No. 12-820

In the Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS (IAML) AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

The Hague Convention on Civil Aspects of International Child Abduction (the "Convention"), which the United States implemented by enacting the International Child Abduction Remedies Act (ICARA), provides in Article 12 that the courts of a requested state must order the return of a child who has been wrongfully removed or retained where a period of less than one year has elapsed from the date of the wrongful act. When return proceedings are commenced after the expiration of the one year period, Article 12 provides that the courts shall also order the return of the child, "unless it is demonstrated that the child is now settled in its new environment". Where a child has been unlawfully removed or retained and concealed from the left behind parent in a country other than the child's habitual residence, does the implementation of the Convention's declared goals require that equitable tolling be applied for the period during which the child was concealed?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

STATEMENT OF FACTS

The International Academy of Matrimonial Lawyers (IAML)[1] adopts the facts as they are stated in the Petitioner's brief.

INTEREST OF THE IAML

The IAML was formed in 1986 to improve the practice of law and the administration of justice in the area of divorce and family law throughout the world. The IAML currently has some 620 "Fellows" in 45 countries, each of whom is recognized by the bench and bar in his or her country as an experienced and skilled family law lawyer.[2] It is a worldwide association of practicing lawyers who are experienced and skilled family law specialists in their respective countries.

IAML has made presentations in the US and in other Fellows' States in relation to legal reforms. The IAML has sent its representatives to participate in relevant international conferences, often as non-governmental experts, including the six Special Commissions on the Hague Convention on the Civil Aspects of International Child Abduction(hereinafter; the Convention). Its Fellows have also written and

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[1] Pursuant to Supreme Court Rule 37.6 counsel for the amici certify that no counsel for a party authored any part of this brief and no person or entity other than counsel for the amici has made a monetary contribution to the preparation or submission of this brief. The parties' consents have been filed.

[2] The IAML website, www.iaml.org, contains, among other items, a listing of its Fellows.

lectured widely on the Convention and related topics, such as proceedings to obtain court approved relocation of children to another country.

IAML's interest in the instant case relates to its concern that the implementation of the Convention, which has significantly reduced the harmful effects of international child abduction, will be severely undermined if the judgment of the Second Circuit in this matter is affirmed. Many Convention cases are brought to court in the signatory States by IAML Fellows. The IAML, therefore, has a strong professional interest in preserving the deterrent effect of the Convention and ensuring the prompt return of wrongfully removed or retained children to their habitual residence.

The IAML is acting pro bono in submitting this brief.

SUMMARY OF ARGUMENT

The purpose of the Convention is to return a child who has been wrongfully removed or retained to its country of habitual residence as swiftly as possible. The Convention does not permit the litigation of custody matters within its parameters. It is an instrument to determine the appropriate forum to litigate matters of custody and the best interests of the child. Determinations of legal and physical custody,

parenting time, and child support are intentionally beyond the scope of the Convention.[3]

Article 6 of the Convention establishes a system of Central Authorities in each contracting State. Each Central Authority is charged with carrying out the duties imposed on the states and their political subdivisions in order to implement the Convention. Among those duties are the obligation to discover the whereabouts of a child who has been wrongfully removed or retained; to provide information of a general character as to the law of the their State in connection with the application of the Convention; and to initiate or facilitate the judicial or administrative proceedings needed to consider the return of the child.

Article 11 of the Convention provides that if the judicial or administrative body has not reached a decision within 6 weeks from the date of the commencement of the proceedings, the Central Authority of the requesting State shall have the right to request a statement of the reasons for the delay from the requested State. Some contracting States, in its implementing legislation, mandate their courts to decide such cases within the six week period, (See for example, Civil Law Rules of Procedure of 1984-5744, Regulation 295 (13)a, Israel). The Convention does not define what precisely constitutes the commencement of the proceedings. It avoids the term "filing of action",

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[3] When ratification of the Convention was being considered by the U.S. Senate and implementing legislation was being considered by the U.S. Congress, the Federal Court made it clear it did not want any such legislation to permit parties to litigate their family law issues in the U.S. District Courts.

thus leaving it to the interpretation of the courts in each jurisdiction.

The courts in most jurisdictions have interpreted "commencement of proceedings" as filing an action in a court. However, a minority of courts have held that filing a petition with the Central Authority constitutes the commencement of proceedings. Some of the minority view jurisdictions, such as California and Australia, commence the legal action on behalf of the petitioner. Thus, once a petition has been filed with the Central Authority in those jurisdictions, the left behind parent has commenced proceedings to the extent which he/she can.

The first paragraph of Article 12 provides that when a period of less than one year has elapsed from the date of the wrongful removal or retention at the time of the commencement of the proceedings, the authority concerned shall order the return of the child forthwith, barring the proof of a recognized defense. Where the proceedings have been commenced after the expiration of the one year period, the authorities shall also order the return of the child unless it is demonstrated that the child is now settled in its new environment. The significance of the one year period thus has enormous consequences on the nature of the proceeding and its likely outcome. Determining whether the child has acclimated to its new surroundings necessarily entails precisely the kind of inquiry which Convention proceedings are not meant to undertake; an evaluation of the best interests of the child. While the one year period does not constitute a bar on commencing an action, it does fundamentally change the scope of the proceedings, significantly altering their nature, length

of time and reduces the probability that a return will be ordered. Therefore, the argument that the one year period is not a statute of limitations is thus wholly unresponsive to the consequences of Article 12. Since Article 12 has been treated as a statute of limitations, equitable tolling should apply as it would to any Federal law containing a statute of limitations.

If by concealing the location of the wrongfully removed or retained child, the abducting parent succeeds in preventing the timely commencement of a proceeding, they are given an enormous advantage in an action for return of the child. If the time during which the abducted child is concealed is not tolled, the purpose of the Convention is severely undermined. Not only would the deterrent factor be vitiated, it would in fact encourage parents who contemplate abduction to also conceal the child in order to insure a successful defense to a return petition. Thus, the failure to implement a tolling of the one year period would be the equivalent of telling the abducting parent that their unlawful actions will likely be successful if they commit yet another wrongful and heinous act: concealment of the child.

