Court Of Appeal

Judges

THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
PRESIDENT
THE HON. MR JUSTICE TONIO MALLIA
THE HON. MR JUSTICE ANTHONY ELLUL

Sitting of Thursday, 28th January, 2021.

Number: 6

Application Number: 200/2019/2 AGV

Cosimo Marziano and Rosanna Bruzzese

v.

Silvia Marziano and Michael Magri

The Court:

1. Having seen that on the 12th March 2020, defendants Silvia Marziano and Michael Magri filed an appeal application before this Court from a preliminary judgment delivered by the Civil Court (Family Section) on the 28th January 2020.

2. Having also seen the acts of the case before the Court of First Instance that led to the present appeal, namely:

2.1. That on the 22nd August 2019 plaintiffs filed a sworn application stating the following:

"1.0 PRELIMINARY FACTS

"1.1 That the applicants are Italian nationals residing in Turin, Italy, who have been married since the year nineteen eighty-one (1981), and from whose marriage were born two children, Silvia and Luca;

"1.2 That the respondent Silvia Marziano is the applicants' daughter, while the other respondent Michael Magri is her husband, with whom she contracted marriage in two thousand and thirteen (2013), when both respondents still resided in Italy;

"1.3 That from the marriage of the respondents Silvia Marziano and Michael Magri, was born the minor daughter Chloe Magri on the twenty-sixth (26) of September two thousand and sixteen (2016), hereinafter referred to as the "Minor Granddaughter";

"1.4 That the Minor Granddaughter is, therefore, the maternal granddaughter of the applicants Cosimo Marziano and Rosanna Bruzzese;

"1.5 That the respondents lived in Turin Italy for a number of years, and it was in Turin that the Minor Granddaughter was born, and she resided there until the year two thousand and seventeen (2017);

"1.6 That while the respondents resided in Turin, Italy, the applicants had established a good relationship with the Minor Granddaughter, whom they used to frequently visit;

"1.7 That since the respondents relocated to Malta in 2017 together with the Minor Granddaughter, communications between the applicants and the respondents have proven to be difficult;

"1.8 That despite attempts to communicate with the respondents, they have not managed to arrange to meet the defendants and the Granddaughter;

"1.9 That although the applicant Cosimo Marziano personally visited Malta from the twenty eight (28) of March two thousand and eighteen (2018) until the second (2) April thousand and eighteen (2018) – with the hope of meeting and spending some time with the Minor Granddaughter, despite that the respondents had given him to understand that they would meet and that he

would meet also his granddaughter – the respondents did not meet with him at all;

"1.10 That the applicants have always proven themselves to be loving grandparents when the Minor Granddaughter still resided in Italy, and the applicants' grandpaternal affection and care towards the Minor Granddaughter is further evidenced by their repeated wish to set up an opportunity that would allow them to visit the Minor Granddaughter;

"2.0 LEGAL AND FACTUAL CONSIDERATIONS

"2.1 That while the applicants appreciate that parents are ultimately responsible for the care and custody of the Minor Granddaughter, there exists no justifiable reason as to why the applicants should be deprived of the possibility of having an affectionate relationship with their granddaughter;

"2.2. That by virtue of a recent decision taken by the European Court of Human Rights ("ECHR") in the names Nelil Vacheva vs. Georgios Babanarakis, decided on the thirty-first (31) of May two thousand and eighteen (2018), the ECHR, when faced with the question as to whether Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility extended the concepts of "parental responsibility" and "rights of access" to grandparents, held that:

> *"It must be noted that 'rights of access' are defined broadly, encompassing in particular the right to take a child to a place other than that child's habitual residence for a limited period of time.*
>
> *That definition does not impose any limitation in regard to the persons who may benefit from those rights of access."*

"It was furthermore noted through this judgment that:

> *"Regulation No. 2201/2003 does not expressly exclude a request made by grandparents for rights of access to their grandchildren from coming within the scope of that regulation."*
> *...*
> *"It follows that the concept of rights of access referred to in Article 1 (2) (a) and in Article 2.7 and 2.10 of Regulation 2201/2003 must be understood as referring not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, that child's grandparents, whether or not they are holders of parental responsibility."*

"2.3. That by means of this decision, the ECHR crystallised the principle that 'parental responsibility' should extend also to grandparents, who should not be denied a right of access without justification;

"2.4. That even through its decision taken on the thirteenth (13) June of the year nineteen seventy-nine (1979) in the names Marckx vs. Belgium, the ECHR had already established the principle that:

> *"In the Court's opinion, "family life", within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life."*

"2.5. That, furthermore, the preamble to the "Convention on Contact Concerning Children" signed on the fifteenth (15) October of the year two thousand and three (2003) by the Member States of the Council of Europe and other Signatories thereto immediately highlights:

> *"the need for children to have contact not only with both parents but also with certain other persons having family ties with children and the importance for parents and those other persons to remain in contact with children, subject to the best interests of the child."*

"2.6. That the tender age of the minor granddaugher further augments the need not to deprive her of the possibility of benefitting from a close and affectionate relationship with her maternal grandparents;

"2.7. That it follows that the rights of the applicants to establish a relationship with and have access to the Minor Granddaughter, coupled with the Minor Granddaughter's right to have contact with her maternal grandparents' should not be construed as a limitation of parental responsibilities. On the other hand, it follows that the behaviour of the respondents to deny the Minor Granddaughter from establishing a relationship with the applicants violates the Minor Granddaughter's right to family life as protected by Article 8 of the European Convention on Human Rights;

