



## **Court Of Appeal**

### **Judges**

**THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO  
(President)  
THE HON. MR JUSTICE TONIO MALLIA  
THE HON. MR JUSTICE ANTHONY ELLUL**

**Sitting of Thursday, 25<sup>th</sup> February, 2021.**

**Number: 14**

**Application Number: 198/2019/3 JPG**

**Wei Sun**

**v.**

**Volodymyr Baran**

1. This judgment concerns an appeal filed on the 22nd October 2020 from a judgment delivered by the Civil Court (Family Section) on the 1st November 2019 whereby the first Court granted care and custody of their daughter to the plaintiff.

2. The relevant facts that led to this case are the following: On the 18th February 2008 the parties were married in Beijing, China. On the 11th August

2013 plaintiff gave birth to their daughter in Washington, America. On the 10th July 2017 she gave birth to their second daughter in Beijing, China. Some months after the birth of the first child, the couple returned to China after a brief period living in Malta. On the 10th July 2018 the defendant departed from China together with the couple's first child. The parties had agreed that during his brief stay in Malta the defendant had to go to the Chinese Embassy and apply for a long term Visa for the child. The document was needed to register the child in an international school in China. However, the defendant did not return to China. This led the plaintiff to travel to Malta and on the 11th October 2018 she arrived in Malta. On the 22nd November 2018 the plaintiff filed a lawsuit against the defendant for child abduction and unlawful retention in Malta in violation of the law including the United Nations Convention on the Rights of the Child (application no. 513/2018). By judgment delivered on the 3rd July 2019 the Court dismissed plaintiff's request and concluded that the Convention does not impose any obligations on the parties themselves. Furthermore, the Court held that plaintiff's requests were premature, since both parties have joint care and custody and there is still no decision concerning the care and custody of the child and her primary residence.

3. On the 16th August 2019 the plaintiff filed this lawsuit and requested the Court to:<sup>1</sup>

*"i. Orders and declared that in the best interest of the said minor child, parties daughter, Karmel Marie Louise Baran, that the care and custody of the said minor be entrusted to plaintiff her mother;*

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<sup>1</sup> Verbatim extract from the plaintiff's sworn application.

*“ii. Authorises plaintiff to, on a date established by this Court in her eventual judgement leaves Malta and takes with her the said minor child Karmel Marie Louise Baran in order to live with her and with the other minor child Wang Chu Fei (also known as Melita Baran) in Beijing, China and this notwithstanding all orders otherwise obtained by the parties or either one of them after the issue of the Prohibitory Injunction to stop a person from taking a minor outside of Malta;*

*“iii. Authorises plaintiff to withdraw the passport issued by the United States to the minor Karmel Marie Louise Baran which was deposited under this Honourable Court’s authority in the records of the Prohibitory Injunction numbers 245/2018 and 247/2018 by order in this sense on 16<sup>th</sup> October 2018;*

*“iv. Authorises plaintiff, if such is needed to travel with the minor child Karmel Marie Louise Baran from Malta to China, as will eventually be ordered as requested in the preceding request, in order that on her own and without the need of defendant’s consent or participation, applies for and receives passport, visa or other document of whatever nature that is needed in order that the said minor Karmel Marie Louise Baran, be able to enter China and lives in China and also in order that the minor Karmel Marie Louise Baran stops and enters in all countries needed in her journey between Malta and China;*

*“v. Authorises plaintiff, in order that on her own and without the need of defendant’s consent or participation, attends the Chinese Embassy in Malta in order to apply and obtain a long term Visa known as "Q1 Family Reunification Visa" and this in order that it would be possible for the minor, Karmel Marie Louise Baran, that she attends an International School in Beijing, China”.*

4. The defendant replied:<sup>2</sup>

*“1. Whereas preliminarily, the applicant pleads that since the plaintiff is declaring her intention to live abroad, specifically in China, this Honourable Court does not have jurisdiction to grant the first request. This Honourable Court cannot entrust the care and custody of minors to one of the parents if the ordinary residence of the minor will be abroad;*

*“2. Whereas, Without prejudice to the above, the Plaintiff’s claims lack the essential elements, since the Plaintiff has not requested a personal separation in terms of Article 35(1) seq and Article 56 of the Civil Code (Chapter 16). Therefore, the action is unsustainable.*

*“3. Whereas, with respect to the fourth claim, this Honourable Court does not have the jurisdiction to impose upon foreign Authorities, principally*

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<sup>2</sup> Verbatim extract from defendant’s reply.

