 2008 the partners came to Israel and got married. After the wedding they had returned to USA, the appealer to her school and the respondent to his job.

5. On September 10th 2009, while in USA, the couple's first daughter was born. By force of being born there – she is an American citizen.

6. On November 2009 the appealer visited in Israel with her daughter, and stayed in Israel for about two months. On January 2010 the respondent came to Israel too, and both of them opened a shop in [home town], which is run by the respondent's sister, while the respondent sends her merchandise from USA to sell at the shop.

7. Over the course of their shared lives, the respondent became increasingly more religious. For that reason, their relationship, as of the time the appealer became pregnant, suffered a crisis, which has brought the respondent to consider divorcing the appealer.

8. On March 25th 2010 the partners came to Israel. There their relationship has ended, while the appealer stays with the joint daughter in her parent's house, and the respondent isn't seeing them.

9. On April 7th 2010 the appealer issued a divorce claim in the Rabbinate court, in which she also involved the issue of custody over the joint daughter. Later they both turned to a joint friend, accountant Y. S., who had tried to bridge over the gaps, but on the eve of April 11th 2010 they decided to part, and therefore drafted an agreement to settle the separation (which wasn't signed eventually). Soon after that, the respondent returned to USA, by himself.

10. On July 1st 2010 the respondent issued a request to the central authority in USA to return his daughter to USA, under the Hague Convention. On August 31st 2010 he issued to the Family court his prosecution to return his daughter to USA, under the Hague Convention Act, claiming that his daughter's habitual residence is USA, and that's where she should be returned to. The appealer claimed to her defense that the habitual residence of the joint daughter is not USA, and therefore the Hague Convention Act doesn't apply to this case. Alternatively she claimed that the respondent consented to or acquiesced with his the daughter remaining in Israel, and alternatively – returning the child to USA will harm her gravely, to the extent that she should not be returned.

Family court's ruling

11. The facts described thus far are not in dispute, for the most part. The court had to weigh in disputes concerning other issues.

12. The parties disagreed on the reason they came to Israel on March 2010. The appealer claims they returned without intention of going back to USA, while the respondent claims the three of them came in order to celebrate the holiday with their families and then return to USA. The Family court ruled that the purpose of arriving at Israel was a visit, and that the appealer intended to stay with her daughter until June in order to spend time with her daughter and her family and then return to USA. The court concluded this ruling from what the appealer herself claimed in the Rabbinate court and from the purchase of plane tickets back to USA.

13. A second dispute between the parties regarded events that happened while the two were in Israel, starting from the day of arrival, March 25th 2010. From the moment they arrived, the appealer went to her parent's house with her daughter, and the partners hardly saw each other. The relationship between the two deteriorated quickly, and on April 7th 2010 the appealer issued a divorce request in the Rabbinate court, including custodial issue, and asked and received a warrant to detain the respondent's departure from Israel, who was due to return to USA on April 19th 2010.

14. Accountant Y. S., a mutual acquaintance, tried to bridge over the gaps, but to no avail. The partners have reached an understanding that their time together has come to an end. They have debated for an entire day in order to settle the end of their relationship, and wrote down an agreement. The agreement was not signed eventually. The Family court ruled that since the agreement was not signed, its content has no relevance.

15. On April 14th 2010 the Rabbinate court has cancelled the warrant it has issued to detain the respondent's departure from Israel. Then the respondent has left Israel, as planned, on April 19th 2010.

16. The Family court has learned that the minor daughter was not returned to USA, albeit an understanding between the parents to do so, by which the appealer and her daughter were to return to USA on June 20th 2010.

17. Another factual/legal issue the Family court had addressed was the question of the habitual residence of the daughter. The Family court sided with the respondent on this issue too. It had reached this conclusion based on two approaches:

    According to the facts ("factual school") – the minor daughter was born in USA, she is a citizen of USA, medical insurance fees were paid on her behalf and she enrolled to a nursery school in USA. Therefore USA should be viewed as her habitual residence, fact wise.

    According to the parties' intent to reside in USA ("intentional school") – the Family court has rejected the appealer's stance, by which they had stayed in USA for her education, intending to return to Israel as she graduates. The court determined that they had meant to settle in USA, and the conclusion was based on the abovementioned chain of events, enhanced by different facts including renting an apartment, fully furnishing it, hosting acquaintances in their apartment, and establishing a company in which the partners were shareholders. The fact that the respondent continue to pay

social security fees in Israel, kept his bank accounts in Israel and established, with the appealer, a shop in [home town], intending to establish a chain of stores in the future, was not seen by the court as an affirmation of the parties' intention to return to Israel, at least not in the foreseeable future. The Family court held against the appealer the fact that she did not complete her schooling in USA and had not presented the court with an address in Israel, in which the partners had intended to live.

18. The court's conclusion, at the end of the day, was that the habitual residence of the daughter is USA, and that the partners did not arrive at Israel in order to stay in Israel but to return to USA. Hence it concluded that she should be returned to her habitual residence, under the Hague Convention. Then the Family court turned to alternative claims made by the appealer, which will be summarized hereinafter.

19. The appealer has claimed, under Article 13(a) of the Act, that the respondent had consented to his daughter's retention in Israel. The Family court has rejected this claim. The fact that the respondent's request according to Hague Convention was issued on July 1st 2010, a claim which wishes to attest that the respondent has delayed its application, and therefore showing he had allegedly consented to his daughter's retention in Israel, was not held against the respondent. The Family court stated that since the appealer was due to return to USA on June 20th 2010 (according to the pre-purchased plane tickets), issuing the request to the central authority in USA on July 1st 2010 is probable, time wise.

20. The Family court has rejected the appealer's attempt to rely on the agreement draft from April 11th 2010, as evidence to the respondent's consenting to or acquiescing with his daughter's retention in Israel. First the judge has established, as aforementioned, that as the draft was not signed, it has no binding value. Second, he has maintained that the respondent's consent to the terms set in the agreement was due to the pressure he was in, while a warrant for detaining his departure from Israel hovers over him, and while concerned with damages to him and to his business in USA should he be forced to stay in Israel. Third, the judge found that the agreement draft did not state who will receive custody over the joint daughter, which supports the conclusion that the respondent didn't acquiesce with her retention in Israel.

21. The appealer also claimed, under Article 13(b) of the Act, that returning the daughter to USA will harm her. The judge had rejected this claim, stating that the appealer's claim addresses a possible Harm to the minor due to the return to USA, and because of the unstable relationship between her parents, but this harm stems from the minor's best interest in the wide sense, and not included in the Convention. This question, related to the custodial issue, will be debated in the authorized court in USA. The Family court had also rejected the appealer's claim based on the fact that the partners no longer have a legal status in USA. The judge thought that the question of the parent's status isn't relevant to the returning of the daughter to USA. Furthermore he claimed that the lack of status to either partner is an outcome of the appealer's behavior, and therefore she may not relay on such a claim. Ultimately, the court was not convinced that there is a concern for grave Harm to the minor daughter were she to return to USA.

22. At the end of the day, as aforementioned, the Family court sided with the prosecution and ordered the return of the minor daughter to USA, provided the respondent will deposit a sum of 6,000$ as alimony for the minor when she returns to USA, and enable the daughter and mother to live in the rented apartment in USA for six months.

