Supreme Court of Israel **Leave for Family Appeal 2270/13**

Before: The Honorable Judge E. Rubinstein
The Honorable Judge H. Meltzer
The Honorable Judge D. Barak - Erez

Plaintiff: D.Z.

V.

Respondent: YVAMVD

Application for leave to appeal the judgment of the Central District Court (Judges Nadav, Brant and Plaut) dated March 21, 2013 in Family Appeal case 16666-02-13

Hearing date: 15 Iyyar 5773 (April 25, 2013)

Attorney for the plaintiff: Attorney Shmuel Moran

Attorney for the respondent: Attorney Varda Efrat

Decision

Judge E. Rubinstein:

1. Application for leave to appeal the judgment of the Central District Court (judges Nadav, Brant and Plaut) dated March 21, 2013 in Family Appeal case 16666-02-13, in which it was determined that the plaintiff shall return her elder son to the Netherlands. The matter of the Application - a dispute regarding the separation of two siblings in Hague Convention proceedings.

2. Here are the main points: the plaintiff came with her two children to Israel without the knowledge of their father, after she tired of her relationship with him and her life in the Netherlands, where they lived together for the previous five years. She now refuses to return the children to the Netherlands, their natural environment so far. Such are the facts characteristic of most of the cases dealing with the Hague Convention, in which the minor is moved from one country to another and pays the price of the struggle between his parents. When removing the child from his residence is tainted with illegality in light of the breach of the parental rights of the other parent, as in this case, the act is defined by the Convention as an abduction, and requires the immediate return of the child to his habitual residence. Hence the present application for leave to appeal the judgment of the Central District Court in which the applicant's appeal against the judgment of the family court in Rishon Lezion (Judge Shira) dated February 3, 2013 in Family Case 36930-09-12, was partially granted (in relation of one of the two sons of the parties). The Family Court ordered the plaintiff to return her two children to the Netherlands under the Hague Convention (Returning of Abducted Children) Law, 5751-1991. The Application included, among other things, a petition to appoint an expert to examine the harm that will be caused to the elder brother as a result of the separation from his younger brother due to his return.

Background and Proceedings

3. The plaintiff (hereinafter the mother), an Israeli citizen, went to the Netherlands in 2005 to study in the field of horse riding and jumping, and in 2007 met the respondent (hereinafter the father) during her studies. The parties began a relationship and started to live together. Within a short time, in August 28, 2008, the eldest son R was born, and less than two years later, on May 4th, 2010, his younger brother D was born. According to the law in the Netherlands, children born to parents who are unmarried are in the mother's custody, unless the father was registered as a joint custodial parent (if the mother objects, a court's clarification is needed). In this case the registration procedure was done with respect to R, and had not yet been done with respect to D. The parties separated in March 2012, and on April 17, 2012 the father filed a claim in a court in the Netherlands for joint custody concerning D, and soon afterwards, on April 21, 2012, filed an urgent claim for the rights of exclusive use of the apartment and for physical custody of the two children, or alternatively for visitation rights and for their passports to be deposited with him. On April 21, 2012, the mother came with the two children to Israel, without the knowledge of the Father. She and the children live in a kibbutz in central Israel near her parents, and only her attorney appeared on her behalf at the court hearings in the Netherlands.

4. Meanwhile, the Court in the Netherlands ruled on September 21, 2012, according to the recommendation of the Child Welfare Council there, that like R, D will also be under the temporary joint custody of both parents. The question of the permanent residence of the children is also expected to be decided during the proceedings in the Netherlands, but the Court delayed the decision on this matter until the decision in the present proceeding.

5. At the same time the plaintiff filed custody claim on July 3, 2012, in the court in Israel (Family Application 6816-07-12), and petitioned for temporary custody, ex parte, on the grounds of a concern that the respondent will abduct the children. Despite this, the court requested the father's response, and at the request of both this claim was also frozen until the decision in the present proceeding.

Proceedings in the Family Court

6. On September 16, 2012, relying on the Hague Convention, the father filed a claim to the Family Court for the return of the children to the Netherlands, claiming that on April 21, 2012 they were wrongfully removed by the mother as aforesaid. According to the father, he was the sole breadwinner of the family, and the main person to take care of the children and household tasks, as the mother was unable to recover from her addiction to alcohol and drugs. According to the father, the mother removed the children to Israel to thwart the custody proceedings commenced in the Netherlands, out of the fear that the court will decide that their permanent residence shall be with the father, and therefore her claim in Israel constitutes an abuse of the legal process. The mother argues that in this case the conditions for the application of the Convention do not apply, and as they do not apply, she cannot be required to return them. She claims that it was she who singlehandedly carried the tasks of raising the children while the father renounced them, and their departure was due to the hardship occurred to herself and the children during their life with him, in view of his violent and abusive behavior, along with his addiction to drinking alcohol and to other substances. In light of this background she argued, among other things, that the

children should not be return to the Netherlands, since the conditions of the defence of Article 13 (b) of the Hague Convention apply, allowing the court not to order the return of the minor to his habitual residence in the case of "grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

