Civil Court
First Hall
(In Its Constitutional Jurisdiction)

THE HON. JUDGE
JACQUELINE PADOVANI GRIMA LL.D. LL.M. (IMLI)

Court Hearing of Tuesday 15th December 2015

Case Number : 1
Application Number : 34/2013/JPG

Etienne Merlevede in his own name and on behalf of his twin minor children Gabriel and Chloe born on 27 June 2007 as authorised by decree dated 19 February 2013

Vs

Attorney General

And by the means of a decree given on 25th July 2013 orders the joinder to the case Lara Merlevede

The Court,

Having seen the application of Etienne Merlevede in his own name and on behalf of his minor children Gabriel and Chloe of the 17th April 2013, (at page 3 et seq.) which reads as follows:

"1. That the Applicant Etienne Merlevede is French. He has never lived abroad and works as a train driver with SNCF, the French railway company.

2. That the Applicant married Lara Borg St John on 7 January 2006 in France (civil marriage) and in February 2006 in Malta (religious marriage). They settled in France at the address: 410b Rue de l'Estree 59193 Erquinghem-Lys, which they chose as their matrimonial home and where the Applicant still resides.

3. That on 27 June 2007, two children were born: Gabriel and Chloe. They were born in Armentieres, France.

4. That in August 2008 the Applicant had an opportunity to improve his career to drive trains for SNCF in France and in Belgium. At that time their children were very young and the Applicant was taking immense care of them, something that he would be unable to do whilst studying and training to obtain this licence for two and a half months. So they agreed that his wife Lara and the children would travel to Malta together with French friends who would help her with the children, first Mrs Mouzouna Seghir, and then Mrs Genevieve Carrier; and he would travel to Malta to spend the Christmas and New Year festive season together with them, and then they would all travel back to their home in France on 3 January 2009. This definite date was shown on their airline tickets.

5. That his wife Lara refused to return to their matrimonial home in France, at first saying that she wished to stay a bit more, then saying no longer than September, and then she refused.

6. That in May 2009 they started to suspect that Gabriel was autistic. Although they should have taken decisions regarding Gabriel together, Lara established contact with a Maltese therapist without keeping the Applicant informed. Meanwhile, the Applicant obtained a great deal of information from the Autism Resource Centre in France.

7. That his wife informed him that Gabriel was bumping his head repeatedly against the walls and the floor. But when she told him on the telephone that she wanted money to buy a trampoline with handles for Gabriel to jump as long as he had the strength to until he exhausted himself, the Applicant was scandalised and realised that Gabriel's place was in France where he could receive the highest level of treatment and care. He therefore told his wife to return home with the children and informed her that he would be arriving at the beginning of October 2009. However, three days prior to his arrival, Lara told him to find accommodation because she did not intend to allow him into the flat.

8. That in October 2009, his wife informed him that she had decided to separate from him. The Applicant was shocked and offered to go through family therapy. She insisted that the therapy would take place after the amicable separation. He asked her `what if we disagree?' and she replied 'then we will go to Court and it will be the end of our family'. On his arrival in Malta in November 2009, his wife had already commenced a separation.

9. That in the meantime, the Applicant contacted the Central Authority in France in connection with the retention of his children in Malta in violation of the Hague Convention.

10. That on 23 July 2009, without his knowledge, his wife had already presented a letter before the Registrar of the Civil Court (Family Section) requesting the commencement of separation proceedings. In her letter, the wife made the following false declaration to the authorities:

"Ir-ragel joqghod Franza izda ma ghandux indirizz fiss u ma tafx fejn qed jirrisjedi prezentement".

The following words were cancelled on the same day:

~~*'u ghalhekk kontestwalment ma' din l-ittra qed taghemel t-tabla ghal hatra ta' kuraturi deputati.*~~

~~*Qed nannetti traduzzjoni tal-ittra bil-lingwa ingliza stante li r-ragel jifhem u jaqra bl-ingliz'*~~

11. That the mediation process was concluded without the Applicant ever having been notified of the proceedings notwithstanding that he has continued to reside at the same address. His wife never even tried to notify him. His detailed mobile telephone bills prove that she made a false declaration to the Court when she stated that she did not know where he was living. She concealed from him the proceedings that she had filed in Court and that she made a false declaration to the authorities.

12. That the Civil Court (Family Section) made no attempt to have the Applicant notified at his home address. The French authorities were not contacted at all.

*13. That on 4 August 2009 Lara Merlevede filed a court case bearing number 250/09 AF in the names "**Lara Merlevede vs. Dr Patrick Valentino et noe**" concerning a request for **personal separation**, and this notwithstanding that the matrimonial home was situated in France, Applicant pays taxes in France and the couple lived in France throughout their married life until then. This court case was therefore abusively filed in Malta.*

14. That on 23 September 2009, the Civil Court (Family Section) ordered that the application be notified to the official curators who were ordered to file a reply within 10 days. The Court added:
"Pendente lite il-kura u kustodja tal-minuri hija fdata f'idejn l-omm."

15. On 8 February 2010 the Civil Court (Family Section) decreed:

"The Court,

Having seen the application of the respondent dated 3 December 2009;
Having seen the reply;
Having seen the records;
Orders that when the father travels to Malta he will have access to his minor children from 3.00 p.m. to 6.00 p.m. daily except on Friday when it will commence at 4.00 p.m.
The Court dismisses the second request."

16. On 8 February 2010, the same day as the decree regarding access, the Civil Court (Family Section) decreed:

> *"The Court,*
> *Having seen the application of the wife dated 14 December 2009;*
> *Having seen the reply and documents;*
> *Orders the respondent to pay his wife every four weeks the sum of EUR900 for the minor children and EUR400 for herself"*

17. That by any standard this amount was excessive, considering the rate which is normally established as maintenance in relation to the salaries in Malta and in comparison with the amount of maintenance which fellow train drivers are required to pay in France (circa Eur 400). Moreover, the exorbitant amount fixed by the Court did not take into consideration the fact that the Applicant has to pay taxes in France and needed to pay for his flights to Malta to visit his children and to find accommodation in Malta.

18. This amount (more than 25% of his wages) was in fact reduced. On 30 September 2010 the Civil Court (Family Section) decreed:

> *"The Court,*
> *Having seen again the application of the respondent dated 4 March 2010;*
> *Having seen the reply and documents;*
> *Modifies the decree given on 8 February 2010 in the sense that the total amount that should be paid as maintenance shall be EUR1100, as to EUR850 for the minor children and EUR250 for the mother."*

19. However, as the Applicant was not in a position to pay such a maintenance allowance, the Civil Court (Family Section) ordered that the sum of eight thousand Euro (EUR8,000) be removed from his bank account in Malta and be given to Lara.

20. That, meanwhile, on 11 January 2010, the Director for Social Welfare Standards filed an application before the First Hall of the Civil Court (Case No.

370/2010 in the names ***"Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. Lara Maria Merlevede nee' Borg St John")*** *in terms of the Hague Convention on the Civil Aspects of International Child Abduction (Chapter 410 of the Laws of Malta) requesting the Court to order the return of the children to France.*

21. That these proceedings had to be concluded ***within six weeks*** *as stipulated in the Hague Convention, in default of which the Court had to state reasons for the delay.*

22. That procedural fairness and justice required that the Judge hearing the proceedings under the Hague Convention with urgency should not also be the same Judge dealing with the proceedings concerning a request for personal separation.

This notwithstanding, both sets of proceedings were heard by the same Judge.

23. That as a result of this irregularity, the proceedings under the Hague Convention were not conducted as envisaged in the Convention and took almost a year to be decided in first instance, instead of being determined expeditiously within the time-limit of six weeks stipulated in the Convention.

24. That judgment was delivered by the First Hall of the Civil Court on 30 November 2010, ten months later, against the Director and an appeal was lodged immediately by the Director against the said judgment.

25. That the Court of Appeal delivered its judgment on 25 February 2011, confirming the judgment given by the Civil Court (Family Section).

26. That the aforesaid decrees of 8 February 2010 were given after the Hague proceedings had been instituted by the Central Authority in Malta on 11 January 2010 requesting a Court order that the children be returned to France. Instead of determining the case in accordance with the provisions contained in the Hague Convention, the Civil Court (Family Section) gave decrees that are incompatible

with the procedure stipulated in the Hague Convention. Indeed, the Civil Court contravened its provisions.

27. That according to both the Hague Convention and Council Regulation (EC) 2201/2003, two instruments that Malta has undertaken to comply with, only the competent court in the country where the married couple have their habitual residence can take decisions concerning the children. The six-week time-limit imposed by the provisions of the Hague Convention is intended to have a decision on the return of the children when these have been removed from the country where the matrimonial home is situated. These rules were binding on the Civil Court (Family Section). Yet they were contravened by the Civil Court, which heard both the Hague proceedings as well as the action for personal separation.

28. That the Civil Court, instead of deciding the Hague proceedings first and refraining from giving interim measures that are permanent in nature, allowed the Hague proceedings to overrun the six week time-limit and drag on for over one year, and gave interim measures which seriously prejudiced the outcome of the Hague proceedings and the position of the Applicant under Maltese laws. So much so that Lara Merlevede, armed with a maintenance decree, was able to obtain criminal convictions against Applicant for default in paying maintenance in accordance with a decree that had been abusively issued. However, the Applicant sent money every month. The Court of Magistrates condemned him to the punishment of detention for a period of four weeks. The decree at the basis of this conviction was issued in contravention of the provisions of the Hague Convention.

29. That the decisions of the Civil Court also seriously prejudiced the efforts by the Central Authority to secure a speedy return of the children to France, and this notwithstanding that Dr Victoria Buttigieg LL.D. from the Office of the Attorney General worked incessantly to secure their return to France and insisted that the provisions of the Hague Convention be respected.

30. That in the meantime, Lara Merlevede was allowed to dig her roots in Malta and strengthen her legal position. Indeed, after refusing to allow Applicant to stay under the same roof with the children when he was in Malta, Lara Merlevede

entered into an extramarital relationship with Adrian Theuma in 2010 and had a child out of wedlock, Alexia Theuma Borg St John, born on 24 September 2011, daughter of the said Adrian Theuma. Indeed, Act of Birth no. 560/2012 whereby the child was registered at the Public Registry contains another false declaration made by Lara Merlevede for the reason that the last time that Applicant was in Malta was in February 2011, therefore, less than 300 days before the birth of the child.

31. That on 9 November 2011 Lara Merlevede filed for divorce. This application is still pending before the Court in Malta.

32. That the Applicant attended every hearing in the case instituted under the Hague Convention by the Central Authority in Malta, and this notwithstanding the costs of travel that he incurred on every occasion. This notwithstanding, in June 2010 there was a hearing planned for him to present his evidence before the Civil Court. The hearing was very short. From the beginning, the presiding Judge refused to hear him, explaining in the Maltese language that she did not want to hear him cry on the microphone. Every person present in the court room was shocked and scandalised. A French policeman who was in the courtroom and heard these words later accompanied the Applicant who informed the French Embassy accordingly.

