



**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
RAYMOND C. PACE**

Seduta tal-15 ta' Mejju, 2003

Rikors Numru. 297/2003

Director of Family Welfare

VS

Heleen Cornelia Van Der Linde

The Court,

I. PRELIMINARY.

Whereby in the application filed by the Director for Family Welfare on 21st February 2003 it was stated that:-

This application is being made in terms of **Act XIII of 1999** which ratified two Conventions relating to the civil aspects of international child abduction and to the recognition and enforcement of custody decisions.

This application regards the minor Yorrick Bos, who was born in Assen (Holland) on 17th July 1998, as shown in

the certificate herewith attached and marked as Doc. "AB 1", son of Harm Bos and Cornelia Van Der Linde, who was illegally removed from his habitual residence, that is Holland and this as shown from the municipal records herewith attached and marked as Doc. "AB2" and Doc. "AB 3", and was brought to Malta on the 11th of August or thereabouts.

The Maltese Central Authority was requested by the Dutch Central Authority and this in terms of **article 7 of the Convention relating to the Civil Aspects of International Child Abduction**, to discover the whereabouts of the minor and to secure his immediate return.

In fact it was found out that the minor was residing with his mother in is-Sidra Street, House-Ashwater, Swieqi.

The Maltese Central Authority was authorised by the minor's father, Harm Bos, to act on his behalf and this as shown in the authorisation herewith attached and marked as Doc. "AB 4".

The divorce of the minor's parents was decreed by order of the Court of Leeuwarden on 25th July 2001 and the father's rights of access were decided upon in the decree of this Court on 3^d April 2002, a copy of which decree is being herewith attached and marked as Doc. "AB 5".

Notwithstanding the mother was given the minor's custody, both parents have joint parental responsibility.

According to **article 251 of the Dutch Civil law**, an extract of which is being herewith attached and marked as Doc. "AB 6", during marriage the parents have joint responsibility of their children; but after dissolution of the marriage the parents who have joint responsibility have to continue sharing that responsibility unless the parents or one of them does not request the Court to order in the minor's interest that responsibility be conferred on one of them alone. In the present case the parents of the minor Yorrick did not request such orders because they wanted

joint responsibility to continue subsisting and so the Dutch Court did not have to deal with this.

According to the Dutch civil law joint parental responsibility means that each parent can exercise his responsibility without breaching the rights of the other parent and so no decisions regarding the minor can be taken by one party without the consent of the other.

In the present case Mrs Van Der Linde brought her minor son to Malta and consequently changed his habitual residence without the father's consent and so breached the rights of parental responsibility and acted wrongfully and this in terms of **Article 3 of the Convention** above-mentioned.

The father has a right to participate in the important decision of changing the minor's habitual residence even more so considering the fact that he was exercising his rights of access as decreed by the Dutch Court before the mother removed this minor wrongfully from Holland.

Consequently the applicant is respectfully requesting this Honourable Court to order the return of the minor back to Holland and in the meantime to give such directives in the interests of the minor concerned, including service to the authorities concerned, in order to prevent that he is again removed wrongfully from Malta to another country, which removal would make the minor's return to his habitual residence much more difficult and this in clear breach of the Convention relating to the Civil Aspects of International Child Abduction.

Saw the record of the proceedings of the 27th March 2003 wherein Dr Francesco Depasquale informed the Court that during the pendency of these proceedings, his client, mother of the said minor child, did not intend to take the child out of this jurisdiction. Dr Audrey Maria Buttigieg Vella bound herself to submit to the Court, within 7 days from said date, the lists of Contracting States primarily, Holland, party to the said Convention. Dr Francesco Depasquale submitted that the Court grants his client's

request to have relative documentation to these proceedings notified to his client in the English language. The Court acceded to the request of Heleen Cornelia Van Der Linde, and ordered that all the relative documentation, including the said application and the Court decree of the 21 February 2003, be notified in English to 'respondent' at her local place of residence "14, Narrow Street, Naxxar" or through her lawyer in Court. Dr Francesco Depasquale declared that the child attends school at Pembroke. Dr Francesco Depasquale also informed the Court, that proceedings haven't been undertaken in Holland to contest the original proceedings. Dr Depasquale presented, voluntarily in Court, the relative passport of his client and the child. Such document was indicated as Doc. "FD 1". The case was adjourned for the 8th of April 2002 at 10:45 for final submissions.