The appeal

23. The appealer wishes to object the Family court's ruling, in the appeal issued before us. She claims that in light of the evidence brought upon before the court the conclusion should have been that the habitual residence of the daughter, who had stayed in Israel for 10 out of 15 months of her life, is not USA, since the partners never intended to settle in USA. As evidence she points out that the partners never acted in order to receive a visa beyond the visa they received based on her schooling. The fact that all through their time in USA the partners continued to pay social security and health fees and maintain a bank account in Israel also points to the parties' intention to return to Israel, so states the appealer in her appeal.

24. The appealer repeats her claim that returning to Israel was a joint return, intending to return to Israel permanently, and the chain of events since returning to Israel attests that, including opening a joint business in Midgal Ha'emek, terminating the respondent's businesses in USA, returning the rented apartment to its owner, sending a container to Israel etc. she complains about the Family court's conclusion that purchasing back and forth tickets attest an intention to return to USA, while ignoring her claim that one-way ticket is more expensive that a two-way one.

25. Furthermore, the appealer claims that the respondent consented to or acquiesced with his the daughter's retention in Israel, and the various proceedings in Israel attest that, including cancelling the warrant detaining his departure from Israel, which clearly states that the parties intended the respondent to return to USA alone. Additional evidence supporting that is the agreement draft from April 11th 2010, which according to the appealer should have been considered more important, as it points out that the respondent consented to the appealer and the joint daughter remaining in Israel.

26. The appealer also mentions in her appeal that the Family court's ruling to return the daughter to USA will harm her, since both parents don't have a visa, nor do they have a place to live in, since the respondent returned the apartment to its owner and terminated his businesses there.

27. The appealer also claims that there is no ongoing procedure in USA regarding the custody over the daughter, and hence no one to examine the best interest of the child were she to return to USA.

28. Another obstacle the appealer refers to – a warrant to detain the respondent's departure from Israel, preventing the actualization of the Family court's ruling.

29. In addition to all of the above, the appealer claims that the terms set by the Family court to return the minor daughter to USA (depositing 6,000$) are inadequate, and

burden her gravely, both by forcing her to purchase plane tickets on her expense and by not being sufficient to pay for the appealer's and the child's stay in USA.

30. During deliberation of the appeal, the appealer's representative added that there was no proof of the foreign law (New Jersey, USA) regarding custody, and therefore no proof of **wrongful** removal of the minor child from USA.

31. On the other hand, the respondent wishes to keep the conclusions and ruling of the Family court unchanged. In addition, he added as evidence in the current procedure a confirmation that the lease for the apartment in USA was extended for one more year, and another confirmation attesting that his visa was approved (or at least being properly advancing).

Habitual residence

32. In order for the Hague Convention Act to apply in the current case, the habitual residence of the joint daughter needs to be USA, prior to her arrival to Israel, during Passover 2010. Not without doubts I've chose not to intervene with the findings and the conclusion of the Family court, as it set USA as the habitual residence of the child. My doubts stem from the circumstances surrounding the couple's stay in USA, at least as of when their relationship started to deteriorate, which occurred even during the pregnancy, hence prior to the child's birth, and continued to deteriorate after her birth, while during the first six months of her life (September 2009 until March 2010) she had spent half of that time in Israel. In any event, as abovementioned, I chose not to address this issue as I found that a defense set in Article 13 of the Convention applies here, according to which the respondent acquiesced with his daughter's retention in Israel, and therefore should not be ordered to return to USA, even if her habitual residence is USA.

Acquiescing with retention

33. The starting point of the discussion will therefore be that the habitual residence of the daughter was USA. However, the appealer has a defense against returning her daughter to USA, if she'll be able to prove that the respondent had acquiesced with his daughter's retention in Israel (Article 13(a) of the Convention). The Family court revoked that question. For my part, that question should be answered affirmatively, and the remainder of my opinion will be dedicated to this issue, and first I present a few quotes from what honorary president A. Barak had written on c.a. 7206/93 **Gabay vs. Gabay**, I.r. 51(2) 241. On article 20 of the ruling, president Barak states:

> **"… A parent "consents" to removal of a child or "acquiesces" with its retention when it is possible to conclude from his behavior (in the wider sense) that he relinquishes an immediate actualization of custodial or visitation rights, granted him by law of the state of habitual residence immediately prior to the removal or retention."**

And later (article 21):

> **"A "Consent" or "Acquiescing" according to Article 13(a) of Hague Convention is a one-sided legal action, which requires comprehension by the other parent. It is based on the subjective desire of the parent finding its external expression in his behavior. It is enhanced when it's comprehended by the other parent, as he becomes aware that the "abducted" parent relinquishes changing the status-quo…**
>
> **Furthermore, a "Consent" or "Acquiescing" given by mistake, deception, coercion or exploitation may be cancelled…"**

And on article 22 of the ruling:

> **"As we've seen, "Consent" is expressing a desire of the "abducted" parent, after the abduction act, to a continuation of the status-quo, while relinquishing the immediate return of the previous situation. Sometimes the "Consent" is expressed by an explicit one-time "behavior", such as signing an agreement with the "abductor" parent regarding the child's retention, and sometimes the "Consent" is implicit of the gradual progression of events. The court must "interpret" the different indicative data over time, while asking whether the "abducted" parent's behavior can be seen as relinquishing his rights… He may have negotiated in order to fulfill his right to return the child peacefully… even if the negotiation takes longer than expected – and even if in the meantime the child goes to kindergarten or school – it does not suggest "Consent" by itself. The same is true if during the negotiation comes forth the possibility of the child remaining in the state to which he was abducted. As we've seen, Consent is a conscience decision to relinquish the right of immediate return granted to the "abducted" parent. Negotiating in good faith is not usually in line with such relinquishment."**

And see also c.a.a. 7994/98 **Dagan vs. Dagan**, I.r. 53(3) 254.

34. All of this is enhanced by the law by which the issue of Consent should be addressed cautiously, so it won't harm the basic purpose of the Convention. For instance, so was ruled on c.a. 93/472 **Labovich vs. Labovich**, I.r. 47(3) 63, 72:

> **"We accept that when Consent is concerned, the court should examine its existence cautiously, while examining all circumstances, if they indeed point out a relinquishment of the immediate return of the status-quo as was prior to the abduction…"**

35. Inferring to the current case, examining the chain of events since the arrival of the partners to Israel, I've learned of the respondent's Consent to his daughter's retention in Israel.

36. Therefore, as abovementioned, on April 7th 2010, about two weeks after landing in Israel, the appealer issued a divorce request, including custody over the child, and asked and received a warrant detaining the respondent's departure from Israel. Shortly after, the two turned to mediation by a joint acquaintance, accountant Y. S., and after an entire day of deliberation decided to divorce and conducted an agreement, referred to as a "financial agreement".

37. The Family court reasoned that since the agreement wasn't **signed** (because the appealer wished to consider its terms), it should not be regarded at all. My opinion is different. Indeed, this agreement has no binding validity as a contract, granting rights and obligations to the parties. However, it should be considered as evidence, attesting the respondent's state of mind at the time. The agreement states that the partners have decided to end their marriage. Considering the agreement one might learn that the respondent wished to return to USA immediately after the divorce (as the warrant detaining his departure from Israel cancelled, as stated in the agreement's opening paragraph), while the appealer and her daughter remain in Israel. Article 4 of the agreement states:

> **"[S. S.] (the respondent) is obliged to transfer to Israel all of the equipment of [O.] (the appealer) and of his daughter [O.], and the costs of that transfer will be at his expense."**

Therefore, the respondent agreed that the joint daughter will remain with her mother in Israel, while he returns to USA and all of the remaining property in USA is his (article 3 and 5 of the agreement). The fact that the alimony was calculated in Shekels (Israeli index linked) also strengthens that conclusion.