33. That in July 2010 when Dr Victoria Buttigieg was carrying out her cross-examination of Lara Merlevede, fifteen minutes into the cross-examination the witness became agitated as a result of the questioning to her by Dr Victoria Buttigieg. The Civil Court immediately suspended the cross-examination and stopped the hearing; and the case was put off for continuation in September 2010.

34. That in the meantime the French authorities contacted the authorities in Malta and requested them to respect the law and Malta's international undertaking under the Hague Convention European Union Law, urging them to provide an explanation for the excessive delay in the delivery of the Court's decision. The authorities in Malta replied by simply pointing out the date of the next hearing and reproducing the court minute of each sitting.

35. That according to Council Regulation (EC) No. 2201/2003 the Maltese authorities should have sent the judgment with a copy of all the documents relative to the hearings to the French authorities within one month, but they did not do so. Instead, they just sent a copy of the judgment.

36. That in view of the criminal convictions before the Court of Magistrates and the punishment of detention for a period of four weeks inflicted on the Applicant for failing to pay maintenance according to Civil Court decree, the Applicant is unable to return to Malta as he will be sent to prison. With regard to the failure by Lara Merlevede to give him access to the children in accordance with the other decree issued illegally on 8 February 2010, the Court of Magistrates despite hearing her admission, declared her not guilty and acquitted her.

37. That no person has the right to separate a loving, caring and deserving father from his children.

38. That with regard to his son Gabriel, who was diagnosed as autistic in May 2009, Lara Merlevede went to several Maltese therapists and did not really keep the Applicant informed about the therapy being followed and who was in charge of it, and she avoided answering his questions. The Applicant made his researches and discovered that the best therapy is ABA (Applied Behaviour Analysis). He looked out for the best French Specialist in ABA, who is Dr Vinca Riviere, who works near the matrimonial home and he made contact with her. She explained to him in detail what autism is, how the ABA therapy can achieve the best results and she checked whether there are any Maltese persons who are qualified and certified to perform the ABA therapy. There are none.

39. That a report produced by Educational Psychologist Juan Camilleri stated 'inter alia' that it would be difficult for the mother to obtain social benefits in France due to her foreign status, a comment that betrays Mr Juan Camilleri's biased outlook and his defence of Lara Merlevede's interests instead of the sole interests of Gabriel. The therapy available in Malta, including that provided by Dr Elena Tanti Burlo', is inadequate and does not match that available in France, no matter how well intended Maltese therapists may be. French children who received ABA therapy

in France completed their therapy at the age of five and a considerable number now lead a normal life, even though some of them manifested worse symptoms than those shown by Gabriel. Many of them showed a marked improvement after following this type of therapy, much more than with other therapies.

40. That it is clear that the wife's interests and aims are very different from those of the Applicant, especially now that she has given birth to another child from another man. Her sole aim is to stay in Malta with the children, obtain the maximum amount of money as maintenance from Applicant and separate the children completely from the Applicant and all their French family members. Unfortunately, she is getting full support from the Courts in Malta notwithstanding that she does not really care about the children's best interests as she is pretending, and is using the children as a tool to attain her aims. Children need to know both parents and family in order to build their identity. From the time that Lara Merlevede returned to Malta, she did her best to prevent him from seeing his children. When he purposely travelled to Malta in October and November 2009 for a period of 12 days, although Lara Merdevede, while pretending that she was not working, just managed to let him see his children once daily for a short time only lasting between one and a half hours and 40 minutes. She did her best to make it for him and the children as horrible as possible. The children had not eaten, were not changed and were tired, and he had to see them in public places. She insisted on forbidding him to talk to his children in French, threatening to go and report the matter to the police if he did. She also prohibited him from moving beyond 5 metres away from her. She insisted in preventing him from holding the children in his arms although he asked her to let him cuddle his children. The humiliations which she made him endure are endless.

41. That whereas the Applicant made it a point to meet and discuss the well being of his son Gabriel with the Maltese therapists, Lara Merlevede never approached Dr Vinca Riviere regarding the opportunity that Gabriel has of receiving the best ABA therapy in France. She never even took Gabriel for a visit to Dr Vinca Riviere. If she would have done so, she would have felt obliged to admit that it was in Gabriel's best interest to receive therapy in France. Lara Merlevede is ready to sacrifice Gabriel's well being in order to have it her way and remain in Malta with all three children.

42. That once Lara Merlevede has throughout these years refused to send Applicant a photo of his children, it is safe to say that she does not show their children a photo of their father, so that they will forget him forever. She has made sure of this by securing a prison term for Applicant should he ever step foot on the Island. She has made it very clear to him "you will have a photo when you decide to pay". She can send him a photo of his children by internet at no cost at all. The Courts in Malta are aware of this situation and that Applicant has not seen his children for a very long time and are doing absolutely nothing about it.

43. That whenever the Applicant telephones Lara Merlevede, she records the conversation which is always the same: the children are fine, Gabriel is doing a lot of progress; when will you pay?

44. That Lara Merlevede also produced a false e-mail signed 'Etienne' wherein he asks for the cancellation of the children's flight tickets. The e-mail, purportedly sent by a French person to someone whose natural language is French, was written in English and contains several typical Maltese English expressions.

45. That as a responsible parent, the Applicant wishes to send Gabriel to receive therapy and other forms of support while attending an international private school near Lille in Marcq en Baroeul, a very expensive school for French/English speaking children where courses are conducted in English or French by English and French qualified teachers. Besides, this school is known for its high level of teaching and would be the perfect venue for the Applicant's children in order to achieve a smooth transition from Malta to France.

46. That the French authorities have been doing their utmost to assist Applicant Etienne Merlevede in these difficult circumstances and have been constantly asking:

".... what can be done in Malta to have an order about the return application rendered within the delay fixed by article 11 of the EC Regulation 2201-2003.
If a new affidavit is requested from the Malta Central Authority, is it possible to explain to the Court the European rules in matter of abduction of children and to

apply for the application of this Regulation?" [letter dated 2 July 2010 addressed to the Central Authority in Malta]

".... if there is a way to call the attention of the Maltese Judge on the rules of article 11.3 of the Regulation CE no. 2001/2003.
You tell me that the .... mother intends to cross examine all the witnesses produced by the Malta CA. As the abduction is ruled by an international Convention, and that it is the mother who abducted the children, the French Central Authority thought that the witnesses would rather be produced by her. I thank you to tell me which witnesses are going to be produced by the Maltese CA to forsee what help could be given to the Applicant for the next hearing" [letter dated 20 July 2010 addressed to the Central Authority in Malta]

"I come back to you after being informed that the hearing in the Hague case has been postponed once more to the 25 October 2010.
It has been more than ten month now since the return application has been filed so that the rule of article 11.3 of the Regulation CE no. 2001/2003 is not respected. The French Central Authority thanks you to provide under article 11 of the Hague Convention of 25 October 1980, explanation for the delay.
This is even more wrongful for Mr Merlevede that in the same time, the Maltese judge finished the proceeding started by the mother for maintenance for the children though under article 10 of the Regulation CE no. 2001/2003 the French judge retain their jurisdiction to deal with parental responsibility in this case till there is an order withdrawing the request for return lodged by the father (article 10 b ii) and that the habitual residence of the child is still in France.
The Maltese judge doesn't deal with the situation of the children and in the time fixes alimonies for these children whose situation is not ruled, which is not satisfying. Whatever could be the decision of the Maltese Judge, an order dealing with the return application will clarify the situation of the children and let things open to try to restore normal and regular contacts between the children and their two parents.
It is the French Central Authority's opinion that it is why the Convention, as the Regulation, stressed on short delays for the resolution of abduction cases.

Besides I thank you to tell me on which ground the order to pay maintenance for the children was taken by the Maltese judge after she was informed that there was a return application pendent and that she could not deal with custody over these children." [letter dated 6 October 2010 addressed to the Central Authority in Malta]

47. That the domestic decisions taken subsequent to the mother's illegal retention of the children in Malta pursuant to the country's obligations under the Hague Convention on International Child Abduction did not comply with the European Convention on Human Rights. For this precise reason, the French authorities complained repeatedly with the Central Authority in Malta that the Courts in Malta were not abiding by the treaty obligations.

48. That notwithstanding that according to French law the Applicant Etienne Merlevede had joint custody over the children, following the illegal retention of the children in Malta the Courts in Malta dismissed his efforts to have the legality of the situation restored and, instead, granted care and custody of the children to the mother, and this in breach of Malta's international obligations.

49. That the Courts in Malta ignored the fact that the matrimonial home is in France, which means that the children were removed by Lara Merdevede from the country where they had their habitual residence. Article 11 of the Council Regulation (EC) No. 2201/2003 provides:

(1) Where a person ... having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the 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.

(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 prejudices 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.

(4) A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

(5) A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

(6) If a court has issued an order on 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.

50. That the above rules have been flagrantly violated by the Civil Court (Family Section) and subsequently by the Court of Appeal. This has tarnished the image of Malta as a reputable EU Member State in so far as the observance of the provisions of the Hague Convention and of Council Regulation (EC) No. 2201/2003 is concerned. Indeed, in the judgment given in first instance proceedings it is expressly stated at page 11:

> *"The respondent's first submission is that by means of a decree given by this Court as presently composed she was granted care and custody of the children.*
>
> *This Court will immediately reject this argument as the said decree had been given by this same Court, as presently presided, in the pending separation case on 23 September 2009, that is to say, nine months after she failed to return with the children to France."*

The judgment given in first instance proceedings was unfortunately confirmed by the Court of Appeal.

51. That whereas the wife stated in judicial proceedings before the Courts of Malta that her husband had agreed to move to Malta, this was to be a temporary measure, that is, while the Applicant was following a course of study in France. It was never agreed that Malta should become their new home. The Applicant did not take a hard stand but tried to convince his wife to stay for a while longer and then return with their children to France. A train driver with a steady, full-time job in France would never renounce to it and accept to work as a part-time tourist guide in Malta just after the family grew from two to four persons. There is abundant evidence that the wife is responsible for manipulative moves, making false declarations and committing forgery.

52. That, in view of the failure by the Court to ensure that regular access is given to the father, on 8 January 2013 the Director filed an urgent application in the acts of General Application No. 396/2012 wherein he requested the Civil Court (Family Section) to enforce the visitation rights of the father in accordance with the Order given by the French Court of Appeal of Douai on 19 April 2012. These proceedings are still pending before the Court.

53. That according to Article 41 para. 1 of Council Regulation 2201/2003:

"The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State <u>without the need for a declaration of enforceability and without any possibility of opposing its recognition</u> if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

54. That two relatives of the Applicant travelled purposely to Malta on three separate occasions in order to collect the two children so that the father would be able to exercise his rights of access in France in accordance with the judgment delivered by the French Court of Appeal. However, on each occasion these two

relatives had to travel back to France without the children as Lara Merlevede continues to act in contempt of the Order contained in this enforceable judgment.

