State of Israel

At the Supreme Court

Motion for Leave to Appeal (Family Matters) 5690/10

Before: The Honorable Judge E. Rubinstein
The Honorable Judge N. Hendel
The Honorable Judge U. Fogelman

Petitioner: *A*

Versus

Respondent: *B*

Hearing on a Motion for Leave to Appeal upon the ruling of the Tel Aviv District Court dated 8.7.10 in Misc. Family Matters 18359 rendered by Judges I. Stufman, T. Shapira and S. Shohat

Hearing Date: 30 Av 5770 (10.8.10)

On behalf of the Petitioner: Adv. Nehama Zibin
Adv. Bernard Alfasi

On behalf of the Respondent: Adv. Edwin Friedman
Adv. Ela Rudnik

Ruling

Judge N. Hendel

1. Before us is a Motion for Leave to Appeal upon the ruling of the Tel Aviv District Court (Misc. Family Matters 18359-05-10, dated 8.7.10), which instructed the return of a abducted child – the son of the Parties, born 3.1.03 – to the United States according to the Hague Convention Law (Return of Abducted Children), 5751-1991 (hereinafter: "the Treaty"). Thus, the District Court accepted the Respondent's appeal on the ruling of the Family Matters Court in Ramat Gan (Family File 34860/06), which had rejected his claim according to the Treaty.

Procedural Background

2. The Respondent is of Chinese origin and a resident of the United States. The Petitioner was born in Israel and has American and Israeli citizenships. The Parties are not married. They met around the year 2002 and their son was born, as aforesaid, about one year afterwards.

   Even though we are dealing with a proceeding administered according to the Treaty, and thus should have been heard urgently, its administration spread over several years. The legal proceedings regarding the child began in 2005, when an order was rendered by the Court in the State of Nevada in the United States, according to which both parents were provided with joint

custody over the child. According to this order, the child was to be under physical custody with the Petitioner and the Respondent was to be provided with visitation rights. About seven months afterwards, on 1.2.06, the mother arrived in Israel with the child without the father's knowledge. After about five months, on 12.7.06, the Respondent submitted to the Family Matters Court a claim for return of his son, pursuant to the Treaty. On 6.12.06, the Family Matters Court ruled in favor of the Respondent in the absence of a statement of defense and appearance by the Petitioner. The ruling was not implemented until 18.1.09. On this date, the Petitioner was located randomly as part of a routine inspection by the traffic police. About a week later, the Petitioner submitted a motion to abolish the ruling, which was accepted. Evidence was heard and an expert was appointed.

The Family Matters Court ruled that the child has been unlawfully removed by the Petitioner. Nevertheless, the Family Matters Court rejected the Respondent's claim, on the basis of the determination that he had settled in his new surroundings. The Respondent emphasized that Article 12 of the Treaty allows for examination of the minor's settlement only if one year elapsed from the date of removal of the minor until commencement of the proceeding. Recall that the claim was submitted several years before then. However, the Court rejected the Respondent's claim and determined that the period of one year should be counted from the date on which actual treatment of the proceeding commenced. Moreover, the Family Matters Court determined that the defense of acquiescence of the parent regarding abduction of the child, as set forth in Article 13(A) of the Treaty, applied in this case. This was also set forth as to the application of Article 13(B) of the Treaty on this case, regarding psychological damage to the child.

The District Court abolished the ruling of the Family Matters Court, and instead ruled that the Respondent's claim was to be accepted. As to Article 12, it was emphasized that the period of one year should be counted from the date of removal until the claim submission date and not beyond. Thus, the test of settlement per Article 12 of the Treaty could not be applied to the case. Also, it was ruled that the Respondent never acquiesced with the abduction pursuant to Article 13(A) of the Treaty. Finally, it was set forth the according to an expert opinion, there was no basis for the determination that it had been proven that damage would be caused to the minor, pursuant to Article 13(B) of the Treaty, in a manner justifying rejection of the Respondent's claim. The basis for the claim regarding cause of psychological damage was an arrest warrant issued against the Petitioner without her knowledge and the implications of the matter on the child. However, during the hearing at the District Court it was discovered that the arrest warrant had been abolished on 16.4.10.

The Parties' Arguments

3. The Motion for Leave to Appeal was set for a hearing before three judges. The Parties argued in writing and an oral discussion was also administered. As indicated, the Respondent places emphasis on two main arguments: first, the District Court erred in rejecting the position of the Family Matters Court according to which the period of one year, pursuant to Article 12 of the Treaty, ought to be counted according to the date on which actual treatment of the proceeding began. Second, severe damage may be caused to the minor if the Petitioner traveled to the United States in order to participate in a proceeding to be held there – if the District Court's ruling prevailed. The reason is that there is substantial risk that the Petitioner would be arrested by the police due to the abduction of the Respondent thus requested. The severance caused between the Petitioner and her son if such scenario materialized would impose great hardship on the child. Accordingly, there is basis for the conclusion that the Respondent would involve the

authorities in order to bring about the Petitioner's arrest. On the other hand, the Respondent holds that there is no error in the ruling of the District Court and no basis to the argument that he would act in order to bring about the Petitioner's arrest.

