In the Supreme Court

Req.Fam. App. 2338/09

Before:	The Honorable M. Na'or The Honorable Justice E. Rubinstein The Honorable Justice S. Joubran
The Applicant:	LM
	v.
The Respondent:	MM

Application for leave to appeal the decision of the District Court in Haifa in Fam. File 4646-11-08 and Fam. File 7972-12-08, given on 13 January 2009 by the Honorable Judges S. Shatmer, Y. Amit, and Y. Wilner

Date of hearing:	7 Nissan 5769 (1 April 2009)
For the Applicant:	Attorney Haya Rudnitzki-Drori
For the Respondent:	Attorney Edwin Friedman

J U D G M E N T

Justice S. Joubran:

1. Before us is an application for leave to appeal the judgment of the District Court in Haifa of 13 January 2009 in Fam. App. 4646-11-08 and Fam. App. 7972-12-08, which denied the applicant's appeal of the judgment given on 3 November 2008, of the Family Court in Hadera in Fam. File 2191/08, and the supplemental decision given by the Family Court in Hadera on 9 December 2008.

The relevant facts

2. These are the relevant facts that are not in dispute, as determined by the lower courts. The applicant is an Israeli citizen, a former kibbutz member, while the respondent is a French citizen. The two became acquainted in the course of their work at a film festival in France in March 2001, after which the respondent came to visit the applicant in Israel. After staying three months in Israel, the two traveled to France. On 12 September 2001, the applicant returned to Israel and two months later, the respondent followed her. On 30 April 2002, their first son was born (hereafter: Minor 1), and on 4 October 2004, the two married in a civil marriage in Cyprus. The couple lived on the kibbutz for a total of some five years. In July 2006, the family went to France for one month, and on 1 September 2006 traveled to France again. This time, the applicant gave up her membership in the kibbutz and received a departure payment for leaving the kibbutz after her request for permission to go on a two-year vacation from the kibbutz was rejected.

3. During their second stay in France, the applicant visited Israel three times, with the respondent accompanying her on one of the trips. The couple lived in France until 26 March 2008, at which time Minor 1 was in their joint custody, when the applicant returned to Israel a fourth time, this time to give birth to their second son. The respondent followed, arriving in Israel on 24 April 2008, and in response, the applicant filed, in the Family Court in Haifa (Fam. File 13,310/08), an application for a protective order against him, which was granted to her *ex parte*. On 1 May 2008, the Family Court in Haifa gave the force of a judgment to an arrangement that the parties made regarding visitation rights for the period the respondent was staying in Israel, and an order forbidding Minor 1 from exiting Israel. The previous day, the applicant filed, in the Family Court in Hadera (Fam. File 2363-01-09), a claim for custody of Minor 1. On 12 May 2008, the respondent filed an action in the Family Court in Hadera (Fam. File 219108) for the return of Minor 1 to France under the Hague Convention (Return of Abducted Children) Law, 5751 – 1991 (hereafter: the Hague Convention Law). The following day, the applicant gave birth to their second son (hereafter: Minor 2). In the framework of the proceeding on 15 July 2008, the Honorable Judge H. Goldkorn decided that there was no reason to meet Minor 1 in her chambers, for the reason that he had spoken through the various persons who had treated him during the proceeding. In addition, on 30 October 2008, the respondent filed an application for *habeas corpus* in the Family

Court in Hadera (Fam. File 2191/08) in the matter of Minor 2 for the purpose of returning him to France.

4. On 3 November 2008, the Family Court in Hadera struck out the mother's petition for custody of Minor 1 and ordered that he be returned to his father for the purpose of returning him to France. The court held that the habitual residence of Minor 1 was in France inasmuch as the family had gone to try their luck in France for an indefinite period of time, after the applicant's request for vacation from the kibbutz had been rejected and she had relinquished her membership in the kibbutz. It was also found that the couple had received payment upon leaving the kibbutz and had sent their possessions in a container to France, and that the applicant had commenced proceedings with the French authorities to obtain residency status. In light of this, and in light of the age of Minor 1, it was found that the period of his stay in France, under the custody of his two parents, was significant and that that country had become his habitual residence. Therefore, the Family Court in Hadera held that the Hague Convention Law applied in the matter of Minor 1.

5. The Family Court then examined whether, in this case, the exceptions prescribed in the Hague Convention Law were met, as a result of which the court would subsequently consider whether to return Minor 1 to the country from which he was abducted. First, it was found it had not been proven that the respondent agreed to return Minor 1 permanently to Israel, and his behavior indicated that he constantly opposed doing so. In order to examine whether the return of Minor 1 to France would raise a grave risk of physical or psychological harm to him, and also whether he was of the level of maturity in which his opinion as to his possible return to France should be taken into account, the Family Court appointed an expert psychologist and a welfare officer. The Family Court found that the expert psychologist did not find support for the various claims that the applicant raised against the respondent's behavior toward Minor 1 and toward her, or that living in France harmed Minor 1. As for the welfare officer, the court held that, although the report indicated there was friction between Minor 1 and his father, the value of this report was limited given that the welfare officer did not personally meet with the respondent, and, in any event, the evidence was not unequivocal that Minor 1 would suffer grave harm that would justify preventing his return to his habitual residence. In the end, the court rejected the argument that the opinion of Minor 1, who opposed returning to France, should be taken into account, the court relying on the expert psychologist's opinion that the thoughts were those of a

six-year-old child whose opinion was not formulated or unambiguous, and therefore his views should not be taken into account. At the end of its judgment, the Family Court added conditions to execution of the judgment, which would apply if the applicant would decide to return to France with her children. On 8 December 2008, the Family Court gave its supplemental decision, in which the aforesaid conditions were explained and expanded.

6. The applicant appealed the judgment and supplemental decision of the Family Court to the District Court in Haifa (Fam. App. 4646-11-08 and Fam. App. 10320-12-08, respectively), while the respondent only appealed the supplemental decision of the Family Court (Fam. App. 7972-12-08). On 13 January 2009, the District Court (the Honorable S. Shatmer, Y. Amit, and Y. Wilner) denied all the appeals. Regarding the applicant's appeal, the District Court rejected her arguments that Israel is the habitual place of residence of Minor 1. Her principal arguments on this matter revolved around a letter of request for vacation that she had written to the kibbutz, which stated that the move to France was intended to arrange their life on the kibbutz and in Israel for when they would return from abroad, and also the testimony of her sister, who testified that she had rented for the couple, prior to the applicant's return to Israel, a house in Zichron Ya'akov for one year. However, the District Court did not deem it proper to interfere in the determination that the testimony of relatives of the applicant was not credible and that it was illogical that the couple intended to live together in a leased apartment given the contentions that the applicant herself made regarding the situation of their marriage upon return to Israel. The District Court further held that, after the applicant's attempt to remain a member of the kibbutz failed, the handling of the financial arrangements with the kibbutz showed that she had reconciled with the decision to leave and move to France to live, meaning that she would have to go through all the proceedings for acceptance in their entirety if she were to decide to return to the kibbutz. In addition to the intention of the parents, the District Court focused on an examination of the place of residence of Minor 1 from his perspective, and found that Minor 1 had lived in France for more than one and a half years, from the time he was five years old, and that he had begun to settle into his surroundings. This being the case, it was found that France was indeed the habitual residence of Minor 1, and any doubt on this point, to the extent such doubt exists, works to the disadvantage of the applicant.