*China and the United States, the receipt of application for the issuance of passports of minors, without the consent of the Defendant;*

*“4. Whereas, in respect of the fifth claim, this Honourable Court does not have jurisdiction to order a sovereign country, as in China, to issue a visa without the consent of the Defendant. This is purely within the jurisdiction of the laws of China and se mai, the request should have been made in proceedings in China and not before this Honourable Court;*

*“5. Whereas, the applicant is objecting to the second and third request of the plaintiff and this is because the principal residence of the minor is in Malta and there is no reason why this should change. It is not in the best interest of the minor to reside with the mother exclusively and in China, in a completely different environment. The minor would have the advantage of receiving a better education in a country in the European Union and in China she would be kept away from the father;*

*“6. Whereas, without prejudice to the foregoing, it is not in the interest of the minor to live in China, that will mean that effectively and in a practical manner she would not be able to access and enjoy her father, since the Defendant would not be able to see or enjoy the minor, due to legal sanctions that he would have to access his two children.*

*“7. Whereas, in the witnesses list, there is written the “relatives, friends and work colleagues of the contenders ...” and this goes against Article 156(4) of Chapter 12 of the Laws of Malta, that states: “(4) The plaintiff shall together with the declaration also give the names of the witnesses he intends to produce in evidence stating in respect of each of them the facts and proof he intends to establish by their evidence”. And thus point number 7 shall be expunged”.*

5. The defendant also filed a counterclaim, wherein he requested the Court:<sup>3</sup>

*“1. Declare the personal separation of the spouses Baran*

*“2. Order that the care and custody of the minor shall continue to be entrusted in the father, whilst authorising him to take all the decisions concerning the minor, including those related to the health and education of the minor Karmel Marie Louise Baran;*

*“3. Fix days and times for the Plaintiff to have direct access to the minor and this in the best interest of the minor;*

*“4. To order that the residence of the minor shall be Malta;*

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<sup>3</sup> Verbatim extract from defendant's counterclaim.

*“5. To liquidate a sum for the payment of maintenance per month for the minor and order the plaintiff to pay the sum of maintenance as liquidated and to contribute to the payment to half the expenses of health and education of the minor;*

*“6. To confirm the decree of the warrant prohibitory injunction number 247/2018 JPG dated 7<sup>th</sup> May 2018 in these names.*

*“7. To declare dissolved, the community of acquests of the Parties and to liquidate the community of acquests in equal portions and to assign the same portions as divided;*

*“8. Assign the dotal and paraphernal property*

*“9. Give other provisions that this Honourable Court may deem fit and appropriate in the circumstances”.*

6. On the 5th September 2019 the first court delivered a decree and upheld plaintiff's request to hear and determine the lawsuit as an urgent case.

7. By judgment delivered on the 1st November 2019 the Civil Court decided:

*“For these reasons the Court:*

*“1. Rejects pleas number (1), (3) and (4) contained in Defendant's Sworn Reply and confirms that it has jurisdiction to hear and determine these proceedings;*

*“2. Rejects plea number (2) contained in Defendant's Sworn Reply;*

*“3. Partially accepts Plaintiff's first preliminary plea contained in her Sworn Reply to Defendant's Counter-Claim, and declares null and void the demands numbered (1), (7) and (8) in Defendant's Counter Claim and consequently abstains from taking cognisance of them, while rejecting that part of this plea relating to demand number (6) in the same Counter Claim; Rejects Defendant's 7<sup>th</sup> Plea and orders Plaintiff to file a note within a week of this judgement indicating the name and surname of the family members, friends and colleagues she intends to summon as witnesses according to paragraph (7) of her list of witnesses;*

*“4. Orders that these proceedings continue for the determination of the merits.*

*“Expenses reserved until final judgement”.*

8. On the 1st July 2020 the first court delivered another decree whereby the court dismissed defendant's request for the appointment of Xiu Vassallo as an interpreter.

9. On the 27th July 2020 the first court upheld plaintiff's request to ask the defendant, during cross-examination, the question:<sup>4</sup>

*"..... when and where he met his current companion from who he has a child born in May 2019, since the result in answer to this question would not only impeach with his credibility but may provide a better explanation of why he left China in July 2018 to come to Malta and this in terms of Section 580 Chapter 12".*

10. By judgment delivered on the 12th October 2020 the Civil Court decided:

*"1. Declares and orders that Plaintiff is exclusively vested with the care and custody of Karmel Marie Louise Baran;*

*"2. Authorises Plaintiff to take Karmel Marie Louise Baran to live in Beijing, China with immediate effect and notwithstanding all orders otherwise obtained by the parties or either one of them, after the issue of the Prohibitory Injunction to stop a person from taking a minor outside of Malta;*

*"3. Authorises Plaintiff to withdraw the passport issued by the United States for Karmel Marie Louise Baran which was deposited under the authority of this Court in the records of the Prohibitory Injunction numbers 245/2018 and 247/2018 by order of the Court dated 16<sup>th</sup> October 2018;*

*"4. Authorises Plaintiff to travel with Karmel Marie Louise Baran from Malta to China, and to, on her own and without the need for Defendant's consent or participation, apply for and receive any passport, visa or other document of whatever nature that is needed in order that the said Karmel Marie Louise Baran be able to enter and live in China and to stop and enter in all countries needed in her journey between Malta and China;*

*"5. Authorises Plaintiff to, on her own and without the need for Defendant's consent or participation, attend the Chinese Embassy in Malta in order to apply for and obtain a long-term Visa known as "Q1 Family Reunification Visa" and this in order that it would be possible for the said Karmel Marie Louise Baran to attend an International School in Beijing, China".*

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<sup>4</sup> Verbatim extract from the proces verbal of the sitting held on the 27th July 2020.

