



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 Friday, 30th July, 2021.

Number: 1

Application Number: 397/2020/1

Chief Executive Officer of the Social Care Standards Authority

v.

Viktoriiia Mykolaivna Koloshkina

1. The case concerns a request by the Ukrainian Authorities through the offices of the corresponding Maltese Authorities for the return of a minor Ukrainian citizen to Ukraine in terms of the Hague Convention on the Civil Aspects of International Child Abduction. By judgement delivered on the 25th May 2021 the Civil Court (Family Section) rejected the applicant's request.

The facts.

2. Defendant and Maksym Koloshkin were married on the 28th March 2009, and on the 28th May 2009 their son Danyil was born. Since birth the child was habitually resident in Ukraine.

3. The family lived in the city of Dubno, Ukraine where Maksym's Koloshkin's family live.

4. In December 2015 the family transferred to the city of Lutsk, where defendant's family live. On the 1st September 2016 the child was enrolled at the Lutsk Specialized School I-III.

5. Since June 2016 the couple separated. The child was living with the defendant. However, in March 2018 the child was with the father in Dubno since defendant left Ukraine. During the period 16th March 2018 till the 4th May 2019, the child went to school in Dubno.

6. In April 2018 the father started a relationship with Mahsymchuk Oksana Volodymyrivna and live together. They also have a child.

7. Since January 2019 defendant has been employed in Malta with a local company (Trebee Company Limited) as confirmed in a letter issued by the company on the 25th January 2021.

8. On the 11th February, 2019 Identity Malta issued a residence card to defendant.

9. When the defendant returned to Ukraine later on during that year, the child returned to Lutsk.

10. The child was enrolled for a second time in the school in Lutsk by the defendant, on the 6th May 2019.

11. On the 11th July 2019, the marriage between Maksym Koloshkin and defendant was dissolved.

12. On the 16th August 2019 the defendant asked permission to the Municipal Council of Lutsk to leave Ukraine with the child.

13. On the 18th September 2019 the Lutsk City Council issued authorisation to the defendant to temporarily depart from Ukraine with the child for a period not exceeding thirty days.

14. Proceedings were commenced in Ukraine for the enforcement of a decision whereby the child's father was ordered to pay maintenance for his son for the period from the 15th July 2019 to the 1st February 2021.

15. On the 8th November 2019 the defendant and the child departed from Ukraine. Defendant and the child came to Malta and settled here. The father has no contact with his son.

16. On the 23rd September 2020 the father requested the Ukrainian authorities to locate his son and provide for his return to Ukraine.

17. On the 14th October 2020 a Maltese court issued a warrant of prohibitory injunction so that the child is not removed from Malta.

18. On the 17th November 2020 the Social Care Standards Authority filed proceedings in the Maltese courts for the return of the child to Ukraine.

19. On the 2nd March 2021 the father informed the Ukrainian authorities that his intention is to return the child to his place of habitual residence, i.e. Dubno City, Hrushevskoho Street, 49, apartment 1. The residence of his parents.

20. The defendant instituted proceedings in Dubno for the determination of the place of residence of the child. By judgement dated 2nd June 2021 the

District Court of Rivne region, Dubno ordered that the child is to reside with the defendant. In the judgement the defendant's address is in Ukraine and there is no reference to Malta.

21. According to Art. 160 of the Family Code of Ukraine, a child who is ten years old or older will have his place of residence decided by the mutual consent of his parents and by his consent.

Judgement of the 25th May, 2021.

22. The first Court rejected the Authority's request and after considering the facts, reasoned as follows:

“Thus, considering all these points, it can be concluded that the minor child's father does not pose much of a risk having a clean criminal record and no issues with the State. Above all this he also kept the child over the period 2018/2019. However, nonetheless, Dr. Anthony De Giovanni emphasized that notwithstanding his several requests, the Central Authority of Ukraine had failed to produce a clear report on the protection of the minor on his return to the Ukraine until a Ukrainian Court decision is reached on the patria potestas of the minor. On the other hand, Defendant presented evidence that presently, her ex-husband is unemployed and it also results that he has a new family, a new partner and a child. Moreover, she also produced evidence to show that she had instituted proceedings against Maksym Koloshkin because he failed to pay her maintenance for the child for the period 15th July 2019 and the 1st February, 2021 and subsequent enforcement orders that were issued against him namely, an enforcement order on temporary restriction on his right to hunt, an enforcement order on temporary restriction on his right to drive vehicles, as well as an enforcement order on temporary restriction on his right to leave the territory of Ukraine, all issued on the 1st September 2020.

