

**In the Supreme Court**

**F.P.A. 741/11**

Facing                      Honorary Judge E. Arbel  
                                    Honorary Judge H. Melcer  
                                    Honorary Judge U. Vogelman

Plaintiff                    Anonymous

vs

Respondent                Anonymous

Sitting regarding permission to appeal the ruling of Regional Court in Nazareth from January 20<sup>th</sup> 2011 in Case Appeal No. 44293-12-10 given by honorary Judges A. Avraham, Y. Avraham and D. Sarfati

Sitting Date:              Adar B 1<sup>st</sup> 5771 (March 7<sup>th</sup> 2011)

Panel secretary:         Ido Glytman

For the plaintiff:         Advocate Tal Itkin, Advocate Avidan Globinsky

For the respondent:     Advocate Gal Torres

**Protocol**

Advocate Globinsky: Your honors, we ask the honorary court to demonstrate we should be granted a permission to appeal in this matter. Afterwards whether the actual appeal may be discussed.

Honorary Judge E. Arbel: You're basically asking us to adopt the minority opinion of the Regional Court.

Honorary Judge U. Vogelman: Why couldn't this matter be over with practically? It was headed for actions and stopped at some point. The question is if there wasn't an option to reach a practical solution? What actually stopped the parties? The question is for both parties.

Honorary Judge E. Arbel: You've basically did not agree to sign the agreement at the last moment. You've had a written agreement between the parties and eventually it was she who changed her mind.

Advocate Globinsky: Your honors, I believe the discussion should be regarding how to solve this package. We're talking of a marriage which has come to its end. The agreement was not signed because there was a point she did not sign since she wanted some financial reference, regarding a joint shop in Israel. It turned out for some reason that this shop does not exist.

Advocate Torres: It is one shop in Migdal Ha'emek.

Honorary Judge H. Melcer: The child is being held hostage.

Advocate Torres: She's not being held hostage.

Honorary Judge H. Melcer: Madam, the representatives should solve the problem first of all. I'm not just saying that. The advocates should finish here.

Honorary Judge E. Arbel: We have here a couple with a child in the middle and she's held hostage. We need to solve this matter.

Advocate Torres: My client is the child's father and he wishes to raise her the same way she raises her. Attempts were made in the past and they've failed and not only by us.

Honorary Judge E. Arbel: Madam needs to pay attention. We are three judges who've read the material and saw that there was some point in which you've reached an understanding. The issue of the child, it's not a conclusive matter. Since there is a minority opinion and also since the whole dispute erupted here in Israel. She notified she has stopped studying there. I understand that he has visa until 2013. This whole issue is not simple. We will of course hear you but this matter needs to be resolved.

Advocate Torres: He did not agree to stay here with the child full heartedly.

Honorary Judge U. Vogelman: Ms. Torres, you had a draft. And regarding the issue that the plaintiff did not agree, it is not relevant. I mean, the differences are not so big, you've agreed to something.

Advocate Torres: The agreement in April was with specific terms. It is still delayed under various circumstances. She's been delaying it ever since he came to testify only since he wanted the court to get an impression of his intents and wishes. He wants to realize his right as a father. He cannot be brought here and then be obliged with things.

I hear the panel and I understand things aren't certain.

Honorary Judge E. Arbel: Madam should explain to him that this will not be the outcome necessarily. In the end it failed because of an issue which does not actually exist. I understand he has a business there.

Advocate Torres: Yes. He and his wife lived there to make a living and live there.

Honorary Judge H. Melcer: How old is the daughter?

Advocate Torres: The child is a year and a half old.

Advocate Globinsky: There's the issue of KTUBA [Jewish marriage contract] in the Rabbinical Court, and these things should be included in the affair.

Honorary Judge H. Melcer: Try and work this amongst yourselves. Be flexible, the attorneys here need to assist since the parties are emotional. Instead of wasting money here and in USA try to help. It's just a waste of money.

Honorary Judge E. Arbel: Set arrangements when and how he will see the child.

Advocate Torres: I'll explain.

Recess and after which:

Advocate Globinsky: Sadly we cannot accept the offer.  
We ask the court the grant us permission to appeal since we claim it is...

Honorary Judge H. Melcer: Present your claims as if the permission was granted.

Advocate Globinsky: We think that this case represents a new kind of cases involving the world as a global village in which it is easy to move from one country to another, it is after all an Israeli couple whose linkage to a different contracting state other than Israel is weak.

Honorary Judge E. Arbel: How long there before coming to the Passover holiday?  
Before the period in which they went for her studies?

Advocate Globinsky: Three years.

