**Supreme Court in Jerusalem** **Case no.**

**In the matter of** **S. S. B.H.**
From New Jersey, United States

By his representative Advocate
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**The Petitioner**

**Vs.**

**O. B.H.**

By her representative advocate
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5th Ha'atzmaut St., P.O.B. no. 25, Haifa
Tel.: 972-4-8661919 Fax: 972-4-8641066

**The Respondent**

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

**The Minor**

# Request for an Additional Discussion

According to article 30(b) of the courts' law (integrated) 1984 [hereinafter: "**courts' law**"], the petitioner is hereby filing a request for an additional discussion of the Supreme court's ruling in F.P.A. 741/11, given on May 17th 2011 (hereinafter: "**the ruling**"), which accepted, by majority of opinions of honorary judges E. Arbel and H. Melcer, against the opposing opinion of honorary judge U. Vogelman, the appeal submitted by the respondent on the ruling of Regional court in Nazareth, given by the panel of judges Y. Avraham and D. Sarfati, and minority opinion of honorary judge A. Avraham, which had rejected the plaintiff's appeal on the ruling of Family court in Nazareth (honorary judge S. Jayyoussi), given on December 21st 2010, a ruling ordering that the minor O. B.H. (hereinafter: "**the minor**") was wrongfully removed by her mother, the respondent, who should be ordered to return her to United States according to the terms set in the Hague Convention Act (returning of abductees children) 1991 (hereinafter: "**the Convention**").

Attached herewith a copy of the ruling as **appendix "a"**.

Attached herewith a copy of the ruling of Regional court in Nazareth in Family Case Appeal no. 44293-12-10 as **appendix "b"**.

Attached herewith a copy of the ruling of Family court in Nazareth in Family Case no. 54043-08-10 as **appendix "c"**.

The honorary court will be requested to order an additional discussion of the laws determined in the ruling, for the forth-mentioned reasons.

## Introduction

**The ruling in this case (given by majority of opinions and turning two rulings of two previous courts) significantly deviates from customary laws regarding abduction of minors, and raises considerable questions which needs to be readdressed, reviewed and re-decided upon.**

**The majority opinion (honorary judges Arbel and Melcer) determined that the defense of article 13(a) of the Hague Convention (returning of abductees children) exists, and therefore one should not order the minor's return to her habitual residence in United States. however: while honorary judge Arbel determines that the consent defense (an event that occur prior to the abduction) exists, honorary judge Melcer determines that there was no consent but acquiescing (an event that occur only after the abduction). Honorary judge Vogelman determines in his minority opinion (as was determined by the previous two courts) that neither consent nor acquiescing exist. Therefore, in effect, none of the claims made by the defense was supported by a majority, and facts-wise, the facts upon which judge Melcer based his ruling do not coincide with the facts upon which judge Arbel based her decision. !!! The ruling in fact orders not to return a minor who was abducted, supposedly due to proving one of the convention's defenses, while the ruling has no majority for the existence of such a defense. In this case, the ruling outcome should have been rejecting the permission to appeal.**

**Honorary judge Arbel based her ruling on a negotiation which yielded an agreement's draft which eventually was not signed!!!**
**While the convention, the overall ruling and the custom encourage negotiating compromises, especially in family affairs, it appears that such a negotiation which did not conclude in a signed agreement, was wrongfully abused for establishing a defense claim of a so-called consent.**

**Basing the ruling regarding the consent defense on a party's willingness to have a negotiation which eventually failed, clearly and extremely contradicts the laws regarding the narrow interpretation of the "consent" or "acquiescing" defenses according to article 13(a) of the convention, as well as the unequivocal stance of the ruling regarding the possibility of basing such a defense on negotiations between the parents - which did not conclude in a binding signed contract.**
**See C.A. 7206/93, Gabay vs. Gabay, I.r. 51(2) 241; C.A. 5532/93, Gunzburg vs. Grinvald, I.r. 49(3) 282; C.P.A. 7994/98, Dagan vs. Dagan, I.r. 53(3) 245, and other cases.**

**To emphasize - having negotiations as a tool of resolving conflicts, especially in regards to family affairs, in the best interest of minors caught in the middle of the storm - is not the reality the court's ruling in this case aims for. on the contrary - the ruling's outcome sends a clear message to the community of practicing lawyers and to the debaters themselves - always seek "legal confrontation", beware of negotiations and compromises - it will be exploited against you!**

