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[21/06/1993; Supreme Court of Israel; Superior Appellate Court]
T. v. M., 15 April 1992, The Supreme Court of Israel

Summary of decision contributed to www.hiltonhouse.com by Dr. Chaim I. Goldwater, Director of Legal Advice in Private International Law, Ministry of Justice, State of Israel.

STATE OF ISRAEL

IN THE SUPREME COURT OF ISRAEL

Before the Honorable Justice Shoshana Netanyahu

P.T. v. D.M.

15 April 1992

A child, aged 6 years, was abducted by his mother from France, and brought by her to Israel. On the 26th March, 1992 the District Court of Tel Aviv gave judgment on a Hague application ordering immediate return of the child to his father in France, but granting stay of execution for 7 days to enable the mother to appeal to the Supreme Court. On appeal, the Supreme Court upheld the order of the District Court and dismissed the mother's application for a further stay of execution.

The parents of the child were divorced by judgment of a French court in May, 1988, which also made provision for custody of the child, in the following terms:

"les deux parents exerceront en commun l'autorite parentale sur l'enfant mineur qui aura residence habituelle chez la mere."

This was somewhat modified in a later judgment of the same court as follows:

". . . exercerant conjointement l'autorite parentale sur leur fils D. avec residence de ce dernier en domicil maternal."

The second French judgment also ordered the passports of the mother and the child to be deposited in court with a view to forestalling any possible abduction.

The Israel Supreme Court held that when the mother came to Israel in January, 1991 with the child, she committed a breach of the father's joint right of custody and right of access in the sense of the Hague Convention. At any rate, the father certainly had a joint right to determine the child's custody under Art. 5 of the Convention, and this was infringed by the mother.

The Supreme Court dealt first with the applicant's argument that the Hague Abduction Convention did not apply to the case, in view of the fact that the implementing statute requires a notice to be published in the Official Gazette by the Minister of Foreign Affairs as to the states with which Israel has relations under the Convention, whereas, it was alleged,

first, that the notice was formally defective and secondly, that the abduction took place before the notice was published. The Court held that there was no formal defect in the notice, and that publication of the notice was not constitutive but purely declaratory, the purpose being to provide information to the public. The Convention, said the Court, was in effect between Israel and France at the time of the abduction.

The Supreme Court upheld the conclusion of the Court below, dismissing the mother's contentions as to the unsuitability of the father as custodian in view of his alleged violent nature and unstable personality as baseless, and refusing to initiate an investigation by a social worker into the psychological state of the child and the suitability of the father as custodian. This was regarded by the District Court as superfluous and a waste of valuable time. The Supreme Court underlined this by referring to the provisions of the Convention which emphasize the importance of preventing delaying tactics and expediting of proceedings. This, the court said, is underscored by the following provisions:

Article 1: "to secure the prompt return of children wrongfully removed..."

Article 2: "they [Contracting States] shall use the most expeditious procedures available. "

Article 11: "The judicial and administrative authorities...shall act expeditiously.

Article 12: "Where...a period of less than one year has elapsed...the authority concerned shall order the return of the child forthwith."

If the case were one in which the provisions of Article 13(b) of the Convention, as to grave risk to the child, were applicable, then such a social investigation would be justified even despite the above provisions of the Convention, but this was not such a case, and indeed the "grave risk" provision only applied to the most extreme cases.

The Supreme Court referred to the report of the deliberations at the Hague Abduction Convention Review Conference in 1989, which pointed out, inter alia, that the provisions of Article 13(a) and (b) of the convention could serve as a basis for delaying tactics on the part of the abducting parent. In this context, it was pointed out that in Contracting States, while the order for return was generally subject to appeal, the time allowed for appeal was very short and/or the first instance judgment was immediately enforceable despite an appeal. Moreover, procedures at first instance gave only limited room to the abductor for calling witnesses.

The reference to the Review Conference Report by the Court was intended to underline the necessity for expeditious procedure and prevention of abuse of appeal procedures and also to underline the importance of uniform interpretation and application of multilateral conventions by all parties thereto.

