Supreme Court of the State of Israel

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 20th 2011 in Case Appeal No. 44293-12-10 given by honorary judges A. Avraham, Y. Avraham and D. Sarfati
Sitting Date:	Adar B 1st 5771 (March 7th 2011)
For the plaintiff:	Advocate, T. Itkin
For the plaintiff:	Advocate, G. Torres

Court ruling

Judge E. Arbel:

Permission to appeal the ruling of Regional court in Nazareth (honorary judges A. Avraham, Y. Avraham, D. Sarfati), which partially accepted the plaintiff's appeal on the ruling of Family court in Nazareth (honorary judge S. Jayyoussi), and ordered the return of the plaintiff's and respondent's mutual daughter to New Jersey, United States, by force of Hague Convention Act (returning of abductees children) 1991 (hereinafter: **the Convention Act**).

Factual background

1. The plaintiff and the respondent, both born in Israel, grew up and met each other in their home town in Israel. As of 2006, the two lived as a couple in the state of New Jersey, United States, by force of tourists' visa. On 2007 the plaintiff began studying, while the respondent continued working in odd jobs. By force of the plaintiff's schooling, they both received a staying visa for student and partner. On 2008 the plaintiff and the respondent got married in Israel, and immediately after the wedding returned to United States. On September 2009 their daughter was born in United States (hereinafter: **the daughter**). About two months later the plaintiff came to Israel with the toddler, and later on the respondent joined both of them. During that visit in Israel, which lasted about two months, the couple had opened a children's clothing shop in their home town. As the shop opening

arrangements ended, the three of them returned to United States. On March 2010 they had arrived again at Israel for Passover holiday (hereinafter: **the last visit**). The respondent returned to United States on April 19th 2010, and the plaintiff and their daughter were to join him on June 20th 2010. However, the plaintiff and the daughter remained in Israel, in which they reside to this day.

2. To complete the picture one should note that, as pointed out in the ruling of the Family court, at some point during the relationship the respondent began embracing a religious lifestyle, while the plaintiff did not change her way of life. It created some controversy between the partners, and during the plaintiff's pregnancy the respondent even considered divorcing her. During their last visit in Israel the dispute between the partners reached a peak, when each of them stayed separately in their families' houses. On April 7th 2010, the plaintiff has filed a divorce claim in the Rabbinate court, to which she had attached the issue of custody over the mutual daughter. On April 11th 2010, the plaintiff and the respondent met, and with the mitigation of an accountant reached an agreement regarding the end of their marriage, titled "financial agreement" (hereinafter: **the agreement** or **the financial agreement**). In the agreement were paragraphs establishing the property allocation between the two partners, as well as paragraphs establishing the issues of custody over the mutual daughter, alimony and seeing arrangements. Eventually the agreement was not signed, since the plaintiff refused to sign it as the respondent rejected a demand made by her regarding possessional rights of the two. The respondent returned to United States as planned, after the plaintiff agreed to remove the warrant detaining his departure from Israel, issued against him at her request. Shortly prior to the day in which the plaintiff and the daughter were to return as planned to United States, the respondent sent the plaintiff, through his lawyer, a warning in which he pointed out that he expects their return as planned. On July 2010, as the plaintiff and the daughter did not return to United States, the respondent filed a claim to return the daughter in a court in New Jersey. Later on he has filed a similar claim to Family court in Nazareth, in which he had requested to order the return of the daughter to United States according to the appendix to the Convention Act (the Hague Convention on the Civil Aspects of International Child Abduction, 31, 43 (opened for signing on 1980); hereinafter: **the convention**).

Family court's ruling

3. The Family court in Nazareth determined that the retention of the daughter in Israel is indeed abduction as defined by the convention, and since the defenses do not apply, the daughter should be returned to United States. First was determined that there was an abduction, as defined in article 3 of the convention, while the main issue was whether at the time of the abduction the "habitual residence" of the daughter was United states. The court tested this issue according to two different schools, the "factual school" and the "intentional school". The court's decision was based primarily on the "factual school", according to which it determined that the geographic-physical place of residence of the daughter prior to the abduction was United States. Furthermore, the court discussed the "intentional school", testing the parties' intents regarding the current and future place of residence. It was determined that renting an apartment in United States and entertaining acquaintances in it, alongside establishing a business in United States, attest an intention to settle in this state. On the other hand, it was determined that the one-sided decision made by the plaintiff to quit her school in United States, opening a shop in Israel, maintain social rights, real estate and bank accounts in Israel – do not attest an immediate intention to return to Israel, but a future intention to do so at best.

After determining that abduction, as defined by article 3 of the convention, indeed occurred, the court discussed the defense claims made by the plaintiff. It was determined that the defense regarding the "abducted" parent's consent to the abduction act, as set by article 13(a) of the convention (hereinafter: **the consent defense**), does not apply in the circumstances of the case. First, it was found that the concern expressed by the plaintiff in her plea to Rabbinate court, that the respondent will abduct the daughter, indicates his refusal to stay in Israel. second, it was determined that the agreement does not suggest consent since it did not develop into a binding contract, and also since the agreement was written while the respondent was under a lot of pressure because of the detention warrant against his departure from Israel. the court also rejected the claim regarding the applicability of the defense of acquiescing with the abduction act, as defined in article 13(a) of the convention (hereinafter: **the acquiescing defense**), since the respondent sent a warning to the plaintiff shortly prior to the planned return date in which he had expected both of them to return to United States, and also since he had turned to the authorities in United States regarding the daughter's abduction about a month after the plaintiff and the daughter were due to return to United States. Thirdly it was determined that the defense regarding grave risk of exposing the minor to harm, according to article 13(b) of the convention (hereinafter: **the grave risk of harm defense**), does not apply in the circumstances of the case. The court rejected the plaintiff's claim, according to which an illegal stay of the parents in United States may harm the daughter, and clarified that the question of the legal status of the parties isn't related directly to the applicability of this defense, since it is enough that the daughter's entry to United States is possible, being an American citizen. Therefore the court ordered the return of the daughter to United States, subject to depositing a sum of 6,000$ to ensure the daughter's alimony, and subject to providing the plaintiff and the daughter accommodations in the apartment in which they had lived in United States, or an alternative apartment, for a period of 6 months.

