Civil Court – Family Section

Mr. Justice Robert G. Mangion LL.D.
Dip.Tax (MIT), P.G.Dip. Mediation (Melit.)

Today the 7th day of December 2016

Application No. 179 / 16RGM

Number on list: 21

Director of the Department for Social Welfare Standards
vs
A B C D E

The Court,

Having seen the application filed by the Director for the Department of Standards in Social Welfare on the 12th April 2016 which reads as follows:-

"Illi dan ir-rikors qieghed isir ai termini ta' l-Att dwar is-Sekwestru u l-Kustodja ta' Minuri (Kapitolu 410 tal-Ligijiet ta' Malta) li bih gie rratifikat fost ohrajn il-Konvenzjoni dwar l-Aspetti Civili ta' Sekwestru Internazzjonali ta' Minuri li kienet giet iffirmata f' Ajja fil-25 ta' Ottubru 1980.

Illi r-rikors odjern jirrigwarda l-ahwa minuri Basmah Fardouz Longley u Ausayd Mudaffar Longley, li twieldu fit-22 ta' Frar 2009 u f1-24 ta' Gunju 2010 rispettivament f' Riyadh, Gharabja Sawdita u dan skond kif jindikaw ic-certifikati tat-twelid taghhom. L-ahwa minuri huma ulied Dylan Michael Longley u A B C D E, li zzewgu fl-1 ta'April 2005 fir-Registry Office, Boulcott House, f'Wellington, u sussegwentament huma bdew jirrisjedu f'Wellington, fi New Zealand hlief ghal numru ta' snin bejn 2007 u l-2011 fejn huma hadmu u ghexu fl-Gharabja Sawdita. Il-minuri Basmah u Ausayd igawdu minn dual citizenship u cioe dik ta' New Zealand u dik Ingliza u huma wkoll dual passport holders.

Illi l-fatti kif spjegati mill-Awtorita Centrali fi New Zealand tramite l-applikazzjoni huma s-segwenti:

a. Illi is-Sur Dylan Michael Longley u A B C D E f'Jannar 2014 waqfu jghixu fid-dar matrimonjali u kien hemm qbil fuq il-mod ta' kif ghandu jigi ezercitat l-access mill-missier peress illi l-minuri marru jghixu mal-omm.

b. Illi f'Dicembru 2014, A siefret lejn l-Ewropa mas-sur Nicola Lippolis illi huwa l-partner il-gdid taghha ghal perjodu ta' 6 gimghat u matul dan iz-zmien il-missier kien qed jiehu hsieb iz-zewg minuri. Meta hija irritornat lura lejn New Zealand l-missier kompla jezercita id-dritt tieghu ta' access.

c. Illi lejn l-ahhar tas-sena 2015 A talbet perrness minghand il-missier sabiex tiehu lit-tfal f'Riyadh, Gharabja Sawdita sabiex izzur lil missierha u Dylan Michael Longley ta l-kunsens tieghu ghal dan. Illi matul dan iz-zmien il-missier zamm kuntatt regolari mat-tfal tramite Skype u l- internet messenger.

d. Illi fil-bidu ta' Marzu il-missier beda jissuspetta illi t-tfal ma kinux ser jirritornaw lura lejn New Zealand u dan kif jirrizulta mill-korrispondenza bejnu u t-tfal tieghu, u minn kif jispjega huwa stess fl-affidavit partikolarment fejn huwa jghid:

20. I spoke with Basmah on the evening of Friday 4 March at 10pm. She informed me that they (A, Basmah and Aysad) were scheduled to travel on Turkish Airlines to "somewhere, but I'm not allowed to tell you". I was unsure what that meant but did not want to question her about it.

21. I was concerned so I raised it with A on 7 March. Attached here to and marked with the letter "N" is a copy of that email.

22. The following day, Monday 7th March at 8.59pm, I received an e-mail from A advising she and the children had moved to Malta. Attached hereto and marked with the letter "O" is a true copy of that e-mail. Whilst I had been sufficient concerned to raise the issue with A [...] the email still came as shock to me. [...]

Illi l-Artikolu 5 tal-Ewwel Skeda tal-Kap 410 jiddefinixxi 'dritt ghal tutela' bhala dak id-dritt li jaffettwa t-tharis tat-tifel, u b'mod partikolari dak li jigi deciz il-post ta' residenza tieghu'. Skond il-ligi applikabbli ta' New Zealand il-missier jezercita kura u kustodja kongunta mal-omm fuq il-minuri u ghalhekk ghandu id-dritt ta' tutela kif mitlub mill-Konvenzjoni surreferita.

Illi l-minuri Basmah Fardouz Longley u Ausayd Mudaffar Longley qeghdin jigu ritenuti illecitament hawn Malta mis-Sinjura A B C D E u dan meta l-habitual residence tal-istess minuri hija fi New Zealand.

Illi l-missier ghandu dritt illi jkun partecipi fid-decizjonijiet importanti fil-hajja tal-minuri aktar u aktar tenut kont tal-fatt li huwa kien qed jezercita d-drittijiet tieghu ta' genitur skond il-ligi civili ta' New Zealand u dan qabel l-intimata qabdet u reteniet b'mod illecitu lill-imsemmija minuri minn New Zealand.

Illi missier il-minuri applika lill-Awotrita` Centrali tal-post fejn ghandu l-post tar-residenza l-minuri cioe New Zealand ghar-ritorn tal-istess minuri ai termini tal-Aritkolu 8 tal-Konvenzjoni tal-Ajja, u hekk kif jipprovdi l-artikolu sussegwenti, l-Awtorita Centrali ta' New Zealand fis-26 taMarzu 2015 baghtet l-applikazzjoni direttament lill-Awotrita Centrali ta' Malta bhala dak l-istat kontraenti fejn jinsabu il-minuri sabiex jinkiseb ir-ritorn taghhom.

Illi l-Awtorita Centrali ta' Malta giet awtoizzata minn missier il-minuri, Dylan Michael Longley sabiex tipprocedi kontra l-omm f'Malta u taghmel dak li huwa permessibbli bil-ligi Maltija sabiex tirritorna il-minuri lejn New Zealand.

Illi l-esponent Direttur ha l-mizuri kollha mehtiega sabiex jinkiseb ir-ritorn volontarju tal-minuri lejn New Zealand skont kif dispost fl-Artikolu 7 (c) u 10 tal-istess Konvenzjoni Ajja izda l-intimata rrifjutat milli tirritorna lill-minuri volontarjament.

Illi kontestwalment ma' dan ir-rikors qieghed jigi pprezentat Mandat t'Inibizzioni biex iwaqqaf lil omm milli tiehu lil minuri Basmah Fardouz Longley u Ausayd Mudaffar Longley barra minn Malta.

Ghaldaqstant, in vista ta' dak suespost, ir-rikorrent umilment jitlob lil dina l-Onorabbli Qorti sabiex joghgobha:

1. Tordna r-ritorn tal-minuri Basmah Fardouz u Ausayd Mudaffar ahwa Longley gewwa New Zealand fi zmien qasir.

2. Taghti fil-frattemp dawk id-direttivi fl-interess tal-minuri koncernati, inkluz avviz lill-awtoritajiet koncernati, biex il-minuri jigu salvagwardjati milli jergghu jittiehdu b'mod illecitu minn Malta ghal pajjiz iehor, liema tnehhija taghmel ir-ritorn tal-minuri fil-habitual residence taghhom ferm aktar difficli u dan bi ksur esplicita tal-Konvenzjoni dwar l-Aspetti Civili tas-Sekwestru Internazzjonali ta' Minuri.

U dan taht kull provvediment iehor li din l-Onorabbli Qorti jidhrilha li jkun xieraq u opportun fic-cirkustanzi.

Bl-ispejjez."

Having seen the reply filed by A B C D E which reads as follows::-

"Illi, it-talbiet fir-rikors promutur, ma ghandhom l-ebda bazi la ta' fatt u lanqas ta' dritt u ghas-segwenti ragunijiet ghandhom jigu michuda bl-ispejjez kontra ir-rikorrent;

1. Illi fl-ewwel lok, l-esponenti peress li ma' tifhimx bil-malti, kien messha wkoll tigi notifikata bl-atti ta' l-istess rikors, ukoll bi traduzzjoni ghall-ingliz u dan ai termini ta' l-Artikolu 5 tal-Kap.189 tal-Ligijiet ta' Malta.

2. Illi, fit-tieni lok, jinghad illi l-esponenti hija fdata bil-kura u l-kustodja ta' l-ulied minuri, u dan kif ser jirrizulta waqt is-smigh tal-provi.

3. Illi, fit-tielet lok, kif dejjem gie komunikat mill-esponenti lill-missier, m'hemm l-ebda intenzjoni da parti ta' l-esponenti illi ccahhad l-access tal-minuri lill-missier, u dan minkejja li l-minuri jinsabu ma' l-omm hawn Malta u qed jattendu skola hawn Malta ukoll, u cioe Primary School, Imsida.

4. Illi fir-raba' lok, jigi rilevat, illi l-esponenti kienet giet awtorizzata bil-miktub mill-missier stess tal-minuri Dylan Michael Longley, sabiex issiefer liberament lill-imsemmija minuri Basmah Fardouz Longley, u Ausayd Mudaffar Longley, u dan kif jindika d-dokument datat 12 ta' Jannar 2016.

5. Illi, ma huwa minnu xejn, kif jinghad fl-affidavit tal-missier, illi 1-esponenti kienet marbuta b'xi terminu sabiex tirritorna l-imsemmija minuri, jew addirittura lanqas ma kien hemm impost fuq l-esponenti, fejn kellha ssiefer bl-istess minuri, u dan kif jirrizulta fl-istess dokument.

