COURTS OF MAGISTRATES (GOZO)
SUPERIOR JURISDICTION
FAMILY SECTION

MAGISTRATE DOCTOR BRIGITTE SULTANA LL.D., LL.M (CARDIFF) ADV. TRIB. ECCL. MELIT.

Today, Friday, 7th January, 2022

Application number: 13/2021BS

Chief Executive Officer
Of The Social Care
Standards Authority

Vs

B

The Court;

Having seen the application of the Chief Executive Officer of the Social Care Standards Authority who declares:

1. That this court application is being made in terms of the Child Abduction and Custody Act (Chapter 410 of the Laws of Malta) by which the Convention on the Civil Aspects of International Child Abduction signed on 25 October 1980[1] was ratified;

2. That this application concerns the children, D born on 1st June 2013 in Truro, United Kingdom and E born on 18th April, 2008 also in

[1] Also known as the Hague Convention.

Truro, United Kingdom. As indicated in the siblings' birth certificates (here annexed and marked as Doc. no DK1 and no DK 2) C is the father of the siblings, a citizen of the United Kingdom;

3. That the facts as explained by the Central Authority of the United Kingdom, through the application (Application by the REMO, the United Kingdom Central Authority annexed and marked Doc. No. DK3) and confirmed by the father's sworn statement (Affidavit of C, annexed and marked as Doc. no DK4) are the following:

   a) That the parents of the minor C and B, both citizens of the United Kingdom, were married on the 17th November 2007 and that they took up residence in the town of Newquay Cornwall UK, when the minor E was born on the 18th April, 2008 and the minor D was born on the 1st June 2013. Both siblings attended school in Newquay Cornwall, United Kingdom (annexed and marked Doc.no DK 5);

   b) That in June 2014, the couple separated, and the father C moved out of the matrimonial house. The father C took care of his children twice a week, a full day and an evening for dinner and sleep over;

   c) The couple were divorced on 4th December 2018. (Annexed and marked Doc. no DK6);

   d) On the first lockdown in the United Kingdom, starting from March 2020, D stayed with his father C for two weeks alternating with the mother while the other sibling E stayed with his mother B;

   e) On the 19th June 2020, the father, C, received a text message from the mother B, informing him that she was moving with the children to Malta in three to six weeks. The father clearly replied that he had joint parental responsibility and that he objected to the children being moved out of the country. The mother's response was that she will be taking the children out of the country with or without his consent and that he could not impede her from taking them out;

f) On the 20th August, the mother B removed the two minors D and E from their habitual residence in the United Kingdom to Malta without the consent of the father C. The father did not consent to the issuing of passports to the minors. The mother through her lawyer informed the left-behind father that the minors had been relocated to Gozo. (Annexed and marked Doc. no DK 7);

g) Provided that minors D and E have been found in Malta without his father's consent and Malta being a country signatory to the 1980 Hague Convention on Abduction, C immediately proceeded with submitting an application through the Central Authority of United Kingdom requesting the return of the minors D and E from Malta to their habitual residence in the United.

4. That in light of the above, the child was removed from the United Kingdom and is being unlawfully detained in Malta by the defendant B born on the 31st January, 1986, residing at *omissis*, when the habitual residence of the same children is in Newquay Cornwall, the United Kingdom;

5. That such a removal or retention on the part of the mother is within the scope of Article 3 of the Hague Convention, which specifies that such a removal or retention is deemed to be wrongful where it is a breach of rights of custody attributed to a person (the father) under the law of the State in which the children were habitually resident immediately before the removal or retention and at the time of removal or retention those rights were actually exercised;

6. That Article 5 of the same convention defines '*rights of custod*y' as the rights relating to the care of the person of the child, and in particular the right to determine the children's place of residence. According to the applicable law of the United Kingdom, and as it will be proved during court proceedings, although now divorced, the parents were married to each other at the time of the children's birth and therefore both have parental responsibility for the minors E and D pursuant to Section 2(1) of the Children's Act of 1989 (Annexed and marked Doc. no DK 8). Although the holders of parental responsibility can act

independently, Section 2(7) of the Children's Act 1989 preserves the operation of other statutory provisions, including Section 1 of the Child Abduction Act of 1984 which requires that the consent of more than one person in matters affecting the children. Section 1 of the Child Abduction Act 1984 prohibits parents or guardians from taking a child out of the United Kingdom without the appropriate consent. (Annexed and marked Doc. no DK 9);

