



**QORTI TA' L-APPELL**

**S.T.O. PRIM IMHALLEF  
SILVIO CAMILLERI**

**ONOR. IMHALLEF  
ALBERT J. MAGRI**

**ONOR. IMHALLEF  
TONIO MALLIA**

Seduta tat-3 ta' Dicembru, 2010

Appell Civili Numru. 251/2010/1

**Direttur tad-Dipartiment Ghal Standards  
fil-Harsien Socjali**

**v.**

**Anita Maria Horry nee Montebello**

**Il-Qorti:**

Rat ir-rikors li ressaq id-Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali fis-7 ta' Awwissu, 2009, li jaqra hekk:

“Illi dan ir-rikors qieghed isir ai termini tal-Att dwar is-Sekwestru u l-Kustodja ta' Minuri (Kap. 410) li bih gew

irratifikati zewg Konvenzjonijiet dwar l-aspetti civili ta' sekwestru internazzjonali ta' minuri u r-rikonoxximent u l-infurzar ta' decizjonijiet dwar kustodja in konnessjoni mar-Regolament tal-Unjoni Ewropea Numru 2201/2003 tas-27 ta' Novembru, 2003.

“Illi r-rikors jirrigwarda l-minuri Michael Robert Montebello Horry, li tweeked f'Dacorum fil-County ta' Hertfordshire, Ingilterra, fit-12 ta' Novembru, 1999, kif jidher mill-kopja tac-certifikat hawn anness u mmarkat bhala 'Dok. AG1', iben Gordon Robert Horry u Anita Maria Horry, illi zzewgu fis-27 ta' Marzu, 1999, f'Louth, Ingilterra. Sussegwentement, il-minuri flimkien mal-genituri tieghu marru joqghodu fi Spanja.

“Illi z-zwieg bejn il-genituri tal-minuri gie terminat permezz ta' Digriet ta' Divorzju moghti fit-28 ta' Jannar, 2009, mill-Qorti ta' Marbella wara li l-istess Qorti kienet approvat il-proposti tas-*settlement agreement* milhuq mill-genituri fil-25 ta' Novembru, 2008, kopji annessi bhala 'Dok. AG2' u 'Dok. AG3' rispettivament. Permezz ta' dan il-ftehim, il-kustodja tal-minuri inghatat lill-intimata filwaqt illi l-missier inghata access.

“Il-minuri Michael Robert Montebello Horry gie mnehhi mill-intimata mill-*habitual residence* tieghu, jigifieri Spanja u ngieb Malta fi Frar 2009 minghajr il-kunsens tal-missier.

“Illi l-Awtorita` Centrali ta' Malta giet mitluba mill-Awtorita` Centrali ta' Spanja sabiex, ai termini tal-Artikolu 7 tal-Konvenzjoni dwar l-Aspetti Civili fis-Sekwestru Internazzjonali ta' Minuri, jigi skopert fejn jinstab il-minuri u jinkiseb ir-ritorn immedjat tieghu.

“Illi l-Awtorita` Centrali ta' Malta hija infurmata illi l-minuri qed joqghod flimkien mal-Intimata f'*ommissis (indirizz)*.

“Illi l-Awtorita` Centrali ta' Malta giet awtorizzata minn missier il-minuri, Gordon Robert Horry, sabiex tagixxi ghan-nom tieghu, kopja annessa u mmarkata bhala 'Dok. AG4'.

“Illi a tenur tal-Artikolu 154 tal-Kodici Civili ta' Spanja, li estratt tieghu qed jigi hawn anness u mmarkat bhala 'Dok. AG5', f'kaz illi l-genituri huma separati, divorzjati jew ma ghadhomx jghixu flimkien, id-drittijiet u d-dmirijiet relattivi ghall-minuri, il-persuna taghom u l-proprjeta` tal-istess hija ezercitata mill-genituri flimkien.

“Illi a tenur tal-Artikolu 156 tal-Kodici Civili ta' Spanja, li estratt tieghu qed jigi hawn anness u mmarkat bhala 'Dok. AG6', bhala regola generali r-responsabbilita` parentali tal-minuri tigi ezercitata mill-genituri flimkien u l-genituri flimkien jiddeciedu dwar il-kwistjonijiet illi jaffettwaw lill-minuri dan anke jekk genitur wiehed ikun inghata l-kustodja tal-minuri.

“Illi fil-kaz odjern, l-intimata gabet lil binha minuri f'Malta u konsegwentement biddel il-*habitual residence* tieghu minghajr il-kunsens tal-missier u b'hekk kisser id-drittijiet tar-responsabbilita` parentali u agixxiet b'mod illecitu ai termini tal-Artikolu 3 tal-Konvenzjoni imsemmija aktar 'il fuq.

“Illi l-missier ghandu dritt illi jkun partecipi fid-decizjonijiet importanti fil-bdil tal-*habitual residence* tal-minuri aktar u aktar tenut kont tal-fatt li huwa kien qed jezercita d-drittijiet tieghu ta' genitur skond il-ligi civili ta' Spanja qabel ma' l-intimata qabdet u nehhiet b'mod illecitu lil dan il-minuri minn Spanja.

