MALTA

QORTI CIVILI
(SEZZJONI TAL-FAMILJA)

**ONOR. IMHALLEF
RAYMOND C. PACE**

Seduta tad-29 ta' April, 2004

Citazzjoni Numru. 44/2004

Michael Borg

vs

Dr. Beppe Fenech Adami u l-PL Veronica Rossignaud li b'digriet tat-8 ta' Marzu, 2004 gew nominati bhala kuraturi deputati biex jirraprezentaw lill-assenti Penelope Lee mart Joseph Agius minnu legalment separata

Il-Qorti,

I. PRELIMINARI.

Rat ic-citazzjoni ipprezentata mill-attur fir-Registru ta' din il-Qorti fit-18 ta' Frar, 2004 a fol. 1 fejn gie premess:-

Illi l-kontendenti huma l-genituri naturali ta' Jake Borg li twieled Malta fl-4 ta' Frar 2000 (certifikat tat-twelid 829/2000);

Illi t-tifel dejjem irrisjeda f'Malta u l-kura u abitazzjoni tieghu kienet maqsuma bi ftehim bejn l-attur u l-konvenuta;

Illi mit-twelid it-tifel ma kellu ebda kuntatt ghajr mal-qraba tal-attur *stante* li l-konvenuta li hi ta' nazzjonalita Ingliza, ma kellhiex qraba f'Malta u ebda kuntatt mal-familjari taghha fl-esteru;

Illi f'dawn l-ahhar granet l-attur mar ghat-tifel ghand il-konvenuta u ma fetahlu hadd, u illi minn indagini li ghamel skopra li l-konvenuta telqet minn Malta hesrem bit-tifel Jake u t-tifel Jordan miz-zwieg li hi kellha ma' Joseph Agius;

Illi dan kollu sar minghajr il-permess u awtorizzazzjoni tal-attur, anzi kompletament ad insaputa tieghu;

Illi l-konvenuta ma ghamlet ebda kuntatt mal-attur mindu telqet u ghalhekk ma jafx fejn marret u fejn qieghed ibnu;

Illi tali agir jikkostitwixxi rresponsabilta da parti tal-konvenuta u abbuz u vjolazzjoni serja tad-dritt ta' kura u kustodja li ghandu l-attur fuq ibnu Jake;

Illi tali agir hu wkoll ta' pregudizzju u hsara ghat-tifel Jake peress illi hu ttiehed mill-ambjent li trabba fih u minn nies li maghhom hu imrobbi u mdorri, minghajr raguni jew gustifikazzjoni valida;

Illi l-istess attur talab lil din l-Onorabbli Qorti sabiex ghar-ragunijiet premessi:-

1. Prevja d-dikjarazzjoni li hu fl-ahjar interess tat-tifel minuri Jake Borg tavda (recte: tafda) l-kura u l-kustodja tat-tifel minuri Jake Borg esklussivament f'idejn l-attur Michael Borg;

2. Tawtorizza lill-imsemmi Michael Borg jiehu l-passi kollha permessi mill-ligi fosthom dawk provduti fil-Kapitoli 410 tal-Ligijiet ta' Malta sabiex igib lura lit-tifel Jake f'Malta cioe l-pajjiz ta' residenza tieghu;

3. Taghti kull provvediment iehor opportun sabiex l-imsemmija minuri jigi ritornat taht il-kura u kustodja u kontroll effettiv tal-attur.

Bl-ispejjez u bl-ingunzjoni tal-konvenuta ghas-subizzjoni.

Rat id-dikjarazzjoni tal-attur a fol. 3 tal-process.

Rat il-lista ta' xhieda u l-elenku tad-dokumenti a fol. 4 tal-process kif ukoll id-dokument esebit a fol. 5 tal-process.

Rat ir-rikors ta' Michael Borg datat 18 ta' Frar 2004, a fol 11, fejn peress illi Penelope Lee telqet minn dawn il-Gzejjer u ma ghandux hjiel fejn tinstab, talab bir-rispett li din l-Onorabbli Qorti tinnomina kuraturI biex jirrapresentaW lill-assenti fl-atti ta' din il-kawza.

Rat id-digriet tal-Qorti datat 8 ta' Marzu 2004, fejn gew innominati Dr. Beppe Fenech Adami u l-P.L. Veronica Rossignaud bhala kuraturi ghall-finijiet kollha tal-ligi.

Rat ir-rikors ta' Michael Borg datat 18 ta' Frar 2004, a fol 15, fejn talab bir-rispett lil din l-Onorabbli Qorti li *a tenur* tal-ligi, tappunta l-kawza bl-urgenza bl-akkorciment tat-termini legal.

Rat id-digriet datat 19 ta' Frar 2004, fejn il-Qorti laqghat it-talba w appunta l-kawza ghas-smiegh ghat-18 ta' Marzu 2004 fid-9.00am b'dan li jigu nominati l-kuraturi deputati u notifikati.

Rat il-verbal datat 18 ta' Marzu 2004, fejn Dr. Beppe Fenech Adami ta ruhu b'notifikat bl-avviz tas-smiegh tal-kawza u ddikjara li gie notifikat bl-affidavit attrici wkoll. Dr. Mark Chetcuti ghandu bzonn seduta wahda biex jaghlaq il-provi u jiddikjara li ma jafx fejn qieghda l-konvenuta hlief li bl-ajruplan waslet l-Ingliterra. Il-Qorti nnominat lil Dr.

Vincent Galea bhala Assistent Gudizzjaru biex malajr jiffissa zewg seduti ghall-konkluzjoni tal-provi tal-partijiet. Dr. Mark Chetcuti talab li jigi mharrka s-CGMO bhala xhud.

Rat in-nota ta' l-eccezzjonijiet tal-konvenuti kuraturi deputati Dr. Beppe Fenech Adami u l-Prokuratur Legali Veronica Rossignaud datata 29 ta' Marzu 2004 a fol 27 tal-process li gewipprezentati fl- u li permezz taghha ecceppew:

1. Illi huma m'humiex edotti mill-fatti li taw lok ghal din il-kawza;

2. Illi salv' eccezzjonijiet ulterjuri.

Rat id-dikjarazzjoni tal-kuraturi deputati u l-lista tax-xhieda a fol 27 tal-process.

Rat in-nota tal-attur datata 17 ta' Marzu 2004, li permezz taghha pprezenta l-affidavit a' Doris Borg u tal-attur stess.

Rat is-seduti mizmuma quddiem l-Assistent Gudizzjaru Dr. Vincent Galea minn fol 28 sa fol 52 tal-process.

Rat il-verbal datat 1 ta' April 2004, fejn il-kawza giet differita ghas-sentenza ghad-29 ta' April 2004.

Rat ix-xhieda prodotta.

Rat id-dokumenti esebiti.

Rat l-atti kollha l-ohra tal-kawza.

II. KONSIDERAZZJONIJIET

Illi l-attur Michael Borg xehed bil-procedura ta' l-affidavit, liema affidavit jinsab esebit a fol. 20 tal-process. F'dan l-affidavit, l-attur jghid illi "*about 6 years ago I met Penelope Lee (I.D. 57925A) and started a relationship with her. We started living together but could not get married as she*

had been married before in Gozo. She was legally separated, and from this marriage she had a son called Jordan Agius, born on the 14.08.95 and who now lived with us”.

