

**CIVIL COURTS
(FAMILY SECTION)**

**MADAME JUSTICE
JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)**

Today, Tuesday 15th of September 2020

App. No.: 126/2020/1 JPG

**GC
vs
YC**

The Court,

Having seen the application filed by GC dated the 14th of August 2020, at page 1, wherein it stated:

That the applicant has interest that the minor mentioned below is not taken outside Malta;

That the respondent is a person who has the actual custody of the said minor and for the following reasons:

The parties are legally separated by means of a contract dated 17th October acts Notary Jean Carl Debono Dok B and according to the said contract the care and custody of their minor child is joint and the minor cannot leave Malta without the written consent of both parties;

The respondent already tried to leave with the minor during Covid which application was rejected by the Court Dok C.

That the applicant got to know that this minor daughter can have a B passport and a R passport without his signature;

That the applicant got to know as well that the respondent sold the house in Malta and made a promise of sale;

That there is the real danger that the respondent leave Malta with the minor with a B passport or a R passport without the authorisation of the applicant and does not return to Malta;

That he has access to the minor (para iii of contract of separation) in summer for one week and the respondent informed him that she can give him such access in October and she is using the pretext that she is busy at work.

That R is not a treaty partner of the Hague Convention.

The applicant humbly request this Honourable Court to order the issue of the warrant of injunction against the respondent whereby she is ordered not to leave Malta with the minor or allow anyone to leave Malta with the said minor.

Details of minor: SC

Date of Birth: X

Place of Birth: Malta

Photo of the minor Dok A

Daughter of GC and YC.

Having seen that the application and documents, the decree and notice of hearing have been duly notified in accordance with law;

Having seen the reply filed by YC, dated the 21st of August 2020, wherein it stated:

- 1. That the defendant has been served with a warrant of prohibitory injunction in the aforesaid names and with the decree of the fourteenth (14th) of August of the year two thousand and twenty (2020) on the seventeenth (17th) day of*

August of the year two thousand and twenty (2020);

2. *That in the first place, this Honourable Court shall abstain from taking cognizance of the plaintiff's demand given that the action as propounded by the applicant is devoid of valid legal basis and hence, it is unfounded in fact and in law;*
3. *That the respondent claims that the applicant's request for the issuing of this warrant is a frivolous and vexatious one, since there is no real fear that she will move abroad to another country with the child.*

That on a factual basis it has to be said:

- a. *That the parties separated by means of a contract dated the seventeenth (17th) day of October of the year two thousand and nineteen (2019) in the Acts of Notary Dr. Jean Carl Debono;*
- b. *That by means of clause number six (6) of the said contract, the Parties agreed that they shall both be entitled to travel abroad together with the minor child S and this after obtaining a written consent of the other party;*
- c. *That in fact, the exponent demanded the applicant's permission to apply for a R Passport to travel with the minor child S to visit R in an attempt to adopt PAN, who is the respondent's niece. That a tragedy has struck the respondent's family when the applicant's sister ON and her husband AN died and the minor child P is in great risk of being put in an orphanage. That the respondent cannot proceed with the adoption process given that she must travel to R to initiate the adoption procedure there, as evidenced in the application bearing the number 114/2020 which is being marked and attached as document 'A';*
- d. *That additionally, the application for a R Passport was demanded at a time when the seriousness of the Covid-19 virus was still not known and certainly, the respondent didn't intend to travel during the pandemic. This process normally takes between two (2) to three (3) months and the respondent attempted to try and obtain the applicant's written consent in advance to*

facilitate the process of adoption. Following the applicant's refusal, the respondent filed the appropriate legal procedures and adhered to the clauses of the separation contract, in particular clause number six (6) sub-article (ii)(b) which stipulates that:

“The parties declare that the minor child shall not possess a separate passport unless the consent of both parties is given in writing, If the said consent is unreasonably withheld, the parties can apply before the Maltese Courts and any other authority for the said passport to be issued”;

