



Neutral Citation Number: [2024] EWHC 2422 (Fam)

Case No: FD24P00257

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

**Date: 17 September 2024**

**Before :**

**HHJ MORADIFAR**  
**(SITTING AS A JUDGE OF THE HIGH COURT)**

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**In the matter of;**

**E v D**  
**(Child: Transfer of Proceedings Art. 9 of Hague Convention 1996)**

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**Mr C Barnes (Instructed by Goodman Ray Solicitors) on behalf of the applicant father**  
**Mr H Langford (Instructed by Freemans Solicitors) on behalf of the respondent mother**

Hearing dates: 16 September 2024  
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**Judgment**

## **HHJ MORADIFAR:**

### Introduction

1. The central issue in this case is whether the courts of England and Wales are better placed to assess the welfare of the subject child V within the meaning of Article 9 of the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ('the 1996 Hague Convention').
2. V is eight years old and the application is brought by his father against a background of previous proceedings in this jurisdiction and in the face of ongoing proceedings in the Courts of the Republic of Malta. V's mother opposes the application.

### The law

3. The parties have each made detailed submissions on the applicable law and there is no material dispute in his regard. Applications under Article 9 are uncommon. Therefore, I will set out a brief summary of the broad applicable principles that are relevant to this case in the following terms:
  - a. The 1996 Hague Convention embodies the principle of cooperation between the authorities of its Contracting State to achieve the purposes of this Convention that includes determination by the State that is to have jurisdiction to take measures for the protection of the child and his/her property. (Article 1).
  - b. Such measures include the rights and custody, determination of the child's residence and access (Article 3).
  - c. Protective measures may be taken by a contracting State where the child is habitually resident (Article 5).
  - d. The Contracting State with jurisdiction under Article 5 (and 6) can request that another Contracting State to exercise jurisdiction by taking protective measures in some circumstances that includes the child being a national of the Contracting State that is receiving the request or with which the child has a substantial connection (Article 8).
  - e. The proposed receiving State can also request a transfer of jurisdiction from a contracting State in which the child is habitually resident and may exercise such jurisdiction if the latter authority has accepted the request (Article 9).

- f. The test to be satisfied before such a request is made under Article 9 is whether the contracting State considers that it is better placed to ‘assess the child’s best interests’. In other words, applying the Article 15 BIIA ratio in *Child and Family Agency v D (R intervening) (ECJ)* [2017] 2 WLR 949 any proposed transfer will provide a genuine added value on the specific facts of the case.
- g. Requests under both Articles 8 and 9 may be made directly with assistance of Central Authority of each State or by invitation to the parties to introduce the request.
- h. The authorities (courts) of the Contracting State proceed on the principle of comity, mutual respect and acceptance that the authorities (courts) of each jurisdiction are competent and able to hear the case.
- i. The approach is similar to Article 15 of BIIA. [*Re D (Care Proceedings: 1996 Hague Convention: Article 9 Request)* [2021] EWHC 1970 (Fam)].
- j. When hearing an application for transfer, the court is not questioning the “competence, diligence, resources or efficacy of either the child protection services or the courts”[per Baroness Hale in *N (Children)* [2016] UKSC 15].
- k. The draft of the text of Articles 8 and 9 are written in the supposition that the authorities of the State of the child’s habitual residence have not had their jurisdiction invoked. However this does not exclude an application under Article 9 when there are proceedings before the courts of the Contracting State with primary jurisdiction (*Rapport explicatif de Paul Lagarde*).

#### Background

4. The relevant background to this matter is helpfully detailed in the judgment of McDonald J in *E v D* [2022] EWHC 1216 (Fam) and I do not intend to rehearse it in any detail. In summary, the father is both a Canadian and British national. V who was born in London similarly holds a Canadian and British Nationality. The mother is Latvian and holds a corresponding nationality.
5. The family lived in England until V was about seventeen months old before they moved to Canada in November 2017. Subsequently in May 2019 they moved to Malta. As was found by McDonald J in the aforementioned judgment, the father travelled to London with V in December 2021 and wrongfully retained him in England until the court ordered his summary return to Malta under the provisions of 1980 Hague Convention at the conclusion of the said hearing.