To top all that, article 7 states the following words:

> **"Seeing arrangements, were [S. S.] to return to Israel, will be twice a week during weekdays and every other week for a weekend."**

38. The content in the agreement draft attests, therefore, the respondent's wish to return to USA without his daughter, who will remain in Israel with her mother. Indeed, this agreement was not signed at the end of the day. But it was not signed since the appealer refused to sign it, making additional demands regarding the **possessional** rights of the two. It had nothing to do with custodial rights, which the respondent relinquished, while maintaining his right to see his daughter should he decides to return to Israel. As far as I understand, the agreement draft clearly points to the subjective desire of the respondent regarding his daughter's retention in Israel. It was enhanced as it was comprehended by the appealer (Gabay, article 21).

39. Furthermore, shortly after that, the warrant detaining the respondent's departure from Israel, issued by Rabbinate court, was cancelled. The cancellation was agreed upon by the appealer, which indicates it stemmed from the understandings achieved under mitigation of accountant [S.], as were expressed in the agreement draft, which explicitly stated that the detaining warrant will be cancelled.

40. To that I add, that with the cancellation of the detaining warrant, the respondent left for USA. That action might be seen as a continuation of behavior on his part, indicating his relinquishment of the **urgent** actualization of his custodial right over his daughter (**Gabay**, article 20), and of her **immediate** return to USA (**Gabay**, article 22), while preferring to return to his businesses in USA over returning his daughter to USA forthwith.

41. The honorary judge in the Family court stated that the agreement should not be weighed in due to additional reason, concerning the warrant detaining the respondent's departure from Israel. He maintained that the warrant hovered over this agreement, and interrupted the respondent's decision making ability.

    Well, I cannot agree with this conclusion of the Family court either. Such conclusion regarding a fundamental flaw in the respondent's decision making ability requires significant support, much more substantial than a detaining warrant preventing the respondent's return to USA. I do not believe that this "pressure" the respondent was under amounted in coercion or exploitation.

Conclusion

42. To sum up all of the above, even assuming the habitual residence of the daughter at the relevant time was USA, the appealer has the defense of Article 13(a) of the Convention, since the respondent acquiesced with his daughter's retention in Israel. since I've reached such conclusion, I am not required to address any of the other claims made by the appealer, including non-proof of foreign law, the Harm that might be inflicted upon the daughter were she to return to USA, the terms set by Family court in order to return her to USA, etc.

43. Therefore, my opinion is to accept the appeal and charge the respondent with the appealer's legal expenses, and so I recommend my colleagues to concur.

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Avraham Avraham, judge
Presiding judge

Honorary judge Yonatan Avraham:

I've considered carefully the opinion of my colleague, honorary vice president Avraham Avraham, and with all due respect, my opinion is different, as I'll describe hereinafter.

Background

We're faced with an appeal of the ruling of the Family court in Nazareth (honorary judge S. Jayyoussi) in f.c. 54043-08-10 given on December 21st 2010.
In the abovementioned ruling, the respondent's claim was affirmed, to receive aid under Article 12 of the addition to Hague Convention Act (returning of abductees children) 1991 (hereinafter: "the Act" or "the Convention", respectively).

The appeal refers to the conclusion of the Family court regarding applicability of the terms set by Article 3(a) of the abovementioned addition (under which the abovementioned aid will be received) and to the conclusion of the Family court rejecting the appealer's claims of the applicability of the defenses defined on Article 13 of the abovementioned addition (under which the abovementioned aid will not be received).

Parties' claims on the Family court

On the statement of prosecution submitted by the respondent to Family court, he had claimed that he and the appealer are the minor's parents, that they had joint custody over the minor while in Jew Jersey USA, and that the parties and the minor resided in New Jersey USA. He claims that on March 2010 the parties decided to fly for a visit in Israel in order to celebrate Passover holiday with their families, but shortly after their arrival at Israel a dispute between them broke out, after which the appealer moved to her parents' house with the minor and refused to allow him to see the minor. He also claimed that back and forth plane tickets for the three of them have been pre-purchased, and that he was due to return to USA on April for his business, and so he did. The return plane tickets for the appealer and the minor were purchased for June 2nd 2010, in order to allow them a longer vacation with family members, however at the relevant date the appealer and the minor did not return to USA but stayed in Israel and the appealer refused to return the minor to USA.
Furthermore he claimed that the parties had rented a joint apartment in New Jersey and lived in it, and that they co-own a company which is registered there. He also claimed that on April 2010 the appealer issued a request to the Rabbinate court, including custodial issue, without the proper authority, to his claim.
Various documents were attached to the prosecution, and at its end the respondent requested the court to accept the prosecution's claims and order the return of the minor to her house in New Jersey USA.

On the statement of defense submitted by the appealer, she had asked to reject the prosecution. She had claimed that she and the respondent are citizens and residents of the state of Israel, that they have no legal status in USA, since she stayed there with a student visa and the respondent stayed there as her partner. She claims that the respondent's attempts to receive a visa in USA have been declined.
She also claimed that they had no intention to settle in USA but to live there for limited time in which she would study and he would work in odd jobs and save money, while intending to return to Israel at the end of that time with some financial security. Furthermore she claimed that while staying in USA they had visited frequently in Israel and continued to pay social security fees in Israel. She also claimed that the financial status of the respondent prior to the birth of the minor was not at its best, and therefore he searched for new investment routes, and in preparation to return to Israel they had established a joint

business, a clothing shop in [home town], on January 2010. The shop is managed by the respondent's sister.

She argues that the tear between her and the respondent began even prior to the birth of the minor, since the respondent became extremely newly religious, and she refused to lead the strict religious lifestyle he demanded. She also claimed to have been treated violently and aggressively by him. She claims that on February she discovered that he wishes to divorce her and turned to Rabbi A. E. on the matter. Therefore she accepted his wishes, after a failed mediation attempt. She also claimed that on January 2010 they had both come to Israel to handle the opening of the shop and on March 2010 visited in Israel, while the plane tickets paid for by her family. During their visit in Israel on March, the difficulties in their relationship had resurfaced; they've spent the holiday apart, during which she had allowed the minor to visit the respondent and his family, and eventually, on April 7th 2010, she had filed for divorce, including requesting custody over the minor and a warrant to detain the respondent's departure from Israel.

Furthermore she claimed that the parties began negotiating a divorce settlement, in which understandings have been reached but which wasn't signed eventually (the agreement draft is attached to the statement of defense as appendix c). On April 14th 2010 the Rabbinate court had cancelled the detention warrant against the respondent and he had left Israel for USA. In his request to cancel the detention warrant, he did not state anything regarding the abduction of a minor. The appealer specified the proceedings in the Rabbinate court in Haifa.

The appealer claimed that the respondent delayed the return procedure under the Convention for six months since the day the minor arrived at Israel. She also claimed he ignores the minor's needs.