L-attur ikompli jghid illi “*In 1999 Penny got pregnant and we decided to move to my house in Gzira in Manoel De Vilhena Street so she would not have to pay rent. In fact from that moment on, all household bills including water and electricity, food etc were paid by myself only*”. Fi Frar tas-sena 2000, twieled it-tifel tal-kontendenti Jake. L-attur jghid illi “*for the first five months Penny did not work as she had a painful condition in her pelvic bone after giving birth. Because of this I took care of baby Jake, sterelizing bottles, preparing milk, changing nappies, washing baby etc. I was also the one who got up in the night when the baby cried to give him his bottle even though I had to work the next day*”. Wara madwar sitt xhur, il-konvenuta bdiet tahdem fuq bazi *part-time* mill-5.00p.m. sad-9.00p.m. Jkompli jghid illi “*this meant that when I came from work at 5.00p.m. to 5.30p.m. she would have left already. Because of the time discrepancy between my arrival and her leaving, my mother used to come every day to babysit Jordan and Jake. After changing my work clothes I would take them both with me shopping for food. Then I would cook dinner for everyone. Feeding the kids came next and after watching some cartoons with them I’d put them to bed after bathing them both and putting on their pyjamas. This went on every day and by the time Penny came home the kids would already be in bed and she’s find a meal waiting for her on the table*”.

L-attur jghid illi l-konvenuta ma tantx kienet tghinu fil-facendi tad-dar u fit-trobbija tat-tfal. Minhabba f’hekk, fi kliem l-attur “*we started to grow apart*”. Jkompli jghid l-attur illi “*In all fairness one thing she always did was help the older boy Jordan with his homework in the afternoon*”.

L-attur fl-affidavit tieghu jghid illi huwa kien qieghed prattikament jaghmel kollox ghall-minuri Jordan u Jake, ghalkemm il-minuri Jordan ma kienx ibnu. In sostenn ta’ dan, fl-affidavit tieghu huwa jghid illi “*with regards to lunch*

I always came home in my lunch-break where I would buy take away meals during the week and I always cooked a Sunday dinner at the weekends. Before leaving for work, which was luckily nearby, every afternoon I used to also wait for Jordan to come back from school at the drop off point of the minibus at 1.40p.m. and then take him home".

Dwar il-passat tal-konvenuta assenti, l-attur jghid illi *"because Penny had a difficult past she suffered bouts of depression. She had had a relationship in Scotland years before and she had a child by the name of David Farell whom she abandoned at the age of 6-7 years leaving him behind and whom she had never contacted again"*. L-attur jghid ukoll illi *"She used to go for treatment for her depression to Dr Schembri Wismayer at the Capua Palace Hospital but she still had bad days. To make matters worse during quarrels she acted very violently smashing bottles of perfumes and ornaments and threatening to swallow tablets such as paracetamol"*.

Madwar sena u nofs ilu, l-konvenuta assenti, kienet abbandunat id-dar fejn kienu qeghdin jirrisjedu fiha l-attur, l-istess konvenuta u z-zewg minuri Jake u Jordan. L-attur jghid illi *"after the split she again suffered from a depression so I took care of Jake for about 6 weeks. When she got better we shared Jake equally. Sometimes because of Pen's job he would stay with me for longer than his usual time. Usually, he would spend three to four nights with me and then the equivalent with Penny. … We both provided for Jake individually I also paid Summer School for him (Summer 2003). As Winter approached I put Jake's name down in a good school (Bambi) and paid the deposit. Penny was against this as she had by now bought back Jordan from Gozo and decided to put them (both boys) in government school together … Since at the time Jake was spending most days with me I took him to Bambi's every morning but when his mother found out she went to school and took the boy out (creating a panic with the headmaster). … In order to avoid problems and after taking legal advice I ended up letting Penny put Jake's name in Pembroke government School (or so she claimed) since this was never confirmed"*.

L-attur jghid illi recentement il-konvenuta assenti kienet qieghda thalli lill-attur jiehu lit-tifel taghhom Jake il-Gimgha filghaxija sabiex jkun jista jzommu mieghu fil-'*weekend*'. Jkompli jghid l-attur illi *"she started working less hours and she said she wanted more time with her children. She said that she wanted to show the children she was a real mother to them. I had no objection since I always wanted the children to have two parents who shared equally the children's time and needs. When I took 5/6 day holiday in January and missed my weekend with Jake she refused to let me see the boy when I phoned on a Tuesday because she said it would upset his routine"*.

Dwar ir-relazzjoni li l-attur ghandu ma' ibnu minuri Jake, huwa jghid illi *"during my weekends with Jake we had quality time together going for walks with his bike, going to MacDonalds, BayStreet and visiting his grandparents and great grandparents who are still alive. In summer we also go to Fortina in the kiddies' pool".*

Dwar l-ahhar granet li l-attur ra lil minuri Jake, huwa jghid is-segwenti:

"Jake's birthday fell on Wednesday, February 4th and since I only have him at the weekend I decided to make him a cake and have a little birthday party on the Sunday before. This was the last time I saw him after dropping him off back at Penny's place in the evening. When I kissed him goodbye and gave him a kiss and a cuddle he said 'see you soon dadda';

On Tuesday when my parents and I tried to contact him on Penny's mobile number, all we got was the busy signal and it wasn't till Wednesday when we tried to call at Penny's house with a bag full of birthday gifts that we realized that she had left the island and taken our little boy. Now Jake has no family left as Penny hasn't spoken to her mother for years and has lost all contact with her dad. She has broken all our hearts and I as his father and my parents can't believe that Jake our little boy is gone from our lives. We hope he will soon be back where he

belongs so we give him the love, care and upbringing full of love that he deserves;

Penny gave absolutely no indication of her intentions. Things seemed all right between us as far as our relationship with Jake was concerned. There was no question that there was any suspicion of mistrust in each other. What she did is still without any cause or reason. She has not tried to contact me since she left and I have no idea where she or my son is".

Xehdet ukoll bil-procedura ta' l-affidavit omm l-attur **Doris Borg**. Hija tghid illi "*I am a qualified school teacher and have studied Child Psychology at Mater Admirabiles Training College. I am Jake's grandmother and at present only work part time on occassions (mornings only)*". Hija tghid illi "*sometimes when my son (Jake's father) and Penny (his mother) were both at work I used to take care of Jake when Penny left for work till Michael came home after work and at weekends when they went out. … Since Michael and Penny split up I have seen Jake on a more regular basis since they both had full time jobs. … Sometimes I also picked him up from school and took him to my house for lunch. After lunch he would usually play with his toys for an hour and then I'd put him to bed for his afternoon nap. … When he gets up around 4.30p.m. he'd have tea and biscuits and we check to see if he has any drawing or simple homework exercises from school. When these are done he is washed and dressed and we go shopping or for a stroll if the weather is fine and we talk. If I'm babysitting with him in the evenings (if his parents get stuck at work) on wet or cold days we'd watch the kids programme on T.V. or he'd play with his toys while watching me cook supper. At weekends or holidays if he was with me we'd go to the swings or for a walk with the bike. We'd stop at a coffee shop where he would play with his drawing books and colours and drink juice and just talk. I might also take him to see his great grandparents who are very fond of him and are always waiting for him with some sweets. … At around 5.30p.m. Michael would usually come and pick him up and take him*

home. Sometimes if his mum needed to go out she would leave him with me too".

