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In the Supreme Court **Family Appeal Motion 1930/14**

Before: His Honor Justice Y. Danziger
His Honor Justice N. Hendel
His Honor Justice N. Solberg

The Applicant: Plonit

v e r s u s

The Respondent: Ploni

Request for leave to appeal against the judgment of the Jerusalem District Court in Family Appeal 39394-01-14 which was given by their honors Justices M. Drori, B. Z. Greenberger and R. Carmel

Attorneys for the Applicant: Advocate Eilat Margalit; Advocate Keren Asher
Attorneys for the Respondent: Advocate Edwin Friedman; Advocate Anat Kedmi

JUDGMENT

Justice N. Hendel:

1. We have before us a request for leave to appeal against the judgment of the Jerusalem District Court in Family Appeal 39394-01-14 (their honors Justices M. Drori, B.Z. Greenberger and r. Carmel), within the framework of which an appeal was upheld against a ruling made by the Jerusalem Family Court in Family Case 44422-12-13 (His Honor Justice S. Elbaz) and a decision was given under section 15 of the Hague Convention (Return of Abducted Children) Law, 5751-1991 (hereinafter: "the Convention Law") according to which the State of Israel is the habitual place of residence of the parties' minor daughter and that her removal by the Applicant to England was unlawful, as defined in paragraph 3 of the Schedule to the Convention Law.

I should start off by mentioning that at the time of writing these lines, in the main proceeding which is being conducted in England, a judgment has been given in favor of the Applicant in which it was held that she did not abduct the child who does not have to be returned to Israel. The English court expressed reservations regarding the District Court's ruling. The Respondent intends to file an appeal against this judgment and it is because the Applicant is concerned that the appeal court in England may view the ruling of the District Court in Israel differently and give it greater weight, that the current motion has been filed.

Given this state of affairs, to my mind it is of no real importance whether this court expresses its opinion regarding the main issue over which the lower courts were divided, namely determining the child's habitual place of residence. The English court in its judgment disregarded the determination of the District Court, which it decided, in the circumstances, was limited to the context of Article 15 of the Convention on the Civil Aspects of International Child Abduction - 1980 (hereinafter: the Convention). To this extent the English court's ruling was consistent with that of the District Court which had itself expressed reservations regarding the binding force of its judgment. In its words, its determination which it defined as "a legal opinion" did not rest on "[…] an in depth inquiry conducted with a view to making a binding decision on the question of the minor's habitual place of residence, which is the issue that the court adjudicating the principal suit for the return of an abducted child shall have to address" (p.16 of the judgment).

At first glance, the said conclusion, that it is not necessary for this court to address the question of whether the child was abducted or not, would appear likely to mean that the motion should be denied, since leave to appeal will not be granted if a resolution of the disputed issue is not going to influence the outcome of the case, even if an important and far reaching point of law is involved (Civil Leave to Appeal 9636/08 Rosh Ha'ayin Religious Council v. Shamaria (27.4.2009)). This proposition is equally pertinent in its wider context, in other words the impact of allowing or denying the motion on the principal action being litigated in England must be examined.

However, the diminutive weight which in any event the English Court attributed to the District Court's ruling is actually indicative of the incidental and in my opinion erroneous legal approach adopted by the lower courts towards the Respondent's request for a ruling to be made under section 15 of the Convention Law. In the light of this and the absence until now of a real discussion of this section by the Supreme Court, I have seen fit to address the matter presented to us and to clarify the general issue arising from it. The broader legal importance of the motion is not in the result, but, as shall be explained hereinafter - in the method. This being so, having regard to the unique status of the Convention which focuses on child abduction, and due to the sensitivity of collaboration between the Convention's member States and the correct division of the work between them, the granting of leave to appeal is justified. In other words, even if the parties' own case does not warrant our interference, and indeed I shall not be addressing the substance of the dispute which has arisen between them, a clarification regarding the context and purpose of Article 15 of the Convention will be of general benefit.

Background

2. The Applicant and the Respondent were married in Russia in 2001. They moved to England in 2004 and they had a daughter together who was born in 2006. The couple divorced in 2009. In April 2010 the court in England, with the parents' consent, issued an order regarding custody and visitation rights between the two of them., which provided, *inter alia*, that the child's habitual place of residence was in England and Wales and that the written consent of both parents would be needed in order to remove her from there. It was further held that the child's British, Israeli and Russian passports were to be deposited with the Applicant's lawyer.