**The ruling of honorary judge Arbel (starting from paragraph 36) suggests that a different law should instruct the applicability of the convention on a couple of Israelis who live abroad for only few years, in comparison to other cases. Likewise, one should address differently to a case of very young children. The ruling suggests that in such cases, majority opinion (judge Arbel) believes that one should consider wider and more general considerations of the child's best interest. Such a diagnosis has no reference in the convention and/or the interpretation of the Supreme Court to this day. If this is the ruling, than it is a "revolution" in the laws regarding children's abductions in Israel. Such determinations stand in a total contradiction to the spirit and purposes of the convention.**
**See C.D.R. 1648/92, Turne vs. Meshulam, I.r. 46(3) 38; C.A. 4391/96, Row vs. Row, I.r. 50(5) 338; C.A. 5532/93, Gunzburg vs. Grinvald, I.r. 49(3) 282, and other cases.**

**In this sense, the ruling sends a difficult message internationally, and violates the commitment to interpret uniformly the convention's articles, since it implies that the minor's best interest can be heard and/or maintained only in an Israeli court, even if a custodial procedure in her matter is already being held in an authorized court in her state of residence.**

**Collectively it appears that the difficulties and the laws determined in the ruling, due to their importance, difficulty and novelty - justify an additional discussion.**

## Summary of the court's ruling relevant to this request

1. In its ruling, the court decides to grant permission to appeal and discuss the respondent's request as if an appeal was filed according to the granted permission.

2. The ruling confirms the determinations of Family court in Nazareth and Regional court in Nazareth that the "habitual residence" of the minor is United States, and that not returning the minor to United States on June 20th 2010 is indeed a wrongful abduction according to the convention.

3. Albeit the clear and unquestioned act of abduction, the majority opinion in the ruling decided not to order the return of the minor to United States, while the judges disagree on the reasons for it.

4. **Honorary judge Arbel** determines that in the current case, exists the defense set in article 13(a) of the convention, according to which the father, the petitioner, had consented, in advance, to the act of abducting his daughter to Israel, and therefore relinquished the immediate aid given to him by the convention to fulfill the custodial rights he has by force of New Jersey's law.

   **Judge Arbel** further determines that one should not order the minor's return to United States and that the custodial issue should be deliberated in Israel, in light of considerations (**which were never brought up as part of the parties' claims, and not proven before any of the courts**) related to the circumstances of the parties' living in United States, the circumstances of the crisis between the partners, caring for the minor and other "custodial considerations".

   **Honorary judge Melcer** determined that in the current case, exists the defense set in article 13(a) of the convention, according to which the father, the petitioner, had

acquiesced, in retrospect, with the act of abducting his daughter to Israel. The honorary judge determines that there was "a kind of consent" from the father's side, which to his opinion suffices for proving the father's relinquishment of the "first aid" granted to him by the convention.

5. It will be emphasized that **honorary judge Vogelman**, in the minority opinion, determines that he agrees with honorary judge Arbel's determination - that the acquiescing defense does not apply, and disagrees with her determination that the consent defense applies, since one cannot base that upon a negotiation between the parties and a draft of the agreement between them - which was not signed. Under these circumstances, determines the honorary judge, there was no final decision and the contract did not develop, and the father's consent, which addressed one of the elements of the agreement's draft, cannot be isolated from the overall agreement and be taken into consideration as is, while the structure within which it was supposed to integrate - did not develop.

   Honorary judge Vogelman even cautions - "**using the points of agreement within a negotiation draft of an agreement, which failed at the end of the day, may carry with it negative implications regarding the willingness of parties to maintain an effective negotiation towards a contract… It may create difficulties in achieving an agreement, thwart compromises and unnecessarily prolong debating.**"

   **It is clear as day - the "consent" defense was rejected by honorary judges Melcer and Vogelman. The "acquiescing" defense was rejected by honorary judges Arbel and Vogelman. There is no majority regarding the applicability of any defense!**

## Relevant Facts

6. The two majority judges, despite the fundamental differences in their reasoning, in the difference between "consenting" in advance to the abduction and "acquiescing" in retrospect with it, based the "consent" and "acquiescing" defenses on the same few evidence, as follows:

   a. The draft of the divorce agreement edited by the parties during negotiations in a single meeting in the accountant's office, on April 11th 2010, which was eventually not signed by the parties.

   b. Cancelling the detaining warrant, on April 14th 2010, which was issued by the respondent against the petitioner, under consent, in a hearing that was held according to the petitioner's request to cancel the warrant.

   c. The petitioner's return to United States on April 19th 2010 according to the previous plan made by the parties, while his wife and daughter remained in Israel, as planned beforehand, and should have returned as agreed on June 20th 2010.

7. In addressing these facts, the majority opinion judges ignored and/or mistreated substantial facts which were proven, without any disagreement, before the discussing court, which clearly attest the petitioner's intentions to fulfill his right for custody over his daughter and the respondent's clear knowledge that the petitioner did not give up on his daughter and her return to United States in the agreed-upon date set for it by the parties, jointly, as specified hereinafter:

a. As early as June 1st 2010, even prior to the abduction act, when the petitioner had suspected that the respondent intends not to return to United States, he had sent her by a local lawyer on his behalf, a severe warning clarifying that if she will not return it will be considered as abduction and a violation of federal law.