The consequences of invoking Article 12 relate only to the date proceedings are commenced. There are no legal consequences where the proceedings do not conclude within a year. Thus, when the left behind parent has acted in a timely fashion, but the court, for no reason which is attributable to the petitioner, does not render a judgment within a year, as unfortunately is often the case, there is no invocation of the settled into its environment test. The courts focus is not a principled belief that after a certain length of time,

broader factors should be weighed before making a return order. Rather the emphasis is on the timely action of the left behind parent. Courts do not permit the abducting parent who deliberately delays proceedings for more than a year to invoke the settled into the new environment defense. Why then, should the abducting parent be able to invoke that defense by preventing the left behind parent from discovering the child's whereabouts?

The IAML believes that the destructive consequences of child abduction, which is a form of child abuse, are compounded by not tolling the period during which the whereabouts of the child are unknown. A reasonable solution can be adopted from the more recent 1996 Hague Convention on Jurisdiction and Protection of Children (Child Protection Convention) which provides a rational and simple formula in establishing jurisdiction in child custody disputes. Article 7(b) of the Child Protection Convention provides that in the case of wrongful removal or retention, jurisdiction passes to the new State where the child resided in that new state for at least one year after the left behind parent has or should have had knowledge of the whereabouts of the child and no request was timely filed and the child is now settled in the new State.

A further simplification of this issue can be made by adopting the position that where the child's whereabouts are unknown, the filing of an application with the Central Authority of the child's habitual residence will be considered the commencement of proceedings for purposes of Article 12. This will enable the left behind parent to take action within the

specified period if he/she wishes to bring about the return of the child and it will simultaneously discourage the abducting parent to seek an advantage by concealing the child.

ARGUMENT

I. THE ONE YEAR FILING PERIOD OF ARTICLE 12 OF THE CONVENTION IS EQUIVALENT TO A STATUTE OF LIMITATIONS.

Article 12 provides that the child may be returned even if the petition is filed after one year, *unless* (emphasis not in original), the settled in its new environment defense is established. Unlike the provisions of Article 13b of the Convention, there is no express discretion to order a return if the child is now settled in its new environment. The discretion to return provision precedes the settled in its new environment exception in the article. Thus, there is no express discretion to order the return if the child is now settled in its new environment where the petition was filed after the one year period. While most courts have inferred a discretion to return, there is no clear mandate to do so in the Convention. See *Re M. (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, House of Lords, minority opinion of Lord Rodger. Even where such discretion is inferred, the one year period severely limits the left behind parent's chances of succeeding in the petition for return and often becomes a *de facto* statute of limitations.

The opinion of the Second Circuit in this matter, reported at 697 F.3d 41, holds that "Unlike a statute of

limitations prohibiting a parent from filing a return petition after a year has expired, the settled defense merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering the child to be returned to her country of habitual residency", (page 14 of the judgment). It is not the court's authority to order a return after the one year period which should considered. What must be considered is the likelihood of successful implementation of the substantive right of return when a well settled defense is permitted.

In addition to the argument that the Convention does not provide the courts with a clear mandate of discretion, in practice, the possibility that an order of return will be made in such cases is significantly diminished. As stated in the petition for certiorari, only two courts in published decisions have ever ordered the return of a child after making a well-settled finding. See p. 22 of the Petition for Writ of Certiorari. The courts in other signatory States have taken a similar approach. In addition to the above cited Re M., courts in member States routinely refuse the return of unlawfully removed children when the petition is filed more than one year after the removal or unlawful retention. In practice, the failure to toll the one year period is most often outcome determinative.

By way of one example, the Appellate Court of Paris, France denied a return where a petition was filed sixteen months after an unlawful removal. The court held that in a conflict between the Convention's purpose and the greater interest of the child, the Convention's purpose takes second place. See CA Paris,

8 Aout 2008, Nos de RG 08/05791 et 08/07826.[4] The Supreme Court of Ireland issued a judgment not to return where the petition was filed by the public prosecutor 20 months after the unlawful removal but within one year after discovery of the child's location. Although the removal was unlawful, the child had become settled in its new environment. *P.* v. *B*. (No. 2), (Child Abduction: Delay)[1999] 4 IR 185.[5] The Supreme Court of New Zealand ruled in a case where the children were unilaterally removed from Australia by the mother in February, 2002. The father was notified of the children's location in May, 2003 and commenced return proceedings in December of that year. The Supreme Court upheld the lower court's refusal to order their return, accepting the argument that they were now settled in their new environment. *Secretary for Justice (NZCA)* v. *H.J.* [2007] 2 NZLR 289.[6] In a case where a child was abducted to England from the U.S., the parents reached an agreement in 1999 to return the child to its habitual residence. However, the abducting mother then removed the child, who was only located in 2003. The court refused the petition for return based on its finding that the child was settled in her new environment. The court noted that her emotional life was not complete, being out of contact with her father, but that did not mean that she was not settled in her new environment. *Re C*

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[4] Case cited at www.incadat.com.

[5] Case cited at www.incadat.com.

[6] Case cited at www.incadat.com.

(Abduction Settlement) [2005] 1 FLR 938.[7] Although it is beyond the scope of the Convention, one cannot completely ignore the consequences of the failure to apply equitable tolling for the future relationship between the left behind parent and the child. The post-judgment prospects in a case such as Re C for the left behind parent to re-establish contact with the child are very slim. An abducting parent, who is permitted to conceal the child without suffering any legal consequences, will have no incentive to abide by any court ordered visitation schedule. As noted by the U.S. Supreme Court, "Abductions may prevent the child from forming a relationship with the left-behind parent, impairing the child's ability to mature". *Abbott* v. *Abbott* , 130 S.Ct. 1983, 1996.

While courts in other signatory states have not adopted equitable tolling, some have fashioned other responses to concealment, such as a heightened burden of proof where the settled in defense is claimed. See for example, *Cannon* v. *Cannon*, [2005] 1 W.L.R. 32, (England). In the United States, the overwhelming majority of federal appellate and district courts have applied equitable tolling in cases where the abducting parent concealed the child's location, as in the present case. See, e.g. *Furness* v. *Reeves*, 362 F.3d 702,723(11th Cir. 2004), *Dietz* v. *Dietz*, 349 Fed. Appx. 930, 933 (5th Cir. 2009), *In re B. Del C.S.B.,* 559 F.3d 999, 1014-15 (9th Cir. 2009).

