QORTI TAL-APPELL

IMĦALLFIN

ONOR. IMĦALLEF TONIO MALLIA
(Aġent President)
ONOR. IMĦALLEF JOSEPH AZZOPARDI
ONOR. IMĦALLEF ANTHONY ELLUL

Seduta ta' nhar it-Tlieta 17 ta' Mejju 2016

Numru

Rikors numru 10/15 PC

Direttur tad-Dipartiment għall-Isdandards
Fil-Ħarsien Soċjali

v.

Sharon Rose Roche nee' Bellamy

Il-Qorti

Rat li dawn huma proċeduri ta' ritrattazzjoni a bażi tal-Artikolu 811(d)(e)(i) u (l) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili (Kap. 12 tal-Liġijiet ta' Malta). Għall-aħjar intendiment ta' dawn il-proċeduri, din il-Qorti sejra tagħmel referenza għas-sentenza li tat din il-Qorti, diversament ippresjeduta, fit-30 ta' Ottubru 2015, u li tagħha qed tintalab ir-ritrattazzjoni. F'din is-sentenza hemm esposti t-talba u r-risposta tal-partijiet, is-sentenza li kienet ingħatat mill-Qorti tal-Maġistrati

(Għawdex), Ġurisdizzjoni Superjuri (Sezzjoni tal-Familja), u r-raġunijiet li waslu lil din il-Qorti tordna r-ritorn tal-minuri lejn l-Ingilterra.

> "1. Dawn huma appell principali maghmul mir-rikorrent u appell incidentali maghmul mill-intimata minn sentenza moghtija fl-24 ta' Lulju 2015 mill-Qorti tal-Magistrati [Ghawdex] Gurisdizzjoni Superjuri, [Sezzjoni tal-Familja] li permezz taghha dik il-Qorti cahdet it-talba tar-rikorrent ghar-ritorn tal-minuri lejn ir-Renju Unit wara li waslet ghall-konkluzjoni li:
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> > "there is a grave risk that the minor child's return to England would expose him to psychological harm and also place him in an intolerable situation, as contemplated in article 13[b] of the Hague Convention…… having also taken into konsideration that as yet not proof has been provided to the satisfaction of this court that adequate arrangements have been made to secure the protection of the child after his return, under article 11[4] of the Reguation [Council Regulation number 2201/2003]".
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> "**Il-Fatti**
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> "2. Missier il-minuri, Dean Michael Roche [il-Missier], cittadin Ingliz u l-intimata [l-Omm], li ghalkemm ghandha passaport Malti kienet ilha tghix l-Ingilterra, izzewwgu f'Ghawdex fis-27 ta' Lulju 2007 fiz-zmien meta dawn kienu jghixu u jahdmu fl-Ingilterra. Huma kienu jigu Malta u Ghawdex ta' spiss ghal btala, circa tlieta jew erba' darbiet fis-sena. L-Omm ghandha Farmhouse proprjeta` parafernali taghha fix-Xaghra Ghawdex[1], filwaqt li hi u l-Missier [il-genituri] ghandhom dar in-Nadur[2]. Fiz-zewg kuntratti hemm indikat li kemm il-Missier kif ukoll l-Omm kellhom ir-residenza taghhom fl-Ingilterra.
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> "3. Meta l-Omm kienet tqila bit-tifel il-partijiet gew Malta peress li l-Omm riedet li t-twelid tat-tifel isir fl-isptar ta' Ghawdex kemm ghax kienet tal-fehema li dan joffri servizzi medici ahjar minn dak li kien ikollha li kieku welldet fi sptar l-Ingilterra, kemm ukoll ghax fil-familja immedjata taghha gewwa Ghawdex hemm tobba u dan kien ta' konfort ghaliha.
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> "4. It-tifel twieled fl-1 ta' Ottubru 2011 u xahar wara t-twelid il-genituri telghu bit-tifel l-Ingilterra fejn kellhom id-dar matrimonjali taghhom sabiex ikomplu jghixu hemmhekk. Peress li z-zewg genituri kienu jahdmu gewwa l-Ingilterra, meta t-tifel kellu ftit xhur huma kienu jibaghtuh f'Nursery fejn dam jattendi ghal circa sentejn u nofs.
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> "5. Fil-15 ta' Awwissu 2014, meta t-tifel allura kellu sentejn u tmien xhur, l-Omm nizlet Ghawdex mill-Ingilterra bit-tifel. Hamest ijiem wara,

[1] Mixtrija fil-15 ta' Ottubru 2005
[2] Mixtrija fit-22 ta' Ottubru 2005

cioe` fl-20 ta' Awwissu hija fethet proceduri ta' medjazzjoni sabiex tissepara minn mal-Missier. Meta beda jghaddi z-zmien u l-Omm ma kinitx irritornat l-Ingilterra bit-tifel, il-Missier ghamel diversi tentattivi biex l-Omm taghtih spjegazzjoni ghar-raguni li ma kinitx ghadha marret lura.

"6. Fl-1 ta' Settembru 2014 l-Omm qalet lill-Missier li kienet ser tibqa' Ghawdex bit-tifel u ma kinitx sejra lura. Konsegwentement huwa nizel Ghawdex fl-14 ta' Novembru 2014 u hemm gie notifikat bl-atti gudizzjarji dwar il-proceduri li kienet fethet martu.

"7. Fil-mori tal-proceduri tal-medjazzjoni il-Qorti tal-Magistrati [Ghawdex] fuq applikazzjoni tal-Omm prezentata fl-20 ta' Awwissu 2014 tat digriet provvizorju li permezz tieghu afdat il-kura u kustodja esklussiva tat-tifel lill-Omm, filwaqt li irregolat l-access favur il-missier.

"8. Minn digriet moghti minn dik il-Qorti fit-3 ta' Marzu 2015 jirrizulta li fit-3 ta' Dicembru 2014 il-Missier, tramite l-avukat tieghu, talab li dik il-Qorti tichad it-talba tal-Omm li din tigi akkordatata l-kura u kustodja esklussiva tal-minuri u *"to order applicant [l-Omm] to return the child back to the United Kingdom in view of the fact that applicant illegaly changed the child's habitual residence".*

"9. Fit-2 ta' Frar 2015 il-Missier, tramite r-rikorrenti, fetah il-proceduri odjerni sabiex it-tifel jigi ritornat l-Ingilterra.

"**L-Appelli**

"10. L-appell principali huwa bazat fuq aggravju wiehed li hu fis-sens li l-ewwel Qorti ghamlet apprezzament hazin tal-fatti tal-kaz u b'hekk applikat hazin l-Artikolu 13[b] tal-Hague Convention 1980 [il-Konvenzjoni] ghall-fatti li kellha quddiemha.

"11. Fir-rikors tal-appell tieghu r-rikorrent, ghar-ragunijiet hemm dettaljatament spjegati minnu, qed jitlob li l-appell tieghu jigi miqlugh u li s-sentenza appellata tigi revokata u, minflok, din il-Qorti tordna r-ritorn tal-minuri lejn l-Ingilterra, bl-ispejjez taz-zewg istanzi kontra l-intimata.

"12. Min-naha taghha l-intimata, ghar-ragunijiet ezawrjentement spjegati minnha fir-risposta taghha qed titlob li l-appell tar-rikorrenti jigi michud; ukoll, permezz ta' appell incidentali qed titlob li s-sentenza appellata tigi revokata f'dik il-parti fejn cahdet l-eccezzjonijiet taghha: li r-residenza abitwali tal-minuri m'hijiex l-Ingilterra izda Malta [Ghawdex], li l-missier ma kellux drittijiet ta' kustodja fiz-zmien tar-rimozzjoni tal-minuri u wkoll li kien hemm il-kunsens jew l-akkwijexxenza tieghu sabiex il-minuri jibqa' jghix Ghawdex u, minflok, tilqa' dawn l-eccezzjonijiet, bl-ispejjez taz-zewg istanzi a kariku tar-rikorrent.

"**Is-Sentenza Appellata**

"13. L-ewwel Qorti waslet ghall-konkluzjoni taghha wara li ghamlet is-segwenti konsiderazzjonijiet:

"1. THE LAW

"This application is being made in terms of Act XIII of 1999 (Ch.410) of the Laws of Malta, whereby the Maltese parliament ratified two Conventions relating to the civil aspects of international child abduction and to the recognition and enforcement of custody rights. The return of the minor child Kaden Mario Roche to his purported habitual residence in the United Kingdom is being sought by the Central Authority of Malta on behalf of the Central Authority of that country in terms of Article 8 of the Hague Convention which states that:

"**Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply with either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child**...."

"In this regard article 11 of the Council Regulation 2201/2003 holds that:

"**1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ..., in order to obtain the return of a child that has been wrongfully removed or retained in a Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply**."

"According to Article 3 of the Convention:

"**The removal of a child is to be considered wrongful where**

"**(a) 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; and**

"**(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention**...."

"1. FACTS

"Dean Michael Roche and Sharon Rose Bellamy were married by civil rights in Gozo, Malta, on the 27th July 2007[3] having first met a year and a half before. At the time of their marriage both lived and worked in the United Kingdom, but frequently holidayed in Malta, as Sharon's parents had settled there some years earlier. Sharon owns a

[3] Vide Dok.SRR 13

farmhouse in Xaghra, Gozo, which she purchased on the 15th April 2005[4] and co-owns with her husband a house in Nadur, Gozo, which they jointly purchased on the 22nd October 2010.[5] Their son was born in Gozo on the 1st October 2011.[6] The present dispute owes its origin to the fact that on the 15th August 2014 respondent flew to Malta on a one-way ticket from Birmingham accompanied by her child.[7] She had previously informed her husband that she needed to go to Malta for some time to assist her mother who had to undergo a medical intervention. Sharon kept postponing her return to the U.K. until early in September of the same year when she informed her husband via e-mail that she would not be returning, that she would be seeking an end to the marriage and intended to live in Gozo.[8] Respondent subsequently initiated mediation proceedings before this Court (differently composed) and she was granted temporary sole custody of her minor child, confirmed by a decree of the 3rd March 2015.[9] Dean Roche had in the meantime already requested the Central Authority in the U.K. to ask the corresponding authority in Malta to proceed with the present application.[10]

"2. RESPONDENT'S PLEAS

(i) Habitual residence of the minor child Kaden Mario Roche:
Respondent is denying that the habitual residence of the minor child at the time this application was filed was the U.K. Although both the Convention and the Regulation make this one of the requirements for a return of the child, neither provides a definition of "habitual residence" for the purpose of these proceedings. On being called in "A" [11] to define this concept, the European Court of Justice noted that in the absence of any express reference to the law of the Member States, the terms 'habitual residence' are an autonomous concept.[12] If national law were to define that concept, the free movement of judgments would be hindered as some Member States might have a definition of 'habitual residence' which is too broad, whilst others might choose one which is too narrow. This could lead to situations where several courts of different Member States claim jurisdiction or, conversely, where no court is willing to assume it. Accordingly, an autonomous interpretation of the terms 'habitual residence' ensures the uniform application of Article 8(1) of the Brussels II bis Regulation throughout the Union. By relying on recital 12 of the Regulation, the European Court of Justice noted that the concept of 'habitual residence' must be shaped in light of the best interests of the child.[13]

"Taking all this into consideration, this Court feels that the habitual residence of the child for the purpose of this application has to be

[4] see Dok.SRR 10
[5] see Dok.SRR 9
[6] see Dok.SRR 14
[7] see Dok.SRR 2
[8] see Dok. DR 9 filed by applicant on the 16.03.2015
[9] see Dok. SRR 7
[10] see Dok. C annexed to the present application
[11] See Case C-523/07 A (2009) ECR 1-2805
[12] Ibid., para. 34
[13] Ibid., para. 35

established with regards to the situation as existing prior to the removal of the child from the U.K. and not afterwards, as respondent seems to imply. From the evidence produced we learn that the couple were living in Birmingham, U.K. in a house owned by Mr. Roche even before they were married. Both had a full-time job in the area, Mr. Roche as Head of Supply Quality Assurance with a chain of food and brewery suppliers,[14] and his wife as an on line Communications Manager. Mr. Roche has two other children (13 year old twins) from a previous relationship, who live with their mother, but visit him for sleepovers on alternate weekends. Kaden was born in Malta by caesarean section, as his mother felt that she would get better treatment over here. However soon after the birth of the child,[15] Sharon returned to the U.K. and Kaden was brought up over there. When he was only four months old, the child was sent to a nursery to be looked after while both parents were at work. A childcare voucher was also deducted from the father's salary in consideration of fees due to the nursery.[16] Up until the 15th August 2015, the couple only visited Malta, together with their child, for short visits.[17] These circumstances should leave no doubt as to the fact that the U.K. is to be considered the habitual residence of the Roche family.