   The respondent confirmed before Family court that she had indeed received the letter from the petitioner's lawyer but chose to ignore it (p. 27 of the protocol, lines 14-17). With that, the respondent indeed knew that the petitioner did not consent in advance and will certainly not acquiesce in retrospect with his daughter's retention in Israel.

b. On July 1st 2010 the petitioner had filed a claim to the central authority in United States regarding the abduction of his daughter [O.], and immediately expressed lack of acquiescing with the abduction act after the effect.

c. On July 5th 2010, in a discussion in Rabbinate court, the petitioner's representative had said that "the husband began a procedure of returning according to Hague Convention. The wife is aware of the procedure." All throughout the proceedings in Rabbinate court the petitioner rejected the court's jurisdiction regarding the issue of custody over his daughter.

d. On August 1st 2010 the central authority in Israel had sent a letter to the respondent, but she had ignored its content. According to the convention's rules, the petitioner had to wait for 15 days before continuing the procedures in order to allow the respondent to willingly return his daughter to United States.

e. On August 31st 2010 the petitioner's claim to the Family court to return the minor according to the convention was administered.

f. After the divorce agreement's draft was not signed by the parties, the respondent added, by hand, comments on this draft. Among other comments she wrote "returning to Israel". The respondent added additional comments regarding living together. The respondent confirmed in her investigation that the agreement's draft, with the additions by hand, was edited by her, and the paper was administered to Family court in Nazareth and marked as C/8 (see p. 29 lines 5-6 of the Family court's protocol).

   These additions by hand by the respondent attest more than anything that she knew, even after editing the divorce agreement's draft, which was not signed, that the petitioner has no intention of returning to Israel and he does not consent to his daughter's retention in Israel. These additions attest that the couple's separation was not clear-cut, agreed-upon and a done-deal following drafting the divorce agreement, and therefore one cannot see in this unsigned draft a waiver of fulfilling the petitioner's custodial rights.

   In contrast to paragraph 30 of the ruling, the respondent had **admitted** in Family court that it is indeed her hand-writing on the divorce agreement's draft which was added **after** the parties' meeting ended **without signing the agreement**. The respondent **added** comments to the agreement which attest her state of mind, thoughts and understandings following the negotiation meeting between the parties. It is apparent from these additions, in the respondent's hand-writing, that

the agreement did not cause the respondent to rely on the minor's stay within her custody in Israel, and did not create definite and certain consensus regarding the end of the dispute between the parties. Not only that, the later claims of the respondent for minor's alimony, wife alimony and ransoming of her "Ktuba" (Jewish marriage contract) indicate that **she herself does not see the agreement's draft as obligating her and even not as a "first evidence" or "kind of evidence" for an obligation of the petitioner towards her or of her towards him**.

g. In conclusion we further clarify that the petitioner's request to cancel the detaining order was filed on April 12th 2010, after the divorce agreement's draft was not signed. The petitioner, who had to return to his job in United States, as determined beforehand, understood that he should not rely on the respondent's "good will" and acted on his own to cancel the warrant. In his request, which was filed a day after that negotiation, it is indicated clearly that although he is accepting the divorce and the alimony for his daughter, he does not relinquish his custodial rights over his daughter. The custodial issue is not at all mentioned in the request, and that attests that less than 24 hours after the negotiation failed, the petitioner clarified that his actions do not imply his relinquishment of the custodial right granted to him by the laws of the state of New Jersey.

h. **The petitioner has never explicitly or tacitly waivered his custodial right over his daughter. Nothing of the sort was mentioned in the divorce agreement's draft, the request to cancel the detention warrant and/or any other document that was issued on his behalf**.

## Reasons for Additional Discussion

### A. Contradicting previous rulings - interpreting the convention's defenses

8. The ruling, as expressed in the majority opinion of honorary judges Arbel and Melcer, clearly and extremely contradicts the most basic laws set to this day in countless rulings, regarding the narrow and strict standards according to which one must apply the defenses set in article 13(a) of the convention - the "consent" defense and the "acquiescing" defense, the narrowing interpretation of them and the unequivocal demand to apply these defenses with caution and restraint.