7. Regarding the existence of the exceptions to the return of an abducted child to whom the Hague Convention Law applies, the District Court determined that the lower court properly held

they did not exist in our case. As for the exception of consent, the District Court rejected the applicant's argument that it was proper to allow her to present to the lower court the affidavit of her counsel at the time, Attorney Ety Sidis-Pearl, which stated that the respondent consented to her returning to Israel, and held that, even if the statements in the affidavit were taken into account, its weight was minimal in light of the mental condition of the respondent at the time he made the statements, since they were made at the time he had just arrived in Israel and had received an order to stay away from his son. As for her argument that return of Minor 1 to his habitual residence would cause him harm, and also that it was proper to let Minor 1 himself be heard in court, the District Court did not find it proper to interfere in the decision of the trial court, which relied on the opinion of the expert psychologist that there was no reason to hear the minor in that he was not yet sufficiently mature. It was also pointed out that the applicant did not provide a reasonable explanation as to why she returned three times to France from her vacations in Israel, or why she did not request any assistance whatsoever during her visits in Israel, if she indeed suffered abuse at the hands of the respondent.

8. The District Court also rejected the applicant's argument that separation of Minor 1, the subject of the present proceeding, from his small brother, Minor 2, was liable to cause him psychological harm, and for this reason he should not be returned to France. The District Court found that this argument had no evidentiary basis, and, in any event, it could not be said that giving birth to another child, to whom the Hague Convention does not apply, negates the return of his brother, the abducted child, inasmuch as doing so would frustrate the objective of the Hague Convention. The District Court further held that the question of separation of the siblings is a subject that the French Court must deal with when making the decision on division of custody between the spouses.

Arguments of the sides

9. The first argument raised by the applicant is directed against the determination that the habitual residence of Minor 1 is in France. She argues that, when the family left the kibbutz in favor of France, it was for a visit for a fixed period of only a number of months, at the end of which they were supposed to return to Israel. During the first eight months of the visit, they did not live in a fixed location, but with friends of the respondent or with his mother. It was not until eight months after they arrived that they rented a small apartment, and it did not have their own

furnishings, most of their possessions having remained in Israel. Their financial situation in France was bad, and they subsisted on the severance payment the applicant had received from the kibbutz and on a loan from her mother. They returned because their money had run out and it was impossible to support the family in France. Regarding Minor 1, the applicant contends that he did not manage to establish social ties in the public kindergarten he went to and that he suffered from violence. She, too, did not manage to integrate, due to language problems, and consequently she was always dependent on her husband. The applicant further claimed that during their stay in France, neither Minor 1 nor she had medical insurance, while she made sure they would be entitled to medical insurance and their national insurance rights in Israel. The applicant further claims that the lower courts erred in the interpretation that they gave to her request to leave the kibbutz for a two-year vacation. She contends that the family took this step because it was the minimal amount of time that she could go on vacation from the kibbutz, and with the knowledge that they would be accepted back to the kibbutz as members at some time in the future, while at the same time they could collect the severance payment to finance their travel. Finally, it was claimed regarding the family's place of residence, that commencing the proceedings to obtain residency in France was intended to prevent her expulsion after she used up the three month's stay that is permitted to a tourist, and not because the family intended to settle in France.

10. The second claim raised by the applicant is directed at the rejection of her alternative claim that the respondent agreed to the family's return to Israel. On this point, she argues that the Family Court erred when it did not accept the testimony of her relatives and additional evidence, including his consent to rent an apartment in Zichron Ya'akov, which proved that the respondent agreed that he would move to live together with Minor 1 in Israel. In the alternative, the applicant argues that she agreed at the start to move with her son to France for a visit for a fixed period of time, and the respondent took advantage of this for the purpose of making a permanent move, contrary to her opinion. Her consent having been obtained by his misrepresentation, she argues that there is no need for the father's consent to return with Minor 1 to Israel. Another argument that the applicant raises is that the respondent acquiesced to the abduction of Minor 1 to Israel. According to this argument, the respondent's conduct at the time he lived in Israel until the filing of the claim under the Hague Convention Law constitutes actual acquiescence to the existing situation. This acquiescence is also apparent from the agreement was reached which was given force as a judgment of the Family Court in Haifa on 1 May 2008, in which he undertook not

to remove Minor 1 from the applicant's custody, and also from a conversation he held with her counsel at the time, on which he testified before the Family Court.

11. The third claim deals with the grave risk of physical or psychological harm to Minor 1 if he is returned to his habitual residence. She first argues that the lower courts erred by giving almost no weight to the welfare officer's report of 10 July 2008, which indicates that signs of distress and lack of social compatibility were revealed with respect to Minor I, contrary to the conclusion reached by the Family Court. The applicant also describes the contents of the affidavit of the applicant regarding the respondent's shameful attitude toward her and Minor 1, and the harsh atmosphere that the respondent imposed in the house. The applicant is of the opinion that the Family Court should have taken into account that the welfare officer met the father after making her report, but did not change her position. In her opinion, the report and also the testimony of the welfare office show that return of Minor 1 to the father's custody in France will expose him to real risk.

12. An interesting argument that the applicant raises involves the right and best interests of Minor 1. According to this argument, since the enactment of the Hague Convention Law, Israel has become a party and to and ratified the Convention on the Rights of the Child (1989) (Treaty Instruments 1038, Volume 31 (hereafter: Convention on the Rights of the Child). The applicant argues that the Convention on the Rights of the Child requires that the best interests of Minor 1 be taken into account in every proceeding regarding him, and, therefore, it cannot be said that his best interests will be taken into account in the custody proceeding in the court in France, thus resolving the matter. In her opinion, return of the minor to the country of his residence is indeed reconcilable with the best interests of children in general, however sometimes it is contrary to the best interests of the minor who is the subject of the proceeding before the court, such as Minor 1. The applicant adds that the rationale underlying the Convention on the Civil Aspects of International Child Abduction (hereafter: the Hague Convention) of deterring parents from abducting their children to a foreign country cannot prevail over the rights of Minor 1, who has rights and is not only the object of the rights of his parents. Therefore, beyond considering the best interests of the child, it is also necessary to take into account his rights, among them the right to give proper consideration to his opinion with respect to his future and situation, as it appears in Article 12 of the Convention on the Rights of the Child. Based on this reasoning, the applicant argues that the Family Court erred when it chose not to obtain a personal impression of Minor 1,

who will soon be seven years old, and is a clever and intelligent child who expresses his desire clearly. The applicant argues that, in this case, his desire is to remain in Israel with his mother, and not to return to the alienation he experienced in France. She further adds that, in the visitation arrangements that were recently made by the welfare officer, Minor 1 sometimes refuses to visit his father.