- e. **That the defendant never showed or gave an indication that she intended to leave the Maltese Islands with the minor child S without the knowledge of the applicant.** That with all due respect, the minor child, has a right to learn more about her mother's culture and meet her mothers' side of the family, given that she has met with her fathers' side of the family on multiple occasions;*
- f. That, it is being stated that the warrant of prohibitory injunction referred to above is simply a **puerile retaliation** on the part of the applicant in regards to the respondent's application in Court to take the minor child S for a short period away for the purposes of adopting P. That in fact, she has rigorously followed the separation contract and never threatened that she will take the minor child outside of the country without the father's authorisation;*
- g. That on the other hand, it should be stated that it was the applicant who threatened to leave the Maltese Islands as admitted by himself in one of the many insulting emails sent to the respondent, whereby he claimed that “you (the respondent) have trapped us all here in Malta for the next 18 years”, as shall be proven in the course of this application;*
- h. That the defendant has solid and stable ties with Malta. That the respondent's intentions are to stay and live in Malta with S and with P after the process of adoption is finalised. That other than that, the respondent is planning ahead to open her own family business here. Furthermore, the respondent's mother TP*

- will move permanently to Malta to help the exponent in the upbringing of S and P, as evidenced in the letter which is being marked and attached as doc 'B';*
- i. *That furthermore, the respondent had also initiated driving lessons, but due to Covid-19 pandemic these lessons were suspended. That in fact, the respondent owns a learner's permit and will resume these lessons in the coming days, as evidenced in the permit which is herewith being marked and attached as doc 'C';*
- j. *That additionally, the respondent has also enrolled the minor child S to Little Einstein Nursery, to start her education from the end of October or beginning of November, depending on the Covid-19 pandemic. As regards to P, the respondent will enroll her to the R Embassy School to learn E, as evidenced from the documents which are being marked and attached as docs 'D' and 'E'.*
- k. *That to rebut the applicant's pretenses, the respondent submits that although a preliminary agreement has been signed to sell the house, this does not infer that she will abscond Malta! The sole reason why the respondent proceeded to put up the house for sale was due to the fact that the house when bought was intended to be purely for investment purposes. That the house at present is unsafe for children and is not suitable given that it has many spiral stone staircases and is limited for more than two people to reside in, as depicted in the photos which are marked and attached as documents 'F' and 'G'. That in fact, the respondent has also looked for other properties in Gozo to accommodate the whole family at comfort, as evidenced in the two screenshots which depict the viewings of the apartments the exponent has visited and is interested in buying, which are being marked as docs 'H' and 'I';*
- l. *That furthermore another reason which triggered the respondent to put up the house for sale was due to the fact that the respondent was faced with the mess the applicant left prior to leaving the matrimonial home, including cigarettes, alcohol bottles and other stuff. That in fact that the applicant kept the house in a very messy state which was unsanitary and brought about unwanted pests, as evidenced in the pictures which are being marked and attached as docs 'J'-
'N';*

- m. *That subsequently and without prejudice of the abovementioned, clause number seven (7) of the separation contract stipulates that access shall be exercised in the mother's presence until the child attains the age of three (3) years due to the fact that the father has a weed-smoking problem and gets aggressive and abusive. Additionally, the applicant lives with his father who is also an alcoholic and has made advances towards the respondent on numerous occasions;*
- n. *That the respondent **categorically disproves** that she impeded or denied access and she strongly insists that it was the applicant himself who failed to provide his roaster to the exponent one month in advance, and this was in breach of the contract which stipulates that:*

“The Husband shall inform the wife about the roster one month in advance”;

- o. *That in fact in December 2019, the applicant provided his roaster **three (3) days before Christmas Day.** This happened quite often and this is why access hasn't been exercised on various occasions, as shall be proven in the course of this application. That not only the respondent has adhered to all clauses enshrined in the separation contract, but she even organised Skype visitation calls with the applicant during the Covid-19 period, even though he failed to provide the roaster for almost four (4) months.*

That in light of these facts, the following submissions of a legal nature are now being made:

- a. *That the warrant of prohibitory injunction is an exceptional procedure and a difficulty, an inconvenience or concern are not enough to justify the issuance of such as was observed in the Commercial Court in the decision in the names of **Cassar Pullicino noe vs Caruana Curran noe et,** decided on the twenty-sixth (26th) of May of the year one thousand nine hundred and ninety-five (1995);*
- b. *That without prejudice to the above mentioned, the plaintiff's demand does not merit acceptance given that there are no reasonable grounds which justify that*

the minor children be impeded from being taken out of the Maltese Islands;

- c. *Having made these considerations, it is being submitted that the demand of the plaintiff lacks on a prima facie basis the existence of the right that he is entitled to safeguard through his application for the issuance of the said warrant since there is no real fear that the defendant is going to take her minor child S outside Malta without the consent of the applicant. That therefore, the plaintiff's request ought to be disregarded, in terms of article 873 of Chapter 12 of the Laws of Malta;*
- d. *That for the aforementioned reasons, there are no grounds for this Honourable Court to accept the plaintiff's demand for the issuance of the warrant of prohibitory injunction, given that there is no just cause why this Court should adhere to the plaintiff's demands which request isn't based on any imminent fear, but simply on vengefulness.*

That in light of the abovementioned, the defendant humbly requests this Honourable Court to disregard the plaintiff's demand for the issuance of the warrant of Prohibitory Injunction, as well as to revoke contrario imperio the decree handed on the fourteenth (14th) of August of the year two thousand and twenty (2020) where the demand of the applicant was provisionally acceded to, with the expenses against the applicant.

Considers:

GC testified that he never unreasonably withheld his consent for the parties' daughter to travel to R, explaining that he did so because R is not safe for the child due to the ongoing Covid-19 pandemic and also because there is no guarantee that she would return to Malta. He testified that he is concerned about the possibility that the child already has a passport that he does not know about and that Defendant intends on leaving the island for good since she is selling her property in Malta. The Plaintiff declared that defendant owns property in R, and has been consistently obstructing him from seeing his daughter and having a relationship with her. Regarding Defendant's claim that she cannot trust the child with him while she is abroad because she is concerned that he will go live with his father who is an alcoholic, the plaintiff testified that he has not lived with his father for many years and that in any case, his father

unfortunately passed away two weeks prior. Regarding Defendant's assertion that she had enrolled the child in a nursery in Malta, he testified that Defendant never informed him about this and that he only found out about this from her reply to these proceedings. He explained that Defendant has been denying him access to his daughter since the start of the pandemic and that even on the child's birthday, she only allowed him twenty-five (25) minutes of access by means of a Skype call.

Under cross-examination he testified that during the Covid-19 pandemic period he was not consigning his work rota to the Defendant only because Defendant had already told him that she would not allow him to see the child. Therefore, he considered that there would no point in doing so. Agreeing that there has been some access only recently.

YC testified that she never told Plaintiff that she would not let him see the child in March 2020 due to the Covid-19 virus and that access did not happen solely because he was not sending her his work rota as stipulated in the contract. She confirmed that she has indeed put her house up for sale, explaining that she was done this because the layout of the house was terrible since it is very old and because it required a lot of work for any changes to be made. She explained that she wanted to go to R because her sister and her sister's husband died, leaving behind a seven (7) year old daughter, P, whom she would like to adopt. She added that in order to adopt P she needs to be physically present in R so that the Authorities can carry out the necessary checks, adding that the parties' child S also needs to be in R because the Authorities need to verify that she does actually "exist and is not just a piece of paper".

Under cross-examination she testified that in order to travel within R, she would need an internal passport and that acquiring this would take a month. She then said that this would take a few days, and changed this again, to about two weeks. Asked why Plaintiff was not given access for six months, she answered "*To be honest is because the corona virus, it's quite dangerous. And there was no rota.*"

Deliberates;

This is a decree following a warrant of injunction filed by Plaintiff to stop Defendant from taking their minor child S outside of Malta. Plaintiff contends that Defendant wants to take the child to R and that he has reason to fear that she would not return with the child. Defendant denies this allegation, arguing that while it is true that she intends on visiting R with the

parties' child, this is only temporary and that the trip was intended to enable her to adopt her niece after the death of her parents. She reiterated that she has every intention of returning to Malta since both she and the child have ties in Malta.

