

The Court of Magistrates (Gozo)
Superior Jurisdiction
Family Section

Application Number 10/2015

Direttur tad-Dipartiment għall-
Istandards fil-Harsien Soċjali
(Director of Social Welfare
Standards)

vs

Sharon Rose Roche nee' Bellamy

An application filed by the Director for Social Welfare Standards in the matter of the minor child Kaden Mario Roche, son of Dean Michael Roche and Sharon Rose Roche nee' Bellamy.

Today the twenty fourth (24) July two thousand fifteen (2015)

The Court,

1. PRELIMINARY

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

Having seen the application of the second (2) February 2015, whereby the Director for Social Welfare Standards, after stating that:

This application was being filed in accordance with the Child Abduction and Custody Act, Chapter 401 of the Laws of Malta, by means of which the Convention on the Civil Aspects of International Child Abduction was ratified, and in terms of the Council Regulation (CE) number 2201/2003;

this application concerns the minor child Kaden Mario Roche, son of respondent Sharon Rose Roche and Dean Michael Roche, born in Victoria, Gozo, on the 1st October 2011;

the minor child was illegally removed by respondent in terms of article 3 of the First Schedule of Chapter 410 of the Laws of Malta in as much as this removal was in breach of custody rights, which at the moment of the removal were vested jointly in both parents under the Law of the United Kingdom which is the State where the minor was habitually resident before the removal, and at a time when custody rights were actually exercised by the father or would have been so exercised but for such removal;

The Laws of the United Kingdom provide in article 2(1) of the Children Act 1989, an extract of which is being hereby annexed as Dok. A, that: **“where a child’s father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child”**, whereas article 1 of the Child Abduction Act 1984, an extract of which is being hereby annexed as Dok. B, expressly prohibits parents from taking or sending the child out of the United Kingdom without the appropriate consent;

The father filed an application with the Central Authority of the United Kingdom, the place of habitual residence of the minor child, in accordance with article 8 of the Hague Convention, and as provided in the subsequent article, the Central Authority of the United Kingdom sent the application directly to the Central Authority of Malta, being the contracting State where the minor child is, to seek his return. A copy of Dean Michael Roche’s application concerning his son Kaden Mario in being annexed as Dok. C;

A warrant of prohibitory injunction restraining the mother from taking the minor child out of Malta, is being presently filed;

Humbly asked the Court to:

1. Order the return of the minor child Kaden Mario Roche to the United Kingdom;
2. Make the necessary arrangements for the return of the minor child Kaden Mario Roche to the United Kingdom; and
3. Order that the minor be accompanied by the Police, the Court Marshall and/or a social worker, should respondent fail to cooperate;

subject to any other directive the Court may deem fit to impose in the circumstances.

Having seen the authenticated copies of the documents above-indicated.

Having seen the decree of the 26th February 2015, whereby it ordered that the proceedings in this matter be henceforth conducted in the English language.

Having seen respondent's original response with reference to the present application, whereby she objected to applicant's request as unfounded in law and in fact, in that the requisites of Article 3 of Chapter 410 and Council Regulation 2201/2003 did not subsist.

Having seen respondent's subsequent and more detailed objection to the return of the minor child for the following reasons:

1. The habitual residence of the child is not the United Kingdom;
2. There was no wrongful detention or removal because the father on whose instance these proceedings were being promoted, has no custody rights and those custody rights over the minor child have been vested in the respondent in virtue of Court proceedings having jurisdiction to decide and to which Dean Michael Roche is still participating;
3. There is ample proof that Dean Michael Roche presented the present application concerning the removal and retention of this child in this country, only after changing his mind, following proceedings in which he participated were no longer to his liking;
4. There is a grave risk of psychological harm if the child is returned to the United Kingdom; and
5. Should the child be returned to the United Kingdom there will be an infringement of the fundamental right to family life with respect to the child, under Article 8 of the European Convention of Human Rights (1950).

Having heard the evidence of both parents and the witnesses for respondent.

Having seen the affidavits, *ex-parte* reports and other documents produced by the parties.

Having seen its decree of the 27th March 2015 whereby the Court appointed Counselling Psychologist Dr. Carly Aquilina, after acceding to respondent's request of the 16th March 2015 for the nomination of a child psychologist to assess the minor child Kaden Roche for the purpose of Article 13(b) of the Hague Convention.