7. That C, the children's father has applied with the Central Authority of the United Kingdom for the return of the minors E and D as per Article 8 of the Hague Convention, and as the subsequent article provides, the Central Authority of United Kingdom had sent the application signed by Mr C on the 22th November 2020 directly to the Central Authority of Malta, since Malta is that State where the children are currently present, The Malta Central Authority will assist in the return of the said minors back to United Kingdom;

8. That the Central Authority of Malta has been authorised by the children's father, C to proceed against the mother in Malta and to do what is permissible under Maltese law in order to return the children to United Kingdom; (Authorisation in terms of Article 28 of the Convention: annexed and marked Doc. no DK 10);

9. That Article 12 of the Convention provides that, where a child has been wrongfully removed or retained in accordance with Article 3, and that the date of the commencement of proceedings before the judicial or administrative authority of the Contracting State in which the child is present for a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority shall order the return of the child forthwith;

10. That the applicant, the Chief Executive Officer, took all necessary measures to attain the children's voluntary return to United Kingdom as provided for in Article 7(c) and 10 of the same Convention, but the defendant refused to return the children voluntarily;

11. That a Warrant of Prohibitory Injunction has been filed and upheld by the Honourable Civil Court (Family Section) on the 29th March 2021,

to restrain any person from taking the minors E and D outside Malta, annexed and marked Doc. no DK 11).

Requested this Honourable Court:

1. Order the stay of court procedures and/or mediation concerning the merits of rights of custody of the minors E and D in terms of Article 16 of the Convention;

2. Order the return of the children E and D to Newquay Cornwall, United Kingdom, immediately;

3. Concurrently provide directives in the interest of the child, including a notice to the authorities concerned, to safeguard the children from being unlawfully removed from Malta to another country, which would make the return of the child to his habitual residence significantly more difficult and this would be in explicit breach of the Convention on the Civil Aspects of International Child Abduction;

4. Give the necessary instructions to the competent authorities, including; the Police, the Court Marshalls, the Child Protection Agency and the Registrar of the Courts, in order to make the practical arrangements necessary for the safe return of the child.

And this under any other provision that this Honourable Court considers appropriate and timely under these circumstances.

With costs.

Having seen the sworn reply of B who declared:

1. That plaintiff's pleas are based on the premises which are totally and entirely unfounded;

2. The elements to satisfy the criteria under Chapter 410 of the Laws of Malta and the "The Hague Convention" signed on the 25th of October 1980 for the return of the minors are missing and this Honourable Court cannot in the particular circumstances of this case orders the return of the minor and this as will be proved in detail during the current proceedings;

3. As will result from the proof brought, the defendant and the father have been divorced for many years and during this period the contact between the father and the minors has been sporadic, with respect to one minor and with respect to the other minor it was totally abandoned. Certainly, and with respect to both minors the father was not exercising his access rights as agreed between the parties and he was not contributing any alimony or taking part in their upbringing and education;

4. In any case the mother will prove during the hearing of these proceedings that the father was aware of the fact that the minors were going to emigrate to Malta and so it is not necessary that this Honourable Court orders the return of the minors;

5. At present the minors live in Gozo together with their mother and her partner and their siblings. Here they have the family and their home and England. They do not want or wish to leave their home in Gozo or to be totally separated from their family;

6. Without prejudice to the above the minors are of an age old enough to be heard by this Honourable Court, and this Honourable Court should hear the minor boys (together with all the defendant's witnesses) to prove these facts which perspective should be taken in consideration by this Honourable Court not only because this Honourable Court should keep in mind the welfare of the minors but also in terms of Article 13 of the Hague Convention and also so that their fundamental rights are not breached and specifically article 8 of the ECHR;