The Court, therefore, has to find a balance to determine whether the risks for the minors' repatriation are grave enough that they justify a decision against repatriation. The facts that the father is unemployed and thus will not be in a position to offer a sound financial upbringing for his son for the time being is not tantamount to a grave risk. However, there are other considerations to be

made. Throughout the year that the minor child has been in Malta with his mother, his father has another partner and he has another child. So, essentially, if the minor child returns to the Ukraine he is going to find himself with new surroundings and a brother. These factors together create a further risk for a recurrence of his post-traumatic stress disorder. As Dr. Nigel Camilleri pointed out presently he shows slight symptoms of this disorder, but taking him back to Ukraine, where he suffered this trauma, would signify an intensification of this disorder and consequential damage to his emotional health.

.....

Article 12.

Defendant also makes reference to Article 12 of the said Convention, which article allows-but does not, of course, require a judicial or administrative authority to refuse to order the repatriation of a child on the sole ground that the child is settled in its new environment, if more than one year has elapsed between the abduction and the petition for return. The article begins by setting forth the general rule that:-

“Where a child has been wrongfully removed or retained... 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 wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

Article 12 of the Hague Convention carves out a simple exception:-

“The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”

In other words, if more than one year has passed, a “demonstration” that the child is now settled in its new environment” may be a sufficient ground for refusing to order repatriation. However jurisprudence has gone as far as to state that this by no means **“implies that the question of whether a child is settled may not be considered at all under Article 13(b); it simply means that this factor cannot be the sole reason for repatriation, except as provided by Article 12.”** Under Article 13(b), the fact that a child is settled may form part of a broader analysis of whether repatriation will create a grave risk of harm. The ordinary disruptions necessarily accompanying a move would not by themselves constitute such a risk.

The Chief Executive Officer of the Social Care Standards Authority filed the petition on the 17th November, 2020, when the Defendant and her son travelled to Malta on the 9th November, 2019, thereby resulting in a lapse of

over a year. Defendant provided evidence to show that her son Danyil has settled and is very happy in Malta. He attends school here and has made friends and they live together in a nice apartment and also Defendant has a stable job providing for him.

Nevertheless, over and above all this, Article 12 has to be read within the ambit of the more restrictive interpretation of Article 13 (b) of the Convention.

*Since Defendant is also basing her case on the proviso to Article 13 of the said Convention, it has also been interpreted that a court **“may consider a younger child’s testimony as part of a broader analysis under Article 13(b). In either case, of course, a court must take into account the child’s age and degree of maturity in considering how much weight to give its views. As the government acknowledges, however, it stands to reason that the standard for considering a child’s testimony as one part of a broader analysis under Article 13(b) would not be as strict as the standard for relying solely on a child’s objections to deny repatriation under Article 13.”***

*The only evidence produced as to what the minor child really feels and wants is what he expressed to Dr. Nigel Camilleri – **“He says that he would like to go on living in Malta. He is afraid of going back to the Ukraine. He’s afraid that is father will try to harm his mother. He says that he has seen violence all his life. He has seen his father beat her physically and shout at her.”** Though he admits that his early childhood years were fine and happy, in the last year or so before returning to Malta **“he would only see his father twice a week and his father would use drugs and drink a lot and would often see him inebriated.”***

Though appointed ex parte, Dr. Nigel Camilleri is a competent professional in his field and this was also confirmed by the Director of Social Welfare, despite the fact that they did not manage to communicate with him, therefore leading the Court to give the necessary importance and evaluation to the conclusions he reached:-

“However, if he returns to the Ukraine, the risk of exploitation under the terms of physical abuse and emotional abuse by his father are high. The risk of neglect is also high given that his father was not in his life for a long time. Also, his father presents with an erratic history of substance misuse, violence, debt, gambling and also, possibly some element of instability within his relationships....,

The risk of returning Danyil back to the Ukraine and disturbing the stability will increase the chances of furthering thus trauma to become a complex Post Traumatic Stress Disorder. Furthermore, increasing the chances of Danyil having life-long mental health problems as a result of trauma.

Furthermore, recurrent trauma is known to lead to emotional dysregulation, unless stability by a consistent caregiver is present

within his life. Therefore, the fact that Danyil has been exposed t trauma in early years, when there is neurodevelopment taking place, could cause lifelong damage to Danyil’s emotional regulation which can only be corrected by Danyil living within a stable and consistent environment with one stable caregiver.”