[7] Case cited at www.incadat.com.

II. THE BRIEF OF THE UNITED STATES

The *amicus curiae* brief submitted by the United States represents a 180 degree reversal of its previous position on equitable tolling prior to the present petition. Petitioner's writ clearly cites the position held by the United States commencing in 1980 until the present case. The United States supported equitable tolling in the 1980 deliberations on drafting of the Convention. In Preliminary Document No. 7 of September, 1980 in Comments of the Governments deliberating the Convention draft, the United States made the following comment on Article 11, which later became Article 12 in the final version of the Convention:

> The United States is perturbed about this article's extremely restrictive time limits. As a practical matter, it may not be possible to locate a child and to bring proceedings in an appropriate court within these limits. This is particularly true in large federated States such as the United States, which also has no requirement for persons to register upon establishing or changing their residence. A *statute of limitations* (emphasis added) of six months from the date of abduction to the institution of legal proceedings, or a maximum of one year in the case of the child's concealment, will cut of many deserving applicants and their children. Rather than deterring abductions this article may benefit those abductors who have the financial means and friends to arrange for life underground, perhaps moving from place to place to avoid

detection. The child in the meantime is subjected to the life of a fugitive.

It has been said that the time limits are necessary because children will be integrated into a new social environment within 6 months to a year, and that it would be contrary to their interests to be returned thereafter. Discussions with mental health professionals in the United States indicate that there is serious doubt about the correctness of such a general assumption. It is recognized that there comes a point in time when it could be harmful to uproot children after an abduction. However, as the Rapporteur points out, it is impossible to come up with an objective criterion concerning the child's integration into a social environment so that any time period adopted 'will always be of an arbitrary nature' (*Report*, paragraph 89).

It is true that possible harm to the child through renewed change of environment after a lengthy stay with the abductor should be considered. But this must be weighed against the Convention's principal objective of deterring kidnappings, which are themselves traumatic experiences for children. In such a weighing process the unproved assumption of harm to children after an absence of six months to one year is clearly outweighed by the necessity to curb abductions. If the time limits of this article remain as written, they may promote rather than deter abductions. The United States urges that at the very least 1-year and 2-year limits be substituted for the present deadlines. (Actes et

> documents de la Quartorzieme session, Tome III, Child Abduction, Hague Conference on Private International Law, p. 242, Imprimerie Nationale/La Haye/1982).

In addition to calling for a minimum of a two year limit before the settled in defense can be invoked in cases of concealment, the United States, contrary to its present position, refers to the time limit as a statute of limitation. The United States' brief before this court also fails to explain how a child whose left behind parent has been suddenly and inexplicitly removed from its life, who is often told by the abducting parent that the left behind parent is no longer interested in maintaining contact, or is indoctrinated with fabricated tales of horror from which the child has allegedly been saved, can possibly be well settled in any environment.

In Public Notice 957, Fed. Reg. 1094 of March 26, 1984, the U.S. Department of State made the following point regarding Article 12. "If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations." P. 10509.

III. PERIODS OF ONE YEAR OR MORE DUE TO COURT DELAYS DO NOT INVOKE THE WELL SETTLED DEFENSE.

In a significant number of cases that were filed within the one year period, the final judgment was rendered two or more years after commencing the action. Those delays, whether due to crowded court calendars or the use of delay tactics by the abducting parent, do not constitute grounds to raise the well settled defense.[8] Once the petition is filed in within the one year period, it would be inequitable to negatively impact petitioner's chance of success due to delays beyond his control. It would certainly be an injustice to permit delays caused by the abductor to change the ultimate decision of the court as result of allowing the well settled defense. If that were the case law, delay tactics would be used in every case in order to undermine, if not nullify, the purpose of the Convention.

Concealment of the child is simply another form of delay tactic. As long as the period of concealment is tolled, the purpose of the Convention is preserved and the abducting parent does not profit by this harmful conduct. From the child's perspective, there is no difference whether the time elapsed is due to concealment, delay tactics of the abductor, or overcrowded court calendars. If the time is tolled once

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[8] "It will be noted once again that this time limit does not affect the length of the proceedings in court". Comments of the Canadian Government, Actes et Documents, id. p. 231, under Art. 11.

the petition is filed in a timely manner, than there is no justification for not tolling the period during which a child is concealed. Counsel for these amici know of not one learned article published in leading journals that conclude the settled in defense serves the best interests of children.

A case which illustrates this point, *Lee* v. *Ezra*,[9] was decided by the Supreme Court of Israel. The mother unlawfully removed the child to Israel from Nevada. She did not inform the father where she and the child were located. Several months subsequent to the abduction, the father was able to obtain information which led him to believe that the child was in Israel, where the mother had family members. Although her precise location was unknown, the father was able to commence action as Israel's civil law regulations[10] permit the filing of Convention cases in the Tel Aviv court in such instances. His action was filed five months after the abduction. The Family Court granted substituted service and a default judgment was rendered ten months after the abduction, ordering the return of the child.

The judgment was not executed as the child could not be found. Just over three years subsequent to the judgment, the mother was located during a random police check. After being personally served with the

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[9] David Lee v. Lilly Ezra, Motion for Leave to Appeal (Family Matters) 5690/10, August 10, 2010, Supreme Court of Israel, (English translation and original decision in Hebrew).

[10] Civil Law Rules of Procedure, 1984-5744, Regulations 295(b), 258 (c), Israel.

return order, the mother filed for a stay and for an order to set aside the default judgment. The Family Court granted both motions and a new trial was held. The court made its new decision three months subsequently, 38 months after the abduction. It held that the removal was unlawful but ruled that the commencement of proceedings for purposes of Article 12 was the time of the actual trial and not the date of filing. The court then held that it was entitled to consider whether the child was settled in to his new environment. The court found that the removal was wrongful but return was denied as the court held that the child was now settled in.