11. On the 22nd October 2020 the defendant filed an appeal with regards to the decrees delivered by the first court on the 5th September 2019, 1st and 27th July 2020, the preliminary judgment of the 1st November 2019 and the final judgment. The plaintiff replied on the 7th January 2021 and gave reasons why defendant's appeal should be rejected.

First ground of appeal.

12. The defendant argued that prior to the decree delivered on the 5th September 2019, the Court should have ensured that he was notified with a copy of the sworn application. He also complained that the court did not motivate the decision to hear the case with urgency.

13. The lawsuit filed by the plaintiff and under review, concerns the care and custody of the parties first child. In the sworn application the plaintiff alleged that the defendant had brought the child to Malta without her consent. The plaintiff also requested the Court's authorisation to take the child with her, back to China.

14. It is a fact that the Court did not motivate the decree delivered on the 5th September 2019 upholding plaintiffs' request so that the lawsuit is heard and decided with urgency. This notwithstanding the decree caused no prejudice to

defendant's rights of defence. Furthermore, this Court is convinced that the merits of this particular case warranted such an order. The case concerns the alleged unauthorised relocation of a child from China to Malta. Courts should promptly deal with such cases. Unnecessary delay may be detrimental to the child's welfare and therefore contrary to his or her best interests. Defendant's claim that "... *there was no urgency for the minor child to leave for China*", is incorrect. The child was habitually resident in China, until the defendant decided to change her place of residence. Furthermore, although the case was filed on the 16th August 2018, final judgment was delivered on the 12th October 2020. Therefore, all parties were granted ample opportunity and time to present their evidence and made submissions. This apart from the fact that there is absolutely no proof that the defendant suffered any prejudice as a result of the decree delivered on the 5th the 5th September 2019.

15. Therefore the Court rejects the first ground of appeal.

Second ground of appeal.

16. This complaint deals with the judgment delivered on the 1st November 2019 whereby the first Court rejected defendant's preliminary plea that reads:

*"1. Whereas preliminarily, the applicant pleads that since the Plaintiff is declaring her intention to live abroad, specifically in China, this Honourable Court does not have jurisdiction to grant the first request. This Honourable Court cannot entrust the care and custody of minors to one of the parents if the ordinary residence will be abroad".*



17. The reasons given by the first Court were:

*“The Court notes that according to Article 742 (1) of Chapter 12 of the Laws of Malta, unless otherwise expressly provided by law, the Civil Courts of Malta have jurisdiction to take cognisance of cases brought before them in the circumstances indicated in the same article. From the manner in which this article is drafted, it is clear that the conditions indicated in the different paragraphs need not be satisfied cumulatively. Rather, once the conditions in one paragraph are satisfied, the Court will be seized of jurisdiction to determine the case, at which point, as rightfully argued by Plaintiff, the Court cannot decline to hear and determine the case.*

*“According to Article 742 (1) (b) of Chapter 12, the Maltese courts have jurisdiction over **“any person as long as he is either domiciled or resident or present in Malta.”** The Court notes that jurisprudence has interpreted the term “any person” in this sub-article as referring to the Defendant in the case, by application of the principles actor sequitur forum rei u tal-massima ubi te invenio, ibi te convenio. The Court notes also that in cases relating to minors, the presence of the minor in the country is also of paramount importance. In the case at hand, both parties as well as the minor child are present in Malta, and have been so present for over a year. Therefore, the Court considers that it has jurisdiction to hear and determine this case under this paragraph.*

*“Furthermore, according to paragraph (g) of the same article, this Court also has jurisdiction to hear this case if the parties “expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.” The Court notes that Defendant not only filed a Sworn Reply to Plaintiff’s Sworn Application, but he also filed a Counter-Claim. Apart from filing such Counter-Claim, Defendant has also filed other proceedings before this Court (Appl. 8/2019 JPG) in which he is demanding, inter alia, that the Court declares and confirms that it has jurisdiction to determine the case and regarding the care and custody and access of KB. In view of this, the Court considers that there is sufficient evidence that Defendant has tacitly submitted to the jurisdiction of the court, and can longer claim that this Court lacks jurisdiction to hear and determine this case.*