7. In the lights of the above it is not in the interest of the minors to return to England;

8. In the circumstances the plaintiff authority has to prove that in this case there was a "wrongful removal" and at the same time this Honourable Court should order the father to provide an judgement delivered by the English Courts that in actual fact there was this illegality and this in terms of Article 14 of the Hague Convention;

9. With respect to the second plea the defendant has no problem that the mediation proceedings between herself and the father regarding the father's access towards the minors will be stopped, if it is truly the father's wish to establish such access;

10. The pleas of the applicant should be rejected with costs against the same authority.

Having gone through and examined all the evidence brought before it;

Having heard the final oral submissions of both parties;

Noting that this case was put off for judgement to be delivered on 7th January, 2021;

Considers

The plaintiff in this case is the Chief Executive Officer of the Social Care Standards Authority. The said Authority is the entity which is endowed with the responsibility to act as the Central Authority in terms of the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on the 25th October, 1980. Malta ratified this Convention on the 26th October, 1999 and incorporated it into legislation by passing the Act regarding Abduction and Custody of Minors, through Parliament on the 1st August 2000[2].

The Director filed this present case in court against the defendant mother B and is asking for the minor boys D and E to be returned to the United Kingdom to be reunited with the father.

The defendant mother's defence to the claim advanced by the plaintiff Authority is that she is and has always been the sole parent taking care of the needs and responsibility of both D and E. She further contends that she had informed the father through his partner that she would be leaving the United Kingdom with both boys in order to take up residence in Malta. According to her the father did not oppose this idea but even told the boys that he thought it was a good move. Defendant further adds that the boys' father was rather passive in his approach and that he cannot argue that he was not informed simply because they had even agreed on additional time to be spent with him by the boys to make up for the move.

Considers

[2] Chapter 410 of the Laws of Malta.

The Court shall first look at the evidence given by the main parties in this suit namely B and C. From the account given by the parties it transpires that the defendant B and C married on the 17th November, 2007. From this marriage the couple had two boys, E and D. The marriage broke down and on the 4th December, 2018 the parties divorced.

B testified during the sitting of the 14th July, 2021. She explained that C is the natural father of E and D. She stated that regarding custody the parties never took the case to court and that both boys reside with her. When she decided to travel to Malta with the boys, the father, C still shared the custody of the children with her.

She further stated that C was very much aware that she was going to travel to Malta with the boys. She adds that he was even discussing the move with her and that the boys were afforded more time with him before the date of departure so that he could see more of them before they leave. She claimed that she never needed his consent to do anything regarding the boys and so her presumption was that she did not require his consent to bring the children to Malta.

She further added that it was only when she tried to enrol the kids to school in Gozo that she was informed that the father's consent was needed. It was then that she, through her lawyer sent a letter to him asking for his consent so that the boys start attending school in Gozo.

Regarding their habitual residence the defendant explains that she and her family always lived in Cornwall, United Kingdom.

Regarding her family, defendant explained that apart from sons D and E, she has an older daughter from a previous relationship and another son with her current partner. She stated that she has been in the present relationship for the past 6 years.

In so far as to the reason for moving to Malta defendant stated that the family had to leave the United Kingdom for business reasons as they were compelled to do so due to Brexit. The discussion about moving over to Malta had been going on since January 2020, before Brexit.

Regarding the communication with C about emigrating to Malta, defendant explained that she did not really broach the subject with him directly as he refused to even walk up to the door to pick up the boys hence contact was limited. In order to communicate with him she had to go through his partner F or through his parents. She did in fact send messages to F regarding the decision to move to Malta and asking Mr. C to reply but whenever she asked about his reaction to what was being proposed, the message that was relayed back to her was that C had a lot on his mind.

She added that Mr. C is unemployed and lives with his girlfriend.

She then explained the relationship the boys E and D have with their father C. According to her the older son E is not close to him at all since according to her C used to pass derogatory comments in her regard and that fact pushed the son away.