   The decision to move to Israel was made in May-July 2013. The parties disagree regarding the nature of their agreement to the move and its purpose. According to the Respondent, the intention had been, with the Applicant's full verbal, if not written, consent, to permanently relocate to Israel, while the Applicant maintains that she only acceded to the Respondent's request because of the economic pressure which he had put her under and that the object of the exercise as far as

she was concerned had been to obtain an Israeli passport, a process which required her to reside in Israel for a year, and that she had not intended to stay in Israel beyond that period. At the start of July 2013 the Respondent went to live in Jerusalem with his new wife. Shortly afterwards, the Applicant and the child moved to a rented apartment located in the center of Israel and the child began attending a local orthodox Jewish school. Between 8-18.12.2013 the child stayed with the Respondent while the Applicant was in England from where she returned on 16.12.2013. On 18.12.2013 the Applicant flew back to England with the child, without the Respondent's knowledge and without intending to return to Israel. As a result of this, on 20.12.2013 the Respondent filed a claim in the Court in London for the child to be returned to Israel under the Convention.

In conjunction with the proceedings which he initiated in England, the Respondent filed a motion in the Jerusalem Family Court under section 15 of the Convention Law, in which he petitioned for a declaration that the child's removal from Israel by the Applicant had been unlawful. After hearing a large body of evidence, the Family Court held that the child's habitual place of residence prior to her removal from Israel had remained in England. In the wake of this determination, it was held that the Israeli court had no authority to make a ruling under section 15 of the Convention Law, since according to the wording of that section it could only be made by the authorities of the State in which the child's habitual place of residence was located. The Family Court also pointed out that even if Israel was the child's habitual place of residence, the order which had been made in England in 2010, according to which England was the child's habitual place of residence, was still in force. Therefore, it was up to the court in England to adjudicate the issue and not the court in Israel.

The Respondent's appeal to the District Court was upheld. After examining the purpose of section 15 of the Convention Law, the appeal court came to the conclusion that since the application in question was urgent and had been made ex parte without the child being present, the court in the State from which the opinion was required, Israel, did not have to conduct a full, preliminary proceeding in order to determine the child's habitual place of residence, which is an issue that would be clarified in depth by the court charged with adjudicating the main action.

In the light of this conclusion, the District Court held that for the purposes of section 15 of the Convention Law, Israel was the child's habitual place of residence and since the English Court's order given in 2010 was open to flexible interpretation so that verbal consent was sufficient to take the child from England and having regard to the undermining of the Respondent's parental rights under Israeli law, the child's removal from Israel had been unlawful.

With regard to the main proceedings which are currently being conducted in England, the competent court there held, as aforesaid, that since the child's habitual place of residence when she was removed from Israel was still in England and Wales and the period of time which she had spent in Israel did not change this, the child was lawfully residing in England and therefore Respondent's petition for her to be returned to Israel should be denied. The English court also decided that the ruling made by the District Court in Israel regarding the child's habitual place of residence merely constituted an initial, non-binding opinion for the purposes of Article 15 of the Convention, whereas the English court was the tribunal which had the jurisdiction to determine the issue.

As already mentioned, because of the Applicant's concern that the District Court's judgment could tilt the outcome of the appeal proceedings in England in the Respondent's favor, she has petitioned for the granting of leave to appeal. Without expressing any opinion as to the chances of the appeal in England, the Applicant's concern does not justify an examination of the substance of the concrete issue which engendered the dispute addressed by the two lower courts. Nevertheless, the background to the case as presented is sufficient to raise the general question: how should the courts in Israel deal with a motion filed under section 15 of the Convention Law? As shall be explained, in the present case I believe that the Respondent's motion under this section should have been denied without adjudicating its substance. In order to explain why, the correct place, object and purpose of section 15 of the Convention Law ought to be examined.