9. Judge Arbel herself summarizes it in her ruling, p. 7-8, paragraph 9:

> **"In the basis of the convention lays several inter-linked purposes. First, achieving inter-state cooperation in dealing with children's abduction, while breaching the custodial rights determined in the state of origin. Second, honoring the rule of law not only within the state but also in the relationship between states of the world. Third, deterring against self justice by one of the parents, and finally preventing harm to the best interest of the child being torn from his natural environment due to the abduction act (see: F.P.A. 1855/08 Anonymous vs. Anonymous (unpublished, 4.8.08); hereinafter: matter of anonymous). In order to accomplish these purposes, the convention sets an aid defined as "first aid" to the abduction act, which requires the contracting states to order the**

**return of the child to the state from which he was abducted urgently and as soon as possible (see: C.A. 7206/93 Gabay vs. Gabay I.r. 51(2) 241 (1997); hereinafter: matter of Gabay), <u>while leaving very limited room for discretion of the court discussing the return request</u>." (Emphases were made by me, G.T.)**

She further adds and emphasizes on p. 10, paragraph 15 of her ruling that:

**"These defenses conflict to some degree with other main purposes of the convention, specifically the purposes of preventing self justice made by the abductor parent and honoring the rule of law according to universal standards. <u>In the balance between these two purposes, it was determined that the defenses should be used under careful consideration, lest the exception will become the rule in a manner that will undermine the purposes of the convention and nullify the obligations of the contracting states. Therefore it was determined that the burden of proof carried by the one claiming the defenses apply is a heavy burden, not to be treated lightly</u> (Emphases were made by me, G.T.) (see: F.P.A. 672/06 Abu Arar vs. Raguzo (unpublished, 10.15.06); Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session 426, 460 (1980) 3; hereinafter: Perez-Vera report)."**

10. So was determined in two key rulings which discussed the applicability of the abovementioned defenses, and especially the acquiescing defense, C.A. 7206/93, **<u>Gabay vs. Gabay</u>**, I.r. 51(2) 241 (hereinafter "the Gabay ruling"), and C.P.A. 7994/98, **<u>Dagan vs. Dagan</u>**, I.r. 53(3) 278 (hereinafter "the Dagan ruling").

    In these rulings the honorary court specifies the contemporary customary rule, both in Israel and internationally, as it is quoted to this day, again and again, in rulings discussing the convention in different courts.

11. The hereinafter quoted, in details, from the ruling of honorary president judge Beinisch in the <u>Dagan</u> ruling, while mentioning the Gabay ruling, is hereby presented in order to re-emphasize the contemporary customary rule, in opposition to the honorary court's ruling in the current case, which as stated contradicts it "head-on":

**"The acquiescing is based, by nature, on the subjective will of the abducted parent, which finds its expression in outer-objective behavior. The complementary condition for an acquiescing is that the acquiescing was registered by the other parent, so that the abductor parent is aware of the abducted parent's relinquishment of the change in status-quo. Therefore, if the abductor parent believes that the abducted parent does not relinquish his right to return the child to his residence immediately, he cannot claim an acquiescing existed in the other parent, even if such an acquiescing might have been interpreted by the reasonable person. Hence, the interpretation of the acquiescing is not that of the reasonable person but that of the specific abductor parent (abovementioned Gabay ruling[2], p. 258).**

**…In continuation to the abovementioned, judge Barak has determined that in many cases the abducted parent continues in his efforts to return the child, but out of concern he consents to sending the child to kindergarten or school. Such consent to the child's stay in the state to which he was abducted is not necessarily a consent to the newly created status-quo, while relinquishing the immediate fulfillment of the custody or visitation right granted to the abducted parent by the convention (abovementioned Gabay ruling[2], p. 257-258). When the abducted parent is making arrangements for relieving the child's stay in the state to which he was abducted, one should examine whether it expresses the parent's will to relinquish the immediate return of the minor to his habitual residence, or is it an expression of concern for the child in the intermediate period, until the child's return will be settled, without relinquishing anything. The burden of proving it lies upon the one claiming the acquiescing defense applies (abovementioned Gabay ruling[2], p. 258-259).**

**This interpretational stance regarding the instructions of article 13(a) pours real substance into the need of narrow interpretation of the convention's defenses, in order to achieve the convention's purposes without disregarding it."**

12. **The ruling expends the narrow discretion the court has and in fact cancels the narrow interpretation of the convention's defenses, and from now on the exception may become the rule, since a determination of "a kind of acquiescing", as says judge Melcer, or an evidence which is "semi-evidential", as says judge Arbel, is sufficient**.

**The ruling constitutes a cancellation of the narrow interpretation of the acquiescing defense in retrospect as it bases this defense's applicability on facts which occurred prior to the abduction act - any evidence might be used to prove the acquiescing with the abduction act and the time factor no longer has meaning, nor does the context of such evidence within the overall evidence.**

**B. Fundamental mistake in applying contract law on the circumstances of this case**

13. The conclusion that negotiating towards settlement, which did not develop to a binding contract, might bind one of the parties, in a non-mutual manner, to a part of his willingness to overall compromise, according to a third party's view and subjective determination, is **extreme and unacceptable** even according to contract law in general but especially and specifically in regards to agreements in family affairs.