Having seen the court expert's report on the matter, filed on the 15th April 2015 and confirmed on oath on the 14th May 2015.

Having heard respondent's request during the sitting of the 14th May 2015 for a constitutional reference (to the Civil Court in Malta), as it was being alleged that these proceedings might be in breach of Article 8 of the European Convention of Human Rights.

Having seen the respective written submissions of the legal counsel to the parties on this request.

Having seen its decree dated the 9th June 2015, rejecting this request as being premature and hence frivolous and vexatious in terms of Article 46(3) of the Constitution of Malta and Article 4(3) of the European Convention Act, Chapter 319 of the Laws of Malta.

Having seen respondents' application dated the 30th June 2015 requesting a reconsideration of the Court's decree of the 9th June 2015.

Having seen its decree dated the 10th July 2015 rejecting this application.

Having seen respondents' application of the 2nd July 2015 requesting a suspension of these proceedings pending the outcome of a constitutional case (reference number 59/2015) filed by her against the Attorney General and the Director of the Department for Social Welfare Standards, whereby she is asking the Court to declare that there is a possibility of her and her son's fundamental human rights, precisely the right to family life, being violated should plaintiff's requests be acceded to by this Court.

Having seen its decree dated the 10th July rejecting this application.

Having seen the written submissions of the respective legal counsel concerning applicant's request for the return of the minor child to the United Kingdom.

Considers that:

1. THE LAW

This application is being made in terms of Act XIII of 1999 (Ch.410) of the Laws of Malta, whereby the Maltese parliament ratified two Conventions relating to the civil aspects of international child abduction and to the recognition and enforcement of custody rights. The return of the minor child Kaden Mario Roche to his purported habitual residence in the United Kingdom is being sought by the Central Authority of Malta on behalf of the Central Authority of that country in terms of Article 8 of the Hague Convention which states that:

“Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply with either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child....”

In this regard article 11 of the Council Regulation 2201/2003 holds that:

“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 ..., in order to obtain the return of a child that has been wrongfully removed or retained in a Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.”

According to Article 3 of the Convention:

“The removal of a child is to be considered wrongful where

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and**
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention....”**

2. FACTS

Dean Michael Roche and Sharon Rose Bellamy were married by civil rights in Gozo, Malta, on the 27th July 2007¹ having first met a year and a half before. At the time of their marriage both lived and worked in the United Kingdom, but frequently holidayed in Malta, as Sharon's parents had settled there some years earlier. Sharon owns a farmhouse in Xaghra, Gozo, which she purchased on the 15th April 2005² and co-owns with her husband a house in Nadur, Gozo, which they jointly purchased on the 22nd October 2010.³ Their son was born in Gozo on the 1st October 2011.⁴ The present dispute owes its origin to the fact that on the 15th August 2014 respondent flew to Malta on a one-way ticket from Birmingham accompanied by her child.⁵ She had previously informed her husband that she needed to go to Malta for some time to assist her mother who had to undergo a medical intervention. Sharon kept postponing her return to the U.K. until early in September of the same year when she informed her husband via e-mail that she would not be returning, that she would be seeking an end to the marriage and intended to live in Gozo.⁶ Respondent subsequently initiated mediation proceedings before this Court (differently composed) and she was granted temporary sole custody of her minor child, confirmed by a decree of the 3rd March 2015.⁷ Dean Roche had in the meantime already requested the Central Authority in the U.K. to ask the corresponding authority in Malta to proceed with the present application.⁸

3. RESPONDENT'S PLEAS

(i) Habitual residence of the minor child Kaden Mario Roche:

Respondent is denying that the habitual residence of the minor child at the time this application was filed was the U.K. Although both the Convention and the Regulation make this one of the requirements for a return of the child, neither provides a definition of "habitual residence" for the purpose of these proceedings. On being called in "A" ⁹ to define this concept, the European Court of Justice noted that in the absence of any express reference to the law of the Member States, the terms