She claimed that C never participated in their sons' lives. She added that she never refused him access to his sons and there were times when the boys were refusing to go and meet him and she had to physically constrain them to go.

Regarding her present relationship, defendant claimed that her partner is a good role model for her children and that their relationship is now very stable and secure. Defendant further added that it is her current partner who provides for the whole family including E and D.

Defendant further added that should the children be forced to return to the United Kingdom, that would mean that the present family unit would be severely disrupted as she would have to abandon her partner and travel with the boys and her baby son back to the UK. She claimed that any such decision will split the family the boys have grown used to.

C testified virtually during the sitting of the 21st July, 2021. He stated that he is the biological father of both E and D. He added that there is no court order or decree depriving him of his parental responsibilities. He added that he wished that the boys were with him so that he could maintain contact with them. He professed his love and affection for them.

Mr C stated that he did not participate in the decision making process which led the defendant to move to Malta. He further added that he first got to know about it on the 19th June, 2021 and then was informed about the flight on the 20th August, 2021.

Asked by the Court what did he actually do from the time he got to know about the plan to move in June till the actual move in August, Mr C stated that he was confused and did not know how to react. He then added that he spoke to his solicitor regarding the matter on the 8th October, 2021.

Mr C confessed that he did not react immediately to the plan to move to Malta as he was slow in understanding what was happening. He stated that he got to know that the boys were actually leaving the UK six (6) weeks before they actually left. He further added that it was B who had informed him of their plans to leave and then his son D confirmed the matter later.

Asked what was his reaction when the defendant wrote to him informing him of the decision to emigrate to Malta, he replied that he did not respond.

During counter-examination C then confirmed that the defendant did in fact inform him of the intended move to Malta as early as the 10th May, 2021[3]. He confirmed also that the defendant once more tried to contact him to get him to react to her message regarding this move and yet he failed to reply to those messages.

Regarding access for the boys before the date of departure Mr C in counter examination confirmed that he was in receipt of a message from the defendant on the 10th May, wherein she was informing him of the move to Malta whilst also trying to establish how contact with him would be done whilst the children are residing to Malta. He further confirmed that the defendant kept on insisting that he replies back since he was failing to get back to her.

Mr. C confirmed also that the defendant was insisting on him having increased access with the boys before the date of departure[4]. When asked

[3] A fol 141 of the records of the case
[4] A fol 141 of the records of the case

to confirm his knowledge of the departure to Malta and this even because of the increased access, Mr. C once again confirmed. He admitted that he was slow to react.

Regarding the issue of maintenance and providing for the boys, Mr. C stated that it was the mother and her partner who provided for the boys' needs. He added that though he had tried to make arrangements with the defendant regarding financial contributions on his part, she had declined.

Regarding the text messages that he had relayed to Ms. Latte, he stated that he did not disclose all the SMSes he had received from the defendant but he only passed on those messages he thought were pertinent to the case[5].

As regards the documents from the court which he received in October 2020, Mr. C agreed that the letter he received was a court document regarding care and custody, access and maintenance. He added that he then sought the advice of a solicitor because he did not want parental responsibility taken away from him[6].

Regarding his consent to the children attending school in Gozo, Mr C stated that he gave his permission for the boys to attend school in Gozo, but he did not give them permission to live in Gozo.

On being asked whether it would be agreeable to him to have the boys living in Gozo and then visiting him during the Christmas Holidays, Easter holidays, summer holidays and every mid-term holiday, his reply was in the affirmative[7].

The Legal Context

The present case is not about the determination of care and custody or who of the parents is the most suited to bring up D and E. The present case deals with the removal from the United Kingdom of the boys D and E by their mother, defendant B. This means that this Court shall only be examining evidence in relation to removal of the boys from their place of

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[6] A fol 147 of the records of the case
[7] A fol 150 of the records of the case

habitual residence and nothing else. Indeed "*Din il-Qorti tfakkar illi, b'dawn il-proceduri, ma jigix deciz min mill-genituri se jkollu l-kura u l-kustodja tal-minuri; din materja li se tibqa' impregjudikata, kif se jibqa impregjudikat id-dritt tal-minuri ghal familja mal-missier jew mal-omm, skont kif tiddeciedi l-Qorti kompetenti in materja*"[8].