"***(ii) Custody rights:***

"As indicated in the application, under Article 2(1) of the Children Act of the U.K. (1989) **"where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child."** According to Article 2.11(a) of the Regulation, a removal or retention is considered wrongful where "**it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention**." There is no evidence of an acquired judgment or agreement with regards to the rights of custody, and so this case is to be considered governed by the law of England above-indicated. Respondent argues that she is in possession of a Court decree issued by this Court granting her sole custody of her minor child.[18] However applicant rightly points out that this was just a temporary measure determining responsibility for the child while he was still on the island, during mediation proceedings before the local courts. Indeed Article 17 of the Convention stipulates that **"the sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention."** The position was also confirmed in a similar case before the Civil Court (Family Section).[19]

"***(iii) Consent for removal and acquiescence in the retention of the child:***

[14] See Dok. DR 6 filed by applicant on the 16.03.15

[15] When he was 6 weeks old (see Carmen Bellamy's evidence under cross-examination)

[16] See Dok. DR 8 filed by applicant on the 16.03.15

[17] see Carmen Bellamy's evidence under cross-examination

[18] See this Court's decree of the 3.03.15 (Dok. SRR 7)

[19] The Director of Social Welfare Standards Department vs Richard John Bridge of the 26.05.11

"This defence is contemplated under Article 13(a) of the Convention. It is being submitted by respondent that Dean Roche consented to the removal of the child as he never objected to his wife's visit to Gozo on the 15th August 2015 and her taking their child with her. This was indeed the case. However he was taken completely by surprise when he learned that his wife was not returning to the U.K. and intended to stay in Gozo with their child. This clearly shows that his consent was only for a temporary visit to the island so that his wife could take care of her mother during her convalescence. As Mr. Justice Baker emphasised in the leading case **RE PJ (Abduction)**,[20] "***Consent to the removal of the child must be clear and unequivocal***."

"Respondent argues also that her husband then acquiesced to the retention of the child in these islands as he only requested the present proceeding in December of last year,[21] when his child had been in Gozo since August. He also accepted the jurisdiction of the Maltese Courts when he participated in mediation proceedings initiated by her before this Court and even visited his son, with his wife's approval, while on the island. However, as rightly pointed out by applicant, the fact that the father was trying to reach an amicable solution to this problem did not amount to such acquiescence. Furthermore it was only natural for him to want to see his son and his contacts with his wife for such a purpose should not be interpreted as acquiescence. As clearly stated by Lord Browne-Wilkinson in **Re H and Others (minors) (Abduction: Acquiescence)**: "*Although each case will depend on its own circumstances, I would suggest that judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to affect a reconciliation or to reach an agreed voluntary return of the abducted child. The Convention places weight on the desirability of negotiating a voluntary return of the child: See Art 7(c) and Art 10... Attempts to produce a resolution of problems by negotiation or through religious or other advisors do not, to my mind, normally concede an intention to accept the status quo if those attempts fail. It is for the judge, in all the circumstances of the case, to attach such weight as he thinks fit to such factors in reaching his findings as to the state of mind of the wronged parent*."[22]

"***(iv) The Grave Risk or Intolerable Situation defence under Article 13(b) of the Convention***

"According to the first paragraph of Article 12 of the Convention, applicable to the present situation, as the child has been less than a year on the island:

> "**Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or**

[20] [2009] EWCA Civ 588, [2009] 2FLR 1051

[21] See his application filed with the Central Authority of the U.K. on the 23.12.14 (Doc. C annexed to the present application)

[22] [1998] AC 72

retention, the authority concerned shall order the return of the child forthwith."

"Under this general rule, once it has been established that the child is habitually resident in the requesting State, as in the present case (see above), the child should be immediately returned for the matter to be dealt with by the Courts of that State. Exceptionally, however, under the circumstances mentioned in Article 13 of the same Convention, the Courts of the requested State may refuse such demand. Indeed, respondent is basing this part of her defence on paragraph (b) of this Article whereby the judicial authority of the requested state is not bound to order the return of the child 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**." Hence it has to be seen whether the circumstances are such as to justify the refusal of the request on these grounds.

"In **Baxter v. Baxter** the American Court of Appeal explained in this regard that: "*to meet her burden under the article 13(b) exception, the respondent must establish that the alleged physical or psychological harm is 'a great deal more than minimal.' Indeed, the harm must be 'something greater than would normally be expected on taking a child away from one parent and passing him to another*." [23]

"To substantiate this defence, respondent exhibited two *ex-parte* reports of psychologists who examined the situation from information supplied by Mrs. Roche and after visiting the child. Both reports have been exhibited and form part of the records of the case.

"**Rev. Joseph Farrugia** believes that: "*in considering all these data, we humbly suggest to the relevant authority to comply with the mother's request to obtain the full custody of the child permanently. The child can't be separated from the mother. All psychological research, especially Attachment Theory, confirm the fundamental role of the mother for the child. There is a strong healthy attachment between mother and child in this case. At the same time the child is still very young and any separation from his mother will cause psychological trauma*." [24]

"Ms. **Maria Grech Brincat** has similar views on the matter and concludes that: "*...it is not advisable that Kaden should be returned back to England. One has to keep in mind that Kaden's father has an alcohol abuse problem and becomes aggressive and also the fact that reportedly he suffers from Sleep Apnea; these facts could put at risk the child's safety. Therefore it is wise if one considers giving full custody of the child to the mother permanently. The child would suffer psychological and emotional difficulties if he is taken away from his mother. Nevertheless a child needs also his father hence it is hugely suggested that Kaden meets his father on a regular basis under supervision*." [25]

[23] 423 F.3d 363 (3d Cir.2005)

[24] See Rev. Farrugia's report confimed on oath on the 25.03.2015 and exhibited as Doc. SR 101

[25] See Ms. Grech Brincat's report confirmed on oath on the 10.04.2015 and exhibited as Doc.MGB by means of a Note filed on the 13.04.2015

"The court-appointed expert **Dr. Carly Aquilina** concurs with these opinions when she states that: "...*Kaden and his mother enjoy a strong bond that has been fostered by attuned parenting from Sharon's part. Sharon is highly sensitive to Kaden's biopsychosocial needs. Sharon has been Kaden's primary caregiver. Dean has reportedly had difficulties with alcohol abuse and has utilised a more detached parenting style. Dean is unlikely to intentionally attempt to harm Kaden; however, he has reportedly at times been unable to change his nappy frequently enough. Kaden appears happier in Gozo than in the U.K. and currently has regular contact with Sharon and extended family.*

"*There would be several risks of harm to Kaden if he were returned permanently to Dean's care. Sharon is unable to return to the UK therefore Kaden would lose regular contact with his primary caregiver, his mother. Dean would be unable to supervise Kaden appropriately given his reported drinking and his difficulties in considering Kaden's basic needs (nappy changing). It is recommended that Kaden remain in Gozo with his mother in order to ensure his wellbeing and reduce his risk of harm*...".[26]

"All these experts concur in the view that the child would suffer psychological harm if he is separated from his mother and returned to the U.K. to live with his father. Mrs. Roche has made it abundantly clear that she is unwilling to go back to the U.K. All her immediate family now reside in Malta and she would be on her own in the U.K. She is settled in her own home in Gozo, but has nowhere to go to in the U.K. She also has a good job and can even work from home, to be in a better position to take care of her son, while she would have to seek a new job should she have to return to the U.K.

"On the other hand Mr. Roche has a full time job and it is not at all clear who would look after Kaden when he is back from school. Mr. Roche's immediate family consist of his mother and a ninety year old grandmother, who Kaden visited sporadically and does not seem to be all that attached to them. There are also Kaden's thirteen year old twin half-siblings, who however do not live with their father and only stay with him for three days every other weekend. Yet the most worrying aspect of returning the child to live with his father concerns his alcohol abuse. Quite a few episodes have been recounted of Mr. Roche not having full control of his senses when he is under the influence of alcohol, and at times these have even been somewhat violent, though no evidence has been produced of the father ever physically harming his son. Mr. Roche has very weakly rebutted these allegations and has made no attempt to convince this Court that he is willing to change his ways and perhaps forfeit his frequent visits to the pub to have more quality time with his son. Also worrying is the medical condition[27] which Mr. Roche is said to suffer from, especially if he would be living on his own with the child.

"Article 11(4) of the Brussels Regulation states that:

[26] See Dr. Aquilina's report, filed on the 15.04.2015 and confirmed on oath on the 14.05.2015
[27] Sleep Apnea

> "**A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return**."

"However in the present case no proof has been forthcoming that such measures have already been taken by the competent authorities in England or indeed, as has been indicated, by the father himself.

"Under the mentioned Article 13: "**The judicial authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views**."

"Obviously a three year old child, as is the case here, could not express his views on the matter. However sufficient evidence has been produced to show that Kaden is now happily settled on the island, is securely attached to his mother and her immediate family [28] and has made good progress at school.[29]

"***(v) The possible breach of Article 8 of the ECHR***

"This is a matter outside this Court's competence, and is in fact being presently examined by the appropriate Court in proceedings already initiated by respondent.[30]

"Ghalkemm is-sentenza fl-ewwel istanza nghatat bl-Ingliz sar qbil quddiem din il-Qorti li l-proceduri f'din l-istanza jsiru bil-Malti.

"14. Illi tenut kont tan-natura tal-aggravji huwa opportun li l-ewwel jigi trattat l-appell incidentali tal-Omm.

"**<u>L-Appell Incidentali</u>**

"15. Dan hu bazat fuq tliet aggravji: [1] li r-residenza abitwali tat-tifel hija Malta u mhux l-Ingilterra, [2] li permezz ta' digriet moghti mill-qrati maltin il-kura u kustodja giet fdata esklussivament lill-Omm, [3] li l-Missier ta l-kunsens u akkwijexxenza tieghu sabiex il-minuri jibqa' jghix f'Malta.

