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ISRAEL

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The 1980 Hague Convention on the Civil Aspects of International Child Abduction was incorporated into Israeli law in December of 1991. The implementing law offers a speedy route for the return of minors to the country from which they were illegally removed so that the courts of the other country are able to deal with the issue of custody. The remedy under the Convention is return of the status quo that existed prior to the abduction.¹

According to annual statistics for the year 2002, there were 17 active cases for the return of children abducted from Israel to other contracting states. One case was rejected by the Central Authority, one was withdrawn, six ended with a final judicial order to return, one was rejected, one case was inactive, and in one case an agreement was reached. Six cases remained pending. Similarly, there were 17 active cases of the return of children abducted from other contracting states to Israel. Three cases were withdrawn, three resulted in voluntary return, five in final judicial order to return, one remained inactive, one was resolved by an agreement, and four remained pending at the end of the year.²

I. Domestic Laws and Regulations Implementing the Hague Convention**A. The Implementing Law**

The Knesset passed the Hague Convention (Return of Abducted Children) Law, 5751-1991³ on May 29, 1991. The law incorporates the Convention on the Civil Aspects of International Child Abduction, signed in the Hague on October 25, 1980 (hereinafter the Convention),⁴ into Israeli domestic law subject to a reservation regarding the reimbursement for legal expenses in accordance with article 26 of the Convention.¹

According to the law,² the Attorney General's Office is designated as the Central Authority for the purpose of discharging the duties under the Convention.³ The Attorney General is authorized to

¹ Civil appeal 7206/93 *John Doe v. Jane Doe*, 51(2) Piske Din [Decisions of the Supreme Court, hereinafter PD] 241 (5757/58-1997).

² For detailed information see "Annual Statistics Relating to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction," information received from the Department of International Affairs, Office of the State Attorney, Ministry of Justice, State of Israel on Nov. 26, 2003.

³ SEFER HACHUKIM [Book of Laws, official gazette] No. 1355 (5751-1991).

⁴ T.I.A.S. No. 11670, available at <http://www.hcch.net/e/conventions/menu28e.html>

¹ *Supra* note 3, see also <http://www.hcch.net/e/status/stat28e.htm>.

² *Id.* § 4.

³ The address is: The Attorney General, International Department, Ministry of Justice, P.O.B. 1087, Jerusalem 91010, Israel. TL: 972(2) 646-6797; Fax: 972(2) 628-7668.

designate qualified welfare officers within the meaning of Welfare Services Law, 5718-1958,⁴ in order to carry out necessary tasks in accordance with the Convention.

The delivery of information necessary for implementing the Convention depends on receipt of a guarantee of secrecy by the Attorney General and a promise that the information will not be used for any purpose other than that for which it was delivered.⁵

The law designates the family court as the authorized court to adjudicate suits involving the application of the Convention.⁶ In accordance with article 16 of the Hague Convention, after the government receives notice of a wrongful removal or retention of a child, no decision on the merits of rights of custody of the minor can be made until it is determined that the child is not to be returned under the Convention. Therefore, any proceedings relating to custody of children, either in civil or religious courts in Israel, will cease until a determination is made on the status of return under the Convention.

B. Procedure in Hague Convention Actions

The implementing law authorizes the Minister of Justice to pass implementing regulations. In accordance with Civil Law Regulations (Amendment) 5756-1995,⁷ Chapter 22(1) titled "Return of Abducted Children Abroad" was added to the principal regulations. The regulations provide that an action for the return of a child abroad under the Convention will begin with the delivery of a pleading to the court in the geographical jurisdiction in which the child is present. If the location of the child is unknown, the pleading should be filed with the authorized court in Tel-Aviv.⁸

The pleading should be in the form of an affidavit that includes personal information regarding the child and the parents such as names, places of birth, passports and Israeli identity cards, places of marriage, place of last shared residence, information regarding the person holding the child, and circumstances of the transfer of the child to a different address. The affidavit should be accompanied by the following: an authentic original or copy of a decision or an agreement regarding the plaintiff's right to have the child in his custody; any other document substantiating the pleading, including proof of the law governing in the child's regular place of residence; and an affidavit from any other person the plaintiff deems necessary.

At the time of filing the request, the plaintiff may request any relevant temporary relief. The court may decide *ex parte* (in the presence of the plaintiff only) in the following matters:⁹

- (1) the issuing of exit orders against an abductor and/or a child to prevent their departure from Israel
- (2) the prohibition of the removal of a child from a location specified in the orders

⁴ 12 LAWS OF THE STATE OF ISRAEL (hereinafter LSI) 120 (5718-1957/58).

⁵ *Supra* note 3, § 5.

⁶ *Id.* § 6.

⁷ Kovets Hatakanot [Regulations] (Sept. 29, 1995).

⁸ Civil Courts Regulations, 5754-1984, as amended, § 258c, Kovets Hatakanot [Regulations] 4685, p. 2220 (5754- Aug. 12, 1984).

⁹ *Id.* § 295(5).

- (3) the issuance of a decree for deposit of the child's passport or a passport where the child is registered
- (4) the issuance of an order for the police to investigate the circumstances of the abduction, locate the child and assist a welfare officer to bring the child before the court
- (5) the issuance of an order directed at other judicial or administrative agencies not to review the matter
- (6) the issuing of any order necessary to prevent any additional harm to the child or to the rights of the parties or that will guarantee the return of the child by consent or by peaceful means.