Dwar il-fatt li hija ma ghadhiex tara lil minuri Jake din ix-xhud tghid illi "*we miss our grandchild a great deal. He has only known us as grandparents or relatives and I am heartbroken that I might not be able to see him again. … My relationship with Penny was also very good and we were on very good terms together so much so that I used to mediate between my son and Penny when they argued. … Her departure with Jake in such a way has shocked me more than I care to believe* ".

Fis-seduta mizmuma nhar il-Gimgha 26 ta' Marzu, 2004 quddiem l-Assistant Gudizzjarju Dott. Vincent Galea xehed **PS 1419 Mark Sultana**, stazzjonat fl-Immigration. Huwa jghid illi minn investigazzjonijiet li ghamel, ma setax jghid jekk il-minuri Jake Borg u Jordan Agius kienux telqu minn Malta fit-2 ta' Frar, 2004 u dan peress "*illi records ma ghadhomx jinzammu ovvjament records tat-tluq*". Jkompli jispjega illi "*Meta nghid records qed nirreferi kemm ghal Maltin u kif ukoll ghall-barranin u dan mill-1 ta' Jannar, 2000*". Dan ix-xhud ikompli jghid illi "*Minn ricerka li ghamilna fir-records tal-passigieri li dahlu Malta rrizulta illi Penelope Lee bil-passaport Ingliz numru P 006476184 dahlet Malta skond il-history taghha tnax-il darba (Dok. MS). L-ahhar dhul taghha kien fit-2 ta' Frar, 2003. Id-darba ta' qabel din l-ahhar arrival taghha f'Malta kien fl-14 ta' Mejju, 2002. It-tluq taghha dejjem kien mir-Renju Unit hlief ghal tlett okkazzjonijiet. Wahda minnhom kienet minn Tunes, iehor minn Dubai, u iehor minn Palermo*". Meta dan ix-xhud gie mistoqsi jekk minn Jannar, 2004 lil hawn sal-lum regghetx dahlet hawn Malta l-konvenuta Penelope Lee, huwa jwiegeb fin-negattiv u jzid jghid illi "*l-ahhar dhul kien fit-2 ta' Frar, 2003*".

Xehed ukoll fl-imsemmija seduta **Paul Gambina**, rapprezentant tal-Bank of Valletta plc li qal illi "*minn ricerka li ghamilt jirrizulta illi fid-29 ta' Jannar, 2004 kien sar preljiev mill-kont numru 148 500 2014 mizmum mal-fergha tal-Preluna Towers f'isem Penelope Agius bil-karta*

ta' l-identita numru 17925 (A) fl-ammont ta' LM9,497 u halliet bilanc ta' LM10".

Illi **Joseph Agius** xehed li huwa kien mizzewweg ma' Penelope nee' Lee u issepara minn maghha fit-2 ta' Dicembru, 1999. Mir-relazzjoni li huwa kellu mal-konvenuta, assenti, twieled fl-14 ta' Awissu, 1995 tifel bl-isem ta' Jordan. Dan ix-xhud jghid illi l-attur kien qallu illi Penelope Lee kienet telqet minn Malta kemm b'iben dan ix-xhud u kif ukoll b'iben l-attur. Jghid illi huwa ghamel il-verifiki tieghu "*fis-sens illi meta kont ikkomunikajt ma' l-iskola fejn imur Jordan f'Pembroke, il-Madame qaltli li kien ha gimgha sick lejn l-ahhar ta' Jannar, 2004. Jiena cempilt lil Penelope u ma qbaditx lilha*". Jghid ukoll illi "*Generalment jiena ncempel lil Penelope tlett darbiet fil-gimgha u jekk ma tirrispondiniex dak il-hin sa ftit sieghat wara hija kienet iccempilli mal-ewwel. Ghalhekk rajtha stramba meta cempiltilha lejn l-ahhar ta' Jannar, 2004 u bqajt bla risposta wara erbat'ijiem. Jiena cempilt lil Michael u staqsejtu jekk kienx ra jew kellem lil Penelope u qalli x'kien qed jissuspetta"*.

Dwar ir-relazzjoni ta' dan ix-xhud mal-konvenuta assenti – wara li dawn kienu nfirdu legalment – huwa jghid illi "*r-relazzjoni tieghi ma' Penelope kienet wahda tajba hafna tant li minkejja l-kondizzjonijiet ta' l-access miktuba fil-kuntratt ta' separazzjoni konna niftehmu ahna t-tnejn ghall-kumdita taghna tant u hekk li gieli qattajt granet shah ghandha bit-tifel Malta. Jiena nghix Ghawdex*" u "*Oltre dan ftit xhur ilu kienet thajjret tixtri dar Malta u fil-fatt jiena kont mort maghha nara xi djar u ghamiltilha stharrig dwar self mill-bank. Anke' xtrajtilha karozza second hand*". *In oltre* ix-xhud Joseph Agius jghid illi "*Penelope kellha kuntatt tajjeb hafna mal-familja tieghi u kienet anke' torqod ghandhom*".

Dwar ir-relazzjoni li kellu l-attur ma' Penelope Lee, dan ix-xhud jghid illi "*fil-perjodu li Michael kien jghix ma' Penelope, Jordan ghamel 4 snin jghix kontinwament maghhom u ma nistax nghid li ghandi xi lmenti kontra Michael lanqas ibni Jordan qatt ma lmenta mieghi f'dan is-sens*".

Meta dan ix-xhud gie mistoqsi jekk jafx fejn Penelope marret ma' ibnu Jordan, huwa jghid illi "*la naf fejn qieghed ibni Jordan jew Penelope u qatt ma ghamlet kuntatt mieghi jew mal-familja tieghi*".

Dwar il-passat ta' Penelope Lee, dan ix-xhud jghid illi "*jiena naf li Penelope ghandha tifel iehor jismu David li ghandu 16-il sena u li twieled l-Ingilterra minn relazzjoni li kellha hi ma' terzi. Il-kunjom tat-tifel huwa Farrell. Hi qaltli li kienet giet Ghawdex darbtejn. L-ewwel kienet giet b'David u t-tieni darba giet minghajru u baqghet Malta*" u "*hija kienet iltaqghet mieghi f'din it-tieni okkazzjoni u baqghet Malta. Minn dak iz-zmien hija qatghet il-kuntatt minn mat-tifel u anke' meta ghidtilha tridx inmorru l-Ingilterra biex tara lit-tifel hija qaltli li ma ridtx taf. Niftakar li kienet qaltli li "I find it hard to face them" lit-tifel u lill-missier*".

Meta dan ix-xhud gie mistoqsi in kontro-ezami jekk ibnu Jordan qatx kien siefer ma l-attrici wehidha, huwa wiegeb illi "*safejn naf jiena Jordan qatt ma siefer ma' ommu pero li kieku riedet tmur holiday bit-tifel ma kontx insib oggezzjoni minhabba r-relazzjoni tajba li kellna*". Jzid jghid dan ix-xhud illi "*it-tifel qatt ma semmieli xejn fuq safar u lanqas Penelope ma qatt qaltli xejn fuq is-safar. Anzi nghid illi jiena hadt l-ideja illi hija riedet tkompli tghix hawn Malta tant li riedet tixtri dar*".

