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# International Child Abduction and the 1980 Hague Convention in Practice: The *Biran* Case

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## Abstract

With its Decision of 29 November 2021 (No. 7918/21), the Supreme Court of Tel Aviv has ruled on the case of Eitan Biran, the child who survived the crash disaster of the “Mottarone” cable car in Italy. After the accident, the child was entrusted to his aunt, appointed as legal guardian. However, a few months later, the child was unexpectedly conducted to Israel by his paternal grandfather. The Israeli Family Court and District Court, appointed for the return of the child according to the 1980 Hague Convention on the Civil Aspects of International Child Abduction, have ordered the immediate repatriation in Italy.

The decision of the District Court was upheld by the Supreme Court, whose decision represents a good example of correct application of the 1980 Hague Convention. Acknowledging that the guiding principle of the Convention is “zero tolerance for child abductions”, the Court has established that the habitual residence of the child was in Italy and that the transfer to Israel was in breach of the custody rights of the legal guardian according to Articles 3 and 5 of the Convention: in fact, the institute of *tutore legale* in Italy attributes to a person the responsibility of a child, a circumstance that in this case derived from a judicial decision. Moreover, the Israeli Supreme Court has adhered to a strict interpretation of the exceptions stated in Articles 12(2), 13 and 20, none of which resulted applicable to the case at hand.

## Keywords

international child abduction – 1980 Hague Convention on the Civil Aspects of International Child Abduction – habitual residence of the child

## 1 Preliminary Remarks

Due to the ever-increasing number of transnational families on the move, international child abduction cases continue to be a reality within and outside the EU,<sup>1</sup> on which the international community is constantly trying to offer appropriate and legal solutions. As any issue involving children, there is a strong need to find a balance between the logic of law and the logic of other disciplines that – in placing the well-being of the child at the centre – assume fundamental importance.

The Hague Convention of 25 October 1980 on the civil aspects of international child abduction (“1980 Hague Convention”),<sup>2</sup> adopted under the auspices of the Hague Conference on Private International Law (“HCCH”), has proven to resist contemporary challenges.<sup>3</sup> For instance, among the trends attributable to recent social changes is the involvement in international abduction proceedings not only of the children’s parents, but also of other relatives, such as grandparents and uncles, who need to recover contact with the child. In this over-changing context, the 1980 Hague Convention is one of the most ratified international treaties in the world<sup>4</sup> and – despite the application problems and adaptation needs encountered – represents a regulatory framework that works well in many cases. The general rule established by the Convention is that a child wrongfully abducted by one parent/relative and taken abroad shall promptly be returned to the State of habitual residence. The focus is, therefore, on jurisdiction, since the immediate return lies on the premises that the merits

1 According to Missing Children Europe, international child abductions constitute the second largest group of children considered missing across the EU (Missing Children Europe, Figures and Trends 2020 from Hotlines for Missing Children and Cross-border Family Mediators, 2021, available at: <<https://missingchildreneurope.eu/?wpdmdl=2558>>). Worldwide, in 2015 the Hague Conference on Private International Law identified 2,270 return applications to Central Authorities in international child abduction cases, involving 2,997 children: see International Centre for Missing and Exploited Children, Hague Conference on Private International Law, Part I – A Statistical Analysis of Applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Global Report, October 2017, p. 10, available at: <<https://assets.hcch.net/docs/dob285fi-5f59-41a6-ad83-8b5cf7a784ce.pdf>>.

2 Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, entered into force 1 December 1983.

3 See FREEMAN and TAYLOR, “Domestic Violence and Child Participation: Contemporary Challenges for the 1980 Hague Child Abduction Convention”, *Journal of Social Welfare and Family Law*, 2020, p. 154 ff.

4 The status table is available on the HCCH official website at: <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>>. At the present moment, there are 101 Contracting Parties.

of rights of custody shall be discussed before the court of the child's habitual residence.<sup>5</sup> However, children's welfare is considered within the exceptions to the return mechanism, i.e. under Articles 12, 13 and 20 of the Convention.