In addition, the law also gives the court general jurisdiction to issue stop orders when a civil suit is filed before it.¹⁰

A notice on the date of the hearing and a copy of the pleading and any order handed by the court should be provided to the respondent, who is under an obligation to respond not later than 2 days before the hearing. The respondent should provide an affidavit and any document or any other person's affidavit substantiating his response. The hearing should take place not later than 15 days following the filing of the suit.

Before reaching a decision, the court may order the plaintiff to provide proof of a decision or a determination from the authorities of the country of the child's regular residence indicating that the child's removal was carried out illegally. A respondent who claims that the return of the child would deprive the minor of the protection of human rights and fundamental freedoms will similarly be requested to provide clear and convincing evidence to substantiate such a claim.¹¹

The Court may order the immediate return of the child to his regular place of residence, even in the presence of one party, as long as a summons for the hearing was delivered to the respondent or his designee. When such an order is issued, the court will provide instructions as to the return of the child to all relevant parties, as well as to a welfare officer and the Israeli police.¹² The court should provide a detailed decision no later than 6 weeks following the filing of the suit.

An appeal on the decision or on any other order should be filed within 7 days from the date it was made. Copies of the appeal pleading should be delivered by the appellant to all parties at the time of the filing.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

There are three sections in the Penal Law related to the abduction of a minor. "Stealing of a minor" is defined as the taking away, detention, receipt, or concealment of a minor under 14 years of age, by fraud, force, or by enticement "with the intent to deprive the parent, the guardian or other person who

¹⁰ *Supra* note 12, § 366, see also Israel's response to Questionnaire on Preventive Measures (3/30/03), available at <ftp://ftp.hcch.net/doc/prevmeas.il.doc>.

¹¹ Rule 295(11).

¹² *Id.*

has the lawful care or charge of him, of possession of the minor and to secure such possession for himself or for another.” The offense of stealing a minor is punishable by 7 years imprisonment.¹³

The taking or enticement of a minor under 16 years of age from the custody of his lawful guardian without the consent of such guardian is punishable by 20 years imprisonment.¹⁴ If the abduction involves removing the minor from the country, the perpetrator may be subject to an additional penalty of 20 years imprisonment.¹⁵

A response to Questionnaire on Preventive Measures submitted by the office of the State Attorney to the Permanent Bureau, the Hague, on March 30, 2003, states with regard to the above offenses: “All are considered serious felonies with one felony carrying a maximum penalty of 7 years imprisonment, and two carrying a maximum penalty of 20 years imprisonment. It is possible that such stringent penalties serve to deter potential abductors and may have a preventive effect.”¹⁶ Some, however, have suggested that the preferred policy in such cases should be to avoid resorting to criminal intervention as long as civil remedies are available.¹⁷

B. Parental Visitation

Israeli law recognizes the principle of equality with respect to guardianship of children. Although both parents are considered “the natural guardians of their children,” a competent court is authorized to determine guardianship “with the interest of the children as the sole consideration.”¹⁸

According to the Capacity and Guardianship Law, 5722-1962,¹⁹ as amended, parents of a minor who live separately may agree on custody arrangements of the minor, including visitation rights.²⁰ The court will determine custody and visitation arrangements only in cases where the parents either have not reached such an agreement or have not carried out the agreement they had reached. In so doing, “[t]he court may determine it to be the best interest of the minor: provided that children up to the age of 6 will be with their mother unless there are special reasons for directing otherwise.”²¹

A decision by an authorized court in Israel under the Hague Convention does not determine the

¹³ Penal Law, 5737-1977, LSI Special Volume (5737-1977), §367, as amended in Penal Law (Amendment No. 12) Law, 5740-1980, § 27 (34 LSI 125 (5740-1979/80)).

¹⁴ *Id.* § 373(a), as amended in Penal Law (Amendment No. 12) Law, 5740-1980, § 28 (34 LSI 125 (5740-1979/80)).

¹⁵ *Id.* § 370.

¹⁶ See <ftp://ftp.hcch.net/doc/prevmeas.il.doc>.

¹⁷ P. Shifman, 2 FAMILY LAW IN ISRAEL 238 (1989). See also Family Appeal 41/97 *Lifmanovitz v. Kovaliakov*, 97(2) Takdin Mehozi [District Court Decisions on Takdin] at 54 (5757/58-1997).

¹⁸ Women's Equal Rights Law, 5711-1951, as amended, 5 LSI 171 (5711-1950/51).

¹⁹ 16 LSI 106 (5722-1961/62).

²⁰ *Id.* § 24.

²¹ *Id.* § 25.

merits of any custody issue.²² Rather, such a decision offers an emergency remedy: by ordering the immediate return of an abducted child, the Israeli court enables the court of the country in which the abduction took place to deal with custody related issues.²³

III. Court System and Structure - Courts Handling the Hague Convention

A. Court System and Structure

In accordance with a 1995 amendment of the Hague Convention (Return of Abducted Children) Law, the authorized court for purpose of implementation of any judicial or administrative function relating to abducted children is the family court.²⁴ The latter court, thus, handles all Hague Convention child return proceedings, visitation, and enforcement of related orders.