14. **For a good reason the law requires the approval of a financial agreement by the court, before it receives a binding validity. It guarantees a thorough examination of the quality of the parties' consent to the agreement, which is a free and willful agreement without any pressure or coercion, and of their true commitment to the agreement, which often contains many sections destined to maintain the welfare of minors**.

**In the same manner, an agreement regarding guardianship over a minor, including custody and residence, also requires its examination and approval by court, as stated in article 24 of the Legal Competency and Guardianship Act 1962 - "such an**

**agreement warrants approval of the court, and the court will approve of it only when it is convinced that the agreement is in the minor's best interest."**

All the more so is true while dealing with convention's cases, in which it is determined, in a long and unequivocal line of rulings, that **one should not infer the "consent" or "acquiescing" defenses from negotiations between the parents**.

In this issue we turn once again to the ruling of honorary president judge Beinisch in the Dagan ruling, while mentioning the Gabay ruling:

> **"It was further determined that the mere avoidance from turning to court in a procedure according to the convention, does not by itself equates with acquiescing, if such avoidance can be explained in a manner which does not necessarily point to acquiescing… The abducted parent may have held negotiations through which he had hoped to fulfill his right to return the child in an amicable manner (the convention encourages such phenomenon in article 7(c) and article 10). As said President Barak: '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 "acquiescing" 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, acquiescing 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[2], p. 258).**

See also: C.A. 5532/93, Gunzburg vs. Grinvald, I.r. 49(3) 282.

15. One can say that the ruling has brought to an end the ability of parties in the middle of the most difficult situation of their lives, in the moment in which their family falls apart, in the moment in which the most important thing in their lives dissipates before their eyes, without being able to change it, to pause, to converse and to think together how may the whole family overcome such crisis towards continuing connection and relationship, although different but nonetheless good.

When every point of agreement in such deliberation might be interpreted as binding even if it did not develop eventually into a document signed by the parties which binds them, each party will be forced to refrain during negotiation as much as possible from conversing, obligating or taking upon himself burdens which he may want to back down from and/or can't keep up with, and obviously no party will wish to state compromises he might be bound to fulfill. There is no doubt that the representing advocate will recommend his/her client to do so.

All the more so is true during abduction procedures according to the convention, in which the parties are aware of the need to collect evidence proving the parties' intentions in establishing "habitual residence" and the convention's defenses.

If the ruling will be applied as the majority judges concluded, and the Supreme court's ruling which interprets very narrowly and with extreme caution stances expressed during negotiations which did not develop into a binding agreement will

not be maintained, we shall never again witness cases in which such negotiations to conclude these painful proceedings in deliberation and under agreement will be held.

Honorary judge Vogelman had stated well, on p. 27 paragraph 5 of the ruling, that:

> **"Beyond the abovementioned, using the points of agreement within a negotiation draft of an agreement, which failed at the end of the day, may carry with it negative implications regarding the willingness of parties to maintain an effective negotiation towards a contract. Note well: the parties might refrain from presentations, declarations or proposals, which include concession in favor of the other party, since they'll fear that such concessions may be held as evidence against them in a future proceeding that the parties may have (see C.A. 172/89 Sela insurance company Ltd. Vs. Solel Bone Ltd., I.r. 47(1) 311, 333 (1993)). It may create difficulties in achieving an agreement, thwart compromises and unnecessarily prolong debating."**

16. An additional comment is that the court, claiming that a "relying interest" was created for the respondent in the presentation made by the petitioner, to the point of subjective realization on her part that the petitioner has actively consented to relinquish the custodial right granted to him by the state of New Jersey, failed to specify in its ruling how has such relying of the respondent on the financial agreement's draft came to be realized, in action or in any other way.

    The only action the respondent has made, after the abduction, was to cancel her student's visa so she will not be able to return to United States, due to status issue, while jeopardizing the petitioner's status as well, but this action clearly has nothing to do with relying on the petitioner's stance in the agreement's draft or gives any validity to the viewpoints presented there.

    Furthermore, the respondent has actually shown the lack of parties' commitment to the agreement's draft by requesting higher alimony for her daughter, well above the sum specified in the agreement, and also claimed alimony for herself and ransoming of her "Ktuba" (Jewish marriage contract) even though she has renounced it in the agreement.

    The respondent also refused, all throughout the time in which the petitioner stayed in Israel, despite many requests in the matter, to allow him to take his daughter for seeing arrangements during weekends as agreed upon in the agreement's draft.

    The necessary conclusion is that the respondent herself did not rely at all on the agreement's principles as binding her, and certainly knew they are not binding the petitioner.