The normative framework - the Convention Law and section 15

3. The Convention, which has so far been adopted by 66 States, is designed to contend with the growing phenomenon of international abduction of children by one of their parents (Rona Schuz, The Hague Child Abduction Convention, A Critical Analysis 1 (2013). It was signed in 1980, came into force in 1983 and was adopted in Israel in 1991 with the enactment of the Convention Law. Its objects of the Convention are set out in Article 1 and are firstly to secure the immediate return of minors who are unlawfully removed from or not returned to their countries of residence, and secondly to ensure that the custody and visitation rights decided upon in Contracting States are mutually and effectively respected. Thus, with the limited number of exceptions specified therein (see for example Article 13), the fundamental principle embodied in the Convention that the situation should be returned to how it was before the child was abducted, if such an incident took place, by the Contracting countries cooperating in order to promptly return the child to his habitual place of residence thereby preventing additional harm being done to him. While parental rights, such as custody, are not determined within the framework of proceedings taken under the Convention but only the country which shall be responsible for adjudicating them, the expedited proceedings conducted under the Convention fulfill two very important functions: firstly, from the point of view of the particular minor, they minimize the pivotal impact on his life and the harm which would be caused to him by protracted litigation, and secondly they serve as a general instrument of deterrence which is wielded immediately against the phenomenon of an abduction by a parent, denying him the possibility, due to procedural delays, of "the sinner being rewarded".

   Section 15 of the Convention Law, upon which the current motion is predicated and which constitutes an expression of the aforementioned cooperation, States as follows:

   > **"The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State in which the child is habitually resident a decision or other**

determination that the removal or retention was unlawful within the meaning of Article 3 of the Convention, when such a decision or determination may be obtained in that State. The principal authorities of the Contracting States shall in so far as practicable assist applicants to obtain such a decision or determination" (The emboldening does not appear in the original)

In other words, the competent authorities in the State in which the main proceedings are being conducted may request a decision from the State in which the minor habitually resides and be assisted by it, in order to clarify whether the minor was removed from that State unlawfully under Article 3 of the Convention. Thus Article 3 takes center stage and constitutes an integral part of Article 15, since it defines when a child has been unlawfully removed from the place in which it was determined that he should reside. Due to its importance, it is appropriate to quote the Article:

"The removal or retention of a child shall be deemed unlawful where -
(a) it violates the joint or several custody rights of a person, institution or any other entity, under the law of the State in which the child was habitually resident immediately prior to the removal or retention; and
(b) at the time of the removal or retention those rights were actually being jointly or separately exercised or would have been had the child not been removed or retained.
The custody rights mentioned in subparagraph (a) above, may arise in particular by operation of law or as a result of a judicial or administrative decision, or an agreement which is legally valid under the law of that State."

In other words, in order to determine whether a child has been unlawfully removed, the court must determine whether there has been a violation of custody rights, which may have been granted by law, a judicial ruling or under the terms of an agreement which is legally valid under the law of the country in which the child had been habitually resident. Making this determination may be a simple matter or a complex one. The complexity may be factual, being a product of the parents' conduct, or legal, involving a definition of the custody rights. And so the practice has been created, as entrenched in section 15 of the Convention Law, whereby the Contracting State in which the proceedings under the Convention are being conducted, requests assistance from the authorities in the State in which the place where child habitually resides is located, in order to clarify the relevant local

law so as to make a determination in the main proceeding. It is often more practical for the court before which proceedings are being conducted under the Convention to receive information from the authorities in the State in which the child habitually resides regarding the law applying in that State, than to be assisted by experts or to start delving into the relevant foreign law. Under Article 15 of the Convention, the authorities of the State in which the child's habitual residence is located serve as a court, assisting and guiding the court before which the main action is being litigated. The source of the assisting court's authority derives from the main proceeding which is being conducted in the State classified as the appropriate forum under the Convention. The ability to assist is derived from its expertise in the local law in so far as recourse to that law is relevant and necessary in order to determine the outcome of the main action. While there is no obligation to request such a ruling, the possibility exists that in so far as any difficulty shall arise in adjudicating the case, the State in which the place where the minor habitually resides has the legal ability to help resolve it (see for example: A.E. Anton, The Hague Convention on International Child Abduction, 30 INT. & COMP. L.Q. 537,553 (1981).