The Court is of the opinion that the return of the minor child Danyil to the Ukraine would cause him undue hardship and possible psychological harm. In this instance it is the duty of the Court to offer the child protection from possible further trauma, however that may be caused. The Court cannot ignore the evidence submitted by the parties and the submissions made by them. Although the Court can never be sure which of the parties’ version of facts is closer to the truth, it cannot ignore the conclusions and recommendations made by Dr Camilleri. The Court furthermore chose specifically to rely on those findings as being objective enough to warrant the Court’s consideration. Given the urgency of the whole case and the risk of subjecting the child to secondary victimisation and further trauma, the Court avoided the appointment of an additional expert to re-examine the child and saw Dr Camilleri’s report as sufficient in this case.

Considering all the factors proven and all the documentation and following the reasonings aforementioned, and above all that one year has elapsed from when the petition was filed, and the minor is now settled nicely in Malta, considering also that he was very clear and mature in expressing his emotions and desires with Dr. Nigel Camilleri, there exists solid and hard proof that satisfy the requisites of Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction and that Article 12 also falls within the broader application of Article 13”.

23. On the 3rd June 2021 the applicant filed an appeal and complained that:
 - i. The first Court made an error in the application of Art. 12 of the Convention. The defendant was in breach of the conditions for travel when she departed from Ukraine with her son and failed to return after thirty (30) days. The illicit retention of the child commenced on the 8th December 2019 and the lawsuit was filed on the 17th November 2020, i.e. within the year referred to in Art. 12. A breach which occurred in terms of Art. 1(d)(i) of Schedule II

of Chapter 410 of the Laws of Malta, i.e the European Convention on Recognition and Enforcement of Decisions Concerning the Custody of Children.

- ii. The child has difficulty to communicate in the official languages spoken in Malta. This was confirmed by the psychiatrist Nigel Camilleri. Furthermore, his presence in Malta depends on his mother's possession of a 'single permit' to work in Malta. This is a one year permit and requires an annual renewal. Circumstances that do not warrant a permanent stay in Malta.
- iii. The judgement was based almost entirely on an *ex parte* report. Since the habitual residence of the child is in Ukraine, any decision regarding the care and custody of the child has to be taken in Ukraine. Defendant illegally retained the child when she had an obligation to return him to Ukraine. Issues concerning the care and custody of the child have to be dealt with and decided according to Ukrainian law. Therefore, the *ex parte* report is based on a wrong premise that an inquiry started with regards to care and custody for the child.
- iv. According to Art. 7 of the Convention, it is not the duty of the central authority to issue an order with regards to the care and custody of the child. According to Ukranian law the child's father enjoyed joint care and custody rights (Art. 160 of the Ukranian Family Code).

- v. The *ex parte* report does not refer to the fact that the child was deprived from the presence his mother in 2015 and 2019 when she went abroad. The lengthy absence of the mother might cause serious trauma to the child.
- vi. The first Court relied completely on an *ex parte* report filed by the defendant. This notwithstanding the conclusion reached by that court, that it can never be sure which of the parties version is the truth. The *ex parte* report is based on facts mentioned only by one parent. The first court also breached the fundamental right of the the father since it entails serious allegations without having heard his version of events. The psychiatrist did not interview the father and ask for his version of facts. Although the report depicts the father in a bad light, the author of the report never spoke to the father.
- vii. There is proof that the father is not a danger to the child, and this was confirmed in the judgement. Documents filed by the appellant show that the father poses no risk towards the child.
- viii. Although the psychiatrist concluded that the return of the child to Ukraine would cause psychological harm, this opinion was modified during cross-examination. The psychiatrist confirmed that the return of the child to Ukraine would not be harmful.
- ix. There are documents that confirm that if the child is returned to Ukraine, he will not be in danger. Amongst these is a letter dated

22nd March 2021 and issued by the Ukrainian Ministry of Justice confirming that child protection measures are available. The onus of proof is on the defendant.

- x. The spirit of the Convention is that a court is to exercise its discretion in favour of the child's return. The party invoking Art. 13 has to prove that the return of the child to his habitual residence would constitute a grave risk of harm or a serious intolerable situation for the minor. No such evidence was produced. The first court confirmed that it was not possible to decide which party was nearer to the truth. Furthermore, the ex parte report did not conclude that the possible symptoms of minor post traumatic stress disorder constitute a grave risk or intolerable situation as defined by the national or international judgements.

24. On the 30th June 2021 the defendant replied and stated the reasons why the Court should reject the appeal.

The Court's review.

25. The first Court concluded that:-

- i. Before the defendant retained the child in Malta, he was habitually resident in Ukraine.