**C. The court's ruling fatally harms article 7 of the convention**

17. Article 7(c) of the convention, which discusses the role of the central authority of each of the contracting states, includes among other things a duty "**to secure the voluntary return of the child or to bring about an amicable resolution of the issues**".

Following the court's ruling and its reference to evaluating parties' state of mind and interpreting it widely, everyone will agree that this article is unimplementable and will nullify it of any content or meaning, since **who shall risk "an amicable resolution of the issues" if such an attempt might "cost" him his abducted daughter…**

**D. Contradicting previous rulings - the "child's best interest" as a part of the court's discretion in deciding according to the convention**

18. At the beginning of the current claim, the petitioner will repeat his opinion that the court has mistaken when determining the applicability of the defenses according to article 13(a) of the convention. However, and in order to avoid any doubt, he will claim that even if such defenses do apply, the court was mistaken when exercising its discretion on whether to return the abducted minor despite the alleged applicability of the defenses.

19. As specified in the abovementioned paragraph 12, honorary judge Arbel determines that "**proving that the defenses apply merely provides the court discretion whether under the circumstances of the case the minor should remain in the state to which he was abducted or to return to the state of residence, considering the convention's purposes. Obviously, in such a case, the court will place at the top of its considerations the best interest of the little child, standing in the middle between his two parents" (Emphases were made by me, G.T.) (p. 11, paragragh 15 of the ruling).**

Honorary judge Arbel further determines on p. 15, paragraph 24:

> **"As above mentioned, the main question to be asked by the court is whether the parent's behavior indicates clearly that he has waived the 'first aid'. If the answer is affirmative, the return of the child to the habitual residence state is not an immediate requirement the court must instruct. The time for an immediate aid has long gone, and the court discussing the matter has discretion to instruct that the matter will be discussed in the current state or in the habitual residence state, while considering the best interest of the child" (Emphases were made by me, G.T.).**

20. In other words, the court's ruling in the current case contradicts the existing customary court's ruling. The court, in its abovementioned ruling, inserts the consideration of the "child's best interest" through the front door, into its main and direct considerations of whether to order the minor's return to her habitual residence.

This decision contradicts existing rulings in the matter and the substantial reduction in this principle and its applicability to the convention, and in effect rewards the maker of injustice – the abductor parent, who has succeeded in her illegal actions to chose the appropriate forum in her view for discussing the custody over the couple's daughter alongside her success in disconnecting the minor from her father.

According to the convention and its interpretation - the underlying basic principle of the convention is that the child's best interest is harmed due to his abduction and

that one must do everything in order to return the status-quo as soon as possible, while honoring the international commitment made by Israel, towards other states, and fully trusting the court in the child's habitual residence to discuss the matter to his best interest.

21. The principle of the child's best interest still exists in the procedure according to the convention but narrowed down (unrecognizably) to two specific roles: **the first** states that the child's best interest is harmed due to his abduction, meaning that the principle is held against the parent claiming the harm defense, and **the second** - in the literal and narrow framework of proving physical and psychological harm as the same principle states, as aforementioned, a negative stance regarding its claim by the abductor parent (see Moran, Amiran and Bar, Immigration and Children's Abductions, p. 108).

22. In the Dagan ruling, p. 269-270, honorary president refers to the existing interface and relations between the principle of the "child's best interest" and the convention's and law's purposes, and elaborates how does this principle assimilates within the convention:

> **"The convention's approach is consistent with the assumption that every court, by its nature and judicial role, will refrain from assisting illegality, and will do everything within its power so that the sinner will not benefit. Discussing the custodial issue in the circumstances in which a procedure is being held according to the convention complicates the court in validating illegality. Likewise, discussing it in the state in which the child stays due to abduction might encourage parents who wish to change the custodial arrangements to act in a manner of abduction, in order to choose a more convenient deliberation forum for themselves. To that we must add that discussing the custodial issue in the court of the state in which the abducted minor stays, while his parents wish to live in different states, might be prolonged and complicated and thwart the idea of immediate return. Accordingly, the convention determines that in a procedure according to the convention, the custodial issue will not be discussed (articles 16, 17 and 19 of the convention). As a result of this purpose, the 'child's best interest' is also not discussed as an independent consideration of the court discussing the child's return according to the convention, as opposed to the custodial proceedings, in which the entire discussion surrounds the 'child's best interest'. The underlying perception of the convention is that the custodial issue will be discussed in court of the state to which the abducted minor will be returned.**
>
> **President Barak has summarized the legal status regarding the principle of the child's best interest in the abovementioned Gabay ruling[2], p. 251, as follows: 'the term "the child's best interest" is not mentioned in Hague Convention. However, one cannot say the child's best interest is irrelevant to the convention. One cannot deal with matters of minors and not examined their best interest. Indeed, the preliminary assumption of the convention is that the child's best interest was taken into account and decided upon as the custodial rights were determined. If a claim that the child's**

