In Supreme Court

C.A.D. 7114/11

Facing	Honorary vice president E. Rivlin
Petitioner	Anonymous
	vs.
Respondent	Anonymous
	Petition for additional discussion regarding the Supreme Court's ruling from May 14th 2011 in F.P.A. 741/11 given by honorary judges E. Arbel, H. Melcer and U. Vogelman
For the petitioner:	Advocate Shmuel Moran; Advocate Gal Torres
For the respondent:	Advocate Tal Itkin

Court Ruling

1. This is a petition for additional discussion regarding the Supreme Court's ruling in F.P.A. 741/11 **Anonymous vs. Anonymous** (unpublished, May 17th 2011), given by honorary judges **E. Arbel**, **H. Melcer** and **U. Vogelman**.

   The petitioner and the respondent have a daughter, hereinafter called: **the minor**. The petitioner and the respondent, both Israelis by origin, moved at some point to reside in United States, where their daughter was born. During a vacation in Israel the petitioner and the respondent decided to separate, and began a divorce process. Shortly after that, the petitioner returned to United States, whereas the respondent stayed in Israel with the minor. As the date in which the two were supposed to also return to United States, according to plan, neared by, the petitioner initiated proceedings to order the minor's return to United States by force of the Convention on the Civil Aspects of International Child Abduction, 31, 43 (concluded in 1980) (hereinafter: **the Convention**).

   The Family court ordered the return of the minor to United States, and the respondent's appeal to Regional court was mostly rejected (apart from the terms of return). The respondent requested permission to appeal before this court, which decided to discuss the request as an appeal and accepted the appeal.

2. The Supreme Court determined that there is no reason to change the findings determined in the Regional court, according to which the preliminary terms for the Convention's applicability, which form an act of "abduction", exist. Therefore, the Supreme Court focused its discussion on the issue of applicability of defenses against return duty set in article 13(a) of the Convention – that is the defenses of consent of the "abducted" parent to the "abduction" act or his acquiescing with such an act. In this regard, the panel members disagreed. Judge E. Arbel determined that the defense according to which the "abducted" parent consented in advance to the minor's retention – exists. This determination was based primarily on the financial agreement draft conducted by the parties, from which arises a consent that the respondent and the minor will stay and live in Israel while the petitioner returns to United States. This draft did not become an agreement, probably due to financial disagreement arose by the respondent. However, it was determined that the respondent has made some actions to fulfill her obligations in the agreement, together with the petitioner, mainly removing the detention warrant against the petitioner's departure from Israel. according to judge Arbel, "the chain of events, and specifically [the petitioner's] departure from Israel under the [respondent]'s consent, after the financial agreement was written and partially even fulfilled, caused the [respondent] to rely on the issue of change in status-quo, mainly separation of the couple and her stay with the daughter in Israel" (paragraph 32 of the ruling). As it was determined that the consent defense applies, the issue of returning the minor is subjected to the court's discretion, so is set. In this case the Supreme Court decided not to order the minor's return to United States, given the temporary nature of the couple's stay there and in light of different considerations regarding the minor's best interest.

   Judge **H. Melcer** also determined that there is no reason to instruct the minor's return to United States, but by force of "acquiescing" defense. The applicability of acquiescing is learned, to his opinion, from the petitioner's return to United States; from the application he filed to Rabbinate court to cancel the detention warrant against his departure from Israel; from his willingness, in the framework of the financial agreement draft, to transfer all the minor's personal equipment to Israel and to pay her alimony in NIS; and from his wish to guarantee his seeing arrangements with the minor whenever he arrives at Israel.

   Judge **U. Vogelman**, in his minority opinion, believed the appeal should be rejected. To his opinion, since the draft did not develop into a final financial agreement, one of the parties cannot be held for his concessions while the other party is exempt of his obligations. Judge **Vogelman** added that using points of agreement given during a negotiation, which did not develop into a binding contract, may carry with it negative implication regarding parties' willingness to maintain an effective negotiation in order to resolve their differences amicably.

3. The petitioner claims that an additional discussion regarding the ruling is needed based on the instructions of article 30(b) of the courts' law [integrated], 1984. The petitioner thinks that the ruling exceeds the norm according to which the defenses against return should be interpreted narrowly and with restraint. This norm is based on the contracting states' duty to order the child's return to the state from which he was abducted quickly and urgently, while leaving a narrow discretion in the hands of the court discussing the return request. The petitioner further claims that inferring a conclusion regarding consent of the petitioner to or acquiescing with the minor's retention, from points of agreement achieved during negotiation which did not develop eventually into a contract, contradicts laws set in this regard, both in the specific context of the Convention's interpretation and in the overall contractual context. The petitioner also thinks that such determination may harm the willingness of parties to end their dispute amicably. The petitioner adds that the court's consideration of the minor's best interest, while exercising the discretion given to it upon determining that the defense against return applies, was out of order. Finally, the petitioner claims that since the majority judges did not base their conclusion on the same defense, the appeal should have been rejected because there was no majority for applying any of the defenses.

4. The respondent, on her part, believes that the terms for having an additional discussion do not exist. The respondent insists that the Supreme Court's determinations were explicitly based upon the previously set rules regarding the Convention's terms, and therefore the ruling mainly applies these rules and doesn't set new rules. The respondent emphasizes the principle that changing the legal norm determined by Supreme Court is done only explicitly and directly – and so was not done in this case. As for the meaning attributed by the Supreme Court to the petitioner's agreements during negotiations between the parties, the respondent claims that the existence of consent can be learned from the case's overall circumstances, including ongoing negotiation. The respondent also refers to the petitioner's claims regarding the position of minor's best interest in exercising court's discretion. In her opinion, one must distinguish between the position of minor's best interest before determining that one of the defenses against return duty applies, and this consideration's position after determining such defense applies, since then the return is no longer the court's duty and is in any case subjected to court's discretion.