*“Therefore, once this Court’s jurisdiction has been confirmed on the basis of the aforementioned paragraphs, Defendant’s arguments lose relevance”.*

18. This Court fully agrees with the first Court’s reasoning. The relevant provisions of law applied by the first Court are clear. Irrespective of where the defendant chooses to live, the Court has jurisdiction to decide on the care and custody of the child. The presence of the parties and the child in Malta and the

voluntary submission of the defendant to the jurisdiction of the court by filing a counter-claim, satisfy the requisites of paragraph (b) and (g) of art. 742(1) of Chapter 12 of the Laws of Malta. The jurisdiction on the plaintiff's first request does not depend on the country where either party intends to live but on the requisites mentioned in the said provisions of the law. Therefore, the defendant is totally incorrect when he claims that *"The Court can only deal with the counter-claim since the Defendant intends to keep the minor child in Malta"*.

19. The plaintiff came to Malta with the intention to take her daughter back to China. The child is currently living with the plaintiff in Malta because of the ongoing dispute with the defendant. For the plaintiff to take her daughter back to China, she needs a Court declaration that she has the care and custody of the child. The defendant himself is claiming care and custody of the child. Therefore, there is a dispute between the parents as to who gets the care and custody of their daughter. Both parties are present in Malta and so is the child, and therefore the Maltese courts have jurisdiction to decide on the matter.

20. The defendant also complains that the first Court dismissed the fourth plea, which reads:

*"Whereas in respect of the fifth claim, this Honourable Court does not have jurisdiction to order a sovereign country, as is China, to issue a visa without the consent of the Defendant. This is purely within the jurisdiction of the laws of China and se mai, the request should have been made in proceedings in China and not before this Honourable Court"*.

21. The plaintiff requested the Court to authorise her to apply, without the consent of the defendant, for a long term Visa for the child so that she could enrol in the International School, in Beijing, China. The first Court upheld the request. The Court simply authorised the plaintiff to file an application for the issue of a “*QI Family Reunification Visa*” without the need to ask the defendant’s consent. The decision in no way imposed an obligation on the Chinese authorities as they are not a party to this lawsuit.

22. The defendant also complained that the first Court rejected his demand for a declaration of separation from the plaintiff. He claims that the counter claim dealt with the same subject matter, the separation of the parties to the lawsuit.

23. The Court does not agree. The case filed by the plaintiff concerned only the care and custody of the child and has nothing to do with separation. The plaintiff had no obligation to include a demand requesting the court to declare separation. There is no legal basis on which to argue that since the parties are married, a dispute concerning the care and custody of the child can only be determined in a separation case. The law does not stipulate such a condition. Furthermore, the first Court partially upheld the first plea of the plaintiff to the counterclaim. That plea includes the defence that the defendant did not ask for the Court’s authorization prior to filing a demand for separation. That was the reason why the first Court declared null and void defendant’s request for separation, and his request for the termination of the community of acquests

and the assignment of paraphernal property. The defendant made no valid arguments why he disagrees with the first Court's reasoning. Defendant's argument that the judgment "... *seriously prejudices the Defendant with regard to the care and custody of the other daughter Melita, because the reasoning of the First Honourbal Court is that Karmel should join her sister, who is currently in China*", has absolutely nothing to do with the decision of the first Court that the first demand of the counterclaim is null.

### Third complaint.

24. The defendant also complained about the court's decree delivered on the 1st July 2020 whereby Xiu Vassallo was appointed as interpreter. He argues that:

*"Mr Vassallo is a good friend of the Plaintiff and had attended a number of sittings of this action, accompanying the Plaintiff. The appellant defendnat, also knows that Ms Vassallo is a confidant of the Plaintiff and regularly visits the Plaintiff and the minor child in Malta".*

25. The *proces verbal* of that sitting states:

*"The Court therefore admits as interpreter Xiu Vassallo only in case Wei Sun requires a translator in the course of her testimony and this because she has a fair understanding of the English language"*.

26. Article 596 of Chapter 12 of the Laws of Malta provides for the appointment of 'a *qualified interpreter*' where the court does not understand the

language in which the evidence is given.<sup>5</sup> From the case file it transpires that the plaintiff can speak English. In fact she spoke English during her examination-in-chief and was not assisted by an interpreter. As regards to the cross examination she evidently asked for the assistance of an interpreter in case that she did not understand a question. Although she was assisted by an interpreter chosen by herself and there is no proof that Xiu Vassallo is a qualified interpreter, the plaintiff did not give her testimony in Chinese. The Court heard the recording of the sitting when plaintiff was cross-examined, and plaintiff spoke in English. The defendant also failed to highlight which parts of the plaintiff's testimony were supposedly the words of the interpreter. The defendant himself confirms that during the testimony the plaintiff "... *made use of her friend Ms Vassallo seldomly...*". After hearing the recording, this Court confirms that plaintiff replied to the questions in English put to her by defendant's legal counsel. She has a good command of English and had no difficulty in replying. Therefore, the court order in issue had no consequence with regards to the outcome of the case.

