MALTA

COURT OF APPEAL

HIS HONOUR THE CHIEF JUSTICE
SILVIO CAMILLERI

THE HON. MR. JUSTICE
RAYMOND C. PACE

THE HON. MR. JUSTICE
TONIO MALLIA

Sitting of the 3 rd July, 2012

Civil Appeal Number. 174/2011/1

The Director of Social Welfare Standards Department

v.

Richard John Bridge

The Court:

Preliminary

This is an application filed on the 18th November, 2010, whereby the Director of Social Welfare Standards Department, while invoking European Union Regulation 2201/2003, and the Child Abduction and Custody Act

(Chap. 410 of the Laws of Malta), requested that the courts order the repatriation of the minor Ella Elizabeth Bridge to the United Kingdom. It was submitted that the habitual residence of the child was in the United Kingdom, before she was abducted by the father, Richard John Bridge, and brought to Malta. The application was instigated by the mother of the child, Nicola Wendy Lee Bridge who has joint custody rights of the child.

The case was assigned to be heard by the Civil Court, Family Section, and by judgement of the 26th day of May, 2011, the said Court acceeded to the applicant's request, and ordered that the child be returned to the United Kingdom.

In terms of the law, the Court Practice and Procedure Rules (Legal Notice 279 of 2008), subsidiary legislation made by the Minister concerned as authorised by the enabling law, the said Chap. 410, the respondent had 8 working days from the date of the delivery of the decision to appeal from the judgment of the first court. The appeal was, however, filed late; it had to be filed by the 8th June, 2011, but was in fact filed on the 10th June, 2011.

Respondent sought to contest the eight day time limit for the filing of the appeal as being ultra vires the powers of the Minister concerned. However, both the Civil Court, General Jurisdiction, in a judgment delivered on the 23rd November, 2001, and this Court (albeit differently composed), in its judgment of the 16th April, 2012, dismissed respondent's claim and held the appeal time limit to be valid and within the powers of the Minister concerned.

Following this judgment, the appeal from the repatriation case was reappointed for the 29th May, 2012, for the Court to hear submissions about the impact of the judgment dismissing respondent's claim about the nullity of the eight day appeal period. Meanwhile, the respondent filed an application on the 27th April, 2012, requesting this court, irrespective of the validity of his

appeal, to hear the child and adopt other measures “in the interests of the minor child”.

There can be no doubt that in the light of the aforegoing respondent’s appeal must be ruled to be null. These courts have on a number of occassions emphasised the public and peremtory nature of time periods imposed by law; to hold otherwise would lead to confusion as to when acts can be filed which would seriously pregudice the proper administraiton of justice. In a judgment delivered by this Court, in its Inferior Jurisdiction, in the case **Zwack-Wandry v. In-Sight Ltd.**, decided on the 6th October, 2010, the peremtory nature of the appeal periods was emphased, with the Court making itself clear in these terms:

”*Il-kwestjoni hawnhekk sollevata giet proprju minn din il-Qorti diversi drabi ezaminata. Hekk inghad illi t-termini ghall-appell minn sentenzi “huma termini perentorji u dwarhom, di regola, ma hemmx possibilita` la ta’ proroga, u lanqas ta’ sospensjoni jew interuzzjoni, jekk mhux fil-kazijiet eccezzjonalment mil-ligi prevvisti. Ad ezempju, fejn il-gurnata ta’ l-iskadenza tat-terminu tahbat nhar ta’ Sibt jew il-Hadd jew xi gurnata festiva. Din in-natura inderogabbli tat-termini processwali ggib b’konsegwenza illi dwarhom ma jistghux jigu applikati provvedimenti sanatorji jew ta’ rimessjoni, ankorke d-dekors inutili taghhom ma jkunx imputabbli lil parti interessata. Dan ghal motiv illi dik l-improrogabilita hi hekk necessarju ghal raguni ta’ certezza u, ukoll, ta’ uniformita`. Sewwa hafna gie ritenut minn din il-Qorti diversament presjeduta illi «l-osservanza tat-termini stabbiliti fil-Kodici ta’ Organizzazzjoni u Procedura Civili u f’ligijiet ohra specjali li jirregolaw il-kondotta tal-proceduri quddiem il-Qrati u quddiem it-Tribunali huma ta’ ordni pubbliku u ma jistghux jigu bl-ebda mod injorati u lanqas bil-kunsens tal-partijiet rinunzjati jew mibdula» (“**Giuseppi Caruana -vs- Charles Psaila**”, Appell mill-Bord li Jirregola l-Kera, 21 ta’ Marzu, 1997)”. Ara “**Salina Wharf Marketing Limited -vs- Malta Tourism Authority**”, Appell Inferjuri, 12 ta’ Dicembru, 2007;*”

Given that the appeal filed by respondent is null and void, this Court is not seized of the matter and cannot delve into issues related to be, what respondent claims, in "the interests of the minor child". Respondent insisted that this Court can, whatever the circumstances, take measures in the best interest of the minor. This, however, has already been seen to by the first Court when it ordered that the child be returned to its habitual residence, for indeed the purpose of the law is to ensure that the best interests of the child are tackled by the courts of the habitual residence of the child, agreed by the parties to the Hague Convention to be the proper forum where such matters are to be discussed.

This Court refers to the book "Bromley's Family Law" (10th Edition 2007 by Nigel Lowe and Gillian Douglas, Oxford University Press), where this issue was espressly discussed. It is written that,

"*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 'whethter 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 tha 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."

It is, therefore, clear that measures to protect the interests of the child are to be taken in the proper forum. Of course, if there is a danger of iminent physical or psychlogical harm to the minor it cannot be excluded a priori that measures be taken in another country to protect the child. In this case, the first court examined allegations of possible dangers if the child is returned to the United Kingdom and found no evidence of such danger. It was not shown to this Court, either, that the return of the child to its proper jurisdiction will seriously harm the child, and any other allegatons appertaining to issues of custody and who of the parents is more able to provide for the well-being of the child can be properly seen to by the courts of the United Kingdom when seized of the matter.

It has to be noted that the first court hearing the case had a private audience with the child and her interests were, therefore, taken into account, inspite of her relative young age. One must keep in mind, that, whatever a child might

opine, it is always the decision of the Court which is to prevail; the court is to use its discretion after weighing all the circumstances of the case. The Court of Session in Scotland, in the case **P.W. v. A.L. or W** (decided on the 12th June, 2003 – presided over by the Lord President, Lady Cosgrove and Lord Johnston) noted the following.
"*If the court is satisfied that the child objects to being returned, has attained an age and suitable degree of maturity, and that it is appropriate to take account of his views, it then has to decide whether it is prepared to exercise its discretion to refuse to order that child's return. That there is a discretion is plain from the article itself which provides that, notwithstanding the provisions of art. 12 which require in mandatory terms that the child wrongfully abducted is to be returned, the court 'may also refuse to order the return' if there is a valid objection by the child. The child's views are never determinative: the final decision as to return must be the court's own … A balancing exercise requires to be carried out, and one of the factors which are to be placed in the balance in favour of return is the spirit and clear purpose of the Convention which is to leave it to the court of habitual residence to resolve the parental dispute.*" (at 21).

There is absolutely no evidence that the first court exercised its discretion in an unreasonable way.

The Court, therefore, for the above reasons, declares the appeal filed by respondent Richard John Bridge to be null and void, and confirms in toto the judgment of the first court; rejects the application filed by the respondent on the 27th April 2012.

Costs of the case are to be borne entirely by respondent Richard John Bridge.

< Final Judgement >

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