“Ghaldaqstant, l-esponent jitlob bir-rispett lil dina l-Onorabbli Qorti sabiex tordna ir-ritorn tal-minuri gewwa Spanja u sabiex fil-frattemp taghti dawk id-direttivi fl-interess tal-minuri koncernat, inkluz avviz lill-awtoritajiet koncernati, biex huwa jigi salvagwardjat milli jerga' jittiehed b'mod illecitu minn go Malta ghal xi pajjiz iehor, liema tnehhija taghmel ir-ritorn tal-minuri fil-*habitual residence* tieghu ferm aktar difficli u dan bi ksur esplicitu tal-Konvenzjoni dwar l-Aspetti Civili tas-Sekwestru Internazzjonali ta' Minuri u r-rikonossiment u l-Infurzar ta' decizjonijiet dwar kustodja in konnessjoni mar-Regolament tal-Unjoni Ewropea Numru 2201/2003 tas-27 ta' Novembru 2003.”

Rat ir-risposta ipprezentata minn Anita Maria Horry li in forza taghha eccepjet:

“Illi permezz ta’ dawn il-proceduri, l-imsemmi Gordon Horry qieghed jitlob illi dina l-Onorabbli Qorti tordna illi l-minuri Michael Montebello Horry, iben il-kontendenti, Mandat ta’ Inibizzjoni jigi ritornat Spanja ghaliex, skond ma huwa allegat mill-istess Gordon Horry, il-minuri gie michud bi ksur tad-dispozizzjonijiet tal-Hague Convention.

“Illi l-esponenti topponi ghal din it-talba ghas-segweni motivi.

“(i) Fl-ewwel lok, din l-azzjoni ma tistax titmexxa bil-procedura sommarja ta’ rikors “general” izda permezz tal-proceduri ordinarji mahsuba fil-Ligi u b’mod partikolari id-dispozizzjonijiet tar-Regola 9 tal-Avviz Legali 397 tas-Sena 2003.

“(ii) Fit-tieni lok, Gordon Horry (permezz tal-mandatarju tieghu) pprezenta proceduri identici (Rikors Generali 91/2009 fl-ismijiet Dr. Lorraine Schembri Orland nomine vs Anna Maria Horry), b’mod illi hemm lok ghas-soprassessjoni ta’ dina l-Onorabbli Qorti fis-smigh ta’ dawn il-proceduri sakemm l-ezitu tal-proceduri istitwiti mill-imsemmi Horry jkun maghruf.

Fit-tielet lok, il-proceduri mahsuba mill-Kapitolu 410, illi introduca fl-ordinament gjuridiku Malti l-aspetti civili tas-sekwestru internazzjonali tal-minuri mahsuba, *inter alia*, fil-konvenzjoni ta’ Hague, jaghti dritt ta’ azzjoni taht il-konvenzjoni biss fic-cirkostanzi specifikatament mahsuba fl-istess Konvenzjoni, cioe` meta it-tehid jew zamma ta’ minuri jkun sar bi ksur tad-drittijiet ta’ kustodja u biss fejn id-dritt ta’ kustodja kien qieghed jigi effettivament ezercitat. Billi jirrizulta illi anke mir-rikors promotur tar-rikorrent illi skond id-digriet ta’ divorzju bejn il-kontendenti tat-28 ta’ Jannar, 2009, l-esponenti **giet fdata fil-kustodja tat-tifel minuri Michael Horry** (Dokument A esebit mill-istess Gordon Horry), id-dispozizzjonijiet tal-Ligi Spanjola citati mir-rikorrent huma rrilevanti bhal ma huwa rrilevanti *per se* it-tibdil tar-residenza abitwali tal-minuri billi jqanqlu

konsiderazzjonijiet illi ma humiex fl-iskop tal-Konvenzjoni u jistrakonfinaw anke l-*locus standi* tar-rikorrent f'dawn il-proceduri. Ghar-rigward tad-dispozizzjonijiet tal-Ligi citati mir-rikorrent, illi huma analogi ghal dispozizzjonijiet fil-Ligi Maltija, jigi rilevat illi l-principji enunzjati fl-imsemmija dispozizzjonijiet ma jirregolawx il-kustodja tal-minuri, illi hija – f'kaz ta' konflitt bejn il-genituri – dterminata mill-Qorti kompetenti jew miftiehma bejn il-genituri bl-awtorizzazzjoni tal-Qorti kompetenti. L-esponenti ma tixtieqx, tramite l-avukat taghha, taghmel sottomissjonijiet dwar it-tifsir tal-Ligi Spanjola izda jidher car illi mid-dispozizzjonijiet tal-Artikolu 156 tal-Kodici Civili Spanjola – citata mir-rikorrent – illi l-Ligi Spanjola, bhal dik Maltija tidistingwi bejn il-kustodja u l-awtorita` parentali.

“(iii) Fir-raba' lok, il-proceduri mahsuba mill-Kapitolu 410, huwa ukoll inapplikabbli ghaliex, kif jirrizulta mill-Artikolu 3 tal-Konvenzjoni, citat aktar 'il fuq, trid tigi provata l-ezistenza ta' lezjoni jew vjolazzjoni ta' drittijiet (tar-rikorrent) mill-persuna li tkun hadet lill-minuri minn gurdizzjoni ghall-ohra. Oltre l-fatt, gja rilevat, illi d-dritt vjolat irid ikun dak ta' kustodja, il-materja ta' jekk sarix vjolazzjoni jew le hija necessarjament determinata b'referenza ghall-proceduri u l-ligijiet tal-pajjiz fejn kien residenti l-minuri qabel ma gie rimoss, f'dan il-kaz, Spanja. L-esponenti tirrileva illi meta, ghal diversi ragunijiet ma kienx possibbli ghaliha illi tibqa' tghix ma' binha gewwa Spanja, hija ghamlet dawk il-prattici necessari (hawn anness u mmarkat bhala Dokument B) illi huma rikjesti mil-Ligi ta' Spanja biex telqet minn Spanja biex tigi tghix Malta flimkien mat-tifel minuri. Dak kien f'Marzu ta' din is-sena, 2009. Dawn il-proceduri kienu jikkontemplaw id-dritt tal-imsemmi Gordon Horry illi joggezzjona jew jopponi ghax-xewqa tal-esponenti illi titlaq minn Spanja u tistabilixxi r-residenza taghha gewwa Malta flimkien mat-tifel. Irrizulta illi Gordon Horry ma ghamel ebda oppozizzjoni u wara li ghalaq il-perjodu mahsub fil-Ligi Spanjola ghal espressjoni ta' tali oppozizzjoni, l-esponenti baqghet Malta. Una volta ghalhekk, ma kienx hemm lezjoni ta' dritt fi Spanja (il-pajjiz tar-residenza tal-minuri u l-pajjiz mnejn emana d-