¹ Vide Dok.SRR 13

² see Dok.SRR 10

³ see Dok.SRR 9

⁴ see Dok.SRR 14

⁵ see Dok.SRR 2

⁶ see Dok. DR 9 filed by applicant on the 16.03.2015

⁷ see Dok. SRR 7

⁸ see Dok. C annexed to the present application

⁹ See Case C-523/07 A (2009) ECR I-2805

'habitual residence' are an autonomous concept.¹⁰ If national law were to define that concept, the free movement of judgments would be hindered as some Member States might have a definition of 'habitual residence' which is too broad, whilst others might choose one which is too narrow. This could lead to situations where several courts of different Member States claim jurisdiction or, conversely, where no court is willing to assume it. Accordingly, an autonomous interpretation of the terms 'habitual residence' ensures the uniform application of Article 8(1) of the Brussels II bis Regulation throughout the Union. By relying on recital 12 of the Regulation, the European Court of Justice noted that the concept of 'habitual residence' must be shaped in light of the best interests of the child.¹¹

Taking all this into consideration, this Court feels that the habitual residence of the child for the purpose of this application has to be established with regards to the situation as existing prior to the removal of the child from the U.K. and not afterwards, as respondent seems to imply. From the evidence produced we learn that the couple were living in Birmingham, U.K. in a house owned by Mr. Roche even before they were married. Both had a full-time job in the area, Mr. Roche as Head of Supply Quality Assurance with a chain of food and brewery suppliers,¹² and his wife as an on line Communications Manager. Mr. Roche has two other children (13 year old twins) from a previous relationship, who live with their mother, but visit him for sleepovers on alternate weekends. Kaden was born in Malta by caesarean section, as his mother felt that she would get better treatment over here. However soon after the birth of the child,¹³ Sharon returned to the U.K. and Kaden was brought up over there. When he was only four months old, the child was sent to a nursery to be looked after while both parents were at work. A childcare voucher was also deducted from the father's salary in consideration of fees due to the nursery.¹⁴ Up until the 15th August 2015, the couple only visited Malta, together with their child, for short visits.¹⁵ These circumstances should leave no doubt as to the fact that the U.K. is to be considered the habitual residence of the Roche family.

¹⁰ Ibid., para. 34

¹¹ Ibid., para. 35

¹² See Dok. DR 6 filed by applicant on the 16.03.15

¹³ When he was 6 weeks old (see Carmen Bellamy's evidence under cross-examination)

¹⁴ See Dok. DR 8 filed by applicant on the 16.03.15

¹⁵ see Carmen Bellamy's evidence under cross-examination

(ii) *Custody rights:*

As indicated in the application, under Article 2(1) of the Children Act of the U.K. (1989) **“where a child’s father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.”** According to Article 2.11(a) of the Regulation, a removal or retention is considered wrongful where **“it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention.”** There is no evidence of an acquired judgment or agreement with regards to the rights of custody, and so this case is to be considered governed by the law of England above-indicated. Respondent argues that she is in possession of a Court decree issued by this Court granting her sole custody of her minor child.¹⁶ However applicant rightly points out that this was just a temporary measure determining responsibility for the child while he was still on the island, during mediation proceedings before the local courts. Indeed Article 17 of the Convention stipulates that **“the sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention.”** The position was also confirmed in a similar case before the Civil Court (Family Section).¹⁷

(iii) *Consent for removal and acquiescence in the retention of the child:*

This defence is contemplated under Article 13(a) of the Convention. It is being submitted by respondent that Dean Roche consented to the removal of the child as he never objected to his wife’s visit to Gozo on the 15th August 2015 and her taking their child with her. This was indeed the case. However he was taken completely by surprise when he learned that his wife was not returning to the U.K. and intended to stay in Gozo with their child. This clearly shows that his consent was only for a temporary visit to the island so that his wife could take care of her mother during her convalescence. As Mr. Justice Baker emphasised in the leading case **RE PJ (Abduction)**,¹⁸ **“Consent to the removal of the child must be clear and unequivocal.”**

¹⁶ See this Court’s decree of the 3.03.15 (Dok. SRR 7)

¹⁷ The Director of Social Welfare Standards Department vs Richard John Bridge of the 26.05.11