Article 15 corresponds well with the Convention's aim of promptly and effectively resolving these disputes by enabling assistance to be obtained from the State which has the greatest expertise in the relevant law in order to determine the question of whether the removal of the child from his habitual place of residence was unlawful. A good example of this is the ruling of my colleague His Honor Justice Y. Danziger in SFamily appeal motion 9441/12 Ploni v. Plonit (17.2.2013), a case in which the Israeli court needed to know the Dutch law regarding the distinction between custody and visitation rights in order to decide within the framework of the main action whether a minor had been unlawfully removed. The District Court decided to turn to the Dutch authorities in the matter, pursuant to Article 15 of the Convention, in order to obtain from them answers to a number of specific questions which needed clarifying concerning the application of the Convention in the particular circumstances of the case under Dutch law. In an opinion given by the Central Authority in Holland and which the District Court adopted it was explained that under Dutch law the removal had been lawful. Justice Danziger denied the motion for leave to appeal, and added that where a

disagreement exists regarding the proper legal interpretation of the law applying in the State in which the place where the child habitually resides is located, obtaining assistance in the form of an opinion given under section 15 of the Hague Convention Law is justified.

4. In contrast to the aforementioned example, in the present case it was not the English court adjudicating the main action which asked for a ruling from the Family Court under section 15 of the Convention Law, but the Respondent. At first glance it would appear that, according to the wording of the section, only authorities, not individuals, may ask for such a ruling. However, there are those who read this section in conjunction with Article 29 of the Convention, which states that:

> **"This Convention shall not preclude any person, institution or body who claims that there has been a violation of custody or visitation rights within the meaning of Articles 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether under the provisions of this Convention or in another way."**

Thus the commentators argue that litigants may also ask for a ruling under Article 15 of the Convention, an entitlement which was expressly anchored in Israeli law by a 2008 amendment to section 295V of the Civil Procedure Rules, 5744-1984:

> **"A motion for a ruling regarding unlawful removal or retention under section 15 of the Schedule to the Law, shall be filed by the person who contends that a child had been unlawfully removed from or not returned to him, regardless of whether there had been a request from the Central Authority of the foreign State to which the child was removed or not".**

Thus from a formal point of view, any person may apparently petition for proceedings under the Convention, file a motion under section 15 of the Convention Law, and request that a second State give its opinion regarding the issue of whether an abduction took place or not. It may even be argued that once a motion has been filed under Article 15 of the Convention an obligation exists to adjudicate that motion it on its merits. Be that as it may, from a practical point of view, the determination of the

State in which the main action is being conducted will be preferred. However, for a number of reasons, which I shall now enumerate and which are rooted in policy considerations, practical considerations and the purpose of the Convention, it may be concluded that not every motion filed by the litigants under section 15 of the Convention Law should be adjudicated on its substance. This is not a matter of authority but the proper exercise of judicial discretion in relation to the provisions and purpose of the Convention.

Firstly, there is a danger of the floodgates opening and motions for a ruling under section 15 of the Convention Law being filed frequently and automatically. And the concern here is not simply that the Family and Appeal Courts will be needlessly inundated with such motions per se, but that a real danger exists that they will not only fail to serve the objects of the Convention, but will actually undermine them and bring about an unnecessary complication that damages the main action as a result of the interference of another State in the issue, and all while the proceedings in question are of a most urgent kind and are designed to either return abducted children to their homes as quickly as possible or determine that no abduction took place.

Secondly, where no justification exists for such a ruling being made by another State, the concern arises that a perception will be created of inappropriate interference which undermines the sovereignty of the State in which the main proceeding is being conducted and its judicial tribunals, which are entrusted with resolving the dispute in accordance with the Convention, which has been adopted by both States.

Thirdly, the very fact that parallel proceedings are being conducted in two courts charged with adjudicating the same issue, including the appeal courts in each State, contradicts the purpose of the Convention. The State in which the principal action is being adjudicated, rather than another State, is supposed to address the subject of the child's habitual place of residence. The other State is obliged to accept the ruling of the first court in all matters concerning the forum which shall adjudicate the custody rights, etc. Double hearings harm the distribution of decision-making as delineated in the Convention.

Fourthly, the structure and language of Article 15 of the Convention show that the object of the request is to obtain from the authorities of the State in which the child's habitual place of residence is located a determination under paragraph 3 of the Schedule to the Convention. The object is not that two States shall focus on the question of the child's habitual place of residence. The mechanism contained in Article 15 of the Convention is intended for those cases where the State in which the Hague Convention proceeding is being conducted wishes to receive assistance from the other State by explaining its stance according to its own domestic laws regarding the legality of the removal or retention of the child under paragraph 3 of the Schedule to the Convention. Its purpose clearly cannot be to receive an additional opinion on a question which the second State is no better qualified to determine than the one seeking the assistance pertaining to the child's habitual place of residence. There would be no benefit in such a double enquiry. This interpretation regarding the purpose of Article 15 is also shared by the learned commentator Rona Schuz:

"Sometimes the court of … [one] State also expresses its view as to whether the child was habitually resident there immediately before the removal or retention. However, there is little point in this since habitual residence has to be determined by the court of the … [other] State in accordance with its own approach to habitual residence" (Schuz, pp.156).

