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[14/08/1995; Supreme Court of Israel, sitting as a Court of Civil Appeals; Appellate Court]
G. v. G., 14 August 1995, C.A. 5532/93

In the Supreme Court (Of Israel)

Sitting as a Court of Civil Appeals

Civil Appeal No: 5532/93

Before: Justice S. Levine

Justice Y. Kedmi

Justice D. Dorner

The Appellant:

D.G.

vs.

The Respondents:

1. E.G.

2. Dr. A.G.

An appeal on the judgment rendered by Judge Z. A. Tal in the Jerusalem District Court on August 31,1993 in Civil Case No. 543/93.

For the appellant: Attorney E. Freedman

For the respondents: Attorney Prof. D. Frimer

Judgment

Justice D. Dorner:

1. The appellant (hereinafter: the Father) and respondent 1 (hereinafter: the Mother) are religiously observant Jews, who were born in the USA and are American citizens. They were married in the State of New York in 1986. In 1987, their son (hereinafter: the Child) was born. The marriage did not work out. The couple petitioned the New York Rabbinical Court for a divorce according to Jewish law. They granted the Rabbinical court arbitrative authority. On January 3, 1988 the Rabbinical Court rendered its decision (hereinafter: the Rabbinical Decision) in which it determined, based on mutual agreement, the terms of the divorce, regarding the division of property, custody of the Child and child support payments. The Rabbinical Decision determined that the Child would remain in his mother's

custody until he reached the age of six at which time the Father could raise the subject for renewed discussion (Section 3), and that the Father would have visitation rights (Section 4). The settlement also determined that decisions made on important matters in the Child's life must receive the Father's agreement (Section 10).

After the Rabbinical Decision was rendered, the parties applied to the civil courts to be divorced according to the laws of the State of New York. Within the context of these proceedings they presented a divorce agreement (hereinafter: the Civil Agreement) to the court which was validated as a judgment. On February 18, 1992 the civil court granted them a civil divorce. Section 1 of the Civil Agreement determines:

"The parties hereto at all times shall live separate and apart from each other and shall have the right to reside from time to time at such place or places as each of the parties may see fit, and to contract, carry on and engage in any employment, profession, or business of trade which either may deem fit, free from control, restraint or interference, direct or indirect, by the other, in all respects as if such parties were sole and unmarried, subject to the terms and conditions contained herein."

This agreement also stipulated that each of the parties must notify the other party of any change of address (Section 7).

The disputes between the couple continued even after the rabbinical and civil divorces were granted. In 1991 the Mother lodged a complaint against the Father in civil court for having violated the Rabbinical Decision.

2. In 1991, the Mother married respondent 2. Six months later the Father discovered that respondent 1 intended to emigrate to Israel. In a meeting held between the Father and the respondents, the Father voiced his unequivocal objection to the Child's emigrating to Israel, as such a move would reduce his rights of visitation. Since the Father feared that the Mother was likely to take the Child with her to Israel, despite his objections, he applied to the New York Court on July 31, 1992, and based on his request the Judge issued a temporary stay of exit order which prohibited the Mother from removing the Child from the State of New York. The Judge also scheduled a hearing, in the parent's presence, for August 6, 1992. The Mother's representative, Attorney Greenwald appeared at the hearing and requested that the hearing be continued until August 10, 1992. The father, who feared that the Mother was likely to abduct the Child before the hearing, applied to the court on August 7, 1992 and requested and received a Writ of Habeas Corpus ordering that the Child be brought to the court. On August 10, 1992 Attorney Greenwald once again appeared before the court, but did not bring the Child with him as required by the injunction. He once again requested that the hearing be continued, this time to August 19, 1992. The judge acceded to the request for continuance and once again ordered that the Child be brought before the court.

On August 19, 1992, Attorney Greenwald did not appear for the hearing. The judge ordered the stay of exit order extended and for the third time directed that the Child be brought to court The hearing was continued until August 24, 1992. Attorney Greenwald then filed a written request to continue the hearing until August 31, 1992. When neither Attorney Greenwald nor the Mother appeared on this date and the Child was not brought to court, the court decided, based on the evidence presented to it, that the stay of exit injunction and release had been served on the Mother and therefore it issued a warrant for her arrest and on September 23,1992 ordered that custody be transferred to the Father and it was so written, inter alia, in the Judgment

"Written and oral proof having been presented in court, by Jonathan Jacobs, presumptively proving to the dissatisfaction of the court that the writ of Habeas corpus and the order to

show cause, duly served upon said E.G. *, Brooklyn, New York, and upon said E.G. at the *, Green Point, New York, on the 18th day of August, 1992, and the matter of the Petition of Habeas Corpus having duly come on to be heard before me on the 19th day of August, 1992, and the Petitioner having presented written and oral proof of service of the Habeas Corpus Petition on E.G., and such Affidavit of Service being duly filed in Court, and the Court having issued its written Order on the 19th day of August, 1992, ...