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 are effectively respected in the other Contracting States.'

Article 3 then goes on to provide as follows:

'*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.'

Article 12 provides that:

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

[8] Direttur tad-Dipartiment għall-Istandards fil-Ħarsien Soċjali vs. Michael Caruana, decided by the Court of Appel on 3rd August 2008.

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."

Article 13 provides that:

"*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 provides that

"*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."

Furthermore the European Union law - The Brussels II Revised (Regulation No. 2201/2003) Recital 17 in the preamble to Regulation No 2201/2003 states:

'*In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end [the 1980 Hague Convention] would continue to apply as complemented by the provisions of this Regulation, in particular Article 11.*'

Article 2(11) then provides that the 'removal or retention … of a child' is wrongful where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.'

'Return of the child' is provided for under Article 11 which states that:

'*1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the [1980 Hague Convention] in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.* - Ommissis.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged. - Ommissis.

6. *If a court has issued an order of non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately, either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.*

7. *Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.*

   Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time-limit.

8. *Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.'*

Article 60 provides for the 'Relations with certain multilateral conventions'. It provides thus:

'*In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation: (e) the [1980 Hague Convention].'*

Furthermore Article 62(2) provides that:

'The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.'

Under Maltese law, particularly the Child Abduction and Custody Act[9] the phrase "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 that Convention are set out in the First Schedule to the aforementioned Act. Additionally it is further established by that same Act that the provisions of the Convention as set out in the First Schedule of the Act shall have the force of law in Malta.

Having considered the above articles of the law this Court is of the opinion that the Articles of the Convention are applicable to this case. Indeed Counsel for defendant in her summing up argued that this Court cannot ignore the provisions of The Brussels II Revised (Regulation No. 2201/2003). As is evident from the afore quoted provisions, the Regulation does not exclude the application of the Convention between Member States. On the contrary its provisions mirror what was agreed by the parties to the Convention and hence the provisions of the Convention are applicable to the present case.

This matter was debated in the case "Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Michael Caruana"[10] wherein it was decided that:

"……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

[9] Chapter 410 Laws of Malta
[10] Decided by the Court of Appeal on the 3rd August 2008

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."

From the evidence brought to the attention of this Court it transpires that the defendant was caring for the minors E and D but though she has been providing for all their needs there is to date no court decree or judgement that gives her the sole care and custody. So much so that she sought to obtain such a decree whilst in Gozo. This means that Mr C still enjoys custody rights as regards both his sons. Furthermore from the facts stated by both parties it is clear and unequivocal that the place of habitual residence of the boys before they departed ta Malta was Cornwall, United Kingdom.

The defendant throughout the case has argued that whilst accepting that before the move to Malta both boys resided in Cornwall and that Mr. C is still sharing with her their care and custody yet inspite of him being fully made aware of the family's move to Gozo he did not oppose the move and hence his behaviour is tantamount to acquiescence. In line with her arguments the defendant invoked the application of Article 13 of the Convention.

As regards subsequent acquiescence reference is made to a judgment "**Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Lara Maria Merlevede nee' Borg St. John**"[11] wherein the Court stated that: "*Fl-ewwel lok, din il-Qorti trid twarrab is-sottomissjoni tad-Direttur appellant, bazata fuq il-kaz Ingliz In Re W (Abduction: Procedure) deciza minn Wall J. fl-1995. F'dik il-kawza l-Qorti qalet li l-kunsens irid ikun "clear and compelling" u, anzi, "in normal circumstances, Informal Copy of Judgement Page 13 of 22 Courts of Justice such consent will need to be in writing or at the very least evidenced by documentary material". Din il-Qorti ma taqbilx ma' din l-ahhar stqarrija li, fuq kollox ma tidhirx li giet aktar segwita lanqas fl-Ingilterra. Fil-*

[11] Decided by the Court of Appeal on the 25th February, 2011

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 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 (Abudction: 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, però, 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."

