*[Translation provided by the Central Authority of Israel]*

*State of Israel Emblem*

**IN THE SUPREME COURT**

**Family Appeal Case File No. 6390/13**

| | |
|---|---|
| Before | HIS HONOR JUDGE Y. DANZIGER<br>HIS HONOR JUDGE A. FOGELMAN<br>HIS HONOR JUDGE N. SOLBERG |
| The Applicant | *JOHN DOE* |
| | Versus |
| The Respondent | *JANE DOE* |
| | Application for leave to appeal against Judgment of the Central District Court (Her Honor the Vice President A.S. Shilo and their Honors Judges M. Nadav and V. Plaut) dated September 16, 2013 in Family Appeal Case File No. 60182-07-13 |
| Hearing Date | 3rd of Cheshvan 5774 (October 7, 2012) |
| Appearing on behalf of the Applicant: | Advocate Varda Efrat |
| Appearing on behalf of the Respondent: | Advocate Haim De-Haas; Advocate Haim Halperin |
| Appearing on behalf of the Central Authority in Israel under the Hague Convention Law: | Advocate Leslie Kaufman |

**JUDGMENT**

JUDGE A. FOGELMAN

Application for Leave to Appeal against a judgment of the Central District Court - Lod which allowed the Respondent's appeal against a judgment of the Family Court in Petach Tikva and dismissed the Applicant's claim for the return of the joint children of the parties to Sweden, under the Hague Convention (Return of Abducted Children) Law, 5751-1991 (hereinafter: "The Law").

1. The Applicant is a Swedish National and resident, and the Respondent holds both Israeli and Swedish citizenship. A marital partnership relationship arose between the Parties, as a result of which the Respondent moved to live in Sweden together with the Appellant. As a result of the relationship of the Parties two children were born: D, born in 2002 (now 11.5 years old) and A. born in 2007 (now 6.5 years old), and they were living permanently in Sweden until the events occurred that are the subject of

these proceedings. The Respondent has another male child from a previous relationship, he is an adult (aged 18.5) and lives with the Applicant in Sweden despite the fact that the Applicant is neither his biological nor his adoptive father.

2. The Parties separated in 2008, after years of bad feelings between them which led to the involvement of the judicial and welfare authorities in Sweden in their affairs. On November 6, 2008 the Court in Sweden awarded temporary custody of the children to the Appellant. Subsequently, in October 2012, the Swedish Welfare Authorities recommended leaving custody of the children with the Applicant. It was also recommended and stipulated that the Respondent could meet the children under supervision. On November 9, 2012 the Respondent arrived in Israel with the children.

THE INITIAL PROCEEDING IN THE FAMILY COURT AND THE JUDGMENT

3. On March 10, 2013 the Applicant brought an action in the Family Court in Petah Tikvah for the return of the children to Sweden under the provisions of the Law. It was not disputed between the Parties that the Respondent had wrongfully removed the children from Sweden, and therefore the condition prescribed in Section 3 of the Convention applied as to the civil aspects of the International Abduction of Children (the Convention having been signed on October 25, 1980) and as prescribed in the Schedule to the Law (hereinafter: "The Convention"). The dispute between the Parties turned on the question of whether in the circumstances of the case the exception applies as prescribed in Article 13(b) of the Law with regard to "a grave risk that the return of the child would expose him to physical or psychological harm or otherwise place the child in an intolerable situation", and also that the exception applies where, "the child objects to his return and has attained an age and degree of maturity at which it is appropriate to take account of its views". The Respondent argued that the Respondent *[sic]* had acted violently towards her and the children, including sexual violence towards the female child, and that the children had been in great distress to the extent of the expression of suicidal thoughts on the part of the male child due to the fear of being returned to Sweden. The Respondent attached a report of the Medical Emergency Department at Geha Hospital supporting her claims with regard to the situation of the child.