ORDERED that the custody of the infant ..... transferred to the Petitioner .....

4 ORDERED that a Warrant of Arrest is issued by this Court in accordance with the annexed Warrant of Arrest, directing that the 'Respondent E.G., shall be apprehended and brought before this court ...".

3. The Father began to search for his son immediately after this decision was given. He filed a complaint with the police, reported to the authorities that his son was missing, turned to organizations who engage in searching for missing children and to the relevant New York State authority (New York State Division of Criminal Justice Services Missing Childrens Clearinghouse), until he learned from friends that the respondents had emigrated to Israel with the Child and were living in Jerusalem.

On March 3, 1993, the Father filed a petition with the Central Authority in the United States for help pursuant to the Hague Convention Law (Return of Abducted Children). On May 23, 1993 the Father filed a petition with the Jerusalem District Court pursuant to the Hague Convention Law (Return of Abducted Children), 1991-5751 (hereinafter: the Convention Law), which gave the validity of law to the Convention On the Civil Aspects of International Abduction of Children, done in The Hague October 25, 1980 (hereinafter: the Convention). To this petition he added, among other documents, the Opinion of the psychiatrist Dr. Yehudah Nir, who had met with the Child and the Father before the abduction. This opinion states that the Child is very attached to the Father and moving to Israel without the Father would likely cause him psychological harm. The respondents defended themselves by arguing that the Convention does not apply to the petition, and that, in any case, returning the Child to the US, after he had been well settled in Israel would cause him harm. In support of this argument they attached the opinion of Dr. Israel Perlmutter, Psychologist.

4. The District Court (Judge Z. A. Tal) found that the Child had been absorbed in Israel and his removal from the country would be likely to cause him harm. In these circumstances - so the court reasoned - The Hague Convention does not apply to the Father's petition because he only has rights of visitation: custody was determined by the law of the state from which the Child was removed. The law in New York State differentiates between before the fact and after the fact. Before the fact, a custodial parent who wishes to remove the Child from the limits of jurisdiction, must show that special circumstances do exist and ask permission of the court. However, after the fact, the deciding factor is the Child's best interests and the court will not order his return if his best interests will be harmed. The mother denied that she had been served with the court's stay of exit order and, at any rate, according to the laws of the State of New York, here too the principal applies that the court does not return a child if its best interests require that it should remain. Section 10 of the Rabbinical Decision that granted the Father the right to participate in important decisions pertaining to the Child, which would certainly include changing the country in which the Child lives, was nullified by the Civil Agreement, wherein each of the parties was allowed unlimited choice of place of residence. The boy was removed due to the "special circumstances" of fulfilling the commandments to emigrate to Israel. And so Judge Tal wrote, inter alia, in his decision:

"In the matter under discussion, Section 10 of the Divorce Agreement grants the Father the right to participate in decisions on 'important matters,' and the Child's country of residence is no less important than his being hospitalized. However, a later agreement which received the validity of a court decision in New York makes specific stipulation in Section 1 regarding the couple's place of residence. According to this stipulation, the parties 'have the right to reside from time to time at such place or places as each of the parties may see fit,' without any limitations whatsoever .... It must be emphasized that this stipulation in the divorce Agreement is later and unique in relation to the stipulation in the first Divorce Agreement .... Without going deeply into the matter of New York State law, the discernment made by Judge Gartenstein (the respondent's expert) appears to me to be an appropriate way of presenting a balanced and harmonious picture of the rulings which at first glance do not agree and may even be contradictory. The essence of this discernment lies in the differentiation between before the fact and after the fact. Before the fact, the custodial parent who wishes to remove the child to outside the residential boundaries of jurisdiction of the non-custodial parent must show 'special circumstances' to explain such a move. However, after the fact, the court would rather pardon being held in contempt, even if it issued a stay of exit order for the Child, because acting in the Child's best interests will be preferable to upholding the honor of the court. In the circumstances before us, it would seem that 'special circumstances' do indeed exist. Shmuel was not removed from the State of New York for insubstantial reasons. His mother and her husband chose to emigrate to israel because they saw it as a duty and a mission ... indeed, the Mother did not ask the court's permission because of these 'special circumstances,' nor did she notify the Child's father as to the date of their leaving for Israel or of their address or home phone number however, after the fact, the Child should not be ordered returned only because of the court being held in contempt. It must be noted that in our matter, contempt of court only exists under the assumption that the Mother was indeed legally summoned to the hearings on the matter of the stay of exit order for the Child. As has been stated, this fact is in dispute, and since such a such a doubt exists, even if remote, we will not remove the Child from his mother's custody and from the place where he is growing up. As stated, I have accepted Judge Gartenstein's testimony, that, after the fact, according to the laws of New York State, the deciding consideration whether to return the Child or not, is the consideration of the Child's best interests ... returning him temporarily to his father (who has not as yet remarried and devotes his time to his specialization) with a reasonable possibility that after the hearing the New York court will return the Child to his mother - such a removal would certainly not be in the Child's best interests."

