MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF
SILVIO CAMILLERI

ONOR. IMHALLEF
RAYMOND C. PACE

ONOR. IMHALLEF
TONIO MALLIA

Seduta tat-3 ta' Awwissu, 2012

Appell Civili Numru. 15/2012/1

Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali

v.

Michael Caruana

Il-Qorti:

Rat ir-rikors li pprezenta r-rikorrent fis-26 ta’ Jannar 2012, 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 kif ukoll in konnessjoni mar-Regolament tal-Unjoni Ewropeja Numru 2201/2003 tas-27 ta' Novembru 2003.

"Illi r-rikors jirrigwarda l-minuri Jackob Poal George Caruana, li twieled f'Pieta`, Malta fil-25 ta' Marzu 2007, kopja tac-certifikat tat-twelid anness u mmarkat bhala 'Dok. AG 1' iben Michael Caruana u Katarzyna Morkis. Il-minuri Jackob ghandu r-residenza abitwali tieghu fil-Polonja u gie ritenut f'Malta mill-intimat. Illi tali ritenzjoni giet kommessa meta l-missier irrifjuta li jirritorna lill-minuri fil-Polonja wara l-festi tal-Milied u minghajr il-kunsens tal-omm. Dan l-agir imur kontra kemm il-Konvenzjoni tal-Aja u r-Regolament tal-Unjoni Ewropeja fuq imsemmija.

"Illi l-Awtorita` Centrali ta' Malta giet mitluba mill-Awtorita` Centrali tal-Polonja 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 fil-fatt instab illi l-minuri qed joqghod flimkien mal-missier f' 'Caruana Flats', Numru 2, Triq Edgar Bernard, Gzira.

"Illi l-Awtorita` Centrali ta' Malta giet awtorizzata minn omm il-minuri, sabiex tagixxi ghan-nom taghha, kopja tal-awtorizzazzjoni hawn annessa u mmarkata bhala 'Dok. AG 2'.

"Illi l-genituri m'humiex mizzewgin u ghandhom responsabbilta` parentali kongunta filwaqt li l-omm ghandha l-kura u l-kustodja u l-missier jezercita` d-dritt ta' access. Hemm ftehim vinkolanti bejn il-genituri dwar il-kura u l-kustodja fdata f'idejn l-omm kif ukoll ir-residenza abitwali tal-minuri li hija stabbilita fil-Polonja. Dan il-ftehim gie approvat permezz ta' Digriet datat 27 ta' Dicembru 2007 mill-Qorti Civili (Sezzjoni Familja), kopji hawn annessi u mmarkati bhala 'Dok. AG 3'.

"Illi permezz tal-*Minutes of a Court Settlement* datat 28 ta' Jannar 2011 moghti mill-Qorti Distrettwali gewwa Gdynia gie stabbilit il-modalita` tal-access tal-missier, kopja hawn annessa u mmarkata bhala 'Dok. AG 4'.

"Illi l-Artikolu 97(2) tal-Kodici tal-Familja tal-Polonja jipprovdi illi decizjonijiet ta' certu importanza ghandhom jittiehdu miz-zewg genituri flimkien u f'kaz ta' nuqqas ta' qbil, tali decizjoni tittiehed mill-Qorti, estratt mil-ligi tal-Polonja anness u mmarkat bhala 'Dok. AG 5'.

"Illi skont il-ligi civili tal-Polonja, ir-responsabbilta` parentali kongunta tfisser li kull genitur jista' jezercita` r-responsabbilta` tieghu minghajr ma jikser id-drittijiet tal-genitur l-iehor.

"Illi fil-kaz odjern, il-minuri ngib Malta mill-missier skont il-modalita` tal-access miftehma. Il-missier kellu jirritorna lura lill-minuri fil-Polonja fl-10 ta' Jannar 2012 izda minflok ghamel hekk, il-missier irrifjuta illi jirritorna lill-minuri fil-*habitual residence* tieghu minghajr il-kunsens tal-omm u b'hekk kisser id-drittijiet tar-responsabbilta` parentali u agixxa b'mod illecitu *ai termini* tal-Artikolu 3 tal-Konvenzjoni msemmija aktar 'il fuq.

"Illi l-omm ghandha dritt illi tkun partecipi fid-decizjonijiet importanti fil-bdil tal-*habitual residence* tal-minuri aktar u aktar tenut kont tal-fatt li hija kienet qed tezercita d-drittijiet taghha ta' genitur skont il-ligi civili tal-Polonja u skont il-ftehim vigenti bejn il-genituri u dan qabel mal-missier qabad u zamm b'mod illecitu lill-minuri f'Malta.

"Ghaldaqstant, l-esponent jitlob bir-rispett lil din l-Onorabbli Qorti sabiex tordna r-ritorn tal-minuri gewwa l-Polonja 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 tar-Regolament tal-Unjoni Ewropeja.”

Rat ir-risposta tal-intimat li in forza taghha eccepixxa illi:

“[1] li preliminarjament ghandu jigi stabbilit jekk il-minuri kienx habitually resident fil-Polonja qabel ma ngab Malta;

“[2] li jkun opportun li din il-Qorti, b’applikazzjoni ta’ l-Artikolu 15 tal-Konvenzjoni, titlob mill-Qorti tal-Polonja dikjarazzjoni fis-sens li z-zamma tal-minuri f’Malta hija illecita fit-termini ta’ l-Artikolu 3 ta’ l-istess Konvenzjoni;

“[3] li l-minuri ma jridx imur lura l-Polonja, u z-zamma tieghu f’Malta ma saritx b’kapricc, izda “wara hafna krib u biki tal-minuri li ta’ kuljum jitlob lil missieru sabiex ma jiehdux lura l-Polonja.”[1]; u li din il-Qorti fid-decizjoni taghha dwar il-kaz ghandha tistabbilixxi l-interess suprem tal-minuri;

“[4] li l-minuri huwa cittadin Malti u ghex il-maggjor parti tal-hames snin tieghu gewwa Malta;

“[5] li jezisti riskju kbir li r-ritorn tal-minuri ser jesponih ghad-dannu psikologiku u/jew inkella jqieghdu f’sitwazzjoni ntollerabbli a tenur ta’ l-Artikolu 13[b] tal-Konvenzjoni.”