Saw the reply of the respondent Heleen Cornelia Van Der Linde dated 7th April 2003 to the Application filed by the Director for Family Welfare wherein she submitted that:

On Friday 4th April 2003, her legal counsel has been notified with the acts filed by the Applicant against her as requested by the Dutch Central Authority.

The claim being forwarded against the respondent is that she has acted wrongfully in terms of **Article 3 of the Convention on the Civil Aspects of International Child Abduction** as ratified by the **Child Abduction and Custody Act, Chapter 410 of the Laws of Malta**.

Respondent considers these claims to be totally unfounded and requests the present Court to avail of the powers granted to it in terms of **article 13** of the same Convention, and this after having taken into consideration all the facts of the case.

Preliminary pleas

Nevertheless, prior to forwarding her submissions as to facts of the case, respondent respectfully would like to forward the following preliminary pleas, which have to be

considered by the Court prior to assessing the whole case.

Applicant has failed to present the necessary documentation proving that, in terms of **Section 4 of the Child Abduction and Custody Act**, The Netherlands is recognised as being one of the Contracting States by the Minister responsible for Foreign Affairs.

ii. Applicant has failed to present the application by the person claiming that the child was removed in breach of custody rights as contemplated for in Article 8 of the Convention, with all the information as requested in the said Article, which application should be communicated in the English Language as provided for in **Section 13 (2) of the Act**.

iii. Applicant has failed to exhaust all remedies available to him prior to referring the matter to the First Hall of the Civil Court, which remedies are clearly specified in **Article 7 of the Convention**

Facts of the case

Following a long and acrimonious battle, wherein respondent's husband battled and objected vehemently to every attempt made by respondent to obtain the divorce, respondent Mrs Van Der Linde finally divorced from her husband Harm Bos as stated by the Applicant however, unlike as stated by applicant, both parties retained custody of the child, as parental responsibility is tantamount to custody in terms of Dutch law. This was solely due to the respondent's ex-husband constant hostility towards a settlement, even in view of the fact that, whilst proceedings were underway, respondent started a relationship with another person, to whom she is now happily married.

Following the divorce proceedings, access to the minor Yorrick Bos was regular and Harm Bos used to take the child for a weekend, every other weekend. It so happened, however, that, at a certain stage, Harm Bos

got to know, through information he had obtained from the child Yorrick Bos, that respondent was going to get married to a Dutch national who was residing in Malta. This was on the 12th of May 2002.

That day, when Harm Bos brought back Yorrick after his weekend access, he informed respondent, in the presence of her partner Mr Peter Groeneveld, that as she was getting married, he was no longer interested in exercising his parental right of access over Yorrick and he was not going to collect him any more.

Subsequently, Yorrick confirmed to respondent that, over the weekend, his father, Harm Bos, had informed him that that was the last weekend he would be spending with him, since he was not going to see him any more.

As a matter of fact, from that date onwards, Mr Harm Bos never came back to collect his son for the weekend access, notwithstanding the fact that respondent remained residing in the same place for several months after.

On the 11th of August 2002, respondent got married to Mr Peter Groeveveld, which marriage Harm Bos was aware of.

The subsequent day, 12th August 2002, respondent, through her legal adviser, informed Mr Harm Bos that, in view of the fact that he had not been visiting the child for several months, she considered his action as tantamount to waiving his rights of paternal authority over the child and informed him that she would be going to live in Malta with Yorrick. She eventually moved to Malta and established her residence here in Malta.

Yorrick was registered with the Verdala International School and has been attending such a school ever since, having made friends with various children.

In December of 2002, more than six months after Harm Bos had last exercised his right to see Yorrick, the legal adviser of Mr Bos communicated to the respondent's legal

adviser in the Netherlands, informing him that Mr Harm Bos intended to exercise his right of paternal authority. Respondent's legal adviser subsequently informed him that Harm Bos had waived his rights, as a result of which Harm Bos lodged a report with the Dutch Authorities which report most probably led to these Proceedings being filed against the respondent.