Mistoqsi jekk Penelope Lee qattx qaltlu li hija kellha xi problemi ma' l-attur, dan ix-xhud wiegeb illi "*lili qatt ma qaltli li hija kellha xi problemi serji ma' l-attur pero' kienet tghidli li hija xtaqet tnaqqas il-kuntatt li Jake kellu ma' missieru u jkollha iktar kontroll fuq uliedha*".

Illi l-**attur** bil-gurament tieghu qal illi "*Minn informazzjoni li ghandi jirrizulta illi ibni Jake, iben Joseph Jordan u Penelope Lee telqu minn Malta fit-2 ta' Frar, 2004 fuq l-ajruplan KM 116 minn Malta ghall-Gatwick gewwa l-Ingilterra. Minn hemm ma nafx x'sar minnu u sal-lum ma ghandi l-ebda kuntatt jew hjiel dwarhom*".

III. KONSIDERAZZJONIJIET TA’ DRITT

Illi l-kawza odjerna titratta dwar talba tal-attur sabiex il-kura u l-kustodja tal-minuri Jake Borg tigi fdata f’idejh a sabiex din il-Qorti tawtorizza lill attur sabiex jiehu dawk il-passi kollha necessarji skond id-disposizzjonijiet tal-Kapitolu 410 tal-Ligijiet ta’ Malta halli l-minuri Jake jingieb lura Malta u b’hekk l-istess attur ikollu l-kura u l-kustodja effettiva tal-imsemmi minuri.

Illi mill-provi prodotti jirrizulta li l-attur u l-konvenuta assenti ma humiex mizzewgin, pero kellhom relazzjoni, mill-liema relazzjoni twieled il-minuri Jake Borg fl-4 ta’ Frar, 2000.

Irrizulta wkoll illi l-konvenuta assenti kienet mizzewga ma’ Joseph Agius, izda li hija isseparat minnu fit-2 ta’ Dicembru, 1999. Minn dan iz-zwieg hija kellha tifel bl-isem ta’ Jordan Agius.

Mill-provi prodotti f’din il-kawza, ma jirrizultax illi kien hemm xi inkwiet bejn il-kontendenti f’din il-kawza, inkwiet fis-sens ta’ xi glied jew abbuz. Huwa minnu li l-kontendenti f’din il-kawza kienu qeghdin jghixu ghal rashom meta l-konvenuta assenti harbet bit-tfal taghha minn Malta, izda dan ma jimportax illi r-relazzjoni ta’ bejniethom kienet wahda hazina. Anzi mill-provi prodotti jirrizulta l-kuntrarju. L-uniku accenn ghal xi dizgwid li l-Qorti tista’ tirraviza mill-provi hija l-fatt li l-konvenuta assenti riedet ikollha iktar kontroll fuq il-minuri Jake milli fil-fatt kellha. Dan jidher li kien il-kaz fir-rigward tal-wild l-iehor taghha Jordan u cioe li hija kellha certu ammont ta’ kontroll fuqhu u dan *stante* li missier dan il-minuri jghix Ghawdex. Mhux l-istess haga jista jinghad fir-rigward tal-minuri Jake. Dan qed jinghad mhux sabiex l-agir abbuziv tal-konvenuta assenti jigi b’xi mod mitigat jew addirittura inkuraggit. Anzi hija l-fehma tal-Qorti illi l-konvenuta assenti qatt ma setghet taghmel dak li ghamlet u li l-agir taghha huwa kundannabbli.

Illi fil-fatt mill-provi prodotti jirrizulta li l-konvenuta assenti qabdet u hadet lil-minuri mill-ambjent li huma trabbew fih fil-hajja qasira taghhom, stronkat kull kuntatt li huma

kellhom mal-ambjent li kienu jafu u hadithom f'pajjiz strangier ghalihom, fejn iridu jergghu jibdew hajjithom mill-gdid, bil-konsegwenzi trawmatici li din iggib maghha. Il-minuri, almenu Jake Borg, kien qieghed jittrabba f'ambjent tajjeb hawn Malta, imdawwar bil-familjari tal-attur, li kienu jiehdu hsiebu. Ma jirrizultax lill-Qorti illi l-minuri kien qieghed f'xi sitwazzjoni ta' abbuz, anzi jirrizulta proprju l-kuntrarju. Il-minuri Jake, jinsab fejn jinsab illum gie f'sitwazzjoni illi gie jiddependi biss fuq ommu u ma jista jdur lejn hadd izjed familjari ghall-ghajnuna. Dak li ma irnexxiliex taghmel il-konvenuta assenti hawn Malta, u cioe li jkollha l-kontroll effettiv tal-minuri, issa, bl-agir illegali w abbiziv taghha, irnexxielha taghmlu meta hija effettivament qabdet u hadet lill-minuri l-barra minn Malta.

Illi *inoltre*, mill-provi prodotti, jirrizulta illi l-konvenuta assenti hadet id-decizjoni li titlaq minn Malta b'mod permanenti u mhux allontanat ruhha ghal ftit. Dan jirrizulta bl-aktar mod car mix-xhieda tar-rapprezentant tal-Bank of Valletta p.l.c. s-Sur Paul Gambina, li jghid illi "*minn ricerka li ghamilt jirrizulta illi fid-29 ta' Jannar, 2004 kien sar preljiev mill-kont numru 148 500 2014 mizmum mal-fergha tal-Preluna Towers f'isem Penelope Agius bil-karta ta' l-identita numru 17925 (A) fl-ammont ta' LM9,497 u halliet bilanc ta' LM10*". Jghid ukoll illi "*hemm kontijiet ohra pero l-bilanci li fihom huwa ta' jew inqas minn Lm10*".

Illi dan zgur li mhux il-mod ta' kif ghandhom jigu assoggettati l-minuri u cioe li jaqbdu u jittiehdu mill-pajjiz fejn huma jkunu trabbew u qattaw hajjithom kollha. L-ebda minuri ma ghandu jkun assoggettat ghal trattament simili. Il-konvenuta assenti ghandha kull dritt li tirritorna lura lejn pajjizha u din il-Qorti zgur li mhux ser izzommha milli taghmel hekk, pero ma kellhiex dritt li titlaq minn Malta u tmur tghix f'pajjiz iehor bil-minuri Jake qabel ma jew ikun hemm ftehim bejn il-partijiet jew inkella jkun hemm decizjoni tal-Qorti. Il-ligi tal-gungla ilha li spiccat. Huwa minnu li fil-passat remot, bniedem kien jaqbad u jaghmel dak li jrid, minghajr ma jara jekk bl-agir tieghu jistax jolqot jew jaffettwa d-drittijiet ta' terzi pero' illum hemm dak li jissejjah ir-*Rule of Law*, fejn kulhadd irid jassoggetta ruhhu ghal-ligi u ghall-obbligi minnha imposta.