4. With the consent of the Parties, the Family Court in Petach Tikvah appointed a clinical psychologist, Dr. Daniel Gottlieb, to give his professional opinion on the question of the applicability of the exception prescribed in Article 13(b) of the Convention as well as the question of the objection of the children to being returned pursuant to the concluding passage in Article 13(b) of the Convention. In his professional opinion (hereinafter: "The Expert Opinion of Dr. Gottlieb"), he recommended the return of the children to Sweden, with the cooperation of the Welfare Services there with a view to treating them. The transfer of the children to a non-domestic framework was also recommended in preparation for their return and which would be made by the father. The expert determined in his opinion that the children were in severe distress owing to the prolonged struggle between the parents; that the examination carried out in respect of the male child in the Emergency Room and the further psychiatric examination to which the mother referred were carried several months prior to the provision of the Expert Opinion and that its recommendations were qualified for a certain period of time and did not deal with "the reality of the Hague Convention Law"; that the Appellant had not accepted the

treatment recommendations and this gave rise to the question as to whether she did indeed believe that the situation of the children was as difficult as she had claimed; that there was no real substance in the child's suicidal threats if he were to be returned to Sweden, and that a reasonable prospect existed that the children had been incited against the father.

5. In a partial judgment of April 12, 2013, the Family Court in Petach Tikvah (His Honor Judge B. Yezraeli) found that the Respondent had not discharged the burden of proof as to the applicability of the exception prescribed in Article 13(b) of the Convention, and ordered the return of the children to Sweden, adopting the conclusions contained in Dr. Gottlieb's Expert Opinion. In a supplementary judgment of May 5, 2013, the Court gave directions as regards the necessary preparation and the manner in which the return was to be carried out (hereinafter: "The Initial Judgment").

THE SECOND PROCEEDING IN THE FAMILY COURT AND THE JUDGMENT

6. The Respondent lodged an appeal to the District Court against the partial judgment and the initial judgment. After hearing the arguments of the Parties, the Central District Court - Lod decided, on May 9, 2013, to appoint experts in the field of child psychiatry, Dr. Ilan Tal and his team, to provide an expert opinion on the question of the applicability of the exception prescribed in Article 13(b) of the Convention in relation to the children. Following submission of the Expert Opinion (hereinafter: "The Expert Opinion of the Dr. Tal Center"), whose conclusions were different in content to those of Dr. Gottlieb, the hearing was referred back, by consent, to the Family Court (judgment dated June 6, 2013), for the questioning of the experts and the pronouncement of a new judgment based on the totality of the evidence.

7. After the examination of the various expert opinions, questioning of the experts, a meeting with the children and receipt of a classified report of the Welfare Unit, the Family Court reiterated and determined in its judgment dated July 24, 2013 that an Order should be made for the return of the children to Sweden. The Court had examined the two expert opinions and had come to the conclusion that Dr. Gottlieb's Expert Opinion was resolute and unequivocal, whereas the report of the Dr. Tal Center, "is not so firm in its conclusion". It was further pointed out that no psycho-diagnostic prognosis had been made of the Respondent as part of the preparation. The Family Court also relied upon the classified report of the Welfare Unit. In order to stabilize the situation of the children, it was held that they would be returned to Sweden at the expiration of three months from the date of pronouncement of judgment, and until their return, the children would continue receiving psychological or psychiatric treatment as necessary; upon return, the children would be in the custody of the mother for a further period of three months, with no visiting by the father, unless otherwise stipulated by the Court in Sweden.

THE HEARING OF THE APPEAL AND THE JUDGMENT THE SUBJECT OF THE APPLICATION

8. The Respondent appealed against the second judgment of the Family Court. Even before hearing the arguments of the Parties on the merits of the Appeal, the District Court held a hearing on the subject of the treatment solution to be provided for the children for as long as the second judgment remains in force. In the hearing, the

persons providing the treatment appeared before the panel of judges. The psychiatrist treating the male child expressed her opinion that in terms of treatment it was not possible to make a disconnection from his suicidal thoughts in respect of the return to Sweden. The treating parties took the view that the child's suicidal tendency was genuine and at a high degree of risk. After the Applicant had stated that he remained firm in his arguments, the District Court instructed the providers of the conflicting expert opinions to discuss among themselves the question of the child's suicidal tendency. The experts from the Dr. Tal Institute, with the agreement of Dr. Gottlieb, recommended hospitalization for the purposes of observation in the children's ward in Itanim Psychiatric Hospital, disconnected from the mother, in order to evaluate the child's mental state and the risk of suicide in particular. The Court rejected the proposal of the experts, finding that this was a disproportionate step and notified the Parties that judgment would be pronounced in respect of the Appeal.