6. Illi, inoltre ma tezisti l-ebda ordni gudizzjarja, jew dispozizzjoni legali, illi b'xi mod izzomm lill-esponenti milli issiefer lill-minuri lil hinn minn New Zealand, kif qed jigi implikat fir-rikors.

7. Illi, missier il-minuri, kien jaf ben tajjeb, illi din is-safra kienet ser tkun fit-tul, u dan peress illi kif jispjega fl-affidavit tieghu stess, l-omm kienet qieghda taghmel l-arrangamenti sabiex il-minuri jattendu skola gewwa l-Arabja Sawdita.

8. Illi, jinghad ukoll, illi missier l-ulied minuri, mhux f'posizzjoni illi jiehu hsieb u jmantni l-istess minuri u dan peress illi kif stqarr hu stess fl-affidavit tieghu, mhux f'posizzjoni finanzjarja illi jaghmel dan.

9. B'riserva ghall-risposti ulterjuri,

10. Salv risposti ulterjuri."

Having seen and examined all the proof, acts and documents submitted by both parties.

Having seen the notes of submissions of both parties.

Having seen that the case was adjourned for judgement.

Having seen a note filed by respondent on the 28th November 2016.

Having considered:

EVIDENCE

Dylan Michael Longley gives evidence by means of an affidavit (fol 19), whereby among other things he states that A and the children are naturalised New Zealand citizens and dual passport holders of the United Kingdom. In December 2011, A and the children returned to New Zealand whilst he stayed on in Saudi to complete his contract. In the meantime they visited each other many times for several weeks at a time. His other daughter from a previous relationship Jasmine also lived with A and the children in New Zealand. He returned to New Zealand in 2013 to study for MBA, A worked full time and they shared childcare. He states that the children have lived continuously in New Zealand since December 2011, where they were habitually resident and attended school there. In November 2013, A informed him that she wanted to separate and in January 2014, they moved out of their family home to live separately. The children lived with A Monday to Thursday and with him Friday to Sunday. He states that they agreed on a shared care arrangement for the children whereby he cared for them from Friday after school until Monday morning and during most school holidays, and they also agreed to having flexible arrangements for the children to travel overseas with either of them, and both of them had taken the kids away after their separation. In December 2014, A travelled to Italy with her new partner for 6 weeks and during that time he cared for the kids.

Regarding the circumstances giving rise to this application and its effect on the children, his testimony is being hereunder reproduced ad verbatim:

"Circumstances Giving Rise to This Application

15. In late 2015, A asked if she could take the children to visit her father, B E, who lives and works in Riyadh, Saudi Arabia. I did not oppose the travel as it had been some time since Basmah and Ausayd's maternal grandparents had been to

visit them in New Zealand (June 2014). As earlier mentioned, the children have travelled overseas in the past, this having been discussed and agreed between A and myself until now. The children have always returned to New Zealand after that travel.

16. A made the travel arrangements and had to seek a visitor's visa for the children and herself to visit Saudi Arabia. That visa was valid for a maximum of 90 days. I had to consent the children travelling to the Middle East with her (a requirement of the authorities in Bahrain, where there travelled through to get to Saudi Arabia). Attached hereto and marked with the letter "L" is a copy of the consent document I signed.

17. A booked and paid for the tickets and she and children left New Zealand on 18 January 2016. As far as I am aware, she did not purchase return tickets at the time but it was clearly agreed between us that the maximum period of travel would be 90 days and we had discussed the length of time being around 60 days, because, amongst other things, the children needed to attend school in New Zealand. Hataitai School was advised and in addition, A assured me that when the children were in Saudi Arabia, they would attend school with their cousin, Tariq so as to minimise the impact on their education. That did not happen. I trusted A to purchase return tickets and advise me when she and the children would be returning.

18. I was in regular contact with the children following their departure, typically 3-4 times a week via internet based contact (Skype/messenger etc). A and I were also in occasional contact and there was no suggestion the children would not be returned.

19. In early March, I received an e-mail from Hataitai School, enquiring when the children would be returning to school. I believe this sort of enquiry is generated when the children have been absent from school for a continuous period. Attached hereto and marked with the letter "M" is an e-mail thread between Hataitai School and myself and A about the children's return to school.

20. I spoke with Basmah on the evening of Friday 4 March at 10pm. She informed me that they (A, Basmah and Ausayd) were scheduled to travel on Turkish Airlines to "somewhere, but I'm not allowed to tell you". I was unsure what that meant but did not want to question her about it.

21. I was concerned so I raised it with A on 7 March. Attached hereto and marked with the letter "N" is a copy of that email.

22. The following day, Monday 7 March at 8.59pm, I received an e- mail from A advising she and the children had moved to Malta. Attached hereto and marked with the letter "0" is a true copy of that e-mail. Whilst I had been sufficiently concerned to raise the issue with A (I note I raised it with her, not the other wayround) the e-mail still came as shock to me. I had no inkling or idea prior to speaking to Basmah, that A was not going to return the children to New Zealand, let alone that she would be contemplating moving to a country that she and the children have never lived in before and have no connection with.

23. At present I have no further details about their address or location, despite A saying she would get a new number and message me (see Annexure 'O').

24. I do not know why A has done this. The only possible explanation I have is that she may have/has resumed her relationship with Nico and has moved there with him. I note that Malta is geographically close to Italy. I accept this is speculation on my part but the reality is A has moved there without my knowledge or consent. Had she proposed this before leaving New Zealand, there is no way I would have agreed to the travel taking place.

Effect on the Children

25. The children have no prior connection with Malta whatsoever and have no family or friends or community or support structures there to help them make sense of this change, other than A's reasoning for why this abrupt change has occurred. They were expecting to return to New Zealand, for me to resume caring for them on the basis of the previous arrangement and to return to school at Hataitai in March or at the latest, April, of this year.

26. In addition, if the children remain in Malta, they will be unable to enjoy free and uninterrupted contact with the majority of their paternal and maternal family (A's two brothers live in New Zealand) as well as their friends with whom they have strong relationships and connections.

27. Basmah and Ausayd have many friends in the neighbourhood and at school. They are both involved with sports teams, dance and performance groups and have relatives in Wellington. They have bonded strongly with their class peers and teachers and have started to develop their identity as members of their community and at school. I have received numerous enquiries from my neighbours and the children's friends asking when they will be returning to Wellington.

28. Their older half-sister Jasmine has been in regular contact with them since birth and since after the separation. Their paternal grandfather, Brett Longley

and his partner Maria "Cecy" Bastias live close by in Wellington and the children regularly spend time with them at the weekends, holidays and some weekday evenings. They attend special school events and join them at their weekend sports activities.

29. My step-sister, Miriam and her partner and two children live in Wellington and visit them regularly. We have a number of family friends and neighbours with children of similar ages and at our local school, all of whom enjoy Basmah and Ausayd's company. My flatmate has three daughters of similar ages (5, 7,10) who also spend time at weekends with Basmah and Ausayd.

30. The children have also spent time with my mother and stepfather each Christmas (hosted at their home in Christchurch) since their return to New Zealand. Although they live in Christchurch, they regularly visit the children and have attended events such as grandparents' day at their school.

31. Although A indicates that she is open to the children having access to see me in Malta, I have no financial means to realise this due to financial constraints in the form of repaying my student loan, paying half of A's $20,000 personal loan taken out in 2013 and providing child support to Basmah and Ausayd as well as caring for my 15 year old daughter, Jasmine, for who I receive no financial support from the other parent. This effectively means that the children have no practical way to continue to enjoy any aspect of the life and connections they had up until January of 2016 for the foreseeable future.

32. I am seeking urgent assistance from the Central Authority in returning Basmah and Ausayd to New Zealand forthwith, so that a decision about their best interests and welfare can be made here in New Zealand. If A is unable to meet the costs of the children's airfares to New Zealand, I will meet that cost (with family assistance).

33.I have not communicated with A since she e-mailed me on 7 March. I did not want to give her any sort of notice that I would be making this application as I am concerned she will flee from Malta with the children. She has already retained them and moved them to a foreign third country without my knowledge or consent and I am very concerned she will do so again, once she learns of my application. She and the children have UK passports and are able to travel freely in the EU, and have the financial means to do so. Therefore, I ask that when my application is advanced in Malta, that the Court considering my application make an order preventing the children's removal from Malta, pending any determinaton of an application for their return to New Zealand."

Christopher John Dellabarca, barrister and solicitor practising in New Zealand also gives testimony by affidavit (fol 28) and states *inter alia*:

"5. The Care of Children Act 2004 ("the Act") is the Act which defines parents' rights and responsibilities in relation to their children. It came into effect on 1 July 2005.

6. New Zealand translated the Convention provisions into sections of the Act. These parts of the Convention derived from Articles 3 and 5, have been translated into s.97—s113 of the Act.

7. The phrase "Guardianship" is defined in section 15 of the Act as including "all duties, powers, right, and responsibilities that a parent of the child has in relation to the upbringing of the child"

8. Section 16 defines those duties, powers, rights and responsibilities as follows:
"16 Exercise of Guardianship
1. The duties, powers, rights, and responsibilities of a guardian of a child including (without limitation) the guardian's -
(a) Having the role of providing day-to-day care for the child, however, under s.26 (5), no testamentary guardian of a child has that role just because of an appointment under section 26); and
(b) Contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
(c) Determining for or with the child, or helping the child to determine questions about important matters affecting the child,
2. Important matters affecting the child include (without limitation) - ....(b) Changes to child's place of residence (including without limitation, changes of that kind arising from travel by the child) that may affect the relationship with his or her parents and guardians

9. Section 16(3) specifically states "A guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with a guardian, unless a Court Order provides otherwise."

