[TRANSLATION – EXTRACTS]

…

THE FACTS

The first applicant, Mrs Ethel Teri Eskinazi, who has French and Turkish nationality and was born in 1963, lodged the application with the Court on her own behalf and on behalf of her daughter, Caroline Ruth Chelouche (the second applicant), who has French, Turkish and Israeli nationality and was born in January 2000 in Tel Aviv (Israel). The applicants are currently living in Istanbul.

They were represented before the Court by Mr D. Bollecker, Mr J. Paillot, Mr H.C. Krüger and Ms E. Schwab-Gyrs, of the Strasbourg Bar, and assisted at the hearing by Mr M. Uluç, of the Istanbul Bar, and Ms R. Halperin-Kaddari, a lawyer practising in Israel.

The third-party intervener in the case, Mr Jacques Gabriel Chelouche, of Franco-Israeli nationality and father of the second applicant, was born in 1959 and lives in Tel Aviv.

He was represented before the Court by Mr F. Ruhlmann, of the Strasbourg Bar, assisted at the hearing by Ms M. Lemarchand, a lawyer practising in Paris, and Mr S. Moran, a lawyer practising in Israel.

A. The circumstances of the case

The facts of the case, as submitted by those appearing before the Court, may be summarised as follows.

1. Background to the case

On 20 April 1997 Mrs Eskinazi married Mr Chelouche. The civil wedding took place before the French consular authorities in Tel Aviv. A Jewish wedding ceremony also took place in the same city.

The couple apparently intended to settle permanently in Paris, although Mr Chelouche's professional activities often kept him in Israel and Mrs Eskinazi often went to Turkey, either for work purposes or to visit her family.

As she never sought to acquire Israeli nationality, the first applicant used to stay in Israel on three-month tourist visas issued by the Israeli consulate in Turkey.

On 27 January 2000 the second applicant was born in Tel Aviv. The couple continued travelling between the three countries, however. The child was always accompanied by her mother.

As time went by the couple's relationship deteriorated.

On 8 April 2004 the applicants went to Turkey for Passover. The plan was that they would stay there for ten days. Mrs Eskinazi put off the return date a number of times, however, and ultimately decided to remain in Turkey.

2. The divorce proceedings instituted by Mrs Eskinazi and Mr Chelouche

(a) Mrs Eskinazi

On 29 April 2004 the first applicant filed a divorce petition (case no. 2004-375) with the single judge of the Sarıyer Family Affairs Court in Istanbul ("the Sarıyer Court").

On 30 April 2004 the Sarıyer Court awarded Mrs Eskinazi interim custody of her daughter. Up until then Mrs Eskinazi and Mr Chelouche had had joint custody of their daughter.

(b) Mr Chelouche

On 16 May 2004, having been informed of the situation, Mr Chelouche in turn petitioned for divorce in the Tel Aviv Rabbinical Court (*Batei Hadîn Harabaniim Haezorim* – "the Rabbinical Court"), composed of three religious judges (*dayanim*). Mr Chelouche asked for the issue of custody of his daughter to be determined at the same time as that of the religious dissolution of the marriage. That request conferred full jurisdiction *ipso jure* on the Rabbinical Court to rule on the issue of custody rights.

In his pleadings Mr Chelouche expressed the fear that his daughter would emigrate from Israel, which, judging by his wife's conduct, would sever all his ties with his daughter.

...

On the same day the Rabbinical Court made two orders.

In the first one it ordered Mrs Eskinazi to bring her daughter back to Israel within seven days, failing which her action would be deemed "wrongful removal of the child" within the meaning of Article 15 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). The first applicant was informed of the order by telephone, and subsequently by fax and mail, and was given three days in which to reply.

Before giving its ruling, the Rabbinical Court found it to be established that after their marriage the couple had elected Israel as the family's fixed place of residence, and that Mrs Eskinazi, although a Turkish national, had continually lived in Israel, had obtained a driving licence and work permit in that country and had opened a bank account there. Pointing out that the child was a minor, of Israeli nationality and resident in Israel, the Rabbinical

Court noted that the mother had taken the child to Turkey on 8 April 2004 supposedly for ten days, but had never returned.

The order in question authorised the father to confiscate the child's passport, once she crossed the Israeli border, and to "use all means" to safeguard his parental rights.

In the second order the Rabbinical Court also imposed a prohibition on Mrs Eskinazi and her daughter leaving Israeli territory. That measure, which was initially valid until 17 May 2005, was lifted on 12 January 2005.

On 10 February 2005 the Rabbinical Court decided to adjourn its hearing in the divorce proceedings, which are still pending. Mrs Eskinazi is represented in those proceedings by two members of the Tel Aviv Bar.

3. The proceedings instituted under the Hague Convention

(a) The measures taken by Turkey's Central Authority

As a first step, Mr Chelouche lodged a criminal complaint in Turkey against his wife for child abduction. The Sarıyer public prosecutor's office took no action, however, on the ground that the case fell to be dealt with under the Hague Convention and should be brought before the bodies having jurisdiction to deal with it.

Mr Chelouche therefore applied to the Ministry of Justice of his country, designated as the Central Authority ("Israel's Central Authority"), for assistance in securing his daughter's return to Israel, in accordance with the procedure laid down in Articles 8 and 9 of the Hague Convention.

On 10 June 2004, for the purposes of those proceedings, Israel's Central Authority sent the two aforementioned orders of the Rabbinical Court to its Turkish counterpart, namely, the General Directorate of International Law and Foreign Relations at the Ministry of Justice ("Turkey's Central Authority").

On 23 June 2004 Turkey's Central Authority instructed the Sarıyer public prosecutor ("the public prosecutor") to ascertain the child's current address, apply to the Sarıyer Court for an order prohibiting her from leaving Turkish territory, and to summon Mrs Eskinazi in order to obtain a statement from her about the alleged abduction.

On 1 July 2004 the Sarıyer Court decided, in case no. 2004-375, to issue the order requested by the public prosecutor, and gave instructions for the border posts to be informed accordingly.

On 6 July 2004 Turkey's Central Authority was sent two further applications by the Israeli authorities claiming that, under Article 16 of the Hague Convention, custody rights should be withdrawn from Mrs Eskinazi as the Rabbinical Court had found her liable for "child abduction".

Turkey's Central Authority then instructed the public prosecutor to raise a preliminary question in case no. 2004-375 pending before the Sarıyer Court, requesting the court not to rule on the custody of the child pending

the outcome of the dispute regarding her return to Israel. On 9 July 2004 the Sarıyer Court followed the public prosecutor's advice and withdrew Mrs Eskinazi's custody of her daughter.