5. An appeal was filed on this judgment.

The Father's main claim is that the Convention Law applies to our matter, both according to the laws of New York State and the court order, and according to the Rabbinical Decision. In reply to the appeal the respondents defended the District Court's judgment and argued that, in any event, the protections of Article 13(a) and (b) of the Convention are applicable: (a) It is proven that the Father had acquiesced to the Child's living in Israel, since he only filed his petition after a long delay - 10 months after the Child had left the US; (b) The opinion of the psychologist, Dr. Perlmutter, proves that the Child will suffer psychological harm if he is returned to the US.

6. The proceedings in this court continued on for a long time because of our efforts to help the parties reach a compromise agreement. We therefore raised the question of whether the time that passed is of consequence in implementing the stipulations of the Convention and requested an opinion on this matter from the State's Attorney.

The State's Attorney filed with us an opinion that the length of time which had passed, in the matter before us, was not to be taken into account. The Convention Law gives literal validity to the Convention and thereby adopts its principals; the principal of the Child's best interests has its expression in returning the Child to its country of residence, subject to the defined exceptions; the establishment of new exceptions, in particular a exception based on the length of the proceedings would undermine the purposes of the Convention. The respondents argued that it was incumbent on the State's Attorney to relate to the best interests of the Child whose return was demanded, and not to focus on the length of time which the proceedings had lasted, and this the State's Attorney did not do.

7. In my opinion this appeal is founded in law.

We are here discussing a clear instance of kidnapping. The mother knew that the Father emphatically objected to the Child's removal from the US, which would, in effect, sever their ties. According to the New York State court the Mother was also served with the stay of exit orders for the Child and the orders obligating 11er to bring him before the court. One way or another, the Mother separated the Child from his father and did not reveal the Child's address in Israel to his father. The boy lives with the new family she established, in her sole custody, with no connection whatsoever to his father. Had the Father not discovered the address, the severance would have been complete. The mother thereby damaged both the Father's parental rights and harmed the Child whose best interests require that he be educated by both his mother and his father, and that he not be removed from one of his parents, even if they are living apart.

8. The Convention is the international community's answer to the cruel phenomenon of children being abducted by one of their parents and being removed to another country to separate them from the other parent. As a result of the rise in the divorce rate and the ease of mobility from country to country in the modern era, abduction has become a frequent occurrence. Many studies have shown that abduction severely harms children and quite often causes them psychological damage. "Child-Snatching Called Threat to Children's Psyches," [Lawyer's Survival, 8 Fam. L. Rep. (BNA) 2702, (1982)].

Legal proceedings in countries to which children have been removed did not help to reduce the dimensions of the phenomenon. In fact, the opposite is true. By courts agreeing to rule on the actual matter of the custody dispute, parents who wished to alter custody arrangements were encouraged to abduct their children and disappear with them to a country with more convenient laws. Since, by the nature of things, in such a hearing importance is attached to the fact that the children have become settled in their new environment and the standards of the child's best interests will be applied as they are understood in that same country. In Israel, for example, it is assumed that emigrating to Israel and living there are in the best interests of a Jewish child (Bagatz 125/49 Emdo vs. Emdo, Piskei Din (D)4, 23; Civil Appeal 503/60 Wolf vs. Wolf, Piskei Din 15, 760, 764). Professor Frank has addressed the issue:

"... courts have contributed to this problem (child snatching) in the past by taking jurisdiction in custody disputes ... Noncustodial parents are thus encouraged to snatch the child and move to a more favorable forum, often 'disappearing' in the process; ... and while many nations theoretically use a standard which promotes the best interests of the child, each country has a different idea as to what 'best interests' means. Each country prefers to use its own substantive standards in adjudicating custody disputes ...."

(R.J. Frank "American and International Responses to International Child Abduction" Int'l. L. And Pol. (1984) vol 16, 415, 417, 423).

9. The Convention provides an answer to the understandable difficulties involved in a discussion of a child's best interests in the country to which the child has been abducted. It does this by determining a rapid process for returning children to the country from which they have been unlawfully removed. The Convention is based on reciprocity and cooperation between the signatory states and makes it easier for all the states to protect their children from being abducted and removed to other countries.