10. The cumulative effect of these sections is that if a parent enjoys rights of guardianship then he will have rights of custody pursuant to the Convention.

Law Applicable to this Application
11. The evidence of the applicant father is that he is a guardian of the children, by operation of s.17 of the Care of Children Act 2004. He was married to the mother of the children and the children were born after the commencement of the Act.

The mother and father of the children are joint guardians of the children because they were married prior to the birth of the children.

12. The parties had had their marriage dissolved prior to the mother travelling to Saudi Arabia and then to Malta with the children, but the father was still exercising rights of custody with the children. There was no Court order in place but the agreement was that the children would be returned to New Zealand no later than three months after leaving New Zealand, that leaving date being 18 January 2016.

13. The legal position therefore is that the applicant father and mother have joint and equal guardianship rights. Both have equal rights to determine the children's place of residence. The respondent mother does not have sole guardianship rights in respect of the children.

14. The applicant father's affirmation sworn in support of his application for return of the children confirms that at the time the children were retained in Malta:
(a) The children were habitually resident in New Zealand.
(b) Although there was no parenting order in force, the father had a right to have the children in his care and was exercising that right.
(c) He last had contact with the children prior to their departure to Malta, more particularly that care of the children was shared between the parties and that they had been in his care for at least a month prior to their departure.
(d) He was a guardian of the children and had rights to determine residence.
(e) He has not relinquished his rights of custody. He has not agreed to the children travelling to Malta.
(f) Although he consented to a holiday to Saudi Arabia, he has not given consent to the children travelling to, or retention of the children in Malta.

15. The applicant father is therefore entitled to seek the return of the children to New Zealand as his evidence establishes the jurisdiction and all requirements of s.102 of the Care of Children Act in that:
(a) The children were resident in New Zealand; and
(b) The children have been retained in another country in breach of the applicant father's right of custody in respect of the children; and
(c) That at the time of the retention those rights of custody were actually being exercised by the applicant father; and
(d) The children were habitually resident in New Zealand before their retention in Malta."

Respondent **A B C D E** testifies by means of affidavit (Fol 60) and states *inter alia* that she did not wrongfully remove or retain the children and makes reference

to the applicant's consent in writing to travel freely (Dok A fol 43). She states that the children were born and grew up in Saudi. She states that the address provided by applicant in his affidavit has only been his residence since March 2014 and is also occupied by his other daughter and some other flatmates. She states that it was her decision to go back to New Zealand with the kids. When they broke up in November 2013 and she took all the responsibility herself, they never shared childcare. She disagrees that the children were habitually resident in New Zealand. They spent most of their time with her family in Saudi. She states that applicant had to go and live with his father and his father's girlfriend because he had no money to rent a place, and he never contributed for the kids. She also holds that there was never a shared agreement.

What follows is respondent's reply to applicant's exposure of the circumstances giving rise to this application and its effect on the children as quoted above:

"15. This paragraph shows exactly that his allegation of my abduction and/ or retention of the kids was inexistent. I always informed him that I would be leaving with the kids . He even took us to the Airport. But I never agreed that this would return or not return to New Zealand.

16. The Visa is not limited. My father lives and works in Saudi Arabia. Visa is easily if required extendable I do not know where he got this information. We never discussed 90 days. He never exhibited the document. I did.

17. He never contributed to our travel expenses. He knew that I was not returning because he knew that I did not purchase return tickets. Therefore it could not be an abduction / retention case. We never agreed on any time limit to return, if ever. I took care of their education whilst in Saudi Arabia. He Knew that I would not be returning. I would only return when the time is right. Now it is not.

18. There was never any suggestion that I would be returning with the kids. He knew that.

19. I informed the school that I would not be returning.

20.1 came to Malta with my father to see what Nico was doing and working. I had to have the approval of my father to get married after Nico proposed to me. Subsequently we went to the mosque and got married by the Imam. I am settled now here in Malta with the kids I have a regular job , the kids are happy with their friends and their school. Nico has also a steady job . The kids do not want to go back to New Zealand . They would be happy to share their views with the Honourable Court.

21. Correct I replied to it immediately copy already submitted.

22. Incorrect he new that we would not be returning to New Zealand. Our lifestyle is similar to that existing in Malta. We like the European Culture, Malta is in Europe. The people are friendly and they make us feel at home. Malta is our home. My family is also 4 hours away from here not like New Zealand which is 24 hours away.

23. This info is easily available I cannot speak to him because he has blocked me and does not want me to speak to him. I even tried with his father, but never told him what is he trying to do to us.

24. He has always known about my relationship with Nico and knew that I would eventually set up a family with him. He is only crying over spilled milk ! He is the type of guy who postpones any decisions or face up reality. He is using the kids to get at me.

Effects on the Children

1. Basmah and Ausayd were not wrongfully removed and I am not retaining the children against their will or their father.

Dylan gave me a written consent to travel with the children freely and no return date was specified.

If my intention was to prevent / abduct the children I would have stayed in Riyadh where Dylan would never be able to take the kids away from me.

Dylan and I have always agreed that we wanted the kids to live and travel overseas and this is something we have done together by having them in Saudi Arabia and as you can see even after we separated we made sure to include in our parental agreement that kids can travel.

We never planned to return to New Zealand but the reason I came back to New Zealand was to move away from Dylan dangerous behaviour.

2.1 was born in Wales and at age of 5 returned to Iraq with my family and 1992 after the gulf war ended we moved to Yemen and after 5 years emigrated to New Zealand and in 2007 moved to Saudi Arabia. Dylan has always been aware that I need to be close to my family in Saudi Arabia and this is why living in Malta is a good compromise where we are just few hours away from my family. Dylan's family got to enjoy the kids for the last few years and I see nothing wrong with the

kids being closer to my family now but this doesn't not mean the kids will not be able to visit their family or their dad in New Zealand.

3.The reason we were in Wellington till 2007 is because Dylan was involved in a 6 year custody battle with his ex in regarding to his daughter Jasmine, we wanted to go overseas earlier like most young people do in New Zealand regularly after completing their university studies but all our money and time was spent in the family court. And in August 2007 we had to leave Jasmine because her mother would not allow her to go with her father so we came back to New Zealand each year to see her. Dylan and I have been in agreement that we would not punishing our children and prevent them from seeing the world because of our selfish pride and I believe Dylan would have not objected to me and the kids staying out of New Zealand longer if I would have stayed single. As I was planning to leave New Zealand with the kids, Dylan has been applying for jobs everywhere and in particular in Middle east because he was not able to find a job in New Zealand and before we left he got a contract to work in Saudi which we talked about the pros and cons of leaving his teenage daughter in New Zealand or the financial burden of international schools.

Jasmine had few medical issues with obesity, depression and suicide. And this is another factor why Dylan cannot move overseas at the moment.

Because Jasmine is living with her father and her depression etc she finds very difficult to have the kids around her and for the last 6 months in particular kids were going to Dylan's house during the day over the weekend.

I have never intended to move back to New Zealand but due to Dylan's behaviour while we were living in Saudi forced me to move back to New Zealand with kids and far away from my parents because I knew I can be protected by the police in New Zealand and I was too ashamed to speak to my parents about what was happening with Dylan.

4.1 decided to return to New Zealand. I never returned to set up a family home with Dylan indeed I rented a small two bedroom apartment for me and the kids I never thought Dylan would came back to New Zealand. The reason I visited Dylan in 2012 was because my parents live there Dylan was more than happy to live away from the children for more than one year so this is something he has already done Jasminewas left at my door step by her mother and I was more than happy to look after her everyday even if Dylan did not return to New Zealand.

5.Dylan decision to study has put a lot of stress and financial burden on the whole entire family including our parents. His decision to study was entirely selfish and left up to me to financially support 5 people.

6. Since we returned in New Zealand in 2011 the kids have travelled to many places so Dylan suggestion that New Zealand was our permanent home is incorrect

7.1 have separated from Dylan even earlier than November 2013 but because the house was under my name and he refused to leave and I did not want to get the police involved because it would only impact on the children, I had no choice but to wait till my lease run out in December 2013. And I had to get a new place for me and the kids. During the period of separation I continued to look after the kids full time and work full time. Dylan at that time was having a major melt down and morning over the end of the relationship. I made sure with all of the drama that went on like Dylan coming to my house in the middle of the night drunk and crying and begging me to come back. I have to stay strong for him and the kids and make sure the kids did not see Dylan in this way or see us fighting. Seeing Dylan and his ex fight over their daughter, made me concern that if Dylan continues down this road the kids will end up in the same position as Jasmine is now.

I never imagined after what this whole family went through, Dylan would do this to our kids.

Besmah and Ausayd, from our separation and even while we were married, were in my full time care, I took them to school, I took to all the extra curriculum activities, I look after them and stayed at home when they were sick from school, I was the one who took them all their immunizations.

And when Dylan was free he would look after the kids and 90% of the time would be during the day bringing them back before bed time.

8. As Dylan stated in his affidavit, page 9 (31), I have no financial means up until recently, Dylan was unemployed/ unemployable due to the fact he went back to study and at almost 40 changed his career which made him unemployable due to the fact he has no work experience aside being a school teacher. The first job he got at sports Wellington he was fired after few months and his recent job at the ministry of education, with a short term contract, will end in August of this year. If you make my children return to New Zealand, you are giving them to a parent who has no job, not an appropriate house for the kids because it is a four bedroom house which has(Dylan, Jasmine his daughter, Jasmine female flat mate and Andy who has his three young daughter stay with him every second weekend)

His fight against me is more based on the fact that I know of his current situation and he knows fully well how important for the kids to be looked after at the best of

my ability, that I would have to be forced to return with them, look after them and Dylan get to see them when it is suitable for him. This accusation is based more on wanting me to return to New Zealand and to be closer to him so he can make sure I do not get the opportunity to get on with my life.

