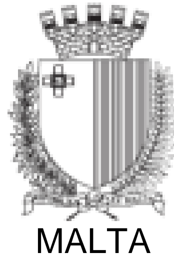

MALTA

COURT OF APPEAL

HIS HONOUR THE CHIEF JUSTICE
SILVIO CAMILLERI

THE HON. MR. JUSTICE
ALBERT J. MAGRI

THE HON. MR. JUSTICE
TONIO MALLIA

Sitting of the 19 th October, 2010

Civil Appeal Number. 90/2008/2

Alexandra Mifsud in her name and as curatrix *ad litem* for and on behalf of her minor son Lucas Mifsud

v.

Sigrid Baron, curator appointed for and in representation of Klaus Zinser

The Court:

Having seen the application filed by Alexandra Mifsud on the 8th of April 2010, which reads as follows:

"That permission for the applicant to relocate to the United Kingdom in order to further her studies was granted by the Honourable Civil Court (Family Division) on 30th April 2009 and was confirmed subject to a number of modifications by the Honourable Court of Appeal on 9th June 2009, among which the condition that such permission shall remain in force until 30th April 2010. Permission was granted after both Courts considered as valid the submissions made by the applicant regarding this issue.

"That the First Honourable Court referred specifically to the necessity for the applicant to remain in the United Kingdom for a much longer period of time than was actually granted. Her stay in the United Kingdom was considered as beneficial to her minor son Lucas (page 12 of the definitive judgment).

"That the Court also observed that Klaus Zinser is not "the left-behind father" and that the Court does not envisage that there should be any obstacles for him to exercise access in the United Kingdom (page 12 of the definitive judgment).

"That for several months Klaus Zinser has failed to inform this Honourable Court that there were pending proceedings before the High Court in London and that the High Court had issued several Orders in the paramount interest of the minor child Lucas, probably in order to avoid having to concede that the applicant cooperated fully with the High Court.

"That in the records of the case here in Malta, copies have been produced of the said Orders given by the High Court as well as a copy of the report presented by the independent Social Worker appointed by the High Court itself, which conveys a very clear picture of the situation.

"That both Lucas as well as the applicant's other son Andreas attend schools in the United Kingdom and have become well accustomed to the new way of life in the United Kingdom. It is evident that both have settled down

very well there. For this reason, a request to this Honourable Court by the applicant for her to be able to continue to reside in the United Kingdom with her two sons is necessary not only in order to enable the applicant to further her Ph.D. studies, but also because in default of such an extension the permission granted after her first request would be rendered inoperative. This would be prejudicial to the applicant insofar as her Ph. D studies are concerned and would also cause immense harm to Lucas as well as to her other son Andreas who are midway through the scholastic year in the United Kingdom.

"Therefore, the applicant humbly requests this Honourable Court to grant an extension to the original permission given on 9th June 2009 until 30th September 2013 and to give all the necessary provisional measures so as to ensure that her stay in the United Kingdom until such time as this Honourable Court gives its final decree will be considered as being fully complaint with this Court's earlier permission."

Having seen defendant's reply filed on the 29th of April 2010, which reads as follows:

"That permission for the applicant to be able to relocate to the United Kingdom in order to further her studies was granted by the Honourable Civil Court (Family Division) on 30th April 2009 subject to various conditions and was confirmed by the Honourable Court of Appeal on 9th June 2009 subject to more stringent conditions;

"That the conditions imposed by both Courts were made in order to facilitate access and secure as much as possible the mother's adherence to these terms and conditions (12/13 definitive judgment) in view mainly of "the mother's constant refusal (verging in some instances on the pathological) to follow and faithfully execute the directions of the Court when granting access to the father" (9/12 definitive judgment);

“That the Court of Appeal reconfirmed the decision of the First Court in limiting the effects of its decision to the end of April 2010 considering it “amply justified” and this despite the mother’s argument that she would definitely need more than a year to complete her studies abroad. The Honourable Court of Appeal explained that she could always apply for an extension of the relocation order in which case such application would be examined in the light of the circumstances of the case ... particularly with regard to the total and faithful application of the terms and conditions imposed by the order of the first Court as modified by this judgment. (10/13 definitive judgment);