This Court also makes reference to a judgment delivered by the Court of Appeal in England in the names "**Re. S. (Abduction: Acquiescence) [1998**]" where it was concluded that the defence of acquiescence is an exception to the general requirement found in Art 12 that the Court shall order the return of the child forthwith.

Indeed Lord Browne-Wilkinson had this to say regarding the application of Article 13[12] :

'What then does Art 13 mean by "acquiescence"? In my view, Art 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted? This is the approach adopted by Neill LJ in Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819 and by Millett LJ in Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716. In my judgment it accords with the ordinary meaning of the word "acquiescence" in this context. In ordinary litigation between two parties it is the facts known to both parties which are relevant. But in ordinary speech a person would not be said to have consented or acquiesced if that was not in fact his state of mind whether communicated or not. In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions...'To bring these strands together, in my view the applicable principles are as follows:

(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in Re S (Minors) "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".

(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.

(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the

[12] Re H(Abduction : Aquiesence) [1998]

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…the extent of the father's knowledge of his rights is in my view crucial to the consideration of acquiescence and whether he formed the subjective intention to agree to the child remaining in the UK. In earlier decisions of this court the lack of knowledge and misleading legal advice have been considered relevant factors to which the court should have regard, see Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 and Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819. In Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 this court held that it is not necessary, in order for the defence under Art 13 to succeed, to show that the applicant had specific knowledge of the Hague Convention. Knowledge of the facts and that the act of removal or retention is wrongful will normally usually be necessary. But to expect the applicant necessarily to have knowledge of the rights which can be enforced under the Convention is to set too high a standard. The degree of knowledge as a relevant factor will, of course, depend on the facts of each case."

From a thorough examination of the afore quoted judgements it is clear to this Court that it is for the abducting parent – the defendant B - to prove that the behaviour of the aggrieved parent – C - is inconsistent with his argument that he opposed the removal of the children from their habitual place of residence. The Court notes that whereas inconsistency may be active, it may also be elicited from the inactivity by the aggrieved parent in the sense that time is allowed by that same parent to pass by without any words or actions on his part to prevent the boys from either leaving their place of residence or indeed to return to that place.

Obviously where the conduct relied on is active, the court would not have to delve into the motives and reasons for such actions. On the other hand however when faced with inactivity on the part of the aggrieved parent, the court then does need examine carefully all the evidence produced by the parties whilst also enquire into the state of mind of the aggrieved parent and the reasons for the inactivity.

From the evidence brought to the attention of this Court it is clear that C was aware that the defendant and the minors E and D were travelling to Malta. He himself admitted that he was even aware that access to his sons was increased so that he enjoys their company before departure. During all that time he did not in any way manifest his disapproval or

disagreement to the move to Malta. He remained passive throughout. Furthermore Mr. C accepts that he was duly informed by the defendant that she was going to travel to Gozo with the boys to settle here as early as May[13]. He remained complacent. The defendant and the boys D and E and the rest of the family then travelled to Malta on the 19th August 2020. Mr C however did not react at this stage either. He actively sought the services of a solicitor only when he received papers from the court in Gozo in October, a good two months after the boys arrived in Malta. When asked specifically by the Court to explain why he had let the matter slip by without taking any action, Mr C in his defence stated that he was grieving the loss of his mother.

The Court whilst understanding that the loss of a parent is a cause of distress however Mr. C admitted that he was made aware of the plans to move to Malta for good in May. The Departure occurred in August – 3 months later. In those three months Mr. C had enough time to compose himself and react to the messages sent by the defendant. He failed to do that. From the various judgements aforequoted by this Court it is now established that consent need not be in writing and indeed it can be elicited from the behaviour of the aggrieved party. Furthermore once consent is given then it cannot be withdrawn simply because the aggrieved party had a change of heart or thought better of it. After sieving through all the evidence this Court is of the opinion that Mr. C complacency amounts to consent and therefore of the boys' move from their habitual place of residence to Malta is not tantamount to removal.