Regional court's ruling

4. The Regional court in Nazareth rejected the plaintiff's appeal by majority of opinions, subject to corrections of the terms for returning the daughter. The majority opinion (honorary judges Y. Avraham and D. Sarfati) determined that one should not interfere with the factual findings determined by the Family court, regarding both the issue of the abduction act and the lack of applicability of the defenses. It was noted that the purpose of the convention, to prevent self justice made by the abductor parent, obliged the one claiming the defenses' applicability to present substantial evidence for its existence. Since the plaintiff did not carry this burden, it was determined that the daughter should be returned to United States, subject to depositing 10,000$ by the respondent, to ensure the daughter's alimony, and subject to providing confirmation of commencing a legal proceeding for custody in New Jersey court by the respondent. The minority opinion (V. President A. Avraham) was that the appeal should be accepted, since the acquiescing defense applies. According to this opinion, the starting point of the discussion was that the habitual residence of the daughter was New Jersey, and therefore the plaintiff's act should be defined as "wrongful retention". However, under the circumstances of the case, evidence show that the acquiescing defense applies: first, the agreement which did not develop into a binding contract was given an evidential weight in proving the respondent's acquiescing with the retention. Second, the removal of the warrant detaining the respondent's departure from Israel, under the plaintiff's consent, shortly after writing the agreement, was understood as an expression of understandings made in the agreement and as an attempt to fulfill one of its terms. Thirdly, the respondent's return to United States was presented as indicating that

the respondent has waived the immediate realization of his custodial right, as well as the immediate return of the daughter to United States.

Now we were asked to grant permission to appeal this ruling.

The plaintiff's claims

5. The plaintiff claims in the appeal request that under the circumstances of the case the terms set in article 3 of the convention do not apply, and therefore one must not determine that the retention of the daughter in Israel is wrongful. It was claimed that the parties stayed in United States temporarily, and therefore the Regional court was mistaken in his determination that the habitual residence of the daughter is United States. It was also claimed that the respondent did not prove that his custodial rights were breached, and that during the discussion in the Family court no ongoing legal proceeding was held in an authorized court in United States.

Alternatively, the plaintiff claims that the defenses against return apply. First, it was claimed that consent and acquiescing defenses according to article 13(a) of the convention – apply. According to her claims, the respondent filed the current prosecution after consenting to the unique jurisdiction of the Rabbinate court regarding the divorce and associated issues. In light of his consent the warrant detaining his departure from Israel was cancelled, and he returned by himself to United States. In addition, in the agreement the respondent gave his consent to his daughter's stay in Israel, to paying alimony in NIS (New Israeli Shekel) and also to agreed-upon seeing arrangements during his visits in Israel. according to the plaintiff's claim, the respondent was willing to accept the agreement as is while it was she who refused to sign it, due to a financial dispute between the parties. Second, it was claimed that the defense of grave risk of harm according to article 13(b) of the convention – applies, and that the best interest of the minor requires her stay in Israel. according to this claim, under the circumstances in which the daughter has no medical insurance in United States and her parents do not have a proper stay visa, the minor is exposed to actual harm if she were to return to United States. The plaintiff wishes to deduct from that that even if she had performed an act of wrongful retention, one should not order under the circumstances of the case the immediate return of the daughter to Unites States. For all the above mentioned reasons the plaintiff wishes to receive permission to appeal the ruling of the Regional court and to override the Regional court's ruling ordering the daughter's return to United States.

The respondent's claims

6. The respondent claims, on the other hand, that the permission to appeal should be denied since the current case does not involve a fundamental legal issue which exceeds the interests of the parties. Specifically he claims that in the current case the terms set in article 3 of the convention – apply. It was claimed that custodial rights of the respondent were exercised according to the law of the state of New Jersey, determining that both parents have joint custody over the daughter, and that according to Regional court's ruling a custodial claim to the court in New Jersey was filed, so that the respondent has actually exercised his custodial rights as required by the convention. The respondent further claims that there is no justification to intervene with the factual determination of the Family court that the habitual residence of the daughter is United States. He had attached to his written response several evidence, which were discussed in Regional court, which to his claim show that the parties' stay in United States wasn't temporary or limited to the plaintiff's schooling

period. Among other things he had presented confirmation of bank accounts and a certificate indicating prolonging the rent lease of the couple's apartment in United States.

The respondent thinks that the defenses against return, which the plaintiff claims, do not apply to the current case. It was claimed that the agreement does not indicate consent or acquiescing since it wasn't signed, and also since it was the plaintiff who had written in the draft attached to the agreement, by hand, "returning to Israel". As far as he's concerned, this comment indicates lack of decision regarding place of residence. The respondent adds that the harm defense also does not apply to the circumstances of the case. To his opinion, there is no concern that the parties will be deported from United States upon return, since he had received a worker's stay visa for a period of two years, while the plaintiff has a tourist stay visa for a similar period. He emphasizes that he had met every term set by Regional court to ensure the daughter welfare upon returning to United States. The rent lease of the apartment was prolonged accordingly, and the required sum of money to ensure the minor's alimony was deposited. Therefore he claims that the permission to appeal should be denied and asks to order the daughter's return to United States immediately.

7. After examining the parties' claims and discussing it, we have decided to grant permission to appeal and discuss the request as if an appeal was filed according to the granted permission.

Discussion and decision

8. In the current case, two key questions emerge. The first is whether the plaintiff performed an act of wrongful retention, as defined in article 3 of the convention, by not returning the daughter to United States on the planned date. If the answer is affirmative, the second question rises – may we conclude from the circumstances of the case that one of the defenses against immediate return as set by the convention applies, so we should not order the immediate return of the daughter to United States as required by the convention. I will discuss these questions in order.

Normative framework

9. In the last few decades, as the world became a global village, in which moving from one state to another is done easily, and people move between states often, emerged an actual need for international cooperation in dealing with the phenomenon of children's abduction by one of their parents, while breaching the custodial rights of the other parent. In most cases that the convention applies to, we deal with parents from different states of origin, that their separation inflicted conflict regarding place of residence, when each parent wishes to raise the mutual child in his home land. Sometimes, one of the parents decides to take a one-sided action of removing the child to another state, without consent of the other parent and while breaching his custodial rights. Such an act of self justice requires a quick and efficient aid, which can be given only by way of cooperation between states. On this background the convention was signed. Judge M. Cheshin points this out as he writes:

> "Hague convention and the convention act were intended to set an inter-state arrangement for a phenomenon, which was seen in the past but in our days became more and more common. The world in which we live is not the same as yesterday's world… visits of people from one state in other states became more common,

> and these visits create by nature encounters between young men and women. These encounters sometimes lead to love stories… The couple, living together in love, must decide: where will they reside – in his state or hers? The decision is made, and one of the partners follows the other. Days go by, and the couple discovers they can no longer live with each other. The partner who has left his state wishes naturally to return to his state, where he was born and raised. And he wishes – again naturally – to not part with his child. When agreement and understanding between the partner lacks, comes the abduction. However, the other partner is also not willing to give up his child, and so the issue comes before court. And the question is: under whose custody will the child be, and in which state will he reside. Hague convention was not destined to apply only for such cases, obviously, but we know that these cases are especially common" (C.A. 4391/96 **Paul Row vs. Dafna Row**, I.r. 50(5) 338, 343 (1997); hereinafter: matter of **Row**).

