In the Supreme Court

LFA 741/11

Before: The Honorable Justice E. Arbel
The Honorable Justice H. Melzer
The Honorable Justice U. Vogelman

The Applicant: Jane Doe

vs.

The Respondent: John Doe
Adv. T. Itkin
On behalf of the Applicant

Adv. G. Turs
On behalf of the Respondent

Hearing of application for leave to appeal on decision of the District Court in Nazareth, on 20 January 2011, in FA 044293-12-10 handed down by Hon. Judges A. Abraham, Y. Abraham, and D. Tzarfati.

Date of hearing: 1 Adar B 5771; March 7, 2011

Israeli Legislation Cited

Hague Convention (Return of Abducted Children) Law, 5751-1991

Israeli Supreme Court cases cited:

[1] CA 4391/96 *Pol Ro v. Daphna Ro*, IsrSC 50(5) 338 (1997).

[2] LFA 1855/08 *Jane Doe v. John Doe* (not reported, 8.4.08).

[3] CA 7206/93 *Gabbai v. Gabbai* IsrSC 51 (2) 241 (1997).

[4] LFA 9802/09 *Jane Doe v. John Doe* (not reported, 17.12.09).

[5] LCA 7994/98 *Dagan v. Dagan* IsrSC 53(3) 254 (1999).

[6] CFH 10136/09 *Jane Doe v. John Doe* (not reported, 21.12.09)

[7] LFA 672/06 *Abu Arar v. Regozzo* (not reported, 15.10.06).

[8] CA 473/93 *Leibovitz v. Leibovitz* IsrSC 47 (3) 63 (1993).

[9] CApp 1648/92 *Torne v. Meshulam* IsrSC 46(3) 38 (1992).

[10] CA 5532/93 *Gonzburg v. Greenwald* IsrSC 49(3) 282 (1995).

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[11] LFA 911/07 *Jane Doe v. John Doe* (not reported, 30.10.07).

[12] FH 40/80 *Koenig v. Cohen* IsrSC 36 (3) 701 (1982).

[13] CA 692/86 *Botkovsky v. Gat* IsrSC 44(1) 57 (1989).

[14] CA 1569/93 *Maya v. Panfird* IsrSC 48(5) 705 (1994).

[15] CA 1912/93 *Shaham v. Mones* IsrSC 52(1) 119 (1998).

[16] LCA 4575/00 *Jane Doe v. John Doe* IsrSC 55 (2) 321 (2001).

[17] LCA 8791/00 *Shalem v. Twenko* (not reported, 13.12.06).

[18] CA 172/89 *Sela Insurance Company Ltd. v. Solel Boneh Ltd.* IsrSC 47 (1) 311 (1993).

English Judgments Cited

[19] In re H and Others (Minors) [1997] UKHL 12.

[20] In re AZ (Minor) [1993] 1 FLR 682.

JUDGMENT

Justice E. Arbel

This is an application for leave to appeal the decision of the District Court of Nazareth (Hon. Judges A. Abraham, Y. Yonatan, D. Tzarfati) that partially accepted the applicant's appeal against the decision of the Nazareth Family Court (Hon. Judge S. Giosi) and ordered that the common daughter of the applicant and the Respondent be returned to New Jersey, United States, pursuant to the Hague Convention (Return of Abducted Children) Law, 5751-1991 (hereinafter: The Convention Law).

Factual Background

1. The applicant and the respondent, both of them natives of this country, grew up and met each other in their residential town in Israel. As of 2006 the two lived as a couple in the state of New Jersey in the United States, where they were staying based on a tourist visa. In 2007, the applicant began studying while the respondent continued

to work various jobs. By virtue of the applicant's studies, they both received a student visa. In 2008 the applicant and the respondent were married in Israel, in accordance with the Law of Moses and Israel, and immediately following the celebrations they returned to the United States. In September 2009, their daughter was born in the United States (hereinafter: the daughter). About two months after that, the applicant came to Israel for a visit together with her baby daughter, and later on the respondent joined them. During their visit in Israel, which lasted for about two months, the couple opened a children's clothing store in their native town. Upon completion of the arrangements for the opening of the shop, the three returned to the United States. In March 2010 they came to Israel again for the Passover holiday (hereinafter: the last visit), and the respondent returned to the United States on April 19, 2010; the applicant and their daughter were supposed to have joined him on June 20, 2010, however, the applicant and their daughter remained in Israel, where they have stayed until now.

2. To complete the picture, as indicated by the decision of the Magistrates Court, at a certain stage of their relationship the respondent began to observe a religious life style, whereas the applicant did not alter her lifestyle. This triggered disputes between the spouses, and in the course of the applicant's pregnancy, the respondent even considered divorcing her. In their last visit to Israel, the dispute between the couple peaked, with each of them staying in separate residences in their respective family homes. On April 7, 2010, when the two were in Israel, the applicant filed for divorce in the Rabbinical Court, attaching thereto the subject of their common daughter's custody. On April 11, 2010, the applicant and respondent met, and, with the help of an accountant who mediated between them, reached an agreement concerning the termination of their relations, titled "Property Agreement" (hereinafter: "the agreement", or "the property agreement"). The agreement established sections intended to regulate the division of property between the couple, as well as sections that regulated the matter of custody of their common daughter, child support, and visitation arrangements. Ultimately however, the agreement was not signed, in the light of the applicant's refusal to sign it, following the respondent's rejection of one of her demands regarding the property rights of the two. The respondent returned to the United States as planned, after the applicant agreed to remove the stay of exit order that was issued against him at her request. At about the time of the date scheduled for the return of the applicant and their daughter to the United States, the respondent sent out a warning to the applicant, via his attorney, stating that he was expecting their return as planned. In July 2010, when the applicant and the daughter did not return to the United States, the respondent filed a claim for the return of the daughter in a New Jersey Court. He subsequently filed a similar claim in the Family Court in Nazareth in which he requested an order for the daughter to be returned to the United States in accordance with the Supplement of the Convention Law (namely the Convention on the Civil Aspects of International Child Abduction, 21. 31, 43 (opened for signing in 1980); hereinafter: the Convention).

The Decision of the Family Court

3. The Nazareth Family Court ruled that failure to return the daughter to the United States constituted an act of abduction as defined in the Convention, and given the non-application of the exceptions thereunder, the daughter must be returned to the United States. The initial determination was that an event of abduction, within the meaning of section 3 of the Convention had occured, while most of the discussion had focused on the question of whether, at the time of the abduction, the daughter was "habitually resident" in the United States. The Court examined the subject from the perspective of two schools of thought, namely the "factual approach" and the "intention-based approach". The Court's ruling relied primarily on the "factual approach", in accordance with which it ruled that the geographical-physical place of

residence of the daughter immediately prior to the act of abduction was in the United States. The Court also discussed the "intention-based approach" in its examination of the parties' intentions with respect to the current and future place of residence. It was held that the renting of an apartment in the United States and hosting of acquaintances in it, as well as the establishment of a business company in the United States attest to the intention of settling in that country. On the other hand, it ruled that the applicant's unilateral decision to discontinue her studies in the United States, the opening of a shop in Israel, the retention of social security rights, real estate and bank accounts in Israel do not attest to an immediate intention to return to Israel, but at the most to an intention to do so in the future.

