MALTA

CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. MR. JUSTICE
JOSEPH AZZOPARDI

Sitting of the 20 th July, 2012

Rikors Number. 52/2012

Richard John Bridge personally and as curator *'ad litem'* for his daughter Ella Bridge as appointed by decree dated 9th July 2012
-vs-

Attorney General and Department for Social Welfare Standards

The Court,

Having seen the application filed on the 6th July 2012 whereby applicant requested the Court to declare that the Court proceedings in the case **"Director of Social Welfare Standards Department vs Richard John Bridge"** decided by the Family Court and the Court of Appeal;

1. Constitute an infringement of the right to a fair hearing sanctioned by Section 39 (2) of the Constitution of Malta and Section 6 (1) of The European Convention on Human Rights and Fundamental Freedoms (which forms part of Maltese Law through Chapter 319 of the Laws of Malta);

2. Constitute a violation of the right to family life of applicant and his daughter Ella sanctioned by Section 8 of the First Schedule of Chapter 319 of the Laws of Malta and Section 8 of afore mentioned European Convention

Applicant also requested the Court to give the relative remedies;

Having seen respondents' reply whereby they opposed applicant's requests on the grounds that;

1. The application was merely an appeal from a judgement given by the Court of Appeal and the Constitutional Court is not a Court of Third Instance;

2. The Court should decline to exercise its jurisdiction since only the Family Court is vested with jurisdiction in regard to proceedings under the Hague and Brussels Conventions relating to abduction of minors;

3. There was no violation of Section 39 of the Constitution and Section 6 of the European Convention as the allegation that the minor was not heard is not true as in fact the presiding Judge in the Family Court did hear the minor in his Chambers and that when the relative Convention speaks of *'the best interest of the child'* this does not mean that the decision of the Court has to be the same as the wishes of the child;

4. There was no violation of Section 8 of the European Convention and that in cases of child abduction the said section is to be interpreted within the ambit of international obligations as established in the aforementioned Conventions relating to return of minors to the proper

jurisdiction. The judgements of the European Court of Human Rights, mentioned by applicant, were also not applicable to this case.

Having examined the Court documents relating to the above mentioned case which was finally decided by the Court of Appeal on the 3rd July 2012;

Having seen its decrees of the 6th July 2012 and the 13th July 2012 whereby it stayed execution proceedings in relation to the said judgement of the Family Court which was confirmed by the Court of Appeal;

Having heard the minor Ella Bridge in the Court Chambers in the presence of the Deputy Registrar;

Having heard witnesses;

Having seen the decree of the 18th July 2012 whereby it put off the case for judgement after the respective counsel made their submissions;

Considered;

The facts leading to these proceedings were as follows:

Applicant was married to the minor's mother and they were divorced in the United Kingdom in September 2010; no provision was made regarding the minor but she was living with applicant; the mother visited her regularly until July 2010; a few days after the divorce decree applicant came to Malta with the minor and his girlfriend and her own son, intending to settle here. The wife started proceedings in October 2010 to have the child returned to the UK and the UK Court issued an order of wrongful removal of the child on the 20th October 2010. Consequently the Director of Social Welfare Standards Department, being the Central Authority in Malta, started proceedings under Chapter 410 of the Laws of Malta and the European Union regulation 2201 of 2003. The proceedings were contested by applicant who objected to the removal of the child as in his view, this was not in her

best interest. The Family Court acceded to the Director's request by judgement given on the 26th May 2011. Applicant filed an appeal but it was filed after the prescribed time-limit and the Court of Appeal dismissed the said appeal on this ground. Applicant filed other procedures before both the First Hall of the Civil Court and the Court of Appeal against the repatriation of the child but these were also turned down on this ground, the last judgement being the aforementioned one given by the Court of Appeal on the 3rd July 2012.

As a result, applicant filed these proceedings requesting the Court to declare that his and his child's fundamental human rights mentioned above were infringed and therefore in effect requesting the Court to order against the removal of the minor.

