

## COUNTRY REPORT: ISRAEL

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### 1. GENERAL BACKGROUND

The Israeli legal system is a unique product of the history of the country during which its development was influenced by three legal systems (the Ottoman law, the English common law and Jewish law) together with the reforms made by the legislature and judiciary since the founding of the State in 1948. However, for practical purposes, the system is most akin to a common law system<sup>1</sup> with two main differences, of which one is relevant in the context of child abduction. The Ottoman system of according extensive autonomy to religious minorities in matters of personal status has continued. Thus, in family law there are two parallel court systems: the civil courts which apply secular law and the religious courts of the different communities which apply the relevant religious law. The religious courts are subject to judicial review by the secular High Court of Justice.<sup>2</sup>

The rules governing the allocation of jurisdiction are complicated often depending on which court is first seised of the case and which matters are included expressly or impliedly in the application. Custody and access disputes may be decided in either system. However, only the civil courts have jurisdiction to decide applications under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter 'the 1980 Hague Convention').<sup>3</sup> Furthermore, religious courts are bound by the Convention to the extent that they are not allowed to decide the merits of a custody dispute in relation to a child who has been abducted to Israel where an application under the Convention is pending.<sup>4</sup>

The Israeli system has adopted the common law doctrine of binding precedent, but the Supreme Court is not bound to follow its previous decisions.<sup>5</sup> In cases under the 1980 Hague Convention, the courts have emphasised the importance of a unified interpretation of the Convention and therefore treat foreign decisions as persuasive precedent.<sup>6</sup>

In the Occupied Territories, the pre-existing law (viz in Judea and Samaria-Jordanian law and in Gaza-Egyptian law) continues to apply subject to amendments made by the Israeli Military Governor.<sup>7</sup> Two cases have considered the question of whether the 1980 Hague Convention applies in relation to children abducted to the Occupied Territories. In *Eden v Eden*,<sup>8</sup> the Jewish abducting mother was living with the children in a settlement in Gush Katif which is in Gaza. In this case, which was decided before the Oslo Accords which set up the Palestinian Authority, it was held that the Convention applies to abducted children who are situated in the Occupied Territories provided the Israeli court has jurisdiction to decide the case. This condition would invariably be fulfilled because jurisdiction is acquired by service of process and regulations allow service of process on persons present in the Territories.<sup>9</sup> Justice Barak stated that to hold otherwise would be to risk turning the Territories, which were under the effective control of Israel into a place of refuge for abducting parents. The second case, *Plonit v Almonit*,<sup>10</sup> which was decided after the Oslo Accords, involved a Palestinian family who were living in Spain. After a visit to relatives in an Arab village situated in Area C of the Occupied Territories, the mother refused to return the children to Spain. The court held that since Area C continued to be under Israeli administrative control, the 1980 Hague Convention continued to apply in relation to abducted children situated in this area. Whilst the court did not say so expressly, the clear implication of the decision is that the Convention will not apply to abducted children situated in Areas A and B which are under the administrative control of the Palestinian Authority.

## **1.1 IMPLEMENTATION OF THE CONVENTION**

The 1980 Hague Convention is the first family law Convention to which Israel has become a party. The Convention was signed by Israel on 3 July 1990, ratified on 4 August 1991 and came into force on 1 December 1991. Israel was the 22<sup>nd</sup> Contracting State (the 18<sup>th</sup> to ratify but with four other States, Belize, Hungary, Mexico and New Zealand having previously acceded).<sup>11</sup> The Convention was implemented in Israel by The Hague Convention (Return of Abducted Children) Law 1991 (hereinafter 'the Hague Convention Law').<sup>12</sup> Section 2 of The Hague Convention Law provides that the provisions of the Convention which appear in the appendix thereto (Articles 1 – 32 without the Preamble) in Hebrew translation will have the force of law and take precedence over all other laws. In 1995, Regulations were enacted governing the procedural aspects of applications under the Abduction Convention. These Regulations were added as a new chapter (numbered 22(1)) to the Civil Procedure Regulations 1984 (hereinafter all references to regulations are to the Civil Procedure Regulations unless otherwise stated).

## **1.2 OTHER CONTRACTING STATES ACCEPTED BY ISRAEL**

Section 3 of the Hague Convention Law requires the Foreign Minister to publish in the official legal gazette *Reshumot* notice of the countries in respect of which the Convention is in force with Israel. Israel has a policy of accepting all accessions and as of 1 January 2005 had accepted all accessions except that of the Dominican Republic.

For a full list of all States with which the Convention is in force with Israel, and the dates that the Convention entered into force for the relevant States, see the Appendix.

## **1.3 BILATERAL AGREEMENTS WITH NON-CONVENTION STATES**

Israel does not have any bilateral agreements concerning child abduction with non-Convention States nor have there been any attempts to do so. No mechanism exists for securing the return of children abducted from Israel to such countries,<sup>13</sup> although the Central Authority, whilst not officially responsible for such cases, will provide assistance in locating a lawyer and liaise with foreign authorities.

Where children are abducted to Israel from non-Convention states, the left-behind parent may obtain a habeas corpus order from the Israeli courts ordering the abductor to release the child. Whilst this remedy is discretionary, the policy of the Israeli courts is to grant such an order where there has been a breach of the custody rights of the left-behind parent unless it is shown that the granting of the order will cause real and irrevocable harm to the child.<sup>14</sup>

## **1.4 CONVENTION NOT APPLICABLE IN INTERNAL ABDUCTIONS**

Abductions *within* Israel are not covered by the Convention. There are no specific civil law provisions dealing with abductions. Thus, the remedy of the left-behind parent is to request interim physical custody (where there is no custody order in force) or to request the enforcement of the custody order (where the abduction is in breach of such an order).<sup>15</sup> Abduction *within* Israel is a criminal offence.<sup>16</sup>

## 2. THE ADMINISTRATIVE AND JUDICIAL BODIES DESIGNATED UNDER THE CONVENTION

### 2.1 CENTRAL AUTHORITY

Section 4(a) of the Hague Convention Law provides that the Attorney General is the Central Authority for the purposes of the Convention. The Attorney General appointed the International Department in the State Attorney's Office (which is situated within the Ministry of Justice) to perform the duties of the Central Authority. Within this Department there are two experienced attorneys who work on Hague Abduction Convention cases<sup>17</sup> under the supervision of the Head of the International Department. The contact details of the Central Authority are:

*International Department  
Ministry of Justice  
PO Box 49029  
Jerusalem 91490  
Israel*  
Tel: +972 (2) 646 6797 / 646 6328  
Fax: +972 (2) 628 7668  
Email: *lesliek@justice.gov.il* and *reginat@justice.gov.il*  
Web site: *http://www.justice.gov.il*

### 2.2 COURTS AND JUDGES EMPOWERED TO HEAR CONVENTION CASES

*The Supreme Court*  
↑  
*The District Court*  
↑  
*The Family Court*

The Israeli court system is three tier. At the lowest level is the Magistrates Court (*shalom*) which hears both civil and criminal cases of lesser importance. The Family Courts Law 1995 created a specialist family court at the same level as the Magistrates Court. At the second level is the District Court which acts both as a first instance court in relation to more important criminal and civil cases and as a court of appeal from the magistrates court and other parallel courts. The Supreme Court has two functions. It acts as a court of final appeal from the District Court and, when sitting as the High Court of Justice, it reviews both administrative and legal decisions for lack of constitutionality or non-compliance with the requirements of administrative law.<sup>18</sup>

Section 6 of the Hague Convention Law provides that the Family Court is authorised to perform the acts which under the Convention are to be carried out by “the judicial or administrative authority.”<sup>19</sup> There are ten area Family Courts which are staffed by approximately 30 judges who sit full-time in the Family Court and receive special training in family law matters.<sup>20</sup> Local jurisdiction is determined by the area in which the child is situated at the date of the commencement of the proceedings.<sup>21</sup> Where the precise whereabouts of the child are unknown, the Family Court in Tel-Aviv has jurisdiction.<sup>22</sup>

Appeals from the Family Court are to the District Court for the area where the Family Court is situated.<sup>23</sup> Appeals are heard by three judges, of whom one will be a family law specialist.<sup>24</sup>

Further appeal to the Supreme Court in Jerusalem requires leave,<sup>25</sup> which is given where the court considers that the case involves a legal question of general importance or has implications

beyond the specific circumstances of the case at hand.<sup>26</sup> Appeals to the Supreme Court are heard by three judges.<sup>27</sup> The President of the Supreme Court may grant leave for a further hearing before an extended Bench of at least five Supreme Court judges, where in view of the importance, difficulty or novelty of a rule laid down in the matter, there is in his opinion room for a further hearing.<sup>28</sup>

### **3. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR RETURN**

#### **3.1 LOCATING THE CHILD**

In 2003, the Israeli Police decided to appoint a liaison officer who receives all complaints about children who have been abducted and are thought to be in Israel. This officer then passes on the information to the police authorities in the district(s) where the child is likely to be found.

Methods of locating the child include searching Ministry of Education records of school registration and National Insurance Institute records. However, where the family does not appear in such records and there are no other clues to the child's whereabouts, it can be very difficult and sometimes impossible to find the child.