Advocate Itkin: The Convention came to deal with disputes between partners, referring to Moran's book, page 41 onward, titled "The Normative Draft of the Convention". We wish to refer the honorary court to the ruling of this honorary court by Judge Procaccia in r.a.r. 672/07 page 5105 paragraph 8 pages 5118,5119 titled "The Convention's Purpose". We ask this honorary court to determine a precedent that between two obvious Israelis who have no foreign citizenship nor double citizenship, no permanent residency nor any other status in the other contracting state, that the Convention's law does not apply. The respondent is himself Israeli, explicitly expressed consent to stay in Israel till the end of the proceedings and the fact that he's here, as he said in Rabbinical Court. Referring to the majority of precedents in the rulings and the parties' claims in this case. Deal with couples in which one is Israeli and the other is foreignly linked. When dealing with two Israelis there is no ruling ordering return. Libowich two Israelis residing in Los Angeles, claim rejected. Gunzberg quoted in each case, two Israelis in USA. There are many examples.

Let's assume a case in which the other country in the dispute was not a contracting state of the Convention. Russia is a prominent example since there are a lot of immigrants nowadays from Russia. Referring to a case involving Sri Lanka 68830/99 page 24 from honorary Judge Granit - quoting. The court wouldn't have ordered "the minor's return" to Sri Lanka to debate the custody there. We claim there really isn't any difference whether it's a contracting state or not, when dealing with two obvious Israelis, the case should be heard here in Israel.

Honorary Judge E. Arbel: When there is an act of abduction, the rule is that the case returns to the state from which the child was abducted.

Honorary Judge U. Vogelman: Sir will continue as if we're within the current case.

Advocate Itkin: So was said in the Libowich ruling - quoting.

In the Kneset [Israeli parliament] I've found sayings of MK Zuker page 55. To summarize the claim, we ask to determine explicitly and precedentially that when dealing with two Israelis, citizenship-wise, in the absence of status in the other state, and the determining date is the day of abduction. All discussions should take place in Israel and in Israeli courts.

Advocate Itkin: In regards to the consent, honorary Presiding Judge Avraham Avraham writes in his ruling that he derives the issue from the agreement. He says that the parties' intention is learnt from the willingness to end the matter itself and the willingness to sign the financial agreement. I want to add before your honors that these are not the only references indicating acquiescing. Another reference of the father's acquiescing to the minor's retention in Israel, the father filed through his sister a request to the Rabbinical Court to cancel the *ne exeat* warrant. In his request there he says he's willing to divorce, he's willing to pay minor's alimony, referring to paragraph 17 in the request to grant *ne exeat* warrant. Regarding those things said thus far, I think that the fact that the father leaves Israel in April without the minor. There is a financial agreement, when the mother says she'll cancel the *ne exeat* warrant, take all the money and go. Is there a clearer acquiescing than a man coming and leaving his child behind in Israel?

I will not refer to the claims regarding the pressure he was under. It was not proven that the father was under any pressure.

If the defense claim will not be accepted, the claim of the harm which may be inflicted upon the minor by mere returning to USA. We are now in a different factual state than we were during the proceedings' onset. As above mentioned, the proceedings began in effect on September 2010 in Family Court in Nazareth. The father came to testify in Israel on November and stayed in Israel since then by his own free will. He appointed a guarantor to ensure the wife's alimony. He said that when he'll know what will happen in the Supreme Court he'll decide whether to return to USA. We're talking about a daughter who's only 18 months old and maintaining a seeing arrangement with her father in Israel. The child is developing normally since both parents are here. There are environmental elements here which contribute to the minor. If we will return her to USA, in fact the anchor which allows the mother to raise the child may collapse. If the mother returns to USA she will

return only for the custodial proceedings. My client, were she to return god forbid to USA, it will definitely influence her parental function without family members. She has no medical insurance there, she has nothing there. We claim that as a result the minor might be harmed. The first court claims that there is no expert to determine the claim regarding the minor's condition. We'll add to that the fact that the father is aggressive, for 12 months he did not pay the minor even one Shekel for her alimony. It means that the mother returns to a very problematic place for her.

In our opinion it reflects on the minor.

Another thing to harm the minor is the issue of separation from her relatives.

The Family Court determined a deposit of 6,000 dollars. A sum of 10,000 dollars was later determined.

One way or the other, we believe that the guarantees of the housing should be for a longer period of time, in a way that will guarantee that when my client will arrive at USA she will have the apartment. The apartment for which a rent was presented is a joint apartment.

One important last thing, we don't know if the father is allowed to enter USA. We don't know whether he'll have a visa.

She lives in her parent's house with the minor and works here.

Advocate Torres: I'll start by referring the court to Judge Danziger's ruling from only a month ago, February 3<sup>rd</sup>, in which he rejects a permission to appeal, under similar circumstances.

I refer to the circumstances of rejecting the appeal. In this case also the age is not an obstacle in reference to the Convention regarding the obligation to return the minor to her habitual residence in USA. Both courts discussed it and received all factual claims regarding the minor's habitual residence. The minority opinion did not address the issue of residence but accepted it as a matter of fact.

Aside from the fact that this claim was not made in previous courts, we are not dealing with obvious Israelis. Even if we were, it does not hinder the Convention from applying. They've come to USA wanting to establish themselves there.

