EGMR 41615/07 vom 6. Juli 2010

Hudoc Ch, 2010-07-06, FR

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FR: CourEDH 41615/07 du 6 juillet 2010

IT: CorteEDU 41615/07 del 6 luglio 2010

Regeste

Violation of Art. 8 (in case of enforcement of the Federal Court's judgment); Violation: 8

Erwägungen

E. 6

On 22 November 2007 the Court decided to give notice to the Government of the part of the application concerning the complaint under Article 8. It further decided that the admissibility and merits of the case would be examined at the same time (Article 29 § 3 of the Convention). It also decided to give the application priority under Rule 41.

E. 7

The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 in fine), the parties replied in writing to each other’s observations.

E. 8

On 14 February 2008 written comments were received from Mr Shai Shuruk, the second applicant’s father, who had been granted leave under Rule 44 § 2 to intervene as a third party.

E. 9

On 8 January 2009 a Chamber composed of Christos Rozakis, President, Anatoly Kovler, Elisabeth Steiner, Dean Spielmann, Sverre Erik Jebens, Giorgio Malinverni and George Nicolaou, judges, and Søren Nielsen, Section Registrar, delivered a judgment. Unanimously, it declared the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible. By four votes to three it found that there had been no violation of Article 8. The separate dissenting opinions of Judges Kovler, Steiner and Spielmann were appended to the judgment.

E. 10

On 31 March 2009 the applicants requested that the case be referred to the Grand Chamber under Article 43 of the Convention and Rule 73. The panel of the Grand Chamber granted the request on 5 June 2009. It moreover confirmed the application of the interim measures that had been indicated under Rule 39.

E. 11

The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

E. 12

The applicants and the Government each filed observations on the merits.

E. 13

Observations were also received from Mr Shuruk. However, as they did not comply with the conditions laid down in Rule 44 §§ 2 and 4 of the Rules of Court, in conjunction with Article 36 § 2 of the Convention, they were not added to the case file.

E. 14

A hearing took place in public in the Human Rights Building, Strasbourg, on 7 October 2009 (Rule 59 § 3). There appeared before the Court: (a) for the Government Mr F. Schürmann , Head of European law and international human rights section, Federal Office of Justice, Agent , Mr D. Urwyler , acting head of private international law section, Federal Office of Justice, Counsel , Ms C. Ehrich, technical adviser, European law and international human rights section, Federal Office of Justice, Adviser ; (b) for the applicants Mr A. Lestourneaud , lawyer, Ms P. Lestourneaud , lawyer, Mr M.-E. Favre , Mr Y. Zander , Counsel , Ms M. Marquez-Lestourneaud , Adviser . The first applicant was also present. The Court heard addresses by Mr Lestourneaud, Ms Lestourneaud, Mr Favre, Mr Zander and Mr Schürmann. It also heard the replies of the parties' representatives to questions from judges. THE FACTS I. THE CIRCUMSTANCES OF THE CASE

E. 15

The applicants were born in 1959 and 2003 respectively and live in Lausanne (Canton of Vaud).

E. 16

The facts as submitted by the parties may be summarised as follows.

E. 17

The first applicant, who refers to herself as Jewish, decided to settle in Israel in 1999. There she met an Israeli national, who is also Jewish, and they were married on 23 October 2001 in Israel. They had a son, Noam, who was born in Tel Aviv on 10 June 2003. He has Israeli and Swiss nationality.

E. 18

According to the applicants, in the autumn of 2003 the child's father joined the Jewish "Lubavitch" movement, which they have described as an ultra-orthodox, radical movement that is known for its zealous proselytising.

E. 19

Marital difficulties then arose, and the first applicant, fearing that her husband would take their son to a "Chabad-Lubavitch" community abroad for religious indoctrination, applied to the Tel Aviv Family Court for a ne exeat order to prevent Noam's removal from Israel. On 20 June 2004 the court made a ne exeat order that was to expire when the child attained his majority, that is to say on 10 June 2021, unless annulled by the court in the meantime.

E. 20

In an interim decision of 27 June 2004, the same court granted "temporary custody" of the child to the mother and requested the Tel Aviv social services to draw up an urgent welfare report. The "guardianship" of the child was to be exercised jointly by both parents.

E. 21

In a decision of 17 November 2004, the court, on the recommendation of a social worker, confirmed the first applicant's custody of the child and granted a right of visitation to the father.

