MALTA

# CIVIL COURT

# (FAMILY SECTION)

## THE HON. MR. JUSTICE

## ROBERT G MANGION

Sitting of the 23 rd July, 2015

Rikors Generali Number. 101/2015

**Director of the Department for Social Welfare Standards**

**vs**

**J K**

**Preamble**.

On the 5th March 2015 the Director of the Department for Social Welfare Standards in Malta filed an application before this Court requesting a court order (1) for the return of the two minor children B C W and R X M W to Belgium; (2) to establish the necessary arrangements so that the said two minor children be returned to Belgium; and (3) in the event that respondent J K does not abide by the return order, to enforce the return order with the assistance of the police, the court marshals and the social workers Applicant premised that the minor children were retained in Malta by the mother, claiming that although mother and children came to Malta with the father's consent this was on the understanding that she returns to Malta after the MEP elections, ie. between the 19th and the 25th May 2014. The department claims that once in Malta the mother decided unilaterally

not to return to Belgium with the children. The Maltese Central Authority submits that the habitual residence of the two minor children prior to their retention by the mother in Malta is Belgium and according to the Belgian Civil Code both parents enjoyed and exercised joint care and custody over the two minor children. When the mother refused to return to Belgium with the children the father applied to the Belgian Central Authority in terms of Article 8 of the Hague Convention on the Civil Aspects of Child Abduction. The Belgian Central Authority forwarded the claim to its counterpart in Malta and the present proceedings were initiated.

Respondent J K filed her reply on the 20th March 2015 contesting the Department's application. Her main defences are the following: (a) that she is not in breach of Article 3 of the First Schedule of Chapter 410 of the Laws of Malta (The Child Abduction and Custody Act) since she maintains that the father of the two minor children "had consented to or subsequently acquiesced in the removal or retention" of the children in terms of Article 13 (a) of the First Schedule of Chapter 410 of the Laws of Malta; (b) she denies there was an agreement between her and her husband, the father of the children, to return to Belgium after the MEP elections. The mother claims that following marital problems between the married couple, they were in agreement that she comes to Malta together with the two minor children for an indeterminate time following their fallout after what respondent describes as "the discovery of her husbands double life" which she describes as being harmful to the minor children; (c) that her husband's request for a return order was made under false pretences since according to the mother, the father invoked the 1980 Convention as a reaction to her filing for personal separation before the Maltese Courts where respondent is requesting the exclusive care and custody of the children; (d) there is a grave risk that the return of the children to Belgium will expose them to "physical or psychological harm or otherwise place the child in an intolerable situation".

**The Evidence.**

**The Testimony of D W**

In his affidavit **D W** states that in the beginning of 2014 he and respondent, who at the time resided in Brussels where they both worked, had marital problems and during Easter they visited Malta together as a family staying at respondent's parents home, as they had done several times in the past. Once the holiday was over they returned to Belgium. The European Parliament elections were due in May 2014 and respondent expressed her wish to come to Malta to vote and take the children with her. He states that: "Considering the problems we had had in our relationship at the time, it was agreed that this would be a good time for both of us to get some distance to everything and clear our thoughts. At no time was it mentioned that my wife would take this opportunity to stay in Malta for good together with our children." Mr W explained that he "….was under the impression that this visit would last, at the most, a couple of weeks after which she would return, as had happened in the past." He emphasised that no mention was ever made by his wife of "any indefinite

stay in Malta with the children at this time or subsequently, and until today she has still not told me in so many words that she wishes to relocate to Malta permanently with the children."

According to Mr W his wife had expressed the wish to stay longer than the one week allowed by the subsidised tickets for the MEP elections and he consented that she flies to Malta with the children on the subsidised tickets but purchase regular tickets for a later return date. He states that he "agreed to a later return date, however thereby in no way approving of an indefinite stay."

After June passed and his wife did not return to Brussels he raised the issue of the duration of the stay and his wife replied that she was not ready to return to Brussels "just yet". The summer holidays were approaching and his wife was not prepared to accompany him to Sweden to visit his family. So he came for a holiday in Malta during July/August 2014 to have contact with his family. He says that he hoped his wife will seize the opportunity and return to Belgium with him since it was quite a feat to travel alone with two kids, one three years of age and a baby of less than one year of age. Following her failure to return with him to Belgium he began to "very openly" raising the issue about when she was planning to return with the children but consistently received the same reply that she "wasn't ready just yet". By the end of October Mr W started raising the issue with his wife that if they did not reach an amicable settlement regarding care and custody of the two minor children he will request a return order under the Hague Convention.