Discussion

4. I shall refer to the arguments according to their order. Article 12 of the Treaty sets forth:
Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment…"

As we can see, the Treaty allows for examination of the child's settlement in his new surroundings only if one year elapsed from the date of removal until the date of the proceeding commencement. The examination is found between two checkpoints: the removal date and commencement of the proceedings. In our case, the proceeding was initiated at the Family Matters Court on 12.7.06, that is, only five months after the removal date. As aforesaid, the Family Matters Court afforded weight to the fact that "treatment of the claim" had not begun until 2½ years following the date of its submission or three years following the date of the removal (pg. 7 of the ruling of the Family Matters Court). This approach ought to be rejected. The term "commencement of the proceeding" is self-explaining. There is no room to determine that commencement of the proceeding is from the stage at which the case reaches actual treatment. It seems that this is certainly a different stage than "commencement of the proceeding". The interpretation offered by the Family Matters Court has no basis in the rulings of the District Court, this Court or foreign countries that also engage in interpretation of the Treaty. Although terms in the Treaty may not be interpreted according to the interpretation of a similar term in the internal law, it is interesting to refer to Regulation 7A of the Civil Procedure Regulations, 5744-1984, entitled "Commencement of the Proceeding". Regulation 7A(A) defines the term as follows: "A proceeding at Court shall commence with the submission of a claim". Beyond the fact that the language of the law is clear in the sense that the intension is not, for example, initiation of the evidence proceeding, the purpose of the law is not compatible with the interpretation suggested by the Family Matters Court.

If commencement of the proceeding means actual treatment of the claim, then this may encourage the abducting parent to prolong the proceeding and prevent commencement of actual treatment of the proceeding, so that he may better substantiate an argument according to which the child involved settled better in the environment to which he brought the child since he had stayed there longer. For this reason, the relatively short period of one year was set forth in the Treaty. The result would be that the abducting parent benefited from prolonging the proceeding. As written in Section 108 of the Perez-Vera Report, which constitutes an official interpretation of the Treaty:

> "The article as retained the date of which proceeding were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interest of parties protected by the Convention".

(Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, *Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session* (Vol. III, 1980), p. 459).

That is, the aim in setting the date at the commencement of the proceeding and not the rendering of the ruling was to protect the parent worthy of protection according to the Treaty – the parent from which the child was abducted.

The Petitioner's Counsel, Adv. N. Zibin, was aware that a new interpretation for term "commencement of the proceeding" was involved, but noted that the trend today was to interpret the Treaty in a manner compatible with the best interests of the child. My response is that the matter depends on the term that is the subject of the interpretative process. There are terms that naturally require interpretation and cannot be defined by pointing to a certain point on the time axis. So, for instance, regarding interpretation of the term "regular place of residence" of the child. I accept that upon interpretation of this term, there is room to examine the matter from the child's perspective, but there are other possibilities in Court rulings (see, for instance, Family Matters (Beer Sheva) 130/08 *A v. B* (31.8.08), in which different approaches appear as to definition of the term "the child's place of residence"). **However,** "commencement of the proceeding" is not such a term. If the enactor of the Treaty had desired to define the term in the manner proposed, he could have written terms such as "from the date of hearing of the evidence", "from the date of rendering of the ruling" or "from the date of actual treatment of the proceeding". **The Treaty is built upon gentle balances in order to fight against the harsh phenomenon of abduction of children from one country to another and there is no room for provision of interpretation to the Treaty that is incompatible with its words and purpose.**

5. An additional argument of the Petitioner that came up at the hearing was the concern that upon arrival of the Petitioner at the United States in order to take part in the proceeding that was supposed to be administered there, she may be arrested as a result of application by the Respondent to the authorities. While the arrest warrant issued against the Petitioner was abolished, there was no prevention, so it was argued, from the Respondent turning to the authorities upon the Petitioner's arrival at the United States in order to participate in the trial. In response, the Respondent's Counsel, Adv. E. Friedman, announced that he would be willing to submit a letter on behalf of his client, to be sent to the local district attorney in the US, according to which he was not interested in the Petitioner being arrested as aforesaid. A copy of such letter, dated 10.8.10, addressed to the Deputy Attorney General of the State of Nevada, was recently submitted to us. The letter received is clear and explicitly specifies that the Respondent is not interested and has no intention of effecting the administration of criminal proceedings against the Petitioner. The Respondent also requested that substantial weight be afforded to his position on the matter. It seems that this letter obviates the concern raised by the Petitioner's Counsel regarding the probability for her client's arrest. It is true that the Respondent's position does not bind the DA in the State of Nevada. However, experience indicates that except for extraordinary cases such as abduction of a child through violence or repeated abductions – the chance that the Petitioner will be arrested is not high. It is certainly not higher than for any parent returning to the country from which the child was abducted in order to participate in the legal proceeding. If we accepted the argument, the result would be that the abducting parent would be entitled to argue that the child ought to be left at the country to which he was taken due to the concern regarding his arrest at the country from which the abduction was performed. Of course, this is not the position of the Court rulings.