E. 22

On 10 January 2005 the Israeli social services were obliged to intervene. They instructed the parents to live apart, in the interest of the child. The letter they sent to the parents read as follows: "1. We take the view that to maintain a common home and live, as you have been doing, under the same roof is not in the child's interest – and that is an understatement. It appears to us that the environment of constant recrimination and invective created by Shai against Isabelle has caused her permanent stress that may prevent her from fulfilling her role as a mother, when she is already faced with the need to find a job in order to support herself and pay the rent. It should be noted that Shai pays neither the maintenance ordered by the court nor the rent. We felt that some of Shai's recriminations verged on the absurd. He has decided that the child's illness, like the glandular fever and the epileptic fit that the child has suffered, are the mother's fault. Shai persists in asserting that Isabelle 'is not a good mother'; he does not accept the fact that the child attends nursery school, and claims that the medical certificates are insufficient. We advise Shai to speak to the doctors who are treating the child. Although he is maintained by Isabelle, Shai demands that the food complies to a very strict degree with Jewish dietary laws, observing one dietary rule or another ... There is no doubt that living apart will resolve some of these problems. We find that Shai creates a hostile environment at home – an atmosphere of verbal aggression and threats that terrorise the mother. In the light of the foregoing, we cannot but find that the mother is exposed to mental harassment and that the maintaining of a common home is harmful to the child. 2. Under the powers conferred on us by sections 19 and 68 of the Law on legal capacity, we reiterate our warning to Shai, calling on him not to take his child with him to engage in religious proselytising on the public highway, where he encourages passers-by to put on phylacteries and collects donations. Likewise, the father is requested not to take the child with him to the synagogue for a whole day at a time. We emphasise that the provisions on access in respect of the child are intended to bring father and child together for their common activities, and not for other purposes."

E. 23

That same day, the first applicant filed a complaint with the police accusing her husband of assault.

E. 24

In an injunction of 12 January 2005 the competent judge of the Tel Aviv Family Court, upon an urgent application lodged earlier that day by the first applicant, prohibited the father from entering the child's nursery school or the first applicant's flat, from disturbing or harassing her in any manner whatsoever, and from carrying or possessing a weapon. Restrictions were also imposed on the access right granted to the father, who was now authorised to see the child only twice a week under the supervision of the social services at a contact centre in Tel Aviv.

E. 25

The couple's divorce was pronounced on 10 February 2005 with no change in the attribution of guardianship.

E. 26
As the father had defaulted on his maintenance payments to the first applicant, an arrest warrant was issued against him on 20 March 2005.

E. 27
In a decision of 27 March 2005, a judge of the Tel Aviv Family Court dismissed an application lodged by the first applicant for the annulment of the ne exeat order prohibiting the removal of the second applicant from Israel. The judge found, in particular, that there was a serious risk that the mother would not return to Israel with the child after visiting her family abroad, in view of the fact that she had no ties in that country.

E. 28
On 24 June 2005 the first applicant secretly left Israel for Switzerland with her son.

E. 29
On 27 June 2005 Noam's father contacted the Israeli Central Authority, which was unable to locate the child until 21 May 2006, when Interpol Jerusalem forwarded him a note from Interpol Berne indicating that the first applicant was in Switzerland.

E. 30
On 22 May 2006 the Israeli Ministry of Justice transmitted to the Swiss Federal Office of Justice an application for the return of the child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (the "Hague Convention"; see paragraph 57 below). In support of its application it indicated, among other things, that Interpol Berne had notified it only the day before that Noam and his mother were living in Lausanne and that the latter had applied for the renewal of her Swiss passport.

E. 31
In a decision of 30 May 2006, delivered upon an application by the child's father, the Tel Aviv Family Court observed that the child was habitually resident in Tel Aviv and that, as of 24 June 2005, the date of the applicants' departure, the parents had been joint guardians of their son, with the mother having temporary custody and the father a right of access. The court held that the child's removal from Israel without the father's consent had been wrongful within the meaning of Article 3 of the Hague Convention.

E. 32
On 8 June 2006 the child's father lodged an application with the Lausanne District Justice of the Peace seeking an order for his son's return to Israel. He requested in particular, as an extremely urgent measure, that the Lausanne Passport Office be ordered to retain the applicants' Swiss passports.