The convention is founded on the concept that children's best interests are served by their immediate return to the country from which they have been abducted. This objective is attained by obligating the authorities in the country to which children have been abducted to return them to the country from which they have been unlawfully removed, and to let the authorized court of the original country decide on the question of the child's best interests. (See L. Silberman, "Hague International Child Abduction Convention: A Progress Report," Law and Contemporary Problems (1994) 210, 257).

In this way the Convention realizes a double purpose. First and most importantly, it protects abducted children. Secondly, by the prompt return of the child it transforms abduction into a futile act and thereby deters parents from doing so.

The purpose of the Convention and the obligation of return are determined in Articles 1-3 of the Convention. These Articles state the following:

Article 1

The objects of the present Convention are - to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and ... to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where - it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

10. At the same time, the obligation to return the child is not absolute. First, the obligation is subject to preliminary conditions: (1) The Convention only applies to children up to the age of 16 (Article 4); (2) The obligation of return only applies if the petition for return is filed within a year of the abduction (Article 12). Secondly, the formulators of the Convention took into account the exceptions itemized in Articles 13 and 20, in which cases the court has the discretion to decide not to return the child. These Articles state the following:

Article 13

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 person 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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 20

The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

It is clear that a broad interpretation of these exceptions - especially Article 13(b), that enables children not to be returned out of consideration of their best interests - is likely to frustrate the Convention's purpose and turn it into a dead letter, The Convention reporter, Prof. Eliza Perez-Vera related to this issue:

" . . . it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter ..." (E. Perez-Vera, "Explanatory Report," Hague Conference of Private International Law. Acts and Documents, (1980, vol 3), 434).

And truly, the formulators of the Convention tried to give expression to the correct interpretation by drawing up the exceptions in the most narrow way. Prof. Perez-Vera speaks of this (Ibid):

"In drafting article 13 and 20, the representatives of countries participating in negotiations the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention to effect the prompt return of abducted children. Further, it was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof."

11. Fulfillment of the Convention's objectives obligates courts in the various countries to deviate from the principles accepted in custody disputes which are based on consideration of the child's best interest according to the standards accepted in each of those countries, and to view the children's best interests in its broader perspective which is anchored on the assumption that the best interest is for children not to be abducted from their habitual residence by one parent and thereby also be separated from the other parent. The specific

examination of the best interests of children who have been abducted remains in the hands of the State from which the children were unlawfully removed. This change brings certain difficulties along with it. Prof. Dyer makes reference to the question:

"The Hague Convention intrudes upon the jurisdiction of the courts in the country to which the child has been taken, even if that is the country of the child's nationality, and insists that the child be returned (usually to the place of the child's habitual residence immediately before the abduction) so that the courts of another country may exercise jurisdiction over the merits of custody. The execution of this obligation requires discipline on the part of the courts and a willingness to let the best interests of the child be framed, not merely within the context of the judge's own culture, but also in a three-dimensional, multicultural setting, including the child's interest in not being abruptly jump-started from one culture to another."

(A. Dyer "The Hague Convention on the Civil Aspects of International Child Abduction - towards global cooperation," The International Journal of Children's Rights 1 273, 274).1

12. Despite these difficulties, according to reports of international committees that reviewed the Convention's implementation, the decisions handed down in the courts of the member countries have, in general, fulfilled the Convention's objectives. The obligation to return the child is broadly interpreted, while exceptions to this obligation receive a narrow interpretation. At times, lower courts have tended to judge the substantive aspects of the child's best interest by giving a broad interpretation to Article 13(b) of the Convention, but these judgments have been remedied by the appellate courts. The proceedings may have taken longer, as a result, but standards have been set which will allow for fulfilling the Convention's objectives in the future. Prof. Dyer explained it thus (Ibid, 279):

One of the important successes of the Convention has been that the courts in the countries Parties to the Convention have in general handed down decisions which follow closely its purpose and spirit ... Occasionally ... local trial courts have reacted against the new concept of the Convention, based on allocation of jurisdiction to decide on the merits, and have proceeded to render decisions under Article 13(b) which have involved practically speaking an examination and a determination of custody on the merits. Fortunately, in a number of countries, appellate courts have corrected this tendency on the part of lower courts and maintained the integrity of the Convention's basic principles. These appeals have, in some cases, taken an inordinate amount of time and therefore have failed to achieve the purpose of the Convention, rapid return of the abducted child in the particular case. The appellate decisions, however have set the standard for subsequent decisions by the trial courts and therefore should lead to much more rapid return of abducted children thereafter."

It has also been accepted that achieving the purpose of the Convention which is based on reciprocity - obligates a uniform interpretation in all countries.