#### **3.2 CENTRAL AUTHORITY PROCEDURE<sup>29</sup>**

Israel has not made a reservation to Article 24 of the Convention and thus applications may be submitted in English or French as well as, of course, in Hebrew. There are no specific forms to be completed.<sup>30</sup>

The lawyers at the Central Authority check each application to ensure that the requirements of the Convention are met and clarify any points which are not clear.

The Israeli Central Authority then sends a letter to the Central Authority in the country of origin explaining that a lawyer needs to be instructed for the purpose of submitting an application for return of the child to the court together with a list of lawyers who have experience in Convention cases.

The Central Authority will send to the abductor a so-called "voluntary return" letter in cases which seem appropriate with the consent of the left-behind parent. This consent is necessary as the letter may cause the abductor to flee. The letter gives the abductor two weeks in which to respond before steps are taken to initiate proceedings. Where the abductor indicates a willingness to return, the Central Authority will help in finalising the details, but does not get involved in negotiations involving other disputes between the parties (e.g. money or property). All voluntary returns have been successfully enforced.

The Central Authority is careful to explain that it does not represent either of the parties, but rather provides information and liaises between the various institutions involved in the legal proceedings or with the welfare of the child.

Once the lawyer has been instructed, the Central Authority will follow the progress of the case and try to prevent any delays. For example, the Authority may contact a judge who has not scheduled a hearing or given a decision on time (see details of time deadlines post at 3.5).

The Central Authority is often requested by the court to provide a legal opinion about the interpretation of the 1980 Hague Convention or its implementation in Israel.<sup>31</sup> This, of course, does not make the Central Authority a party to the case.

The Central Authority may also be involved in trying to solve technical problems which may prevent a return order being made. For example, in a number of cases of abductions by Israelis from the USA, the abductor does not have any right to enter the USA and thus unless a visa is

granted he or she will not be able to return with the child. After considerable difficulties, visas have eventually been obtained in these cases.

### **3.3 LEGAL REPRESENTATION**

Applicants in Convention cases in Israel are represented by private lawyers (but see legal aid post at 3.4). Any lawyer may be used, but most applicants will choose a lawyer from the Central Authority's list (which is also available on the Ministry of Justice web site (<http://www.justice.gov.il>)). At present 36 lawyers appear on this list. In fact, any lawyer who so requests, is placed on the list and the Central Authority states that inclusion on the list does not constitute an endorsement or recommendation by them and that it does not take any responsibility for the professional integrity of the lawyers.

Where the left-behind parent applies directly to the court, under Article 29 of the Convention, the Central Authority will monitor the case as soon as it becomes aware of its existence either through the lawyer acting for the applicant or through the court.<sup>32</sup>

### **3.4 COSTS AND LEGAL AID**

Israel made a reservation to Article 26<sup>33</sup> concerning costs in Convention proceedings.<sup>34</sup> However, in practice, applicants who can prove by means of a certificate of entitlement that they qualify for legal aid in their own country are entitled to legal aid in Israel. This means that they will be represented free of charge by private lawyers under the auspices of the Legal Aid Unit of the Ministry of Justice.

The Regulations provide that no form of guarantee or surety for costs should be demanded in Hague Convention cases.<sup>35</sup> Similarly, no court fee nor execution of judgment fee is charged.<sup>36</sup> Where a return is ordered, the court is authorised to impose on the respondent the costs of the applicant including travel expenses, costs in locating the child, legal fees and costs involved in the return of the child.<sup>37</sup> Courts usually make use of this authority and abductors are required to pay substantial sums.

### **3.5 LEGAL PROCEEDINGS**

The application to the court for return of the child or enforcement of access rights has to be submitted on a specific form accompanied by specific documents.<sup>38</sup> The form requests personal details about the parents and the child (e.g. date of birth, nationality, habitual residence, occupation, passport number), details as to (a) the removal or retention or denial of access rights, (b) of other pending proceedings in relation to the child and (c) of the relief sought.

The documents to be attached are: (1) any authenticated decision or agreement evidencing the applicant's right to custody of the child, (2) any other document establishing the application including a certificate as to the law applicable in the country of habitual residence and (3) an affidavit from any person who, in the applicant's opinion, is a necessary witness.<sup>39</sup> All documents submitted to the court have to be in Hebrew or be accompanied by a Hebrew translation,<sup>40</sup> but authentication is not required unless specifically stated in the regulations.<sup>41</sup>

Failure to attach any of the documents will not prevent the court from hearing the case, but the court may take the lack of documentation into account.<sup>42</sup>

When submitting the application, the applicant may request the following ex parte relief:<sup>43</sup> (1) an injunction forbidding the child or the person holding him from leaving the country; (2) an order forbidding the child from leaving a specific place; (3) an order requesting deposit of the child's passport (or a passport on which he is included); (4) an order instructing the police to (a) investigate the abduction, (b) locate the child or (c) help the welfare officer bring the child before

the court; (5) an order instructing other judicial or administrative authorities not to hear the matter (in accordance with Article 16 of the Convention) and / or (6) any other order which will prevent further damage to the child or to the rights of the parties or which will ensure voluntary return of the child or otherwise resolve the dispute peaceably.<sup>44</sup>

The Regulations provide that the hearing should take place no later than 15 days after the submission of the application to the court.<sup>45</sup>

Notice of the date of the hearing, a copy of the application and any interim relief ordered by the court must be served on the respondent as soon as possible after the hearing date is fixed. The reply of the respondent must be submitted to the court and the applicant at least two days before the date of the hearing.<sup>46</sup>

The Regulations attempt to minimise the delay caused by the giving of oral evidence by restricting the situations in which such evidence may be heard. Thus, a party may request an oral hearing either to cross-examine a witness who swore an affidavit for the other party or to examine a witness who could not give his evidence by affidavit.<sup>47</sup> However, the court may refuse these requests where in its view there is no necessity for the hearing of the evidence or the witness is not available for immediate examination.<sup>48</sup> The court itself may only summons a witness for examination if there are special reasons which must be recorded.<sup>49</sup> The Regulations provide that any oral hearing of evidence and examination of witnesses should take place no later than five days after the first hearing.<sup>50</sup>

The courts' practice in relation to the necessity for the applicant to appear for the purpose of examination does not seem to be consistent. On the one hand, it has been held that, as a result of Article 23 of the Convention which provides that authentication and similar formalities should not be insisted on, the usual requirement of being available to be examined on the affidavit should not be enforced.<sup>51</sup> Similarly, in a case where the applicant was abroad, it was held that the abductor would be heard first before deciding if it were necessary to examine the applicant in person.<sup>52</sup> However, in one case it was held that lack of availability to be examined may reduce the weight placed on the affidavit<sup>53</sup> and in another that the applicant's factual claims could not be accepted without examination in court.<sup>54</sup>

Before making a decision, the court may require the applicant to produce evidence from the authorities of the State of habitual residence confirming that the removal or retention was not lawful in accordance with Article 3 of the Convention.<sup>55</sup> Such a request will be made where, for example, the abductor appears to have sole custody.<sup>56</sup> However, the court may be content to rely on foreign statutes and case-law<sup>57</sup> or an opinion by an expert in the foreign law.<sup>58</sup> In one case, it was held that where there is no proof of the foreign law in relation to custody rights, the court may rely on the presumption of identity of laws and thus apply the Israeli law which gives both parents custody rights unless and until there is an agreement or court order to the contrary.<sup>59</sup>

Where the respondent claims that return of the child will expose him to harm within Article 13(1)(b) or that a return would breach the principles set out in Article 20, the Regulations require that he must bring clear and convincing evidence to support his claim and the court may request additional evidence.<sup>60</sup> In practice, wherever the abductor raises a "defence" under Article 13(1)(b) (grave risk of harm) or Article 13(2) (child's objections), the court will order an expert opinion of a psychologist or psychiatrist. The raising of these defences inevitably leads to delays, although judges make attempts to minimise these as far as possible.

The courts impose a very high burden of proof on an abductor who raises these defences and the Supreme Court has repeatedly reaffirmed that both these exceptions are to be interpreted very narrowly.<sup>61</sup>

Of particular interest is the provision in the Regulations concerning hearing the abducted child. It is provided that where the child is of an age and maturity that it is appropriate to take into account his view, the court may not decide the case until the judge has heard the child unless the court does not see any necessity for this for special reasons, which must be recorded.<sup>62</sup> Thus, the judge is required to see the child in person and listen to his views. Where there is evidence that

the child objects, the court will usually request a report from a welfare officer. This is in addition to the judge's hearing the child in person. Whilst the court has the power to order separate representation of the child where in its view this is necessary to prevent harm to the child's interests,<sup>63</sup> such representation is very rarely ordered.