Over the years, the 1980 Hague Convention has been stress-tested with reference to the fundamental rights of the child, which are significantly affected by cross-border abduction.<sup>6</sup> In particular, the European Court of Human Rights ("ECtHR") has fostered an interpretation of the 1980 Hague Convention in accordance with the right to respect for private and family life (Article 8 of the European Convention on Human Rights, hereinafter "ECHR").<sup>7</sup> The ECtHR has required judicial authorities to conduct an effective examination of the situation of the child involved in each particular case, in order to determine whether the child's best interests, in each particular case, effectively coincides with the immediate return. In particular, in the landmark case *Neulinger and Shuruk v. Switzerland*,<sup>8</sup> the Strasbourg Court stressed the need to conduct an "in-depth" analysis of the entire family situation, with particular attention for the position of the child: an assessment which risked to be too close to an overall assessment of the merits of custody rights, with the risk to undermine the need to act expeditiously against wrongful transfers of retentions.<sup>9</sup> This approach has been nuanced in the Decision *X v. Latvia*,<sup>10</sup> where it has been explained how the 1980 Hague Convention and its immediate return mechanism pursue the best interests of the child, the analysis of which can be done

5 SCHUZ, *The Hague Child Abduction Convention: A Critical Analysis*, Oxford, 2013, pp. 126–127.

6 On the topic HONORATI, "Sottrazione internazionale di minori e diritti fondamentali", *Rivista di diritto internazionale privato e processuale*, 2013, p. 6 ff.; FREEMAN, "The Child Perspective in the Context of the 1980 Hague Convention", study requested by the European Parliament's Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs, Bruxelles, 2020, p. 5 ff., available at: <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL\\_IDA\(2020\)659819\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL_IDA(2020)659819_EN.pdf)>.

7 MCELEAVY, "The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?", *Netherlands International Law Review*, 2015, p. 365 ff.; WALKER and BEAUMONT, "Shifting The Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice", *Journal of Private International Law*, 2011, p. 231 ff.; KELLER and HERI, "Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights", *Nordic Journal of International Law*, 2015, p. 270 ff.

8 *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, Judgment of 6 July 2010.

9 See WALKER, "The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-Law of the European Court of Human Rights and the Un Human Rights Committee: The Danger of Neulinger", *Journal of Private International Law*, 2010, p. 649 ff.

10 *X v. Latvia*, Application No. 27853/09, Judgment of 26 November 2013.

in the light of the exceptions provided by the Convention. This, even though the return procedure does not relate to the merits of custody rights and does not require an in-depth examination of the entire family situation.<sup>11</sup>

At the same time, human rights standards require national courts to respect the right of the child to be heard according to Article 12 of the United Nations Convention on the Rights of the Child (“UNCRC”).<sup>12</sup> While Article 13(2) of the 1980 Hague Convention introduces an exception to the “immediate return” rule where the child raises an objection, prescribing the conditions under which the judge may take into account the child’s views, human rights obligations state the general duty for the court to give the child the opportunity to be heard and explains how to take into consideration the child’s perspective.<sup>13</sup> In international child abduction cases that involve the member States of the Council of Europe, it should also be mentioned the 1996 European Convention on the exercise of children’s rights, which specifies the obligations imposed on the judicial authority with reference to the child’s right to be heard.<sup>14</sup> As underlined by the ECtHR, the obligation to hear the child has become more and more stringent in proceedings involving them, provided that it should be surrounded by adequate guarantees and it must respectful of their best interests.<sup>15</sup>

In this context, a recent decision of the Supreme Court of Israel represents a good example of correct application of the 1980 Hague Convention.<sup>16</sup>

11 *X v. Latvia*, cit. *supra* note 10, para. 104 ff.

12 UN Committee on the Rights of the Child, General Comment No. 12: The Right of the Child to be Heard, UN Doc. CRC/C/GC/12, 20 July 2009, para. 32. On child participation and private international law, see KRUGER and MAOLI, “The Hague Conventions and EU Instruments in Private International Law”, in SCHRAMA et al. (eds.), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 69 ff.

13 Indeed, a tension may arise between the summary nature of return proceedings (where, according to Art. 2 of the 1980 Hague Convention, the court shall take a decision within six weeks) and the necessary procedural guarantees surrounding the child’s right to participate. This is the reason why the approach adopted by different States varies significantly. See the research carried out by CARPANETO et al. within the EU-co-funded project *The VOICE of the child in international child abduction proceedings in Europe* (“VOICE”, JUST-AG-2016/JUST-AG-2016-02/764206): the research report of 2018 is available at: <<https://repository.uantwerpen.be/docman/irua/boc972/157267.pdf>>. On the topic also ELROD, “‘Please Let Me Stay’: Hearing the Voice of the Child in Hague Abduction Cases”, *Oklahoma Law Review*, 2011, p. 633 ff.