   It will be commented that the respondent's representative also claimed that in the matter of **Gabay** (C.A. 7206/93 **Gabay vs. Gabay** I.r. 51(2) 241 (1997)), on which the petitioner wished to rely, the consent defense applied. And so he writes: "Albeit the narrowing approach the court applied in the matter of **'Gabay**', it saw fit to determine that the defenses of consent or acquiescing do apply." Let us point out that reviewing the ruling in the matter of **gabay** reveals that it is to the contrary, since the Supreme Court determined that in that case consent or acquiescing did not apply. The respondent's representative also

quotes the ruling inaccurately, to say the least. So, in the response to the petition the following quote from the ruling in the matter of **Gabay** was writen: "In my opinion, there is no doubt that such consent or acquiescing **applies** to the matter at hand" (paragraph 37 of the response; the emphasis added – E. R.), whereas the accurate quote is: "In my opinion, there is no doubt that such consent or acquiescing **doesn't apply** to the matter at hand" (paragraph 23 of the ruling).

5. To the court's request, the attorney general also submitted his opinion in the controversial issues, through the Central Authority in Israel according to Hague Convention Act (returning of abductees children) 1991 (hereinafter: **the Authority**), acting on his behalf. The Authority's opinion is that the court was mistaken to give weight to the fact that the petitioner has left Israel, since this was in line with the parties' original plan; and also mistaken to give weight to the points of agreement in the financial agreement draft, since to the Authority's view these points of agreement were obtained due to the pressure the petitioner was under after a warrant detaining his departure from Israel was issued against him. In any case, so was claimed, the negotiation between the parties did not develop into a final agreement. The Authority emphasizes that "obviously, a different impression of the facts does not warrant an additional discussion. However, under the matter's circumstances there is concern that the abovementioned determinations will become baselines in many other cases to recognize such actions, including the complaining parent's return to his habitual residence, as consent according to the Convention, which in the Central Authority's opinion contradicts the Convention's purpose and makes it impossible to act accordingly." The Authority further emphasizes that the "abducted" parent's return to his state of residence or his stay in it is common, since the procedure is supposed to end quickly. Finally, the Authority feels that even after the applicability of the consent of acquiescing defense (as opposed to the defense concerning grave risk to the minor's wellbeing) is proven, in the framework of the discretion the court has in the issue of whether to order the minor's return, the minor's best interest should not be a significant consideration and should be balanced against the Convention's purposes as a whole. In light of all the above mentioned, the Authority recommends having an additional discussion regarding the ruling.

6. The petition is rejected. The Supreme Court discussed lengthily the rules concerning the narrow interpretation to be given to the defenses set in the Convention, and guided itself within these rules. The outcome reached by the court in this case was based on applying these rules on the unique circumstances of the case at hand, and does not set any new legal norm. Indeed, as the Authority lengthily explains, usually the "abducted" parent's stay in his state of residence will not be held as evidence to his consent to or acquiescing with the abduction act. And points of agreement achieved during negotiation which did not develop into a binding contract cannot, usually, be used later

against one of the parties. Giving evidential significance to such agreements should be done only under extremely careful consideration. Indeed, lack of caution in addressing the content of agreement achieved in a failed negotiation might discourage parties from attempting to settle their differences amicably. Judge E. Arbel referred to this issue in her ruling, writing that "as for the concern my colleague has regarding the negative implications of parties' willingness to maintain an effective negotiation, I believe that this concern is not an actual one, since this case has unique circumstances." Judge **H. Melcer** also saw fit to emphasize that "this information… suffice to view them, **under the unique circumstances of the matter at hand**, as kind of 'acquiescing' and waiving the 'first aid' granted by force of the Convention" (the emphasis is original – E. R.). Indeed, the Supreme Court's determinations in this case are all embedded in the case's circumstances, and stem from applying existing norms on the concrete case. The petitioner, like the Authority, thinks that the application was wrong in this case. However, the purpose of the additional discussion procedure is not to review or appeal the rulings of the Supreme Court, but to clarify a legal norm, since it is renewed or for any other reason specified in article 30 of the courts' law. In this case no one disputes the content of the relevant legal norm, on which the Supreme Court stands heavily in the currently discussed ruling. Applying the rule depends anyway on the circumstances of each case, and does not warrant an additional discussion.

7. I did not find any substance in other claims made by the petitioner. The Supreme Court did not set any general rule regarding the relative weight of the different considerations one can apply in the framework of the consent and acquiescing defenses. Its consideration of the minor's best interest is embedded in the existing norms (and see for example: C.A. 473/93 **Libowich vs. Libowich** I.r. 47(3) 63 (1993)). The Authority addresses the issue of whether to give different weight to the consideration of the minor's best interest within each of the defenses, according to its rational – but this issue was not discussed in the framework of the ruling and therefore one should not order based on it to have an additional discussion. The fact that the majority judges differed in their opinions regarding the reasoning also does not add nor subtracts, since both of them reached the conclusion that one of the defenses against return duty applies, and that the minor's return should not be ordered in this case.

8. The conclusion is that the petition is rejected. Under the circumstances, there will be no warrant for expenditures.

Given today, Tamuz 10th 5771 (July 12th 2011).

The Vice President