The Regulations do not mention the exceptions in Article 13(a) of the Convention. Acquiescence is fairly frequently pleaded, but this defence is also interpreted narrowly.<sup>64</sup>

The court may, but does not usually, give an order for the return of the child to his place of habitual residence immediately at the end of the hearing.<sup>65</sup> Even if the respondent does not appear, such an order may be made provided that notice of the hearing was served on him. In any event, a reasoned decision must be given no later than six weeks from the date of submission of the application to the court.<sup>66</sup> However, in practice it seems that judges do not adhere to this deadline,<sup>67</sup> although they do sometimes refer to it in rejecting a request to bring witnesses for examination or for adjournment to allow for evidence to be brought from abroad.<sup>68</sup> There are also examples of appeal court judges criticising the admission of evidence which delayed the proceedings at first instance.<sup>69</sup>

Israeli judges commonly attach conditions to return orders such as (1) an undertaking by the applicant not to initiate criminal proceedings against the returning abductor,<sup>70</sup> (2) agreement by the applicant that the abductor should have temporary custody,<sup>71</sup> (3) deposit by the applicants of sums to cover the initial maintenance of the returning child and parent<sup>72</sup> and (4) undertaking not to have contact with the returning child and parent without authorisation of the court in the country of origin.<sup>73</sup>

### **3.6 APPEALS**

An appeal against a decision in Convention proceedings must be submitted within seven days of the date of the decision.<sup>74</sup> The appeal must then be heard no later than ten days after the submission of the appeal and the decision must be given no later than 30 days after such date.<sup>75</sup> The reasons for the high rate of appeals (55% in 1999)<sup>76</sup> would seem to be the ease of appeal to the District Court (which is basically a court of first instance) and the importance of children in Israeli culture.<sup>77</sup>

The reported case-law shows that a short stay of execution pending the submission is often granted.<sup>78</sup> However, it seems that after the appeal is submitted, the appeal court will often, although not automatically, grant a further stay of execution<sup>79</sup> unless there is thought to be no substance in the appeal.<sup>80</sup> In such cases, the stay may be conditional upon the child being transferred to the requesting parent in Israel until the appeal is heard.<sup>81</sup>

### **3.7 ENFORCEMENT OF ORDERS**

When making a return order, the court gives instructions for enforcement of the order including instructions to the welfare officer and the police. The order is executable immediately upon being pronounced and can be enforced by the police and welfare authorities without the necessity for any other proceedings, although it will usually be necessary to apply for the lifting of an injunction preventing departure from the country shortly before the scheduled departure date.

The Central Authority is involved in liaising with the Central Authority in the requesting State in connection with the travel arrangements. Where there is thought to be a risk that the abductor will make an attempt to avoid returning, the Central Authority will coordinate enforcement with the police and welfare authorities. This usually involves accompaniment of the child and abductor onto the plane by a welfare officer and / or officers of the border police.

There have been few problems with enforcement.<sup>82</sup> In one case,<sup>83</sup> where the parties were Palestinians living in Spain and the mother had retained the child in an Arab village in the

Occupied Territories, the order was enforced by police interception of the car taking the children to school outside their village.<sup>84</sup>

Where return is conditional upon undertakings which have to be performed before return and the left-behind parent does not comply with these undertakings, execution of the order may be delayed until there is full-compliance.<sup>85</sup>

## **4. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR ACCESS**

### **4.1 / 4.2 CENTRAL AUTHORITY PROCEDURE<sup>86</sup> AND LEGAL PROCEEDINGS**

When the Central Authority receives a request for access they act in the same manner as with requests for return. In other words they will provide information about legal representation, monitor the progress of the case and provide any information necessary in the course of the proceedings.

On the few occasions that 1980 Hague Convention access cases have reached the courts,<sup>87</sup> the judges explained that Article 21 of the Convention in combination with relevant provisions of the Israeli Civil Procedure Regulations afforded the applicant procedural benefits in seeking to enforce a foreign access judgment, but did not themselves provide any right to enforcement of the judgment.<sup>88</sup>

Indeed, the Civil Procedure Regulations provide that all the regulations relating to applications for return apply *mutatis mutandis* to applications to enforce access.<sup>89</sup> Thus, for example, the application will benefit from the exemption from providing security for costs, the time deadlines and the relaxation of the rules from proving foreign law and recognizing foreign judgments. However, as one judge pointed out,<sup>90</sup> the Regulations do not contain any mechanism for making or enforcing access orders.

The Israeli court will not enforce or modify a foreign access order without checking that it is consistent with the welfare of the child as required by the Legal Capacity and Guardianship Law 1964. This is effectively the same as making a fresh access order.

Thus, unless there will be entitlement to legal aid under the Convention, there is little incentive to apply for access under the Convention rather than applying directly. This probably explains why there are so few applications under the Convention (see the statistics post at 7).

### **4.3 ENFORCEMENT OF ORDERS**

If an access order is not complied with, there are in theory a number of possible remedies available. Some of them may be applied for directly by the aggrieved parent, whilst others require institution of proceedings by public authorities. As will be seen, all the remedies involve an element of discretion, which reduces the likelihood of effective enforcement.

#### *(a) Civil Contempt of Court (Section 6 of the Contempt of Court Ordinance)*

If the court is satisfied that there has been a breach of the order, it may issue a further order requiring the breach to be remedied and specifying the sanction for failure to remedy. The purpose of the sanction, which will be a fine and / or imprisonment, is to cause compliance with the court order and is not intended to be punitive.

A recent illustration of use of this remedy is *A.B.M. v A.E.*<sup>91</sup> In this case the mother had relocated to Israel with the children with the consent of the court in California, where the family had lived previously. When the mother refused to allow the father to visit the child in accordance with the order of the Californian court, the father applied to the Israeli court to enforce his access



rights under the 1980 Hague Abduction Convention. In the course of these proceedings, the parties came to agreement about the access arrangements, which were then included in a court order. When the mother failed to comply with these arrangements, the father requested that sanctions be imposed on the mother under the Contempt of Court Ordinance. Accepting this request, the court ordered that the mother pay a fine of 1,500 shekels (approximately \$350) for further breach of the access arrangements contained in the court order.

However, in practice most judges are reluctant to use such sanctions and will simply warn the offending party.

*(b) Execution of the Order (section 62 of the Execution Law 1967)*

Under this provision, an order for the handing over of a child or an order providing for a parent to have access to a child may be enforced by the Execution of Judgments Agency where the court has stated that the order should be so enforced. The court officer charged with executing the order must request the assistance of the welfare officer. Furthermore, the provision expressly states that where the officer charged with executing the order decides that the order can only be executed by the use of force against the child and the child is capable of understanding the matter, or there are other difficulties in executing the order, the case may be referred back to the court for further instructions.

Case-law goes further and requires the Head of the Execution of Judgments Agency not to enforce the judgment against the wishes of the child unless he is convinced or the court has specifically held that the child's welfare requires forcible execution of the judgment.<sup>92</sup> No case has been found where a court has authorised execution against the child's wishes.

*(c) Criminal Contempt of Court (section 287 of the Penal Code 1977)*

Under s 287 of the Penal Code, a person who is in breach of an order given by a court is guilty of a criminal offence for which he may be sentenced to up to two years imprisonment. Liability will only be imposed under this section where no other punishment or procedure has been fixed in relation to the breach in question.

In *Greenburg v State of Israel*,<sup>93</sup> an injunction had been issued against the mother ordering her not to prevent the father taking their daughter for an outing at the time specified. When the mother broke this injunction, she was sentenced to three months imprisonment suspended for two years. She appealed contending that the matter should have been dealt with under the Contempt of Court Ordinance and that this constituted another procedure. Her appeal was rejected on the basis that each time the mother prevented the realisation of the father's access rights constituted a separate breach of the court order. The sanctions available under the Contempt of Court Ordinance only applied to future breaches and did not constitute a punishment for past breaches which could not be remedied. Thus, there was no other procedure in relation to past breaches and the conviction was upheld.<sup>94</sup>

Criminal prosecutions may only be instituted by the State. This is rarely done *inter alia* because in many cases prosecution may be harmful to the child.

*(d) Care Order*

Where the welfare officer is of the opinion that the denial of access is causing serious irreparable harm to the child, for example where the child is said to be suffering from Parental Alienation Syndrome (PAS), he or she may bring proceedings under the Youth Law (Care and Supervision) 1960 requesting that the minor be declared "a minor in need of protection." Where such a declaration is made, the court may issue a care order or a supervision order. The effect of a care order is to transfer the custody of the child to the welfare authorities who will determine

where the child is to reside and what treatment he is to receive. The purpose of such an order in these cases is to enable the child to receive psychological counselling which will enable him to rebuild his relationship with the alienated parent while living in a neutral environment. Clearly such an order is only made as a last resort where all other efforts to resolve the situation have failed.

Removal of the child from the custodial parent in such circumstances is highly controversial and widespread criticism was voiced against a 2003 Supreme Court case confirming the issue of a care order in a case of PAS.<sup>95</sup> An appeal against this decision was allowed by a majority of the Supreme Court in an additional hearing.<sup>96</sup>

## **5. OPERATING THE CONVENTION – OUTGOING APPLICATIONS FOR RETURN**

### **5.1 PREVENTING THE REMOVAL OF THE CHILD FROM THE JURISDICTION**

#### **5.1.1 CIVIL LAW**

##### *(a) Injunctions*

A parent who fears that his child will be taken out of the country without his permission may request from the court an ex parte injunction preventing departure from Israel. All ports in Israel are computerised and it therefore should not be possible to depart without assuming a false identity.