Family courts are magistrates' courts that have been designated as family courts by a decree signed by the Minister of Justice, with the consent of the Chief Justice of the Supreme Court. Judges can be appointed to the family court if they prove to have knowledge and professional experience in this area.²⁵

The Israeli court system is composed of a general court system and a number of specialized courts. The general court system is comprised of three instances: magistrates' courts, district courts, and the Supreme Court.²⁶ As explained above, the courts that have jurisdiction over implementation of the Hague Convention are the family courts, which are magistrates' courts, and thus part of the general court system.

Appeals on decisions of magistrates' courts are entertained by district courts. The five Israeli district courts are located in Jerusalem, Tel Aviv, Haifa, Beer-Sheva, and Nazareth. District courts have residual jurisdiction over all criminal and civil matters that do not fall within the jurisdiction of the magistrates' courts, and general residual jurisdiction to hear any matter that is not under the exclusive jurisdiction of any other court or tribunal.²⁷

The Supreme Court sits in Jerusalem and has jurisdiction throughout the whole country. Its substantive jurisdiction lies mainly in two areas: it hears appeals against judgments and other decisions of the district courts, and also sits as a High Court of Justice. "When so sitting, it will hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court. . . ."²⁸

In addition to the general system of courts, Israel has some special courts, including labor courts, military courts, and religious courts. The rulings of the appellate tribunals of these courts are subject to

²² The Hague Convention § 19.

²³ See, e.g. Civil Appeal 7206/93 *Doe et al. v. Joe*, *supra* note 1.

²⁴ *Supra* note 4, § 6. See also, The Family Courts Law, 5755-1995, as amended, § 1(5), SEFER HACHUKIM [Book of Laws, Official Gazette] issue No. 1537 at 393 (Aug. 7, 1995).

²⁵ *Id.* §§ 2- 3.

²⁶ Basic Law: Adjudication, § 1(a), 38 Laws of the State of Israel 101 (5744-1983/84).

²⁷ Courts Law (Consolidated Version), 5744-1984, § 40, 38 LSI 282 (5744-1983/84).

²⁸ *Id.* § 15.

a limited review by the Supreme Court sitting as a High Court of Justice.

Although family courts have exclusive jurisdiction over requests for implementation of the Hague Convention,²⁹ the issue of permanent custody may be adjudicated by either the family court or the appropriate religious court.

The religious courts of Israel have jurisdiction in matters of personal status relating to members of their communities. According to the Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 1953,³⁰ "matters of marriage and divorce of Jews in Israel, being nationals or residents of the state, will be under the exclusive jurisdiction of the rabbinical courts."³¹ Matters incidental to divorce, including suits for maintenance and custody of children, however, are not within the exclusive jurisdiction of the rabbinical courts. Jurisdiction by a family court may be established by filing an action there before filing an action for divorce and other incidental matters in the Rabbinical court. The Christian religious courts and the Druze courts have jurisdiction similar to that of the rabbinical courts. The religious courts of the Muslim community (the Sharia courts), enjoy the highest level of substantive independence in that they are empowered with general exclusive jurisdiction over all personal status matters, not merely over marriage and divorce.³²

B. Court Decisions

Numerous cases involving implementation of the Hague Convention (Return of Abducted Children) Law have been entertained by Israeli courts. In most cases the Israeli courts have ordered the return of the children. The Supreme Court repeatedly held that the general rule dictated by the Convention is the return of an abducted child to the country of habitual residence and the protection of rights of access. While the general rule enjoys broad interpretation, exceptions to it are interpreted very restrictively. In the absence of proof of severe harm to the child expected as a result of the return, the child should be returned. The time that lapsed since the abduction, the child's positive adjustment to the new place, and the strong contact with the abducting parent are all important considerations in the determination of custody. Israel's highest court, however, held that such considerations should be evaluated by the court of the country from which a child was abducted during the process of determining the custody of a child based on the best interest of the child.³³

The following is a summary of recent decisions of the Supreme Court on this matter, reflecting its approach to implementation of the Convention. According to the rule of *Stare decisis* as applicable in Israel, decisions by this court bind all other courts.

²⁹ Hague Convention (Return of Abducted Children) Law, 5751-1991, § 6, *supra* note 4.

³⁰ 7 LSI 139 (5713-1952/53).

³¹ *Id.* § 1.

³² See S. SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 105-108 (1994).

³³ See Dr. Gonzburg v. Elena Gail Grinwald, 49(3) PD 282 (5755/56-1995).

C. Jurisdiction

*Einat Ron v. the Superior and Regional Rabbinical Courts, and Erez Ron.*³⁴ Decision rendered on January 10, 2002, and confirmed in rejection of a request for a special hearing on October 6, 2002.³⁵ In its decision the High Court of Justice recognized the authority of a New York court under the treaty to determine the habitual residence of the children as New York ordered the Israeli rabbinical court to refrain from hearing a suit for their custody. The Court thus rejected the request to return the children to Israel.