Mr W explains that following their marital problems in the beginning of the year 2014 he and his wife had discussed on several occasions the possibility of relocating but no concrete conclusion was ever arrived at. He explains that when his wife was still working in Brussels her salary was two hundred and fifty per cent (250%) bigger than his salary. Since she decided not to return to her job in Brussels there income is approximately thirty per cent (30%) of what it used to be when respondent worked there. His employment contract with the European Commission was due to come to an end in the beginning of this year 2015.

The drastic reductions in their income lead Mr W to consider ways how to reduce their recurrent expenses. He states that this was the real motivation behind their agreement to (1) sublet the studio flat which they had previously rented to house respondent's parents when they were staying in Brussels helping out with the kids, thereby saving €550 per month; (2) selling their car in Brussels saving another €440 per month for the remaining car loan and another €180 per month for the car insurance; (3) the sale of the car lead to a cash injection of €19,300.00. He contests respondent's claim that these actions are a reflection of his acquiescence for his wife to relocate to Malta with the children. Mr W a lawyer by profession, states that he could not risk being put in personal bankruptcy putting the exercise of his profession in serious risk.

As regards his wife's claim that a return order would put the children in "physical or psychological harm or otherwise place the child in an intolerable situation", he states that he never and would never expose his children to anything that would cause harm of any kind to the children. He comments on the occasion referred to by his wife when he showed to his two year old son a picture of the "rear of a woman". He explains that the picture was the cover of an LP, the first edition of the Jimi Hendrix Experience album. He said that the LP is part of a large collection he has consisting of approximately 1000 LPs, 500 7" records and 2000 CDs.

As regards the allegation of mental and physical damage to the children if they are returned to Belgium, Mr W said that he is in contact with an organisation in Belgium that deals with psychological issues and provide other support to children who are victims of child abduction and to the adults involved.

Under cross-examination held during the sitting of the 16th April 2015 Mr W stated that there has been an ongoing discussion with his wife about the possibility of relocating to Malta but that discussion has never been concluded. He said that inconclusive discussions about relocating to Malta had been taking place between him and his wife prior to 2014. Relocating and finding a job in Malta was an option that they had discussed, "I have never promised that we are moving to Malta now. We have discussed the possibility of Malta as an option". In the light of these ongoing discussions he had applied to jobs in Malta as he had done in other countries both in Belgium and elsewhere:

"I can produce the 15 applications that I have done since January this year. I can produce another list for 2014 and I have indeed been in contact with a couple of companies in Malta, just as I have been in contact with a number of companies in Belgium as well."

Mr W stated that his wife had listed their matrimonial home to be rented and that he showed the apartment to potential tenants. He explained that during a visit to Malta he made during Christmas time of 2014 they were discussing the possibility of an amicable settlement about all aspects of their life. However he was not prepared to go anywhere without sorting out the custody of the children. Although he was showing the matrimonial home to potential tenants, he stopped once he filed in February 2015 the abduction proceedings with the Belgian Central Authority.

Mr W stated that he applied for jobs not only in Malta and in Belgium but also in Sweden, his country of origin. To date he is still without a job and receives unemployment benefit from the Belgian state which is topped up by the European Commission to approximately €1,900 a month.

During the same cross-examination Mr W admitted that he was attending psychological sessions due to his addiction of a sexual nature, "I was definitely not doing well and was taking it out in a sexual way and for that I apologize to my wife thousand times …..". He also admitted that during the time they were still living together in Brussels he used his wife's computer and without her knowledge downloaded naked pictures of himself and of others but said that he always deleted them afterwards, "I don't think that I have left anything on purpose on the computer, but sure there could be a risk that something, there could be a possibility that there could be something left there, I normally try to clear the computer.". He also agreed with the suggestion put to him that a Swedish psychologist diagnosed him with a 'sexual addiction'.

**The Testimony of J K** .

**Respondent J K** submitted her affidavit. She states that when she moved to Malta with the children she had her husband's full consent and acquiescence, "No deadline for return was agreed between us and the matter of returning was left open in that my husband was and, to my knowledge, still is, thinking of moving to Malta himself.". She states that this is evidenced by his active search for a job in Malta. Ms K states that it was never her intention to abduct or illegally retain the children in Malta. Discussions about moving to Malta had been on going since 2013 but after the escalation of the marital problems in the beginning of 2014 they agreed that Ms K comes to Malta together with the two children to clear her head and come to terms with her husband's sexual encounters with third parties and his sexual addiction.

She says that Mr W has been in daily contact with the children via Skype since she came to Malta with the children in May of last year. Mr W consented so that the children start attending a nursery and a playschool respectively. She refers to the summer of 2014 when the father was visiting and attended a school activity and was constantly being updated about the children's activities.