A further and important support for my approach in this matter is to be found in paragraph 120 of the Perez-Vera Report, which constitutes an official commentary on the Convention:

> " This article answers to the difficulties which the competent authorities of the requested State might experience in reaching a decision on an application for the return of a child through being uncertain of how the law of the child's habitual residence will apply in a particular case. Where this is so, the authorities concerned can request "that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination". […] the contents of the decision or certificate must have a bearing upon the wrongful nature , in the Convention sense, of the removal or retention. This means, in our opinion, that one or the other will have to contain a decision on the two elements in article 3, and thus establish that the removal was in breach of custody rights which, prima facie, were being exercised legitimately and in actual fact, in terms of the law of the child's habitual residence" (Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention 463 (HCCH Publication, 1980)).

In a further remark Prof. Perez-Vera emphasizes that the Article is intended to answer the difficulties which the Contracting State is likely to experience due to the absence of certainty regarding the question of how it should implement the law of the State in which the child's habitual place of residence is located in the circumstances of the case. The method proposed in Article 15 of the Convention is to ask the State where the child has his habitual residence. The State receiving the request is supposed to adopt a stance regarding the conditions of paragraph 3 of the Schedule to the Convention in order to determine whether the removal violated the custody rights - rights which correspond with its domestic law.

In reliance upon these reasons, my position is that even though Israeli law enables an individual to submit a motion under section 15 of the Convention Law to the courts in Israel, the court must exercise its discretion and decide whether the motion which was filed is consistent with the purpose of the Convention. In other words, does it assist and advance the main proceeding by clarifying the Israeli law which the foreign court has to consider, or maybe it only constitutes a tool in the hands of a parent who is seeking to conduct two proceedings at the same time regarding the issue of the child's habitual place of residence, in which case the motion will just needlessly complicate the main action in a way that undermines the objectives of the Convention in general and of Article 15 in particular. The mere fact that the opportunity of filing the motion exists does not make the motion itself appropriate in every situation. Blanket adjudication of the substance of each motion, while forcing the court to determine the child's habitual place of residence and whether the relevant laws on the issue have been satisfied is inconsistent with the objects of the Convention and the case law in other countries such as England and the United States.

Comparative Law

5. Questions regarding the requirement for a ruling under Article 15 of the Convention and how to contend with the issues of its context and operation have also arisen in other States that have adopted the Convention. English law, like Israeli law, expressly provides that a litigant may file a motion under Article 15 of the Convention (Child Abduction and Custody Act 1985, c.5.03 s 8 (Eng)). However, the Court of Appeal in England has limited the possibility of doing so by holding that emphasis should be put not on the identity of the Applicant but the purpose of and need for the motion:

> **"The existence of the statutory jurisdiction depends in my view on the purpose for which the declaration is sought and not on the source of the initiating request. If it is sought for a proper purpose it can be granted under s.8; if it is not sought for a proper purpose it should not be granted at all" (Re P [1995] 1 FLR 831 (Eng. C.A.)**

In other words, if the motion under Article 15 of the Convention was not filed for a proper purpose then no decision or declaration shall be given by the court regarding its substance. In the aforementioned case, the English Court of Appeal ruled that the motion had been filed for a proper purpose in the light of the request from the court in the United States for an order from an English court, its exceptional factual complexity and the intricate judicial proceeding which was being conducted between the spouses in England. In another case the Family Court in England acceded to the father's request and gave a decision under Article 15 of the Convention at the same time as the principal action was being litigated in Germany, after the mother contended that he had no custody rights in England from where she had removed their children, despite a judicial order prohibiting her from doing so. The mother's contention was rejected by the court in England as being at variance with local law (Re L [2001] 2 FCR (Fam) 1). In a similar case, a Family Court in England likewise agreed to rule on an Article 15 motion where children had been removed from England in violation of an English judicial order, which apparently had not yet been served on the abducting parent thus bringing into question its validity, on the grounds that an erroneous assessment of custody rights under local law had been presented to the French court in which the main proceeding was being conducted and it was

therefore obliged to clarify the English law regarding the issue (A v. B [2008] EWHC 2524 (Fam)).