After determining that an abduction, within the meaning of section 3 of the Convention, had occurred, the Court discussed the applicant's defence claims. It determined that the exception pertaining to the "abductee" parent's consent to the abduction, prescribed in section 13 (a) of the Convention (hereinafter – "the exception of consent") is not applicable to the case at hand. First, it found that the applicant's fear, as expressed in her application to the Rabbinical Court, that the respondent would abduct the daughter, attests to his refusal to remain in Israel. Second, it ruled that the agreement that crystallized does not attest to consent because it did not become a binding contract, and because the agreement was concluded at a time when the respondent was under tremendous pressure due to stay of exit order that was issued against him. It likewise rejected the claim of applicability of the exception of subsequent acquiescence to the act of abduction, within the meaning of section 13 (a) of the Convention (hereinafter – the "exception of subsequent acquiescence"), given that the respondent sent a warning to the applicant near the time of the scheduled return to the effect that he was awaiting the return of the two to the United States, and also because he actually applied to the state authorities in the United States concerning the abduction of the daughter, about one month after the applicant and the daughter were supposed to have returned to the United States. Finally, it was determined that even the exception regarding a grave concern for harm to the minor, under section 13 (b) of the Convention (hereinafter: the exception of grave concern for harm) has no application in this case. The court rejected the applicant's claim that illegally staying in the United States on the parents' part was liable to harm the daughter. It clarified that the legal status of the parties was not directly connected to the application of this exception, because it sufficed that the daughter's entry into the United States was possible, given that she was an American citizen. Accordingly, the court ordered that the daughter be returned to the United States, subject to a deposit for the sum of $6000 to guarantee the child support for the daughter, and subject to the assurance of living arrangements for the two in the apartment in which they had lived in the United States, or an alternative apartment for a period of 6 months.

The Decision of the District Court

4. In a majority decision the Nazareth District Court dismissed the applicant's appeal, subject to changes that it introduced into the conditions for the return of the daughter. The majority (Hon. Judges Y. Avraham, and Z. Tzarfati) ruled that there were no grounds for interfering with the factual holdings of the Family Court, both regarding the act of abduction and regarding the non-application of the exceptions to the obligation to return. It stated that the Convention's purpose of preventing the abducting parent from taking the law into their own hands mandated the presentation of concrete evidence of the applicability of the exceptions by the party claiming their applicability. The applicant failed to discharge that burden, it was therefore determined that the daughter should be returned to the United States, subject to the deposit of $10,000 by the respondent to assure the child support of the daughter and subject to the respondent's submitting of a confirmation of the filing of a custody suit in the New

Jersey court. The minority view (Dep. President A. Abraham) was that the appeal should be accepted given the applicability of the exception of subsequent acquiescence. According to this position, the starting point for the discussion was that the daughter was habitually resident in New Jersey and the applicant's act could therefore be referred to as a "wrongful retention". However, under the circumstances, the evidence indicates that the exception of subsequent acquiescence is applicable. First, where the agreement did not crystallize into a binding contract, evidentiary weight was ascribed to the proof of the respondent's agreement to the act of retention. Second, the cancellation of the stay of exit order, with the applicant's consent, immediately after the drafting of the agreement, was interpreted as giving expression to the understandings reached in the agreement and as an attempt to comply with one of its sections. Third, the respondent's return to the United States was presented as demonstrating the respondent's waiver of the immediate realization of his right of custody, as well the immediate return of the daughter to the United States.

The permission to appeal this decision is now being requested.

The Applicant's Claims

5. In her application to appeal the applicant claims that under the circumstances of the case the conditions prescribed in section 3 of the Convention aren't fulfilled and hence it cannot be held that the failure to return the daughter to the United States was unlawful. The claim was that the parties' stay in the United States was temporary and hence the trial court erred in holding that the habitual residence of the daughter was in the United States. It was further claimed that the respondent had not proved that his custody rights were breached, and that during proceedings in the trial court, no legal proceeding was pending in the competent forum in the United States concerning custody.

Alternatively, the applicant claims that the exceptions to the obligation to return rule are applicable. First, it is claimed that the exceptions of consent and subsequent acquiescence under section 13 (a) are applicable. The claim is that the respondent filed this suit after having accepted the exclusive jurisdiction of the Rabbinical Court over the matter of divorce and the attached matters. In light of his consent, the stay of exit order issued against him was cancelled, and he returned alone to the United States. In addition, in the agreement the respondent consented to his daughter remaining in Israel and to the payments of child support in Shekels and to the consensual visitation arrangements during his visits to Israel. According to the applicant, the respondent was prepared to accept the agreement as it was, while she was the one who refused to sign it, due to a financial dispute between the parties. Second, it was claimed that the exception of grave concern for harm under section 13 (b) was applicable and that the minor's best interests dictated that she remain in Israel. The argument was that in circumstances where there is no medical insurance for the daughter in the United States and in which her parents have no legal visitors' permit there, the return of the minor to the United States would expose her to real harm. Therefore, the applicant seeks to infer that even assuming the act of a wrongful retention, under the circumstances no order should be given to immediately return the daughter to the United States. In view of all of the above reasons, the applicant has petitioned for leave to appeal the decision of the lower court and to set aside its decision that ordered the return of the daughter to the United States.

The Respondent's Claims

6. The respondent, on the other hand, claims that the application for leave to appeal should be dismissed, because the case is not one that raises any principled legal question beyond the particular concern of the parties. On the merits of the matter he claims that the conditions set forth in section 3 of the Convention were fulfilled. The

claim is that the respondent’s custody rights were exercised pursuant to the laws of the state of New Jersey, under which both parents have joint custody over the daughter, and that according to the decision of the lower court a custody suit had been filed in the court in New Jersey, meaning that the respondent was already exercising his custody rights, as required by the Convention. The respondent further maintains that there is no justification for interference with the factual holding of the Family Court that the habitual residence of the daughter is in the United States. The respondent attached various items of evidence to his response, which were discussed in the trial court, and which he claims show that his claim that the parties' stay in the United States was neither temporary nor limited to the duration of the applicant’s studies. The evidence presented included, amongst others, the confirmation of the conduct of bank accounts and a document attesting to the extension of a rental contract for the spouses’ residential apartment in the United States.

The respondent further opines that the exceptions to the obligation to return, as argued for by the applicant – have no application in the current case. The claim was that the agreement drafted attests neither to consent nor to acquiescence, both because it was not signed, and because it was the applicant who hand wrote in the attached draft to the agreement, “returning to Israel”. In his view this note proves the absence of a final decision concerning the place of residence. The respondent added that the exception concerning harm is similarly inapplicable to the particular circumstances. He claims that there is no fear of the parties being expelled upon their return to the U.S., given that he had received a worker’s visa in a required profession for a period of two years while the applicant had a visitor's permit for a similar period. He stressed that he had complied with the conditions set by the trial court to assure the safety of the daughter upon her return to the United States. The rent contract had been accordingly extended and the sum required to assure the payment of child support was deposited. He therefore claimed that the application for leave to appeal ought to be rejected and he requested an order for the immediate return of the daughter to the United States.

7. After our examination of the parties' pleadings and having conducted an oral hearing, we have decided to grant leave to appeal and to hear the application as though it were an appeal in accordance with the permission granted.

Deliberation and Ruling

8. The case before us presents two central questions. The first is whether the applicant committed an act of wrongful retention as defined in section 3 of the Convention by not returning the daughter to the United States on the scheduled date. Should the answer be affirmative, the second question arises – whether the circumstances of the case give rise to the conclusion that one of the exceptions to the Convention's obligation of immediate return is applicable, so that no such order for the prompt return of the daughter to the United States, as the treaty dictates, should be given. I will discuss these questions by order.