13. Another argument the applicant raises relates to the separation of Minor 1 from his younger brother, who is two years old. She is of the opinion that until the respondent filed a petition for *habeas corpus* on 30 October 2008, the respondent was not at all interested in the situation of Minor 2. The latter was not even taken into account in the considerations of the District Court. According to this argument, the return of Minor 1 to France while Minor 2 remains with the applicant would create an intolerable situation in which the two siblings are separated from each other. The applicant adds that return of Minor 1 to France may bring about her return with her two children to France such that, with the passage of time, the Hague Convention Law will also apply to Minor 2 and the respondent would initiate legal proceedings to have their second child remain in France.

14. The respondent, on the other hand, relies on the judgment of the Family Court and argues that the applicant does not offer any basis for the interference of a court of the third instance, as the arguments raised by the applicant were discussed at length in the previous instances. Regarding the merits of the arguments, he argues that the factual picture presented by the applicant is erroneous and partial, as the rejection of her request for vacation from the kibbutz and the family's travel to France regardless, shows that France is the family's habitual residence. He further argues that proceedings under the Hague Convention Law are intended to be swift, so that the appointment of an expert psychologist and welfare officer to examine the case was unnecessary, and even more so, it was not proper to hear Minor 1 in court, who was not even seven years old at the time, and had not yet reached the level of maturity for his views to be taken into account. The respondent further argues that the applicant did not meet the burden of proving that the return of Minor 1 to France would cause him physical or psychological harm. In his opinion, the opinion of the expert psychologist and also the testimony of the welfare officer and the applicant's family clearly indicate that the arguments are baseless. As for the argument that the return of Minor 1 to France would necessarily separate him from his brother, the respondent contends that the argument exploits the fact that the Hague Convention does not

apply to Minor 2, and, in any event, for this reason, he filed a *habeas corpus* petition regarding Minor 2, so that the two children would return together to France. Finally, the respondent argues that he did not acquiesce to the abduction of Minor 1 at all, as the arrangement reached by the parties was temporary, and he acted immediately to achieve the return of his abducted son to France.

15. On 28 April 2009, the applicant filed an application to add new evidence, which dealt with a judgment given by the Magistrate's Court in Paris on 17 March 2009 regarding the respondent's petition for custody (hereafter: the French judgment) , in which it was decided that Minor 1 would live with the respondent, while Minor 2 would live with the applicant. The applicant also includes a translation of the French judgment into Hebrew that was done by the attorney of the French consulate in Haifa, a photocopy of a French resident's card and an invitation to collect it from the Paris police, and also an opinion of Dr. Michel Colvo (hereafter: Dr. Colvo), an expert in French law. His opinion claims that the documents attached to the application indicate that a resident's card in France had been issued to the applicant and that she was requested to go and collect it personally. Not having done so, she will have to commence residency proceedings anew. The opinion also states that when the respondent filed the application for divorce, the applicant was not able to begin residency proceedings anew, so that, from now on, her stay in France would be limited to three months as a tourist. Dr. Colvo further contends that under the French judgment, the applicant can live with Minor 2 as she wishes, but because of her lack of status in France, the return of Minor 1 to France will separate him from his mother and brother. In addition, the applicant contended that the French judgment contained mistakes in the understanding of the proceedings taking place in Israel regarding Minor 1, factual and legal mistakes, and that the Magistrate's Court in France did not have jurisdiction to hear the matter of Minor 2, who was born in Israel.

16. The application was forwarded to a panel of three justices, and due to the complexity of the matter, in which the two minors might be separated from each other, it was decided to accept the application and hear it as an appeal.

Discussion

17. We are engaged in the operation of the Hague Convention Law, a Law that adopted the Hague Convention into Israeli domestic law for the purposes of its implementation. More than once, this court has stated the objective of this Convention, which was signed on the background of the phenomenon of the abduction of children by their parents from state to state, in an era in which divorce rates are increasing, while movement between states is routine (Civ. App. 5523/93, *Gunzburg v. Greenwald*, P. D. 49 (3) 282, 291 (1995) (hereafter: *Gunzburg*); Civ. App. 7994/98, *Dagan v. Dagan,* P. D. 53 (3) 254, 266 (1999) (hereafter: *Dagan*); Perm. Dist. App. 672/06, *A v. B* (not reported, 15 October 2006) (hereafter: *A v. B*); Perm. Dist. App. 1855/08, *RB v. VG* (not reported, 8 April 2008) (hereafter: *Biton*)). The drafters of the Convention thought it proper to cope with the phenomenon by creating an apparatus in which there is close cooperation between the judicial and administrative authorities of the States Parties to ensure the swift return of children who have been wrongfully removed from or not returned to their country of habitual residence, so that the latter will decide the question of the child's custody (Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention,* Hague Conference of Private International Law, Act and Documents of the Fourteenth Session (Vol. 111, page 435) (hereafter: Perez-Vera Report)). By doing so, the Hague Convention ensures mutual respect for the laws of the State Parties, deterrence of parents from taking the law into their own hands, and the best interests of the child himself, who has been removed from the surroundings in which he resides to surroundings that are forced on him by one of his parents, (*Gunzburg,* at page 292 of the judgment; Civ. App. 7206/93, *Gabai v. Gabai,* P. D. 51 (2) 241, 250-253 (1997) (hereafter: *Gabai*); *Dagan* ,at pages 266-272 of the judgment).

18. Article 3 of the Hague Convention provides that where a child was removed from or not returned to his place of habitual residence, in other words abducted, in breach of the rights of custody of the other parent that were determined in that state, the court must order the immediate return of the child to the country from which he was removed. There are a number of exceptions to this obligation, which relate to the best interests of the child who is the subject of the proceeding which, if met, gives the court discretion whether to order the child's return to his habitual residence. The law is that the objective of the Convention requires that these exceptions be interpreted narrowly, for if this were not so, the objectives for which the Convention was drafted would not be achieved, and its uniform interpretation in all the States Parties would be

prevented (*Gunzburg,* at page 295 of the judgment; *Gabai,* at page 256 of the judgment; *Dagan,* at page 268 of the judgment; *Biton;* Perez-Vera Report, at page 435). Therefore, only in exceptional and extreme cases will the best interests of the abducted child require that he remain in Israel, contrary to the rule underlying the Convention that is intended to prevent the wrongful abduction of children to a foreign country (*A v. B; Biton*). Also, the burden of proof that these exceptions are met rests on the shoulders of the abducting parent, who seeks to benefit from breaching the custody laws of the state in which the child resides (*Gabai,* at page 256 of the judgment; *Dagan,* at page 268 of the judgment; *A v. B*.)

