In the Supreme Court

Request to Appeal - Family 1855/08

Before:	The Honorable Justice A. Procaccia The Honorable Justice E. Arbel The Honorable Justice S. Jubran
The Applicant:	Ronit Biton
The Respondent:	Vincent Georis
	Application for permission to appeal the judgment of the District Court in Beersheva of 20 February 2008 in file Fam. App. 104/08 given by the Honorable Vice-President N. Hendel and Judges T. Tsfat and E. Bitan
Date of the session:	1 Adar B 5768 (13 March 2008)
On behalf of the Applicant:	Attorney T. Feinberg, Attorney Y. Lange, Attorney S. Mantesh
On behalf of the Respondent:	Attorney E. Freedman

J u d g m e n t

Justice A. Procaccia:

1. This is an application for permission to appeal the judgment of the District Court in Beersheva (the Honorable Vice-President Hendel and the Honorable Judges Tsfat and Bitan) of 20 February 2008, which decided by majority decision to return the minor, the son of the applicant and the respondent, to the father in Belgium, in the framework of the Hague Convention (Return of Abducted Children), 5751 – 1991 (hereafter – the Hague Convention Law).

2. In the framework of the hearing before us, permission to appeal was given with the consent of the litigants, and therefore the proceeding is heard before us as an appeal on the merits.

3. The events and proceedings in this file are long and complicated, and have now reached the final stop. We shall briefly describe the background and chronology of events to the present stage.

The Proceedings Abroad

4. The applicant (hereafter also – the mother) is Jewish, an Israeli citizen, who now lives in Ofakim. The respondent (hereafter also – the father) is a Christian, a Belgian citizen, who lives in Brussels. The sides married in France in 1998, and in June 2002, the applicant filed a complaint for divorce against the respondent in a court in Belgium. On 14 October 2004, the couple was registered as divorced. The minor son of the couple was born on 18 January 1999 in Belgium.

On 30 July 2002, the court in Belgium gave an order granting custody of the minor to the mother. Another decision, made subsequently by a court in Belgium on 23 January 2004, allowed the mother to live with the minor in France, and simultaneously set visitation arrangements between the father, who continued to live in Belgium, and the minor, who was supposed to live with his mother in France. In March 2004, the mother moved with her son to live in France.

On 22 November 2005, a judgment was given in the Court of Appeals in Belgium, whereby, commencing on 3 January 2006, the principal place of residence of the minor would be with his father in Belgium. This judgment established meetings between the mother and the minor. It also established an arrangement for support of the minor, and each side was ordered to inform the other side in advance of his or her intention to travel with the minor outside France or Belgium.

On 21 December 2005, the mother filed an action for custody of the minor in a court in France.

On 4 January 2006, the mother came to Israel with the minor, without the father's consent.

On 7 February 2006, a court in France held a hearing on the mother's action for custody. The mother and the minor went especially to France for the hearing, and were present at it. At the end of the hearing, they returned to Israel, and have been living here since then.

On 7 March 2006, the court in France rejected the mother's claim for custody and held that the judgment given in the Court of Appeals in Belgium was valid and enforceable in France.

The Proceedings in Israel

First Proceeding: Family Court (Fam. File 3450/07)

5. On 18 December 2006, the father filed his claim in Israel to return the minor to his custody in Belgium, relying on the Hague Convention Law.

6. On 25 April 2007, the Family Court in Beersheva (the Honorable Judge Assulin) gave his judgment, which accepted the father's claim and ordered the minor to be returned to his father in Belgium. In its judgment, the Family Court held that the custody rights of the father, as defined by the Belgian and French courts, were breached just prior to removing the minor from France to Israel. The court ordered that the minor was to be returned to the place where the custody rights given to the father could be exercised, which is Belgium. The court also held that, in this case, the provisions of article 12 of the Hague Convention (hereafter also – the Convention) do not apply, given that one year had not yet passed from the time the minor was removed to Israel to the time that proceedings were initiated in this action. It was also held that the mother had not proved that the father consented at the beginning, or subsequently became reconciled, with the minor living in Israel in the sense of article 13(a) of the Convention. The court also thoroughly examined the end of article 13 of the Convention, that is, objection of the minor to being returned, and whether he was of the age and degree of maturity at which his views should be taken into account. In examining this claim, the court appointed, with the sides' consent, Dr. Daniel Gottlieb (protocol of 20 February 2007). The court presented detailed questions to the expert with respect to the matters that he was to investigate in preparing a complete opinion on the questions requiring proof. Based on analysis of the opinion of expert Gottlieb and the position of the professionals in the welfare services, the court concluded that the minor was of the degree of maturity at which his views were to be taken into account. It was also found that the minor objected to being returned to his father's custody in Belgium, but that this opposition did not arise from the minor himself, and was not a substantive position based on the actual facts. The court held that the possibility should not be rejected that the minor's position was affected by the mother's position, and from the child's fear of not acting as she wished (paragraph 8(g) of the judgment). The claim regarding application of the exception specified at the end of article 13(b) of the Convention was, therefore, rejected.

The court also discussed the exception at the beginning of article 13(b) of the Convention, which relates to the grave risk of physical or psychological harm if the minor is returned to the applicant parent, or the grave risk that he would otherwise be placed in an intolerable position on his said return. The court held that the burden of proof with respect to this exception rests with the party contending it, and that the burden is very heavy, for even if it is proven, the court has discretion not to exercise it. The existence of doubt as to the applicability of the exception in the present case must result in rejection of the contended defense against application of the Convention. On this matter, it was held that the mother pointed to two matters as to which the said exception might exist: *one* – the claim of the father's *violence* toward the minor; *and two – religion and nationality,* which justify application of the said exception. The court rejected the accuracy of these contentions: it held that no basis was provided for the fear of violence by the father toward the minor, learning this from the expert's opinion and the social services in Israel on this

point. This also arose from the custody proceedings in France and Belgium, which rejected this contention and granted custody of the child to the father.

The argument regarding considerations of religion and nationality arose in the context that the child is now receiving an ultra-Orthodox education, has acclimated in Israel, while his father is not Jewish and his parents are devout Christians. Detachment of the child from the environment to which he has become exposed in the meantime in Israel is liable to cause him great harm, so the mother contends. As to this contention, the court held that, indeed, the parents' different religions and nationalities make the matter especially complicated, but it cannot justify abduction of the a child in opposition to valid custody orders in the country of origin. The religious way of life of the minor might be relevant in examining acclimatization under section 12 of the Hague Convention, or with respect to custody proceedings in the country of origin, but not with respect to the return of an abducted child under the Convention. The Family Court also rejected the mother's argument that the minor should not be returned to his father out of fear that he would not receive a fair trial in Belgium. The court ultimately ordered the return of the minor to the custody of his father in Belgium.

First Proceeding: Appeal in the District Court (Fam. App. 121/07)

7. The mother appealed the judgment to the District Court in Beersheva (the Honorable Vice-President Hendel and the Honorable Judges Tsfat and Ya'akov), which, on 18 June 2007, denied the appeal.

8. The judgment on appeal (written by Judge Tsfat) adopted the approach of the Family Court regarding the right of the father to custody under the foreign laws applying to the matter, and held that, pursuant thereto, custody was given to the father in Belgium, and that the minor should be returned to his custody. The court also held that the lower court properly held that article 12 of the Convention does not apply to the matter, inasmuch as the claim was filed less than one year from the time of the abduction. The court emphasized the obligation to construe very narrowly the defenses specified in the Convention. On the exception regarding the risk of physical or psychological harm and the exception relating to the desire of the child, the District Court observed as follows:

> It should be noted that examination of this case is not carried out on virgin ground. The minor was examined twice by experts on behalf of the court in Belgium (Le Gres Institute) at different times. The first time was prior to establishing custody and permitting immigration to France, and the second time was in the framework of the hearing on the appeal, when the minor was already with his mother in France. The examination in Israel by Dr. Gottlieb, the expert appointed by the lower court in the framework of this proceeding, is the third. As stated, based on the recommendations of the expert appointed in Belgium, custody of the minor was given to the respondent.

It was further held that the mother's arguments regarding the harm that was liable to result from detachment of the minor from his nationality and religion were not the kind of arguments that are properly made in the framework of the restricted defenses specified in the Convention, and are not included in protection from the risk of grave psychological harm to the child, which the Convention intended in the exception specified therein. They should be heard in the framework of an examination of the best interest of the minor in a custody proceeding.

First Proceeding: Application for Permission to Appeal to the Supreme Court (Appl. App. Meh. 5579/07)

9. The mother filed an application for permission to appeal this judgment to the Supreme Court. In its ruling, the Supreme Court ordered, on 7 August 2007, by majority opinion (of the Honorable Vice-President E. Rivlin and the Honorable Justice E. Arbel, against the opposing opinion of the Honorable Justice Y. Elon) to return the matter to the District Court, to appoint an expert on its part to decide the question of the application of the provisions specified at the end of article 13(b) of the Hague Convention, that is, whether the child objects to being returned and whether he is of the age and degree of maturity at which it is proper to take into account his views. The ruling further stated that, if the expert's opinion states that the appearance of the minor before the court is possible, and would not harm him, then the District Court should also hear the minor for the purpose of deciding the question of his opposition.

In this proceeding, the Supreme Court adopted, by majority opinion, the holding of the lower courts with respect to the existence of the act of abduction and the applicability of the Convention regarding the obligation to return the minor to the custody of the father in Belgium. However, regarding the exception of the desire of the child specified at the end of article 13(b) of the Convention, the majority of the court found that the three opinions given in the matter of the child – two by the Les Gres Institute in Belgium and the third by Dr. Gottlieb in Israel – did not provide a complete picture of the matter under review. The court also held that, under the circumstances, the court should hear the independent comments of the child. The Supreme Court did not interfere and did not deviate from the holdings of the lower courts, whereby the minor did not come within the exception at the beginning of article 13(b), and that there was no risk of psychological or physical harm if he were to be returned to his father's custody in Belgium.

Second Proceeding: District Court (Appl. App. Fam. 121/07)

10. At the order of the Supreme Court, the District Court appointed, as an additional expert, Dr. Gabriel Weil, and heard the minor himself for the purposes of examining the application of the "child's-desire" exception with respect to him. After hearing them, the District Court gave, on 21 October 2007, an additional judgment. In this judgment, the court rejected the mother's argument regarding the applicability of the end of article 13(b)

of the Hague Convention, the "child's-desire" exception as to the minor in our case, and held that the new evidence that had been submitted, that is, the testimony of the minor and of the expert, reinforces the conclusion that the said exception should not be applied to the matter that is the subject of this hearing.

However, the District Court, in this judgment, took the initiative to transfer the matter to the Family Court to examine the applicability of the beginning of article 13(b) of the Convention to the minor, which relates to the question of the grave risk of physical or psychological harm to the child if he were to be returned to the custodial parent.

Second Proceeding: Application for Permission to Appeal to the Supreme Court (Appl. App. Meh. 9114/07)

11. On this judgment of the District Court, the mother applied to the Supreme Court for permission to appeal. This application was denied by the Honorable Justice Arbel on 30 October 2007.