On the 21st of March 2003, respondent filed a writ before the Court of Leeuwarden, wherein she requested that Harm Bos rights of access be withdrawn as a result of his non-compliance with his duties as above indicated. On the same day, a letter was sent to Harm Bos' solicitor requesting them to stop the proceedings instituted in terms of the Convention in Malta.

No reply was received from Mr Harm Bos, as a result of which, on the 28th March 2003, an application was filed before the Court of Leeuwarden requesting that the proceedings instituted by the Central Authority and being heard in Malta be halted, as well as requesting that respondent is allowed to keep the minor child in Malta and that, until the writ of summons filed on the 21st March 2003 is decided upon, the rights which Harm Bos had with regards to the child be suspended. This application has now been appointed for hearing for the 14th of April 2003 and a final decision shall be given on the 22nd of April 2003.

Requests

Considering all the above, the respondent humbly requests this Honourable Court to:

1. Suspend the present proceedings until the application filed on the 28th of March 2003 before the Court of Leeuwarden is decided and final;
2. avail of the opportunity granted to the Court in terms of **Article 15 of the Convention** to request the applicant to obtain, from the authorities of The Netherlands, a decision

stating that the removal of Yorrick was wrongful within the meaning of **Article 3 of the Convention**;

3. avail of the discretion granted to it in terms of **Article 13 of the Convention** and order that the minor child shall not be returned in view of the fact that:

a. Harm Bos was not actually exercising the custody rights at the time which Yorrick Bos was brought over to Malta;

b. The same Harm Bos "acquiesced in the removal" as he had been informed of respondent's intentions and did not object to same when such a request was made, such an objection being made only more than four months later;

c. Removal of the child from Malta would, at present, expose the child to "psychological harm"

Took cognisance of the record of the Court proceedings of the 8th of April 2003 where in Dr Audrey Buttigieg Vella presented a copy of the relative application by the father through the Dutch Central Authority which is being marked as Document "JD1" and Dr Francesco Depasquale renounced to the first two preliminary plea. Dr Francesco Depasquale presented four documents with a note "VDL1" – "VDL4". Testimony of Joseph Camilleri in the name of the Director of Family Welfare and Heleen Cornelia Van Der Linde was submitted and recorded. The Court directed the parties to present written submissions on their respective claims, the applicant within 7 days from date of Court sitting, with a copy to the mother's legal counsel who was granted a seven day period from notification to file and submit the aforesaid note. Directions were given so that such written submissions were to be presented in a clear and concise manner. The case is postponed for a final decision on the said application for the 29th of April 2003.

Took cognisance of the note of written submissions of the Director of Family Welfare dated 15th April 2003.

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Took cognisance of the note of written submissions of the Heleen Cornelia Van Der Linde dated 28th April 2003.

Took cognisance of the record of proceedings of the 2nd May 2003.

Took cognisance all the documents presented.

II. CONSIDERATIONS

The records of today's proceeding show that the Department of Social Welfare in Malta had received an application from the Central Authority of Holland alleging that Heelen Van Der Linde had taken her child from the Dutch jurisdiction, and therefore a request was made to the Maltese Central authorities under article 7 of the Convention.

In actual fact the child was located with his mother at Sidra Street, House-Ashwater, Swieqi, and the father of the child authorised the Local Authority to proceed with these same proceedings.

It also results that the parents of the child divorced by order of the Court of Leeuwarden, Holland in the 25th July 2001 and by a further decree of the 3rd April 2002, it was decided that Yorrick born on the 17th July 1998, in the municipality of Assen "*shall stay with the man in weekend per fourteen days from Friday 18.00 hours to Sunday 18.00 Hours, whilst contact during vacations and public holidays will be arranged by mutual consultation*".

It also results that on the 11th August 2002 the respondent Heleen Cornelia Van Der Linde brought the child to Malta, where he is presently, and the present Court proceedings were filed under **Chapter 410 of the Laws of Malta**.

The father of the child reported the matter to the Leeuwarden Police Authorities on the 12th August 2002 and on discovering the applicability of the Civil Aspects of

International Child Abduction presented a formal report on the 10th January 2003.