9. On September 16, 2013 judgment was pronounced in the Second Appeal. The Court (Her Honor the Vice President A.S. Shiloh and Their Honors Judges M. Nadav and V. Plaut) held that in the case of the male child the exception contained in Article 13(b) of the Convention applied, because a high degree of risk existed that the child would carry through his threat to take his own life if he is returned to Sweden. Thus, the District Court preferred the expert opinion of Dr. Tal's Center over that of Dr. Gottlieb. This was, *inter alia* in light of the support given to the expert opinion of Dr. Tal's Center in the statements made by the persons currently treating the child, whereas Dr. Gottlieb's Expert Opinion had been prepared by a single expert in the field of psychology. In its judgment, the Court did not disregard the doubt concerning the authenticity of the child's threats (whether these were in fact vain threats or perhaps had been influenced by the Respondent), but it found that the concern for the wellbeing of the child tipped the scales in favor of not returning him to Sweden. Along with the above, it was held that the burden had not been discharged as regards the exception regarding the wishes of the child under the concluding passage of Article 13(b) of the Convention. The children had indeed expressed their objection to being returned to Sweden and it appeared that they were intelligent and mature for their ages, "however a fear existed as to them having been incited by the mother as the experts had stated". It was further held that such objection was not based on grounds of significant, stable and reasonable weight, and therefore the female child should not be returned to Sweden separately from him. In light of the foregoing, the District Court set aside the Second Judgment and dismissed the Applicant's claim for an order for the return of the children to Sweden. The Court ordered - in light of the worrying condition of the children - that a copy of the Judgment should be forwarded to the Juvenile Law Welfare Officer applicable at the mother's place of residence, and to the Juvenile Law District Welfare Officer, as well as to the District Psychiatrist. It was further held that continuous monitoring and supervision by the Welfare Services was necessary at the place of residence of the mother and the children.

THE ARGUMENTS SUBMITTED IN THE APPLICATION FOR LEAVE TO APPEAL

10. In the Application for Leave to Appeal which is before us as aforementioned, the Applicant argued that the children should be returned to Sweden as had been decided by the Family Court. It was submitted, *inter alia,* that there had been no cause for according weight to the expert opinion of the Dr. Tal Center as there was already on the file an expert opinion by a reputable expert in the field of psychology who had

been appointed by the Court; that the District Court had disregarded the findings of the Authorities in Sweden and the Court there, they having determined that it would be in the best interests of the children for them to be with their father and not with their mother, and that the danger to the children was reflected paradoxically in terms of the mother's conduct; that the ruling of the District Court is open to manipulation by parents of abducted children in the future; who would put into the mouths of their children a vain threat of suicide in order to prevent their return; that the District Court had disregarded the agreed recommendations of the persons providing treatment that the male child should be hospitalized in a non-domestic framework in order to assess his mental state; that the result of the judgment would lead to the children being disconnected from their adult brother who lived with the Respondent in Sweden, and therefore no weight was accorded to this; that the District Court had disregarded the possibility of returning the children to Sweden by awarding temporary custody to the mother (as had been determined by the Family Court); and that the District Court had erred in its decision that the children should not be separated.

11. The Respondent was of the view that there was no ground for the granting of leave to appeal in light of the criteria laid down in the decided cases, for a "third round" hearing. In essence, the Respondent relies on the findings of the District Court as to the preference of the expert opinion of the Dr. Tal Center over that of Dr. Gottlieb. According to her submission, Dr. Gottlieb, in his opinion, relied on the form of the categorization of the "parental alienation" syndrome, from which he concluded that the statements of the child are nothing but the result of the activation of various psychological measures on the part of the Respondent, inciting him against his father. In addition, it was claimed that this was the professional opinion of an expert in the sphere of psychology whereas the conflicting expert opinion had been provided by persons with expertise in the field of psychiatry. According to her, in the circumstances of the case, the decision to appoint an additional expert taken by the District Court does not give rise to any difficulty, and in any case is not a wide enough question that justifies the granting of leave to appeal. The Respondent emphasized that all the medical expert reports, with the exception of that of Dr. Gottlieb, had been based on the existence of real and imminent danger to the life of the male child if he were to be returned to Sweden, and that even Dr. Gottlieb himself had not ruled out such a danger. Along with the above, the Respondent adds that there is an imminent risk to the wellbeing to the female child against the background of claims of sexual abuse perpetrated on her by her father in the past.

