



COURT OF APPEAL

**HIS HONOUR THE CHIEF JUSTICE
SILVIO CAMILLERI**

**THE HON. MR. JUSTICE
ALBERT J. MAGRI**

**THE HON. MR. JUSTICE
TONIO MALLIA**

Sitting of the 3rd December, 2010

Civil Appeal Number. 242/2010/1

Director for Social Welfare Standards

v.

Nigel Barton

The Court:

Preliminary

Having seen the application presented in the Maltese language on the 10th May, 2010, with a translation in the

English language which was filed on the 17th May, 2010, and which reads as follows:

“This application is being filed in terms of the Child Abduction and Custody Act (Chapter 410 of the Laws of Malta) whereby two Conventions relative to the civil aspects of international child abduction and to the recognition and enforcement of custody decisions were ratified and also in terms of the European Union Regulation number 2201/2003 of the 27th November 2003.

“The application deals with minor siblings Thomas and Nigel Barton, born in Northwich, Cheshire in the United Kingdom on the 17th April 1995 and on the 10th August 1996, sons of Nigel Barton and Geana Francis Barton, as appears from the birth certificates annexed and marked as documents ‘Dok. Ag1’ and ‘Dok. AG 2’. The minors Thomas and Nigel Barton are being illegally retained in Malta by Nigel Barton.

“The Malta Central Authority was requested by the United Kingdom Central Authority in terms of Article 7 of the Convention on International Child Abduction, to discover the whereabouts of the minors and to obtain their immediate return.

“In fact, the applicant is informed that the minors reside with their father at 58, St. Joseph’s Appartment, Triq I-Imhar, Qawra.

“The mother of the minor siblings Thomas and Harry Barton, that is, Mrs Geana Francis Barton, authorised the Malta Central Authority to act in her name as appears from the authorisation attached and marked as ‘Dok. AG3’.

“Although the parents of the minors are divorced, the parents were legally married when the minors were born. In terms of Article 2 (1) of the United Kingdom Children Act, 1989, both parents have parental responsibility over their children, extract of the Act is herewith attached and

marked as 'Dok. AG4'. In this case, during the pendency of the divorce proceedings, the parents agreed that the minors will reside in the United Kingdom while the father was given access to the minors.

“In the case, Mr Nigel Barton is illegally retaining his minor children in Malta and consequently changed their habitual residence without the consent of the mother and consequently violated the rights of parental responsibility of the mother and is acting in an illegal manner by completely isolating her from the minors.

“The mother has the right to participate in important decisions relative to the change in the habitual residence of the minors even more so given the fact that she was exercising her rights as a parent in terms of the laws of the United Kingdom prior to the illegal retention in Malta by the father of the minor siblings Thomas and Harry Barton.

“For these reasons, the applicant is respectfully requesting this Honourable Court to order the return of the minor siblings Thomas and Harry Barton to the United Kingdom and that in the interim period, the Court gives those directives in the interest of the said minors, including a notice to the competent authorities, in order to safeguard the children from being illegally removed from Malta to any other State, which removal would make the return of the minors to their habitual residence much more difficult and in express violation of the Convention on the Civil Aspects of International Child Abduction and of the Convention on the Civil Aspects of International Child Abduction and of the European Union Regulation.”

Having seen that the respondent Nigel Barton was served with this application on the 22nd June, 2010, and he filed his reply on the 28th June, 2010, whereby he stated as follows.

“Both minors Thomas and Harry brothers Barton, were born in the United Kingdom on the United Kingdom on the 17th April 1995 and 10th August 1996, respectively, to the respondent and Geana Francis Barton;

“The divorce decree absolute between the respondent and Geana Francis Barton was delivered on the 5th September 2007, in which decree there is no reference to the care and custody of the minors Thomas and Harry;

“The respondent declares that he was aware of the divorce decree six weeks after it was delivered. He was not even notified of the divorce proceedings;

“Both minors Harry and Thomas resided together with the respondent, however Harry wanted to return to the United Kingdom. In fact he left the Maltese Islands on the 22nd June 2010, before the respondent was aware and notified of the application;

“Respondant has been residing in Malta for the past 5 years, and his residence is Flat 58, St Joseph Apartments, Triq l-Imhar, Qawra, San Pawl-il Bahar, and is the place where both minors have been residing;

“The respondent is in agreement that the custody of the minors is joint with Geana Francis Barton as declared in the application, however he disagrees with regards to the existence of an alleged agreement between the respondent and Geana Francis Barton about the residence of the minors and the manner in which access rights are to be exercised;

“When there is not a declaration to the contrary, the custody of minor children, is to remain a joint custody between both parents. Hence, when custody is joint, every parent has the same rights and obligations towards the minors. This is not a residence order, in other words, a declaration where the minors are to reside, therefore, it cannot be declared that there was child abduction by one parent or another, once that parent has the same rights over the children just like the other parent;

“Without prejudice to the above, both the respondent and the minor child Thomas, asked Geana Francis Barton to give her consent so that Thomas resides in Malta with his

father, however she refused to give consent and this without any reason whatsoever. Hence, the fact that the minors were in Malta living with the respondent does not constitute a breach of the United Kingdom Child Abduction Act 1989, annexed with the application and marked as Dok AG4;