Yes we attended a separation through parenting course and that is usually good enough for the family court for separated parents to work out their own arrangements and unless both parents do not agree they can go to family court for a judge to make a decision on their behalf.

We chose this option because Dylan knew where I came from and who I am that while children are at this young age they need to be looked after by their mother. And as Dylan stated, going overseas is something we both discussed due to the realities that we are multicultural family and our family are all over the world.

So the only problem for Dylan is not the fact that I live in Malta, it is more based on that I am getting married and he is loosing his ability to control my life because he was free to do it while we were in New Zealand because I have no family to support me through this ordeal.

9.1 went to Europe with Nicola to meet his family and because was Christmas and because Dylan has not seen the kids for several months while he was finishing his MBA I saw no harm in them staying with Dylan and also I did not need to worry about him taking them to school or picking them up. It meant a lot less responsibility on him. Also his father at that time was also on holiday which meant Dylan had help. Also Dylan was dating a new girl so he had her to help him. Aside from this circumstance I do not believe Dylan who is late to every event in his life or his children could manage to be available parent to the kids.

10. When I returned from the trip, Dylan prevented me from seeing the children and even when the kids were screaming and begging him to come with me he just dragged them inside the house. I had just had to threaten him with legal action because he knew I was their primary care giver and no way the family court would grant the custody of the kids.
While I was away travelling Dylan made my life unbearable and continuously threatens to never let me see the kids again and as you can imagine, this was his intention to put stress and strain on my new relationship.

11.In order for me to see my kids again, Nico and I agreed due to the fact that Dylan was still finding it difficult to move on with his life and not allowing me to be happy so we decided to give the impression that our relationship was over. Nico and I never broke up and I never suggested to Dylan to resume our relationship. And just to make it clear that he has been in a relationship with

Saudi but that did not seemed to stop him from continuously feeling jealousy of my relationship .

12.At no stage was mentioned 90 days as you can see in the letter he has given me

13.If Dylan was so sure I was returning in 90 days, wouldn't a reasonable person who is so sure of the return date would have booked a return flight and try to save money that way. Dylan knew I was going overseas and I had no return date in mind and he knew I was looking for jobs while I was overseas because the living cost in New Zealand is really high and Dylan was not able to help me with continuous child support.

And just to make it clear the fact that we are not going to live in New Zealand , since Dylan had not managed to get a job/high paying job he was applying and waiting for response from a company in Abu Dhabi. And just before I left he had a job offer from New Zealand therefore Dylan had no intention to stay in New Zealand and I told him we would make it work and try to live in that part of the world so he can see the kids in the holidays.

Where is the proof that Dylan says we clearly agreed between us that the maximum period of travel would be 90 days.

While I left New Zealand it was during the kids summer holiday.

While I was in Saudi Arabia, I continued to home school the children and Dylan got to see that when he talked to the children. And in respect to enrolling the kids at school in Saudi Arabia was a little bit more difficult that I anticipated. And as you can see from Dylan's evidence he knew the kids were going to be enrolled in a school so why would we discuss this matter if we only have been given permission to stay for 60 days.

14. As you can see from Dylan's evidence I did not prevent him from communicating with the children and that would never stop even if we are living in Malta.
15.I informed Dylan as soon as we arrived to Malta and made sure to put his mind at ease that shortly school holidays are coming up and kids can come back to see him for three months and return back to me. I knew that the kids are so excited of being here and see Nico that as soon as he heard that name it will make him panic.

16.If Dylan was willing for me and the kids to go to Saudi Arabia and suggesting that a person like me and the kids who have lived around the world would be afraid to move to another country is something of a shock, has to be the most

insane comment he has made so far. Where we are today, is due to Dylan selfish ways of jumping to conclusion and mostly based on the fair of me being with another person. If he was a grown up and allowed me to talk to him this problem that he has created could have been solved.

He is fully aware of the damage and the financial burden involving lawyers.

He has done this to put stress on me to make irrational decisions whereby I leave my partner and go back to New Zealand. This way making sure that I would not get on with my life.

If he cared about the kids at all, all he needed to do is talk to me and the kids to see that this is something we wanted and needed.

The kids and I have every right to build our own family, the kids are aware of our cultural and religious expectation that a woman needs to be married and I have every right to look after my children future and do what is best for them which includes them seeing their father.

17. Since found out that I was in Malta to get married, he has blocked me and the kids from communicating with him. SO in the mean time kids get to skype his parents.

18. To answer to Dylan question in regards to why A has done this, could have been answered immediately after we arrived but he chose to put me and the kids in this horrible life shattering experience of being accused of kidnapping the kids. Also this is where the kids want to be right now and he should take the time to listen to them because he knows well enough to know that this kids are intelligent, confident a more than willing to voice their opinion.

Dylan is saying even if I have told him about moving to Malta and why, he would have objected to the travel taking in place. Again it does not take a genius to see that is all about my relationship and not about the children.

19. The statement is incorrect. We came to Malta to be with Nicola who is our family indeed he has been part of our everyday life for the past two years while we were in New Zealand. The kids have a very strong bond with Nico and have been waiting to see him since he left New Zealand in November 2015. Nico has a circle of friends which we are part of. We have already have had many of our common friends come to visit us and the kids enjoyed showing them around Malta. The kids have made many friends from school and usually meet at the local park after school. We have had a privilege to have great neighbour who spend time with us and the kids are free to go and play with their children.

The kids were fully aware that we are not returning to New Zealand any time soon nor they are not even willing to return to New Zealand because they love Malta and the fact that we are finally a family. They are always looking forward for the weekend because no weekend is the same, they love to go to the beach to swim which is something that they cannot do in New Zealand due to the cold weather. But most importantly they cannot wait for this court hearing to be over so they can go to Disney Land in Paris and Italy to meet Nico's family which is looking forward to getting to know their new family members.

Contrariety to Dylan statement re resuming caring for them upon the kids returning to New Zealand, as of August 2016 Dylan will be unemployed (see attached document), he is still financially in trouble, he lives in a shared flat with other 6 people, he has no beds or a bedroom for the children, he has no car so his idea of resuming care for the kids is I (A) return to New Zealand, I work, I provide for the children, I house them and he will see them when it is convenient for him in the weekends.

20.Suggesting if children remain in Malta kids will not be able to enjoy their contact with the New Zealand family, is a lie because what was Dylan's plan when was going overseas to work. Or in fact when he lived in Saudi for one year we managed to continue uninterrupted contact with him and the wider family. I have suggested to Dylan before he falsely accused me of abducting the children to have them for the upcoming holidays (July, August, September) and again for the Christmas holiday.

At no stage I said I will live forever in Malta At no stage I said I will live in New Zealand forever but I believe while the kids are young is a great opportunity to travel and became more open-minded.

21. Travel and living abroad has been part of B and A lives and if you ask any of their friends in New Zealand they will tell you how excited this trip has been for them. B and A are confident and very friendly children with no difficulties to make friends and integrate in a new environment. At school they are fully integrated and happy to participate to all the activities with their schoolmates and even to study new topics like Maltese. Their teachers are very impressed of their progress in such small amount of time.

22. For the past year Jasmine has been struggling to get along with B and A while they are visiting Dylan in the weekend. Dylan and I had several conversations where he suggested the kids to see him only when she is out of the house to reduce Jasmine's anxiety. Dylan's father and me have a very close relationship and he knows that I would never prevent the kids from seeing any of their family, Dylan's

dad regularly travels to Europe on business and he will make time to come and see the kids.

23. Family and friends are and have always been part of B and A life as it has been in Saudi Arabia, Iraq, New Zealand and now in Malta.

24. The children are always free to continue to visit Dylan's mother and step father in Christchurch. Since Dylan's mother has many family overseas and they travel on regular bases, visiting them in Malta will be a treat for everyone.

25.1 indicated to Dylan that he is able to visit the children in Malta at any time he wishes and the kids can go to visit him in New Zealand Dylan's financial constraint should have no bearing on their visit in New Zealand. What concerns me is Dylan has declared to the court of his financial hardship therefore any suggestion of making us return to New Zealand now will cause catastrophic results.

26. Dylan has no basis to seek the return of B and A. Fie is making this application out of jealousy and resentments without consider what is best for the kids. A man who is almost 40 year old is seeking his parents financial help to meet the cost of bringing the kids back to New Zealand . How can this make any judge in the world feel confident that this person can support three children.

27.lt has been 40 days since he has filed this case against me, I have tried to resolve this with Dylan but he has continued to ignore me, even his father and my parents have been trying to reason with him to no avail Dylan fears of me fleeing to another country once I found out about his false accusation is without a cause, I have no intention to flee to another country, our life is here, both of our families are close by and once this will be over we will be resuming our wedding plans and expand our family.

I can assure this court that I did not abduct the kids, I will do my very best to continue the kids relationship with their father.

Sending us back to New Zealand will put a lot of hardship on my relationship with Nico , it will mean that the kids and I will spend years in the family court process which is currently up to 1 year in backlog. It will mean instead of saving money for the kids future we will be wasting it on lawyer bills as we did with dylan's daughter."

Respondent gave testimony during the sitting of the 11th June 2016, and states among other things that before leaving to Saudi in January 2016, the children had been residing with her in Wellington, New Zealand since 2011, and they attended

school there and extra curricular activities. She states that the school where the children attended knew that there was the possibility that the children were not going to return and they had to contact the school to let them know. Asked whether they [the school] knew that the children are not going to be returned to the school or that they are going to be away for a while from school, she replies: "Yes for a while and we weren't sure when we were going to be returning." She agrees that they were brought up in New Zealand but also states that they were brought up in Saudi Arabia because they were born there. Asked what was her intention at the moment that she left New Zealand to go to Saudi Arabia, she states that at that moment her intention was to go and live with her parents in Saudi Arabia. She states that her reason for returning to New Zealand with the kids was the fact that Dylan got involved with a prince in Saudi Arabia and they were doing dangerous things like dealing with drugs and smuggling alcohol, and she was afraid she would go to jail. She states that when he went back to New Zealand the situation degenerated and they lived under the same roof till December 2014 since he refused to move out earlier.