14 European Convention on the Exercise of Children’s Rights, 25 January 1996, entered into force 1 July 2000.

15 *M.K. v. Greece*, Application No. 51312/16, Judgment of 1 February 2018, para. 75.

16 Both Israel and Italy are Contracting Parties to the Convention, which was ratified by Israel with the Hague Convention (Return of Abducted Children) Law, 2 S.H. 1355, 148

Acknowledging that the guiding principle of the Convention is “zero tolerance for child abductions”,<sup>17</sup> the judges have adhered to a strict interpretation of the exceptions stated in Articles 12(2), 13 and 20 and have ordered the return of a child, wrongfully conducted in Israel, to his habitual residence in Italy.

## 2 The Facts of the Case

The facts underlying the story and preceding the transfer of the child to Israel are known to the general public.<sup>18</sup>

The child (an Italian and Israeli citizen) is the only survivor of the accident of the “Mottarone” cable car of 23 May 2021, which fell to the ground due to the breaking of a rope: among the deceased, the parents of the child, the younger brother and the maternal grandparents. After the accident, the child was temporarily entrusted to his paternal aunt, appointed as legal guardian, with whom he already had a stable relationship. The paternal grandfather of the child, of Israeli citizenship and habitually resident in Israel, challenged the appointment, without success, before the *Corte d'Appello di Pavia*. At the same time, the Italian court had also ordered the grandfather to hand over the child's Israeli passport to the guardian: a request that, however, was never respected.

After a few months, during one of the two weekly visits agreed to in court, the grandfather took the child from his home, moved him to Switzerland and put him on a private plane for Tel Aviv. As a result, the guardian filed an appeal before the Tel Aviv Family Court for the immediate return of the child, under the 1980 Hague Convention.

The request was accepted by the Tel Aviv Family Court and the District Court, which found the child being habitually resident in Italy, making the transfer to Israel against the custody rights of the aunt.

The Israeli Supreme Court, seized as a last resort by the child's grandfather, rejected the appeal and ordered the return of the child to Italy on the basis of a rigorous application of the funding principles of the 1980 Hague Convention,

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(1991). With the Civil Law Regulations (Amendment) 5756-1995, Chapter 22(1) “Return of Abducted Children Abroad” was added to the Civil Procedure Regulations of 1984. See the country report on Israel by LOWE and SCHUZ within the research implemented by the International Centre for Missing and Exploited Children, available at: <<https://www.icmec.org/wp-content/uploads/2015/10/Israel-EN.pdf>>.

17 Author's translation.

18 Among the other available sources, see the comment of PAUL, “Analyzing the Hague Convention on the Civil Aspects of International Child Abduction through the case of Eitan Biran”, Blog of Michigan Journal of International Law, October 2021, available at:

namely: *i*) the immediate return of the child to their habitual residence; *ii*) the respect for the rights of custody towards a child, as determined by the competent authorities of the country from which they were unlawfully removed; *iii*) the competence of the judicial authorities of the habitual residence of the child as concerns the merits of the rights of custody, which also determines the logical duty – upon the authorities of the State where the child was unlawfully conducted – to refrain from adopting any decision on the same issues unless any of the exceptions provided by Article 13 of the Convention apply; *iv*) lastly, the duty to ensure a swift application of the rules of the Convention.

### 3 The Determination of Habitual Residence

The abovementioned founding principles have been used by the Israeli Supreme Court as the legal basis to reject the appeal and to order the return of the child in Italy. One of the first issues to be decided by the Court was the determination of the child's habitual residence. In fact, an application for return can succeed only if a child was, immediately before the alleged removal or retention, habitually resident in the State to which return is sought.<sup>19</sup>

Even if the location of the habitual residence in Italy has been qualified as “indisputable” by the Court, it nonetheless provides an adequate motivation, which, from a methodological standpoint, makes clear a factual approach has been employed.

