

Court of Appeal

Sitting of Tuesday, 24th July 2018.

Appeal no: 12/2015

**Sharon Rose Roche nee Bellamy**

**Vs**

**Dean Michael Roche**

1. By application filed on the 20th July, 2018 the respondent challenged Mr Justice Anthony Ellul in terms of Article 734(1)(d)(ii) of the Code of Organization and Civil Procedure since he was one of the members of the Court of Appeal in the retrial proceedings, **Direttur tad-Dipartiment ghall-Istandards fil-Harsien Socjali v Sharon Rose Roche nee Bellamy** (application no. 10/2015). The retrial proceedings were decided by a judgment delivered on the 17th May, 2016.
2. Appellant contends that there are no legal grounds for this Court to uphold respondent's request.
3. The above-mentioned proceedings (10/2015) dealt with a request for a retrial of the Hague Convention proceedings decided by the Court of Appeal on the 30<sup>th</sup> October 2015. The request for retrial was rejected by a judgment delivered on the 30th October, 2015.
4. In the Hague Convention proceedings, the Court decided upon the request for the return of the minor child to England. The Court of Appeal after

having ascertained that the minor was being illegally kept in Malta, ordered that he is returned to England and thereby revoked the judgment delivered on the 24th July, 2015 by the Court of Magistrates (Gozo) Superior Jurisdiction. The scope of that proceeding was certainly not to determine which parent should be granted the care and custody of the child.

5. In the present proceedings, one of the appellant's complaints deals with that part of the judgment of the First Court (21<sup>st</sup> February, 2017) whereby the care and custody of the child was given to the respondent. This notwithstanding that in the Hague Convention proceedings, the Court of Appeal ordered that the child is returned to the United Kingdom.
6. With regards to the present appeal, by a court order delivered on the 11th June, 2018 the Court of Appeal upheld a request for the abstention of the three judges that were presiding this case. In the decision the court stated that, "*... the challenge of the President of the Court is based on the fact that Mr Justice Azzopardi was one of the judges who had heard and decided the retrial proceedings relating to that same case*". The Court also stated:

*"The Court notes that the Mother's application for the challenge of the judges in the present proceedings (12/2015) is based on the ground that 'The three judges composing the present court were the same judges who decided the afore-mentioned judgment of the 30th October 2015'. The Court also notes, that the first grievance in The Father's appeal application in the present case is that the first Court 'was obliged to suspend proceedings in so far as care and custody were concerned', and that the Court could not ignore the final judgment given on that date by this Court in the abduction case*".

7. In actual fact the Chief Justice was not a member of the Court of Appeal that on the 30<sup>th</sup> October 2015 delivered judgment in the Hague Convention proceedings. This notwithstanding the Court upheld the respondent's challenge.

8. Respondent claims that her challenge (vide application filed on the 22<sup>nd</sup> July, 2018) is justified due to the same reasons that led to the Court of Appeal to decide that the Chief Justice should also abstain.
9. Respondent's challenge is based on Article 734(1)(d) of Chapter 12 of the Laws of Malta, i.e.

*"if he had given advice, pleaded or written on the cause or on any other matter connected therewith or dependant thereon".*

10. Mr Justice Anthony Ellul was not a member of the Court of Appeal that delivered judgment on the 30th October, 2015. However, he was a member of the Court of Appeal that delivered judgment in the retrial proceedings.
11. In the retrial proceedings (10/2015), the Court of Appeal did not decide or express an opinion on the issues concerning the present case which is the separation case (12/2015). The Court of Appeal decided on whether or not there were grounds for a retrial of the Hague Convention proceedings, based on respondents claims that:
  - i. The Court of Appeal had wrongly applied the law since the father had no custodial rights over their son, and wrongly applied the concept of habitual residence;
  - ii. The Court of Appeal had committed an error of fact;
  - iii. The Court of Appeal did not have jurisdiction to determine the Hague Convention proceedings;
  - iv. The judgment contains contradictory dispositions;
12. In the current appeal proceedings, one of appellant's complaints deals with his claim that the First Court should not have decided on the issue of the care and custody of the child, in the light of the judgment delivered by

the Court of Appeal on the 30<sup>th</sup> October 2015 in the Hague Convention proceedings. On the other hand, the respondent insists that the appellant had accepted the jurisdiction of the Maltese Courts also with respect to the care and custody of the minor, and the Hague Convention proceedings had become superfluous. The respondent also argues that it is not right to enforce the judgment of the Hague Convention proceedings, thereby removing the minor from the surroundings he has lived in for the past years. Enforcing that decision would certainly not be in the best interest of the child.

13. As regards to the issue concerning the jurisdiction of the Court, in the retrial proceedings judgment (17th May, 2016) this Court stated:

*"Fir-rikors tal-appell sar l-argument li ghal dan il-kaz japplika Artikolu 12 tar-Regolament 2201/2003 (Prorogation of Jurisdiction), u li gialadarba l-missier accetta l-gurisdizzjoni tal-qorti Maltin biex tigi deciza l-kwistjoni dwar il-kura u kustodja tal-minuri allura l-Konvenzjoni tal-Ajja ma tapplikax. **Pero' dan hu kaz ta' child abduction, u ghalhekk japplika l-Artikolu 10 tar-Regolament (Jurisdiction in cases of Child Abduction). Provediment li jidher li hu ntiz sabiex ma jippermettix li l-gurisdizzjoni tinbidel permezz ta' htif. Dan apparti li l-Qorti tal-Appell fis-sentenza precedenti ikkunsidrat l-allegata akkwijexxenza tal-missier biex it-tifel jibqa' Ghawdex u kkonkludiet li f'dan il-kaz ma kienx hemm kunsens tal-missier**".*

14. Therefore, in the judgment delivered in the retrial proceedings the reasoning of the Court of Appeal gives one to understand that the Hague Convention proceedings had not become superfluous. In fact the Court referred to Article 10 of the Regulation, and said that it is a provision, "... ntiz sabiex ma jippermettix li l-gurisdizzjoni tinbidel permezz ta' htif". This contrary to what respondent is claiming in the current proceedings. It is evident that in the current separation proceedings, with regards to appellant's first complaint this Court has to decide on whether the Hague Convention proceedings judgment (30th October, 2015) has an effect on the outcome of respondent's request to be granted care and custody of the child. The opinion expressed by the Court of Appeal in the retrial

proceedings with regards to jurisdiction, justifies respondent's challenge thereby ensuring that justice is also seen to be done.

**For the above reasons the Court upholds respondent's challenge to Mr Justice Anthony Ellul.**

Anthony Ellul

Lawrence Mintoff

Toni Abela

Acting Chief Justice

Judge

Judge

Deputy Registrar

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