

Court Of Appeal

Judges

**THE HON. CHIEF JUSTICE JOSEPH AZZOPARDI
THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE NOEL CUSCHIERI**

Sitting of Monday 11th June 2018

Number: 7

Application Number: 12/15 JVC

Sharon Rose Roche nee` Bellamy

v.

Dean Michael Roche

This is a decree following an application filed by plaintiff [The Mother] and a request made by same during the sitting of the 7th May 2018 calling on the President of the Court Mr. Justice Joseph Azzopardi and the other two members Mr. Justice Giannino Caruana Demajo and Mr. Justice Noel Cuschieri, sitting in the Court of Appeal as composed at present, to abstain from hearing this case on the ground stated in article 734[1][d][ii] of the Code of Organization and Civil Procedure as well as

on the basis of case-law of the European Court of Human Rights, cited by The Mother.

On his part defendant [The Father] is objecting to this request on the grounds that there are no valid legal reasons supporting that request.

The relevant facts are as follows.

On the 2nd July 2015 The Mother had filed a sworn application for personal separation, requesting inter alia that she be granted sole care and custody of the parties' minor son. In its judgment of the 21st February 2017 the first Court rejected the Father's plea "*to suspend separation proceedings in so far as such proceedings concern the issue of care and custody of the child and until the request for [the minor's] return to the UK is definitely decided upon*". The first Court then proceeded to decide on this issue together with the other matters dealing with the separation.

During the pendency of these proceedings, separate proceedings [10/2015] had been instituted at the instance of The Father with a view to obtaining a court order for the return of the child to the UK on the basis of the Hague Convention rules. Although in those proceedings the first court had decided in favour of the Mother, the judgment was

later revoked by a judgment given on the 30th October 2015 by the Court of Appeal composed at that time by The President of the Court Silvio Camilleri and the two other judges indicated above. In this judgment the Court of Appeal dealt, inter alia, with the issue of whether the Maltese courts had jurisdiction to hear the case on the merits, and concluded that the child was to be returned to the UK as the country having jurisdiction to deal with the issue of care and custody according to the Hague Convention rules.

By virtue of the application in issue filed on the 2nd May 2017, The Mother is requesting that the judges composing this Court, including Mr. Justice Joseph Azzopardi who is now President of the Court of Appeal abstain from hearing this case. The challenge of Mr. Justice Giannino Caruana Demajo and Mr. Justice Noel Cuschieri is based on the fact that these were members of the Court of Appeal which decided the abduction case [10/2015] and issued the return order, whilst the challenge of the President of the Court is based on the fact that Mr. Justice Azzopardi was one of the judges who had heard and decided the retrial proceedings relating to that same case.

The Court notes that the Mother's application for the challenge of the judges in the present proceedings [12/2015] is based on the ground that *"The three judges composing the present court were the same judges*

who decided the afore-mentioned judgment of the 30th October 2015.”

The Court also notes, that the first grievance in The Father’s appeal application in the present case is that the first Court “*was obliged to suspend proceedings in so far as care and custody were concerned.*” and that that Court could not ignore the final judgment given on that date by this Court in the abduction case.

The above necessarily involves an examination of the issues dealt with by the Court of Appeal in the abduction case and those dealt with by the first court in the present case. From an examination of the 30th October 2015 judgment it results quite clearly that the Court of Appeal had decided definitely that according to the rules of the Hague Convention the matter of care and custody of the minor child falls within the jurisdiction of the UK courts on the basis of the fact that the UK was the child’s habitual place of residence before his illegal retention by The Mother, and accordingly ordered his removal from these islands.

From this it emerges quite clearly that the judges forming this Court have already pronounced themselves on the issue of jurisdiction.

By virtue of this appeal this Court is being called upon by The Father to overrule that part of the appealed judgment where the first Court dealt with and decided on the merits regarding the care and custody of the

child as that Court considered that such a decision was in the child's best interest. That Court stated that:

“Forcing the child to go back to live in the United Kingdom, even with his mother, away from the life he has been used to for the last two and a half years.....would be outright injustice against the child and would definitely not be in his best interests.”

Plaintiff claims that this may involve a re-examination of this Court's final decision in the abduction case in the light of the child's best interests at this point in time, that is almost two and half years after the judgment of the 30 October 2015.

In the circumstances this Court considers that The Mother's request is legally justified in terms of the aforementioned article of law and is being acceded to.

For the above reasons this Court accedes to the application in question and accordingly the judges composing this Court are abstaining from proceeding with the hearing of the present case.

Joseph Azzopardi
Chief Justice

Noel Cuschieri
Judge

Deputy Registrar
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