Two additional points arise from the judgments referred to and which in the light of the reasons which I have explained above I agree with. Firstly, the question is not whether at the request of a litigant the court has the authority to make a ruling or declaration under Article 15 of the Convention, but the legal issue arising vis-à-vis the proper use of judicial discretion and secondly, the court in the State to which the request was made may have to incidentally address the issue of the child's habitual place of residence, provided that the answer is clear, constitutes a presumption only, no factual clarification or determination of the substantive case was made and according to the internal law the matter appears to be essential to the question of custody rights under Article 3 of the Convention.

The courts in the United States have also addressed on more than one occasion the connection between Article 15 of the Convention and the purpose of the Convention to act promptly and effectively. Thus for example, the Court of Appeals in Washington took into account the fact that its request for a decision under Article 15 of the Convention could delay the proceedings, since the authority which was competent to make such a decision in Mexico was the judicial authority, before which proceedings progressed slowly (Perez v. Garcia, 148 Wn. App. 131, 136-137 (2009). It was emphasized there that in most cases the courts do not require such a decision (ibid; and see also: Viragh v. Foldes, 415 Mass.96 (1993)). These are the practical aspects of the matter, which are in keeping with the appropriate state of affairs in Israel.

The approaches presented above, in the case law and in the legal literature, are to my mind the correct ones. They make sure that Article 15 of the Convention is used in a manner which is consistent with its goals and promotes its object of promptly and effectively determining the issue of whether the child was unlawfully removed, while encouraging cooperation between the Contracting States and harnessing them to the task in accordance with the distribution of functions delineated by the Convention.

From the general to the specific

6. In the present case both the Family Court and the District Court adjudicated the substance of the Respondent's motion and reached as aforesaid, contradictory conclusions. A detailed assessment of the determinations made by the two lower courts will strengthen the proposition that it would have been better if the substance of the matter had not been adjudicated at all.

   The Family Court held that there was no need to give a decision under section 15 of the Convention Law. However, it also ruled, and this is the main point, after holding a full hearing and presentation of evidence, that the State of Israel was not the child's habitual place of residence. This clarification required resources and valuable time. The purpose of section 15 of the Convention Law is not that the court should delve into the question of the child's habitual place of residence. This is the responsibility of the court which is adjudicating the principal action in England. Where it is clear that the English court will discharge that responsibility, which as aforesaid is the purpose of the Convention, there is no need for this comprehensive enquiry to be undertaken in Israel. Moreover, the Family Court had not been required to address the local Israeli law regarding the issue of whether there had been a violation of the custody right. This being so, and as shown by the judgments, the actual purpose of the motion was to fix that Israel is the child's habitual place of residence. The conclusion is that it would have been better to deny the motion, while still in the preliminary stage, without holding a full hearing on the habitual place of residence issue.

   The District Court recognized that its ability to undertake the comprehensive factual inquiry required in order to determine the child's habitual place of residence was impaired by the nature of the proceeding, the knowledge that its determination might in any event be rejected by the other State and the diverse approaches to interpreting the term "the child's habitual place of residence". It justifiably cited this court's ruling in Family Appeal Motion 7784/12 Plonit v. Ploni (28.7.2013), in which it was held that determining the child's habitual place of residence required an extensive inquiry. The District Court therefore drew a distinction between the high standard required in order to reach a decision concerning the habitual place of residence in the principal action under the

Convention, and the low standard for its part required under section 15 of the Convention Law. The question which arises regarding this approach, is what benefit is to be gained from such a determination? From the English court's point of view the result is neither decisive nor helpful. It would be therefore have been better if the District Court had held that it was inappropriate for the Family Court to have made a ruling regarding the child's habitual place of residence, and that in the concrete circumstances there had been no need to address or clarify the local law. The proof of the pudding is in the eating. The ruling made regarding the child's habitual place of residence is not binding on the English court, even though it came from the District Court. Given the circumstances, there is no justifiable reason for the Israeli court to address this issue, which must be resolved exclusively by its English counterpart.