The father appealed the decision to the District Court of Tel Aviv sitting as an appellate court. The District Court reversed the trial court, holding that the language of the Convention is clear and that the one year period runs until an action is commenced. In this case, the date on which the father filed his petition with the trial court is determinative. Therefore, the trial court erred in considering the settled in defense. In August of 2010, four and a half years after the abduction, the Supreme Court of Israel affirmed the ruling of the District Court. The child was then returned to the United States by the father, as the mother chose to remain in Israel, despite her allegations of the grave risk of intolerable physical and psychological harm to the child should he be returned. The simple fact that a petition was filed with the court within five months of the abduction, even though the actual trial took place three years subsequent to the abduction and the return occurred over four years later, meant that the settled in argument was not relevant. Certainly, none of the procedural matters are

of concern to the child. Yet due to the fact that the US has no jurisdictional regulation parallel to that of Israel, a US court would consider the settled in argument in the same fact pattern simply because the left behind parent would have no place to file the petition in a timely manner. The results would most likely be completely opposite in the two countries due to the technicality of a filing provision or lack thereof.

The IAML seeks to have the Convention implemented in good faith. It should not be a weapon that a left behind parent can threaten to invoke for an undetermined period in order to gain tactical advantages in negotiating with the other party. In order to counter that possibility while not encouraging the concealment of abducted children, a simple solution is suggested. Whenever the whereabouts of the child is unknown to the left behind parent and the Central Authority of the requesting State is unable to ascertain the child's location, filing an application with the Central Authority should be considered as the commencement of the proceedings for purposes of Article 12. There is nothing in the Convention that contradicts such an interpretation. In fact, as discussed above, some courts have held that the action commences when the application is filed with the Central Authority. If the application is filed within the one year period, then the settled in defense should not be considered. This enables the left behind parent to take action within the specified period while simultaneously discouraging the abducting parent to seek an advantage by concealing the child.

A further solution can be found in the 1996 Hague Convention on Jurisdiction and Protection of Children.

Article 7(b) of that Convention provides that in the case of wrongful removal or retention, jurisdiction passes to the new State if the child resided in that new State for at least one year after the left behind parent has or should have had knowledge of the child's whereabouts and did make a timely request. We believe that the adoption of this principle to the Abduction Convention, along with the solution of filing with the Central Authority as stated above, provides an equitable resolution for the implementation of the well settled defense in cases where the child is concealed.

CONCLUSION

The IAML concludes that equitable tolling must be read into the Convention in cases where the child has been concealed by the abductor. A decision to the contrary would undermine the goals of the Convention and enable its own undoing. Failure to apply tolling not only encourages parents who consider abducting their children to carry out the abduction, it would cause further damage by encouraging those abductors to conceal their child. Consideration of the well settled defense significantly reduces the chances for a return order. It turns the Convention proceedings from a deliberation on the choice of forum to a hearing on the best interests of the child. This is contrary to the goals of the Convention, which are to discourage child abduction and to bring about the swift return of abducted children.

The IAML's proposed solution of tolling the period in the case of a concealed child from the date of filing a petition with the Central Authority or adopting the provisions of Article 7(b) of the 1996 Convention on

Jurisdiction and Protection of Children presents a reasonable and equitable resolution of the issue before this court.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

State of Israel

At the Supreme Court

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

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

Petitioner: *A*

Versus

Respondent: *B*

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

Hearing Date: 30 Av 5770 (10.8.10)

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

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

Ruling

Judge N. Hendel

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

Procedural Background

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

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

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

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

the child, as set forth in Article 13(A) of the Treaty, applied in this case. This was also set forth as to the application of Article 13(B) of the Treaty on this case, regarding psychological damage to the child.

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

The Parties' Arguments

3. The Motion for Leave to Appeal was set for a hearing before three judges. The Parties argued in writing and an oral discussion was also administered. As indicated, the Respondent places emphasis on two main arguments: first, the District

Court erred in rejecting the position of the Family Matters Court according to which the period of one year, pursuant to Article 12 of the Treaty, ought to be counted according to the date on which actual treatment of the proceeding began. Second, severe damage may be caused to the minor if the Petitioner traveled to the United States in order to participate in a proceeding to be held there – if the District Court's ruling prevailed. The reason is that there is substantial risk that the Petitioner would be arrested by the police due to the abduction of the Respondent thus requested. The severance caused between the Petitioner and her son if such scenario materialized would impose great hardship on the child. Accordingly, there is basis for the conclusion that the Respondent would involve the authorities in order to bring about the Petitioner's arrest. On the other hand, the Respondent holds that there is no error in the ruling of the District Court and no basis to the argument that he would act in order to bring about the Petitioner's arrest.

Discussion

4. I shall refer to the arguments according to their order. Article 12 of the Treaty sets forth:
   Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority,

even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment…"

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

Procedure Regulations, 5744-1984, entitled "Commencement of the Proceeding". Regulation 7A(A) defines the term as follows: "A proceeding at Court shall commence with the submission of a claim". Beyond the fact that the language of the law is clear in the sense that the intension is not, for example, initiation of the evidence proceeding, the purpose of the law is not compatible with the interpretation suggested by the Family Matters Court.

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

> "The article as retained the date of which proceeding were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interest of parties protected by the Convention".
>
> (Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, *Hague*

> *Conference on Private International Law, Acts and Documents of the Fourteenth Session* (Vol. III, 1980), p. 459).

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

The Petitioner's Counsel, Adv. N. Zibin, was aware that a new interpretation for term "commencement of the proceeding" was involved, but noted that the trend today was to interpret the Treaty in a manner compatible with the best interests of the child. My response is that the matter depends on the term that is the subject of the interpretative process. There are terms that naturally require interpretation and cannot be defined by pointing to a certain point on the time axis. So, for instance, regarding interpretation of the term "regular place of residence" of the child. I accept that upon interpretation of this term, there is room to examine the matter from the child's perspective, but there are other possibilities in Court rulings (see, for instance, Family Matters (Beer Sheva) 130/08 *A v. B* (31.8.08), in which different approaches appear as to definition of the term "the child's place of residence"). **However,** "commencement of the proceeding" is not such a term. If the enactor of the Treaty had desired to define the term in the manner proposed, he could have written terms such as "from the date of hearing of the evidence", "from the date of rendering of the ruling" or "from the date of actual treatment of the proceeding". **The Treaty is**

built upon gentle balances in order to fight against the harsh phenomenon of abduction of children from one country to another and there is no room for provision of interpretation to the Treaty that is incompatible with its words and purpose.