The legal significance of the decision in this proceeding is that the holdings of the District Court regarding the non-applicability of the "child's-desire" exception became absolute. Remaining open for discussion was the question of the applicability of the exception regarding grave risk of harm to the child, which question the Family Court was requested to investigate.

Expert's Opinion in the Matter of the Exception for Grave Risk of Harm to the Child

12. In accordance with the instruction of the District Court, the Family Court appointed Dr. Weil to give his opinion on the question that remained to be decided – whether there is grave risk of physical or psychological harm to the child if he is returned, or whether his return would otherwise place him in an intolerable position. The Family Court precisely defined for the expert the questions as to which he was requested to give his opinion.

Principal Elements of the Expert's Opinion

13. The expert, Dr. Weil, gave his opinion that the minor would not be subject to *physical* harm if returned to Belgium to his father, and explained that the likelihood that his father would cause him physical harm if returned to his custody was extremely low.

As for the degree of *psychological* harm that might await the minor, the expert held that he undoubtedly could expect such harm, but that this harm must be compared to the harm he might suffer if he remained in Israel with his mother, entailing the risk of complete detachment between the minor and his father, which is liable to cause him grave injury.

On the question of the degree that return of the minor to Belgium might place him in an intolerable situation, within the meaning of this term in the end of article 13(b) of the

Convention, the expert responded that two situations must be distinguished: one, if the mother remains in Israel, in which case the separation from the mother would be traumatic, and for him be intolerable. In the second situation, if the mother cooperates and goes with the minor to Belgium, she could provide important assistance in the child's acclimatization to his new life in Belgium. The expert also raised the difficulties and doubt accompanying the question of the mother's cooperation in easing the acclimatization process of the child to his home in Belgium, in light of her conduct in the abduction and thereafter, and in light of her ongoing actions to detach the child from his father.

The expert further noted in his opinion additional facts that aggravate the difficulty entailed in canceling the results of the abduction: the minor is nine years old, and has rarely seen his father for two years now, and prior to the abduction he saw him, as part of the visitation arrangement, not very frequently. Therefore, this child would not be returned to a natural environment in which he had previously lived, but to a life that he left when he was five years old. In the meantime, he settled into a new environment in Paris for two years and then to a new environment in Israel, for another two years. Furthermore, the minor underwent a change in identity from a Belgian Jewish child to an ultra-Orthodox Jewish child in Israel.

14. After noting all the aspects related to return of the child to his father's custody, the expert concluded his opinion, as follows:

> Having the (minor). . . remain with his mother in Ofakim is a bad solution that endangers the child, as described above, and is a prize for the abduction, and this certainly is not desirable. Transfer (of the minor) to his father's custody in Belgium is liable to endanger the child gravely if the mother does not support and accompany him as we delineated; on the other hand, it is clear that the best interest of the child demands a renewed connection with this father, beyond obeying the decisions of the court in Belgium (p. 14 of the opinion).

Third Proceeding: Judgment of the Family Court (Fam. File 3450/07)

15. The Family Court, in its judgment given on 9 January 2008, denied the application to nullify the opinion of the expert Weil, holding that the expert related to the question of the best interest of the child only, and that the court did not find a flaw in his position from the perspective of the neutrality and objectivity needed in expressing a professional opinion.

16. With respect to the merits of the case, the court examined the applicable normative framework, and guided itself according to the following principles: meeting the exception of grave risk of harm to the minor if he were to be returned to the custodial parent does not negate the court's discretion whether to return him, or not. The burden of proving the risk of harm to the child lies with the parent contending it, and the burden is very heavy; investigation of the elements of the exception does not entail examination of the best interest of the minor within the meaning of this term in custody proceedings. To

meet the exception, proof of harm or an intolerable situation, of the importance and weight that justify refraining from returning the abducted child to the custodial parent in the country of origin.

17. In the matter under discussion, the court held that it was not proven that the minor can expect physical harm upon return to his father in Belgium, this finding being made on the basis of all the material that had been submitted and of the opinion given the court by the expert Weil. As for the effect of the "religion and nationality" factor, and based on the expert's opinion, the court held that the anticipated change in the social-religious environment of the minor upon being returned to Belgium is significant, but does not, in and of itself, place the minor in an intolerable situation.

With respect to the aspect of detachment of the minor from his mother, the court held, based on the expert's opinion, that at the present time the mother is the primary parental image in the child's life. The minor has been separated from his father for a long time, and returning him to the father means return to an environment that he left at age five. Against the harm entailed in detachment from the mother, there is the harm to the minor from detachment from the father, and if the child remains in Israel and the detachment from his father is final, he would suffer severe harm. The mother sought to detach the child from his father, and has constantly acted to attain this goal. On the above background, the family court held:

> Alongside the grave risk of psychological harm to the minor, and of placing him in an intolerable situation if he must return to Belgium without the mother, lies the grave risk of harm that would be caused the minor if he remains with the mother in Israel, this because of the child's total detachment from his father.

The court further held that the key to substantially reducing the expected harm to the minor in returning him to Belgium rests with the mother, and depends on her joining the child on his journey and her cooperation in promoting a positive connection between the minor and the father.

18. Based on the said analysis, the court ruled: the existence of risk, certainly not grave risk, of physical harm in returning the minor to his father was not proven; also, it was not proven that change in the social-religious environment of the minor, in and of itself, is liable to cause him psychological harm or place him in an intolerable situation.

The court also held that it was proven that there was grave risk that return of the minor to Belgium is liable to expose him to psychological harm, and place him in an intolerable situation if the mother does not join him going to Belgium. On the other hand, it was proven that there is a grave risk of psychological harm to the minor if he remains in Israel with his mother, and if the detachment from his father is final, the result that the mother sought to achieve. If the mother accompanies the child, and cooperates positively in his settling in Belgium, it would substantially reduce the harm and difficulties that the child is liable to encounter. If the mother does not accompany the minor, he will be exposed, as stated, to psychological harm and be placed in an intolerable situation. But on

the other hand, if he is not returned, he will suffer harm from the detachment from his father, which is also exceptionally harsh harm. In the court's opinion, it cannot be said that the anticipated harm from detachment of the minor from his mother, and in taking into account religion and nationality, is greater in intensity that the anticipated harm to the child from his detachment from his father. For the purposes of the exceptions in the beginning of article 13(b) of the Hague Convention, one substantial harm is not to be rectified by creating conditions for generating another substantial harm. Added to this weighing of considerations is the possibility that the mother will accompany the minor to Belgium, and thus ease his acclimatization. Also, return of the child to the father's custody does not render superfluous the holding of custody proceedings in the country of origin, in which it is possible to investigate, in a custody proceeding, the question of the best interest of the child, in all its aspects, under the current circumstances.

The Family Court repeated its original instruction given in the judgment in the first proceeding to return the child to his father in Belgium. It set conditions for the return in the event that the mother indicates that she is prepared to accompany the minor to Belgium.

Third Proceeding: Judgment of the District Court on Appeal (Fam. App. 104/08)

19. The District Court in Beersheva ((the Honorable Vice-President Hendel and the Honorable Judges Tsfat and Bitan) decided, by majority opinion of Judges Hendel and Tsfat, on 20 February 2008, to adopt the holdings of the Family Court in its decision in the third proceeding. The court, by majority opinion, guided itself in accordance with the following two points: the exceptions to the Convention are to be construed very narrowly, and the burden of proof lies with the parent arguing their applicability; the arrangement of the Convention is to be seen as weighing the interest of all children, in the aspiration to combat, from the start and after the fact, the abhorrent phenomenon of child abduction. The exception of physical or psychological harm to the child is not the best interest of the child in the meaning of this term in a custody proceeding, but involves preventing "bad" to the minor, of great intensity, that only it might justify refraining from fulfilling the objectives of the Convention.

20. In his opinion, Judge Hendel noted the following facts: the father conducted regular visits with the minor, and made a frank effort to maintain ties with him. The mother, on her part, acted in every way possible to bring about a severance of ties between the child and his father. The mother adopted an ultra-Orthodox way of life for her and the minor. The father, who is an atheist, expressed a willingness to relate to the change in the way of life of the minor, and agreed to allow the minor to keep the commandments, the Sabbath, and kashrut, and to study in a religious Jewish school in Belgium. The last time the child lived in Belgium was in 2004. After that, he lived two years in France and two years in Israel. Also when he lived in Paris, twice a month he went to Brussels to visit his father. The child's personality is especially fragile and sensitive.

As regards comparing the expected harm to the child from his return to Belgium with his remaining in Israel, the District Court believed that the expected harm in returning is greater. However, it was not correct to make the decision in reliance on the mother's declaration that she would not accompany the child to Belgium, from the aspect of a person acting wrongfully who wants to benefit from his wrong. The court gave great weight to the fact that, after return of the child, it is possible to hold custody proceedings in Belgium to investigate his best interest. After analyzing the various facts, the court reached the conclusion, by majority opinion, that the exception in the beginning of article 13(b) does not apply in this case, and denied the appeal, adopting the consistent position of the Family Court.

21. Judge Bitan, in a minority opinion, thought differently. In his opinion, he pointed to the holdings of the expert, whereby return of the child to Belgium was liable to cause extreme reactions and an intolerable situation for him. He noted the vulnerability and fragility of the child, on the fact that he had not met with his father for a long time, on the fact that return to his father means return to an environment to which he is not accustomed, and he also related to the revolutionary change in his identity when he became ultra-Orthodox. In light of the analysis of the facts that had been investigated, Judge Bitan was convinced that there is grave risk that returning the minor to Belgium will expose him to psychological harm and place him in an intolerable situation. Also there is no guarantee that the mother will join him in his journey to Belgium. He added that, even if she does join him, it is not clear what her effect on the child in his relations with his father will be. On the other hand, Judge Bitan held that there is no certainty that, if the child remains in Israel he would be completely detached from his father. In any event, the harm in this context is small and not immediate, and can be prevented. In his words, the expected harm from returning the child to Belgium is infinitely greater in intensity than the harm expected if he remains in Israel. Judge Bitan thought that the appeal should be accepted, and that the decision to return the minor to Belgium should be nullified. He proposed a treatment plan that would enable renewal of ties between the minor and his father, while weighing the possibility of compelling visits of the minor in Belgium accompanied by the mother, or without her. He proposed that, if the mother does not accompany the minor to Belgium, substantial preparatory measures be made in Israel for the child and his father, with proper professional assistance, in advance of his return. He also proposed that the return be carried out in any event not before the end of the current school year.

Decision

22. This case has undergone a long journey and wide-ranging proceedings in various courts and in a number of stages. The complexity of the proceedings, the time needed to conduct them, and the facts that arose in their framework, call for explanation, in brief, of the norms underlying the Hague Convention and its objectives. The Hague Convention is intended, basically, to remedy a grave injustice done to the fundamental rights of a child

and natural parent to live together, one with the other, and thereby to fulfill nature's order, which the law recognizes and sanctions in the state's statutes and in conventions between civilized countries.