digriet ta' kustodja) ma jista' qatt jinghad illi kien hemm sekwestru jew htif ta' minuri ghall-fini tal-Konvenzjoni.

“(iv) Illi skond il-gurisprudenza Maltija, il-Qrati Maltin ghandhom is-setgha residwa illi jintervjenu u jirrovexxaw l-arrangamenti stabbiliti minn Qrati esteri dwar il-kustodja u l-access tat-tfal fejn jirrizulta illi tali intervent huwa mehtieg fl-interess tal-minuri. Fil-kawza "Dottor Stephen Thake nomine vs Joseph Portelli", il-Qorti tal-Appell kienet iddecidiet illi, propju ghaliex hekk kien jirrikjedi l-interess suprem tal-minuri, tifel ta' tmien snin illi kien gie mahtuf minn missier Malti mill-kustodja tal-omm Ingliza tieghu gewwa l-Ingilterra u migjub Malta, kellu jibqa' fil-kura ta' missieru. L-esponenti tirrileva illi ghal diversi ragunijiet, l-interess ta' binha jezigi illi huwa jghix Malta. Hija tirrileva illi z-zwieg taghha tkisser ghaliex zewgha kien patologikament vjolenti u aggressiv maghha (Dokumenti C u D annessi ma' dan l-att) anke fil-prezenza tat-tifel u t-tifel ghadu bezghan minn missieru u psikologikament affett minn din l-esperjenza; ir-rikorrent m'huwix qieghed ihallas il-manteniment kif miftiehem; l-esponenti ma kellhiex impjeg fi Spanja u giet zgombrata mir-residenza taghha gewwa Spanja; ir-rikorrent waqaf ihallas l-ispejjez tal-edukazzjoni tat-tifel illi qabel kien jattendi skola Ingliza gewwa Spanja u t-tifel kien sejjer ghalhekk jitqieghed fi skola tal-gvern li kien ta' ugigh ta' qalb kbir ghalih ghaliex ma jtkellimx tajjed bl-Ispanjol. Fi ftit kliem, ir-rikorrent kien ghamel li seta` biex il-permanenza tal-esponenti u tat-tifel gewwa Spanja tkun skomoda u difficili. Kemm ilu Malta, it-tifel ha r-ruh, stabbilixxa ruhu socialment u ghamel hafna hbieb u qieghed issa jattendi Chiswick School. Dan ikollu jafu ukoll ir-rikorrent illi zamm kuntatt telefoniku ma' ibnu u kien jistqarr illi kien sodisfatt illi t-tifel kien ghal qalbu f'Malta.”

Rat is-sentenza moghtija mill-Qorti Civili – Sezzjoni Familja – fit-30 ta' Settembru 2010, li ddecidiet il-kawza billi filwaqt li laqghet l-eccezzjonijiet tal-intimata, cahdet it-talbiet tar-rikorrent, bl-ispejjez jibqghu bla taxxa bejn il-partijiet.

Dik il-Qorti tat is-sentenza taghha wara li ghamlet is-segwenti konsiderazzjonijiet:

“Ikkunsidrat illi l-proceduri odjerni nbdew mid-Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali ai termini tal-Kap. 410 tal-Ligijiet ta' Malta bil-ghan li l-minuri jigi rritornat fi Spanja.

“Jirrizulta illi l-genituri tal-minuri zzewgu fir-Renju Unit fl-1999. Fl-istess sena, ukoll fir-Renju Unit, twieled il-minuri. Meta t-tifel kellu sentejn ittiehed miz-zewg genituri l-Awstralja, fejn damu xi sentejn u nofs. Imbaghad marru lura lejn l-Ingilterra. Xi zmien wara, ghamlu hsieb li jigu Malta u bdew isiru l-preparamenti ghal dan il-ghan, pero` dawn il-pjanijiet gew abbandunati u l-koppja garret ghal Spanja. Wara dan il-perjodu, iz-zwieg tkisser u l-genituri ddivorzzjaw fi Spanja finalment f'Jannar tas-sena 2009. Fid-divorzju l-kura u kustodja tal-minuri giet fdata lill-omm, filwaqt li l-missier kellu drittijiet ta' access regolari ghall-minuri. Il-patria potestas fuq il-minuri baqghet f'idejn iz-zewg genituri. Fi Frar 2009, l-omm gabet lill-minuri maghha Malta, u ghalhekk, il-missier beda dawn il-proceduri.