Ms K states that on the 1st March 2015 the studio-flat previously rented for her parents to stay to help them out with the children was sub-let and on the 3rd February 2015 the car was sold. She says that although she had filed separation proceedings in Malta, Mr W still planned to relocate to Malta in order to be near the children. To this end he was still in search of a job in Malta even though he was aware that she had filed for personal separation.

Although the matrimonial home has not been sold a room forming part of the matrimonial home has been rented out.

Ms K claims that if the children are returned to Belgium they shall be exposed to 'grave and serious harm". She explained that she had discovered that when she was pregnant with their child Mr W had reckless unprotected sex in threesomes, visited prostitutes, had sex with others at his place of work which was the same place of work of Ms K and planned to have sexual encounters with others at their matrimonial home.

She refers to the voluminous exchanges of highly sexualised mails, images and videos of himself and other women naked on Ms K 's laptop. Ms K refers to an episode when Mr W showed his then two year old son the image of a woman's naked bottom. She denies that the image was the cover of an LP as Mr W had stated earlier in the proceedings.

Ms K refers to an episode during Christmas time of 2014 when during Mr W visit to Malta he left a Facebook page open on the kitchen table which included an explicit photo of Mr W's intimate parts which could have easily been found by the children. Instead it was discovered by Ms K which lead to the discovery of other sexual encounters including plans of Mr W to have sexual activities in the matrimonial home involving multiple partners.

Under cross-examination Ms J K stated that in May 2014 they had agreed that she comes to Malta and stay for an indefinite period. She explained that during Mr W's visit to Malta in July/August 2014 she had told him that one way to attempt salvaging their marriage was for him to move to Malta so that "he would get cut off from the networks that he had….. so coming to Malta for me would have been a sign of reassurance I asked from my husband that would have meant concretely that he would have cut off from those networks." Following that both of them started to look for a job in Malta. She stated that when Mr W visited Malta during the summer holidays of 2014 he stayed with Ms K at her parents' home as they had done before.

As regards the question of returning to Belgium, Ms K testified that during Mr W's visit of July/August 2014 she told him that she was not ready to go back to Belgium.

Ms K denied during cross-examination that she had agreed with her husband to stay in Malta for just ten days after the European election. On the contrary she declares: "I didn't know whether to trust my husband again or not and I informed him that one way that it could work out between us was that he would move to Malta and as per that decision we started looking for jobs" in Malta.

She denies that Mr W had asked her to return to Belgium. "At that point in time when he came to Malta in summer we jointly agreed that the way forward would be that he would start looking for

jobs in Malta. And me too. And that was the time which corresponds to what he earlier mentioned himself that he also recommended my CV to Pantasia after a Skype interview we had with them".

Ms K refers to the visit in Malta of Mr W during December 2014. She explains that the visit followed an email she sent him informing that she had filed for personal separation. "I wrote to him in an email where I told him that I filed for separation, I told him as well that I was also ready to discuss options and he came down to Malta following that email. When he was here in December we discussed options and the options we discussed were that he would still move to Malta even though I would be separating and he told me at that point the reasons for that being that he still wanted to be close to the children…..at that point in time he told me "that there is no way that I would be able to convince you that I would ever change if I were to be living in Brussels and you were to be staying in Malta". That is what he had told me." Ms K testified that during that December visit Mr W told her that if the flat (ie. the matrimonial home) was the one to be rented before the studio flat, he will come to Malta immediately.

Cross-examined about Mr W insistence that if they did not reach an amicable settlement regarding custody of the children he will file proceedings under the Hague Convention, she replied that Mr W had told her that they had a deadline till March 2015 to reach an agreement, referring to the one year time limit within which proceedings under the Hague Convention have to be instituted. Her reaction to that statement was "… why a child abduction procedure when we are talking of moving here."

When during cross-examination it was suggested to Ms Cardona that the extra-marital sexual activities of her husband did not jeopardise her job, she objected stating that he was doing those acts at the place of work itself, "putting his own work and career in jeopardy, contacting (recte: committing) these acts even at the office. By the way the workplace where he works was also mine. So that could have also damaged my reputation and both of us……We work in the same building, everybody knows we are husband and wife, I worked on one floor and he worked on the top floor."

Ms K gave a detailed account of the discoveries she made about her husband's extra marital sexual encounters, his repeated broken promises of desisting in future, her hopes of salvaging the marriage and the final episode in Malta during Christmas of 2014 when she discovered that he remained all along involved in group sex.

Respondent filed the affidavits of Dr Cristina Rapa Manche, Juanita Brockdorff, Victor Rizzo, Emanuela K and Anthony K who were all cross-examined during the hearing of the 7th May 2015.

Both parties filed notes of submissions and subsequently made final oral submissions during the hearing of the 10th June 2015 and the case was adjourned for judgement.