27. While the defendant objected to Xiu Vassallo as an interpreter, there is absolutely no information as to who translated his sister's affidavit from Ukrainian. In his appeal application he referred to the document as evidence, even though the author of that document is anonymous.

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<sup>5</sup> "If the court does not understand the language in which the evidence is given, it shall appoint a qualified interpreter at the provisional expense of the party producing the witness".

#### **Fourth complaint.**

28. Another grievance concerns the court order delivered on the 27th July 2020 whereby the first Court authorised counsel to plaintiff to ask defendant in cross-examination, “... *when and where he met his current companion from whom he has a child born in May 2019*”. The first Court upheld the request “... *as it may have relevance to the reasons for which the defendant may have travelled to Malta*”.

29. Defendant objects to this question, and in his appeal application argued:

*“The issue was clear, in that the Court was asked to decide which of the parties were to have exclusive care and custody of the Parties’ minor daughter. The request for a matrimonial separation was turned down in the preliminary judgment. Therefore, any evidence of adultery was irrelevant. The plaintiff chose to ask questions on a matter totally irrelevant to the proceedings and this concerned a relationship that the Defendant never denied and the Plaintiff was well aware of. Neither were the questions intended to impeach his credibility, because the Defendant never denied and therefore, certainly credible”.*<sup>6</sup>

30. Defendant’s relationship with another woman was relevant since he requested the court to grant him care and custody of the child. More important the questions were certainly admissible in terms of article 580 of the Code of Organization and Civil Procedure. It is clear that defence counsel was trying to impeach defendant’s credibility in the sense that when he travelled to Malta with his daughter his only intention was to settle in Malta. This notwithstanding, when

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<sup>6</sup> *Verbatim* extract from the appeal application.

the defendant was asked the question as to whether in July 2018 his partner travelled with him to Malta, the Court told the lawyer, *“I think it’s enough now”*. Although counsel asked defendant to say when his partner arrived in Malta, the Court noted: *“But I think we have exhausted this line of questioning now”* and the matter stopped at that.

31. The complaint is therefore dismissed.

#### Fifth Complaint.

32. The final complaint concerns the merits of the case. The first Court’s reasoning in granting care and custody of the child to the plaintiff, was the following:-

*“The Court has seen that Defendant has made various allegations about Plaintiff in order to claim that the child should not be entrusted in her care and should not be allowed to return to C , alleging that Plaintiff is mentally unstable, violent and neglectful. Having seen all the evidence produced by the parties, the Court considers these allegations to be manifestly unfounded, and further considers that Defendant’s testimony is thoroughly lacking in credibility and trustworthiness.*

*“One of the allegations made by Defendant against Plaintiff is that she is mentally unstable. The Court notes however that even though Defendant contends that Plaintiff was seen by Psychiatrists at Mater Dei and placed on medication, the Defendant’s medical records show that this allegation is manifestly untruthful. These medical records, which document Plaintiff’s attendance and treatment at Mater Dei Hospital with effect from 2013 onwards, show that Plaintiff was referred to Mater Dei for treatment in February 2014 due to lumps in her breasts, and subsequently attended the Emergency Department in February 2020 due to sudden onset severe bleeding from her right nostril. Defendant also alleged that Plaintiff had arranged for brain surgery to be performed on the minor when she was still around two months old, however failed to produce any hospital documentation to corroborate this allegation. Furthermore, it results from the testimony of Paediatric Neurologist Dr. Stephen Attard that while it is true that Plaintiff was extremely concerned that there was*

*something neurologically wrong with the child, this was not something out of the norm and it is in fact an issue that he faces very often with other mothers.*

*“The Court also does not find credible Defendant’s allegations that Plaintiff was violent towards him and the children. Defendant himself testified that for some time before he came to Malta with K in 2018, the parties were living in separate residences, and according to him K lived with Plaintiff in one apartment while he lived with Plaintiff’s parents and M in another residence. The Court cannot therefore help but question Defendant’s allegations that Plaintiff was violent with K when Defendant himself seems to have been willing to leave K alone in Plaintiff’s care, especially when he claimed that Plaintiff punched K in the head, as well as Defendant’s allegation of serious violence perpetrated against him by Plaintiff’s parents, when he testified that he went to live with them, taking with him M who was still an infant at the time. The only two conclusions that can be drawn from this testimony is either that Defendant’s allegations of violence are untruthful, or that, contrary to his submissions in this case, he cares very little about his children’s well-being and safety. Furthermore, the Court notes that even though Defendant tries to give the impression that he decided to keep K in Malta in 2018 because of Plaintiff’s violent behaviour, he seemed to have no issue with leaving M, an infant, behind in C with Plaintiff. This also places serious doubt as to the truthfulness of his allegations that Plaintiff neglected M to the extent that she did not even feed her, and this more so since it results from the evidence, and notably from Defendant’s own testimony, that he left C to come to Malta for three weeks to a month the day after M was born and Plaintiff was M’s sole care-giver during that time. Defendant also alleged that while in Malta, Plaintiff was not keeping K clean. From his own testimony, it results however, that he himself had arbitrarily decided to cut off the water supply of the property where Plaintiff and K were residing, which made it impossible for Plaintiff to wash the child properly. Moreover, none of the social workers who testified in this case made any mention of instances where K turned up for access dirty or unkept as Defendant is alleging.*