"2.8. That it is certainly in the best interests of the Minor Granddaughter to experience the love and affection that may be offered by grandparents;

"Therefore, for the reasons explained here above, and on the basis of the pronouncements of the indicated courts, the applicants humbly request this Honourable Court to:

- *"a) Declare that it is in the best interests of the Minor Granddaughter HG to allow the applicants visitation rights;*
- *"b) Give visitation rights to the applicants with the Minor Granddaughter by establishing such days, time and such directives as are deemed by this Honourable Court to be required and which would allow the relationship of the grandparents with the Minor Granddaughter to continue to develop;*
- *"c) Give such other directives as this Honourable Court may deem to be adequate and opportune.'*;

2.2. That by means of a sworn reply filed on the 24th September 2019,[1] defendants replied as follows:

> *" Pleas*
> *"Defendants hereby respectfully pleads in connection with plaintiff's requests that:-*
>
> *"1) In the first instance, the merits of the case in question have already been decided by a foreign Court namely the Italian Court as the Tribunale per I Minorenni del Piemonte e Valle D'Aosta on the 31 January 2019 (Document A) and therefore the matter in question has now passed in gudikat and is therefore res judicata in light of the concurrence of the eadem res, eadem personae, and eadem causa petendi;*
>
> *"2) In the second instance, and without prejudice to the foregoing, the plaintiffs have no locus standi or juridical interest in order to proceed with the present case. Although it may appear, prima facie, that they may have a general and emotional interest, the plaintiff's interest must be recognised at law and the action must be pre-ordained to acquire a remedy protected by law. In the case in question, Maltese law does not contemplate any right of access towards grandparents of minor children and the action is therefore unsustainable and outrightly inpropositional. As taught by Mattirolo, se l'interesse e` scompagnato dal diritto, non vi ha azione, non giudizio possibile. Moreover, this point, namely that the grandparents of minor children have no juridical interest in regard to the access of their grandchildren has already been determined by the Civil Court (Constitutional Jurisdiction) in the case in the names of Joseph sive Giuzeppi Schembri vs Registratur tal-Qorti Superjuri et in which the Court stated that while it is understandable that grandparents have a big interest in their grandchildren, they do not have juridical interest. Furthermore, it should be pointed out at the outset that the judgment cited by plaintiffs, namely Nell Vacheva vs Georgios Babanarakis, is inapplicable in the present case as will be shown throughout the present suit;*
>
> *"3) Thirdly, plaintiff's requests amount to a (potential) serious threat to Maltese public order. If this Honourable Court were to establish a right of access due to grandparents notwithstanding the above and thereby accord unto grandparents locus standi, as well as juridical interest, in regard to access, this will set a dangerous precedent which will have serious ramifications on current and future lawsuits which contemplate minor children as their object or part of their object, including care and custody and separation suits. Moreover, the delay which will inevitably be caused through the introduction of the competing interests of the grandparents will certainly run counter to the best interests of the child;*
>
> *4) Without prejudice to the foregoing, unless it is proven that parents are unable to exercise their right of parental authority, parents cannot be forced to apply their absolute discretion against their will;*

[1] Fol. 18 et seq.

"5) Without prejudice to the foregoing, it is humbly submitted that it is not in the best interests of the minor children to have access towards their maternal grandparents as already determined by the Italian Court in the aforementioned judgment and as shall be confirmed throughout the present suit.

"6) Save all other pleas which may be brought forward at any other stage.

"With costs against plaintiffs who are as of now hereby summoned with reference to their oath.

"Facts

"1) Defendants moved to Malta on 25 October 2017 from Italy, having already registered their Marriage in Malta in August 2017;

"2) The minor child, Chloe, is the daughter of defendants and the granddaughter of plaintiffs. She has duel Maltese and Italian citizenship;

"3) The relationship between the defendant, Silvia Marziano, and the plaintiffs was never a healthy one due to the overbearing and intrusive nature of the upbringing which had long-term effects on the defendant;

"4) For the duration of defendants' engagement and subsequent marriage, plaintiffs, particularly Cosimo Marziano have had an intrusive and negative influence on the defendants and their marriage. Following the birth of the minor child, Chloe, this was unfortunately extended in regard to the minor child such that the relationship between the plaintiffs and their granddaughter was unhealthy from the beginning;

"5) By virtue of a judgment of the 31 January 2019 an Italian Court stated in unequivocal terms, following psychological consideration, that it was not in the best interests of the minor child, Chloe, for plaintiffs to have access to the said minor.';

2.3. That during the sitting of the 26th September 2019[2] the Civil Court (Family Section) ordered proceedings to continue in English and authorised parties to file written submissions regarding the first four pleas raised by defendants;

[2] Fol. 34.