**The Legal Context.**

***The 1980 Hague Convention on the Civil Aspects of International Child Abduction.***

**Article 1** of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction ('the 1980 Hague Convention') provides:

'The objects of the present Convention are:
(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'

**Article 3**
'The removal or the retention of a child is to be considered wrongful where:

(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 which the child was habitually resident immediately 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.

The rights of custody mentioned in subparagraph (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.'

**Article 12** Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

**Article 13**

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that - (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (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. The judicial or administrative authority may also refuse to order the return of the child if 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. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

**Article 15**

'The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.'

***European Union law - The Brussels II Revised (Regulation No. 2201/2003)***

**Recital 17** in the preamble to Regulation No 2201/2003 states:

'In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end [the 1980 Hague Convention] would continue to apply as complemented by the provisions of this Regulation, in particular Article 11.'

**Recital 33** in the preamble:

'This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union ["the Charter"]. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of [the Charter].'

**Article 2(9)** defines 'rights of custody' as covering 'rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence'.

**Article 2(11)** provides that the 'removal or retention … of a child' is wrongful where:

'(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.'

**Article 11** headed '**Return of the child**', provides:

'1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the [1980 Hague Convention] in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

- omissis -

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.
Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

- omissis -

6. If a court has issued an order of non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately, either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives the information mentioned in paragraph 6

must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time-limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.'

**Article 60** headed '**Relations with certain multilateral conventions**', is worded as follows:

'In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(e) the [1980 Hague Convention].'

**Article 62(2)** headed '**Scope of effects**', provides:

'The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.'

***Maltese National law***

**Child Abduction and Custody Act – Chapter 410, Laws of Malta.**

**Article 3.**
(1) In this Part of this Act "the Convention" means the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on the 25th October, 1980 and the relevant Articles of which Convention are set out in the First Schedule to this Act.
(2) Subject to the provisions of this Part of this Act, the provisions of the Convention set out in the First Schedule to this Act shall have the force of law in Malta.

**Article 4.**
(1) For the purposes of the Convention as having the force of law in Malta under this Part of this Act, the Contracting States other than Malta shall be those for the time being specified by the Minister responsible for foreign affairs by an order in the Gazette under this article.

(2) Such order shall specify the date of the coming into force of the Convention as between Malta and any State specified in it; and, except where the order otherwise provides, the

Convention shall apply as between Malta and that State only in relation to wrongful removals or retentions occurring on or after that date.

**Jurisprudence.**

**Wrongful Retention.**

"**Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Michael Caruana**" decided by the Court of Appeal on the 3rd August 2008:-

"……il-Qorti tinnota 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 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."

**Subsequent Acquiescence**.

Reference is made to a judgment of the Court of Appeal of the 25th February 2011 in the names "**Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Lara Maria Merlevede nee' Borg St. John**". The facts of that case resemble in many respects the facts of the present case. In that case the parents resided with their children in France and they agreed that the mother visits Malta for three months together with the children while the father remained in France. When time was up for their return to France the mother refused and after almost a year the father instituted proceedings under the Hague Convention. The Court of Appeal had this to say regarding 'subsequent acquiescence':-

"Fl-ewwel lok, din il-Qorti trid twarrab is-sottomissjoni tad-Direttur appellant, bazata fuq il-kaz Ingliz **In Re W (Abduction: Procedure)** deciza minn Wall J. fl-1995. F'dik il-kawza l-Qorti qalet li l-kunsens irid ikun "clear and compelling" u, anzi, "in normal circumstances,

such consent will need to be in writing or at the very least evidenced by documentary material". Din il-Qorti ma taqbilx ma' din l-ahhar stqarrija li, fuq kollox ma tidhirx li giet aktar segwita lanqas fl-Ingilterra. Fil-ktieb **Bromley's Family Law** (10th Edit, 2007 f'pagna 650) intqal hekk fuq din il-kwistjoni: "**In Re W (Abduction: Procedure)**, Wall J considered that to establish consent the evidence needs to be clear and compelling, which in his Lordship's view means that the evidence normally needs to be in writing or evidenced by documentary material. Accordingly, a parent must establish the defence 'on the face of the documentation' since, if he cannot do so, 'oral evidence is unlikely to affect the issue and will not be entertained'. However, in **Re C (Abduction: Consent)** Holman J, while agreeing that the evidence needs to be clear and cogent, took issue with Wall J over the need for writing. As he pointed out, 'Article 13 does not use the words "in writing", and parents do not necessarily expect to reduce their agreements and understandings about their children to writing even at the time of marital breakdown'. In his view it is sufficient that the defence is clearly established. He also disagreed with Wall J that consent had to be 'positive' if that meant 'express'. In Holman J's views it is possible in an appropriate case to infer consent from conduct.. In **Re K (Abudction: Consent)** Hale J, preferring Holman J's views on both counts to those of Wall J, said that while it was obvious that consent must be real, positive and unequivocal, it did not necessarily have to be in writing. She further held that once given (and acted upon) it cannot subsequently be withdrawn by the parent who gave it subsequently thinking better of it. Wall J has now reconsidered his view and accepts Holman J's analysis." Ghalhekk, il-kunsens mhux mehtieg li jkun la bil-kitba u lanqas espress, pero`, irid ikun car u inekwivoku. Fl-Ingilterra hu ammess ukoll li l-kunsens jista' jirrizulta minn kondotta. Fil-kaz **Re: H (Minors) (Abduction: Acquiescence)** deciza mill-House of Lords fl-1998, apparti li ntqal li akkwiexxenza tiddependi mill-"actual state of mind" ta' dak li jkun, il-Qorti osservat li, min-naha l-ohra, b'mod oggettiv; "Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