The Court stressed that on a Hague application the court applied to is not required to consider permanent custody arrangements or undertake a full scale investigation into the child's welfare. It is merely called on to restore the status quo prior to the abduction, and to consider the question of the child's welfare in the narrow context of whether or not an exception to return under Article 13 of the Convention is applicable in the particular case.

[FULL TEXT OF THE ABOVE DECISION]

The full text of this decision in English was contributed to www.hiltonhouse.com by Zeeve Welner, Advocate, Tel-Aviv, Israel.

IN THE SUPREME COURT IN JERUSALEM

VARIOUS CIVIL APPLICATIONS FILE 1648/92

APPLICANT: P.T.

-vs-

RESPONDENT: D.M.

BEFORE: The Hon. Judge S. Netanyahu

DATE OF SESSION: 11 Nissan 5752 (14 April 1992)

COUNSEL FOR APPLICANT: Adv. Dr. Ben-Or

COUNSEL FOR RESPONDENT: Adv. Welner

Appeal against the decision of the Tel Aviv District Court on 26 Mar 1992 in Civil Status File 1367/92 given by the Hon. Judge S. Porat.

DECISION

1. The Tel Aviv-Yafo District Court (Hon. Judge S. Porat) ordered the Applicant, in its judgment of 26 Mar 1992, to return immediately her minor son D. to France and place him in the custody of his father, the Respondent. Upon her request to defer the execution of judgment, the Court decided on a deferment of one week only, to enable her to appeal to this Court and here apply for an additional deferment. The Applicant did so. On 15 Apr 1992, I decided to deny the application for deferment. Due to the urgency of the matter, I did not give reason for my decision and they are presented hereinafter. But first the facts.

The Facts

2. Both of the parents are Jews. The father is a citizen and resident of France. The mother is a citizen of Israel, who, while visiting France, was married there to the father, in 1984. From this marriage was born the minor child, in May 1985, and he is now some six and a half years old. He holds dual citizenship, Israeli and French. The marriage did not work out well and ended in divorce, in France, in 1988. The Paris District Court, which declared the divorce in May 1988, ruled that both parents would have joint parental authority over the minor child, who would live with the mother:

". . . les deux parents exerceront en commun l'autorite parentale sur l'enfant mineur qui aura residence habituelle chez la mere . . ."

Meanwhile, both parents have remarried other partners. Each of them has one child from the second marriage: The father has a son and the mother, a daughter.

In December 1991, the same Court in paris issued an order amending the original judgment of May 1988. The order legalized an agreement reached between the two parents, following examination by a social worker and the provision of expert opinions by psychologists as instructed by the Court. The order repeats that stated in the original judgment concerning the joint parental authority and the residence with the mother. The parents, according to the order:

". . . exerceront conjointement l'autorite parentale sur leur fils D. avec residence de ce dernier en domicile maternel."

The change in the amending order constituted a certain reduction in the father's visiting arrangements and an instruction to deposit the passports of the mother and son, for fear of his abduction. This, following the psychological expert opinion which stated that the child was terrified of being abducted to Israel. It was there recorded that they mother notified the father that she would be visiting Israel in January 1992, on the occasion of her sister's wedding. For this purpose, an instruction was given to release the passports.

It is therefore obvious that the instruction that the child would live with his mother, included in the judgment and in the amending order, did not give her permission to remove the child from France and from the joint parental authority with the father, who also has the right of visitation, without the father's consent.

In January 1992, the mother arrived in Israel and the minor child was with her. By so doing, she performed an "abduction" of the minor, in the sense of the ruling of this Court (see High Court of Justice 405/83 and Various Applications 1050, 958/83, Cabelli vs Cabelli, Rulings 37 (4)705; Further Hearing 23/72, Goldstein vs Goldstein Rulings 27(2)197; High Court of Justice 836/86, Bechar vs Gale Rulings 41(3)701). It also appears that she injured the father's rights of joint custody and visitation in the sense of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (hereinafter: "The Convention"), which has here been legalized as the Hague Convention Law (Return of Abducted Children), 5751-1991 (hereinafter: "the Law").