“The Minor Thomas wishes to stay and reside with the respondent, as he is being given the attention he should be given from a parent. The minor has been residing with his father for the past 7 months, before this he used to come to Malta during his school holidays. The minor says that when he stayed in England, he used to stay alone, and his mother Geana Francis Barton did not care for him properly;

“The respondent is ready to take care of Thomas and to keep him in Malta, and Geana Francis Barton will be given access to the minor;

“According to Regulation 2201/2003, the minor’s habitual residence is Malta;

“The respondent has a fixed income of circa €1035 per month, and can take care of the needs of the minor Thomas;

“The minor Thomas today has attained 15 years of age and should be given the opportunity to voice his wishes;

“The respondent humbly requests this Honourable Court to nominate a children’s advocate to represent the best interests of the minor child Thomas, and the minor Thomas is heard by this Honourable Court, and that this application is appointed for hearing before this Honourable Court;

“In view of the above, the request presented by the Director for Social Welfare, is to be dismissed, as the minor Harry has already returned to the United Kingdom, and the return of the minor Thomas is not in his best interest.”

Having seen the decision of the Civil Court (Family Section) delivered on the 10th September, 2010, by virtue of which the Court, after having noted that the minor Harry returned to England “according to his wishes”, refused the request to send the minor Thomas back to England;

The said Court gave the following reasons for its decision: “That by virtue of the present proceedings, the applicant appearing on behalf of the children’s Mother, is requesting that the children, Thomas and Harry be returned to the UK to continue living with her; whilst the Father is opposing to this request for the reasons outlined above, and stated in detail in his reply.

“Also, since Harry has been returned to the UK, the present proceeding, at this stage, concern only the child Thomas.

“The Facts

“That from the evidence it results that the parties, both English nationals, have two children from their marriage, Thomas and Harry, born respectively on the 17th April 1995 and on the 10th August 1996.

“That, on the 5th September 2007 the parties had obtained a divorce decree in the UK where they had been residing, but, whilst the Mother continued to reside with the children in the UK, the Father had come to live in Malta some six years ago. There exists no written agreement or court order regarding the parental responsibility of the children, however it appears, that the children continued to reside with the mother in the UK, with visitation rights in Malta in favour of the Father. The latter states in his evidence that, both prior and after the divorce, Thomas had lived for some time in Malta with his father, but had returned to the UK according to his wishes.

“That the Mother had agreed in January 2010 to send the children to Malta to spend a few days with their Father who had informed her over the phone that he was diagnosed with a terminal illness. The children were

supposed to be returned back to the UK, where they were then living, on the 29th January, however, the Father failed to return the children by that date, and eventually informed the Mother that the children were to continue living with him in Malta.

“Eventually, Harry returned to the UK to continue living with his mother, according to his wishes, but Thomas has remained in Malta, and is strongly objecting to being returned to the UK, He wishes to continue living with his father in Malta, primarily on the ground, that over here he is better cared for by his father, whilst in the UK he was living with his half-brother and his boy friend in a rented house, whilst his mother lived separately with his younger brother in the residence of his maternal grandmother. Also, Thomas likes the maltese way of life, he has made friends in Malta, and has a part-time job allowing him to indulge in his hobby as a bird-fancier and breeder. He told the Court that he is much happier living here in Malta, than in the UK where he lived separately from his mother, with his half-brother who is in a relationship with another man.

“Today Thomas is over fifteen [15] years of age, and clearly comes across as a mature boy of his age who can take considered decisions whilst being aware of the consequences.

“Considerations of the Court

“That firstly, it is relevant to observe that since Thomas is still under 16 years of age, the Child Abduction and Custody Act [Chapter 410 of the Laws of Malta] is applicable.

“That secondly, according to the defence stated in paragraph [b] of the first paragraph of Article 13 of the Hague Convention, the Court is not bound to order the return of the child where “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 next paragraph, adds a further

exception to the rule of the immediate return of the child, where “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.”

“It has been observed that “The scheme of the Hague Convention is that in normal circumstances it is considered to be in the best interests of children generally that they should be promptly returned to the country whence they have been wrongfully removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. That discretion must be exercised in the context of the approach of the Hague Convention.” [Balcombe LJ].

“In *Zaffino vs Zaffino* [Abduction: Children’s Views][2005] Thorpe LJ states that “the court must balance the nature and strength of the child’s objections against both the Convention considerations [obviously including comity and respect for the judicial processes in the requesting state] and also general welfare considerations.”

“On the merits of the case in issue, this Court observes that, from the evidence adduced, although no written order or written agreement exists as to the child’s care and custody, still it results to the satisfaction of this Court that, at the time the children were sent to Malta in January of the current year, the child Thomas, and his brother Harry, were both residing habitually in the UK, in the care of the Mother, and that there, in other circumstances, this Court would not hesitate in ordering the return of the child.