E. 33
On 12 June 2006 the Justice of the Peace made an order allowing the application by Noam's father for an extremely urgent measure.

E. 34
Following a new application for an extremely urgent measure, faxed by the child's father on 27 June 2006, the Justice of the Peace, in a provisional-measures order made that same day, ordered the first applicant to deposit her passport and that of Noam immediately with the

court registry of the Justice of the Peace, on pain of criminal sanctions for refusal to comply with the decision of an authority.

E. 35

The first applicant, assisted by counsel, and the legal representative of the father, whose obligation to appear in person had been waived, made representations to the Justice of the Peace on 18 July 2006.

E. 36

In a decision of 29 August 2006, after a hearing, the father's application was dismissed by the Lausanne District Justice of the Peace. The court took the view that, whilst the child's removal had been wrongful within the meaning of Article 3 of the Hague Convention, it had to apply Article 13, sub-paragraph (b), of that Convention, as there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

E. 37

On 25 September 2006 the father appealed against that decision before the Guardianship Division (chambre des tutelles) of the Vaud Cantonal Court, which ordered an expert's report and for that purpose appointed Dr B., a paediatrician and child psychiatrist. In his report, delivered on 16 April 2007, he stated that the child's return to Israel with his mother would expose him to a risk of psychological harm whose intensity could not be assessed without ascertaining the conditions of that return, in particular the conditions awaiting the mother and their potential repercussions for the child; that the return of the child without his mother would expose him to a risk of major psychological harm; and that the maintaining of the status quo would also represent for the child a risk of major psychological harm in the long term.

E. 38

On 30 November 2006 the competent court in Tel Aviv cancelled an indictment for domestic violence that the second wife of Noam's father had initiated, as she had left the country.

E. 39

In a letter of 12 March 2007, in connection with the proceedings to secure the child's return, the Israeli Central Authority made the following observations to its Swiss counterpart: "We acknowledge receipt of your letter dated 7 February 2007. We wish to respond to the questions raised in that letter as follows: Mr Shuruk states that in the event that the mother refuses to return to Israel, he will take care of the child. He currently lives in an apartment with a roommate, however if the child is returned to Israel, he states that he will immediately secure an apartment to live in with the child. He is currently working and studying at an institution for religious learning, from 9 a.m. to 3 p.m. The child would be in day care/nursery school during those hours. Mr Shuruk points out that prior to the child's abduction to Switzerland, he was in day care as the mother worked. Mr Shuruk advises that his extended family would provide a back-up system for him in the event that he would need assistance from time to time. The Appeal Court in Switzerland has raised a concern as to how Mr Shuruk can care for the child when his right of access has been restricted. As we stated in our letter to your office dated 28 September 2006, it must be remembered that according to the report of the social worker in Israel, the father and child had a wonderful

relationship. There were plans to expand the visitation, to include overnight visits, however these plans were interrupted as a result of the mother's abduction of the child. If the mother were to refuse to return to Israel with the child, she would in effect be agreeing to the father having de facto custody, and Mr Shuruk could apply to the Israeli court to grant an order reflecting the new reality. You further asked what steps could be taken to protect the mother should she return, given her allegations of violence on the part of Mr Shuruk. Mr Shuruk denies all such allegations. Furthermore, we are attaching a copy of the decision of the Tel Aviv Magistrate's Court dated 30 November 2006, together with a translation into English. This decision concerned an indictment filed against Mr Shuruk for allegations of assault by his second wife. As you can see, the complainant apparently left Israel and could not be located, therefore the court cancelled the indictment against Mr Shuruk. In any event, we wish to draw your attention to the law in Israel that provides protection in cases of allegations of family violence; that law is the Prevention of Family Violence Law 1991. We are attaching a translation of that law into English, and an unofficial translation into French. Section 2 provides for protection orders that can be made. Therefore, if the mother has any concerns for her safety, she can apply to the court in Israel and request any necessary protection. Her allegations should not constitute a basis for the Swiss court to refuse to return the child to Israel. You informed us that the court ordered a psychological evaluation of the child. We must express our concern in this respect. Such evaluation was not ordered by the lower court, and we wish to inquire as to why it has been ordered at this late stage. It must be remembered that the child was abducted by the mother in June 2005 . The child has not seen his father in almost two years. During this period he has been subject to the sole influence of the mother. We therefore question what can be gained by a psychological evaluation of the child. It must be remembered that this is a Hague Convention proceeding, and not a custody case. It seems that the mother is trying to prove that the child will be psychologically damaged by being separated from her if he is returned to Israel. However this can be avoided if the mother will act in the child's best interests and return with him. As we stated in our letter of 28 September 2006, the mother does not appear to have any justifiable reason under the Hague Convention to prevent her return ..."