Illi din il-Qorti dejjem imxiet fuq il-massima illi f'kawzi ta' kura u kustodja – bhal ma huwa dan il-kaz – l-interess tal-minuri ghandu jkun u huwa suprem. Fil-**Kodici Civili** u senjatament fid-diversi disposizzjoniiet li jinsabu fl-**Ewwel Ktieb intitolat Fuq il-Persuni** wiehed jirriskontra diversi artikoli tal-ligi fosthom l-**artikoli 47, 56, 57, 60 u 61 tal-Kodici Civili**. Il-ligi tuza diversi frazijiet bhal "*ghall-ahjar tat-tfal*", "*ghall-gid tat-tfal*", u "*il-gid ta' l-ulied*". Uhud minn dawn il-frazi jigu ikkwalifikati bil-frazijiet "*ghandha tqis bhala l-iktar konsiderazzjoni importanti l-gid ta' l-ulied*". Jista' sahansitra jigi annullat kull ftehim li jsir bejn il-mara u r-ragel dwar il-kustodja tat-tfal jekk ikun hekk mehtieg ghall-gid tat-tfal (Ara **artikolu 61 Kap. 16**). Sahansitra anke' il-Qorti tista', f'kull zmien, ghall-ahjar tat-tfal, thassar jew tbiddel l-ordnijiet li tkun tat dwarhom (Ara **artikolu 60(2) tal-Kap. 16**). L-ghan ewlieni tal-Legislatur allura huwa car u univoku. L-interess tal-minuri ghandu dejjem jipprevali fuq kull ftehim li jkun sar jew impost. Ghalhekk l-interess tal-minuri jinghad li huwa suprem.

<u>IV. IL-KUNCETT TA" KURA U KUSTODJA FIS_SISTEMA LEGALI TAGHNA</u>

Illi din il-Qorti kif diversament ippreseduta fil-kawza fl-ismijiet **"Susan Ellen Lawless vs Il Reverendo George Lawless"** deciza fit-8 ta' Dicembru 1858 qalet illi : "*Che la cura ed educazione dei figli, nel caso che la moglie non continua ad abitare col marito, deve essere commessa ed affidata a colui, fra i conjugi, che si riconoscera' piu atto ed idoneo a curarli ed educarli, avuto riguardo alla loro eta', ed a tutte le circostanze del caso – sotto quei provvedimenti, che si reputino spedienti pel vantaggio di tali figli*".

Inghad ukoll fil-kawza fl-ismijiet **"John Cutajar vs Amelia Cutajar et**" deciza minn din il-Qorti kif diversament ippreseduta fit-28 ta' Jannar 1956, illi "*apparti l-hsieb ta' ordni morali u dak ta' ordni legali, li ghandhom setgha fil-materja ta' kura u kustodja tat-tfal in generali, il-principju dominanti 'in subjecta materia', li jiddetermina normalment u generalment il-kwistjonijiet bhal din insorta f'dina l-*

kawza, huwa dak tal-aktar utilita' u dak tal-aqwa vantagg u nteress tal-istess minuri fl-isfond tac-cirkostanzi personali u 'de facto' li jkunu jirrizultaw mill-provi tal-kaz li jrid jigi rizolut;

Fil-kamp li fuqu qeghdin nitkellmu, ghalkemm il-parti umanitarja ghandha certament l-importanza taghha fir-relazzjoni tal-persuni li jkunu taw il-hajja lill-istess minuri, eppure l-istess ma ghandhiex tipprevali fuq l-interess u vantagg dirett tal-istess tfal; bhal ma ghandhiex ikollha fil-hajja ta' kuljum - kif l-esperjenza tghallem - prevalenza l-affezzjoni jew l-attakkament lejn persuna, anki jekk dettat minn natura, fuq id-dover impost mir-raguni fl-azzjonijiet tal-bniedem tant bhala membru tal-familja, kemm bhala membru tal-komunita li lilha jkun jappartjeni. Meta l-ghajn tar-raguni, f'xelta tal-azzjoni li bniedem jkun irid ta' bilfors jaghzel li jaghmel, turi dover, impellenti versu certa linea ta' kondotta, ghalkemm dik l-ghazla tkun timporta azzjoni drastika fil-kamp umanitarju, eppure dik il-hruxija ma tkunx hlief apparentement tali; in kwantokke li bilanci tal-mohh id-dover, li jeleva l-bniedem, u mhux ibaxxieh, ikun ghaleb kwalunkwe konsiderazzjoni ohra li di fronti ghalieh (dover) tkun anqas tajba u anqas dinjituza;

Illi, fil-kaz in dizamina, jinghad li di fronti ghat-tifla in kwistjoni l-kontendenti jinsabu fuq livell ugwali ghal dak li jirrigwarda parentela u drittijiet tal-persuna li bihom huma rivestiti; b'dana pero', li fil-kawza tal-firda l-affidament tat-tifla in kwistjoni gie moghti minn dina l-Qorti, skond is-savju gudizzju taghha, lill-omm. Dina l-istess tifla, kwindi, almenu mill-annu 1950, ghexet permanentement dejjem ma' ommha, u fl-ambjent u atmosfera fejn l-istess ommha, wara l-kawza ta' separazzjoni personali, ipprexeljiet, bla ma jidher li kien hemm kontestazzjoni jew opozizzjoni mill-instanti. Minn dan jitnissel li, in kwantu ghal dak li hija edukazzjoni fis-sens lat tal-kelma, li tikkomprendi tant dik morali kemm ukoll dik religjuza, nonke' ukoll socjali, sa ma qamet il-kwistjoni odjerna l-instanti ma sab xi jghid xejn dwar il-prossimita intima tal-konvenuta ma bintha, kif ukoll man-nies tal-familja ta' l-istess omm. Il-fatt li l-Awstralja, fejn trid tiehu maghha l-bintha l-konvenuta, huwa pajjiz mhux purament kattoliku, ma huwiex fid-dawl tal-hsieb

taz-zminijiet moderni, raguni bizzejjed valida biex tissepara lit-tifla minn ommha u mill-atmosfera fejn ghexet wara l-firda personali; l-ghaliex fi kwalunkwe pajjiz, jekk ma jkunx pajjiz prettament kommunista jew ateu, jinsabu nies ta' hafna denominazzjonijiet religjuzi, u kulhadd jippratika dik ir-religjon li jidhirlu l-ahjar ghalieh; u kif ommha telletgha fir-religjon kattolika appostolika rumana hawn f'dawn il-Gzejjer, ma jidherx mill-provi li hemm xi indizju ta' provi li hija mhix sejra tkompli taghtiha dik l-edukazzjoni religjuza u morali, jew l-istess konvenuta sejra hija personalment taqleb ghal xi denominazzjoni religjuza ohra"