As for Article 3(a) of the addition to the Hague Convention Act, she claimed it was not proven that USA is the habitual residence of the minor, since the respondent and the appealer stayed only temporarily in USA, and also pointed out that after announcing her school that she quits studying, she received a massage from the university that her legal stay in USA is restricted to 15 days only. She was required to announce her husband about having to leave USA forthwith.

The appealer claimed before the Family court that the habitual residence should not be determined only based on physical location but also according to the "intentional school", which is based on the parties' intention to relocate to a different state.

She claims that the parties' stay in USA for schooling and establishing financial basis temporarily, while laying the foundations to return to Israel, by opening a business in Israel amongst other things, necessitates the conclusion that the residence in USA was not habitual but temporary, and that the habitual residence is Israel.

The appealer further claimed before the Family court that the defenses under Articles 13(a) and 13(b) of the Act apply to her case. Regarding the Consent and Acquiescing defense set by Article 13(a) of the Act, she claimed it implies by the fact that the respondent wanted to divorce her; that during the attempt to cancel the detaining warrant against his departure from Israel he was willing to divorce her and pay alimony for the minor in Israel, and didn't mention abduction; that according to the divorce agreement draft he consented to the minor living in Israel; and that he acquiesced with the Rabbinate court's conclusion that the appealer has custody over the minor. Alternatively she claimed that since the respondent

didn't commence the proceedings according to the Convention immediately, one may conclude that he had acquiesced with the removal of the minor from her residence in USA.

Regarding the defense of preventing Harm to the minor, by force of Article 13(b) of the Act, she claimed that transferring the minor to a foreign state, in which the custodian mother has no legal status, would harm her. She also claimed she has no residence in USA since the lease of the apartment in which they had lived has expired. She also claimed that since returning to USA, the respondent did not provide for any of the minor's needs nor maintained any relationship with her.
She also claimed that since the Convention doesn't apply, the respondent's claim to visitation, according to Article 21 of the Convention, should also be rejected.
Finally she claimed that the respondent did not act in good faith while dragging her to futile and expensive legal proceedings, while pointing out his delay in commencing the proceedings, his agreement with the divorce while attempting to deny the appealer of all her financial rights, his disconnection with the minor, etc.

Family court's ruling

The Family court determined that the parties are Israeli citizens who stayed in USA since 2004, when they toured there together and lived there ever since, and at some point, on 2006, even started to live together. On 2008 they got married, although in Israel, but returned to USA and on September 10th 2009 their minor daughter was born.
As for the purpose of arriving at Israel on March 2010, the Family court accepted the respondent's version, by which this was a visit in order to celebrate Passover holiday with family members, based both on the pre-purchased back and forth plane tickets and on what the appealer herself stated in her request to Rabbinate court, according to which they had arrived at Israel "**in order to celebrate Passover with extended family…**". Therefore, the Family court rejected her claim that the parties arrived in order to settle in Israel, and also rejected a later version of the appealer, by which she had purchased back and forth plane tickets since they cost less.

As for the status of the agreement draft based on which the appealer has requested to determine that the respondent has consented to the minor's retention in Israel, the Family court determined that the draft was formed during negotiations to reach joint understanding with the help of a joint acquaintance, but eventually such understanding was not reached and the negotiation didn't lead to a binding agreement since the appealer refused to sign it.

As for the appealer's claim that the respondent has delayed the commencing of the proceedings according to Hague Convention, from the day they had arrived at Israel on March 2010 until July 2010, the Family court has accepted the respondent's version according to which he had waited until June 20th 2010, the return date to USA according to the pre-purchased plane tickets, and that shortly after the appealer didn't return to USA he turned to the central authority in USA on July 2010, and on August 31st 2010 filed the prosecution to the Family court, and therefore this is not a delay that justifies the appealer's claim of Consent to the minor's retention.

As for the minor's habitual residence, the Family court determined that according to factual school the geographic and physical habitual residence was USA up until the visit in Israel, since social security fees were paid on her behalf in USA and she also enlisted to a nursery there, and therefore this was her habitual residence.

The Family court also examined the evidence according to the intentional school, and determined that according to this approach too, the habitual residence is USA, since the parties showed indications of settling in USA, had lived there prior to the appealer's schooling, indeed got married in Israel but returned to USA immediately after, had lived in a fully furnished apartment and even established a joint company in USA.
The Family court did not perceive managing a bank account in Israel and Israeli credit card, alongside paying life insurance and medical insurance fees in Israel, as indications that the minor's habitual residence isn't in USA.
As for the business established in Israel, the Family court determined that by itself, opening it does not prove intent to return and settle in Israel, and at the most part it is a first step to a future plan, depending on how well the business will succeed. The Family court has relied in this matter on a witness on behalf of the respondent and also on what the appealer had said before the court, that the parties' return to Israel depends on the business' success.

As for the defenses set by Hague Convention, regarding Consent/Acquiescing and Harm to the minor, the court determined that these do not apply in the current case since the respondent never consented to nor acquiesced with the minor's retention in Israel, and also that the returning of the minor to USA will not harm her as suggested since although the appealer's entrance visa to USA has been cancelled (as a result of announcing she had quit school), it is possible today to receive a visa by force of the custodial procedure.

At the end of the day, the Family court sided with the prosecution and set the terms by which to return the minor, including depositing a sum of 6,000$ for alimony and to provide for the minor in the near future, within 7 days.
The Family court also determined that the respondent must also ensure accommodation for the appealer and the minor in the apartment in which they had lived or an alternative apartment including furniture, for at least 6 months from the day they'll return to USA. The court determined that the plane tickets to USA for the appealer and the minor will be purchased by the appealer on her expense.

Appealer's claims on the appeal

As for the minor's life center, the appealer claimed that the Family court had mistaken not to accept her claim that the parties or the minor has no residence in USA to which to return. She also claimed that there is a warrant detaining the respondent's departure from Israel, administered by Rabbinate court, and it is inconceivable that on these circumstances she and the minor would return to USA, while the respondent hasn't filed a custodial request there yet and is being detained in Israel.
As for the manner in which the minor's life center was determined, the appealer claimed that the Family court had mistaken not to conclude, according to "intentional school", that the residence in USA is only temporary and that they intended to return and settle in Israel.

She claims the court should have concluded that from the fact that the respondent has brought all of his belongings to Israel and shut down the company in which he was active, the fact that the parties had temporary visas in USA, and the fact that they had continued to manage an account and pay insurance in Israel. She even claimed that although these are determinations of fact, the court's conclusion is so illogical and irrational, that the appeal court should intervene and change it.

The appealer further claimed that the Family court had been mistaken when determining that "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". She claims that the Convention doesn't examine the best interest of the child but requires his return to the state in which he had resided in order to commence the proper legal proceedings in which the principle of the child's best interest will be examined and actualized. Regarding this issue, she claimed that no such proceeding is being commenced in Jew Jersey USA since the parties never saw themselves as belonging to this state.
The appealer also claimed that the Family court should have concluded a different conclusion from the factual system described in its ruling, which indicates that since the minor was born 15 months ago, she stayed for 10 months in Israel, therefore Israel should have been determined as her life's center.
The appealer also claimed that the Family court had mistaken not to accept her claim that the pre-purchase of back and forth plane tickets was due to lower price.