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**), while leaving very limited room for discretion of the court discussing the return request.

Preliminary terms for the convention's applicability

10. An order to return a child to the state from which he was abducted and to which he was not returned may be given under the preliminary terms of the convention's applicability, set in article 3 of the convention, which turn an act to an "abduction". One should distinguish between two types of cases under this article. The first type is an act of "active abduction", meaning removal from the habitual residence of the minor to a contracting state. The second type is an act of "abduction by omission", meaning retention of the minor to a contracting state and not the state of habitual residence of the minor (See: F.P.A. 9802/09 **Anonymous vs. Anonymous** (unpublished, 12.17.09); hereinafter: **matter of anonymous(1)**).

11. Article 4 of the convention sets an age limit of the minor according to which the convention's instructions apply, and sets it on the age of 16 years. Article 3 of the convention sets three preliminary terms for defining the removal or retention of a minor as "wrongful", and therefore the convention applies: it is required that the act has breached the custodial rights of the "abducted" parent; that these rights were actually exercised; and that the state from which the minor was abducted or the state to which he was not returned was indeed the habitual residence of the minor. The term "habitual residence" isn't defined

in the convention, probably since its drafters intended to allow flexibility and ability to discuss the circumstances of each case, considering a variety of possible cases. The interpreting tendency in to give the term "habitual residence" a literal and limited interpretation, since an overly extensive interpretation might harm the fulfillment of the convention's purposes and even nullify it (see: **ibid**, art. 9; matter of **Gabay**, p. 254-255).

12. Regarding the question of "habitual residence" of the minor, two schools developed in the ruling, namely "factual school" and "intentional school". The factual school is based on testing the geographic-physical residence prior to the minor's removal. This is a factual examination and not a legal one. This school addresses the past. In its framework, one mustn't test intentions or future plans of the parents, together or separately, regarding residence. The only question asked is where did the minor reside regularly prior to the act of removal, from his point of view, or from the parent's point of view if he did not yet reached the age of testifying regarding his residence:

> "the residence is not a technical term… It expresses ongoing life reality. It reflects the place in which the child had regularly resided prior to the abduction. The point of view is that of the child and where he had resided. The examination focuses on the daily lives of the past and not on the plans for the future. When the parents live together, the habitual residence of the child is usually the parent's residence" ((retired) president A. Barak, **ibid**, p. 254).

In parallel to the factual school, gradually developed an additional school, named the "intentional school". In this school, one does not test only the physical residence of the minor prior to his abduction, but also the parent's intentions regarding the duration and circumstances of staying in the state. So, for example, the fact that the parents immigrated to a state permanently or moved there for a limited period has a different relevance in determining the "habitual residence" according to this school. The parent's intention is inferred from the circumstances of the case and the interpretation of their stay in the state (see: matter of **anonymous(1)** and the references there).

13. Of all the above mentioned, it seems that the intentional school focuses on "matters of the heart" and arguable circumstances, whereas the factual school presents an easy and simple test, objective by nature, which makes it difficult at times to consider a more complex reality. The issue of comparing the two schools and giving different weight to each of them remains to be discussed (see: C.A. 7994/98 **Dagan vs. Dagan**, I.r. 53(3) 254 (1999) (hereinafter: **matter of Dagan**); C.A.D. 10136/09 **Anonymous vs. Anonymous** (unpublished, 12.21.09)), although it is customary to test mainly the factual school, since testing the parent's intentions might erode the convention's purposes. In my opinion, the two schools should be combined, in a manner that will leave the focus in the question of factual physical residence, but will also give some weight to the parties' intentions and reality of life. Anyway, we are not asked to settle this issue in the current case. And indeed, in the current case too, the previous courts tested both schools in discussing the question of "habitual residence" of the daughter. The conclusion was that the habitual residence of the daughter prior to her retention was United States.

Defenses against return

14. The underlying perception of the convention is that the act of abduction harms the best interest and welfare of the child, since he is torn from its natural environment and

custodial parent and brought to a foreign environment, forced upon him by the other parent. Even though the term "best interest of the child" isn't mentioned in the convention, this principle underlies it, since one cannot discuss matters of children without considering their best interest (see: matter of **Gabay**, p. 251; for a discussion of the relation between the convention and children's rights see: Rona Shoz "rights of abducted children: does Hague Convention Act (returning of abductees children) 1991, coincides with the doctrine of children's rights?" **legal studies** 20, 421 (2004)). It is the question of the best interest of the child that will determine the fundamental dispute regarding child's custody. The discussion regarding procedures according to the convention act should be held in a forum that will discuss this question. Considering the purposes of the convention, and especially the importance of honoring the rule of law on an international level, the default rule is that the best interest of the child will be discussed in his habitual residence and not in the state to which he was abducted.

15. However, sometimes returning the child to his habitual residence might harm him, so it is not in his best interest. For such cases there are the defenses against return, anchored in articles 12, 13 and 20 of the convention. According to article 12 of the convention, the return is not required if the child stayed in the state to which he was abducted for more than one year, and it is proven that he has integrated well in his new environment. Article 13 sets three defenses against return: the consent and acquiescing defenses, the grave risk of harm defense and the consideration of the minor's will defense, if he has reached a proper age and degree of maturity. An additional defense is specified in article 20, according to which one may refuse to return a child if the return does not settle with fundamental principles of the state discussing the return request in regards to protecting human rights and fundamental liberties. Underlying the defenses against immediate return is the duty of protecting the child and the need to prevent grave harms which may be inflicted upon him as a result of his return.

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. 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 (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**). Note well, carrying the burden of proof does not terminate the possibility of returning the minor to the state from which he was removed or to which he wasn't returned. 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.

16. The defenses to be tested in the current case are set in article 13 of the convention, and so is written in it:

> "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" (The emphases were made by me, E.A.).

I will discuss the essence and scope of the related defenses according to order.