7. At the request of the mother and the despite the father's objections, the Family Court ordered in its decision dated October 25, 2012, to appoint an experts' team, to check whether - as the mother argued - the conduct of children, especially the eldest son R, can indicate the existence of a concern as stated in Section 13 (b) of the Convention regarding both of the children. The mother also claimed that should the court reject the claim regarding D and order the return of R, the brothers will be in an intolerable situation as a result of the separation from one another, and in addition R will be separated from his mother, and there is a risk that this will cause grave psychological harm to him. The conclusion of the experts was that each of the parents has his/her own problems; the mother is complex, yet ready to understand the problems and address them: the father is a restrained person, with psychological difficulties and limited emotional capabilities, including the failure to understand the complex relationship between parents and children, and there are concerns regarding his ability to harm the children without intensive guidance and support; however no fear from the children of him was observed in the examined interaction, and see also paragraph 10 below; The father can benefit from appropriate guidance and treatment.

Judgment of the Family Court

8. The judgment of the Family Court was given on February 3, 2013. The court first reviewed the factual background of the case. In June 2011, the whole family came to Israel for medical surgery of the mother. Two weeks later, the father had to return to the Netherlands for work related reasons, and the mother stayed with the children in Israel to recover and heal from the surgery. The Judgment also indicate that the visit lengthened beyond what the father expected, and that due to the problems in the relationship with the mother even before the trip, he had concerns even then that she did not intend to return with the children to the Netherlands. In the end they returned after six months. The Family Court found that prior to this trip the mother began to plan her steps so that she would be able to bring the children to Israel without the consent of the father, in a manner that the provisions of the Convention will not require their return, and that from that visit on her actions, including the return to the Netherlands, were directed to this purpose.

9. The Family Court further held that on April 21, 2012 the mother wrongfully removed R from the Netherlands while preventing the father from exercising his parental authority toward him, and that since September 21, 2012, when the Court of the Netherlands decided that the parents shall have joint custody also regarding D, the retention of D from the Netherlands is also contrary to the Convention. It was also determined that the father did not agree to the removal of the children nor accepted its occurrence, and that since the Convention applies to both of the brothers, there is no room to discuss the harm that may be caused to them, as the mother argues, as a result of the separation between them. Above and beyond, it was noted that the mother's claim is outrageous, since by taking the law into her own hands, she herself created the situation where there is a concern of separation of the two sons, and therefore her claim cannot be accepted so that she will not "benefit from her sin".

10. Regarding the defences of Section 13 (b) of the Convention, the Family Court reviewed the separate reports of the various social workers that attended the meetings of the father with the children at the aid unit, and they did not identify signs of fear of the children from the father. They also had the impression that the father is attentive to the wishes of the children, that he was very excited and that the children had a close connection to him, and that there is no doubt that both the father and the children enjoyed and were very happy from the meeting . The Court also reviewed the opinion of the court appointed expert, who conducted extensive testing to the parents and children, and had the impression that the children were happy to see their father and were not afraid of him. Accordingly the Family Court did not find that the defences set forth in Section 13 (b) prevail, and ordered the return of both of the children to their habitual residence in the Netherlands and the conditions under which this should be done, so that the parties will continue the custody hearings there. Theexecution of the judgment was stayed while the mother appealed it.

11. In the appeal in the District Court, the mother repeated her arguments, and primarily appealed the decision that the Convention applies to D, with respect to whom the father did not have custody prior to the time she and the children left the Netherlands. At a hearing in the District Court on March 20, 2013, the parties agreed that in the matter of D the appeal is accepted in the sense that the Convention does not apply to him, and that in the matter of D the appeal will be narrowed to the question of the concern of psychological harm that will be caused to him, as defined in Section 13 (b) of the Convention, as a result of the separation between the siblings.

12. According to the mother, as the Convention applies to R only and not to D, the assumption of the Family Court that the brothers will not be separated does not exist and therefore an expert should be appointed to examine, concerning R, the harm that could be caused by his return to the Netherlands separately from his brother. It was further argued, inter alia, that this issue has to be examined separately from the question of the mother's behavior, contrary to the ruling of the Family Court.

13. The father responded that the question of the harm to the minors as a result of the separation has to be examined in the court in the Netherlands in the permanent custody hearings, and if there is such concern regarding the period of the proceedings, in order to not violate the provisions of the Convention this should mean that of D returns with R , not leaving R with D. At the end of argument he expressed doubt whether the expected harm from the separation between the brothers is more grave than the expected harm to R as a result of the separation from his father.