*“The Court also considers that Defendant’s allegation, that the parties never discussed the issue of K returning to C when he brought her here in 2018, to lack credibility. It is manifestly evident from the acts of the case, that one of the reasons for K’s visit in 2018 was so that Defendant could obtain the necessary official documentation for her to be enrolled in an International School in B. This in itself is sufficient to cast out any doubt as to the temporary nature of K’s visit to Malta in July 2018. The temporary nature of K’s 2018 visit is however further corroborated by the fact that the parties had bought a return ticket for the child, and not a one-way one. Furthermore, Defendant’s admission that he had decided that K should stay in Malta in August means nothing other than Defendant alone, and without consulting with Plaintiff, decided to wrongfully retain the child here in Malta at a time when she should have already been returned to C.*

*“The Court also considers reprehensible Defendant’s behaviour when he sent the child to U for two months, without Plaintiff’s consent or knowledge, and without either of her parents. While it is true that she was going to be with family*



*members, the Court considers that it was not in the best interests of the child, to send such a young child to a foreign country for a protracted period of time with people she had never met, or met when she was only a few months old, of which she could have had no recollection. This is not only a serious abdication of Defendant's obligations as a husband, but also as a father.*

*"Having seen all the acts of the case, the Court considers that it is manifestly evident that the parties had an agreement that K was to return to C after her trip to Malta, and that therefore this is not a matter of relocation as Defendant is trying to portray it, but a matter of wrongful retention of the child, whose country of habitual residence is clearly C. From the evidence, it is clear that K consistently lived in C from when she was approximately eight months old and had never left the country until she came to Malta with Defendant in 2018. By that point K had established her roots in C, where her parents, sister and grandparents lived, had already started attending school in C and spoke C, whereas it is clear that K has absolutely no links to Malta. It is irrelevant that Defendant always wanted to live in Europe because the primary consideration in these cases is what is in the best interests of the child. To this Court, it is clear that it is not in the best interests of the child to be separated from her sister and to be uprooted from the country where she was being brought up and schooled because of a whim on the part of Defendant.*

*"The Court furthermore considers that it is evident that Defendant should not be entrusted with the care and custody of the child. It is clear from the facts of the case, that he wrongfully retained the child in a country she has no connection with, and furthermore sent her alone for two months to the U to live with people she did not know and did not speak her language and all this without her mother's knowledge. These facts, amply illustrates that Defendant does not act in, or even take into consideration, the best interests of the child.*

*"While Defendant tried hard to portray Plaintiff as a violent, neglectful and mentally unstable mother, no credible evidence was brought before this Court to corroborate these allegations, and no evidence was produced which in any way shows that it is not in the best interests of the child for Plaintiff to be entrusted with her care and custody. Regarding Defendant's plea that should the minor be allowed to return to C it would be very difficult for him to exercise access, the Court notes that when Defendant decided that he wanted to live in Malta, he was well aware that his two daughters, K and M, are habitual residents of C, and his choice cannot be allowed to disrupt the children's life.*

*"It is for these reasons that the Court considers that Plaintiff should be solely vested with the care and custody of KB, whose residence should in C, that is, the country of her habitual residence until Defendant decided to wrongfully retain her in Malta".*

33. This case concerns a child who was living in China with her parents until the day her father decided that it was time to leave China and settle in Malta. A decision which he took without asking for his wife's consent. The same thing happened when in August 2018 the defendant sent his daughter to Ukraine with his sister, without discussing the matter with his wife. The defendant said, "*I said to Wei Sun that Karmel is in Ukraine few days after she left to Ukraine. So before she went to the Ukraine Wei Sun didn't know that she was going to Ukraine*" (sitting of the 16th July 2020). This demeanour confirms to the Court that defendant had no intention to discuss with his wife important issues that concern their daughter and decisions were to be taken only by himself.