On 19 July 2004 friendly-settlement negotiations, conducted at the request of Turkey's Central Authority and under the aegis of the Sarıyer Court, failed after Mr Chelouche insisted on his daughter's repatriation.

On 23 July 2004 Turkey's Central Authority sent Mrs Eskinazi's lawyer a request from the Israeli authorities regarding the arrangements proposed by Mr Chelouche for visiting his daughter in Istanbul.

(b) Proceedings for the return of the child

On 16 August 2004 the public prosecutor brought proceedings in the Sarıyer Court for the return of the child to her father (case no. 2004-683).

(i) The hearings

The Sarıyer Court held two hearings in the case.

At the hearing on 17 September 2004 the parties submitted their preliminary observations. Counsel for Mrs Eskinazi argued that the Hague Convention was inapplicable in a number of respects to the case in hand and produced in support of that submission private legal opinions by Turkish professors of private international law and French lawyers.

With a view to proving that the child was socially integrated in Turkey and had ties there, Mrs Eskinazi also relied on numerous documents and witness statements, and asserted that the girl had gone with her to Turkey with the father's consent and could not therefore be regarded as having been abducted.

Mr Chelouche, for his part, disputed those submissions and called two witnesses: his uncle and mother.

At the end of the hearing the court fixed the father's visiting days. The visits were to take place at the mother's home in the presence of a social worker, but without the mother being present.

At the following hearing, on 25 October 2004, which was the last one, the Sarıyer Court first took formal note of the documents produced by Turkey's Central Authority in support of Mr Chelouche's application. These were statements from nurseries and paediatricians in Israel. Also produced in the proceedings was an official record of the dates on which the child had gone in and out of Israel during the period 2000-04, drawn up by the Tel Aviv city authorities and the Israeli and Turkish border police.

During the proceedings Mr Chelouche, referring in particular to the information provided by the Central Authorities, claimed that his daughter had spent 76% of her life in Israel. He submitted that his right was established and that a ruling had to be made expeditiously, since Article 11 of the Hague Convention required proceedings to be disposed of within six weeks.

The court then heard evidence from Mr Chelouche's mother and uncle and from the defendant's eight witnesses. According to the latter, the child and her mother had mainly spent their time in Turkey, with the father's knowledge. The first applicant also produced a written statement to that effect by Mr S. Levi, an Israeli importer known to the couple.

Mrs Eskinazi relied further on photocopies of her passport, declaring that she had never stayed in Israel for more than 132 days out of 365 and had always had her daughter with her. She also submitted several psychologists' opinions questioning Mr Chelouche's ability to assume custody of his daughter.

In addition, Mrs Eskinazi challenged the participation of a public prosecutor in the proceedings and complained that the plaintiff was attempting to influence the court by referring to observations of the Turkish Central Authority that were not based on any final judicial and binding decision awarding custody of the child to the father, that right having previously been exercised jointly by the parents in Israel.

Lastly, Mrs Eskinazi submitted a list of further witnesses. The public prosecutor opposed her application to call them, arguing that the case was ready for decision and that, in the light of the evidence, the court should find in favour of Mr Chelouche.

In accordance with Article 13 (b), second paragraph, of the Hague Convention, the Sarıyer Court did not hear the second applicant on account of her young age.

(ii) The judgment of 25 October 2004

At the end of the proceedings the Sarıyer Court decided that the child should be returned to her father in Israel, and maintained the prohibition on her leaving Turkey until the judgment became final.

The court found that, whilst the parties to the dispute had joint custody of their daughter, Mrs Eskinazi had assured Mr Chelouche that she would go to Turkey on 8 April 2004, as usual, and return on 18 April, which she had not done in the end, contrary to the father's wishes. Having regard in particular to the official record provided by Israel's Central Authority, the court found that, during the period 2000-04, that is, until Miss Chelouche was removed, she had spent only 455 days outside Israel.

The other relevant passages from the judgment read as follows:

> "... The Court cannot accept the argument submitted by the defendant and her representative that the child's habitual place of residence is not Israel. In the light of the two-page official document issued by the Israeli Ministry of the Interior ... setting out the dates of the child's entry into and exit from Israel between 2000 and 2004 ... and the other documents ..., it is established that, from her birth onwards, the child spent most of her life in Israel. The assertion regarding the habitual place of residence is therefore inadmissible, particularly when regard is had to the fact that the defendant declared on 15 July 2004 before the Sarıyer public prosecutor that she had lived in Israel for the six years that elapsed following the marriage. The child's habitual place

of residence, prior to her removal, was therefore Israel, notwithstanding the contrary statements by the defendant's witnesses, which are not based on established facts and are contradicted by the official documents filed in the proceedings.

Nor can the Court accept the final submission of the defendant's representative, based on Article 13 (b) of the Hague Convention, according to which the conditions for ordering the child's return are not satisfied on account of the state of war affecting Israel. It would appear that life in Israel pursues its normal course regarding, among other things, teaching, education, business, tourism, etc., and that the conflict and disorder in the country are confined to certain specific regions. Moreover, the conflict, which is not new and has been going on for many years, did not stop the parties from continuing to live in Israel. Furthermore, the existence of a grave risk, within the meaning of Article 13 (b) of the Hague Convention, that her return would expose the child to physical or psychological harm or otherwise place her in an intolerable situation has not been established. Thus, the conditions for refusing to return the child, as specified in the said Article, have not been made out."

The judge of the Sarıyer Court concluded as follows:

"... After hearing the parties' submissions, I consider it established that Caroline Ruth Chelouche was taken to Turkey by her mother and subsequently removed ... from her father, contrary to the latter's wishes, in breach of Article 3 of the Hague Convention ... I also consider it established that the requirements regarding the time-limit stipulated in Article 12 § 1 of [that convention] are satisfied, but that the conditions capable of justifying a refusal to return the child in the light of Articles 13 and 20 are not."

(iii) The steps taken by the first applicant following the judgment of 25 October 2004

On 1 November 2005, following the divorce proceedings instituted by her husband, Mrs Eskinazi applied to the Tel Aviv Civil Family Court (*Batei Mishpath Lelnyanei Hamishpa'ha*), using an Israeli lawyer. The application, which was lodged on Caroline Chelouche's behalf, sought to challenge the jurisdiction of the religious courts on the ground that the mother was not an Israeli national and did not reside in Israel.

However, after a thorough examination of the case another lawyer convinced the first applicant that the application "stood no chance of success", and she withdrew it on 23 November 2005.

