

The Court above the Supreme Court

A debate between parents regarding the state in which their daughter will be raised became a world-wide legal complication. The Israeli Supreme Court determined that the daughter will remain in Israel, but the New Jersey Supreme Court determined in a precedential decision that the Israeli ruling should be overturned and ordered the child's return to United States | **Tova Tzimuki**

The former president of the Supreme Court, Aharon Barak, used to say that if there was an appeal court for the Supreme Court, many rulings would have been overturned. An incident that happened last week, in which a ruling of the New Jersey Supreme Court overturned the one made by the Israeli Supreme Court, proved he was right.

The story began seven years ago. An Israeli couple moved to the town of Hackensack, New Jersey, got married and had a child. About a year ago, the mother went to Israel, and although she promised to return to United States she chose to stay in Israel and filed for divorce in Rabbinical Court. At first the husband tried to reach an agreement and make seeing arrangements, but the mother refused to sign the agreement due to financial issues between the two, and the father, relying on the Hague Convention regarding International Child Abduction, filed a claim in the Israeli Court.

Rabbinical Court in Haifa ordered to grant the mother temporary custody over the child, the father appealed this ruling before Family Court in Nazareth and his appeal was approved by the court, which has determined that the child's habitual residence is New Jersey, and therefore the mother's reliance on an unsigned agreement draft should be rejected. This time it was the mother's turn to appeal this ruling before the Regional Court in Nazareth, which has also determined that the child should be returned to New Jersey, a ruling which the mother appealed again before the Supreme Court. On the other hand, the father turned to New Jersey Supreme Court, which has determined, in an intermediate decision given on April 2011, that a daily Skype communication between father and daughter should be allowed.

On May 17th, a panel of the Israeli Supreme Court gave three different rulings of its judges regarding this case. Judge Edna Arbel's ruling overturned the ruling of Regional Court in Nazareth, claiming defenses included in the international convention apply, and therefore the child's stay in Israel is justifiable. According to Arbel, the father has consented beforehand to grant his wife custody over the child in Israel, and therefore should be seen as waiving the aid granted to him by the Hague Convention. Even though the agreement was not signed, she determined, it is a declaration of intent.

The second judge, Hanan Melcer, determined that Judge Arbel was right and that the father returned to United States even though the agreement was not signed. Therefore he has acquiesced with the agreement not being binding. The third judge, Uzi Vogelmann, presented the minority opinion, on which Judge Bonnie Mizdol of the New Jersey Supreme Court has relied. "This Court disagrees with application of the consent defense as the facts in this matter do not sustain its application," determined the American Judge. "The couple's original plan was that the father would return by himself to the United States in April and that the mother and daughter would return in June. Further, reliance upon an unexecuted agreement does not equate to consent. That agreement had no binding value".



"The girl stays". Edna Arbel

Judge Mizdol elaborates in detail four factors that could allow for deviation from the Hague Convention and warrant the child's stay in Israel. She shows that these do not apply, albeit the Israeli court's ruling. At the end of her ruling she wishes to criticize the court in Israel: "I cannot agree with the final determination of the Israeli court. I find that the Hague applies. I find, as did every other judge who has entertained this application, found that New Jersey is the habitual residence of the child. And I find that the child must be returned to New Jersey. The Israeli court failed to follow the provisions established within the Hague. I find that the decisions were not based in the facts and that they have exceeded their boundaries. And as such, I will not accept that decision. I will not afford it comity. And I am going to order that the child be returned to the state of New Jersey".

We will note that the child is still in Israel and that the American ruling does not force the mother to return her. However, it is evaluated that the mother wouldn't want to get in trouble with the American authorities and return the child.

Attorney Yael Gil, specialist in family law, notes that the purpose of Hague Convention is the urgent and quick return of abducted children to their parents, while granting the courts of the country from which the child was abducted full authority to figure out the custodial issue. "Although in this case four out of seven Israeli judges discussing the case thought that the Convention should be obeyed, and so believed the professional authorities too, we find ourselves in a situation that does not add to the respect of the Israeli judicial system", says Gil. "This situation can darken the odds of Israeli children abducted overseas".