19. On the background of this normative framework, the applicant's first argument is that the habitual residence of Minor 1 is in Israel, and therefore the Convention does not apply to her matter. But in this case, I did not find it proper to interfere with the determination of the District Court that the habitual residence of Minor 1 is in France. In *Gabai,* this court related to the matter of establishing the place of habitual residence of a minor for the purpose of determining the applicability of the Hague Convention:

> "Place of residence" is not a technical expression. It is not "domicile" or "residence." It expresses an ongoing reality of life. It reflects the place in which the child habitually lived prior to the abduction. The perspective is that of the child and the place in which he lives. The examination focuses on past daily life and not on plans for the future. When the parents live together, the child's habitual place of residence is generally the place of residence of his parents. (*Gabai,* at page 254 of the judgment)

Under this factual test, from the perspective of Minor 1, it appears that the lower courts were correct in holding that the habitual residence of Minor 1 is in France. Based on the applicant's testimony in the Family Court on 8 July 2008, it appears that Minor 1 developed a fixed daily routine in France, usually going to kindergarten and on Wednesdays taking part in soccer and karate classes. The mother further said that, for a number of months, the family rented their own apartment in Paris, such that Minor 1 lived in a fixed place. The District Court rightly noted that Minor 1's stay in France for one and a half years had great weight given that at the time of the move, he was a five-year-old child, tender in years. Moreover, even if determination of the place of residence of Minor 1 also results from the intention of his parents at the time of the move to France (on the various opinions on this matter, see *Dagan,* at pages 262-265 of the judgment), this intention leads to the same conclusion. In her affidavit the applicant claims that the move to France was intended to create a financial foundation to provide a basis for the family in Israel, and it was agreed that the trip would be limited to a fixed period of a number of months. To support her claim, she submitted a letter that was sent to the kibbutz, in which she

requested vacation for the fixed period of two years, but the kibbutz refused to accede to her request, and, despite this, the applicant decided to give up her membership in the kibbutz to go to France. Furthermore, from the start, she did not go to the human resources department at the kibbutz, as was customary when a kibbutz member takes vacation for a few months, as the kibbutz member Eyal Alkalai testified, but requested a two-year vacation from the kibbutz secretariat, a fact that contradicts her claim. Therefore, the determination that France is the habitual residence of Minor 1 is sustained.

20. Having reached this conclusion, I considered the alternative arguments made by the applicant that, in this case, the exceptions prescribed in the Hague Convention have been met, justifying that Minor 1 remain in Israel. As I mentioned above, the objective of the Convention requires that these exceptions be interpreted narrowly. The first two exceptions that the applicant argues, enshrined in article 13(a) of the Hague Convention, instruct that the court does not have to order the return of the child to his state of residence if the abducting parent has proven that:

> 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;

Relying on this article, the applicant claims that the respondent consented that she and Minor 1 return to live in Israel, and, in the alternative, that he acquiesced to their return afterwards. The distinction between consent and acquiescence is based on the time in which the relevant parent expressed his desire. While consent involves approving the removal of the child from his place of residence prior to the act itself, acquiescence deals with approving the same act after it has been done (*Gabai*, at page 257 of the judgment). Although we are involved with consent or acquiescence that is reached subjectively by the parent, it is possible to determine whether these exceptions are met by the parent's behavior, expressing waiver of urgent fulfillment of the parent's right of custody under the law of the child's place of residence (ibid., at pages 257-258 of the judgment).

21. In the matter before us, these two arguments must be rejected. Notwithstanding the applicant's arguments, the respondent's behavior does not indicate consent or acquiescence to the removal of his son from France. As for consent, the applicant did not succeed in proving that the respondent consented to the move of Minor 1 to Israel for the purpose of living there, and not solely for the purpose of a visit. The Family Court held that minimal weight is to be given to the testimonies of the applicant's relatives and friends on this issue, given that they are biased and

are based on hearsay. Also, the court found internal contradictions in the applicant's claims that the couple intended to live together and that in order to do so they jointly rented an apartment in Zichron Ya'akov, as the applicant repeatedly claimed that her life with the respondent was intolerable. I did not find it proper to interfere with these determinations, in that the Family Court stated that no objective evidence was submitted to support this version. Here I should observe that the sister's sending of photos of the said apartment to the couple's joint e-mail address does not show that the respondent consented to Minor 1's moving to Israel. Furthermore, the testimony and affidavit of the applicant and the testimony of her relatives and friends show that the respondent was consistent, throughout his stay in France, in his opposition to returning the family to Israel, and no explanation was given why he suddenly changed his mind and agreed to the return of the applicant and Minor 1 at the present time. The Family Court pointed out that the witness Aviva Magnus wrote, in section 6 of her affidavit, that the applicant told her that throughout the period of her stay in France, the respondent was interested that Minor 1 remain in the country. In her testimony given on 8 July 2008, the applicant herself testified that the respondent consistently maintained this desire, and this could be understood also from the testimony that her mother and sister gave on the same day. As a marginal note, I will add that, once the applicant's claim – that she intended to move to France for only a few months – was not accepted, there is no basis to the claim that she lived in France on the basis of a misrepresentation, and therefore there was no need for the respondent's consent to the move of Minor 1 to Israel. Therefore, the consent argument is rejected.

22. Regarding the claim that the respondent acquiesced after the fact with the abduction of the child to Israel, this claim is unsupported. The applicant stated in her affidavit that on 21 April 2008, about one month after she arrived in Israel, the respondent called her and threatened that he would come to Israel to take back Minor 1. According to her testimony in the Family Court, prior to this conversation the respondent threatened her in three similar telephone conversations. Indeed, on 24 April 2008, the respondent arrived in Israel, and on 12 May 2008, he filed the petition that is the subject of this proceeding. The respondent's behavior shows that he did not acquiesce at all in the abduction of his son, and that he is determined that his son return to his place of residence. Take note: the temporary agreement reached by the couple regarding the respondent's visitation with Minor 1 is of no consequence to the matter of acquiescence by the respondent to the existing situation. The arrangement, by its nature, is temporary, and it states explicitly that it will remain in force "until another judgment is given by the competent court" in

the matter of Minor 1. The fact that the two wisely arranged temporarily meetings of Minor 1 with his father, and that the respondent undertook not to remove Minor 1 from Israel prior to the matter being adjudicated by the court, does not in any way demonstrate waiver by the respondent of his right to demand the return of his son to his place of residence, to which the proceeding before us also testifies, and it would have been better had this argument not been raised (for further discussion on this issue, see *Gabai,* at pages 257-258 of the judgment). Therefore, the argument of acquiescence is also rejected.