She states that she went to Saudi Arabia to convince her parents to let her get married again to Nicola. Her husband Nicola moved to Malta in November 2015. According to respondent Dylan knew that she wasn't going back in a few months' time. She states that when she left New Zealand with the children, applicant was searching for a job outside New Zealand. Respondent declares that Dylan was not aware that she planned to come to Malta with the kids, and she did not tell him because she knew he would be upset if he knew she was going to visit Nicola. She states that she had emailed him to inform him that she was moving to Malta with the kids but he did not reply and she subsequently received the court papers. She confirms that she only told the children's father that they were in Malta when they had actually arrived in Malta, and she also showed him her intention to settle in Malta. She states that this is not a kidnap situation, if their father wants to see them or if he thinks he can take care of them, she will not withhold that from him. She states that after leaving New Zealand she got no child support from applicant, however during the year he was working in Saudi and she was in New Zealand, he had sent her money. She says that since she left Saudi, she only got 106 dollars once as maintenance from applicant.

Margaret Gillian Powell, barrister and solicitor practising in Wellington, New Zealand, testifies by means of an affidavit (fol 201) and states that she is independent from both applicant and respondent. She confirms that, based on the facts of the case and on New Zealand law, the applicant father and mother have joint and equal guardianship rights. Based on the applicant's evidence, he is entitled to seek the return of the children to New Zealand since the children were resident in New Zealand; the children were retained in another country in breach of the applicant father's rights of custody in respect of the child; at the time of

retention the rights of custody were actually being exercised by the applicant father, and the children were habitually resident in New Zealand before their retention in Malta.

Kay Scott, teacher at Hataitai School Wellington, testifies by means of an affidavit (fol 205) and states that towards the end of 2015, Basmah told her that she was going on holiday to Saudi Arabia and that she did not know when she was coming back. She states that neither of Basmah's parents spoke to her about this.

Tanya Jolly, Office Manager at the same school, states that she got to know about the holiday in Saudi Arabia by Basmah's teacher, but none of her parents informed her about this. She attaches copies of emails with the parties respectively to confirm this.

Applicant files another affidavit of Dylan Michael Longley Dylan Michael Longley (fol 217), in which he states *inter alia*, that he is paying child support and he attaches a copy of the Notice of Assessment of Child Support whereby he was assessed to pay child support and has been doing so. He also attaches the children's travel movements and a copy of the parenting agreement he had with respondent showing that they had joint care of the children. He also states that he did not consent to the children being enrolled at school in Malta. Referring to Dok 'L' attached to his first affidavit he states that it does not in any way refer to moving to another country but it is just a document authorising travel. He signed in good faith based on the understanding that the children were going to Saudi Arabia for a holiday and would be returning within 90 days at latest given that his clear understanding was that the visa was valid for 90 days. He also states:

"...I dispute that A told me that she would be leaving with the children. I had agreed that they could travel to Saudi Arabia to see her family. It was never anything more than that. If I had agreed to the children leaving on a permanent basis, then I imagine that A would have sought my consent to that, and would potentially have requested that in writing. I imagine that there would have been discussion between us about where the children would live (if overseas) and what the arrangements for their time with each parent would have been. I would have made arrangements for the children to be farewelled by my family and I would have told them that the children would be moving overseas. Hataitai School would have been advised in advance. There was nothing of that nature, and if A had suggested that she was intending to leave permanently, I would never have agreed to the children leaving. I agree I took the children to the airport (paragraph 15, A's response), but that is unremarkable. I wanted to say goodbye to the children and wish them well on their trip to Saudi Arabia.

Paragraph 17

I am concerned about the tone of this paragraph, and to me it speaks volumes about A and her approach to my application. She says in that sentence "He knew I would not be returning. I would only return when the time is right. Now it is not'

My understanding is that decisions about children travelling overseas and where they live are guardianship matters that are to be jointly exercised by A and myself. I refer to the Affidavit of Applicable Law in New Zealand in that regard. However and sadly, this paragraph from A speaks very much of someone who believes that she has the sole right to determine these matters, and to me, it perfectly encapsulates the approach that she has taken. She believed that she was entitled to unilaterally determine the future care arrangements for our children, including where they would live, without reference to me. That is exactly what she has done.

Paragraph 20

I note that it does appear that the reason for moving to Malta was to resume her relationship with Nico (as suggested by me in my first affirmation - paragraph 24), and I note that A has deposed that she now had her father's consent to marry Nico and that they are married. I don't know when they were married -1 can only assume it was at some point after she left New Zealand. Her response is silent on this point, but I would be interested to know if that permission was granted before she left New Zealand. To me, the timing of that permission makes no difference to the issue and A's personal life is her business, but if she had that permission before she left New Zealand, that simply reinforces to me the reason why she left New Zealand with the children. I am concerned that this was all part of a very concerted plan by A to deceive me by always having the intention to move to Malta before she left in January 2016 with the children, and using the story of a trip to Saudi Arabia as a cover for that. Even if that is not so and she decided to marry and move to Malta once she arrived in Saudi Arabia, it still does not justify her unilaterally retaining the children there.

Conclusion
19. I am only seeking that the children be returned to New Zealand in the first instance so that A and i can have the issue of their future care arrangements determined in the New Zealand Family Court. This is where the children were living. It is their home."

Nicola Lippolis, respondent's new husband testifies by means of an affidavit (fol 268), and states:

"I am writing this letter to give an honest and true explanation to make understand how fundamental and extremely important A, Basmah and Ausayd are in my life and I am for them.

I met A and we both fell in love, I chose to enter into a relationship and marry her, a woman with children, so I ultimately chose to be a role model and a parental figure for her children.

I always loved kids but with Basmah and Ausayd has been love at first instance. Our relationship has been great since the beginning with a strong mutual attachment and true friendship. I feel so lucky to be part of this small family and I want to give my contribution to make them even happier. Seeing them happy, makes A happy which makes me happy.

Since the beginning, I agreed with A to raise the children in alignment with her wishes having strong respect and consideration about her expectations and intentions for raising them, and having clarity on the direction both of us will take.

I promised A and her family to do my best to look after the kids and help to plan their future. I am aware of my role and I am actively involved in working out what is needed now and in the future of our family. I have a secure job here in Malta and I have always been financially stable, I provide A and the children a house, car and make sure whatever the kids need will be available to them. The kids are very passionate about travelling and this is something I would like to be able to do as a whole family whenever we have holidays.

I always tried and try to invite them to participate and appropriately involve in my own activities taking them along or spending time for their activities like helping with schoolwork, projects, and attending events they are involved to support their efforts. It is very important for me to dedicate and spend time with them and teach them ways to become responsible adults.

I consider Basmah and Ausayd as if they were my children and part of my family now and I am intended to maintain a happy family atmosphere. They are an integrate part of the relationship with A. My love for Basmah and Ausayd is as big as the love I have for A. I feel accepted in the role of alternative dad and I am grateful that they are a part of my life. I am happy to give them my fatherly shoulder to cry on at times or even just a hug or a kiss on the forehead or just a simple "I love you".

A and me are in the process for the civil marriage and planning to enlarge our family. Basmah and Ausayd know about the intention to be a bigger family. They are excited to be part of it, they are looking forward to participate to the wedding ceremony, to travel to Italy and meet my parents in person and to have a new sibling.

I am aware that the children also have their biological father and I have always respected this. I have never complained or disagreed with them to be in touch and spend time with Dylan and especially I have never thought to substitute him as their natural father. It is important for them to have in their life all of us because each one of us can contribute to enrich them and make them happy.

I think it is right and fair for the kids to spend time with their father and grandparents. I reckon a good Mution could be for instance that Basmah and Ausayd would spend their coming school holiday with their her, having some continuous and qualitative time. I always thought it is a good idea to be in goodrapport with Dylan because it goes only in favor of the kids. We all have to act in the best interest of the children and collaborate.

I really hope, for the sake of the children, a positive outcome will occur. I know this has been very hard time for A seeing her struggle with the thought that her children might be taken away but we are hopeful that the court can see we are good parents and we have no intentions of preventing the kids from seeing their father. When we have a positive outcome we can go back to dedicating our energy and time to work what is best for the future of our family and in particular Basmah and Ausayd."

Nicola Lippolis testifies in cross-examination during the sitting of the 1st July 2016 and states inter alia, that he is working in Malta and earns €43,000 per year. He states that he shall marry the respondent in August with a civil ceremony and then have a big wedding in Italy with his family. He states that if they find an agreement from both sides, he would have no problem to pay half the price of the ticket for the children to go and visit their father. He states among other things that he is aware that there is a parental agreement between the parties. He says that A informed him that Dylan was planning to leave New Zealand and he applied for a job in Saudi but he didn't accept it because of his other daughter Jasmine. He states that he came to Malta in November 2015 and A arrived beginning of March 2016. They had been living as a family since the beginning of 2015, but in the evening he sued to go back to his house across the street as her religion did not permit them to live together before getting married. From the information he was given, Dylan was agreeing for A to move from New Zealand with the kids and establish residence in Saudi with her parents. He states that the move to Saudi was never seen as temporary and that is why A cancelled her lease, sold furniture and got rid of her car. He believes Dylan knew about this as he took some of her furniture and her car.