E. 40

In a letter of 30 April 2007 to the lawyer acting for Noam's father, the Israeli Central Authority made the following observations on the question whether the first applicant would be prosecuted or imprisoned if she returned to Israel: "... You have requested that we inform you as to the legal consequences that would face the mother, Isabelle Neulinger, should she return to Israel with the child, as a result of the act of abduction of the child. In terms of criminal consequences for the act of abduction, abduction is an offence under Israel's Penal Law 1977 and carries a possible penalty of imprisonment. However , according to the guidelines of the State Attorney of Israel, upon receipt of a criminal complaint of parental abduction, the police are to forward the matter to the Central Authority under the Hague Convention for guidelines as to how to proceed in the matter. The State Attorney's guidelines provide that criminal proceedings should be commenced only in very exceptional circumstances . In Ms Neulinger's case, should she comply with an order to return the child to Israel, not disappear with the child upon her arrival to Israel, cooperate with the Israeli authorities and comply with the existing court order for supervised visitation by Mr Shuruk (pending any further decision), the Central Authority for Israel would positively consider instructing the Israel Police to close the criminal file for lack of public interest, provided that Ms Neulinger not commit further acts of abjection with

respect to the child. In terms of civil consequences, we can inform you that the sole consideration in both the Israeli civil courts and Rabbinical courts, when deciding matters such as custody and access, is the best interests of the child ..."

E. 41

In a judgment of 22 May 2007, the Guardianship Division of the Vaud Cantonal Court dismissed the father's appeal. Having carried out an additional investigation, and taking into account the expert's report by Dr B. of 16 April 2007, it took the view that the child's return carried a grave risk of psychological harm, whether or not he was accompanied by his mother, and would also place him in an intolerable situation. It therefore considered that the conditions of Article 13, sub-paragraph (b), of the Hague Convention were met. Finding, however, that the child could not be deprived of all relations with his father, it prescribed measures with a view to rebuilding the personal relationship between them. Its judgment read as follows: "4. (d) ... In response to the questions put to him, expert B. ... states in his conclusions that Noam's return to Israel with his mother would expose him to psychological harm, the intensity of which cannot be assessed without knowledge of the conditions of such return, in particular those awaiting his mother and the repercussions which they might have on the child; as regards the child's return to Israel without his mother, [the expert] is of the opinion that it would expose him to major psychological harm, as described in detail in the report. In the 'discussion' part of his report the expert emphasises that Noam's situation seems at present to be completely blocked. On the one hand, given his young age and his complete lack of recollection of his first years in Israel, including of his father, any visit to that country without his mother, even a brief visit, and even if the legal situation allowed it, would be psychologically highly traumatic, involving extreme separation-related anxiety and a major risk of severe depression. On the other hand, the possibility of the mother's return to Israel with Noam, even for a short period, is totally out of the question for the mother. In answer to the question whether Noam's return to Israel might place the child in an intolerable situation, the expert replied that it was 'clearly' the conditions of the child's possible return to Israel that would or would not render the situation intolerable. He observed that, likewise, it was the conditions of his continuing residence in Switzerland that would or would not render his situation there intolerable and that the maintaining of the status quo represented a long-term major psychological risk for the child, with the result that, if there were no understanding between his parents, an agreement would urgently be required between the child protection services of the States of the parents' residence in order to make up for their failure to act. In accordance with Article 13, third paragraph, of the Hague Convention, this court also requested the Israeli Central Authority to provide information about the child's social background, by answering the following questions: 'in the event that, as she has stated, the mother does not return to Israel, who will take care of the child and where will he stay? As the father does not appear to be in gainful employment, who will provide for the child's upkeep? As the right of access has been restricted by judicial decisions, what measures will be taken to ensure that the exercise of the right of access does not harm the child's physical and psychological welfare?' In its letter of 12 March 2007 the Israeli Central Authority did not really answer the questions put to it, so it is impossible to be satisfied about the interests of the child. The Central Authority merely mentioned the appellant's intentions concerning his son if his son should return to Israel without his mother, in the following terms: '[I]n the event that Noam's mother refuses to return to Israel, the father will take care of the child. He currently lives in an apartment with a roommate; however if the child is returned to Israel, he states