55. That despite the children having French passports, Lara Merlevede nee' Borg St John has not renewed their passports in order to ensure their continued presence in Malta, claiming on oath that the Applicant had stolen both passports, which is absolutely false.

56. On its part, the Civil Court (Family Section) has issued an Order preventing the children from travelling or being removed from Malta, and this in clear violation of the rights of the three Applicants as the Court of Malta is not entitled to separate the father and the twin children in this illegal manner and in violation of European Union Law.

57. The Courts of Malta have not even ordered the mother to provide the father with the name of the school which the two children attend. In this way, the father is unable to obtain school reports about the children's 'progress'.

58. Article 8 of the European Convention on Human Rights {Chapter 319 of the Laws of Malta) imposes positive obligations upon Contracting States, requiring them to take affirmative action to respect family life.

59. The European Court of Human Rights has created a jurisprudential trend concerning the right of contact with the child. States have been held to have violated Article 8 of the Convention by failing to take adequate measures to give effect to the aims and objectives of the 1980 Hague Convention after the abduction/retention took place. The European Court reiterated that the state has the obligation to take positive measures within the framework of Article 8 in order to guarantee the right of parents to measures that will enable them to be reunited with their children and an obligation on national authorities to take such measures. In the present case, the domestic authorities failed to take such measures to the detriment of the father and his son and daughter.

60. That the Maltese authorities breached Article 8 of the European Convention in failing to take adequate measures to give effect to the aims and objectives of the 1980 Hague Convention after the illegal retention took place. The positive obligations contained in Article 8 of the European Convention must be interpreted in light of the Hague Convention. Article 11 of the 1980 Hague Convention stipulates that the authorities must act expeditiously in proceedings for the return of children and that any failure to act for more than six weeks may give rise to a request for a statement of reasons for the delay.

61. That the decision of the Maltese Courts is flawed at a fundamental level. The Court ought not have been concerned with issues of care and custody and maintenance before determining the Hague proceedings. It would have made an enormous difference to the outcome of the present case if the Maltese Court had followed the provisions of the Hague Convention.

62. That the actions of the authorities breached several articles of the European Convention on Human Rights (Chapter 319), namely:

- *Article 6 right to fair hearing before an independent and impartial tribunal*
- *Article 8 right to private and family life*
- *Article 3 protection against inhuman treatment*
- *Article 5 right to liberty*
- *Article 45 of the Constitution concerning discrimination on grounds of place of origin.*

63. That the excessive length of proceedings before the Court dealing with the Hague proceedings in the present case and in several other cases that came before the Courts of Malta breached Article 6 and the guarantee of a fair hearing within a reasonable time.

64. That the inappropriate and abusive way in which the Maltese Courts gave orders and decisions in the Hague proceedings and in the separation proceedings that were incompatible with their positive obligations aforementioned instead of providing a quick remedy in terms of Malta's international obligations breached

Article 6 and the guarantee of a fair hearing by an independent and impartial tribunal. Article 16 of the Hague Convention provides:

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

65. That the orders and decisions that were given by the Court, including the judgment given in the Hague proceedings on 30 November 2010 by the Civil Court (Family Section) and on 25 February 2011 by the Court of Appeal were in serious violation of the fundamental right to private and family life pertaining to Applicant Etienne Merlevede and to his two children Gabriel and Chloe which is guaranteed by Article 8 of the European Convention.

66. That illegal criminal convictions of Applicant Etienne Merlevede by the Court of Magistrates (Malta) imposing a prison sentence for failing to pay maintenance illegally established, thereby preventing him from setting foot on the Island for fear of being imprisoned, violated Article 5 of the European Convention guaranteeing the right to liberty and security of the person.

67. That the orders given illegally by the Civil Court (Family Section) and the Court of Magistrates (Malta) in breach of the Applicant's and his children's rights constituted degrading and inhuman treatment and this in breach of Article 3 of the European Convention.

68. Moreover, Article 3 of the European Convention has been breached to an extent that the father just knows that his children exist but he doesn't know their voice, the sound of their laugh, the way they like to play ... not even how they look.

Now therefore the Applicant Etienne Merlevede in his own name and on behalf of his minor children Gabriel and Chloe born on 27 June 2007 as authorised by the

decree given on 19 February 2013, humbly requests this Honourable Court in its Constitutional Jurisdiction —

(1) to declare that the actions of the authorities breached several articles of the European Convention on Human Rights (Chapter 319), namely:

- *Article 6 right to fair hearing before an independent and impartial tribunal*
- *Article 8 right to private and family life*
- *Article 3 protection against inhuman treatment*
- *Article 5 right to liberty;*
- *Article 45 of the Constitution concerning discrimination on grounds of place of origin.*

(2) to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, the aforementioned provisions of the European Convention (Chapter 319 of the Laws of Malta) to the protection of which the Applicants are entitled. Applicant was duly authorised to represent the interests of his children in this fundamental rights action;

(3) to revoke and declare null and void the judgments given in the Hague proceedings (Case No. 370/2010) as well as the orders and decisions given in the separation proceedings (Case No. 250/2010);

(4) to issue an order for the immediate return of the children Gabriel and Chloe who were wrongfully retained in Malta to the country where the said children were habitually resident immediately before the wrongful retention, that is to say, France.

(5) to order the respondents to reimburse Etienne Merlevede the sum of eight thousand Euro (Eur 8000), to order the respondents to pay the sum of sixty thousand Euro (Eur 60,000) as non-pecuniary or moral damages in respect of his illegal conviction to a term of imprisonment, and three hundred thousand Euro (Eur 300,000) as non-pecuniary or moral damages in respect of his forced separation from his dear children on account of the illegally obtained criminal convictions against him. With all judicial costs incurred."

Having seen the reply of the Attorney General, of the 2nd May 2013 (at page 27 et seq.), which reads as follows:

"1. That in this case Applicant is requesting this honourable Court to declare that his fundamental human rights and those of his two minor children as protected by several articles of the European Convention on Human Rights and by the Constitution of Malta have been breached.

A. <u>Preliminary pleas</u>

i. That the application is null and void in terms of Article 180 (1) (a) of Chapter 12 of the Laws of Malta because Applicant is not resident in Malta and as has been already declared by the Courts[1], for an interested person to file proceedings and defend his case in Malta he must be present in Malta and if a person is absent curators must be appointed in terms of Article 929 of the Laws of Malta. Since by Applicant's own admission he lives in France he has no locus standi to institute the present proceedings in Malta.

ii. That the application is also null and void because it lacks the mandatory requirements listed in Article 174 (2) (a), (c), (d) and (e) of Chapter 12 of the Laws of Malta, that is, a legally valid identification document number since Applicant is pleading in his personal capacity, a proper and full indication of the place of residence or business of Applicant; a proper and full indication of the place of business of respondent; and any other particulars as may serve to identify parties to this case.

iii. That since Applicant is by means of the present case making allegations and requesting remedies [2] that if upheld will affect the rights of his wife Lara Merlevede he is bound to call his wife to be a party of the proceedings[3].

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[1] *See "Avv. Carmelo Castelli noe vs Focal Maritime Services Ltd et" decided by the Court of Appeal on the 3rd February 2012 (App No 1465/2001)*
[2] *Reference is made particularly to the 3rd and 4th claim in application*

iv. That respondent requests this court to revoke contrario imperio the decree of the 19th February 2013 by virtue of which Applicant was granted the authorisation by the Court to file the present proceedings on behalf of his two minor children. Respondent contends that in view of the fact that the legal care and custody of his children is by order of the Court itself assigned to the mother, then Applicant cannot legally represent them himself. Moreover since it is evident from the allegations exposed in the present application that there is ample strife between the parents, respondent deems that it would be in the best interest of Gabriel and Chloe Merlevede to be represented by independent curators in this case.

v. That since in this case Applicant is challenging several judicial proceedings that took place in front of the Courts, respondent requests the allegation to these proceedings of all the acts of the cases that are now a res judicata[4], and respondent requests this honourable Court to take cognisance of all the acts of the proceedings that are still pending to dates[5].

B. <u>Facts as resulting from the acts of the cases referred to in the present case</u>

That a brief overview of some of these cases shows clearly that several allegations which Applicants is hereby presenting as "facts" have already been proven to the contrary by the Courts. For instance:

i. In the abduction proceedings in question, both the First Court Civil Court and the Court of Appeal after having examined all the facts and evidence produced,

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[3] Something which he apparently was going to do but for inexplicable reasons he seems to have had a change of heart at the time of filing of the application as can be seen from the acts of this case themselves.

[4] Abduction proceedings in the names "Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Lara Maria Merlevede nee' Borg St.John" (App No 370/10) decided b' the First hall Civil Court on the 30th November 2010 and by the Court of Appeal on the 25' February 2011; Several proceedings in front of the Courts of Magistrates (Malta) as a Court of Criminal Judicature all in the names "Police vs Etienne Pierre Merlevede" decided on the 27th September 2010; Appeal proceedings in front of the Court of Criminal Appeal in the names "Police vs Etienne Pierre Merlevede" (App No 395/2010); Mediation proceedings between Applicant and Lara Maria Merlevede nee' Borg St.John

[5]Separation proceedings in the names "Lara Merlevede vs Dr Patrick Valentino et noe" (App No 250/09) and proceedings in the names "Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Lara Maria Merlevede nee' Borg St.John" (App No 396/2012AL)

have both concluded that the consent of Applicant for his minor children to stay in Malta existed and was well demonstrated and that moreover if Applicant's son was to be returned to France he would risk being exposed to physical or psychological damage. So all the references made by Applicant at various stages of his application in the present case to the "illegal retention" of his children in Malta are manifestly unfounded in fact and at law.

ii. Also and for the avoidance of repetition respondent refers to other issues that are mentioned by Applicant in this present case such as the therapy offered to his son Gabriel, his contact with his wife and children in Malta etc, all of which have already been exhaustively examined and decided upon by the Court in the abduction proceedings.

iii. That in respect of the mediation referred to in paragraphs 10 et seq, it transpired that Applicant was working back and forth between France and Belgium and his Belgian address was unknown, so the Civil Court (Family Section) was correct in so far as the service of the relevant acts was concerned.

iv. That with reference to the separation proceedings referred to in paragraph 13 et seq it does not transpire that he raised any plea regarding the jurisdiction of the Maltese Courts to hear the case. Rather he was initially represented by curators but subsequently he assumed the acts himself and had an active role in the proceedings.

2. That subordinately and without prejudice to the preliminary pleas referred to above, in merit, respondent rebuts all allegations and claims as unfounded in fact and in law for the following reasons:

No breach of Article 6 of the European Convention on Human Rights

i. <u>fair hearing before an independent and impartial tribunal</u>

That from an examination of the acts of the cases referred to by Applicant it results that all the elements of fair hearing have been and are still being respected in his regard, that is, the right of access to the courts; the right to equality of arms; the right to a fair presentation of the evidence; the right to cross-examine; and the right to a reasoned judgement.