THE DEVELOPMENTS FOLLOWING THE FILING OF THE APPLICATION

12. Three days after the filing of the application (September 27, 2013), the Applicant (father) filed an urgent motion for the transfer of the children to his custody and alternatively for an order directing the Welfare Officer to remove the children to stay in an emergency reception center. It was claimed in the application that the male child had made contact with the father in Sweden through "internet chat" and had informed him that the mother was abusing him. As a result of this approach the Applicant came to Israel and met with the child at a meeting place specified by the latter. The Applicant took his son to the police station in Petach Tikva where the child was questioned about his claims of abuse by the mother. The child refused to be escorted to his mother, and as a result of a decision of a social worker (and contrary to the position taken by the mother and her attorney) he was accompanied to the Applicant

(the father). Subsequently (September 29, 2013) the Applicant requested that the material from the questioning of the child at Petach Tikva police station should be provided. The Respondent (the Reply and Application dated October 1, 2013) argued that the child should be returned to her custody until a further judicial decision on the question of custody, and alternatively she requested an order directing that the child should be hospitalized for treatment in order to prevent irreversible damage to his condition. According to her, the Applicant had exerted undue influence over the child and had persuaded him to claim in front of the police officers that she had abused him. The Respondent claimed that she had not assaulted the child but had been forced to restrain him after he had attempted to attack her and the female child with a knife and had also threatened suicide, and the bruises that he showed the police officers were the result of this. In response the Applicant argued that there was no ground for removing the child from his custody because he was the only person who was in possession of a legal decision with regard to custody (from the Swedish Court).

POSITION OF THE CENTRAL AUTHORITY UNDER THE HAGUE CONVENTION LAW AND OF THE WELFARE AUTHORITIES

13. Pursuant to the decision dated September 27, 2013, the State Attorney's Office submitted the position taken by the Central Authority under the Law regarding the subject matter of the application, and along with the above it presented the views of the Welfare Authorities both in Israel and in Sweden. The position taken by the Welfare Authorities in Israel was that the children "were in very considerable danger due to them being situated in the midst of the prolonged conflict between their parents. The risk derives from the exposure of the children to the details of the struggle and them being used as a "punch-bag" in the tug-of-war between the two parents". The Authorities are of the view that the children are in need of prolonged diagnosis in a non-domestic framework which could be carried out either in Israel or in Sweden, as decided by the Court. The Welfare Authorities in Sweden expressed their willingness to immediately provide such treatment, and the required diagnosis in a non-domestic framework in Sweden, and also stated that an appropriate professional person could be sent to accompany the children in their return to Sweden.

14. In the position that it took on the merits of the application, the State Attorney's Office widened the deliberations on a number of main issues:

Firstly, it was argued that the question that the expert is required to answer in his Expert Opinion as to the applicability of the exception prescribed in Article 13(b) of the Convention is extremely narrow and should contain the following points: (a) Does a grave risk exist of physical, psychological or other harm that would place the child in an intolerable situation, and what is the cause of such harm; (b) Does the aforementioned harm derive from the return of the child to the country from which it was abducted (as opposed to being returned to the authority of the left-behind parent); (c) Is the harm in question of sufficiently real intensity and gravity so as to prevent the child being returned to such country; (d) Is there no possibility of the Authorities in the State from which the child was abducted dealing with possible problems.

Secondly, it was argued that notwithstanding the fact that the Court has authority to request a further expert opinion, then such authority must be exercised in a measured way when dealing with cases of abduction of children, this owing to the concern as to

the prolonged continuation of proceedings that are liable to adversely effect the best interests of the child.

Thirdly, as far as concerns the separation of siblings it was argued that as had already been decided, when it was not possible to return one sibling due to the application of the exception appearing in Article 13(b) of the Convention, the Court must examine whether the situation in which that sibling finds himself was caused by the abducting parent. If so - then there is no cause for preventing the return of the second sibling in order to accomplish the aim of the Convention, so that the offense should not be compounded.

THE HEARING BEFORE US

15. Pursuant to the decision of Judge Z. Zilbertal of September 27, 2013, the application was referred for hearing before this Panel. In the hearing that took place before us, the Welfare personnel attended and expressed their up to date view on the question of the condition of the children. According to the Social Worker, Ben Haim, the two children are at the center of the conflict between the couple, and as a result of this they have experienced a severe crisis. The male child sounds as if he "is reciting" his words. When he is with the mother he supports her position and when he is under the authority of his father - he supports his position. The child has recently undergone further diagnosis by the psychiatrist treating him, and it again appears that he is not in need of psychiatric hospitalization. The position taken by the Welfare personnel, as stated, is that the children are in need of deep therapy at a neutral location, whether in Israel or in Sweden. They also had been updated that the Welfare Authorities in Sweden are also prepared to provide the necessary treatment in children's country of origin, should it be so decided.