A final point that is noteworthy is that there was no room to set forth that the Respondent has acquiesced with abduction of the child after he had been brought to the State of Israel. To the contrary – it seems that the Respondent's actions speak loudly and sharply and indicate that he is acquiescent as to the abduction at all.

6. Therefore, whereas it is agreed that the Petitioner performed abduction towards her son, and the exception appearing in Articles 12-13 of the Treaty do not apply, the District Court was correct in deciding, in practice, to instruct that the trial be held in the United States, while abolishing the ruling of the Family Matters Court.

   It shall be noted that the implication of rejection of the Motion is that the last section in the District Court's decision is in effect. According to this Section, the Family Matters Court must discuss "the arrangements for return of the child to the US, arrangement of the flights, guarantee of child support and housing for the child as pertain to relocation of the minor from Israel to the US", in order to safeguard the child's best interests during the period until the decision by the Court in the US. It may be assumed that the Family Matters Court will act promptly in order to determine the arrangements required in order to transfer the minor to the US. Hopefully, the Parties will understand that their son is common to them and that they have the power to impose hardship on him or, on the other hand, alleviate his hardship, during the upcoming period of relocation to the US. Assumingly, the difference between the two possibilities may be very significant for the child at the junction where he is found.

7. I did not find that the District Court erred in its conclusion. There was no room to affirm the ruling of the Family Matters Court. I would propose to reject the Motion and for the Petitioner to incur the Respondent's expenses at the sum of NIS30,000 as of today.

Judge

Judge E. Rubinstein:

A. I agree with the opinion of my colleague, Judge Hendel. Hague Treaty cases, certainly once several years have passed since the abduction, often raise a difficult humane question, since the cost of the situation formed is often paid by the minor that is the subject of the proceedings and he is essentially the subject of the abducting parent's wrongdoing. In Motion for Leave to Appeal (Family Matters) 2338/09 *A v. B* (unpublished), I had the chance to say:

   "Hague Treaty cases naturally represent human tragedies, war between parents, who may be essentially be normative parents, though wish to reside in different countries. The international order at the 'global village' and the simple mobility that is characteristic of the same resulted in the Hague Treaty which aims at ensuring the immediate return of children unlawfully removed to another country (Judge Procaccia in Motion for Leave to Appeal (Family Matters) 672/06 *A v. B* (unpublished), par. 8). As she noted, in such cases the best interests of the child is decisive only 'whereupon its weight prevails over the central purpose of the Treaty'. Each of these cases represents human worlds above which there is the world of the minor that is taken from one place to another."

B. Unfortunately, this is the case here as well: the mother acted unlawfully and as described by my colleague, Judge Hendel, all roads lead to the direction instructed by the District Court, return of the minor. Possibly, the sadness over the minor's relocation was in the conscience of the Family Matters Court, which even treated (according to the expert opinion) the concern of severance of

the minor from his mother. We do not believe that this concern regarding severance will materialize, and my colleague referred to the matter of concern regarding criminal proceedings against the mother and limitation thereof, in light of the father's clear letter of the DA in Nevada. Also, the mother is not estranged to the US, judging by her life history and citizenship, and this is significant for the mother's ability to cope with the return thereto.

C. Matters regarding the paternal capability of the father (who already placed a child in adoption, an issue that must be addressed) may be heard in their proper forum before the Court in the US, which will assumingly adjudicate according to the principle of best interests of the child.

D. In conclusion, I shall express the hope that the Parties will find ways, which may be diverse, for the maintenance of appropriate connection with the father as part of maternal custody, and will allow the minor to grow in a reasonable manner under conditions that are naturally complex, though possible. The father's Counsel affirmed during the hearing, in this respect, the his client was interested in being "an active father in the child's life, to visit him regularly, to have a good and warm connection with him, and without undermining the aspect of the relations between the child and the mother". I do hope so.

E. As aforesaid, I join the opinion of my colleague. I hope and assume that our ruling will be translated to English for the convenience of the Court in the US.

Judge

Judge U. Fogelman:

I agree with the opinion of my colleague, Judge N. Hendel, and the comments of my colleague, Judge E. Rubinstein.

Judge

Decided as aforesaid in Judge N. Hendel's ruling.

Rendered today, 8 Elul 5770 (18.8.10).

Judge Judge Judge