Facts:

The petitioner and the third respondent (the husband) are both citizens of Israel. In 1991 they were married in the United States in a civil marriage. In 1992, they returned to Israel and went through a Jewish religious marriage. The couple's two children were born in Israel in 1993 and 1995. They jointly bought a house in 1995. Upon the advice of a marriage counselor trying to save the marriage, the couple relocated to the United States in August 1997. The husband argued that there was consent that the relocation would be temporary. In May 1998, following the filing for a divorce, custody of the children, alimony, and property division, the petitioner and the children moved to the petitioner's sister's house in the United States. Welfare authorities of New York started investigating suspicions of sexual abuse by the husband towards the children following a report by a nursery school teacher of strange behavior by one of the children. Although the husband was notified that the hearing of the divorce request was scheduled for May 8, 1998, he left the United States three days earlier and returned to Israel. He then filed for a divorce, division of property, custody of the children, and child support at the Tel- Aviv regional rabbinical court.

On July 27, 1998, the New York court ordered the dissolution of the civil marriage and further ordered the husband to divorce the wife in accordance with Jewish law in the rabbinical court in New York. The court granted the wife exclusive custody of the children without visitation rights to the husband and ordered the division of the couple's joint property in Israel. In early 1999, the husband filed a request for return of the children to Israel in accordance with the Hague Treaty. The New York court rejected the request and held that it had not been proved that the regular place of residence of the children was not in New York.

The petitioner requested the High Court of Justice to prohibit the rabbinical court to entertain the suits for divorce, children custody, and division of property.

Decision of the High Court of Justice:

While recognizing the jurisdiction of the regional rabbinical court to hear the suit for divorce and for division of joint property, Justice Beinish distinguishes between these suits and the suit for custody of the children. She concludes that even if the rabbinical court had jurisdiction to entertain a suit for custody of the children, it should refrain from exercising it in this case. Based on the Hague Convention, the authority to determine the place of habitual residence of the children prior to their removal or lack of return is vested with the court of the requested state where they are present. It follows that the New York court has the jurisdiction to determine the children's place of regular residence. Because Israel is a party to the Convention, it is obliged to respect this determination. The Israeli courts, including the rabbinical

³⁴ H.C. 8754/00, available on Takdinet, (Juridisc Database).

³⁵ Request for Additional Hearing 843/02, available on Takdinet.

courts, cannot sit as a court of appeals over determinations made by authorized agencies in New York under the Hague Convention. Doing so will result in circumventing Israel's obligations under the treaty

and will have a negative impact on the strength of the treaty, which is based on mutual respect among Member States.

Another reason for the obligation of the rabbinical court to refrain from exercising its jurisdiction is based on the doctrine of *Forum Non Conveniens*, which recognizes the forum which has most relevant links to the case as the proper forum for the proceedings. Generally, the proper forum for child custody proceedings, in accordance with the treaty, is the child's regular place of residence. In the current case a hearing on this issue will require removing the children from their regular residence and education system to Israel. An additional difficulty arises from the fact that many social and education workers who handled allegations of sexual abuse against the husband are in New York. The New York forum is, therefore, the proper forum.

Justice England agreed that the rabbinical court should refrain from exercising jurisdiction based on lack of sincerity on the part of the husband, who attached his claim for custody of the children to a suit for divorce before the rabbinical court even though he knew that custody proceedings had already begun in the United States and proceeded with him, or his a representative, intentionally absent.

Based on the above, the rabbinical court was ordered to refrain from entertaining the suit for custody of the children subject to a commitment by the petitioner to do whatever she could to allow the entry and the stay of the husband in the United States for the duration of the proceedings.

A case where the High Court of Justice reached an opposite decision recognizing the jurisdiction of an Israeli rabbinical court to determine the children's place of regular residence and to hold that they were removed from Israel illegally is *Malina Esther Hagag v. the Superior and Natania Regional Rabbinical courts and David Hagag*.³⁶ The decision was rendered on August 6, 2001 to return the children to Israel.

Facts:

The petitioner is a Danish citizen who arrived in Israel in 1994. During her stay in Israel, she converted to Judaism with her first two children and married the third respondent (their father, hereafter the husband) who was an Israeli citizen, and they had their third child. In 1998, the petitioner left Israel with her children for Denmark where she filed a suit for divorce. Three months later the husband filed a suit at the rabbinical court in Natania to which he later attached a suit for return of his children to Israel and a determination of their custody. The Rabbinical court issued an order to the petitioner to return the children to Israel within 30 days of the date of the order. The petitioner's appeal to the Superior rabbinical court was rejected. At the request of the husband, Israel's Attorney General's Office filed a request with the Central Authority in Denmark in accordance with the Hague Convention to return the children to Israel. The Danish court held that although there was no appropriate reason to refuse the return of the children to Israel, a final decision would be made after receipt of a report from a child psychologist and a determination by the Israeli High Court of Justice regarding the validity of the Superior Rabbinical Court's decision.

³⁶ H.C. 1480/01 available on Takdinet.

Decision of the High Court of Justice:

Justice Cheshin held that in the circumstances of this case the rabbinical court has jurisdiction under Israeli law, which requires that both spouses are Jewish and citizens of Israel. He interpreted the additional requirement that the spouses are “in Israel,” as a requirement of proof of strong linkage to Israel. The petitioner’s strong linkage is manifested by the fact she lived in Israel with her husband for 4 years, went through the very demanding process of conversion to Judaism with her two older children who went to Israeli schools and spoke Hebrew, had a third child born in Israel, and became an Israeli citizen with her children. The husband filed for divorce and return of his children 2 months after the petitioner left Israel.