"*L-ewwel aggravju*

"16. L-Omm issostni li, ghalkemm huwa minnu li hi u l-Missier mat-tifel ghamlu xi zmien jghixu l-Ingilterra, ir-residenza abitwali taghhom hija Malta [Ghawdex] u mhux kif konkluz mill-ewwel Qorti. Hija ressqet diversi fatturi in sostenn ta' din it-tezi taghha: li hi u t-tifel huma ta' nazzjonalita` Maltija; li l-post tax-xoghol taghha huwa f'Malta u li hi ghandha proprjeta` Malta; li hi u l-missier ghamlu testment *unica charta*

[28] See page 9 of the court expert's report
[29] See school reports exhibited by respondent as Dok. SRR 20
[30] Constitutional Case No. 59/2015

f'Ghawdex; li z-zwieg mal-missier sar f'Malta; li d-"dar matrimonjali" taghhom hi sitwata f'Malta; li t-tifel imur l-iskola f'Malta u li fi zmien tliet xhur[31] ikun ghamel sena skolastika shiha f'Malta; li l-familjari tal-Omm jghixu Ghawdex fejn ghalhekk ghandha l-appogg kollu li ghandha bzonn; li hi m'ghandhiex post fejn tabita kieku kellha tirritorna l-Ingilterra; li l-familja taghha ghandha qabar f'Ghawdex u li anke ghandha d-dentist taghha f'Ghawdex; li matul iz-zmien l-Omm u l-Missier kienu jigu ta' spiss Ghawdex *"with every intention of living here"* tant li kellhom l-intenzjoni li jifthu *"food business"* f'Ghawdex; li l-hbieb taghha kollha jghixu Ghawdex filwaqt li fl-Ingilterra m'ghandhiex *"social life";* li proceduri ghas-separazzjoni personali gew istitwiti fil-Qorti ta' Ghawdex u li l-missier ma ssollevax l-eccezzjoni dwar il-gurisdizzjoni ta' dik il-Qorti.

"17. Fl-ewwel lok din il-Qorti tirribadixxi dak li osservat fil-kawza **Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali v. Jessica Farrugia**[32]:

> "Il-Qorti tara li, skont id-duttrina Ingliza, li maghha din il-Qorti taqbel, mhux mehtieg li dak li jkun jmur f'post bi hsieb li jibqa' fih b'mod indefinit; sakemm dak li jkun imur f'post *for a settled purpose*, li mhux vaganza jew ghal fini ta' access, jista' jitqies li rawwem ir-residenza abitwali f'dak il-post…..
>
> "Fil-kaz *Re: B [Minors] [Abduction[2] 1993* Waite J. osserva: 'Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and <u>for settled purposes as part of the regular order of their life</u>[33] for the time being, whether of short or of long duration.
>
> "…..L-intenzjoni ta' residenza hija marbuta mal-iskop, u mhux mehtieg zmien twil biex din tigi stabbilita."

"18. Fil-meritu din il-Qorti tosserva li l-fatturi elenkati mill-Omm b'tentattiv li ssostni t-tezi taghha li, qabel ma sehhet ir-rimozzjoni tat-tifel mill-Ingilterra, ir-residenza abitwali tieghu kienet f'Ghawdex ma jwasslux, la mehudin wahda wahda u lanqas flimkien, ghal dik il-konkluzjoni. Dan qed jinghad fid-dawl tal-konsiderazzjoni li l-provi juru li, minkejja li l-genituri kellhom proprjeta` f'Ghawdex, huma kienu fil-fatt jghixu l-Ingilterra fejn kienu ilhom jghixu ghal diversi snin, fejn it-tnejn kellhom il-post tax-xoghol taghhom u fejn it-tifel kien jintbaghat in-nursery l-Ingilterra sabiex huma jkunu jistghu jmorru jahdmu. Huma kienu iddecidew li jibqghu jghixu l-Ingilterra *"for settled purposes as part of the regular order of their life".*

"19. Il-fatt li l-partijiet izzewwgu f'Ghawdex u li l-Omm kienet nizlet Ghawdex biex twelled hemm huma fatturi incidentali rizultanti mill-fatt li

[31] In-nota ta' sottomissjonijiet kienet giet prezentata fis-6 ta' Lulju 2015
[32] App.141/2014 deciz 5 Dicembru 2014
[33] Sottolinear ta' din il-Qorti

l-Omm ghandha familja estensiva gewwa Ghawdex u li f'Ghawdex ghandha wkoll membri tal-familja li huma tobba. Hija iddecidiet li jkollha t-tifel Ghawdex ghax hasset li hemmhekk kellha hafna izjed appogg milli kieku welldet l-Ingilterra. Di fatti, xahar wara t-twelid tat-tifel, hija regghet marret lura l-Ingilterra bit-tarbija sabiex tkompli tghix hemm flimkien ma' zewgha fid-dar matrimonjali.

"20. Lanqas il-fatt li l-Omm kellha f'Ghawdex proprjeta` parafernali taghha gewwa x-Xaghra[34] u proprjeta` ohra gewwa n-Nadur[35] komuni ma' zewgha ma jwasslu ghall-konkluzjoni li r-residenza abitwali taghhom kienet go Ghawdex. Kif jirrizulta mix-xhieda, kemm il-proprjeta` taghha kif ukoll il-proprjeta` komuni[36] ma' zewgha kienu jinkrew u kien biss meta l-Omm iddecidiet li ma tmurx lura l-Ingilterra li waqfet tikri l-proprjeta` tan-Nadur ghax marret tghix fiha. Barra minnhekk il-fatt li l-partijiet xtraw proprjeta` f'Ghawdex ma jwassalx ghal bdil tar-residenza abitwali taghhom. Jista' jkun li meta l-genituri iddecidew li jixtru dik il-proprjeta` kellhom il-hsieb li xi darba fil-futur huma jmorru jghixu hemm, izda ghall-finijiet tal-proceduri odjerni l-*punctum temporis* huwa z-zmien meta l-Omm iddecidiet li ma tmurx lura l-Ingilterra fejn f'dak iz-zmien kienet qieghda tghix ma' zewgha. F'dak iz-zmien ir-residenza abitwali taghha ma kinitx go Ghawdex imma go l-Ingilterra.

"21. Apparti minn hekk il-proprjeta` f'Ghawdex kif stqarr il-Missier kienet isservihom ukoll [sakemm ma kinitx tkun mikrija] biex ikollhom fejn joqghodu meta kienu jinzlu Ghawdex ghal btala tlieta jew erba' darbiet fis-sena.

"22. Dwar il-fatturi l-ohra elenkati mill-Omm din il-Qorti tosserva li ghandu jirrizulta car li dawn ma jsostnux it-tezi taghha.

"23. Rigward it-testment *unica charta* li l-genituri kienu ghamlu fis-26 ta' Lulju 2010 meta kienu Ghawdex, mill-istess att jirrizulta li f'dak iz-zmien il-genituri kienu residenti l-Ingilterra, u precizament go Birmingham fejn allura kellhom id-dar li legalment ghandha titqies bhala d-dar matrimonjali taghhom. Fit-tieni paragrafu tat-testment fejn hemm indikat id-dettalji tal-partijiet hemm imnizzel li *"both [testators] residing in Birmingham, United Kingdom presently di passaggio in these Islands".* L-istess dettalji nghataw fil-kuntratti ta' xiri tal-post tax-Xaghra u tan-Nadur. Kemm l-Omm kif ukoll l-Missier indikaw li huma kienu jirrisjedu l-l-Ingilterra.

"24. Fid-dawl tal-konsiderazzjonijiet premessi din il-Qorti taqbel mal-konkluzjoni raggjunta mill-ewwel Qorti fir-rigward u ma tarax li hemm xi raguni ghaliex ghandha tiddisturba l-apprezzament maghmul minn dik il-Qorti dwar ir-residenza abitwali tat-tifel immedjatament qabel ma dan ittiehed Ghawdex mill-Omm.

[34] Mixtrija fil-15 Ottubru 2005
[35] Mixtrija fit-22 Ottubru 2010
[36] Ara xhieda Carmen Bellamy 16 Marzu 2015

"25. Ghaldaqstant dan l-aggravju huwa infondat u qed jigi michud.

"*It-tieni aggravju*

"26. Fl-appell taghha l-Omm tkompli tilmenta li, meta l-ewwel Qorti ikkonsidrat li l-*parental responsibility* kienet tirrisjedi fuq iz-zewg genituri skont ic-Children Act [1989] tal-Ingilterra, hija injorat il-fatt li permezz ta' digriet provvizorju moghti mill-qrati maltin il-*"custodial rights had already been vested in the respondent"* qabel ma bdew il-proceduri odjerni. Dan id-digiret ghadu vigenti u allura *"should stand as the only legal instrument granting custodial rights".*

"27. Rigward l-Artikolu 17 tal-Konvenzjoni, l-Omm tissottometti li dan m'ghandux jinqara flimkien mal-Artikolu 2[11][a] tar-Regulation. Hija tkompli tispjega hekk din il-parti tal-aggravju:

> "The First Court then goes on to quote Article 17 of the Convention that states that 'the fact that a decision relating to custody has been given in or is entitled to recognition in the requested state shall not be a ground for refusing to return the child under the Convention'. But Article I7 of the Convention does not deal with custodial rights and whether removal or retention is in breach of custodial rights and therefore removal to be considered wrongful. It simply states that once removal is considered wrongful because it is in breach of custodial rights etc. ... then the fact that there is a decision relating to custody should not preclude the court from ordering the return. That would have been the *scenario* for example if parallel proceedings had been insituted in the U.K. by the father and there would have been conflicted decisions relating to the custody of the minor child. Article 2.1I(a) of the Regulation and Article 17 of the Convention do not have the same purpose and should not be read in conjuction with each other."

"28. Fl-ewwel lok din il-Qorti tosserva li ghandu jirrizulta car u manifest li l-Artikolu 17 tal-Konvenzjoni jittratta dwar decizjonijiet fuq kustodja fir-"requested State", filwaqt li l-Artikolu 2[11][a] tar-Regulation jiddefenixxi l-kuncett ta' "wrongful removal or retention". L-ewwel Qorti ghamlet referenza ghall-artikolu 2[11][a] meta osservat li ma kienx hemm ordni mill-Qorti Ingliza li dderogat mid-dritt tal-kura u kustodja kongunta tal-genituri tat-tifel attwibwita lilhom taht il-ligi Ingliza fiz-zmien li dawn kienu jghixu l-Ingilterra u immedjatament qabel ir-ritenzjoni illegali da parti tal-Omm.