Ukoll fil-kawza fl-ismijiet **"Giuseppe Scicluna vs Maria Scicluna pro et noe**" deciza minn din il-Qorti, kif diversament ippreseduta, fil-31 ta' Mejju, 1958 inghad illi "*Illi l-kura tat-tfal komuni tal-mizzewgin, sew fil-ligi antika (li titkellem fuq l-edukazzjoni, terminu li ontologikament jimporta l-kura u l-amministrazzjoni tas-sustanzi taghhom (ara De Rohan Lib. III, Capo II, paragrafo XXIV), sew fil-ligi vigenti (ara argument mehud mill-art. 68 Kap. 23), kif ukoll fil-gurisprudenza estera (Annali della Giurisprudenza Italiana, Volume VII, P. II, p.39, **Appell Lucca** 4 ta' Settembru 1872 in **re Buoni utrinque**), u f'dik lokali (ara Prim' Awla Civili 8 ta' Dicembru 1858, **"Lawless utrinque"**, Vol. I pag. 180, kolonna sekonda (2da.) med.; Appell 26 ta' April 1867, **"Camenzuli vs. Gatt"**, Volume IV, pagina 74, kolonna prima in fine; Prim' Awla Civili 28 ta' Jannar 1956 in re **"John Cutajar vs Amelia mart l-istess John Cutajar"**; u hafna ohrajn), hija regolata mill-principju tal-aqwa utilita' u l-akbar vantagg ghall-interess tal-istess tfal li c-cirkustanzi tal-kaz u l-koefficjenti tal-fatti partikulari tal-mument ikunu jissuggerixxu;*

Illi, in konsegwenza, ir-regola sovrana fuq enuncjata ghandha tipprevali dwar il-kustodja u l-edukazzjoni tat-tfal komuni tal-mizzewgin, sew meta l-konjugi jisseparaw ruhhom gudizzjarjament (art. 68 Kap. 23), sew meta jigu biex jisseparaw konsenswalment (ara art. 71 u 72 Kap. 23);"

Illi fil-kawza fl-ismijiet **“Carmela Falzon vs Paolo Falzon**” deciza mill-Onorabbli Qorti ta’ l-Appell fis-17 ta’ April, 1959 inghad illi *“skond l-art.68, dawn jitqieghdu taht il-kustodja tal-konjugi innocenti, ammenokke l-Qorti ma tordnax xort’ ohra ghall-gid tat-tfal stess; kozikke’ l-interess tat-tfal hu r-regola sovrana”*.

U fil-kawza fl-ismijiet **“Alfred Cassano vs Violet Cassano”** deciza fil-15 ta’ Mejju, 1963 minn din il-Qorti diversament ippreseduta illi *“...il-mara li tabbanduna d-dar konjugali u tiehu maghha t-tfal, hija obbligata tirrestitwixxi dawn it-tfal lil zewgha, minghajr ma ghandu jitqies, fl-azzjoni li r-ragel jaghmel kontra taghha ghal dik ir-restituzzjoni, jekk hi kellhiex gusta kawza biex thalli d-dar ta’ zewgha billi azzjoni simili ma ghandhiex tigi konfuza ma’ l-azzjoni tal-mara li tfittex lir-ragel ghall-alimenti a parti mill-gudizzju tas-separazzjoni”*.

Illi fil-kaz **“Yolanda Formosa vs Maggur Frank Formosa**” deciz minn din il-Qorti kif diversament ippreseduta fl-10 ta’ Gunju, 1964 inghad illi *“Illi l-ligi tiddisponi li, barra minn xi kazijiet li fihom il-legislatur espressament akkorda l-forza esekuttiva lis-sentenza tal-Qorti ta’ l-ewwel istanza (art. 265) meta ssir talba biex sentenza li tkun ghadha ma saritx ‘res judicata’ tigi dikjarata provvizorjament esegwibili, il-Qorti ghandha tilqa t-talba jekk tkun sodisfatta li d-dewmien fl-esekuzzjoni tas-sentenza jkun sejjer aktarx jikkaguna pregudizzju akbar lill-parti li titlob dik l-esekuzzjoni milli dik l-esekuzzjoni tkun tikkaguna lill-parti kuntrarja (art. 264(7)). Fit-tieni kategorija ta’ kazijiet, ghalhekk, il-legislatur halla kollox f’idejn il-kriterju prudenti tal-awtorita gudikanti, taht zewg kondizzjonijiet biss, l-istanza tal-parti u l-pregudizzju akbar taghha. L-ewwel kondizzjoni hija element konstatabili materjalment; it-tieni wiehed huwa diskrezzjonali ghall-Imhallef li ghandu pero’ juza dik id-diskrezzjoni mhux semplicement biex jara x’inhu ahjar li jsir imma biex jizen il-pregudizzju;*

Illi meta l-istanza tkun tirrigwarda l-kura tat-tfal in konsiderazzjoni tal-kwistjoni tal-pregudizzju ma tistax tipprexxindi mid-disposizzjonijiet tal-Kodici Civili u l-

principji in materja li jirrendu suprem mhux l-interess tal-genituri imma l-gid tat-tfal (art. 68 u 69 Kod. Civ.) u b'gid tat-tfal ghandna nifhmu mhux tant il-profitt materjali kemm-il ben esseri morali taghhom. It-tfal, f'kawzi bhal dawn, mhumiex oggett in kontraversja u l-interess tal-genituri fil-kwistjoni dwar il-kustodja taghhom huwa inservjenti ghall-interess tat-tfal. Konsegwentement il-pregudizzju tal-partijiet imsemmi fl-artikolu 264 (7) irid jigi misurat, f'dan il-kaz, fuq il-pregudizzju ikbar jew inqas li jista jsofri l-imsemmi tifel skond jekk tinghatax jew l-esegwibilita provvisorja fis-sentenza in kwantu tirrigwarda l-kura u kustodja tieghu u l-accessibilita ghalih";

Illi ukoll fil-kawza fl-ismijiet **"Ray Calleja vs L-Avukat Dottor Raymond Pace et noe"** deciza minn din il-Qorti kif diversament ippreseduta fil-21 ta' April, l995 illi *"Li f'kawza bhal din dwar il-kura u l-kustodja ta minuri, l-interess ta l-istess minuri huwa l-uniku fattur determinanti u, ghalhekk, il-Qorti ghandha tipprexxindi mit-tortijiet o meno tal-partijiet u zzomm biss fl-ottika taghha dak li jidhrilha li huwa fl-ahjar interess tal-minuri.*

Ghandu jigi mill-ewwel osservat illi t-tifla minuri A twieldet fis-26 ta Lulju, l989. Dan ifisser li illum din ghandha hames snin u nofs u, ghalhekk, mhux il-kaz li jista' jinghad li l-kura li normalment taghti l-omm lill-uliedha, fl-ewwel snin ta trobbija, hija ndispensabbli ghat-tifla minuri A".

Illi tant dan l-interess tal-minuri huwa suprem illi l-Onorabbli Qorti ta' l-Appell fil-kawza fl-ismijiet **"L-Avukat Dottor Stephen Thake noe et vs Joseph Portelli**" deciza fl-4 ta' Novembru, 1994 qalet illi *"Il-Qorti trid tenfasizza, illi f'kawza bhal din, l-ottika principali taghha hija wahda - fuq kollox, l-interess tal-minuri. Id-drittijiet u l-obbligi tal-omm u tal-missier, li jkunu il-kawza tal-litigju, huma assolutament sekondarji"*. F'din l-istess kawza, l-Onorabbli Qorti ta' l-Appell anzi marret oltre u qalet illi fejn ikun hekk jehtieg – u dan meta l-interess suprem tal-minuri hekk jirrikjedi – hija tista tohrog barra mit-termini li jimpurtawlha l-partijiet fit-talbiet taghhom.