That Applicant's main complaint in this respect seems primarily based on the fact that the same judge presided over the separation proceedings and the abduction case and that adverse remarks were allegedly passed to Applicants as indicated in paragraphs 32 and 33 of the application.

Respondent rebuts these allegations on the basis that it is an accepted principle even at European Court level that having a judge presiding cases concerning same party or parties does not in itself raise a legitimate doubt as to the independence and impartiality of the court.

Moreover in our present case the merit of the cases was different - one was the separation case and the other was the abduction case.

Also respondent contests Applicant's allegations as put forward in paragraphs 32 and 33. It does not result to respondent that such episodes happened and that moreover no mention or complaint has been registered about these alleged episodes by Applicant in the acts of that case and not even at appeal stage.

ii. *<u>alleged length of proceedings before the Courts</u>*

That first and foremost Applicant should indicate which "several other cases" he is referring to in this context in paragraph 63 of his application. In this respect respondent reserves the right to reply further as the case may be.

That without prejudice to the above it is an accepted principle both at local and at European Court level that the factors which the Courts look at in determining whether the hearing of a case was within a reasonable time or not are the

complexity of the case, the attitude of the parties and also of the relevant authority - in this case a judicial authority.

That keeping in mind that the abduction case referred to in the present proceedings was a complex one, that it does not result from the acts of that case that there was an unreasonable delays by the parties in producing evidence and that there were no unreasonable delays by the Courts either in delivering the judgements respondent contends that there is no breach of human rights in this respect.

No breach of Article 8 of the European Convention on Human Rights

Respondent insists that neither the Maltese authorities nor the Maltese courts have in any way and at any stage put obstacles for the Applicant to exercise his right to private and family life. The relative court decrees in the challenged proceedings are a proof that the courts have granted Applicant access to his children.

That moreover if Applicant is not exercising any family life with his children this transpires to be a result of his own non-adherence to his obligations towards them, including his obligation to pay them maintenance with all the consequences that follow.

That subordinately and without prejudice to the above, if this honourable Court finds that there was an interference by the authorities with the exercise of this right, such interference is justifiable in terms of Article 8 (2) of the said Convention.

So it is not true that the State or the Courts are in breach of their obligations under this Article.

No breach of Article 3 of the European Convention on Human Rights

That the European Court of Human Rights has repeatedly defined degrading and inhuman treatment as follows:

"Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see Kaftans v. Cyprus [GC], no. 21906/04, § 95, ECHR 2008). The Court has considered treatment to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among other authorities, Kudla v. Poland [GC], no. 30210/96, § 92, ECHR 2000-XI). In considering whether a punishment or treatment was "degrading" within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3." [6]

That taking into account the allegations put forward by Applicant respondent contends that by no stretch of the imagination can it result to this Honourable Court that Applicant's rights under this Article were in any way breached.

That with all due respect if Applicant is failing to adhere to his legal obligations towards his children, he cannot now complain that he is being degraded or treated inhumanely. The situation which he put himself in is his sole responsibility and nobody else's.

No breath of Article 5 of the European Convention on Human Rights

That the judgements of the Criminal Courts whereby Applicant was condemned to detention for his repeated failure to pay maintenance to his wife and children are in accordance with the law.

[6] *A and others v. United Kingdom decided 19th February 2009 (App No 3455/05)*

That although Article 5(1) states that "no one shall be deprived of his liberty", this right is qualified by several exceptions two of which are:

"(a) the lawful detention of a person after conviction by a competent court; and

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law"

This means that if anything, these exceptions are applicable to the present case and hence Applicant cannot invoke Article 5 to his favour.

That in any case and without prejudice to the above, any allegation under this Article by Applicant is premature because no one has deprived him or attempted to deprive him of his liberty yet.

No breach of Article 45 of the Constitution of Malta

That Applicant's allegation that he is being discriminated against on the basis of place of origin is unfounded in fact and at law and respondent rebuts that it is simply a gratuitous and frivolous allegation.

3. That respondent contends that the allegations put forward in this case by appellant are also vexatious because they are intended to serve as an appeal/re-trial of cases which are already res judicata. Moreover with respect to the cases that are still pending, Applicant has ordinary remedies where he can address his complaints.

4. That in the light of the above respondent insists that there is no breach of any of the fundamental human rights of Applicant or his children.

5. That moreover and without prejudice to the above, in the event that this honourable Court finds in favour of Applicant and awards him a remedy, this should be fair and reasonable and certainly not in the astronomic range of figures as claimed by Applicant.

6. Respondent reserves the right to make further pleas.

That respondent humbly requests this Honourable Court to dismiss all of Applicant's allegations and claims, with costs against same Applicant."

Having heard oral submissions of the parties;

Having seen the note of submissions of the Attorney General of the 14th May 2013 (vide page 40 et seq.);

Having seen the note of submissions of Etienne Merlevede in his own name and on behalf of his minor children of the 21st May 2013 (vide page 156 et seq.);

Having seen the decision of this Court pronounced on the 25th July 2013(vide page 187 et seq.);

Having seen the reply of Lara Merlevede of the 27th November 2013 in term of the decision of this Court of the 25th July 2013 (at page 232 et seq) which states:

*"**1. Preliminary Pleas***

1.1 Legal Representation of the minor children

Firstly and by way of preliminary plea, the respondent requests this court to revoke contraio imperio the decree of the 19th February 2013 wherein the Applicant was granted the authorisation by the Court to file the present proceedings. It is submitted that in view of the fact that care and custody was entrusted pendente lite to the respondent Lara Medevede by means of a decree given by the Civil Court (Family Section), it is therefore the respondent that has legal representation of the minor children and thus the children should be represented by her. In default, the children should be represented by independent curators in this case.

1.2 Consitutional Court not a third degree appeals Court

That the Applicant in these proceedings has inter alia requested the court to revoke and declare null the judgements in the Hague Proceedings (Case 370/10) as well as the orders and decisions given in the separation proceedings (Case 250/10). He further requests this Court to issue an order for the immediate return of the children Gabriel and Chloe.

That in making these requests the Court the Applicant is effectively requesting this court to act as a Court of third degree appeal

That, as repeatedly held by our Courts, this competence. The function of the Constitutional judgement that the Applicant does not agree with[7]

1.3 Failure to Exhaust Ordinary Remedies

That Article 734 (1) (d) (ii) of Chapter 12 of the Laws of Malta provides for the possibility of challenging the judge presiding over a case inter alia:

"If be had previously taken cognizance of the cause as a judge or as an arbitrator"

That if, as the Applicant seems to be implying, the separation proceedings are to be considered the same cause as the Hague proceedings then the Applicant had ample opportunity to request the withdrawal of the presiding Judge. In failing to make such a request, the Applicant has failed to exhaust the ordinary remedies

[7] *'Din il-Qorti tibda biex tirribadixxi li bhala Qorti b'kompetenza kostituzzjonali / konvenzjonali ma tistax isservi bhala Qorti tat-tielet grad, ossia bhala Qorti tal-Appell, minn decizjoni li maghha r-rikkorent ma jaqbilx. Mhix kompetenza ta' din il-Qorti tirrevedi l-meritu tal-kaz d-diskrezzjoni tal-Qorti ...'*

'...l-funzjoni li din il-Qorti trid twettaq fl-istharrig taghha tal-ilment kostituzzjonali jew konzenzjonali mressaq mir-ikorrent m'ghandux jissarraf f'appell iehor mis-sentenza kontestata ..." Qorti Civili Prim'Awla (Gurisdizzjoni Kostituzzionali) Onor J.R, Micallef Deciza 8 ta' Gunju 2005

available to him and therefore this Honorable Court may decline to exercise it powers according to Article 46 (2) of the Constitution.

2. Pleas as to Merits

That subordinately and without prejudice to the preliminary pleas, in merit, respondent rebuts all allegations and claims as unfounded in fact and in law for the following reasons:

That first and foremost the application submitted by Etienne Merlevede contains various statements that have, in the course of the Hague proceedings, been proven to be false. That the Applicant's persistent repetition of these false statements can have no other end but to mislead this Honourable Court.

2.1. Article 6 ECHR – Fair hearing before an independent and impatial Tribunal

2.1.1 Independent and Impartial Tribunal

That the Applicant complains that his right to fair hearing before an independent and impartial tribunal has been breached in that the Honorable Anna Felice was the presiding judge in the Hague proceedings as well as the separatton proceedings. He also alleges that the presiding judge was not impartial because she allegedly passed inappropriate comments during a court hearing (paragraphs 32 and 33 of the application).

That firstly the respondent firmly rebuts this allegation and states that she never heard the court pass the comments that the Applicant alleges were uttered by the presiding judge. Neither did she hear any comments that could have been construed to have the same meaning.

That, without prejudice and subordinately to the plea of non exhaustion or ordinary remedies, if, as rightly pointed out by the Attorney General, the merits

of the two cases (separation and Hague proceedings), it is deemed that the two are separate causes, there does not exist any objective impartiality.

That furthermore, the simple fact that the same judge heard both cases did not in any way affect the presiding judge's personal convictions on the matter in any matter and therefore there does not exist any subjective impartiality.

That contrary to what was declared by the Applicant in Point 22 of his application the Hague Convention does not preclude the proceedings under the Hague Convention from being heard by the same Judge dealing with the separation.

That it has been held by this Honorable Court that is not sufficient for the a party to suspect that a judge was not impartial simply because the case was decided in a way that that party does not agree with.[8]

That even the European Court of Human rights has:

'made clear that the standpoint of the persons concerrued is not in itself decisive. The misgivings of the individuals before the courts, ... must in addition be capable of being held to be objectively justified'

2.1.2 Length of Proceedings

That the Applicant complains that the length of the Hague proceedings before the Court were excessive.

That as rightly pointed out by the Attorney General, in determining whether the length of proceedings were reasonable or otherwise, one has to look at the complexity of the case and the conduct of the Applicant and that of the relevant authorities.

[8] ECHR Kraska vs Switzerland Decided 19th April 1993,para32

That whereas the Applicant repeatedly implies that the case should have been decided within six weeks, the said Applicant took several months to present all his evidence. Indeed, notwithstanding the time-frames given by the presiding judge for the presentation of evidence, the Applicant kept on filing new documentary evidence up to the sitting of the 28th September 2010.

That the respondent, can in no way held responsible for the alleged delay in the proceedings. Indeed she was fully cooperative and actually appeared in court on the 13th April 2010, in spite of the fact that she had not been duly notified with the notice of appointment of hearing.

That the Applicant implies that the alleged delay allowed respondent 'to dig her roots in Malta and strengthen her legal position' (paragraph 30 of the application). That this implication is totally unfounded and in fact neither the judgment of the first Court nor the judgment of the Court of Appeal was based on the length of the period during which respondent resided in Malta with the children. The main motivating factor behind the judgments was the Applicant's consent for the children's presence in Malta.

That, without prejudice to previous pleas that this Honorable Court does not have the competence to act as a third degree appeals court, it is evident that the length of proceedings cannot be flagged as a pretext for requesting that the judgment given by the Court in the Hague Proceedings to be revoked.

