



CIVIL COURT, FIRST HALL

(Constitutional Jurisdiction)
The Hon Mr Justice Henri Mizzi

16 May 2025

No: 1

Application No. 251/2024

**Directorate for Child Protection as the entity entrusted
with the obligation to see to and protect the interests
of minors in terms of Chapter 602 of the Laws of Malta**

and

**Directorate for Alternative Care (Children and Youth)
which was vested with the care and custody of the
minor Sole Dube by means of a decree given on the
25 January 2024**

within the Foundation for Social Welfare Services

in the name of the minor

Sole Dube

v.

John Nocca Azzopardi, Michele Nocca Azzopardi,

Vuyo Dube

and

State Advocate

Introduction

1. Sole Dube was born in Zimbabwe on 13 September 2023. He was brought to Malta just before Christmas of 2023 with a view, it would appear, to him being adopted by John and Michele Nocca Azzopardi.
2. The Directorate for Child Protection (the “DCP”) became aware of the situation and, on 24 January 2024, filed an application in the Juvenile Court (*Direttorat għall-Harsien tat-Tfal v Vuyo Dube*, No. 7/24, copy of application at p. 17-24), by means of which it sought orders by that court in terms of Cap. 602.
3. The Juvenile Court issued a provisional order on 25 January 2024 (see p. 25 – 27) in terms of which (*inter alia*) the Director or the Directorate Alternative Care (Children and Youths) (the “DAC”) was entrusted with the care and custody of Sole Dube.
4. After a lengthy hearing on 16 April 2024, the Juvenile Court issued another order (see p. 28 – 33) in terms of which, *inter alia*, John and Michele Nocca Azzopardi were granted (limited) physical access to Sole Dube. The duration of that access has since been extended by a further order of the Juvenile Court, handed down on 17 February 2025 (Vol 3, part 2 of the copy of the record of case 7/2024 before the Juvenile Court, un-numbered).¹
5. In terms of practical effect, this case is mainly about the Juvenile Court’s grant of access to Messrs Nocca Azzopardi, which the DCP and the DAC (together, the “Directorates”) say is in breach of Sole Dube’s fundamental rights.

The claims

6. Indeed, the Directorates’ first claim in this case was for an interim order to the effect that John and Michele Nocca Azzopardi should be precluded from “any form of access and/or contact” with Sole Dube and that there should be no “physical and/or virtual” contact

¹ A request by the DCP to have the extended access reversed was turned down by the Juvenile Court on 26 March 2025.

between them and young Sole. This request was rejected by means of a decision handed down on 22 July 2024 (pages 111 – 113).

7. The Directorates now seek the following declarations:

Declares and decides for the reasons aforementioned and those which will result from the submissions of this application, that the intent and actions of the defendants John Nocca Azzopardi, Michele Nocca Azzopardi and Vuyo Dube against the minor Sole Dube by the means of how he was brought to Malta with the scope of an illegal adoption amounts to the breach of the fundamental right of the minor as protected by Article 32(c) of the Constitution, Article 8 of the First Protocol of Chapter 319 of the Laws of Malta and Article 21 of the Convention of the Right of the Child;

Declares and decides that illegal adoption in general is a breach of the fundamental human rights of the person according to Article 32(c) of the Constitution, Article 8 of the First Protocol of Chapter 319 of the Laws of Malta and Article 21 of the Convention of the Right of the Child;

Declares that any form of access and/or contact, either physical and/or virtual of the defendants John Nocca Azzopardi and Michele Nocca Azzopardi with the minor Sole Dube given by a decree dated the 16th of April, 2024 by the Juvenile Court is an ulterior breach to the right of the minor as protected in Article 32(c) of the Constitution, Article 8 of the First Protocol of Chapter 319 of the Laws of Malta and Article 21 of the Convention of the Right of the Child;

The preliminary defences

8. The defendants have raised several preliminary points. John and Michele Nocca Azzopardi's point can be summarised as follows:

- a. The Directorates failed to exhaust the ordinary remedies available to them;
- b. The case, based as it is on a hypothetical scenario (namely the potential future adoption of Sole Dube by them) is, as such, untenable;
- c. The claims, properly construed, are not constitutional in nature at all, in that the Directorates seek to have this court decide what is in Sole Dube's best interests and, in effect, to appeal the Juvenile Court's decision to grant them access to Sole;
- d. The claim based on an alleged breach of article 32(c) of the Constitution is not justiciable;
- e. The claim based on the allegation that John and Michele Nocca Azzopardi have breached Sole Dube's fundamental rights has no basis in law, as it is only the State that can breach fundamental rights; and
- f. The claim that the access granted by the Juvenile Court to John and Michele Nocca Azzopardi is also in breach of Sole Dube's fundamental rights has no basis in law as

(i) it is directed at the actions of the said defendants; (ii) it is premised on a hypothesis (an illegal adoption) that has not and will not happen; and (iii) this is not an *actio popularis*.

9. The State Advocate makes the following preliminary points:

- a. In so far as the claims are directed against the actions of the other defendants, the State Advocate should be non-suited;
- b. The Directorates' standing needs to be determined because they have no right to institute proceedings for a breach of the Constitution or of the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- c. The Directorates need to indicate the legal authority on which they filed this case on behalf of Sole Dube; and
- d. If the Directorates failed to exhaust the ordinary remedies available to them, then the court should decline the request to hear this case.

10. Finally, these are Vuyo Dube's preliminary defences:

- a. The Directorates have no standing in that that they have no right to institute proceedings for a breach of the Constitution or of the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- b. The Directorates have no standing because judicial representation is vested in the Director and not in the DCP;
- c. The Directorates failed to exhaust the ordinary remedies available to them;
- d. The claim based on the allegation that John and Michele Nocca Azzopardi have breached Sole Dube's fundamental rights has no basis in law, as it is only the State that can breach fundamental rights; and
- e. The claim based on an alleged breach of article 32(c) of the Constitution is not justiciable.

The scope of this judgment

11. The defendants have, as one would expect, raised substantive defences also; but they do not figure in this judgment, the parameters of which were set out in the court's direction of

22 July 2024 (pages 109–110), as followed up in the minutes of the hearing held on 6 November 2024. In effect, the court directed that it be dealing with the preliminary defences in a separate judgment: this one.

12. In so far as the evidence goes, the record shows that, after some exchanges over the summer of 2024, the parties eventually agreed to rely on a copy of the record of the case before the Juvenile Court. This was duly produced – updated up until 4 April 2025 or thereabouts – partly in paper format, and partly in digital format.²
13. Oral submissions were heard on 4 March 2025 and a transcript is included in the record.

Vuyo Dube’s first and the State Advocate’s third preliminary defences

14. Vuyo Dube argues that the Directorates, in purporting to act on behalf of Sole Dube, do not have standing because they are not entitled to initiate this action on his behalf. The State Advocate makes much the same point, even if in terms not quite as assertive.

Was the DCP entitled to file these proceedings on Sole’s behalf?

15. Article 5(1) of Cap. 602 provides, in essence, that the Director (Child Protection) is to investigate any harm or risk to a minor and to take any action as may be deemed appropriate for the protection of the minor. Article 5(2)(a) then provides that in the exercise of his functions, the Director (Child Protection) shall act in the best interests of the minor at risk.
16. Then, in terms of article 18(1), the Director (Child Protection) may request the Juvenile Court to issue a protection order in accordance with article 19. Such an order may take various forms: a welfare care order (under article 19(1)(a)(i)) (which is the order sought in *Direttorat għall-Ħarsien tat-Tfal v Vuyo Dube*, No. 7/24); a correctional care order (under article 19(1)(a)(ii)); a supervision order (under article 19(1)(b)); a treatment order (under article 19(1)(c)); or a removal order (under article 19(1)(d)).