14. In its Judgment dated March 21, 2013 the District Court did not see fit to request a supplementary opinion from the expert, as it was already prepared to assume that the separation of the siblings would cause them harm; relying on the judgment of my colleague Judge Joubran in Leave for Family Appeal 2338/09 Jane Doe v. John Doe (2009) (hereinafter the matter of Jane Doe) he noted that since the separation is a direct result of the acts of the mother, if the court were to refrain from ordering the return of R for this reason, it will act contrary to one of the Convention's goals, since the mother would benefit from the abduction; this, in particular since it is in her hands to prevent the harm, by returning with both of the children to the Netherlands. Therefore the appeal was accepted, with the consent of the parties, regarding D, but was rejected regarding R.

The application and the hearing before us

15. The current application for leave to appeal this judgment was filed on March 24, 2013, and it was argued that t it should not be considered as a third hearing since the question of the expected harm to R as a result of his separation from his brother was not considered in either of the two previous instances that heard the case. According to the mother, the Family Court dismissed the need to examine the harm to R as a result of the separation from his brother, for the reason that it held that the brothers will not be separated (as the Convention applies to both); once this statement was overruled in the judgment of the District Court and in view of the lack of professional and factual foundation in this matter, this need arose again. The plaintiff's Attorney further referred to the judgment in the matter of Jane Doe on which the District Court relied, arguing that the separation between siblings in this case was not negated as a consideration in Hague Convention proceedings, and that Judge Joubran recognized the possibility that in exceptional cases it may result in harm as defined in Article 13 (b) of the Convention. It was further argued that the circumstances in that case were different from the circumstances here, since an expert's opinion was not requested from the outset with respect to the separation between the siblings, and in any case the elder son did not have time to connect there to his baby brother, who had just been born at the time.

16. Therefore it was argued that in the circumstances, in its refusal to order a supplementary expert's opinion in this matter despite repeated requests of the mother, the District Court prevented her right to argue that this case falls within the exceptions mentioned; that, contrary to the rule that decisions under the Convention should be based on a broad factual basis, particularly when they relate to the child 's best interests, as there is great importance in the expert's opinion even if it may delay the process. It was also argued that in the foreign case law it is accepted principle that a child should not be returned under the Convention, if this will cause a separation from his siblings to whom the Convention does not apply; and in the hearing before us the attorney for the mother added that in the last five years the Supreme Court, when deciding on the matter of Jane Doe, was the only court who ordered the return of a child under the Convention despite the separation from his sibling in this manner.

17. It was also argued that "in the circumstances of this case the mother, who was exposed to constant violence and abuse from the father, and ran for her life with the children to Israel after the father threw them out of the from home and was not financially supporting them and made their lives impossible, cannot be considered a 'sinner' " (para. 46), and therefore the District Court erred in determining that the expected separation is as a result to the acts of the mother. It was emphasized that as the removal of D was lawful, it is the court who – by its decision to return R – is causing the separation of the siblings, and that it is the court's duty to examine in a comprehensive and professional way the concern for the existence of the conditions in Article 13 (b) of the Convention. It was also argued that since Israel is a party to the Convention on the Rights of the Child (Treaty 31, 221 (opened for signature in 1989)), the court must see the best interests of R as a primary consideration, and if his best interests are compromised as a result of the separation from his brother, the violation is prohibited. Thus, we were asked to cancel the judgment of the District Court and to reject the father's claim concerning R, or alternatively to order a supplemental opinion regarding the expected harm from the separation from his brother.

18. The response of the father to the application was requested, in which it was argued that there is a reason that the Convention does not set the non-separation of siblings as a condition for the return of an abducted child under its provisions, and that just as the court is not obligated to appoint an expert in every case where the return results in the separation of the child from his mother, all the more so there is no such obligation when he may be separated from his sibling. Moreover, it was argued that while the mother warns of the harm expected as a result of the separation between the brothers, she does not attaches importance to the consequences of separating them from their father – as a result of her own choice – while she can prevent both by her return to the Netherlands with both children. In the hearing before us (on April 25, 2013) the father's attorney emphasized that the decision of the District Court does not necessarily lead to the separation of the brothers, and that it is the choice of the mother as to who is allowed to return to the Netherlands. It was also argued that the principle that the harm as a result of the return of a child under the Convention may not be the result of a parent's refusal to return with him, including whether the child will be separated from the mother or from other siblings, is enshrined in foreign case law. It was emphasized that the abstaining of the Family Court from considering the alleged harm as a result of the separation, was not only due to its assertion that the Convention applies to both minors, but was also based on the principle that "a sinner should not benefit from his sin", as it was convinced that there is no harm expected to the children as a result of their return to the Netherlands that would justify not returning them.