Rat is-sentenza li tat il-Qorti Civili, Sezzjoni Familja, fit-28 ta’ Gunju 2012, li in forza taghha ddecidiet il-kawza fis-sens illi:

“…tilqa’ t-talba, u tordna r-ritorn tal-minuri minn Malta lejn il-Polonja, filwaqt li tordna li l-istess Direttur jiehu dawk il-mizuri necessarji sabiex din l-ordni tigi ezegwita.

“Spejjez kollha a kariku tal-intimat.”
Dik il-Qoti tat is-sentenza taghha wara li ghamlet is-segwenti konsiderazzjonijiet:

[1] Fol.26

“Illi fis-sena 2005 Katarzyna Morkis, cittadina Pollakka [l-Omm], giet Malta fejn bdiet relazzjoni mal-konvenut Michael Caruana [il-Missier], cittadin Malti, residenti Malta.

“Illi din ir-relazzjoni, ghalkemm stabbli, kienet karatterizzata b’ hafna litigji bejn il-partjiet, bir-rizutlat li f’ izjed minn okkazzjoni wahda l-l-Omm kienet tmur lura l-Polonja, u kienet wahda minn dawn l-okkazzjonijiet fejn din insertat qeda l-Polonja, li nformat lill-Missier li hi kienet tqila bil-wild tieghu. Sussegwentement giet lura Malta u l-partijiet komplew ir-relazzjoni taghhom, bir-rizultat li fil-25 ta’ Marzu 2007 twieled f’ Malta t-tifel Jackob Poal George Caruana.

“Illi f’ Awissu 2007 l-Omm regghet telghet il-Polonja, u f’ Dicembru 2007 tela’ il-Missier biex ikun maghhom. Kien f’ dan l-istadju li l-Omm informat lill-Missier li hi ma kienitx ser tinzel Malta bit-tifel jekk id-drittijiet taghha fuq il-minuri ma kienux ser jigu kawtelati bi proceduri appoziti. Rizultat ta’ dan gie redatt ftehim li gie approvat minn din il-Qorti fis-27 ta’ Dicembru 2007.[2] Skond dan il-ftehim il-genituri qabblu, inter alia, li “[1] That the care and custody of the minor, Jackob Poal George Caruana, shall be entrusted to Katarzyna Joanne Morkis, with the minor’s father having free access, even in the event that the minor is resideing in the mother’s country, that is, Poland;….[omissis]…. [3] That Michael Caruana does not object to the minor residing in Poland with his mother in the event that their relationship ends, however, without any prejudice to his rights of free access to his son.”

“Wara dan il-ftehim, l-Omm accettat li terga’ tigi lura Malta bit-tifel bil-ghan li ssir tentattiv biex tirrikoncilja mal-Missier u t-tifel jitrabba f’ ambjent ta’ Familja; izda f’ Awissu 2009 l-Omm regghet telghet il-Polonja u baqghet hemm u rrifjutat li tinzel lura Malta, bir-rizultat li f’ Marzu 2010 l-Missier tela’ Poland, u f’ Jannar 2011 il-partijiet, fil-mori ta’ proceduri gudizzjarji fil-Polonja, lahqu ftehim dwar il-modalita’ ta’ l-access favur il-missier f’ Malta. Dan il-ftehim sar quddiem imhallef fil-Qorti f’ Gdynia fl-udjenza

[2] Fol.7

tat-28 ta' Jannar 2011, u gie ffirmat miz-zewg genituri li t-tnejn kienu assistiti mill-avukati rispettivi taghhom.

"Illi dan il-ftehim jipprovdi fid-dettal dwar l-access tal-missier f' Malta, u f' izjed minn darba jispecifika li l-Missier "shall be each time obliged to collect the minor Jackob Caruana from the place of residence in Poland and deliver him to the place of residence in Poland."[3]

"Illi sussegwentement fi Frar 2011 l-Omm regghet giet Malta bit-tifel, b' tentattiv iehor biex tirrikoncilja mal-Missier, izda nutilment, u f' Settembru ta' l-istess sena telqet lejn il-Polonja bl-intenzjoni li tistabbilixxi ruhha hemmhekk, tant li fil-Polonja hija kompliet fl-impieg li kellha qabel, u kitbet it-tifel go skola fejn dam jattendi sakemm intbaghat minnha Malta ghall-access tal-missier skond l-imsemmi ftehim, bl-obbligu li l-Missier jirritorna l-minuri fil-Polonja fl-10 ta' Jannar 2012; izda l-Missier zamm lill-minuri Malta, fejn ghadu s' issa. Il-Missier minn naha tieghu kiteb lill-minuri go skola f' Malta fejn qed jattendi llum. Minn naha taghha l-Omm baghqet tirrisjedi fil-Polonja, u llum ghandha relazzjoni ma' ragel Pollakk

"Illi l-Omm tghid li hi kienet accettat li tigi Malta bit-tifel wara li kellha l-assikurazzjoni tal-ftehim tas-27 ta' Dicembru 2007, u l-ftehim ulterjuri tat-28 ta' Jannar 2010. Hija tghid li pprovat tkompli r-relazzjoni mal-Missier bil-ghan li t-tifel jitrabba f' ambjent ta' familja; u di fatti tat izjed minn cans wiehed lil din ir-relazzjoni. Dan jispjega ghaliex wara dan l-ahhar ftehim hija akkonsentiet li terga' tigi Malta fi Frar 2011, izda meta skopriet li Missier kien ghadu f' relazzjoni ma' mara ohra, kien deher car ghaliha li ma kienx hemm cans ta' rikonciljazzjoni u li r-relazzjoni kienet spiccat defenittivament. L-Omm tghid li fit-23 Settembru 2011 hija ddecidiet li tmur lura il-Polonja, bit-tifel, u l-Missier, fuq talba taghha, kien hallsilha l-biljett tal-ajru one way.

"Dwar il-fatt li hi kienet baghtet lit-tifel Malta biex dan ikollu kuntatt ma' missieru, l-Omm tispjega *li "I obeyed the*

[3] Fols.10-11 – sottolinear tal-qorti

signed agreement and with trust sent my son to the father who cheated and caused trauma for his son in a long run..”[4]

“Illi minn naha tieghu l-Missier jghid li huwa qatt ma’ kellu l-intenzjoni li jaccetta li l-kura u kustodja tat-tifel tigi fdata f’ idejn l-Omm. Jispejega li huwa kien iffirma l-ftehim, kemm dak tas-sena 2007 kif ukoll tas-sena 2010, ghax kien kostrett lil jaghmel hekk biex jassigura li jkollu access ghal ibnu. Jghid li meta l-Omm kienet marret lura l-Polonja bit-tifel, hija kienet bdiet taghmilhielu difficli sabiex jaghmel kuntatt mieghu, u kienet theddu li ma kien ser jarah izjed. Kien f’ dan il-kuntest li huwa accetta li jiffirma li l-kura u kustodja tal-minuri tigi fdata f’ idejn l-Omm, u li l-access tieghu f’ Malta, meta l-Omm kienet tirrisjedi mal-minuri fil-Polonja, jigi regolat f’ mod dettaljat.