2.4. On the 28th January 2020, after also having heard submissions made by the parties,[3] the first court proceeded to deliver its preliminary judgment in terms of which all four preliminary pleas raised by defendants were rejected. Its considerations were the following:

> *"The Defendants raised four preliminary pleas to the case filed by Plaintiffs. This Honourable Court shall be analysing each plea individually hereunder:-*
>
> *"1. <u>RES JUDICATA</u>*
>
> *"Defendants insist that the merits of this case have already been decided by the Italian court, precisely the Tribunale per I minorenni del Piemonte e Valle D'Aosta on the 31st January, 2019[4] in the names and therefore the case is res judicata in the light of the concurrence eadem res, eadem personae and eadem causa petendi.*
>
> *"The said decision given by the Italian courts, essentially, never decided the merits of the case and it very clearly dismissed the case on the grounds of lack of jurisdiction. In the Courts very own words "In via preliminare il Collegio, composto da un relatore subentrato nella titolarita' del fascicolo, ritiene che il TM adito non abbia giurisdizione per decider sull' istanza dei nonni materni.*
>
> *"Invero, e' pacifico in cause che la vita della minore e della sua famiglia sia ormai radicata, da svariati mesi, a Malta, dove la famiglia vive, i genitori lavorano e Chloe va al nido.; a fronte di tale circostanza, ha poco rilievo il dato formale del momento del cambio di residenza….a maggior ragione atteso che in materia minorile in principio della perpetuation iurisdictionis di cui all'art.5 cpc deve essere contemperato con il c.d. principio di prossimita' di cui all'art.5 della convenzione Aja 1961."*
>
> *"Thus, the Italian Court rejected jurisdiction as a result of the fact that the minor child had, together with the defendants, moved to Malta and therefore the Maltese Courts where the courts vested with jurisdiction.*
>
> *"In this respect, the first preliminary plea of res judicata is to be rejected.*
>
> *"2. <u>JURIDICAL INTEREST AND LOCUS STANDI</u>*
>
> *"Defendants plead that Plaintiffs as grandparents, prima facie, might appear to have an emotional and general interest in seeing their granddaughter, but for them to have a juridical interest and a locus standi, this requires that their interest arises from the law and is protected by the said law. They argue that this is not the case under Maltese law, which at no point in time, grants any access rights to grandparents and therefore Plaintiff's case is unsustainable.*

[3] Fol. 49.
[4] Fol. 30 of the acts.

"They go on to state that "It is clear therefore, that in order for someone to have an interest that person must have a basis at law. In the present case, the applicants made no attempt to outline which article of the law they filed the suit under and infact framed their suit more like a constitutional suit in pursuit of a remedy then as that appropriate to the current court."

"Plaintiffs insist that grandparents have a legal right and a legal standing to seek the protection of the right of the child to continue to develop his/her relationship with the grandparents and of the grandparents to ensure and safeguard the welfare of such niece, citing foreign case-law under the European Convention of Human Rights and Regulation 2201/2003.

"This issue is by far and large an untouched area of our law and jurisprudence and in itself represents a "grey area" that requires great thought and adapting to the lines of thought at an international level.

> *"At the sociocultural level, equally profound transformations are affecting the way of life of citizens. The phenomenon of families whose members (parents and children) have dual or different nationalities (which is closely linked to the free movement of persons and, more generally, to globalisation), the diversity of forms of union and cohabitation, besides marriage, in particular the civil partnership…..are just a few examples. The diversification of family structures is therefore a reality of contemporary society…Those economic and sociocultural changes, whose multiple effects on the lives of citizens are being felt at a steady pace, require in some cases a reconsideration of the assumptions underlying legal systems and the substance of their rules, and necessitate an adaptation of the law and in particular EU law (including private international law)….*
>
> *"However, despite the efforts of the EU legislature to adapt the legislation in matters of parental responsibility to developments in society, those developments are proceeding to a much faster pace than the process of legislative adaptation and it is clear that there remain some "grey areas," for which the legislation does not provide an explicit response. The case in the main proceedings is an illustration of those grey areas created by developments in society, in particular with regard to a child's contact with other persons to whom the child has "family" ties based on law or on fact (such as the former spouse of one of the parents, the child's siblings, grandparents…). Those grey areas may give rise to, sometimes paradoxical, uncertainties concerning the existence of rights of access by persons other than the parents, in this case grandparents.*
>
> *"With regard to grandparents specifically, is not that uncertainty disconcerting considering that, in principle and subject to the best interests of the child, contact between grandparents and their grandchildren, in particular in an ever-changing society, remains an essential source of stability for children and an important factor in the*

> *intergenerational bond which undoubtedly contributes to building their personal identity?"*

"The consideration of this legal point at issue has been dealt with in depth at an international level. The European Court of Human Rights has confirmed through a number of its judgements that the concept of "family life" extends to beyond the relationships between children and their parents and as enunciated in the judgement in the names Marcks vs Belgium decided on the 13th June, 1979, "family life" "includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life." All subsequent European Human Right case law has followed this interpretation.

"Plaintiffs also referred to another landmark judgement by the European Court of Human Rights Manuello and Nevi vs Italy decided on the 20th January, 2015 wherein it was stated that "the ties between grandparents and their grandchildren fell within the scope of family ties for the purposes of Article 8 and that measures severing the ties between a child and his or her family could only be applied in exceptional circumstances."

"That said, it is clear that Article 8 of the European Convention of Human Rights that provides "Everyone has the right to respect for his private and family life, his home and his correspondence," extends to include within its interpretation de facto family relationships, such as relationships between grandparents and children. The Convention itself has been part and parcel of Maltese law, precisely Chapter 319 of the Laws of Malta and in practice today, Maltese Courts have always followed established human rights case law, provided it does not conflict with clear provisions of the law. Considering that there is no conflict with the domestic law, it is the Convention that prevails.