The consent and acquiescing defenses

17. As aforementioned, article 13(a) of the convention sets the defenses against immediate return: the consent defense and the acquiescing defense. These two defenses have two main purposes. The first purpose is providing a proper response to a situation in which the "abducted" parent consented or acquiesced with the abduction act, in a manner which makes the need to immediately return affairs the way they were before redundant (see: C.A. 473/93 **Libowich vs. Libowich** I.r. 47(3) 63 (1993); hereinafter: **matter of Libowich**). The second purpose is preventing cynical use of the immediate return aid given in the convention, in a manner that will turn the convention to a bargaining tool in the hands of the abducted parent:

> "On the other hand, the guardian's conduct can also alter the characterization of the abductor's action, in cases where he has agreed to, or thereafter acquiesced in, the removal which he now seeks to challenge. This fact allowed the deletion of any reference to the exercise of custody rights 'in good faith', and at the same time prevented the Convention from being used as a vehicle for possible 'bargaining' between the parties" (**Perez-Vera report**, p. 461).

18. The issue of consent or acquiescing is that of custodial rights; That is, the parent's consent to or acquiescing with the factual status created in regards to custodial rights of the minor (see: matter of **Gabay**, p. 257). Unlike determining the habitual residence under article 3 of the convention, where it is customary to give some weight to the parents' intentions and future plans, in these defenses one must consider the parent's intentions regarding the minor's residence, their expectations and future plans (see: Shmuel Moran, Alon Amiran and Hadara Bar, **Immigration and Children's Abduction, Legal and Psychological Aspects** 88-89 (2003)). If these suggest consent to or acquiescing with the act of removal or retention, one should not order the return of the minor to the habitual

residence immediately. The immediate return is no longer mandatory, and becomes subjected to discussing court's discretion.

19. The consent defense and the acquiescing defense are similar in their essence and characteristics, even though the ruling mainly addresses the acquiescing defense (see for example: matter of **Dagan**; matter of **Libowich**). The main difference between the two defenses lays in the time factor – while consent is granted before the act of removal or retention, acquiescing is created in retrospect, after such an act (matter of **Gabay**, p. 257; matter of **Libowich**, p. 72). Therefore, when we wish to determine which of the two defenses applies to the circumstances of the case at hand, we should first determine whether we're dealing with consent given prior to the abduction act, or with acquiescing after the abduction act. On the subsequent stage we should examine the main question regarding the applicability of these defenses, which is whether the parent whose rights were suffered acted as would a parent whose goal is to immediately return affairs the way they were, or has he acted in a manner that indicates his consent in effect to it or acquiescing with it:

> "the existence of consent is examined in light of the question: did the "abducted" parent's behavior coincides with his intent to guard his rights regarding returning the status-quo, that is, immediately returning the child to his habitual residence from which he was removed, or whether the circumstances and his behavior suggest consent to the change in status-quo, to moving the child to the new location?" ((then) vice president judge Alon, **ibid**, p. 72).

20. Logic dictates that cases in which the question of defenses rises will be discussed individually, each case and its unique circumstances. Therefore, narrow standards regarding the issue of consent or acquiescing should not be determined. However, the boundaries of these defenses should be defined, and as mentioned above, the convention's purposes require giving it a narrow interpretation and use them with care and restrain. Three main characteristics assist in examining the applicability of the defenses and in understanding their boundaries: nature and quality of the consent or acquiescing; contract law applicability; and the weight to be given to the reasons of consent or acquiescing and to the period of time passed (matter of **Gabay**, p. 255-259; matter of **Libowich**, p. 71-75). All these will assist us in answering the question of whether the requesting parent has waived the aid of immediately returning the minor by consenting to the act from the outset or by acquiescing with it post factum. All this will be specified subsequently.

21. First, we should outline the nature and quality of the consent or acquiescing. It was determined that it should not necessarily be interpreted or done in a manner of active action. One can also learn of consent to the abduction act or of acquiescing with it from behavior by omission or implied behavior. However, not every step made by one of the parties indicates consent or renunciation. It is a fundamental examination of the abducted parent in general – we should conclude from the overall circumstances and observing the general picture that the parent has waived the immediate fulfillment of the custodial or visitation rights that he had by force of the habitual residence state prior to the act of removal or retention (see: matter of **Dagan**, p. 273). Such an examination is objective by nature. The abducted parent's subjective state of mind will be examined only as long as it realizes in his objective external behavior (see: matter of **Libowich**, p. 74). The existence of

consent or acquiescing is also learned, among other things, from the awareness of the "abducted" parent to the fact that his rights are being hurt. He needs not be aware of the specific rights granted to the parent by force of the convention. A general understanding that his parental rights are being hurt or may be hurt due to the other parent's actions is sufficient to learn of awareness. So, for example, if the parent knows that a wrongful act was done, and did not attempt to receive legal advice in the matter, it may indicate consent to the abduction act (see: matter of **Dagan**, p. 274).

22. Consent or acquiescing are contractual by nature, as it is a one-sided action done by one parent, develops within the other parent and creates a relying interest regarding the change of status quo. Therefore it was determined that contract laws apply to the consent and acquiescing defenses, including all implications (matter of **Libowich**, p. 73 and the references there; matter of **Gabay**, p. 258). So, for example, consent or acquiescing that was done by mistake, deception, coercion or exploitation should be treated as a contract done under similar circumstances and can be cancelled. Likewise, if the abductor parent was aware of the fact that the abducted parent does not waiver the change of status-quo, therefore a claim on his behalf that the defenses apply will contradict the bona fide principle. In addition, one should consider the foundation on which the parent who made the abduction act had to rely. If he had made some actions to change his condition following the consent or acquiescing of the other parent, it should be brought into account within the considerations examined under this defense, although it is befitting that the relying interest as above mentioned will be considered cautiously, lest the abductor parent enjoys the fruits of his own wrong doing (matter of **Libowich**, p. 71).

23. In addition, the **weight** to be attributed to the different circumstances in which the consent or acquiescing was given should be considered, and especially the weight to be attributed to the reasons for the consent and to the period of time that passed since the act of removal until the filing of the prosecution according to the convention. So was determined that the reasons for which the parent has consented to the abduction act or acquiesced with it will not be taken into account while examining the quality of consent or acquiescing, since it is possible that he did not want to move the minor from state to state, or he was interested in having the custodial issue discussed in the state to which the minor was abducted, being the parent's state of origin. Whatever his reasons are, if the behavior of the parent indicates consent to or acquiescing with the abduction act, one should conclude that he has waived the immediate aid granted by the convention, and is willing to solve the dispute in alternative ways (matter of **Libowich**, p. 70).