“Inoltre, jghid li l-ambjent li joffri hu f’ Malta lit-tifel huwa hafna ahjar minn dak li tista’ toffri l-Omm fil-Polonja; u li ghalhekk ir-ritorn tieghu lejn il-Polonja jista’ jikkaguna hsara psikologika lit-tifel, tenut kont ukoll tal-fatt allegat mill-Missier, li t-tifel ma jridx imur lura l-Polonja jghix ma’ Ommu.

“Konsiderazzjonijiet tal-Qorti

“Illi fl-ewwel lok huwa opportun li jigi rilevat li l-vertena li ghandha quddiemha l-Qorti tinvolvi d-determinazzjoni tal-proper forum li ghandu jiddeciedi l-kwistjoni dwar il-kura u kustodja, u access tal-minuri: jekk hux il-qrati Maltin jew il-qrati Pollakki.

“Il-materja in kwsitjoni hija regolata bl-Att Dwar is-Sekwetru u l-Kustodja ta’ Minuri Kapitolu 410 fil-Ligijiet ta’ Malta, li bih giet ratifikata l-Konvenzjoni dwar l-aspett Civili ta’ Sekwestru Internazzjonali ta’ Minuri. L-Artikolu 3 ta din il-Konvenzjoni jistipula li hemm *wrongful removal* jew *wrongful retention* fejn *[a] it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in*

[4] Fol.69

which the child was habitually resident immediately[5] *before the removal or retention; and [b] at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.” L-istess artikolu jkompli jghid li “The rights of custody mentioned in sub-paragraph [a] above may arise in particular by operation of law, or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”* Fl-Artikolu 5[a] il-Konvenzjoni tispjega li *“[a] “rights of custody” shall include rights relating to the care of the person of the child, and in particular, the right to determine the child’s place of residence.”*[6]

“Illi ghalhekk sabiex ir-rikorrent jirnexxi fl-azzjoni tieghu jehtieg li jipprova li fil-mument tar-ritenzjoni tat-tifel mill-Missier f’ Malta, [1] il-minuri kellu r-residenza abitwali tieghu fil-Polonja; [2] li l-Omm kellha l-kura u kustodja tal-minuri that il-ligi tal-Polonja, liema dritt kien qed jigi ezercitat minnha; u li [3] li bir-ritenzjoni tal-minuri f’ Malta, dan id-dritt tal-Omm gie vjolat.

“Illi jekk jikkonkorru dawn l-elementi din il-Qorti hija legalment marbuta li tordna r-ritorn tal-minuri, sakemm ma tavverax ruhha wahda mill-kondizzjonijiet indikati fl-Artikolu 13, fosthom dik indikata fil-paragrafu [b] li qed tigi nvokata mill-intimat, u li taqra hekk: *“[b] there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” ukoll il-Qorti tista’ tirrifuta li tordna r-ritorn tal-minuri “it it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”’*[7]

“Kura u Kustodja

“Illi ma hemmx dubju li fil-kaz in tizamina l-kura u kustodja tal-minuri kienet, u ghadha, fdata f’ idejn l-Omm. Dan

---

[5] Sottolinear tal-qorti
[6] Ibid
[7] Sottolinear tal-qorti

johrog car mill-ftehim milhuq bejn il-partijiet u sussegwentement inkorporat f' digriet moghti minn din il-Qorti fis-27 ta' Dicembru 2007; kif ukoll mill-ftehim ulterjuri raggjunt mill-partijiet fl-udjenza tat-28 ta' Jannar 2010 quddiem il-Qorti Pollakka. Mill-kontenut ta' l-istess ftehimiet jirrizulta li dawn ma kienux ta' natura provvizorja, izda kienu ntizi sabiex jidderminaw il-kwistjoni tal-kura u kustodja u tal-access defenittivament.

"Fl-ewwel ftehim jirrizulta car li l-Omm giet fdata bil-kura u kustodja tal-minuri bil-fakolta' li tmur tirrisjedi fil-Polonja mal-minuri fil-kaz li r-relazzjoni bejn il-genituri tigi terminata. Minn naha tieghu l-Missier inghata access liberu ghall-minuri "even in the event that the minor is residing in the mother's country, that is, Poland."[8] Fit-tieni ftehim, peress li l-Omm kienet qeda tirrisjedi Poland bit-tifel, gie regolat fid-dettal l-access tal-Missier.

"L-ezistenza ta' dawn iz-zewg ftehimiet regolanti kemm l-kwistjoni tal-kura u kustodja tal-minuri, kif ukoll l-access favur il-Missier, huma esebiti fl-atti, u ma gewx kontestati mill-partijiet, salv li l-Missier qed jikkontendi li meta huwa accetta li jidhol fihom, huwa ma ghamilx hekk volontarjament izda ghax kien kostrett li jaghmel hekk mill-Omm li, skond hu, kienet qed theddu li ma jarax aktar lil ibnu, jekk ma jaccettax. Inoltre, rigwad it-tieni ftehim, dak tat-28 ta' Jannar 2011 huwa jallega li ma kienx konxju tal-kontenut tieghu.

"Illi fir-rigward il-Qorti tisserva li t-tezi tal-intimat fis-sens li huwa ffirma ghax kien kostrett, u li noltre, huwa ma kienx jaf x' fih it-tieni ftehim, hija nverosimili u nattendibbli ghal zewg ragunijiet principali: [1] l-ewwel nett, fiz-zewg okkazzjonijiet l-intimat kien assisti minn avukat, u [2] fit-tieni lok, ma jirrizultax mill-provi li l-intimat kien kostrett minn forza estranea u rrezistibbli li jaccetta l-kontenut tal-ftehim. Ma jirrizulta li kien hemm xejn x' jzommu milli jibda proceduri fil-qrati Pollakki jekk hass li huwa kien qed jigi pregudikat fid-drittijiet tieghu; dan japplika b' izjed qawwa fit-tieni ftehim, liema ftehim sar quddiem il-Qorti !