That the Applicant repeatedly that the Hague Convention lays down a six week deadline for the case to be proceedings to be determined. That contrary to that implied by the Applicant Article 11 of the Convention simply provides that if a decision is not reached within six weeks, the judicial authority may be requested to state the reasons fot the delay.

That therefore the repeated statements that the 'proceedings had to be concluded within six weeks as stipulated in the Hague Convention ...' and references to '...the time-limit of six weeks stipulated in the Convention...', 'six-week time limit imposed by the provisions of the Hague Convention...', 'allowed

the Hague proceedings to overrun the six week time limit ..' made by the Applicant (paragraphs 21, 23, 27 , 28) are false and misleading.

That, as rightly stated by the Attorney General in his reply, all the elements of a fair hearing were satisfied.

That therefore, the Applicant was duly given a fair, hearing before an independent and impartial tribunal and thus there was no breach of Article 6 of the European Convention of Human Rights.

2.2 Article 8 ECHR – Right no Private and Family Life

That there was no breach of Applicant's right to private and family life. The fact that the Maltese Courts have taken decisions, with which the Applicant does not agree, does not equate to a breach of his fundamental rights.

That furthermore, and without prejudice to the former submission, the respondent can only be held liable for her conduct and not for the conduct/decisions of the court.

2.3 Article 5 ECHR – Right to Liberty

That with regards to the prison sentence imposed on the Applicant by the Court of Magistrates for failing to pay maintenance, said sentence was handed down by a competent court and the execution of such sentence (should the Applicant return to Malta) would constitute a lawful detention according to Article 5 of the ECHR.

That the Applicant's hysterical claims, throughout his application, that the court decree wherein he was ordered to pay maintenance for his minor children is illegal, are totally unfounded. The Hague Convention does not preclude the court from giving maintenance orders and the decree was not issued in contravention of the Hague Convention.

That the Applicant chose to ignore the order of the court to pay maintenance and at the same time ignore his children's material needs. When he was found guilty of this criminal offence by the Court of Magistrates, instead of making use of the ordinary remedies available to him under Maltese law and appear before the Court of Criminal Appeal to challenge the judgment of the Court of Magistrates, he decided to abscond from the Maltese islands.

2.4 Article 3 ECHR – Inhuman and Degrading Treatment

That it was the Applicant's decision to abscond from the Maltese islands and that placed him in a position wherein he cannot exercise the access rights granted to him by the Maltese Courts and consequently not knowing what his children look like or how their voice sounds like.

That the Civil Court (Family Section) granted the Applicant access rights after the said Applicant made such a request. That notwithstanding it was the said Applicant that filed an application before the Civil Court (Family Section) to grant him access rights, he insists that the decree wherein his request was granted was illegal (Point 36) and in contravention of the Hague Convention (Point 26,64).

That Article 16 of the Convention states:

After receiving notice of a wrongful removal or retention in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child had been removed or in which it has been retained shall not decide on the merits of the rights of custody until it has been determined that the child is not to be returned under this Convention....'

The Convention distinguishes between 'rights of custody' and 'rights of access' in Article 5. That thus the Convention does not preclude the judicial authorities of the Contacting State from giving decrees on rights of access.

That therefore the respondent totally agrees with the plea made by the Attorney General 'that by no stretch of the imagination can it result to this Honourable Court that Applicant's rights under this Article were in any way breached'

2.5 Article 45 OF The Constitution of Malta

That the respondent totally agrees with the Attorney General's plea that the 'Applicant's allegation that he is being discriminated against in the basis of origin is unfounded in fact and at law ' and that it is simply a gratuitous and frivolous allegation'.

3. Final Pleas

That in the light of the above respondent pleads that there has been no breach of the Applicant's and of the children's fundamental human right.

That without prejudice to the above, in the event that this Honorable Court deems that there has been such a breach, the revocation of the Hague proceedings as well as the orders and decisions given in the separation proceedings and/ or the issuing an order for the immediate return of the children to France, would not constitute an appropriate remedy and such a decision would in itself result in the breach of the fundamental human rights of the respondent and her children.

That without prejudice to the above, in the event that this Honorable Court deems that there has been a breach of the Applicant's fundamental human rights, the respondent cannot be held liable for such a breach and cannot be ordered to pay the Applicant any compensation.

Respondent reserves the right to make further pleas.

That respondent humbly requests this Honourable Court to dismiss all of the Applicants' allegations and claims, with costs against the same Applicant."

Having seen the note of submissions of Lara Merlevede of the 7th February 2014 (vide page 242 et seq.);

Having seen the note of submissions of Etienne Merlevede proprio et nomine of the 11th February 2014 (vide page 244 et seq.);

Having seen the decision of this Court pronounced on the 5th May 2014(vide page 259 et seq.);

Having seen the note of submissions of Applicant Etienne Merlevede proprio et nomine of the 22nd June 2015;

Having seen the note of submissions of the Attorney General of the 23rd July 2015;

Having seen the note of submissions of Lara Merlevede of the 27th July 2015;

Having seen all exibited documents and the record of the proceedings;

Having heard the oral submissions of the parties ;

Deliberates:

The facts of the case.

The facts of the case that result from these proceedings as well as from the record of proceedings annexed by decree of this Court dated the 3rd May 2013 [9] are as follows:

[9] Vide page 36 of these proceedings wherein the Court ordered the following proceedings be annexed thereto:
[9] *Abduction proceedings in the names "Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Lara Maria Merlevede nee' Borg St.John" (App No 370/10) decided b' the First hall Civil Court on the 30th November 2010 and by the Court of Appeal on the 25' February 2011; Several proceedings in front of the Courts of Magistrates (Malta) as a Court of Criminal Judicature all in the names "Police vs Etienne Pierre Merlevede" decided on the 27th September 2010; Appeal proceedings in front of the Court of Criminal Appeal in the names "Police vs Etienne Pierre Merlevede" (App No 395/2010); Mediation proceedings between Applicant and Lara Maria Merlevede nee' Borg St.John*

The minor children, the twins Chloe and Gabriel Merlevede were born on 27 June 2007 and were brought to Malta by their mother Lara Merlevede with the consent of their father Etienne Merlevede in September 2008. Etienne Merlevede, a train driver by profession, joined his family for the Christmas period and started making arrangement for his temporary settlement in Malta by attempting to take up a course at the Institute of Tourism Studies as a Tourist Guide– (Vide e-mail April 2009 to Vincent Zammit at page 50 of the proceedings 4/10 AF.) Futhermore Etienne Merlevede opened a bank account with HSBC Bank; applied for the children's allowance from the Maltese Government after having cancelled the benefits received in France stating that he was resident in Malta – (Vide page 25 of proceedings 4/10 AF.) He bought a car for his wife (Dok ETX at page 268) and applied for a Maltese TV Licence (Vide Dok. B at page 26 of proceedings 4/10 AF.)

More importantly, Etienne Merlevede gave his wife a power of attorney ***"to carry out all that is necessary and is in the best interest of our children"*** – Vide Dok. E at page 32 of proceedings 4/10 AF. At this time Etienne Merlevede was granting his wife a monthly allowance of €1,500 for his wife and children.

In May 2009 the minor child Gabriel Merlevede was diagnosed as suffering from autism. Lara Merlevede requested the immediate return of her husband, who only returned to Malta in July 2009. After departing from Malta, he travelled to Belgium where he was living and working for a few months in order to obtain further certification as a train driver in Belgium. During this period his French mobile phone was inoperative and he had left no Belgian forwarding address to his wife.

On the 23rd July 2009 Lara Merlevede requested Maltese Courts for authorisation to separate from her husband – Vide page 5 of the separation proceedings 250/09 AL.

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[9]*Separation proceedings in the names "Lara Merlevede vs Dr Patrick Valentino et noe" (App No 250/09) and proceedings in the names "Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Lara Maria Merlevede nee' Borg St.John" (App No 396/2012AL)*

The Civil Court (Family Section) authorised Lara Merlevede to proceed with the separation – Vide page 7 of the separation proceedings 250/09 AL and Dr Patrick Valentino and PL. Mario Mifsud Bonnici were appointed as curators to represent Etienne Merlevede (vide page 11 of separation proceedings 250/09 AL) whose current address was unknown.

On the 23rd September 2009 the Court gave an interim decree for care and custody of the twins Chloe and Gabriel Merlevede to their mother.

In October 2009 Etienne Merlevede returned to Malta and proceeded personally assume the acts of the separation case and filed a sworn reply on December 3rd 2009, engaging Dr. Stefano Filletti as his legal counsel. No exception or plea as the jurisdiction of the Maltese Courts or a plea of nullity of the proceedings[10] were proferred – Vide page 40 of separation proceedings 250/09 AL.

The Abduction proceedings invoked in France by Etienne Merlevede on the 24th of November 2009[11]were conducted by the Director of Social Welfare Standards and initiated in Malta on the 11th January 2010[12] Lara Merlevede was notified on the 2nd March 2010 after unsuccessful attempts at notification. The first hearing was rescheduled for the 13th April 2010. The Applicant was granted six weeks for the filing of his affidavits and the hearing was adjourned to the 8th June 2010, respondant been given five weeks for the filing of her affidavit. During the hearing of the 15th July, 2010 the parties informed the Court that they had no further evidence to profer, other than the cross examination of the parties and the witnesses, which were conducted during the hearings of the 15th July; 10th September; and 28th September 2010. Both parties exhibited further documents and the Director for Social Welfare Standards, and Lara Merlevede were further cross examined on the 25th October 2010. In the course of this hearing the Court set out time limits for the final written submissions of the parties and judgement was pronounced on the 30th November 2010.

[10] On the basis that the Judge seized with the separation case was the same one presiding over the Abduction Proceedings
[11] Vide Dok AG3 a page 8 of proceedings 4/10 AF
[12] Ibid page 1 of the proceedings 4/10 AF

In its judgement, the Civil Court (Family Section) held that Chloe and Gabriel, minor children of the parties, had been brought to Malta with the consent of their father and that the evidence showed that no abduction in fact had taken place, and further more in view of Gabriel's autism, the children's return to France would have exposed Gabriel to a grave risk of physical and psychogical harm within the meaning of Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction.

Etienne Merlevede appealed from this decision on the 10th December 2010. Lara Merlevede filed her response on the 27th January 2011 and the Appeal was scheduled for hearing on the 8th February 2011, after which, judgement was pronounced on the 25th February 2011 which confirmed the judgement pronounced by the Court of First Instance, in that no abduction in fact had taken place.

The Civil Court (Family Section) found that the children had indeed been brought to Malta with the consent of their father and that he had acquiesed in terms of Article 13(1) (a) of the Convention and that during the period of close to a year father had acted in a manner that led one to believe that he was not going to assert the right to the summary return of the children and that his conduct over all ammounted to aquiescence.[13].

The Maltese Courts issued a maintenance order in the ammount of €1300 per month €900 for the minor children and €400 to Lara Merlevede.