23. Another exception claimed by the applicant relates to the harm that will be caused to Minor 1 if he is returned to France. Article 13(b) of the Hague Convention stipulates that the court is not bound to order the return of a child to his residence when it is proven that:

> "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

The applicant's claims concerning the respondent's treatment of her and Minor 1 are described at length in her affidavit and testimony, and she also expressed her claims to her family and to the welfare officer. However, I did not find that she met the burden of proof that Minor 1 will indeed be exposed to harm if he is returned to France. Her claims primarily revolve around the proper weight that should be given to the welfare officer's report of 10 July 2008, where Minor 1 indeed mentions to the welfare officer that he did not like the kindergarten in France and that he did not have friends there, and also that he was frightened when his father shouted. The report also states that Minor 1 enjoyed himself in Israel and did not like being in France. However, the report also indicates that Minor 1 enjoys being with his father and looks forward to his meetings with him, and finally, the report makes no recommendations whatsoever. In addition, in her testimony before the Family Court on 13 July 2008, the welfare officer stated that she does not have the tools to examine the mother's claims regarding symptoms of distress of Minor 1 while he was in France, such as bedwetting at night, since the two parents stated that they did not turn to others regarding the matter. Another report made by the same welfare officer, dated 29 December 2008, made in the framework of the petition for *habeas corpus* that the respondent filed (Fam. File 2192/08), explicitly states that Minor 1 feels good in his father's company. In addition to this, there is the opinion of the expert psychologist, which noted the positive interaction between the father and his son, and the desire of the latter that his father remain close to him, and concluded that living in France would not harm Minor 1. As the Family

Court stated, the applicant's serious allegations regarding the respondent's harsh behavior toward and abuse of her and Minor 1 are denied outright by him. Therefore, it cannot be said that it was proven that there exists a grave risk that return of minor 1 to France will cause him any harm whatsoever, so this argument as well is rejected.

24. On 2 September 1990, the Convention on the Rights of the Child entered into force, and it was ratified by Israel on 4 August 1991. The Convention on the Rights of the Child expresses movement from the perspective of paternalism, in which it is determined what is good for the child, that is, weighing the "best interests of the child" as evaluated by the court, to a perspective of the child as an object of independent rights and as a person with his own independent opinion regarding his life and fate. On this change in perception, in the context of custody petitions, Chief Justice Shamgar stated:

> The concept "rights of the child" teaches us that a child has rights. The concept "rights of the child" is within the scope of constitutional protection of the child. It is expressed in the recognition of his rights and in the fact that the inclusion of the rights guarantees protecting his best interests. As a standard for resolving custody disputes or disputes between parents and children, the perception that envelops the concept within it is this: the child is an autonomous creature having rights and interests that are independent of those of his parents. Indeed, the scope of the rights might be narrower than the rights of adults, but this fact does not undermine the assumption regarding rights of the child. Therefore, according to this approach, the perspective regarding rights of the child can serve as a proper standard for resolving custody disputes, in that it protects the child and his general good in a better way than the principle of best interests of the child. . . "Rights of the child" is not a substitute for the concept of "best interests of the child." To the contrary, it is a broader concept than the concept of "best interests of the child" and includes it within it. The advantage in turning to rights of the child is that the "best interests of the child" is an emotional-subjective concept that is based on the discretion and the factual assessment of the court in a specific case, whereas "rights of the child" is a constitutional-normative concept based on a recognized and existing system of rights, which is guided, of course, also by the aspiration to recognize the best interests of the child. (Civ. App. 2266/93, *A v, B,* P. D. 49 (1) 221, 253-254 (1995))

Based on this perception, the Convention on the Rights of the Child is founded on four primary principles: the principle of equality, the principle of best interests of the child, the principle of life, survival, and development, and the principle of participation of children in making decisions regarding their lives (hereafter: the principle of participation) (Report of the Committee Examining Fundamental Principles in the Sphere of the Child and the Law and Their Implementation in Legislation, headed by Judge S. Rotlevi (5764 – 2003), at page 41 (hereinafter: the Rotlevi Report); Sharon Detrick, *A Commentary on the United Nation Convention on the Rights of the Child,* page 92 (1999) (hereafter: Detrick); Committee on the Rights of the Child, *General*

Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44, paragraph 1(b), of the Convention, of 29 November 2005, CRC/C/58/Rev.1, pages 5-6).

25. Before relating to the applicant's claims under the Convention on the Rights of the Child, I shall briefly point out that international norms are part of Israeli law, and they can be used for support before this court insofar as they express international customary law, unless they contradict domestic Israeli legislation. Alternatively, when we are involved with international treaty-based law, the international norms are not part of the domestic law until they are adopted through a legislative process, such as in the case of the Hague Convention (HCJ 785/87, *Afo v. Commander of IDF Forces in the West Bank*, P. D. 42 (2) 4, 37-38 (1988)). However, there is a presumption that the domestic law corresponds with the international norms to which Israel is obligated, and therefore should be interpreted in accordance with these norms to the extent possible (HCJ 2599/00, *Yated – Parents Association for Children with Down's Syndrome*, P. D. 56 (5) 834, 846 (2002); Crim. App. 6639/06, *A v. State of Israel* (not reported, 11 June 2008)). In the case before us, it is not necessary to decide on the status in Israeli domestic law of the rights specified in the Convention on the Rights of the Child on which the applicant relies since I did not find that the return of Minor 1 to France under the Hague Convention Law contradicts these rights. This conclusion results from the nature of the procedure under the Hague Convention Law, which I shall describe below.

26. Regarding our case, the principle of best interests of the child (article 3 of the Convention on the Rights of Child) and the principle of participation (article 12) are relevant. The language of article 3(a) instructs as follows:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The applicant claims that returning Minor 1 to France is contrary to his best interests and therefore contravenes Israel's international obligations. Indeed, the language of article 3 of the Convention on the Rights of the Child requires the best interests of the child to be taken into account in every judicial proceeding involving him, also in expeditious proceedings of the kind under the Hague Convention Law, but it does not prescribe that this is the sole or primary consideration in the framework of the proceeding. On the other hand, in specific contexts, the drafters of the Convention on the Rights of the Child saw fit to explicitly stipulate that the best interests of the child will be the decisive or basic consideration (see, for example, article 18(1) and

article 20 of the Convention on the Rights of the Child) or even the only consideration (see article 9(1) of the Convention on the Rights of the Child; for more on this matter, see Rotlevi Report, pages 130-131; Detrick, at page 91). As is pointed out above, one of the objectives of the Hague Convention is to safeguard the best interests of the abducted child, it being inconceivable that in a proceeding in which the object is a minor, his best interests will not be taken into account (*Gabai,* at page 251 of the judgment). But, as we see, the Hague Convention has other important objectives – reciprocal respect for the laws of the States Parties and deterrence of parents from taking the law into their hands – as part of the general concept that the return of the child to his place of residence as promptly as possible serves his best interests, as Chief Justice Barak stated:

> A child is not an object, and he is not to be dragged from place to place to establish the location for a hearing on the rights relating to him. The child himself has rights, and his best interests requires that the decision regarding his rights be made in his place of habitual residence, and is not to be influenced by actions of abduction. (*Gabai,* at page 250 of the judgment)