that he will immediately secure an apartment to live in with the child. He is currently working and studying at an institution for religious learning, from 9 a.m. to 3 p.m. The child would be in day care/nursery school during those hours. Mr Shuruk points out that prior to the child's abduction to Switzerland, he was in day care as the mother worked. Mr Shuruk advises that his extended family would provide a back-up system for him in the event that he needs assistance from time to time.' As to the issue of how Shai Shuruk would be able to take care of the child, given that he has only a restricted right of access, the Israeli Central Authority emphasised: 'As we stated in our findings of 28 September 2006, according to the report of the social worker in Israel, the father and child had a wonderful relationship. There were plans to expand the visitation, to include overnight visits; however these plans were interrupted as a result of the mother's abduction of the child.' The Israeli Central Authority concluded that '[i]f the mother were to refuse to return to Israel with the child, she would in effect be agreeing to the father having de facto custody, and Mr Shuruk could apply to the Israeli court to grant an order reflecting the new reality'. It should be noted that neither the conclusions of the child psychiatrist's report nor the information provided by the Israeli Central Authority are conducive to Noam's return to Israel. Not only would such a return entail a grave risk of exposure to psychological harm, whether or not he is accompanied by his mother, it would also place him again in an intolerable situation. Firstly, the psychiatric expert observes that if the child returns to Israel with his mother, he will risk being exposed to psychological harm whose intensity cannot be assessed without knowledge of the conditions of that return. In that connection, the Guardianship Division is of the opinion that, since the child's removal to Israel, even if his mother accompanies him, may expose the child to psychological harm and since, unlike the 'classic scenario' envisaged by the Hague Convention, the respondent has custody of her son, she cannot reasonably be required to return to Israel. An additional factor is that the mother's return to Israel would also undermine the child's economic security, since the mother would be required to find a job there, in order to provide not only for her own needs but also for those of her son. The fact that the appellant has never provided for his child's upkeep and that he is known to earn only 300 [Swiss] francs per month cannot be disregarded when the interests of the child are taken into consideration in that context. Lastly, it must be considered that the requirement of the mother's return is disproportionate to the reason for the return: the object of the Hague Convention is to put the child back into the legal situation in which he was before he was abducted. However, the present return is requested in order to allow the appellant to exercise his right to a personal relationship, a right which is shown to have been exercised before the child's departure under the supervision of the social services in the form of two weekly meetings of two hours each. To require a mother to uproot herself in order to permit the exercise of such a restricted right of access, when the child's return certainly entails a risk of grave psychological harm, in view of the conditions of insecurity in which the return will take place, constitutes an intolerable situation for the child within the meaning of Article 13, sub-paragraph (b), of the Hague Convention. As to Noam's return to Israel without his mother, the expert is of the opinion that it would be psychologically highly traumatic, involving extreme separation anxiety and a major risk of severe depression, which can be explained by his young age and his total lack of recollection of his first years in Israel, including of his father. That element is sufficient for a finding that the condition laid down in Article 13, sub-paragraph (b), is satisfied. In addition, the information provided by the Israeli Central Authority about the arrangements envisaged in the event that the child returns without his mother are, at the very least, a matter for concern: although the