Applicant **Dylan Michael Longley** testifies in cross-examination by means of video conferencing on the 14th September 2016, and states *inter alia* that on the 19th September he would be commencing a contract with the Department of Corrections in the Commercial Contracts Facility Team, for a fixed term of 12

months. He confirms that he pays 319 dollars per month in maintenance directly to the Inland Revenue and respondent receives it in her bank account in New Zealand. He states that when he got to know that the children had re-located to Malta, he seized some of the payments to put the money aside in case he needed to fly to Malta to collect the children. He states that he lives with his daughter Yasmine and another flatmate. He pays 550dollars a week in rent. Before the children and respondent left, A assured him that her dad would pay their return ticket from Saudi back to New Zealand. As regards expenses in relation to the children, applicant states that health and education expenses are paid by the state and in case of food and lodging he already made arrangements for the children to be taken care of at home. His father and sister live in Wellington, and the children can attend after school and holiday programmes. These are the same services A used when she was working. He explains that he signed the authorisation to travel due to a past experience with A getting stuck on the border between Saudi Arabia and Kuwait and again Kuwait and Iraq. He confirms that he has never given verbal or written agreement for the children to move out of New Zealand permanently. Respondent's expressed intention was to be away for two to three months, which is the limit for the Visa in Saudi Arabia. The first time he heard about Malta was when they had already relocated.

THE RELEVANT LEGAL CONTEXT

The 1980 Hague Convention on the Civil Aspects of International Child Abduction. Article 1 of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction ('the 1980 Hague Convention') provides:

'The objects of the present Convention are:
(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'

Article 3 provides:

'The removal or the retention 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 so exercised but for the removal or retention.
The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative

decision, or by reason of an agreement having legal effect under the law of that State.' [Court's emphasis]

Article 12 provides:
'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, for a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.' [Court's emphasis]

Article 13
'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

Article 15
'The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision

or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.'

Article 19
"A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

Maltese National law

Chapter 410 of the Laws of Malta, the Child Abduction and Custody Act, forms the legal basis for the present proceedings.

Article 3 provides:
'(1) In this Part of this Act "the Convention" means the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on the 25th October, 1980 and the relevant Articles of which Convention are set out in the First Schedule to this Act.
(2) Subject to the provisions of this Part of this Act, the provisions of the Convention set out in the First Schedule to this Act shall have the force of law in Malta.'

Article 4 states:
'(1) For the purposes of the Convention as having the force of law in Malta under this Part of this Act, the Contracting States other than Malta shall be those for the time being specified by the Minister responsible for foreign affairs by an order in the Gazette under this article.
(2) Such order shall specify the date of the coming into force of the Convention as between Malta and any State specified in it; and, except where the order otherwise provides, the Convention shall apply as between Malta and that State only in relation to wrongful removals or retentions occurring on or after that date.'

JURISPRUDENCE

Habitual Residence

Reference is hereby made to the judgment in the names **Direttur tad-Dipartiment Ghal Standards Fil-Harsien Socjali vs Jessica Farrugia** decided by the Court of Appeal on the 5th December 2014, whereby the Court held:

"Trattat il-kuncett ta' residenza abitwali, din il-Qorti tara li, skont id-duttrina Ingliza, li maghha din il-Qorti taqbel, mhux mehtieg li dak li jkun imur 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) (No. 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 for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration."

Fil-fatt, fl-Ingilterra, gie accettat li residenza temporanja ghal skopijiet ta' edukazzjoni, business, xoghol (inkluz posting militari), jew biex jinghaqad mal-familja, tista' twassal ghal bidla fir-residenza abitwali ta' dak li jkun. Kaz iehor interessanti huwa Re V (Abduction: Habitual Residence), deciz ukoll fl-Ingilterra fl-1995, fejn fil-kuntest ta' familja li tghix Londra fix-xitwa u Corfu fis-sajf, gie osservat li din il-familja tkun fix-xitwa residenti Londra u fis-sajf f'Corfu, avolja f'dan l-ahhar post ir-residenza kienet wahda ta' villeggjatura. L-intenzjoni ta' residenza hija marbuta mal-iskop u mhux mehtieg zmien twil biex din tigi stabbilita.

Hu car f'dan il-kaz illi l-genituri marru l-Ingilterra ghal skop determinat "as part of the regular order of their life for the time being". Anke jekk wiehed iqis dak li tghid l-intimata, hu car li l-genituri telghu l-Ingilterra bi skop preciz li jahdmu ghal xi zmien f'dak il-pajjiz bi hsieb li wara li jgemmghu ftit flus mhux hazin, jirritornaw Malta u jkunu jistghu jixtru fond ghalihom minghajr htiega li jissellfu minn xi bank. Fil-fatt, l-intimata applikat ghal kors ta' filosofija gewwa Manchester, li kien previst li jdum tliet snin, u hi giet lura Malta bit-tifel wara li kienu jghixu l-Ingilterra ghal aktar minn sena u nofs. Dawn il-fatti wahedhom juru li, ghal matul iz-zmien in partikolari, il-genituri u t-tifel kienu residenti abitwalment fl-Ingilterra. Il-kriterju jidher li, ghall-fini tal-ligi in kwisjtoni, residenza "for an appreciable period of time" ghal skop partikolari hu bizzejjed biex jigi sodisfatt il-vot tal-ligi. Difatti il-Qorti Ingliza fil-kaz Re B (A Minor) (Abduction) deciza fl-1991, irriteniet li anke perjodu ta' xahrejn huwa bizzejjed biex jigi stabbilit "a new habitual residence".

Mhux mehtieg, fil-fehma ta' din il-Qorti, xi hsieb li dak li jkun li jibqa' fil-post ghal xi zmien konsiderevoli. Il-kuncett ta' intenzjoni waqt residenza hija mehtiega biex tistabilixxi domicilju, mentri min-naha l-ohra, residenza abitwali huwa stat

ta' fatt determinat minn abitazzjoni ta' persuna f'pajjiz partikolari ghal zmien apprezzabbli u ghal skop preciz li mhux ta' vaganza.

F'dan il-kaz, hemm diversi fatturi ohra li jindikaw il-hsieb tal-genituri li, almenu ghal zmien mhux hazin, jistabbilixxi r-residenza taghhom f'dak il-pajjiz esteru. Missier il-minuri telaq il-full time job li kellu Malta, biegh il-karozza li kellu u ma halla xejn warajh. Hemm xhieda li jindikaw li l-genituri telghu l-Ingilterra bla impieg bil-hsieb li jahdmu u jixtru proprjeta` hemmhekk. L-intimata kif gia` inghad applikat ghal kors universitarju fl-Ingilterra li kien twil tliet snin u bdiet, fil-fatt, tattendi l-kors b'mod regolari. Il-minuri ddahhal fi skola l-Ingilterra u beda jikkomunika bl-ingliz, u l-genituri tieghu bdew jircievu c-children's allowance u c-child tax credits mill-gvern Ingliz. Jista' jkun li l-genituri ma eskludewx il-possibbilita` li, fil-futur, jirritornaw Malta, pero`, fil-mument li l-intimata ssekwestrat illegalment il-minuri, ir-residenza abitwali tal-genituri kienet gewwa l-Ingilterra u, ghalhekk, ghandu jigi ritornat lejn dak il-pajjiz."

<u>*Wrongful retention*</u>

In the case **Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Michael Caruana**, decided by the Court of Appeal on the 3rd August 2008, it was held:-

"……il-Qorti tinnota li r-regolament in kwistjoni jolqot kemm wrongful removal kif ukoll wrongful retention, b'din tal-ahhar tavvera ruhha meta minuri li jkun barra mill-pajjiz tar-residenza ordinarja tieghu ghal perjodu temporanju, ma jigix ritornat lura f'gheluq dak il-perjodu. Il-protezzjoni, f'kull kaz, ghandha tintalab minn min ikollu "drittijiet ta' kustodja". Din il-Qorti sejra, minn issa 'l quddiem, tirreferi b'mod generali ghal ktieb "Bromley's Family Law" (10th Edition 2007 ta' Nigel Lowe u Gillian Douglas, Oxford University Press), peress li dan jaghti trattat meqjus u car tar-Regolament applikabbli fost diversi stati tal-Unjoni Ewropeja. Dwar kif ghandhom jigu stabbiliti dawn id-drittijiet fil-ktieb jinghad hekk (pagna 639): "The general approach in determining this issue has been well summarised by Dyson LJ in Hunter v. Murrow (Abduction: Rights of Custody). The first task, the so called 'domestic law question', is to establish what rights, if any, the applicant had under the law of the state in which the child was habitually resident immediately before his or her removal or retention. This question is determined in accordance with the domestic law of that State and involves deciding what rights are recognised by that law and how these rights are characterised. The second task, the so-called 'Convention question', is to determine whether those rights are properly to be categorised as 'rights of custody'. This is a matter of international law and depends upon the application of the autonomous meaning of the phrase 'rights of custody' as understood by the English courts." …jew, fil-kaz taghna, mill-qrati ta' Malta."

Custody Rights

In the recent Court of Appeal judgment of the 30th September 2016, in the names **Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Katya Vella Bamber**, the Court of Appeal, confirming a decision by the Court of First Instance, held in relation to custody agreements:

"Jigi innutat li l-artikolu in ezami [Artiklu 3 tal-Kap 410] jitratta mhux biss rimozzjoni, izda wkoll ritenzjoni li tista' tigi meqjusa illecita; din tal-ahhar issehh meta bhal f'dan il-kaz, il-minuri jkun barra l-pajjiz tar-residenza ordinarja tieghu ghal perjodu temporanju u ma jigix ritornat lura wara li jintemm dak il-perjodu. Il-protezzjoni tista' tintalab minn kull min ikollu "drittiijiet ta' kustodja".