Although the rabbinical court is not the designated Central Authority under the Convention, it was fully authorized to make a determination that the children must be returned. This is because the rabbinical court has full authority to hear child custody cases based on Israeli domestic law. Its decision to return the children to Israel does not mean that it recognizes the rights of the husband for custody, rather that the petitioner violated the custody rights of the husband. The issue of custody will be determined after the return of the children and a hearing of the parties and experts, in accordance with the best interest of the children.

Justice Cheshin finds no contradiction between the provisions of Israel’s domestic law and the treaty. Indeed, it is the family court which has exclusive jurisdiction under the Convention in cases where the child is in Israel after being illegally taken from Israel to another state. The Central Authority under the Convention is located in the requested state. In this case, however, there are no proceedings in Israel where a Central Authority is requested to order the return of the children to another country. Instead, it is the Central Authority in Denmark which is requested to order the return of the children to Israel.

The decision of the rabbinical court is therefore within its power and can properly be forwarded to the Denmark court. If the latter will order the return of the children, Israeli courts will make a determination of their custody based on the principle of the best interest of the children.

D. Return of children Illegally Removed or Whose Return Was Illegally Prevented

*Joe v. Doe.*³⁷ Decision rendered on April 29, 1999 ordering the return of children to Italy.

Facts:

The petitioner (the mother) was married to the respondent (the father). They lived in Italy and had two daughters. In accordance with the divorce agreement, the mother was awarded custody of the daughters and the father obtained visitation rights. The mother was prohibited from taking them out of Italy. In violation of the agreement, the mother took the girls to Israel. Following the district court decision to return the daughters to Italy in accordance with the Hague Convention, the mother petitioned the Supreme Court to allow an appeal.

³⁷Civil Appeal Request 2610/99, 99(2) Tadkin Elyon 55 (5760-1999).

Decision of the Supreme Court:

After reviewing all the evidence including the testimony of the psychologist, Justice Strasberg-Cohen held that although the girls have adjusted to life in Israel, their arrival there was wrong, being in violation of a court order given in Italy. Their continued stay in the country was also in violation of Israeli court orders. The continued efforts of the mother to avoid compliance with her obligation by repeatedly disappearing and changing her address convinced the Court that the mother should not be given even temporary custody. Furthermore, the lapse of time since the petitioner abducted the daughters was not in her favor, since the Hague Convention did not recognize extending legal proceedings as a defense.

*D.S. v. A.S.*³⁸ Decision rendered on June 1, 1999 to return a child to the United States.

Facts:

The petitioner (the mother) was born in Israel, left the country as a child and settled in the United States with her parents. She had dual United States and Israeli nationality. The respondent (the father) was born in Israel and was an Israeli citizen who resided in the United States for 23 years and held an American work permit. The parties married in the United States in 1979, where they had a child in 1986. They maintained close contacts with Israel and visited it frequently. The child was bilingual. They planned to move to Israel. For this purpose, they sold their residence and deposited the proceeds in their joint account in a bank in New York. In 1998, the relationship between the parties deteriorated and the petitioner reversed her plan to immigrate to Israel. She conveyed her decision to the respondent and the child and filed for custody with the authorized court in New York. The respondent then withdrew all the money from their joint account and transferred it to Israel. He convinced the child to immigrate with him to Israel using a new passport based on a false claim that the child's passport, which was held by the mother, was lost. The petitioner filed a request with the Haifa family court for the return of her son. The respondent's defense was that the petitioner agreed that the child would live in Israel and that the child objected to being returned. An appeal to the Supreme Court was lodged following the district court decision accepting an appeal over the family court decision accepting the request for return.

Decision of the Supreme Court:

The Court accepted the appeal and determined that the child should be returned to the United States. Justice Dorner held that a child's objection was not sufficient for the application of the exception to the rule of return. Rather, the Court should apply its own discretion by interpreting the exceptions specified by the Convention very restrictively. Moreover, the Court should always presume that the best interest of the child is not to be abducted by one parent and lose contact with the other parent. The child's wish to remain in the country to which he was abducted and his positive adjustment to it are considerations that should be reviewed in the process of determining custody. The determination over custody, in accordance with the best interest of the child, is to be made by the court of the country from which he was abducted.

In the circumstances of the case, it was determined that the child loved his mother. The need to choose between his parents resulted in a deep anguish for him. The court found that the child was not mature enough to make a determination based on consideration of all the circumstances. In light of the

³⁸Appeal Request 3052/99, 99(2) Tadkin-Elyon (jurisdisc) (5759/60-1999).

restrictive interpretation of the exception laid by article 13 of the Convention, the Court accepted the appeal and ordered the return of the child to the United States.

*T.D. v. S.D.*³⁹ Decision rendered on June 14, 1999 to return a child to the United States.

Facts:

The parties (a married couple) were Israeli citizens and did not hold any additional citizenship. They arrived in the United States in the summer of 1994 for a two week visit to the petitioner's parents who had been living there for twenty years. During the visit, they agreed to stay in the United States for a period of two years, during which the petitioner would develop a business and the respondent would study. They applied for green cards and bought an apartment. The petitioner established a company with his father. The respondent completed her studies for a Masters Degree and started looking for a job in the United States. In December 1995, the minor who became the subject of the request, was born in the United States and as such was an American citizen. In 1996, the respondent, with the consent of her husband, flew to Israel with her one year old son for a visit. Although their tickets were round-trip tickets, the respondent and the child did not return to the United States on the return date specified on the tickets. Both parties started custody proceedings, the petitioner in New Jersey and the respondent in Israel. The petitioner submitted a request for return of the minor to New Jersey under the Hague Convention. The Israeli family court accepted the petitioner's request for return of the child to the United States, holding that he was removed from his regular place of residence and was illegally prevented from returning to it. This determination was reversed by the district court.