23. The Hague Convention Law gave domestic normative force to the Hague Convention, which sought to attain the cooperation of the countries around the world in coping with the phenomenon of abduction of children by one of their parents, while denying the right of the child and the custodial parent to live together with each other. The objective of the Convention is to ensure the immediate return of children who are wrongfully removed by one parent from the lawful custody of another parent, and take the child to another country, and to ensure that the custodial rights recognized in the county of origin are respected by the country to which the minor is abducted. The Convention's arrangement is intended to insure respect for the rule of law and its enforcement, not only in the state domestically, but also in relations between countries, and to deter one of the parents from taking the law into his own hands. The Convention is also intended to prevent harm to the safety of the minor, who is uprooted as a result of the abduction from his natural surroundings and from the custodial parent, and taken to other surroundings, which are forced on him by the other parent. Underlying the Convention is the conception that the best interest of the child requires his immediate return to the custody of the parent in the country from which he was abducted (Civ. App. 7206/93, *Gabai v. Gabai,* P. D. 51 (2) 241 (1997); Perm. Civ. App. 7994/98, *Dagan v. Dagan,* P. D. 53 (3) 254, 266 (1999); Appl. App. Meh. 672/06, *John Doe v. Jane Doe* (not reported, 15 October 2006), paragraph 8 (hereafter – *John Doe*)). Beyond the obligation to rectify the injustice of the abduction in the name of the principle of the rule of law and the prohibition on taking the law into one's own hands, the Convention seeks to promote the best interest of the child in preventing a situation in which he becomes a plaything in the hands of the law-breaking parent, who takes the law into his own hands, and to give effect to the custody orders that were lawfully issued in the country of origin, following thorough examination of the best interest of the child, in all its aspects. Indeed, "Abduction of the child itself is something that is liable to harm his best interest" (President Barak in *Gabai,* supra, at p. 251). And indeed, under the Convention, removal or retention of a child is considered a wrongful act, where it breaches the custodial rights given to a person in accord with the laws of the country of origin (article 3 of the Convention).

24. Under the Convention, a child who is wrongfully removed by one of his parents must be returned *immediately* to the custodial parent. This obligation is absolute, and is not given to judicial discretion, subject to certain exceptions specified in the Convention. This approach is derived from the basic conception of the rule of law, from the obligation of reciprocal respect for the laws of the states that are party to the Convention, and from the clear public interest that is intended to prevent grave harm to the child's wellbeing, which is inherent in his being smuggled to another country, in breach of the law and orders of the court in the country of his place of residence, which set the custodial arrangements and custody in his case, after examining all aspects related to his best interest. When applicability of the exceptions to the Convention is rejected, the obligation to return the

child is categorical, and is not open to judicial discretion. Contrarily, if an exception to the obligation to return is met, the court still has discretion to order the return of the abducted child or to refrain from so ordering (Civ. App. 4391/96, *Roe v. Roe,* P. D. 50 (5) 338, 345-346 (1997); Civ. App. 5532/93, *Gunzburg v. Greenwald,* P. D. 49 (3) 282, 293 (1995)).

25. The obligation to return the abducted child to the custodial parent in his country must be done urgently and expeditiously as possible, as stated in article 2 of the Convention:

> Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

The clock forms the hard core of the abduction and is a substantial element of the matter, in remedying the injustice of the abduction as swiftly as possible, in respect for the domestic and international law, and for the sake of the best interest of the child.

26. The fundamental rule in applying the Convention is, therefore, immediate remedy of the injustice of the abduction by immediately returning the situation to what it was previously, and where there are questions as to the best interest of the child as regards custodial arrangements, they must be investigated in the country of origin (*Roe,* supra, at p. 345). The rule of immediate remedy of the injustice of the abduction meets the demand to respect the rule of law and to respect the laws of the states and of the international convention, which expresses a commitment of all states to achieve the objective of preventing the phenomenon of abduction; its meets the demand to promote the best interest of the child in returning him to the country of origin to the custodial parent, whose custody advances the best interest of the child in accordance with the custody order that was issued (Misc. Appl. 1648/92, *Turna v. Meshulam,* P. D. 46 (3) 38 (1992)).

27. The Convention specifies a number of exceptions to the fundamental principle underlying the Convention, which requires the immediate return of the abducted child to the country of origin. The exceptions are built on a conception whereby their might be special, exceptional circumstances related to the situation of the minor, whose extraordinary weight is liable to prevail even over the central objective of the Convention. Existence of the exceptions expresses a clash between two interests: the necessary interest in the inclination to immediately nullify the results of the abduction, to deter taking the law into one's own hands, and to advance the child's best interest in the broad sense, and the special, exceptional factor related to the minor, which must be taken into account. In coping between these interests, the special interest of the child will be decisive only when its weight clearly prevails over the central objective of the Convention – to prevent and deter acts of abduction, with this deterrence itself being built on a conception that is intended to protect also the best interest of the child in the broad sense of this concept (Civ. App. 1372/95, *Stegman v. Bork,* P. D. 49 (2) 431, 437-438 (1995)).

28. The exceptions in the Convention include those found in article 13, among them the exception regarding the grave risk that return of the child will expose him to physical or psychological harm, or place him in an intolerable situation (hereafter – the grave-risk

exception). Another exception exists when the child objects to his return, and he has reached the age and the degree of maturity such that it is proper to take his views into account (hereafter – the child's-desire exception). Article 13(b) of the Convention reads as follows:

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

The aforesaid exceptions are intended to balance between two fundamental interests: one – fulfillment of the objective of the Convention to protect the rule of law, to prevent taking the law into one's own hands, to protect the best interest of the child as embodied in the custody order given in the country of origin, and to prevent harm caused by the act of abduction. Two – to give, in certain, exceptional situations, consideration to the special case of the child where it is directly relevant and significant for the purpose of considering his return to the country of origin.

29. In balancing the aforesaid two clashing values, decisive weight is usually given to the interest in achieving the objective of the Convention, which calls for the return of the child to the custodial parent in the country of origin. Also inherent in this interest is the assumption that the return advances the best interest of the child in the broad sense. Non-return of the abducted child in the framework of one of the exception to the Convention is reserved for rare, extreme cases only:

> Non-return of the abducted child is permitted, in the framework of the exceptions, only in extreme cases in which the needs of the abducted child are so great as to prevail even over the central objective of the Convention – to prevent abduction of children and moving them from country to country
>
> (*John Doe*, supra, paragraph 9)

30. The concept "best interest of the child" under the Convention is not identical to the concept "best interest of the child" in custody proceedings. The Convention assumes that

the best interest of the child in the broad sense is taken into account when the custodial rights of the custodial parent in the country of origin are decided. If it is argued that the custodial arrangements should be changed, in giving consideration to various aspects, then the decision should be made in a custody proceeding in the country of origin, with the cooperation of the custodial parent, and in the framework of proceedings in accordance with the law. The act of abduction harms, therefore, the best interest of the child, and flies in the face of the custody order given in the country of origin, after the question of the best interest of the child was examined, and decision was reached. Based on this assumption, contentions regarding the best interest of the child in the accepted sense has no place in the framework the narrow exceptions specified in the Convention (articles 16, 17, and 19 of the Convention; HCJ 4365/97, *Tur Sinai v. Minister of Foreign Affairs,* P. D. 53 (3) 673, 693 (1998); *John Doe,* supra, paragraph 9).

31. The considerations related to the minor's case with respect to applicability of the exceptions to the Convention deviate, therefore, from the considerations of "best interest of the child" in the custody proceeding, both in their nature and their intensity. The structure, wording, and purposes of the Convention indicate that the exceptions must be given a restricted and literal interpretation; otherwise, the Convention's objective would be rendered meaningless (Perm. Civ. App. 2610/99, *Jane Doe v. John Doe,* P. D. 53 (2) 566, 573 (1999); *Gunzburg,* supra, at pp. 294-295; *Gabai,* supra, at p. 256). Regarding the "grave-risk" exception, it has been held that it should be limited to extraordinary cases from the aspect of the intolerable situation and gravity of the risk, to its creation as a result of the return (*Turna,* supra, at p. 45).

32. The aforesaid analysis also indicates that the burden of proof on applicability of the exception in a case being heard lies with the person contending it (beginning of article 13 of the Convention; *Stegman,* supra, at p. 438; *Dagan,* supra, at p. 267; *Gabai,* supra, at p. 250). Doubt as to the applicability of the exception in the case being heard leads, automatically, to application of the general rule that requires return of the abducted child to his country (*Stegman,* supra, at p. 438; *Roe,* supra, at p. 346; *John Doe,* supra, paragraph 21). The burden of proof that the exception is met is not imposed on the court, and it is assumed that, where there is a real factual basis to apply it, the side so contending will provide a basis for his contention, and the court is not required, usually, to initiate the defense of the exception, and to act pursuant thereto to provide evidence to prove it.

33. The burden of proof on applicability of the exception to the concrete case is very heavy, as derived from the objectives of the Convention. Where the party alleging applicability of the exception fails in meeting the burden, the court has the categorical obligation to return the abducted minor to the country of origin, as expeditiously as possible, and has no discretion in this matter (article 12 of the Convention; *Roe,* supra, at pp. 345-347; *Gabai,* supra, at p. 250).

34. Due to the severe time pressures that the Convention places on returning the abducted child to the custodial parent, the court must act very expeditiously in

investigating the conditions for applying the Convention, this including also the abducting parent's contentions regarding the applicability of the exception defenses that restrict the obligation to return the child under the Convention. The time dimension is extremely significant in the international treaty-based system for returning abducted children who have been taken from state to state. The time dimension results from the express provisions of the Convention, and from its substantive objective. The time dimension for carrying out the Convention's provisions are closely linked also to the best interest of the child, inasmuch as the longer he remains in the country to which he has been abducted, the greater the risk that he will establish roots in the place, acclimate himself to a new framework of life, and detaching him from this environment to return him to the country of origin will be harder and more bitter. In light of this, the authorities and the courts must do everything they can to carry out the proceedings under the Convention to return an abducted child in an inclusive, concentrated, and expeditious manner as possible, relying on all the evidentiary material and expert opinions submitted to them within the shortest time schedules. Handling the case in another manner is liable to impair attainment of the objectives of the Convention and harm the place of Israel in the existing international treaty-based system between it and other countries, which is reflected in the Convention. It is also liable to intensify the difficulty in detachment of the child from his new environment, which, as time passes, becomes harder to leave and the harm inherent in leaving it is aggravated.

From the General to the Particular

35. In our case, in light of the holdings made by the lower courts in all the proceedings, and in light of the decision of this court in Appl. App. Meh. 5579/07, there is no longer dispute that the Hague Convention Law applies to the circumstances in which the minor was brought to Israel by his mother. Also, there is no longer dispute that the father was given custodial rights with respect to the child, based on the orders lawfully given both in Belgium and in France. Under the Convention, the basic conditions are met for requiring return of the child immediately to the custodian father in Belgium.

It is also to be assumed that, in our case, the exception in article 12 of the Convention, which provides that an abducted child does not have to be returned if more than a year passed since the abduction, and it was proved that the child had meanwhile settled in his new surroundings, does not apply. The reason for this is that the legal proceedings in Israel to return the child began before a year passed after the child was brought to Israel.