5. An additional argument of the Petitioner that came up at the hearing was the concern that upon arrival of the Petitioner at the United States in order to take part in the proceeding that was supposed to be administered there, she may be arrested as a result of application by the Respondent to the authorities. While the arrest warrant issued against the Petitioner was abolished, there was no prevention, so it was argued, from the Respondent turning to the authorities upon the Petitioner's arrival at the United States in order to participate in the trial. In response, the Respondent's Counsel, Adv. E. Friedman, announced that he would be willing to submit a letter on behalf of his client, to be sent to the local district attorney in the US, according to which he was not interested in the Petitioner being arrested as aforesaid. A copy of such letter, dated 10.8.10, addressed to the Deputy Attorney General of the State of Nevada, was recently submitted to us. The letter received is clear and explicitly specifies that the Respondent is not interested and has no intention of effecting the administration of criminal proceedings against the Petitioner. The Respondent also requested that substantial weight be afforded to his position on the matter. It seems that this letter obviates the concern raised by the Petitioner's Counsel regarding the probability for her client's arrest. It is true that the Respondent's

position does not bind the DA in the State of Nevada. However, experience indicates that except for extraordinary cases such as abduction of a child through violence or repeated abductions – the chance that the Petitioner will be arrested is not high. It is certainly not higher than for any parent returning to the country from which the child was abducted in order to participate in the legal proceeding. If we accepted the argument, the result would be that the abducting parent would be entitled to argue that the child ought to be left at the country to which he was taken due to the concern regarding his arrest at the country from which the abduction was performed. Of course, this is not the position of the Court rulings.

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

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

   It shall be noted that the implication of rejection of the Motion is that the last section in the District Court's decision is in effect. According to this

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

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

Judge

Judge E. Rubinstein:

A. I agree with the opinion of my colleague, Judge Hendel. Hague Treaty cases, certainly once several years have passed since the abduction, often raise a difficult humane question, since the cost of the situation formed is often paid by the minor that is

the subject of the proceedings and he is essentially the subject of the abducting parent's wrongdoing. In Motion for Leave to Appeal (Family Matters) 2338/09 *A v. B* (unpublished), I had the chance to say:

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

B. Unfortunately, this is the case here as well: the mother acted unlawfully and as described by my colleague, Judge Hendel, all roads lead to the direction instructed by the District Court, return of the minor. Possibly, the sadness over the minor's relocation was in the conscience of the Family Matters Court, which even treated (according to the expert opinion) the concern of severance of the minor from his mother. We do not believe that this concern regarding severance will materialize, and my colleague referred to the matter of concern

regarding criminal proceedings against the mother and limitation thereof, in light of the father's clear letter of the DA in Nevada. Also, the mother is not estranged to the US, judging by her life history and citizenship, and this is significant for the mother's ability to cope with the return thereto.

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

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

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

Judge

Judge U. Fogelman:

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

Judge

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

Rendered today, 8 Elul 5770 (18.8.10).

Judge Judge Judge

_____

APPENDIX B

State of Israel

At the Supreme Court

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

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

Petitioner: *A*

Versus

Respondent: *B*

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

Hearing Date: 30 Av 5770 (10.8.10)

ORIGINAL IN HEBREW

בבית המשפט העליון

בע"מ 5690/10

בפני:	כבוד השופט א' רובינשטיין כבוד השופט נ' הנדל כבוד השופט ע' פוגלמן	
המבקשת:	פלונית	
	נ ג ד	
המשיב:	פלוני	
	דיון בבקשת רשות ערעור על פסק דינו של בית המשפט המחוזי בתל אביב-יפו מיום 8.7.10 בעמ"ש 18359 שניתן על ידי השופטים י' שטופמן, ת' שפירא ו-ש' שוחט	
תאריך הישיבה:	ל' באב התש"ע	(10.08.10)
בשם המבקשת:	עו"ד נחמה ציבין עו"ד ברנרד אלפסי	
בשם המשיב:	עו"ד אדווין פרידמן עו"ד אלה רודניק	

פסק-דין

השופט נ' הנדל:

1. מונחת בפנינו בקשת רשות ערעור על פסק דינו של בית המשפט המחוזי בתל אביב-יפו (עמ"ש 18359-05-10 מיום 8.7.10) אשר הורה על החזרת ילד חטוף – הוא בנם של הצדדים ויליד 3.10.03 - לארצות הברית על פי חוק אמנת האג (החזרת ילדים חטופים), התשנ"א-1991 (להלן: 'האמנה'). בכך, בית המשפט המחוזי קיבל את ערעור המשיב על פסק דינו של בית המשפט לענייני משפחה ברמת גן (תמ"ש 34860/06) אשר דחה את תביעתו לפי האמנה.

<u>הרקע הדיוני</u>

2. המשיב הינו ממוצא סיני וחושב ארצות הברית. המבקשה הינה ילידת ישראל בעלת אזרחות אמריקאית וישראלית. הצדדים אינם נשואים. הם נפגשו בסמוך לשנת 2002 ובנם נולד כאמור כשנה לאחר מכן.