“However, Thomas informed the Court that in the UK, he was not residing with his mother, but in a different house with his half-brother. This explains why he has expressed to this Court his strong objection to being returned to the UK. where he is forced to live in such a situation, as against the situation prevailing at present in Malta where he lives with his father and is better cared for.

“Also, the Court observes that the present age of the child grants him a sufficient level of maturity enabling him to reach considered decisions relating to his own welfare, and this Court is bound to give due weight to his views and wishes. It is true that the right of the child to freely express its views is not tantamount to self-determination, but on the other hand, if the child is of a certain age and the Court is satisfied that his views are not tainted with undue influence and pressure of the abducting parent, but are reasonably directed to what the child rightfully perceives to be his own interest¹, then his view must be give due weight by the Court. To hold otherwise, would stultify the provision requiring the Court to take, where appropriate, account of the child’s views.

“On the strength of the above considerations, factual and legal, this Court has come to the conclusion that, in the best interests of the child, it should decline applicant’s request.”

Having seen the application of appeal filed by the Director for Social Welfare Standards by virtue of which, for reasons set out in the said application, he requested that this Court annuls and revokes the judgement delivered by the first Court on the 10th September, 2010, with costs against appealed party;

Having seen the reply to the appeal filed by Nigel Barton by virtue of which, for reasons set out in the said reply, he requested that this Court rejects the application of the appellant and thus reject the appeal, with costs of both instances to be supported by the appellant;

Having talked to the minor Thomas in its chambers on the 12th October, 2010;

Having heard submissions by Counsel;

Having seen the records of the case;

¹ Vide in this regard dictum by Ward LJ in Re T [Abduction: Child’s Objections to Return] [2000] 2 FLR 192

Considers:

That the proceedings were initiated with a request for the Court to send back to the United Kingdom the minor Thomas, who was residing “with” his mother in that country, but has since January of this year resided in Malta with his father, who had requested his ex-wife to send the children to visit him as he had a terminal illness. The facts of the matter are set out in the preliminary part of the First Court’s judgement reproduced as part of this judgement and hence there is no need for the Court to provide an outline of the facts that led to these proceedings. The first Court refused to send Thomas back to the U.K. due to the fact that the child himself has strongly objected to his being sent back as he wishes to remain in Malta with his father.

The appellant argues that the child should be sent back as a mere “desire” to remain in Malta should not be enough to hinder the application of the Child Abduction and Custody Act, which ratifies two International Conventions and Regulation 2201/2003 of the European Union.

There is agreement between the parties that the said Regulation (which is broadly similar to the Hague Convention on the Civil Aspects of International Child Abduction) applies to this case, that the child has his habitual residence in England, and that the child was under the custody of the mother before he came to Malta, and that the mother has joint parental responsibility with the child’s father. Under these circumstances this Court would not have hesitated to return the child to England, where if not for article 13 of the Convention which permits a refusal to make a return order if the judicial authority finds that the child objects to being returned and has obtained an age and degree of maturity of which it is appropriate to take account of his views. The child in question is 15 years 6 months old, and both the First Court and this Court felt that the child has sufficient maturity to have his views taken into account, and in fact

heard his views in chambers. Given the age of the child, the Court felt it was incumbent upon it to hear his views, given also the circumstance that the child expressed his willingness to air his views on the matter.

There is no doubt in the Court's mind that this part of article 13 is independent of the rest of it, and hence there is no additional requirement to establish that there is a grave risk that a return order would expose the child to psychological harm. Nor is it required to consider whether the child objects to returning in any circumstances; it is enough for the child to indicate that, in the present circumstances, he objects to returning to his mother.

This Court, as noted, had an open and frank discussion with the child who outlined his objections to returning to England; notes of the child's statement were taken down in writing, but have been sealed by Court order at the express wish of the child. The child noted that he has been living in England under the control of his mother for the last 10 years, and now wishes to remain in Malta to live in a family environment with his father. He likes Malta and believes that his father is showing much more interest in his welfare than his family in England ever did. The child pointed out the state in which he was forced to live in England, how he ended up living with his half-brother and his partner, and how the prospect of living in a cramped environment with his mother and grand-mother was not appealing to him. The child also referred to his mother's past stint with alcoholism and his fears in this regard which would, of itself, justify a refusal of a return – see Re J (Abduction: Child's Objection To Return) decided in the U.K. in 2004 (EWCA Civ 428; 2FLR 64). Mention was made of difference in treatment between himself and his brother by his mother.

The Court acknowledges that, notwithstanding the above, it still has a discretion to order the return of the minor, but feels that it should give due weight to the child's wishes. The Court does not think his views have been "shaped or even coloured" by undue parental pressure; it even

Informal Copy of Judgement

warned him of the consequences of his decision, but he remained adamant that he wanted to stay in Malta.

For these reasons, the Court dismisses the appeal filed by the Director for Social Welfare Standards and confirms the decision given by the first court on the 10th September, 2010.

As to costs, the Court decrees that the parties are to bear their own costs of these proceedings.

This Court orders plaintiff authority, in terms of article 11(6)(7) of Regulation 2201/03 of the European Union, to transmit a copy of its decision to the competent Court in the Member State of origin.

< Final Judgement >

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