3. Soon after her arrival in Israel, the Applicant filed suit with the Tel Aviv District Court for custody of the child and there received a temporary custody order. The father approached the Paris Court, in which, on 4 March 1992, the same judge who had issued the original judgment and the first amending order issued an additional amending order, in the absence of the mother. The order ruled that the father alone would realize the right of parenthood of the child, that the child would live with him and that it was inappropriate to grant the mother the right to visit the child or to take him to sleep at her home. It was there stated that the mother did not appear and was not represented, although she had been summoned. The mother claims that she did not receive a summons.

The father subsequently approached the Tel Aviv-Yafo District Court, asking it to instruct that the child be returned to France by virtue of the Hague Convention. The Court, as stated, acceded to his request and, in so deciding, canceled the temporary custody order which had been given in the mother's suit and struck out the custody suit in limine.

Applicable Law

4. "The object of the hearing is a proceeding in accordance with the Hague Convention Law (Return of Abducted Children), 5751-1991." This is the opening sentence of the judgment and the matter was so treated there. However, in the appeal and application for stay, it was claimed that the said Law does not apply to the case at all. I shall not discuss the procedural aspect of this claim's having been raised for the first time in the appeal and the application for stay of execution submitted therewith, as I do not consider the claim as acceptable from the substantive aspect.

The claim is based on Section 3 of the law, which states that:

"the Minister of Foreign Affairs shall publish in Reshumot [the official gazette of the Israel Government] a notice of the states with which the State of Israel is engaged by The Convention . . . "

and on the fact that the notice, which was published in the Official Announcements and Advertisements Gazette (#39990, 1 April 1992, p. 2644), bears the name of the Government Secretary and not of the Minister of Foreign Affairs. It appears that the publication in the Official Announcements and Advertisements Gazette was erroneous. The Minister of Foreign Affairs certainly did sign the notice, on 9 March 1992 (the original notice, bearing his signature, was presented and submitted to the file). This, perhaps, did not remedy the flaw, as Section 3 does not content itself with the Minister's signature, but calls for publication by the minister and such publication was not made. In any event, even had the publication been properly executed, it does not give the Law retroactive effect concerning the return of the child to France due to infringement of the custody rights, as the child was brought to Israel as early as January 1992, before the publication.

Admittedly, the Law does not have retroactive effect (cf. the English case of B v B 1988 1.W.L.R. 526); however, it became valid as of the day of its publication, on 29 May 1991, before the child was removed from France. The publication required by Section 3 is not constitutive; it does not determine the initial validity of the Law. The publication is declarative only; it is the method which the Law determined for informing the public of the states with which Israel is engaged by the Convention. It is an undisputed fact that Israel was engaged with France by The Convention even before the child was brought to Israel.

Let us, then, return to the Law. Only as a parenthetical remark, I shall first note that, due to the reasons which will be explained later, the result would have been no different in this case, even had the matter been heard in accordance with the legal situation which prevailed in Israel before the signature of the Convention and the enactment of the Law.

Application of the Hague Convention Law (Return of Abducted Children, 5751-1991) and the Provisions of the Convention.

5. Section 2 of the Law instructs that "the articles of the Convention . . . shall have legal validity as a Law and shall apply despite that stated in any law . . . ".

The purposes of the Convention, as declared in Article 1 thereto, are two:

a. to ensure "the immediate return" (emphasis in the original) of children unlawfully removed to a state engaged by the Convention ("an engaged state") or not returned therefrom;

b. to ensure that the right of custody and visitation, in accordance with the law of an engaged state, shall be effectively honored in the other engaged states.

The operative provision in the case of the removal of a child is that in Article 12, stating that in the case of a child who was removed and not returned, unlawfully, and if a year has not elapsed from that time to the date of opening proceedings in the engaged state in which the child is located, "the relevant authority shall order that the child be immediately returned". This provision has a few exceptions, detailed in the Convention. The one which interests us is that listed in Article 13(b), on which the mother basis her claim, in which:

" . . . there is a grave risk that the return of the child will expose him to physical or psychological damage or will place the child, in some other manner, in an intolerable situation" (emphases not in the original).