The Court agrees with respondents' plea that it is not a Court of Third Instance and therefore is not in a position to decide on the merits of the case decided by the Family Court; besides not having jurisdiction to do so, it is also obvious that there is no appeal from a judgement which has become *'res judicata'* as this case has certainly become. However the Constitutional Court **does** have jurisdiction to decide whether there has been an infringement of fundamental human rights enshrined in the Constitution and the relative European Convention. Therefore the first two pleas raised by respondents cannot be upheld '*a priori*' without the Court investigating whether applicant's claims are founded.

Applicant's **first** complaint is that the minor was not heard during the relative proceedings. This is manifestly untrue. It is clear that the minor **was** heard on the 14th April 2011 and this is evident both from the records of the case and from the judgement of the Family Court. The least said about this matter is better for applicant for this claim is possibly tantamount to contempt of the said Court. It is true that later on in his application he does acknowledge that the Court did hear the minor, but says the meeting was very short and she was merely asked whether she liked Malta. It is strange how applicant can say what

happened in the meeting since he was certainly not present. The Court also wishes to make it clear that as respondents replied, hearing the child does not mean that the Court must accede to the child's wishes, as otherwise one might as well not go through these painful proceedings and simply let the child decide the case. ***The child's views are never determinative; the final decision 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 the 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*****. (P.W. vs A.L. decided by the Court of Session of Scotland)**. Applicant's claim that the Court should have appointed a Child's Advocate is also unfounded – the relative law does not indicate anything mandatory in this respect.

Applicant's **second** complaint deserves more attention. He claims that the Court's decision to send the child back to the UK violates his own and her fundamental human right to a family life (Section 8 of the ECHR). He bases this claim on the judgement of the European Court of Human Rights in the case **"Neulinger and Shuruk vs Switzerland"** decided on the 6th July 2010. The Court is here reproducing some of the quotations from this case mentioned in the application:

"The Court must ascertain whether the domestic Courts conducted an in depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin. (paragraph 139)

Even though he (the minor) *is at an age where he still has a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would*

probably have serious consequences for him, especially if he return on his own, as indicated in the medical reports. His return to Israel cannot therefore be regarded as beneficial. Accordingly the significance disturbance that the second applicant's forced return is likely to cause in his mind must be weighed against any benefit that he may gain from it. (para. 147-8)

As to the problems that the mother's return would entail for her, she could be exposed to a risk of criminal sanctions, the extent of which however remains to be determined. … It is clear that such a scenario would not be in the best interests of the child, the first applicant being probably the only person to whom he relates. (para. 149).

The mother's refusal to return to Israel does not therefore appear totally unjustified. Having Swiss nationality, she is entitled to remain in Switzerland. Even supposing that she agreed to return to Israel, there would be an issue as to who would take care of the child in the event of criminal proceedings against her and of her subsequent imprisonment. The father's capacity to do so may be called into question, in view of his past conduct and limited financial resources. He has never lived alone with the child and has not seen him since the child's departure. (para. 150).

In conclusion, and in the light of all foregoing considerations, particularly the subsequent developments in the applicant's situation … the Court is not convinced that it would be in the child's interest to return the child to Israel. As to the mother, she would sustain a disproportionate interference with her family life if she were forced to return with her son to Israel. Consequently there would be a violation of Article 8 of the Convention in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced." (para. 151)

Before proceeding further it has to be said that there were some important facts in this case which were different to

those in the one before this Court. In the **Neulinger Case**, the mother had secretly left Israel with the child, then only two years old, in 2004. Therefore until the case was decided in the Swiss Courts in 2007 the minor had lived almost exclusively with his mother in Switzerland. The father, who was requesting his return to Israel, belonged to a fanatical ultra orthodox sect and wanted his child to be brought up in the same way; in fact even the Israeli Social Services had ordered him not to go to the matrimonial home and his access to the child was under supervision.