The time factor should also be considered while examining the question of whether the parent's behavior during the time passed coincides with his later demand to return the minor. Regarding the consent defense, it was ruled that one should examine the period of time that has passed since the day of abduction until the day the prosecution according to the convention was filed, and whether one can infer from it, alongside other circumstances, acquiescing of the parent with the condition created. In this context it was determined that the time in which the acquiescing consolidated is not defined, and should be learned individually in each case, according to its unique circumstances (**ibid**, p. 72-74). While examining the consent defense, the time factor is less significant. A short or long period of time might pass since the day of abduction until the day the prosecution was filed, but in most cases it will have no relevance since the consent, by nature, was given in advance, prior to the abduction act. Therefore, under the consent defense the main question is that of weight, that is, what were the circumstances indicating consent, and to what degree of

details it indicates consent of the "abducted" parent to waiving the "first aid" granted by the convention, all that subjected to the above mentioned defenses' boundaries.

24. In several cases, a parent who has consented to or acquiesced with the abduction act may wish to go back on his consent. The rule is that one cannot go back on his consent or acquiescing and cancel it retroactively. Since the time consent or acquiescing has developed, the parent whose custodial rights were harmed will be seen as if he has waived the immediate aid granted by the convention (**ibid**, p. 73; matter of **Dagan**, p. 275). Even changed circumstances do not justify going back on consent or acquiescing. 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.

The grave risk of harm defense

25. Article 13(b) of the convention determines that where there is a grave risk that the minor's return would expose him to physical or psychological harm, or otherwise place him in an intolerable situation, the court does not have to instruct his return. The rule is that the best interest of the child considered in this defense is narrower than the one considered in regular custodial proceedings, since over-extension of the defense might nullify the convention's purposes (see: matter of **anonymous**, art. 29-33). Therefore the court used two tools intended to reduce the defense's applicability. First it was determined that the burden laid upon the one claiming the defense applies is beyond reasonable doubt, which is of course a very heavy burden of proof. Second, the defense's applicability was reduced in an interpretational way, as the principle determining the defense is that set at the end of article 13(b), according to which the child will not be returned only if there is a grave risk that his return will place him in an intolerable situation.

> "the principle determining article 13(b) of the convention is the one at its end, which regards placing the child in an intolerable situation were he to return to his habitual residence…The formula refers to placing the child in an intolerable situation…That is: one may not instruct to return a child if his return will place him "in an intolerable situation": whether that intolerable situation is due to a grave risk of exposing the child to physical or psychological harm, or his return will place him in an intolerable situation "otherwise"" (matter of **Row**, p. 347).

In addition, it was determined that the defense in question refers to harm inflicted upon the minor due to returning to the state from which he was removed, and not as a result of returning to the parent from which he was abducted or from disconnecting him from the abductor parent (see: C.D.R. 1648/92 **Turne vs. Meshulam** I.r. 46(3) 38, 46 (1992)). Accordingly, in many cases the claim of lack of parental capability of the parent requesting the aid by force of the convention was rejected, as was a claim that the abductor parent is facing deportation or substantial financial difficulty as a result of returning with the child to the state he had left (see for example: C.A. 5532/93 **Gunzburg vs. Grinvald**. I.r. 49(3) 282 (1995)). The court relies in this context only on experts' determinations, from which one can

clearly realize that the risk of physical or psychological harm is substantial. So, the harm defense is extremely narrow, only for cases in which returning the minor would expose him to physical or psychological harm, or otherwise place him in an intolerable situation.

Deduction from the general to the specific

26. In the current case, the plaintiff and the respondent were both born in Israel and went to find their luck in United States, in which they had resided since the beginning of their relationship. The plaintiff began studying, while the respondent worked in odd jobs, and at some point established a business company in partnership with the plaintiff. In United States their first daughter was born. Throughout all this time they maintained their connections in Israel, came to visit in Israel often and preserved their social rights and even opened a shop in their home town. Consensually, the plaintiff and the respondent came with their daughter to Israel for Passover holiday. In this vacation they have decided to separate. The respondent returned to United States as planned while the plaintiff did not do so, having decided to stay in Israel with the daughter. As the daughter was not returned to United States at the planned date, the respondent filed a claim for her return according to Hague convention.

27. Therefore, we deal with a case of retention, and the question at hand is whether the terms of the convention's applicability exist. The minor the respondent wishes to return to United States is extremely young. At the time in which she were allegedly to return to United States she was only nine months old, and therefore her age meets the age limit set in article 4 of the convention, determining the age limit for claiming the return of a minor according to the convention at the age of 16 years. In addition, the Regional court decided that the law in the state of New Jersey, in which the plaintiff and the respondent has resided, is that the custodial rights are joint rights. Therefore the first term set in article 3 of the convention exists, since the retention has breached the custodial rights of the respondent over his daughter. Later on, the Regional court ordered the respondent to issue a custody proceeding in the state of New Jersey before returning the daughter to United States, and the respondent attached to his written response confirmation of issuing such procedure. With that, the respondent has actually exercised his custodial rights, and the second term set in article 3 of the convention, according to which the parent requesting the return of the minor according to the convention must exercise the custodial rights granted to him, exists. Finally, the Family court determined that the habitual residence of the daughter was United States, so the third term set in article 3 of the convention for proving an act of abduction exists. In examining the issue of habitual residence by factual school and intentional school, the Regional court reached the same conclusion regarding the habitual residence prior to the act of retention. The Regional court's judges also accepted this factual determination. I do not find a reason to intervene with this factual determination of the discussing court (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.

In conclusion of this issue – regarding the preliminary terms of the convention's applicability, as determined by Regional court, the plaintiff has performed an act of wrongful retention. At this point we should therefore examine whether one of the defenses against immediate return applies.

28. In order to determine whether under the circumstances of the case, the consent defense or the acquiescing defense applies, one must first examine the time factor, that is, do the circumstances indicate that the respondent consented in advance to the retention or acquiesced with it after the effect. The Family court's premise, also adopted by Regional court, was that the date of the daughter's retention is June 20th 2010, the day in which the plaintiff and the daughter were to return to United States according to the plane tickets purchased before the parties' arrival at Israel (hereinafter: **the date of retention**). The respondent issued proceedings according to Hauge convention in order to return the daughter to United States, immediately and shortly after the date of retention. At this stage I will clarify that I realize that the minority opinion in the Regional court focused on the applicability of the acquiescing defense. However, in light of the distinction I described between these two defenses, it seems that under the circumstances of the case the respondent's immediate action does not allow us to view his behavior as acquiescing with the daughter's retention. Therefore, the defense fitting the current matter is the consent defense, according to which one should examine whether the overall circumstances indicate that the respondent consented in effect to the retention and the change of status-quo, and with that actually waived the "first aid" granted by the convention. As I'll explain hereinafter, I believe that this question should be answered affirmatively, since the circumstances of the case suggest that the respondent consented prior to the date of the daughter's retention to leaving the custody over her at the plaintiff's hands.