Decision

19. In the past I had the opportunity to note the similarity between the Hague Convention cases and custody or adoption cases, in that at the center of the discussion are "tender souls who did not sin and are victims of parents who are hostile to each other to no end" (Leave to Appeal Family Case 5024/10 John Doe v. Attorney General (2010), paragraph I). In these cases, dealing with the future of young children, leave to appeal in the third round is given with a relatively generous hand and heart, due their deep and extraordinary sensitivity , and in order to exhaust the judicial examination as much as possible (Additional civil hearing 1892/11 Attorney General v. Jane Doe (2011), paragraph D). However, after reviewing the request, the response and their appendices, as well as the references filed, we did not see fit to interfere in this case with the decisions of the lower courts.

The Hague Convention – the obligation to return an abducted child to his habitual residence

20. Israel adopted the Hague Convention verbatim, and it appears in the addition to the Hague Convention Law in the official translation. The purpose underlying the Convention is set out in Article 1 - to ensure that children who were wrongfully removed from their habitual residence to another country will be promptly returned., and to effectively and quickly prevent the possibility of the parent to unilaterally change the existing situation of custody visitation and rights which were granted to the other parent by the laws of the contracting country, and doing so by the act of abduction, in an attempt to take the law into his/her hands (Miscellaneous Civil Requests 1648/92 Torneh v Meshulam, PD 46 (3), 38, 42 (1992) (hereinafter the Torneh case); Leibowitz v. Leibowitz, PD 47 (3), 63, 70 (1993) , Application of Leave for Family Appeal 672/06 Abu Arar v. Ragusa (2006), in paragraph 8 of the judgment of Judge Procaccia (hereinafter the Abu – Arar case)). Article 3 of the Convention sets forth the conditions upon which the

child's removal violates the law, and when those conditions prevail, Article 12 of the Convention obligates the country to which the child was removed to order his immediate return. This obligation is absolute (the Abu – Arar Case, ibid; Civil Appeal 7206/93 Gabai v. Gabai, PD 51 (2), 241, 250 (1997) (hereinafter the Gabai case)). The Convention embodies agreements of international order, which is essential in a global world to prevent "every man for himself" (Judges 21:25). This principle temporarily prevails over the basic "regular" principle of the best interests of the child, i.e., the court is required (exceptions excluded) primarily to the obligations of the international order; and in the words of Chief Justice Barak, ''This is a special and narrow 'best interests of the child'. It is not the usual framework of 'best interests of the child' in question in determining the right of permanent custody. This is a 'best interests of the child' that is examined as part of the first aid of return of the situation to the status quo" "(The Gabai case, pp. 252-251; Compare to CA Stegmann v. Burke, PD 49 (2) 431, 438-437 (1995), in the Judgement of Judge E. Goldberg (hereinafter the Stegmann case)).

21. Unlike cases of adoption or custody, the decision in proceedings under the Convention is characterized by temporariness and does not rule on the child's permanent place of residence and custody. The relief that is given under the Convention, in accordance with its purpose, is an emergency relief in cases of abduction, which is designed to be fast, urgent and immediate. A type of "first aid" to negate the results of the abduction, in which the remedy is return to the status quo, to prevent harm resulting from delaying the return (the Torneh case, p. 46; the Gabai case, p 251). Indeed the concept enshrined in the Convention is that the removal of a child from his habitual residence without examination by the authorized and appropriate court, while moving the child from place to place and separating him from one of his parents and his natural and habitual environment, is contrary to his best interests (Leave for Civil Appeal 7994.98 Dagan v. Dagan, PD 53(3), 254, 266 (1999) (hereinafter: Dagan case), and the abduction of the child should not change the place of the hearing that will determine his best interests; "A child is not an object, and he cannot be moved from place to place in order to determine the forum for the hearing on the rights concerning him. The child himself has rights, and his best interests demand that the determination on his rights will be made in the place of his habitual residence, and will not be affected by acts of abduction" (Gabai case, pages 251-252 of the Judgment of Chief Justice Barak). The presumption at the basis of this perception is that every court of a state that is party to the Convention shall see the best interests of the child as the cardinal principle in reaching a decision on the issue of custody (Dagan case, pages 271-272), and therefore his return to the state from which he was abducted does not harm his best interests, and this does not prevent the courts in the habitual residence, after an in-depth and comprehensive examination, to eventually determine that the child should be in the country to which he was abducted. In any event, the foundation is international order and the preservation thereof.

Best interests of the child – the exceptions to the obligation to return

22. Despite what is stated above, the Convention recognizes that there may be exceptional cases in which the child's best interests require that he not be returned to his habitual residence, and as such there are exceptions anchored in Articles 12, 13 and 20 of the Convention which leave the question of the child's return to the discretion of the court. In the Family Court the mother claimed the existence of most of these exceptions, and her claims were dismissed, one after the other, in the Judgment. Thus, in our case

the only relevant issue is the exception above which is set out in Article 13(b) of the Convention; the section sets out in its entirety as follows:

> *"Article 13*
>
> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> *a)* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> *b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." (Emphasis added – E.R.).