"The same trend has been followed in the Court of Justice of the European Court when interpreting Regulation No.2201/2003 better known as Brussels IIa Regulation. In a recent judgement Neil Valcheva vs Georgios Babanarkis decided on the 31st May, 2018, the European Court, wherein it had to determine whether access rights extended to grandparents, it had the following to say:-

> *"It must be noted that the "rights of access" are defined broadly, encompassing in particular the right to take a child to a place other than that child's habitual residence for a limited period of time.*
>
> *That definition does not impose any limitation in regard to the persons who may benefit from these rights of access."*

"It added,

> *"Regulation No.2201/2203 does not expressly exclude a request made by grandparents for rights of access to their grandchildren from coming within the scope of that regulation.*

…

"It follows that the concept of rights of access referred to in Article 1 (2) (a) and in Article 2.7 and 2.10 of Regulation 2201/2003 must be understood as referring not only to the rights of access of parents to their child, but also to the the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, that child's grandparents, whether or not they are holders of parental responsibility."

"The Court of Justice of the European Court in its press release had the following to say:-

"In today's judgment, the Court of Justice begins by stating that the notion of 'rights of access' within the meaning of the Brussels IIa Regulation must be interpreted autonomously. After pointing out that that regulation covers all decisions on parental responsibility and that rights of access are identified as a priority, the Court notes that the EU legislature chose not to provide for any limitation of the range of persons who may exercise parental responsibility or hold rights of access. Thus, according to the Court, the notion of rights of access refers not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, the child's grandparents.

"The Court also points out that, in order to avoid the adoption of conflicting measures by different courts, and in the best interests of the child, the same court — as a general rule, the court of the child's habitual residence — should rule on rights of access."

"In the same judgement the Court justified and summed up the reason for its decision in the following terms:-

"..if applications for rights of access by persons other than parents are to be excluded from the scope of Regulation No.2201/2003, jurisdiction in respect of these applications will be determined by non-harmonised rules. The risk that a child might be involved in a dispute before a court with which that child has no close link and the likelihood of parallel proceedings and irreconcilable decisions would increase, contrary to the purpose of Regulation 2201/2003, which aims to lay down uniform rules of jurisdiction in accordance with the principle of proximity in judicial proceedings."

"Thus, a wide interpretation of the provisions of Regulation No.2201/2003 in the sense that it includes within its parameters an application for rights of access by a grandparent, does not run counter to the objective pursued by the EU legislature in the context of that Regulation.

"Furthermore, for the purposes of Maltese law, the said Regulation takes precedence over domestic law and therefore even though our law does not contemplate access rights for grandparents, the application of Regulation 2201/2003 and the interpretation of its articles through its jurisprudence is to prevail, especially when one considers that the Italian court didn't deny the right of access to the grandparents, but just denied jurisdiction, because Malta was the habitual residence of the minor and this for the sake of uniformity and stability in the child's life.

"Having considered the above and for the above reasons, therefore, Defendants' plea on lack of juridical interest and locus standi is to be rejected.

"a. <u>PUBLIC ORDER</u>

"Defendants believe that if the said Honourable Court had to confirm the right of access due to grandparents acknowledging their juridical interest and locus standi, this would threaten the very essence and stability of family life and family cases. Plaintiff begs to differ.

"As has already been stated above, the European Convention of Human Rights is enshrined within our domestic law and its jurisprudence on the interpretation of Article 8 of the said Convention, like any other jurisprudence interpreting the European Convention of Human Rights, today forms part of our rich collection of case-law. Likewise, Regulation 2201/2003 has become a predominant feature in Maltese law and jurisprudence. In the light of all this, it is inevitable to conclude that to keep in line with international legal interpretations that are more in keeping with the realities of contemporary society, grandparents are entitled to file a case asking to be granted rights of access. Nevertheless, this in itself is a procedural determination and in terms of the international law cited, it cannot be denied, but it does not bring an automatic application of this doctrine. The right of access is subject to the overriding principle that the best interests of the children prevail. Every case must be examined on the merits, and if grave factual reasons against the grandparents or grave prejudice to the children result, then the ultimate interest of the children prevails. This alone is not tantamount to a disruption of public order.

"Understandably defendants' plea are their concerns of a public threat, but in matters concerning childrens rights, it has always been of paramount importance that whatever decisions are made, they are always made in the best interests of the child. This line of thought has been expressed in various Conventions as quoted by Plaintiff, namely Article 5(1) of the Convention on Contact concerning Children of the Council of Europe provides that "subject to his or her best interests, contact may be established between the child and persons other than his or parents having family ties with the child.

"Article 3(1) of the Convention on the Rights of the Child provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

"So even Article 8 under Regulation 2201/2003, albeit granting the right to ask for access rights to grandparents, whether this will be exercised or not is a substantive matter, that can only be decided by the Courts once it has collected all the evidence and has assured itself that its decision is taken in the best interests of the child. This is the overriding principle.

"In conjunction with all this is Article 149 of the Civil Code (Chapter 16 of the Laws of Malta) that states "Notwithstanding any other provision of this Code, the Court may upon good cause being shown, give such directions as regards the person or the property of a minor as it may deem appropriate in the best interests of the child.