As known, this connecting factor is indirectly used by the 1980 Hague Convention, since the law of the State of the child's habitual residence determines the existence of rights of custody, as well as representing an indirect ground of jurisdiction. This connecting factor was already known in the context of the HCCH, and has been strongly consolidated over the years as the privileged connecting factor in private international law when it comes to disputes involving children:<sup>20</sup> it has a central role within the 1996 Hague Convention on parental responsibility and protection of children,<sup>21</sup> as well as in the EU

<<http://www.mjilonline.org/analyzing-the-hague-convention-on-the-civil-aspects-of-international-child-abduction-through-the-case-of-eitan-biran/>>.

19 ATKINSON, “The Meaning of ‘Habitual Residence’ under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children”, *Oklahoma Law Review*, 2011, p. 647 ff., pp. 647–648.

20 DE WINTER, “Nationality or Domicile? The Present State of Affairs”, *RCADI*, 1969-III, Vol. 128, p. 346 ff.; KRUGER, *The Quest for Legal Certainty in International Civil Cases*, Leiden-Boston, 2016, p. 353.

21 See Arts. 5, 15 and 16 of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996, entered into force 1 January 2022.

instruments adopted in the field of judicial cooperation in civil matters. The Court of Justice of the European Union has rendered several decisions interpreting the head of jurisdiction provided by Article 8 of the Regulation (EU) No. 2201/2003<sup>22</sup> (that is now to be found in Article 7 of the new Regulation (EU) No. 2019/1111, applicable from August 1st, 2022),<sup>23</sup> providing important indications on habitual residence as an autonomous concept of EU law.<sup>24</sup> In its most recent rulings, the Court has stressed the importance to conduct a factual analysis of the situation, rather than focusing on a legal perspective.<sup>25</sup> As a first element, the physical presence of the child in the territory of a State is a necessary precondition for establishing their habitual residence: this means that a child who has never entered a territory cannot acquire their habitual residence in that State. Secondly, other elements shall make it clear that the presence is not in any way temporary or intermittent, such as the degree of integration by the child in a social and family environment, taking into account all the circumstances that are specific to the individual case.<sup>26</sup> On the other hand, the intention of the parents (or the persons taking care of the child) to settle permanently in a State can be taken into account in the overall evaluation, but cannot by itself be crucial to the determination of the habitual residence.<sup>27</sup>

A very similar interpretation results from the case law of the ECtHR, where the factual elements related to the person of the child have been prioritised over other circumstances that involve other family members. In *Michnea v.*

22 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 L 338, 23 December 2003.

23 Council Regulation (EU) 2019/1111 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction, OJ L 178, 2.7.2019, 2 July 2019.

24 On the concept of habitual residence in EU private international law, see FRANZINA, "The Place of Human Rights in the Private International Law of the Union in Family Matters", in BERGAMINI and RAGNI (eds.), *Fundamental Rights and the Best Interest of the Child in Transnational Families*, Cambridge, 2019, p. 141 ff.; LAMONT, "Habitual Residence and Brussels II-bis: Developing Concepts for European Private International Law", *Journal of Private International Law*, 2007, p. 261 ff.; RE, "Where did they live? Habitual Residence in the Succession Regulation", *Rivista di diritto internazionale privato e processuale*, 2018, p. 978 ff.

25 Case C-111/17 PPU, *OL v. PQ*, 2017, paras. 31–70; Case C-512/17, *HR*, paras. 38–46; Case C-393/18, *UD v. XB*, paras. 43–55. See BIAGIONI, "Jurisdiction in Matters of Parental Responsibility Between Legal Certainty and Children's Fundamental Rights", *European Papers*, 2019, p. 285 ff.

26 All principles already established in Case C-523/07, *A*, 2009, paras. 39–44; Case C-497/10 PPU, *Mercredi*, 2010, para. 47.

27 Case C-111/17 PPU, *OL v. PQ*, 2017, paras. 46–47; Case C-512/17, *HR*, para. 46.

*Romania*,<sup>28</sup> the ECtHR has criticized the approach of Romanian courts, which had refused to order the return of a newborn child in Italy, which was conducted in Romania by her mother without the consent of the father, on the basis of the alleged habitual residence of the child in the last mentioned State. However, as noticed by the Strasbourg judges, all the factual circumstances of the case suggested that the child's habitual residence was in Italy: above all, there was the fact that the child was registered in Italy at birth and she had spent all her life there, with both her parents, before moving to Romania. In that case, the ECtHR has valued the existence of a family life in Italy, which had covered all the first months of life of their daughter, rather than the lawful residence of the parents in Romania.