“In linea preliminari, il-Qorti qieghda mal-ewwel tiskarta l-ewwel zewg eccezzjonijiet tal-intimata ghar-raguni li dawn huma t-tnejn infondati.

“L-Art. 3 u 4 tal-Konvenzjoni kif skedata fil-Kap. 410 tal-Ligijiet ta' Malta jipprovdu illi:

*“Art. 3: Ir-rimozzjoni jew ir-ritenzjoni ta' minuri ghandhom jitqiesu bhala illeciti meta –*

a) *Dan ikun bi ksur tad-drittijiet ta' kustodja, vestiti f'persuna, istituzzjoni jew enti ohra, kemm singolarment, kif ukoll konguntement, taht il-ligi tal-Istat fejn il-minuri kien soltu joqghod minnufih qabel ir-rimozzjoni jew ritenzjoni.*

b) *Fil-waqt tar-rimozzjoni jew tar-ritenzjoni, dawk id-drittijiet kienu attwalment ezercitati, jew konguntement*

*sew singolarment, jew kienu jkunu hekk ezercitati kieku ma kienx ghar-rimozzjoni jew ghar-ritenzjoni.*

*“Id-drittijiet ta’ kustodja msemmija fis-subparagrafu (a) hawn aktar qabel jistghu joriginaw b’mod partikolari mill-operat tal-ligi jew bis-sahha ta’ decizjoni gudizzjarja jew amministrattiva, jew bis-sahha ta’ ftehim li jkollu effett legali skond il-ligi ta’ dak l-Istat.*

*“Art. 4: Il-Konvenzjoni tapplika ghal kull minuri li kien soltu joqghod fi Stat Kontraenti minnufih qabel ikunu nkisru d-drittijiet ta’ kustodja jew ta’ access. Il-Konvenzjoni ma tibqax tapplika meta l-minuri jaghlaq is-sittax-il sena.”*

“Kif irriteniet il-Qorti tal-Appell fit-8 ta’ Lulju, 2008, (Direttur tad-Dipartiment Ghal Standards fil-Harsien Socjali vs Josephine Arslan):

“In linea generali, biex dik il-Konvenzjoni tapplika jrid jigi muri li l-minuri kienet toqghod (cioe` kellha l-*“habitual residence”*) f’pajjiz iehor, u li ttiehdet illegalment minn taht il-kontroll ta’ persuna li skond il-ligi ta’ dak il-pajjiz kellu drittijiet ta’ kustodja fuqha.”

“Fil-kaz in ezami, m’huwiex kontestat illi l-missier ma kienx qed jezercita il-kura u kustodja tal-minuri, pero` kellu biss dritt ta’ access. Kien qed jaqsam l-awtorita` fuq il-minuri mal-omm.

“F’dan il-kontest, il-Qorti trid tasal ghall-konkluzjoni jekk, fil-kundizzjonijiet fis-sehh meta l-omm baqghet Malta bil-minuri, din kellhiex id-dritt li taghzel ir-residenza tal-minuri hi. F’dan l-istharrig il-Qorti tirreferi biss ghal-ligi ta’ Spanja, il-pajjiz fejn il-minuri kellu r-residenza ordinarja tieghu qabel ma ngab Malta, fatt dan mhux kontestat u ben stabbilit.

“Il-Qorti qieset il-proceduri li stitwiet fi Spanja l-omm meta hadet id-decizjoni li tibqa’ Malta u zzomm lil binha maghha. Hija infurmat lill-Qorti Spanjola bid-decizjoni taghha u fiha elenkat ir-ragunijiet ghall-ghazla taghha. Il-Qorti accettat id-dikjarazzjoni unilaterali tal-omm



(dokumenti a fol. 43 et seq.), stante li l-istess Qorti tikkonferma li l-missier kellu opportunita` jirribatti u ghazel li ma jaghmilx hekk.

“Il-Qorti qieset ukoll dak li ddikjarat l-omm fl-affidavit taghha illi, fit-trattati li ghaddew bejn il-genituri bil-ghan tad-divorzju, il-missier kien espressament talab divjet fuq is-safar tal-minuri, liema divjet qatt ma gie accettat u ghalhekk ma ddahhal qatt bhala kundizzjoni tad-divorzju. Din il-prova da parti tal-omm (fol. 157) ma giet kontestata bl-ebda mod mill-missier.

“Il-Qorti tqis li kien piz tad-Direttur rikorrenti li jipprova skond il-ligi Spanjola li l-omm ma kellha ebda dritt tibdel ir-residenza taghha, u konsegwentement ta' binha. Dan, fil-fehma ta' din il-Qorti ma sehxx. L-artikolu rilevanti tal-Ligi Spanjola, u cioe` l-Art. 156 tal-Kodici Civili ta' Spanja jipprovdi illi:

““The authority of the parents will be exerted by both, or by one of them with the expressed or tacit consent of the other. The acts of either of them according to social uses and circumstances or in situations of urgent need will be valid.

“In case of disagreement, anyone of them could refer to the Judge, who, after having heard both parents and the child, were this one sufficiently judicious or at any rate over twelve years of age, will assign, with no further appeal, the power of decision to father or mother. In case of reiterative disagreements or if any cause severely obstructing the exertion of paternal authority would be present, he could assign the power, in whole or in part, to one of the parents or divide functions between them. Such a measure will be in force for the period fixed which could never exceed two years.

“In the hypothesis of previous paragraphs, with reference to bona fide third parties, it will be presumed that each one of the parents is acting in ordinary exertion of parental authority with the consent of the other.