There are two questions before us: whether the alleged harm caused by the separation between the brothers is within the definition of the harm described in section 13 (b), and if so - whether under the circumstances that claimed harm is tipping the scales in favor of the plaintiff. For the purposes of this section Judge Netanyahu emphasized that ''the goal of the Convention is to bring about the immediate return of the 'abducted' child and Section 13 (b) should be limited to *exceptional* cases in terms of the intolerable situation and the severity of the risk of its emergence as a result of the return "(Torneh case, p. 45; Emphasis added – E.R.). In this regard, and in light of what is stated above regarding the nature of the considerations in Hague Convention cases, we should consider the mother's claim that in view of the judgment of the district court, there is a risk that R will be placed in an intolerable situation and that grave psychological harm will be caused to him, if he will be returned to the Netherlands, as a result of the separation from his brother, and that an expert should be appointed to provide an opinion in the matter.

23. Before I respond to this claim, it should be noted that, like the District Court, we shall also assume in our discussion that the separation will not benefit the brothers. I believe that common sense can tell us that, and it is not necessary to elaborate; nature's way is for siblings to be raised together. The question is, if so, whether this assumption justifies, in the circumstances, leaving R, the older brother, in Israel.

Harm as a result of the separation between siblings.

24. As for whether the harm as a result of the separation between the siblings satisfies the conditions of Article 13(b), my colleague Judge Joubran referred to this question in his judgement in the matter of Jane Doe, noting that:

> "There should not be a rule that whenever there is a concern of separation of two siblings from each other, or of a child from one of his parents, the court cannot exercise its jurisdiction to return the child to his habitual residence under the Hague Convention, since such rule will completely nullify *one of the purposes of the Convention, which is that the abducting parent will not benefit from his actions*. I am prepared to accept that in *exceptional cases* this can lead to the result that the court will refrain from returning a minor to his residence. The case before us, however, does not qualify as one of those *exceptional cases* "(the Jane Doe case, paragraph 30, emphasis added – E.R.).

Judge Joubran also referred to a foreign judgement in the same spirit (ibid., at paragraph 29). i.e. Article 13(b) of the Convention shall be established, on the basis of a claim of harm resulting from the separation of siblings, in exceptional cases only.

25. Indeed, to support his claim – which, prima facie, is not consistent with the judgment regarding Jane Doe - that the guiding rule is not to separate siblings, the mother's attorney submitted in the hearing held before us extensive case law, some more recent than the judgment in the case of Jane Doe, of courts around the world, in countries that are parties to the Hague Convention. In that case law – it was alleged – it was decided again and again that when the Convention does not require the return of all of the siblings to their habitual residence, the separation of one child from his siblings will cause psychological harm and will put the child in an intolerable situation within the meaning of Section 13 (b) of the Convention, and it was decided not to order it. However, we examined this case law, and as explained below, I believe that the cases cited suggest a rule different than the one set forth in the case of Jane Doe, because they come under the category of *special and exceptional cases* recognized by the judgment.

26. So what are those special and exceptional cases? I think that this question can be answered if we examine the cases of separation between siblings, in light of the problem which the Convention is designed to handle; this problem is defined in section 15 of the official interpretation of the Hague Convention, as follows:

> "15 ... it can firmly be stated that the problem with which the Convention deals - together with all the drama implicit in the fact that it is concerned with the protection of children in international relations - *derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial* "(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. Ill, 1980), p. 429, (hereinafter the Perez-Vera Report; Emphasis added - ER).

The purpose of restoring the situation to the status quo is intended to deal with new legal circumstances created by the abducting parent artificially as a result of their actions; this, as mentioned, from the basic concept that it is not in the best interests of the child to be cut off from his natural and usual surroundings without examining the existence of appropriate guarantees to maintain the stability of his world. When, however, the need to cancel the aggressive attempt of the abducting parent to take the law into his own hands conflicts with the need to protect the child from grave harm - Article 13 (b) of the Convention instructs us that the best interests of the child may require, that the interest of his stability – and I can add the interest of the international order - will recede due to the need to protect his well-being (Perez-vera report, paragraph 29; compare the Stegman case, pp. 438-437). Note that not in every case in which the return of the child to his natural environment may be accompanied by grave harm, will the outcome be to apply the exception in Article 13(b). This is discretionary and it may be possible to think of solutions to nullify this harm. Whenever it is possible to return the child to his habitual residence without exposing him to harm, obviously this is the way to go. However, in case of grave harm in the absence of a proper solution, the child will not be returned. In summary, "the non-return of the abducted child is permitted, as an exception, only in extreme cases where the weight of the needs of the abducted child is so powerful that it supersedes even the main purpose of the Convention - to prevent child abduction and moving the child from one country to another" (the Abu – Arar case, paragraph 9 of the judgment of Judge Procaccia). When dealing with a case such as the one before us, of course, as long as it is possible to return the child without necessarily causing separation between siblings, we should be careful of the *artificial situation presented to the court as a result of the abduction*, according to which the return will result in the separation of the siblings, since avoiding the return in this situation ignores the root of the problem underlying the Convention, "Abducting and benefiting". Such an understanding of the issues also deals with the concern that the abducting parent shall not benefit from his actions, as the grounds for non-return must be differentiated from the artificial circumstances created by the abduction.