34. The child was literally uprooted from her environment and brought to live in Malta. The country where her father decided to settle and seek a future. The defendant insists that this case has nothing to do with abduction. It is true that the child was brought to Malta with the plaintiff's permission primarily to acquire a visa. However, her stay in Malta was supposed to be temporary. Instead the defendant took a unilateral decision and retained the child in Malta without the plaintiff's consent. That in itself is wrongful. The Court is not convinced that when the defendant left China with the child, he had the intention to return back to China. During cross-examination he confirmed that, "*I always thought the best place for Carmel is Malta*". Asked repeatedly whether he had the intention to return to China, he said "*I was not thinking of returning or not returning. I had been thinking to go to Europe. That was my intention. And this (is) what we*

*were doing was (with) Karmel*". Evidently the defendant was doing his best not to answer the question. Based on his replies during cross-examination the Court concludes that probably when he left China he was already in a relationship with another woman, and from which relationship defendant fathered a child. Therefore, the Court concludes that the defendant was not honest when he invited the plaintiff to come to Malta with their second child in order to be reunited as a family. The defendant knew very well that plaintiff had no intention of moving to Malta. A fact he himself confirmed during his testimony. This apart from the fact that such matters are not discussed over the phone. Had the defendant truly been honest that he wanted the whole family to move to Malta, he would have returned to China and discussed the matter in person with his wife.

35. In the appeal application the defendant claimed that he took the decision to remain in Malta "*out of necessity*". The Court confirms that the defendant has not given any proof that there was any necessity to retain the child in Malta and deprive her from her mother. Furthermore there is no concrete evidence that the child was in any danger while she was habitually resident in China. Defendant stated that he wanted to live in Malta, where he had a career, to have a better life.<sup>7</sup> However this has nothing to do with necessity. The fact that the parties own a house in Malta and the defendant wants to live in Malta, is no justification for what he did.

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<sup>7</sup> In his appeal he declared, "*Her connection with Malta is her father who wants to live and who has a career in Malta*" (page 22).

36. The defendant claims that the plaintiff is mentally unstable. However, there is no medical proof which supports such a serious claim. The defendant made a lot of emphasis on the testimony given by Dr Stephen Attard, who had examined the child towards the end of 2013, when she was still a few months old.<sup>8</sup> The witness explained that the plaintiff had insisted that an MRI is done on the child or otherwise she would not feed her. The doctor explained that the plaintiff's insistence was based on the fact that she was convinced that her daughter was sick. However, the child is now seven years old, and the first Court did well not to base the final decision on that occurrence. Since then more than seven years have passed, and there is absolutely no evidence that the plaintiff is maltreating her daughter or that she is an unfit mother to take care of the child. She travelled to Malta from China and filed two lawsuits in a foreign country to take her daughter back to China, and in the meantime has been detached from her second younger child. More than two years have already passed since plaintiff's arrival in Malta, and she is still here in her attempt to take the child back to China. These facts in themselves confirm the attachment that the plaintiff has towards her daughter. There is absolutely no evidence that the plaintiff is acting in such a way that would justify the Court to conclude that the plaintiff is probably mentally unstable. Without tangible evidence of the serious allegation made by defendant, no court of law can reach such a conclusion on an incident that occurred seven years before.

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<sup>8</sup> Sitting of the 3rd March, 2020.

37. Defendant also insists that the child was going to undergo brain surgery in China when she was still two months old. He referred to that part of the plaintiff's cross-examination when she said that '*stickers*' were placed on their daughter's forehead at the hospital and argued that this is disturbing.<sup>9</sup> This Court finds nothing disturbing. The so called '*stickers*' in no way prove that the child was going to have surgery. It is evident that it was only a medical examination and the doctors concluded that there was nothing wrong with the child. The defendant himself confirmed that the doctors in China said that their daughter was healthy (sitting of the 16th July 2020). There is no evidence that at any point in time surgery was scheduled to be performed on the child who at the time was still a baby. The plaintiff also refuted that she wanted her daughter to have brain surgery. She said it is '*nonsense*'. As confirmed by the first Court this too has not been adequately proved. In any case no surgery was performed on the child and seven years have passed. The Court cannot decide a dispute concerning care and custody of the child on what happened seven years ago, and on something that has not been proved. Although it is evident that after the birth plaintiff was passing through a difficult period as she was personally convinced that something was wrong with the child because she had difficulty to sleep, there is no evidence that this period lasted for a long time.

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<sup>9</sup> Fol. 258/22.