¹⁸ [2009] EWCA Civ 588, [2009] 2FLR 1051

Respondent argues also that her husband then acquiesced to the retention of the child in these islands as he only requested the present proceeding in December of last year,¹⁹ when his child had been in Gozo since August. He also accepted the jurisdiction of the Maltese Courts when he participated in mediation proceedings initiated by her before this Court and even visited his son, with his wife's approval, while on the island. However, as rightly pointed out by applicant, the fact that the father was trying to reach an amicable solution to this problem did not amount to such acquiescence. Furthermore it was only natural for him to want to see his son and his contacts with his wife for such a purpose should not be interpreted as acquiescence. As clearly stated by Lord Browne-Wilkinson in **Re H and Others (minors) (Abduction: Acquiescence)**: *"Although each case will depend on its own circumstances, I would suggest that judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to affect a reconciliation or to reach an agreed voluntary return of the abducted child. The Convention places weight on the desirability of negotiating a voluntary return of the child: See Art 7(c) and Art 10... Attempts to produce a resolution of problems by negotiation or through religious or other advisors do not, to my mind, normally concede an intention to accept the status quo if those attempts fail. It is for the judge, in all the circumstances of the case, to attach such weight as he thinks fit to such factors in reaching his findings as to the state of mind of the wronged parent."*²⁰

(iv) The Grave Risk or Intolerable Situation defence under Article 13(b) of the Convention

According to the first paragraph of Article 12 of the Convention, applicable to the present situation, as the child has been less than a year on the island:

"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."

Under this general rule, once it has been established that the child is habitually resident in the requesting State, as in the present case (see above), the child should be immediately returned for the matter to be dealt with by the Courts of that State. Exceptionally, however, under the

¹⁹ See his application filed with the Central Authority of the U.K. on the 23.12.14 (Doc. C annexed to the present application)

²⁰ [1998] AC 72

circumstances mentioned in Article 13 of the same Convention, the Courts of the requested State may refuse such demand. Indeed, respondent is basing this part of her defence on paragraph (b) of this Article whereby the judicial authority of the requested state is not bound to order the return of the child if “**there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.**” Hence it has to be seen whether the circumstances are such as to justify the refusal of the request on these grounds.

In **Baxter v. Baxter** the American Court of Appeal explained in this regard that: “*to meet her burden under the article 13(b) exception, the respondent must establish that the alleged physical or psychological harm is ‘a great deal more than minimal.’ Indeed, the harm must be ‘something greater than would normally be expected on taking a child away from one parent and passing him to another.*”²¹

To substantiate this defence, respondent exhibited two *ex-parte* reports of psychologists who examined the situation from information supplied by Mrs. Roche and after visiting the child. Both reports have been exhibited and form part of the records of the case.

Rev. Joseph Farrugia believes that: “*in considering all these data, we humbly suggest to the relevant authority to comply with the mother’s request to obtain the full custody of the child permanently. The child can’t be separated from the mother. All psychological research, especially Attachment Theory, confirm the fundamental role of the mother for the child. There is a strong healthy attachment between mother and child in this case. At the same time the child is still very young and any separation from his mother will cause psychological trauma.*”²²

Ms. Maria Grech Brincat has similar views on the matter and concludes that: “*...it is not advisable that Kaden should be returned back to England. One has to keep in mind that Kaden’s father has an alcohol abuse problem and becomes aggressive and also the fact that reportedly he suffers from Sleep Apnea; these facts could put at risk the child’s safety. Therefore it is wise if one considers giving full custody of the child to the mother permanently. The child would suffer psychological and emotional difficulties if he is taken away from his mother. Nevertheless a child needs also his father hence it is hugely suggested that Kaden meets his father on a regular basis under supervision.*”²³

²¹ 423 F.3d 363 (3d Cir.2005)

²² See Rev. Farrugia’s report confirmed on oath on the 25.03.2015 and exhibited as Doc. SR 101

²³ See Ms. Grech Brincat’s report confirmed on oath on the 10.04.2015 and exhibited as Doc.MGB by means of a Note filed on the 13.04.2015

The court-appointed expert **Dr. Carly Aquilina** concurs with these opinions when she states that: “...Kaden and his mother enjoy a strong bond that has been fostered by attuned parenting from Sharon’s part. Sharon is highly sensitive to Kaden’s biopsychosocial needs. Sharon has been Kaden’s primary caregiver. Dean has reportedly had difficulties with alcohol abuse and has utilised a more detached parenting style. Dean is unlikely to intentionally attempt to harm Kaden; however, he has reportedly at times been unable to change his nappy frequently enough. Kaden appears happier in Gozo than in the U.K. and currently has regular contact with Sharon and extended family.

