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Judgment: approved by the Court for handing down

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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND ON
APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

BETWEEN:

DA

Appellant;

-and-

RA

Respondent.

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal by the mother from a decision of Gillen J who on 23 October 2012 ordered the return of K, a 10-year-old child, to Malta pursuant to Article 12 of the Hague Convention. Nothing must be reported in this case which could lead to the identification of the children concerned or any of the parties. We gave our decision at the end of the hearing on 22 November 2012 dismissing the appeal and ordering the return of the child on 27 November. These are our reasons.

Background

[2] We are happy to adopt the background as outlined by the learned trial judge. The respondent father is a national of Malta and the mother a national of the United Kingdom having been born and brought up in Northern Ireland. The parties were married on 22 September 1990. They lived in Malta for a year, came to live in Northern Ireland between 1991 and 1996 when they returned to Malta. The family has resided in Malta ever since save for the mother returning to live in Northern Ireland in or about September 2011. There are two children of the marriage, D who was born on 30 September 1991 in Northern Ireland and K who was born on 29 March 2002. The position therefore is that K was born in Malta and has lived there all his life save for the period he has been here in Northern Ireland. He is habitually resident in Malta. After the parties separated in 2003 D lived with the father, K lived with the mother until May 2011 when, triggered allegedly by a drunken incident at the mother's home, K was removed from her care and given into the care of the father.

[3] There is a relevant history of proceedings concerning the care of K. On 2 October 2004 the mother obtained an order for the custody of K with access for the father. In October 2009, although this was disputed, there was a court hearing sitting as a Court of Criminal Judicature, whereby the mother was sentenced to a period of detention for denying access although the Court of Criminal Appeal in Malta on 10 December 2009 varied that order to a period of three years' probation provided she did not commit other offences within three years. On 2 June 2011 the Civil Court Family Section made an order giving custody of K to the father. There was no order for access for the mother to K which was to be regulated at a later stage. The mother was to seek professional help for what was alleged to be a drinking problem (although she denies she has one) and to obtain necessary verifiable documentation in this regard. There were subsequent proceedings regarding this application, the last being on 3 November 2011. The mother has now made a relocation application which is listed for hearing on 6 December 2012 in Malta. It is unlikely that any final order will be made on that date.

[4] By agreement, D and K came to Northern Ireland at Christmas 2011 and stayed with the maternal grandparents until their return to Malta. K also visited for a short time in March 2012. K returned to Northern Ireland at the beginning of July 2012 by agreement for a summer holiday with his mother. He was due to return to Malta on 31 July 2012 but that did not happen. The father gave permission for the child to remain for a further month until the end of August. The child was not returned by his mother and that has triggered these proceedings under the Hague Convention. It is common case that the retention in Northern Ireland is unlawful.

The views of the child

[5] On 4 October 2012 the Official Solicitor (OS) met with K. He said that he knew that the meeting was in relation to the fact that he wanted to stay in Northern Ireland and live with this mother. He said that in Malta he lived with his father's girlfriend, his little brother S and his big brother D. When asked if he liked living in Malta he replied 'yes' but had not enjoyed living with his father's girlfriend because she always shouts. He repeated on a number of occasions that he does not like living with her and does not want to return to Malta to live with her again. The OS asked K whether he liked living with his dad and he nodded and smiled. He confirmed he also liked living with his half brother S, who is now seven, and he described having a close relationship with both S and D who is now 21. K said he had previously been over to Northern Ireland at Christmas 2011 for a holiday and stayed with his granddad. He had lived with his mum at his current address for some months now. He said that he thought at the beginning he was just there for a holiday but then "we decided for me to stay here". He said that he had asked his mother if he could stay and his mum said "Anything". K also described how in the evenings after school he and his mother did things together e.g. going for tea, homework and "went a lot of places". The OS discussed with K how he would feel about returning to Malta and explained that the court had to make a decision about this. K started crying, said he did not want to go back to Malta and said he would feel sad. She asked K whether it was because he "would miss mummy" and he became very upset, nodded his head and said yes. He said "I want to stay with mum even if (my dad's girlfriend) was not there". K was very upset at that stage. He went on to say that his father's girlfriend would get cross and sometimes hit both him and S.