38. Defendant also claimed that plaintiff was violent towards him and their daughter. The defendant said that towards the end of 2017 and the beginning 2018 the plaintiff hit the child on the head by punching her with a fist (sitting of the 16th July 2020). There is absolutely no evidence that corroborates such a serious claim. Asked by the Court whether the child was afraid, the defendant answered, *“Well afraid not afraid”*. This statement contradicts the violence mentioned by the defendant. Furthermore if the plaintiff was violent towards him and their daughter, how is it that he wanted the plaintiff to join him in Malta and settle here as a family? This question is unanswered. There is also no proof that since plaintiff has been living in Malta with her daughter, she has shown any violent traits towards her daughter. The defendant expected the first Court to believe whatever he said. However, that Court heard all the testimonies and was in the best position to decide on points of fact. After reading the case file, in his appeal application the defendant has not given reasons which convince the Court to disagree with the conclusions made by the first Court. During cross-examination the plaintiff categorically denied that she ever physically disciplined their daughter.

39. The defendant made a lot of emphasis on the fact that the plaintiff was opposing his requests for the child to attend school in Malta. The Court does not approve of plaintiff's opposition for the child to attend a school in Malta (irrespective of whether it is a public, church or private school) until the pending lawsuit is finally determined. This notwithstanding, her opposition is not crucial

for the determination of the dispute as to which parent should be granted care and custody. The plaintiff is temporarily living in a foreign country and evidently she is apprehensive and does not want her daughter to settle in Malta. Furthermore, it is understandable that plaintiff is over cautious since she has already been through a terrible experience when the defendant failed to return to China with their daughter and made it clear that he has settled in Malta with the child. In Malta she has no family and her presence is only linked with her daughter's presence and the pending litigation. Over two years have passed since she arrived in Malta and understandably it is extremely difficult for her to act as if life is normal. The defendant himself confirmed that plaintiff did not want to settle in Malta and when he told her that he was staying in Malta and told her to come and settle in Malta, she started shouting and insisted that he returns the child to China. The fact that she was opposing defendant's request does not mean that she is unfit to care and raise her daughter. This notwithstanding, on the 17th June 2020 the Civil Court (Family Section) in the proceedings **Volodymyr Baran proprio et nomine v. Wei Sun et** ordered that the child is registered in a private school or a church school at the expense of the defendant. However, the defendant claims that he is not in a financial situation to pay for his daughter's school fees. The same court concluded that since the child speaks English and Chinese, "*... enrolment in a Government school will not benefit the child at all because she does not speak or understand the Maltese language*". A decision which apparently was not appealed. In fact the defendant eventually discontinued those proceedings. On the other hand

the Court does note that the plaintiff confirmed that the child was attending extra-curricular activities, which in itself is positive.

40. It is a fact that the judgment delivered by the first Court will separate the child from the defendant. However, if the daughter remains in Malta that would mean that the plaintiff has to remain in Malta against her will or she would return to China without her daughter. Ideally, both parents take an active role in their daughter's upbringing. However, it was defendant's decision to leave China for good and settle in Malta. He made a free choice without his wife's involvement and has made a new life for himself with another person and has also fathered another child. There is no evidence that if the child returns to live in China she will be in any danger or that she would have an improved quality of life in Malta. In his fifth plea the defendant claimed that his daughter would receive a better education in an EU country than China. However, there is no proof that the child would receive a better education in Malta than in China. The Court cannot speculate. Furthermore, her younger sister is living in China, with whom she has unfortunately lost any physical contact since her forced relocation to Malta. It would also be traumatic for the child to be separated from her mother who has looked after her since birth and with whom she has also lived during the period since the plaintiff's arrival in Malta. There clearly is a very close bond between the child and her mother. The Court concludes that the child can return to China together with the plaintiff.



41. The defendant also complained about the first court's refusal to grant him visitation rights to his daughter. The first Court concluded that it was defendant who took the decision to come and live in Malta, and he was well aware that his two daughters are habitual residents of China, and his choice cannot disrupt the children's life. This Court does not agree. The child should retain some form of contact with her father once she returns to China. This can be done remotely every Wednesday and Friday from 1:00pm to 2:00pm C.E.T. With regards to physical contact, since the child will return to China and the defendant is residing in Malta there is certainly no point in establishing days during the week for such contact. Furthermore, until the child is still in Malta the prevailing supervised contact arrangement is to continue.

For these reasons the court rejects the defendant's first, second, third and fourth complaint. Partially upholds his fifth complaint and varies the judgment delivered by the Civil Court (Family Section) on the 20th October 2020 and orders that once the child returns to and resides in China the defendant is to have remote access to his daughter every Wednesday and Friday from 1:00pm to 2:00pm C.E.T. Until the child is present in Malta, visitation rights in favour of the defendant shall remain supervised. The Court rejects the rest of defendant's complaint and confirms the decrees and judgments from which defendant filed an appeal.

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Judicial costs relating to defendant's appeal are to be apportioned as to one ninth ( $\frac{1}{9}$ ) at the charge of the plaintiff and eight ninths ( $\frac{8}{9}$ ) at the charge of the defendant.

Giannino Caruana Demajo  
President

Tonio Mallia  
Judge

Anthony Ellul  
Judge

Deputy Registrar  
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