29. The Regional court determined that the plaintiff and the respondent consensually arrived at Israel for Passover holiday. During this vacation, in which each of them stayed at their families' houses, they have decided to separate. The plaintiff turned to Rabbinate court and issued a divorce procedure, to which she attached the issue of custody over the daughter. On her request, the Rabbinate court issued a warrant detaining the respondent and the daughter against departure from Israel. The respondent turned to Rabbinate court with an urgent request to cancel this warrant. In his request, the respondent described before the Rabbinate court the course of events between the couple, and even declared that he is willing to divorce the plaintiff immediately and reach an alimony agreement with her as required. That, I emphasize, is not enough to teach of his consent to leave the custody over the daughter with the plaintiff.

Later on, the parties decided to converse and reach a separation agreement that will be acceptable by both of them. With the mitigation of an accountant, which is a mutual friend, an agreement was drafted, titled "financial agreement". The paragraphs of the agreement indicate that the parties consented to the plaintiff's and the daughter's stay in Israel, while the respondent returns to United States to his business. So was determined on paragraph 1 of the agreement that the plaintiff will remove the detaining warrant issued against the respondent at her request; paragraph 2 states that the monthly alimony for the daughter will be paid in NIS; in paragraph 3 the respondent promised to transfer on his name certain contracts that the plaintiff was signed on as a partner in the company in United States; in paragraph 4 the respondent consented to moving the plaintiff's and the daughter's equipment to Israel; and in paragraph 7 the parties determined consensual seeing arrangements were the respondent to return and reside in Israel. the overall points of agreement in this agreement teaches clearly that the parties consented that each of the parties will go their own way – the respondent will return to United States and the plaintiff and the daughter will remain in Israel.

However, at the end of the day, due to financial dispute, apparently from the plaintiff's side, the financial agreement was not signed. Nonetheless, the plaintiff performed actions indicating she began honoring her obligations according to the agreement. We learn of that by her consent to cancel the detaining warrant issued against the respondent at her request, after which the respondent has returned by himself to United States.

30. In other contexts it was said that "there is nothing holy about signature" (A.D. 40/80 **Kenig vs. Cohen** I.r. 36(3) 701, 724 (1982)), so if foundations of decision and specification exist in an agreement, it is valid even without the parties' signatures (see for example: C.A. 692/86 **Botkowsky vs. Gat** I.r. 44(1) 57 (1989)). Of course, this rule does not apply to the circumstances of the current case, since the parties agree that the financial agreement did not develop into a binding contract. However, I believe that the minority judge in the Regional court was right to determine that the agreement has a "semi-evidential" meaning in examining the respondent's consent to leaving the custody over the daughter in the hands of the plaintiff. The agreement was not signed eventually since the plaintiff refused to sign it, while the respondent was willing to accept it as is, including the paragraphs indication his consent to the daughter's stay in Israel, under the plaintiff's custody. Under these circumstances I believe that the agreement should be viewed as main evidence, assisting in completing the overall picture, which indicates that the respondent waived the urgent fulfillment of the custodial rights granted to him by force of the state of New Jersey's law.

I fully realize that the respondent attached to his written response an additional agreement draft, written to his claim by the plaintiff by hand, on which she wrote "returning to Israel" (hereinafter: **the draft**). To his claim, it attests that the parties did not agree on the issue of the daughter's residence, and therefore there wasn't any early consent regarding custody. The Family court who examined this draft treated it as a draft for the financial agreement, while the Regional court did not discuss its relevance. After reviewing the draft it becomes evident that its content does not coincide with the financial agreement's content, since it deals with a situation of reconciliation between the plaintiff and the respondent and not of separation and divorce. It wasn't clarified – and in any case wasn't proved – when was this draft written and by whom. In the absence of such information, the draft cannot teach us what the respondent wishes to teach, and in any case it seems that no one disputes the fact that the final draft of the financial agreement is the one edited by the accountant and deals with separation and with the plaintiff's and the daughter's stay in Israel.

31. In conclusion of this issue – consent is being learned from the overall circumstances and it need not be literal. Indeed, in the current case the respondent's conduct teaches that he had consented to the non-return of the plaintiff and the daughter to United States. He was involved in drafting the financial agreement, in which he had consented among other things to the issue of custody and seeing arrangements. Later on he has even made an active action by turning with the plaintiff to the Rabbinate court, requesting to remove the warrant detaining his departure from Israel, and returned to United States to his affairs, while the plaintiff and the daughter remained in Israel. I will clarify that it is indeed possible that the respondent hoped that the plaintiff and the daughter will return to United States at the date of retention, and may have even believed they would do so, especially given the fact that the marriage did not yet end officially. However, the respondent's objective behavior indicates his consent to leaving the custody over the daughter in the plaintiff's hands, and to the staying of the two of them in Israel. the subjective state of mind, feelings and expectations of the respondent are not suffice to conclude that he did not give his consent to the plaintiff's and the daughter's stay in Israel, in light of his explicit manifested actions.

32. As above mentioned, the act of consent is a contractual action by nature. After the parties conversed the issue of custody, and after the plaintiff agreed to remove the detaining warrant against the respondent's departure from Israel, he left Israel and return to his business in United States. It is certainly reasonable to assume that the chain of events, and specifically his departure from Israel under the plaintiff's consent, after the financial agreement was written and partially even fulfilled, caused the plaintiff to rely on the issue of change in status-quo, mainly separation of the couple and her stay with the daughter in Israel. while discussing the relevance of the agreement between the parties, Family court determined that:

> "the plaintiff was under stress as he had a detention warrant against him leaving Israel, which would have disrupted his plans to return to USA… Reading the draft, one can't help but wonder whether it was written under the **heavy shadow** of the detention warrant, and even if the **plaintiff's consent** would have been granted in the draft, indeed it would have been **granted under the pressure laid upon him by the detention warrant**" (Family court ruling, paragraph 28, p. 14; The emphases were made by me, E.A.).

I cannot accept such assumption, that the respondent consented to the daughter's stay in Israel only because he was under pressure laid upon him by the detention warrant against him. While negotiating for a contract, each side is surely under pressures and influenced by various considerations, and calculates his actions accordingly. The rule is that the freedom of will should be interpreted widely, and that various pressures, financial, social or political, should not be viewed as harming the minimal will (see and compare: C.A. 1569/93 **Maya vs. Panford** I.r. 48(5) 705 (1994); C.A. 1912/93 **Shaham vs. Mans** I.r. 52(1) 119 (1998)). Therefore, I do not believe that it is right to determine that the respondent was under heavy pressure due to the detention warrant, and that his consent was granted under that pressure without being able to use his discretion. Let us not forget that against the pressure under which the respondent was to continue with his plans, stood the issue of custody over his daughter, which is in itself a matter of uppermost importance.