On the 28th March 2003 respondent filed proceedings in Leeuwarden requesting that the decree of the same Court of Leeuwarden granting visiting rights to the father of the child be revoked so that the said father will have no visiting rights, to declare that the respondent be declared to be legally entitled to have the child with her in Malta, to declare that Yorrick's main residence is in Malta, as long as respondent in this case is in Malta and consequently order the father to withdraw the present proceedings in Malta, to grant respondent preliminary approval that her child resides with her in Malta pending the judgement of the said Court in Holland, and to suspend the social intercourse between father and child according to the 3rd April 2002 decree until the said decision by the competent Dutch Courts.

On the 22nd April 2003 the said Leeuwarden Court dismissed the present respondents requests whereby it was decided that it will not grant a decree declaring that Yorrick's temporary place of residence be in Malta, since it resulted to the said Court that the fact that the respondent took the child out of Holland did not mean that she had a right to do so, taking into consideration the fact that in virtue of the decree of the 25th July 2001 Yorrick's main place of stay was Holland and the child was brought to Malta without the permission of the custodial parent; did not suspend the visiting rights until the decisions on the merits of the case for a change in visiting rights is finally decided on the merits.

This application was made under **article 6 (1) of Chapter 410 of the Laws of Malta**, requesting this Court to order redress since the said Yorrick was alleged to have been wrongly removed with the meaning of article 3 of the Convention.

According to **article 3 of the Convention:-**

“The removal 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 exercised but for the removal or retention.

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”.

It appears to this Court from the facts of the case as presented in these proceedings that the judicial decision which established the visiting rights or “*rights of access*” of the father, within the meaning of article 5 of the Convention on the Civil Aspects of International Child Abduction, was the decision of the 25th July 2001 of the Court in Leeuwarden which stated that the father had the right to have the child with him for one weekend from Friday 18.00 hours to Sunday 18.00 hours, and this decision still stands as confirmed by the decision of the same Court of the 22nd April 2003, all documents exhibited in these present proceedings.

It may also be stated that according to Dutch Law and in particular **article 251** thereof determines that upon dissolution of marriage or following judicial separation the parents shall have joint responsibility over the said minor unless the parents or one of them requests the Court that such responsibility be conferred on one of them and this in the interests of the said child.

It results that no such request was presented by the respondent to the Dutch Courts before bringing the child

over to Malta in August 2002, and therefore up to the date of this judgement, the parents of the minor child have joint responsibility over the said child according to the meaning given to the term pursuant to **article 247 of the same Dutch Law** which states that:-

“1. Parental responsibility shall include the duty and the right of a parent to care for and bring up his minor child.

2. Care and upbringing shall include care and responsibility for the physical and mental welfare of the child and for the development of his personality”.

It also results that the child was born in Holland of Dutch parents who were married in Assen on the 17th July 1998 and always resided in Holland, even after their separation, except that respondent from August 2002, (date of removal of the child from Holland), has been residing in Malta where her husband P.M. Groeneveld and in fact brought over with her to Malta the same child subject of the present proceedings.

Thus the law of the State in which the child habitually resided is that of Holland, and according to that law the father of the child has visitation and contact rights as decreed in the decisions of Dutch Court referred to and also joint responsibility with the mother over the said child according to the relevant articles of the Dutch Code above-mentioned.

It also results that the said child was taken outside the jurisdiction of the Dutch Courts by the respondent, and this was done without the authorisation, express or otherwise by the father of the said child. This was also done by the respondent without any recourse whatsoever to the Courts in Holland, so that the decision by the respondent to take the child with her to Malta was in this Court's opinion unilateral and arbitrary and without even the slightest hint of consultation with the father of the said rights, who was obviously prejudiced by the mother's decision, both with regard to his visitation rights as pronounced by the Dutch Courts following agreement

between the parents on such a matter, and with regard his rights and obligations over the said child under the joint responsibility regime of the Dutch Code.

Thus it is the Court's opinion that such removal of the child outside the Dutch jurisdiction by the respondent, mother of the said child, is a wrongful removal of the said child within the meaning of article 3 of the said Convention, Holland being the place where the child was habitually resident prior to his arrival in Malta, and this also according to Dutch Law, which law is the applicable law to determine these matters, being the Law of the State where the child was habitually resident prior to his removal. Reference is also made to the decree of the Leeuwarden Court on this matter dated 22nd April 2003.