- ii. The mother was in breach of the law when she failed to return the child to Ukraine once the thirty (30) day authorised temporary absence from Ukraine lapsed.
- iii. The father's child does not pose much of a risk having a clean criminal record and no issues with the State.
- iv. Based on what Dr Nigel Camilleri said, the return of the child to Ukraine would cause undue hardship and possible psychological harm.
- v. The Court can never be sure which of the parties' version of facts is closer to the truth.
- vi. The father has a partner and another child. This will create a further risk for a recurrence of the child's post-traumatic stress disorder. His return to Ukraine would intensify this disorder.
- vii. One year has elapsed from when the petition was filed, and the child has settled well in Malta.

26. In his report and testimony, Dr Nigel Camilleri concluded that:

- i. The child is afraid that his mother will be harmed by his father if he returns to Ukraine.
- ii. The child has been exposed to a life long history of trauma from a young age due to physical and emotional abuse by his father and paternal grandparents towards his mother.

- iii. The child has been exposed to traumatic experiences such as fire setting, damage to property, use of drugs, use of alcohol, inebriation and gambling at a young age.
- iv. He has possibly symptoms of minor post traumatic stress disorder, that include hyper vigilance, anxiety, irritability and fears of returning to Ukraine.
- v. His return to Ukraine would disturb the stability he has and increase the chance of a complex post traumatic stress disorder.
- vi. There is a high risk of abuse and neglect if he is returned to Ukraine.
- vii. The child should be referred to psychotherapy for *“trauma focused CBT to address the past history of trauma, and at present, until the father is fully assessed by social services, Danyil has no contact with his father”*.

27. Article 12 of the Convention provides:

“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.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

.....”

28. In this case the child left Ukraine on the 8th November 2019. He was authorised to temporarily depart from Ukraine for a period of thirty (30) days. So it was after that period that the one year period started to run, that is with effect from the 8th December 2021. Proceedings for the return of the child were filed on the 17th November 2020, that is within the one year mentioned in Article 12. Therefore, this Court does not agree with the first Court that the year mentioned in Article 12 had lapsed when the appellant filed proceedings in terms of the Convention on the Civil aspects of International Child Abduction.

29. Article 13 of the Convention provides:

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) 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. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence”.

30. There is no doubt that defendant had an obligation to return the child to Ukraine once the thirty day period passed. Evidently, when she asked authorisation for temporary departure from Ukraine with her son, her intention

was to settle in Malta. In fact the evidence shows that she had already been working in Malta. At the time her marriage to Maksym Koloshkin had already been dissolved and they were no longer living together. Therefore, the danger that the child would witness his father abusing the defendant if returned to Ukraine, is highly improbable. This apart from the fact that if the defendant wanted to take the child under her care and leave Ukraine permanently, she had to pursue legal avenues in Ukraine and not retain the child in Malta beyond the period of authorisation.

31. The Court has certain reservations with regards to the *ex parte* report written by Dr Nigel Camilleri, since his opinion is based on the interview of the child and the defendant. It does not appear that he made an attempt to contact the father of the child and his parents and ask them for their version. It would have certainly been appropriate if he tried to contact them to have a holistic picture before expressing an opinion on whether the child should be returned to Ukraine. Alternatively, the defendant could have given him a copy of all documents and statements filed by the appellant, and asked him to consider whether he would like to change his conclusions. Furthermore, Dr Camilleri did not attach to his report a recording of the interviews, which would have certainly assisted the court in reaching its conclusions with regards to his findings.

32. In this particular case there is no contestation that there is an international abduction of the child. The mother brought the child to Malta and kept him here

notwithstanding that the authorisation granted by the Ukrainian authorities was only for a thirty (30) day temporary absence from Ukraine. In her affidavit the defendant confirmed:-

“Thus, i received permission for a period of 30 days within one year to travel abroad with my son. When my son and I flew to Malta, we hoped and prayed and believed that we would never return to the hell from which we fled. Therefore, I broke the law by not returning to Ukraine after 30 days”.

33. In her statement of defence the defendant claimed that the request for her son’s return to Ukraine is not justified *“21..... on the basis of the defence contained in Article 13 of the Convention on the Civil Aspects of International Child Abduction, which will be proved and demonstrated by the evidence and evidentiary documents.....”.*

34. Obviously, the fact that in Malta the child might have a better and more comfortable life than in Ukraine, is an issue which has to be decided in proceedings dealing with the care and custody of the child. A matter for the Ukrainian courts to decide. In fact in terms of Article 19 of the same Convention:

“A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue”.