27. Against this background we will examine the foreign case law that was brought to us on behalf of the mother. In most of those cases the courts found, sometimes after hearing an expert's opinion and sometimes in its absence, that the older children clearly opposed to their return, and that they were mature enough to express their wishes in a sincere and intelligent manner, independently of the wishes of the abducting parent (usually the mother). In the majority of those cases the children were older, aged 10 and above. Therefore, it was decided that it is appropriate to consider their position and not to order the return, according to the latter part of Article 13, which instructs, as stated, that: "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Following this, it was decided in those cases that if the younger siblings, who have yet not reached the degree of maturity that allows considering their views or who did not oppose to the return, would be returned without their older siblings, they would suffer intolerable psychological harm as a result of the separation, and they would find themselves in an intolerable situation. Thus once it was decided to consider the wishes of the older siblings, it was decided that their right to object to the return should not be nullified from fear of separation from their younger siblings, or by forcing the mother to choose whether to return with her young children or to stay with their older siblings, and therefore even though the conditions of the Convention apply to the young children, they should not be returned ([1993].

B. V. K 1 FCR 382; Urness v. Minto [1994] SC 249; In the Marriage of SS and DK Bassi [1994] FLC 92-4, pars. 51-56; Secretary for Justice v. P., ex parte C. [1995] NZFLR [2010] (827; Singh v. Singh [1998] SC 68; Re T. [2000] 2 FCR 159; Re W. (MINORS [2010] (2 EWCA civ 520, pars. 13 (b) 26; State Central Authority v Hotzner (No FamCa 1041, pars. 194-199, 233-234; WF v. RJ and BF and RF [2010] EWHC 55 .2909, pars. 68-69; JMH v. AS [2010] NBQN 275, par 55). In other cases – of younger children - in the courts in Scotland and United States; the mothers bore the burden of proof for the existence of fear of physical or psychological harm (*which does not derive from the separation*) to their older daughters upon their return, due to a background of abuse by the father, and it was determined that it is not unlikely that this fear exists also in their younger siblings, and it was noted that it is not desirable to separate them from each other (Q. Petitioner [2001] SLT 243; Miltiadous v. Tetervak [2010] 686 F. Supp. 2d 544). Namely, In such cases the separation that created the harm was the result of the obvious and expressed desire of the elder, more mature siblings not to return, or the result of fear of physical or psychological harm caused to one of the children (not as a result of the separation).

28. As we see: in the aforementioned cases, the justification not to order the return of some of the children, and their siblings as a result, was due to factors that went beyond the choice of the abducting parent to leave the habitual residence of the children. In those cases, there was no real option to restore the former situation, as it would be not be right to return all the siblings together to their habitual residence, due to factors that are beyond the act of abduction and the behaviour of the abducting parent (the wish of one of the children, or the concern that one of them will be exposed to physical or psychological harm that does not derive from the separation). Regarding the exception of the child's wish, see the remarks of Judge Procaccia in the matter of Abu – Arar, noting that "the Convention on the return of abducted children is built on the concept that the child, like an adult, has personal autonomy, personal dignity, and independent will that should be considered. The Convention is based on the idea that even though the child is subjected during his minor years to the natural custody of his parents, he has the right, even within this custody, for a certain autonomy, freedom of opinion and will that are worthy of consideration, and the court recognizes that and gives it weight in different contexts and within defined limits "(paragraph 11 of the judgment of judge Procaccia). Here, the cases cited are exceptional, and they can be considered the exceptions to which my colleague Judge Joubran refered in the Jane Doe case cited above.