36. It is also assumed that the father was given custody of the minor in orders issued both in Belgium and in France after the best interest of the child, in all its aspects, was investigated and examined. Examination of the child's case in the framework of proceedings under the Convention is not based on an amorphous structure regarding the best interest of the child in the broad sense. The best interest of the child was examined and is anchored in custody orders given in Belgium and France. Parties to the Convention

determined that the best interest of the child justifies that the father have custody over him. Israel respects the orders of the country of origin, and relates to them as reflecting all the aspects necessary for deciding the question of custody. As a result, not only do we not deal in the framework of the Convention with an examination of the best interest of the child in the broad sense, we must assume that this "best interest" was examined in depth in the countries of origin and was decided, and there is a presumption of properness that has not been refuted that the orders given by them are based on substantive and proper considerations. Also, reciprocal respect between the courts and the states justifies this fundamental assumption.

37. In the framework of the proceedings that we held in the matter under discussion, the two exceptions at the beginning and end of article 13(b) of the Convention remain to be discussed. These are the exception relating to the "grave-risk" exception and the "child's-desire" exception. We shall examine them on the merits.

The Exception at the End of Article 13(b) – The Child's Desire

38. In the first proceeding, the Family Court and the District Court held that the said exception was not met in this case, this, inter alia, in reliance on the opinion of Dr. Gottlieb, who was appointed as an expert with the consent of the parties. These courts held that the mother did not prove this defense, and in light of the opinion of the expert Gottlieb, the objection of the minor did not express his independent position, but the objection was directly influenced by the mother's position, and by the child's fear of not placating her if he expresses a different position.

39. The Supreme Court ordered, in its judgment in the first proceeding in Appl. App. Meh. 5579/07 that the child's-desire exception would be re-examined in the District Court by an additional expert, and gave various instructions for that purpose.

40. This examination, made in the second proceeding in the District Court, reinforced the conclusion reached in the lower court in the first proceeding, whereby the "child's-desire" exception is not met in this case. Before the District Court were the opinion of Dr. Gottlieb and the additional expert, Dr. Weil, as well as the testimony of the minor, who testified before the court *ex parte.* The court gained the impression from the entirety of the additional material placed before it that supported and reinforced its original decision, whereby the child's-desire exception does not apply in the present case. The court explained its position, as follows: indeed the child subjectively wants to remain in Israel, and not move to live with his father in Belgium, but this position broadcasts "confusion, evasion, wisdom, and also distress," in the court's language. The mother greatly affected the attitude of the child toward his father, such that the child cannot express an independent desire (paragraph 4 of Judge Hendel's judgment). It was also held that the minor gives the impression that he is smart and mature for his age, but it is not proper, under the circumstances in this case, to hold that he is sufficiently mature for the court to give weight to his opinion, as required by the exception at the end of article 13(b). These

facts and determinations of the District Court in the second proceeding, which strengthen the holdings made in the first proceeding, and which were confirmed by additional evidence, do not justify our interference in the matter of the aforesaid exception. The question of the child's desire was examined comprehensively at the factual and legal level, and a supplemental examination was made in the form of an additional expert opinion and testimony of the child before the court, which reinforced the original conclusions that were reached in this matter.

Furthermore, in Application for Permission to Appeal 9114/07, *Jane Doe v. John Doe,* which was filed in this court with respect to the judgment of the District Court in the second proceeding in our case, the court rejected (the Honorable Justice Arbel for the court) the application, holding that the decision of the District Court denying applicability of the child's-desire exception, which is based on factual holdings, and findings that were made in the wake of an expert opinion.

In these circumstances, it must be held that the child's-desire exception is not met in the present case.

The Exception at the Beginning of Article 13(b) – Grave Risk

41. The grave-risk exception that returning the child to the country of origin will expose him to physical or psychological harm, or otherwise place him in an intolerable situation, was considered already by the Family Court and on appeal to the District Court in the first proceeding. In their decisions, it was explicitly held that the mother did not meet the burden of proof of the aforesaid exception, and that it therefore does not apply in the circumstances of this case. Nor was this exception left as an open question by the Supreme Court in the first proceeding in Appl. App. Meh. 5579/07, which focused entirely on the child's-desire exception, the investigation of which was the sole purpose that the matter was returned to the District Court for further examination. The District Court, incidental to considering the child's-desire exception, ordered transfer of the matter to the Family Court to obtain an expert opinion for an examination of the "grave-risk" exception, thus opening a new, additional front that required, in practice, initiating a third proceeding in the case. Such an opinion was submitted by Dr. Weil. The expert was questioned, and at the end of the day, both the trial court and the appellate court were of the opinion that the mother did not meet the burden of proof imposed on her to establish the applicability of the "grave-risk" exception. In the present case, the holdings of the lower courts on the matter of this exception are the sole focus of the appeal before us. In light of the great number of proceedings that took place in this case, in which *seven* judgments have been given, and in light of their great detail, it is possible and proper to present the position on this appeal briefly and succinctly.

42. The accumulated weight of all the facts that were investigated in the various proceedings, including the position of the expert Dr. Weil, paints the following picture:

Transfer of the child to the custodial parent in Belgium is, without question, complicated and multi-faceted with respect to its effect on the minor. In this context, the contention that returning him to the custody of his father entailed a risk of physical harm was rejected outright. The question focuses on the risk of psychological harm to the minor, or that returning the child will create an intolerable situation in another way. In this matter, the facts indicate that, on the one hand, the child has an extremely close connection with his mother, that she is currently the significant parent in his life. Also, the child has been absorbed in his new surroundings in Israel, and in his ultra-Orthodox educational framework, which is completely different from his environment abroad. Regarding this point, the lower courts correctly held that considerations of religion and nationality and of the social environment in which the child currently lives do not comprise an independent component to be weighed in the framework of the "grave-risk" exception, but are to be considered only in the direct context of the question of grave risk of psychological harm that might result following the child's detachment from his customary environment in Israel. The child's absorption in the new environment in Israel is linked more than a little to the long amount of time that has passed since he was brought to Israel in early January 2006, a period of more than two years. The aforesaid long period of time contributed to the great emotional burden placed on the child, at a heavy psychological cost to him.

However, the lower courts held, properly, that detachment from his surroundings does not create, in and of itself, grave risk of psychological harm to the child. Contrarily, detachment of the child from his mother might create such harm. Separation from his mother might be hard for him, and this factor deserves special attention: on the other hand, as appears from the holdings of the lower courts, the child can expect significant psychological harm also if he remains in Israel with his mother, given the absolute severance that she seeks to create between the child and his father, the characteristic feature of her conduct being aimed at creating an absolute partition between them. In weighing the overall harsh psychological harm the child might expect from being detached from the mother against the psychological harm the child might expect from detachment from the father, and taking into account that the custody order in the country of origin states that the best interest of the child justifies granting custody of the minor to the father, the lower courts held that the burden of proving the "grave-risk" exception has not been met in this case.

It appears to me that the lower courts were correct in the professional, cautious, substantive, and strict weighing of the various facts that were proved before them, while giving profound consideration to the expert opinion, and its conclusions, with respect not only to its wording, but also to its spirit and depth of understanding.

43. Applicability of the grave-risk" exception requires the existence of an extreme, extraordinary, and unambiguous situation that raises a grave risk of psychological harm to the child, that is liable to result from his return to the country of origin, and whose weight prevails also over the basic objective of the Convention, which requires the immediate

return of an abducted child. The conceptual apparatus and the balancing required in accordance with the objective of the Convention limit application of the exception to extreme situations that exceed the ordinary harm that is naturally anticipated and understood in returning an abducted child to the custodial parent.

44. In the circumstances before us, grave risk of psychological harm of this special degree was not proven; moreover, the question of the psychological harm of the minor in our case is especially complicated from the aspect of his remaining in Israel.

It is superfluous to say that the very act of abduction, and every act of abduction, entails grave harm to the abducted child, who is taken from his custodial parent. As a result of this harm, the child also is caused grave harm when being returned from the abducting parent to the custodial parent, and in the need to separate again from one parent and acclimate to a new life with the other parent. The transfer of the child here and there, from parent to parent, incidental to execution of a wrong that the child is certainly not aware of, entails harm and profound injury to a young child.

This is a difficult and complicated case of complex psychological injury caused to the child at the time of the abduction, consequently the compelling need to combat this phenomenon with efficient means, among them returning the situation to the way it was previously, and rectification of the unjust abduction as expeditiously as possible. The act of abduction itself is the root of all evil, not only toward the rule of law in the state and among the countries of the world, but first and foremost toward the child and his wellbeing. The harm caused the child is ongoing, beginning with his being removed from the custodial parent, and continues when he must separate from the abducting parent and return to the custodial parent, who in the meantime was detached from him, and when he find himself, in some instances, in an environment that is hostile and alien to him. These phenomena are understood to be inherent in abductions, and the more time that passes before the child is retuned, the difficulty in returning the child increases because of the intensity of the hostility to the custodial parent that grows with time, the deepening ties of the child with the abducting parent, and the child's acclimatization in the new surroundings.

Circumstances of this kind, which entail built-in psychological harm to the child, its source being the act of abduction and the prolonged separation form the custodial parent, including the natural difficulty of separating from the abducting parent and the new environment into which he had settled, do not meet, generally, in and of themselves, the extraordinary and special condition of grave risk of "psychological harm" in the meaning of the exception to the Convention. Were this the case, most cases of abduction would come within the exception and justify not returning the abducted child. To come within the said exception, it is generally required that there be "something additional," which points to an extraordinary difficulty, unique to the particular minor, which creates a special reason not to return him to the country of origin for the purpose of protecting his psychological wellbeing.

It is also important to emphasize in the context of the demand for a narrow and literal application of this exception, that difficulties that a child encounters in being returned due to his separation from the abducting parent, and in light of his being torn from the new environment to which he had acclimated in the state to which he had been taken, are liable to serve as an immediate basis for initiating custody proceedings anew in the country of origin, in which context a reassessment is made of the best interest of the child in the broad meaning of the term. Retuning an abducted child to the country of origin does not mean he is abandoned; it means that he is being returned to the custodial parent who received court orders giving him custody of the child based on the best interest of the child. It also means that the courts in the country of origin are also able to rehear the question of the best interest of the child in new custody proceedings, in which the child's overall needs, in all their aspects, will be examined and investigated anew.

45. In our case, the minor undoubtedly suffered great harm when he was abducted and separated from the custodial parent; there is also no doubt that the great time that passed from the time he was brought to Israel creates great difficulty in returning him, especially with respect to detachment from his mother, to whom he is very deeply attached, and also from his new environment, which is completely different from that which preceded it. Much time and effort will be required to enable the child to acclimate to his different environment with his father, from whom he was separated for a long time. However, these factors do not meet the burden of proving the "grave-risk" exception, and do not justify refraining from applying the Convention.

Furthermore, even if doubt remains if the exception exists, it is sufficient to apply the Convention's provisions in accordance with the rules of burden of proof applying in this case. Moreover, even had the burden of proof to substantiate the exception were met, I do not reject the possibility that it would be proper for the court to exercise in this case its discretion and order that the minor be returned, based on the clear assumption that the question of the best interest of the child, on the background of his psychological condition following the return, might be examined, if necessary, in custody proceedings in the country of origin. In my opinion, this is the proper answer in a case of the kind before us, which combines a real concern for the best interest of the child, together with implementation of the important objective of the Convention to return abducted children to the custodial parent, a Convention to which Israel is party.