[6] Dr Leddy is a very distinguished child adolescent psychiatrist. She examined the child on 22 October 2012. She noted the symptoms of disturbed sleep and enuresis and concluded that the disruption and uncertainty in his life had caused him anxiety. He was guarded on the subject of his home life in Malta but made no allegations of ill-treatment. He did at a late stage concede that his father loved him. She noted that the mother had planned a series of events for the future including his Christmas letter and that she had encouraged the belief in the child that he will be staying in Northern Ireland. She also noted that the mother expressed a great deal of negativity about the father and her impression was that the child was anxious about the relationship between his father and mother. She concluded that the child was inevitably suffering emotional harm at present because he loves his mother very much and is afraid of losing her. She also considered it likely that he was worried about losing his family in Malta although he could not and did not say so. She noted that it was likely that each parent was hostile to the other and that the child was picking this up from both of them. She thought it unlikely the child would self harm

were he to return to Malta even though the mother had indicated that he had threatened to do so. He did not seem to be unhappy about the prospect of spending Christmas in his father's house and spoke happily about school in Malta where he had four particular friends. She did, however, note that if he returned to Malta there was a risk that the child would suffer further emotional harm because of worry and anxiety about his mother's well-being, distress if exposed to negative or hostile expressed feelings regarding his mother by family members and sadness about being separated from her. Reports were also available from the GP and school although frankly these did not add very much to the picture.

Consideration

[7] The learned trial judge noted the undertakings which had been given by the father. For ease of reference we set these out again here.

“Undertakings by the father which were be given on his behalf in open court.

[9] First he shall provide a smooth transition for the mother and son returning to Malta with him paying for the flight tickets to Malta, without prejudice of course to his right to seek to recover that sum in the future matrimonial proceedings. I note of course that the mother does not concede this right and that is a matter that will have to be determined by the future court hearing in Malta. However in the interim he has given an undertaking that he will pay now for the tickets for return.

[10] Secondly he has given an undertaking that in the event of the child returning to live with him and his partner and the rest of the family he will afford access in the following terms to the mother, namely three times per week on schools days 5.00 to 7.30 and each Saturday and Sunday 9.00 to 12.30 pending a decision on this matter by the Maltese Court.

[11] Thirdly he has undertaken that he will arrange for a lease for a flat for the mother to live close to where the child lives with him so that easy access and contact can be arranged. That lease he undertook would be provided from 1 November I understand. My view is that the mother of course has got some rights here so far as accommodation and that if upon returning to Malta with the child she considers this

accommodation unacceptable she can then proceed to find alternative accommodation with the father paying rental up to the level of the accommodation which he has chosen with any surplus rental being paid by the mother. Again this situation shall continue until the date of judgment by the Maltese Court. I should indicate that the father will have to give proof that (a) he has produced the tickets; and (b) obtained the lease to the solicitor of the mother who must be reasonably satisfied that this has been done before the mother and the child would return.

[12] Fourthly that he will not invoke criminal proceedings in Malta against the mother in the wake of the wrongful retention."

He also spoke to the liaison judge in Malta who informed him that if the mother issued proceedings in Malta a speedy hearing would be arranged there. That hearing is now scheduled to take place on 6 December 2012. The liaison judge stated that there was no reason why the proceedings should not take place in English or that an interpreter be provided. Thirdly the liaison judge noted the undertaking that no criminal proceedings would be invoked by the father.

[8] The learned trial judge dismissed the argument that the child would suffer physical or psychological harm or would otherwise be placed in an intolerable situation if returned. There is no appeal against that decision. He noted that line of authority which states that the objection of the child must be more than a mere preference. He concluded that he did not think that the child had any real objection to returning to Malta if his mother was there and he was seeing her. He stated that the boy was very young and his views were likely to have been influenced to some degree by the fact that he was living for three months alone with his mother. That real possibility was also recognised by Dr Leddy. He stated that the underlying purpose and integrity of the convention would be seriously compromised if the refusal to order a return was not confined to a wholly exceptional case and accordingly he ordered the return of the child.