"29. Fil-fehma ta' din il-Qorti, la darba gie stabbilit li r-residenza abitwali tat-tifel qabel ma gie ritenut mill-Omm f'Ghawdex kienet l-Ingilterra, din il-parti ta' dan l-aggravju hija legalment insostenibbli u l-ewwel Qorti kienet korretta meta applikat ghall-kaz odjern l-Artikolu 17 tal-Konvenzjoni, fid-dawl tal-fatt li d-digriet provvizorju moghti mill-Qorti ta' Ghawdex kien sar necessarju biss tenut kont tal-fatt li, ghalkemm l-Omm kienet qed izzomm it-tifel illegalment f'Ghawdex, hija kienet l-

uniku genitur li kienet qed tiehu hsieb il-bzonnijiet tat-tifel f'Ghawdex. Dan certament m'ghandux l-effett legali li jimmina d-drittijiet ta' kustodja tal-Missier li baqa' jghix fl-Ingilterra fejn sa qabel ir-ritenzjoni tat-tifel da parti tal-Omm dawn il-genituri kienu jirrisjedu abitwalment flimkien mat-tifel. Ghalhekk id-digriet provvizorju moghti mill-Qorti ta' Ghawdex fl-interess tat-tifel ma jikkostitwixxi ebda ostakolu legali ghar-ritorn tat-tifel u dan b'applikazzjoni tal-Artikolu 17 tal-Konvenzjoni.

"30. Ghaldaqstant dan l-aggravju huwa infondat u qed jigi michud.

"*It-tielet aggravju*

"31. Dan jirrigwardja l-element tal-kunsens u l-akwijexxenza da parti tal-Missier ghar-ritenzjoni tat-tifel f'Ghawdex.

"32. In tema legali jigi ribadit li, kif gia` qalet din il-Qorti fil-kawza *App.S* **Direttur v. Merleverde Lara Maria**[37] l-akkwijexxenza ghandha tkun:

> "clear and unequivocal" [Bromely, Family Law [2007 pg.650]…."Where the words or actions of the wronged parent clearly and unequivocally show, and have led the other parent to believe, that the wronged parent is not asserting or going to assert his right to the summary return[38] of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced." [HOL 1998]

"33. L-ewwel parti ta' dan l-aggravju huwa fis-sens li skont l-Omm ma hux minnu li kif allegat mill-Missier dan kien *"taken by surprise"* meta sar jaf minn ghandha li hi ma kinitx ser tirritorna l-Ingilterra bit-tifel. Tissottometti li *"there is evidence that he was all this time aware of what was going on and at one point gave her an ultimatum by which date if she did not return he was going to throw her beloingings in the garage."*

"34. Din il-Qorti tosserva li mill-istess termini ta' din il-parti tal-aggravju jirrizulta manifest li meta fl-1 ta' Settembru 2014 l-Omm informat lill-Missier li ser tibqa' Ghawdex bit-tifel huwa kien oggezzjona ghal dan il-fatt *"in a clear and unequivocal manner"* u kien beda jinsisti li din tirritorna lura bit-tifel. Tant dan hu minnu li eventwalment mar ghand is-Central Authority fl-Ingilterra biex jibdew proceduri f'Malta [Ghawdex] ghar-ritorn tat-tifel. Di fatti l-proceduri odjerni bdew fit-2 ta' Frar 2015.

"35. Fil-fehma ta' din il-Qorti dawn il-fatti mhux talli ma jikkonfermawx it-tezi tal-Omm li kien hemm kunsens u akkwijexxenza da parti tal-Missier, izda ghal kuntrarju jeskludu dawn il-fatturi.

[37] Deciza 25 Frar 2011
[38] Sottolinear ta' din il-Qorti

"36. Fit-tieni parti ta' dan l-aggravju, l-Omm tissottometti li l-Missier accetta l-gurisdizzjoni tal-qrati maltin bil-fatt li huwa *"is particpating fully"* fil-proceduri tas-separazzjoni inizjati mill-Omm fil-Qorti ta' Ghawdex minghajr ma ssolleva l-vertenza dwar il-gurisdizzjoni ta' dik il-Qorti. Hija tghid li b'dan il-fatt huwa ssottometta ruhu ghall-gurisdizzjoni ta' dik il-Qorti u li dan jammonta ghal akkwijexxenza da parti tieghu. Hija tkompli tispejga hekk dan l-aggravju:

> "Participating in court proceedings in a certain jurisdiction without raising the issue of jurisdiction as a preliminary matter is not trying to find an amicable solution but participating in the litigation with the full knowledge that one is accepting the jurisdiction of the Court he is litigating in front of *[sic].* The question between respondent and Dean Michael Roche is no longer in the stages of mediation."

"37. Dwar dan, din il-Qorti tibda biex ticcita t-tieni eccezzjoni tal-Missier u l-ghaxar paragrafu tar-risposta guramentata[39] tieghu fil-kawza tas-separazzjoni:

> "2.Illi huwa jopponi sabiex il-kura u l-kustodja tal-iben minuri Kaden Mario Roche tkun unikament f'idejn ir-rikorrenti. Il-kura u kustodja tal-wild minuri ghandha tkun kongunta f'idejn iz-zewg partijiet u ghandhom jigu stabbiliti hinijiet u modalitajiet ta' access. Tali access ghandu ukoll jinkludi zjajjar tal-minuri fir-Renju Unit ……. Dan fl-eventwalita li jigi deciz li l-minuri ghandu jibqa' jghix hawn Ghawdex u ma tintlaqax it-talba tal-missier sabiex it-tifel jirritorna lura lejn ir-Renju Unit."

> "10.Din ir-risposta guramentata qieghda tigi prezentata minghajr pregudizzju ghall-appell numru 10/2015 fl-ismijiet Direttur tad-Dipartiment ghall-istandards fil-Harsien tal-Familja vs Sharon Rose Roche nee Bellamy, liema appell jinsab pendenti quddiem il-Qorti tal-Appell u f'liema proceduri qieghed jintalab li Kaden Mario Roche jigi ritornat lura l-Ingilterra stante li inzamm hawn Malta minghajr il-kunsens tal-missier."

"38. Mill-premess jirrizulta car li, ghalkemm il-Missier ma kellux problema li l-qrati maltin jiddeciedu l-kawza tas-separazzjoni li fethet martu hamest ijiem wara li nizlet Ghawdex, inkluza l-vertenza dwar il-kura u kustodja tat-tifel u d-drittijiet tal-access, izda xorta wahda zamm impregudikata t-talba tieghu maghmula f'dawn il-proceduri ghar-ritorn tat-tifel. Mit-termini tal-eccezzjoni tieghu jirrizulta manifest li huwa kien qed jikkondizzjona l-accettazzjoni tieghu li l-vertenza tigi deciza mill-qrati maltin kemm-il darba t-talba tieghu, maghmula precedentement ghar-risposta guramentata, dwar ir-ritorn tal-minuri tigi michuda.

"39. Il-premess juri bic-car li ma kienx hemm akkwijexxenza da parti tal-Missier ghar-ritenzjoni tat-tifel tieghu f'Malta u l-provi juru li, minkejja li fil-proceduri ta' separazzjoni inizjati mill-Omm fil-Qorti tal-Magistrati [Ghawdex] huwa ma kkontestax il-gurisdizzjoni ta' dik il-Qorti ghal dawk

[39] Prezentata 21 ta' Awissu 2015

il-proceduri, izda fl-istess proceduri, permezz tar-risposta prezentata minnu, huwa indika b'mod car li huwa ried li l-kwistjoni tal-kura u kustodja tal-minuri ma tkunx deciza minn dik il-Qorti u kien baqa' jinsisti li t-tifel jigi ritornat lura l-Ingilterra. Jirrizulta ghalhekk car u inekwivokabilment li huwa kellu l-intenzjoni li jkompli jasserixxi d-dritt tieghu ghar-ritorn tal-minuri. Dan johrog car mit-termini tar-risposta guramentata u b'mod partikolarli mill-paragrafu 10 tal-istess risposta.

"40. Ghaldaqsant dan l-aggravju qed jitqies infondat u qed jigi michud.

"**L-Appell Principali**

"41. [a] Ir-rikorrent jilmenta li, fl-apprezzament tal-provi li a bazi tieghu l-ewwel Qorti waslet ghall-konkluzjoni li jekk it-tifel jintbaghat lura l-Ingilterra, huwa jkun soggett ghal riskju gravi ta' hsara fisika u psikologika jew ta' tqeghid tieghu f'sitwazzjoni intollerabbli a tenur tal-artikolu precitat, dik il-Qorti strahet biss fuq ir-relazzjonijiet taz-zewg esperti *ex parte* r-Reverendu Joseph Farrugia u Maria Grech Brincat inkarigati mill-Omm kif ukoll tal-espert Dottoressa Carly Aquilina nominata mill-Qorti, liema esperti semghu biss lill-Omm u lit-tifel izda ma semghux lill-Missier.

"42. [b] Ir-rikorrent jilmenta wkoll li, meta l-ewwel Qorti tat is-sentenza taghha fl-24 ta' Lulju 2015, id-deposizzjonijiet in eskussjoni ta' dawn l-esperti ma kinux ghadhom gew traskritti, tant li t-traskrizzjonijiet kienu waslu ghandha fit-28 ta' Lulju 2015. Fil-fatt jirrizulta li sad-data tas-sentenza t-traskrizzjoni ta' dawk id-depozizzjonijiet ma kinux ghadhom inseriti fl-atti tal-kawza. Ghalhekk huwa pprezenta mar-rikors tal-appell tieghu, kopja tal-emails li ghaddew fir-rigward bejn impjegati fil-Qorti tal-Magistrati [Ghawdex] u d-difensur tal-istess rikorrent flimkien ma kopja tat-traskrizzjonijiet fuq riferiti, markati rispettivament bhala Dok. A u dok. B.

"43. [c] Jghid ukoll li fuq certu aspetti tal-kaz l-Omm tat verzjoni tal-fatti kontrastanti lill-esperti li semghuha fejn l-ewwel tghid li l-Missier kien waqqa' lit-tifel izda f'verzjoni ohra tghid li l-Missier kwazi waqqa' lit-tifel. Minn naha tieghu l-Missier cahad li qatt kien vjolenti mat-tifel.

"44. Rigward l-allegazzjoni tal-Omm li l-Missier ghandu l-vizzju tal-alkohol u ghalhekk kien ta' perikolu ghall-minuri, il-Missier cahad kategorikament din l-allegazzjoni. Ir-rikorrent jissottolinea li mill-provi ma rrizultax li l-Missier kien abusiv fil-konfront tal-Omm jew tal-minuri. Di fatti ma hemm ebda evidenza ta' abbuz fuq it-tifel, kif fil-fatt gie konstatat mill-espert tal-Qorti fix-xhieda taghha.

"45. [d] Ir-rikorrent jilmenta li, kif jirrizulta mir-rapport tal-esperti, l-analizi maghmula minnhom u l-konkluzjoni li waslu ghaliha dawn l-esperti juru li dawn kienu iffokaw fuq il-punt dwar min hu l-ahjar genitur

sabiex irabbi lill-minuri. Fi kliem iehor dawn trattaw il-meritu tal-kura u kustodja u mhux il-meritu tal-proceduri odjerni.

"46. [e] Huwa jiccita estensivament minn kazistika lokali u dik barranija dwar l-interpretazzjoni li ghandha tinghata lid-difiza kontemplata fl-Artikolu 13[b] tal-Konvenzjoni tenut kont tal-iskop u l-ispirtu tal-istess konvenzjoni. Fis-succint, isostni li d-difiza kontemplata f'dak l-artikolu ghandha tkun interpretata b'mod strett u, biex tirnexxi, ghandu jigi pprovat li r-riskju tal-hsara lill-minuri jekk dan jigi ritornat ikun wiehed gravi u serju u ghandu jirrizulta minn provi cari u konvincenti.