In this case, the Court feels that most of the content of the application do not reflect the actual facts which led to the litigation. The minor's mother was still visiting her – albeit sporadically – in the UK until a few weeks before applicant left the jurisdiction, and in fact proceedings started days later. It is normal in these cases for some time to elapse before the Central Authority to start the actual proceedings as it is first necessary to locate the minor and this necessarily takes some time. Therefore one cannot accuse the mother of not having acted as soon as possible therefore indicating that she did not wish to lose contact with her daughter. The Family Court also went into great detail in its judgement to explain that it did the necessary enquiry as to whether there was some grave physical or psychological danger to the child before deciding to repatriate. This Court therefore does not need to reinvestigate this issue and thus it cannot equate this situation to that of the **Neulinger**. The Court in fact concluded, that *"the child's objection in this case is more relevant to the custody issue and should not be considered as a valid obstacle for the granting of an order for return*."

This in effect is what is in issue; the Family Court and the Court of Appeal had to decide whether the decision on the custody of the child could be decided in Malta or in the UK and in the latter case the only way for this to be done was to repatriate the minor. The aim of the relative convention is to ensure that the **proper forum** decides the issue and not allow the parent who flees with the child from that

forum to benefit from that act. It is also clear, especially in regard to the Brussels Regulations, that the signatories to the Convention (in this case all European Union members) accepted to have complete faith in each other's Courts and Tribunals and have no reason to doubt that in the end the right decision is given even though it must be said that custody decisions are often painful even for the Court deciding the issue. The refusal to repatriate because of grave danger to the child has to be exercised exceptionally. It is obvious that repatriation causes undue stress on the child who would have settled in the repatriating country but if one were to accept applicant's claim, the Convention would be rendered useless. Unfortunately it was applicant himself, who left the UK with the child knowing he did not have sole custody, who caused this stress.

The Court has no doubt that the applicant and his new partner are taking good care of the minor and she has settled in Malta and would definitely prefer to remain here. The minor also obviously views her father's wife as her mother, and the latter, when testifying, convinced the Court that she loves her as her own. It also appears that applicant and his wife are better off financially than the mother and are therefore able to secure a better future for the minor. However these are considerations that have to be taken by the proper forum. The European Court of Human Rights also stated in the case **"Maumosseau et vs France"** (39388/05) that *"the aim of the Hague Convention was to prevent the abducting parent from succeeding in legitimating, by the passage of time operating in his or her favour, a 'de facto' situation which he or she had created unilaterally*." The Court therefore feels that this fact has aggravated the problem.

The Court also feels that applicant knew, in leaving the UK, that he was taking advantage of the situation and attempt to cut off his ex-wife from their daughter. It should definitely have been up to the UK Courts to decide whether the child should live in Malta with her father and his new family. Applicant also has only himself to blame if

he faces criminal charges in the UK and cannot use this argument to persuade the Court to decide in his favour.

There is therefore no doubt that from a purely legal point of view applicant put himself and his daughter in a difficult situation. However in this case the Court feels that there is an issue which has made her deliberations more difficult in arriving at a decision. There is little doubt that in normal circumstances, any Court would have given custody to applicant. The mother's track record is unfortunately not good in this respect. She conceded custody of her first two children by her previous marriage to her ex-husband and apparently rarely sees them. It is therefore apt to ask; *"Why is she insisting on having custody of Ella?"* For a time she also let applicant take care of her aforementioned children and left the UK for the USA, according to her because she had a health problem. In her past it appears to the Court that she hardly took any care of her children.

As the Court has already made clear, these considerations should properly be made by an English Court as there is no doubt that applicant took the child out of her habitual residence in terms of the Hague Convention and Brussels Regulations. But the Court feels that the removal of Ella at this stage would be a waste of her precious time and cause her undue stress. The Court feels that her right to family life would be tampered with and she has the right to be left with her new family. While making it clear that this case should not be interpreted as having laid down any precedent, as every case has its own particular circumstances, the Court therefore feels that Ella's fundamental right to have a family life would be infringed by her removal. Applicant however should bear the costs of the case because of what has been already said above.

Thus the Court does not find that applicant's fundamental human rights have been violated as indicated in the application, but that the minor's fundamental right to have a family life would be infringed by her removal and decides the case by

ordering her not to be removed from Malta. Costs however are to be borne by applicant.

Read.

< Final Judgement >

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