על אף שעסקינן בהליך המתנהל לפי האמנה, ועל כן אמור להישמע בדחיפות, ניהולו השתרע על פני מספר שנים. ההליכים המשפטיים בעניינו של הילד החלו בשנת 2005 כאשר ניתן צו על ידי בית המשפט במדינת נבאדה שבארצות הברית לפיו הוענקה לשני ההורים משמורת משותפת על הילד. על פי צו זה, הילד יימצא במשמורת פיזית אצל המבקשת והמשיב יזכה בזכויות ביקור. כשבעה חודשים לאחר מכן, ביום 1.2.06, הגיעה האם לישראל עם הילד ללא ידיעת האב. בחלוף כחמישה חודשים ובתאריך 12.7.06, הגיש המשיב לבית המשפט לענייני משפחה הביעה להשבת בנו מכוח האמנה. בתאריך 6.12.06 ביה המשפט לענייני משפחה נתן פסק דין לטובת המשיב בהיעדר כתב הגנה והופעה מטעם המבקשת. פסק הדין לא בוצע עד לתאריך 18.1.09. במועד זה, אותרה המבקשת באקוראי במסגרת בדיקה שגרתית של משטרת התנועה. כשבוע לאחר מכן, הגישה המבקשת בקשה לביטול פסק הדין, אשר התקבלה. נשמעו הוכחות ומונה מומחה.

בית המשפט לענייני משפחה קבע כי הילד הורחק על ידי המבקשת שלא כדין. חרף האמור, בית המשפט לענייני משפחה דחה את חביעת המשיב. זאת, על יסוד הקביעה שהוא השתלב בסביבתו החדשה. המשיב הדגיש כי סעיף 12 לאמנה מאפשר בדיקת השתלבותו של הקטין רק אם חלפה שנה ממועד הרחקת הקטין ועד תחילת ההליך. כזכור, התביעה הוגשה מספר שנים לפני כן. ברם, בית משפט דחה את טענת המשיב בקובעו כי יש למנות את הקופה השנה מן המועד בו החל ביזור ההליך לגופו. למעלה מן הצורך, בית המשפט לענייני משפחה קבע כי הגנת ההשלמה של ההורה עם חטיפת הילד ממנו הקבועה בסעיף 13(א) רישא לאמנה חלה במקרה דנא, וכך גם נקבע לגבי תחולתו של סעיף 13(ב) רישא לאמנה על הסכרה הדן בדבר נזק פסיכולוגי לילד.

בית המשפט המחוזי ביטל את פסק דינו של בית המשפט לענייני משפחה ותחת זאת קבע כי דין תביעת המשיב – להתקבל. באשר לסעיף 12, הודגש כי יש למנות את תקופת השנה ממועד ההרחקה ועד למועד הגשת התביעה, ולא מעבר לכך. על כן, לא ניתן להחיל על המקרה את מבחן ההשתלבות שבסעיף 12 לאמנה. כמו כן,

נפסק כי המשיב לא השלים עם החטיפה בהתאם לסעיף 13(א) לאמנה. אחרון נקבע כי על פי חוות דעת מומחה לא קם בסיס לקביעה שהוכח כי יגרם נזק לקטין כמשמעותו בסעיף 13(ב) לאמנה באופן שמצדיק את דחיית תביעת המשיב. הבסיס לטענה לגרימת נזק פסיכולוגי נעוץ בצו מאסר שהוצא נגד המבקשת שלא בידיעתה והשלכת העניין על הילד. ברם, במהלך הדיון בפני בית המשפט המחוזי נתברר כי צו המאסר בוטל ביום 16.4.10.

<u>טענות הצדדים</u>

3. הבקשה למתן רשות ערעור נקבעה לדיון בפני מותב תלתא. הצדדים טענו בכתב והתקיים גם דיון על-פה. עולה, כי המבקשת שמה דגש על שתי טענות עיקריות: האחת, כי טעה בית המשפט המחוזי בדחותו את עמדת בית המשפט לענייני משפחה לפיה יש למנות את תקופת השנה במסגרת סעיף 12 לאמנה על פי המועד בו החל בירור ההליך לגופו. השנייה, כי עלול להיגרם נזק חמור לקטין אם המבקשת תיסע לארצות הברית כדי להשתתף בהליך שיתקיים שם - אם פסק הדין של בית המשפט המחוזי יוותר על כנו. זאת מכיוון שקיים סיכון של ממש כי המבקשת תיעצר על ידי המשטרה בגין מעשה החטיפה אם המשיב ידרוש זאת. הנתק שייווצר בין המבקשת לבין בנה, אם תרחיש כזה יתממש, יקשה על הילד מאוד. על פי קו זה, ישנו בסיס למסקנה שהמשיב יפעל לערב את הרשויות על מנת להביא למעצרה של המבקשת. מנגד, המשיב סבור כי אין כל טעות בפסיקתו של בית המשפט המחוזי ואף אין יסוד לטענה כי יפעל להביא למעצרה של המבקשת.

<u>דיון</u>

4. אתייחס לטענות לפי סדרן. סעיף 12 לאמנה קובע:

> "ילד, אשר לא כדין, הורחק או לא הוחזר כאמור בסעיף 3, וביום פתיחת ההליכים בפני הרשות השיפוטית או המינהלית של המדינה המתקשרת שבה נמצא הילד חלפה תקופה של פחות משנה מתאריך ההרחקה או אי ההחזרה, שלא כדין, תצווה הרשות הנוגעת בדבר להחזיר את הילד לאלתר. הרשות השיפוטית או המינהלית תצווה להחזיר את הילד, אף אם החלו ההליכים לאחר תום התקופה של שנה אחת האמורה בפסקה הקודמת, זולת אם הוכח כי הילד השתלב כבר בסביבתו החדשה...".