On 11 February 2005 Mrs Eskinazi's final application for reinstatement of custody of her daughter, in case no. 2004-375, was dismissed by the Sarıyer Court, having regard to the order for the child's return in case no. 2004-683.

(iv) The appeal against the judgment of 25 October 2004 and the enforcement proceedings

On 18 February 2005 Mrs Eskinazi appealed on points of law against the decision to return the child to her father. Relying on the concept of the "best interest of the child", she maintained that her daughter's habitual residence was in Turkey. In her submission, a child could have several places of

residence, under the rules of international law, and, in any event, the Hague Convention could not be applied merely by calculating the number of days the child had spent in Israel.

The first applicant argued that the child could not therefore be considered to have been abducted, especially as the father had knowingly agreed to the child gradually settling in Turkey; Mr Chelouche had neither a fixed place of residence nor regular work commitments in Israel, and had himself been keen to settle elsewhere.

According to Mrs Eskinazi, he had in fact acted in bad faith in order to have the child's habitual residence established arbitrarily, deliberately referring the matter to a rabbinical court, which – despite having no jurisdiction – had ruled in the absence of the mother on the basis of religious tenets and with total disregard for the principles of equality of arms and adversarial process.

Lastly, Mrs Eskinazi's lawyer referred to the prosecution's participation in the proceedings before the Sarıyer Court, alleging that this had considerably swayed the mind of the single judge of the Sarıyer Court.

...

On 22 March 2005 the Court of Cassation held a hearing at which it heard submissions from both parties' representatives. On 29 March 2005 it upheld all the provisions of the impugned judgment.

The applicant then lodged an application for rectification of a judgment.

On 25 April 2005, at the request of its Israeli counterpart, Turkey's Central Authority instructed the public prosecutor to take the necessary measures to prevent Mrs Eskinazi from leaving with the child.

On 22 September 2005 Mrs Eskinazi's application for rectification was refused and the judgment ordering the child's return thus became final.

On 10 October 2005 Mr Chelouche brought enforcement proceedings for the return of his daughter.

Enforcement of the judgment was stayed, however, in accordance with the interim measure indicated in the case by the European Court under Rule 39 of the Rules of Court.

4. The events concerning more specifically the second applicant

A report drawn up on 22 October 2004 by the social worker responsible for overseeing the parental visits noted that Mrs Eskinazi had made efforts to ensure that the child's meetings with her father were conducted smoothly and in a warm atmosphere. A second report, filed in the proceedings on 25 October 2004, on the date when the judgment at first instance was delivered, still referred to a harmonious relationship between the child and her father.

However, the many further reports drawn up by social workers after that judgment were increasingly critical of the father.

On 27 February 2005, when visiting the child at Mrs Eskinazi's flat, Mr Chelouche allegedly attacked the social worker present, insisting that he wanted to talk to his daughter alone. He allegedly also caused damage in the flat. A complaint lodged in connection with those events led to the institution of criminal proceedings, which are still pending.

It appears that relations deteriorated still further after that incident, and on 7 May 2005, at Mrs Eskinazi's request, a second indictment was filed against Mr Chelouche.

Following a series of psychiatric examinations carried out in September and October 2005, in the appropriate departments of two university hospitals, the second applicant was diagnosed with post-traumatic stress disorder. She has been taking medication ever since.

B. Relevant domestic and international law and practice

1. International texts

(a) The Hague Convention on the Civil Aspects of International Child Abduction (ratified by Turkey and by Israel)

For some of the provisions of this convention, see, for example, *Iglesias Gil and A.U.I. v. Spain* (no. 56673/00, § 29, ECHR 2003-V). The following Articles are also relevant:

Article 9

"If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be."

...

Article 14

"In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."

Article 15

"The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from

the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."

Article 16

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice."

Article 20

"The return of the child under the provisions 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."

Article 30

"Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States."

(b) Convention on the Rights of the Child

The relevant provisions of this convention, ratified by Turkey and by Israel on 4 April 1995 and 3 October 1991 respectively, provide:

Article 3 § 1

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 8 § 1

"States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference."

Article 9 §§ 1-3

"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present Article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

Article 10

"1. In accordance with the obligation of States Parties under Article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under Article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the present Convention."

...

Article 12

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

(c) International Covenant on Civil and Political Rights

Article 23 of the International Covenant on Civil and Political Rights, signed by Turkey on 15 August 2000 and ratified by Israel on 3 October 1991, provides:

> "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> ...
>
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

Israel's reservation regarding that provision reads as follows:

> "With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned.
>
> To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law."

Implementation of the Covenant by the States Parties is supervised by the Human Rights Committee, which is a body made up of independent experts. Under Article 41 of the Covenant, the Committee may examine communications of States Parties in respect of other States. All the States Parties undertake to submit reports, at regular intervals, on the measures they have adopted which give effect to the rights recognised in the Covenant. They must submit an initial report within one year of acceding to the Covenant and subsequently whenever the Committee requests one. The Committee studies the reports and informs the State Party concerned of its concerns and recommendations in the form of "final observations". The Committee meets in Geneva or New York and generally holds three sessions per year.

(d) Parliamentary Assembly of the Council of Europe

Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe on a European Charter on the Rights of the Child states among the first general principles:

> "(a) Children must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs;"

2. Relevant national laws and practices

(a) Turkish law

The Hague Convention has statutory force in Turkish law and forms part of the legislation. In theory, the execution in Turkey of a decision of a foreign court requires a registration procedure. However, by virtue of Article 14 of the Hague Convention, decisions delivered by the courts of the place of "habitual residence" of the child concerned are applicable without any need for a registration procedure. When dealing with an application under Article 8 of the Hague Convention, the Turkish family affairs courts are therefore empowered to rely directly on the court decision on which the application is based as conclusive evidence (Article 30 of the Hague Convention), without having to endorse it in the legal sense of the term.

Execution of a decision to return a child to the country deemed to be its "habitual residence" is carried out by public prosecutors, on behalf of the General Directorate of International Law and Foreign Relations at the Ministry of Justice, that is, "the Central Authority" designated to implement the procedures laid down in the Hague Convention.

In practice, in that context, the public prosecutor in charge of execution asks the requesting Central Authority to inform him of the date of arrival of the parent whose child has been abducted and makes the necessary arrangements for the child to be returned in the best conditions.

In accordance with Article 25 (b) of the Judgment Enforcement Code, procedures for the return of a child and meetings in person with a child are conducted in the presence of an expert (social worker, teacher, psychologist, etc.) who is appointed jointly by the head of the Judgment Enforcement Agency and the Institute of Social Services and the Protection of Children.