Such orders are usually granted under s.68 of the Legal Capacity and Guardianship Law 1962 which authorises the Family Court to take temporary or permanent steps necessary for the protection of the minor and the safeguarding of his welfare. Since both parents as natural guardians of the child have the right to determine his place of residence and since it is assumed that the unilateral removal of the child by one parent damages the child's welfare, the courts are liberal in granting such orders.<sup>97</sup> Use of this jurisdiction avoids the need to satisfy the conditions for the granting of such injunctions under the Civil Procedure Regulations.<sup>98</sup>

Where there are proceedings pending between the parties, the decision as to whether to grant the order is based on a balance between the interests of the different parties. In particular, the court will ask what will be the effect of granting or not granting such an order on the substantive issue between the parties.

In one case,<sup>99</sup> the mother wished to relocate with the child to Guatemala in order to live with her new partner and in response the father requested that custody be transferred to him. The trial was set for a month's time, but the mother wanted to take the child to Guatemala for a holiday in the interim period. The father applied for an order preventing removal of the child from Israel. The court, granting the order, held that such a trip would not only interfere with the father's access rights during that period, but was liable to influence the child's views about the relocation and thereby alter the existing situation. The court did not mention the risk that the child might not be returned at the end of the holiday period, although that would seem to be a highly relevant factor.

##### *(b) Passports*

In Israel, children need their own passports and cannot be added onto their parents' passports. In order to obtain a passport the minor has to attend the Population Registry at the Interior Ministry in person together with one of his parents.<sup>100</sup>

In principle the powers invested in the parents as guardians of the child, which include the right to obtain a passport on behalf of the minor, may only be exercised with the consent of both parents.<sup>101</sup> However, there is a statutory presumption that each parent agrees to the actions of the other unless it is proved to the contrary. Accordingly, where the parents are still married, even if they are separated, the Population Registry is entitled to assume that the other parent agrees to the granting of the passport unless there is reason to believe to the contrary. Consequently, where one parent is concerned that the other may use the passport in order to abduct the child, he or she should write to the Population Registry stating clearly that he or she does not consent to his child being granted a passport.

The fact that the parents have never been married to each other or are divorced will appear on the parent's identity card and no passport can be granted without the express consent of both parents or a court order or an agreement between the parents approved by the court providing that the parent requesting the passport has sole custody for the purposes of this decision.<sup>102</sup>

### *(c) Financial Guarantees*

The obligation to provide financial security for the parent's obligation to keep the child in Israel or to return him to Israel on time may be inserted in custody agreements or in court orders to deter abduction. Such security is commonly required when one parent takes the child abroad.

The size of the security required by courts depends not only on the financial position of the parent who is giving the security, but also on the degree of risk. For example, where the parent has previously abducted or tried to abduct the child or where a parent wishes to take a child abroad in circumstance in which he stands to gain from not returning, a more substantial sum will be ordered.<sup>103</sup>

## **5.1.2 CRIMINAL LAW**

The Penal Law<sup>104</sup> contains two relevant offences which both carry a maximum sentence of 20 years imprisonment. Under section 373, a person who removes a minor under the age of 16 from the custody of his or her guardian without the consent of a guardian commits a criminal offence. Under section 370, a person who takes another person outside the borders of the State without the permission of that person or his legal representative commits a criminal offence. It is clear that both of these offences may be committed by a parent abducting his own child even though this is not expressly stated in the statutes. Accordingly, a parent abducting his child abroad without the consent of the other parent (where such consent is required) will be guilty of both of these offences.<sup>105</sup>

However, in practice, criminal proceedings are rarely brought against a parent for child abduction under either section as there is a 1995 directive<sup>106</sup> from the State Attorney not to prosecute abducting parents unless the abduction involves exceptional circumstances (such as violence, moving the child surreptitiously through a variety of countries,<sup>107</sup> repeat offences<sup>108</sup> and keeping the child in hiding).<sup>109</sup>

## **5.2 CENTRAL AUTHORITY PROCEDURE**

Where a child has been taken out of Israel to another Convention State, the Israeli Central Authority will request that the applicant swear an affidavit and provide any relevant documentation (such as court orders). This is then sent, with a translation provided by the applicant, to the relevant Central Authority in the foreign State. The Israeli Central Authority will then follow closely the progress of the case and where necessary send reminders and requests for information about developments in the case. The Central Authority will also provide any further information required and liaise between the foreign Central Authority and the applicant.

### **5.3 PROTECTION AND ASSISTANCE ON RETURN**

The Israeli Central Authority will request details of the travel arrangements from the foreign Central Authority. Where there is a stop-over in another country and there is thought to be a risk that the returning parent will try to exploit this in order to prevent enforcement, the Central Authority will attempt to make arrangements for the parent and child to be accompanied during the stop-over.

The Central Authority will alert the welfare authorities if there are any child protection issues. However, the enforcement of undertakings is primarily the responsibility of the lawyer representing the abducting parent.

### **5.4 COSTS AND LEGAL AID**

No legal aid is available for instructing foreign lawyers since the Israeli legal aid system provides services and not monetary payments.

## **6. AWARENESS OF THE CONVENTION**

### **6.1 EDUCATION OF CENTRAL AUTHORITIES, THE JUDICIARY AND PRACTITIONERS**

The Israeli Central Authority sends representatives to conferences at The Hague and participates in local conferences and continuing education programmes organised by the Family Courts, the Israeli Bar and by other organisations.<sup>110</sup>

### **6.2 INFORMATION AND SUPPORT PROVIDED TO THE GENERAL PUBLIC**

Information and advice to parents can be found on the Central Authority's web site (<http://www.justice.gov.il>). At present this site is only in Hebrew, but it is in the process of being translated into English.

The 1980 Hague Convention receives a fair amount of press coverage. In 2004, a four page feature on child abduction in the weekend edition of one of the main daily Hebrew newspapers<sup>111</sup> explained the scope of the duty of automatic return and portrayed the Israeli courts as faithful adherents to the Convention. The feature included an interview with an abducting mother against whom a return order was made. Although the USA Court eventually allowed her to relocate to Israel with her son, her advice to women in a similar situation is under no circumstances to resort to abduction.

## **7. THE CONVENTION IN PRACTICE – A STATISTICAL ANALYSIS OF APPLICATIONS IN 1999<sup>112</sup>**

The Central Authority in Israel handled a total of 57 new applications in 1999, making Israel the thirteenth busiest Convention jurisdiction in that year.<sup>113</sup>

Incoming applications for return	19
Outgoing applications for return	30
Incoming applications for access	2
Outgoing applications for access	6
<b>Total number of applications</b>	<b>57</b>

## 7.1 INCOMING APPLICATIONS FOR RETURN

### 7.1.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

	<b>Requesting States</b>	
	Number of Applications	Percent
USA	11	58
Netherlands	2	11
Canada	1	5
Denmark	1	5
Finland	1	5
France	1	5
Italy	1	5
Zimbabwe	1	5
<b>Total</b>	<b>19</b>	<b>~100</b>

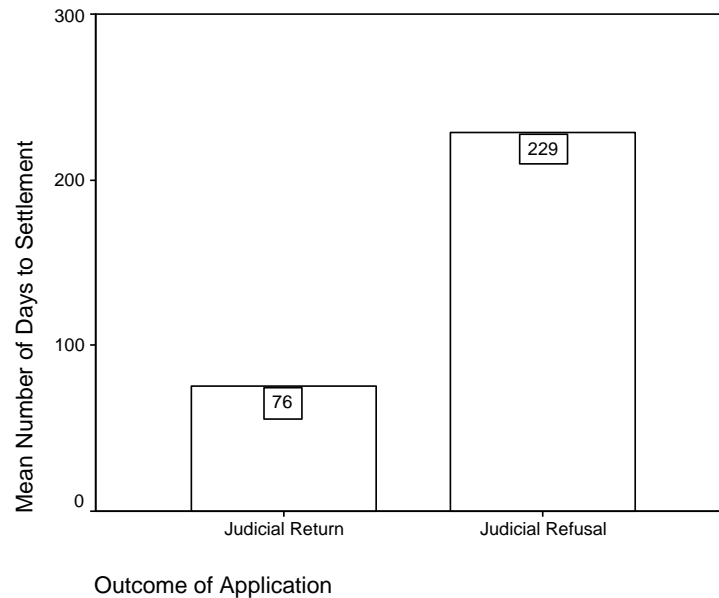
Over half of all the return applications came from the USA. This is perhaps not surprising given the close connection between the two States. Apart from the USA and the Netherlands no other State made more than one application to Israel in 1999.

### 7.1.2 THE OUTCOMES OF THE APPLICATIONS

	<b>Outcome of Application</b>	
	Number	Percent
Rejection	2	11
Voluntary Return	2	11
Judicial Return	6	32
Judicial Refusal	5	26
Withdrawn	3	16
Pending	1	5
<b>Total</b>	<b>19</b>	<b>~100</b>

The proportion of cases which resulted in a judicial return, at 32%, is identical to the global norm. On the other hand, the proportion of voluntary returns at 11% is below the global norm of 18%. Combining judicial and voluntary returns, there was an overall return rate of 43% which is below the global average of 50%. Of those cases where return was achieved, 75% were judicial rather than voluntary. Overall, almost 58% of applications to Israel went to court. Of these, 45% ended in a judicial refusal and only 55% in a judicial return. This differs from the global position where 74% of applications which went to court resulted in a judicial return. The overall refusal rate of 26% is much higher than the global norm of 11%. The proportion of applications which were rejected was identical to the global norm of 11%. The number withdrawn at 16% was also similar to global norms of 14%.