Honorary Judge E. Arbel: By what force was their stay there breached?

Advocate Torres: After a year they knew that for them to continue... these are not circumstances of Israeli professor coming for a doctorate and they went to study in England. It's not the same case. Both previous courts accepted both of these claims. The Social Security Institute informed my client he is not an Israeli resident and stopped his payments for Social Security. So it's difficult to say he is obviously an Israeli.

Honorary Judge E. Arbel: If he returns tomorrow, he'll be a returned resident.

Advocate Torres: I suppose he will be a returned resident, but he did not request to be a returned resident.

Honorary Judge E. Arbel: What the Social Security Institute does is not an indication.

Advocate Torres: In regards to the Hague Convention, in regards to the issue at hand. This claim will surely not be accepted in this matter.

Honorary Judge H. Melcer: Madam says the situation isn't routine, giving a false statement here once, and a false statement there another time. If they would have said they're going to settle there, then it is a different route.

Advocate Torres: I'm not saying the lady didn't study there.

Honorary Judge U. Vogelman: There is the formality as my colleague Judge Melcer says and there is the non-formal.

Advocate Torres: I believe that in light of the existing ruling and the developing ruling, the intentional school is also new in regards to Hague Convention.

Honorary Judge E. Arbel: They came here for a vacation and here the dispute erupted and here she turned to court and here the argument established itself. This is not a mother who took the child from there and brought her. They were both here. After what had happened she turned to Rabbinical Court and then also came this agreement which cannot be ignored, which the Regional Court refers to.

Advocate Torres: Referring to the ruling regarding Dagan. The couple, according to their testimony in Family Court, started to have a dispute in USA and they went to mediation by their Rabbi and talked with him and tried to resolve their dispute. In March the wife told him lets go on a vacation to Israel for Passover and she managed to persuade him. She was at her mother's place and told him not to get near the child.

Honorary Judge E. Arbel: According to you they came to Israel in order to return. Everything erupted erupted here in Israel. It's not as if she abducted according to Hague Convention.

Advocate Torres: They came consensually, and she even brought him to Israel deceitfully. She issued a *ne exeat* warrant a few days before they should have left Israel. From the moment he consented to testify in November he stayed. His stay also attests that he wishes to return to USA and conduct his affairs from there.

Honorary Judge H. Melcer: He's a Finny citizen, and he is a resident of Finland.

Advocate Torres: The rulings themselves do not address that.

Honorary Judge U. Vogelman: Why not conduct this in Israel? I'm talking about the practical level, not the judicial level.

Advocate Torres: His house is there, he has a business there, he is a man of profession and the employers there signed his visa.

Honorary Judge U. Vogelman: He has a very limited status. He ran a business without a license. Madam presents as if he is just wandering there.

Advocate Torres: The gentleman runs a business. I make factual claims. He deposited 10,000 dollars for his responsibilities.

Honorary Judge E. Arbel: There are rulings and there are court decisions, but there are people behind it, there are people and there is a child. We see many cases and we have more experience and you need to consider everything. We advise both parties if you can reach an agreement. We will approve any agreement signed by both parties. He can work there, establish himself and the child will come to visit him. That's the advice I think the three of us recommend.

Honorary Judge H. Melcer: Up until now she didn't want to inflict more harm. There is also the question of visa.

Advocate Torres: He has a visa. The cancellation was one-sided; the Family Court ruled that it was an intentional act of the appellant in order to harm their status. You should address all the rulings of the Family Court too.

At the time of the abduction, which is the date of retention, June 20<sup>th</sup>, they had status by force of student visa.

Honorary Judge E. Arbel: June 20<sup>th</sup> was the date of the return tickets.

Advocate Torres: True. The agreement's draft was written in the beginning of April. She wrote remarks on the agreement's draft indicating returning to Israel. Meaning, she knew they would continue to live in USA. He returned to USA in order to continue working and told her he is waiting for their return. There is neither consent nor acquiescing here.

Honorary Judge E. Arbel: When was the letter from the American lawyer sent?

Advocate Torres: July 1<sup>st</sup>. Regional Court, minority opinion - quoting. The draft was not completed; if it was complete she wouldn't have written remarks about returning. This draft cannot be viewed as consent. It cannot be viewed as the necessary evidence to prove the acquiescing defense. This is the only claim accepted by the minority opinion. Both majority judges determined that the agreement's draft cannot be addressed as sufficient evidence to prove the acquiescing defense and to the strength of evidence required for acquiescing defense. The majority opinion is better established than the minority opinion.

All rulings refer to the difficulty of returning a baby to USA, and therefore rely on the foreign country. That is to say that we've paid the fees required to initiate the procedure, on March 18<sup>th</sup> there is a first sitting before the panel. She was guaranteed conditions far and beyond. 10,000 is a high amount guaranteed for her in USA. We need to follow the Convention and discuss the issue of her well-being in a court in New Jersey.

Advocate Globinsky: He did not get a stay visa. He got a work visa.