33. The respondent's later actions, around the date of retention, may well teach that he had a change of heart regarding his daughter's stay in Israel, or that he had still hoped to reconcile with the plaintiff. The respondent sent the plaintiff a warning letter by his lawyer, close to the date of retention. He even issued proceedings to return the daughter to United States according to the convention, in the authorized court in Israel, about two months after that date. Furthermore, he acted to achieve a stay visa for himself in United States; presented documents indicating he had prolonged the rent lease and paid health insurance fees for the daughter in United States; and later he met the preliminary terms for returning the daughter as set by the Regional court. These actions indicate his desire to return the daughter to United States, and that the custody hearing in her matter will be held in his state of residence. However, these later actions do not erase the consent he had previously granted to the daughter's stay in Israel, prior to the act of retention. As above mentioned, the rule is that one cannot go back on granting consent, since the respondent's consent to the plaintiff's and the daughter's retention in Israel teaches of his waive of the immediate aid granted by the convention. Hence, in light of the overall picture arising from the specified facts, the consent defense applies to the case at hand. Therefore, the question of

returning the daughter to United States is within the court's discretion, and there is no immediate obligation to return her according to the convention.

34. In light of the determination that the consent defense applies, we need not further discuss the plaintiff's claim regarding the applicability of the grave risk of harm defense, since it is sufficient to prove one of the defenses in order to grant the discussing court the discretion to decide whether to order the daughter's return or not. In short I will comment that the burden of proving such defense applies, laid upon the one claiming it, is very heavy, and the interpretation given to it is extremely narrow. It seems 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.

35. In conclusion, the convention applies to the matter at hand, since the preliminary terms for its applicability exist, and the plaintiff performed an act of wrongful retention in Israel. however, the consent defense applies to the current case, since the overall circumstances, mainly the separation agreement and the parties' behavior after writing this agreement, indicate that the respondent had consented to the mother's and the daughter's stay in Israel. Therefore the immediate return is not mandatory according to the convention and it is included in the court's discretion. I will turn now to the considerations relevant for such a decision.

36. After considering the overall circumstances, I am satisfied not to order the daughter's return to United States, and believe that the custodial issue should be discussed in the authorized court in Israel. The plaintiff and the respondent resided in United States for about four years, since the beginning of their relationship. They do not have an American citizenship – the respondent has a temporary work visa for only two years, and the plaintiff has tourist's visa, which does not allow her to work for a living. The extended families of both parties stay in Israel and they do not have a permanent housing in United States. While they resided in United States, they've established a business in Israel and maintained their bank accounts and social rights in Israel. The entire nature of the stay in United States, even if it lasted for several years, is therefore that of temporariness. As they've decided to separate, the respondent wished to return to his business in United States whereas the plaintiff wished to stay in Israel, within a family support system, while in the middle stands the mutual daughter, a very young toddler, whose both parents surely wish her the best. In my opinion, the best interest of the minor obligates discussing the custodial proceedings in her matter in Israel and not in United States. For most of her life the daughter, **who is not even two years old**, resides with the plaintiff, which is the dominant parental figure in her life, especially considering the respondent's long stay in United States, even to this day, in separation from his daughter. Under the circumstances of the couple's separation, the return of the plaintiff and the daughter to United States for the custodial proceedings might place the plaintiff in an unbearable situation, which will ultimately be against the minor's best interest. First, one cannot expect that after separating, the plaintiff and the respondent will continue residing in the apartment in which they lived as a couple, of which the lease was prolonged according to the decision made by Regional court in order to ensure the minor's accommodation. Note well, under the circumstances in which the plaintiff has only tourist's visa, and may not work for a living in United States, the plaintiff will not be able to provide for herself and the daughter for housing separately from the respondent, and if she will do so, she may face the danger of expulsion from United States. Even if the risk of such an event is not grave, I believe that we should not risk disconnecting the plaintiff from her toddler daughter, in a manner that contradicts the young daughter's best interest (see:

C.P.A. 4575/00 **Anonymous vs. Anonymous** I.r. 55(2) 321, 331 (2001)). Alternatively, the plaintiff might be forced to reside again with the respondent under the same roof, but considering the ongoing disconnection and alienation between the parties during the legal proceedings, it is reasonable to assume that joint residence of parents who do not get along will also be against the minor's best interest. Thus I believe that the above mentioned considerations, primarily the daughter being **extremely young** and the plaintiff's legal status in United States, indicate that the custodial issue should be discussed in Israel, and therefore I won't instruct her return to Unites States for the purpose of deliberating this issue.

37. In conclusion I have two comments regarding the progression of the procedure at hand. First, the respondent requested to present us with the exhibits file presented before the Regional court, and the plaintiff replied she leaves it to the court's discretion. I've reviewed the file as requested, but did not find the exhibits within it to shed light on additional aspects discussed in this decision. Its content surely influenced my current decision, but it did not convince me to accept the respondent's point of view.

A second comment refers to an announcement the respondent filed to court, in which he had informed that he is forced to leave Israel and return to his business in United States before the legal proceeding at hand ends. The plaintiff responded to this announcement by claiming that the respondent's return to United States was done while violating a detention warrant against his departure from Israel. In his response, the respondent rejected this claim. Without discussing the claim itself, since it is not necessary and we don't have enough details to make any determination in the matter, it seems that the divorce dispute has brought the parties to a bitter and alienated confrontation. I sincerely hope that as the current proceeding ends, the plaintiff and the respondent will succeed soon in achieving an understanding and resolve their differences, placing at the top of their priorities the best interest of the mutual daughter, who's entitled to have both parents present in her life.

Hence I suggest my colleagues to accept the appeal and determine that the Regional court's decision regarding the daughter's return to United States according to the convention is hereby cancelled. I also suggest cancelling the plaintiff's debit of legal expenditures as determined by Family court. Under the circumstances I do not find it appropriate to debit the respondent with the expenditures of the current discussion.

At the end of affairs I've read the opinion of my colleague, judge Vogelman, and wish to shed a light on two issues. First, I believe that there will be cases in which the overlap between civil contract law and family contract law will not be complete, and there will be a need to address uniquely the family contract (see for example: C.P.A. 8791/00 **Shalem vs. Twinko**, art. 7 (unpublished, 12.13.06); Shahar Lifshitz "Couple Contract Regularization in Israeli Law – Initial Outline" **Court Campus** 4, 271 (2004)). Second, 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. In this case there was a complete agreement which was not signed eventually only due to the plaintiff's refusal while the respondent was willing to fulfill it. Beyond that, as I've emphasized, the parties began acting according to the agreement by consensually cancelling the detention warrant issued against the respondent's departure from Israel, and the respondent even left Israel and returned to United States, while the plaintiff and the daughter stayed in Israel. These unique circumstances justify in my view

seeing the respondent's consent within the negotiation between the parties as indication of the consent defense's applicability.