See P.H. Pfund, "The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for all Petitioners," 24 (1) Fam. L.Q. (1990) 36, 43; Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (18-21 Jan. 1993, Hague Conference on Private International Law) p. 60; C vs. C. [1989] 1 WLR 654, 663 (C.A.) In Re A (Minors) [1992] 2 FLR 14;

In citation Basha 1648/92 Tourne vs. Meshulam Piskei Din 46 (3) 38, 45.2

The majority of the proceedings relevant to our matter were on the question of the exception Article 13(b) in the matter of psychological harm to the child.

13. In the United Stales, for example, in a case where children who were abducted by their mother from Spain to California, and lived there for over a year, in the natural course of events found new friends and become attached to their new home, it was determined that they should still be returned to Spain, despite their unwillingness to return to the Father they had not seen for this entire period; and despite the fact that according to the opinion of the court appointed psychologist the children would be caused irrevocable damage if they were taken from their mother and returned to Spain. The court determined that although a child who was abducted and moved from country to country would clearly suffer some degree of trauma; Article 13(b) should still be interpreted in the most narrow and literal manner, and therefore the condition for non-return of the children exists only if there is grave risk that the children will be exposed to harm. The burden of proof is on the mother and its extent clear and convincing evidence. It was determined that in this case the Mother did not bear the burden of proof and it was doubtful if the children being returned to their native country would expose them to the stated risk. The Spanish court is the one that would determine the child's best interests. Any other way would have allowed the Mother to benefit from the prohibited act which she committed. See Navarro vs. Bullock, Calif. Super. Ct. Placer Cty., 15 Fam L. Rep 1576 (1989).3

In the judgment in the matter of Renovales vs. Roosa, No. 91 0392232 (Conn.Super. Ct. (mem) Sept. 27, 1991) the court noted the great weight of the burden of proof required in order to enter within the exception under, Article 13(b):

"Clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty, as where this high standard is required to sustain claims which have serious consequences or harsh or far reaching effects on individuals, to prove willful, wrongful and unlawful acts, to justify an exceptional judicial remedy, or to circumvent established legal safeguards."

See also Shaffer vs. Lindy, 8 Conn.App. 96, 104 (1986).

14. In England, the amount of harm required to refrain from returning an abducted child according to Article 13(b) of the Convention has been interpreted as being "an intolerable situation." Therefore, even if the parent petitioning for the child's return is a drug user, homeless or living on welfare, it is not enough to prevent the child's return. The same is true regarding a parent who, in the past, has neglected the child. See: Re Arthur (a minor), High Court of Justice, Family Division (January, 13 1988); Re A (a minor), Court of Appeal, Civil Division (June 10, 1987); Re Duncan (a minor), High Court of Justice, Family Division (January 29, 1988); All of them were published in: Case Law Decided Under the Convention of October 25, 1980 On the Civil Aspects of International Child Abduction, (Hague Convention On Private International Law, Preliminary Document No.2 of September 1989 for Attention of the Special Commission of October 1989).

15. In the Australian case law the emphasis is placed on the requirement of an "intolerable situation." It was held that the risk of ordinary psychological harm is not sufficient. The condition for returning the child is severe (or physical) harm of substantial nature. See: Ottens vs. Ottens, Family Court of Australia (Melbourne) No. M. 9653/88 (Dec. 2 1988).

The characteristic mark of all the above proceedings is that the best interests of the child are not determined in the court which decides on the child's return, but in the court in the place of the child's habitual residence after the child has returned.

16. In Israel, Article 2 of the Convention Law determines that the Articles of the Convention whose formulation is stated in the addendum to the Law -- will receive the validity of law,

and they will apply, despite what is stated in any other law. In this way the provisions of the Convention became incorporated in Israel's internal law and changed the legal situation.

Before the Convention Law was passed the only recourse for a parent whose child was kidnapped by the other parent was to apply to the Supreme Court under the authority granted it by Section 15 (D) (1) of the Basic Law: the ruling, which authorizes the Supreme Court Sitting as a High Court of Justice (Bagatz) "to issue orders on the release of persons have been unlawfully arrested or imprisoned" (Writs of Habeas Corpus). This proceeding is still available in situations where the Convention Law does not provide the parent with a remedy, whether it be because the country from which the child was abducted is not a party to the Convention or for any other reason. We are not here required to determine the question of whether the Supreme Court will provide a remedy in a situation where it is possible to resort to a proceeding under the authority of Convention Law. Applying the authority according to Section 15 (D) (1) of the Basic Law: the ruling is based on the assumption that the child was unlawfully removed by one parent from the custody of the other parent (Bagatz 125/49, Ibid, 13). Like the proceeding according to the Convention, the proceeding in the High Court of Justice is only temporary. It does not include awarding custody and the question of the child's best interests is not discussed in all its aspects. The presumption is that foreign judgments in the matter of child custody should be honored, and the situation should be returned to its previous condition. See the opinion of Justice Vitkin in Bagatz 76/71 Landror v, Landror, Piskei Din 25 (2) 258, 274; President Agronat in Bagatz 330/72 Goldstein vs. Goldstein, Piskei Din 26 (2) 634, 649.