"Having considered all this, since the grandparents' rights to demand access is not an automatic and an absolute right, but subject to the best interests of the child test, then safeguarding a child in this way leaves no place for threat to the public order. In this respect, once again, defendants' plea stands no ground.

"b. <u>PARENTAL AUTHORITY</u>

"Defendants are insisting that by the said action filed by the grandparents, they are attempting to forfeit the rights of parental authority over the said minor and until this can done it first has to be proved that they are unfit parents.

"As has already been reiterated by this Honourable Court, the decision as to whether there should be visitation rights between the grandparents and the grandchild depends upon whether, after having assessed the whole case, it deems it in the best interests of that child and this in itself entails a decision on the merits of the case. This Honourable Court is not momentarily dealing with this matter in this decision, before it resolves the procedural issues raised in this case.

"The parental authority remains vested within the parents of the minor child and essentially granting visitation rights to grandparents can never be construed as a limitation of parental authority. Ultimately, it is always the best interests of the child that are to prevail. As Plaintiff submitted, Article 3(1) of the Convention on the Rights of the Child and Article 24(2) of the Charter of Fundamental Rights of the European Union, ensures that at all times, even when the child's best interests are in conflict with the parents' needs, the child's interests are to prevail, both in short and long term. These are the determining factors that can lead this Honourable Court to reach a decision.

"Thus said, the plea raised by Defendants on parental authority is too to be rejected.';

2.5. By application filed on the 30th January 2020, defendants requested leave of Court to file an appeal from its preliminary judgment of the 28th January 2020;

2.6. The request was upheld by decree issued on the 11th March 2020.

3. Having further seen that on the 12th March 2020, the defendants filed an appeal application from the judgment of the Civil Court (Family Section) of the 28th January 2020. Their grievances are the following:

3.1. That the Civil Court (Family Section) made an error of law when it concluded that the matter was not barred by the plea of *res judicata*;

3.2. That the Civil Court (Family Section) made an error of law when it concluded that plaintiffs' have the necessary *locus standi* in these proceedings;

3.3. The Civil Court (Family Section) made an error of law and of fact when it concluded that there is no threat to public order in allowing the grandparents' to file court actions to obtain enforceable visitation rights with their grandchildren; and

3.4. That the Civil Court (Family Section) erred at law when it rejected appellant's plea relating to parental authority.

4. Respondents replied that appellant's appeal should be dismissed and the judgment delivered by the Civil Court (Family Section) on the 28th January 2020 upheld.

Having considered that:

First Complaint.

5. The defendants contend that the first court made an error of law when it concluded that the present proceedings are not barred by the plea of *res judicata*. They claim that contrary to what was decided by the Court of first instance, the merits of the case in question – not just the issue of jurisdiction – have already been decided by the Italian *Tribunale per I Minorenni del Piemonte e Valle D'Aosta* on the 31st January 2019.[5] Hence, contrary to what was decided by the Court of First Instance, the present proceedings are *res judicata.*

6. The judgment of the Italian Tribunal for Minors, exhibited together with defendants' sworn reply, refers to proceedings filed by '*I nonni materni della bambina (prima il nonno e poi la nonna con intervento ad adiuvandum) ... allegando di non riuscire a frequentare regolarmente la nipote, in estrema*

[5] Fol. 23 *et seq*.

sintesi a causa dell' ostilità del genero e dell' incapacità della figlia di opporvisi'.

After summarising the evidence brought before it, the *Tribunale per I Minorenni del Piemonte e Valle D'Aosta* made the following considerations:

> *"In via preliminare, il Collegio, composto da un relatore subentrato nella titolarità del fascicolo ritiene che il TM adito non abbia gurisdizione per decidere sull' istanza dei nonni materni.*
>
> *"Invero, è pacifico in causa che la vita della minore e della sua famiglia sia ormai radicata , da svariati mesi, a Malta, dove la famiglia vive, i genitori lavorano e Chloe va al nido; a fronte di tale circostanza, ha poco rilievo il dato formale del momento del cambio di residenza ...*
>
> *"Per quanto il profile preliminare risulti assorbente, il Collegio osserva in ogni caso[6] che l'istruttoria svolta ha evidenziato la sussistenza di un conflitto allo stato non sanabile all' interno del nucleo familiare allargato della bambina ed in particolare nella relazione madre-nonno, conflitto che l' azione giudiziaria proposta ha sicuramente inasprito e le cui cause non sono in nessun modo condivise tra le parti, come si evince dal tenore, diametralmente opposto, delle dichiarazioni rese in giudizio sulla qualità della relazione della madre della minore con i propri genitori.*
>
> *"Anche il contenuto delle molteplici missive nonno-madre versate in atti attesta il fallimento del tentattivo di far intrattenere alla bambina un rapporto con i nonni che prescinde dal conflitto tra gli stessi ed i genitori della bambina; in alter parole, pare al Collegio che Chloe si trovi attualmente al centro di una dinamica disfunzionale che non sembra in alcun modo mediabile e nell' ambito della quale l'imposizione di un qualsivoglia rapporto nonni-nipote avrebbe l'unico effetto di mettere la bambina al centro di un conflitto grave e sicuramente non risolvibile fino al momento in cui il conflitto stesso (e il malessere della madre nella relazione con i propri genitori, come emerso in udienza) non sara riconosciuto anche dai ricorrenti.*
>
> *"Da quanto sopra brevemente esposto segue, in definitiva, la pronuncia in dispositivo."*

7. It follows that prior to filing the current lawsuit, plaintiffs had instituted proceedings before an Italian court complaining that they were not allowed to visit their niece regularly. It is not clear, however, what specific requests they made before that Tribunal. In its decision, the *Tribunale per I Minorenni del*

[6] Enfasi ta' din il-Qorti.