עינינו הרואות כי האמנה מכשירה בדיקת השתלבותו של הילד עם סביבתו החדשה רק בתנאי שחלפה שנה ממועד ההרחקה ועד למועד פתיחת ההליך. הבדיקה מצויה בין שני ציוני דרך: תאריך ההרחקה ופתיחת ההליכים. בעניינו, ההליך נפתח בבית המשפט לענייני משפחה ביום 12.7.06, דהיינו – רק כחמישה חודשים לאחר מועד ההרחקה. כאמור, בית המשפט לענייני משפחה נתן משקל לכך כי "התביעה לא הוגשה להחברר לגופה" אלא כעבור שנתיים וחצי לאחר מועד הגשתה, או שלוש שנים לאחר מועד ההרחקה (עמ' 7 לפסק דינו של בית המשפט לענייני משפחה). גישה זו דינה להידחות. המונח "פתיחת ההליך"- כשמו כן הוא. אין מקום לקבוע כי פתיחת ההליך הינה מהשלב שהמשפט מגיע לבירור לגופו. נדמה, כי זה ודאי שלב אחר מ"פתיחת ההליך". הפרשנות שהוצעה על ידי בית המשפט לענייני משפחה לא מוצאת אחיזה בפסיקה של בית המשפט המחוזי, של בית משפט זה או במדינות זרות שאף הן עוסקות במלאכת פרשנות האמנה. הגם ואין לפרש מונחים באמנה על פי פרשנותו של מונח דומה בדין הפנימי, מעניין יהיה לפנות לתקנה 7א' לתקנות סדר הדין האזרחי, התשמ"ו-1984 שכותרתה "פתיחת ההליך". תקנה 7א(א) מגדירה את המונח באופן הבא: "הליך בבית משפט ייפתח בהגשת תובענה". מעבר לכך שלשון החוק ברורה במובן זה שאין הכוונה למשל לתחילת הליך ההוכחות, הרי שתכלית החוק אינה מתיישבת עם הפרשנות שהוצעה על ידי בית המשפט לענייני משפחה.

אם פתיחת ההליך משמעותו בירור לגופה של התביעה, יש בכך כדי לעודד את ההורה החוטף למשוך את ההליך ולמנוע את תחילת הליך הבירור לגופו. זאת, כדי שיוכל לבסס טוב יותר טענה שהילד המעורב השתלב טוב יותר בסביבה אליה הביאה את הילד מן הטעם שנמצא שם יותר זמן. בשל כך נקבעה התקופה הקצרה יחסית של שנה באמנה. התוצאה תהא כי ההורה החוטף יצא נשכר מכך שחקע טריז בגלגלי ההליך. כפי שנכתב בסעיף 108 ל- Perez-Vera Report, המהווה פרשנות רשמית לאמנה:

> "The article as retained the date on which proceeding were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interest of parties protected by the Convention".
> (Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, *Hague Conference on Private International Law, Acts*

and Documents of the Fourteenth Session (Vol. III, 1980), p. 459)

רוצה לומר, כי המטרה בקביעת המועד בפתיחת ההליך ולא במתן פסק הדין נועדה להגן על ההורה הראוי לזכות להגנה על פי האמנה – הוא ההורה ממנו נחטף הילד.

באת כוח המבקשת, עו"ד נ' ציבין, הייתה מודעת לכך שמדובר בפרשנות חדשה למונח "פתיחת הליך" אך ציינה כי הסוגיה היום היא לפרש את האמנה באופן המתיישב עם טובת הילד. תשובתי לכך היא כי העניין תלוי במונח נשוא ההליך הפרשני. ישנם מונחים שמטיבם דורשים פרשנות ולא ניתן להגדירם באמצעות הצבעה על נקודה מסוימת על ציר הזמן. כך למשל, לעניין פרשנות המונח "מקום מגוריו הרגיל" של הילד. מקובל עליי כי בפרשנות מונח כזה יש מקום לבחון את העניין מנקודת מבטו של הילד, אך קיימות בפסיקה גם אפשרויות אחרות (ראו למשל: ע"מ (ב"ש) 130/08 פלונית נגד פלוני (31.8.08) שם מופיעות גישות שונות בכל הקשור להגדרת המונח "מקום מגוריו של הילד"). אולם, "פתיחת ההליך" אינו מונח שכזה. לו רצה מכונן האמנה להגדיר את המונח באופן שהוצע, רשאי היה לכתוב מונחים כגון "ממועד שמיעת הראיות", "ממועד מתן פסק הדין" או "ממועד שמיעת ההליך לגופו". האמנה בנויה על איזונים עדינים כדי להילחם נגד התופעה הקשה של חטיפת ילדים ממדינה למדינה ואין מקום למתן פרשנות לאמנה שאינה תואמת את מילותיה ואת תכליתה.

5. טענה נוספת של המבקשת שהתעוררה בדיון היא החשש שעם הגעה המבקשת לארצות הברית כדי ליטול חלק בהליך אשר אמור להתנהל שם, עלולה להיעצר כתוצאה מפניות המשיב לשלטונות. אמנם, צו המעצר שהוצא נגד המבקשת בוטל אבל אין מניעה, כך נטען, כי המשיב יפנה לשלטונות כאשר המבקשת תגיע לארצות הברית כדי להשתתף במשפט. בתשובה לכך, הודיע בא כוח המשיב, עו"ד א' פרידמן, כי יהא מוכן להגיש מכתב מטעם מרשו, אשר יישלח לפרקליטות המקומית בארה"ב, בו יודיע כי אינו מעוניין כלל שהמבקשת תיעצר כאמור. עותק מכתב שכזה, מיום 10.8.10, שמונח לפנַי התובע הכללי של מדינת נוואדה, הוגש לידינו בימים האחרונים. המכתב שהתקבל הינו ברור וצוין בו מפורשות כי המשיב אינו מעוניין ואין לו כל כוונה לפעול לקיומם של הליכים פליליים נגד המבקשת. עוד ביקש המשיב שיינתן משקל רב לעמדתו בנדון. נדמה כי המכתב האמור מוציא את הרוח ממפרש החששות שהעלתה באת כוח המבקשת בדבר הסיכוי למעצרה של מרשתה. נכון הוא, כי אין בעמדת המשיב כדי

לחייב את פרקליט המחוז במדינת נבאדה. יחד עם זאת, הניסיון מלמד כי למעט מקרים חריגים כגון חטיפת ילד תוך ביצוע אלימות או חטיפות חוזרות – הסיכוי כי המבקשת תיעצר אינו גבוה. ודאי אין הוא גדול יותר מכל הורה אשר חוזר למדינה משם נחטף הילד על ידו כדי להשתתף בהליך המשפטי. לו נקבל את הטענה, ייצא שההורה החוטף יהא רשאי לטעון כי חובה להשאיר את הילד במדינה אליה נלקח בשל החשש למעצרו במדינה בה בוצעה החטיפה. כמובן, אין זו עמדת הפסיקה.