“That Alexandra Mifsud has failed to abide by the decision given by this Honourable Court on the 30th April 2009 and confirmed subject to a number of modifications by the Honourable Court of Appeal on 9th June 2009 wherein it is stated “That, prior to her leaving these Islands with the child the mother is to present a sworn note in the Registry of this Court indicating in detail her full residential contact address in the United Kingdom; and she is also bound to present such note each time she changes her residential contact address when in UK” (condition 1/5 definitive judgment). Not only did Alexandra Mifsud not give her full residential contact address, never indicating which apartment in the block she was in, but she furthermore gave the wrong block address. Furthermore though she changed her residential contact address repeatedly she never presented a note indicating such in the Registry to this very day;

“That Alexandra Mifsud also failed to abide by the second condition given by this Honourable Court on the 30th of April 2009 wherein it is stated “that within a week of her arrival in the UK this passport (the child’s) be deposited in the Registry of the Court of the locality or place where she will be residing with the child;” she neither presented it within a week nor did she present it in the Registry of the Court of the locality or place where she claimed to this very Court that she was residing with the child;

“That furthermore, Alexandra Mifsud has failed to abide by the decision given by the Court of Appeal, wherein it is stated that “further to Condition 4 the mother is to present to the father a six monthly schedule of her visits to Malta in connection with her lectures and research work in Malta, so as to enable the father to plan his visits to the United Kingdom; moreover, the two days mentioned in Condition 4 are to be understood as two consecutive days.”(iii/15 final judgment).
“That indeed till today the mother has still not presented to the father this schedule, notwithstanding that the said decision was given on the 9th of June 2009 and that Alexandra Mifsud had left the Maltese Islands during the week the father was meant to have access rights to his son Lucas in Malta, without in anyway informing Klaus Zinser;

“That yet again, Alexandra Mifsud has failed to comply with the fifth condition given by this Honourable Court wherein it was stated “That the mother is to bring the child to Malta, or send him accompanied during his scholastic vacations in summer, and in Christmas, to spend seven (7) days with the father during these periods;

“That Alexandra Mifsud also failed to abide by the further condition given by the Court of Appeal to condition 1, given by this Honourable Court, wherein it is stated that “the mother is in addition to give the address and other details of the school which the child will be attending and this within five (5) days from the registration of the child with the school; such note is to be filed in the Registry of the first Court and is also to be confirmed on oath by the mother”; and this despite the fact that the child is attending school in the UK (ii/15 final judgment);

“That worst of all Alexandra Mifsud has failed to abide by the fourth condition given in the decision given by this Honourable Court on the 30th of April 2009 wherein it is stated “that during her stay abroad, the mother is hereby bound to make possible and allow personal contact by the father with the child on a monthly basis for ten hours spread over a period of two days”;

“That for all intents and purposes Klaus Zinser went over to the UK in order to see his son on the 26th and 27th June 2009 again in accordance with the Court’s decision, giving prior notice to Alexandra Mifsud through her lawyer in Malta as well as by registered letter to her address in the UK as provided by the said Alexandra Mifsud. However Alexandra Mifsud failed to give him access to his son Lucas for the month of June and simply did not turn up on both days. Mr. Zinser also continued to send registered letters to the given address with his proposed dates for the next months after that and went to London regularly for the proposed access but Alexandra Mifsud continued not to give him access to his son Lucas.

“That the father was forced to bring proceedings in the English Court because the mother failed to comply with these contact provisions which contact provisions she is still opposing to this very day;

“That it was only because Klaus Zinser started proceedings in the English Court that it was ordered by the English Court that access was to take place – this, after more than six (6) months of Klaus Zinser being deprived of seeing his son. Furthermore, it is to be pointed out that it was only at the very last minute, that Alexandra Mifsud opted to indicate through her lawyer a place of encounter which required both Klaus Zinser and the social worker involved to change venue, expected within London, to Westfield Shopping Centre in Derby – a very busy noisy centre, a considerable distance from London. This resulted in the meeting taking place much later than the time ordered by the English Court leaving less than an hour of access. During this time the mother and Lucas’ older brother Andreas were constantly present and the child was held firmly by the mother throughout this brief meeting so that yet again, Alexandra Mifsud’s transgression rendered the father’s encounter with his son both tragical and farcical. The social worker who was not briefed with the history of the case was of course oblivious to what was truly happening.