The Normative Framework

9. Over the past few decades, as the world turned into a global village in which transition between countries is easy, and people frequently move between countries, a real need has risen for international cooperation in dealing the phenomena of abduction of children by one of the parents, in violation of the other parent's custodial rights. In most of the cases falling within the scope of the Convention our concern is with parents from different countries of origin, whose separation triggers a dispute concerning the place of residence, with each parent seeking to raise the joint child in that parent's country of birth. Occasionally, one of the parents decides to take the unilateral step of removing the child to another state, without the other parent's consent, and in violation of his custody rights. This kind of act of self-help demands a swift and efficient remedy

that can only be given by way of cooperation between the states of the world. This was the background for the signing of the convention. Justice M. Cheshin dwelt on this point, writing:

> The Hague Convention and the Convention Law were intended to establish an inter-state arrangement for a phenomenon that though observed in the past, has in our time become increasingly frequent. The world we live in today differs from that of yesterday… visits of persons native to one country in other countries have become particularly frequent, and these visits give rise to meetings between young men and women. The meetings often spark love between him and her… the couple, living together and in love, must decide between them: Where will they live – in his or her country? A decision is made and one spouse follows the other. Time passes, and the spouses discover that they are unable to live together. The spouse who went into exile from his country naturally seeks to return to the country where he was born and raised, and seeks – also naturally – not to be separated from his child. The absent of agreement and understanding between the couple the results with abduction. However, the other spouse, is also unwilling to give up his child, and the issue thus comes before the court. The question is: In whose custody will the child be in, and in which state will he live. Naturally, the Hague Convention was not intended to apply exclusively to cases of this kind, but as we know, cases of this kind are particularly common (CA 4391/96 *Pol Ro v Daphna Ro* [1] p. 343 (hereinafter: "the *Ro* case").

The Convention is based on a number of related goals. First – achieving cooperation between states in dealing with child abduction in breach of the custody rights determined in the state of origin. Second, respect for the rule of law not only within the state, but also in the relations between the states of the world. Third, the deterrence against self-help on the part of one of the parents, and finally, preventing harm to the welfare of the minor who was uprooted from his natural environment by the act of abduction (see LFA 1855/08 *Jane Doe v. John Doe* [2]; (hereinafter: *Jane Doe* case). To realize these goals the Convention established a remedy defined as "first aid" for the act of abduction, which requires signatory states to order the return of the child to the state from which he was abducted urgently and with all possible speed (see CA 7206/93 *Gabbai v. Gabbai* [3] (hereinafter: *Gabbai* case), while leaving a limited margin of discretion for the court hearing the application for return.

The Preliminary Conditions for the Application of the Convention

10. An instruction for the return of the child to the state from which he was removed, or to which he was not returned can only be given when the preliminary conditions for the application of the Convention are satisfied, as prescribed in section 3 thereof, and which constitute an act of "abduction". A distinction must be made between two categories of cases dealt with by this section. The first is an act of "active abduction" namely – removal from the habitual residence of the minor, to a contracting state. The second case is that of "abduction by omission", namely the failure to return a minor from a contracting state to the state in which the minor was habitually resident

(see LFA 9802/09 *Jane Doe v. John Doe* [4] (hereinafter: *Jane Doe* (1) case.))

11. Section 4 of the Convention establishes the age threshold for the minor in respect of whom there is a request to apply the Convention, setting it as 16. Section 3 of the Convention establishes three preliminary conditions for a removal or retention of a minor to be considered as "wrongful", enabling the application of the Convention: There is a requirement that the act violated the custody rights of the "abductee" parent; that these rights were actually exercised; and that the state from which the minor was removed, or to which he was not returned was the habitual residence of the minor. The term "habitual residence" is not defined in the Convention, apparently due the aim of its drafters to enable flexibility and the ability to conduct each case according to its circumstances, having consideration for the variety of possible situations. The interpretative tendency is to give the term "habitual residence" a strict and narrow construction since overly broad interpretation is liable to undermine the realization of the Convention's objectives, and even to devoid it of all meaning (see *ibid.,* at para, 9 ; *Gabbai* case[3] pp. 254-255.)

12. Regarding the question of what constitutes the "habitual residence" of the minor, two schools of thought have developed in the case law, referred to respectively as the "factual approach" and the "intention based approach". The factual approach is based on an examination of the minor's geographical-physical place of residence immediately prior to the minor's removal. This is a factual examination and not a legal one. This is an approach that focuses on the past. In this framework there is no place for examining the parent's future intentions or plans, whether jointly or individually regarding the place of residence. The only question to be asked is where did the child reside on a permanent basis just before the act of removal, from his own perspective, or from his parents' perspective if he is not at an age of sufficient maturity to testify regarding his place of residence:

> The place of residence is not a technical expression...it expresses an ongoing life reality. It reflects the place in which the child was habitually resident before the abduction. The point of view is that of the child and the place in which he resided. The examination centers on past daily life and not on future plans. When parents are living together, the habitual residence of the minor is generally the place of his parents' residence (President (Ret.) A. Barak, *ibid,* [3], p. 254.)

Alongside the factual approach another approach also developed, known as the intention-based approach. This approach does not limit itself to an examination of the minor's physical place of residence before his abduction, but also considers the parents' intention regarding the duration and circumstances of his stay in the state. According to this approach, for example, the fact of parents having immigrated to a particular state on a permanent basis or perhaps only for a limited period would have different significance in the determination of the "habitual residence". The parental intention is inferred from the circumstances of the case and the interpretation given to the facts pertaining to their stay in the state (see *Jane Doe (1)*[4], and references cited).

13. From the aforementioned it emerges that the intention-based approach focuses on "matters in the heart" and circumstances of debatable interpretation. The factual approach on the other hand, offers a simple and essentially objective approach, which occasionally precludes having consideration for a more complex reality. The question of the relationship between the two approaches and the weight to be ascribed to each has been left for further consideration (see CA 7994/98 *Dagan v. Dagan* [5] (hereinafter: *Dagan* case); CFH 10136/09 *Jane Doe v. John Doe*) [6], although it is generally accepted that the examination should be principally in accordance with the

factual approach, for fear that an examination of the parents' intention will undermine the goals of the Convention. In my view, the two approaches should be combined so that the primary focus remain on the factual question of the physical place of residence, but certain weight also be ascribed to the intentions of the parties and their life circumstances. Either way, we are not required to decide this issue in the case before us. Indeed, both of the approaches were examined by the previous instances in their consideration of the question of the daughter's “habitual place of residence”. The conclusion they reached was that the daughter's “habitual place of residence” prior to the failure to return her was the United States.

Exceptions to the Obligation to Return Rule

14. The underlying conception of the Convention is that the abduction act harms the child and his welfare, by reason of his being uprooted from his natural environment and from his custodian parent and being brought to a foreign environment, which was forced upon him by the other parent. While the term "child's best interest" is not mentioned in the Convention, it constitutes its basic principle, for matters concerning children cannot be dealt with without taking their best interest into account (see *Gabbai* [3] p. 251; for a discussion of the connection between the Convention and children's rights, see: Rona Shus "The Rights of Abducted Children: Is the Hague Convention (Return of Abducted Children) Law 5751-1991 Consistent with the Doctrine of Children's Rights" *Mechkarei Mishpat* 20 (2004) 421). The question of the child's best interest will determine the decision on the substantive question of child custody. The discussion in proceedings under the Convention Law concerns the forum that should consider this question. Having consideration for the goals of the Convention, and primarily the goal of stressing the importance of upholding the rule of law on the international level, the default rule is that the child's best interest will be adjudicated in the child's habitual residence and not in the state to which he was abducted.

15. That said, the child's return to his habitual residence is occasionally liable to harm him, making it inimical to his best interest. The exceptions to the obligation of return as anchored in sections 12, 13 and 20 of the convention are intended for cases such as these. According to section 12 of the Convention, the obligation of returning will not apply where the child stayed in the state to which he was abducted for a period exceeding one year, and where it was proven that child has become settled in his new environment. Section 13 establishes 3 exceptions to the obligation of return: the exception of consent and subsequent acquiescence, the exception of grave concern regarding harm, and the exception relating to consideration for the wishes of the minor, when he has reached an appropriate age and level of maturity. Section 20 establishes an additional exception, whereby the return of the child may be refused if it would be inconsistent with the fundamental principles of the state hearing the application, relating to the protection of human rights and fundamental freedoms. The exceptions to the obligation of immediate return are based on the duty of protecting the child's best interest and the need to prevent grave damages that may be caused as a result of his return.