29. From here, we come to answer the concrete question before us. Are the circumstances similar in this case? I'm afraid the answer is not affirmative. The concern that R would be separated from his brother D, does not result from his wish to remain in Israel, or from the fear of harm that would be inflicted to him upon his return to The Netherlands, but from the fact that the mother does not wants to return to the Netherlands and is not obliged to return him there. In other words - the fear of separation of the siblings and the harm that will be caused to them is the result of the conduct of the mother only. Therefore both the Family Court and the District Court were right to refer to the matter of Jane Doe, since the circumstances of this case are similar to the relevant factual and legal foundation of that matter. In that case, the couple lived in France with a child that was born to them there, and the mother returned to Israel to give birth to their younger son, and intended to stay here with both children. The Convention applied only to the eldest son. After the court rejected the mother's claims regarding the harm that will

be caused to him by his father in the case of his return to France, , the mother claimed in her appeal to the District Court and application for leave of appeal to this Court, inter alia, that the elder son would be exposed to intolerable harm if he will be returned to France, due to separation from her and from his younger brother, who will remain in Israel. In that case, as aforesaid, it was not found that the circumstances of the case come within the exceptional cases of separation whose harm is included in section 13 (b) of the Convention. Even when we assumed, as stated, that the best interests of R will be harmed as a result of his separation from D, the circumstances do not amount to the rule of grave harm that justifies the application of this section, according to the convention interpretation.

30. We asked ourselves is there any need to accede to the mother's request to appoint an expert regarding the harm. As mentioned, we assume that some harm will be caused, while on the other hand the children are young, the elder is 5 years old in about three months, and the younger is three years old, and are not at the age where it is possible to get their opinions, and the mother has the option to go to litigate in the Netherlands if she so chooses. At the end of the day we agree with the District Court (paragraph 10) that the foundation before us is enough to make a determination, and therefore we did not see fit to appoint an expert under the specific circumstances.

31. Finally, the mother claims that in fact, that it is not her desire to live in Israel that is separating the siblings, but rather the lack of the application of the Convention to D. This claim cannot be accepted. While the mother is not required to return D to The Netherlands, nothing under the Convention prevents her from doing so. Since there is the option to return R to his usual place without separating him from his brother, the presentation of the return as obligating the separation of the siblings is artificial, and accepting this claim is inconsistent with the purposes of the Convention. If we look at the circumstances with a view of "restoring the situation to its status quo", had the mother not abducted R, the harm would have been caused to him as a result of the mother's departure to Israel and not as a result of his return to the Netherlands, as there is nothing preventing D from staying with him in the Netherlands for the purpose of the judicial hearings and decision. Clearly the best interests of R are not to be separated from D, but their separation, as stated, is not inevitable and predestined. Even if it will be decided - we express no opinion, of course - that the two children shall live here, by agreement between the parents or by order from the court in the Netherland, there is no place to nullify the application of the Convention.

32. Therefore we do not accept the application: R shall be returned within two weeks from today, according to the judgment of the District Court. Insofar as the mother would like to return with D to the Netherlands - and the presumption is that the best interests of her children are before her eyes - until the end of the legal proceedings regarding the custody of the children, I suggest that the return will be made under the terms prescribed in the judgment of the Family Court dated February 3, 2013, which, it seems to me, has to allay the concern regarding suitable housing for them, as well as to some extent the alleged concern regarding further friction with the father. Should the mother choose not to return with D, the father will come to Israel to take R with him, and R will be in his custody pending the decision in the competent authorities in the Netherlands, where the issue of permanent custody will be decided, and the consideration is - as usual and properly - first and foremost the best interests of the children, and it is assumed that the arguments of the parties will be heard through and through; and as was written regarding the matter of Jane Doe (paragraph 50), the mother may raise her arguments regarding joint

custody of the siblings for the best interest of the children, including in light of statements made by the team of experts appointed by the Family Court. It should be emphasized, as aforesaid, that our decision here does not constitute an opinion on this issue.

33. I allow myself to finish with part of my opinion regarding the matter of Jane Doe (paragraphs B - C):

> "The Hague Convention cases inherently represent human tragedies, a war between parents, who may be quite normative people, but each wish to live in another country. The international order in the "global village" and the easy mobility characteristic to it, prescribed the Hague Convention, to ensure the immediate return of children who were wrongfully removed to another country" (Judge Procaccia in Leave for Family Appeal 672/06 Jane Doe v. John Doe (unpublished), paragraph 8), and as she noted, in those cases the best interests of the child is determinative "only where its weight exceeds the main purpose of the Convention." Each one of those cases represents human worlds, and above all the world of a child who is moved around from one place to another. The attorney for the plaintiff raised within this framework all possible arguments, even though her opinion was not accepted.
>
> Indeed, here we are dealing with a case that is somewhat unusual, even for a Hague Convention case, due to the legal difference between the two sons of the couple – the first, the older, is covered by the Convention, and other, the baby – is not. There is therefore an inherent difficulty in that the plaintiff will have to go to France, naturally, with her younger son, with all meaning of that. Yet the legal structure of the regulation which is the basis of the Convention is that the issue of custody has to be decided in the place from which the child was abducted. In this case the whole picture should be brought before the French courts, including the unfamiliarity of the mother in France, and the basic approach that it is natural that the two siblings will be together, and that the custody very young children is generally given to the mother. However, at the end of the day we must carry out our obligations under the Hague Convention ... ".