Furthermore, the appealer claimed that the Family court had mistaken to reject her claim regarding the respondent's Consent to or Acquiescing with the minor's retention in Israel, and also to reject her claim that returning the minor to USA will harm her gravely. Regarding this issue she claimed that the Family court should have ordered an expert opinion to examine this claim, which was not ordered. She also claimed that a deposit of 6,000$ as ordered isn't sufficient to provide for the minor's needs. She also requested to relieve her of paying legal expenditures in the sum of 10,000 NIS.

In her summary, brought upon before us on January 11th 2011, she repeated the abovementioned claims while referring us to judicial references which strengthen her claims in her opinion.

In the arguments presented by the appealer's representatives (attorneys Glovinsky and Itkin) on January 13th 2011, they've referred us once again to the appealer's claims, while referring the court to the instructions of the abovementioned Act and to the evidence brought upon before the Family court, which they believe necessitates the opposite conclusion to that made by the Family court. During that sitting, the appealer's representative, attorney Glovinsky, presented another claim, by which the respondent should have proved to the Family court that he has a joint custody right over the minor with the appealer, which was not proven, and therefore the instructions of the Hague Convention do not apply to the current case, according to Article 3(a) of the addition to the Hague Convention Act which requires proof of violation on the respondent's custodial rights according to the state law in the minor's residence.

The appealer's representatives claimed before us again that in the circumstances proven to the Family court, the habitual residence of the minor should be Israel and not USA, and their stay in USA should be seen as temporary and not regular, based on all the claims made before the Family court regarding the lack of permanent USA visa, the cancelling of the appealer's visa, etc.
As for the claims regarding the Consent/Acquiescing and the Harm to be inflicted upon the minor were she to return to USA, attorney Itkin, the appealer's representative, repeated the referral to the evidence brought upon before the Family court and the proceedings between the parties in the Rabbinate court, while emphasizing the lack of legal visa to stay in USA, the lack of regular housing and a danger of deportation of the minor as a result. Attorney Itkin also claimed that the order of 6,000$ isn't sufficient to provide for the minor, which has many and more expensive needs.

Plaintiff's claims on the appeal

In his statements, the respondent wished to reject the appeal. He claims that the Family court's rulings are determinations of fact which were based, among other things, on impression made by the testimonies heard before the court and therefore one should not intervene with them.
He claims that the Family court has analyzed the evidence carefully and inferred the required conclusions. The respondent has referred the court to the evidence supporting the court's conclusion regarding the minor's habitual residence being in USA. He also claimed that following the cancellation of the appealer's visa in USA (as a result of announcing she had quit school), he initiated an application for permanent visa and he is not likely to be deported by immigration authorities. In this regard we'll point out that the respondent was asked to show evidence in the appeal, and has presented (without rejection from the appealer) an e-mail message he had received from immigration authorities in USA, which included a decision given by them on his behalf, which acknowledges his request to receive visa in USA based on professional skills, as of January 10th 2011.
He claims that the Convention's purpose is to set a fast track to discuss the returning of an abducted minor, as "first aid" to restoring the status-quo. He agrees that a procedure regarding the custodial issue hasn't yet been commenced in a court in USA, but claims that such procedure wasn't initiated prior to their arrival at Israel since up until then they had resided together and had joint custody and there was no need for such procedure. He claims that today, in light of the Family court's ruling, when it is not clear at all whether the appealer intends to return to USA, he will file such request for custody over his daughter.
As for residential issue, he agrees with the Family court's ruling, claiming it has been examined both by the "factual school" and the "intentional school".

As for claims regarding Consent or Harm to the minor, he claimed that the Family court has addressed these issues, analyzed them carefully and rejected all of them. He claimed that the appealer did not carry the burden of proving these claims in the Family court, a burden laid upon her, and presented the same claims verbally, without evidential grounds. He also addressed specifically the appealer's claims regarding Acquiescing or Consent, and wished to reject them, also in agreement with the reasons provided by the Family court.

As for the terms to the minor's returning, he claimed that the appealer herself hasn't set any terms and the terms set were initiated by the court, and they are generous and beyond reasonable terms.

In the respondent's arguments before us, his representative, attorney Tores, wished as abovementioned to present new evidence that had been received after the Family court's ruling, among which are the abovementioned decision made by immigration authorities, in addition to a lease contract extending the lease period of the apartment in which the parties had resided prior to their arrival at Israel on March 2010 (the appealer did not object the presentation of the evidence).
The respondent's representative claimed that beyond the Family court's decision (which has rejected the appealer's claims that the lack of visa to allow the respondent to stay in USA, and the lack of residence, indicate temporariness of the stay in USA and a potential Harm to be inflicted upon the minor), the new evidence show that the respondent has a visa in USA, valid until November 14th 2013, which was given based on professional skills and not based on being the partner of the appealer, who received temporary visa by force of her schooling. Likewise, the lease contract nullifies completely the claim of potential Harm to the minor because of lack of residence in USA during the custodial proceedings.

As for the claim made by the appealer's representative, attorney Glovinsky, regarding lack of proof of the customary law of New Jersey, granting the respondent joint custody, replied attorney Tores that the respondent's claim for joint custody according to American law, which was mentioned in his prosecution arguments before the Family court (article 3), wasn't denied nor disputed and is being presented for the first time during the deliberations before the appeal court.

As for the lack of legal proceedings in USA regarding the custodial issue, she repeats the claim presented in the response arguments, according to which prior to the parties' arrival at Israel on March 2010, there was no need for such proceedings, in light of joint residence in New Jersey and joint custody.

As for the claim regarding the delay in commencing proceedings under Hague Convention, she replied that the respondent waited until the date in which the appealer and the minor were due to return to USA according to the pre-purchased plane tickets, June 20th 2010, and as that date passed and it became obvious that they are not returning to USA, his American representative sent a letter to the appealer, clarifying that it is an illegal act. The respondent even administered the current prosecution on August 2010, and therefore this delay should not be seen as indicative of Consent nor Acquiescing to the minor's retention in Israel. Likewise, attorney Tores referred us again to the other evidence presented before the Family court, according to which the Family court has rejected the claim regarding the respondent's Acquiescing with the minor's retention or his Consent to it.
As for the claims regarding the respondent's employment, she claimed that the financial status of the respondent's independent company is irrelevant.
She also claimed that the fact that the minor is staying in Israel for a longer period that she stayed in USA should not be seen as indicative of her life's center, since we should not take

into account the time since she was scheduled to return to USA, June 20th 2010, during which she was held in Israel illegally.

As for the alleged damages to the minor, she claimed that the sum of 6,000$ set by the Family court, which have already been deposited by the respondent, is sufficient to provide for her needs.
She also claimed that the minor's plane ticket costs about 100$, due to her age.
In light of all of the above, she asked to reject the appeal.

Hereinafter we will discuss the parties' arguments and the disputes presented before us.

Normative framework

The disputes relevant to the current case are rooted in the instructions of the Hague Convention Act, specifically the instructions in Articles 3, 12 and 13 of the addition to the abovementioned Act, in which determined:

> **"Article 3**
> **The removal or the retention of a child is to be considered wrongful where –**
> ***a)*** **It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and**
> ***b)*** **At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.**
> **The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.**
> **…**
> **Article 12**
> **Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.**
> **The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.**
> **Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another**

State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13
Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

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

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

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

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Level of intervention with determinations of fact

As clarified by the content of the abovementioned parties' claims, the majority of the claims refer to determinations of fact determined by the Family court regarding the habitual residence of the minor, the respondent's Consent to / Acquiescing with her retention, and whether returning her to USA will harm her in any substantial way.