“In default or absence, incapacity or impossibility of one of the parents, parental authority will be exerted exclusively by the other.

“If parents are living separately, parental authority will be exerted by the one with whom the child is living. The Judge could however, on request of the other and acting on behalf of the child, assign paternal authority to the petitioner, for him to exert it jointly with the other parent, or divide between father and mother the inherent functions.”

“Qari kkunsidrat ta’ dan l-Artiklu jwassal lill-Qorti tikkonkludi illi l-kuncett ta’ “patria potestad” kif kunsidrata fil-ligi Spanjola tidher li hija distinta mill-kuncett ta’ patria potestas kif dejjem kunsidrata f’dawn il-Qrati u ghalhekk il-Qorti tkompli tissoda l-fehma taghha li d-Direttur ma rnexxilux jipprova li skond il-ligi Spanjola ir-rimozzjoni tal-minuri lejn Malta kienet wahda llecita.

Madanakollu, il-Qorti ma tistax tenfasizza biss l-argumenti legali minghajr ma zzomm ferm quddiem ghajnejha dak li hu essenzjalment il-ghan ta’ kull provvediment legali jew trattat li jikkoncerna l-minuri u cioe` l-interess suprem tal-istess minuri. L-istess konvenzjoni ghaldaqstant tattribwixxi lil kull gudikant mgħobbi bir-responsabbilita` f’dawn il-kazijiet, b’diskrezzjoni.

“Art. 13 tal-Konvenzjoni jipprovdi illi:

*“Minkejja d-dispozizzjonijiet tal-Artikolu ta’ qabel, l-awtorita` gudizzjarja jew amministrattiva tal-Istat rikjest m’hiex marbuta li tordna r-ritorn tal-minuri jekk il-persuna, istituzzjoni jew enti ohra li toponi r-ritorn iggib il-prova li –*

*b) Jkun hemm riskju kbir li r-ritorn tal-minuri se jesponih ghal dannu fiziku jew psikologiku jew inkella jqiegħed lill-minuri f’sitwazzjoni intollerabbi”.*

“Il-Qorti hawnhekk l-ewwelnett tqis li din hija diskrezzjoni li ebda Qorti ma tezercita kapriccozament. Altrimenti twassal għall-istultifikazzjoni ta’ kull ghan tal-Konvenzjoni nnifisha.

“Enuncjat dak il-principju, fil-kaz li ghandha quddiemha il-Qorti jirrizulta illi l-omm telqet minn Spanja meta ma setghetx ragjonevolment tkompli tghix hemm. Ma kellhiex dar u lanqas ma kellha xoghol. Il-missier ma rribatta xejn minn dan. Lanqas ma kkontesta li kien waqaf li jhallas kemm manteniment kif ukoll il-mizata tal-iskola tat-tifel li kien ikun kostrett, kieku baqa' Spanja jattendi skola Spanjola meta ma jafx il-lingwa ghax il-missier dejjem irrifjuta li t-tifel jigi mghallem l-Ispanjol.

“L-omm ma kellha ebda sostenn tal-familjari fi Spanja. Il-Qorti tat ferm piz lil hafna okkazjonijiet ta' vjolenza domestika li kienet soggettata ghalihom l-omm u li wara uhud minnhom, il-missier ghadha proceduri gudizzjarji u nstab hati. Il-Qorti nnotat ukoll illi xi uhud minn dawn l-incidenti graw quddiem l-istess minuri. Ma ngabet ebda prova biex tirribatti dak konfermat bil-gurament mill-omm dwar il-hafna problemi ta' natura legali u finanzjarja li l-missier donnu dejjem involut fihom.

“Il-Qorti qieset fit-tul ic-cirkostanzi kollha u waslet ghall-konkluzjoni illi, anke kieku kienet illecita r-ritenzjoni tal-minuri f'Malta, jezistu dawk ic-cirkostanzi ta' natura serjissima biex iwassluha biex tezercita d-diskrezzjoni moghtija lilha bl-Art. 13 tal-Konvenzjoni.

“**Ghaldaqstant**, filwaqt li tilqa' l-eccezzjonijiet tal-intimata in kwantu konsistenti ma dak li intqal aktar 'il fuq tichad it-talbiet tad-Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali.

“L-ispejjez jibqghu bla taxxa bejn il-partijiet.”

Rat ir-rikors tal-appell tar-rikorrent li in forza tieghu, ghar-ragunijiet minnu premessi, talab li din il-Qorti joghgobha thassar u tirrevoka s-sentenza appellata u (presumibilment) tghaddi biex tilqa' t-talbiet tieghu, bl-ispejjez taz-zewg istanzi kontra l-intimata appellata;

Rat ir-risposta tal-appell tal-intimata li in forza taghha, ghar-ragunijiet minnha premessi, stqarret li s-sentenza

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appellata hija korretta u timmerita illi tigi kkonfermata, bl-ispejjez kontra l-appellant;

Semghet lid-difensuri tal-partijiet;

Rat l-atti kollha tal-kawza u d-dokumenti esebiti;

Ikkunsidrat:

Illi dawn huma proceduri intizi ghar-ritorn lejn Spanja tal-minuri Michael Robert Montebello Horry, peress li allegatament dan qed jinzamm b'mod illegali hawn Malta minn ommu, kontra r-rieda ta' missieru u l-boghod mir-residenza ordinarja tieghu li tinsab gewwa Spanja. It-talba qed issir a bazi tar-Regolament 2201/03 tal-Unjoni Ewropea.