(b) Israeli law

(i) General information

The Law of 1984, which establishes the structure of the Israeli legal system, provides – apart from the special courts – for three major types of court: civil, religious and military. The religious courts are governed by the Rabbinical Courts (Marriage and Divorce) Act (Law no. 5713/1953). The laws applicable to Israeli Jews in the sphere of personal status are generally based on the *Torah*[1] and the *Halacha*[1].

1. Comprising the first five books of the Bible: Genesis, Exodus, Leviticus, Numbers and Deuteronomy. Often referred to as "The Law of Moses", they constitute the basis of Jewish religious traditional knowledge. The principal collection of commentaries on the "Law of Moses", i.e. of the *Torah*, is the *Talmud*, which means "teaching".

For parties of the Jewish faith, the regional rabbinical courts (*Batei Hadîn Harabaniim*) have exclusive jurisdiction in the areas of, among other things, divorce, marriage and diet of the members of their community. They also have jurisdiction in any other sphere relating to the personal status of Jews (such as custody and contact rights in respect of children, maintenance payments, filiation, etc.). Moreover, in respect of those matters, the regional rabbinical courts and the civil family courts (*Batei Mishpath Lelnyanei Hamishpa'ha*) – which are governed by the Family Courts Act (Law no. 5755/1995) – are vested with concurrent jurisdiction, which, in practice, becomes exclusive for the court before which the case is first brought.

Decisions of the rabbinical courts delivered at first instance are subject to review by the Grand Rabbinical Court (*Beith Hadîn Harabani Hagadol*), which is the appeal court.

Whether a case is tried by the rabbinical or the civil courts, the final court of appeal is the Supreme Court. According to the information in the Court's possession, however, in respect of the rabbinical courts the Supreme Court acts as High Court of Justice, under section 15(c) of the above-mentioned Law of 1984, and, accordingly, the object and scope of its power of review are more limited. In practice, it would appear that this power of review is often exercised in respect of disputes relating to the jurisdiction of the rabbinical courts and, more rarely, in cases of denial of natural rights and non-application of the mandatory provisions of civil law. It is accepted that, in cases of conflict of jurisdiction, the Supreme Court can set aside the decision of the rabbinical court and refer the case to a civil court, but that, where errors of law with regard to the *Halacha* are concerned, it will merely remit the case to the original rabbinical court for it alone to amend its decision.

...

(iv) Specific issues concerning the get *institution and* ne exeat *measures*

(α) The *get*

Many Israeli writers point to the inequality between the sexes in the rabbinical courts, particularly in connection with the *get* institution, which is often criticised by Israeli society. In accordance with the *Halacha*, only the husband may petition for divorce from his wife, by handing her the *get*. There is a consensual aspect to the measure, however, since the wife is free to accept or refuse the *get*.

...

1. Sometimes called "the Jewish religious law", the *Halacha*, derived from the 613 laws of the *Talmud*, is the corpus not only of rabbinical law but also of Jewish traditions and customs.

(β) *ne exeat* measures

Under Israeli law, the family courts and the rabbinical courts can, in the interests of the proper conduct of the proceedings, prohibit a party to divorce proceedings from leaving Israeli territory. According to the information available, such *ne exeat* measures are ordered by the rabbinical courts at the request of the party petitioning for divorce, normally for a renewable one-year period. Where the respondent is not an Israeli national, the measure is applied with particular rigour. Where the opposing party objects, the rabbinical court determines the matter following a hearing of the issue.

COMPLAINTS

The first applicant, Mrs Eskinazi, acting on her own behalf and as legal representative of her daughter, asserted firstly that demanding her daughter's return to Israel amounted to a potential violation of Article 8 of the Convention in so far as the circumstances capable of bringing the Hague Convention into play had not been made out. In that connection she complained, in particular, that the Turkish courts had based their decision solely on the issue of the place of her daughter's "habitual residence", without ever considering the child's "best interests", and had confined their examination to calculating the number of days she had spent in Israel since her birth.

Relying on Article 6 of the Convention, taken in conjunction with Article 8, Mrs Eskinazi also complained that returning her daughter to Israel would have the direct consequence of depriving her of an effective remedy before the Turkish courts by which to seek custody of her daughter. That question would be examined by the rabbinical court to which her husband had applied, that is, a religious court which did not provide the same fundamental guarantees relating to public policy as a secular court and which she did not in any way recognise as having jurisdiction in the case.

THE LAW

The relevant parts of Article 6 and Article 8 of the Convention provide:

Article 6

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ..."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

...

B. The complaint under Article 8 of the Convention

1. Arguments of those appearing before the Court

(a) The applicants

In her written and oral observations, the first applicant stressed that her daughter's return to Israel would be contrary to the child's interests because it would sever both her strong emotional bond with her mother and her family and social ties in Turkey, where she had spent most of the previous two years.

In that connection the first applicant explained that her daughter, who had a perfect command of Turkish, was currently enrolled at a school in Turkey, was doing exceptionally well in dancing and riding classes, and had thus developed a social life in the country, where she had made friends, established a routine and forged memories.

The Turkish courts had nevertheless decided that she should return to a country where she had no frame of reference and did not even speak the language. She had never been to school there, although she had apparently been enrolled in a number of nurseries or schools for purely administrative purposes. The child did not have a single friend in Israel and her only close relatives there were her paternal grandparents; more importantly still, she had never lived alone with her father, and it was questionable, in the first applicant's submission, whether he was psychologically capable of taking on such a responsibility.

Mrs Eskinazi also criticised the decision not to let her daughter testify before the court, contrary to Article 13 (b), second paragraph, of the Hague Convention. She considered that the child's alleged inability to form her own views should have been backed up by an expert report and not left to the judge's discretion alone.

The national authorities had refused to accept that her daughter had never had a fixed residence in Israel that could be regarded as her habitual

residence and, moreover, that returning a child to its alleged place of habitual residence did not always coincide with the child's best interests.

Even assuming that the Turkish courts' strict interpretation was well-founded, they should nonetheless have ensured, as required by Articles 13 and 20 of the Hague Convention, that the request for the child's return was justified and did not infringe Article 8 of the European Convention on Human Rights. The circumstances of the present case did not involve any conflict between the two instruments and, even if there had been one, it was the European Convention on Human Rights that should prevail since this Court was the ultimate guarantor of fundamental human rights.

The Turkish courts had not done so, however. The Sarıyer Family Affairs Court had practically adopted the decision of the Rabbinical Court. Under Turkish private international law, it was impossible to validate such a decision, however, because not only did it emanate from a religious court renowned for giving preference to husbands, but it had also been delivered at the end of summary and not adversarial proceedings.