**best interest necessitates a change in custodial rights emerges, it needs to be discussed in the child's habitual residence prior to his abduction. The convention maintains that a child's abduction need not change the place in which his best interest will be discussed. On the contrary: abducting the child in itself is harmful to his best interest…'**

**Hague convention's consideration of the child's best interest in the procedure regarding his return is evident in determining the defenses granting the court discretion to refrain from returning the child in case these defenses apply. For that reason the defense of article 13(b) of the convention was set, determining, in other words: '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.'"**

23. In light of the abovementioned ruling it appears that honorary judge Arbel has deviated in her ruling from the intended narrow use of the principle of "child's best interest" while discussing the procedure according to the convention. As she determined in p. 22, paragraph 34 of the ruling that the "harm" defense does not apply to the current case and "**that in the absence of an expert opinion in the matter, and in the absence of extreme circumstances indicating grave risk of harm, one cannot determine that this defense applies to the current case**", the honorary judge has in effect rejected the concern of harming the minor in a manner which narrows this issue's discussion in a procedure according to the convention.

24. Widening the use of the term "child's best interest" in the ruling nullifies the intended narrow use of this term, exclusively in the framework of examining the "harm" defense.

    The ruling suggests that the same claims which were rejected by the judge while examining the "harm" defense are the basis for her claim regarding the "minor's best interest" as she examines the court's discretion to order the minor's return - on p. 16, paragraph 25, the court specifies that the "harm" defense, which incorporates the concern for the child's best interest in a literal and narrow manner, **will not include** a case in which the abductor parent is facing deportation or substantial financial difficulty and that the court relies in this context only on experts' determinations, while later in the ruling the court mentions exactly the same reasons for determining that the minor's best interest requires discussing the custodial issue in Israel and therefore does not order her return to United States in order to discuss this issue.

25. On p. 272 of the Dagan ruling, honorary president judge Beinisch addresses these issues:

    **"The convention takes into account, while relying on the uniformity of the legal system in this issue, that no court of a contracting state will neglect the principle of the child's best interest as it decides in the custodial issue. The role of the court discussing the return according to the convention is therefore to be a kind of temporary transitional station on the path leading to the final procedure.**

    **Considering the temporary nature of the procedure, the courts discussing according to the convention took it upon themselves to**

**determine a narrow framework in examining the child's best interest issue. The convention has left the role of protecting the best interest and well-being of the child in the long run in the hands of the court discussing the custodial issue.**

**One can therefore conclude that the norm set in the convention weighs in the respective weight of the interests worthy of protection in the issue of children's abduction as viewed by the convention writers: honoring the law; respecting the parent's legitimate rights as determined by the law of the habitual residence state; and also, of course, the child's best interest as it is usually viewed.**

**Accordingly, the immediate return of the abducted child is the binding rule, and leaving him in the state to which he was abducted due to concern for expected harm due to the return is the exception, given the court's discretion.**

**This is the balance formula chosen by the convention's designers, in order to create a unified and clear rule for prevention of children's abductions and for the promotion of children's best interests in general.**

**The arrangement determined by the convention, including its balance formula, coincides with the basic principles of our system. It was adopted by the Israeli legislator, and our courts are obligated to act accordingly."**

And on F.P.A. 1855/08 **Anonymous vs. Anonymous** it was again determined that:

**"In balancing the two abovementioned conflicting values, one must usually give considerable weight to the interest of fulfilling the convention's purpose, calling for the child's return to the custodial parent in the state of origin. Underlying this interest is an assumption that the return promotes the child's best interest in the wider sense. Retention of the abducted child in the framework of one of the convention's defenses is preserved for rare and extreme cases only."**

The court's ruling in the current case contradicts all the abovementioned rulings. The case before us is not so rare and surely has no extreme circumstances. The parties' being Israeli citizens does not override the fact that they have chosen to live in United States, to give birth to their daughter there and to build their lives there.

The respondent's one-sided decision to change the status-quo, on her own, and not to return their daughter to United States at the end of a planned vacation in Israel cannot, by any standard, reward her with the "prize" in which she had won, meaning her stay in Israel and having the custodial procedure in the authorized court in Israel.

**E. Fundamental mistake in appeal court's intervention with discussing court's findings**

26. In its decision the court emphasizes that "**it is a known rule that the appeal court does not intervene at all with the discussing court's findings (see: F.P.A. 911/07 Anonymous vs. Anonymous (unpublished 10.30.2007)). After two courts examined the circumstances of the case and reached the same conclusion, and after examining the parties' claims, I do not find justification for additional**

**factual examination of the term regarding the habitual residence or for deviating from the rule of non-intervention in this context.**"

27. Albeit the abovementioned justified determination of the court, the court indeed intervenes with a wide variety of additional facts, while sometimes ignoring or disregarding the factual determinations of the discussing court without justifying such deviation from the abovementioned rule, while placing its factual determinations as superior to the stance of the previous court's judges, without hearing the witnesses and/or creating a direct impression of them.