Fil-kaz in ezami, il-genituri ftehmu li jezercitaw l-awtorità taghhom ta' genituri b'mod kongunt u dan kif tipprovdi wkoll il-ligi Belgjana. Fil-fatt mill-atti jirrizulta li l-Artikolu 374 tal-Kodici Belgjana jipprovdi li meta l-missier u l-omm ma joqghodux flimkien l-awtorità tal-genituri jibqa' wiehed kongunt. Jigifieri, lil hinn mill-konsiderazzjonijiet dwar il-ftehim, biex genitur, f'dan il-kaz il-missier, ikun intitolat jitlob ir-ritorn ta' ibnu lejn pajjizu mhux mehtieg li jitlob li jinghata drittijiet ta' kura u kustodja ghax hu bizzejjed li dak il-genitur, bhala fatt, ikun jezercità dawk il-funzjonijiet. Lanqas m'hu mehtieg dritt ta' kustodja esklussiva, hu bizzejjed li dak li jkun fil-fatt jezercità drittijiet ta' genitur fuq il-minuri. F'dan il-kaz imkien ma jirrizulta li l-missier kien qieghed joqghod lura milli jezercita d-drittijiet tieghu, u kien jippartecipa fil-hajja tal-minuri b'mod regolari. Ghalhekk huwa ritenut li r-residenza tat-tifel ma setghetx tinbidel unilateralment mill-omm minghajr il-kunsens tal-missier, u ma setghetx tippretendi li tiddeciedi hi wahedha fejn u kif jitrabba l-minuri."

Grave Risk for the children in case of return

In the above-mentioned Court of Appeal judgment of the 30th September 2016, in the names **Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Katya Vella Bamber**, the Court of Appeal made the following considerations:

"Fil-fehma tal-Qorti, dan hu kaz car fejn il-genituri bl-agir taghhom qeghdin joholqu impatt negattiv fuq it-tifel taghhom. Ma jistax ma jigix ribadit li l-omm kienet tkun mhux biss legalment korretta, izda kienet tkun qeghda tagixxi fl-ahjar interess tat-tifel, li kieku segwiet il-proceduri legali u mxiet mal-ftehim li kellha originarjament mar-ragel u talbet lill-Qorti Belgjana l-kura u l-kustodja tat-tifel, inkluz li tirriloka f'Malta bit-tifel. Izda dawn huma materji li f'kull kaz jistghu jigu trattati fil-forum kompetenti u ma jimpedux ir-ritorn tat-tifel. Din il-Qorti taf, mhux biss, li l-Belgju huwa pajjiz demokratiku, u membru tal-Unjoni Ewropea u

firmatarju tal-Konvenzjoni ghad-Drittijiet tal-Bniedem, izda jikkontjeni struttura guridika efficjenti u qawwija bizzejjed biex, f'kull cirkustanza, tipprotegi l-interessi tal-minuri (ara, bhala rifless fuq dan, il-ktieb "Introduction to Belgium Law" ta' Bocken u DeBondt)

Ma hemm xejn fl-atti li juri li, jekk it-tifel jigi ritornat lejn il-Belgju, se jsofri minn xi trawma ta' hsara kbira ghalih. Ovvjament, it-tifel zgur li qed ihossu konfuz b'dak li qed jigri, u n-nuqqas tal-genituri tieghu li jiftehmu dwaru u, aktar, li jonoraw dak li jkunu ftehmu fuqu, zgur li qieghed ihalli mpatt xejn sabih fuq il-minuri. Pero`, din il-Qorti ma tistax torbot ma' din il-konfuzjoni f'mohh il-minuri biex tichad ir-ritorn, u fin-nuqqas ta' prova li r-ritorn tal-minuri lejn il-Belgju jista' johloqlu pregudizzju serju, pregudizzju li l-qrati tal-Belgju ma jkunux jistghu jahsbu ghalih, allura ma ghandux jinholoq intopp ghar-ritorn tal-minuri lejn il-gurisdizzjoni abitwali tieghu.

Il-fatt li l-minuri jista' jkollu f'Malta hajja ahjar milli jkollu gewwa Brussel, u li jista' jkun iktar kuntent hawn milli hemm, dan huwa mertu li ghandu jigi investit f'kawza ta' kura u kustodja. Jigi ribadit li l-kwistjoni ta' kura u kustodja tal-minuri ghandha tigi trattata mill-qorti Belgjana, il-post tar-residenza abitwali tal-minuri, u mhux minn dawn il-qrati, permezz tal-proceduri odjerni. Fil-fatt, kif gustament tosserva l-abbli rappresentant tad-Dipartiment appellat, l-Artikolu 19 tal-Konvenzjoni tal-Ajja espressament jipprovdi:
"Decizjoni li tittiehed taht din il-Konvenzjoni dwar ir-ritorn ta' minuri m'ghandhiex titqies bhala li tkun qed tiddeciedi wkoll il-mertu ta' xi kwistjoni dwar il-kustodja."

It has also been held that by UK Courts that: *"The threshold for an Article 13 defence is not to be decided on the basis of straightforward welfare considerations, but according to the higher standard of serious risk of harm."*[1]

Hearing of older children

Our Courts have also held that on the basis of Article 13, when the child has reached a degree of sufficient maturity to be able to express his or her own views and opposes the return, weight should be given to such opposition. In the case **Director for Social Welfare Standards vs Nigel Barton**, decided on the 3rd December 2010, the Court of Appeal held that:

"The appellant argues that the child should be sent back as a mere "desire" to remain in Malta should not be enough to hinder the application of the Child Abduction and Custody Act, which ratifies two International Conventions and Regulation 2201/2003 of the European Union. There is agreement between the

1 Cv B [Abduction: grave risk] [2005][EWHC 2988] per Potter J

parties that the said Regulation (which is broadly similar to the Hague Convention on the Civil Aspects of International Child Abduction) applies to this case, that the child has his habitual residence in England, and that the child was under the custody of the mother before he came to Malta, and that the mother has joint parental responsibility with the child's father. Under these circumstances this Court would not have hesitated to return the child to England, where if not for article 13 of the Convention which permits a refusal to make a return order if the judicial authority finds that the child objects to being returned and has obtained an age and degree of maturity of which it is appropriate to take account of his views. The child in question is 15 years 6 months old..."

In **Blondin vs Dubois**[2], the United States Court of Appeals for the second circuit, whilst accentuating the fact that the Court in such cases, must determine the merits of an abduction claim, and not the merits of the underlying custody claim, held that:

'Each of the four exceptions to return, as well as the provision for taking account of an older child's objection, must be construed narrowly to avoid frustration of the Convention's purpose. ... Thus, even if an action falls within an exception to return, the court may nonetheless order return if return is consistent with the interests represented by that exception, and the court should look for ways to order return.'

Acquiescence

Reference is also made to a judgment of the Court of Appeal of the 25th February 2011 in the names **Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Lara Maria Merlevede nee' Borg St. John,** whereby the Court seems to have departed from the view that the acquiescence needs to be clear and compelling, and stated:

"Fil-ktieb" Bromley's Family Law (10th Edit, 2007 f'pagna 650) intqal hekk fuq din il-kwistjoni: "In Re W (Abduction: Procedure), Wall J considered that to establish consent the evidence needs to be clear and compelling, which in his Lordship's view means that the evidence normally needs to be in writing or evidenced by documentary material. Accordingly, a parent must establish the defence 'on the face of the documentation' since, if he cannot do so, 'oral evidence is unlikely to affect the issue and will not be entertained'. However, in Re C (Abduction: Consent) Holman J, while agreeing that the evidence needs to be clear and cogent, took issue with Wall J over the need for writing. As he pointed out, 'Article 13 does not use the words "in writing", and parents do not necessarily expect to reduce their agreements and understandings about their

2 238 F.3d 153 (2d Cir. 2001)

children to writing even at the time of marital breakdown'. In his view it is sufficient that the defence is clearly established. He also disagreed with Wall J that consent had to be 'positive' if that meant 'express'. In Holman J's views it is possible in an appropriate case to infer consent from conduct.

In Re K (Abduction: Consent) Hale J, preferring Holman J's views on both counts to those of Wall J, said that while it was obvious that consent must be real, positive and unequivocal, it did not necessarily have to be in writing. She further held that once given (and acted upon) it cannot subsequently be withdrawn by the parent who gave it subsequently thinking better of it. Wall J has now reconsidered his view and accepts Holman J's analysis."

Ghalhekk, il-kunsens mhux mehtieg li jkun la bil-kitba u lanqas espress, pero`, irid ikun car u inekwivoku. Fl-Ingilterra hu ammess ukoll li l-kunsens jista' jirrizulta minn kondotta. Fil-kaz Re: H (Minors) (Abduction: Acquiescence) deciza mill-House of Lords fl-1998, apparti li ntqal li akkwiexxenza tiddependi mill-"actual state of mind" ta' dak li jkun, il-Qorti osservat li, min-naha l-ohra, b'mod oggettiv; "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 of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced." [Court's emphasis]

The determination of whether acquiescence has in fact taken place thus boils down to proof of whether the applicant parent has in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted.

Reference is also made to a Court of Appeal judgment which confirmed the judgment of first instance in the case **Director of the Department for Social Welfare Standards vs Elaine Cordina**, decided on the 25th September 2015, whereby the Court, confirming the First Court's decision that the applicant parent had acquiesced, held:

"68. It is this Court's view that the First Court had made a correct appreciation of the evidence produced before it. Prior to the Father's application of the 10th February 2015 for abduction proceedings to be initiated, the Father had already acquiesced to the children remaining permanantly in Malta as evidenced by the agreement for the sale of the family car, the subletting of the studio flat for the remaining period of the lease, and the listing for rent of the matrimonial house which in January 2015 he showed to a prospective tenant and his active search for a job in Malta. The First Court was entitled to give credibility to the Mother's version which is also supported by the testimony of her parents.