Reference is also made to a judgment delivered by the Court of Appeal in England in the names: **Re. S. (Abduction: Acquiescence) [1998]**.[1] :

"The defence of acquiescence is to be found in Art 13 of the Hague Convention and is an exception to the general requirement under the Convention embodied in Art 12 that 'the authority concerned shall order the return of the child forthwith'. The relevant part of Art 13 reads as follows:

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-

[1] ref.: HC/E/UKe 49; [26/11/1997; Court of Appeal (England); Appellate Court]; 2 FLR 115

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; ...'

The English approach to this part of Art 13 is now summarised in the speech of **Lord Browne-Wilkinson in Re H (Abduction: Acquiescence) [1998]** AC 72, [1997] 1 FLR 872. At 87G-88D and 882A-E respectively he said:

'What then does Art 13 mean by "acquiescence"? In my view, Art 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted? This is the approach adopted by Neill LJ in Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819 and by Millett LJ in Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716. In my judgment it accords with the ordinary meaning of the word "acquiescence" in this context. In ordinary litigation between two parties it is the facts known to both parties which are relevant. But in ordinary speech a person would not be said to have consented or acquiesced if that was not in fact his state of mind whether communicated or not.

In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. **Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions.**

Then at 90D-G and 884E respectively Lord Browne-Wilkinson summarised it:

'To bring these strands together, in my view the applicable principles are as follows:

(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in Re S (Minors) "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".

(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.

(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced……the extent of the father's knowledge of his rights is in my view crucial to the consideration of acquiescence and whether he formed the subjective intention to agree to the child remaining in the UK.

In earlier decisions of this court the lack of knowledge and misleading legal advice have been considered relevant factors to which the court should have regard, see Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 and Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819. In Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 this court held that it is not necessary, in order for the defence under Art 13 to succeed, to show that the applicant had specific knowledge of the Hague Convention. Knowledge of the facts and that the act of removal or retention is wrongful will normally usually be necessary. But to expect the applicant necessarily to have knowledge of the rights which can be enforced under the Convention is to set too high a standard. The degree of knowledge as a relevant factor will, of course, depend on the facts of each case."

The House of Lords sitting as the Superior Appellate Court had this to say in the case re. H and Others (Minors) (Abduction: Acquiescence) [1988][2] :-

"The phrase 'subsequently acquiesced in the removal or retention' has been elaborated in England by case law. The governing authorities are *In re A. (Minors) (Abduction: Custody Rights)* [1992] Fam. 106, *In re A. Z. (A Minor) (Abduction: Acquiescence)* [1993] 1 F.L.R. 682 and *In re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819. Their general effect, to summarise it shortly, is as follows. In order to establish acquiescence by the aggrieved parent, the abducting parent must be able to point to some conduct on the part of the aggrieved parent which is inconsistent with the summary return of the child to the place of habitual residence. 'Summary return' means in that context an immediate or peremptory return, as distinct from an eventual return following the more detailed investigation and deliberation involved in a settlement of the children's future achieved through a full court hearing on the merits or through negotiation. Such conduct may be active, taking the form of some step by the aggrieved parent which is demonstrably inconsistent with insistence on his or her part upon a summary return; or it may be inactive, in the sense that time is allowed by the aggrieved parent to pass by without any words or actions on his or her part referable to insistence upon summary return. Where the conduct relied on is active, little if any weight is accorded to the subjective motives or reasons of the party so acting. Where the relevant conduct is

[2] http://www.incadat.com/ ref.: HC/E/UKe 46
[10/04/1997; House of Lords (England); Superior Appellate Court]
Re H. and Others (Minors) (Abduction: Acquiescence) [1998] AC 72, [1997] 2 WLR 563, [1997] 2 All ER 225

inactive, some limited enquiry into the state of mind of the aggrieved parent and the subjective reasons for inaction may be appropriate."