These exceptions to a large degree contravene the other basic goals of the Convention, namely the goals of preventing the abducting parent from taking the law into his own hands, and respect for the rule of law in accordance with universal standards. In striking a balance between these two goals it was held that applying exceptions to the obligation of return must be done with careful and cautious consideration, to prevent the exception from becoming the rule in a manner that undermines the goals of the Convention and empties the undertakings of the contracting states of any content. It follows therefore that the onus of proving the existence of exceptions is a heavy burden, not easily discharged (see LFA 672/06 *Abu Arar v. Regozzo* [7] ; 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 426, 460 (1980) 3; hereinafter: Perez-Vera report). More precisely, discharging the burden of proof does not absolutely prevent any possibility of the minor being returned to the state from which he was removed, or to which he was not returned. Proving the existence of the exceptions only confers the court discretion regarding whether under the circumstances it would be appropriate to leave the minor in the country to which he was abducted or to return him to his residential state, having regard for the provisions of the Convention. Needless to say, in cases such as these the court's primary concern is the best interest of the minor child, located betwixt his two parents.

16. The exceptions to be examined for our purposes are set forth in section 13, which reads as follows:

> Notwithstanding what mentioned in the preceding section, 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 concern that the child's 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 the degree of maturity at which it is appropriate to take his views into consideration."

I will discuss the meaning and extent of the relevant exceptions by order.

The Consent and Acquiescence Exceptions

17. As mentioned, section 13(a) of the Convention establishes two exceptions to the obligation of immediate return: the exception of consent and the exception of subsequent acquiescence. The two exceptions serve two central goals. The first goal is providing an appropriate solution to a situation in which the "abductee" parent actually agreed to or thereafter acquiesced in the act of abduction, in a matter that obviates the need to immediately restore the original situation (see CA 473/93 *Leibovitz v. Leibovitz* [8] (Hereinafter *Leibovitz*). The second goal is to prevent the cynical abuse of the remedy of immediate return granted in the framework of the Convention, in a manner that would transform the Convention into a bargaining chip in the hands of the abductee parent:

> On the other hand, the guardian's conduct can also alter the characterization of the abductor's action, in cases where he has agreed to, or thereafter acquiesced in, the removal which he now seeks to challenge. This fact allowed the deletion of any reference to the exercise of custody rights 'in good faith', and at the same time prevented the Convention from being used as a vehicle for possible 'bargaining' between the parties" (*Perez-*

Vera report, p. 461)

18. The subject of consent or acquiescence is the custody rights. That is to say - the consent or acquiescence of the parent to a factual situation that has emerged concerning the issue of custody rights relating to the minor (see *Gabbai* [3], at p.257). Unlike the determination of the habitual residence as regards section 3 of the Convention, regarding which it is customary to attribute only minimal significance to the parents' intentions and future plans, in the context of these exceptions consideration should be given to the parents' intentions relating to the minor's place of residence, their expectations and plans for the future (see: Shmuel Moran, Alon Amiran, and Hadara Bar, *Immigration and Child Abduction, Legal and Psychological Aspects* 88-89 (2003)). If these attest to a consent or acquiescence to the act of removal or retention, then the order to the immediate return of the minor to the habitual residence must not be given. The obligation of immediate return is no longer in the category of a duty and is given to the discretion of the court hearing the case.

19. The exception of consent or acquiescence are similar in terms of their essence and characteristics, even though case law primarily addresses the exception of acquiescence (see e.g. in *Dagan* [5]; *Leibovitz* [8]). The central difference between the two exceptions is centered in the time dimension – whereas consent is given prior to the act of removal or retention, subsequent acquiescence materializes after the aforementioned act (*Gabbai* [3], p;. 257; *Leibovitz* [8], p. 72). Therefore, when deciding which of the two exceptions has application in the case before us, the first thing to consider is whether the case concerns consent given before the act of abduction, or acquiescence, that materialized after the act of abduction. The second stage involves the examination of the central question regarding the application of these exceptions, namely whether the parent whose rights were breached acted as a parent whose goal was the immediate restoration of the original situation would act, or perhaps he acted in a manner that attests to his actual consent or reconciliation with it:

> The existence of acquiescence is examined in light of the question: whether the conduct of the "abductee" parent is consistent with his intention to insist on his rights regarding the restoration of the status quo, namely the immediate return of the child to his habitual residence from which he was removed, or perhaps the circumstances and his conduct indicate his reconciliation to the change in the status quo, with the transfer of the child to a new location?" (Deputy President (former title) Justice Elon (*ibid.* [8] p. 72)

20. Logic dictates that cases posing questions concerning the applicability of the exceptions should be heard on their merits, each case in accordance with its circumstances. Therefore, strict standards for examining the issue of consent or acquiescence must not be set. However, it is appropriate to demarcate the borders of these exceptions, for as stated, the goals of the Convention compel giving them a narrow interpretation and that they be exercised with caution and restraint. Three central features assist us in determining the applicability of exceptions and in understanding their scope: the nature and essence of the consent or acquiescence; the applicability of contract law; and the weight to be ascribed to the reason for the consent or the acquiescence and the elapsed time (*Gabbai* [3], pp. 255-259; *Leibovitz* [8], pp. 71-75). All of these will assist us in answering the question of whether the applicant parent has waived the remedy of the immediate return of the minor, insofar as he agreed to the act beforehand or reconciled himself to it after the fact, all as explained forthwith.

21. First, the nature and essence of the consent or acquiescence must be delineated. It was held that there is no need for these to be explicit or to be done by an active act.

Consent to an act of abduction or reconciliation thereto may be inferred from behavior in the form of omission or from implied conduct. That said, the consent or waiver cannot be inferred from any individual acts of any one of the parties; the examination is a substantive one of the conduct of the abductee parent in the broad sense. Based on a broad perspective of the circumstances in their entirety and the overall picture we should infer that the parent waived the urgent realization of the custody or visitation rights conferred to him by authority of the domestic law of the place of the habitual residence before the act of removal or retention (see *Dagan* [5] p. 273). This examination is essentially objective. The abductee parent's subjective state of mind will only be considered to the extent that it received expression in his objective, external conduct (*Leibovitz* p. 74). The existence of consent or acquiescence, may even be inferred from the abductee parent's awareness of the breach of his rights, among other things. The awareness need not be specifically of the rights conferred to the parent by force of the Convention. To infer the existence of awareness it suffices that there is a general awareness that the parent's rights were breached or will be breached as a result of the action of the second parent. So, for example, if the parent knows that a wrongful act was committed, and he failed to receive legal advice regarding the matter, it may attest to his reconciliation with the act of abduction (see *Dagan* [5], p. 274)

22. Consent or acquiescence, are contractual, in essence, given that it is a unilateral act by one of the parents, which finds its completion with the other parent, creating a reliance interest on his part with respect to the change in the status quo. Accordingly, it was ruled that the exceptions of consent or acquiescence are governed by the laws of contracts with all that is implied thereby (see *Leibovitz* [8], p.73 and references cited; *Gabai* [3], p. 258). As such, for example, the law applying to consent or acquiescence that originated in a mistake, misleading, coercion or extortion is the same law that would apply to a contract concluded under similar circumstances and would admit of rescission. Similarly, if the abducting parent was aware that the abductee parent had not waived the change in the status quo then a claim presented by him to the effect of the applicability of the exceptions would contravene the principle of good faith. In addition, consideration should be given to the element of reliance on the part of the parent who committed the abduction. If he took measures that led to a change in his position as a result of the consent or acquiescence of the other parent, this should be taken into account as part of the entirety of considerations to be considered as part of the exception, though such consideration for the reliance interest should be exercised carefully, for fear of the abducting parent reaping the fruits of the wrong that he committed (*Leibovitz* [8] p. 71)