46. The lower courts were of the opinion, on the background of the expert opinion, that the mother's joining her son on his way to Belgium to his father would ease the acclimatization of the child in the first stage. It is important to note that, both the expert and these courts assumed that the likelihood the mother would join her son remains unclear for various reasons, including the mother's fear that if she enters Belgium criminal proceedings for abduction might be initiated against her. The fear was also expressed, and it is not to be ignored, that her going to Belgium with the minor might aggravate, rather than ease, the situation, and might even damage efforts to integrate the child in a new

framework in the father's custody, if the mother continues her hostile opposition to ties between the child and his father.

Indeed, conditioning the mother's joining her son on the journey to Belgium , a condition subject to the decision of the mother herself, and the question of the extent of the mother joining the child, are not unequivocal and involve different values.

47. It is decision in the third proceeding, the Family Court set conditions for the mother joining her son (Fam. Comp. 3450/07, paragraph 17(f) of the judgment). These conditions raise in my opinion various problems, legal and practical. I also fear that setting these conditions is liable to provide the mother means to cause further delay in returning the minor to his father. However, given that the father's counsel did not object to these conditions, it is improper to interfere on this point in the appeal before us, and we hope that this possible mechanism will not be misused, and if it is, that the court will act to prevent this procedure from taking an improper path.

48. *In light of the above, I conclude that, in the case before us, the "grave-risk" exception is not met, and that the child is to be returned to his father in the country of origin as soon as possible, as the Convention commands.*

49. As regards the conditions of the return of the minor to his father, the conditions specified in the judgment of the Family Court in Fam. Comp. 3450/07, of 9 January 2008, paragraphs 17(a) to (d), are to be adopted, provided that the transfer will be delayed as stated for a period of 21 days to enable the child and his mother to properly arrange the move of the child to his father in Belgium. During this period, it is desirable that the competent welfare authorities prepare the mother and child for the aforesaid move, to ease the process as much as possible. It is especially important to involve the father in the preparation in advance of the move before the time of return, as required in the best interest of the child.

<u>Postponing the Time of the Child's Return</u>

50. With regard to the time for returning the child to his father, I would like to make the following points.

The minority opinion of the Honorable Judge Bitan in the District Court suggested, in the alternative, that, if it is decided to return the child to Belgium without his mother accompanying him, meaningful preparatory measures should be taken in Israel for the child and his father, with proper professional assistance, in advance of the child's journey to Belgium. The opinion also stated that it would be better not to return the child to Belgium before the end of the current school year.

I do not agree.

Part of the great difficulty created in this case in returning the child to the custodial parent arises from the great amount of time that has passed since he was brought to Israel. Additional delay in the child's return is improper from a few perspectives: the more

that time passes, the greater the difficulty for the child to separate from his mother and his surroundings in Israel, and in this regard, a period of some months is significant, given that the child has been in Israel for more than two years.

Furthermore, no expert opinion has been presented that supports an additional waiting period for the child's return, and the litigants have not shown any real cooperation between them for the purpose of softening the return process over the course of a number of months. The belief that such an interim period is liable to benefit all the persons involved is not supported, neither by any professional opinion, nor by the attitude of the parties themselves, and further delay in returning the abducted child is liable to place a stumbling block in the way of the minor's proper return, which should have been done a long time ago.

In addition, waiting for an additional interim period to return the child is inconsistent with the objectives of the Convention, and with Israel's obligation to the states that signed it. The Convention requires immediate return of an abducted child, to which the Convention applies. Further wait would not only add to the difficulty of separation of the child from his surroundings, but would deviate from the spirit of the Convention, and is inconsistent with the important objective of tenaciously and effectively combating the harsh phenomenon of abduction of children by their parents. Coping with this phenomenon requires, in the framework of the obligation to enforce the rule of law among international law, to act efficiently against taking the law into one's own hands in the field of family relations, and in light of the fundamental commitment to prevent critical harm to the best interest of the child, who is the principal injured party in the act of abduction and pays the heaviest price.

Before Concluding

51. Prior to ending, it is proper to raise a number of questions closely related to the handling of the proceedings in the case under discussion, which have general implications on the manner of handling proceedings under the Convention for the return of an abducted child.

In the case before us, seven judgments have been given in various courts, and this judgment is the eighth. The case was heard in three separate and distinct proceedings, which passed across all the levels of courts a number of times. Deliberation on the various questions related to the applicability of the exceptions to the Convention were divided and heard in separate courts, which demanded both much judicial effort, and precious time, even though all the courts issued their rulings without great delay. The complicated, extensive deliberation processes in all the courts in this case raise the question as to how it is possible and proper to investigate fully all the questions requiring clarification in the framework of one hearing proceeding, without dividing them into various hearing proceedings following one another, which are spread among different courts, in a way that enables, on the one hand, proper examination of the questions, and, on the other hand,

meets the objective of the Convention with respect to time pressure, and prevents a situation in which extending the time of the proceedings affects the grave risk of harm to a child in returning him to the country of origin, or on the existence of another pretext for not returning him. Possibly, one of the ways to cope with this difficulty is holding a special effort to concentrate the investigation of all the questions in their entirety in one hearing procedure, and, if necessary, complete the missing elements by the appellate court, which would come in the shoes of the court hearing the matter for the purpose of saving time, which is essential in proceedings on returning an abducted minor.

Another question arising in the wake of the proceedings in this case is the extent of the initiative that a judicial body should require in raising questions for hearing and proof, in which the heavy burden of proof rests from the beginning on the party contending the Convention does not apply, and where a doubt on the question if the contention is met is sufficient to reject it.

The aforesaid questions, notwithstanding their hearing characteristic, are liable to be critical in proceedings under the Convention, requiring concentrated, expeditious, precise, and professional judicial action. This case warrants that we state our opinion on them with an eye to the future.

Concluding Remarks

52. In light of the aforesaid, I suggest to my colleagues as follows:

To deny the appeal, and order the return of the child to his father in Belgium as stated in paragraphs 17(a) to 17(d) of the judgment of the Family Court in Fam. Comp. 3450/07, of 9 January 2008, the fundamental points of which are:

(a) The minor will be returned to his father in Belgium.

(b) The mother shall hand over the child to the father in Israel for the father to take him to Belgium.

(c) The Order Prohibiting Leaving Israel given against the minor will be vacated after the child is handed over to the father, upon application of the father to the court.

(d) If, Heaven forbid, the mother does not act as specified above, the police shall assist the father in carrying out the return of the child, with the cooperation of the relevant competent welfare officials.

(e) The minor shall be returned at the end of 21 days from the day this judgment is given.

(f) The welfare authorities shall act, during the period specified in subsection (e), to prepare the child for his move to Belgium, with the involvement as much as possible of the father and the cooperation of the mother.

(g) If the mother announces that she agrees to accompany the minor to Belgium under the conditions specified in paragraph 17(f) of the judgment in Fam. Comp. 3450/07, then the conditions specified in sections f(1) to (5) of the said judgment shall apply.

The applicant shall pay the respondent attorney's fees for this proceeding in the amount of NIS 15,000.

Justice

Justice E. Arbel:

> A minor is not an object that can be moved from hand to hand as if unwanted. A minor is a person, a human being, a man though small in dimension. A man, also a small man, is entitled to all the rights of a big man
>
> (Justice (as his title was at the time) M. Cheshin App. Civ. App. 6106/92, *Jane Doe v. The Attorney General*, P. D. 48 (2) 833, 836 (1994))

1. The point of departure for our discussion deals with article 12 of the Hague Convention – the Hague Convention on the Civil Aspects of International Child Abduction (hereafter – the Convention) – as it appears in the annex to the Hague Convention Law (Return of Abducted Children) Law, 5751 – 1991 (hereafter – the Law). Under the article, when one parent of a child abducts and takes him unlawfully from his habitual place of residence to another country, the court must act to return the situation to its previous condition immediately by returning the child, and as it was said:

> The authority – that is, in our case: the court – has no discretion whether to decide one way or the other; it must order the return of the minor to his place. This is the fundamental rule, then, and the law repeatedly emphasized it. . . The rule is to return the situation to what it was previously, on the assumption that the court in the place of the habitual residence of the minor will decide the issue of his custody: which of the parents will have custody of the minor, where the said parent will hold custody. In other words: the question of the best interest of the child – which will decide ultimately with respect to which of the parents will have custody – will be decided by the court of his habitual place of residence, it and not the court of the country to which he was abducted
>
> (Civ. App. 4391/96, *Roe v. Roe (Yakobovich),* P. D. 50 (5) 338, 345 (1997) (hereafter – *Roe*)

2. On the various reasons underlying this fundamental rule, in particular the need to prevent harm to the wellbeing of the child following his abduction from his natural surroundings; on the need to ensure respect for the law and the Convention and their enforcement; and on the need to deter parents from taking the law into their hands, I noted in the previous "incarnation" of this case in this court, in which I emphasized the following points:

> The foundation of the Hague Convention and the Hague Law that is intended to give effect to its fundamental elements is the desire to return a minor who is abducted to his habitual place of residence as expeditiously as possible, this based on the view that a change in status quo made unilaterally by one of his parents is inconsistent with the child's best interest. . . Along with the desire to reduce to the extent possible the harm to the best interest of the minor who sometimes falls victim to the battle being waged between his parents and is moved involuntarily from palace to place, the expeditious and incisive procedure carried out under the Convention is intended also to deter the parent who ponders, sometimes to his regret, smuggling his child to another country, either because of his desire to distance him as much as possible from the other parent, or because he believes that the laws or nature of the country to which the minor is smuggled is more convenient for him and increase his chances to have the minor remain with him. . . And furthermore, the procedure under the Convention is directed toward inculcating values of the rule of law, to ensure respect for the law and its expeditious enforcement and also respect for the courts in other countries.
>
> (App. App. Meh. 5579/07, *John Doe v. Jane Doe,* paragraph 9 of the judgment (not yet reported, 7 August 2007) and the references there)

3. Along with this rule, the Convention specifies a number of exceptions which, if met, permits the court to exercise its discretion to order that the child not be returned, when "these exceptions are likely to give expression to lofty interests that contradict the interest in returning the child to his place of residence, and essentially are to protect the child" (*Roe*, at p. 345). Thus, the Convention specifies that the court is not obligated to return the child if the period of time that he stayed in the country to which he was abducted exceeds one year and it is proven that the child "is now settled in its new environment" (article 12 of the Convention); if the custodian demanding his return refrains from exercising custodial rights at the time of the abduction or consented to or subsequently acquiesced in the removal or retention (article 13(a) of the Convention); if there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (article 13(b) of the Convention (hereafter – grave-risk exception)); if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views (end

of article 13(b) of the Convention (hereafter – child's-desire exception)); and when return of the child would not be permitted by the fundamental principles of the state to which the child is abducted relating to the protection of human rights and fundamental freedoms (article 20 of the Convention).