**Considerations of this Court**.

Applicant, in its capacity as the Central Authority in Malta, is requesting a return order in respect of the minor children on the strength of Chapter 410 of the Laws of Malta, the 1980 Hague Convention on the Civil Aspects of Child Abduction which has the force of law in Malta and of Council Regulation number 2201/2003 (Brussels II Bis).

The court heard the testimony of both parents and of several other witnesses. In essence both parents are in agreement as to the facts leading to the mother coming to Malta together with the two minor children in May 2014. As a married couple they resided in Belgium were both worked with one of the European Union institutions. At the time their son was two and a half years of age and the daughter was six months old. It is not contested that at the time Belgium was their habitual place of residence and that under Belgian law both had and exercised equal parental authority and custody rights over their two minor children.

They had serious marital problems, their marriage was breaking down and they agreed that the mother together with both children come to Malta, the mother's country of origin, in order to clear her ideas about their marriage. Both are in agreement that no date was set for their return to Belgium. However the father contends that he expected her to return within a couple of weeks while the mother contends that no return date was agreed and the matter of returning was left open since one of the options discussed at the time to save their marriage was that both parents together with their children relocate to Malta.

In its application the Central Authority states that there was agreement between the parents that the mother returns to Belgium with the children as soon as the MEP elections were over ie. between the 19th and the 25th May 2014. In his testimony however Mr W stated that he knew that mother and children would not return on the date of the subsidised return ticket. He agreed to a later return date but no specific date was established or agreed upon.

Applicant claims that the mother's decision not to return to Belgium with the children amounts to a wrongful retention in terms of Article 3 of the First Schedule of Chapter 410 which corresponds to Article 3 of the 1980 Hague Convention. On her part the mother claims that she came to Malta with the children with the father's consent at a time when they were seriously considering relocating to Malta once the employment contract of the father expired at the end of the year.

On the basis of these facts it is amply clear that there is no case of illegal removal of the children from one jurisdiction to another. Both knew that this was not the normal short visit by the mother to her family and country of origin. The father, a lawyer by profession, was well aware of his rights under the 1980 Hague Convention so much so that by

October/November 2014 he started mentioning to his wife that unless they reached an amicable agreement regarding the care and custody of the children he would invoke the 1980 Hague Convention before a year lapses.

The fact that no specific date was established for the return of mother and children to Belgium does not mean that the father agreed to an indefinite stay in Malta. This in a way is also acknowledged by the mother when she testifies that when they agreed to the visit the return date was left open. The court therefore concludes that at that moment in time the father had good reasons to believe that the mother will return back to Belgium together with the children within a short time. At the onset of the visit to Malta in May 2014 neither the mother requested nor the father consented to an indefinite stay. It is clear that a time frame for the return was not established or agreed upon. At that moment in time the mother did not tell her husband that she will not be returning to Belgium and that she will stay in Malta indefinitely together with the children.

Having established that the father was justified in expecting the mother to return to Belgium together with the children within a reasonable time of a couple of weeks, the Court is of the opinion that when sometime through the visit the mother made up her mind not to return to Belgium with the children, at that moment in time an "unlawful retention" occurred and the father was well within his rights to protest her unilateral decision which was in breach of his parental and custody rights over his children.

The pivotal question which now needs to be addressed is whether there was a moment in time between the mother's unilateral decision not to return indefinitely and the father's decision to proceed under the 1980 Hague Convention when the father "acquiesced" in terms of Article 13 of the Convention which provides that the Court is not bound to order the return of the child if the parent opposing the return establishes that the requesting parent ***"had consented to or subsequently acquiesced in the removal or retention;***"

Once the mother travelled to Malta with the children with the father's consent, the visit cannot be considered under the heading of "removal". Applicant rightly points out in its note of submissions that "consenting" and "subsequently acquiescing" are distinct from each other. "Consent" means prior approval whilst "subsequent acquiescence" means approval *ex post facto*.

The Court shall now embark on an examination of the evidence tendered by both parties with respect to the father's actions following that point in time when it became apparently clear that the mother did not intend to return to Belgium with the children.

Taking account of the testimony of both parents the Court concludes that when the mother came to Malta in May 2014 the parents were already seriously considering relocating to Malta. The Court will not delve into the reasons why these two parents were discussing relocating from Belgium to Malta. Suffice it to say for the purposes of the present court case

that for respondent the only way to salvage their marriage was to remove her husband from the environment of promiscuity to which he admits forming part.