### 7.1.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION



Timing was available on 5 of the 6 judicial returns, 4 of the 5 judicial refusals and neither of the voluntary returns. The chart above, therefore, relates to these cases only.

On average it took 76 days from application to outcome in the judicially returned cases. This is faster than the global average speed of 107 days though slower than the six week target set for EU Member States under the revised Brussels II Regulation.<sup>114</sup> Conversely, the judicially refused cases took an average time of 229 days, which is considerably slower than the global average speed of 147 days. The times given here are for final judicial settlement and include six cases which went to appeal. Three of these ended in judicial return. Consequently the average time of 76 days is relatively fast. Three others ended in judicial refusal.

The following table shows the mean, the median, the minimum and the maximum number of days from application to final outcome.

	Number of Days Taken to Reach Final Outcome	
	Outcome of Application	
	Judicial Return	Judicial Refusal
Mean	76	229
Median	75	164
Minimum	43	111
Maximum	131	476
<b>Number of Cases</b>	<b>5</b>	<b>4</b>

Globally, only 14% of cases going to court were appealed, while in applications to Israel this proportion was significantly higher at 55%. Four of the six appeal cases were decisions to return. Three of these were upheld on appeal, the fourth ended in a judicial refusal. The other two appeal cases were decisions refusing return. Both of these were upheld on appeal. We have information on timing for two of the three judicial returns at appellate level. These were both decided relatively quickly, that is in 43 and 75 days respectively. This compares favourably with a global average of 208 days. The three judicial refusals on appeal took an average of 268 days from

application to final conclusion. Globally, judicial refusals on appeal took an average of 176 days. Consequently, judicial return cases to Israel were determined considerably quicker than the global average, while judicial refusals were considerably slower, albeit that there were only a small number of cases.

## **7.2 INCOMING APPLICATIONS FOR ACCESS**

### **7.2.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS**

There were just two access applications received in 1999 (compared with 19 return applications), one from Germany and one from Sweden. Interestingly, neither of these States made return applications to Israel in the same year. At 2 out of a total of 21 incoming applications made to Israel in 1999 the proportion of access applications was below the global norm of 17% at 10% of all applications received.

### **7.2.2 THE OUTCOMES OF THE APPLICATIONS**

Both of the incoming access applications were withdrawn, compared with the global mean of 26%.

### **7.2.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION**

Both the access cases were withdrawn and therefore timing was not stated.

## **8. CONCLUSIONS**

In many respects Israel has implemented the Convention effectively. Certainly, for the most part, Israel complies with the recommendations as to good practice contained in the *Guide to Good Practice on Central Authority Practice and Implementing Measures* recently produced by the Permanent Bureau of the Hague Conference.<sup>115</sup> The Central Authority operates efficiently and effectively. It will accept applications in English, French and Hebrew and provides information and advice on its web site (currently this is only in Hebrew, but is in the process of being translated into English). The Central Authority seeks to encourage voluntary settlements to the extent of sending the abductor a “voluntary return” letter in cases where the left-behind parent consents. Although, when compared with the global position, the proportion of voluntary returns, according to the 1999 Statistical Survey,<sup>116</sup> are relatively low,<sup>117</sup> the 2002 statistics, provided by the Israeli Central Authority paint a more favourable picture.<sup>118</sup>

Although the Central Authority does not itself take applications to court, it clearly explains to applicants that they need to instruct a lawyer and provides a list of those who have experience of Hague Convention cases.<sup>119</sup> Once a lawyer has been appointed the Central Authority tracks the progress of the case and tries to prevent delays by, for example, contacting a judge who has not scheduled a hearing within the stipulated time (see below). It is also on hand to smooth any difficulties that might delay a child’s return as, for example, to help to obtain visas for the defendant to enable him or her to travel back with the child. Furthermore, where necessary it will also co-ordinate enforcement with the police and welfare authorities. For children being returned to Israel the Central Authority will alert the welfare authorities if there are any child protection issues and, in cases where problems are contemplated will, where possible, make arrangements to have the parties monitored or accompanied during a stop-over on a return journey.

Although Israel has made a reservation to Article 26, provided applicants qualify for legal aid in their own country they will be entitled to legal aid in Israel. This is an interesting way of dealing with this issue. It means, for example, that most USA applicants, for example, will not be

granted legal aid, since it is generally unavailable in their own country. In no event, however, will a court fee or execution of judgment fee be charged.

Although jurisdiction to hear 1980 Hague Convention applications is vested in the lowest court tier, that is the Family Court rather than the District Court, it nevertheless is a specialist court and as Israel is a small country there are only ten such courts staffed by approximately 30 judges. Furthermore, in practice in some districts, certain judges are more likely than others to hear such cases both at first instance and appellate level.<sup>120</sup> Consequently, the de facto practice is to confine jurisdiction to a relatively small number of judges. However, the position would be further improved by standardisation of the practice of assigning Hague Convention cases to a particular judge or two in each court. One worrying feature of the system is the relative ease and consequential frequency of appeals. Over half of return applications made in 1999 went on appeal.<sup>121</sup>

Another matter of concern is, at any rate according to the 1999 Statistical Survey,<sup>122</sup> the relatively low proportion of return applications ending in the child's return, 43% compared with a global rate of 50% and a relatively high proportion of judicial refusals to return, 26% compared with the global average of 11%, (45% of those going to court, compared with 24% globally). Of course, the 1999 survey only provides a "snap shot" of one year and may not be typical. Certainly, recent case-law<sup>123</sup> has emphasised the high burden of proof lying on those raising the exceptions under Articles 13 or 20 and the 2002 statistics<sup>124</sup> do suggest some improvement inasmuch as of the cases resolved (four cases were still pending at the time of collection of the statistics) there was no judicial refusal and five judicial returns.

So far as disposal times are concerned the Israeli system itself provides for tight deadlines – hearings should take place within 15 days of the submission of the application to the court<sup>125</sup> and appeals should be submitted within 7 days of the decision and heard within 10 days with the decision given no later than 30 days after such date.<sup>126</sup> Moreover, the Central Authority will track an application and enquire of the judge if the deadline is not met. Furthermore, in a further effort to minimise delay, oral evidence is limited.<sup>127</sup> To some extent the 1999 statistics bears witness to the fruit of these endeavours since, at any rate, where a return is ordered the system works relatively quickly, faster than the global average, 76 days as opposed to 107 days, but still falling short of the six week ideal. On the other hand, when return applications are refused the system works slowly. In part this is because where Article 13(b) (grave risk of harm) or the child's objection exception is raised the court will order an expert opinion of a psychologist or psychiatrist and will also hear the child and in part because of the frequency of appeals. To what extent proceedings can be speeded up in contested cases perhaps represents the greatest challenge to the Israeli system. Consequently, it is to be hoped that discussions currently being held between the Central Authority and other relevant bodies and individuals on how to further expedite proceedings and ensure compliance with the time deadlines in Hague Convention cases, inter alia by making changes to the regulations, will bear fruit.

## 9. SUMMARY OF CONCERNS

- According to the 1999 statistics the overall return rate is below the global average and there is a significantly higher proportion of judicial refusals to return.<sup>128</sup>
- There is a high proportion of appeals in return applications.
- According to the 1999 statistics judicial refusals to return are disposed of relatively slowly.



## 10. SUMMARY OF GOOD PRACTICES

- The Central Authority is efficient in handling child abduction cases and will accept applications made in English, French or Hebrew.
- There is information and advice (currently in Hebrew but soon to be in English as well) on the Central Authority web site.
- Following the appointment of a lawyer, the Central Authority tracks the progress of the case and will contact a judge where a hearing is not fixed within the stipulated time.
- Where necessary, the Central Authority will co-ordinate enforcement with the police and welfare agencies.
- For children being returned to Israel the Central Authority will alert the welfare authorities if there are child protection issues.
- As of 1 January 2005 Israel has accepted accessions of all Contracting States (save the Dominican Republic which only acceded on 1 November 2004).

## APPENDIX

As at 1 January 2005, the Convention is in force between the following 73 Contracting States and Israel.