Illi fil-kawza fl-ismijiet **"Sylvia Melfi vs Philip Vassallo"** deciza mill-Onorabbli Qorti ta' l-Appell fil-25 ta' Novembru, 1998 inghad illi *"The Court should at all times seek the best interests of the child irrespective of the allegation, true or false, made against each other by the parties. Such allegations often serve to distance oneself from the truth and serve to render almost impossible the search of the Court for the truth. This is why it is the duty of the court to always look for the interests of the child. Exaggerated controversies between the parties often make one wonder how much the parents have at heart the interest of their children. Sometimes parents are only interested at getting at each other and all they want is to pay back the other party through their minor child."*

Illi ghalhekk abbazi tal-principji fuq enuncjati li jirregolaw l-kura u l-kustodja ta' minuri f'Malta jidher din il-Qorti ghandha dejjem thares l-lejn l-interess suprem tal-istess minuri, liema interess huwa dejjem superjuri ghal dak sekondarju tal-partijiet fil-kawza u cjoe' il-genituri tal-istess tant li tali principju gie indikat bhala *il-paramountancy principle* fil-kaz ingliz **"J vs C"** (HL 1969) minn Lord McDermott iccitat fil-kawza **"Marisa Josephine Shafiquzzaman vs Syed Shaffiquzzam"** (P.A. (N.A.) 31 ta' Mejju 1999).

Illi l-istess gie ritenut fis-sentenza **"Sylvia Melfi vs Philip Vassallo"** hawn fuq citata fejn inghad illi *"In this case the Court must seek to do what is in the sole interest of the minor child. In its decision whether the care and custody of the child should be given to one parent or the other the Court must solely be guided by what is most beneficial to the child. The Court refers to a judgement of the Honourable Court of Appeal in the names **"Leslie Anne Pace vs Joseph Pace"** decided on the 27 th March, 1998".*

Illi dawn il-principji gew dejjem ikkonfermati f'diversi sentenzi Maltin fosthom dik ta' **"Ronald Apap vs Ruby Ritchie pro et noe"** deciza mill-Onorabbli Qorti ta' l-Appell fis-27 ta' Ottubru 1995 fejn gie stabBilit ukoll l-principju li fl-*"ahhar mill-ahhar hija biss il-Qorti li hi l-arbitru*

finali ta' x'inhu l-interess tal-minuti u kull direzzjoni taghha trid tkun ezaminata minn din l-ottika u hekk motivata".

Illi fis-sentenza fl-ismijiet **"Monique Grecula vs Ronald Allen Grecula"** deciza minn din il-Qorti, kif preseduta fis-6 ta' Marzu, 2002 intqal illi: *"dan huwa principju fondamentali stante li din l-Qorti huwa dak li fil-fatt qeghda tezamina u wara dan kollox huwa sekondarju tant li gie ritenut li gie ritenut li " the conduct of the parent is only relevant to the extent that it affects parenting capacity, the child's relationship with the parent, his or her safety or development. Doing justice between the parents, or the notion that parents have rights over their children, has been said to play no part in the application of the welfare test".* **"Princiles of Family Law" - S. M.; Cretney and J. M. Masson –** pg 719)*".*

Illi dan gie kkonfermat fis-sentenza **"Jurgen Sixt vs Rosemarie Sixt"** (A.C. (JSP) 3 ta' Marzu 1999) fejn inghad li *"The Court has repeatedly stated that in matters of custody and access to children, the primary consideration is not the wishes of the parents but the welfare and best interests of the child".*

Inghad ukoll fis-sentenza **"Grecula vs Grecula"** illi *"fl-opinjoni ta' din il-Qorti dan fil-fatt huwa l-perm tal-problema kollha dwar din il-kustodja u kura tal-istess minuri, u d-distinzjoni hija netta u cara bejn l-interess tal-minuri u dak li l-partijiet jistghu jippretendu li huma d-drittijiet taghhom verso l-istess minuri. Dak li din il-Qorti qed tistharreg huwa l-gid tal-istess minuri u li huma jitrabbew b'sahhithom, f'ambjent familjari u naturali kemm jista' jkun, u jinghataw fibra u edukazzjoni fuq l-aspetti kollha tal-hajja inkluzi dawk morali religjuzi, edukattivi, socjali, fizici f'ambjent stabbli, tenut kont tal-post fejn twieldu u fejn trabbew. Ir-rwol tal-genitur hija mahluqa sabiex iservi ghall dan l-iskop dejjem immirat ghad-direzzjoni alturista ghall gid tal-istess minuri, stante li dawn huma l-genituri u cittadini ta' ghada, u fdati f'idejn il-genituri proprju minhabba l-fragilita' taghhom u l-innocenza taghhom, u ghalhekk l-interess tal-istat huwa ezatt dak li jipproteggi l-trobbija sew tal-istess minuri, u*

f'dan il-kuntest il-ġenituri jista' jingħad li għandhom responsablitajiet lejn l-istess minuri milli drittijiet.

Illi l-aġir tal-istess ġenitur jidħol fil-kuntest ta' ġid tal-minuri jekk tali disposizzjoni tkun tista' taffetwa posittivament jew negattivament l-istat fiżiku u morali tal-istess ulied, u jekk dan ikun fil-posittiv għandu jiġi nkoraġġit, u jekk huwa fin-negattiv, ovvjament għandu jiġi mwaqqaf għaliex ikun qed jagħmel ħsara lill-istess minuri".

Illi din il-Qorti, anke' *in sostenn* ta' dak li għadu kif ingħad u mill-ġurisprudenza kopjuża hawn fuq ċitata dwar materja ta' kura u kustodja hija tal-fehma illi l-aġir tal-konvenuta assenti huwa ta' dannu għall-minuri Jake Borg, u li l-istess minuri għandu jerġa jinġieb hawn Malta. F'dan l-isfond din il-Qorti tħoss li l-aġir tal-konvenuta assenti fil-konfront tal-istess minuri huwa dannuż għall-aħħar fil-konfront tal-istess, mhux tant għaliex l-istess atti u mod ta' azzjoni tal-konvenuta assenti huma kundannabbli fihom infishom, iżda għaliex l-istess aġir ikkreja pressjoni kbira fuq l-istess minuri li arbitrarjament ġie mċaħħad mhux biss minn missierhu u minn dak kollu li sa mill-mument tat-twelid tiegħu kienet id-dinja tiegħu, b'dan li bħal pjanta ġew maqlugħa bl-għeruq b'kollox minn fejn kienu imħawwla u litteralment meħud f'post ieħor kompletament aljen għas-sistema li jkun trabba fiha, tant li huwa estranju f'art u ambjenti strambi għalih, u dan kapriċċjosament u aktar gravi minn persuna bħal ommhu, li suppost hija stess għandha l-obbligu li tevita li dan isir.

Illi dan huwa aggravat mill-fatt li l-istess konvenuta assenti għadha ma għamlet l-ebda kuntatt mal-attur, kif lanqas ma ħalliet lill-minuri Jake jagħmel kuntatt ma' l-istess missieru, u jidher li hekk ser jkompli jsir sakemm il-konvenuta assenti u l-minuri Jake jiġu rintraċċjati.