When considering the existence of these circumstances, the authorities must take into account the information concerning the child's social background, as produced by the authorities of the child's ordinary place of residence. This is also provided in Article 13.

6. The mother's factual claim in the lower court was that the father is a violent man who frequently hit her and also attacked his stepson G., the son of his second wife (and, for that reason, the father of that child had lodged a complaint with the police and a file was opened); the child is afraid of his father and of his violent outbursts and refuses to meet him and visit his home.

Such claims were also made in the affidavit supporting the application for stay. In that document, the mother describes the father as an unstable person, who practices physical violence and endangers the child's physical and mental health. Out of ear, the child refuses to visit him or even to speak with him on the telephone. The mother also emphasizes that the child is very much attached to her and to his stepsister from her second marriage and is not willing to be separated from them.

The mother complains that the French Court revoked her custody -- after she unlawfully removed the child from France -- without even considering the welfare of the child. This is not so. Before the French Court was a psychiatric expert opinion on this subject, prepared on the instructions of that Court. In her appeal to this Court, the mother claims that the Hon. Judge Porat did not enable investigation and clarification of the child's situation and of the effect that separation from her and from her stepsister and return to his father in France would have on him.

7. The learned Judge attests that he debated, given the mother's claim, whether there was justification to hold an investigation and request an expert opinion. He reached the conclusion that this was unnecessary, as the mother's factual claims appeared groundless to him.

His considerations were detailed in the judgment and there is no need for me to repeat them. He shows, on the basis of the material which he had before him, that the Applicant's behavior is not in line with the truth of her claims; this is especially shown by the fact that the amending order of December 1991 was given with her consent, after the incident with the stepson G.

It should be noted that the psychological expert opinion before the French Court stated that the child loves both parents and feels good and at ease with both of them. His relationship with each of them is close and good and he meets his father gladly. The psychiatrist did not ignore the child's relationship with his stepsister. He expressed the opinion that the arrangement (which, as stated, was reached with the consent of both Parties) was satisfactory when both parents were living in France; yet the suspicion of abduction to Israel was also expressed there, which, as stated, led to the decision to deposit the passports.

The learned Judge drew his conclusions also from the letter written by G.'s natural father, stating that the incident with him was marginal and that the Respondent and G. get along well and on the certificate given by the clerk of the Paris Court on 27 Apr 1991. That clerk went, as stated therein, to the mother's house in order to cause the realization of the father's right of visitation, which he claimed to have been prevented from realizing. According to that certificate, the child agreed willingly to go with the father.

All this showed that not only was there no support of the mother's version concerning the father's terrible violence which led the child to fear not only his presence, but also his voice on the phone; on the contrary, there are facts and circumstances which indicate that her

complaint is not true. In this situation, and in view of the provisions of The Convention concerning the urgency with which action is to be taken the learned Judge reached the decision that it would be a waste of valuable time, particularly in the circumstances of the case, to delegate a welfare clerk to investigate the matter of the child and submit an opinion, especially that the welfare clerks are woefully overburdened and this would lead to a protracted delay.

8. This conclusion does not appear to me to have been erroneous, for two reasons:

a. The urgency of handling the return of a child unlawfully removed and not returned, in a manner involving the breach of the right of custody or visitation, is the basis of the Convention. It is woven into the Convention and runs through the entire document as a principal motif. This is not only indicated in Article 1, which has already been quoted above, instructing the immediate return. This urgency is also expressed in other provisions of The Convention. Thus, Article 2, which instructs the engaged states to take all proper measures to ensure the objectives of The Convention and ". . . for that purpose to activate the most urgent proceedings at their disposal.". Thus also Article 11, in accordance with which ". . . the judicial or administrative authorities shall act urgently in proceedings for the return of children . . .", so much so that, if a decision is not reached within six weeks of the opening of the proceedings, the Applicant is entitled to demand an explanation for the delay. Also Article 12, in accordance with which, in a fresh case, in which a year has not elapsed between the date of the child's removal and the opening of proceedings (and this is the case before me), ". . . the . . . authority shall order that the child be immediately returned". (All emphases not in the original).