Decision of the Supreme Court:

In accepting an appeal on the decision of the district court, Justice Beinisch analyzed several aspects of the Hague Convention. She held that the court's role in handling requests under the Convention was viewed as "putting out fires" or the provision of "first aid," for the purpose of nullifying the results of the abduction and preventing the abductor from benefitting from the abduction by returning the status quo prior to the abduction. According to Justice Beinisch, the Convention presumes that any court by virtue of its nature and its judicial role will do the utmost to make sure that the abducting parent will not benefit from the abduction. The court will refrain from ordering the return of an abducted minor, only in rare cases enumerated by the Convention, such as high probability of physical, psychological, or other harm to the child. Determination of the custody should rely on the best interest of the child. The latter, however, is to be decided by the court in the country of habitual residence and not by the court in the country to which the child was abducted.

In the circumstances of the case, Justice Beinisch held that the respondent abducted the child. The date of the return ticket was the date of the "abduction" for the purpose of implementation of the Hague Convention. There was insufficient evidence to conclude that the petitioner gave up his claim to the return of his child. In her decision, Justice Beinisch recognized the anguish of the mother who wished to continue her life in Israel, supported by her family and in the social and cultural environment with which she was most familiar. The Convention, however, does not recognize these circumstances as justification for not returning the minor to the United States. Although holding that the child should be returned, the Court recommended that the parties reach an agreement rather than continue litigation.

³⁹ Appeal Request 7994/98, 99(2) Takdin-Elyon (Juridisc)1472 (5759/60-1999).

E. Exception to Return: Consent to Illegal Removal or Giving up Rights of Custody

*Roni Gabai et al. v. Efrat Gabai.*⁴⁰ Decision rendered on March 21, 1994 to return a child to the United States.

Facts:

The first petitioner and the respondent were Israeli citizens and residents when they were married in Israel. They immigrated to the United States and acquired United States citizenship (in addition to their Israel citizenship). Their two children were born in 1981 and 1987 and raised in the United States. In 1992, the family arrived in Israel on round-trip tickets to spend the summer in an apartment they had bought the year before. The parties returned to New York as planned, allowing their minor child to extend his stay in Israel. The petitioner, who suspected that his wife was committing adultery, misled her by claiming that he had to return to Israel to tend to some financial matter. In fact, he consulted an attorney there to initiate divorce proceedings in Israel. During that visit he did not visit his child. Upon returning to the United States, he falsely convinced his wife that they must leave the United States to escape prosecution for tax evasion. Believing the petitioner, the respondent consented to leave the minor child in Israel for an additional period of time and even requested that the child be registered at a school in Israel. The petitioner then had her sign a document, according to which she consented to arrive in Israel within 12 days, and allow him to take the children to Israel, or lose all her property. Two days later the petitioner arrived in Israel and initiated divorce proceedings in the rabbinical court including a suit for custody of the children, child support, and division of property. The rabbinical court ordered temporary custody of the minor with the petitioner in Israel and a stay of the child's exit from the country.

The respondent and her daughter (the second child) stayed in New York in a grave economic and emotional state. She filed for return of the minor child under the Hague Convention, but avoided travel to Israel for fear she would be prevented from leaving the country under the proceedings in the rabbinical court. The respondent mother tried to take the minor child out of Israel, but failed because of the stay injunction. The child was taken by the petitioner and resided at the petitioner's parents' home in Israel. The respondent talked with her son on the phone and agreed that he would register for school in Israel so that he would not be harmed.

Decision of the Supreme Court:

Chief Justice Barak rejected the petitioner's claim that the mother gave up her rights of custody of the child. Consent or giving up rights under Section 13(a) of the Convention is a one-sided legal action which requires its receipt by the other parent. It is based on a subjective parental wish manifested by the parent's behavior. Consent or giving up rights made under error, fraud, coercion, or duress are voidable.

The Court recognized the United States as the place of habitual residence of the minor prior to his arrival in Israel. There he resided, was educated, and raised. In the circumstances of the case the mother only consented to a temporary stay of the minor in Israel while constantly expressing her wish to have him returned to the United States. The purchase of the apartment reflected a financial investment, but not an act of settling in Israel. The fact that the child was registered to a school in Israel did not signify a surrender of the right to an immediate return of the child. Moreover, the mother's written consent to the taking of her children to Israel was taken fraudulently, because her husband knew well that her signature

⁴⁰ Civil Appeal 7206/93, *supra* note 1.

did not reflect her will to leave the minor in Israel permanently.

The Court ordered the return of the child to his mother in the United States.

F. Exception to Return: When the Return of a Child Contradicts Israel's Fundamental Principles

Exceptions to implementation of the general rule regarding the return of abducted children are interpreted very restrictively. However, in accordance with article 20 of the Convention, when the court is satisfied that the return of a child contradicts Israel's fundamental principles, Israeli courts could refuse a return of a child. One such case is where the child's return is requested to a country which would sever his contact to the other parent. This holding was made by the High Court of Justice in reference to decisions made by Spanish courts in the matter of *John Dow v. The Minister of Foreign Affairs, the Minister of Justice, the Attorney General and two others*.⁴¹ The decision exemplifies the extent of injustice to the parties and to the child which may result from manipulation and deception by abducting parents.