On the 3rd December 2009 Etienne Merlevede filed an interim application requesting the reduction of maintenance order to €350 and authorization to visit his children everyday whilst he was in Malta.

On the 8th February 2010 the Court acceded to Etienne Merlevede's request on the access to his children but declined the request for reduction of maintenance allowance. On March 4th 2010, Etienne again filed a request for reduction of the

[13] Vide Appellate Judgement 4/10 at page 17 and 18 of the said judgement

maintenance order which was upheld. Thereby, reducing the allowance to €1,100 a month - €850 for the children and €250 for Lara Merlevede.

Subsequently Etienne Merlevede failed to pay the maintenance allowance as ordered by the Court and Lara Merlevede filed a police report to this effect. Criminal proceedings followed before the Magistrates' Court. These proceedings were formally exhibited and marked Dok. EQ 1 to EQ 4 with copies of the judgements of Magistrate Dr. Anthony Vella of the 27th Septemebr 2010 at page 57, 87, 110, 113 wherein the Magistrates' Courts found Etienne Merlevede guilty of having failed to give his wife and children the maintenance allowance issued by Court order and was sentenced to a week's detention in each of the four judgements, that is, a total of one month's detention.

Etienne Merlevede appealed the above mentioned judgements which appeal lapsed due to the fact that Etienne Merlevede failed to appear at the scheduled appellate court hearing - Vide page 149 of these proceedings.

Etienne Merlevede had also filed judicial proceedings in the French Court of Douai with regard to visitation. On the 19th April 2012 the appellant Court of Douai in France granted Etienne Merlevede rights of visit to the minor children in Malta.

In July 2012, the Director for Social Welfare Standards filed another application[14] requesting The Maltese Courts to make practical arrangements to facilitate the Applicant's rights of acess under Article 48 of the Regulations. On the 8th August 2013 the Court pronounced the manner in which such visitation rights were to be exercised in Malta and in France. Lara Merlevede appealed this decision on the 9th August 2013. The Court of Appeal, on the 31st January 2014 pronounced its judgement, providing for limited passport validity dates for the minor children, for a deposit by Etienne Merlevede of €10,000, ruling that Etienne Merlevede had to pay for the travel arrangement including flights and accommodation for the minor children and their mother.

[14] In terms of Regulation 2201/2003 concerning the jurisdiction and the recognition and enforcement of judgements in matrimonial matter and matters of parental responsibility

On the 7th February Lara Merlevede filed another application requesting clarification of futher conditions.

On the 4th March 2014 the Court acceded to the request of the presence of the mother and the social worker during visitation, but refused the request that the father to pay for the accommodation expenses in a hotel.

On the 22nd April 2014, the Director for Social Welfare Standards moved for a retrial in terms of Article 811 of Chapter 12 of the Laws of Malta on the grounds that the Court of Appeal's judgement was ultra petita, which judgement was in fact revoked.

In the retrial proceedings, the Court of Appeal (8th June 2015) rejected Lara Merlevede's appeal and made the following arrangements: that when access rights of the Applicant were being exercised in Malta, the minor children were to be picked up not later than 9.00am at their mother's residence and returned to the same residence not later by 8.00pm; when access rights were to be exercised in France, the minor children were to be collected by father or his representative by not later than 7.30am and returned not later than 8.00pm. The Court furthermore ordered the active communication between the father and/or his representative and the minor children by Skype sessions, twice weekly, to enable the children to familiarize themselves with their father and the person who was to accompany them in their travel to and from Malta.

Deliberates:

Before embarking on the merits of the case, the Court draws the attention of the Attorney General to its decision of the 5th May 2014 a fol. 259 to 297, wherein this Court had already rejected the fourth prelimary plea of the Attorney General and the first preliminary plea of Lara Merlevede and therefore abstains from taking further cognisance of the same.

Deliberates:

The Court now turns to examine the case on the merits. The Applicant Etienne Merlevede alleges that the Maltese Authorities breached:

1. The right to a fair hearing before an independent and impartial Tribunal, in terms of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

2. The right to a private and family life, in terms of Article 8 of the said Convention;

3. The right for protection against inhuman treatment, in terms of Article 3 of the said Convention;

4. The right to liberty, in terms of Article 5 of the said Convention;

5. The right for protection against discrimination on the grounds of place of origin in terms of Article 45 of the Constitution of Malta.

The Court will analyse and examine each alleged breach in term, starting with the right to a fair hearing under Article 6 of the European Convention of Human Rights, which states:

> ***"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special***

> ***circumstances where publicity would prejudice the interests of justice."***

Before delving into the merits of the case, the Court feels it incumbent on her to reiteriate that this Court, in its Constitutional jurisdiction, is not a third Court of Appeal. Its brief is not to identify and address wrongs or mistakes in judgements of the Court of the First Instance or the Court of Appeal. Its only jurisdiction and competence is to examine and remedy human rights violations.
Indeed this train of legal thought has been repeatedly confirmed by our Costitutional Court. This school of thought is also reflected in the jurisprudence of the European Court of Human Rights.

Indeed in its judgement **J.E.M Investments Limited vs Attorney General** decided on **30th September 2011** the Costitutional Court reiterated:

> ***"23. Illi kif tajjeb osservat il-Prim' Awla (Sede Kostituzzjonali), u fuq dan jaqblu l-intimati u anke s-socjeta` rikorrenti, id-dritt ghas-smigh xieraq ma jiggarantix il-korrettezza tas-sentenzi fil-meritu izda jiggarantixxi biss l-aderenza ma' certi principji procedurali (indipendenza u imparzjalita` tal-Qorti u tal-gudikant, audi alteram partem u smigh u pronuncjament tas-sentenza fil-pubbliku) li huma konducenti ghall-amministrazzjoni tajba tal-gustizzja. Il-funzjoni tal-Qorti, fil-gurisdizzjoni Kostituzzjonali taghha, m'hijiex illi tirrevedi s-sentenzi ta' Qrati ohra biex tghid jekk dawn gewx decizi 'sewwa' jew le, izda hija limitata ghall-funzjoni li tara jekk dawk is-sentenzi kisrux il-Kostituzzjoni jew il-Konvenzjoni Ewropea.***
>
> ***24. Effettivament il-Qorti Ewropea dwar Drittijiet tal-Bniedem dejjem sostniet li:***
>
> ***a. "The question whether proceedings have been 'fair' is of course quite separate from the question whether the tribunal's***

> ***decision is correct or not. As the Commission has frequently pointed out under its so called "fourth instance formula", it has no general jurisdiction to consider whether domestic courts have committed errors of law or fact, its function being to consider the fairness of the proceedings". (Application 6172/73, X v. U.K.)"***

Vide also **Fatiha Khallouf vs Commissioner Police** decided on **28th December 2001** per Mr Justice Dr. Vincent Degaetano;and **Carmel Joseph Farrugia vs Attorney Generali** decided on **5th April 2013.**

Indeed in the judgement of **Andrew Ellul Sullivan u Charles sive Carmelo Elul Sullivan vs Commissioner Police and Attorney General** decided on **31st October 2008** the Costitutional Court held:

> ***"Ghandu jigi enfasizzat li l-kaz odjern ma huwiex appell mid-decizjoni tal-Qorti ta' l-Appell Kriminali. Il-kompitu ta' din il-Qorti, kif kien ta' l-ewwel Qorti, ma huwiex li tezamina l-process kriminali biex tara jekk is-sentenza impunjata ghamlitx valutazzjoni korretta tal-provi akkwiziti fil-process, jew jekk dik il-Qorti ta' gurisdizzjoni kriminali interpretatx u applikatx korrettement id-disposizzjonijiet li fuqhom kienu msejsin l-imputazzjonijiet. Kieku din il-Qorti kellha tassumi dan il-kompitu, hija tkun qieghda tqieghed lilha nnifisha bhala qorti tat-tielet grad. Certament din il-Qorti qatt ma nghatat din il-mansjoni u din il-gurisdizzjoni. Minflok, il-kompitu ta' din il-Qorti huwa li tezamina l-process kriminali u partikolarment is-sentenza impunjata bl-iskop li tistabilixxi jekk dak il-process, ikkonsidrat fl-assjem tieghu, kienx ta smigh xieraq lill-akkuzati u kienx wiehed "fair" billi partikolarment jigi stabbilit jekk id-drittijiet fondamentali ta' l-appellanti msemmija fir-rikors promotur dwar il-prezunzjonijiet hemm riferiti u dwar id-dritt li jkunu gudikati minn Qorti imparzjali, kienx skrupolozament osservat. Kif***

> ***josserva l-awtur Stefan Trechsel fil-ktieb fuq imsemmi, ezattament f'pagna 83:***
>
> ***""The guarantee of a fair trial is "only" a procedural gurantee, designed to secure "procedural justice" rather than "result-orientated justice", i.e. a decision or judgment based on the true facts and the correct application of the law."***

Indeed the European Court of Human Rights have reiterated the same concept:

> ***"The question whether the proceedings have been "fair" is of course quite separate from the question whether the Tribunal's decision is correct or not. As the commission has frequently pointed out under its so called "fourth instance formula" it has no general jurisdiction to consider whether domestic court have committed errors of Law or fact, its function being to consider the fairness of the proceedings."***
>
> (Vide **X vs UK** App. No. 6172/73; **Kemmache vs France** App. No. 17621/91 para. 44; **Garcia Ruiz vs Spain** App. No. 30555/96 para. 28; **Sisojeva and Others vs Latvia** App. No. 60654/00 para. 89)[15]

In the light of the above, the Court will consider the **"fairness"** of the proceedings in accordance with Article 6 of European Convention.

There is a wealth of jurisprudence of the European Courts of Human Rights with regards to the meaning and essence of the right to a fair trial, and the concept of a fair trial is deemed to include the right to access to Court, the right to equality of arms, the right to produce evidence and witnesses and to cross examine all witnesses, the right to a public hearing and the right of public delivery of the judgement. The Court, having examined all these major attributes in the light of the proceedings

[15] Vide also **Jacobs and White, The European Convention on Human Rights** at page 140; and **ECHR, Practical Guide on Admissibility Criteria (2014)** at page 83 to 84.

which are being impugned, finds that there is no breach of the Applicant's right to a fair trial where these attributes are concerned.

The Applicant Etienne Merlevede is grounding the alleged breach to his right to a fair hearing by alledging:

1. That the separation case 250/09/AF was filed in Malta in violation of rules of jurisdiction;

2. That the maintenance decree of 8th February 2010 was excessive;

3. That the abduction proceedings in terms of the Hague Convention on the Civil Aspects of International Child Abduction (Chapter 410 of Laws of Malta) were not concluded within the prescribed time, that is within six weeks;

4. That the separation proceedings and the abduction proceedings were heard by one and the same Judge;

5. That instead of deciding the abduction proceedings the Civil Court (Family Section) issued interim decrees *"that are permanent in nature*"[16];

6. That by means of the interim maintenance order Lara Merlevede was able to obtain criminal convictions against the Applicant for the default, in spite of the fact that *"the Applicant sent money every month"*[17]*;*

7. That the Magistrate Courts' conviction of Applicant to a week detention, was in contravention of the Hague Convention;

8. That the Civil Court (Family Section) refused to hear the Applicant.

9. That various professionals and members of constituted bodies failed in their duty with regards to the Applicant.

[16] Vide para 28 of Etienne Merlevede application at page 8 of these proceedings
[17] Vide para. 28 of Application at page 8 of these proceedings

Deliberates:

The Applicant Etienne Merlevede complains that the separation proceedings were brought before the Maltese Court in violation of the applicable jurisdictional rules.