Piemonte concluded that it did not have jurisdiction to decide the request made by the minors' maternal grandparents since the child in question resides in Malta with her family.

8. This notwithstanding, the Italian Tribunal for Minors went on to make further considerations regarding the merits of the case by stating that the minor Chloe currently finds herself at the centre of a dysfunctional dynamic that does not seem in any way mediatable, and in which, the imposition of any grandparent-niece relationship would have the sole effect of putting the child at the center of a serious conflict, which will remain unsolvable until the grandparents themselves recognise the conflict itself and the mother's malaise in her relationship with them. In other words, it found that it would not be in the best interests of the minor child Chloe for it to impose a relationship between said minor and her maternal grandparents until the conflict between the latter and their own daughter (who is the minor's mother) subsisted.

9. Since the Italian Court clearly decided that it had no jurisdiction to decide the request made by the maternal grandparents, this Court understands that the Italian Courts considerations regarding the merits of the case were *obiter dicta* and not *ratio decidendi*. In the circumstances the decision is not a *res judicata* on the merits of the case.

10. Therefore, the court rejects defendants first complaint.

Second Complaint.

11. The appellants also claim that the plaintiffs do not have any *locus standi* in these proceedings and the first court allegedly made an error of law consisting in a profound misunderstanding of Regulation 2201/2003.

12. The court of first instance incorrectly applied Council Regulation EC No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (also referred to as the Brussels IIa Regulation).

13. It is clear, even from the title of the Regulation itself, that its object is not that of granting substantive rights in matrimonial matters or matters of parental responsibility,[7] but rather that of establishing jurisdiction rules ensuring the free movement of persons and the free circulation of judgments in the area of family law within the EU. Article 8(1) provides that '*The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.'* Chapter III then deals with the recognition and enforcement of judgments of divorce, legal separation or marriage annulment, as well as judgments relating to parental responsibility pronounced by a court of a Member State, whatever the

[7] This is in any case a matter of national competence – articles 3, 4 and 6 TFEU, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0020.

judgment may be called, including a decree, order or decision. Article 21, futher provides that said judgments *'given in a Member State shall be recognised in the other Member States without any special procedure being required'*, and subsequent provisions state that an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with the Regulation.

14. This Court will not go into further detail regarding Council Regulation (EC) No 2001/2003 as it is clearly beyond the scope of the present case which neither deals with issues of jurisdiction nor the recognition and enforceability of a judgment in matrimonial matters or matters of parental responsibility decided and enforceable in another Member State. Instead, the legal issue at hand is whether the plaintiffs, grandparents of the minor child, have the *locus standi* to request the Civil Court (Family Section) to grant them visitation rights to their granddaughter Chloe who is still a minor.

15. As regards the *Valcheva vs Babanarakis* case[8] referred to in the judgment of the first court, it concerned a reference for a preliminary ruling by the Bulgarian Supreme Court of Cassation to the ECJ in the context of the fact that a Bulgarian Court of first instance (confirmed on appeal) decided that it did

[8]http://curia.europa.eu/juris/document/document.jsf?docid=202411&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=12991750.

not have jurisdiction to determine an application made by Valcheva to exercise rights of access to her grandson since the latter was habitually resident in Greece with his father, a Greek national, and therefore, in terms of the Brussels IIa Regulation, it was the Greek Courts that had jurisdiction over the matter.

16. It is pertinent to note however, that the Bulgarian Courts applied the Brussels IIa Regulation only as regards the issue of jurisdiction. The substantive right claimed by Valcheva was based in terms of the national law of Bulgaria, namely Article 128 of the *Semeen kodeks* (Family Code) which provides as follows:

> *" (1) The grandfather and the grandmother may apply to the Rayonen sad (District Court) at the place where the child currently resides for determination of measures governing their rights of access, if this is in the child's interests. The child shall also have the right to make such application."*

17. Further to an appeal filed by Valcheva before the Bulgarian Supreme Court of Cassation contesting this decision on a point of law, the following question was sent to the ECJ for a preliminary ruling:

> *"Is the concept of "rights of access" used in Article 1(2)(a) and Article 2.10 of Regulation No 2201/2003 to be interpreted as encompassing not only access between the parents and the child but also the child's access to relatives other than the parents, that is to say the grandparents?"*

18. In the judgment the court said:

> *"15. By its question, the referring court seeks to determine whether rights of access of grandparents to their grandchild come within the scope of Regulation No 2201/2003, in order to determine whether the court having jurisdiction to rule on an application, such as that made by Ms Valcheva concerning those rights of access, has to be determined on the bais of that regulation or on the basis of the rules of private internationa law"*.