In the decision under examination, the Israeli Supreme Court has addressed accordingly the issue of the determination of the child's habitual residence. In particular, the thesis sustained by the abductor in the return proceedings was centred on the alleged intention of the (deceased) parents of the child to move back to Israel. Following the approach and legal reasoning of the Family Court and the District Court, the judges of last resort confirmed that – in the matter under consideration – the determination of habitual residence follows a “factual test”, rather than an “intentional test”. This, without mentioning the fact that, according to the evidence, there were several elements endorsing the wish of the late parents to stay in Italy. The only non-controversial circumstance is that the child was born in Israel and moved permanently to Italy the following month with his family, until the abduction that occurred when he was six years old.

The approach of the Supreme Court is, therefore, in line with the indications given by the Explanatory Report to the Convention,<sup>29</sup> as well as with the interpretation of the concept of habitual residence resulting from the rulings of the ECJ and the ECtHR, as well as with the case law of other Contracting States of the 1980 Hague Convention.<sup>30</sup>

28 *Michnea v. Romania*, Application No. 10395/19, Judgment of 7 July 2020, para. 47 ff.

29 PÉREZ VERA, Explanatory Report to the Convention on the Civil Aspects of International Child Abduction, 1980, p. 445, available at: <<https://www.hcch.net/en/publications-and-studies/details4/?pid=2779>>.

30 In the legal literature, see the analysis by KRUGER, “Habitual Residence: the Factors that Courts Consider”, in BEAUMONT et al. (eds.), *Cross-Border Litigation in Europe*, Oxford,



#### 4 The Breach of Rights of Custody Under the Law of the State of Habitual Residence

Acknowledging that the system of the 1980 Hague Convention has the scope to protect custody rights as well as the well-being of the abducted child,<sup>31</sup> the Israeli Supreme Court refers to the “deterrent effect” that should derive from the application of the immediate return rule, which consists in preventing the kidnapper from benefiting from a decision on the merits of custody rights adopted by the State of refuge (where the child was unlawfully conducted or retained).<sup>32</sup> Indeed, the 1980 Hague Convention is characterized by an indirect distribution of competences between the courts of the State of refuge and the courts of the child’s habitual residence: the latter have exclusive jurisdiction as concerns the merits of custody rights and any decision concerning the child’s future, being considered the most appropriate forum in this regard.<sup>33</sup>

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2017, p. 741 ff. Recently, in Supreme Court (US), *Monasky v. Taglieri*, Judgment of 25 February 2020, available at: <[https://www.supremecourt.gov/opinions/19pdf/18-935\\_new\\_fd9g.pdf](https://www.supremecourt.gov/opinions/19pdf/18-935_new_fd9g.pdf)>, the US Supreme Court put into perspective the weight that should be given to parental intent when determining the habitual residence of the child. Although the decision refers to an infant child, unable *per se* to integrate in a social environment, the Court held that a child’s habitual residence under the 1980 Hague Convention depends on the totality of the circumstances specific to the case, not on categorical requirements such as an actual agreement between the parents. See also Supreme Court (Canada), *Office of the Children’s Lawyer v. Balev*, Judgment of 20 April 2018, paras. 48–50, available at: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17064/index.do>>, where the traditional case law of Canadian courts, following a “parental intention approach”, was overturned by the Supreme Court, stating the preference for an “hybrid approach” where, instead of focusing primarily on either parental intention or the child’s acclimatization, looks to all relevant considerations arising from the facts of the case. The INCADAT portal, containing a database of case law on the 1980 Hague Convention, has made available a case law analysis: see the section “Habitual Residence”, available at: <<https://www.incadat.com/en/convention/case-law-analysis>>.

31 The 1980 Hague Convention protects the right of the child to maintain regular contacts with his or her parents: in this, it predates the UNCRC, which codifies this fundamental right in its Art. 9(2).