16. The Applicant is of the view that there is no cause for preventing the return of the children to Sweden at the present point in time, as the Respondent's argument, that the child does not wish to be in his father's custody, has collapsed. It was further argued that in so far as the child may be in need of treatment, this could be provided for him by the authorities in Sweden. The Applicant emphasizes that the Respondent is being manipulative in order to get what she wants, and that it is she who is endangering the child. The Respondent agrees with the proposal made by the Welfare personnel as regards treatment but does not believe that the proceeding herein (which concerns the Hague Convention) is the appropriate context for it. Counsel for the State Attorney's Office also took the view that the proceeding herein is not the appropriate framework, because the question to be decided is of a narrow nature and touches upon the apparent danger to the child in his country of origin (where he will not necessarily be with his father). In her view, the children should be returned to Sweden forthwith, where immediate treatment will be provided for them.

THE INTERIM DECISION

17. After having heard the Parties, the position taken by Counsel for the Central Authority and the views of the Welfare personnel, we suggested that until a decision is pronounced in respect of this Application, the two children will be placed for a stay in the "Hadassim" Emergency Center under the supervision of the Welfare personnel. Counsel for the Applicant agreed to our proposal. Counsel for the Respondent stated

that his client prefers that the children should not be transferred to "Hadassim", but left this question to the Court's discretion. Counsel for the State Attorney's Office expressed her agreement to the proposal, after having consulted with the relevant professional parties, and submitted that it would not be proper for the stay at "Hadassim" to be for the purposes of diagnosis but for an interim stay for a limited period of time until a decision on the Application, she having argued - as stated previously - that it would be proper for the diagnosis to be made by the welfare authorities in Sweden. In our decision pronounced in the course of the hearing, we ordered the Parties to bring the children to "Hadassim" by 4 PM that same day, and this was indeed done. In our decision, we did not order the implementation of a treatment program at this time.

DISCUSSION AND DECISION

18. There have been many twists and turns in this dispute, as result of substantive changes that have occurred in the factual basis since pronouncement of Judgment by the District Court and up to the hearing before us in respect of the Application for Leave to Appeal. The general picture is a sad and distressing one, and the decision is not an easy one. Nevertheless, after an examination of the new data and of the case, against the background of the decided case-law which is unambiguous, we have decided to hear the Application as if Leave to Appeal had been granted and an Appeal had been lodged on the basis of which leave has been granted, and to allow the Appeal and set aside the Judgment of the District Court.

THE NORMATIVE BASIS

19. The aim of the Hague Convention, which was adopted word for word into the statute, is to ensure that children who have been wrongfully removed from their habitual place of residence to another State, are promptly returned, and to prevent, as efficiently and as expeditiously as possible, a unilateral change in the existing status by a parent in an act of abduction, in attempting to take the law into his own hands (Family Appeal Case File No. 2270/13 Jane Doe v Richard Roe (May 30, 2013)). Upon satisfaction of the conditions prescribed in Article 3 of the Convention, the State must order the immediate return of a child wrongfully removed from its habitual place of residence. The concept that reflects the arrangement prescribed in the Hague Convention is that relocation of the child's place of residence without supervision of the duly authorized and appropriate instance for doing so, moving him about from place to place and disconnecting him from one of his parents and from his natural and habitual environment, is against his best interests. As the President A. Barak stated in one of the cases, "a child is not an object and he cannot be moved about from place to place so as to determine the place of deliberation as to the rights pertaining to him. The child possesses a right independently and his best interests demand that the decision as to his rights should be made at his habitual place of residence and not be influenced by the actions of the abductor" (Civil Appeal 7206/93 Gabay v. Gabay, Israel Supreme Court Judgments 51(2), 241, 251-252 (1997)). The basic assumption of this concept is that any Court of any country that is a party to the Convention will take account of the child's best interests when coming to decide the issue of custody, and therefore the return of the child to the country from which it was abducted is not prejudicial to his best interests.