---

[8] Fol.7

"In propozitu l-Qorti hi tal-fehema li, kien qieghed f' sitwazzjoni difficli ghalih, tenut kont li meta saru l-ftehimiet huwa kien barra minn Malta, il-verita' hi li huwa accetta li jiffirma l-ewwel ftehim, ghax hass li d-drittijiet tieghu fuq it-tifel kienu qed jigu kawtelati bl-access liberu li nghata lilu fl-istess ftehim. Dan zgur li kien fattur determinanti li wassal lill-intimat sabiex jaccetta dan il-ftehim fiz-zmien meta ibnu kien ghadu tarbija tat-twelid. Illi anke t-tieni ftehim, li rregola fid-dettal l-access favur il-Missier, jaghtih access ampju ghat-tifel, partikolarment fil-vaganzi estivi.

"In fine, rigward l-eccezzjoni sollevata mill-intimat fit-trattazzjoni orali tieghu, u t-talba tieghu ghall-isfilz maghmula fl-istess stadju, tat-tieni ftehim peress li mhuwiex apostilizzat, il-Qorti tosserva li l-istess intimat accetta l-ezistenza ta' dan id-dokument, u l-kontestazzjoni tieghu kienet limitata biss ghall-fatt li hu kien kostrett li jiffirmah.

"Residenza Abitwali tal-Minuri

"Illi dan l-aspett tal-kawza jidher li hu kkomplikat tenut kont tal-fatt li r-relazzjoni bejn il-gendituri tal-minuri kienet wahda bis-sulluzzu, b' mod li f' izjed minn okkazzjoni wahda mat-terminazzjoni tar-relazzjoni, l-Omm telqet minn Malta lejn pajjizha. F' okkazzjoni minnhom kien l-istess intimat li qallha biex titlaq u sahansitra hallsilha l-passagg one-way tal-ajru.

"In tema legali jigi osservat li ngredient essenzjali sabiex tigi stabbilita r-residenza abitwali ta' persuna, hija l-iskop ta' dik il-persuna li tmur f' post bl-intenzjoni li tistabbilixxi ruhha hemmhekk; u l-fattur taz-zmien, ghalkemm jista' jkun ta' relevanza f' certu kazijiet sabiex tigi ppruvata din l-intenzjoni, mhux necessarjament wiehed determinanti; b' mod li persuna tista titqies residenzi abitwalment f' pajjiz, anke jekk tkun ghamlet ftit taz-zmien biss, basta li tkun marret hemm volontarjament u "for settled purposes and with a settled intention"[9].

[9] E vs E – EWHC 276 [Fam] [2007] per Potter J

"L-intenzjoni ta' residenza hija marbuta mal-iskop, u mhux mehtieg zmien twil biex din tigi stabbilita. *"Thus in Re B [Child Abduction Habitual Residence][1994] it was held that a short time spent by a mother in another country with a view to effecting a reconciliation with a father which failed, was insufficient for a settled intention to have been formed as to a change of residence."*[10]

"Illi fil-kaz in dizamina, u ghall-finijiet tal-ezami odjerni huwa ta' rilevanza qawwija iz-zmien tat-23 ta' Settembru 2011 'il quddiem meta l-Omm, wara li rrealizzat li l-intimat kien ghadu fir-relazzjoni ma' mara ohra, iddecidiet li terga' tmur lura tirrisjedi bit-tifel il-Polonja. Hemmhekk, kompliet fl-impieg li kellha qabel, iskriviet lit-tifel fi skola hemmhekk, u sahansitra dahlet f' relazzjoni ma' ragel iehor.

"Il-Qorti m' ghandhiex dubju li l-Omm telqet bl-intenzjoni li tistabbilixxi ruhha u lit-tifel b' mod defenittiv fil-Polonja; u dan, jsib konfort qawwi fis-segwenti fatti: [1] li fl-ewwel ftehim, hi kienet ghamlitha cara li f' kaz li r-relazzjoni ma' l-intimat tigi terminata, hija tmur tirrisjedi bil-minuri fil-Polonja; u ghal dan, l-intimat iddikjara li ma kellux oggezzjoni peress li kien inghata access liberu ghat-tifel; [2] li anke meta precedentement kienet giet terminata r-relazzjoni bejn il-genituri hija marret lura l-Polonja bl-intenzjoni li tibqa' tirrisjedi hemm, tant li fil-ftehim tat-28 ta' Jannar 2011, ghal izjed minn darba, issemma li r-residenza tal-minuri kienet fil-Polonja; u fil-fehema ta' din il-Qorti, il-fatt li hija sussegwentement irritornat lura Malta sabiex tipprova tirranga r-relazzjoni taghha mal-Missier ma jwassalx ghat-telf tar-residenza abitwali taghha fil-Polonja. Dan ghamlitu biss bhala tentattiv, u ma kellhiex l-intenzjoni defenittiva li tistabbilixxi ruhha bit-tifel hawnhekk qabel ma tkun certa li r-rikonciljazzjoni sehhet b' mod effettiv.

"Illi rigward il-minuri ghandhu jirrizulta car li r-residenza abitwali tieghu s-segwi dik tal-Omm. Dan jirrizulta car mill-Artikolu 5[a] tal-Konvenzjoni.

[10] Ibid

"Ghaldaqstant il-Qorti hija tal-fehema li mill-provi jirrizulta sodisfacentement li fiz-zmien li l-Missier zamm it-tifel f' Malta minghajr il-kunsens ta' l-Omm u kontra x-xewqa taghha, it-tifel kellu r-residenza abitwali tieghu fil-Polonja u kien that il-kura u kustodja ta' Ommu, u ghalhekk iz-zamma tieghu f' Malta tmur kontra l-obbligi tieghu that il-Konvenzjoni, u tikkwalifika bhala wahda illegali ai termini ta' l-artikolu 3.

"Physical or Psychological Harm

"Illi in vena legali l-Qorti tosserva li l-kontenut ta' l-Artikolu 13 huwa ta' natura eccezzjonali, u ghandu jigi applikat b' mod ristrett, tenut kont tal-fatt li l-applikazzjoni leggera jew inopportuna tieghu tista' twassal ghall-istultifikazzjoni tal-iskop tal-Konvenzjoni li hu dak li jipprevjeni s-sekwestru tat-tfal.