“That unfortunately, as can be seen, what this Honourable Court had observed in its decision of the 30th April 2009 in that “the mother has shown an acute and manifest resistance to complying the Court decree, and, notwithstanding the efforts of this Court to try to arrive at a temporary modus Vivendi on this aspect, even by initially allowing her to be present for some time during the access, still she remained intransigent, either by interfering unduly during the access, or by not turning up with the child, and literally going into hiding till after the access days when the father left these Islands.” (4/6 final judgment) has not changed.

“That, as the Honourable Court of Appeal observed then and holds again today, “basically the issue boils down to the effective exercise of visitation rights by the father, and more precisely, whether the fact that his son will be temporarily residing in the UK will result in a reduction, or loss, of contact with his son to whom he is very committed and who he loves very much. Therefore, a balance must be sought between the mother’s right on the one hand, as primary carer having the exclusive care and custody of the child, to relocate temporarily with the child to pursue her studies abroad and further her career; and on the other hand, the rights and interests of the child and those of father to have as much contact as possible with one another with a view to developing a strong and healthy father-son relationship.” ([5]9, 10 final judgment).

“That unfortunately, except for the brief encounter in a shopping centre, mentioned above, the father has now not seen his son for close to a year, with the mother transgressing practically every condition given by this Honourable Court and the Honourable Court of Appeal.

“Therefore in view of applicant Alexandra Mifsud’s acute and manifest resistance to complying with the Court decrees and to give effective access to the father and son, respondent humbly requests that this Honourable Court refuses applicant’s demand and reconfirms its own decision that Alexandra Mifsud will return the child to Malta for good by not later than 30th April 2010, to render

real and effective respondent's right of access to his child Lucas in order that the fundamental human rights to which both he and his son are entitled be not further transgressed by applicant."

Having seen the decision delivered by the Civil Court – Family Section – on the 12th day of July 2010, by virtue of which applicant's request for an extension to keep the minor child in England was refused and this for the following reasons:

"That by decision[1] given by this court on the 30th April 2009, subsequently confirmed, save for a few modifications, by the Honourable Court of Appeal by a decision[2] of the 9th June 2009, plaintiff was authorised to relocate temporarily to the United Kingdom with the parties' minor son Lucas in order to pursue her studies abroad.

"That in view of the enormous difficulties which plaintiff had created in Malta regarding defendant's visitation rights, this court imposed a number of conditions which plaintiff had to abide by during her stay in the UK.

"That regarding these conditions, the Honourable Court of Appeal in its judgment observed that "This Court [Appeal], taking into account what motivated the first Court to impose such stringent conditions, namely the mother's constant refusal [verging, in some instances on the pathological] to follow and faithfully execute the directions of the Court when granting access to the father, agrees that the conditions should be stringent, and shall, in fact, proceed to impose further guarantees on conditions on the mother." In fact, the Court of Appeal had, *inter alia*, raised the monetary guarantee from seven to ten thousand Euros[3].

"That subsequent to these judgments plaintiff signed a written guarantee in the Registry of this court whereby she

[1] Vol. 4-fol.870 *et seq*
[2] Vol.4-fol.1123 *et seq*
[3] Vol.4-fol.1128 *tergo*

bound herself "to observe strictly all the conditions imposed on [her] by virtue of the said decree[4]."

"That condition number [5] of this court's decision binds plaintiff "to bring the child to Malta, or send him accompanied, during his scholastic vacations in summer, and in Christmas to spend seven [7] days with the Father during these periods[5]."

"That from the records of the proceedings it appears that plaintiff has violated most of the conditions imposed by this court, notably the one contained in the preceding paragraph. It also appears that, in the UK, she continued to conduct an intensive father-alienation exercise to the detriment of the child, and of the father.

"That these conditions were imposed, chiefly and primarily, in the interests of the minor child with a view to building and strengthening the child's relationship with his father.