23. In addition, consideration must be had for the *weight* to be accorded to the various circumstances in which the consent or the acquiescence was awarded and especially for the weight to be accorded to the time period that has elapsed from the act of removal and until the filing of the claim under the Convention. As such, it was held that reasons leading to the parent's consent or acquiescence to the act of abduction will not be taken into account when considering the nature of the consent or acquiescence because conceivably he may not have been interested in moving the minor from one state to another or was interested in the custody issue being adjudicated in the state to which he was abducted, which was the parents' native state. Irrespective of his reasons, if the parent's conduct attests to consent or acquiescence to the act of abduction, it will be inferred that he has waived the rapid and immediate relief granted under the Convention, and is willing to resolve the conflict in alternative ways (*Leibovitz* [8], p. 70)

The time factor too is a factor when examining whether a parent's conduct during the elapsing period is consistent with his later demand to return the minor. Regarding

the exception of acquiescence, it has been ruled that consideration must be had for the time period passed from the abduction date and until the filing of the claim under the Convention, and whether it supports the inference, along with additional circumstances, of the parent acquiesced to the situation that transpired. In this context it was held that there is no defined period for crystallization of acquiescence, and that it must be determined on a case by case basis, according to the circumstances (*ibid* [8], pp. 72-74). In examining the exception of consent, the time element is less significant, and either a long or brief period may elapse from the time of the abduction and until the day of filing the claim, but in most cases it will have no significance, because consent by nature is given in advance, prior to the act of abduction. As such, regarding the consent exception the central question will be one of weight, namely, what were the circumstances that indicates consent and to what extent do they unequivocally attest to the "abductee" parent's consent to waive the "first aid" provided under the Convention, all this subject to the scope of the exceptions outlined above.

24. In some cases, perhaps the parent who consented or acquiesced to the act of abduction will ask to retract his consent. The rule is that it is not possible to retract the consent or acquiescence, and to rescind it retroactively. Once the consent or acquiescence have crystallized the parent whose custody rights were violated is deemed to have waived the immediate relief provided in the framework of the convention (*ibid* [8], p. 73; *Dagan* [5], p. 275). A change in circumstances does not justify the retraction from advance consent or subsequent acquiescence either. As noted, the central question that the court should consider is whether the parent's conduct clearly indicates that the parent waived the remedy of "first aid". If the answer is in the affirmative, then the minor's return to the state of habitual residence is not defined as an immediate obligation imposed on the court to order the minor's return to habitual residence. The time for the immediate remedy has passed and done and the court that heard the matter has discretion to order that the matter be heard in the state of request, or in the state of habitual residence, its guiding consideration being the best interest of the child concerned.

The Grave Concern of Harm Exception

25. Section 13(b) of the Convention provides that where there is a grave concern that the return of the minor will cause him physical or psychological harm or otherwise place the child in an intolerable situation, the court is not bound to order the return of the child. The rule is that the child's interest when considered as part of this exception is narrower than when considered in the framework of regular custody proceedings, due to the concern that overly broadening of the exception will undermine the objectives of the Convention (see *Jane Doe* [2] at paras. 29 – 33). For this reason, the court utilized two tools designed to narrow the application of the exception. First, it was ruled that the party claiming the applicability of the harm exception bears the onus of proving it beyond any reasonable doubt, which is a particularly heavy burden of proof. Secondly, the application of the exception was significantly narrowed, on an interpretative level, as it was ruled that the controlling principle governing the exception would be as prescribed in the closing section of section 13(b) whereby the child wouldn't be returned only where there is a grave risk that the return would place him in an intolerable situation:

> The principle governing the provision of section 13(b) of the Convention is the one determined in its conclusion, and which is concerned with placing the child in an intolerable position were he to be returned to his habitual residence . . . The controlling wording is concerned with the child being placed in an intolerable situation . . . which is to say: that is permitted to refrain from ordering the return of the child if

> his return would place him in "an intolerable situation": whether that intolerable situation arises due to the grave concern that the return will expose the child to physical or psychological harm and whether his return will place him in an intolerable position "in any other way" (*Ro* [1] p. 347)

In addition, it was held that this exception relates to the damage that will be caused to the minor as a result of his return to the state from which he was removed, and not as a result of his return to the parent from whom he was abducted or his severance from the abducting parent (see Capp 1648/92 *Torne v. Meshulam* [9]). Accordingly there were many cases which rejected the claim concerning the lack of parental ability of the parent requesting the remedy by force of the Convention, as well as the claim that the abducting parent is liable to be expelled, or to dire economic difficulties as a result of returning with the child to the state he left (see for example: CA 5532/93 *Gonzburg v. Greenwald* [10]). In this context the court relied solely on the determinations of experts, from whom it emerged clearly that the concern of physical or psychological damage was particularly tangible. As indicated, the exception relating to harm is particularly narrow, being limited to cases in which the return would place the child in an intolerable situation due to his exposure to the exceedingly grave physical or psychological damage, or due to his exposure to an intolerable situation for some other reason.

From the General to the Particular

26. In the case before me both the applicant and the respondent are natives of this country who went trying their luck in the United States, where they had lived since the beginning of their relationship as a couple. The applicant began her studies, while the respondent was occupied in a variety of jobs, and at a certain stage established a business company in partnership with the applicant. Their first born daughter was born in the United States. For the duration of this period they maintained their connection with Israel, in visiting Israel frequently, retained their social security rights and even opened a store in their native city. By agreement, the applicant and the respondent with their mutual daughter came to Israel for the Pessah vacation. During that vacation they decided to separate. The respondent returned to the United States, as planned, whereas the applicant did not, having decided to stay with the daughter in Israel. In the wake of the non-return of the daughter to the United States at the scheduled time, the respondent filed a suit for her return under the Hague Convention.

27. This is therefore a case of retention and the question that arises is whether it meets the conditions for the application of the Convention. The minor whose return is requested by the respondent is tender in years. On the dates that she was supposedly meant to be returned to the United States she was only nine months old, hence her age satisfies the age threshold prescribed in section 4 of the Convention, which establishes an age threshold of 16 years for a suit for the return of a minor under the Convention. In addition, it was proven in the trial court that the law of the state of New Jersey, where the applicant and respondent lived, is that the custody rights over children are joint rights. Therefore, the first condition prescribed in section 3 of the Convention is satisfied, because the retention was in breach of the respondent's custody rights over his daughter. The trial court subsequently ordered the filing of a proceeding to determine the custody in New Jersey, prior to the child being returned to the United States, and the respondent submitted documentation to his response, attesting to the fact that such a proceeding had indeed been filed. In so doing the respondent actually exercised his custodial rights, thus meeting the second condition of section 3 of the Convention, in which the parent suing for the return of the child under the Convention is obligated to exercise the custody rights that are vested in him. Finally, the Family Court held that

the habitual residence of the daughter was in the United States, thus satisfying the third condition of section 3 of the Convention pertaining to proof of the act of abduction. In examination of the subject of the habitual residence from the perspectives of the factual approach and the intention based approach, the Family Court reached at an identical conclusion regarding the habitual residence prior to the act of retention. The judges of the District Court too adopted this factual determination; I see no reason to intervene in this factual determination of the trial forum. The settled rule is that the appellant forum will not as a rule intervene in the findings of the trial forum (see LFA 911/07 *Jane Doe v. John Doe* [11].) after two forums have examined the circumstances of the case, reaching identical conclusions, and having examined the parties' pleadings, I see no justification for an additional factual examination of the condition concerning the habitual residence and for deviation from the rule of non-intervention in this context.