"47. [f] Ir-rikorrent jissenjala l-fatt li fl-Ingilterra jezistu *'support services'* li jaghtu protezzjoni adegwata lill-minuri jekk ikun hemm bzonn. Inoltre, zgur li l-qrati Inglizi ghandhom ghad-dispozizzjoni taghhom il-mezzi sabiex jipprotegu lill-minuri sakemm tigi deciza minnhom il-kwistjoni tal-kura u kustodja.

"*Konsiderazzjonijiet tal-Qorti*

"48. Qabel ma din il-Qorti tghaddi biex tezamina l-meritu tal-appell, jehtieg li jigu ezaminati zewg kwistjonijiet, wahda sollevata mir-rikorrent u li tirrigwarda t-traskrizzjonijiet tax-xhieda tal-esperti, u l-ohra sollevata mill-Omm dwar in-nullita` tar-rikors tal-appell principali fuq il-bazi li skont l-Omm ma jirrizultax b'mod car x'inhu l-aggravju li fuqu r-rikorrent qed jibbaza l-appell tieghu.

"49. Dwar l-ewwel kwistjoni din il-Qorti tosserva li, izjed milli jigi stabbilit jekk it-traskrizzjonijiet kinux gew inseriti fil-process qabel jew wara li l-ewwel Qorti tat is-sentenza taghha, dak li hu relevanti huwa jekk dik il-Qorti haditx konjizzjoni tax-xhieda li ghalihom jirreferu t-traskrizzjonijiet. Din l-Qorti tosserva li x-xhieda in eskussjoni tal-esperti, inkluza dik tal-espert gudizzjarju, instemghet *viva voce* quddiem il-Qorti tal-Magistrati [Ghawdex] mill-istess Magistrat li ta s-sentenza u ghalhekk ma jistax jinghad li l-istess Magistrat ma kienx konxju tal-kontenut tad-depozizzjonijiet ta' dawn ix-xhieda. Probabbilment, peress li bejn id-data tas-smigh ta' dawn ix-xhieda u l-ghoti tas-sentenza ghaddew biss xaharejn zmien id-depozizzjonijiet taghhom kienu ghadhom friski f'mohh il-Qorti u dan minghajr ma jigi eskluz li matul id-depozizzjonijiet dik il-Qorti setghet hadet notamenti tad-depozizzjonijiet. Barra minnhekk, li kieku l-ewwel Qorti hasset il-htiega li tikkonferma xi punti billi tezamina t-traskrizzjonijiet, dejjem kellha l-awtorita` li tordna li t-traskrizzjonijiet tax-xhieda jigu inseriti fil-process qabel ma taghti s-sentenza. Din l-ordni ma tidhirx mill-atti li nghatat.

"50. Ghaldaqstant il-kwistjoni sollevata mir-rikorrenti fir-rigward ma setghet kienet ta' ebda pregudizzju ghar-rikorrent. Fid-dawl tal-premess mhux il-kaz li din il-Qorti tordna l-isfilz tad-Dok. A u Dok. B mitlub mill-Omm.

"51. Rigward il-kwistjoni tan-nullita` tar-rikors sollevata mill-Omm fir-risposta taghha, din il-Qorti tosserva li mir-rikors tal-appell jirrizulta car, minghajr l-icken sforz tal-intellet, li l-aggravju tar-rikorrent kien bazat fuq dik il-parti tas-sentenza appellata li laqghat ir-raba eccezzjoni tal-Omm li *"There is a grave risk of pyschological harm if the child is returned to the United Kingdom".* Dan qed jinghad ukoll fid-dawl tal-fatt li mir-risposta tal-Omm jirrizulta li din fehmet sew l-aggravju tar-rikorrent u rrispondiet ghalih b'mod estensiv. Ghalhekk it-talba tal-Omm fir-rigward hija manifestament insostenibbli.

"52. Dwar l-aggravju huwa opportun li f'dan l-istadju jigu senjalati s-segwenti principji legali rigwardanti l-applikazzjoni tad-difizi kontemplati fl-Artikolu 13 tal-Konvenzjoni u dan fid-dawl ta' diversi konsiderazzjonijiet legali maghmula fir-risposta tal-Missier.

"53. Jigi mill-ewwel senjalat li l-proceduri taht il-Konvenzjoni huma principalment intizi sabiex il-vertenza dwar ir-ritorn tal-minuri tigi deciza bi speditezza fl-interess ewlieni tal-minuri u ghalhekk f'dawk il-proceduri ghandu jigi ezaminat il-meritu tal-abduction u mhux tal-kura u kustodja. Izda, fl-interess tal-minuri, il-Konvenzjoni tipprovdi wkoll ghal dawk il-kazijiet eccezzjonali kontemplati fl-artikolu fuq citat meta jkun jidher car u inekwivokabbilment li r-ritorn tal-minuri ma jkunx fl-interess tieghu jew li l-*'left behind parent'* ikun ta l-kunsens tieghu ghar-rimozzjoni jew ritenzjoni tal-minuri jew ikun sussegwentement ta l-kunsens ghall-istess.

"54. Minn dan ghandu jirrizulta car li l-interessi tal-minuri ghandhom jigu mharsa billi fil-kaz ta' remozzjoni jew ritenzjoni illegali dan jigi ritornat lill-pajjiz fejn l-minuri kien abitwalment residenti qabel ma gie illegalment rimoss jew ritenut. Ghalhekk l-*punto di partenza*[40] ghandu jkun li r-ritorn tal-minuri ghal dik ir-residenza huwa fl-ahjar interess tal-minuri u huwa biss f'kazijiet eccezzjonali kontemplati fl-Artikolu 13 li r-rimozzjoni jew ritenzjoni minn wahda illegali ssir wahda legali fil-parametru ta' dak l-artikolu. Jinghad ukoll li:

> "a systematic invocation of [these] exceptions substituting the forum chosen by the abductor for that of the child's residence would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration" [Prof.Elisa Perez-Vera][41]

"55. Fir-rigward gie ritenut mill-qrati inglizi li:

> "The whole object of the Hague Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the furture

[40] Q.Kos.52/2012 Richard Bridge vs Attorney Generali, 24 Awissu 2012

[41] Explanatory Report: Hague Conference on Private International law

> can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed." [para.48] [Baroness Hale – *Re D [Abduction: rights of custody] [2006].*
>
> "It is obvious as Professor Perez-Vera points out, that these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated. The authorities of the requested state are not to conduct their own investigation and evaluation of what will be the best for the child. There is a particular risk that an expansive application of Art.13[b] which focuses on the situation of the child could lead to that result. Nevertheless there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Hague Convention to require it. A restrictive application of Art.13 does not mean that it should never be applied at all" [supra]

"56. Fil-kaz **Maumousseau and Washington v. France**[42] il-Qorti Ewropeja tad-Drittijiet tal-Bniedem osservat hekk:

> "The Court is entirely in agreement with the philosophy underlying the Hague Convention. Inspired by a desire to protect children, regarded as the first victims of the trauma caused by their removal or retention, that instrument seeks to deter the proliferation of international child abudctions. It is therefore a matter, once the conditions for the application of the Hague Convention have been met, of restoring as soon as possible the *status quo ante* in order to avoid the legal consolidation of *de facto* situations that were brought about wrongfully, and of leaving the issues of custody and parental authority to be determined by the courts that have jurisdiction in the place of the child's habitual residence in accordance with Article 19 of the Hague Convention"

"57. Dawn il-principji gew abbracjati mill-qrati maltin f'diversi gudikati, fosthom *Q.Kos*. **Richard Bridge noe v. Attorney Generali et**[43]**,** u *App.S* **Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali v. Dorian Turner**[44]*.* Barra minn hekk din il-Qorti fil-kaz *App.S* **Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali v. Horry**[45] ghamlet is-segwenti konsiderazzjonijiet rigward l-interpretazzjoni u l-applikazzjoni tal-Artikolu 13[b]:

> "Biex minuri ma jintbaghatx lura jrid ikun hemm ragunijiet gravi u impellenti li jiggustifikaw decizjoni simili. Kif intqal fil-kawza Re: H [Children][Abduction] deciza mill-Qorti tal-Appell fl-Ingilterra –
>
> "The threshold to be crossed when an article 13[b] defence is raised is a high one and difficult to surmount. Hence the courts in this country

[42] Appl.39388/05, deciz 6 Dicembru 2007 para 69, citat b' approvazzjoni mill-Q.Kost fil-kaz *Richard Bridge nor vs Attorney Generali et,* deciz 24 Awissu 2012

[43] Deciz 24 Awissu 2012

[44] Deciz 25 Marzu 2011

[45] Deciz 3 Dicembru 2010

> have always adopted a strict view of Article 13[b]. The risk must be grave and the harm must be serious. The courts are also anxious that the wrongdoer should not benefit from the wrong: that is the person removing the children should not be able to rely on the consequences of that removal to create a risk of harm[46] or an intolerable situation to return……[Dik l-istess qorti ingliza ccitat bran ta' Ward LJ li jghid] 'There is therfore an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence."

"58. Din il-Qorti hasset opportun li tissenjala l-premess in vista tas-sottomissjoni tal-Omm li wara d-decizjoni tal-Qorti Ewropeja fil-kaz ta' **Neulinger and Shrunk v. Switzerland**[47] il-gurisprudenza kemm lokali kif ukoll barranija u anke dik ewropeja giet sorpassata u f'kaz ta' proceduri ta' abduction il-qorti tar-'requested state' jehtieg li taghmel *"an in-dept examination of the entire family situation"* sabiex tasal ghad-decizjoni jekk ir-ritorn tal-minuri jkunx ta' pregudizzju ghalih.

"59. Din il-Qorti diga` kellha okkazzjoni li tissenjala dwar il-kaz fuq citat li c-cirkostanzi f'*Neulinger* kienu estremi[48]. F'dak il-kaz missier tat-tifel li kien qed jitlob ir-ritorn tieghu kien jifforma parti minn setta radikali u li kien jissoggetta lit-tifel ghal indottrinazzjoni religjuza. Il-Qorti Ewropeja qalet li l-kondotta tieghu kienet tali *"that all judges dealing with this case had unanimously found to be unacceptable" [para.108].* Mill-banda l-ohra fil-kaz odjern ghandu jirrizulta pacifiku li ma hemmx cirkostanzi estremi bhal dawk li kien hemm fl-imsemmi kaz.

"60. Fil-kaz odjern, din il-Qorti ma tistax taqbel mal-konkluzjoni tal-ewwel Qorti li f'dan il-kaz jezistu l-estremi ghall-applikazzjoni tal-Artikolu 13[b] tal-Konvenzjoni. Kif tajjeb sottomess mir-rikorrent dik il-Qorti strahet unikament fuq il-konkluzjonijiet tal-esperti, kemm dawk *ex parte*, kif ukoll dik nominata mill-istess Qorti, meta mir-rapporti taghhom jirrizulta kristallin li huma trattaw l-inkarigu taghhom bhala wiehed li jiddetermina l-vertenza dwar il-kura u kustodja tal-minuri, mentri dak li kellu jigi determinat kien il-punt jekk ir-ritorn tat-tifel lejn l-Ingilterra bhala l-pajjiz fejn dan kellu r-residenza abitwali tieghu u minn fejn gie rimoss sabiex jinzamm Ghawdex jpoggix lit-tifel f'riskju gravi ta' hsara fizika jew psikologika jew f'sitwazzjoni intollerabbli.