32 In the logic of the Convention, the immediate return rule represent a solution that pursues, at the same time, the best interests of the child and the jurisdiction of the courts of the child’s habitual residence over the merits of rights of custody: see CARPANETO, “La sottrazione internazionale di minori”, in AUTORITÀ GARANTE PER L’INFANZIA E L’ADOLESCENZA, *La Convenzione delle Nazioni Unite sui diritti dell’infanzia e dell’adolescenza: conquiste e prospettive a 30 anni dall’adozione*, Roma, 2019, p. 414 ff., p. 419.

33 SCHUZ, *The Hague Child Abduction Convention*, cit. *supra* note 5, p. 102. As already explained in the Explanatory Report by PÉREZ VERA, cit. *supra* note 29, p. 429, the mechanism set out by the Convention “will tend in most cases to allow a final decision

Therefore, the localization of the child's habitual residence is crucial for the mechanism of the 1980 Hague Convention, whose Article 3(a) provides that

“The removal or 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”.

This means that the domestic law of the country where the child habitually resided controls the existence of custody rights, whose breach (according to the same law of the habitual residence) is a prerequisite for considering the wrongfulness of the removal or retention, thus justifying the activation of the immediate return rule. Article 5 of the 1980 Hague Convention notes that “the rights of custody shall 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”. In the explanatory report regarding the Hague Convention, it is observed that these individuals will often be “as a rule close relatives of the child, and normally will be its mother or father”.<sup>34</sup> However, as noted above, Article 3 allows for the possibility of custody being attributed to “a person, an institution or other body,” which is sufficiently vague to allow for relatives or legal guardians to be included.

Indeed, there is an apparent inconsistency between the rules of the Convention, fostering respectively an autonomous definition of “rights of custody” (Article 5) and a reference to the law of the habitual residence (Article 3). In many cases, this divergence has been resolved by identifying, firstly, the rights and duties existing in the hands (of a parent or) of a guardian on the basis of the law of the State of habitual residence and, secondly, by verifying whether these rights could be included in the definition of Article 5.<sup>35</sup>

In the case at hand, following the death of the parents, the aunt of the child was appointed as a legal guardian (“*tutrice legale*”) by the *Tribunale di Torino* in May 2021.<sup>36</sup> Although the decision was taken immediately after the

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on custody to be taken by the authorities of the child's habitual residence prior to its removal”.

34 PÉREZ VERA, cit. *supra* note 29, pp. 450, 445–448.

35 See the analysis of SCHUZ, cit. *supra* note 5, p. 147 and the reference to the relevant case law. On the topic also FREEMAN, “Rights of Custody and Access under the Hague Child Abduction Convention – A Questionable Result?”, *California Western International Law Journal*, 2000, p. 39 ff.; SILBERMAN, “Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis”, *Family Law Quarterly*, 1994, p. 28 ff.

36 On legal guardianship in Italy, see LONG, “L'istituto giuridico della ‘tutela’ alla prova del tempo”, *Diritto di famiglia e delle persone*, 2018, p. 594 ff.

accident, when the child was in hospital and it was necessary to take urgent medical decision on his behalf, the appointment was subsequently confirmed by another court order. The *Tribunale di Pavia*, in August 2021, had not only confirmed the appointment of the aunt as legal guardian, but had also ordered the grandfather (and future abductor) to return the Israeli passport of the child and had come to the conclusion that the best interests of the latter, at that time, required that the child continue to reside in Italy in the stable and family environment that had accompanied him until the moment of the accident.

The decision of Italian courts, notwithstanding the (still on-going) legal dispute over custody rights, suggests a certain degree of certainty over the fact that, at the time of the wrongful transfer, the child was entrusted to his aunt, who was *de facto* taking care of the child according to Articles 3 and 5 of the 1980 Hague Convention.<sup>37</sup> The Supreme Court of Israel adheres to this approach while considering that the institute of *tutore legale* in Italy attributes to a person the responsibility of a child,<sup>38</sup> a circumstance that in this case derives from a judicial decision.