[9] The appellant submitted that it was unclear whether the learned trial judge concluded that the child objected to being returned. If he failed to take into account the child's objection that may have affected the exercise of his discretion. In any event he introduced an exceptionality test which was not warranted. In those circumstances he did not give proper consideration to the child's expressed views. The appellant also criticised the learned trial judge's reliance on undertakings but accepted that the criticisms were really directed towards whether the child should be returned and if so whether his mother should be given custody. In oral submissions

the appellant recognised that this court could not interfere with the custody order made by the court in Malta.

[10] The starting point is to examine the terms this portion of Article 13 of the Hague Convention.

“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 his views.”

The court must, therefore, determine whether the child objects to being returned and if so whether he has attained an age and degree of maturity at which it is appropriate to take account of his views. As Baroness Hale pointed out at paragraph 51 of In re D (Abduction: Rights of Custody) [2006] UKHL 51 the limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated. That is the context, therefore, in which the discretion is to be exercised if it arises. The House of Lords indicated, however, in Re M (Abduction-Zimbabwe) [2007] UKHL 55 at paragraph 40 that there is no strict test of exceptionality.

[11] Baroness Hale helpfully set out the approach that the court should take in child's objection cases at paragraph 46 of Re M (Abduction-Zimbabwe).

“In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of art 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are “authentically her own” or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child,

the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

[12] There are cases such as M v T (Abduction) [2008] EWHC 1383 (Fam) where it can be said that the objection raised by the child is not to a return to the country of habitual residence but rather a return to the requesting parent. In many cases, however, these issues are intertwined. Particularly in the case of younger children where there may be some ambiguity in the way in which they articulate their concerns we consider that it is usually appropriate to give a generous interpretation to the child's objection but to take into account the circumstances of objection at the later stages. We consider that this is such a case.

[13] K is 10 years old. There is nothing in the papers to suggest that he is any more or less mature than the average boy of that age. We accept, therefore, that his views should be taken into account. The OS report indicates that the child does not want to go back to Malta because he would miss his mother. That is reinforced by the report from Dr Leddy who indicates that he has a fear of losing his mother. The context in which this child has been interviewed is one where he has been with his mother for a period of more than three months without any appreciable contact with his father and siblings. His mother is clearly anxious to continue living in Northern Ireland as is evidenced by the fact that she has made a relocation application. Her parents live here and she was brought up here. The mother also expressed very negative views about the father to Dr Leddy so that in all those circumstances the conclusion by the learned trial judge that it was likely that the child's views had been influenced by the mother is unimpeachable.

[14] The OS report also indicated that the child agreed that he liked living in Malta and indeed that he liked living with his father. The child also stated that he liked living with his little brother S and that he had a close relationship with both his siblings. He spoke happily about a school in Malta to Dr Leddy and described how he had four friends who each took responsibility for helping out with special needs children. In addition to this it is necessary to take into account Dr Leddy's view that K is likely to be worried about losing his family in Malta.

[15] All of the evidence indicates that this is a conflicted child. In those circumstances and at his age it is highly unlikely that he is in a position to take any view about his medium to long term future. Insofar as the short term is concerned his focus has been influenced by his present circumstances but even then there are clear signs that he has important relationships and roots in Malta. In re E (Children)(Abduction: Custody Appeal) [2011] UKSC 27 makes it plain that the Hague Convention was designed with the best interest both of children generally and of the individual child concerned as a primary consideration. We considered

that the exercise of the discretion in this case pointed strongly towards his return to his country of habitual residence.

[16] At the end of the hearing we considered the circumstances in which the child might be returned. In light of the undertakings provided by the father we accepted the mother's undertaking that she would bring the child to the airport on Tuesday, 27 November 2012 in good time for her and the child to board the flight to Malta and that she would accompany the child on the flight to Malta on that date.