<b>Contracting State</b>	<b>Entry into Force</b>
ARGENTINA	1 DECEMBER 1991
AUSTRALIA	1 DECEMBER 1991
AUSTRIA	1 DECEMBER 1991
BAHAMAS	1 JANUARY 1996
BELARUS	1 JUNE 1998
BELGIUM	1 MAY 1999
BELIZE	1 FEBRUARY 1992
BOSNIA AND HERZEGOVINA	1 DECEMBER 1991
BRAZIL	1 APRIL 2000
BULGARIA	1 JANUARY 2004
BURKINA FASO	1 NOVEMBER 1993
CANADA	1 DECEMBER 1991
CHILE	1 JANUARY 1996
CHINA-HONG KONG SPECIAL ADMINISTRATIVE REGION	1 SEPTEMBER 1997
CHINA-MACAO SPECIAL ADMINISTRATIVE REGION	1 MARCH 1999
COLOMBIA	1 JUNE 1996
COSTA RICA	1 APRIL 1999
CROATIA	1 DECEMBER 1991
CYPRUS	1 JANUARY 1996
CZECH REPUBLIC	1 MARCH 1998
DENMARK	1 DECEMBER 1991
ECUADOR	1 JUNE 1992
EL SALVADOR	1 APRIL 2002
ESTONIA	1 APRIL 2002
FIJI	1 OCTOBER 1999
FINLAND	1 AUGUST 1994
FORMER YUGOSLAV REPUBLIC OF MACEDONIA	1 DECEMBER 1991
FRANCE	1 DECEMBER 1991
GEORGIA	1 DECEMBER 1997
GERMANY	1 DECEMBER 1991
GREECE	1 JUNE 1993
GUATEMALA	1 AUGUST 2002
HONDURAS	1 JANUARY 1996
HUNGARY	1 FEBRUARY 1992
ICELAND	1 FEBRUARY 1997
IRELAND	1 DECEMBER 1991
ITALY	1 MAY 1995
LATVIA	1 AUGUST 2002
LITHUANIA	1 NOVEMBER 2003
LUXEMBOURG	1 DECEMBER 1991
MALTA	1 APRIL 2000
MAURITIUS	1 DECEMBER 1993
MEXICO	1 FEBRUARY 1992
REPUBLIC OF MOLDOVA	1 SEPTEMBER 1998
MONACO	1 NOVEMBER 1993
NETHERLANDS	1 DECEMBER 1991

NEW ZEALAND	1 FEBRUARY 1992
NICARAGUA	1 APRIL 2002
NORWAY	1 DECEMBER 1991
PANAMA	1 JANUARY 1996
PARAGUAY	1 OCTOBER 1998
PERU	1 AUGUST 2002
POLAND	1 NOVEMBER 1993
PORTUGAL	1 DECEMBER 1991
ROMANIA	1 NOVEMBER 1993
SAINT KITTS AND NEVIS	1 JANUARY 1996
SERBIA AND MONTENEGRO	1 DECEMBER 1991
SLOVAK REPUBLIC	1 FEBRUARY 2001
SLOVENIA	1 JANUARY 1996
SOUTH AFRICA	1 DECEMBER 1997
SPAIN	1 DECEMBER 1991
SRI LANKA	1 AUGUST 2002
SWEDEN	1 DECEMBER 1991
SWITZERLAND	1 DECEMBER 1991
THAILAND	1 NOVEMBER 2003
TRINIDAD AND TOBAGO	1 AUGUST 2002
TURKEY	1 JULY 2000
TURKMENISTAN	1 JUNE 1998
UNITED KINGDOM	1 DECEMBER 1991
UNITED STATES OF AMERICA	1 DECEMBER 1991
URUGUAY	1 APRIL 2000
UZBEKISTAN	1 OCTOBER 1999
VENEZUELA	1 JANUARY 1997
ZIMBABWE	1 OCTOBER 1997

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<sup>1</sup> The continuing influence of English law after 1948 is due not only to the fact that most of the legal institutions created during the Mandate continued to operate in more or less the same form, but also to the fact that Israeli judges were enjoined by art. 46 of the Palestine Order in Council of 1922 (whose provision remained in force unless and until expressly abolished by Israeli legislation) to fill all lacunae in accordance with “the substance of the common law and doctrines of equity in force in England.” This section was abolished by the Foundations of Law statute of 1980, the first section of which provides “Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case law or by analogy, it shall decide it in light of the principles of freedom, justice, equity and peace of Israel’s heritage.” Whilst this section has clearly reduced dependence on foreign law, sources from other legal systems may have persuasive value. (See Y. Shachar, “History and Sources of Israeli Law” in Introduction to the Law of Israel (A. Shapira (ed) and K.C. Dewitt-Arar (ed) Kluwer, 1995, pp. 6-7)).

<sup>2</sup> As in English law, administrative law has been developed by judicial decision.

<sup>3</sup> See post at 2.2.

<sup>4</sup> H.C. 6056/93 *Eden v Eden* 51(4) P.D. 197, (hereafter ‘*Eden v Eden*’).

<sup>5</sup> *The Basic Law: The Judicature*, 38 L.S.I. 101 (1983-1984), s 20 (b) provides: “A rule laid down by the Supreme Court shall bind any court other than the Supreme Court”.

<sup>6</sup> Miscellaneous Civil Application 1648/92 *Turner v Meshulam* P.D. 46(3) 38.

<sup>7</sup> The Order in relation to Legal Arrangements (No. 2) 1967. Further to the Oslo Accords, the local courts in Areas A and B of the Occupied Territories apply the law existing in 1967 subject to amendments made by the Palestinian Legislative Council.

<sup>8</sup> *Eden v Eden*, op. cit., n. 4.

<sup>9</sup> Civil Procedure (Service of Documents on the Occupied Territories) Regulations 1969.

<sup>10</sup> Family Application 4330/01 *Plonit v Almonit* (not published) (hereafter ‘*Plonit v Almonit*’).

<sup>11</sup> Israel’s ratification took effect on the same day as those of Bosnia and Herzegovina, Croatia and the Former Yugoslav Republic of Macedonia and Serbia and Montenegro. See generally <http://www.hcch.net>

<sup>12</sup> S.H. 148 (1991). Under Israeli law, implementing legislation is required to give effect to International Conventions which have been signed and ratified by the Government.

<sup>13</sup> In particular, there have been cases where children have been abducted to Russia and it has not been possible to secure their return. This information was received in May 2003 from the lawyers working at the Israeli Central Authority.

<sup>14</sup> H.C.J. 405/83 *Kebly v Kebly* P.D. 37(4) 705.

<sup>15</sup> The decision of the court is based on the welfare of the child. Thus, for example, in the case of Application for Leave to Appeal 225/00 *Ferach v Ferach* (not published), where the father refused to return the children to the mother, who had temporary custody, after visitation the majority of the District Court (allowing the father’s appeal from the Family Court) held that in the light of the evidence it would be in the children’s interests to remain with the father pending the decision in relation to permanent custody. Whilst the court noted that the father had taken the law into his own hands, this was mitigated by the fact that he applied to the court within a short time requesting temporary custody and the fact that the children had not wanted to return to their mother. One judge expressly pointed out that the position in the present case was different from that in relation to international abductions and that the rules of the 1980 Hague Convention were not relevant, even by way of analogy, to the present case.

<sup>16</sup> Under s.373 of the Penal Law (as amended in Amendment no. 12, 34 L.S.I 125 (1979 – 1980). See discussion post at 5.1.2.

<sup>17</sup> One works exclusively on Hague Convention cases, but the second attorney also deals with other international legal matters.

<sup>18</sup> For example, in the case of H.C.J 4365/97 *Tur Sinai v the Foreign Minister and others* 53(3) P.D. 673 the father, whose daughter was not returned by the Spanish courts (under Article 20 of the 1980 Hague Convention) as a result of the false evidence about the content of Israeli law given by the Israeli consul in Spain (who was the mother’s uncle) in an unauthorised opinion, petitioned the High Court of Justice requesting an order mandating the Foreign and Justice Ministers to take administrative and diplomatic action in order to promote his claims for the return of his daughter and the right to visit her in Spain. The court, whilst displaying great sympathy for the father and strongly condemning the unforeseeable outrageous and shameful behaviour of the consul (who had since resigned), found that there were no further actions that the Ministries in question could be expected to take at that stage. The court emphasised that the Central Authority had made every possible effort to help the father including urging the Spanish courts to reconsider and that the ultimate fault lay with the Spanish courts which had unjustifiably refused to allow an appeal in the case after the truth about the evidence became known.

<sup>19</sup> This section was amended by the Family Courts Law 1995 S.H., which created the Family Courts. Previously the authorised court was the District Court (the *Mehozzi* Court).

<sup>20</sup> There is no formal provision for judges who specialise in Hague cases, but in some Family Courts, there is a particular judge or small number of judges who are assigned to hear all the Hague cases.

<sup>21</sup> Reg. 295B.

<sup>22</sup> Reg. 258C(c). However, where there is no court with local jurisdiction because the child is situated in the Occupied Territories, the appropriate court in Jerusalem has residual jurisdiction by virtue of reg. 6 of the Civil Procedure Regulations (see *Eden v Eden*, op. cit., n. 4).

<sup>23</sup> There are five District Courts: Tel-Aviv, Jerusalem, Beersheba, Haifa and Nazareth. There are around 100 District Court judges.

<sup>24</sup> In some districts, the practice is to assign one judge to all Hague Cases.

<sup>25</sup> Courts Law (consolidated version), 38 L.S.I 271 (1983 – 1984), s.41.

<sup>26</sup> Leave for Criminal Appeal 1245/93 *Shterkmo v The State of Israel* P.D. 47(2) 177.

<sup>27</sup> There are 14 judges in the Supreme Court. The President of the Supreme Court has discretion to increase the size of the bench, but this is rarely done.

<sup>28</sup> Courts Law (consolidated version), s.30 (hereafter ‘Courts Law’).

<sup>29</sup> The information in this section was obtained either from the Replies to the Questionnaire Concerning the Practical Operation of the Convention and Views on Possible Recommendations sent to the Permanent Bureau (made available to the authors of this Report by the Israeli Central Authority in November 2003) or from conversations between November 2003 and March 2004 with the lawyers working at the Israeli Central Authority.