The rule regarding intervention with determinations of fact determined by court is well known, and according to which the appeal court will not rush into intervening with such findings, especially when the debating court heard verbal testimonies and therefore had an advantage of forming direct impressions of the witnesses. An exception to this rule is where the court had been apparently mistaken, in a way that may inflict injustice or actual distortion of justice.

As for determinations of fact in proceedings under the Hague Convention Act, such as the current case, the courts tend to take a more liberal approach and examine to an extent the previous court's determinations even regarding facts, while requiring evidential analysis (see for example: both in c.a. 107/97 (Tel Aviv Regional) and in c.a.a. 7994/98, appeal request regarding the ruling of Tel Aviv Regional court in the abovementioned c.a. 107/97, where honorary judge Banish points out: "**the majority judge of the appeal court examined the evidence with the point of view of the debating court… in light of the sensitive nature of the conflict, I also see a need for evidential analysis**…").

To my humble opinion, so should we do in the current case, which is just as sensitive.

Habitual residence of the minor

Before we address the issue of examining the parties' claims based on the Family court's ruling and the evidential material which was presented to it, we should remove a claim made by the appealer's representative, according to which the New Jersey's law was not proven to be applicable before the Family court, and therefore the respondent's right to custody over the minor was not proven, nor a violation of that right warranting the application of Hague Convention.

This claim must be rejected.

Consideration of the statement of defense submitted to the Family court indeed confirms the respondent's claim that from the beginning there was no disagreement regarding joint custody and regarding the respondent's right to joint custody over the minor, since the appealer did not disagree with those claims in her statement of defense.

Furthermore, such claim was not mentioned even in the appeal statement or the respondent's arguments, and was brought up only while attorney Glovinsky presented his arguments during the deliberation.

In light of all of the above, there was no need to prove the foreign law.

Now we turn to discuss the dispute regarding the minor's habitual residence.

Regarding the tests according to which the "habitual residence" should be examined, Judge Y. Amit stated in r.a. 9802/09 (Supreme court):

> **"The term "habitual residence" was not defined in the Convention, and is the focus of deliberations in cases of children's abductions. In the past, the rule in this issue was clear and courts repeatedly determined that the term refers to the physical place of residence of the minor. The court had examined fact wise where had the partners resided, without addressing the issue of the parties' intention or future intention – see c.a. 7206/93 Gabay vs. Gabay I.r. 51(2) (hereinafter: Gabay), where it is stated:**
>
> > **"The residence is not a technical phrase… it describes an ongoing life reality. It reflects the place in which the child was used to live prior to the abduction. The point of view is that of the child and where he resides. The examination focuses on previous daily lives and not future plans. When the parents reside together, the habitual residence of the child is usually his parent's residence."**
>
> **This approach, which can be called "the factual school", was the dominant approach for many years. Alongside this approach, the "intentional school" gradually developed, while emphasizing the parent's intention. The question whether the parent's intention should be considered for determining the habitual residence was discussed on Supreme court in c.a. 7994/98 Dagan vs. Dagan, I.r.**

> **53(3) 254, 263 (1999), but was not resolved. For further distinguishing between the schools and their applicability, see in detail my ruling on f.a. (Haifa Regional) 4646-11-08 L.M. vs. M.M. (not published, January 13th 2009), and the referrals there. The ruling was approved in this court on r.a. 2338/09 anonymous vs. anonymous (not published, June 3rd 2009) (hereinafter: anonymous case).**
>
> **10. In anonymous case, I have expressed my opinion that the most important issue should be the factual test from the minor's point of view.**
>
> **..."**
>
> (r.a. 9802/09 **anonymous vs. anonymous** Su.C. 2009(4), 3771, 3775 (2009))

Analyzing the evidential material presented before the Family court leads, in my opinion, to the conclusion determined by the Family courts, according to which the habitual residence of the minor was indeed New Jersey, USA.
First, it is agreed that the minor was born there and even grew up there in her parent's house for about five months.
Furthermore, the parties came to USA about 4 years prior to the minor's birth. According to the appealer's testimony she had arrived there in order to study, and the evidential material shows that the respondent came to USA after her and established with her a joint company and even attempted to establish himself financially. The parties rented a furnished apartment in USA, in which they had lived and even hosted acquaintances.
The evidential material also shows that the parties have visited Israel on more than one occasion, but returned after each visit to USA, and even arrived at Israel in order to get married and returned to USA after the wedding.

It seems that there is an agreement regarding these facts.
Therefore, in my opinion, with regards to concluding about the habitual residence, according to the factual school, the Family court had not been mistaken

But the appealer wished to base her claim on the intentional school. In this framework she asked the court to conclude from the circumstances that the parties intended to stay in USA only temporarily, that they did not view their residence there as future residence and that their arrival at Israel on March 2010 was in order to settle permanently in Israel.

The next question we should ask is whether the arrival at Israel on March 2010 was in order to settle in Israel permanently or for a visit/Passover holiday only.
The Family court debated the appealer's claim regarding the "parties' intention" to stay and settle in Israel, and rejected that claim, while specifying his reasons to rejecting these claims of the appealer regarding the matter. I have not found any flaw in the Family court's conclusion, in light of the evidence presented before the Family court, that warrants our intervention. Mind that on the aforementioned issue of parties' intention, as presented by

the appealer, the Family court could have formed a direct impression of the parties' testimonies, and therefore has an advantage over us regarding this issue.

In my opinion too, the evidence analysis suggests that the arrival at Israel was for a visit only. The pre-purchased plane tickets, from USA and back, clearly show that the parties intended to return to USA at the end of the visit and not to stay in Israel. Likewise, as determined by Family court, the appealer stated in her request to Rabbinate court to issue a warrant detaining the respondent's departure from Israel, that their arrival at Israel was "**in order to celebrate Passover holiday with the extended family**".

In my opinion, the appealer's conflicting claims before the Family court (regarding her claim before the Rabbinate court that the visit on March 2010 was for a holiday vacation) should be rejected for judicial estoppels grounds also.
Note that according to judicial estoppels doctrine, when a litigant has requested an aid in any legal procedure based on factual claim, which was accepted on that procedure, and received that aid, he is prevented from claiming a conflicting factual claim in a different procedure (even if the procedures are against different people).
See – c.a.a. 4224/04 **Beit Sason vs. Shikun Ovdim Ltd**.

In the current case the appealer petitioned to the Rabbinate court for a warrant detaining the respondent's departure from Israel. In her request she had pointed out that their joint arrival at Israel was for a visit during Passover holiday.
One may conclude that were she to claim before the Rabbinate court that she and the respondent arrived at Israel in order to set their permanent residence in Israel, she would have pulled the rug out from under her own feet in her request to issue the detaining warrant.
For this reason also the Family court should have rejected her claim regarding the intention the stay and settle in Israel after arriving on March 2010. It certainly strengthens the conclusion determined by the Family court regarding the "habitual residence" according to "intentional school".

Adding to all of the above, as suggested by the abovementioned statements made by honorary judge Amit, the factual test regarding the physical/geographical residence prior to the abduction or the retention (which is undoubtedly in New Jersey) should be considered most important.