"That in view of plaintiff's acute and manifest intransigence to comply with the orders if this court, and give defendant effective access to his son, this court is of the opinion that granting the requested extension to plaintiff is not in the best interests of the child who has been deprived of his right to contact with his father."

Having seen the application of appeal filed by Alexandra Mifsud by virtue of which she requested, for reasons set out in the application, that this Court revokes the judgment given on the 12th of July 2010, and grants the requested extension;

Having seen the reply filed by Sigrid Baron by virtue of which he requested, for reasons set out in the application, that this Court reject the claims made by appellant in her application of appeal and to proceed to confirm the

[4] Vol.4-fol.876
[5] Vol.4-fol.874

judgment given on the 12th of July 2010, and thereby refuse to grant the requested extension;

Having heard the lengthy submissions by counsel during the hearing of the 12th October 2010;

Having seen the records of this case as well as the acts related to prior applications;

Considers:

By virtue of a judgment delivered by this Court on the 9th June 2009, applicant Alexandra Mifsud was allowed to take her minor child Lucas Eric Mifsud with her to England to enable her to continue with her studies at one of the Universities of that country. This permission was granted under several conditions intended to protect the father's rights of access, and in particular it was noted that permission was only granted for a year on the understanding that an extension will be granted only if applicant follows in a "total and faithful" manner the conditions imposed. The mother, applicant Alexandra Mifsud, who has not abided by all of the terms and conditions imposed by this Court, is now requesting an extension of the permission granted to her by this Court on the 9th June 2009.

The First Court, as noted, refused this request after having noted that the applicant has violated most of the conditions imposed by this Court.

Applicant has filed this appeal and has brought forward various reasons to justify her breach of certain conditions. Applicant contests, in the first place, the jurisdiction of the Courts of Malta as the child is currently residing in England. This Court notes however that the child's habitual residence was and still is in Malta, as the child was only allowed to leave Malta for a brief and temporary duration because of the exigencies of his mother. The child's stay in the United Kingdom was strictly regulated by this Court, and given that the mother is under a duty to return the child pursuant to this Court's order, it cannot be

said that the child has "lost" his habitual residence. To say that the child has changed his residence in these circumstances is to give consolidation to a factual situation deriving from wrongful conduct, and to strengthen the position of the parent responsible for the wrongful deed. It cannot be said that the child has "settled" in the United Kingdom, as applicant herself has envisaged his stay to be temporary. An agreement, albeit imposed by this Court, to send a child abroad for some temporary purpose is not sufficient to change that child's habitual residence. It was held in Re A (Wardship, Jurisdiction) decided by the High Court in the United Kingdom in 1995 (1 FLR 767), that sending a child abroad to a boarding school is not to be regarded as being more than for the "temporary purpose of education", which does not change the child's normal residence. The same principle applies in this case.

In any case, even if a change in the habitual residence of the child were to be acknowledged (which this court does not), it is a principle of law under Regulation 2201/03 of the European Union, that a change of habitual residence while proceedings are pending does not itself entail a change of jurisdiction. Furthermore, in the circumstances, the Court does not feel it would be in the best interest of the child to request a transfer of jurisdiction under Article 15 of the said Council Regulation.

Turning to the merits of the application, applicant Alexandra Mifsud has brought forward various reasons to try to justify her failure abide with the conditions of the permission granted by this Court. This Court had noted, in its decision of June, 2009, applicant's reluctance and constant refusal to obey the Family Court's instructions to allow the father to have direct and reasonable access to his child, and warned applicant that unless there was a total and faithful observance of the terms of the order, the court would be inclined to review its decision. Thus, although she did register her United Kingdom address with the Court, there was a slight "error" in the address with the result that weeks had to pass before she was contacted by the Court authorities in England, and this as

a result of the issuance of a search order. Her lawyers in England had advised her not to do anything herself about contacting her husband, but wait for the latter to do so – unfortunately, the "error" in the address registered meant that for a time the father could not exercise his rights of access.