On the other hand, the Court does not fully investigate the matter, on the assumption that it has no operational significance after it appears that the child was brought to Israel in violation of Italian law (i.e. against the decision of the *Tribunale di Pavia*). Indeed, the fact that any appointment of a legal guardian, or any decision concerning custody and access rights over the child, may have a temporary nature does not constitute a circumstance that may invalidate the application of the remedies provided by the Convention.<sup>39</sup>

## 5 Reasons Impeding Immediate Return: the Need for a Rigorous Assessment

As mentioned, the 1980 Hague Convention intends to discourage the abductor from taking unilateral action, depriving him or her from any advantage that could result from the abduction. For this reason, exceptions to the immediate return rule provided by the Convention are exhaustive and should be subject

37 The actual exercise of rights of custody is another pre-requisite for the activation of the remedies of the 1980 Hague Convention, as specified by Art. 3(b).

38 Art. 343 ff. of the Italian Civil Code.

39 It being understood that, when it comes to children, decisions are by their nature temporary, since the passage of time may always require a new assessment of the child's best interests.

to restrictive interpretation.<sup>40</sup> On the other hand, their presence is necessary, because the return must always be in the best interests of the child: if this interest corresponds, in principle, with the immediate return to the State of habitual residence, it is quite possible that this correspondence will cease in the presence of certain circumstances, which lead to believe that the repatriation would be seriously prejudicial to the child.<sup>41</sup>

In particular, the abductor can oppose to return (i) if a period of one year has expired and the child has settled in his or her new environment (Article 12(2)); (ii) if the person, institution or other body having the care of the child is not exercising the custody rights at the time of removal or retention, or has consented to or subsequently acquiesced in the removal or retention (Article 13(1)(a)); (iii) if 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 (Article 13(1)(b)); (iv) if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views (Article 13(2));<sup>42</sup> (v) if return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20).

In the case under examination, the Supreme Court approves the reasoning of the courts of first and second instance and does not seem concerned about re-examining the existence of one of those circumstances, which are partially absorbed in the analysis of the pre-requisites for ordering the return of the child (such as the breach of custody rights or the determination of the child's habitual residence prior to the abduction). At the same time, the Court

40 Indeed, this is a very delicate matter in the context of the application of the 1980 Hague Convention worldwide, since the exceptions to immediate return may be interpreted in very different ways by national courts: on the topic SCHUZ, cit. *supra* note 5, p. 223 ff.; HALE, "Taking Flight – Domestic Violence and Child Abduction", *Current Legal Problems*, 2017, p. 3 ff.

41 As explained by the ECtHR in *X v. Latvia*, cit. *supra* note 10, paras. 96–97: "The Court reiterates that there is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount [...]. The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the status quo by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of 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 (Art. 13, first paragraph, (b))".

42 It is worth observing that this provision has gradually – but inexorably – gained importance over the years.

seems to take a correct approach, according to which the exceptions provided by the Convention for the immediate repatriation rule are very limited: their evidence must remove any reasonable doubt as to their existence in the facts of the case.

In particular, the settlement of the child in the new environment (Article 12(2)) did not seem to be an issue here, at least because of the swiftness of the proceedings in Israel.<sup>43</sup> Similarly, the exercise of custody rights by the aunt of the child – as court-appointed legal guardian – was not contested, since the child was living with her and her family before the abduction and she has always contested the movement of the child to Israel. Likewise, the Supreme Court dismissed the request to apply the “grave-risk-of-harm” exception of Article 13(1)(b), given the lack of adequate findings concerning the alleged danger that the child could have faced in Italy. In particular, it was argued that a return to the habitual residence in Italy would be to deny the child a relationship with his grandparents, causing an insufferable psychological harm. A weak argument, which – according to the Supreme Court – did not meet the standard of grave risk, considering the temporary nature of the separation and the fact that the relationship between the child and his relatives would have been the object of the proceedings on the merits, in Italy.<sup>44</sup>

As concerns the exception provided by Article 13(2), in the absence of evidence to demonstrate that the child expressly objected to being returned to Italy, the Supreme Court has endorsed the decision of the Family Court of Tel Aviv, which had decided not to order the audition. The Supreme Court upheld the view that the child’s young age and mental state did not allow him to form an autonomous will concerning his non-return to the country of habitual residence and, therefore, had excluded the application of the exception. This reasoning appears to take into adequate consideration, on the one hand, the child’s fundamental right of the child to be heard and, on the other hand, the need to pursue his or her best interests. If the right to participate in the decision-making process (even in the summary return proceedings under the 1980 Hague Convention) is now undisputed in the international legal framework,

43 The child has been conducted in Israel on 11 September 2021 and returned to Italy on 3 December 2021. On the practical problems surrounding the swift application of the 1980 Hague Convention and the enforcement of return orders KRUGER, *International Child Abduction: the Inadequacies of the Law*, Oxford, 2011, pp. 161–172.