Il-genituri tal-minuri kienu mizzewga, izda ddivorzjaw fil-bidu tal-2009. Id-divorzju sar a bazi tal-ligi Spanjola, u l-Qorti ta' Marbella tat effett lill-ftehim li waslu ghalih il-partijiet biex jiregolaw id-divorzju taghhom. A bazi tal-ftehim u s-sentenza tal-Qorti, "*guardianship and custody of the child of the marriage, the minor Michael Robert Montebello Horry, now nine years of age, shall remain with the mother, Anita Maria Horry, and the patria potestas shall be exercised by both parents*". Fis-sentenza tal-Qorti gie stabbilit ukoll u regolat id-dritt ta' access favur il-missier, Gordon Robert Horry.

F'dan il-kaz gara li, darba minnhom, l-omm hadet lit-tifel mill-iskola gewwa Spanja giet bih hawn Malta u qed tirrifjuta li tirritorna lill-minuri lejn Spanja. Il-missier talab l-ghajnuna tal-awtoritajjiet kompetenti fi Spanja u f'Malta, u qed jitlob li l-minuri jintbaghat lura fil-pajjiz tar-residenza ordinarja tieghu. Mhux kontestat, li qabel ma sehh dan l-agir da parti tal-omm fi Frar tal-2009, ir-residenza ordinarja tal-minuri kienet fi Spanja.

L-ewwel Qorti cahdet it-talba ghar-ritorn tal-minuri wara li qieset li d-Direttur rikorrent ma rnexxielux jipprova li r-rimozzjoni tal-minuri lejn Malta kienet wahda llecita, u wkoll ghax qieset li r-ritorn tal-minuri kien se jesponieh

ghal dannu fiziku jew psikologiku jew inkella jqieghed lill-minuri f'sitwazzjoni intollerabbli (il-famuza "13(b) exception" taht il-Konvenzjoni ta' Hague li wassal ghar-Regolament tal-Unjoni Ewropea).

Id-Direttur rikorrent appella mis-sentenza u ressaq aggravji dwar id-drittijiet tal-missier li, skont hu, gew skartati mill-ewwel Qorti, u dwar l-interpretazzjoni moghtija lill-Artikolu 13(b) aktar qabel imsemmi.

Trattat dawn l-aggravji, din il-Qorti tibda biex tinnnota 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 b'mod 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 ghall-ktieb "*Bromley's Family Law*" (10<sup>th</sup> 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 Ewropea. Dwar kif ghandhom jigu stabbiliti dawn id-drittijiet, fil-ktieb jinghad hekk (pagna 639):

*"The general approach in determining this issue has been well summarised by Dyson LJ in Hunter v. Murrow (Abduction: Rights of Custody). The first task, the so-called 'domestic law question', is to establish what rights, if any, the applicant had under the law of the state in which the child was habitually resident immediately before his or her removal or retention. This question is determined in accordance with the domestic law of that State and involves deciding what rights are recognised by that law and how these rights are characterised. The second task, the so-called 'Convention question', is to determine whether those rights are properly to be categorised as 'rights of custody'. This is a matter of international law and depends upon the application of the autonomous meaning of the phrase 'rights of custody' as understood by the English courts."*

... jew, fil-kaz taghna, mill-qrati ta' Malta.

Kwindi, is-sitwazzjoni ma tridxi tigi meqjusa biss fid-dawl tal-ligi estera, izda mehud kont ukoll ta' kif il-qrati Maltin jikkonsidraw id-drittijiet ta' *patria potestas*. L-ewwel Qorti innotat li l-ligi Spanjola fejn jidhol il-kuncett ta' *patria potestas* hija distinta mill-kuncett ta' *patria potestas* kif dejjem konsidrata mill-qrati Maltin, pero`, ma qisitx id-drittijiet tal-missier ukoll taht il-ligi ta' Malta. Dan hu importanti, ghax la darba, wara d-divorzju, id-drittijiet ta' *patria potestas* fuq il-minuri baqghu vestiti fiz-zewg genituri, l-effetti ta' dan ghandhom jigu kkunsidrati a bazi taz-zewg ligijiet: dik Spanjola, biex jigi determinat xi drittijiet baqa' jgawdi l-missier, u dik Maltija biex jigi determinat jekk dawk id-drittijiet jistghux jitqiesu bhala "drittijiet ta' kustodja", u dan peress li dawn id-drittijiet ghandhom tifsira awtonoma mhux necessarjament marbuta mat-tifsira moghtija mill-pajjiz tar-residenza ordinarja tal-minuri.

Kif inghad, f'dan il-kaz, il-missier ghandu drittijiet ta' *patria potestas* fuq il-minuri, li jfisser allura li "*those who have automatic parental rights or have custody rights in their favour will generally be regarded as having rights of custody*" (ibid pagna 640). Ikompli jinghad fil-ktieb imesemmi (pagna 641) li, "*provided the aggrieved parent was, at the time of the wrongful removal or retention, exercising functions in the requesting state of a parental or custodial nature, he could be regarded as having 'rights of custody' without the benefit of any court order or official custodial status. Re B was relied upon by Cazalet J in Re O (Abduction: Custody Rights) to hold that German grandparents who had been exclusively looking after the child in question for over 12 months before the mother took the child to England had 'rights of custody' for the purposes of Art. 3.*"

Kwindi, la darba l-missier ghandu drittijiet ta' *patria potestas*, li taht il-ligi Maltija jinkludu obbligu li jiehdusieb, imantnu, jghallmu u jedukaw lil uliedhom (Artikolu 7 tal-Kodici Civili), ma jistax jinghad li hu ma ghandux "drittijiet ta' kustodja".