The Court therefore concludes that although it is true that both parents had been for long discussing relocation to Malta, when the visit to Malta actually took place in May 2014 the discussion was at its full throttle so much so that both a couple of weeks before respondent's return to Malta and just two weeks after respondents arrival in Malta, Mr W was applying for jobs in Malta. He was applying for long term jobs and not for summer jobs.

It is the opinion of this Court that by latest October/November of 2014 Mr W was aware that his wife was definitely not going to voluntarily return to Belgium with the children. This is why at that time he started telling his wife that unless they came to an agreement regarding the care and custody of the children he would invoke the 1980 Hague Convention.

That development in the chronology of events requires a thorough in depth analysis. The Court observes that the father was not telling his wife that he would file an application under the 1980 Hague Convention in the event that she does not return to Belgium with the children but that he would file such an application in the event that they did not reach an amicable settlement regarding the custody of the children. That statement by the father by its very nature shows that by that time the father was prepared to accept a permanent relocation by the mother and the children to Malta on condition that they reached an agreement regarding his parental rights over the children. Understandably, at that time he was not insisting that the children return to Brussels but that an agreement is reached regarding his parental rights over the two children, whether they reside in Belgium or Malta. So much so that at least till January 2015 the father kept on applying for jobs in Malta in order to relocate and be near the children. The father not stated that he stopped is search for a job in Malta.

This shows that at that moment in time the father was fully aware that the mother would not return to Belgium with the children. Their marriage was given the proverbial fatal blow when during the father's visit to Malta for Christmas of 2014 Ms K discovered that in spite of all his promises her husband continued with his promiscuous life back in Belgium.

By that time it was amply clear to both parties that the wife would not return to Belgium with the children. The change brought about by that event was that all chances of recouping the marriage were now lost. What is relevant to this case is the fact that even at that late stage when it was amply clear that the marriage could not be salvaged and therefore husband and wife were not going to reconcile, Mr W was showing around the matrimonial home in Brussels to potential tenants with the intention of renting out the matrimonial home and come to Malta. The email sent by Mr W to his wife on the 15th January 2015 confirms that he had taken photos of the matrimonial home to be used in the listing of the property to be rented out. The email of the 21st January 2015 is evidence that Mr W was personally showing the property to prospective tenants.

At the same time Mr W continued his search for a job in Malta, actually intensifying his efforts.

In April 2014, just a month prior to the mother's visit to Malta, Mr W asked **Mr Victor Rizzo** to look for a job for him in Malta. In his affidavit Mr Rizzo explained: "I personally met D in April 2014…D confirmed to me that he was really interested in working in Malta and I asked him to provide me with a CV. I said that if I come across a suitable opportunity I will immediately let him know about it. D was pleased with this proposal …..". On the 6th May 2014 Mr W emailed his CV to Mr Rizzo. On the 19th May 2014 Ms K came to Malta with the children.

In her testimony by affidavit **Dr Rapa Manche** states that on the 31st May 2014 respondent sent to her an email with Mr W's curriculum vitae. The email included an email sent by Mr W to his wife dated 29th May 2014 with the subject matter "My CV for your cousin". In his email to his wife who at the time was already in Malta with the children Mr W writes: "Attached the same CV I shared with uncle Victor. I suppose it would be useful as a start also with your cousin… I can of course always update if needed for a particular case…."

Another witness, **Dr Juanita Brockdorff** testified "That in the second half of the year two thousand and fourteen (2014) I became aware of D W's intention to search for an occupation on an indefinite basis in Malta. That as a result of the above I proceeded to forward his C.V. to two of the largest online gaming companies in Malta known to me. That in pursuit of the above I called the HR Manager at one of such two companies to explain and explore the possibilities of a Swedish lawyer, being the nationality and profession respectively of D W, gaining employment with such firm (Betclic/Everest Group based in Sliema) in Malta".

An email dated 22 August 2014 is exhibited as Doc D with a note filed by respondent. It is an exchange between Mr W and **Mr Micallef of B3W Ltd** discussing employment opportunities for Mr W in Malta.

Dok 1C attached with respondent's affidavit is an email exchange dated 12th November 2014 between Mr W and **Ms Maria Camilleri, the Recruitment Officer at CSB Group in Malta** which is proof that as late as November 2014 Mr W was still applying for jobs in Malta after his wife and children had been staying in Malta for six months.

During the same period Mr W met a certain **Mr Nicholas Genovese, Recruitment Consultant at Pentasia** in connection with the former's pursuit of a job in Malta. In his email Mr Genevose states: "…..was nice getting to know you and looking forward to helping you make the move to Malta". This email shows that Mr W was externalising his plans to move and relocate to Malta to join his wife and children albeit not necessarily reconciling but at least to be near his children.