20. In this case herein it is not disputed that the conditions prescribed in Article 3 of the Convention are satisfied, namely: that the children were wrongfully removed from Sweden by their Mother. The only relevant question that has to be decided is whether the narrow exceptions to the rule that obligates Israel to return to them Sweden, are applicable. The Convention does indeed recognize that there may be exceptional cases requiring, in the best interests of the child, prevention of its return to its habitual environment. These exceptions are set out in Articles 12, 13 and 20 of the Convention. If one of these exceptions applies then the question of the child's return lies within the discretion of the Court. It has been held in the case-law that the said exceptions must be construed narrowly, according decisive weight to the interest of preserving the aim of the Convention, which calls for the return of the child to its custodial parent in the country of origin. Accordingly, the non-return of the abducted child in the context of one of the exceptions to the Convention is reserved for rare and extreme situations only (Family Appeal Case File No. 672/06 Abu Arar v Ragozo, Paragraph 9 (October 15, 2006)) (hereinafter: "the Abu Arar Case". The narrow scope of the exceptions has implications on the intensity of the burden of proof required of a party who claims that they are applicable, and this is a heavy burden of proof (*Ibid*, at Paragraph 12).

21. The exception relevant in this case is the one prescribed in Article 13(b) of the Convention, which provides that where there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, the Court is not obligated to order the child's return (hereinafter: "the fifth actual exception"). It has been held in the decided cases that the onus lies with the party claiming the applicability of this exception to show beyond reasonable doubt that it applies, which is an extremely onerous burden of proof. It has also been held that "the best interests of the child" that is weighed in the context of this exception is narrower than that weighed in normal custody proceedings, because it is feared that a wider construction of the exception would denude the Convention of its aim (see: the case of John Doe, at Paragraphs 29-33). It has further been held that the exception in question refers to damage that might be caused to a child as a result of its return to the country from which it was removed and not as a result of its return to the parent from which it was abducted, or by reason of its disconnection from the abducting parent (see: MCA 1648/92 Turana v Meshulam, Israel Supreme Court Judgments 46(3) 38, 46(1992)).

FROM THE GENERAL TO THE PARTICULAR

22. The Respondent argued, as previously stated, that the exception in question applies owing to the fear that the child might attempt to harm himself if he is returned to Sweden. During the course of the hearings in this case at the various instances, two professional expert opinions were presented, such experts being in the field of psychology and psychiatry and the views were also heard of the persons treating the child at the present point in time. From the first expert opinion, that of Dr. Gottlieb, it emerged that doubt existed as to whether any store could be placed in threats made by the child, who was under the influence of his mother. From the second expert's opinion, that of the experts from the Dr. Tal Center, a different picture emerged which indicated that we are concerned in this case with a real and tangible risk. The persons providing the treatment, who appeared at the hearing in the District Court, were also of the view that this was a case of a tangible risk. The problem is that at the present

point in time the situation is different. As has been detailed above, since the arrival of the Applicant in Israel, the child has moved to stay with the father.

23. However even after the change in the factual basis herein, one cannot rule out the risk pointed to by the persons providing the treatment in respect of the suicidal tendency of the child. The problem is, and as has been pointed out by the welfare personnel, that the risk derives from the child finding himself at the center of a prolonged conflict between his parents. The risk derives from his exposure to the details of the struggle between them and to his being used as a "punch-bag" between his parents. And indeed the parties agree that the child needs immediate treatment and that for such purpose he must be moved to a non-domestic framework. The question is as to where this treatment is to be undergone - in Israel or in Sweden. As previously stated, after the child had stayed with his father and did not agree to return to his mother, a doubt arises as to whether the suicidal tendencies of the child indeed involve his return to Sweden, as is claimed by the Respondent. This quick change in the attitude of the child towards his parents is an obvious indication of the fragile and emotional state which he is in, against the background of him being caught up at the core of the intense conflict between his parents. As aforementioned, it has been held in the decided cases that the onus on the party claiming the applicability of the real damage exception is a very heavy burden of proof, that of beyond reasonable doubt. At the present point in time and against a background of the up to date factual basis - this exception is inapplicable. It should be clarified that the only question before the Court at this stage is whether the treatment in the non-domestic institution is to be provided in Israel or in Sweden. Even after his move to Sweden, the child would not be staying with his father until a decision of the welfare authorities in Sweden. In the new circumstances that apply, it cannot be determined that the transfer to the authority of the welfare services in Sweden for diagnostic purposes (disconnected from his father and his mother) creates a risk to the child's wellbeing, while at the same time it in a sense fully accomplishes the aims of the Convention. Consequently there is no cause to prevent the immediate implementation of the State's commitment to return the child to Sweden. In view of the foregoing, we are not required to address the substance of the findings of the District Court, in view of the changes that have occurred since pronouncement of the Judgment.