Having examined the acts of the proceedings 250/2009 AF, this Court finds this complaint is manifestly unfounded.

This is so due to the fact that these separation proceedings were **filed almost a year after Lara Merlevede and her children arrived in Malta (i.e. September 2008), with the consent of the Applicant.** Indeed the separation proceedings were filed on the **4th August 2009** through the appointment of curators. Furthermore on the **3rd December 2009**, the Applicant personally assumed the acts of proceedings. He immediately filed a sworn reply in which be outlined all the pleas and exeptions that he intended to profer in the proceedings. This was done with the assistance of an advocate of his choice who file the sworn reply. The Court notes that no prelimanary plea contesting the jurisdiction of the Maltese Courts was lodged at that time or during the several subsequent hearings. The questioning of the Court's jurisdiction **was first raised on the 4th July 2011**. It is understood at Law, that a preliminary plea contesting jurisdiction must necessarily be filed ***ad limine lites***.

Moreover the record of the separation proceedings show that the **Applicant actually submitted to that Court's jurisdiction by repeatedly requesting the reduction of the maintenance allowance established by Court order.** It is difficult therefore to placate this active submission to the Court's jurisdiction with the late contestation of the same jurisdiction.

The question of jurisdiction will be further examined in the Court's later analysis of the alleged breach of Article 8 of the Convention.

The Applicant complains that the maintenance allowance was excessive. This Court has already reiterated that its function is not that of a third Appellate Court. Moreover the maintenance order in question was an interim or a provisional one which may be increased or decreased at any time, according to law. Indeed the original interim maintenance allowance was in fact reduced after the Applicant filed an application to that effect. The Court notes further more that maintenance orders are not prohibited under the Hague Convention. Therefore this Court finds this complaint to be unfounded.

Etienne Merlevede alleges that his right to a fair hearing in accordance with Article 6 of the European Convention has been breached as a result of the fact that the Civil Court (Family Section) failed to hear and decide the abduction proceedings within six weeks.

The record shows that the abduction proceedings were not in fact completed in six weeks. These proceedings were initated on the 11th January 2010[18]. Judgement of the Court of the First Instance was deliverted on the 30th November 2010. An appeal was lodged on the 10th December 2010 and the the Appellate Court decision was pronounced on the 25th February 2011.

Article 11 of the Hague Convention on the Civil Aspects of International Child Abduction, ratified and incorporated into Maltese Law by means of Chapter 410 of Laws of Malta, states:

> ***"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.***
>
> ***If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the Applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State,***

[18] Vide page 1 of 4/10 AF

> ***shall have the right to request a statement of the reasons for the delay"***

The Hague Convention lays down a ***desiderata*** of a period of six weeks within which the abduction proceedings ought to be expedited and lays down a right to information in case the final decision is not forthcoming within this period.

However Regulation 11 of the the Council of Europe Regulation No 2201/2003 esthablishes a strict and mandatory six week time period for the expediting of all proceedings whether by the Court of First Instance or by the Appealed Court of the Requested State:

> ***"Return of the child***
>
> ***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 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "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 B shall apply.***
>
> ***2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.***
>
> ***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."***

It is evident that raison d'etre for the stringent and mandatory time period established by the Council of Europe Regulations 2201/03, is the prevention and discouragement of wrongful retention or abduction of children and the prevention of the irremediable consequences in the relations between the children and the non custodian parent. Indeed, the Explanotury Report on the 1980 Hague Child Abduction Convention by Elisa Perez-Vera (HCCH 1982) sheds light not only as a commentary on its provisions but on the philosphy of the Hague Convention in its fight against the multiplication of international child abduction.

The matter that is to be examined by this Court is whether the lenght of abduction proceedings before the Maltese Court (which found that in fact **there was no abduction**, that no wrongful retention of the child was grounded, and found that the children were brought to Malta with the consent of the father who had acquiesced in terms of Article 13(1)(a) of the Convention) was in breach of his right to a fair hearing before an independent and impartial tribunal or otherwise.

This Court having examined all the acts of the abduction proceedings came into conclusion that the Applicant's right for a fair trial was not breached because of the length of the proceedings in excess of the period of six weeks, and this due to the fact that there were exeptional circumstances that made it impossible for the Civil Court (Family Section) and Appellate to conclude proceedings in the said mandatory time period.

The Court notes that the child Gabriel suffered from autism, and needed the specialised care given by a number of professionals who were conducting his therapy in a multi-diciplinary fashion. These professionals were requested to give

evidence in the abduction proceedings in view of the fact that Lara Merlevede was challenging the abduction proceedings under Article 13 of the Hague Convention. It is this Court considered opinion that the autism of the child Gabriel , his very young age, the necessity of the testimony of Doctors and Professionals in the field constituted the "exceptional circumstances" cited in Article 11(3) that prevented the Civil Court (Family Section) and the Appellate Court from adhering to the six week time limit to deliver final judgement. Perhaps the greatest accreditation of the fairness of the Maltese proceedings was given by the French Appellate Court of Douai – (the Courts of the State that the appellant believes should have properly been seized of the case,) – granted custody of the two minor children to Lara Merlevede and access rights to Etienne Merlevede in its judgement of the 19th April 2012.

The Applicant alleges that the Maltese Central Authority did not keep its French counterpart and himself informed with the reasons for the delay in the abduction proceedings.

This Court finds that the record shows that the Maltese Central Authority was in constant contact with the French Central Authority as may be evidenced by the voluminous corrispondance exibited at the records of the proceedings -Vide Dok SHV1 to SHV4 from page 389 to 570.

The Applicant alleges that his right to a fair trial by an independent impartial Tribunal was breached because the Judge who was hearing the separation proceedings was the same judge hearing the abduction proceedings.

It is this Court considered opinion that any objection or challenge regarding the presiding Judge in any proceedings before these Courts may be raised according to the Maltese Law by means of a preliminary plea calling for the abstension of the presiding Judge.[19] It is understood that this may be effected by means of a preliminary plea which is to be raised ad limine litis. This preliminary plea was not proffered either in separation proceedings 250/09 AF or in the abduction proceedings at the appropriate time of the proceedings. The Applicant did not therefore exhaust

[19] - Vide Art 734 (1) (d) (ii) of Chapter 12 of the Laws of Malta

the ordinary remedies available to him under Maltese Law. Therefore the Court finds that this complaint is unfounded.

The Court also needs to address the slur on the presiding Judge and the alleged remarks apparently said by the same Judge in open Court. The record of the separation proceedings show no such remarks. Moreover the lawyers present at the hearing gave evidence in these proceedings, and denied hearing any derogatory remarks.[20] This Court notes that no mention of such derogatory remarks or complaint, thereof was registered in the note of the record of proceeding of that hearing. This Court also fails to see how the French-speaking Brigadier David Barriere could have understood the alleged remarks which were spoken in the Maltese language. The Court notes that little weight may be given to this witness's testimony in view of the fact that he was not produced for cross examination. Vide page 340 of these proceedings.

The Applicant alleges that the Civil Court (Family Section) pronounced interim decrees which were of permanent nature, and that criminal convictions were pronounced in spite of the fact that the Applicant was paying maintenance every month.

The Court finds that both complaints are manifestly unfounded. This is due to the fact that the Civil Court (Family Section) has to date only passed an **interim custody and access order; and an interim maintenance orders**. None of these decrees, by the very facts of their being interim or provisional, have a permanent nature. The declaration of Etienne Merlevede that he was convicted of not paying maintenance when, in fact, he paid maintenance every month is at best misleading. The record shows that the Maltese Civil Court (Family Section) ordered Etienne Merlevede to pay the reduced sum of €1,100 every month to his wife and children. The record also shows that Etienne Merlevede **pays €200 a month** in maintenance to his wife and children. The criminal convictions of the 27th September 2010 were grounded on the fact **of his non compliance of the maintenance order** as pronounced by the Court.

[20] Vide evidence of Dr. Buttigieg at page 595E.

The Applicant complains that the Court refused to hear him. There is no registered objection to this effect in the record of the proceedings, which amply show that the Court heard **all the evidence** proffered by the parties to the case.

The Applicant further complaints about several Professionals including members of the Police Force of failing in the duty were he was concerned. This Court has already addressed the slur of the presiding Judge, the denegration of the Maltese child psychiatrist and the Advocates of the Maltese Central Authority. The Court will now address the allegations made with regard to Inspector Louise Calleja. The Court after having seen the record of the proccedings finds no wrongdoing. It is evident that Inspector Calleja acted on advice taken from the Attorney General in not pursuing criminal proceedings against Lara Merlevede for non compliance with the access rights of the Applicant, because the proceedings on the practical arrangements in terms of Art 48 were still pending on Appeal.

Therefore the Court finds no breach of Article 6 of the Convention.

The Court will now address the alleged breach of Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which enshrines one of the most fundamental values of a democratic society:

> **"*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"**

The Convention prohibits, in absolute terms, torture or inhuman or degrading treatment or punishment (Vide **V vs United Kingdom** GC No 248881/94 at para. 69; **Labita vs Italy** GC No 26772/95 para 119; **Kudla vs Poland** App No 30210/96 decided on 26th October 2000. The European Court of Human Rights has repeatly affirmed that in order that ill treatment be considered as falling within the scope of Article 3 it must *"attain a minimum level of severity, the assessment of which depends on all circumstances of the case including the nature and context of treatment, the manner and method of execution, its duration, its physical or mental effects among others."* – Vide **Raninen vs Finland** decided on the 16th December 1997 para. 55; **Kafkaris vs Cyprus** No 21906/04 para 95. The European Court has

adjudged treatment to be inhuman because it was premeditated, applied for several hours at a stretch, caused actual bodily injury or intense physical or mental suffering.

Treatment was held to be degrading because it aroused feelings of fear, anguish and inferiority, its object being to humiliate and debase the person concerned – Vide **A and others vs UK** decided on the 19th February 2009 App No 3455/05 at para 127.

The Court has also repeatedly stressed that the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment - Vide **Tyrer vs UK** decided on 25th April 1978 at para 30; **Soering vs UK** decided on 7th July 1989 at para 100; **V vs UK** Ibid at para 71; **Kudla vs Poland** Ibid at para 92.

Etienne Merlevede claims that his suffering as a result of the treatment meted out by the Maltese Courts was so *"intense that it may only be described as constituting degrading and inhuman treatment"*.