b. Of course, if the situation at hand appeared to be a severe one, in which the return of the child would injure his welfare, the judicial authority would have to investigate the matter, even though the investigation would take time. I agree with the learned Judge's statement that the State of Israel, which has joined the Convention and adopted it into its own laws, must ensure the appointment of welfare clerks who will be able to devote themselves to the rapid handling of the matters dealt with by the Hague Convention. This, however, does not appear to me to be the case before me. The relevant section of the Convention in this case is, as stated, Article 13(b), which speaks of " . . . a grave risk that the return of the child will expose him to physical or psychological damage or will place the child, in some other manner, in an intolerable situation".

The law adopting the Convention is a new law and has not yet accumulated sufficient experience in its implementation and interpretation. A certain amount of experience has already been acquired in other engaged states, which adopted the Convention earlier. With the intention of exchanging opinions and drawing conclusions as to the manner of activation of the Convention, a Special Commission was established for this purpose in 1989 and its conclusions were published by the Permanent Bureau of the Hague Conference. Among the questions discussed was the use made of the provision of Articles 13(a) and 13(b). In its conclusion, the Commission calls attention to the fact that these provisions are likely to bring about delaying tactics on the part of the defendant, whereas it is obvious that this was not their intention and that the authorities operating by law have the mission of instructing the parties and the courts as to the proper role of these provisions. In the same context, the question was raised as to whether the return order is subject to appeal in the engaged states. The conclusion was that, as a rule, it is indeed subject to appeal, but that, generally speaking, the delay granted for the submission of an appeal is brief and the order of the first instance is implemented immediately or could have been implemented immediately following the Applicant's application and/or the procedure in the first instance allowed only a brief interval for the "abductor" to have his/her witnesses heard. Questions were also asked about

the extent of the "grave risk" of an "intolerable situation" in the sense of the section under discussion; the impression obtained was that the interpretation of the various courts is stringent. On this question, see also Federal Register, Vol. 51, No. 58, March 1986, p. 36:

"The person opposing the child's return must show that the risk to the child is grave, not merely serious. . . An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child.

Here, then, the trend of the Convention is to bring about the immediate return of any "abducted" child and Article 13(b) must be limited to exceptional cases from the standpoint of the intolerable situation and the gravity of the risk of its arising as a result of the return.

When the matter at hand is an international convention which creates mutuality among the engaged states, great importance is ascribed to uniformity of interpretation (unless and as noted otherwise in internal legislation). See the English case of C. v C., p. 663; and of my statement in Further Hearing 36/84, Teichner vs. Air France, Rulings 41(1)589, 639-641.

Adv. Goldwasser of the Government Legal Advisor's Office has noted that applications from Israel to return children "abducted" here are handled by the authorities of engaged states abroad in a manner appropriate to this trend.

The factual circumstances raised in the case at hand do not meet the criteria for implementing the exception in Article 13(b). To them should be added the report by the welfare clerk date 8 April 1992, which details the behavior of the child and those around him, on both sides, when she came to fulfill the duty which had been imposed on her, to return the child to his father in accordance with the judgment of the Hon. Judge Porat. Her impression was that the child was in a state of anxiety because of the tension of the adults surrounding him on his mother's side before his transfer to his father. But he had no fear of his father. He went with him entirely calmly and also in the course of the clerk's visit to the father the next day, in the mother's presence, the child behaved freely, with no sign of anxiety or tension involving either of the parents.

The impression is that the child is sensitive and attached to his mother and thus the mother managed to project and to transfer to him, her own anxieties regarding the separation from him. This is also apparently the explanation for the situation in which the family doctor found the child before his delivery to his father. But there was no fear of his father in the child.