appellant has, legally speaking, only a very restricted right of access, under supervision, it is envisaged, according to the information provided by the Central Authority, that the appellant will take his son home (without any guarantee that he will by then have an individual flat) and will thus have de facto custody. In that connection, the Israeli Central Authority claims that by refusing to return to Israel with her son, the respondent is implicitly acquiescing in that change of situation – a new reality of which the appellant will then seek validation by the Israeli judicial authorities. That does not correspond to the aim pursued by the Hague Convention, which provides for the immediate return of the unlawfully removed child in order to put it back in the status quo ante. Such a return cannot therefore be ordered on the basis of the Hague Convention, and it is emphasised that there is no doubt that Noam's return to Israel in such circumstances would definitely expose him to a risk of major psychological harm, owing not only to the fact that he would be abruptly separated from his mother, when she has been his principal parental reference since he was born and has been the only one to provide for his upkeep, but also to the fact that he will be just as abruptly faced with a father of whose existence he has just learnt. In the light of the foregoing, the appeal on this point must be dismissed. ... 5. ... In the present case, it is apparent from the file that Noam Shuruk has lived with his mother, who has custody of him, for at least one year in Lausanne. Thus, the Justice of the Peace of the District of Lausanne had jurisdiction, ratione loci and ratione materiae , to take the disputed protective measure. As to the merits, it is sufficient to state that, since the child has no recollection of his father, owing to the process of physiological amnesia attributable to his very young age, there are valid grounds for avoiding an abrupt reunion, as the welfare of the child requires that the resumption of a personal relationship with his father should take place calmly and gradually, after he has been properly prepared for that new situation, as may be seen from the expert's convincing submissions on that point. The ground of appeal is therefore ill-founded and must be rejected ..."

E. 42

The father lodged a civil appeal with the Federal Court seeking the quashing of the Cantonal Court's judgment and the return of the child to Israel. He alleged that the court had misapplied Article 13, sub-paragraph (b), of the Hague Convention, principally, and Article 3 of the United Nations Convention on the Rights of the Child, secondarily.

E. 43

In a decision of 27 June 2007, the President of the appropriate division of the Federal Court granted the father's request for immediate suspension of the judgment.

E. 44

In a judgment of 16 August 2007, served on the first applicant's lawyer on 21 September 2007, the Federal Court allowed the father's appeal. The relevant passages of its judgment read as follows: "3. The object of the Hague Convention on the Civil Aspects of International Child Abduction is to secure the prompt return of children wrongfully removed to or retained in any Contracting State (Article 1, sub-paragraph (a)). The removal or the retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention (Article 3, sub-paragraph (a)). 'Rights of custody' include rights relating to the care of the person of the child and, in particular, the right to determine the

child’s place of residence (Article 5 (a)). In the present case it is not in dispute that the child’s removal to Switzerland was wrongful, since the father retained, jointly with the respondent, the right of ‘guardianship’, which under Israeli law includes the right to decide on the child’s residence. Moreover, since the application for return was presented within a period of one year after the removal, the respondent cannot deny either that, in principle, pursuant to Article 12 of the Hague Convention, the child’s prompt return should be ordered. The only matter in dispute is therefore the question whether an exception to that return may be applied under Article 13, sub-paragraph (b), of the Hague Convention. 4. According to the appellant, by refusing to order the child’s return to Israel, the Cantonal Court misapplied Article 13, sub-paragraph (b), of the Hague Convention. 4.1 Under Article 13, sub-paragraph (b), of the Hague Convention, in respect of which the Federal Court is entitled to examine matters of compliance freely (section 95(b) of the Federal Court Act), the judicial authority of the requested State is not bound to order the child’s return when the person opposing that return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The exceptions to return provided for under Article 13 of the Hague Convention must be interpreted restrictively; the parent who has abducted the child cannot take advantage of his or her unlawful conduct (judgment 5P.71/2003 of 27 March 2003, recital 2.2, in FamPra.ch 2003, p. 718). Only grave risks must be taken into consideration, excluding any grounds relating to the parents’ child-rearing capacities, as the purpose of the Hague Convention is not to attribute parental authority (Federal Court judgment 131 III 334, recital 5.3; 123 II 419, recital 2b, p. 425). An exception to return under Article 13, sub-paragraph (b), of the Hague Convention, is therefore not open to consideration unless the child’s intellectual, physical, moral or social development is under serious threat (judgment 5P.65/2002 of 11 April 2002, recital 4c/bb, in FamPra.ch 2002, p. 620 and the reference cited therein). The burden of proof lies with the person who opposes the child’s return (ibid., recital 4b, in FamPra.ch 2002, p. 620 and the reference cited therein). 4.2 The Cantonal Court observed that the case concerned a very young child in the custody of his mother, who had always provided for him. The father, for his part, lived in a religious community where he was fed, and from his activity as a sports and art teacher he had a monthly income of only 300 [Swiss] francs. The custody of the child had been withdrawn from him on account of the atmosphere of fear that he had created at the family home. For the same reason, the Israeli courts ordered him to live separately and prohibited him from approaching the mother’s flat. Before the child’s removal to Switzerland he had only had a restricted right of visitation, limited to two hours twice a week, under the supervision of the Israeli social services. Concerning the conditions of a possible return of the child without his mother, according to the information provided by the Israeli Ministry of Justice on 12 March 2007, the father, who now shares a flat with one other tenant and still works in an institution for religious education, would be prepared to take care of the child. Taking into account the laconic and not very reassuring nature of this information, together with the expert’s report by Dr ..., a psychiatrist, the Cantonal Court considered that a return to Israel involved a risk of psychological harm for the child and might place him in an intolerable situation, whether or not he was accompanied by his mother. The court added that, in view of the father’s low income, the return to Israel of the respondent would also undermine the child’s economic stability and the mother would have to find a job in order to provide for them both. In his appeal, the appellant does not criticise the Cantonal Court’s finding that there was a grave risk that the child would be exposed to psychological harm if he returned