J u d g e

Judge H. Melcer:

1. I concur with the result my colleague, judge **E. Arbel**, has concluded in her review and with the main reasons she elaborated. However, I believe that the reason supporting the conclusion reached by her in her ruling should be based more on "the acquiescing defense" set in article 13(a) of the convention, as defined by **Hague Convention Act (returning of abductees children) 1991**, than "the consent defense" included in the same article. I hereby explain my reasons.

2. Due to the circumstances described in my colleague's ruling and also in the minority opinion of vice president, judge **A. Avraham** in the Regional court in Nazareth, I believe that the respondent – upon leaving recently for United States, has actually "consented" – at least at the time – to the daughter's retention in Israel and to leaving her in her mother's hands in Israel at that point. This may be inferred from the request made by the respondent to Rabbinate court in order to cancel the detaining warrant issued against his departure from Israel by the plaintiff – a procedure at the end of which the abovementioned warrant was cancelled consensually. In this context we remind that the Rabbinate court has unique jurisdiction in the divorce claim between the parties, being Israeli citizens who got legally married in Israel. furthermore the respondent was willing within the "financial agreement" deliberated between the parties (and was not signed eventually due to reservations made in fact by the plaintiff) – to promise to move all the personal equipment of the minor to Israel and pay her monthly alimony in NIS. At the same time he wished to guarantee himself seeing arrangements with the child whenever he arrives at Israel.

This information, learned from the evidence included in the case, 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. see: C.A. 7206/93 **Gabay vs. Gabay** I.r. 51(2) 241, 256-259 (1997); C.P.A. 7994/98 **Dagan vs. Dagan**, I.r. 53(3) 254, 273-276 (1999).

All this is said without expressing my opinion regarding the continued procedures between the parties.

Furthermore – differently. Even if we were to say that the respondent did not explicitly express his "acquiescing" with the child's retention in Israel at that point, the plaintiff could have concluded from the agreements achieved during negotiations with the respondent towards signing the abovementioned "financial agreement" that he has effectively "acquiesced" for the time being with the child's move to Israel, or consented to it. Therefore, by force of estoppels law – the respondent is not entitled to the temporary aid requested by him. An expression of similar view may be found in the reasoning (although not the conclusion) mentioned in the ruling of the house of Lords in England in the matter of In re H and Others (Minors) [1997] UKHL 12 (which also refers to Israeli couple) – written by Lord Browne-Wilkinson, who emphasized that it is an exception to the rule. See also: In re AZ (Minor) [1993] 1 FLR 682.

Such defense is also known in France, where it led to a result similar to the one laid out by us here. See: ruling of Aubrey vs. Aubrey, as quoted in the book: Beaumont & McEleavy, The Hague Convention on International Child Abduction (1999), P. 122 (note that the abovementioned book criticizes the abovementioned ruling and also mentions a contradicting French ruling – Horlander c. Horlander. Cass. 1re civ., 1992 Bull. Civ. L. No 91-18177; D.S 1993, 570).

3. In light of all the abovementioned – the appeal is accepted, as suggested by my colleague, judge **E. Arbel**.

J u d g e

Judge U. Vogelman:

1. I concur with the majority of determinations detailed in the opinion of my colleague Judge **Arbel**, and the reasons for them. I also concur with her determination that the "acquiescing defense" set in article 13(a) of the convention, as defined by Hague Convention Act (returning of abductees children) 1991, does not apply to the current matter. However, regretfully, I cannot concur with her determination that the consent defense set in the same article was proven in the current case, which allows not to return the mutual daughter to U.S.A; that, since the respondent consented to it in an early draft made during negotiation to prepare a "financial agreement" which did not develop at the end of the day.

2. As my colleague points out, contract law applies to the consent defense, including all implications of it. A fundamental principle of contract law, which has relevance to the current matter, is the **principle of reciprocity**. According to this principle, the advantage of a contract, that is the benefit received from the other party, and the disadvantage, that is the thing to be given to the other party, have to be reciprocal (see Daniel Friedman and Nili Cohen **Contracts** 149 (volume 1, 1991) (hereinafter: **Friedman and Cohen**). A situation in which the legal status of the two parties is divided, so one of them is being held for his sayings and concessions during negotiation while the other party is exempt and released of his obligations – places the parties in an uneven position, and therefore does not coincide with the abovementioned principle.

3. The agreement draft in the current matter is a result of a negotiation between the parties, in which none of the parties fulfilled all his wishes. Examining the various ingredients of the contract suggests that each side waived and compromised until eventually they've reached consent to a draft, in which the various obligations are dependant and conditioned to each other. Assuming that the respondent's consent to the plaintiff's and the daughter's stay in Israel is a one-sided, unconditional obligation does not coincide, in my opinion, according to the factual infrastructure before us, with the various ingredients of the contract nor with its purpose – to settle all controversial issues in a manner that will allow the parties to end their marriage. Therefore, since at the end of the day the draft did not develop into a binding agreement, the obligations included in it do not stand, as they were conditioned by each party's execution reciprocally.

4. Indeed, as my colleague points out, "there is nothing holy about signature", and if foundations of decision and specification exist in an agreement, it is valid even without a signature. However, as she points out, these foundations, and especially that of decision, did not exist in the matter at hand and therefore the contract did not develop. In this state of

affairs, I do not believe that one can separate the respondent's consent regarding one of the ingredients of the agreement's draft from the overall agreement, and view it by itself, even though the framework in which it was supposed to fit did not emerge. Furthermore, these things do not deny the possibility of creating a legally binding obligation – even one-sided by nature – even during negotiating towards a contract which did not develop at the end of the day to an agreement. Such are for example situations in which one party has reason to rely on a contract, following obligations given or presentation shown by the other party during negotiation (**Friedman and Cohen**, p. 519-648). However, I do not believe that in the matter at hand the factual infrastructure laid before the discussing court indicates that the respondent said or presented anything that might have brought the plaintiff to reasonably rely on it in a manner that justifies protection by law.

5. 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.

Since the consent defense does not apply, there is no choice, in my view, but to reject the appeal.

J u d g e

By majority of opinions it was decided as specified in the ruling of Judge E. Arbel.

Given today, Iyar 13th 5771 (May 17th 2011).

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