FURTHER ARGUMENTS

24. We have found no reason for intervening in the finding of the District Court as regards the inapplicability of the exception prescribed in the concluding passage of Article 13 (b) of the Convention, concerning the wish of the child not to be returned to the country from which it was abducted. As was pointed out by the District Court, despite the maturity of the children, it is not possible to determine that the wish expressed by the children (at a certain point in time) is independent (compare: The Abu Arar Case). This for the reasons stated by the District Court.

25. The Respondent argues alternatively that as regards the female child the aforementioned fear exception applies against the background of allegations of sexual abuse perpetrated upon her by her father. There is nothing in this allegation that could alter the decision necessitated by virtue of the provisions of the Hague Convention. As aforementioned, it has been held in the decided cases that the exception prescribed in Article 13 (b) of the Convention relates to damage that might be caused to a child

as a result of its return TO THE COUNTRY from which it was removed, and not as a result of its return TO THE PARENT from whom it was abducted. In this case herein, following return of the female child to Sweden, the Swedish Authorities will be able to examine the grave allegations made by the Respondent (in so far as these have not been examined in depth to date), and the presumption is that they will take action in order to ensure the best interests of the female child and prevent her exposure to any risk.

PRINCIPAL ISSUES

26. Counsel for the Applicant and Counsel for the State Attorney's Office raised, in their submissions, various issues of principle most of which do not require a decision in light of the result that we have reached. *Inter alia,* in light of the outcome that we have arrived at of the return OF THE TWO CHILDREN to their country of origin, we are not required to consider the arguments pertaining to the possible separation of the siblings and its ramifications on the applicability of the exceptions to the Convention. Nevertheless, I thought it proper to briefly address two issues that are connected with the function of the expert in the context of proceedings under the Hague Convention.

27. As is well known, in order to examine the applicability of the exception prescribed in Article 13 (b) of the Hague Convention, more than one expert opinion can be submitted. As has been underscored in more than one of our decided cases, the expert is not required to address other questions in the sphere of custody because these will be considered in the framework of the custody proceedings that will - as a general rule - be conducted at the habitual place of residence of the children. The expert is thus required TO SPECIFICALLY ADDRESS THE APPLICABILITY OF THE EXCEPTION, as has been outlined in decided cases that we have cited and have relied upon. Counsel for the State Attorney's Office, in her response, set out a list of points which must be addressed by the expert, in the context of the interpretation of the Convention and the extent of the discretion vested in the Court in applying the exception. Although this is *prima facie* an appropriate list, I have not found it necessary to make a hard and fast determination in the matter in question in this present case, and I will content myself with this general observation.

28. The second issue that has arisen in the case before us, pertains to the need for a further expert opinion, after one expert opinion has already been provided. Counsel for the State Attorney's Office argues that the provisions as to the preparation of an additional report by other experts, has led to the unnecessary prolongation of the proceedings. As is well known, the speed and efficiency of the proceedings is an overriding principle in implementing the provisions of the Hague Convention. As Article 2 of the Convention provides: "The Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention; for this purpose, they shall use the most expeditious procedures available to them". It has been held on more than one occasion in the case law that the relief that the Hague Convention provides is emergency relief, which is intended to be EXPEDITIOUS, URGENT AND IMMEDIATE. Naturally, submission of an expert opinion and the examinations necessary with a view to its preparation lead to a postponement of a decision in the proceedings. The Court's Decision as to the obtaining of an ADDITIONAL expert opinion leads to further delay. It is therefore important to emphasize the fact that this power that is within its discretion is to be

reserved for exceptional cases, after actions have been taken with a view to clarification of the picture in the context of an examination of the original expert opinion. As has been stated on more than one occasion, prolongation of the proceedings is liable to cause additional harm to the child, beyond that which is a consequence of the fact of the abduction, and that everything possible must be done in order to bring about a speedy determination of the issue.

THE RESULT:

29. As previously mentioned, we have not found that the exceptions prescribed in Section 13 (b) of the Law are applicable, and we are therefore setting aside the Judgment of the District Court and are ordering the return of the children to Sweden without delay, in accordance with a timetable that is to be set in coordination with the competent authorities in Israel and in Sweden. In accordance with the position taken by the competent authorities in Israel and in Sweden, the male child will be transferred for diagnosis examination in a non-domestic framework in Sweden, and the Swedish Authorities are to examine the appropriate treatment outlined and the steps that it is necessary to take by virtue of the results of such diagnosis. The female child is also to be returned to Sweden and the competent authorities in Sweden will proceed to the best of their understanding, having regard to the recommendation of the welfare authorities in Israel that she should also integrated, for the purposes of diagnosis and status evaluation, into a non-domestic framework. The relevant welfare personnel in Sweden have expressed their willingness to send a professional person to Israel in order to accompany the children in their return to their country, and we assume that this will be done in coordination between the authorities.