The assumption forming the basis of the Hague Convention is that, due to the complexity of determining custody of minors, and the difficulty in weighing the best interests of the child in the country to which he was abducted, the proceeding must take place in his habitual residence, where the court can seriously weigh all the relevant considerations and dedicate the appropriate time toward this end (*Gunzburg,* at page 292 of the judgment); on the complexity and length of a proceeding to determine custody in the context of cross-border relations between spouses, see the comments of Justice A. Grunis in Civ. Reh. 9201/08, *A v. B* (not reported, 5 April 2009)). Therefore, the State Parties to the Hague Convention developed a procedural mechanism that is intended to enable the prompt return of the abducted child to his country of residence, so as to negate the possible implications that his wrongful removal from there will have on his rights and best interests (Perez-Vera Report, at page 431; Civ. App. 1372/95, *Stegman v. Burke,* P. D. 49 (2) 431, 437 (1995) (hereafter: *Stegman*); *Biton*). The effectiveness of the mechanism depends on the swiftness of the proceedings, and it is therefore prescribed that a proceeding under the Hague Convention Law is a kind of "first-aid" or "fire-extinguishing" proceeding, and the best interests of the child are considered only if it is found that the minor's return to his place of residence is contrary to his best interests (*Gabai,* at page 251 of the judgment). Conversely, the procedural nature of the Hague Convention does not enable a full and through consideration, at this stage, of the best interests of the child, and this issue is not before the court to decide at this stage; therefore, the Convention does not profess to establish the rights of custody of the child at all, with these rights

to be determined in his place of residence when he will be returned there (see article 19 of the Hague Convention; Misc. Appl. 1648/92, *Turneh v. Meshulam,* P. D. 46 (3) 38, 45-46 (992); *Stegman,* at pages 437-438 of the judgment; *Gabai,* at page 252 of the judgment).

27. The drafters of the Convention on the Rights of the Child, aware of the procedural nature of the Hague Convention, saw fit to draft an article that protects the right of the child not to be exposed to being wrongfully transferred from country to country (Detrick, at pages 207-210). This understanding gave birth to article 11 of the Convention on the Rights of the Child, which provides that:

> 1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
>
> 2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

We see, then, that the adoption of the Hague Convention in the domestic law fulfills and advances the rights of children that they will not be forcibly taken from country to country. The aforesaid procedural arrangement thus serves the best interests of the child as a rule. However, there is logic in the comments of the applicant that the specific case of Minor 1 might be different, and his best interests require that he remain in Israel at this time. It was precisely for these kinds of situations that the exceptions were prescribed to the rule requiring that the minor who is the subject of the proceeding be returned to his place of residence, but the applicant did not meet the burden of proof that this case comes within those exceptional cases. I have already stated that it was not proven that the return of Minor 1 to France would cause him physical or psychological harm with respect to the nature of his relations with his father. This determination holds true also regarding the claim of psychological harm that he would suffer following separation from his younger brother.

28. It should be noted that the respondent filed a *habeas corpus* petition regarding Minor 2, but the decision on that petition is not relevant to the matter before us because this proceeding relates only to Minor 1, and the sides do not disagree that the Hague Convention Law does not apply to Minor 2. Return of Minor 1 to France, in the event that the applicant decides not to join him together with Minor 2, will result in separation of the siblings and separation of Minor 1 and his mother, a very regrettable result. The French judgment filed in the framework of the application to add new evidence indicates that the Magistrate's Court in Paris separated the siblings also in matter of custody, a fact that, in the applicant's opinion, strengthens her argument that return of

Minor 1 to France would cause him psychological harm. In her claims before the District Court, the applicant also referred to a judgment that the Family Court in England gave under the Hague Convention (*B v. K* [1993] 1 F. C. R. 382 (Eng. F.D. 1981) (U.K)). This judgment involved a case in which the English mother wrongfully removed her three children from their residence in Germany to her homeland. The English court found that the two eldest children, who were nine years old and seven years old respectively, expressed their firm opinion that they did not want to return to Germany, and therefore the exception to their return prescribed in article 13(b) of the Hague Convention was met. As for the youngest of the three children, the court found that he had not reached the level of maturity that enables his opinion to be taken into account. However, the English court held that he would suffer psychological harm if he were returned to Germany without his two brothers, and therefore decided that the three children would remain together in England.

29. However, it appears that later English case law tends to order the return of the child to his place of residence also in situations in which the result is separation of two siblings, or separation of the abducted child from the abducting parent, until a final decision is reached with respect to the rights of custody of the children. In a case that was before the Family Court in England (*S v. B* [2005] 2 F. L. R. 78 (Eng. F. D.), the English mother returned on a visit to her homeland from New Zealand with the knowledge of her spouse, together with her infant daughter and a son from a previous relationship. After she refused to return to their place of residence in New Zealand, the father initiated proceedings under the Hague Convention regarding his infant daughter. The eldest son, who was 13 years old at the time of the proceedings, expressed his firm opinion that he did not want to return to New Zealand, and the mother argued that it was improper to order the return of the infant daughter – who was then 20 months old – to New Zealand, as that would result in the older child's separation from her and his sister, or would compel him to return to New Zealand against his will. In its ruling that is important to our matter, the English court emphasized that the mother was to blame for the impossible situation that was created, and the objective of the Hague Convention requires that a "sinner not benefit" and the child to whom the Hague Convention applies will be returned to his place of residence, in the matter of the infant daughter, except in exceptional cases. The court stated:

> The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which she herself created by her own conduct is born of the proposition that it would drive a coach and horses through the

> 1985 Act if that were not accepted as the broad and instinctive approach to a defence raised under Art 13(b) of the Convention. (See, also, paragraphs 49-50 of the judgment.)

A similar conclusion was reached by the court of Appeals in England in the case of *Re C. (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 F. L. R. 478 (Eng. C. A.). In the language of Judge Buttler-Sloss:

> The position of A is a relevant factor in the case to which the court has to have regard. But the mother had the opportunity to consider the implications of returning to England with both children. On the facts of this case I do not consider that the consequences of that return on A should deflect the court from concentrating upon the right of B to have his future decided in the State of his habitual residence.

30. Without expressing an opinion one way or the other on the value of these judgments, it appears to me that, in the case before us, the circumstances require that Minor 1 be returned to his place of residence, even if this results, temporarily, in the separation of the siblings or that Minor 1 will be separated from his mother. There cannot be a rule that because there is a fear that two siblings will be separated from each other, or a child from one of his parents, the court cannot exercise its jurisdiction to return the child to his place of residence under the Hague Convention, in that such a rule completely negates one of the objectives of the Convention, that the abducting parent will not profit from his acts. Indeed, I am ready to accept the argument that in unusual cases, this result will result in the court refraining from returning a minor to his place of residence. But the case before us, in any event, does not come within the borders of these exceptional cases. Even if the separation of the two siblings harms them, something that has not been proven, it does not seem that this harm is greater than the harm caused to Minor 1 as a result of his separation from his father and his surroundings in his place of residence. On this balance, it cannot be said that separation of Minor 1 from his mother, who acted wrongfully, is more serious than his present separation from his father. Taking this into account, and also taking into account the additional objectives of the Hague Convention, which I spoke about above, the balance of considerations underlying the Convention leads to the conclusion that Minor 1 must be returned to his place of residence, with or without his brother.