According to Mrs Eskinazi, the outcome of the proceedings in question could be explained by the participation of the prosecutor, who should have confined himself to presenting the application for the child's return and not attended hearings or given an opinion, which he had done despite the defendant's objections, thus influencing the outcome of the case.

...

(b) The Government

As a subsidiary argument, the Government submitted that there had not been any interference within the meaning of Article 8, as the Turkish courts had strictly confined themselves to implementing the proper procedure under the Hague Convention.

In that connection they first pointed out that, for the purposes of protecting the parties' interests, the Sarıyer Family Affairs Court had granted Mrs Eskinazi's request for an injunction preventing Mr Chelouche from leaving Turkish territory with his daughter until the end of the domestic proceedings. The court had also taken the necessary measures to regulate the father's visits to the child, a right which he had only been able to exercise for the first five months on account of the conduct of the first applicant.

Before giving its decision, the Sarıyer Court had rigorously analysed the evidence submitted by the Central Authorities and examined all the allegations of the requesting party in the light of the relevant criteria, including the "habitual residence", which was bound up with the criterion of the "child's best interests". The facts established in the present case concerning the determination of the child's habitual residence were based on unequivocal official Turkish and Israeli documents contradicting the

allegations of Mrs Eskinazi, who had placed particular reliance on statements by her family and friends.

It had thus been established that the girl had been removed from her father in breach of the parental authority and custody rights previously exercised jointly by the couple under Israeli law, without a divorce decree or final decision regarding custody of their daughter having been pronounced.

It was also established that the conditions stipulated in Articles 13 and 20 of the Hague Convention, which alone could impede the child's return, had not been met: at no time had it been proved that she would be exposed – to the detriment of her fundamental rights and freedoms – to any harm if she were taken back to Israel, the country where Mrs Eskinazi had married and had lived for several years and where her daughter had been born.

With regard to the child not being heard by the Sarıyer Court, the Government referred to a practical guide published by the committee responsible for the implementation of the Hague Convention and explained that in such cases it was recommended that minors be heard from the age of ten upwards.

Regarding the prosecutor's participation in the proceedings, the Government pointed out that, under the Hague Convention, the prosecution authorities were not in any way involved as a judicial body applying the criminal law, but exclusively as local agents to whom power is delegated by Turkey's Central Authority in accordance with a ministerial circular of 24 November 2000[1].

(c) The intervening party

In his written and oral observations, the third-party intervener pointed out that the case brought before the Court was an ordinary one of child abduction and not a dispute about custody rights.

In that connection, he argued that the Hague Convention, the purpose of which was precisely to recreate – in the child's interests – the situation that had existed prior to the abduction, had to be applied strictly and without delay, which was common sense and should also prevent the parent who had abducted the child from taking advantage of the situation.

Mr Chelouche further submitted that the two international conventions in issue in the present case should be superimposed and that the European Convention on Human Rights did not take precedence over the Hague Convention.

With regard to Mrs Eskinazi's version of the facts, the third-party intervener stated that his daughter had spent 76% of her life in Israel and the

1. The contents of the documents produced by the Government are incorporated into the text of the decision.

remainder in Switzerland, England, Turkey and France, and strongly disputed the truth of the contention that he himself lived in France.

The third-party intervener deplored the conduct of the first applicant, alleging that she had used delaying tactics and lodged premeditated complaints in order to delay the child's return. He complained of the extreme tension that had been created unnecessarily and that had resulted in his daughter needing psychiatric care.

Moreover, Mr Chelouche agreed with the Government that there had been no obstacle, for the purposes of Article 20 of the Hague Convention, to his daughter's return to her country of origin, adding that that provision had to be interpreted restrictively and should be applied only in the event of very serious problems, and not those raised casually and out of ignorance of the "legal system" in Israel, which was a country governed by the rule of law in which there was nothing to suggest that a child, once he or she had gone back there, would not be able to leave the country.

With regard, lastly, to his daughter's participation in the proceedings for her return, Mr Chelouche alleged that it would not have been appropriate to hear her, having regard to the risk of a child being manipulated beforehand by the parent who had abducted him or her.

...

2. The Court's assessment

The Court notes at the outset that it is not disputed in the present case that, for Mrs Eskinazi and her daughter Caroline, the continued mutual enjoyment of each other's company constitutes a fundamental element of family life within the meaning of the first paragraph of Article 8 of the Convention, which is therefore applicable here (see *Maire v. Portugal*, no. 48206/99, § 68, ECHR 2003-VII).

It would also appear undisputed that in relation to both applicants the proceedings complained of involved an "interference" within the meaning of paragraph 2 (see *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 55, §§ 86 and 87), it being understood that the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition (see, for example, *Iglesias Gil and A.U.I.*, cited above , § 48, and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 55, 24 April 2003).

The applicable principles are comparable and must be applied in accordance with the principles of international law, in particular those concerning the international protection of human rights (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II, and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI). No issue of hierarchy needs to be addressed.

The obligations imposed under Article 8 must be interpreted in the light of the requirements of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (see *Iglesias Gil and A.U.I.*, cited above, § 51, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I) and the Convention on the Rights of the Child of 20 November 1989 (see *Maire*, cited above, § 72).

In the instant case the Court notes, moreover, that the decision of the Sarıyer Family Affairs Court was based on the provisions of the Hague Convention, incorporated into Turkish law and applied with the aim of protecting the second applicant, the lawfulness of which aim has moreover not been challenged (see *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV).

It remains to be determined whether the above-mentioned interference was "necessary in a democratic society" within the meaning of paragraph 2 of Article 8.

What is decisive is whether the necessary fair balance was struck between the competing interests of the child, her two parents and public policy, within the limits of the margin of appreciation enjoyed by the States in the area (see *Sylvester* and *Maire*, cited above, ibid.). In that connection it should be pointed out that, whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect for the interests safeguarded by Article 8 (see *McMichael*, cited above, ibid.).

In the present case Mrs Eskinazi left Israel, together with her daughter, on 8 April 2004 on a visit to Turkey. She put off her return a number of times before deciding not to go back to Israel.

The Court observes that, under Article 3 of the Hague Convention, the removal or retention of a child is to be considered "wrongful" where it is in breach of rights of custody attributed to a person under the law of the State in which the child was "habitually resident" immediately before the removal or retention.