"Gie osservat mill-qrati Inglizi li *"The threshold for an Article 13 defence is not to be decided on the basis of straightforward welfare considerations , but according to the higher standard of serious risk of harm"*[11]

"Il-Qorti tosserva li fil-kaz in dizamina l-oneru ta' din il-prova kien jispetta lill-intimat li ssolleva din id-difiza; u mill-provi ma jirrizultax li jekk il-minuri jintbaghat lura l-Polonja jghix ma' Ommu, hemm riskju serju li t-tifel jigi espost ghal dannu, la psikologiku u wisq anqas fiziku, jew li jitpogga f' sitwazzjoni ntollerabbli.,

"Illi r-rapport[12] tal-Psikologu Juan Camilleri.prezentat mill-intimat b' tentattiv li jsostni din it-tezi tieghu, huwa monk fis-sens li m' ghandux valur probatorju stante li ma jipprova xejn, tenut kont li, kif xehed l-istess Juan Camilleri u kif jirrizulta mill-istess rapport tieghu, dan ma semghax lit-tifel, izda ghamel rapport fuq dak li rrakkontalu l-intimat. Barra minnhekk ir-rapport ta' l-

[11] Cv B [Abduction: grave risk] [2005][EWHC 2988] per Potter J
[12] Fol.86 et seq.

Avukat tat-Tfal jkompli jdghajjef serjament it-tezi tal-intimat f’ dan ir-rigward.

“Illi rigward l-allegazzjoni tal-intimat li t-tifel ma jridx imur il-Polonja, il-Qorti tosserva li tifel ta’ circa hames snin m’ ghandux l-eta’ jew maturita’ sufficjenti sabiex tkun applikabbli f’ dan il-kaz l-proviso indikata fl-Artikolu 13.

“Illi rigward it-talba tal-intimat sabiex din il-Qorti tezercita l-fakolta’ taghha that l-Artikolu 15 tal-Konvenjzoni, il-Qorti tosserva li din il-fakolta’ hija diskrezjonali, u li ma thoss li fic-cirkostanzi ghandha tapplika din il-mizura, gialdarba hemm elementi ta’ prova bizzejjed sabiex il-vertenza tigi deciza minn din il-Qorti.
“Ferm il-premess il-Qorti tikkunsidera t-talba tar-rikorrent gustifikata fil-fatt u fid-dritt u timmerita li tigi milqugha.”

Rat ir-rikors tal-appell tal-intimat li in forza tieghu, ghar-ragunijiet minnu premessi, talab illi din il-Qorti joghgobha:

“…thassar, tannulla u tirrevoka s-sentenza tat-28 ta’ Gunju 2012 fin-numru 15/2012 NC u fl-ismijiet premessi billi filwaqt illi tilqa’ l-eccezzjonijiet u d-difiza tal-konvenut appellant, tichad it-talbiet attrici bl-ispejjez taz-zewg istanzi kontra l-attur.”

Rat ir-risposta tal-appell tad-Direttur rikorrent li in forza taghha, ghar-ragunijiet minnha premessi, talab illi din il-Qorti joghgobha:

“…tirrespingi u tichad l-appell imressaq mill-appellant u b’hekk tikkonferma s-sentenza moghtija mill-Prim’ Awla tal-Qorti Civili fit-28 ta’ Gunju 2012 fl-ismijiet **Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali v. Michael Caruana (Rik. Gen Nru 15/2012)**, bl-ispejjez inkluzi dawk ta’ dan l-appell, doppji, kontra l-appellant.”

Semghet lid-difensuri tal-partijiet;

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

Ikkunsidrat:

Illi fis-sentenza li tat l-ewwel Qorti f'din il-kawza gie ordnat r-ritorn tal-minuri Jackob (li ghandu hames snin) lejn il-Polonja, wara li sabet li dak it-tifel inzamm illegalment hawn Malta minn missieru kontra r-rieda tal-omm li tinsab residenti fil-Polonja. L-intimat missier huwa ta' nazzjonalita` Maltija waqt li l-omm hija ta' nazzjonalita` Polakka; il-genituri ma humiex mizzewga u l-minuri twieled hawn Malta minn relazzjoni li kellhom il-genituri waqt li l-omm kienet ghal xi zmien hawn Malta. Ir-relazzjoni ta' bejn il-genituri kienet karatterizzata b'hafna litigji, u ma damitx wisq biex tigi fi tmiemha. Bid-diskordju bejn il-genituri jiccentra fuq it-tifel, fis-27 ta' Dicembru 2007, gie redatt ftehim approvat mill-Qorti Maltija, li bih il-kura u l-kustodja tal-minuri giet affdata lill-omm, b'access liberu favur il-missier. Sar tentattiv bejn il-genituri ta' rikonciljazzjoni, izda f'Awwissu tal-2009, l-omm regghet lura l-Polonja.

Hawnhekk sar ftehim iehor iffirmat fit-28 ta Jannar 2011, u approvat minn qorti ta' dak il-pajjiz, li kien jipprovdi li l-access tal-missier, f'kull kaz, kellu jibda u jintemm fil-Polonja. Fi Frar 2011, l-omm regghet giet Malta, b'tentattiv iehor biex tirrikoncilja mal-missier, izda meta rat li kien ghal xejn, f'Settembru tal-2011 iddecidiet li tirritorna lura l-Polonja darba ghal dejjem. Hi regghet bdiet tahdem hemm u irregistrat it-tifel go skola Polakka. Skont il-ftehim milhuq bejn il-partijiet, il-missier inghata access ghall-minuri li ngieb Malta biex iqatta zmien mal-familja tal-missier. It-tifel kellu jirritorna l-Polonja fl-10 ta' Jannar 2012, izda inzamm Malta mill-missier.

Dan hu kaz car ta' *wrongful retention* li ghalih hu applikabbli l-Att dwar is-Sekwestru u l-Kustodja ta' Minuri (Kapitolu 410 tal-Ligijiet ta' Malta) imsejjes fuq ir-Regolament numru 2201/2003 tal-Unjoni Ewropeja. Kif inghad, l-ewwel Qorti ordnat ir-ritorn tal-minuri lejn il-Polonja, decizjoni li maghha l-intimat ma qabilx u qieghed issa jikkontesta b'dawn il-proceduri ta' appell. L-intimat ressaq diversi aggravji li, ftit jew wisq, jolqtu l-elementi kollha mehtiega biex tirnexxi l-azzjoni tad-Direttur rikorrent.