19. Whereas the ECJ replied that '*the answer to the question referred is that the concept of 'rights of access' referred to in Article 1(2)(a) and in Article 2.7 and 2.10 of Regulation No 2201/2003 must be interpreted as including rights of access of grandparents to their grandchildren'*, it also decided that in order to avoid the adoption of conflicting measures by different courts, and in the best interests of the child, the same court — as a general rule, the court of the child's habitual residence — should rule on rights of access.

20. However, the rules of jurisdiction and recognition and enforcement of judgments established in Council Regulation (EC) No 2201/2003 apply to cases of rights of access of grandparents to their grandchildren only insofar as the applicable national law in any given case provides for said rights, as was the case of Valcheva under article 128 of the Bulgarian Family Code. In other words, the Brussels IIa Regulation does not grant the substantive right of action to grandparents for visitation rights with their grandchildren as this is a matter of applicable national law.

21. As noted by the appellants this is not an entirely novel issue for our domestic courts. In the case of *RB noe vs RBM* decided on the 3rd July 2019, the Civil Court (Family Section) held as follows:

> *"Il-Qorti taghraf illi huwa minnu dak li targumenta l-intimata illi d-dritt Malti ma jirrikonoxxix access versu n-nanniet.*
>
> *"B'referenza ghas-sentenza fl-ismijiet Neli Valcheva vs Georgios Babanarakis citata mir-rikorrent, il-Qorti tirrileva illi din is-sentenza m'hijiex applikabbli fil-kaz odjern peress illi a kuntrarju tal-ligi Maltija, il-ligi Bulgara fl-Artikolu 128 tal-Kodici tal-Familja tipprovdi ghal dritt ta' access ghan-nanniet, u kien a bazi ta'*

dan l-artikolu li n-nanna tal-minuri f'dik il-kawza kienet ghamlet talba ghall-access mal-minuri. Il-Qorti tirrileva wkoll illi r-Regolament tal-Kunsill numru 2201/2003 ma jistabilixxix drittijiet t'access ghall-genituri jew membri ohra tal-familja. Dan ir-regolament jistabilixxi biss regoli rigward il-gurisdizzjoni tal-Qrati u r-rikonoxximent u l-infurzar ta' decizjonijiet moghtija mill-Qrati tal-Istati membru tal-Unjoni Ewropeja fl-ambitu ta' kwistjonijiet specifici tal-ligi tal-familja, inkluz kawzi u decizjonijiet dwar drittijiet t'access lejn tfal minuri. Dan jidher b'mod car mill-Artikolu 41 li jipprovdi dwar ir-rikonoxximent u l-infurzar ta' sentenzi li jiddeterminaw id-drittijiet t'access, izda ma jakkordawx xi drittijiet t'access:

> *"Id-drittijiet t'access imsemmija fl-Artikolu 40(1)(1) moghitja f'sentenza nfurzabbli li tkun inghatat fi Stat Membru ghandhom jigu rikonoxxuti u jkunu nfurzabbli fi Stat Membru iehor minghajr il-bzonn ta' dikjarazzjoni ta' l-infurzabbilita minghajr ebda possibilita li ssir opposizzjoni ghar-rikonoxximent taghhom jekk is-sentenza tkun giet iccertifikata fl-Istat Membru ta' l-origini skond il-paragrafu 2."*

"Fi kliem iehor, sabiex ikunu applikabbli r-Regolament u s-sentenza citati mir-rikorrent fir-rigward tan-nanniet tal-minuri, irid ikun hemm ligi domestika illi tirrikonixxi dan id-dritt. Il-Ligi Maltija ma tirrikonoxxix id-dritt tan-nanniet ghall-access, u ghalhekk dak citat mir-rikorrent m'huwiex applikabbli."

22. The appellants are also aggrieved by the fact that the first court decided that plaintiffs enjoy a legal right to access with their grandchildren on the basis of the European Convention of Human Rights and the incorrect application of the relative jurisprudence.

23. The court notes that in the case Manuello and Nevi v. Italy (107/10) decided by the ECtHR on the 20th January 2015, and referred to in the first court's judgment, the merits were very different from the present case. According to the facts listed in that judgment, Manuello and Nevi (the grandparents) were given custody of their minor niece further to criminal proceedings against the child's father for alleged sexual abuse:

> *"12. Il 9 ottobre 2002 il tribunale incaricò i servizi sociali e gli psicologi di seguire M.C., affidò la custodia della minore ai nonni materni, autorizzò la*

> *madre a vedere liberamente M.C. e autorizzò il padre a vedere la figlia secondo le modalità stabilite dai servizi sociali."*

The finding of breach of Manuello and Nevi's fundamental human rights under article 8 of the Convention was based on specific shortcomings of the competent authorities and of the Italian Court:

> *"54. La Corte osserva che, nel caso di specie, l'impossibilità per i ricorrenti di vedere la nipote è stata la conseguenza, in un primo momento, della mancanza di diligenza delle autorità competenti e, in un secondo tempo, della decisione di sospendere gli incontri. I ricorrenti non hanno potuto ottenere la realizzazione, in un tempo ragionevole, di un percorso di riavvicinamento con la nipote, né far rispettare il loro diritto di visita, così come era stato riconosciuto dalla decisione del tribunale del 16 febbraio 2006."* (emphasis by this Court)

24. In the present case the minor has absolutely no contact with her grandparents since her parents have refused.

25. The ECtHR has confirmed that ties between the grandparents and their grandchildren fell within the scope of family ties for the purposes of Article 8. However, in Kruškić v. Croatia (application 10140/13) decided on the 25th November 2014, the ECtHR said:

> *"111. Thus, the right to respect for family life of grandparent in relation to their grandchildren primarily entails the right to maintain a normal grandparent-grandchild relationship through contacts between them.*
>
> "*112. However, the Court reiterates that contacts between grandparents and grandchildren normally take place with the agreement of the person who has parental responsibility which means that access of a grandparent to his or her grandchild is normally at the discretion of the child's parents (see Price, cited above; and Lawlor, cited above)".*

26. This notwithstanding, the issue in the present case is whether or not Maltese ordinary law grants the grandparents a possibility to make a request to the court to be granted access to their grandchildren.