31. Regarding the French judgment that was submitted in the framework of the application to add new evidence, in which it was decided to separate the siblings in the framework of the custody proceedings, it neither adds nor detracts, since the Hague Convention is intended to restore the status quo that existed prior to the act of abduction, whether the court in the place of residence had already determined custody arrangements or will set them after the child is

returned (Perez-Vera Report, at page 430). The arrangement in the Hague Convention provides that the proper court for hearing the question of the best interests and rights of Minor 1 is the court in France. Determination of joint custody of the siblings so that they will not be separated should be seriously considered before the court hearing the question of the parents' custody of their children, and the applicant should raise her arguments on this matter before the relevant competent court in France. Even if the opinion of Dr. Colvo is true, and the applicant lacks a status in France – an additional result of the act of abduction that she committed – this, too, is an argument that she should raise before the court hearing the matter of custody of the siblings. As appears from the French judgment that was presented before us, the decision is temporary, and the applicant can, therefore, raise all her arguments in the framework of the proceedings before the French court, and one assumes that these things will be taken into account by the French court along with the other circumstances of the case. For this reason also, it is not proper to accept the application of the applicant to add the French judgment and the documents submitted with it as new evidence. Indeed, section 9 of the Family Court Law, 5755 – 1995, grants relatively broad discretion to the court to accept new evidence at the appellate stage, but this is when it is of the opinion that the admission is necessary for the investigation of the file, and in the case before us, the new evidence does not advance the arguments of the applicant, so there is no reason to accept it (see Perm. Dist. App. 1913/05, *A v. B* (not reported, 16 October 2005); Civ. App. 4151/99, *Brill v. Brill*, P. D. 58 (4) 709, 719 (2001)). To sum up this point, I did not find that return of Minor 1 to France cannot be reconciled with his right that his best interests be considered in every proceeding involving him.

32. The applicant's second argument under the Convention on the Rights of the Child is that the right of Minor 1 to have his opinion heard was breached. This right is prescribed in article 12 of the Convention on the Rights of the Child, as follows:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This article enshrines the principle of participation that is a central element of the Convention on the Rights of the Child and is intended to give the child the opportunity to

express himself and be heard, and also to encourage him to take part in all the proceedings and decisions relating to him, out of recognition that a child is a person with rights, and with his own independent personality (for more on this issue see the Rotlevi Report, at pages 207-213). The Hague Convention also gives expression to the desire of the minor who is the subject of the proceeding, stating in article 13(b) that,

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

The conditions for meeting the exception of the desire of the child under the Hague Convention were delineated at length some time ago by this court in *A v. B*. There are essentially three conditions: the child is of the age and level of maturity in which it is proper to take his views into account; the child formulated an independent desire not to return to the country of his residence; and the child has an extremely dominating and strong objection to returning. These conditions are an expression of the proper weight to be given to the views of a child in a proceeding under the Hague Convention, in light of the need for a narrow and uniform interpretation that is aimed at achieving the objectives of the Convention, among them the best interests of the child himself (*A v. B*).

33. In our case, the Family Court found that, in light of the comments of the welfare officer and of the expert psychologist regarding the maturity and wishes of Minor 1, it was not proper to take his views into consideration. It was emphasized in particular that the expert psychologist's opinion shows that the desire of Minor 1 to remain in Israel is not a real desire, and is related also to the level of maturity of Minor 1. I did not find fault in this conclusion of the Family Court for the following reasons. Regarding Minor 1's level of maturity, the welfare officer testified that Minor 1 is a clever child who expresses himself well for his age and is aware of his situation. The expert psychologist, too, was of the opinion that the child is bright, but, in accordance with his age, which is at the lower end of children whose views should be taken into account, he tends to exaggerate and speak in generalities, so there is a doubt in the mind of the expert psychologist regarding the genuineness of the comments of Minor 1. Regarding the dominance of Minor 1's desire, the Family Court stated that the opinion of the expert psychologist mentions that the opposition of Minor 1 to returning to France is light and not unequivocal, and it might be that it does not express a real desire at all. In addition, both the testimony of the welfare officer and the testimony of the expert psychologist indicate that Minor 1 might indeed prefer remaining in

Israel, but it is good for him with his father and he wants to spend time and live with him also. Unlike a custody proceeding, where the preference of the child has greater weight, in the proceeding before us, the preference of Minor 1 to remain in Israel is not by itself sufficient to prevent his return to his place of residence, but a strong and clear desire is needed (*A v. B*). In light of the weak desire of Minor 1 to remain in Israel, together with the doubt as to his level of maturity, I did not find that the applicant succeeded in proving that the child's desire exception was met.

34. Nor did I find reason to interfere in the Family Court's decision of 15 July 2008, in which it decided not to hear Minor 1 independently. Indeed, section 295I(h) of the Rules of Civil Procedure, 5744 – 1984 (hereafter: Rules of Civil Procedure) state that the court shall hear the comments of a child who has reached the age and level of maturity that justifies taking his views into account – which in the case of Minor 1 is in doubt – except for special reasons that shall be recorded. However, before the judge sitting in judgment meets with a child face to face, he must take into account additional considerations:

> In the case of the appearance of a minor in the court to hear his opinion and desire in a matter relating to him, it is necessary to consider the relationship between the benefit entailed in doing so to achieve a proper result in the judicial proceeding and the possible harm entailed in exposing the child to legal proceedings, especially when they deal with a dispute between his parents, in which he is required to take part. This balancing between the benefit and harm comes within the discretion given to the court, whether to permit the child to appear in a judicial proceeding to be heard. (*A v. B;* Civ. App. 6056/93, *Eden v. Eden*, P. D. 51 (4) 197, 202)

Since the Family Court had before it the opinions of two professionals, who met with Minor 1 and presented before the court an updated picture regarding his preferences and related to his level of maturity, and in light of the possible harm to Minor 1 entailed in giving testimony before the court in a controversy between his father and mother, who, based on the information before us and according to the testimony of the professionals, cast severe blame on each other, I did not find fault in the Family Court's decision not to hear Minor 1 himself, there appearing to have been minimal benefit in doing so, while the risk that it would harm him was real. Here, too, the decision is consistent with the obligations of Israel under the Convention on the Rights of the Child inasmuch as article 12(b) prescribes that a child can be heard also indirectly, by means of a professional, and in accordance with the rules of procedure in Israel.