At the same time, the Supreme Court sitting as a High Court of Justice (Bagatz), left itself the discretion to not apply its authority if it were proven that the return of the child would cause substantial harm of a nature that would be more serious than the harm caused as a result of severing the tie with the custodial parent. See the opinion of Justice Berenzon in Bagatz 40/63 Lawrence vs. Chairman of the Execution of Judgment Office Haifa, Piskei Din 17 1709, 1716; Justice Zussmall in Bagatz 391/71 Jane Doe vs. John Doe, Piskei Din 26 (1) 85, 92; Justice Shamgar in Bagatz 71/80 Saliach vs. Arshid (Saliach), Piskei Din 35 (1) 108, 109; Justice Barak in Bagatz 405/83 Cabelli vs. Cabelli, Piskei Din 37 (4) 705, 718.

The main consideration in refraining from applying the authority is the Child's establishing roots in Israel during the period of the abduction and turning it into the "center of his life." See the Opinion of Justice Beisky in Bagatz 268/80 Jansell-Zohar et al vs. Zohar et al, Piskei Din 35 (1) 1, 37; Justice Barak in Bagatz 405/83 Ibid, Ibid.

17. Regarding this point, the Convention Law has a different approach. "The child's best interest," as an independent consideration separate from the protection determined by Article 13(b) of the Convention, is no longer open to the decision of the court in the country to which the Child has been removed. If the conditions determined by the Convention exist, the court is obligated to order the Child's return to the State from which he was abducted, subject to those exceptions determined by the Convention, which exceptions must be narrowly and literally interpreted. Judge Netanyanu refers to this in citation Basha 1648/92, Ibid 45-46;

"Here, the objective of the Convention is to bring about the prompt return of the 'snatched' child. Article 13(b) should be limited to exceptional instances from the aspect of the intolerable situation and the grave risk of its coming about as a result of the return so . . . in a proceeding according to the law, such as a Bagatz, the child's best interests are only relevant as a consideration, if the court should decide to refrain from ordering the situation returned to its previous condition, until the question of custody is clarified by the authorized court ... the difference between the law and a ruling by the High Court in everything related

to the child's best interests, in this limited context, lies in the amount of actual harm to the child; harm which justifies refraining from returning him to his original country. From what has been said above, there is no doubt that Article 13(b) of the law is much more stringent on this point than is a ruling by the Supreme Court Sitting as a High Court of Justice...."

In Civil Appeal 1372/95 Stegemann vs. Burke, (unpublished) this court, reversed the lower court's judgment which stated that the child be allowed to stay in Israel, and ordered that the situation be returned to its previous condition, even though the lower court's reason for deferring the petition was the best interests of the child who had settled into his new environment. See also Civil Appeal 5271/92 Foxman vs. Foxman (unpublished).4

This way maintains the primary principle of the child's best interests, according to which the custody dispute must be decided. Except that authority for deciding what is the child's best interests is transferred to the courts in the country from which the child was abducted. Those courts will hear the arguments and decide as to the degree of harm likely to be caused the child by severing him from the surroundings to which he has become accustomed during the period of the abduction.

This arrangement fulfills the principle of the child's best interests in its broader sense. As previously stated, it deters abduction, which in itself is the primary cause of harm to the child, and it allows for holding a full and comprehensive hearing as to what the child's best interests require. This, in a forum before which both parents -- who, in the nature of things, are familiar with the country from which the child was abducted -- may present their evidence and make their arguments on an equal basis. See the opinion of President Agrausat in Bagatz 330/72, Ibid, Ibid; Justice Barak in Bagatz 405/83, Ibid 713.

18. In our matter, the District Court's decision is based on the determination that the Child's best interests require that he not be uprooted from the surroundings in Israel in which he is living today. However, we read it thus, that in a proceeding according to the Convention Law the decision as to what the Child's best interests require is not in the hands of the Israeli court.

There are only two questions which arise from the above normative framework: First, does the Father have the right, according to the laws of New York State, to determine the Child's place of residence (hereinafter: Custodial Right). And second, was one of the defenses specified in the Convention proven.

19. From the evidence presented before the District Court it arises that the Father received custodial rights from three authorities - any one of which is enough to vest him with that right: The Rabbinical Decision, the laws of the State of New York and the orders of the New York Court.