With regard to the rights of custody of Caroline Chelouche, which certainly included the right to determine her place of residence, it should be pointed out that under the Hague Convention these rights may arise, *inter alia*, by operation of law. This was indeed the case here, since on the date when the child was removed it is not disputed that Mrs Eskinazi and Mr Chelouche exercised jointly, under Israeli law, parental responsibility and rights of custody (compare *Guichard v. France* (dec.), no. 56838/00, ECHR 2003-X).

The refusal by Mrs Eskinazi, who had joint custody rights, to return the child to Israel, in breach of the rights of Mr Chelouche, the other person with joint custody rights, undoubtedly brought the case within the scope of the Hague Convention, notwithstanding the father's initial consent to the

visit to Turkey (consent explained by the fact that the visit was meant to last ten days, though it in fact went on for longer).

Accordingly, under Articles 6 and 7 of the Hague Convention, the Central Authorities had to cooperate with each other and promote cooperation amongst the competent authorities in their respective States, it being understood that the obligations on the Turkish authorities in the present case were not extinguished following the decision of 30 April 2004 awarding Mrs Eskinazi custody of her daughter in case no. 2004-375. That interim decision was, moreover, subsequently set aside.

Thus, on 10 June 2004 Israel's Central Authority applied to its Turkish counterpart for the return of the child, basing its request*, inter alia*, on a decision of the Tel Aviv Rabbinical Court that the child had been "unlawfully" removed from her place of "habitual residence".

In the proceedings instituted in that regard the Sarıyer Family Affairs Court assessed the credibility of the evidence submitted by the parties, including witness evidence, to ensure that there was a fair trial. Basing its decision on, among other things, the official records produced by Israel's and Turkey's Central Authorities – unrefuted by the first applicant, moreover – the Turkish court was satisfied that, prior to her removal, Caroline Chelouche had spent most of her life in Israel, which should therefore be regarded as her "habitual residence" for the purposes of the Hague Convention.

Admittedly, before reaching that conclusion the court had also taken account of the decision of the Rabbinical Court, which was strongly contested by Mrs Eskinazi. It was empowered to do so, however, under the Hague Convention, which allows courts to rely on foreign court judgments directly without any need for a registration procedure. Moreover, it is apparent from the judgment of 25 October 2004 that the conclusions of the Rabbinical Court – which, moreover, did not concern the merits of custody rights in respect of Caroline Chelouche – were used merely as factual elements, for the purposes of Article 13 *in fine* and Article 14 of the Hague Convention. It follows that the first applicant's complaint that the decision of the Rabbinical Court was delivered in her absence has no decisive weight.

Having regard to all the evidence, the Court is not aware of any circumstance that might call into question the findings of fact of the national authorities (see *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, pp. 17-18, §§ 29-30) and considers that, on 10 June 2004, the date of the application for the child's return lodged by Israel's Central Authority, Caroline Chelouche had been wrongfully removed within the meaning of the Hague Convention.

Having reached that conclusion, the Court points out that its examination must now be strictly limited to assessing the circumstances prior to 10 June 2004, including in particular those referred to in relation to the alleged

unsuitability of one or other of the parents. The order for the child's return under examination here is a purely interim measure and does not prejudge the merits of the issue of custody, which the Hague Convention does not seek to establish, still less the Court.

Relying on Articles 13 (b) and 20 of the Hague Convention, the first applicant complained that insufficient consideration had been given to her daughter's best interests.

The Court agrees with the first applicant that the concept of the child's best interests should be paramount in the procedures put in place by the Hague Convention. However, it should not be overlooked that among the constitutive elements of that concept is also the fact of the child not being removed from one of its parents and retained by the other, who rightly or wrongly considers that their right over the person of the child is as important or more important. In that connection, the Court points out that Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe states that "[c]hildren must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs".

Coming back to the facts of the case, the Court notes that the Turkish courts finally concluded that the child's return to Israel would not expose her to physical or psychological harm or place her in an intolerable situation and/or a situation incompatible with her fundamental rights and freedoms.

The Court does not see any reason, in the light of Article 13 (b) of the Hague Convention, to believe that the Sarıyer Court and the Court of Cassation drew arbitrary conclusions from the arguments freely submitted to them in the adversarial proceedings and at the hearings before the two levels of jurisdiction. The judgments of the national courts are sufficiently reasoned on this point.

In the instant case it is sufficient for the Court to point out that a situation that might appear unstable in certain parts of Israel does not suffice, on its own, to claim, under the Convention, that once the second applicant returned to the country, accompanied by her relatives, her personal situation would give greater cause for alarm than that of other children living in Israel, especially as the Eskinazi-Chelouche family had lived in the country for years without trouble and the child herself was born there.

There is therefore nothing to suggest that the decision-making process leading to the adoption of the impugned measures by the domestic court was unfair or failed to involve the first applicant to a degree sufficient to protect her interests (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 28-29, §§ 64-65; *McMichael*, cited above, pp. 55 and 57, §§ 87 and 92; and *Tiemann,* cited above).

In that connection, the Court does not accept the argument based on the Sarıyer prosecutor's participation in the proceedings, particularly as the first applicant, who was represented by several lawyers, never suggested that she

had been denied knowledge of the grounds submitted by the prosecutor or the possibility of disputing them. As regards the complaint that Caroline Chelouche was not heard, the Court stresses that it is not its task to substitute its own assessment of the facts and the evidence for that of the Turkish courts regarding the adequacy of such a delicate process or to review the interpretation and application of the provisions of international conventions (in the present case Article 13 of the Hague Convention and Article 12 § 1 of the Convention on the Rights of the Child), other than in cases of an arbitrary decision. The applicant has not substantiated any such allegation; neither has one been made out on the basis of the material before the Court. Having regard to the child's age, the Court finds it plausible that hearing her would not have served any purpose.

There remains, however, the issue of respect for fundamental rights and freedoms within the meaning of Article 20 of the Hague Convention, which presents a number of particularities.

In that connection, the first applicant drew attention to the features of the rabbinical courts in Israel, to which she and her daughter would have to submit if the disputed measure were executed. She complained of the *get* requirement and the *ne exeat* measures provided for under Israeli law and also of the discriminatory procedures and religious considerations which would work to her disadvantage regarding the determination of the rights relating to her daughter's personal status.

Despite their undeniable relevance in the light of the procedural requirement inherent in Article 8 of the Convention, the Court nonetheless considers that it should examine these arguments in the framework of the complaint based on Article 6 § 1 (see, *mutatis mutandis*, *Sylvester*, cited above, § 76, and *McMichael*, cited above, p. 57, § 91), a provision which – in the special circumstances of the instant case – requires it to review whether Mrs Eskinazi or her daughter risk being subjected to "a flagrant denial of justice" in Israel, a State not party to the Convention.