John Dow v. The Minister of Foreign Affairs, the Minister of Justice, the Attorney General and two others. Decision rendered on July 1, 1999.

Facts:

The petitioner (the husband) married the respondent (the wife) in Israel in a Jewish ceremony. The couple resided in Israel. Following the birth of their daughter, the relationship between the spouses deteriorated. The respondent sued the petitioner for alimony in the district court. The petitioner, on his part, filed for divorce at the rabbinical court. As part of the proceedings before the latter court, the petitioner initiated a proceeding aimed at declaring his wife as *isha moredet* ("rebellious" wife).⁴² At the time all these proceedings were pending before the Israeli courts, the respondent and her daughter disappeared. They were found half a year later in Barcelona, Spain, residing in proximity to the wife's relatives, among whom was Mr. M., the wife's uncle, who at the time served as Honorary Consul of Israel in Barcelona. During the search for the mother and daughter, the rabbinical court issued an *ex parte* injunction for the wife to return the child to Israel and transfer custody of the minor to the petitioner. After the discovery of their whereabouts, the petitioner requested the Israeli authorities to start proceedings under the Hague Convention.

The Spanish family court in Barcelona rejected the Israeli request for return of the minor to Israel. An appeal lodged by the respondent to the Spanish Court of Appeal was also rejected. Both courts applied article 20 of the Convention in deciding that the transfer of the custody of the child from the mother to the father was against the basic principles of Spanish law and that the child would be severely harmed if the mother were declared a rebellious wife and, as a consequence, lose all her custodial rights. Custody of the child was given to the wife, while the petitioner was awarded very limited visitation with his daughter under difficult conditions: not conducive to establishing any meaningful parent-child relationship.

⁴¹ High Court of Justice 4365/97, 99(1) Takdin-Elyon 7 (5759/60-1999).

⁴² According to Jewish law, *isha moredet* is a wife who persistently refuses to cohabit with her husband either because of anger or quarreling, or for other reasons offering no legal justification, or because she cannot bring herself to have sexual relations with him and can satisfy the court that this is for genuine reasons, which impel her to seek a divorce. In both cases, the *moredet* immediately loses her right to maintenance, and in consequence thereof, her husband loses the right to her handiwork since he is only entitled to this in consideration of her maintenance. Ultimately, this may lead to a divorce. See M. Elon, *The Principles of Jewish Law* 381 (Encyclopaedia Judaica, 1975).

In his suit, the petitioner requested that the Court order the Israeli authorities to resort to any legal or diplomatic means to change the Spanish ruling in the matter. The petitioner also requested assistance in financing legal representation, a psychologist, and an interpreter in Spain for the purpose of guaranteeing the return of the minor to Israel.

Decision of the High Court of Justice:

The Supreme Court reviewed the decisions of the Spanish courts in the process of evaluating the petitioner's claim. Justice Cheshin concluded that the Spanish courts' decisions were detrimentally influenced by a false document signed by the wife's uncle, Mr. M., on formal stationery of the Israeli Consulate. The document purported to describe the consequences of the potential declaration of the wife as *isha moredet* by the Israeli rabbinical court. According to the statement, such a declaration would result in the full and lifelong disconnection between the mother and her child.

Justice Cheshin held that the Israeli court, faced with proof of a similar rule applied by another country, would decide the same way the Spanish courts did in this case. He stated the following:

an Israeli court would not even imagine, under Israeli law, to “extradite” a child to a country which is about to disconnect him from his mother only because of a quarrel between the mother and the father.⁴³

Thus, the Spanish courts applied a just rule. The problem, though, was that they were misled by Mr. M's statement. The statement by the wife's uncle was provided without authority or permission. Not being an expert on the Israeli legal system, Mr. M. was not authorized to provide such a legal opinion. Such a document would not be admissible in Israeli courts. Moreover, the statement was completely false. A declaration of a wife as *isha moredet* has no bearing on her rights toward her children. The implications of such a declaration may only affect the relationship between the husband and the wife, mostly in financial issues, and not her custodial or visitation rights. A legal opinion explaining the meaning and implications of such a declaration was submitted to the Barcelona Court of Appeals by the Chief Rabbi of Israel, who served as the president of the Rabbinical Court of Appeals, a person who was regarded as the top rabbinic legal authority on the subject in the State of Israel. The Spanish Court of Appeals, however, refused to accept into evidence the Chief Rabbi's expert opinion.

As to the specific remedies requested by the petitioner against Israeli authorities, the Court concluded that such are not normally provided. Justice Cheshin recognized that the Ministry of Foreign Affairs could not have foreseen the irresponsible action of Mr. M. Once the false statement was made, the Ministry should have resorted to stronger measures in order to contradict the statement in Mr. M.'s document. According to the Court, this would have prevented a personal harm to the petitioner, and a harm to the State of Israel, which was falsely identified as a backward country which removes custodial rights from a mother due to controversy with the father. Considering that Mr. M. resigned from his voluntary post as an honorary consul, that the Ministry of Justice in Israel assisted and continue to assist the petitioner, and, as the nature of the remedies requested, the Court rejected the petition. However, the Court expressed its wish that the Spanish courts would revisit the case in total disregard of the statement issued by Mr. M.