9. It should be clarified here that, in the proceedings according to the Law, the court is not considering the question of the permanent custody of the child, nor even that of the welfare of the child in the full sense of the word. The framework of the session is not intended for, and does not enable, such a comprehensive discussion. The role of the court in the proceedings according to the Law, similarly to the role of the Israel High Court of Justice in this question of abducted children, is simply "putting out a fire" or "first aid" in order to restore the former situation -- returning the child unlawfully taken from the custody of the other parent or the joint custody determined by a competent court or in an agreement between the parents (see the said High Court of Justice 405/83; the said High Court of Justice 836/86, p. 705). The question of custody, when it is disputed, is ordinarily settled in the competent court and the welfare of the child is fully and thoroughly examined in that framework. However, in proceedings according to the Law, such as those in the High Court of Justice, the welfare of the child is relevant only as a consideration whether to refrain from ordering the restoration of the former situation, until the question of custody has been examined by a competent court (see High Court of Justice 836/86, p. 706 and references therein). As stated there, "only real damage to the child will justify rejecting the appeal,

which rejection could eventually perpetuate the minor's remaining in the hands of the parent who unlawfully took him."

The difference between the Law and the High Court of Justice rulings in all matters concerning the welfare of the child, in this limited context, is in the extent of real damage to the child justifying the refraining from returning him to his former place. From all that stated above, there can be no doubt that Section 13(b) of the Law is much more stringent than the High Court of Justice rulings in this matter, as may be seen from the judgments mentioned above and from those referred to therein.

10. Adv. Maimon, who was also present on behalf of the Government Legal Division, on her own initiative raised the question as to whether this case concerned a breach of custody rights as defined in Article 59a) of The Convention, that is, removal or non-return of a child in the sense of Article 3, as in that case, the provisions of Article 12 ordering that child's immediate return would apply; or whether this was no more than a breach of visitation rights as defined in Article 5(b) of the Convention, in which case it would not be necessary to return the child, but only to make arrangements to ensure the effective activation of visitation rights, in accordance with Article 21 of the Convention. The answer was that this was a case of breach of custody rights.

When the question arose, the mother's counsel seized it in order to claim that this was precisely a breach of visitation rights. This claim first arose at the very end of the session; not only was it not brought up before, but, in fact, both in the lower court and in the arguments before me, up to that point, there had been no dispute that this was an "abduction" from custody. Yet here too, as in the claim that the Law does not apply to the case, I shall not take pains to discuss the procedural aspect, as the substantive aspect is enough to reject it. As stated in Section 2 above, the French judgment of 1988 and the amending order of 1991 gave both parents joint custody of the child. Even if we ignore (based on the mother's claim that she was not summoned to court) the second amending order of March 1992, which ordered the realization of parental authority by the father alone, the joint right held by both parents has been breached; this is enough to justify Article 3, which refers to custody rights granted "whether jointly or separately".

Until the raising of the question by Adv. Maimon, all of the parties appeared to consider parental authority as custody. Now, Adv. Dr. Ben-Or claims that this is not the case. I do not know how the term "parental authority" (authorite parentale) is interpreted in accordance with French law, nor whether it is parallel to guardianship as defined by our law or to custody. However, this question is not to be judged by French law, but by the Law, which refers to the Convention. The definition of custody in Article 5(a) of the Convention is:

'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

Whether or not the definition remains unclear, one thing is clear -- the right to determine the child's place of residence is a custody right. The mother did not have such an exclusive right; and I have already shown above that she required the permission of the Court, not only to change her place of residence to Israel without the husband's consent, but even to leave for a visit to Israel. The statement, included in the court judgment, that the child's residence would be with her did not give her the exclusive right to determine the place of residence. The father held that right jointly with her. He was entitled to refuse to give his agreement to the child's place of residence or to any change therein, whether within or outside France; this was reflected in his custody right.

This interpretation is in line with the purpose of the Convention. Any other interpretation would mean that there could be no rapid relief provided by the Convention for the return of the child removed or abducted by one of the parents from his agreed place of residence, without the agreement of the other party. For this matter, cf. the said English ruling C. v. C., pp. 658, 662, 663-664.

11. For these reasons, on 15 April 1992, I rejected the application to delay the child's return as ordered by the District Court.

Given this day, 26 Nissan 5752 (29 Apr 1992), in the absence of the litigants. The Secretariat is requested to notify them.

/s/ S. Netanyahu, Judge

Shmaryahu Cohen, Chief Secretary.
