



**QORTI CIVILI  
(SEZZJONI TAL-FAMILJA)**

**ONOR. IMHALLEF  
NOEL CUSCHIERI**

Seduta tas-26 ta' Mejju, 2011

Rikors Generali Numru. 197/2010

**The Director of Social Welfare Standards Department  
vs  
A B C**

**The Court,**

Having seen the application filed by the Director for Social Welfare Standards on the 18<sup>th</sup> November 2010, by virtue of which he is requesting this Court to order the return of the minor child D to the United Kingdom, and to give the necessary interim orders in the interests of the child, after having premised: that the said minor child was wrongfully removed from her place of habitual residence in the UK, by respondent [The Father] and brought to Malta, without the consent of the Mother; that at the time of the removal both parents were legally married, and therefore had joint parental responsibility according to UK law; that the removal of the child has violated the rights of custody of the Mother in terms of article 3 of the Child abduction and

Custody Act contained in Chapter 410 of the Laws of Malta;

Having seen the reply filed by respondent on the 29<sup>th</sup> November 2010, by virtue of which, after raising preliminary pleas of a procedural nature, he registered his opposition to applicant's request on the grounds: that the Mother never involved herself in decisions concerning the minor, did had no contact with the child, and that she has no evidence that she had visitation rights regarding the minor, or that she had actually exercised some form of custody either at the moment of the removal or prior to that; that the child's removal to Malta, was not clandestine or unlawful, and that there was no abduction of the child since the Father was the primary carer and that only the minor's residence was changed; that the Mother is an unpredictable and unstable person; that it is for this Court to decide whether an order for the return of the child to the UK is in the child's "supreme interests", and there exists "a grave risk that the return of the child would expose her to physical or psychological harm, or otherwise place her in an intolerable situation in terms of sub section [b] of article 13 of the Act;

Having seen all the acts of the case, including a copy of the Social Worker's Report drawn up by Corrina Bryant of Devon County Council; and also the affidavits presented by the parties;

Having heard all the evidence on oath, including the evidence of the child's parents;

Having heard the parties' oral submissions;

Having spoken to the minor child [aged 9] in chambers on the 14<sup>th</sup> April 2011;

Having considered;

### **The Facts**

That respondent [The Father] and E F, now G, [The Mother], both British citizens residing in the United

Kingdom married on the 24 February 2001. At that time, the Mother had two other minor children from a previous relationship. On the 23 May 2002 D was from this marriage.

Unfortunately the parties began to experience matrimonial problems, and in May 2009, the Mother left the matrimonial home for good, leaving behind the three children in the care of the Father. Eventually the two older children went to live with their natural father, whilst D remained in the care of respondent. The Mother however kept contact visits with her till July 2010 when these stopped.

In the meantime, the Father started a relationship with another woman who planned to further her university education in Malta.

On the 16<sup>th</sup> September 2010 the marriage was dissolved by a divorce decree absolute, but no provision was made as to the parental responsibility or care and custody of D. On the 22<sup>nd</sup> September 2010 the Father came to Malta together with his girlfriend and her minor son, planning to settle in Malta.

In the meantime, after contact was stopped in July 2010, and after the divorce decree, the Mother started proceedings for the return of D to the United Kingdom, and on the 15<sup>th</sup> October 2010 the British Courts made D a ward of court, and on the 20<sup>th</sup> October they issued a declaration of wrongful removal of D from their jurisdiction.

#### *The Father's Version*

The Father, a technician in the aviation industry, states that the marriage broke down because of his wife's mental illness [social anxiety disorder], and that, due to the her neglect of the family, the children, including D, were always under his care with the help of au pairs.

After having left home on two occasions to go to America to meet an acquaintance she had made through the

internet, the Mother left home for good, leaving the children in the care of the Father.

The Father states that, after the Mother left home, she was no longer interested in D, and she did not exercise her rights of custody on a regular basis. Personal contact ceased in July 2010, and her MSN contact dropped to once a week. He explains that the reason why no provision was made in the divorce decree as to who was to have effective custody of D, was that they had come to an agreement in the sense that, whilst D was to remain in the care of the Father, the latter was to pay the debts and expenses incurred by the Mother.