⁴³ Translated by the author, Ruth Levush.

G. Rejection of Claims: That Terrorist Attacks Pose “A Grave Risk” Within the Exception Under article 13(b). Official Position of Israel’s Central Authority

A recent document submitted by the Office of the State Attorney to a foreign Central Authority in connection with a specific case reflects Israel’s position on rejecting claims that “Israel is a war zone and the return of children abducted from Israel would expose them to physical or psychological harm or otherwise place them in an intolerable situation.”⁴⁴ The document analyzes foreign courts’ relevant holdings in the United States, Denmark, Canada, France, Argentina, England, Germany and Belgium, and concludes that “although the courts, in interpreting the Convention have not proposed a uniform interpretation of “grave risk of harm” (within the exception to return provided by article 13(a)), it is clear that the harm must be grave, not just serious, and must demonstrate imminent danger to the child prior to the resolution of the custody dispute.”

The document rejects the general claim that terrorist acts in a requesting country make it unfit for posing “grave risk of harm” to abducted children. It states that “after the recent events in the United States, terrorism today is a worldwide problem, with terrorist attacks being perpetrated against civilians in many countries . . . under the Convention, the issue is not which country is the ‘safest’ or ‘the best’ country for the child (that determination should be made in the country of habitual residence of the child), the issue is which country is the child’s home.”

The document further states that Israel is not at war and is not a war zone. In spite of events of terrorism in the past 3 years,

“Israeli citizens and residents continue to lead normal lives and to go about their daily business. Shops and businesses continue to operate as normal. Kindergartens, schools and universities have remained open continually. . . .there continues to be a steady stream of people wishing to immigrate to Israel from various countriesIt is noteworthy that the Israeli Central Authority has processed a significantly greater number of incoming cases (abductions to Israel) in the past three years of unrest, than in the same period prior to the current *intifada*. This would be an unlikely statistic for a ‘war-torn’ country.”

IV. Law Enforcement System

The Execution Law, 5727-1967,⁴⁵ as amended, regulates the enforcement of court decisions for the "surrender of a minor." The law provides:

62. (a) Where the judgment directs that a minor will be surrendered, or that contact, interviews or communication between the parent and the minor child not in his custody will be enabled or that anything else will be done in connection with the minor, the Execution Officer will take all steps required for the execution of the judgment, and for that purpose he will avail himself of the assistance of a welfare officer, within the meaning

⁴⁴ A position paper dated 11/12/03 and signed by Irit Kohn, Director, and authored by Leslie Kaufman, Senior Deputy to the State Attorney, of the Department of International Affairs, Office of the State Attorney, Ministry of Justice, State of Israel to a foreign Central Authority regarding Hague Convention Application. A copy of the paper was received by this author and is available upon request.

⁴⁵ 21 LSI 112 (5727-1966/67).

of the Welfare (Procedure in Matters of Minors, Sick Persons and Absent Persons Law), 5715-1955.⁴⁶

(b) Where the Execution Officer finds that the judgment can only be executed against the will of the minor and, in his opinion, the minor is capable of understanding the matter, or where the execution of judgement involves other difficulties, the Chief Execution Officer may apply to the court which gave the judgment for directions.

Although requests for stay of enforcement (until a final decision in an appeal is made) can be filed, the courts normally do not grant such stays in cases where there is no clear chance for winning on appeal. This policy is based on the essence of the Convention itself, which is designed to return children immediately to the country from which they were kidnaped.⁴⁷

V. Legal Assistance Programs

Israel has made a reservation on article 26 of the Convention. Accordingly:

[t]he State of Israel hereby declares that, in proceedings under the Convention, it will not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.⁴⁸

Legal aid is provided to those applicants who would qualify in their own jurisdiction.⁴⁹ Clients resorting to private attorneys are usually charged \$10,000, exclusive of taxation at 17%, or more to handle the case in the family court. Appeals are billed separately.⁵⁰ The party held liable by the court for the abduction may be ordered to cover legal and related expenses, such as hotel stay and travel expenses of the injured party.

VI. Conclusion

Following its adoption of the Hague Convention on the Civil Aspects of International Child Abduction, Israel incorporated the Convention into its domestic law and passed implementing regulations to enable proceedings under the Convention. A study of relevant court decisions and statistical data indicates an overall compliance with the obligations under the Convention.

According to Israel's Minister of Justice, neither the actual implementation of the Convention, nor the policy of his office and the Office of the Attorney General include any reference to the religion of the

⁴⁶ 9 LSI 139 (5715-1954/55).

⁴⁷ *Lifmanovitz v. Kovaliakov*, *supra* note 21.

⁴⁸ <http://www.hcch.net/e/status/stat28e.htm>.

⁴⁹ A. Hutchinson et al., 2 INTERNATIONAL PARENTAL CHILD ABDUCTION (1998).

⁵⁰ *Id.*

minor or the parents.⁵¹ Return will be denied only under the limited reasons enumerated by the Convention.

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⁵¹ Minister of Justice Z. Hanegbi, in a 1998 response to a Constituent Request, *available at* <http://www1.knesset.gov.il/tql/mark1/H0000680.html>.