*There would be several risks of harm to Kaden if he were returned permanently to Dean’s care. Sharon is unable to return to the UK therefore Kaden would lose regular contact with his primary caregiver, his mother. Dean would be unable to supervise Kaden appropriately given his reported drinking and his difficulties in considering Kaden’s basic needs (nappy changing). It is recommended that Kaden remain in Gozo with his mother in order to ensure his wellbeing and reduce his risk of harm...”*²⁴

All these experts concur in the view that the child would suffer psychological harm if he is separated from his mother and returned to the U.K. to live with his father. Mrs. Roche has made it abundantly clear that she is unwilling to go back to the U.K. All her immediate family now reside in Malta and she would be on her own in the U.K. She is settled in her own home in Gozo, but has nowhere to go to in the U.K. She also has a good job and can even work from home, to be in a better position to take care of her son, while she would have to seek a new job should she have to return to the U.K.

On the other hand Mr. Roche has a full time job and it is not at all clear who would look after Kaden when he is back from school. Mr. Roche’s immediate family consist of his mother and a ninety year old grandmother, who Kaden visited sporadically and does not seem to be all that attached to them. There are also Kaden’s thirteen year old twin half-siblings, who however do not live with their father and only stay with him for three days every other weekend. Yet the most worrying aspect of returning the child to live with his father concerns his alcohol abuse. Quite a few episodes have been recounted of Mr. Roche not having full control of his senses when he is under the influence of alcohol, and at times these have even been somewhat violent, though no evidence has been produced of the father ever physically harming his son. Mr. Roche has very weakly rebutted these allegations and has made no attempt to convince this Court that he is willing to change his ways and perhaps forfeit his frequent visits to the pub to have more

²⁴ See Dr. Aquilina’s report, filed on the 15.04.2015 and confirmed on oath on the 14.05.2015

quality time with his son. Also worrying is the medical condition²⁵ which Mr. Roche is said to suffer from, especially if he would be living on his own with the child.

Article 11(4) of the Brussels Regulation states that:

“A court cannot refuse to return a child on the basis of Article 13(b) 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.”

However in the present case no proof has been forthcoming that such measures have already been taken by the competent authorities in England or indeed, as has been indicated, by the father himself.

Under the mentioned Article 13: **“The judicial 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.”**

Obviously a three year old child, as is the case here, could not express his views on the matter. However sufficient evidence has been produced to show that Kaden is now happily settled on the island, is securely attached to his mother and her immediate family²⁶ and has made good progress at school.²⁷

(v) The possible breach of Article 8 of the ECHR

This is a matter outside this Court’s competence, and is in fact being presently examined by the appropriate Court in proceedings already initiated by respondent.²⁸

4. CONCLUSION

In view of the above, this Court is satisfied that, after taking into consideration all the circumstances of the case, it has been established that there is a grave risk that the minor child’s return to England would expose him to psychological harm and also place him in an intolerable situation, as contemplated in Article 13(b) of the Hague Convention.

²⁵ Sleep Apnea

²⁶ See page 9 of the court expert’s report

²⁷ See school reports exhibited by respondent as Dok. SRR 20

²⁸ Constitutional Case No. 59/2015

Consequently, having also taken into account the fact that as yet no proof has been provided to the satisfaction of this Court that adequate arrangements have been made to secure the protection of the child after his return, under Article 11(4) of the Regulation, it determines the matter by rejecting the demands of applicant to declare the continued retention of the minor child Kaden Mario Roche, son of Dean Michael Roche and Sharon Rose Roche nee' Bellamy, wrongful under the principles of the Hague Convention, and to order his return to England.

Finally, in accordance with Article 32 of the Regulation, the Court orders that an official copy of this decision is notified to the Central Authority of England and Wales through the Central Authority of Malta.

(sgnd) Paul Coppini
Magistrate

(sgnd) Silvio Xerri
D/Registrar

True Copy

f/Registrar