27. In the Civil Code there is no express provision of law granting grandparents such a right.

28. However, according to article 7(2) of the Civil Code grandparents have an obligation to provide maintenance for their grandchildren in particular circumstances:

> *"7(2) In default of the parents, or where the parents do not possess sufficient means, the liability for the maintenance and education of the children devolves on the other ascendants".*

29. An obligation which leads to the participation of the grandparents in the life of grandchildren. The law also provides that children have an obligation to provide maintenance to their ascendants in case of indigence (art. 8 of the Civil Code). Such obligations would not seem to be justified if it is declared that in all cases, irrespective of the circumstances, grandparents have absolutely no right to ask the Court to authorize them to have some form of contact with their grandchild.

30. These obligations are in themselves a confirmation that Maltese law recognises the existence of a special relationship between grandparents and their grandchildren, and therefore grandparents have an interest in making a request to have some form of contact with their grandchildren.

31. Grandparents are normally close family members. Obviously each case has its particular circumstances and fact. There may be circumstances where it is justified that grandparents do not have any contact with their grandchildren.

32. Plaintiffs, in their sworn application, also referred to article 149 of the Civil Code, which provides that the Civil Court (Family Section) may:

> *"upon good cause being shown, give such directions as regards the person or the property of a minor as it may deem appropriate in the best interests of the child."*

33. This provision of law is in itself relevant once Maltese Law recognises the existence of a relationship between grandparents and their grandchildren. Minors do not have an independent voice. The interest of the parents, who have parental authority over their children, are not always in tune.

34. Therefeore, the Court concludes that the plaintiffs do have a juridical interest in this case wherein their request to the Court is to grant them access to their grandchild. Obviously it is the Family Court that has to decide on whether in this particular case it is in the best interests of the child to have any form of contact with her grandparents, after taking into account the objection of the parents.

35. The defendants also complain that the appealed judgment has:

> *"28..... created a scenario where children may become the victims of innumerable legal suits, as various people in their life try to claw for themselves a part of that child's life against the parents wishes, that they can enforce under threat of imprisonment of the parents. It is not in children's best interest for it to even be possible that they may end up the object of so much litigation. It is absolute irrelevant that the decision on the meirt would be taken in the child's best interests, because children's best interests dictate that they are not put through so much court litigation in the first place, and the consequent conflicts of loyalty that these will cause for the child.*
>
> *"29. Furthermore, with court-mandated access rights for various relatives, non-biological fathers, ex-partners and possibly even close family friends who may all fall within the definition of family life children will barely have time to breathe as parents whizz their children from one access to the next, while the threat of imprisonment for failing to obey court-mandated access looms ominously over their head. How could it possibly be in children's best interest that their time is taken over by the various people who may claim enforceable visitation rights with tem, restricting not only the time available for them to purse their interests, but also the time that they have to spend with their parents ?"*.

36. However, in this case we are dealing with grandparents and not other persons. Furthermore, it will now be up to the Family Court to decide on the merits of the case, and therefore whether the grandparents should have any contact with their granddaughter. The Court is certainly not declaring that the plaintiffs have a guaranteed right to visit or have contact with their granddaughter. However, as grandparents, they do have a right to ask for visitation. The Family Court will then take a decision based on the best interests of the child.

37. The final complaint of the defendants is that the decision as to who has contact with the child is an intrinsic part of parental authority. They claim that the State's role in the upbringing of children is a subsidiary and supportive one.

Furthermore, they claim that in this particular case there is no objective reason for the State to interfere with the exercise of appellant's parental authority.

38. It is evident that the mother of the child is not on good terms with her parents. This notwithstanding, a decision can only be taken as to what is best for the child once evidence is produced by both parties. The fact that parental authority is vested in the parents, does not mean that the parents have the last say on all matters that concern the child. Article 149 of the Civil Code is very clear on this matter, and the defendants complaints merits no further consideration.

39. As a final point the Court remarks that this judgment does not imply that where the parents have the parental authority over their children, the grandparents can interfere in their grandchildren's upbringing. The decision deals with the opportunity given to grandparents to seek contact with a minor grandchild, whereby if circumstances are right the minor will undoubtedly reap benefits from keeping contact with his ascendants. A relationship recognised by the law itself as explained above.

For these reasons the Court rejects the appeal filed by defendants, with costs at their charge.

The Registrar is to ensure that the records of the proceedings are sent back to the Civil Court, Family Section.

Giannino Caruana Demajo President	Tonio Mallia Judge	Anthony Ellul Judge

Deputy Registrar
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