35. The result, therefore, is that all of the applicant's arguments are rejected. Before concluding, I note that this case, like many cases heard under the Hague Convention, is difficult as the

framework of the hearing presents the court with difficult questions and the need to decide between two possibilities, each of them problematic. Cases such as the one before us illustrate that the law is limited in its abilities, and that the best interests of the two siblings in this case is principally in the hands of their parents, and in their ability to find an arrangement that will benefit their children to the extent possible when they divorce. But when the court comes to decide the question before us, it appears that the return of Minor 1 to France at this time is the lesser evil, based on the assumption that the court in France will consider the best interests of the child, in the full meaning of the term, and his various rights, when it gives its final decision on the question of custody between his two parents.

36. In conclusion, I suggest to my colleagues to deny the appeal. Minor 1 will be returned no later than 15 July 2009 to his habitual residence in France, in accordance with the terms specified in the judgment of the Family Court of 3 November 2008, and its supplemental decision of 9 December 2008.

Justice

Justice M. Na'or:

I concur in the judgment of my colleague Justice Joubran.

I believe that, from the start, it would have been better had the Family Court heard the child's position. According to the expert's opinion, the child would not have been harmed by a meeting with the judge in her chambers. However, he thought that the benefit from the meeting would be minimal, given the fact that the minor does not express clearly his positions on the relevant questions, in part because of his tender age. I believe that if there is no concern that the minor would be harmed, it is preferable for the court to hear the minor, if only so that he does not feel like an object as to whom decisions are made regarding him without hearing him. As Justice Arbel stated in Perm. Dist. App. 5579/07, *A v. B* (not yet reported, 7 August 2007):

> Indeed, just as I have already mentioned elsewhere, hearing the child has various advantages, among them that it gives the court an opportunity to gain an independent impression of the child, which will aid in making an intelligent decision and will transmit to the child a message that his position is important, that he is not only an object that moves between his parents, and that he is taking part in decisions relating to his life (Perm. Dist. App. 27/06, supra, paragraph 18). The more that the child expresses a desire to appear before the court, and the court concludes that his appearance before it will not harm his best interests, will not place him in a situation

in which he is liable to be torn between the conflicting desires of his parents, and will not cause undesirable emotional and psychological consequences (ibid.), favorable consideration should therefore be given, subject to the circumstances of the specific case and to the special needs of the particular child, to enable him to be heard. (And see further: Perm. Dist. App. 27/06, *A v. B*, paragraph 18 of the judgment (not yet reported, 1 May 2006); Perm. Dist. App. 1855/08, *A v. B*, comments of Justice Arbel at the beginning of her judgment (not yet reported, 8 April 2008); Perm. Dist. App. 672/06, *A v. B*, paragraph C(1) of the judgment of Justice Rubinstein (not yet reported, 15 October 2006); Perm. Dist. App. 902/07, *A v. B*, paragraph E of the judgment of Justice Rubinstein (not yet reported, 26 April 2007)).

Thus, from the beginning. However in retrospect, I do not think it proper to return the hearing to the Family Court to hear the child. It appears that, in light of the reasons cited by my colleague, that the benefit that would arise from doing so is small, if any at all, especially in the framework of a proceeding under the Hague Convention. On the other hand, doing so would result in a delay in a proceeding under the Hague Convention, which requires an expeditious proceeding so as to achieve the objective underlying the Convention.

Justice

Justice E. Rubinstein:

A. At the end of the day, I agree with the result that my colleague Justice Joubran reached in his comprehensive opinion.

B. Hague Convention files by their nature present human tragedies, war between parents, who are likely completely normative persons but want to live in different countries. The international arrangement, in the "global village" and in the easy mobility characterizing it, set forth in the Hague Convention is intended to ensure the "prompt return of children who have been wrongfully removed to another country" (Justice Procaccia in Perm. Dist. App. 672/06, *A v. B* (not yet reported), paragraph 8), and as she pointed out, as such, the best interests of the child is dispositive "only where its weight prevails over the central objective of the Convention." Every one of these files presents worlds of human beings, and most of all the world of the minor who is transferred from place to place. Applicant's counsel raises, in this context, all the possible arguments, but her opinion was not accepted.

C. Indeed, in the present case we are engaged in a file that is unusual to a certain extent, also for Hague Convention files, because of the legal difference between the couple's two sons – one of whom, the elder, comes within the Convention, and the other, the infant – does not. There is, then, an inherent difficulty in that the applicant must go to France, naturally, also with her younger son, with all that this entails. However, the legal structure of the arrangement underlying the Convention is that the question of custody is to be decided in the place from which the child was abducted. In the present case, it is appropriate that the entire picture be brought before the French court, including the foreignness of the mother in France, and the basic approach whereby it is natural that two brothers remain together, and that custody of very small children is generally given to the mother. However, at the end of the day, we must meet the obligation of the Hague Convention, and as my colleague described in detail, the exceptions to the Convention are not met.

D. My colleague Justice Na'or considered – and I agree with everything she said – the matter of the need as a rule to hear the minor. It seems to me that, where the court ponders whether to hear the opinion of a minor, that is, when the minor is of borderline age, in which the question is whether the conditions of section 295I(e) of the Rules of Civil Procedure regarding the age and level of maturity justifying that his views be taken into account are met, the tendency should be to hear him. In my opinion, it would also make it easier as a rule for the court to make its determination in the case after hearing the minor, and knowing and understanding that he is subject to influence. Let us recall, for example, that in the Child Adoption Law, 5741 – 1981, it is stated that, if "the adopted child is nine years old, or is not yet nine years old but is able to understand the matter, the court shall not give an adoption order unless it is convinced that the child being adopted wants the adopting person to adopt him. . ." In continuation of the comments of my colleague, see my comment in Perm. Dist. App. 672/06, *A v. B* (not reported); Perm. Dist. App. 5579/07, *A v. B* (not reported); Perm. Dist. App. 902/07, *A v. B* (not reported (Justice Arbel). My experience in the District Court and in this court has taught me that, in cases in which I heard minors, that fact greatly aided me in making my decision. I know that there are also opinions that raise a concern, as was also documented by my colleague; however, the matter depends on the circumstances, and, as stated, in my opinion the tendency should be to hear the minor. I should add that in cases in which the minor is heard, it is proper, in my opinion, that the court hear him as a rule without other persons in the room (of course, a legal assistant or law clerk can participate and keep a record), the parents not being present, and also determine in

advance who will bring the minor, based on his age and the circumstances. In the present case, the age is borderline – seven – and according to the reasoning of my colleague, not without uncertainty, I do not deem it proper to return the matter to the lower court, and my comments are made therefore with an eye to the future.

Justice

Therefore, it is decided as stated in the judgment of Justice S. Joubran.

Given today, 11 Sivan 5769 (3 June 2009).

Justice (signature)	Justice (signature)	Justice (signature)