Illi f'dan il-kuntest din il-Qorti deħrilha li huwa fl-interess tal-istess minuri li tali kawża tiġi trattata bl-urġenza, u hekk fil-fatt qed tiġi deċiża, *stante* li huwa mportanti fl-interess tal-istess minuri li kemm jista' jkun malajr tali pendenza tiġi riżolta, tenut kont tal-*fatti specie* partikolari u serji tal-każ in eżami, u wkoll tal-fatt li kull applikazzjoni jew kawża

dwar l-kura u l-kustodja tal-minuri, proprju minhabba l-interess tal-istess minuri, hija minna nnfisha urgenti, aktar u aktar f'dan il-kaz, li jittratta dwar htief illegali ta' minuri barra minn pajjizhom. (**"Jurgen Sixt vs Rosemarie Sixt" –** A.C. 3 ta' Marzu 1999)

Illi *nonostante* l-istess urgenza din il-Qorti tat l-fakoltajiet kollha lill-partijiet sabiex iressqu il-kaz taghhom u anke' sabiex jitilghu jixhdu diversi xhieda ohra in konnessjoni ma' dan il-kaz.

Illi *oltre* dan kollu, din il-Qorti hija konvinta illi l-minuri Jake Borg gie effettivament sekwestrat minn ommu u dan bil-konsegwenzi kollha li hemm mahsub fil-Kapitolu 410 tal-Ligijiet ta' Malta li hija l-Att dwar is-sekwestru u l-kustodja ta' minuri.

Illi mill-provi prodotti – li ma gewx kontradetti – jirrizulta illi z-zewg kontendenti kellhom il-kura u l-kustodja tal-minuri tant illi l-minuri kien qieghed jinzamm matul il-gimgha mill-konvenuta assenti u mbaghad fil-*weekends*, mill-attur, ftehim bonarjament milhuq bejn il-kontendenti minghajr l-ebda intervent ta' xi Qorti. Illi f'kazijiet simili, fejn il-ġenituri ma jkunux mizzewgin, u anke' fejn dawn ikunu, jekk ma jkunx hemm dikjarazzjoni tal-Qorti ghand minn qieghda tigi fdata il-kura u l-kustodja tal-minuri, il-kura u l-kustodja tal-minuri hija *ex lege* vestita fl-istess genituri u dan anke' abbazi tad-dispozizzjonijiet relattivi tal-**Kap 16**, inkluz l-**artikoli 7 u 90 tal-Kodici Civili**. Dan huwa konformi wkoll mal-gurisprudenza nostrana.

Illi f'dan ir-rigward il-Qorti taghmel referenza ghal-kawza fl-ismijiet **"Melissa Micallef pro et noe vs Konrad Scotto"** deciza minn din il-Qorti kif preseduta fis-27 ta' Gunju, 2002 fejn inghad illi *"jinghad illi l-kontendenti f'din il-kawza ma humiex mizzewwgin. Il-mistoqsija allura illi wiehed jistaqsi huwa jekk japplikawx jew le l-artikoli tal-ligi li jitkellmu fuq il-minuri, liema artikoli tal-ligi jinsabu fl-ewwel ktieb tal-**Kodici Civili** taht l-intestatura **"Fuq il-Persuni Titolu I Fuq il-Jeddijiet u d-Dmirijiet li jitnisslu miz-Zwieg Sub-titolu III Fuq il-Firda Personali"**. Jinghad mal-ewwel illi anke jekk ghas-sahha ta' l-*

*argument dawn ma japplikawx ghal kaz de quo, xorta ghandhom japplikaw il-principji generali li jitnisslu minn dawn l-artikoli fir-rigward tal-minuri. Ghalhekk din il-Qorti ghalkemm ser taghmel xi referenza ghal artikoli tal-ligi li jinsabu fl-intestaturi hawn fuq indikati, hija qeghda zzomm quddiem ghajnejha wkoll il-fatt illi l-kontendenti f'din il-kawza ma humiex mizzewgin. Dan qed jinghad il-ghaliex dawn l-artikoli jitkellmu fuq il-manteniment, il-kura u l-kustodja tal-minuri, t-trobbija u l-edukazzjoni tal-minuri. Zgur almenu japplikaw allura l-kuncetti strettament legali. Anke l-ligi wkoll donnha ma taghmilx distinzjoni bejn ulied li l-genituri taghhom huma maghqudin fiz-zwieg u genituri illi ma humiex hemm maghqudin fiz-zwieg. Bhala ezempju jigi ikkwotat l-***artikolu 7 tal-Kap. 16*** *li jghid testwalment illi "Il-genituri ghandhom l-obbligu li jiehdu hsieb, imantnu, ighallmu u jedukaw lil uliedhom bil-mod stabbilit fl-artikolu 3B"*.

Illi minn qari akkurat ta' l-**artikolu 3** li jinsab fl-**Ewwel Skeda tal-Kapitolu 410 tal-Ligijiet ta' Malta** ghandu jirrizulta allura illi r-rimozzjoni tal-minuri minn Malta kienet wahda illecita ghall-finijiet ta' dan il-Kapitolu tal-ligi, anke' peress li l-istess attur kellu almenu flimkien ma' l-omm, u skond il-ligi l-kura u kustodja ta' l-istess minuri, li kif jirrizulta mill-provi kien abitwalment u permanentement residenti hawn Malta, u d-domicilju ta' l-istess minuri kien proprju f'dan il-pajjiz. Jirrizulta wkoll li l-attur kien effettivament qed jezecita d-drittijiet u jonora l-obbligi tieghu bhala missier versu l-istess minuri, u fl-ahhar nett jirrizulta wkoll li l-konvenuta assenti hadet lill-istess minuri barra minn Malta llegalment, kollox fit-termini tar-rimuzzjoni ta' minuri kontemplata fit-termini tal-**Kap 410 tal-Ligijiet ta' Malta** fuq citat.

Illi ghalhekk din il-Qorti tenut kont ta' dak li ghadu kif intqal hawn fuq hija tal-ferma opinjoni illi l-kura u l-kustodja tal-minuri Jake Borg ghandha tigi f'data f'dan l-istadju f'idejn l-attur esklussivament bil-konsegwenza li t-talbiet attrici ghandhom jigu milqugha fit-termini proposti.

V. KONKLUZJONI.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi** billi tilqa' t-talbiet ta' l-attur b'dan illi:-

1. Tafda l-kura u l-kustodja tal-minuri Jake Borg f'idejn l-attur u dan *stante* li jirrizulta illi huwa fl-interess suprem ta' l-istess minuri li hekk ghandu jkun;

2. Tawtorizza lill-attur sabiex jiehu dawk il-passi kollha necessarji u permessi mill-ligi fosthom dawk provduti fil-**Kapitolu 410 tal-ligijiet ta' Malta** halli l-minuri Jake Borg jigi ritornat lura Malta;

3. TORDNA lill-awtoritajiet kompetenti lokali nkluzi dawk centrali ndikati fil-**Kap 410 tal-Ligijiet ta' Malta** sabiex jaghmlu dak kollu li huwa necessarju u mehtieg sabiex il-minuri Jake Borg jigi ritornat lura Malta u li mar-ritorn lura Malta ta' l-imsemmi minuri Jake Borg, dan ghandu jinghata mmedjatament lill-attur;

Bl-ispejjez kollha kontra l-konvenuta assenti b'dan illi l-ispejjez tad-Deputati Kuraturi ghandhom jithallsu skond il-ligi.

Moqrija.

< Sentenza Finali >

--------------------------------TMIEM--------------------------------