4. In the case under discussion, in its various "incarnations" of the case, the question discussed was whether a number of exceptions were met – the exception specified in article 12 of the Convention and the exceptions specified in article 13 of the Convention: the grave-risk exception and the child's-desire exception. Ultimately, after the matter was thoroughly examined with caution and care as required by the complexity and sensitivity of the matter and based on the opinion of the expert appointed for that purpose, the two courts – both the Family Court, and the majority of the District Court – found that the said exceptions were not met, and that an order must be given to return the minor, whom his mother had abducted to Israel, to the father, the custodial parent, in Belgium. As my colleague Justice Procaccia points out in her judgment, the question if the exception specified in article 12 of the Convention and the child's-desire exception were met no longer remain for our examination in the present proceeding, the holdings regarding them having been made conclusive. Consequently, Justice Procaccia examined in her judgment the grave-risk exception, and at the end – following analysis of the holdings of the lower courts and the position of the expert appointed to examine the question, the clinical and educational psychologist Dr. Gabriel Weil (hereafter – the expert) – adopts their conclusions and holds that this exception too is not met in our case.

Following much pondering and with a feeling of uneasiness, I join Justice Procaccia's conclusion, which accords as stated with the holdings of the lower courts and is based on the expert's opinion, that it not having been proved that any of the exceptions justifying that the minor not be returned to his father have been met, the rule specified in the Convention must be applied and the order given to return the child to Belgium. It is emphasized: this conclusion does not indicate that the various fears raised by the minority opinion in the District Court relating to this step are baseless. These fears find a not insignificant basis in the opinion of the expert himself. However, when the lower courts adopted the expert's professional opinion, I did not find it justifiable for us to interfere in their holding that allowing the minor to remain with his mother would deepen the alienation between him and his father and even create a final severance of ties between them, while returning him to Belgium to his father is liable to place him at great risk if his mother does not support him and accompany him, and therefore, taking into account that under each of the possible scenarios the minor would be harmed, I too believe that the expert's conclusions lead to applying the rule and not its exceptions.

However, if my opinion were to be accepted, we would order that the obligation to return the minor to his father in Belgium, with or without the mother joining him, would apply from 15 July 2008, that its, shortly after the end of the current school year, which would enable making the arrangements needed for the move. In the period of time until then, significant and intensive steps would be taken to prepare the minor for the move,

including actions to ease his settling into the new environment to which he will be taken; to prepare the initial renewal of ties between him and his father; and to get the mother to cooperate with the move and to consider joining the minor. All this would be carried out in conformity with a plan to be prepared by the welfare authorities and under the supervision of the Family Court.

I shall explain my position.

5. It is undisputed that, as a rule, return of an abducted child to the custodial parent in his country must be done as expeditiously as possible, this while permitting hearing on the question of permanent custody of the minor by the competent courts in the country of origin. Article 2 of the Convention so stipulates, as does the nature of the matter, particularly the need to heal immediately the harm of the abduction for the best interest of the child who was unilaterally separated from his natural surroundings and his custodial parent, together with the need to safeguard the rule of law and prevent the creation of improper behavioral norms in which a person takes the law into his own hands. "Urgent handling of the return of the child who was wrongfully removed and not returned, in breach of custodial or visitation rights, lies at the foundation of the Convention, it is intertwined in it. It passes through it like the second thread" (Misc. Civ. Appl. 1648/92, *Turna v. Meshulam,* P. D. 46 (3) 38, 44 (1992) (hereafter – *Turna*). There is no longer dispute that proceedings to enforce the Law and the Convention are not the appropriate framework for examining the best interest of the child "in its full sense" and that the role of the court in a proceeding under the Law is only to "fight fires" or provide "first-aid" to return the situation to what it was previously (in the words of Justice Netanyahu in *Turna,* at p. 45). However, I believe that the special , complicated circumstances in our case justify, even require, delay of the return of the minor for an extremely short, defined period of time, this to ensure his wellbeing and best interest, without the other rationales underlying the obligation of immediate return being harmed. To what does this refer?

6. The expert and following him the lower courts, concluded that the return of the minor to Belgium does not entail risk of physical harm that he might suffer, but that it is clearly expected he will be exposed to substantial psychological harm. In his opinion, the expert noted that, "in the reality created, there is no doubt that the move to Belgium will cause a severe crisis for the child: he will be torn from the social and cultural environment to which he has well acclimated himself, he will be away from his mother to one extent or another. . . and switch to a new social-cultural framework" (the expert's opinion of 17 December 2007 attached as Appendix 2 of the application (hereafter – the second opinion), at p. 10). The expert further noted that, "there might be extreme responses that reflect his distress" (ibid., at p. 12); that if the mother does not join him in the move, "it appears that the separation is liable to be traumatic and intolerable for the child" (ibid., at p. 13); and in conclusion, that "transfer (of the minor) to Belgium to his father's custody is liable to gravely endanger the child if the mother does not support and accompany him" (ibid., at p. 14). In his testimony to the District Court, the expert even expressed his opinion that this situation will be, in the minor's view, "a catastrophe, a tragedy. By this I

mean extremely severe psychological suffering, depression… He will feel very hopeless, severely depressed" (protocol of the District Court hearing on 20 September 2007, Appendix 1 in the file of the applicant's exhibits, at p. 8).

7. In light of the expert's findings, the Family Court held that there was grave risk that return of the child would expose him to psychological harm and place him in an intolerable position if his mother chooses not to join him (paragraph 13 of the Family Court's judgment). While the Family Court was of the opinion that a kind of "set-off" had to be made between the anticipated harm to the minor if he is returned to Belgium and the harm awaiting him if he remains in Israel, the District Court found that the former harm, that is, the harm the child might expect from the transfer, is greater than the latter. Thus, ultimately, the court held that the mechanism proposed for the return of the child to Belgium under his mother's custody, while setting conditions preventing her from being prosecuted on criminal charges, balances the result required under the Convention – non-application of the exception – and outlining a way that will ease the move of the minor to Belgium (paragraph 9 of the District Court's judgment).

8. The aforesaid fear of substantial psychological harm that is expected to await the minor as a result of his return to his father's custody in Belgium is very complicated due to a combination of a number of circumstances that characterize the case: the long period of time that has passed since the minor left Belgium and since the abduction and his arrival in Israel; the prolonged severance of ties between him and his father compared to the dominant connection to his mother; the change in the way of life of the minor in Israel; and personality traits of the minor and his objection to returning to Belgium. I shall address briefly each of these factors.

The time that has passed since the minor left Belgium and from the time of the abduction and his arrival in Israel

9. As will be recalled, the minor, now eight and a half years old, left Belgium with his mother and went to live in France in March 2004, that is, when he was only about five years old. For close to two years, until January 2006, he lived with his mother in France, when the two of them arrived in Israel. So four years have passed since the minor last visited in Belgium, the state to which he is now ordered to return. In this period of time he spent close to two years in France and more than two years in Israel. As stated, the situation's complexity and sensitivity required examination in depth in all the courts that heard the matter. The courts related with great caution to the various questions that arose, were assisted by specialists, and analyzed the situation with a fine surgical knife, which took time. In the meantime, the minor settled into the new environment, which became the only environment he knows, while Belgium, to which he is now being returned, is for him an almost completely new environment. The expert noted this: "This does not involve return to an environment in which he lives but to an environment that he left when he was five years old, acclimated to a new environment in Paris for two years and then to a new environment in the next two years. Certainly, Belgium is not a strange country for

him, but the place to which he acclimated at a more significant age of awareness and understanding (entering first grade – age 5-6) is Paris, so there is a difference here" (second opinion, at p. 13), and "From this perspective, this is a re-immigration to Belgium (because it is not his return to the same place as in an ordinary abduction but return to a place that is remote to him" (second opinion, at p. 9).

Note well: the time that has passed since the abduction works neither to the good nor defense of the mother, the abducting parent, nor is it a reason not to return the minor in accordance with the Convention. This conclusion results, as stated, from examination and investigation in the various courts as delineated, the agreed point of departure of all of us being that there is no option to returning the minor to his father, who holds custody of the child, in the country of origin. In this context, it should also be mentioned that, as a rule, "giving weight to the continuation of the proceedings and the passage of time since the act of the abduction, as a consideration that increases the obligation to return the child to his permanent place of residence, would grant a price to the abducting parent, in the sense that the wrongdoer gains a benefit, a thing with which we cannot accept" (Perm. Civ. App. 2610/99, *Jane Doe v. John Doe,* P. D. 53 (2) 566, 5757 (1999) (hereafter – *Jane Doe*). However, I believe that it is impossible to ignore the aforesaid factor of time in outlining the path in which the child is returned to his father and in an attempt to reduce, to the extent possible, the harm that is liable to be caused him as a result of the move, especially given it will be done, as described to us, without his mother's accompaniment.

The detachment created between the minor and his father and the strong, dominant relationship with his mother

10. As the expert noted, during the past two years since the minor arrived in Israel with his mother, he has almost never seen his father, and in the two preceding years, the two did not meet often (second opinion, at p. 13). The Family Court, relying on the expert's opinion, held that the mother is now the principal parent in the minor's life, following a long period of detachment from the father (paragraph 9 of the judgment), and in this spirit also, the District Court pointed out that the ties between the minor and his mother are closer, because she is the psychological parent for him, and that detachment from her is liable to be a very grave experience for him (paragraph 7 of the judgment). Return of the child to his father would mean, therefore, return of the child to a parent who, if not strange to him, in recent years was not close to him or did not inspire trust and security, while the mother is the principle support on which the minor rests, in her lap he was raised, and on her image of support he relies.

The change in the minor's way of life since arriving in Israel

11. The material before us indicates that in the past two years, the mother, and the child in her wake, adapted to an ultra-Orthodox way of life and that the minor currently studies in an ultra-Orthodox school, in which everyone agrees he has integrated well.

Consequently, also if we take into account the declaration of the father – who is an atheist – that he is prepared to relate to the change in the minor's way of life and that he agrees to let him continue to obey the religious commandments, among them the commandment to keep the Sabbath and kashrut, and to let him attend a religious Jewish school in Belgium, there is clearly a recognizable and substantial religious-social-cultural gap between the minor and the environment to which he is being moved – a gap that surely will take time and effort to bridge. The expert mentioned this: "Even if all this takes place, it is clear that, from the child's perspective, the move will be extremely hard from these aspects. This is to integrate in a non-Jewish environment when this environment is that of the father who was declared the custodian" (protocol of the Family Court hearing of 27 December 2007, at p. 143). The expert further noted in this context: "The child underwent a transformation in identity. . . from a Jewish Belgian child without any meaningful ties to Judaism to an ultra-Orthodox Israeli Jewish with all that entails" (second opinion, at p. 14). In addition, regarding the minor's acclimatization in his present environment, the expert pointed out that all the markings indicate that the minor made a "successful adaptation in his studies. . . socially, behaviorally, and emotionally. He feels integrated in his family, in his surroundings, and expresses satisfaction for the most part" (expert opinion of 9 September 2007 (hereafter – the first opinion), at p. 15).

Thus, also on the background of the abilities that the minor proved in the past and present to acclimate to a new environment and way of life, the move to Belgium involves substantial and complicated change, which will surely require much time and substantial effort to adapt to. Given the fact that, as stated, the move is not only to a new religious-social-cultural environment but also to a parent with whom he has not had meaningful ties in recent years, it seems that it would not be an exaggeration to say that the expected difficulties are tenfold greater.