Relevant also is an email dated 7th November 2014 (Doc 1b attached to respondent's affidavit) in which Mr W asks Mr Genovese of Pentasia to consider Ms K for a job in Malta.

In December 2014 during the second visit of W since respondent came to Malta in May 2014, she discovered that in her absence and in spite of all his promises Mr W continued with his promiscuous activities back in Belgium. This event seems to have shattered the last possibilities of a reconciliation and salvaging the marriage. After that occasion Mr W acknowledged with Ms K that at that point there was no way that she would consider returning to Belgium. In spite of that dramatic development shattering the last hopes of salvaging a crumbling marriage and aware that Ms K will definitely not reconcile with him nor return voluntarily to Belgium with the children he continued his pursuit for a job in Malta.

On the 23rd January 2015 **Mr Andrew Zammit of CSB Group** wrote to Mr W: "It was good to meet you earlier today. Thank you for coming over. As discussed earlier today please find attached the outline of the objectives to establish Malta as an IP hub." The following day Mr W replied (Doc 1c) to Mr Zammit suggesting that he be employed "as the director of the department". During his testimony Mr W said that when interviewed by Mr Zammit it was made amply clear by Mr Zammit : "…. have no illusions I am not going to offer you a job here,……". In the context of the present court case what is relevant is not what Mr Zammit was ready to offer Mr W but Mr W's intentions when he applied with CSB. It is amply clear that for the whole duration of Ms K 's return to Malta till a couple of days before filing proceedings under the Hague Convention Mr W was applying for jobs in Malta initially with the intention of relocating to Malta and hopefully reconciling with his wife and salvaging his marriage and subsequently to be in regular contact with his children although the marriage had broken down and respondent filed for personal separation.

It is the Court's view that when the mother unilaterally decided not to return to Belgium, her action amounts to an "unlawful retention". However by his words and actions the father "subsequently acquiesced". The words and actions of the father following the mother's decision not to return to Belgium and retain the children in Malta may be summarized as follows:-

1. Mr W intensified his search for a job in Malta.

2. He was actively involved in renting out the matrimonial home in Belgium in order to come and stay in Malta.

3. He was promoting his wife's CV for a job in Malta.

It is true that at the same time Mr W was applying for jobs in Belgium and in Sweden, his country of origin. However those applications do not neutralise the fact that the preponderance of the evidence produced show that Mr W had acquiesced to the mother's decision to retain the two minor children in Malta. Actually his application for a job in Sweden shows that he was prepared to cut all connections with Belgium and relocate to Sweden in the event that he found a job there.

It is not contested that since the mother came to Malta with the children a studio flat they rented in Belgium to accommodate respondent's parents when they regularly visited was sub-let; their car was sold and the matrimonial home was listed to be rented out. Mr W testified that this was done after a drastic reduction in their income following respondent's termination of employment with the Commission. He denies that this was done in line with their intention of relocating to Malta. Ms K on her part reiterates that this was done in consonance with their plans for Mr W to join them in Malta. During his testimony Mr W tried to give the impression that the matrimonial home was listed to be rented out without his intervention. The Court is of the view that Mr W was economical with the truth here knowing full well that renting out the matrimonial home is compatible with a decision to relocate. As late as the 21st January 2015 Mr W agreed with respondent to show the matrimonial home to a certain Ms Beata Bartosova with a view of renting it out to her. In an email dated 15th January 2015 sent by Mr W to Ms K , he states that he took pictures of the apartment in view of being listed to be rented out. Taking photos of the rooms forming part of the matrimonial home and opening the matrimonial home for viewing by potential tenants is compatible with his acquiescence that the children remain in Malta with their mother.

It is the Court's view that once the father decided to rent out the matrimonial home, find a job in Malta and relocate here he was acquiescing to the retention. It is also established jurisprudence that once a parent acquiesces to a retention he or she may not withdraw that acquiescence. As has been declared by the Court of Appeal in England in the above quoted judgment se **Re. S. (Abduction: Acquiescence) [1998]:-**

"Once the father …….did acquiesce in the retention of M by the mother, as I believe he did, his subsequent change of heart for whatever reason in September 1997 is irrelevant, **since acquiescence had already taken place. Acquiescence is not a continuing state of affairs and, once given, cannot be withdrawn**"

**Decision**.

For the reasons outlined above the Court decides that respondent managed to prove that Mr W did acquiesce in the retention in Malta of the two minor children by the mother in terms of Article 13 (a) of the 1980 Hague Convention for the Civil Aspects of Child Abduction as incorporated into the Laws of Malta by virtue of Chapter 410 and in terms of Brussels II Bis.

The application of the 5th March 2015 filed by the Department for Social Standards is being rejected.

Expenses to be borne by applicant.

## < Final Judgement >

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