נקודה אחרונה שראויה לציון היא כי לא היה מקום לקבוע שהמשיב השלים עם חטיפת הילד לאחר שהובא למדינת ישראל. ההפך הוא הנכון – נדמה כי פעילותו של המשיב מדברת בקול ברור וחד כי הוא אינו משלים כלל וכלל עם החטיפה.

6. העולה מן המקובץ, כי הואיל ומוסכם שהמבקשת ביצעה פעולת חטיפה כלפי בנה, והסייגים המופיעים בסעיפים 13-12 לאמנה אינם חלים, צדק בית המשפט המחוזי בהחלטתו, הלכה למעשה, להורות על קיום המשפט בארצות הברית, וזאת תוך כדי ביטול פסק דינו של בית המשפט לענייני משפחה.

יצוין כי המשמעות של דחיית הבקשה היא שהסעיף האחרון בפסק הדין בבית המשפט המחוזי הינו בתוקף. על פי סעיף זה, על בית המשפט לענייני משפחה לדון "בסדרי החזרת הילד לארה"ב, הסדרת הטיפות, הבטחת מזונות ומדור לקטין בכל הכרוך בהעתקת מקום מגורי הקטין מישראל לארה"ב". זאת, במטרה לשמור על טובת הילד בתקופה עד שיכריע בית המשפט בארצות הברית. ניתן להניח כי בית המשפט לענייני משפחה יפעל בהקדם על מנת לקבוע הסדרים הנחוצים כדי להעביר את הקטין לארצות הברית. יש לקוות, כי הצדדים יבינו שהמשותף להם הינו בנם ובכוחם להכביד עליו בתקופה הקרובה במהלכה יועבר לארצות הברית ומנגד - בכוחם גם להקל עליו. ניתן להניח כי ההבדל בין שתי האפשרויות עשוי להיות משמעותי מאוד עבור הילד בצומת הדרכים בו מצוי.

7. לא מצאתי כי טעה בית המשפט המחוזי במסקנתו. לא היה מקום להותיר את פסק דינו של בית המשפט לענייני משפחה על כנו. הייתי מציע לדחות את הבקשה ושהמבקשת תישא בהוצאות המשיב בסך 30,000 ש"ח להיום.

השופט א' רובינשטיין:

א. מסכים אני לחוות דעתו של חברי השופט הנדל. תיקי אמנת האג, בוראי כאשר חולפות שנים מאז החטיפה, מעוררים תדיר שאלה אנושית קשה, שכן את מחיר המצב שנוצר משלם לא אחת הקטין עצמו, נשוא ההליכים, ובמהות נפקד עליו עוון ההורה החוטף. בבע"מ 2338/09 פלונית נ' פלוני (לא פורסם) נזדמן לי לאמור:

> "תיקי אמנת האג מטבעם מייצגים טרגדיות אנושיות, מלחמה בין הורים, העשויים להיות אנשים נורמטיביים בתכלית, אך המבקשים לחיות כל אחד או אחת בארץ אחרת. הסדר הבינלאומי ב'כפר הגלובלי' ובניידות הקלה האופיינית לו קבע את אמנת האג, לשם הבטחת החזרתם המיידית של ילדים שהורחקו שלא כדין אל מדינה אחרת (השופטת פרוקצ'יה בבע"מ 672/06 פלונית נ' פלוני (טרם פורסם), פסקה 8), וכפי שציינה, בכנון רא מכריעה טובת הילד 'רק מקום שמשקלה גובר על התכלית המרכזית של האמנה'. כל תיק מחיקים אלה מייצג עולמות אנושיים, ועל כולנה עולמו של הקטין המיטלטל ממקום למקום".

ב. כך, לצערי, גם בעניינו: האם פעלה שלא כדין, וכפי שתיאר חברי השופט הנדל, כל הדרכים מובילות לכיוון שהורה עליו בית המשפט המחוזי, החזרת הקטין. יתכן כי אותו צער על טלטלה הקטין היה בתודעתו של בית המשפט למשפחה, שגם נדרש (על פי חוות דעת המומחית) לחשש ניתוקו של הקטין מאמו. אנו איננו מאמינים כי חשש זה של ניתוק יתממש חלילה, וחברי התייחס לנושא החשש מהליכים פליליים נגד האם וצמצומו, גם נוכח מכתבו הברור של האב לחביעה בנוואדה. האם גם אינה זרה לארה"ב על פי תולדותיה ואזרחותה, ולכן יש משמעות באפשרויות ההתמודדות עם השיבה לשם.

ג. נושאים הקשורים במסוגלותו האבהית של האם (שמסר כבר ילד לאימוץ, דבר האומר דרשני), יוכלו לשוב ולהתברר במקום הראוי להם בבית המשפט בארה"ב, אשר יש להניח כי ידון על פי עקרון טובת הקטין.

ד. בסופו של יום אביע את התקוה כי הצדדים ימצאו דרכים, היכולות להיות מגוונות, לקיום קשר ראוי עם האב במסגרת משמורת האם, ויאפשרו לקטין לגדול באופן סביר בתנאים שמטבעם אינם פשוטים, אך אפשריים. בא כוח האב הצהיר לעניין זה בפנינו בדיון, כי שולחו מעוניין "להיות אב פעיל בחיי הילד, לראות אותו באופן

סדיר, שיהיה לו קשר טוב וחם אתו, ובלי לפגוע בהיבט של היחסים בין הילד לאם".
לוא יהי.

ה. כאמור, מצטרף אני לחוות דעת חברי. אני מקוה ומניח שפסק דיננו יתורגם לאנגלית לנוחות בית המשפט בארה"ב.

ש ו פ ט

השופט ע' פוגלמן:

אני מסכים לחוות דעתו של חברי השופט נ' הנדל ולהערותיו של חברי השופט א' רובינשטין.

ש ו פ ט

הוחלט כאמור בפסק דינו של השופט נ' הנדל.

ניתן היום, ח' אלול התש"ע (18.8.10).

ש ו פ ט ש ו פ ט ש ו פ ט