Summing up this point – in terms of the preliminary conditions for the application of the Convention, as determined by the District Court, the applicant committed an act of wrongful retention. At this stage it is incumbent upon us to examine whether any of the exceptions to the duty of immediate return are applicable.

28. In order to determine whether under the circumstances, the exception of consent or of subsequent acquiescence are applicable, we must first examine the time dimension, which is to say: Do the circumstances indicate that the respondent consented in advance to the retention or acquiesced to it after the fact. The point of departure for the Family Court, that was also adopted by the trial court, was that the date of retention of the daughter was on 20 June, 2010, which was the date on which the applicant and the daughter were supposed to have returned to the United State in accordance with the flight tickets that were purchased prior to the parties' arrival in Israel (hereinafter: the "retention date"). The respondent filed the claim under the Hague Convention for the daughter's return to the United States immediately after the retention date. Regarding this point I should clarify that I am aware that the minority opinion in the trial court focused on the application of the acquiescence exception. However, in view of the distinction I elaborated on between the two exceptions it seems that under the circumstances, the immediate action taken by the respondent precludes the possibility of viewing his conduct as amounting to acquiescence to the retention of the daughter. Accordingly, the exception appropriate for our purposes is the exception of consent, which requires us to examine whether having regard for the entirety of circumstances we may infer that the respondent agreed to the act of retention and to the change in the status quo, and in doing so effectively waived the "first aid" remedy conferred in the framework of the Convention. As I will presently explain, I believe this question must be answered in the affirmative, because the circumstances indicate that prior to the act of retention of the daughter, the respondent agreed that the applicant would have custody over her.

29. The trial court held that the applicant and the respondent came to Israel by mutual agreement for the Passover vacation. During this vacation, when each of them was staying in their family's home, they agreed to separate from each other. The applicant applied to the Rabbinical Court, and commenced a divorce proceeding, to which she attached the matter of the custody of the daughter. At her request, the Rabbinical Court issued a stay of exit order against the respondent and against the daughter. The respondent applied to the Rabbinical Court with an urgent application to cancel the order. In his application he presented the entire unfolding of events between the spouses, and even declared that he was prepared to divorce the applicant immediately and to conclude a child support agreement with her as required. It should be stressed that this does not suffice to infer his consent to the applicant having the custody of the daughter.

Subsequently, the parties decided to negotiate and to reach a separation agreement,

acceptable to both of them. With the mediation of an accountant who was a mutual friend, an agreement was drafted, titled "Property Agreement". From the sections of the agreement it can be inferred that the parties agreed that the applicant and the daughter would remain living in Israel, whereas the respondent would return to the United States and to his business affairs. In section 1 of the agreement it was likewise determined that the applicant would remove the stay of exit order which was valid against the respondent, at her request. Section 2 provided that the sum of the monthly child support for the daughter would be paid in shekels; in section 3 the respondent undertook to transfer various contracts into his name, upon which the applicant had previously been signed, in the framework of her partnership in the company in the United States. In section 4 the respondent agreed to convey all of the equipment of the applicant and the daughter to Israel, and in section 7 the parties determined consensual visitation arrangements in the event of the respondent returning to live in Israel. The entirety of the agreements in this agreement clearly evidences the parties' agreement that each of the spouses would go his/her own way – the respondent would return to the United States and the applicant and the daughter would remain in Israel.

At the end of the day however, due to an economic dispute that arose, apparently due to the applicant, the property agreement was not signed. Even so, the applicant adopted measures, which indicate that she had begun to comply with her undertakings under the agreement. This can be learnt from her consent to the removal of the stay of exit order, imposed on the respondent at her request, a consent followed by the respondent did returning to the United States alone.

30. In other contexts it has been held that "there is no sanctity in a signature" (FH 40/80 *Koenig v. Cohen* [12] p.724), so that if the agreement fulfills the requirements of resolve and specificity, it will be valid even in the absence of the parties' signatures (see e.g. CA 692/86 *Botkovsky v. Gat* [13] p.57). Obviously, this rule is not applicable to the case before us, because the parties do not dispute that the property agreement did not become a binding contract. However, in my view the minority judge in the trial court was correct in ruling that this agreement has "quasi evidential" standing in terms of the respondent's consent for applicant to retain custody of the daughter. In the final analysis the agreement was not signed due the applicant's refusal to sign on it whereas the respondent was prepared to accept it as it was, including the sections that attest to his consent for the daughter to stay in Israel, in the applicant's custody. These being the circumstances, I think that the agreement should be considered as principal evidence, which assists in completing the overall picture, from which it may be inferred that the respondent waived the urgent realization of the custody rights that were conferred to him under the law of New Jersey.

It has not escaped me that in his statement of response the respondent attached an additional agreement draft, claiming that it was in the applicant's handwriting, and on which it was written, "returning to Israel" (hereinafter: "the draft"). His claim was that this proves that there was no agreement between the parties concerning the daughter's place of residence, and that accordingly, there was no advance agreement on the matter of the custody. The family court that adjudicated the matter of the draft viewed it as a property agreement draft, whereas the district court did not discuss its significance. From an examination of the draft it is apparent that its contents in no way conformed to the contents of the property agreement, because it dealt with a situation of reconciliation between the parties and not a situation of separation and divorce. There was no clarification – and anyway no proof – regarding when and by whom this draft was written. In the absence of these details, the aforementioned draft cannot teach us that which the respondent seeks to infer and it anyway seems that it is undisputed that the final draft of the property agreement was the one drawn up by the accountant, and that refers to a situation of separation and of the continued staying in Israel of the

applicant and her daughter.

31. Summing up this point, the agreement can be inferred from the entirety of the circumstances and need not be explicit. Indeed, in the case before me the respondent's conduct indicates his agreement that the applicant and their common daughter would not be returning to the United States. He was partner to the drafting of the property agreement in which he agreed inter alia to the matter of custody and the visitation arrangements. Later on he even took the active step of applying to the Rabbinical Court together with the applicant, requesting the removal of the stay of exit order, after which he returned to his business in the United States, as the applicant and the daughter remained in Israel. To be clear, it is quite possible that the respondent hoped that the applicant and the daughter would return to the United States at the time of their non-return, and may even have thought that this is what they would do, especially in view of the fact that the marital connection had not been finally terminated. Nonetheless, the respondent's objective conduct attests to his agreement that the daughter would remain with the applicant, and that the two of them would continue to live in Israel. The respondent's subjective state of mind, his feelings and expectations do not suffice to enable the conclusion that he had not given his consent to the applicant and the daughter remaining in Israel, when compared with his explicit and overt conduct.

32. As mentioned, the act of agreement is essentially a contractual act. After the parties had discussed the subject of custody, and after the applicant agreed to the removal of the stay of exit from order that was in place against the respondent, he left the country and returned to his business in the United States. It is definitely reasonable to assume that the unfolding of events, and particularly his departure from the country with the applicant's consent, after the property agreement had been written and even fulfilled in part, engendered the applicant's reliance on a change in the status quo, the thrust of which its main part was the separation between the spouses and her remaining with the daughter in Israel. When discussing the relevance of the agreement drafted between the parties, the Family Court held that:

> "The plaintiff was under pressure with a stay of exit order issued against him, that disrupted his plans which were based on his imminent return to the United States… reading the draft it is hard to escape the impression that it was drawn up under the *palling shadow* of the stay of exit order and even the *plaintiff's consent* to the contents of the draft *are accepted*, *it was given and obtained by reason of the pressure exercised on him in the form of the stay of exit order*" (judgment of the Family Court, para. 28, p.14; emphasis mine, E.A)

I am unable to accept the conjecture that the respondent's agreement that the daughter would stay in Israel was exclusively the result of pressure due to the stay of exit order stood against him. In conducting negotiations for concluding a contract, each party is doubtless subject to and influenced by various pressures and influenced by various considerations, and calculates his steps accordingly. It has been ruled that freedom of will is constructed in a broad sense and various kinds of pressure, such as economic, social or political will not impair contractual freedom, provided that the pressures are not heavy to the degree of impairing his minimal free will (see and compare: CA 1569/93 *Maya v. Panfird* [14] p.705; CA 1912/93 *Shaham v. Mones* [15] p. 119)). In view of this, I do not accept the holding that the respondent was under tremendous pressure by reason of the stay of exit order, and that his consent was given in the wake of that pressure, without him having had the opportunity of exercising discretion. We must not forget that the pressure on the respondent by reason of his plans was counterbalanced by the matter of the custody of his daughter, which in and of

itself is a matter of supreme importance.