It's interesting to note the substantial differences between the approaches of the lower courts. While the Family Court upheld the high standard required in the main proceeding to determine the child's habitual place of residence, even in the context of section 15 of the Convention Law, the District Court lowered that standard for the purposes of making the section 15 determination. Even though lower courts took opposite approaches, both of their rulings raise difficulties. On the one hand, it would be better not to undertake a comprehensive and intensive enquiry within the framework of a motion filed under section 15 of the Convention Law as the Family Court demanded, since *inter alia* the minor is not present at the hearing, the hearing is urgent and may be held *ex parte* and in any event the matter will be reviewed by the court empowered to adjudicate the principal action in accordance with the Convention. On the other hand, lowering the requisite standard in accordance with the District Court's approach would be likely, as may clearly be seen from the present case, to result in an incomplete decision the significance and contribution of which to the main proceeding is questionable. (including the findings in paragraphs 30-31).

Furthermore, within the framework of the substantive enquiry undertaken by the lower courts, in order to determine the question of the parents' rights in this specific case, they were compelled to address the legal significance of the order which was given by the English court, and in particular the requirement for

written consent in order to remove the child from England and Wales. They also considered the issue of whether the circumstances justified setting aside the requirement for written agreement between the parties. As we see then, the roles were actually reversed. Instead of clarifying the Israeli law pertaining to section 15, the Israeli courts adjudicated an issue which should clearly have been dealt with by the English court in which the main proceeding was being conducting in any event. As both the lower courts pointed out, the English court would necessarily have to address the issue of the validity and significance of the order in question and its legal determination of the matter would be overriding. This is in contrast, for example, to the contribution of the Dutch opinion given pursuant Article 15 of the Convention in Family Appeal Motion 9441/12. And it should be noted, that the difference between the aforementioned case and the one before us lies not in the identity of the Applicant - the other State as opposed to a party to the proceedings - but in the purpose of the motion, which is the overriding consideration.

Moreover, the fact that the two courts reached contradictory conclusions based on different tests while having to consider the English law, may have led the English court, and in my opinion quite rightly, to disagree with the District Court's ruling. This possibility strengthens my stance that the mere fact that a parallel proceeding was being conducted in Israel did not expedite the main proceeding in England, and may even have delayed it. The Respondent submitted the ruling of the District Court to the English court as evidence and may even have asked to postpone the appeal proceedings in England pending this court's decision. In any event, such a scenario is a definite possibility and is indicative of another aspect of the lack of effectiveness engendered by conducting the parallel proceeding. The want of any benefit in the current proceeding which finds explicit expression in the English court's rejection of the ruling made in Israel and in the criticism leveled at the volume of evidence submitted to it by the parties to the dispute, illustrates the importance of exercising judicial discretion when examining motions such as these. The court may and where appropriate is even obliged to rule that there is no justification for addressing the substance of a motion filed under section 15 of the Convention Law. Just as it is the role of the Family Court and Appeal Courts to

adjudicate the substance of the motion in appropriate cases, so they are obliged to exercise discretion and refrain from doing so in inappropriate ones.

Moreover, the case before us in which a foreign court conducting the main proceeding under the Convention ruled against a decision given by the courts in Israel pursuant to Article 15 of the Convention, is not unique. In another case, a court in the United States before which the principal action was being tried, held that the children's habitual place of residence was in the United States and therefore no abduction had taken place under the Convention. This finding contradicted the ruling of the Kfar Saba Family Court given pursuant to section 15 of the Convention Law, which in a similar way focused more on determining the habitual place of residence of the children that the parental rights of the parties (c.f. between the judgment of the court in Michigan, United States: Tsimhoni v. Eibschitz-Tsimhoni, US District Court for Eastern District of Michigan, unreported 26th March 2010, and the ruling given by the Kfar Saba Family Court in Family Case 29189-12-09 Z.L. v. Z.M. (23.12.2009)). In my opinion, these additional examples strengthen my conviction that the Israeli courts must exercise discretion and consider the purpose of the motions submitted to them under section 15 of the Convention Law before they adjudicate the substance of such motions.