After that final examination, the Court will rule on the application as a whole.

C. The complaint based on Article 6 of the Convention

1. Arguments of those appearing before the Court

(a) The applicants

Mrs Eskinazi pointed out that if her daughter were returned to Israel it would be a rabbinical court ruling both on the divorce and the related issues of personal status. She submitted that she would thus be definitively denied the benefit of fair proceedings in the Turkish courts, to which she had duly

applied prior to any proceedings instituted by her husband. Once the case had been finally decided by the Rabbinical Court, even if she were to obtain a favourable decision in Turkey one day, it would hardly be enforceable in Israel.

In that connection, Mrs Eskinazi maintained that she and her daughter were in a particularly difficult position on account of the prohibition on leaving Israeli territory that had been imposed on them, since there was nothing to rule out the possibility that the prohibition would remain in force once they had crossed the Israeli borders.

According to the first applicant, since the Rabbinical Court was a religious court, any future decision by that court would be contrary not only to Article 6 but also to Turkish public policy.

The first applicant pointed out that a possible review by the Israeli Supreme Court did not afford her any safeguards, since its authority over the rabbinical courts was, in theory, limited to questions of jurisdiction or denial of fundamental rights. Furthermore, the case-law of the Supreme Court did not contain any significant example of a decision of a rabbinical court being overturned because it had not duly taken account of the child's best interests.

The first applicant submitted that the criterion of the child's best interests was inherent in the Mental Capacity and Guardianship Act of 1964. In practice, however, the rabbinical courts' interpretation of that criterion differed considerably from that of the civil courts: the rabbinical courts gave precedence to religious considerations when assessing the child's interests and systematically ignored the opinions of specialists in the field.

At the hearing the first applicant stated, in reply to a question regarding the possibility of continuing the divorce proceedings in Turkey and referring the question of custody of the child to a civil court in Israel, that this would be impossible under Article 182 of the Turkish Code of Civil Procedure, which provided that the jurisdiction of the court that had ruled on the divorce issue could not be excluded regarding the question of child custody. Even a mutual agreement between the parties to that end would be considered null and void.

The first applicant also explained at the hearing why she had withdrawn the proceedings she had initially instituted in the Israeli civil courts in order to have the issue of custody decided separately. In August 2004 the Supreme Court had delivered a judgment (*Sharabi* case) holding that, where child custody proceedings were bound up with divorce proceedings, the two issues had to be determined by the same court. The proceedings would therefore have been bound to fail, given the divorce proceedings introduced much earlier by her husband before a rabbinical court.

(b) The Government

The Government firmly maintained that it was definitely not the task of the Turkish authorities to give judgment *in abstracto* on the judicial system legally established in another State that was not a party to the Convention. They also stressed the fact that in the instant case no one could claim to have been injured from the outset as a result of a measure attributable to that system.

The Government contended that, in any event, the applicant had been unable to substantiate her allegations regarding the rabbinical courts and consequently the existence of a risk of a denial of justice, as understood by the Court.

The Government asked the Court to refrain from speculating about a situation of fact and law which, to date, had not been established either with regard to Caroline Chelouche or her parents.

(c) The intervening party

The third-party intervener submitted that the Sarıyer Family Affairs Court had duly examined Mrs Eskinazi's complaints about the rabbinical courts, particularly with regard to their alleged failure to respect human rights, their purported bias against women, and their denial of the child's interests. The Turkish courts had not in the end found any potential conflict with Turkish public policy.

The intervening party, supported in this regard by the written submissions of the Israeli ministerial authorities, pointed out that, subject as they were to the supervision of the Israeli Supreme Court, namely, the highest civil court of a State governed by the rule of law, the rabbinical courts took their decisions in strict accordance with fundamental human rights.

Regarding the question of having the divorce case and the issue of custody of his daughter tried by separate courts, Mr Chelouche pointed out at the outset that it was Mrs Eskinazi herself who had refused that possibility. He went on to explain that the Tel Aviv Rabbinical Court was his "rightful judge" and that he saw no reason to renounce it, particularly as that court, which was bound by civil positive law, was composed of judges who were particularly aware of the paramount interests of the child.

At the hearing Mr Chelouche pointed out that there was no such thing as civil marriage in Israel and that the rabbinical courts had exclusive jurisdiction in divorce proceedings. It was therefore logical that they should also rule on the other aspects of a husband and wife's separation so that the judges could consider the issues in their entirety.

Mr Chelouche also stated at the hearing, in respect of the doubts raised with regard to religious divorce proceedings in Israel, that he had absolutely no desire to delay a situation that had already become serious by misusing

the traditional formality of the *get* or to attempt to harm his wife by taking advantage of the *ne exeat* measures provided for in Israeli law.

2. The Court's assessment

The Court points out that in the present case neither the Sarıyer Family Affairs Court nor the Court of Cassation dealt with the issues relating to the exercise of parental rights or to the child's personal status. They merely noted, in the light of all the evidence in the case, that on the date of the child's removal the father had joint custody of her and that the removal could not but be regarded as "unlawful" within the meaning of the Hague Convention.

That viewpoint tallies with the aim pursued by the Hague Convention, to which the Court subscribes: preventing the law applicable to such questions from being unilaterally circumvented by one of the parents, in breach of the legitimate rights of the other. At the appropriate time, the dispute relating to the merits of the rights in issue will have to be brought before the competent judicial authorities of the State where Caroline Chelouche is deemed to be habitually resident.

It is not in any way the Court's task to address the determination of those rights, for the simple reason that Israel is not a party to the Convention and, moreover, the application was lodged against Turkey.

Admittedly, the Court has previously acknowledged that where the courts of a State party to the Convention are required to enforce a judicial decision of the courts of a country that is not a party, the former must duly satisfy themselves that the proceedings before the latter fulfilled the guarantees of Article 6 of the Convention, such a review being especially necessary where the implications are of capital importance for the parties (see *Pellegrini v. Italy*, no. 30882/96, § 40, ECHR 2001-VIII).

In the instant case, although the stakes involved for Mrs Eskinazi and her daughter are clearly of capital importance, their situation is hardly comparable to that of Mrs Pellegrini, whose complaint was about proceedings that had ended with a decision of the Vatican courts declaring her marriage definitively null and void and a decision by the Italian courts declaring the decision enforceable.