Diversi aggravji jolqtu l-interess guridiku tal-omm li titlob ir-ritorn tal-minuri lejn pajjizha. L-intimat jilmenta dwar il-validita` u l-effetti tal-ftehim li gew iffirmati bejn il-partijiet, ghax jilmenta li huwa ffirma l-ftehim taht forza insormontabbli u dan biex ikun jista' jara lill-ibnu. L-ewwel Qorti qieset din il-lanjanza u warbitha u dan anke ghaliex l-intimat stess ta' ezekuzzjoni ghal dawk il-ftehim meta accetta li jgib lill-minuri Malta skont it-terminu tal-istess ftehim.

Din il-Qorti ma tarax li ghandha ghalfejn tidhol fi kwistjonijiet marbuta mal-ftehim, ghax biex genitur ikun intitolat jitlob ir-ritorn ta' minuri lejn pajjizu mhux mehtieg li jkollu *de iure* drittijiet ta' kura u kustodja, u hu bizzejjed li dak il-genitur ikun jezercita bhala fatt dawk il-funzjonijiet biex ikun intitolat jitlob ir-ritorn tal-minuri. Lanqas ma hu mehtieg li dak il-genitur jezercita` b'mod esklussiv id-drittijiet ta' kustodja, u hu bizzejjed li dak li jkun ikun jista' u fil-fatt jezercita` drittijiet fuq il-minuri.

Fuq dan il-punt, din il-Qorti tinnota li r-regolament inkwistjoni 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 ghal perjodu 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 ghal ktieb "Bromley's Family Law" (10th 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 Ewropeja. 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 tridx tigi meqjusa biss fid-dawl tal-ligi estera, izda mehud kont ukoll dak li tipprovdi l-ligi ta' Malta fuq id-drittijiet ta' *patria potestas*. Anke minghajr il-ftehim, u indipendentement mill-validita` tal-istess, jirrizulta li l-minuri hu bin l-intimat u l-mara Polakka li tat lok ghal dawn il-proceduri, u skont il-ligi ta' Malta <u>kull genitur</u> ghandu dritt ta' *patria potestas* fuq minuri mwieled minn relazzjoni bhal din, u ma jirrizultax li l-omm tilfet dawn id-drittijiet. Jirrizulta anzi, li l-omm qed tezercita dawn id-drittijiet fil-Polonja u ma gietx mizmuma jew imcahhda milli tkompli tezercita l-istess.

L-omm, f'dan il-kaz, ghandha 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 imsemmi (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-omm ghandha drittijiet ta' *patria potestas*, li taht il-ligi Maltija jinkludu obbligu li jiehdu hsieb, imantnu, jghallmu u jedukaw lil uliedhom (Artikolu 7 tal-Kodici Civili), ma jistax jinghad li hi m'ghanhiex "drittijiet ta' kustodja". Fil-mument li t-tifel ingieb Malta, l-omm kienet qed tezercita` dawn id-drittijiet, u ma jistax il-missier jiehdu mill-post ta' residenza ordinarja tieghu, u jippretendi li jiddeciedi hu biss fejn se jeduka lill-minuri u kif se jrabbieh.

In kwantu ghaz-zewg ftehim bejn il-partijiet ghandu jinghad dan li gej. Anki jekk id-digriet tal-Qorti Maltija tas-27 ta' Dicembru 2007 li nhareg minn dik il-Qorti biex jaghti "forza gudizzjarja" lill-ewwel ftehim milhuq bejn il-partijiet jitqies, minghajr ma qieghed jigi koncess ghall-fini ta' din il-kawza, li jista' jkollu effett biss provizorja, il-ftehim innifsu ma ghandux dan l-istess effett, u ftehim fuq kustodja jorbot anke jekk ma jkunx gie formalizzat f'kuntratt pubbliku. Inoltre, ghalkemm il-missier appellant jghid li l-ftehim kienu ivvizzjati – u dan nonostante li f'kull kaz hu kien assistit minn Avukat – ma jidhirx li hu qatt ha passi legali biex jatakka l-istess ftehim.

L-intimat joggezzjona wkoll ghas-sejba mill-ewwel Qorti tal-post tar-residenza tal-minuri fil-Polonja qabel iz-zamma tieghu hawn Malta. Trattat il-kuncett ta' residenza abitwali, din il-Qorti tara, li skont id-duttrina Ingliza, li maghha din il-Qorti taqbel, mhux mehtieg li dak li jkun imur f'post bi hsieb li jibqa' fih b'mod indefinit; sakemm dak li jkun imur f'post *"for a settled purpose"*, li mhux vaganza jew ghal fini ta' access, jista' jitqies li rawwem ir-residenza abitwali f'dak il-post. Fil-kaz <u>Re B (Minors) (Abduction) (No. 2)</u> 1993, Waite J. osserva:

"Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration."

Fil-fatt, fl-Ingilterra, gie accettat li residenza temporanja ghal skopijiet ta’ edukazzjoni, *business*, xoghol (inkluz *posting* militari), jew biex jinghaqad mal-familja, tista’ twassal ghal bidla fir-residenza abitwali ta’ dak li jkun. Kaz iehor interessanti huwa Re V (Abduction: Habitual Residence), deciz ukoll fl-Ingilterra fl-1995 fejn fil-kuntest ta’ familja li tghix Londra fix-xitwa u Corfu fis-sajf, gie osservat li din il-familja tkun, fix-xitwa residenti Londra u fis-sajf f’Corfu, avvolja f’dan l-ahhar post ir-residenza kienet wahda ta’ vileggjatura. L-intenzjoni ta’ residenza hija marbuta mal-iskop u mhux mehtieg zmien twil biex din tigi stabbilita.

Lanqas ma hu mehtieg li dak li jkun ikollu intenzjoni li jirrisjedi fil-pajjiz b’mod indefinit, izda hu bizejjed il-hsieb ta’ dak li jkun li jirrisjedi f’pajjiz ghal perjodu ta’ zmien apprezzabbli.