Counsel for the State Attorney's Office will see to it that the main points of this decision, and in particular what is stated above in Paragraph 29, are forwarded for the attention of the relevant authority in Sweden.

The appeal is therefore allowed as detailed above. In the circumstances of the case, there is no order for costs.

JUDGE

JUDGE N. SOLBERG:

I agree with the opinion of my learned colleague Judge A. Fogelman, there is a gaping chasm between the parents, a polar dispute, save for one matter as to which there is no argument: the very high degree of risk in which the children are placed. The Welfare Authorities attribute the risk to the exposure of the children to the details of the struggle between the parents - both of whom are problematical in terms of their personalities - and the use made of the children in the tug of war between them. By reason of such risk, and in accordance with the recommendation of the professional parties, agreement has been reached as to prolonged diagnosis in a non-domestic framework. In such a framework which is inevitable given the reality of the case, contact with both the father and the mother will be severed. In any case, I reiterate that the exception to the rule that prescribes the obligation of returning the child to the country from which it was abducted, which is "GRAVE RISK THAT THE RETURN OF THE CHILD WILL EXPOSE HIM TO PHYSICAL OR PSYCHOLOGICAL DAMAGE OR OTHERWISE PLACE HIM IN AN INTOLERABLE SITUATION", does not apply

(Section 3 (b) to the Schedule to the Hague Convention (Return of Abducted Children) Law, 5751 - 1991. The collaboration between the welfare authorities in Israel and those in Sweden should ensure adequate diagnosis and the necessary treatment as a result thereof.

JUDGE

JUDGE Y. DANZIGER:

I concur with the Judgment of my learned colleague Judge A. Fogelman.

In the circumstances of the case, as it has been clarified that the position taken by the welfare authorities is that the children are in a situation of high risk in view of their prolonged exposure to the bitter struggle between their parents, and as the unequivocal recommendation of the welfare personnel is that the children should be immediately removed from BOTH PARENTS and placed at this stage in a "neutral" non-domestic treatment facility, I am of the view that the Judgment of the District Court must be set aside. This is in the best interests of the children and is obligatory. As and when the children have been removed to a non-domestic framework, the only question remaining to be decided is whether the stay and the treatment in such a non-domestic framework will be carried out in Israel or in Sweden. Taking into account the purpose of the Hague Convention and the usually accepted narrow interpretative approach taken in the decided cases as regards the exception thereto, I am of the view that there is no cause for ordering the treatment to be provided in Israel, and as my learned colleague Judge Fogelman has stated, it cannot be determined that the fact of the return to Sweden (when one is in the circumstances of the case talking about return to the welfare authorities there) creates a risk to the wellbeing of the children.

As to the State's contention that one should be content - as a general rule - with the submission of one expert's opinion as to the applicability of the exception prescribed in Article 13 (b) of the Hague Convention, and that the Court should refrain from ordering another expert opinion other in the most exceptional cases; my learned colleague Judge Fogelman has held that the authority of the Court to order the preparation of a third expert opinion, which is within its discretion, should be reserved for exceptional cases after the exhausting of action with a view to clarifying the picture in the context of the examination of the original expert opinion. This is so, in order to avoid the lengthening of the proceedings which undermines the purpose of the Hague Convention which is intended to provide the custodian parent with speedy and urgent relief. I agree with my learned colleague Judge Fogelman on this point that the starting assumption that guides the Court is that there should be no hurry to appoint an additional expert in relation to the applicability of the exception prescribed in Article 13 (b) of the Hague Convention, an act which by its very nature extends the legal proceedings contrary to the purpose of the Hague Convention, but I wish to emphasize that to my mind, the Courts in these sensitive cases should be left with a wide discretion, depending upon the special circumstances of each individual case [see and compare: Civil Application for Leave to Appeal 6512/10 Jane Doe -v- John Doe (September 7, 2010) at Paragraph 8 of my Decision].

It has been so decided as stated in the Judgment of Judge A. Fogelman.

Given this 6th day of Cheshvan, 5774 (October 10, 2013)

JUDGE JUDGE JUDGE