In the present case, with no proceedings concerning the applicants' interests having yet been disposed of by a judicial decision in Israel, the Turkish authorities had to lend their assistance with Caroline Chelouche's return unless objective factors caused them to fear that the child and, if applicable, her mother risked suffering a "flagrant denial of justice" (see, *mutatis mutandis*, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 88, ECHR 2005-I; *Einhorn v. France* (dec.), no. 71555/01, ECHR 2001-XI; *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, pp. 34-35, § 110; and *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 45, § 113).

The Convention does not require the Contracting Parties to impose its standards on third States or territories, and to require Turkey to review under the Convention all aspects of the Israeli proceedings would thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned (see *Drozd and Janousek,* cited above, pp. 34-35, § 110), and would risk turning international instruments into a dead letter, to the detriment of the persons they protect.

That being so, a "denial of justice" is prohibited by international law (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 17, § 35). As part of its international rights and obligations, Turkey must ensure that this principle is respected with regard to its reciprocal commitments with Israel, both countries belonging to the same legal community defined by conventions they have signed, such as the Hague Convention and the Convention on the Rights of the Child. Mention should again be made of the International Covenant on Civil and Political Rights, which has been ratified both by Israel and by France, a country of which Caroline Chelouche is also a national.

Having regard to the above-mentioned principles, the Court has examined all the available material, primarily with reference, as is right and proper, to the circumstances of which the Turkish authorities had or ought to have had knowledge at the time when the child's return was requested of them.

It notes first of all that, even though Israel is not a Contracting Party to the Convention, the rabbinical courts form an integral part of the judicial system in the country and are "tribunals established by law" within the meaning of Article 6 § 1. It reiterates that a tribunal is characterised in the substantive sense of the term by its judicial function: "determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner; it must also satisfy a series of other conditions, including the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards" (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 99, ECHR 2000-VII). In the absence of criticism based on those requirements, the first applicant's general argument based on the "religious nature" of the rabbinical courts is not decisive, the Court having never given a ruling to that effect (see, *mutatis mutandis*, *Pellegrini*, cited above, and *Kohn v. Germany* (dec.), no. 47021/99, 23 March 2000). The Court does not have the particular task of assessing whether a religious court is in substance and *in abstracto* incompatible with the Convention, and particularly Article 6. It will only examine whether the proceedings before such a court – as before any tribunal moreover – complied with the requirements of Article 6. There is

nothing to suggest in the present case that the rabbinical courts have breached or would breach those requirements.

That said, the Court is not indifferent to the problems referred to by the first applicant and which transpire from certain documents and examples of case-law produced by her. These documents confirm that issues giving cause for concern, related to the features of the proceedings before those courts – particularly regarding the religious-based notions by which they are inspired – may arise.

That being so, the Court also takes note of the information provided by the Israeli ministerial authorities, and, in so far as this has not been disputed, it notes the assurance given regarding the conformity of the procedural guarantees afforded by the rabbinical courts with the relevant principles of international law. The Court finds confirmation of this in certain decisions delivered by the rabbinical courts, it being understood that, for the purposes of the present case, that assurance must be seen as a commitment by the Israeli authorities towards Turkey.

Whilst the first applicant rightly pointed out that the information provided by the Israeli authorities did not explicitly address all the questions raised in the present case, the Court for its part does not consider it necessary to resolve the entire dispute here, which, it must be repeated, is closely bound up with a choice made by Mrs Eskinazi when she agreed to contract a religious marriage in Tel Aviv – that choice resulting in the rabbinical courts having exclusive jurisdiction – in addition to the civil marriage which had been contracted in the same town before the French consular authorities.

However, intent on replying to the applicants, the Court considers that it should make a number of observations.

Firstly, the Turkish authorities cannot be accused of acting in bad faith in this case regarding their duty to ensure that Israel complied with international law; nor can it be argued that Israel is not a State governed by the rule of law. Having regard to the respective arguments submitted by the parties, there was no basis on which the Turkish authorities could, at the material time, have found any "substantial grounds for believing" that the denial of justice feared by Mrs Eskinazi was "flagrant", without going into the details of a broad debate on the specific features of the Israeli judicial system. It was patently not for the respondent State to determine such an issue before authorising Caroline Chelouche's return, no such duty arising from Turkey's obligations under the Convention (see, *mutatis mutandis*, *Einhorn*, cited above).

Secondly, the Court sees no reason to doubt Mr Chelouche's sincerity when, at the hearing, he stated that he was in favour of the proceedings being conducted smoothly and did not have any intention of hindering them by refusing to go through with the traditional *get*, or by seeking a further prohibition on the first applicant leaving Israeli territory.

Lastly, there is no evidence to suggest that possible proceedings in Israel would lead to a hasty decision without a proper examination of all Mrs Eskinazi's claims. Admittedly, this examination may ultimately lead to a decision unfavourable to her, in which case she will, in the final instance, be able to apply to the Israeli Supreme Court in its capacity as High Court of Justice. It is not disputed in the present case that the Israeli Supreme Court has a power of review of the decisions of the rabbinical courts such as to prevent a flagrant denial of justice. Admittedly, it does not appear that the Israeli Supreme Court can reassess matters of pure fact. However, that limitation is also a feature of some court systems of the member States of the Council of Europe that the Court has already had occasion to examine (see, for example, *Civet v. France* [GC], no. 29340/95, ECHR 1999-VI). The Court does not therefore see any reason to fear that, at the appropriate time, the Israeli High Court of Justice will be content with a reasoning that denies the fundamental laws of its country and the principles of international law.

In the light of the foregoing, the Court is not persuaded that the Turkish authorities had sufficient material in their possession to suggest that the possible shortcomings in proceedings that the applicants might face in Israel might amount to a "flagrant denial of justice". Furthermore, while it is true that the outcome of such proceedings might not be subject to review at the European level, the Court notes nonetheless the object and scope of the obligations incumbent on the State of Israel under other international instruments of human rights protection in force in that State towards the countries of which Mrs Eskinazi and Miss Chelouche are nationals, and in particular the Hague Convention itself, the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child (see "International texts" under "Relevant domestic and international law and practice" above).

D. Conclusion

Having regard to all the foregoing considerations, and reiterating that Article 8 of the Convention has to be interpreted in the light of the Hague Convention, the Court concludes that in deciding that Caroline Chelouche should be returned to Israel the Turkish authorities cannot be deemed to have disregarded their obligations under Article 6 of the Convention or violated the right to respect for family life guaranteed under Article 8.

It follows that the application must be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, by a majority,

Decides to terminate the application of Article 29 § 3 of the Convention;

Decides to lift the interim measure indicated to the Government under Rule 39 of the Rules of Court;

Declares the application inadmissible.

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