F’dan il-kaz, il-minuri qatta zmien twil jghix fil-Polonja, hlief ghall-perjodi li fihom l-omm giet Malta bit-tifel bil-hsieb li tipprova tirrikoncilja mal-intimat. Fl-ahhar, pero`, irritornat lejn Polonja b’intenzjoni li tibqa’ hemm, tant li regghet impjegat ruhha f’dak il-pajjiz, u issa anke qabdet relazzjoni ma’ ragel iehor Polakk. It-tifel da parti tieghu, issodisfa kriterji ta’ integrazzjoni f’dak il-pajjiz, fis-sens li huwa cittadin Pollakk, kien jattendi l-iskola “Jas I Malgosia (Hansel and Gretel)” u li skont ix-xhieda tal-omm li lanqas ma hi kontestata kien ilu iskritt f’dik l-iskola sa minn Settembru 2010. Kien ukoll jattendi lezzjonijiet tal-Judo u sezzjonijiet ta’ Speech Therapy kif ukoll lezzjonijiet ta’ filghaxija tal-Ingliz f’Helen Doron Learning Centre kif muri fid-dokumenti pprezentati mir-rikorrenti.

Ghar-rigward tal-interess tal-minuri, il-Konvenzjoni nfisha tfittex li tipprotegi l-interess suprem tal-minuri billi tintenta tevita li l-minuri jigi mehud bil-forza jew bla awtorizzazzjoni gudizzjarja jew minghajr il-kunsens ta’ xi wahda mill-ġenituri tieghu, b'mod li l-istess minuri jigi impedut li jara jew ikollu access ghall-wiehed mill-genituri tieghu. 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-interess suprem tal-minuri jiddetta li 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. Dan huwa l-veru interess tal-minuri, u cioe`, li jkollu l-kaz tieghu trattat fl-ambjent li fih kien qed jghix. Xort'ohra jigri li tigi incentivata u ppremjata l-prepotenza u l-illegalita' u l-htif illegali tal-minuri u dan palesament imur kontra l-interess suprem tal-istess minuri. Din il-Qorti tfakkar illi, b'dawn il-proceduri, ma jigix deciz min mill-genituri se jkollu l-kura u l-kustodja tal-minuri; din materja li se tibqa' impregjudikata, kif se jibqa impregjudikat id-dritt tal-minuri ghal familja mal-missier jew mal-omm, skont kif tiddeciedi l-Qorti kompetenti in materja. Il-minuri beda jkollu familja fil-Polonja, u din il-familja giet "imfixkla" bl-agir tal-intimat li qed izomm lit-tifel hawn Malta. Il-missier qed jipprova jibni familja gdida ghat-tifel hawn Malta, pero`, dan ma jistax jaghmlu b'mod unilaterali wara li hataf lit-tifel mill-familja li ommu kienet holqot ghat-tifel gewwa l-Polonja. Jekk il-hajja fil-Polonja hijiex aghar jew ahjar mill-hajja f'Malta, ma giex muri f'dawn l-atti, u din il-Qorti ma tistax tinqeda bil-preferenzi taghha u tirrifjuta li tirritorna t-tifel ghax jidhrilha li l-hajja f'Malta hi ahjar minn dik Polakka – aktar u aktar meta ma ghandhiex prova li l-familja fil-Polonja hija xi wahda sfrattata, meqjus li l-Polonja huwa pajjiz civilizzat u bi stima gholja lejn il-valur tal-familja u b'valuri etici generali ghoja bhal f'Malta.

Ir-ritorn tal-minuri lejn il-gurisdizzjoni abitwali tieghu issir bis-sahha ta' ligi li hi msejsa fuq il-htiega li jigu skuraggati *abductions* ta' minuri; zgur li mhux fl-interess tal-minuri li dawn jitnehhew bil-mohbi jew b'sotterfugju mill-pajjiz fejn ghandhom ir-residenza taghhom. Huwa anzi mehtieg f'socjeta` demokratika li dan l-abbuz jigi mwaqqaf, bil-genituri jigu invitati jirrisolvu kwistjonijiet li jolqtu lil uliedhom b'mod pacifiku u/jew quddiem il-qrati li maghhom il-minuri ghandu l-akbar konnessjoni. Hu fl-

interess tal-minuri li dan ma jintuzax bhala ballun bejn il-genituri, u jekk ikollu residenza f'pajjiz ma jitnehhiex minn hemm minn genitur wiehed li jkun jista' "jaghzel" il-gurisdizzjoni biex quddiemha jressaq il-kaz tieghu. Genitur ma ghandux jithalla "jaghzel" hu fejn tittiehed decizjoni li taffettwa l-interessi tal-minuri, izda dawn tal-ahhar ghandhom jigu mistharrga mill-qorti tar-residenza abitwali tieghu. Altrimenti r-rieda ta' min jahtaf l-ewwel taht idejh lill-minuri tipprevali fuq ir-rieda tas-saltna tad-dritt u dan certament iservi biss sabiex jinkoraggixxi l-htif ta' tfal minuri li certament b'ebda mod ma jista' jkun fl-ahjar interess taghhom.

Din il-Qorti hi sodisfatta li l-awtoritajiet u l-qrati Polakki jistghu jiehdu kull provvediment opportun biex jipprotegu kontra xi riskju ta' hsara lill-minuri, u ma giex senjalat lil din il-Qorti li l-interessi tal-partijiet fil-materja se jkunu jew jistghu jkunu ppregudikati bir-ritorn tal-minuri lejn il-Polonja.

Biex minuri ma jintbaghatx lura jrid ikun hemm ragunijiet gravi u impellenti li jiggustifikaw decizjoni simili. Kif intqal fil-kaz **<u>Re: H (Children) (Abduction)</u>** 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). <u>The risk must be grave and the harm must be serious</u>. 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 inntolerable 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 <u>require clear and compelling evidence of the grave risk of harm or other intolerability which must be</u>*

measured as sustantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainity 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 beeen 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 posssession 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 Preceedings) 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-intimat kontra r-ritorn tal-minuri ma ghandhomx jigu mistharrga minn din il-Qorti,

u, ghalhekk, taqbel mad-decizjoni li hadet l-ewwel Qorti fit-28 ta' Gunju, 2012 li ma tahtarx espert psikologiku biex jezamina l-minuri la darba ma kellhiex indikazzjonijiet li l-minuri jsofri xi hsara bir-ritorn tieghu lejn il-Polonja. Ma hemm xejn fl-atti li juri li, jekk it-tifel jigi ritornat lejn il-Polonja, se jsofri minn xi trawma ta' hsara kbira ghalih. Ovvjament, it-tifel zgur li qed ihossu konfuz b'dak li qed jigri, u n-nuqqas tal-genituri tieghu li jiftehmu dwaru u, aktar, li jonoraw dak li jkunu ftehmu fuqu, zgur li jhalli mpatt mhux sabih fuq il-minuri. Pero`, din il-Qorti ma tistax torbot ma' din il-konfuzjoni f'mohh il-minuri biex tichad ir-ritorn, u fin-nuqqas ta' prova li r-ritorn tal-minuri lejn il-Polonja jista' johloqlu pregudizzju serju, <u>pregudizzju li l-qrati tal-Polonja ma jkunux jistghu jahsbu ghalih</u>, allura ma ghandux jinholoq intopp ghar-ritorn tal-minuri lejn il-gurisdizzjoni abitwali tieghu.