The Father states that D does not wish to leave Malta, and that if she were to be ordered to return to the United Kingdom to live with her mother, she would suffer psychological harm, and be placed in an intolerable situation which he describes in these words: "Should D be returned to live with her mother, even pending the residency order, she would be in a council house which has a horrible finishing, she will be looked after by a mother who has psychological issues and who is living with a man.. whom she argues with all the time; neither of them work, so they are unable to provide very well, and it is in an area, a council estate that is run down and decrap, [whilst D] is used to live in a nice house in Devon, [and] she is used to the countryside."

*The Mother's version*

The Mother, a qualified nutritionist and a qualified dental nurse, states that on May 2009 she left the matrimonial home on the spur of the moment because she could no longer take the controlling behaviour of her husband, as a result of which she developed psychological problems. Because of these problems she could not cope any more, and she was consequently forced to stay away from the family and shut herself up. This is the reason why she left the children with the Father on a temporary basis.

She states: "At the time I had nowhere to live, and so we agreed it would be in the children's best interests to

continue to stay with Respondent in the former matrimonial home. I also did not wish to cause unnecessary upheaval to the children by moving them as they were well settled.”

The Mother affirms that prior to the separation, she was the primary carer of the children.

Eventually, in April 2010 the Mother set up residence with her partner and their baby, and she tried to keep personal contact with D. However, she complains that contact was hindered by the Father whose attitude she describes as vindictive. She explains that when she had left the matrimonial home “He also refused to let me see D and the eldest two as often as I wanted to, and only let me see them when it was suitable for him although he will now say that I did not have direct contact with D at all, which is untrue” The Mother explains further that “Since I left home, and the situation at home, I recovered from these conditions. Since I left home I visited D and the other children a handful of times, and I did not visit them more often due to financial considerations, and also A was controlling my visits to the children in the sense that I could visit the children only when he consented.”

She does not recall all the occasions on which she had contact with D, but mentions that D spent a whole day with her in August 2009, a weekend during October and November 2009, and five days during December 2009. She recalls having D for a weekend in April, May, June and July 2010.

Regarding the care of the children, the Mother states that when she visited them in May and June 2010 “things had deteriorated and this alarmed me” and “I recall having a discussion with Respondent about the children being better off living with me, and at first he agreed, but then he changed his mind and said that they would be staying with him.”

### **The Court's Considerations**

*Rights of Custody – Articles 3 – 13[a]*

Article 3 of the Convention states that the removal or retention of a child [under 16 years] is wrongful if it is in breach of rights of custody which, at the time of the removal or retention, were actually exercised, or would have been so exercised but for the removal or retention.

“The court of the requested state applies the law of the child’s habitual resident state in order to determine whether the left behind parent has ‘rights of custody’ capable of being breached under the Convention. Accordingly, where a child had been abducted [removed or retained] from England/Wales, the parties with rights of custody for the purpose of the convention are those with parental responsibility for the child as determined by the Children Act 1989. In the case of married persons, both have parental responsibility under section 2[1].” Also “there is a tradition of broad and purposive interpretation of the concept of ‘rights of custody’ in order to give effect to the aims of the Convention.” [*Children and Their Families – Contact, Rights and Welfare* – Andrew Beinham et [2003] pg.337]

In the present case, the child D was born when her parents were still married, and therefore under English Law both parents have, joint parental responsibility over the child, which they retained after the divorce since no provision was made on this issue in the relative decree.

Regarding the Father’s allegations that, after the Mother had left the matrimonial home, leaving the child in his care, was not having regular contact with the child, and that eventually contact ceased completely in July 2010, these allegations has been denied by the Mother who holds that she had had contact with D on various occasions, and explains further that the visits were not as frequent as she would have liked due to financial considerations “and also A was controlling my visits to the children in the sense that I could visit them only when he consented.”

The Court observes that in the circumstances it cannot be validly concluded that the Mother had clearly and

unequivocally abandoned her rights of custody granted to her by UK law. This conclusion is further fortified by the consideration that when she could not contact the child because the Father had brought her over to Malta on the 22<sup>nd</sup> September, without informing the mother, the latter immediately began judicial proceedings in the English Courts.

Therefore to conclude on this issue, this Court is of the opinion that the circumstances uphold the applicant's claim that the removal of D by the Father from the UK, without the consent of the Mother, is wrongful in terms of section 3 of the Convention, since at that time the child was habitually resident in the UK, and was under joint parental responsibility of both parents.