When, finally, a date for access was fixed, the applicant refused to move away from the site and continually held on to the child. The mother had been ordered to allow and make possible "personal contact" between the child and the father, but she chose a Shopping Centre in Derby for this purpose and insisted on being at all times present. This access had to be and was indeed supervised by a social worker, but, due to the suddenness of the arranged access, the social worker was given no information about the parents and no background to the case. The mother arrived for the meeting carrying the child who "appeared to be tired", as noted by the social worker. When the father arrived on the scene, he insisted on the mother not being present, but the social worker – who as noted had no information about the case, especially regarding the mother's attitude in Malta, – insisted on both parents being present. The father, who had not seen his child for over six months, was visibly upset, especially as he knew, from experience, that the mother would turn the child against him. In fact, when the father thrust out his hand to greet his son – who was in the arms of his mother – the child hit his father's hand repeatedly. The father got upset and, in those circumstances, felt that he could not go ahead with his visiting rights. This episode led to a United Kingdom Court temporarily suspending the father's right of access, but given the background of the case, this Court feels that the encounter between the father and child could have been managed better and the applicant should have actively facilitated the encounter for it to take place in a proper and calm way. It is the mother who must coordinate matters to ensure a smooth exercise of access for the child's father. Unfortunately, the child is being indoctrinated by the mother who has no interest to see to the true welfare of the child by seeking to smoothen contacts between her son and his father. Her

love for the child can only be described by this Court as misconceived or “false”, as a parent who truly loves his/her child will do everything in his/her empower to ensure that there exists a loving relationship between the child and the other parent.

Applicant claimed that she was faced with various difficulties in ensuring compliance with the terms of this Court’s order. The fact, however, that she was denied legal aid in England, does not mean, as she submitted before this Court, that she was effectively denied access to a court to seek redress for her grievances.

Furthermore, when the applicant did not bring the child to Malta either at Christmas 2009 or in the summer of 2010 she broke another condition of the order. Had she brought the child to Malta she could have asked the Family Court to review the conditions in the light of the difficulties she claims she is facing in seeing to their compliance. She, however, did nothing of this sort but unilaterally ignored the conditions of the order and is now seeking to justify herself.

Applicant also notes that, in any case the child refuses to meet his father and it would lead to grave psychological harm for the child if he is made to meet his father. This Court notes, in the first place, that the High Court of Justice, Family Division, of the United Kingdom, on the 17th September, 2010, ordered that the child be returned to Malta and did so after hearing the child’s objections, which it, however, refused to accept as, in the words of the Court, “they seem to me to be a clear reflection of the mother’s position and a likely product of not very subtle indoctrination”. This Court cannot see the child’s objections in any other light. In any case this Court will be in a better position to directly evaluate the child’s views once he is back in Malta.

As to the issue of grave psychological harm, no proof has been forthcoming to show such an effect on the child if the child is brought to Malta. There certainly could be no harm if the child is brought to Malta where his maternal

family resides, and the mother should, first of all, obey the Court's orders and accordingly bring the child to Malta. The Maltese Courts, if asked to do so, would then be in a position to evaluate if indeed harm will be caused to the child if visited on a regular basis by his father, but, of course, this evaluation depends on the mother's fullest cooperation with the Courts to ensure a truthful analysis of the situation. So far, no such "harm" has been shown, but if such a danger would manifest itself, the local courts are in a position to organise therepy and assistance leading to a change in the situation. But this is a matter which can be seen to only after applicant obeys the terms and conditions imposed by this Court when it granted her permission to take the child temporarily out of its jurisdiction. The argument that the child should not be uprooted from his United Kingdom abode does not hold water, as his residence there was always intended to be a temporary one, and indeed even the applicant is still considering temporary her own and her son's residence in that country.

This Court has always considered access by both parents to be, not only a right of the parents, but a right of the children, and a parent will be denied such access only for serious and grave reasons. Certainly such rights should not be compromised by any behaviour of one of the parents, who indeed have a duty to ensure that such rights are reasonably exercised.
For these reasons, this Court dismiss the appeal filed by Alexandra Mifsud and confirms the decision of the first court delivered on the 12th July, 2010.

Costs are to be borne by applicant Alexandra Mifsud.

< Final Judgement >

---------------------------------END---------------------------------