Din il-pozizzjoni ma hiex daqshekk aljena ghall-pozizzjoni fi Spanja fejn ukoll, min ikollu drittijiet ta' *patria potestas*, ghandu l-obbligi ta' "*looking after them, keeping them in their company, feeding them, educating them and providing them with an integral upbringing*" (Artikolu 154 Kodici Civili Spanjol). Kien korrett, ghalhekk, il-Ministero de Justicia Spanjol jghid, fl-espozizzjoni tieghu tal-ligi Spanjola, li meta z-zewg genituri jgawdu mid-drittijiet ta' *patria potestas* fuq minuri, "*both parents therefore share the ability to decide and resolve all matters that affect a minor, even though only one of them may have been awarded custody*". Fil-mument li t-tifel ingieb Malta, il-missier kien qed jezercita dawn id-drittijiet, u ma tistax il-mara tieghu mill-post ta' residenza ordinarja tieghu, u tippretendi li tiddeciedi hi biss fejn se teduka lill-minuri u kif se trabbieh.

Skont il-ligi Spanjola, nonostante li parti jkollha l-kustodja ta' minuri, decizjonijiet li jolqtu "*schooling and educational matters such as choosing a school or extra curricular activities, health care when choosing a doctor, personal training when choosing the denomination or religious training, or choosing the place or country where the minors live*" jehtiegu ftehim bejn il-genituri jew decizjoni tal-Qorti kompetenti. La darba l-missier igawdi dawn id-drittijiet, ghandu drittijiet ta' kustodja li jintitolawh jitlob l-applikazzjoni tar-Regolament imsemmi. Skont ir-Regolament ukoll, min ikollu setgha jiddetermina l-post tar-residenza tal-minuri, ghandu wkoll drittijiet ta' kustodja (Artikolu 2), u la dan id-dritt, f'dan il-kaz, jappartjeni liz-zewg genituri flimkien, allura t-tnejn ghandhom drittijiet ta' kustodja fis-sens tal-ligi. Huwa biss f'kaz ta' genitur li jgawdi drittijiet ta' access, izda mhux ukoll *patria potestas*, li jkun jista' jinghad li dak il-genitur m'ghandux dritt ta' kustodja.

L-ewwel Qorti osservat li skont l-Artikolu 156 tal-Kodici Civili Spanjol, "*if parents are living separately, parental authority will be exerted by the one with whom the child is living*". Din hi r-regola generali li, pero`, ma tapplikax meta l-istess genituri jiftehmu (ftehim li gie inkorporat minn qorti Spanjola fis-sentenza taghha meta ppronunzjat id-

divorzju bejn il-genituri) li dan il-“*parental authority*” ghandu jibqa' vestit fiz-zewg genituri.

Dan id-dritt ta' *patria potestas* jinsab vestit fil-missier skont il-ligi Spanjola, u kemm taht il-ligi ta' dak il-pajjiz kif ukoll taht il-ligi ta' Malta, dan jinvesti lill-missier bid-dritt li jiehu certu decizjonijiet importanti fil-konfront tal-minuri, u kwindi hu meqjus li ghandu “drittijiet ta' kustodja” ai fini tal-ligi invokata b'dawn il-proceduri.

L-intimata ittentat turi li skont il-ligi Spanjola, id-dritt li jiddetermina r-residenza tal-minuri, hi vestita biss f'dak il-genitur li ghandu l-kustodja tal-minuri. Apparti li din mhix is-sitwazzjoni kif spjegata mill-Ministero di Justicia ta' Spanja, kif rajna, jekk id-dritt ta' *patria potestas* jaghtix drittijiet ta' kustodja, irid jigi determinat skont il-ligi Maltija – “the Convention Question”. F'kull kaz, anke taht il-ligi Spanjola, id-drittijiet ta' *patria potestas* huma vasti u jolqtu direttament l-interess tal-minuri, b'mod li anke jekk jinghad li ma jinkludux id-dritt ta' determinazzjoni tar-residenza, jinkludu drittijiet ohra li jvestu fil-missier “drittijiet ta' kustodja” fis-sens tar-Regolament.

L-ewwel Qorti cahdet it-talba wkoll a bazi tal-konsiderazzjoni li ma jkunx fl-interess tat-tifel li dan jintbaghat lura fi Spanja. Din il-Qorti ma taqbilx li l-interess suprem tal-minuri ghandu jigwida lill-Qorti f'kawza ta' din ix-xorta. Kif qal Mr. Justice Johnson fil-kaz “B v. UK Child Abduction” deciz fl-Ingilterra fl-1993 (1FCR 382), “*under the Hague Convention ... it is no part of my function to decide where the long term future of these children lies*”. Din il-Qorti terga' tirreferi ghall-ktieb fuq indikat (“Bromley's Family Law”), fejn jinghad hekk fuq din il-kwistjoni:

*“The fact that an individual child's interests are not the paramount consideration when determining a return application prompts the question as to the 1980 Convention's compatibility with the requirement under Art 3 of the UN Convention on the Rights of the Child 1989 that in all actions concerning children 'whether undertaken by public or private social welfare institutions, courts of*