L-intimat jipprova jpengi lill-omm bhala wahda li ma hiex kapaci tiehu hsieb ta' binha ghaliex ma jimpurtahiex mill-interessi tieghu, kif ukoll ghax tbati minn hafna hass hazinijiet u jkollha tiehu l-medicina. Ta' dan pero`, l-intimat ma ressaqx provi konkreti u huma materji li, f'kull kaz, jistghu jigu trattati fil-forum kompetenti, u ma jimpedix ir-ritorn tat-tifel. Fuq kollox, il-fatt li l-omm tiehu medicina ma jfissirx li hi ma tistax trabbi lil uliedha. Inoltre, kif osserva d-Direttur rikorrent, fl-atti hemm bizzejjed indikazzjonijiet li juru li l-omm bl-ebda mod ma hi qed titraskura l-interessi ta' binha. Hekk insibu:

i. Dikjarazzjoni mill-*headmaster* tal-Kindergartin Hansel and Gretel fejn kien jattendi l-minuri fejn dan ccertifika li Jacob *"is being brought to the kindergarten at 8 o'clock in the morning and picked up at 4 o'clock in the afernoon. Often, he is being picked up earlier than that"*;

ii. Certifikat mediku mahrug mill-Paediatrician Piotr Komarnicki fejn wara li sar ezami mediku shih ta' Jacob li dak iz-zmien kellu erba' snin gie dikjarat li *"there are no deviations from the norm"*;

iii. *Statement* mahrug mill-"*Pozytywka*" *family development academy* fejn l-Psikologista Joanna Kot

ddikjarat li *"Ms. Katarzyna Morkis reported the intention to participate in the psychological consultation on the possibilities of preparing a child for the separation of the child from one of his parents and on the ways of dealing with the child in the moment of parents' separation"*;

iv. *Social Investigation Report* fejn il-Family Specialist Guardian wara li rat il-Jacob u osservat il-mod ta' kif jirrelata mal-familja tieghu kkonkludiet li *"The minor is brought up in very good conditions…The boy is developing harmoniously. He has a strong emotional relationship with his mother and her family…it results from my observations that the mother considers the matter of the father's and son's contacts in a very mature way"*;

v. Il-messaggi fuq facebook mibghutin minn Mariella Cauchi, oht l-intimat stess fejn, kuntrarjament ghal dak li qalet fix-xhieda taghha stess, qalet *"I know that you done the best when you was here…you are the mother of my nephew and I am very proud to see that you are a very caring and wonderful mother to him"*.

Huwa minnu li l-Qorti ghandha – u zgur hekk sar mill-ewwel Qorti – tiehu in konsiderazzjoni l-fehmiet tal-minuri jekki dan ikun ta' eta` u livell ta' maturita` "li jkun tajjeb li wiehed jaghti kaz tal-fehmiet tieghu". Pero` tali fehmiet ma humiex determinanti. Kif inghad mill-*Court of Session* tal-Iskozja fil-kaz **<u>P.W. v. A.L. or W.</u>** (deciz fit-12 ta' Gunju 2003 – sedenti The Lord President, Lady Cosgrove u Lord Johnston).

"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 the 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).

Fic-cirkustanzi li jirrizultaw mill-atti din il-Qorti ma tara ebda raguni ghala ghandha tiddisturba d-diskrezzjoni tal-ewwel Qorti f'dan ir-rigward. Hawn ghandha kaz ta' tifel fl-eta` tenera ta' hames snin li zgur li, bhal issa, qed jghix kuntent fis-sajf ta' Malta, jghum u jkun imfissed mill-familja tal-intimat li, wisq probabbli, jaghtuh kull ma jitlob biex jassiguraw il-kuntentizza tieghu hawn Malta. Ghall-kuntrarju l-opportunita' li kienet legittimament tgawdi l-omm sabiex trabbi lil binha felicement fil-Polonja bil-kunsens tal-appellant giet illegittimament u unilatermalment stronkata mill-istess appellant meta ddecieda li jzomm lil ibnu f'Malta. Il-Qorti, ghalhekk, qieset il-fatturi kollha rilevanti, u ma tarax li l-missier ghandu jiehu vantagg bl-illegalita` tieghu, u ma tarax li l-minuri jista' jigi pregjudikat jekk jghix il-Polonja u jqatta' xi gimghat fis-sajf hawn Malta, skont kif jiftehmu l-partijiet li mistenni minnhom li jonoraw dak il-ftehim!

Ma hemmx lok, allura, la li jigi varjat id-digriet tal-ewwel Qorti tal-25 ta' Gunju, 2012, li bih il-Qorti cahdet talba li jigu annessi l-atti ta' medjazzjoni, u lanqas li l-partijiet jinghataw access ghar-rapport tal-avukat tat-tfal, peress li, ghall-fini ta' din il-kawza, hemm bizzejjed fl-atti disponibbli fuqhiex din il-Qorti, bhall-ewwel Qorti, tikkonkludi li t-tifel ghandu jigi ritornat lejn pajjizu. Dan apparti li, fir-rigward tar-rapport tal-avukat tat-tfal, il-Kodici Civili stess jaghti kull setgha lill-Qorti li zzomm dan ir-rapport kunfidenzjali "kif jidhrilha xieraq fl-ahjar interessi tat-tifel" (Artikolu 149).

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell tal-intimat appellant billi tichad l-istess u tikkonferma s-sentenza tal-ewwel Qorti, u tordna lir-rikorrent jipprovdi mmedjatament ghar-ritorn tal-minuri lejn il-Polonja.

L-ispejjez kollha tal-kawza ghadhom jithallsu mill-intimat Michael Caruana.

< Sentenza Finali >

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