<sup>30</sup> Cf when applying to court, see post at 3.5.

<sup>31</sup> For example, in the case of *Plonit v Almoni*, op. cit., n. 10, the Central Authority was asked to give its opinion on the application of the Convention to children in the Occupied Territories.

<sup>32</sup> An internal directive requires the court management to inform the Central Authority of such an application.

<sup>33</sup> [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24)

<sup>34</sup> Section 2 of the Law.

<sup>35</sup> Civil Procedure Regulations, reg 295O. This applies also in relation to an appeal, *Civil Appeal 2764/92 Cohen v Cohen, Dinim Elyon 28, 352*.

<sup>36</sup> Leave for Appeal 1429/96 *Isik v Isik* (not published) (hereafter '*Isik v Isik*').

<sup>37</sup> Reg. 295P.

<sup>38</sup> Reg. 295C(a)(b). The required form is Form 34 (which appears in the First Schedule to the Civil Procedure Regulations).

<sup>39</sup> Reg. 295C(b).

<sup>40</sup> Reg 295Q.

<sup>41</sup> Reg. 295R.

<sup>42</sup> Reg. 295C(d).

<sup>43</sup> Reg. 295E.

<sup>44</sup> In Civil Application 6374/94 *Kalmutz v Kalmutz*, the court ordered emergency measures including publication in newspapers and checking the abductor's bank accounts.

<sup>45</sup> Reg. 295H.

<sup>46</sup> Reg 295G.

<sup>47</sup> Reg. 295I(a).

<sup>48</sup> Ibid.

<sup>49</sup> Reg 295I(b).

<sup>50</sup> Reg 295I(d).

<sup>51</sup> Civil Application 1403/94 *Plonit v Almoni*, P.M. 5756(2) 315.

<sup>52</sup> Family Application 44240/02 *Bournstein v Bournstein* (not published).

<sup>53</sup> Civil Application 2214/94 *Luria v Luria* (not published).

<sup>54</sup> Family Application 8003/98 *R v R* (not published).

<sup>55</sup> Reg 295K9(a). Account will be taken of the foreign decision even if it does not fulfill the criteria for recognition of foreign decisions under s.11 of the Enforcement of Foreign Judgments Law 1958 (reg. 295S).

<sup>56</sup> See, for example, the case of Family Application 022073/01 *D.Y. v D.R.* (not published) where the New York judge's reply to an Article 15 request simply stated that there had been a breach of the noncustodial father's visitation rights, without addressing the issue of whether under New York law the mother had the right to change the child's residence without the father's consent. Thus, the Israeli judge held that the father had not satisfied the burden of proving that there had been a wrongful removal. The Israeli courts have held that where the left-behind parent has an express right of veto on removing the child from the country of habitual residence, he or she is to be treated as having rights of custody. See, for example, Israel Civil Miscellaneous Request 5271/92 *Foxman v. Foxman* (unreported) adopting the approach in the English case, *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654.

<sup>57</sup> For example, Family Application 56083/96 *K v L* (not published) and Civil Application 1192/95 *Sapir v Sapir* (not published).

<sup>58</sup> For example, Family Application 26930/97 *Plonit v Almonit*, op. cit., n. 10.

<sup>59</sup> Miscellaneous Civil Application 9163/96 *Hori v Bergstrum, tak-elyon 96(4) 95*.

<sup>60</sup> Reg 295K9(b).

<sup>61</sup> The leading authorities are *C.A. 4391/96, Roe v. Roe*, 50(5) P.D. 338 (Article 13(1)(b)) and *Leave for Civil Appeal 3052/99 A.Sh. v. D.Sh.* (unreported) (Article 13(2)). For criticism of both of these cases, see R. Schuz, "The Hague Child Abduction Convention and Children's Rights," (2002) 12 *Transnational Law & Contemporary Problems* 393 at pp. 425, 427-428, 444-446.

<sup>62</sup> Reg 295I(e). This regulation adopts the approach taken by Justice Matza in the case of *Isik v Isik* op. cit., n. 36. It has been held on at least two occasions that there is no need to hear the children because it is clear that their views will not carry any weight. In one case, the court accepted the view of the welfare officer that a meeting with the judge might harm them. See details in R. Schuz, *ibid.*, pp. 422-424. However, it seems that in most cases, the judge does hear children who are old enough to express a coherent view. There is no fixed age, but most judges seem to hear children of 7/8 and upwards. In one case, a judge had a meeting with children age 3 and 5 (*C.A. 6056/93, Eden v Eden*, op. cit., n. 4). In Family Appeal 001085/01, Justice Porat criticised the first instance judge for not hearing children aged nearly 8 and 6. The learned judge explained that the purpose in such a meeting is not only to clarify the child's views for the purpose of child objection exception in Article 13 of the 1980 Hague Convention, but also to fulfil the child's right to be heard under Article 12 of the UN Convention on the Rights of the Child 1989. Furthermore, in the judge's opinion, this meeting enables the judge to explain to the child the nature of the dispute and for the child to see that the judge

making the decision is not a “monster”. No case has been found where the objections of a child under 10 have been sufficient to prevent return.

<sup>63</sup> F.C. 2860/96 *Ploni v Almonim* (Family Court) (not reported).

<sup>64</sup> In L.C.A.7994/98 *Dagan v Dagan* (not yet published) the Supreme Court clarified that the test is subjective in the sense both that the left-behind parent intended to acquiesce and that the abductor honestly believed that the other parent had acquiesced (hereafter ‘*Dagan v Dagan*’).

<sup>65</sup> Reg 295J(a).

<sup>66</sup> Reg 295M(a).

<sup>67</sup> Moran et al, *Abduction and Relocation of Children 2003* (Boursey) (Hebrew), p. 168 claims that it is virtually impossible to comply with the six week deadline (hereafter ‘Moran’). See also the 1999 statistics as compiled in *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October on the Civil Aspects of International Child Abduction* drawn up by Professor Nigel Lowe, Sarah Armstrong and Anest Mathias and available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2844&dtid=32](http://www.hcch.net/index_en.php?act=publications.details&pid=2844&dtid=32) (hereafter ‘1999 Statistical Survey’) post at 7.1.3.

<sup>68</sup> See, for example, Family Appeal 55/96 *B v B, Dinim Mechozi 32(1) 801*.

<sup>69</sup> See for example, the strong rebuke of Justice Porat in the case of *Dagan v Dagan*, op. cit., n. 64, mainly against the wife’s lawyers who had produced many tapes and other evidence to show that the parties intended to stay abroad for a specific period of time. Since Justice Porat took the view that the child’s habitual residence was determined by objective factors relating to the child and not the parents’ intentions, this evidence was completely irrelevant (see generally R. Schuz, “Habitual Residence under the Hague Child Abduction Convention – theory and practice” (2001) 13 CFLQ 1). In another case Justice Porat criticised the first instance court for hearing the case in stages, treating the question of the effect of the foreign custody decision on the custody rights of the parties, as a preliminary issue (Family Appeal 00185/01 *Plonit v Ploni* (not published)).

<sup>70</sup> For example, Civil Application 2898/92 *Foxman v Foxman* (not published).

<sup>71</sup> For example, Civil Appeal 1372/95 *Stagman v Burke* 49(2) P.D. 431.

<sup>72</sup> For example, Civil Application 507/95 *Goldman v Goldman* (not published) and Civil Appeal 4391/96 *Roe v Roe* 50(5) P.D. 338.

<sup>73</sup> *Roe v Roe* 50(5) P.D. 338 (hereafter ‘*Roe v Roe*’).

<sup>74</sup> Reg 295N(a). It has been held that this deadline will only be extended where good reasons are given (in accordance with Regulation 295T) and that the general procedural laxity in Convention cases is not a ground for an extension: Miscellaneous Civil Application 2136/96 *Sapir v Sapir, tak-elyon 96(2)1*.

<sup>75</sup> Reg. 295N(b).

<sup>76</sup> 1999 Statistical Survey, op. cit., n. 67, discussed post at 7.1.3.

<sup>77</sup> Moran, op. cit., n. 67, p. 83.

<sup>78</sup> See, for example, Civil Application 418/93 *Gabbai v Gabbai* (not published) where the stay was granted for ten days.

<sup>79</sup> Because immediate return will nearly always cause irreversible damage to the appellant’s case, see Moran, op. cit., n. 67, p. 83.

<sup>80</sup> See, for example, Miscellaneous Civil Request 9163/96 *Chori v Bergstraum, tak-elyon 96(4) 95*.

<sup>81</sup> See, for example, *Isik v Isik*, op. cit., n. 36.

<sup>82</sup> Although in the case of Leave for Civil Appeal 2610a/99 *Plonit v Ploni* P.D. 53(2) 566, the mother succeeded in avoiding enforcement of the return order (made in March 1997) by hiding the children in Israel and abroad, with changed identities and appearances. Eventually after police intervention at the request of the father, the children were found in Israel in April 1999. After the mother’s applications to have the earlier decision annulled and for a stay of execution were rejected by first instance and appeal courts, the children were eventually returned to Italy in May 1999.