to Israel without his mother. He is of the opinion, however, that such a risk would not exist if the child's mother accompanied him to Israel, as could be reasonably expected of her. As regards that latter hypothesis, the judgment of the Cantonal Court fails to provide any evidence of such a grave risk of harm, or of any intolerable situation for the child. The expert psychiatrist failed, in particular, to address that question, simply explaining that the risk could not be assessed without ascertaining the conditions of a possible return. As to the appellant's aggressive behaviour towards the respondent, it does not appear from the Cantonal Court's judgment that the child would be threatened directly or indirectly as a result of witnessing such violence against his mother. She stated that the father had complied with the arrangements for his right of visitation and that the visits had gone well. The social worker appointed to supervise the right of visitation had described as 'wonderful' the father-son relationship as established just before the child's abduction by his mother. She has not claimed that the appellant breached the judicial instructions which required him not to approach her flat or to disturb and/or harass her. As to the considerations relating to the father's low income and his ties with the 'Lubavitch' religious community, as they stand they do not indicate a grave risk that the child would be exposed to harm within the meaning of Article 13, sub-paragraph (b), of the Hague Convention. Whilst such considerations may help to determine which of the two parents offers the best child-rearing capacities for the purpose of deciding on the attribution of the right of custody – a matter that is decided by the judicial authorities of the place of habitual residence (Article 16 of the Hague Convention) – they are not pertinent, however, for a decision about the return of a child after a wrongful abduction (see recital 4.1 above). As to the mother's threat not to return to Israel, the judgment of the Cantonal Court did not deal at all with the reasons for her refusal, whereas it should have established the existence of objective circumstances justifying that attitude. The Cantonal Court judges quoted the expert psychiatrist who had referred to the 'judicial risks' that would be entailed in the event of a return to Israel, without any indication as to whether the respondent actually faced a prison sentence as a result of the abduction. Supposing that such a risk were proven, she could not be expected to return to Israel with the child – and that would accordingly rule out the return of [the child] in view of the major psychological harm that would be caused to him by the separation from his mother. She made no comment on that question in her reply to the Federal Court; in particular, she has not claimed that immediate imprisonment, or even any criminal sanction at all, would be imposed on her. Neither has she argued that in the event of her return to Israel it would be impossible or very difficult for her to integrate, or, in particular, to find a new job. Consequently, it cannot be said that the mother's return, and therefore that of the child, would be unbearable for economic reasons either. Therefore, as the respondent has failed to establish the existence of reasons that would objectively justify a refusal on her part to return to Israel, it must be accepted that she could reasonably be expected to return to that State of origin accompanied by the child. In these circumstances, it is of no import that the information provided by the Israeli Central Authority (see recital 4.2 above) on which the Cantonal Court based, in particular, its justification of the exception to the child's return as provided for by Article 13, sub-paragraph (b), of the Hague Convention, was deemed not very reassuring, because that information was based only on the hypothesis of the child's return without his mother. Accordingly, the Cantonal Court judges breached Article 13, sub-paragraph (b), of the Hague Convention in finding that they were entitled to apply an exception to the child's return to the State of his habitual residence. The appeal must therefore be allowed and the judgment of the court below

quashed, without it being necessary to examine the complaint concerning a violation of Article 3 of the Convention on the Rights of the Child. It is incumbent on the respondent to secure the return of the child ... to Israel by the end of September 2007. ... The Federal Court therefore finds as follows: