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(subject to editorial corrections)*

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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RA

-v-

DA

_____

GILLEN J

Background

[1] This is an application pursuant to Article 12 of the Hague Convention for the return of a child on the grounds of wrongful detention. I have already given a detailed ex tempore judgment on the day of the hearing and I now set out that decision in writing in somewhat more detail. The proceedings were commenced on 26 September 2012. The background is that the plaintiff applicant, the father, is a national of Malta and the defendant, the mother, a national of the United Kingdom having been born and brought up in Northern Ireland. The parties were married in 1990. They lived in Malta for a year, came to live in Northern Ireland between 1991 and 1996, and 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 family. D who was born in 1991 in Northern Ireland and K who was born in 2002. The position therefore is that K was born in Malta, has lived there all his life, save for the period he has been here in Northern Ireland and 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. The plaintiff father therefore has a custody order in Malta for K obtained on 2 June 2011.

Proceedings in Malta

[2] Briefly the history of proceedings in Malta includes the following.

[3] On 2 October 2004 the mother obtained an order for custody of K with access to the father. In October 2009, although there is some dispute about this, allegedly 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 year 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 current position

[4] The plaintiff father therefore has a custody order in Malta for K which runs from 2 June 2011. The child came 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 and that did not happen. The father gave permission for the child to remain a further month until the end of August. The child was not returned by his mother and this has triggered the proceedings now under the Hague Convention. It is common case that the retention in Northern Ireland is deemed unlawful.

The Defence

[5] Two defences are raised by the mother in this case. The first is that there is a grave risk of harm to the child and that his return would expose this child to physical or psychological harm or otherwise place him in an intolerable situation ie. The Hague Convention 13(b) defence. Secondly, again under article 13, 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 Role of the Official Solicitor

[6] The child was interviewed by the Official Solicitor, the court having invoked the assistance of the Official Solicitor often happens in these cases. On 4 October 2012 the Official Solicitor met with K and the comprehensive report records a number of findings. K was asked if he was aware of the reason for his visit with the Official Solicitor and said that he knew it was in relation to the fact that he wanted to stay in Northern Ireland and live with this mother. The position was discussed with K and he was told that he could speak confidentially if he chose to do so and that he understood all this. K went on to say that so far as living in Malta was concerned he lived with G, who was 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 G because she always shouts. The Official Solicitor asked K to tell her about this and if there was anything else he did not like about G. K at that stage looked at

the ground and seemed to find it difficult to discuss it. He said again he did not like G because she shouted at everyone, not just him and 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 Official Solicitor asked K whether he liked living with his dad and he nodded and smiled. He confirmed he also liked living with his 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. K told the Official Solicitor that he 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 told the Official Solicitor of the evenings after school that he and his mother did things together e.g. going for tea, homework and "went a lot of places". She discussed with K how he would feel about returning to Malta and 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 [G] was not there". K was very upset at that stage. He went on to say that G sometimes would get cross and sometimes hit both him and S.

[7] The leading authority on this area of a 13(b) defence is most recently found in the Supreme Court in a case of Re E [2012] 1 AC1. The thrust of the leading judgment from Baroness Hale is found, among other places, at paragraphs 32 to 35 where she said:

> "First, it is clear that the burden of proof lies with the 'person, institution or other body' which opposes the child's return. (In this case the burden of proof lies with the mother). It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination. (*That is precisely the process that was adopted properly by counsel in this case*)
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> Second, the risk to the child must be 'grave. It is not enough, as it is in other contexts such as asylum, that the risk be 'real'. It must have reached such a level of seriousness as to be characterised as 'grave'.

> Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.
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> Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or otherwise placed in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of a parent.
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> Fourth, Article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when he or she gets home."

[8] I am satisfied in this case that there is no compelling or clear evidence that there is a grave risk that the child's return would expose him to physical or psychological harm or place him in an intolerable situation. Despite the fact that he has apparently told his mother that he would harm himself if returned Dr Leddy, who examined him the day before the hearing and who is a very distinguished child adolescent psychiatrist, saw no evidence of depression or mood or suicidal ideation. It was her opinion that he does not intend to harm himself. This was a view which

was agreed apparently by his general practitioner and social worker to whom she had spoken. Whilst this child has a strong attachment to his mother and will clearly feel distressed and sad on returning there I am satisfied that this is largely borne out of an attachment to his mother and the three months he has spent with her rather than anything else. Looking to the future I am satisfied that if this child returns to Malta there can be sufficient protective measures put in place to ensure that he does not suffer any grave psychological or physical harm. That can be achieved if he returns to his father in the following circumstances.

Undertakings

[9] Undertakings by the father which were to be given on his behalf in open court. 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.

[13] So far as the mother is concerned protective measures can be taken by her:

(a) That school reports should be obtained from the present school outlining what the child has been doing for the last month so there is no loss of educational benefit when he returns to school in Malta.

(b) She must allow the social worker to visit the house regularly until the date of departure from Northern Ireland to ensure that this child is properly cared for, remains with her in Northern Ireland and is in no danger.

Liaison with the Maltese Court

[14] As a further protective measure and at the request of counsel I invoked the procedure of speaking to the Hague Convention liaison judge in Malta by telephone in the presence of counsel. Prior to this exchange I made it clear to counsel that the merits of any hearing in Malta would not be canvassed and that the matter would be confined to procedure and practice. The judge informed me in the presence of counsel that upon the mother issuing proceedings in Malta a speedy hearing will take place in Malta. Next he indicated there was no reason why the proceedings should not take place in English or that an interpreter should be provided (a concern voiced by the respondent about previous proceedings in Malta). Thirdly, that no criminal proceedings would be invoked by the father.

The central authorities

[15] I also considered that the central authorities have a role to play here to ensure protective measures are in place. First that the central authorities here in Northern Ireland should be in contact with the central authorities in Malta to ensure that the contents of this judgment are communicated to the Maltese Court.

[16] Secondly that the undertakings given by the father and the steps which I believe the mother should carry out must be passed to the Maltese Court.

[17] Thirdly that the central authorities will emphasise to the Maltese central authorities the importance in my view of a speedy determination of any application by the mother to seek a residence or contact order for this child in Malta. The sooner this matter is dealt with by the Maltese Court the better.

Other steps to be taken

[18] I have indicated that I consider it is important that the Official Solicitor should make contact with the social worker who has been dealing with this case in Northern Ireland to ensure that an eye is kept on the situation in the mother's home here in Northern Ireland pending any return to Malta. I have emphasised to the mother the extreme importance of taking steps to obtain a lawyer swiftly in Malta, to process any claims she wishes to make for a residence or contact. She must urge on him or her the absolute necessity of expedition in the application. The concerns I have about the need for an urgent proceedings should be drawn to the attention of the central authorities in Malta by the central authorities here in Northern Ireland.

The child's objection

[19] Finally, I turn to the defence that the child objects to returning. The case law was reviewed in some detail by counsel who had all diligently researched the matter. It is important that the voice of the child be heard in these proceedings. However I have decided that it was not appropriate that I should speak to the child. I heard that Dr Leddy has opined that this child has been "overly interviewed". He has been spoken to by Dr Leddy, the Official Solicitor, the GP, the social worker and perhaps by the headmistress in the school. It is quite inappropriate that this young child should have been exposed to this level of interview and I think it would be a wholly inappropriate step for me to further interview this child, particularly when I have all this information before me. The voice of this child has been thoroughly heard through the medium of all these witnesses.

[20] On the question of the child's desire to remain here I recognise that this child has expressed a concern and desire to live in Northern Ireland with his mother. That is something I have to take into account whilst recognising that he is only ten years of age. He has been living with his mother for in or about three months now and I consider that this may well have been a factor in his conclusions. When speaking with the Official Solicitor he was asked about his home life in Malta. At this point he nodded and smiled and mentioned how he cared for the relationship of both his siblings S and D. He nodded when he was asked whether he liked living with his dad. I consider this little boy is very young and his views have likely been influenced to some degree by the fact that he has been living for three months alone with his mother.

[21] Nonetheless I have to take those views into account. However to look at this view in isolation is to give the branch an existence which is independent of the tree. A leading authority in this jurisdiction is a decision of the Court of Appeal in Northern Ireland in Re KR and SR [2007] NICA 50. In that case the court drew attention to two countervailing factors to be set against the child's views. The first is that the underlying purpose of the Convention is to robustly ensure that unlawfully removed children are returned to their habitual residence as soon as possible so as to ensure that issues concerning their welfare are quickly and expeditiously addressed. That is ever more important in a case like this where the Maltese Court has had quite a history dealing with this family and has much more experience of this family than I have. The underlying purpose and the integrity of the Convention would be seriously compromised if the refusal to order a return was not confined to a wholly exceptional case. I do not believe this is such an exceptional case. Another factor to be taken into account relates to the father's rights as well as the mother's rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Those are rights of the father which he has obtained through the court in Malta in 2011. A residence order was made in his favour. That right to residence would unquestionably be interfered with if I refused the order of the return of this child. None of the matters adumbrated in Article 8(2) apply in this instance and such an interference cannot therefore be justified.

[22] The objection of the child must be more than a mere preference expressed by the subject child. It must be to the returning country of habitual residence and I am not satisfied that this child is concerned about returning to Malta. Whilst he has exercised a preference to live in Northern Ireland, I do not think he has any real objection to Malta if his mother was there and he was seeing her. I also indicate that the child, I believe, is clearly feeling the emotional weight of this whole situation and the fact that, as I have indicated, he told the Official Solicitor that he liked living with his dad and with his family are matters that I have also taken into account. In all the circumstances of the overarching narrative of this case therefore I do not consider the child's asserted objection is sufficient to dissuade me from ordering a return.

[23] I have come to the conclusion that I must make an order returning this child to Malta pursuant to Article 12 of the Convention of Civil Aspects and International Child Abduction 1980 The Hague Convention on the grounds of wrongful retention in Northern Ireland. I see no reason to exercise my overall discretion against doing so in the circumstances I have outlined.

[24] I strongly urge the mother and father in this case to listen to the admonition and advice of Dr Leddy. Placing too heavy a burden of choice on this child is going to be hugely detrimental to him and to his development. He needs to be allowed to love both parents in the absence of the accusatory fervour of warring parents if he is to avoid a tainted future. It is a responsibility of both parents to encourage this to happen. If a child feels he has to reject one parent to protect his relationship with the other this will serve not only to close him off from a relevant relationship but provide a risk that he will have less closer relationship with both the parents. Both of these parties may in time feel the weight of fortune's frown unless they realise that damage to this child could be incalculable unless they take the responsibility of parenthood seriously. It is vital that the mother ensure that this smooth transition occurs without visiting blame on the father and that the father not quiz the child about what has happened when he returns and recognise that the mother did this because she loves the boy. I therefore have no hesitation in ordering the return of this child.