Since we've established that the Family court had ruled the minor's residence in Jew Jersey USA, therefore according to Article 12 "**the authority concerned shall order the return of the child forthwith**", except if the defenses specified on Article 13 of the abovementioned addition are proved to apply.

Hereinafter we examine whether one of these defenses indeed exists.

Defense of physical or mental Harm as a result of returning to USA

This claim was based primarily on the lack of residence as the lease expired, the lack of visa for the appealer and the respondent and the lack of employment and finances as well as an expected deportation.
The evidential material presented to the Family court and that presented to us during the appeal refutes all these claims.
We were presented with an agreement for renewal of the lease for another year. We were also presented with a letter received by the respondent from the immigration authorities in USA, according to which his request for visa in USA based on professional skills is approved.
As for visa for the appealer, we may apply the words of honorary judge Banish in c.a.a 7994/98, in which an appeal on a decision to return an abducted child **to New Jersey USA** was deliberated, according to which:

> **"A letter presented to the Regional court on behalf of the international department of the attorney's office, shows that the policy of the immigration and naturalization authorities in USA has changed, and so has the policy of the American foreign affairs office. We've come to learn that today the parent who's not entitled for a visa in USA, but who's bound by the court to return his child to USA, has an option to receive a special permit to stay in USA until the debating procedures to return the child end. Considering that, the respondent can return to USA with the minor in order to conduct the custody trial there. We must presume that during the deliberations about the custody and the future residence of the minor, the court in New Jersey will take into account the fact that the responsive has no legal status in USA."**

I can only add to the above mentioned, that we must presume that during the deliberations, the court in New Jersey will also take into account the claims regarding the respondent's employment and earnings. Note that as the Family court instructed, the respondent has already deposited 6,000$ in order to provide for the minor's needs in USA in the immediate time after her return, in which the custodial issue will be discussed. Setting the terms to ensure her alimony during the time of custodial deliberations in USA (to which I'll further address later), nullifies the concern of harming her in that sense.

As for the claim that it is unreasonable that the appealer and her daughter will return to USA while the respondent's departure from Israel is detained according to Rabbinate court's order, it is superfluous since the respondent has stated before us that he agrees that as long as his departure is detained, so will be the court order instructing the return of the minor to USA.

The claim concerning the lack of an expert opinion to examine the alleged Harm to the minor should also be rejected. I didn't find any such claim or request for ordering an expert opinion presented before the Family court, and in any event, I doubt if such expert opinion by social workers associated with family courts in Israel is possible when the potential residence to be examined is in USA.

Therefore the appealer's claims regarding this issue should also be rejected.

Consent or Acquiescing on the respondent's part

In Gabay case (c.a. 7206/93) the court determined that the Consent defense should be interpreted in the narrow sense, otherwise the Hague Convention loses its purpose. It was also determined there that the burden of proving it rests upon the party claiming it applies. So says honorary judge Banish on the abovementioned c.a.a. 7994/98:

> **Avoiding commencement to the court in a procedure according to the Convention does not, by itself, indicates Consent. The abducted parent may have been looking for the child and not turning to court since he didn't know where he is; the abducted parent may have not been aware of his rights; he may have negotiated trying to peacefully fulfill his right to return to child (which is encouraged by the Convention on Articles 7(c) and 10). As President Barak said:**
>
> > **"Even if the negotiation takes longer than expected – and even if in the meantime the child goes to kindergarten or school – it does not suggest "Consent" by itself. The same is true if during the negotiation comes forth the possibility of the child remaining in the state to which he was abducted. As we've seen, Consent is a conscience decision to relinquish the right of immediate return granted to the "abducted" parent. Negotiating in good faith is not usually in line with such relinquishment."**
>
> **(Abovementioned Gabay ruling, article 22)".**

In addition, she referred there to the extent of required proof:

> **"The question the court should ask when faced with the decision of whether there was "Consent" is, has the abductor parent laid enough factual infrastructure in order to determine that the abducted parent has consented to the change in status-quo, by which relinquishing the immediate return of the minor.**
>
> **It's difficult to define in advance all the circumstances from which to conclude "Consent". However, since the "Consent" is an expression made by the abducted parent to relinquish the immediate actualization of his custodial right, <u>it must be clear and unequivocal</u>.**
>
> **It is usually easier to detect a positive act of Consent, which is realized clearly in writing or by heart. It must not be inferred from sayings which can be interpreted in different ways, sayings which were not comprehended clearly by the abductor parent. When the Consent isn't explicit but inferred from behavior, it is harder to**

> **detect it, and usually its existence should be inferred from consistent and prolonged unambiguous behavior. (In the matter of active and passive Consent see:**
>
> **Re A and another (minors) (abduction: acquiescence) (1992) All E. 929 (c.a. 1.R); and also: H. and others (minors) (abduction: acquiescence) (1997) W.L.R. 563 (H.L.(E)2).)**
>
> **The question of whether the "Consent" defense applies may be answered not only based on the litigants' testimonies but also on external evidence and testimonies. However, the parent wishing to prove the "Consent" defense must present clear and convincing evidence that the abducted parent has relinquished his right to immediate return of the child. One should not determine that the "Consent" defense applies based on ambiguous sayings or on unclear behavior which may be interpreted differently".** (The underlying emphasizes were made by me – Y.A.)

The abovementioned points to the quality of evidence the claimer of Consent must present before court. Ambiguous evidence which may be interpreted in different ways will not suffice. One must present clear and unequivocal evidence.

I believe that in light of the abovementioned rules, we mustn't intervene with the determinations made by Family court and its conclusions regarding lack of Consent or Acquiescing too.

The difference between "Consent" and "Acquiescing" was described by honorary judge Banish in the abovementioned 7994/98 as follows:

> **"12. The defense against returning the minor set by Article 13(a) of the Convention distinguishes between "Consent" and "Acquiescing". The difference between the two is related to the time factor. "Consent" is given in advance and "Acquiescing" is in retrospect.**

In the current case, I believe the respondent did not consent to nor acquiesced with the minor's retention.
In light of the appealer's and the minor's plane tickets back to USA, the respondent had no reason to anticipate their return to USA any time sooner. Furthermore, in light of the respondent's initial **Consent** to the minor's stay in Israel until June 20th 2010, a Consent learnt by the date on the minor's plane ticket, it is apparent that the respondent had no cause during that period to prosecute under Article 12 of the abovementioned addition, up until that date.

Even though the parties negotiated to conclude all of their conflicts, I do not support the conclusion that the agreement draft, which the appealer did not sign eventually, reflects

Consent by the respondent nor relinquishing or acquiescing with the minor's retention in Israel.
The agreement draft includes several components and issues. Obviously, in order to reach an understanding regarding all the negotiated issues (alimony, divorce, custody, seeing arrangements, etc.), each of the parties had to make certain compromises and each of them was willing to do so in exchange for the compromises made by the other party.
Refusal of one party, in this case the appealer, according to the Family court, to sign the agreement, ends the negotiation and the other side's willingness to reach an agreement, since that willingness is conditioned by nature to the other side's acceptance of the agreement's terms as a whole. Otherwise, what might the parties benefit from negotiating an overall agreement instead of negotiating narrowly on a specific issue and conducting individual agreements, each addressing a specific conflict between them?

In any event, the agreement draft on which the appealer refused to sign does not qualify to my opinion as "clear evidence" as the law requires in order to prove Consent or Acquiescing.
Consent to pay temporary alimony is also not such evidence, especially while the minor is being held outside of her habitual residence, and the question of permanent custody still stands undecided. It is at the most part Consent given for a limited amount of time, until the custodial issue is decided.