"61. Apparti minnhekk l-esperti jistqarru li huma strahu fuq l-allegazzjonijiet maghumla mill-Omm fil-konfront tal-Missier li dan jabbuza mill-alkohol fuq bazi regolari, liema allegazzjoni kienet giet kategorikament michuda mill-Missier fix-xhieda moghtija minnu *viva voce* quddiem l-ewwel Qorti. Strahu wkoll fuq l-allegazzjoni tal-Omm li l-Missier ma tantx kien jippartecipa wisq fil-hajja tat-tifel.

[46] Sottolinear ta' din il-Qorti
[47] Appl.41615/07, deciz 6 Lulju 2010
[48] *Richard Bridge [supra]*

"62. Fir-rigward din il-Qorti, filwaqt li tosserva li mill-brani mehuda mir-rapport tal-esperti u li gew citati fis-sentenza appellata jirrizulta car li dawk l-esperti ikkonsidraw il-kwistjoni bhala wahda dwar kura u kustodja, ser tiffoka l-konsiderazzjonijiet taghha fuq ir-rapport maghmul mill-espert nominata mill-ewwel Qorti u b'mod partikolari fuq ix-xhieda moghtija minn din l-espert in eskussjoni.

"63. Mir-rapport ta' din l-espert u mix-xhieda moghtija minnha jirrizulta pacifiku li din ibbazat ir-rapport taghha fuq il-verzjoni moghtija mill-Omm matul is-saghtejn li fiha l-espert kellmet lill-Omm u osservat il-komportament tat-tifel fid-dar tal-genituri tal-Omm. Jirrizulta pacifiku li, ghalkemm l-inkarigu moghti lil din l-espert kien li tidditermina jekk ir-ritorn tat-tifel lejn l-Ingilterra kienx ser ipoggih f'riskju gravi ta' hsara skont l-Artikolu 13[b] hija ma semghetx lill-Missier u lanqas saret talba lill-ewwel Qorti sabiex hi tkun tista' tisma' lill-Missier jekk hemm bzonn bil-mezz tal-*video conferencing.* Ghalhekk din l-espert ma kellhiex l-opportunita` jew ahjar il-beneficju li tkellem lill-Missier u tisma' l-verzjoni tieghu dwar il-hajja tat-tifel fl-Ingilterra.

"64. Barra minn hekk mix-xhieda ta' din l-espert johorgu diversi fatturi li jimmilitaw kontra l-applikazzjoni tal-artikolu 13[b] ghal dan il-kaz.

"65. L-espert issenjalat li, filwaqt li l-Missier *"is unlikely to intentionally attempt to harm [it-tifel]….[dan] appears happier in Gozo than in the UK"* Din l-konkluzjoni hija bazata fuq xi ritratti li l-Omm uriet lill-espert waqt is-sessjoni li kellha maghha. Ukoll din il-Qorti tosserva li l-fatt li skont ma ntqal lill-espert l-Missier *"has reportedly at times been unable to change his nappy frequently enough"* zgur mhux fattur li ghandu lok fil-konsiderazzjonijiet dwar l-esistenza o meno ta' dak kontemplat fl-artikolu precitat. Inoltre, il-fatt li l-Omm tghid li hi ma tridx tibqa' tghix l-Ingilterra m'ghandux jittiehed bhala fattur favorevoli ghat-tezi taghha. Kienet l-Omm li illegalment holqot sitwazzjoni fejn it-tifel necessarjament tpogga' f'sitwazzjoni ta' anzjeta` meta hu gie rimoss mill-Ingilterra biex jittiehed Ghawdex fejn qed isir tentattiv kontiwu da parti tal-Omm u tal-familjari taghha biex jipprovaw jintegrawh fis-socejta` f'Ghawdex. Dan il-fatt jikkostitwixxi fih innifsu vjolazzjoni inerenti tal-Konvenzjoni ghax bl-agir illegali taghha l-Omm, b'detriment ghat-tifel, holqot sitwazzjoni *de facto* li m'ghandhiex tigi legalizzata billi tintlaqa' t-talba taghha u jigi koncess lilha li ma tirritornax lit-tifel lejn l-Ingilterra.

"66. Fil-fehma ta' din il-Qorti l-fatt li jista' jkun li t-tifel ikollu f'Ghawdex hajja ahjar milli kellu jew ikollu Birmingham fejn kien joqghod mal-genituri tieghu, jista' jkun li jkun izjed kuntent jghix ma' ommu f'Ghawdex milli ma' missieru l-Ingilterra, izda dan il-fatt huwa meritu tal-vertenza tal-kura u kustodja li ghandha tigi deciza mill-qrati inglizi fejn it-tifel ghandu r-residenza abitwali tieghu, imma zgur li dan m'ghandux ikun il-meritu li ghandu jigi ezaminat fil-proceduri odjerni. Ladarba l-estremi kontemplati fl-Artikolu 13[b] ma jirrizultawx, il-Konvenzjoni tezigi

li t-tifel jigi ritornat l-Ingilterra. Dan ovvjament ma jeskludix li l-Omm ukoll titla' bit-tifel hi l-Ingilterra.

"67. Fix-xhieda[49] in eskussjoni taghha l-espert Dr Carly Aquilina, apparti milli tghid li hi ma semghetx il-Missier anke dwar l-allegazzjoni maghmula mill-Omm, tghid li *"my assessment was of that of the child and to assess his functioning and how he is doing in Malta[50]".* Tghid li *"A mother usually does keep the child in the case of separation. It is always best for the child to stay with the primary care-giver".* Tghid: *"The child is obviously in a very stable environment at the moment whether I speak to the father or not, realistically why should he be disloged back to ..the UK?"* Minn dan jirrizulta car li l-espert donnha ma fhemitx li l-inkarigu taghha kien, mhux jekk it-tifel huwiex kuntent jew ferhan f'Ghawdex, izda jekk ir-ritorn tieghu l-Ingilterra johlqox dak kontemplat fl-Artikolu 13[b].

"68. Fix-xhieda taghha din l-espert, wara li tghid li hi kienet ghadha kemm irritornat mill-Ingilterra fejn kienet ilha tahdem ghal sitt snin, tikkonferma li fl-Ingilterra hemm *"support services"* li jipprotegu lil min hu vulnerabbli fosthom lit-tfal li jsibu ruhhom f'cirkostanzi bhal dak in kwistjoni. Ix-xhud tishaq li dwar il-komportament tal-Missier mat-tifel hija strahet unikament fuq dak li ntqal lilha mill-Omm. Tghid li *"I am not suggesting in any way that he is a bad father"* u, ghalkemm tghid li bejn l-Omm u t-tifel hemm *"a very clear and strong bond",* hija tikkonferma li ma setghetx tosserva jekk bejn it-tifel u l-missier kienx hemm rabta soda kif lanqas setghet tosserva r-relazzjoni bejn it-tifel u l-familja tal-Missier.

"69. Dwar l-aspett tal-hsara lit-tifel l-espert tghid li *"based on my observation, having seen a lot of clinical cases [of abused persons or children] who have been abused, there is no evidence [in this case] from his behaviour and his social functioning and his emotional functioning that would indicate that he has been abused by mum or dad or anyone else".* Ix-xhud tikkonferma li meta hi uriet lit-tifel ir-ritratt tal-Missier ma kienx hemm *"signs of discomfort"* da parti tat-tifel. Tghid ukoll li *"there is not an acute concern about risk where Kayden is concerned with his father".* Fil-fehma ta' din il-Qorti din il-parti tax-xhieda taghha timmilita` ferm kontra l-applikazzjoni tal-Artikolu 13[b].

"70. Fuq diversi mistoqsijiet ohra l-espert tispjega li *"there is a lot of research that says that attachment to both parents is very important but attachment with the primary care-giver is the most important in ensuring social, emotional and educational functioning".* Tkompli tghid li t-tifel *"right now is very settled and I would be very concerned if he was suddenly shifted back to the UK because it would I think impact [on] his attachment with the mother".* Tghid li: *"it's very hard to say what would happen if he were to go back to a nursery in the UK full-*

[49] Depozizzjoni 14 Mejju 2015
[50] Sottolinear tal-Qorti

time because it would depend on how the parents phrase it to him, how they support him". Din il-parti tax-xhieda tkompli ssostni l-konkluzjoni ta' din il-Qorti li din l-espert iffokat fuq il-hajja tat-tifel f'Ghawdex u mhux fuq l-ezistenza o meno ta' xi riskju gravi ta' hsara jekk it-tifel jigi ritornat lejn l-Ingilterra. Fil-fatt l-istess espert tosserva li huwa difficli tghid xi tkun ir-reazzjoni tat-tifel jekk dan jerga' jintbaghat in-nursery gol-Ingilterra fejn kien imur qabel. Dan zgur ma jissodisfax l-oneru ta' *"clear and compelling evidence of the grave risk of harm"* li jaghti lok ghall-applikazzjoni tal-Artikolu 13[b].

"71. Fid-dawl tal-premess jirrizulta li l-preokkupazzjoni principali tal-espert li t-tifel jintbaghat lura l-Ingilterra hija li dan il-fatt ikollu impatt negattiv fuq ir-rabta li t-tifel ghandu mal-Omm li fil-prezent hija l-*primary care-giver*. Fir-rigward din il-Qorti taghmel is-segwenti osservazzjonijiet:

"72. [a] Dak li ghandu jkun predominanti huwa l-interessi tal-minuri u mhux tal-Omm li f'dan il-kaz, tenut kont tal-problemi matrimonjali li rriskontrat ma' zewgha, thossha aktar komda li tbiddel ir-residenza taghha u tat-tifel mill-Ingilterra fejn kienu jghixu u tmur tghix Ghawdex. Il-bdil fir-residenza tat-tifel hija vertenza li ghandha tigi deciza mill-qrati inglizi tenut kont li fil-mument tar-ritenzjoni tat-tifel ir-residenza abitwali tieghu kienet l-Ingilterra.

"73. [b] Dan hu kaz car fejn l-Omm holqot sitwazzjoni illegali li issa qed tipprova tiggustifikaha f'dawn il-proceduri minghajr ma tat konsiderazzjoni ghal-fatt li l-agir taghha holoq inutilment sitwazzjoni li jista' jkollha impatt negattiv fuq it-tifel. Ma jistax ma jinghadx li l-Omm kienet tkun mhux biss legalment korretta, izda kienet tkun verament thares l-interessi tat-tifel li kieku segwiet il-proceduri legali u talbet fil-qrati inglizi l-kura u kustodja tal-minuri, bil-fakolta` li tirriloka f'Ghawdex bit-tifel.