20. Section 10 of the Rabbinical Decision, which was rendered by agreement of both parties, determines that the Father must participate in decisions on important matters. There is no argument -- and thus it was also determined in the District Court's decision -- that the Child's country of residence is an important matter. The civil divorce agreement does not state that it nullifies the Rabbinical Decision. Witness that after the decision validating the Civil Agreement, the Mother herself even filed a claim against the Father for violating the Rabbinical Decision.

The question which arises is therefore, what is the relationship between Section 10 of the Rabbinical Decision and Section 2 of the civil divorce agreement, wherein, as it may be recalled, it is written that each party is permitted to select their place of residence.

As is known, an agreement should be interpreted according to the parties mutual intentions, which may first and foremost be drawn from the agreement's language. However, when the text does not suffice it is also possible to make use of external sources which can prove "circumstances" that when combined with the text are an indication of the parties intentions (Section 25 (A) of the Law of Contracts (General Section), 5735-1973).

In the matter before us the parties reached two agreements. As stated, the Civil Agreement did not nullify the Rabbinical Decision but came in addition to it, so that the later agreement does not stand alone, but is a part of a general agreement between the parties, as drawn up within the framework of both agreements. Both agreements, must therefore, be seen as a single unit, and all the conditions must be interpreted according to the purpose of the entire unit; the relationship between each condition and the other conditions and the internal logic.

See Civil Appeal 554/83 Ata Textile Company Ltd. vs. The Estate of the Deceased Zolotov, Piskei Din 41 (1) 282, 305; Civil Appeal 5597/90; Cohen vs. C.B.S. Records, Piskei Din 47 (3) 218, 219; Civil Appeal 5559/91 Gas & Energy Industries vs. Maxima - Air Separation Center, Piskei Din 47 (2) 642, 647.

From the text of both documents it follows that Section 2 of the Civil Agreement -- a general stipulation that permits both parties to act as they see fit in all matters, including the selection of a place to live and a place of work, with no interference on the part of the other party -- is subject to the specific stipulation in Section 10 of the Rabbinical Decision. The mother's execution of the right to select a place to live includes transferring the Child from the US to Israel -- which is an important matter in his life -- and transforms the moving of the Child's residence into a decision which requires the Father's agreement, according to Section 10 of the Rabbinical Decision.

This result also fits the general interpretive principle according to which a specific provision takes precedence over a general provision, and this applies even if the general provision is the later of the two. See A. Barak Interpretations in Law - The Theory of General Interpretations (Vol. A, 5742 - 1982) 540.

The same conclusion also follows from the agreement the parties reached regarding custody of the Child. According to this agreement the Mother's custodial rights were subject to the Father's right to maintain a continuous connection with his son and to participate in all important decisions in the Child's life. It is unthinkable that the parties' mutual intention in Section 2 of the Civil Agreement was the implied nullification of this right of the Father which is integral to the custody agreement.

It is held that the Rabbinical Decision -- whose base is, as stated, an agreement -- vests custodial rights in the Father.

21. Custodial rights were also vested in the Father by the authority of New York State Law. In their arguments the parties' attorneys enlarged upon the law in New York State which applies to our matter, and each of them brought case decisions which supported their positions. Even according to the opinion of the respondents' expert, which was accepted by the District Court, the custodial parent may not remove the Child from the boundaries of jurisdiction without receiving the court's permission, which will only be given when special circumstances exist to doing so. Indeed, according to the same opinion, once the Child has been removed without permission, the court will not order him returned if his best interests demand that he not be returned. However, as explained above, the question of whether the child's best interests obligate letting him stay in the country to which he has been abducted, is not a question to be decided by a court in that same country, but must be decided upon by

a court in the country from which the Child was unlawfully removed. According to the Convention, it is enough if custodial rights have been violated.

22. Custodial rights are also vested in the Father according to the orders of the court in New York State. As stated, the court in New York State decreed that the orders it had issued regarding stay of exit from the boundaries of jurisdiction and bringing the Child before the court had been served on the respondent. The mother denies that she received these orders. But, even if the foreign court is mistaken, it is not the Israeli court's business to correct that mistake. Not only does the principle of honoring the decisions of foreign courts also apply in this matter (Bagatz 330/73, Ibid, 643; Bagatz 510/75 Liponsky vs. Liponsky, Piskei Din 30 (1) 619, 625), but according to to Article 3 of the Convention the injunctions of the court in the country from which the child was removed are one of the sources for the determination of custodial rights.

The District Court noted that the New York courts are willing to forego their honor, and that even if injunctions they issued have been violated it is not possible to return the Child if his best interests dictate that this not be done. But, here as well, the principle applies that the question of whether returning the Child will harm the child's best interests must be determined by the court in the country from which the child was removed.