*law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.*

*"This issue has been expressly litigated in Australia where the charge of incompatibility was rejected inter alia on the ground that Art 11 of the UN Convention entreats States 'to take measures to combat the illicit transfer and non-return of children abroad'. It may also be pointed out that Art 35 of the UN Convention requires States to 'take all appropriate national, bilateral and multilateral measures to prevent the abduction of children for any purpose or in any form'. In any event, surely the most persuasive argument is that by providing admittedly limited exceptions to the obligation to return, the Hague Convention does, in principle, pay sufficient regard to the interests of each individual child especially as it is not determining the merits of any custody dispute but rather the forum in which that dispute must be determined. At any rate, it was this line of argument that led the German Constitutional Court in G and G v. Decision of OLG Hamm to rule that the 1980 Convention was compatible with the UN Convention.*

*"Prompt returns are also entirely compatible with the European Convention on Human Rights. The English courts, for example, take the view that a return order under the 1980 Convention is unlikely to be thought to be in breach of Art 8 of the European Human Rights Convention as interfering with the right to respect for family life particularly as the abduction will have disrupted the child's living arrangements in the first place. Furthermore, the European Court of Human Rights has held that the failure expeditiously to enforce a return order under the Hague Convention can be a breach of Art 8 on the basis of a failure to meet the positive obligation on States to ensure effective respect for family life by taking measures to enforce a parent's right to be reunited with his or her child."*

Kwindi, l-interessi tat-tfal ghandhom jigu ezaminati u salvagwardati fil-forum opportun, fejn il-minuri jkollu r-

residenza abitwali tieghu, u mhux mill-Qorti tal-pajjiz fejn il-genitur jahrab bil-minuri.

Biex minuri ma jintbaghatx lura jrid ikun hemm ragunijiet gravi u impellenti li jiggustifikaw decizjoni simili. Kif intqal fil-kaz **Re: H (Children) (Abduction)** deciza mill-Qorti tal-Appell fl-Ingilterra:

*“The threshold to be crossed when an article 13(b) defence is raised is a high one and difficult to surmount. Hence the courts in this country have always adopted a strict view of Article 13(b). The risk must be grave and the harm must be serious. The courts are also anxious that the wrongdoer should not benefit from the wrong: that is, that the person removing the children should not be able to rely on the consequences of that removal to create a risk of harm or an intolerable situation on return. This is summed up, after a review of the authorities, in the words of Ward LJ in re C (Abduction: Grave Risk of Psychological Harm) [1999] 1 FLR 1145, 1154, cited by the judge in the present case:-*

*“There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.”*

(Sottolinear ta' din il-Qorti)

Din il-Qorti rat ukoll l-ezempji riprodotti fil-ktieb imsemmi fejn difiza taht l-Artikolu 13(b) giet michuda – ibid pagna 654-655:

*“Case law abounds with examples of failed Art 13(b) pleas. In N v. N (Abduction: Article 13 Defence), for example, an allegation of sexual abuse by the applicant was not held sufficient to justify a refusal to return. Similarly in Re S (Abduction: Return into Care) the defence failed notwithstanding that there were serious allegations of sexual abuse against the mother's cohabitant because the court accepted that the matter would be adequately dealt with and the child protected by*

*the Swedish authorities upon the child's return. In Re M (Abduction: Intolerable Situation) the defence again failed, notwithstanding the mother's genuine fear of physical harm by her husband who, having been imprisoned for murdering someone whom he believed to be having an affair with the mother, was due to be released, since the court again believed that the mother would be adequately protected by the Norwegian authorities to whom mirror undertakings had been given. In Re K (Abduction: Psychological Harm) a mother, who contended that as she had no immigration status she would be unable to support herself and would not therefore exercise any possession rights as defined by a Texan court, failed to convince the court that the child would be placed in an intolerable position if ordered to be returned to the USA. In Re L (Abduction: Pending Criminal Proceedings) it was held that neither the possibility of criminal proceedings being brought nor even the possibility of the mother being arrested at the airport on her return was enough to establish a grave risk of harm to the children."*

Mill-premess jidher car li l-ilmenti tal-intimata kontra r-ritorn tal-minuri ma ghandhomx jigu mistharga minn din il-Qorti. Kienu l-partijiet li qablu li z-zewg genituri jkollhom drittijiet ta' *patria potestas* fuq it-tifel, u jekk xi parti jrid ibiddel dan l-arrangament jew irid iccahhad lill-parti l-ohra minn xi dritt li johrog minn *patria potestas*, irid jadixxi l-"proper forum" u jressaq it-talba tieghu hemmhekk. L-allegat vjolenza domestika mill-missier lejn martu kien jipprecedi d-divorzju, izda xorta wahda l-genituri qablu li jibqghu jzommu t-tnejn id-drittijiet indaqs fuq il-minuri. Kwindi ma tarax li, jekk it-tifel jintbaghat lura Spanja, hemm riskju ta' dannu fiziku jew psikologiku, u allura ma hemmx lok li dan il-provvediment jigi applikat f'dan il-kaz.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell interpost mid-Direttur tad-Dipartiment Ghal Standards fil-Harsien Socjali billi tilqa' l-istess, thassar u tirrevoka s-sentenza tal-ewwel Qorti u minflok tghaddi biex tilqa' t-talba tar-rikorrent u tordna r-ritorn immedjat tal-minuri Michael Robert Montebello gewwa Spanja, u tordna lill-istess rikorrent jiehu dawk il-passi kollha

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mehtiega u opportuni sabiex jara li l-minuri jigi ritornat lejn Spanja.

L-ispejjez kollha tal-kawza, inkluzi dawk in prim istanza, ghandhom jithallsu mill-intimata appellata.

**< Sentenza Finali >**

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