6. V returned to Malta with his mother in April 2022. By June of the same year the parties were engaged in litigation about V's welfare interests in the courts of Malta. The litigation has since continued involving a number of applications by the parties including the father's application for V to live with the father in the UK. The mother has since settled in a relationship with a Maltese nation and has a two year child.
7. The proceedings in Malta have suffered a most regrettable delay that are in part due the sad personal circumstances of the learned judge who is allocated to the case. Until now, there have been at least five hearings or decisions that have included measures for the interim arrangements were V regularly sees his father and a recent decision in July that was to adjourn an application on considering the papers. The case is now listed for a hearing in October of this year, where the father is expected to adduce his evidence in support of his applications.
8. The father issued his application to this court in July when it first came before Morgan J who gave directions including a request for information from the Maltese court to be sought by way of judicial liaison between the respective courts. Unfortunately that information has not yet been requested due to some procedural issues, but neither party seeks an adjournment of this hearing pending the provision of that information. Indeed, they each make a positive case for the resolution of the father's application. I agree with their approach and have proceeded to hear submissions on behalf each of the parties.

#### Analysis

9. There is no dispute between the parties that the case in Malta have suffered a most regrettable delay and neither party appears to have sought to address this. The father's application is borne out of concern for even further delay. In a letter from the firm of lawyers representing him in Malta, it is stated that the proceedings in Malta are likely to continue for a further two to three years from May 2024. This includes any appeal following the first instance decision of the court in circumstances where there are no requirements to first obtain the court's permission to appeal.
10. The father argues that there has been little progress in the Maltese proceedings and it would be unconscionable and manifestly contrary to V's welfare should the proceedings continue for another two or three years. V has expressed a wish to move back to the UK and he is suffering by expecting him to integrate in school where he does not speak the language. He is suffering emotionally and the unresolved

applications continue to contribute to the same. In this context he explains that he has not applied for a transfer from the Maltese courts to those of England and Wales given that it may also be delayed or cause further delay. He argues that even with the pressures on the courts of England and Wales together with the fact that the mother and V live in Malta, the Family Court in this jurisdiction is likely to reach a final decision by the middle of 2025.

11. The mother argues that the court is not tasked with making a judgment about the competency of the Maltese courts. There is a hearing that the parties will be shortly attending. The father's application hides his real motivation which is to seek an advantage by the transfer of the proceedings, which in the circumstances could have been made to the Maltese courts. She argues that for a significant period V has been living in Malta and any transfer of these proceedings is likely to cause her a disadvantage and she may not be able to obtain legal aid and cannot privately fund ongoing proceedings in the courts of England and Wales. By contrast she has the benefit of legal aid and can properly engage in the proceedings in Malta. She further argues that the time estimate about the length of proceedings in Malta by the father's lawyers are to be treated cautiously and any proceedings in England and Wales are likely to suffer more delay than stated given where mother and child reside.
12. As part of the proceedings in Malta, the court has commissioned a psychological report of V that in some respects chimes with the father's concerns about his behaviour and continuing issues. However in the concluding paragraphs, it is opined that V is suffering with seeking to protect both of his parents and in so doing, he is suffering harm that may have dire consequences for him in the future. His school reports also raise some concern about his degree of integration, the language barriers and his behaviour.
13. Although these issues are most concerning and the delay in the resolution of the proceedings is a significant factor that runs through the father's arguments, it is not the function of this court to undertake a welfare analysis of the child but rather to assess if the courts of this jurisdiction can add real value or in Convention terms are better placed to hear the applications. I am not satisfied that this jurisdiction is better placed to hear the case. Arguably there is some prospect of the courts of this jurisdiction reaching an earlier decision, but this is speculative given the challenges that this would entail. Further, in light of the parties expressed concerns about delay, I am staggered that neither appears to have made any attempts to resolve the

proceedings more expeditiously or to adduce any evidence as to why this would not be possible. There is no evidence before the court that the current listed hearing in October is at jeopardy and I strongly encourage the parties to reflect on the conclusions of the psychological report and take all necessary steps to resolve their differences as soon possible.

14. For reasons that I have stated above I dismiss the father's application.