These things, I think, are appropriate also in our case.

Summary

34. As mentioned, we cannot grant the leave for appeal. There will be no order for costs.

Judge

Judge D. Barak - Erez:

I agree with the comprehensive opinion of my colleague Judge E. Rubinstein.

1. The case at hand highlights the fundamental tension underlying the Convention on the Civil Aspects of International Child Abduction (hereinafter: the Hague Convention) - the tension between the rejecting the option of having a "de novo" hearing on with the best interests of the child as part of the proceeding for return the abducted child (a hearing that must be held before the competent Court) and the recognition of exceptions to this rule under section 13 (b) of the Convention in extreme situations of "distress" or "harm."

2. The uniqueness of the case is that the risk of the separation between the brothers is embodied in its background circumstances - the fact that only one of the siblings is an "abducted child" to whom the regulation of the Convention applies. In this type of case the separation of the siblings is one of the elements that characterizes the situation which the court is required to decide. This is different from the typical case in which the question of separation of siblings arises - when all the children of the family were transferred by one of the parents to his country of residency (i.e. all were abducted all). In these cases, often only the older child or children can express their opinion on the question of the return, and when they vehemently oppose it, this could create a situation in which only the younger sibling, who is not mature enough for consideration regarding the question, will be returned without his siblings. This is the typical situation discussed in the judgments on which the mother's attorney relied upon, as was clarified by my colleague Judge E. Rubinstein in his opinion. In these cases, the exception for the return of older children applies independently of the question of the separation of the younger brother or sister and stems from difficulties in the relationship between the parent seeking the return of children and his older children. The younger brother or sister is not being returned in order to avoid being harmed because they are unable to present a mature and independent opinion to the court.

3. Our case is different in a few ways from this typical case. The main difference is that in the circumstances, there was no independent justification for the non-return of the brother. The mother requests to bases his non-return to the father only on the fact that theresult would be that he would be separated from his sibling. There is great concern that should we allow the non-return of a child from the parent from whom he was abducted only because of the connection to a sibling to whom the Convention does not apply – we will significantly expand the exception provided in Article 13(b) of the Convention in a manner that could undermine it. A deliberation in cases of this type is not common, but when it reached the courts in other countries, it points to recognition of the need to return the abducted child, despite the result of separation of siblings. (See: Cawdrey v. Cawdrey 2010 (Cawdrey v. Cawdrey 2011 ONCA 29 (Canada); ONSC 5573 (Canada).

4. More generally, it should be noted that the separation between the siblings is indeed a difficult outcome, given the value of the direct connection between siblings - as a support group, as friends, as an emotional and material support, whether at the present or in the future. The importance of the relationship between siblings is gaining increased recognition both in the decisions of this Court (see, for example: LCA 9192/12 John Doe v. Attorney General, in paragraph 12 of the judgment of Justice Y. Danziger, and in the words of my colleague, Judge Rubinstein (February 17, 2013)) and in the legal literature (see, for example: Jill Elaine Hasday, Siblings in Law 65 Vand. L. Rev. 897 (2012)). Our judgment does not undermine this recognition. The problem in this case, is that the price of separation between the brothers does not stand alone. The real choice in a case of this type is the choice between separation of

the siblings and the actual separation of both from the father. The result is difficult either way. In these circumstances, weight should be given to the part of the mother in creating the situation, not from considerations of blame, but rather primarily to avoid undermining the purposes of the Hague Convention. In essence, and from the outset, it must be remembered that the best interest of children requires that the decision on questions concerning custody and treatment will not be accepted by way of "might makes right". The interpretation of the Convention should be done in light of this purpose, while limiting the exceptions to the operation of the rule of return rule to situations where the difficulty is associated with the parent requesting the return of the child or with the living environment that that parent can provide to the child.

Judge

Judge H., Meltzer:

I agree with the exhaustive opinion of my colleague, Judge E. Rubinstein, and the comments of my colleague Judge D. Barak - Erez.

It seems to me that the conclusion reached by my colleagues is also justified by the "Judgment of Solomon test", since the Father gave here his consent to not applying the Convention to D, the younger brother. It is hard to rectify all the motives of this approach for the father, but it resulted in the minor in question stayמעו with his mother and in fact the "Judgment of Solomon test" is implemented here (compare my judgment in Additional Civil Hearing 1892/11 Attorney General v. (22.05. 2011)). In this way the "best interests of the child" was also achieved under the circumstances, given the tender age of the child and his need of his mother.

Similar criteria can also be operated for the separation created between the siblings: D and R, that the applicant can cancel or minimize (even only until the deciding of the dispute by the competent forum) - this according to the "Judgment of Solomon test", if it will be necessary.

Judge

Decided as stated in the judgment of Judge E. Rubinstein.

Given today, 21 o Sivan 5773 (May 30, 2013).

Judge Judge Judge