The personality traits of the minor and his objection to being returned to Belgium

12. Fourth and final, consideration should be given to the personality of the minor as understood by the expert. In this context, the expert noted in his opinion that, "The child is sensitive, vulnerable, and it appears that he is fragile and has trouble absorbing pressure, which causes him imbalance. He is at his best in clear (and not fuzzy), stable (and not shifting), and known (and not changing) situations, and then he functions impulsively. . . In the opposite situation (unclear, unstable, and strange), his judgment declines, he becomes confused, insufficient, and there are signs of anxiety and somatic symptoms" (first opinion, at p. 11). The expert further mentioned in this context in his testimony in court that, "the child is especially fragile and sensitive, vulnerable when pressure makes him imbalanced, and has a certain sensitivity and fragility that are not common in all children" (protocol of the Family Court hearing of 27 December 2007, at p. 152). Nor it is possible to ignore the objection that the minor expressed regarding return to his father. Though it was held that this does not justify deviating from the rule that an abducted minor is to be returned to the custodial parent, I believe that it indicates now

about the difficulties the minor can expect to have in acclimatizing to new surroundings and living with his father, to which he is not interested and as to which he has fears and anger, for whatever reason. Thus, in this context, the expert noted that the minor "expressed a firm position, a stubborn and extreme position, against returning to his father to Belgium" (first opinion, at p. 12), and that he told him that, "he wants to remain in Israel with his mother. He prefers dying to going to his father" (ibid., at p. 4). (Compare in these contexts the matter heard in Perm. Civ. App. 5253/00, *John Doe v. Anonymous* (unreported, 21 January 2001), where Justice Procaccia denied the application for permission to appeal a decision not to return an abducted child by his mother to Israel, on the background of concrete risk of suicide of the minor if he is returned to his father in the Untied States.)

Interim Conclusion

13. The expert, the Family Court, and the District Court all expected that the minor was liable to suffer substantial harm as a result of being returned to his father in Belgium, with the Family Court and the majority of the District Court believing that the key to reducing the aforesaid harm lies with the mother, in her joining the minor on his journey to Belgium and in her cooperation in promoting the ties with the father. On the other hand, they anticipated significant difficulties if the mother did not accompany the minor on his return to his father's house, to a new world from which he was severed a long time ago, one different culturally and religiously from the world to which he had adapted here, and which for him, apparently, he feels anger and fear. These difficulties and fears are aggravated in light of the special circumstances of the case as described above.

Alongside this, as Justice Procaccia points out, the two courts assumed, properly so in my opinion, that the possibility of the mother's accompanying the son remains, for various reasons, in doubt, when, in her words, having her join him as a condition for returning the minor to the father and the question of its benefit, are not unambiguous and are not clear in terms of value. In any event, I think it can be said that, under the circumstances, at this time, the chances are not very good, especially given the mother's declaration to the expert that she is not prepared to return to Belgium no matter what, and that she views the return as "Hell" (second opinion, at p. 4; and also the protocol of the Family Court hearing of 27 December 2007, Appendix 1 of the respondent's exhibits file, at p. 139). Before us, too, it was expressly stated that the mother does not intend to travel to Belgium with the minor. To this must also be added the mother's declared intention to marry again and the concern that proceedings might be initiated against her by the authorities in Belgium and France, which, too, support the assumption that the mother apparently will not join the minor and go with him to Belgium.

14. Files of this kind are always complicated and especially difficult. They cause all involved to lost sleep, both the courts and the various professionals, all of whom seek the proper and most suitable solution, both from the perspective of the Law and the Convention, and the legal and social principles specified therein, and from the perspective

of the principle of the best interest of the child, which is also given clear expression and a firm place in the Convention. As the District Court noted, it appears that, unfortunately, we do not find in this file a choice between a good solution and a bad solution. We must decide between a bad solution and a worse solution or between a bad solution and a slightly less bad solution. In these circumstances, and on the background of all the facts of the case as I have laid them out in brief and as described at length by the lower courts, I believe that we are required to try and find the way in which, also in the situation in which the mother does not join the minor on his journey to Belgium, that the return of the child to his father will be achieved in the easiest way, while reducing and minimizing the risk to which he will be exposed and by softening the expected difficulties resulting from the move. For this purpose, there is no doubt, in my opinion, that the cooperation, to the extent possible, of the mother is needed, as is the assistance and involvement of the professionals.

15. This result can be achieved, I believe, only if we order that the minor not be returned to Belgium immediately, and also not within the period of 21 days suggested by my colleague Justice Procaccia, but within a period of time of three and a half months, after conclusion of the current school year and no later than 15 July 2008, during which period substantial preparatory steps will be taken in advance of the move, in accordance with a plan that will be formulated by the welfare authorities under the supervision of the Family Court. In particular, I suggest that this plan include actions to get the minor acquainted with the features of the environment to which he is being moved (with respect to religion, culture, language, and the like); supervised meetings with the father with professional assistance, to renew the relationship between them; and actions to have the mother cooperate in renewing the relationship between the father and his son, and to check her willingness to join the minor on his journey, also for the initial stage. These actions will hopefully make the mother understand that the return of the child to Belgium is no longer a question and does not depend any longer on the judicial authorities, but is an accomplished fact which, the faster she realizes this fact, the better it will be for the minor. In addition, in this period of time, the father will provide, as he promised, confirmation from the prosecuting authorities in Belgium that they will not initiate any proceedings regarding abduction of the minor and violation of court orders in this context, and also, to the extent it depends on him, a similar approval from the French authorities. He must also provide an undertaking on his part not to initiate proceedings against the mother in the context of this case.

16. As Justice Procaccia mentions, the more time that passes and the longer the minor remains in the country to which he was abducted, the greater the difficulties on his return: "the risk grows that he will establish roots in the place, acclimate himself to a new framework of life, and it will be harder and more bitter to sever him from this environment to return him to the country of origin. . . [it] becomes harder to leave and the harm inherent in leaving that environment is aggravated" and "the difficulty in returning the child increases, both because of the intensity of the hostility to the custodial parent that grows with time, the deepening ties of the child with the abducting parent, and the child's

acclimatization in the new surroundings" (paragraphs 34 and 44 of her judgment). In these circumstances, it seems that there can be no dispute, and indeed my colleague also believes, that substantial time and effort are needed for the minor to readapt to the new surroundings to which he is being moved and from which he was taken so long ago, not to mention to the parent with whom he has not had an ongoing, meaningful relationship. Justice Procaccia, too, is of the opinion that it is necessary to give the minor and his mother the possibility to organize properly for the move, and also for action by the welfare authorities to prepare the minor and his mother for the move and to involve the father in the preparation process prior to the date of return. However, in her opinion, 21 days are sufficient to carry out these actions. I cannot agree. The complexity and sensitivity of the matter, on the backdrop of the long time that has passed and the special circumstances described above, indicate, in my opinion, that a significantly longer time is needed to really ease the return of the minor to his father. The so significant detachment between the minor and his father; his existing connection with, and dependence on, his mother; the existing dramatic gaps between the features of his present environment and those of the environment to which he is being moved; and also the minor's position regarding the move and his personality traits, all require under the circumstances of this case, that all the sides – the minor and his parents – be allowed a certain period of time to bridge the gaps, to mend the tears created and prevent damage or keep them to a minimum to the extent possible, with an eye to the future. Three weeks are insufficient to do this. In addition, as stated, I believe that our case requires substantial assistance from the welfare authorities (and compare the position of the expert in this context, at p. 14 of the second opinion), with the natural difficulty of accompaniment of this kind achieving positive results in such a short period as proposed by my colleague. Finally, I consider it important also to give the minor a chance to finish the current school year, with him integrating in the educational system in Belgium at the beginning of the next school year and not in the middle of the current school year, which is already in the second half, with all the difficulties this would entail.

It goes without saying in this context that, where a court orders return of an abducted minor to the country of origin, the time for return is set at the end of the school year (see, for example, HCJ 5891/91, *Koart v. Koart-Sharsho* (not reported, 24 May 1992); Appl. App. Meh. 902/07, *Jane Doe v. John Does*, paragraph 5 of the judgment of Justice Elon (not yet reported, 26 April 2007); compare also the comments in this context in *Jane Doe*, where such a possibility was rejected primarily for the reason that the minors' studies were not continuous and orderly, so their return would not interrupt an orderly study program (supra, at p. 574 of the decision). See also, in a different context, App. App. Meh. 27/06*, John Doe v. Jane Doe,* paragraph 24 of the judgment (not reported, 1 May 2006)). Indeed, this determination well reflects recognition of the importance of the stability, trust, and security in the minor's life, which in any event are about to be jolted, and the need for time to organize and prepare for the expected move, also under the obligation to carry out the provisions of the Convention.

17. In paragraph 50 of her judgment, my colleague Justice Procaccia expresses her opinion that further delay of a few months until returning the minor to his father is improper because of the greater expectation of difficulties in his separating from his mother, that this few-month period is significant in this context, that no professional opinion was brought supporting the need for an additional waiting period as stated, and that the litigants did not indicate they would cooperate in a step of this kind. She also believes that waiting for an additional interim period cannot be reconciled with the objectives of the Convention and the State of Israel's obligations under it.

First, I say that, in my opinion, greater harm is liable to be caused to the minor as a result of a sharp and swift detachment from his mother and the surroundings to which he has become accustomed, while placing him in an environment almost completely new for him and to the full custody of his father, with whom he has not had ties in recent years, or has had only sporadic ties.

Second, I say that I believe that it is very significant that the professionals did not expressly state a need for such a preparatory period. As I see it, it is sufficient that the professionals, in their comprehensive and thorough examinations, expressed an explicit position as regards the significant difficulties and risks awaiting the minor as a result of his return to his father, to learn from their position that preparing the minor for the move and to soften and reduce the anticipated difficulties would likely bring a benefit, and in any event not cause additional harm to that which is created in any event. Nor is it proper, in my opinion, to view the fact that the litigants did not state their willingness to cooperate in softening the return process, as being dispositive, this for the reason that they were not actually offered the possibility, and even if it was presented briefly in the course of the hearing, they were not requested to seriously consider it, and one would think that they did not do so, given that the mother maintained the fervent hope that the minor would remain with her, and the father was not present at the hearing and his counsel insisted on exhausting the proceedings and the immediate return of the minor in light of the great amount of time that had passed. In any event, I hope that, with the judicial proceedings not at an end, the two sides will use the time proposed for preparing the minor to renew ties with his father and for the move to his father's home, as well as to prepare them for the expected change.