69. Finally, in the light of all the circumstances above-mentioned, the fact that the Father had accepted that his children be registered in a nursery and a playgroup in Malta, even after July/August when during his stay in Malta the Mother had informed him that she would not be returning back to Belgium, contrasts sharply with his claim against acquiescence, as it should result amply clear that a wronged parent who is actively seeking the return of his children to their place of habitual residence would object to any move made by the other parent aimed at integrating the children in any way in another country pending abduction proceedings under the Hague Convention the purpose of which is chiefly that of ensuring the prompt return of abducted or wrongfully retained children in another country." [Court's emphasis]

Considerations of this Court

The Central Authority in Malta, is requesting a return order in respect of the minor children Basmah and Ausayd on the strength of Chapter 410 of the Laws of Malta, which ratified the 1980 Hague Convention on the Civil Aspects of Child Abduction. For applicant to succeed in its request it needs to prove that at the moment of departure of the mother and kids from New Zealand and at the time of wrongful retention, [1] the minors' habitual residence was New Zealand; [2] that the father enjoyed parental rights under New Zealand Law and was actually exercising such rights at the time of retention, and that [3] he had not consented or subsequently acquiesced to the retention of the children in Malta.

The court heard the testimony of both parents and of several other witnesses. In essence both parents are in agreement as to the fact that the father, whilst being aware of the children leaving New Zealand with the mother, so much so that he signed a written authorisation for the kids to travel and took them to the airport himself, was neither aware of the kids' entry into Malta and mush less of the mother's intention not to return to New Zealandbut permanently. In fact both parties are in agreement that applicant got to know that the kids were in Malta only after they had actually arrived in Malta.

The fact that no specific date was established for the return of mother and children to New Zealand does not mean that the father agreed to an indefinite stay in Saudi, which was the original destination. He had every reason to believe that this was a short visit to the minors' maternal grandparents and that they would be back as they had been back other times. This, in a way, is also acknowledged by the mother when she testifies that the school knew that the children would be away for a while but they were not informed for how long. The court therefore concludes that at that moment in time the father had good reason to believe that

the mother will return back to New Zealand together with the children within a reasonable time.

Whilst the mother agrees that the children have resided habitually in New Zealand since their arrival in December 2013 till they left for Saudi in 2016, she also states that Saudi is their habitual residence since they were born and spent some time there.

The Court notes that there is no dispute to the fact that the children have been residing in New Zealand ever since their return back from Saudi Arabia in 2013, with the exception of a few short trips as evidenced by the travel history presented by applicant (fol 235-236). Proof was also brought about the fact that they were attending school in New Zealand, they attended extra-curricular activities such as dancing lessons, and they were in contact with their extended families. All this points to the fact that the parties had established their residence in New Zealand as part of the regular order of their life, and even though they might not have excluded relocating in the future or finding jobs elsewhere, at the time the mother and children left New Zealand for Saudi Arabia, there was no other place but New Zealand which can be held to have been their habitual residence.

The next issue to be determined is whether the father was enjoying parental authority over the children. This Court gives weight to the testimony of two barristers and solicitors practicising in New Zealand, Christopher John Dellabarca and Margaret Gillian Powell, who, based on the facts as portrayed to them by applicant and on the New Zealand Law, opine that the father had the right to care for his children and was exercising such rights at the time that the mother and the kids left New Zealand. Even though the conclusions of such attorneys were based on the facts as exposed to them by the father, the Court notes that these declarations were never rebutted and neither were they cross-examined.

Based upon the evidence brought forward in these proceedings, the Court ascertains that there is no court order attributing sole care and custody to the mother, and that the applicant was exercising his custody rights including overnight stays of the children with him prior to them leaving New Zealand. The Court has also examined the relevant legal provisions regarding parental responsibility under New Zealand Law, in particular those quoted by solicitors Christopher John Dellabarca and Margaret Gillian Powell. The court notes that there is a presumption under New Zealand Law that both parents are jointly the guardians of the minors given that they were married before the children's birth.

Article 16(3) of the **Care of Children Act 2004**, provides that a guardian of a child may exercise or continue to exercise the duties, powers, rights, responsibilities of a guardian in relation to a child, whether or not the child lives

with the guardian, unless a court order provides otherwise. No Court order to this effect was presented. On the contrary, both parties presented a copy of an agreement entered into voluntarily between them, whereby they shared rights and obligations.

This means that in order to change the minors' country of residence, the consent or authorisation of the father is a must. The Court is also satisfied that the applicant was actually exercising his parental rights at the moment of departure of the minors from New Zealand, and even after departure, he maintained regular contact with the children. This is undisputed from respondent's side.

Regarding the applicant's contribution to the minors' maintenance, the parties are in disagreement. Whereas the applicant states that he provided continuous childcare, support and financial assistance to the children after the separation, respondent is unclear in her testimony. On the one hand she states that she never received any financial assistance, whilst on the other hand she states that the last contribution she received was that of half the holiday programme for the kids, a while before leaving New Zealand. However, the applicant states that he has always contributed to the children's maintenance and has taken care of them on a regular basis, particularly during weekends and for six consecutive weeks when the mother was travelling with her new partner.

The mother is inconsistent in this regards in her testimony. During the sitting of the 1st June 2016, she first states that her intention for leaving New Zealand was to go and live with the kids at her parents' in Saudi, whilst a while later she states that her intention was that of obtaining her parents' permission to marry Nicola. During the same sitting, asked whether she made the children aware of her intention of coming to Malta and settling in Malta, she replies that she herself wasn't 100%, but she knew that she wanted to get married and she wanted the children to be part of it. This is very indicative of the fact that her decision was a unilateral one, with no consultation with the applicant and having been driven by the wish to join her partner, now husband Nicola.

In view of all this, the Court concludes that not only is it morally convinced that the children's father had custody rights over his kids when they were wrongfully retained by the mother, and that he was also actively exercising such rights at the moment of departure and retention, but that the mother's unilateral decision to relocate and retain the kids in Malta was in breach of the father's parental rights.

Having thus established: that the minors' father enjoyed and was exercising his parental rights prior to the children's departure and when they were wrongfully retained by the mother; that it was respondent's unilateral decision to retain the children in Malta without the applicant's consent, and considering also that the

children are still of tender age, and do not fall within the maturity parameters needed to pose a valid and sustained objection to their return, the Court shall now assess whether there exist any of the other exceptions contemplated in Article 13 of the Hague Convention. That is, whether the applicant subsequently acquiesced to the children's stay in Malta, or whether there is a grave and serious risk of physical or psychological harm to the children should they be returned, or they would otherwise find themselves in an intolerable situation.

As per the jurisprudence here-above quoted, acquiescence need not necessarily be express or in writing, but must result clearly and unequivocally, and can also be inferred from the applicant's conduct. In the present case, nothing emanating from the applicant's speech or conduct leads the Court to believe that at any point he acquiesced to the minors' continued retention in Malta. Respondent herself during her cross-examination states that she informed the applicant by email that they were re-locating to Malta when they had already arrived, after which applicant immediately filed these proceedings. Contrary to respondent's submissions thus, not only did applicant never acquiesce to the minors' stay in Malta, but he took immediate action to oppose such unilateral decision and have the kids reintegrated back to New Zealand. The applicant's acquiescence does not result.

In line with the jurisprudence quoted above, it is not sufficient to prove that the children may have a better life in Malta than they would in New Zealand, or that they are now happy here. What needs to be proved is that were the minors to return, they would be exposed to serious physical or psychological harm which the Court in New Zealand would not be able to address in subsequent custody proceedings. The respondent submits that the applicant lacks the financial means to take care of his kids, would need help to care for them after school and she also claims that he lives in a shared apartment which is not suitable for the kids. Whereas the Court notes that none of these issues can fall within the meaning of a grave risk of physical or psychological harm or an intolerable situation, it also notes that these are issues that would fall within the merits of custody proceedings in New Zealand, but not those of the present case. This Court is confident that the Judicial and Social Welfare Authorities in New Zealand shall take all necessary steps to address the concerns of the mother if the children were to be returned to New Zealand.

Neither is the potential hardship that the children's return to New Zealand in order for the custody proceedings to take place would create to respondent and her new husband of any relevance to the merits of Hague proceedings. The Court's concern is always first and foremost the best interests of the children and the correct interpretation and application of the legal provisions applicable to the merits of this case.

In the absence of proof as to any serious risk of harm for the children should they be returned to New Zealand, the Court is convinced that applicant's claim is justified and that the children should be returned to the country of their habitual residence in order for the judicial authorities there to determine the care and custody issues surrounding the children given the present circumstances of both parents.

Finally the Court remarks that considering the tender age of the two minor siblings, six and seven years of age respectively, the Court used its discretion not to hear them.

Decision

For the reasons outlined above the Court, whilst rejecting respondent's pleas, accedes to the applicant's request and consequently:-

1. Finds that respondent A B C D E has wrongfully retained the two minor children Basmah Fardouz and Ausayd Mudaffar Longley in Malta in breach of the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and of the provisions of Chapter 410 of the Laws of Malta.

2. Orders the return of the minor siblings Basmah Fardouz and Ausayd Mudaffar Longley to New Zealand. Applicant is to provide all the necessary assistance for the safe return of the minors from Malta to New Zealand.

3. Date of the minors' departure from Malta shall be established by a decree in camera once the Court is informed by Applicant that the relative judicial proceedings regarding parental and custody rights have been instituted by the minors' father in New Zealand and a date has been set for a court hearing.

With costs against respondent.

Judge **Deputy Registrar**