<sup>83</sup> *Plonit v Almoni*, op. cit., n. 10.

<sup>84</sup> The left-behind father was waiting to return with children on a pre-arranged flight. However, shocked by the children’s (aged approximately 12 and 6) refusal to return to Spain and their antagonism to him, he would not agree to their return by force and at the last minute agreed to the children staying in Israel.

<sup>85</sup> In the case of *Roe v Roe*, op. cit., n. 73, the father did not comply with the undertaking to pay £5,000 for the purposes of the abducting mother’s sustenance upon return to England. Thus, the child was not returned. The parties subsequently came to an agreement under which the child would remain in the mother’s custody in Israel. This information was received in May 2003 from the lawyers working at the Central Authority.

<sup>86</sup> For source of information see op. cit., n. 29.

<sup>87</sup> Family Application 89790/00, *M.R.B. v A.R.* (not reported) and Family Application 39216/97 *A.B. v A.B.* (not reported).

<sup>88</sup> This is in line with case-law in other jurisdictions. See, for example, in England and Wales, *Re G (A Minor) (Enforcement of Access Abroad)* [1993] Fam 216.

<sup>89</sup> Reg. 295U.

<sup>90</sup> Family Application 39216/97 *A.B. v A.B.* (not reported).

<sup>91</sup> Miscellaneous Civil Request 089792/00 *A.B.M. v A.E.* (decision of Family Court dated 22.12.02).

<sup>92</sup> C.A. 653/72 *Yahalomi v Yahalomi* 27 P.D. (2) 434.

<sup>93</sup> Cr. App. 519/82 *Greenburg v State of Israel* P.D. 37(2) 187.

<sup>94</sup> Although her appeal against sentence was allowed. The suspended prison sentence was reduced to a fine since the existence of a sentence of imprisonment was causing her problems at work.

<sup>95</sup> Request for Civil Appeal 3009/02 *Plonit v Plonit* 56 P.D. (4) 872. For analysis of the case and the criticism, see R. Schuz, "Surrogacy and PAS in the Israeli Supreme Court and the Reports of the Committee on the Children's Rights" in A. Bainham (ed) *The International Survey of Family Law 2004 (Jordan's Family Law, 2004)* 247.

<sup>96</sup> Courts Law, op. cit., n. 28.

<sup>97</sup> Moran, op. cit., n. 67, p. 29.

<sup>98</sup> Miscellaneous Civil Proceedings 12421/03 *M.Sh. v Y.Sh.* (unreported) (decided 06.08.03). Reg 384 authorises the court to grant an ex parte order forbidding the defendant in civil proceedings from leaving the country where there is a reasonable risk that the respondent is about to leave the country permanently or for a prolonged period and that this will impede legal proceedings or enforcement of a judgment.

<sup>99</sup> Miscellaneous Civil Proceedings 12421/03 *M.Sh. v Y.Sh.* (unreported) (decided 06.08.03).

<sup>100</sup> This is in order to check, so far as possible, the identity of the child and the authenticity of the photograph. A child who is old enough to talk is asked his name and age and a child who can write signs the application form (in addition, of course, to the parent's signature). These requirements will presumably make it harder for a potential abductor to obtain a passport for the children "in secret".

<sup>101</sup> Legal Capacity and Guardianship Law 1962, s.18.

<sup>102</sup> This is the authors' translation of the wording which appears in the notes on the application form and in information given on the Interior Ministry's web site.

<sup>103</sup> For example, in Family Application 6490/96 *Gol v Gol* (not published), the father, who was a USA citizen living abroad, was ordered to provide a bank guarantee of \$200,000 to secure the return of his son after a visit abroad. In this case the temptation was thought to be the escape from high maintenance payments which the father was obliged to make. In Family Application 4440/98 *Plonim v Almoni, Dinim Mishpachah (1) 110*, a mother, who was given permission to relocate, was ordered to provide a bank guarantee of \$50,000 to secure the bringing of the child to Israel for visits. In Family Application 5601/90 *Goldfine v Goldfine, tak-mechozi 92(2) 392*, the mother was required to put a charge on her flat in Israel to cover compensation to the father if she failed to send the child on the scheduled visits to Israel (the amount fixed depended on the length of the visit, ranging from \$5,000 to \$15,000 per visit).

<sup>104</sup> Penal Law (as amended in Amendment no. 12, 34 L.S.I 125 (1979 – 1980)).

<sup>105</sup> *State of Israel v Gefen (Takdin Elyon 94(3) 551* and 1806/00 *State of Israel v Chabibi, tak-mechozi 2000(4) 1163*.

<sup>106</sup> It seems that the directive was issued in response to the case of Cr. App. 2223/94 *State of Israel v Gefen (Takdin Elyon 94(3) 551* in which the mother took her four year old son to Colombia, which was her country of origin, without the consent of her husband who was the boy's father. She did not hide the child and kept in telephone contact with the father. A few months later, the father re-abducted the child to Israel. The mother then also returned to Israel and obtained custody of the child. The mother was charged with removal abroad under section 370. The District Court accepted that she had committed the offence, but did not formally convict her. Instead, with her consent, she was placed on probation for 18 months. The State appealed against the decision, claiming that the District Court should have formally convicted the mother so as to make clear the severity of the offence, but did not seek any further punishment. The Supreme Court agreed in principle that abducting a child abroad without the knowledge or agreement of the other parent was a serious offence, for which the offender should not only be convicted but also be punished heavily in order to deter others. However, in view of the evidence that conviction would prevent the mother obtaining employment in the Colombian embassy in Israel and that the State did not seek any further punishment, the circumstances of the case were exceptional and so the appeal was dismissed. The court expressly referred to the fact that preventing the mother from earning a living would damage the child.

<sup>107</sup> For example, in one case, the mother had kept the girls in hiding in many countries, including ones in South America and had changed their appearances and their names. In another case, the mother who had been ordered by the English Court to return the children to Israel at the end of the school year (*Re S and Another (Minors) (Abduction: Wrongful Detention)* [1994] Fam 70) fled from England using a forged passport and traveled to various different countries by boat until eventually she decided to return voluntarily to Israel.

<sup>108</sup> In Cr.C. 305/98 *State of Israel v Ploni (takdin mechozi 98(1)11*), the father had abducted his son on two occasions to the USA. The first time he returned voluntarily after 10 days but the second time the child was only returned after the intervention of the USA authorities. In this case, the father was violent and was also accused of a variety of other offences mainly against the mother of the child. So, the charges under s.370 and 373 were simply added to the list.

<sup>109</sup> In the internal case of Miscellaneous Application 1806/00 *State of Israel v Chabibi, tak-mechozi 2000(4) 1163*, the parents tried to hide the child in a hotel in Ramallah. This was very frightening for the children who were Israeli Jews.

<sup>110</sup> In November 2003, a day conference was organised jointly by the National Council for the Welfare of the Child and the Rackman Centre for Advancement of the Status of Women at Bar Ilan University.

<sup>111</sup> "Where is the Child" in Seven Days, Yediot Aharonot 14.05.04.

<sup>112</sup> The following analysis is based on the 1999 Statistical Survey, op. cit., n. 67. But note the 2002 Statistics provided by the Israeli Central Authority in December 2003 (hereafter '2002 Statistics') paint a more favourable picture particularly with regard to outcomes, as discussed post at 8.

<sup>113</sup> The USA, England and Wales, Germany, Australia, France, Italy, Canada, New Zealand, Spain, Mexico, Ireland and the Netherlands all handled more cases in 1999. According to the 2002 Statistics, *ibid.*, there were 17 incoming return applications made in 2002.

<sup>114</sup> *Viz* Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L338 (23.12.2003) p. 1, Article 11(3). This Regulation, which applies to abduction applications as between all EU Member States (except Denmark), came into force on 1 March 2005.

<sup>115</sup> See *The Guide to Good Practice*, Parts I *Central Authority Practice* and II *Implementing Measures (Jordan's Family Law*, 2003) and available on the Hague Conference on Private International Law web site at [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=3&cid=24](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=3&cid=24)

<sup>116</sup> Moran, *op. cit.*, n. 67.

<sup>117</sup> See ante at 7.1.2.

<sup>118</sup> In 2002 out of 14 applications, voluntary returns were effected in three and the matter was resolved by agreement in one, 2002 Statistics, *op. cit.*, n. 112.

<sup>119</sup> Cf the system in England and Wales (see *Country Report: United Kingdom* (NCMEC 2002 at <http://www.icmec.org>)) where the Central Authority itself allocates the applicant a lawyer to make the application to court. The advantage of the English system is that it is a speedy method albeit that it effectively deprives the applicant of choosing his own legal representative.

<sup>120</sup> See *op. cit.*, n. 20.

<sup>121</sup> See ante at 7.1.3.

<sup>122</sup> See ante at 7.1.2.

<sup>123</sup> See *op. cit.*, n. 62.

<sup>124</sup> 2002 Statistics, *op. cit.*, n. 112.

<sup>125</sup> Reg. 295H.

<sup>126</sup> Reg. 295N(b).

<sup>127</sup> See ante at 3.5.

<sup>128</sup> Although the 2002 Statistics, *op. cit.*, n. 112, (see ante at 8) paint a more favourable picture.

[Logos]

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