44 There is a certain degree of consensus, in the application of the 1980 Hague Convention, on the approach followed by the Supreme Court of Tel Aviv in this regard. See the case law analysis of MCELEAVY in the INCADAT portal, cit. *supra* note 30, section “Grave Risk of Harm”.

case law and legal scholarship,<sup>45</sup> the Supreme Court has correctly assumed – given the particular circumstances of the case at hand – that the audition by a judge or by an appointed expert could have been detrimental to the well-being of the child.

On the other hand, the decision not to hear the child in Israel did not exclude the audition to be performed by Italian courts, when deciding on the merits of custody rights (or possibly on the declaration of the state of adoptability). Italy is subject to the human rights standards concerning the hearing of the child and, other than being part of the UNCRIC, is also part of the 1996 European Convention on the exercise of children's rights.<sup>46</sup> This means that the child will probably be heard within the Italian proceedings and he will also be older and more mature at that time (also taking into account the length of judicial proceedings in Italy). Again, the Supreme Court of Tel Aviv has considered the importance of a correct allocation of competences between the courts of the child's habitual residence and the courts appointed with the (summary) decision on return following an international abduction.

## 6 Concluding Remarks

The decision under review adheres to a clear and linear application of the safeguards provided by the 1980 Hague Convention. The swiftness of the proceedings did not result in a lack of consideration and reasoning – especially as concerns the assessment on the child's habitual residence and on the grounds for non-return provided by Articles 12 and 13 of the Convention. Moreover, the national courts have stressed, from different points of view, the importance to distinguish between the proceedings on return (which are summary in nature) and the proceedings on the merits of custody rights, where more stable and long-lasting decisions on the future of the child are taken. In absence of exceptional circumstances, the immediate return mechanism of the 1980 Hague Convention ensures that the proceedings on the merits take place in the State of the child's habitual residence, which is also the place where the best interest

45 See *supra* Section 1. On the topic, see also FREEMAN, "The Child Perspective in the Context of the 1980 Hague Convention", cit. *supra* note 6; FENTON-GLYNN, "Participation and Natural Justice: Children's Rights and Interests in Hague Abduction Proceedings", *Journal of Comparative Law*, 2014, p. 129 ff. The issue has been addressed in the Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction Convention and of the 1996 Child Protection Convention – July 6, 2017, available at: <<https://assets.hcch.net/docs/a093695a-5310-42df-92bb-068abfde67c2.pdf>, para. 63>.

46 Cit. *supra* note 14.

of the child is better pursued – both from the substantial and the procedural point of view. In the decision, it is well explained that the authorities of the habitual residence are in a better position to adopt the necessary determinations for the child's future, as well as to ensure the respect for his fundamental rights – among which the right to be heard and to participate in the proceedings, if this corresponds to his best interests.

Undoubtedly, the case at hand presents strong characteristic elements, which distinguish it from a “classic” international child abduction from various points of view. Among others, the dramatic circumstances that preceded the abduction and the fact that the latter was performed by the grandfather of the child, in breach of the custody rights of a legal guardian. Moreover, there is a strong cultural element that has also determined a high degree of conflict<sup>47</sup> and has also been used by the defendants to justify the desirability of obtaining a custody rights decision from the Israeli courts. Nonetheless, the Supreme Court did not deviate from a coherent application of the principles of the 1980 Hague Convention.

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47 The strong cultural characterization of the dispute raises the question whether recourse to mediation may be a possible way to address the conflict in the future. On the perks of mediation in the context of cross-border litigation involving families and children, see STALFORD, “Crossing Boundaries: Reconciling Law, Culture and Values in International Family Mediation”, *Journal of Social Welfare & Family Law*, 2012, p. 155 ff.; SALMINEN, “Mediation and the Best Interests of the Child from a Child Law Perspective”, in NYLUND, ERVASTI and ADRIAN (eds.), *Nordic Mediation Research*, Cham, 2018, p. 209 ff.