Finally, with respect to the contended harm to the objectives of the Convention and the obligations of the State of Israel under it. As I noted at the outset of my comments, there is no dispute that the legal proceedings under the Law and the Convention are not the stage to investigate thoroughly and completely the best interest of the minor. There is also no dispute that the State of Israel is committed to carrying out the duties that it imposed on itself in the framework of the Convention. As has been made clear in the past, the arrangement under the Convention has a dual objective:

> [T]o insure respect for the rule and enforcement of the law, and to deter one of the parents from taking the law into his own hands. The Convention is also intended to prevent harm to the wellbeing of the

> minor, who is uprooted as a result of the abduction from his natural surroundings and from the custodial parent, and taken to strange surroundings, which are forced on him by the other parent. Underlying the Convention is the conception that the best interest of the child requires his immediate return to the custody of the parent in the country from which he was abducted.
>
> (Appl. App. Meh. 672/06, *John Doe v. Jane Doe* (not reported, 15 October 2006)

Thus, the principle of the best interest of the child is not foreign to the Convention, even if its center of gravity is that the forum before which the question of the best interest of the child is the state in which he lived prior to being abducted (Appl. App. Meh. 902/07, *Jane Doe v. John Does* (not reported, 26 April 2007)). The fact that the provisions of the Convention were formulated in light of the principle of the best interest of the child and the conception whereby the best interest of a minor requires "return to the previous situation" as it was prior to the abduction, at least until the end of the legal proceeding before us, it is important, in my view, also in a case of the present kind. This is so because, where much time has passed from the time of the abduction to the time of return of the abducted child to the country of origin, as in our case, and when the operative result of our decision is to enforce the principle stated in the Law and in the Convention and to order return of the minor to the custodial parent in the country of origin, a short delay in the time for returning the minor for the purpose of advancing his best interest does not undermine the Convention and compliance of the State of Israel with its obligations thereunder. Furthermore, it cannot be ignored that, under the circumstances in our case, the minor has been detached from his father and country of origin for a number of years. In such a situation, the obligation of Israel under the Convention remains in place, but it is clear that the conception that views the best interest of the child to be returned immediately to the country from which he was abducted, a conception that underlies also the need for stability in the child's life, no longer has the same force. Therefore, when it is decided that, in the present case, there is no justification in deviating from the commandments of the Convention and the Law, and in the said circumstances, it seems that a short and appropriate delay in returning the minor to Belgium for the purpose of preparing him for the change he is going to experience and to minimize, to the extent possible, the great harm that he will indisputably suffer, do not contradict the Convention and Law, but are consistent with the principle of the best interest of the child that underlies it. To sum up this point: our obligation to respect the Law and the Convention is not in dispute, it is clear and we do not have to ponder over it. However, when it is possible to meet this obligation and at the same time reduce the great harm that awaits the minor, which the expert said would occur, by only a short delay in carrying out the decision so as to lay the groundwork for the move to the country of origin does not detract one bit from performing the commandments of the Convention, but actually comports with the principle of the best interest of the child that lies at its foundation. I emphasize that, in our case, the delay is

extremely short, particularly if we take into account the period of time that the minor has remained in the country to which he was abducted.

Concluding Remarks

18. Someone might wonder why I wrote as much as I did given that the controversy between my colleague and me comes down to the question of the *time* of the return of the minor to his father, and not to the question of the *very obligation* of his return, with which I agree as stated, albeit with an uneasy feeling, with the result reached by my colleague and the two lower courts. On this, I say: the time factor is complicated and multifaceted. Undoubtedly, many times, possibly in most cases, passage of much time requires a swift and immediate solution to rectify the situation, this, inter alia, because of the fear that lengthy proceedings and the existing situation will cause further harm – either to one of the persons involved or to broader interests. Other times, contrarily, the present case being one such instance, when so much time has passed from the time of the wrongdoing – in our case, the time that the minor was abducted – an attempt to rectify the situation by immediate, expeditious, and abrupt action is liable, in my view, to worsen matters and even frustrate or diminish the chance of success of a solution that, under the circumstances, is considered the lesser evil. In the context of our matter and other contexts, the time factor is liable then to be very significant. If this is insufficient, this factor entails special significance when we are dealing with minors and with decisions regarding their best interest and safety. In this context, it seems that we cannot find more appropriate words than those of Vice-President (ret.) Cheshin in another complicated case, the spirit of which, although it involved adoption proceedings, holds true also in our case:

> Mr. Time, that fourth dimension accompanying us all our lives, is a dimension of greatest import in the life of a minor. Alongside Mrs. Mother, Mr. Father, and Mr. Public, Mr. Time stands firmly at the foundation of the system. . . . Mr. Time is not a secondary element in the system. It holds an honored place as a primary and decisive element.
>
> . . .
>
> Mr. Time has great weight in the life of every person – it may even be said that life is time – however, Mr. Time holds greater weight in the life of a minor.
>
> (App. App. Meh. 5082/05, *The Attorney General v. John Doe*, paragraphs 2-3 of the judgment of Justice Cheshin (not reported, 26 October 2005))

Therefore, if my opinion were to be accepted, we would order as stated in paragraph 52 of the judgment of Justice Procaccia, provided that in subsection (3) of this paragraph it is be stated that the return of the minor to Belgium is to be carried out no later than 15 July 2008. During the time until this date, meaningful preparatory measures will be taken for the minor, and to the extent possible also for his father and mother, in accordance with a professional plan to be formulated by the welfare authorities, under the supervision of the Family Court. This plan will include actions to acquaint the minor with

the features of the environment to which he will be moved, to prepare the renewal of relations with the father, which will include to the extent possible also meetings with the father with professional accompaniment, and to try and get the mother to cooperate in renewing the relations between the minor and his father, as well as examine her willingness to join the minor on his journey to Belgium, if only for the initial period. I further propose holding that, to the extent that the mother indeed decides to join the minor on his journey to Belgium, the father will be required to pay the expenses for the mother and minor to go to Belgium and stay there until decision is made by the competent court in Belgium, the assumption being, of course, that proceedings regarding custody of the minor will be conducted in Belgium. In such case, the father would be required to provide, prior to 15 July 2008, confirmation from the prosecuting authorities in Belgium and France that they will not prosecute the mother for abduction or in regards thereto.

In addition, I propose to my colleagues not to give an order for expenses in this proceeding.

Following these Remarks

19. After I completed my opinion, I was given the opinion of my colleague, Justice Jubran. Under the situation that has been created, with my desire being to minimize as much as possible the harm awaiting the minor, and taking into account the provisions of the end of section 190(b) of the Rules of Civil Procedure, 5744 – 1984, I have decided to join the holding of Justice Jubran that the minor be returned to Belgium no later than 1 June 2008. As I explained above, I believe that, to take the preparatory actions needed, a longer period of time should be allowed. However, it is clear to me that it is better to carry out the preparatory actions until 1 June 2008, which will enable a certain reduction of harm, which could not be achieved, in my opinion, if the minor is returned to Belgium within in a shorter period of time. With the current situation offering these two options, I concur with the time proposed by Justice Jubran, with the grounds for my judgment remaining entirely as stated. This period will be used to carry out the preparatory measures in advance of the move, as delineated in section 18 of my opinion.

Justice

Justice S. Jubran:

The case before us, on which we must decide, is extremely hard. Without doubt, we lose sleep over cases like this. In the circumstances of the case, it is hard to know the best solution, and as my colleague Justice Arbel notes, it appears that we must decide between a bad solution and a less bad solution or between a bad solution and a little bit less bad solution.

Everyone agrees, and there is no dispute on this, that there is no option but to return the minor to his father, who has custodial rights over the child in the country of origin, Belgium.

However, in light of the fact that the minor has lived and remained with his mother since he was five years old; in light of the fact that the mother is now the dominant parental figure in the minor's life and the child is extremely attached to her; in light of the fact that the expert's opinion indicates that severance from the mother is liable to be an extremely harsh experience for the minor; in light of the fact that the minor has not seen his father for two years and prior to the abduction saw him only in a visitation framework, at infrequent intervals; in light of the fact that, for four years the minor did not visit in Belgium, and Belgium is an environment that is completely new for him; in light of the fact that the minor expressed his objection to returning to his father, and also in light of the fact that it is questionable if the mother will join him on the journey to Belgium and it seems that the likelihood of her joining him is not great, one thing is clear to all – that we must find the way to make the return of the minor to his father in Belgium as easy as possible for him, in a way that minimizes the psychological harm in particular, and the harm to which the minor is liable to be exposed in general, and to soften the difficulties that are liable to occur.

My colleague Justice A. Procaccia believes that the minor should be returned to Belgium within 21 days, inasmuch the more that time passes and the longer that the minor remains in the country to which he was abducted, the difficulties in returning him increase, and he is liable to adapt to the place, to intensify his ties with this mother, to integrate in the new way of life, thus making detachment from the environment and his return to Belgium substantially harder. In addition, she contends, waiting for an additional interim period for purposes of the return cannot be reconciled with the objectives of the Convention and with the obligation of Israel to the states that are party to the Convention to return an abducted child immediately, which is the case before us.

Contrarily, my colleague Justice E. Arbel believes that the minor should be returned to Belgium within a period of three and a half months, after completion of the current school year, and no later than 15 July 2008, during which time substantial preparatory steps will be taken in advance of the move, in accordance with a plan that the welfare authorities will formulate and under the supervision of the Family Court.

My colleagues agree that it is necessary to give the minor and his mother time to organize properly for the move and also for the welfare authorities to prepare the minor and his mother for the move to Belgium and also to involve the father in the preparatory process prior to the time of return. However, my college Justice Procaccia is of the opinion, as stated, that 21 days are sufficient to perform these actions, inasmuch as further wait of a number of months until the minor is returned to his father is liable to intensify the child's difficulty in separating from his mother, while my colleague Justice Arbel thinks, as stated, that the complexity and sensitivity of the case requires a significantly longer period of time

of three and a half months to bridge the gaps that have been created, to mend the tear and minimize the harm.

Following much thought and examination, I have concluded that a time must be set for return of the minor to his father in Belgium that, on the one hand, enables sufficient time to organize in advance of the move and for the welfare authorities to prepare the minor and his mother for the move, and to involve the father in the preparatory process prior to the time of return, so that the minor's detachment from his mother and the environment to which he has been accustomed in recent years is not abrupt and cold, and on the other hand, a time that will not be too long, so that it will not intensify and increase the difficulty of detachment of the minor from his mother at the time of return. In these circumstances, I would propose to my colleagues that we order the return of the minor to Belgium within a two-month period and no later than 1 June 2008, during which period it is possible to carry out all the significant preparations in advance of the move, in accordance with a professional plan prepared by the welfare authorities and under the supervision of the Family Court. It is most important that, in this period of time, the minor learns about the environment to which he is being moved and meets with his father to renew their relationship, and that actions are taken to achieve the mother's cooperation regarding renewal of ties between the minor and his father and regarding her joining the minor on his journey to Belgium, also for the initial settling-in period. In the event that the mother agrees to join the minor on his return to Belgium, if only for the initial settling-in period, the father will be required to provide prior to the time of return, meaning prior to 1 June 2008, confirmation from the prosecuting authorities in Belgium and France that they will not prosecute the mother for abducting the child or in relation thereto, and that the father submits to the Family Court an undertaking not to initiate himself legal proceedings against the mother for abducting the minor or in relation thereto, and that the conditions set by the Family Court in Fam. Comp. 3450/07 are met.

It is my hope that the mother will come to realize that the key to substantial lessening of harm awaiting the minor upon his return to Belgium depends on her joining him on his journey and on cooperating in improving the ties between the minor and his father, and will thus decide to join the minor on his return to Belgium, if only for a short period, which will be a new, significant path for the minor and ease the difficulties that await him. If the mother announces that she agrees to accompany the minor to Belgium, the conditions specified in sections f(1) to (5) [of paragraph 17] of the Family Court's judgment in Fam. Comp. 3450/07 shall apply.

Also, I suggest to my colleagues that, in the circumstances of the case herein, that an order for expenses not be given.

Justice

Accordingly, the result is by majority opinion as stated in the judgment of Justice Jubran.

Given today, 3 Nissan 57678 (8 April 2008).

Justice Justice Justice