He submits furthermore that the fact that he cannot provide for the specialised care that his son requires through Dr Vinca Riviere in France has caused him *"extreme heartache"*.[21]

This Court understands the anxiety of persons who are in the midst of legal proceedings. It also appreciates the fact that Etienne Merlevede feels, perhaps even greatly, the separation of his children.

This level of anxiety however does not begin to approximate the attainment of a sufficient level of severity to come within the scope of Article 3 of the Convention.

The Court furthermore cannot fail to note that the "separation" between father and children was a self-imposed incapacitation, the result of his failure to pay the reduced maintenance allowance for successive weeks and months.

[21] The Court simply refers to the statement of the French Douai Appellate Court with reference to Dr Vinca Riviere's proposed treatment and cure of autism, as partaking more of personal conviction than scientific research.

This Court has little doubt that should the Applicant honor his obligations and pay the arrears in maintenance, he may apply for a Presidential Pardon to have his one month detention reviewed or commuted according to Law, a procedure which, the record shows, has not yet been attempted.

Therefore, the Court holds that there has been no violation of Article 3 of the Convention in the present case.

The Court shall turn its attention to the alleged violation of Article 5 of European Convention of Human Rights which states:

> ***" Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:***
>
> ***(a) the lawful detention of a person after conviction by a competent court;***
>
> ***(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;"***

There can be no doubt that the four judgement pronounced by the Magistrates' Court on the 27th September 2010, each sentencing Etienne Merlevede to one week detention were *"convictions by a competent Court" in terms of Art 5 (a) of the Convention.* [22].

The record furthermore shows that Etienne Merlevede never served his sentence of detention.

[22] Vide judgement at page 57, 87, 110, 113.

The Court therefore finds the allegation of breach of Article 5 to be manifestly unfounded.

The Court will examine the alleged breach of Article 8 of the European Convention that is the right to a private and family life. This Article states:

> ***(1) Everyone has the right to respect for his private and family life, his home and his correspondence.***
>
> ***(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.***

The relevant Articles of the 1980 Hague Convention on the Civil Aspects of Child Abduction are the following:

> ***"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 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.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

...

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

...

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the Applicant or the Central Authority of the requested State, on its own initiative

or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.

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 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

...

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

> ***...***
>
> ***Article 19***
>
> ***A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.***
>
> ***Article 20***
>
> ***The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."***

The European Court of Human Rights has repeatedly asserted, that it is common ground that the relationship between the parent and the child comes within the sphere of family life under Article 8 of the Convention.[23]

The European Court reiterated that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 (Vide **Monory vs Romania and Hungary**, App. No. 71099/01, para. 70).[24]

The European Court have accordingly been asked to determine whether the domestic measures amounted to an interference with the Applicants' right to respect for their family life in that it restricted the enjoyment of each other's company.

The European Court has reiterated that, although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, **there are in addition positive obligations inherent in effective "respect" for family life.**

[23] **Iosub Caras vs Romania** App No. 7198/04 para. 28; **Ferrari vs Romania** App No. 1714/10 para 41.
[24] Vide also **Shaw vs Hungary** App No. 6457/09

However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both contexts the State enjoys a certain margin of appreciation (Vide **Ignaccolo-Zenide vs Romania**, App. No. 31679/96, para. 94, ECHR 2000-I, **Iglesias Gil and A.U.I.,** para. 48; **Sylvester vs Austria**, App. No. 36812/97, 40104/98, para. 51; **Ferrari vs Romania** App. No. 1714/10 para 44) .

The European Court has emphasised that the child best interest must be the primarily consideration, and that the objectives of prevention and immediate return correspond to a specific conception of the best interest of the child. [25] It has also been said that notwithstanding the State's margin of appreciation, the Court is called upon to examine whether the decision making process leading to an interference, was fair and afforded those concerned to present their case fully, and that the best interests of the child were defended. [26]

Indeed, the factors capable of constituting an exception to the child's immediate return in terms of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the parties to the proceedings, **must genuinely** be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention (Vide **X vs Latvia**,Ibid Para. 106; and **Neulinger and Shuruk vs Switzerland [GC],** App. no. 41615/07, para 133, ECHR 2010).

The European Court has also reaffirmed that with regarding the reunification of children with their parents, ***"the adequacy of a measure is also to be judged by the swiftness of its implementation. Such cases require urgent handling, as the passage of time can have irremediable consequences for the relations between the***

[25] Vide **X vs Latvia** App No. 27853/09 para. 95
[26] Vide **Ignaccolo Zenide vs Romania** App. No. 31679/96 para 99

children and the parent who does not live with them" (Vide **Iosub Caras,** para 38; and **Blaga**, para 72). It has been held that the delays in the procedure alone may enable the Court to conclude that the authorities had not complied with their positive obligations under the Convention (Vide **Shaw v. Hungary**, App.No. 6457/09, para 72).

Deliberates:

It is this Court considered opinion that the decision of Civil Court (Family Section) of the 30th November 2010 and the Appellate Court 25th February 2011, were judgement were delivered only after an indepth examination of the exceptions proferred under Article 13 of the Convention, that the decision-making process was fair and afforded all concerned to present their case fully and that the best interests of the child were defended.[27]

According to the evidence proffered in the proceedings under examination, this Court notes **that the timeline in this case is of major importance**. It needs to be emphasised that the children were brought to Malta from France with the consent of the father in **September 2008**. The **interim care order** was pronounced by the Civil Court (Family Section) on the **23rd September 2009 almost a year to the day that the children arrived to Malta**. The Applicant initiated the abduction proceedings in France in **24th November 2009** which proceedings intiated in Malta on the **11th January 2010.**

Indeed both the Court of First Instance and the Appellant Court examined the evidence minutely and came to the conclusion that the testimony showed that the Applicant **had consented** to his children's stay in Malta, that he showed evidence of preparing to settle down in Malta for some considerable time and to that effect, was joining a course to become a Tourist Guide in Malta; had in pursuance of the same intention, requested his employer for a long period of leave; had bought a car for his wife in Malta; had cancelled the French welfare benefits and applied for the children's allowance to be given by the Maltese Government stating that he was

[27] As outlined in **Ignaccolo Zenide vs Romania** App. No. 31679/96 para 99

resident in Malta; had applied for a Maltese TV licence and had given his wife a power of Attorney ***"to carry out all that is necessary and is in the best interest of our children"*** – Vide Dok. E at page 32 of proceedings 4/10 AF.

All this, according to the Appellate Court decision, showed that the Applicant had aquiesced in terms of Article 13 (1)(a) of The Hague Convention. Moreover the Court of First Instance also found that in view Gabriel's condition, a child of tender age manifesting autistic traits, his return, would pose a great risk to the child and may expose him to physical or psychological harm in terms of Article 13(1)(b) of the Convention. Therefore the Maltese Courts found that no abduction and no wrongful retention had taken place.

The Court understands that whilst the Hague Convention demands expedience and efficiency in Abduction Proceedings and lays out a period of six weeks as a ***desiderata*** within which the Court of the Requested States should expedite abduction proceedings not only at First Instance but also at the Appellate Stage, Article 11 of the Council of Europe Regulations 2201/03 esthablish a mandatory and much stricter time-limit:

> ***"Return of the child***
>
> ***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 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "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 B shall apply.***

> ***2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.***
>
> ***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 couft shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged."***
>
> ***(Emphasis of the Court)***

It is this Court's considered opinion that Gabriel's autism, constitute a special circumstance that fully explain and justify the length of the procedures. It is relevant to note that this child was being look after by a multi-disciplinary team of experts including Doctors, Child Physchitrists, Speech Therapists etc. All these professionals needed to be examined at length in the Abduction Proceedings. The **fact that the child had only been diagnosed with autistic traits in May 2009 when he was not yet two years of age,** did not help the situation in that the professionals had to examine the development or otherwise of the condition of autism and to follow closely the progress or otherwise of the child. The record shows that this was done with a great sense of responsibility by all the concerned, and this Courts finds not a shred of evidence of arbitrariness in any of the proceedings pursuant to the Hague Convention and the decisions taken thereunder.[28] Therefore this Court finds that the length of the abduction proceedings was justifiable in view of the above exceptional circumstances within the meaning of

[28] Vide Strombald vs Sweeden Judgement, app. 3684/07 decided on 5th July 2012 at para 92

Article 11 (3) that made it impossible for the Maltese Court to issue a final judgement by not later than six weeks after the application was lodged. Therefore the Court finds that there was no violation as to Article 8 on account of the length of the Hague Abduction Proceedings.

With regards to access rights of the Applicant and whether the measures taken by Maltese Courts posed an interference with the rights of access of the Applicant within the meaning of Article 8, the record of the annexed proceedings show that the Civil Court (Family Section) granted the Applicant reasonable access rights to his very young children. The record further shows that these access rights **were amplified** on the Applicant's request to allow for **better contact** between father and childen when he travelled to Malta.

Etienne Merlevede only stopped exercising his right of access to his children when, following his continued non-compliance with maintence order, he was charged with the same and convicted to a month's detention. It cannot but be said that it was Etienne Merlevede's choice not to comply with the Maintenance Order issued by the Maltese Courts as it was Etienne Merlevede's choice not to return to Malta to avoid detention.

The judgements delivered against Etienne Merlevede are therefore justifiable in terms of Article 8(2) of the European Convention.

Therefore the Court finds no breach of Article 8 of the Convention.

The Court shall now examine the alleged breach in terms of Article 45 of the Costitution of Malta.

Accordingly, Etienne Merlevede complains that he has been discriminated against on the grounds of place of origin. The Court examined the acts of these proceedings and the records of proceedings annexed thereto and finds that the Applicant has not produced a shred of evidence to substantiate his claim.

Therefore this Court dismisses as manifestly unfounded the alleged breach in terms of Article 45 of the Costitution of Malta.

Having found no breach of Etienne Merlevede's Human Rights and Fundamental Freedoms as alleged, the Court has no alternative but to reject the remedies requested by him.

Therefore and for these reasons the Court abstains from taking further cognisance of the preliminary pleas of the Attorney General, numbered 1, 2, 3, and 5 in view of its decision of 25th July 2013; abstains from taking further cognisance of the 4th preliminary plea of the Attorney General and the 1st preliminary plea of Lara Merlevede in view of its decision of the 5th of May 2014, upholds the preliminary pleas of Lara Merlevede enumerated 1.2 and 1.3; upholds the Attorney General pleas on the merits, upholds Lara Merlevede' s pleas on the merits and,

Holds:

1. That there has been no violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

2. That there has been no violation of Article 3 of the said European Convention;

3. That there has been no violation of Article 5 of the said European Convention;

4. That there has been no violation of Article 8 of the said European Convention;

5. That there has been no violation of Article 45 of the Costitution of Malta;

Therefore denies the second (2nd,) third (3th,) fourth (4th) and fifth (5th) request for remedies demanded by the Applicant, since they are not justified according to law.

Costs are to be paid by the Applicant Etienne Merlevede.

Read.

Judge Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli
Deputy Registrar