The claim regarding the delay in commencing proceedings under Hague Convention should also not be accepted in my opinion, since no such delay occurred.
First, the Convention allows applying for the return aid during a period of one year starting from the day of the abduction or the retention.
Second, in the current case, as mentioned above, the respondent could have reasonably expected that the minor would not be returned to USA prior to the date specified in the plane ticket purchased for her.
Shortly after that date he had sent a warning letter through an American lawyer, in which he had stated unequivocally he wants the minor to return, and about a month later he had commenced the procedure in the Family court. This behavior on his part supports the Family court's conclusion that he had not consented in advance to the minor's retention and had not acquiesced with it in retrospect.
Considering the aforementioned evidence on one hand and the burden laid upon the claimer of the Consent defense as described previously on the other, I believe that the conclusion made by the Family court was the reasonable one and we should not intervene with it.

In conclusion I'll point out that I didn't find reason to discuss the appealer's claim regarding the Family court's statement that "**the fundamental basis of the Hague Convention is that the best interest of the minor requires his immediate return to the state from which he was abducted**". Even if the court has been wrong about this issue, it does not benefit the appealer, whose claims, factual almost completely, have been rejected by themselves, regardless of the abovementioned statement made by the Family court (a detailed discussion of the relations between the instructions of Hague Convention and the "best interest of the minor" principle and its application on Hague Convention is found in the ruling given on the abovementioned c.a.a. 7994/98).

Sufficiency of the terms set by Family court

The term regarding residence has become redundant in light of the aforementioned lease extension contract presented before us.

As for the amount of money deposited, I believe an intervention is in order. This amount reflects an expenditure of one thousand dollars per month for six months.
Even presuming the proceeding in USA are conducted tomorrow, we have no indication (nor did the Family court) regarding the amount of time since commencing the procedure in the New Jersey court until it is deliberated and decided upon.
Hence I would recommend my colleagues to set the amount to be deposited on the sum of 10,000 US$.

I would also recommend my colleagues to delay the return warrant until we will be presented with evidence of commencing custodial proceedings in New Jersey court (which has not yet been initiated). The respondent stated that he will commence it soon.

We note the respondent's Consent to the minor's retention in Israel as long as the detaining warrant issued against him by the Rabbinate court has not been cancelled.

Conclusion

I would recommend my colleagues to reject the appeal, provided the alterations of the deposit and the actualization delay as mentioned above.

_____

Yonatan Avraham, judge

<u>Honorary judge Dani Tsarfati:</u>

After examination and consideration, I concur with the ruling of my colleague, judge Yonatan Avraham, especially with regards to the dispute between my colleagues around the applicability of the Consent and Acquiescing defenses in the current case, according to Article 13(a) of the Convention.

First, in my opinion, the analysis of the evidence brought upon before the Family court leads to the conclusion that the habitual residence of the minor is indeed New Jersey, USA, as specified in the ruling of honorary judge Yonatan Avraham.

In this context, the Family court has also rejected the appealer's claim that the partners had arrived at Israel on March 2010 in order to settle in Israel. The analysis of the relevant evidence indeed shows that they had arrived for a visit only, and I didn't find in the Family court's reasoning of the issue any flaw requiring intervention.

Additionally, in my opinion, the appealer's one-sided actions and intentions, since the weakening of the partners' relationship began, even if they indeed indicate her intention to return to Israel and even if they have developed for several months since the minor was born, should not change the determination that the habitual residence of the minor, considering all circumstances, is USA.

In general, it should be determined regarding Article 4 of the Convention, that one-sided intention (certainly when it is directed at the future) and even one-sided action of either one of the partners, as a result of a tear in their joint lives prior to the legal proceedings' commencement, including under a Convention, cannot be of significant influence and certainly cannot subvert the determination of the habitual residence, as determined by the factual test and the joint intention test (incorporated into the main factual test), which was true in the current case for a period of about four year prior to the minor's birth and even on the first few months after her birth, at least.

After consideration I see, as aforementioned, that the Consent defense applicability, under Article 13(a) of the Convention, was also not proven, as explained in the ruling of judge Yonatan Avraham.

Negotiations to end all conflicts between the parties, as suggested by the agreement draft, cannot indicate Acquiescing and certainly not Consent of the respondent to the minor's retention in Israel.

Even in the narrower sense of Acquiescing, all we can learn from the respondent's willingness, according to one term in the agreement draft, to relinquish his right and retaining the minor in Israel under her mother's custody, is of a conditioned willingness on his part, and only to the extent that the parties have reached an overall agreement in all of the conflicts to which the draft refers, each party and the compromises he is required to make.

It should be emphasized that the evidential infrastructure concerning the negotiations between the parties do not suggest any intention to isolate different controversial issues as sub-agreements, meaning that agreeing to cancel the detaining warrant against the respondent's departure from Israel was formed facing his relinquishment of the minor's custody, allegedly as separate and independent from the entirety of the controversial issues.

In our case, since the abovementioned negotiation didn't transform into a signing of an overall binding agreement, one should not learn from the negotiation procedures of Consent or relinquishment by the respondent, by isolated referral to a specific term in which the respondent has expressed a conditioned willingness during negotiations.

It seems that even proper policy, aimed at encouraging negotiations in order to solve conflicts between partners, even in cases of abduction, while allowing the parties the freedom to conduct it in good faith and without worrying that a willingness to make some kind of compromise will be later interpreted against them, necessitates a narrow interpretation and twice as much caution before we ascribe one party a conscious decision to relinquish his right of returning, based on conditioned stances he had held during the negotiation procedure, which did not become a binding agreement, as in the case before us.

The Consent or relinquishment on the respondent's side which the appealer wishes to illustrate in the current case, necessarily does not qualify in term of quality and scope of evidence required of one who wishes to prove Consent or relinquishment under Article 13(a) of the Convention.

In addition, I concur with the adjustments in the amount of monetary deposit and with the delay of the actualization until the commencement of custodial proceedings in New Jersey court, as determined in the ruling of judge Yonatan Avraham.

Subject to all of the above mentioned, I concur with rejecting the appeal.

As a final note I will add that hopefully, as the legal battles will subside, the parties will return to an overall practical deliberations, without need for legal proceedings, at least in order to regulate the issues discussed during their negotiation, especially considering the fact that the gaps between the parties allegedly summed up in financial issues (which were the ones that have also prevented the appealer from eventually signing on the agreement draft), since the best interest of the minor and even the personal best interest of the parties warrants and necessitates it.

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Dani Tsarfati, judge

Therefore it is decided by majority of opinions, as described by honorary judge Yonatan Avraham in his opinion, to partially accept the appeal, in the sense that the sum of the deposit set by the Family court will be 10,000$ instead of 6,000$. The other parts of the ruling stay unchanged, and the appeal – as it refers to them – is rejected. The appealer will pay the plaintiff his legal expenditures in the sum of 10,000 NIS. In addition we order to delay the return warrant until evidence of commencing proceedings in Jew Jersey court regarding custodial issue will be presented.

Given today, January 20th 2011, in the absence of the parties.

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Avraham Avraham, judge	Yonatan Avraham, judge	Dani Tsarfati, judge
(Presiding judge)		