23. I also did not find an evidential basis for the existence of the defenses claimed by the respondents.

(1) The harm which, according to Article 13(b) of the Convention, is enough to refrain from returning the Child can only be the most serious harm. The opinion of the psychologist, Dr. Perlmutter, does not indicate harm of the type which would justify refraining from returning the Child. Not only this but opposed to Dr. Perlmutter's opinion is the opinion of Dr. Yehudah Nir, that the Child's separation from his father is likely to cause him psychological damage. One way or another, seeing that there is no unequivocal proof that serious harm is likely to occur, it is up to the court in New York to clarify the issue of with which parent the Child's best interests will be served.

(2) The defense according to Article 13(a) of the Convention in the matter of the Father's acquiescence to the Child's remaining in Israel, is based on the fact that the Father's petition was presented ten months after the Child was removed from the USA.

Article 12 of the Convention gives the parent a year's time to petition for the return of the child to his place. The defense of acquiescence enables us to conclude that the parent acquiesced to the Child's removal in the sense that he waived his right to the immediate return of the situation to its former condition, because he did not react to the removal during a reasonable time, which is less than a year. However, this defense does not apply when there is an acceptable reason for the delay. See Civil Appeal 473/93 Leibowitz vs. Leibowitz, Piskei Din 47 (3) 63, 72.

In the instance before us, it may be recalled, the delay stemmed from the Mother's abduction of the Child. She did not notify the Father of the Child's address in Israel and a long time passed until the Father succeeded in locating the address. Only then was he able to submit a petition to the court in Israel, which is what he did. Since the petition was submitted to the court the Father has been working persistently, through his Attorney, for the Child's return. As stated, his petition was denied in the District Court and the appeal proceeding was drawn out, not because of the Father's wishes, but because of this court's attempts at reaching a compromise -- which attempts were made at a time when the previous decision which rejected his petition was still valid, and we had not as yet reached a decision on the matter. Among these efforts at compromise we suggested that the Father

come to Israel to meet with the Child, and we therefore continued the hearing. During this entire period, the Father's representative, Attorney Freedman, continued to emphasize the Father's insistence on his right to have the minor returned to his place of residence. The length of the proceedings cannot therefore be blamed On the Father nor can it be concluded from this length of time that the Father ever waived his right to return the situation to its former condition.

As stated, the convention itself does not recognize the length of the proceedings as being a defense. The position of American case law in this matter is unequivocal, and states that the length of proceedings is irrelevant. See, for example, Rexford vs. Rexford (Alaska 1980) 631 P. 2d 475, 478; Plas vs. Superior Court (1984) 155 Cal.App. 3d 1008, 1015, [202 Cal.Rptr. 490, 494]; Bull vs. Bull (Mich. App. 19881) 311 N.W. 2d 768, 744; Boyd vs. Boyd (Tenn. App. 1983) 653 S.W. 2d 732, 738; Irving vs. lrving (Tex. App. 1985) 682 S.W. 2d 718, 721.5

This is an approach which I can accept. It follows from the Convention's language and objectives. Still, it is understood that when the authorized court in the country from which the abduction took place makes its determination regarding custody, according to the Child's best interests, it will take into account the influence of the time which has passed.

My conclusion is therefore, that since the Father's custodial rights have been proven and since none of the defenses specified in the Convention have been proven, the Child should be returned to the State of New York in the United States of America.

24. As stated, a considerable amount of time has passed since the abduction. The boy has settled into his new surroundings. These facts and his connection to his mother are important considerations in the determination of his custody. However, the decision in this matter is in the hands of the court in the State of New York, and it is incumbent upon it to take account of these considerations and decide according to the best interests of the Child.

25. On the basis of what has been said above, I recommend that the appeal be accepted and that the District Court's decision be overturned. I order the Mother to return the Child to the USA no later than August 21, 1995. We recommend that the Mother, whose devotion to the child is not denied, will make every effort to do this and to return the child to New York by herself. Should she not do so, she must deliver the Child to his father, in Israel, on August 22, 1995, so that he may be returned with him to the State of New York in the USA and act in accordance with the instructions of the court in that state.

I also recommend that the respondents pay the Father's costs, including travel expenses to Israel and accommodation while in the country, as determined by this court's registrar, and that they be obligated to pay the petitioners attorney's fees in the amount of NIS 15,000.

Justice

Justice S. Levine:

I concur.

Justice

Justice Y. Kedmi:

I concur.

Justice

Decided as stated in the judgment of Justice Dorner.

Given on this day, the 18th of Av 5755 (14 August 1995)

Judge Judge Judge

Copy authentic to the original

Shmaryahu Cohen - Chef Clerk

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