35. There is absolutely no evidence that if the child returns to Ukraine he will be exposed to physical harm. This notwithstanding that in Dr. Camilleri’s report it is stated that if the child returns to the Ukraine, *“the risk of exploitation under the terms of physical abuse by his father are high”.* There is no evidence of incidents during which the father physically abused the child. Although in the report it is also stated that there was also physical abuse by his paternal

grandparents, there is no mention of this in that part of the report which refers to what the child told Dr Camilleri. Neither is there clear evidence that if the child is sent back to Ukraine he will be placed in an intolerable situation. Such situations are extreme situations, for example physical abuse on the child. What the defendant said with regards to the paternal grandparents has not been corroborated by the child when Dr Camilleri spoke to him. Had it been, probably Dr Camilleri would have said so in his report.

36. Obviously a return to Ukraine will cause the child inevitable worry, uncertainty and anxiety especially if he is separated from his mother. However, the Court cannot conclude that this alone will probably cause considerable psychological harm to the child.

37. With regards to the allegation that there is a grave risk of psychological harm if the child is returned to Ukraine, the Court notes:

- i. The father consistently denied that he abused drugs and alcohol. The father's current wife confirmed in her statement that he does not make use of drugs and alcohol. The father strongly rebutted all allegations made by the defendant in his regard;
- ii. The father is no longer part of defendant's family, and has made a new family;

- iii. The psychiatrist Dr Nigel Camilleri concluded that the child has “.... *possible symptoms of minor Post Traumatic Disorder*”. Although he confirmed that if the child is returned to Ukraine, this “.... *will increase the chances of furthering this trauma to become a complex Post Traumatic Stree Disorder*”, there is no evidence that convinces the Court that this will probably occur.

38. Furthermore, with regards to the judgement delivered in Ukraine on the 2nd June 2021, there is no mention that the child is to reside with his mother in Malta. The Court’s order was simply that the child is to reside with his mother. There is no evidence as to whether the defendant informed the Ukranian court that she was residing in Malta, and that proceedings were pending in court for the return of the child to Ukraine. The only address of the defendant referred to in the foreign judgement is Kovelska Street, 62/31, Lutsk city, Volyn region which the Court understands is the residence of her mother in Ukraine.

39. What is disturbing is that the father’s intention is clearly to have his son return to Ukraine and live with his parents in Dubno. This is confirmed in a letter dated 3rd March 2021 issued by the Lutsk City Council Service on Children Issues, wherein it is declared that on the 2nd March 2021 during a phone conversation the father declared that he intends to return the child to his place of habitual residence that is apartment 1, 49, Hruzhevskoho Street, Dubno. The apartment is the residence of the paternal grandparents. In her statement the

father's current wife¹ confirmed that they live together. Evidently his parents have a different address, an apartment which has a separate room for the child (*vide* document dated 12th March 2021 which is a report of a Commission made up of the Head of the Service on Children Issues of the Dubenska City Council and the Head of Division of the Service on Children Issues of the Dubenska City Council, wherein it is stated that during an inspection the grandfather claimed that his son '*periodically resides at the said address*'). The Court is convinced that the separation of the child from his mother, now settled in Malta and employed, with whom there is evidently a close attachment, poses a considerable risk of psychological harm to the child. This especially when the father's intention is to send his son to live with his paternal grandparents. This in itself indicates that the grandparents will take over the child's upbringing, probably because the father has a new family.

40. Furthermore, the child declared that he does not want to return to Ukraine. In his report Dr Camilleri wrote, "*He is clear about not wanting to return back to the Ukraine....*". From what the child told Dr Camilleri it is clear that he considers Malta to be a safe place. During the sitting held on the 22nd July 2021 the members of the Court spoke to the child, and he repeatedly stated that he does not want to return to Ukraine but to live in Malta with his mother. It is evident that for the child his mother is his priority. He has no doubt that he wants to live with her in Malta and not his father, or maternal grandparents, or

¹ Her name is Maksymchuk Oksana Volodymyrivna and in her statement she declared that she is the wife of Koloshkin Maksym Anatoliiovych.

paternal grandparents in Ukraine. In expressing his will the child showed no signs of hesitation or doubt, and he presents himself as having a clear understanding of the situation. Evidently he has adapted very well to life in Malta. Furthermore, there is no indication that the child's choice is unduly influenced by external pressure or that it is a matter of mere instinct. He is also aware of the consequences of his choice.

41. The child is adamant in his choice not to return to Ukraine. During the session the Court confirmed that the child has a sufficient level of maturity to properly express his choice of place of residence. Throughout the interview he expressed his desire in a very clear and determined manner.

42. In the circumstances the Court finds no reason why it should revoke the judgement delivered by the first Court and order the return of the child to Ukraine.

For these reasons the Court rejects the appeal with costs against the appellant.

Giannino Caruana Demajo
President

Tonio Mallia
Judge

Anthony Ellul
Judge

Deputy Registrar
gr