"74. [c] Mill-provi kollha mismugha, u b'mod partikolari minn dak li rrizulta mix-xhieda in eskussjoni tal-espert Dr Carly Aquilina, ma rrizultax li r-ritorn tal-minuri lejn l-Ingilterra ser jikkrea ghat-tifel is-sitwazzjoni kontemplata fl-Artikolu 13[b] tal-Konvenzjoni. Inoltre, kif jirrizulta wkoll mix-xhieda tal-espert jigi senjalat li fl-Ingilterra hemm *support services* adegwati li l-Omm tista' tirrikorri ghalihom f'kaz ta' bzonn.

"75. Mis-sentenza appellata jidher li sfortunatament l-ewwel Qorti bhall-esperti dahlet fil-meriti tal-kura u kustodja izjed milli tal-abduction. Dik il-Qorti, minkejja c-cahda tal-Missier, osservat li dan kien jabbuza mill-alcohol u tghid li *"Yet the most worrying aspect of returning the child to live with the father concerns his alkohol abuse".* Din il-Qorti tosserva li, ghalkemm l-ewwel Qorti li semghet ix-xhieda *viva voce* kellha kull dritt li ma temminx lill-Missier fir-rigward u tistrih fuq l-allegazzjoni maghmula mill-Omm, dan il-fatt wahdu ma jwassalx ghall-konfigurazzjoni tal-estremi kontemplati fl-Artikolu 13[b], *multo magis* fid-

dawl ta' dak li qalet l-istess espert gudizzjarju li l-Missier *"is unlikely to intentionally attempt to harm [it-tifel]",* li *"there is not an acute concern about risk where Kayden is concerned with his father"* u li *"I am not suggesting in any way that he is a bad father".* Dawn huma kollha elementi ta' prova li jdghajjfu serjament il-konkluzjoni tal-ewwel Qorti.

"76. Barra minnhekk l-ewwel Qorti ikkonkludiet li *"sufficient evidence has been produced to show that Kaden is now happily settled on the island, is securely attached to his mother and her immediate family and has made good progress at school".* Din il-Qorti tosserva li, il-fatt li skont l-ewwel Qorti t-tifel, wara li kien ilu jghix Ghawdex inqas minn sena minn meta kien gie ritenut illegalment, huwa issa *"happily settled on the Island"* ma jindirizzax dak rikjest mill-Artikolu 13[b]. L-istess jinghad ghall-osservazzjoni li t-tifel *"is securely attached to his mother and her immediate family"* u li ghamel progress tajjeb l-iskola. Dawn huma elementi li jindirizzaw il-kwistjoni tal-kura u kustodja tal-minuri, u mhux il-kwistjoni jekk ir-ritorn tal-minuri ser tpoggih f'riskju gravi ta' hsara jew f'sitwazzjoni intollerabbli. Ghal din il-Qorti huwa car li dawn l-estremi ma jirrizultawx provati u fid-dawl ta' dawn il-konsiderazzjonijiet u dawk premessi, din il-Qorti ghandha f'dan il-kaz tiddisturba d-diskrezzjoni ezercitata mill-ewwel Qorti fl-apprezzament tal-provi u tasal ghall-konkluzjoni li t-tifel ghandu jigi ritornat lejn l-Ingilterra.

"77. Ghaldaqstant dan l-aggravju huwa gustifikat u qed jigi milqugh.

"**Decide**

"Ghar-ragunijiet premessi tiddeciedi billi, filwaqt li tichad l-appell incidentali, tilqa' l-appell principali tar-rikorrent u tirrevoka s-sentenza appellata f'dik il-parti fejn l-ewwel Qorti ddecidiet li tichad it-talba tieghu u tilqa' r-raba' eccezzjoni tal-intimata a bazi tal-Artikolu 13[b] u, minflok, tilqa' t-talbiet tar-rikorrent u tordna r-ritorn tat-tifel Kayden lejn l-Ingilterra; kif ukoll tordna lir-rikorrent jaghmel l-arrangamenti prattici ghar-ritorn tat-tifel minuri lejn l-Ingilterra u tordna lill-intimata sabiex taderixxi ma' dawn l-arrangamenti li ghandhom jigu enforzati jekk hemm bzonn mill-Marixxalli tal-Qorti bl-assistenza tal-Pulizija u anke bl-assistenza ta' social worker, kollox a spejjez tal-intimata.

"L-ispejjez, kemm dawk tal-ewwel istanza, kif ukoll dawk relatati mal-appell principali u l-appell incidentali jkunu kollha a kariku tal-intimata."

F'dawn il-proċeduri, l-intimata Sharon Rose Roche qed titlob li l'fuq imsemmija sentenza ta' din il-Qorti tiġi mħassra biex l-appell ikun jista' jiġi trattat mill-ġdid. Hi qed tissottometti dan peress li tallega (i) li l-Qorti ma kellhiex ġurisdizzjoni tisma' dan il-każ; (ii) li hemm fis-sentenza

applikazzjoni ħażina tal-liġi; (iii) li hemm ukoll fis-sentenza żbalji ta' fatt, u (iv) li fis-sentenza hemm dispożizzjonijiet kontra xulxin.

Din il-Qorti, mingħajr ma toqgħod tikkwota mill-ġurisprudenza kopjuża in materja, tirribadixxi l-prinċipji li r-regoli ta' ritrattazzjoni għandhom jingħataw interpretazzjoni stretta, anke biex ma jingħatax lok għal tentattivi tat-tielet appell, li mhux koncess fis-sistema proċedurali Malti.

Trattati issa l-aggravji, din il-Qorti sejra tqishom fl-ordni li ġew imsemmija fir-rikors ta' ritrattazzjoni. L-ilment a bażi tal-Artikolu 811(d) ġie formalment irtirat waqt l-udjenza tat-3 ta' Mejju 2016.

Ir-ritrattandi tgħid li hemm żball ta' liġi fis-sentenza li jagħti lok għar-ritrattazzjoni tal-kawża a tenur tal-Artikolu 811(e) tal-istess Kap. 12. Dan tgħidu għax il-Qorti ma qiesitx li l-missier ma għadx għandu "*custodial rights*" fuq ibnu, applikat ħażin il-kunċett ta' "*habitual residence*". L-argument tar-ritrattandi, pero`, ma jwasslux ghal żball ta' liġi, iżda aktar għal sottomissjonijiet fuq il-meritu. Ir-rikorrenti ma taqbilx kif din il-Qorti trattat dawn iż-żewġ materji, pero`, dan ma jagħtix lok għar-ritrattazzjoni. Din il-Qorti kienet konxja mill-fatt li l-Qorti tal-Magistrati (Għawdex) tat il-kura u l-kustodja proviżorja tal-minuri lill-omm, u kienet konxja wkoll mill-fatt li l-missier ippartecipa b'mod attiv fil-proċeduri ta' separazzjoni pendenti quddiem il-Qorti ta' Għawdex, pero`,

qieset li dawn iċ-ċirkostanzi ma jaffettwawx it-talba għar-ritorn tal-minuri. Din il-Qorti applikat il-ligi rilevanti, interpretat it-termini tal-Konvenzjoni tal-Ajja kif inkorporati fil-liġi Maltija, u iddeċidiet, b'mod espress u ċar, fuq l-influwenza tagħhom għall-każ. Ikun hemm applikazzjoni ħażina tal-liġi biss meta ma tkunx ġiet applikata l-liġi korretta għall-fatti, u mhux meta tingħata xi forma ta' interpretazzjoni għal dik il-liġi korretta (ara **Vella v. Spiteri**, deciza minn din il-Qorti fis-7 ta' Frar, 2003).

Fir-rigward tal-kwistjoni marbuta mar-residenza abitwali tal-minuri, din il-Qorti, kull ma għamlet, kien li analizzat il-fatti u rat li, fil-fehma tagħha, dawn juru li r-residenza abitwali tal-minuri kienet ġewwa l-Ingilterra. Din il-Qorti ma applikat ebda liġi ħażina. Il-liġi titkellem fuq ir-ritorn tal-minuri lejn l-istat fejn il-minuri għandu r-residenza abitwali tiegħu, u l-Qorti applikat din il-liġi wara li eżaminat il-provi u ċ-ċirkostanzi tal-każ biex tistabbilixxi, kif kellha dmir li tagħmel, f'liema stat kellu r-residenza abitwali tiegħu l-minuri. Kif ġia` ingħad, dawn il-proċeduri ma humiex intiżi biex jiġi determinat min għandu jkollu responsabbilita` ta' ġenitur fuq il-minuri, imma biss li l-minuri jiġi ritornat minn fejn "inħataf".

Għalhekk l-aggravju relatat mal-Artikolu 811(e) imsemmi qed jiġi miċhud.

In kwantu t-talba hija bażata fuq l-Artikolu 811 (i) tal-imsemmi Kap. 12,

ġie ritenut li d-dispożizzjonijiet kontra xulxin iridu jirriżultaw fil-parti dispożittiva tas-sentenza u mhux fil-motivazzjoni (ara **Gauci v. Vella** deċiża minn din il-Qorti fl-10 ta' Ottubru 2003). Intqal ukoll li l-kontradizzjoni "*trid tkun tax-xorta li tippreġudika l-esekuzzjoni tas-sentenza*": **Testaferrata Moroni Viani v. Vella** deċiża minn din il-Qorti fl-24 ta' Settembru, 2004.

Ir-ritrattandi f'din il-kawża tallega li hemm kontradizzjoni, mhux fil-parti dispożittiva tas-sentenza, iżda fil-motivazzjoni tal-istess. Apparti l-fatt li din il-Qorti ma taqbilx li fis-sentenza hemm xi dispożizzjonijiet kontra xulxin kif tallega r-ritrattandi, id-dispożittiv tas-sentenza huwa ċar u konsistenti, mingħajr ebda aċċenn ta' kontradizzjoni.

L-aggravju relattiv bażat fuq l-Artikolu 811 (i) hu għalhekk, miċħud.

Fil-konfront tal-aggravju ai termini tal-Artikolu 811 (l), hi ġurisprudenza assodata li l-iżball li jwassal għat-tħassir tas-sentenza taħt din il-kawżali jrid ikun żball materjali ta' fatt, u mhux żball ta' kriterju jew interpretazzjoni. Kif osservat din il-Qorti fil-kawża **Abela v. Cortis**, deċiża fl-20 ta' Novembru, 2008.