² The State Advocate made a very late request to introduce evidence that the claimants have recently opened a new front in this matter, with a suit filed before this court, exercising what may be called its ordinary jurisdiction. This evidence was admitted given that the suit in question has only been filed recently.

17. In providing that the Director (Child Protection) is entitled to ‘take any action as may be deemed appropriate for the protection of the minor’ and to ‘act in the best interests of the minor at risk’ does the law grant the Director authority to institute legal proceedings in the name of the minor?
18. The phrases in question are cast in rather wide language. However, to act to protect a minor or to act in his best interests does not appear to authorize one to act in the name of the minor. Rather, it requires one to act in one’s own name, but for the minor’s benefit. Authority to act in the minor’s name would, it seems to the court, require clearer language than that adopted by the legislator: language, for instance, such as that used in respect of a tutor who, in terms of article 172 of the Civil Code does not only have the care of the minor, but represents him in all civil matters, and administers his property.

Can a mandate be inferred from the remainder of the provisions of Cap. 602? No. Indeed, the other provisions of Cap. 602 serve to restrict, not broaden, the Director’s powers as set out in article 5. As we have seen, the Director may, in terms of article 18, ask the Juvenile Court to issue a protection order. In this context, the word ‘may’ has an imperative import: when a protection order is called for, then the Director must – not may - request it. If he does not do so, he will be guilty of a dereliction of duty. If he acts without such an order, he will be acting beyond his powers (except as provided in article 20, in cases of emergency).

19. Now when the Director requests a protection order, he acts in what he considers to be the best interests of the minor. But he acts in his own name, not in the name of the minor (see, as a relevant example, the application in this very case: 7/2024 *Direttorat għall-Harsien tat-Tfal v Vuyo Dube*, a copy of which is to be found at pages 17-24).
20. The court therefore finds that the Director (Child Protection) has no mandate to act in the name of a minor child; and hence that the Directorate was not entitled to institute these proceedings.

Was the DAC entitled to file these proceedings on Sole's behalf?

21. In terms of the order of the Juvenile Court of 25 January 2025, the Director of the DAC was, pursuant to article 18(3) of Cap. 602, entrusted with the care and custody of Sole Dube. The Director was also 'given the power to delegate her authority to take ordinary decisions in relation to the minor's education, medical treatment, therapeutic and psychiatric [treatment] to persons of trust or persons who have the competence to administer homes of alternative care' (see para. 2 of the provisional part of the said order, at pages 25-26).
22. Does this mean that the Director of the DAC was entrusted with a mandate to act in Sole's name? And if so, does that mandate entitle the DAC to file judicial proceedings – and, in particular, these proceedings - in his name?
23. The phrase 'care and custody' is, in effect, given a statutory definition or, perhaps more precisely, a statutory meaning. This is to be found in article 36A(1) of Cap. 602, which sets out the Director's functions and which is, in effect, the way in which the law fleshes out the 'care and custody' function.
24. There is nothing in article 36A(1) which can be read as including authority to act on Sole Dube's behalf except to the limited extent set out therein (for example, see paras. (f) and (l)). It follows that the mandate afforded to the Director is circumscribed within the parameters set out in article 36A(1). That mandate does not include authority to initiate legal proceedings on behalf of the minor. The court therefore finds that the Director had no authority to commence these proceedings on Sole's behalf; and, consequently, that the DAC was not entitled to proceed on his behalf either.

Decision

For these reasons, the court upholds Vuyo Dube's first defence and the State Advocate's third defence and finds that the Directorates were not entitled to commence these proceedings. It follows that the court does not need to consider the defendants' other preliminary defences.

The case is dismissed, with costs to be borne by the Directorates.

The Hon Mr Justice Henri Mizzi

Tristan Duca
Deputy Registrar