28. For example, determining that the petitioner has returned to United States on his own due to consent to cancel the detention warrant. It is clear that the petitioner's return on this date was planned in advance and agreed upon. Its fulfillment's certainty was undermined due to the detention warrant, but as it was cancelled, the petitioner has fulfilled the original plan of the couple. So was determined in the discussing court and it is not clear at all why such determination was altered.

    It is twice as severe when the court bases its decision on incorrect facts, in which the error can be easily proven, while the discussing court has accepted a different factual decision, or alternatively ignores facts which were accepted in the discussing court and do not serve its decision.

    For example, the court determines that the request to cancel the detention warrant was filed by the petitioner before the parties decided to deliberate between them (p. 18 paragraph 29 of the ruling), and it is not the case. This fact can be easily clarified by checking the dates.

    Additional incorrect facts which were determined (p. 22, paragraph 36) are that the petitioner has a stay visa for two years, while it was given for 3 years. The court determines that the couple has no permanent housing in United States but ignores the fact that they also do not have nor ever had such housing in Israel, and that the respondent and the minor live in a small room in her mother's house all throughout the time of the abduction. The court determines that the couple had maintained their social rights but ignores the fact that the social security institution refused to view them as state's residents and therefore they had stopped paying for such rights. The court determines that they had established a business in Israel but does not emphasize the fact specified in Family court's ruling that this business was opened for about two months prior to the couple's arrival at Israel and was not a financial source to rely on.

## Conclusion

29. **"The term for having an additional discussion of the ruling given in this court is the existence of contradiction between the ruling and prior rulings of the Supreme court, or some importance, difficulty or novelty ruling, which justifies, in the court's opinion, having an additional discussion (Zusman, Civil Law Order, 7th ed., p. 871; C.A.D. 4813/04 McDonald vs. Aloniel Ltd. [published in NEVO] (hereinafter: matter of McDonald); C.A.D. 4011/04 municipality of Jerusalem vs. deceased Etinger's estate, I.r. 59(4) 8).**

**The rational for having an additional discussion of the ruling given in this court lies in the actual and immediate need to re-examine a ruling, and in that need being clearly substantial even in light of the discussion finality interest and of efficient use of the judicial resource (C.A.D. 2596/02 Hadarey Ha'hof no. 63 Co. Ltd. Vs. Be'er Sheva real estate tax administration [published in NEVO]). Another consideration for having an additional discussion is when there is a good chance that the determined ruling will be altered (C.A.D. 8349/03 Rubinstein vs. big factories assessing officer [published in NEVO])."** (From the ruling of honorary judge Procaccia in the matter of Delta Lingerie S.A. Ofcachan, France vs. Tea Board India, published in NEVO).

**As abovementioned in this appeal - this is a characteristic case in which there is a need for an additional discussion: the majority opinion's ruling contradicts previous rulings regarding the manner of interpreting the convention's defenses, regarding a fundamental mistake in using contract law and concluding from a failed negotiation about establishing "consent" (in general, and in convention's cases in particular), and regarding the possible use of the principle of "child's best interest" and custody considerations - within a convention's case. Furthermore, the ruling decided not to order the return of a minor, without having a majority opinion for establishing any particular defense, the ruling allowed for a "third round" discussion without proving the terms determined by law for such an issue, and having done so, even intervened with factual findings determined by the previous discussing courts. The outcomes of the difficulties and the mistakes that exists in the ruling are severe outcomes: beyond the private damage caused to the father, it is a damage to the commitment of the state of Israel to uniformly interpret the convention and a damage to the public interest of encouraging agreements and conflict solving in an amicable manner.**

Although as abovementioned - this appeal has a wide legal scope, we wish to conclude on a personal note: The petitioner is a father, a young man, only 32 years old, who is very attached to his only daughter [O.]. The petitioner and his wife resided and raised their daughter at their home in New Jersey, in which [O.] was born, and in which the couple had intended to and actually realized their family cell, and in which [O.]'s parent intended to raise her well, side by side. The petitioner wishes to continue being a real father figure for [O.] and to have a continuous stable and consistent relationship with her, just as her mother is entitled to have. No more, no less. It is unacceptable that due to an act of abduction (and no one disagrees with that determination (!)), the abductor will triumph.

Therefore the court is hereby requested to have an additional discussion in the appeal and the emerging issues, to cancel the ruling and order the return of [O.] to United States as required by law.

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Gal Torres, Advocate Shmuel Moran, Advocate

The petitioner's representatives