> "Illi **dwar il-kawżali tas-sentenza milquta minn żball li jidher mill-atti jew mid-dokumenti tal-kawża** (Art. 811(*l*) tal-Kap 12), huwa meħtieġ li wieħed iqis sewwa x'inhu dak li tgħid il-liġi sabiex tali kawżali titqies mistħoqqa. Il-liġi titkellem b'mod ċar dwar liema żball irid ikun biex iwassal ħalli sentenza tista' titħassar. Tali żball irid joħroġ mis-sentenza nnifisha u jkun jidher mill-atti jew mid-dokumenti tal-kawża u dan biss

> fil-każ li d-deċiżjoni tkun imsejsa fuq is-suppożizzjoni ta' xi fatt li l-verità tiegħu tkun eskluża għal kollox jew fuq is-suppożizzjoni li l-fatt ma jeżistix. F'kull każ, il-fatt ma jridx ikun punt kontestat li jkun ġie deċiż bis-sentenza;
>
> "Illi, fuq kollox, l-iżball li għalih tirreferi din id-dispożizzjoni jrid ikun wieħed ta' fatt. Kemm hu hekk, dan huwa li jagħraf smigħ mill-ġdid ta' kawża fuq din id-dispożizzjoni minn smigħ mill-ġdid ta' kawża taħt il-paragrafu (*e*) tal-artikolu 811, li jirreferi għal żball ta' liġi. Għal dan il-għan, l-iżball ta' fatt li jagħti lok għar-ritrattazzjoni jrid ikun wieħed materjali, manifest u jirriżulta mill-atti nfushom, għaliex mhux imħolli li jitressqu provi biex jippruvaw tali żball. Minbarra dan, l-iżball ma jridx ikun relattiv għall-kriterji jew karattri li bihom il-fatt ikun ġie jew seta' ġie mifhum mill-ġudikant li ta s-sentenza li qiegħed jintalab it-tħassir tagħha, għaliex dan m'huwiex żball li joħroġ mill-atti imma fis-sewwa konvinċiment insindakabbli tal-ġudikant;"

Din il-Qorti ezaminat il-lanjanza tar-ritrattandi u tgħid mill-ewwel li ma irraviżat ebda żball ta' fatt fis-sentenza attakkata. Din il-Qorti, fis-sentenza tagħha, rat li l-missier aċċetta l-ġurisdizzjoni tal-Qorti ta' Għawdex għall-fini ta' separazzjoni personali bejnu u martu, u interpretat dan il-fatt bħala li ma jeskludix li l-minuri, li qed jinżamm hawn Malta illeċitament, jiġi ritornat lejn l-Ingilterra.

Wieħed jista' ma jaqbilx ma' din l-interpretazzjoni, pero`, ma jistax jingħad li, fuq il-fatti, sar żball.

Għar-rigward tal-interess tal-minuri, il-Konvenzjoni nfisha tfittex li tipprotegi l-interess suprem tal-minuri billi tintenta tevita li l-minuri jiġi meħud bil-forza jew bla awtorizzazzjoni gudizzjarja jew minghajr il-kunsens ta' xi waħda mill-ġenituri tiegħu, b'mod li l-istess minuri jiġi impedut li jara jew ikollu aċċess għall-wieħed mill-ġenituri tiegħu. Din il-

Qorti tirreferi għall-ktieb "Bromley's Family Law" (10th Edition 2007 ta' Nigel Lowe u Gillian Douglas, Oxford University Press) fejn jinghad hekk fuq din il-kwistjoni:

> *"The fact that an individual child's interests are not the paramount consideration when determining a return application prompts the question as to the 1980 Convention's compatibility with the requirement under Art 3 of the UN Convention on the Rights of the Child 1989 that in all actions concerning children 'whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.*
>
> *"This issue has been expressly litigated in Australia where the charge of incompatibility was rejected inter alia on the ground that Art 11 of the UN Convention entreats States 'to take measures to combat the illicit transfer and non-return of children abroad'. It may also be pointed out that Art 35 of the UN Convention requires States to 'take all appropriate national, bilateral and multilateral measures to prevent the abduction of children for any purpose or in any form'. In any event, surely the most persuasive argument is that by providing admittedly limited exceptions to the obligation to return, the Hague Convention does, in principle, pay sufficient regard to the interests of each individual child especially as it is not determining the merits of any custody dispute but rather the forum in which that dispute must be determined. At any rate, it was this line of argument that led the German Constitutional Court in G and G v. Decision of OLG Hamm to rule that the 1980 Convention was compatible with the UN Convention.*
>
> *"Prompt returns are also entirely compatible with the European Convention on Human Rights. The English courts, for example, take the view that a return order under the 1980 Convention is unlikely to be thought to be in breach of Art 8 of the European Human Rights Convention as interfering with the right to respect for family life particularly as the abduction will have disrupted the child's living arrangements in the first place. Furthermore, the European Court of Human Rights has held that the failure expeditiously to enforce a return order under the Hague Convention can be a breach of Art 8 on the basis of a failure to meet the positive obligation on States to ensure effective respect for family life by taking measures to enforce a parent's right to be reunited with his or her child."*

Kif qalet din il-Qorti fil-kawża **Direttur tad-Dipartiment għal Standards fil-Ħarsien Soċjali v. Caruana**, deċiża fit-3 ta' Awwissu, 2012:

> "*Kwindi, l-interess suprem tal-minuri jiddetta li l-interessi tat-tfal ghandhom jigu ezaminati u salvagwardati fil-forum opportun, fejn il-minuri jkollu r-residenza abitwali tieghu, u mhux mill-Qorti tal-pajjiz fejn il-genitur jahrab bil-minuri. Dan huwa l-veru interess tal-minuri, u cioe`, li jkollu l-kaz tieghu trattat fl-ambjent li fih kien qed jghix. Xort'ohra jigri li tigi incentivata u ppremjata l-prepotenza u l-illegalita' u l-htif illegali tal-minuri u dan palesament imur kontra l-interess suprem tal-istess minuri. Din il-Qorti tfakkar illi, b'dawn il-proceduri, ma jigix deciz min mill-genituri se jkollu l-kura u l-kustodja tal-minuri; din materja li se tibqa' impregjudikata, kif se jibqa impregjudikat id-dritt tal-minuri ghal familja mal-missier jew mal-omm, skont kif tiddeciedi l-Qorti kompetenti in materja.*"

Anke l-Qorti Ewropeja tad-Drittijiet tal-Bniedem tqis li din il-Konvenzjoni tirrispetta l-interessi tal-minuri dment li ma jkunx hemm "*serious risk*"ghat-tifel, u jiġi aċċertat li jkun hemm "*adequate safeguards*" fil-pajjiż l-ieħor biex il-minuri jitħares minn xi riskji magħrufa (ara **X v. Latvia**, deċiża mill-Grand Chamber fis-26 ta' Novembru, 2013). Din il-Qorti, fis-sentenza attakkata, qieset il-fatturi kollha rilevanti fid-dawl taċ-ċirkostanza jekk kellhiex jew le tapplika d-deroga taħt l-Artikolu 13 tal-Konvenzjoni tal-Ajja. Il-fatt li irreferiet għal sentenzi Ingliżi in materja u għall-opinjoni ta' ċertu Professur Perez-Vera, ma jfissirx li sar xi żball ta' fatt, meta tqis li dawn kienu qed jittrattaw l-istess Konvenzjoni in vigore hawn Malta. Qieset u trattat ukoll dak li qalu l-esperti Maltin fuq it-tifel, u dan f'ċertu dettal, u din il-Qorti ma tarax li sar xi żball materjali u impellenti fil-mod ta' kif ġie trattat l-aggravju relattiv marbut mal-interess tal-minuri. Kien dover tal-Qorti tqis ir-rapport tal-esperti fil-kuntest tal-azzjoni li jkollha quddiemha, u r-rilevanza o meno ta' kull "prova" taqa' fid-diskrezzjoni tal-Qorti li tkun qed titratta l-każ fil-meritu. Din il-Qorti,

fis-sentenza preċedenti tagħha, imxiet fuq il-fatti li kellha quddiemha u ma jirriżultax li qieset xi fatt li l-verita` tiegħu tkun eskluza jew xi fatt li ma jeżistix.

Għalhekk, anke l-aggravju relatat mal-Artikolu 811(l) qed jigi miċħud.

Jiġi rilevat illi dak li kellha quddiemha din il-Qorti kien biss talba għar-ritorn tal-minuri lejn il-pajjiż fejn għandu r-residenza ordinarja tiegħu. Din tista' titqies bħala "faċċata waħda" tal-problemi u l-kwistjonijiet li għandhom il-partijiet, pero`, il-kawża ma hijiex intiża biex tiddetermina xi waħda minn dawn il-problemi. Din il-Qorti sempliċement aċċertat ruħha li l-minuri kien qed jinżamm Malta illeċitament, skont l-Artikolu 3 tal-Konvenzjoni tal-Ajja tal-1980, u ordnat ir-ritorn tiegħu lejn pajjiżu. Ir-Regolament 2201/2003 tal-Unjoni Ewropeja jitkellem fost oħrajn, fuq kawżi intiżi għad-determinazzjoni ta' min ghandu jkollu l-kura u l-kustodja tal-minuri, iżda din il-kawża ma għandhiex dan il-fini, u lanqas ma hi intiża biex tiġi stabbilita xi responsabbilita` ta' wieħed mill-ġenituri lejn il-minuri. Fuq kollox dan l-istess Regolament jikkumplimenta l-Konvenzjoni tal-Ajja, u hu rilevanti l-Artikolu 11 tar-Regolament li jitratta dwar ir-ritorn ta' minuri lejn l-istat membru ta' oriġini f'każ ta' ħtif. Il-Konvenzjoni tal-Ajja, u l-Att lokali dwar is-Sekwestru u l-Kustodja ta' Minuri (Kap. 410 tal-Liġijiet ta' Malta) jobbligaw l-istat fejn il-minuri jinstab sabiex jordnaw ir-ritorn tiegħu lejn l-istat tar-residenza abitwali

tiegħu, appuntu sabiex il-kwistjoni ta' responsabbilita` tal-ġenituri tiġi determinata quddiem il-Qorti kompetenti, u mhux, kif qed titlob ir-rikorrenti ritrattandi f'dan il-każ, quddiem il-Qorti ta' Għawdex. L-ordni proviżorja ta' kura u kustodja li ngħatat f'dan il-każ mhux ta' ostakolu għal dan il-proċess, għax hi ordni temporanja sabiex fil-frattemp jiġu salvagwardati l-interessi tal-minuri.

Fir-rikors tal-appell sar l-argument li għal dan il-każ japplika Artikolu 12 tar-Regolament 2201/2003 (Prorogation of Jurisdiction), u li ġialadarba l-missier aċċetta l-ġurisdizzjoni tal qrati Maltin biex tiġi deċiża l-kwistjoni dwar il-kura u kustodja tal-minuri allura l-Konvenzjoni tal-Ajja ma tapplikax. Pero` dan hu każ ta' *child abduction*, u għalhekk japplika l-Artikolu 10 tar-Regolament (***Jurisdiction in cases of Child Abduction***). Provvediment li jidher li hu ntiż sabiex ma jippermettix li l-ġurisdizzjoni tinbidel permezz ta' ħtif. Dan apparti li l-Qorti tal-Appell fis-sentenza preċedenti ikkonsidrat l-allegata akkwiljexxenza tal-missier biex it-tifel jibqa' Għawdex u ikkonkludiet li f'dan il-każ ma kienx hemm kunsens tal-missier.

Għalhekk, għar-raġunijiet premessi, tiddisponi mir-rikors ta' ritrattazzjoni ta' Sharon Rose Roche nee' Bellany billi tiċħad l-istess, tiddeċiedi li ma hemmx lok għat-tħassir jew revoka tas-sentenza li tat din il-Qorti fit-30 ta' Ottubru, 2015 u tiċħad ukoll it-talba konsegwenzjali għas-smigħ mill-

ġdid tal-appell.

L-ispejjeż kollha marbuta ma' din il-proċedura għandhom jitħallsu mir-

ritrattandi Sharon Rose Roche nee' Bellany.

Tonio Mallia Aġent President	Joseph Azzopardi Imħallef	Anthony Ellul Imħallef

Deputat Reġistratur
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