*Article 13[b]*

According to this sub article of the Convention, the court of the requested State is not bound to order the return of the child if "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. Also the said court "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."

The following legal observations are relevant.

[1] In the first place, it must be noted that the risk of physical or psychological harm must be 'grave'. On this issue Ward LJ in *Abduction: Grave Risk of Psychological Harm* [1999] [cited in *Family Law Case Library: Children – Prest and Wildblood* [2008][pg.730] observed that "there is an established line of authority that the court should require a clear and compelling evidence of the grave risk of harm or other intolerability, which must be measured as substantial, not trivial, and of a severity that is much more than is inherent with the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.....the high

standard which, in my judgment, it is vital that our courts maintain in order to give full effect to the purpose of the Convention so as to carry out our international obligations. Stringent tests must be enforced, not diluted.”

[2] “The scheme of the Hague Convention is that in normal circumstances it is considered to be in the best interests of the children generally that they should be promptly returned to the country whence they have been wrongfully removed, and it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. That discretion must be exercised in the context of the approach of the Hague Convention” [Balcombe LJ [Ibid. pg.739]

[3] It is not for this court to decide the custody dispute, as this matter falls within the competence of the United Kingdom courts which are the proper fora to deal with this issue as the country of the habitual residence of the minor child. In ordering the return of the child this Court is not detracting from the Father’s legal rights over the child in terms of UK law, but is referring the matter to the proper fora.

In the present case, the Court’s opinion is to the effect that the Father has failed to produce satisfactory evidence supporting the defence under article 13[b]. this opinion is based on the following considerations:-

Firstly the Father has failed to validly sustain his allegation that the Mother is mentally ill, and therefore unable to take care of the minor child. This consideration is fortified by the findings of the social worker’s report wherein she states, inter alia, that “There is evidence to suggest that Ms.G [The Mother] and Mr.C individually, are able to meet D’s needs. There are no known concerns regarding D’s health and development. Ms G is willing and able to provide a clean, well presented home environment to D, where her developmental needs would be met and promoted.” [pg.14]



Secondly, the Father has failed to prove that sending the child back would put her in grave risk of physical or psychological harm or that the child would be in an intolerable situation. Even though financially he may appear to be in a much better position than the Mother, and that consequently he may give the child a more comfortable life than she would otherwise enjoy with the Mother, this does not per se, validly give rise to the defence contained in the above section of law, as pertains to the custody issue, which is to be decided by the UK courts, and not to the wrongful removal issue which falls within the competence of this Court.

In conformity with the above, it is this Court's view, that the child's objection in this case to go back to the UK, based on her wish to continue living with the Father in Malta, is more relevant to the custody dispute, and should not be considered a valid obstacle for the granting of an order for return.

#### Procedural Issues

[a] The pleas contained in the Father's sworn reply, relating [1] to the alleged irrituality of applicant's request, and [2] to the fact that the Mother is not a party to the proceedings, are unfounded at law, in terms of article 21 of the Convention.

[b] The plea that the Father was not notified and was unaware that the Mother had instituted judicial proceedings in the UK, and that he had no access to information about those procedures, is irrelevant, since this Court has proceeded in terms of the above articles of the Convention, and has arrived at its decision after having heard all the evidence produced before it, including that of the Father, and has applied articles 3 and 13 to the facts which have emerged from this evidence.

At this stage, it is not amiss to point out that the interim order which this Court had issued on the 19th October 2010 on an application of the same date filed by the Father granting the latter temporary care and custody over the child whilst in Malta, was intended to be only a

temporary measure, taken solely in the interests of the child whilst in Malta with her father, pending the outcome of the said application. The Father however has failed to serve a copy of the application on the Mother as ordered by this Court, with the consequence that the application was left pending, and eventually dismissed by this Court. The court had also directed the Father to file mediation proceedings according to Maltese Law; however even in this respect the father remained non-compliant. Finally, it is significant to note in this respect, that the Father had filed the application, after the wrongful removal of the child from the UK, and prior to the present proceedings.

On the strength of the above the Court has come to the conclusion that applicant's requests are justified in fact and at law, and are being upheld.

Decide

For the above reasons, the Court upholds applicant's requests; and orders applicant to make the necessary arrangement for the return of the child D to the United Kingdom. In the meantime the child is not to be taken out of this jurisdiction, except for the above purpose.

All costs are to be borne by respondent.

**< Sentenza Finali >**

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