33. Possibly, the later measures taken by the respondent, at around the time of the retention, indicate that he changed his mind regarding the daughter remaining in Israel, or that he was still hoping for a reconciliation with the applicant. The respondent sent a warning letter to the applicant by way of his attorney, at about the time of the retention. He also filed a claim under the Convention, two months later for the return of the daughter to the United States, in the competent forum in Israel; and took steps toward acquiring a United States visitor's visa for himself. He presented documents attesting to the extension of the rental contract and the payment of the daughter’s health insurance in the United States. Later on, he complied with the preliminary conditions for the return of the daughter, as determined by the lower court. These steps attest to his desire for the daughter to return to the United States and for the question of her custody to be decided in his state of residence. However, these later steps cannot negate the consent that the respondent had previously given for the daughter to stay in Israel, prior to the act of retention. As stated, the rule is that one cannot renege on a consent that was given because the respondent’s consent to the non-return of the applicant and the daughter to the United States, indicates his waiver of the immediate remedy provided under the Convention. This being the case, in view of the overall picture emerging from the facts described, the exception of consent applies in this case. As such the question of the daughter’s return to the United States is at the discretion of the court, and the court has no immediate obligation to return the daughter pursuant to the provisions of the Convention.

34. In light of our holding that the exception of consent is applicable, there's no need to delve into the applicant's claim concerning the application of the exception of the grave concern for harm, since it is suffice to prove one of the exceptions in order to confer the court discretion whether to order the return of daughter or not. Briefly, I will point out that the burden of proof carried by the party making the claim is particularly heavy and its interpretation has been particularly limited. It would seem that in the absence of an expert opinion on this matter, and in the absence of any extreme circumstances, that attest to the grave concern for harm it cannot be determined that this exception has application in the case before us.

35. Summing up, the Convention is applicable to the case before us, inasmuch as the preliminary conditions for its application are satisfied, and the applicant committed an act of unlawfully not returning the daughter to the United States. However, in the case before us, the exception of consent applies, because based on the entirety of the circumstances, first and foremost, the separation agreement and the parties' conduct after the writing of the agreement, it may be concluded that the respondent agreed to the mother and the daughter remaining in Israel. Accordingly, there is no obligation for the immediate return under the Convention, and the matter is given to the discretion of the court. I will now address the considerations relevant for this decision.

36. After giving consideration to the entire complex of circumstances, my view is that no order should be given for the return of the daughter to the United States, and that it would be appropriate for the question of custody to be clarified in the competent forum in Israel. The applicant and the respondent lived in the United States for four years, from the beginning of their relationship. They are not American citizens; the respondent has a temporary work permit for two years only, and the applicant has a visitors permit in the category of a tourist, which does not enable her to work for a living. The extended family of both parties lives in Israel and they have no permanent home in the United States. While they were living in the United States, they established a business in Israel and continued to conduct bank accounts and maintain their social security rights in Israel. Their entire stay in the United States, even if it lasted a few years, bore the character of a temporary stay. When they decided to separate from each

other the respondent wanted to return to his business in the United States, whereas the applicant wanted to remain in Israel, in a supportive family framework, with the common daughter standing between them, a child tender in years, both of whose parents surely seek her best interest. In my view, the minor's best interest demands that the custody proceeding in her matter be conducted here in Israel and not in the United States. The daughter, *who is not yet two years old* has lived for most of her life with the applicant, who is the dominant parental figure in her life, especially having consideration for the respondent's long stay in the United States, which continues even now, severed from his daughter. In the circumstances of the separation between the spouses, the return of the applicant and the daughter to the United States in order to settle the custody matter may place the applicant in an intolerable situation which will ultimately work against the minor's best interest. First, it cannot be expected that after their separation the spouses will continue to live in the residential home in which they lived as a couple, the rental of which was extended in compliance with the decision of the trial court in order to ensure a residence for the minor. More precisely, given the circumstances in which the applicant only has a tourist permit, and is not permitted to work for a living in the United States, she will not be able to earn a living and support herself and her daughter apart from the respondent and should she do so, she will face the danger of expulsion from the United States. Even if the concern of such an event is not great, I do not think that one can run the risk of the applicant being separated from her baby daughter, in a manner that would contravene the best interest of the daughter at such a tender age (see LCA 4575/00 *Jane Doe v. John Doe* [16] at p. 331). Alternatively, the applicant might be compelled to return to living with the respondent under the same roof, but having consideration for the continued separation and the alienation that the parties displayed throughout the legal proceedings, it may reasonably be presumed that the joint residence of parents living in a state of disharmony would be detrimental to the minor's best interest. Accordingly, I believe that the considerations I enumerated above, and above all the fact of the daughter still being particularly young, and the applicant's legal position in the United States, indicate that the best interest of the minor requires that the custody matter be resolved in Israel and that therefore there should be no order for her return to the United States for the purpose of resolving this issue.

37. As an aside I have two comments to make regarding the unfolding of the proceedings before me. First, the respondent filed an application to present us with the exhibits file that was before the trial court, and the applicant replied that she would leave the matter for the court's discretion. I examined the file as requested (by way of "Net Ha-Mishpat" system), but I found nothing there that sheds more light on the matters discussed in this decision. The matters presented there are certainly in the background of my decision, but they do not persuade me to accept the respondent's position.

Another comment pertains to the notification given to the Court by the respondent, informing us that he had been forced to leave Israel and to return to his business in the U.S.A., even before the termination of the legal proceedings before us. The applicant submitted her response to the notification, claiming that the respondent had returned to the U.S.A. in violation of the stay of exit order that was pending against him. In his reply, the respondent rejected this claim. Without addressing the claim on its merits, given that it is unnecessary and given that we do not have sufficient details for making any determination in respect thereof, it is apparent that the divorce dispute has brought the parties into a bitter and acrimonious battle. I fervently hope that with the termination of the current proceeding, the applicant and the respondent sensibly reach an agreement and will solve the disputes between them, with their primary concern being the best interest of their common daughter, who is entitled to the presence of both of her parents in her life.

Therefore, I propose to my colleagues to accept the appeal, and to determine that the decision of the District Court concerning the return of the daughter in accordance with the Convention is hereby overturned. In addition, I would suggest to my colleagues to cancel the applicant's obligation for court expenses, as stipulated by the Family Court. Under the circumstances I do not think it would be appropriate to obligate the respondent to pay the costs of this hearing,

At a later stage I read the opinion of my colleague, Justice Fogelman, and I would like to make two comments. First, I think that there will be cases in which the overlap between the civil law of contracts and the law of contracts in the family framework will not be complete (see for example LCA 8791/00 *Shalem v. Twenko* [17], para. 7); Shachar Lifshitz "Regulation of the Spousal Contact in Israeli Law – Preliminary Outline" *Kiryat ha-Mishpat* 4, 271 (5764)). Second, regarding my colleague's concern of the negative implications, in terms of the parties' willingness to conduct substantive negotiations, I think this concern is insignificant, since this case is unique in its circumstances. In this case there was a complete agreement which was not signed in the end only because of the applicant's refusal, whereas the respondent was prepared to realize it. Beyond that, as I stressed, the spouses had begun to act in accordance with the agreement when they consensually cancelled the stay of exit order that was issued against the respondent, and the respondent even left Israel and returned to the United States, while the daughter and the applicant were left in Israel. In my view, these unique circumstances justify viewing the respondent's agreements in the framework of the negotiations between the parties, as being indicative of the application of the exception of consent.