Therefore, even though formally speaking the Respondent could have petitioned the Israeli Family Court for a ruling, this is not an appropriate case for adjudicating such a request. The in-depth examination of the substance of the motion by the Israeli courts led to the obfuscation of the proceedings. The concern that a motion is superfluous and inconsistent with the purpose of the Convention arises mainly in motions filed by the litigants and not those filed by the authorities. Having said that there may certainly be cases in which a litigant does file a suitable motion, the substance of which should be examined and, where appropriate, adjudicated on its merits.

7. Finally, it is to be hoped that this clarification regarding section 15 of the Convention Law and its function within the broader context of the Convention will be of assistance in future cases. In the light of the major public importance of

these clarifications, I would recommend to my colleagues that they adjudicate the motion as if leave had been granted and an appeal had been filed pursuant thereto, to uphold the appeal and to quash the rulings of both the District Court and the Family Court. I would emphasize that the appeal is not being upheld for the reasons pleaded by the Applicant or due to a rejection of those pleaded by the Respondent. I would recommend to my colleagues not to make a ruling on the disagreement between the Family Court and the District Court regarding the child's habitual place of residence, including the giving of an interpretation to the English order. The appeal is being upheld therefore, on the grounds that the proceeding which was conducted in the matter and the rulings of the lower courts were fundamentally unnecessary. The lower court ought to have held that for the reasons given the Respondent's motion would not be adjudicated and was being struck out. The error which occurred here is not actually in the ruling but in the intention to adjudicate the substance of a motion which was filed by one a party to the proceedings in question. Therefore, the lower courts' rulings should be annulled, leaving the dispute between the parties before us to be adjudicated exclusively by the English court.

In my opinion, the appeal should be upheld as aforesaid. In the light of the reasons for my decision, no costs order shall be made.

Justice N. Solberg:

I agree.

Justice Y. Danziger:

I agree with the thorough judgment delivered by my colleague Justice N. Hendel. Apart from the learned legal analysis upon which my colleague's judgment is based, his words are consistent with the voice of logic and common sense. The proceedings which were conducted in the Israeli courts in this case prove that a liberal interpretation of section 15 of the Hague Convention (Return of Abducted Children)

Law, 5751-1991 (hereinafter: the Convention Law) leads to the undesirable result of conducting duplicate and superfluous proceedings, contrary to the purpose of the Convention. I see no need to reiterate the things which my colleague has written, and of course I share his opinion.

However, I feel it right to comment on one point. Towards the end of his judgment (in the margins of paragraph 6) my colleague Justice Hendel states that "The concern that a motion is superfluous and inconsistent with the purpose of the Convention arises mainly in motions filed by the litigants and not those filed by the authorities. Having said that there may certainly be cases in which a litigant does file a suitable motion, the substance of which should be examined and, where appropriate, adjudicated on its merits". I agree with every word of this determination and even wish to take a small stride beyond it: In my opinion the Family Courts must scrutinize very carefully motions filed under section 15 of the Convention Law by parents alleging unlawful removal or retention without a request from the Central Authority in the foreign State to which the child was removed. I would remark on this point that in my view the language of section 15 of the Convention Law does not allow the filing of such a motion at all, and I find the reasoning applied by the Family Courts (in the judgments cited in the judgments of the lower courts in this case) whereby section 15 of the Convention Law is given a liberal interpretation based on the wording of section 29 of the Convention Law, to be unconvincing. According to the judgment of my colleague Justice Hendel, he also disagrees with this interpretation. However, in the light of the provisions of section 295 V of the Civil Procedure Rules, 5744-1984, which my colleague mentions in his judgment and which expressly refer to the filing of a motion such as this one ["…regardless of whether there had been a request from the Central Authority in the foreign State to which the child was removed **or not**" (the emboldening has been added, Y.D.)] there is no reason in my view to warrant emptying the wording of the secondary legislation of all meaning or to establish an inflexible common law rule to the effect that no parent may file a motion under section 15 of the Convention Law if it was not accompanied by a request from the Central Authority in the foreign State to which the child was removed. Nevertheless, to my mind common sense dictates that a rebuttable quasi-presumption should be established that a motion filed under section 15 of the Convention Law by a parent without there having been a request from the Central Authority in the foreign State is

one which the Family Courts must treat with caution and consider carefully whether or not to allow.

It is therefore decided to accept the appeal as stated in the judgment of Justice N. Hendel.

Given today, 7th Sivan 5774 (5.6.2014).

Judge Judge Judge