Article 877 of Chapter 12 of the Laws of Malta provides:

877. (1) A warrant of prohibitory injunction may also be issued to restrain any person from taking any minor outside Malta.

(2) The warrant shall be served on the person or persons having, or who might have, the legal or actual custody of the minor enjoining them not to take, or allow anyone to take, the minor, out of Malta.

(3) The warrant shall also be served on:

(a) the officer charged with the issue of passports enjoining him not to issue, and or deliver, any passport in respect of the minor and not to include the name of the minor in the passport of the minor's legal representatives or in the passport of any other person; and

(b) the Commissioner of Police enjoining him not to allow such minor to leave Malta.

The Court begins by noting that in proceedings for the issuance of a precautionary warrant, the Court may not delve into the merits of the case, but rather it must be satisfied that the person asking for the warrant to be issued has a *prima facie* right and that the warrant is necessary in order to preserve that right.¹

The Court has seen that it results from the acts of the case, that Defendant intends on travelling to R in order to adopt her niece, whose parents unfortunately passed away. From Defendant's testimony it also results that she is planning on taking the parties' child with her during this trip.

Having heard the testimony given by the parties on oath and the documents filed by them, it is the Court's considered opinion that Defendant's version lacks credibility and trustworthiness for the reasons hereunder explained.

¹ Vide for instance **Panorama Company Limited vs Enemalta Corporation** decided by the First Hall of the Civil Court on the 14th of February 2013.

The Court begins by noting that although Defendant stated that Plaintiff had not been having access with the child only because he had not been sending her his work rotas, the Court notes that this statement has been contradicted both by testimony given by Defendant herself under cross-examination, as well as by the document exhibited in the proceedings (marked as Dok AC2) which Defendant sent to Plaintiff on the 13th of March 2020 which reads:

“Due to the current situation of high risk of Corona virus, there will be no visitations for the time being.”

This email clearly contradicts Defendant’s statement and corroborates Plaintiff’s assertion that Defendant had arbitrarily suspended his access with their child.

The Court further notes that Defendant was rather evasive when asked about how much time she would need to spend in R. In fact, Defendant gave three different versions of how much time she would need in order to obtain an internal passport to travel within R, stating that she would need a month, then a few days, and then two weeks. The Court also considers it improbable that the physical presence of the parties’ child is required in order to prove her existence to the R Authorities, considering that a duly authenticated birth certificate constitutes objective evidence of the existence and status of a child, and notes that Defendant produced no evidence to the contrary.

Regarding the letter signed by Defendant’s mother and exhibited in these proceedings as Dok B, the Court notes that this document was not confirmed on oath by the person who allegedly wrote it and therefore has no probative value in these proceedings. The Court further notes that it results that Defendant has put her house up for sale, and that while she asserts that she has been seeing properties, no evidence was adduced to sustain this - such as correspondence with real-estate agents or property owners. Furthermore, it does not appear that Defendant has at least signed a promise of sale agreement to secure another property in which to live. The Court notes that the future home of a prospective adoptee is a very relevant factor which is taken into consideration by any Adoption Authority.

The Court also notes that R is not a signatory to the Hague Convention on the Civil Aspects of Child Abduction, which would make it very difficult, if not impossible, for Plaintiff to be reunited with the child in case that Defendant does not return her from R.

Therefore, this Court, having seen Articles 873 to 877 of Chapter 12 of the Laws of Malta is of

the opinion that all the essential elements of the prohibitory injunction concur.

For these reasons the Court orders that the defendant YC, mother of the minor child **SC**, of X born in Malta, on the X to GC (born in CGB) and YC nee` G (born in TOR) be prohibited from taking or allowing anybody to take the said child out of the Maltese Islands, and sustains this Court's order dated 17th of August 2020 that passport and all travel documents of the same child be deposited and retained under this Court's Authority.

To this end the Court orders that a copy of this decree be notified to the Director (Civil Registration) as Officer in charge of the issuance of passports within the Passport Office and Commissioner of the Police as Principal Officer of Immigration.

All costs are to be borne by Defendant.

Given in camera.

Madame Justice Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli
Deputy Registrar