It is relevant at this point to indicate that the first time that the respondent informed the father of the child of her decision to take the child to Malta was only on the 12th August 2002, and this where according to the said letter it is stated that *"my client has moved to Malta"*.

Thus it is obvious from such correspondence exhibited as Doc. "VDL 1" of the present proceedings that the respondent informed Yorrick's father about her stay in Malta with the child only after the said child was brought to Malta, as the above quotation from her legal advisor clearly shows.

This militates significantly against the respondent's claim that the applicant had acquiesced to her decision on the child's removal to Malta, and all her allegations on the matter are furthermore contradicted by the testimony of Harm Bos as given on the 2nd of May 2003 to this same Court, who made it very clear that in no way did he acquiesce or otherwise give his consent for the child's removal from Holland to Malta. The Court is satisfied that the allegations by the respondent on this matter have not only not been proven according to law, but also this Court finds that the child was removed from the Dutch jurisdiction without the consent, express or otherwise of the father, and without the respondent seeking prior

father's and Court's authorisation to this effect, and therefore her claim on this basis under **article 13 of the Convention** is being hereby rejected.

Furthermore it is submitted by the said respondent that Harm Bos was not exercising his custodial rights prior to the child's arrival in Malta and this on the alleged fact that on the 12th May 2002 he stated that he was no longer going to exercise his rights of visitation over the said child and in fact did not exercise that right up to the date of the child's removal from Holland.

However this assertion is also contradicted by the father's testimony in these proceedings, whereby he stated that since that date respondent did not co-operate with him over the said visitation rights, and although he suspected that the respondent might change her place of residence, she never attempted to inform him of her eventual address, whether in Holland or in any other country. It was only through his efforts, and the Maltese Central Authority that he discovered that respondent was in Malta, and these proceedings were duly initiated.

This Court also on the basis that also in the past and even whilst the parents were in Holland various difficulties had arisen in connection with such visitation rights, were the respondent could not be said to have fully co-operated with the father of the child in this respect, so much so that the Dutch Court in the last decision cited stated that "*joint consultation has failed miserably*", also finds for the applicant in this instance, confirming that the said visitation rights were not exercised by the father due to the obstructions procured by the respondent and her lack of co-operation with the father, and it appears to this Court that the respondent's aim is to terminate or otherwise restrict such visitation rights of the father to the said child.

It was also suggested by the respondent that on the basis of the provisions of **article 13 of the Convention** the return of the child to Holland might have a prejudicial effect on the minor within the meaning of the same, but nothing was substantially proven in this sense by the

respondent, and furthermore from the evidence of Harm Bos it results that his relationship with the child is quite healthy and if anything to be encouraged.

In the last instance the respondent submitted that not all remedies have been exhausted and in the Courts opinion this submission is totally unfounded since communication between her and the Central Authority on this matter has been constant, and respondent has never indicated that she would voluntarily return the child to Holland; she even started "*pendente lite*" Dutch proceedings to make such move to Malta somewhat permanent and to suspend the visitation rights of the father even in Malta, and ultimately made a request for the Dutch Courts to revoke and rescind all visitation rights so far entrusted to the father, most of which proceedings have mainly been instituted by the respondent, after the initiation of the current Maltese proceedings, and thus this claim by respondent is clearly vexatious.

The Court in view of this decision grants applicants request since it is the aim of the law and in particular **Chapter 410** and the **Convention on the Civil Aspects of International Abduction** to provide for the immediate return of minors so therein defined to their habitual place of residence from which they have been illegally removed, and the applicant has proved conclusively and to the satisfaction of this Court that the present is such a case, and that the applicant has correctly used the said procedure according to the relevant provisions of the said **Act XIII of 1999**.

III. CONCLUSION.

For these reasons, this Court decides that whilst denying all claims by the respondent in her reply of the 7th April 2002 as being unfounded in fact and in law, and **allows and grants the demands of the applicant to his application and therefore also accedes to the request of the applicant Director for Family Welfare of the 21st February 2003 and consequently orders the immediate return of the child Yorrick Bos born in**

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Assen Holland on the 17th July 1998 back to Holland, and to this effect the applicant is to use all effective means by law to ensure compliance with this decision according to the Laws of Malta and also Chapter 410 thereof.

Read.

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