Justice

Justice H. Melzer

1. I concur with the result reached by my colleague Justice E. Arbel in her opinion and with the main elements of her reasoning. That said, in my view, the justification for the result that she reached in her judgment, should be based more on the "exception of subsequent acquiescence" prescribed in section 13(a) of the Convention, as per its definition in the Hague Convention (Return of Abducted Children) Law, 5751-1991 than on the "exception of consent" included in the same section. My reasons for this position will be presented forthwith.

2. Based on the circumstances described in my colleague's opinion, as well as in minority opinion, of the Deputy President, Judge A. Abraham of the Nazareth District Court, it seems to me that the respondent, with his final departure to the United States had in fact "acquiesced" at least at that time, to the non-return of the child to the United States and to her remaining together with her mother in Israel at this stage. This can be inferred from the application filed with the Rabbinical Court to cancel the stay of exit order that was issued at the applicant's initiative – a proceeding in which its completion the order was ultimately cancelled by agreement. In this context it should be remembered that the Rabbinical Court has exclusive jurisdiction in a suit for divorce between the parties where they are Israeli citizens who were married in Israel in accordance with the law of the Torah. Furthermore, in the framework of the "property agreement" that was under discussion between the parties (and which finally was not signed specifically by reason of the applicant's reservations), the respondent was prepared to undertake to transfer all of the minor's personal belongings to Israel and to pay for her monthly child support in Shekels. Parallel to this he also wanted to ensure his visiting arrangements with the daughter, whenever he came to Israel.

These data which can be learnt from the evidence in the file, suffice for purposes of

being viewed, *in the special circumstances of this case before us* as a quasi - "acquiescence" and a waiver of the "first aid" remedies by force of the Convention. See CA 7206/93 *Gabbai v. Gabbai* [3] pp. 256-259; LCA 7994/98 *Dagan v. Dagan* [5], pp. 273-276. I make these comments without expressing a view regarding the continuation of the proceedings between the parties.

Furthermore, even were it to be argued that the respondent did not explicitly express his "acquiescence" to the non-return of the girl to the United States at this stage, the applicant could have inferred from the consents obtained in the course of the negotiations with the respondent leading to the signing of the said "property agreement" that he had actually reconciled himself, at this time, to the daughter's transition to Israel, or that he had consented to it. Accordingly, by force of the laws of estoppel the respondent is not entitled to the temporary remedy that he requested. Expression of a similar approach can be found in the reasoning (albeit not in the result) mentioned in the decision of the House of Lords in England in IN RE H AND OTHERS (MINORS) [19] 12 (which likewise concerned an Israeli couple) per Lord Browne – Wilkinson, where he stressed that this was the exception to the rule. See also in 1 FLR 682 IN RE AZ (MINOR) [1993] [20].

In France too, case-law recognized this type of exception, which lead to a similar result as the result we delineated in this case. See in the decision in *Aubrey v. Aubrey* as cited in the book Beaumont & McEleavy THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION (1999), at p. 122 (it bears mention that the aforementioned book critiques that decision, and also cites opposing French decisions - HORLANDER c HORLANDER. Cass. 1re civ., 1992 Bull. Civ. L. No 91-18177; D.S 1993, 570)

3. In view of all the above, the appeal should be accepted, as proposed by my colleague, Justice E. Arbel.

Justice

Justice U. Vogelman

1. I concur with the majority of the determinations set forth in the opinion of my colleague Justice Arbel, and with their accompanying reasons. I also agree with her determination that our case does not enable application of the "exception of acquiescence" in section 13 (a) of the Convention, within the meaning of the Hague Convention Law (Return of Abducted Children) 5751-1991. All the same, unfortunately, I cannot concur with her determination that in the case at hand there is application of the exception of consent prescribed in the same section, which would enable the non-return of the common daughter to the U.S.A, in view of the respondent's consent to the same in the framework of the preliminary draft agreement that was prepared in the course of negotiating the "property agreement", and which did not finally materialize.

2. As my colleague notes, the exception of consent is governed by the law of contracts, with all of the conditions implicit therein. A fundamental principle of contracts law, which also has relevance to our case, is the *principle of reciprocity*. According to this principle, the advantage of the contract – i.e. the benefit received from the second party, and the disadvantage, i.e. that which must be given to the second party, must be reciprocal (see Daniel Friedman, and Nili Cohen, *Contracts* 149 (Vol. 1, 1991) (hereinafter: Friedman and Cohen). A situation in which there is a bifurcation in the legal status of the two contracting parties, in which one of them is held by his word and his waiver in the negotiation, and the other party is exempt and free from his consents - places the contracting parties on an unequal footing, and is not consistent with the aforementioned principle.

3. The draft agreement in our case is the result of negotiations between the parties, in which neither of the parties realized all of their wishes. Analysis of the various components of the contract indicates that each party waived and compromised until finally a draft agreement was reached, in which the various obligations are dependent upon each other, The assumption that the respondent's consent that the applicant and the daughter would remain in Israel was a unilateral and unconditional, in my view, is not consistent with the factual infrastructure that has been presented to us, including the various components of the contract, nor with its purpose, which was to resolve the entirety of subjects that were in dispute in a manner that would enable the termination of the marriage between the parties. In this situation, where at the end of the day no agreement was reached, and the draft did not become a binding agreement, the undertakings included therein did not take effect, their execution being dependent upon reciprocal execution by each one of the parties.

4. Concededly, as noted by my colleague "there is no sanctity in the act of signing" and if the agreement embodies the foundations of resolve and specificity, it will be binding even in the absence of a signature. However, as she herself mentions, these foundations, and primarily the foundation of resolve did not exist in our case, and hence the contract did not materialize. In this situation I do not think that it is possible to severe the respondent's consent which related to one of the components of the draft agreement, from the overall agreement structure, and left alone notwithstanding that the framework of which it was supposed to be a part did not materialize. I will further add that these comments do not preclude the possibility of a legally binding undertaking being created, even if essentially unilateral, even in the framework of a negotiations towards a contract that did not ultimately result in an agreement. This would be the case in situations where there was reasonable reliance of one party to the contract in the wake of undertakings given, or presentations made by his friend in the course of negotiations (Friedman and Cohen, p. 519-648)). However, in the case before us I do not think that the factual infrastructure that was presented to the trial forum indicates that the respondent made a statement or a presentation that was liable to lead to the applicant to reasonable reliance that would justify the protection of the law.

5. Apart from all the above, the use of agreements in the framework of negotiations draft towards an agreement, which ultimately did not reach fruition, carries negative consequences in terms of the readiness of the parties to conduct practical negotiations towards an agreement. More precisely, the parties are liable to avoid making representations, declarations or offers which involve a waiver to the second party, in their fear that such a waiver will serve as evidence to their detriment in a future proceeding that might take place between the parties (see CA 172/89 *Sela Insurance Company Ltd. v. Solel Boneh Ltd.* [18] 333. This could create difficulties in reaching agreements, frustrate settlements, and needlessly lengthen adjudication.

Since the exception of consent has no applicability, there is no escaping, in my view, from the dismissal of the appeal.

Justice

It was decided by a majority of opinions in accordance with the decision of Justice E. Arbel.

Handed down today, 13 Iyar 5771 (17.5.11)

JUSTICE JUSTICE JUSTICE