Defendant also argued that following their arrival in Malta, Mr C acquiesced to them settling in Malta. On the point of acquiescence the Court of Appeal in the case "**Director of the Department for Social Welfare Standards – vs – Elaine Cordina"[14]** concluded that "*…the Court is not bound to order the return of the child if the parent opposing the return establishes that the requesting parent "had consented to or subsequently acquiesced in the removal or retention;" Once the mother travelled to Malta with the children with the father's consent, the visit cannot be considered under the heading of "removal". Applicant rightly point out in its note of submissions that "consenting" and "subsequent acquiescing" are distinct from each other. "Consent" prior approval whilst "subsequent acquiescence" means approval ex*

[13] Counter examination at fol 141 of the records of the case.
[14] 25th September, 2015

post facto…. It is also established jurisprudence that once a parent acquiesces to a retention he or she may not withdraw that acquiescence. As has been declared by the Court of Appeal in England in the above quoted judgement se Re. S. (Abduction: Acquiescence) [1998]: - "Once the father…did acquiesce in the retention of M by the mother, as I believe he did, his subsequent change of heart for whatever reason in September 1997 is irrelevant, since acquiescence had already taken place. Acquiescence is not continuing state of affairs and, once given, cannot be withdrawn".

In the present case Mr. C decided to react when he received the papers from the court in Gozo. Up until then he had not done anything at all to ensure the boys' return to the United Kingdom. But then, the court documents triggered a reaction. However it is clear to this Court that Mr. C reacted not because he was actively seeking to have the boys returned back home, but because he thought that HE was being taken to court. Indeed when the Counsel for the defendant asked him whether he had been to his solicitor by way of reaction to the receipt of the court documents, Mr. C reply was very clear:

"*The witness: Yeah, because I was being taken to Court, so I needed to find out where I stood.*"[15]

Additionally the Court notes also how Mr. C also stated that he had even given his permission so that the children attend school in Gozo as he did not wish to disrupt their education while they are away. However, the father's consent cannot be evaluated as an isolated fact but needs to be examined within the whole scenario of the present case. Mr. C was informed by the defendant that she was moving with the family including the boys permanently to Malta. He had been aware of that fact since May, 2020 and therefore the justification given by him that he did not wish for the boys to miss out on their education whilst in Malta is unacceptable to this Court. School attendance is an important step toward integrating the children in their new environment and any reasonable person understands that registering at a school is not undertaken by those who visit a country whilst on holiday but is another step towards establishing permanence. Hence it is the opinion of this Court that Mr. C acquiesced to the boys living in Gozo and as has been declared by the Court of Appeal in England in judgment se Re. S. 6(Abduction: Acquiescence) [1998]:-

[15] Fol 146 of the records of the case

"*Once the father …….did acquiesce in the retention of M by the mother, as I believe he did, his subsequent change of heart for whatever reason in September 1997 is irrelevant, since acquiescence had already taken place. Acquiescence is not a continuing state of affairs and, once given, cannot be withdrawn*."

Finally, the Court also notes the report submitted by the court appointed expert Dr. Darlinka Barbara, psychologist who was tasked to interview the boys. It is pertinent to note that the expert was appointed after the Court herself had interviewed the boys privately in Chambers and following their replies it was deemed in the interest of justice to have an expert evaluate the children's interest with regards to the claims made by the plaintiff.

According to the expert both boys are well settled in Gozo and both have stated that they do not wish to return to the United Kingdom. The younger boy D, who is the one who Mr. C stated spent most time with him is reported as being dismayed at his father's action and cannot understand why he wants them returned back to the United Kingdom.

The conclusion reached by the court appointed expert is that the boys do not have any memory of living with their biological father, Mr. C and that it is not in the best interest of the children to return to the United Kingdom since they have settled well in Gozo.

Decision

For the reasons outlined above the Court is hereby rejecting in toto the application of the 20th May 2021 filed by the Chief Executive Officer of the Social Care Standards Authority.

Expenses to be borne by the plaintiff.

(sgn.) Dr Brigitte Sultana
Magistrate

(sgn.) John Vella
D/Registrar

True Copy

For the Registrar