

**CIVIL COURT
(FAMILY SECTION)**

**THE HON. MADAM JUSTICE
JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)**

TODAY 23RD OF SEPTEMBER 2021

Warrant No.: 136/2021 JPG

**EC
Vs
LS**

The Court:

Having seen the sworn application filed on the 22nd of July 2021, wherein it was held:

That the Applicant has an interest that the minor, hereinafter indicated, be not taken outside Malta;

That the Respondent is a persons having, or who might have, the legal or actual custody of said minor

Wherefore, the Applicant respectfully requests that this Court orders the issue of a warrant of prohibitory injunction against the Respondent enjoining him not to take, or allow anybody to take, the said minor out of Malta;

Particulars of the minor:

SC born in Mater Dei Hospital Malta on the sixteenth (16th) day of August 2018 as results from the birth certificate bearing number 5430/18 (certified copy attached and marked as Dok. A), which minor is indicated in the photograph attached and marked as Dok B.

The present request is being submitted in the context of the mediation proceedings between the parties above indicated (Mediation Number 1101/20)

Having seen the decree of this Court dated 20th July 2021, wherein the legal time limits were extended (vide page 17);

Having seen that the application and its decree have been duly notified.

Having seen the reply filed by LS dated 10th August 2021, at page 27, where it stated that:

- 1. That the Applicant stresses that he doesn't have in his possession nor has any foreign authority ever issued a foreign passport for the minor, he also vehemently denies that he tried or is trying to take the minor abroad.*
- 2. That so much so the parties were trying to reach to an amicable settlement and during such discussions the Applicant had already proposed that the minor should be allowed the possibility to have an Italian passport so as to cater for any future needs, nonetheless this proposal was only to be included if an agreement is reached between the two parties.*
- 3. That the Applicant was also proposing that this passport should also be held in the mother's possession and that in such an event that he himself wishes to travel with the minor he shall first need to obtain the written consent from the Plaintiff and where such agreement is not reached, it shall be the father who shall then make a request before this Honorable Court to give its decision in this regard.*
- 4. That the Applicant had expressed his interest to the Plaintiff in order to travel with the minor on the dates between the 13th and the 15th August 2021, and*

provided that he had no ulterior motive he even suggested to the Plaintiff to join them.

5. That after the Plaintiff did not grant her consent, the Applicant did not raise this issue ever again however, he still wishes to have the opportunity to travel with his daughter in Italy or to any other country in Europe where the protection of minors is safeguarded.

Therefore, taking into account the present circumstances, except for any other provisions that it deems fit and appropriate, the Applicant humbly requests this Honorable Court to dismiss in its entirety the requests made in the application filed by the Plaintiff EC.

Having heard all the evidence on oath;

Having seen all the documents exhibited;

Having seen Notes of Submissions;

Having heard Final Submissions;

Considers:

Applicant EC testified on the 6th of September 2021 (Vide fol 34), wherein she explained that the Defendant is her daughter's father, and despite the fact that their relationship was a turbulent one, she felt the need to put aside all this so that her daughter can get the best out of her father. However, she adds that after having received certain threats, such as "you have one hour to answer my messages or I will get the court or you will loose S", she felt the need to, file this injunction, even though the minor does not have a valid passport as has expired. Plaintiff asserts that it was when she received these messages that she felt the need to file for a warrant as she was not sure whether Defendant could one day abscond with the minor. Applicant contends that Defendant works at centrecom for Airmalta which is an added concern together with the fact that he comes from the south of Italy and could also leave by boat. Plaintiff underscored Defendant's lack of ties with Malta, by explaining that he (Defendant) has only the minor who binds him to Malta.

When **cross-examined**, Plaintiff asserts that Defendant had told her that she would lose her daughter, and that this seemed plausible since Defendant has no family ties in Malta, and rents a shared apartment. Asked whether Defendant had made a request to travel with the minor to visit his parents in Italy, Plaintiff confirms, and that was what essentially brought up this issue. Applicant adds that when she refused, Defendant told her that he would make recourse to his lawyer and the Courts. Asked to confirm whether the Defendant had asked the Plaintiff to travel again, Plaintiff replied that he could not travel because she had filed the warrant but asserts that he had advised that his parents would be coming to Malta in July. With regards to having an Italian passport issued for the minor, Applicant holds that she had informed the Defendant that they would look into it. Applicant adds that the minor's expired Maltese passport is currently in her possession and that they never discussed who would retain possession of the Italian passport and that the discussion revolved around whether an Italian passport could be issued and that the issue of possession was then subsequently mentioned in the mediation stage.

Defendant LS testified on the 6th of September 2021 (Vide fol 39), wherein he asserted that he had asked Plaintiff to take the minor to visit his parents in Italy for a few days in August that is, between the 14th and the 16th. Defendant confirms that he had never asked for an Italian passport but had mentioned it as a mere possibility to consider in the future. Plaintiff had told him to wait till November when the Maltese passport expired. This was because Plaintiff had only recently allowed the Defendant to acknowledge the minor as his daughter. In fact in the expired passport, the minor bears her mother's surname, C. Defendant contends that he had given Plaintiff a deadline because she did not adhere to any of the rules set out in the mediation. Defendant confirms that he only intends to travel with the minor for a couple of days or a weekend on holiday to visit his parents in Italy since the minor has not seen her grandparents for two years. Asked about his employment, Defendant confirms that he works with Centrecom which is a call centre for Air Malta.

Defendant adds that he had asked Plaintiff to travel on other occasions and that he even suggested that he pays the Plaintiff's hotel expenses for the duration of the trip. Furthermore, he even offered Plaintiff accommodation in his house, albeit this might be uncomfortable.

When **cross-examined**, and asked about the fourth line as evidenced in Dok EC2, Defendant contends that this is a piece of paper which can be photoshopped and that at the time he did not make proper use of the English Language and that even though he did send the message in question, the context of that conversation on whatsapp needs to be verified. With regards to his

tights with Malta, Defendant confirmed apart from his daughter, he owns a motor bike and car, and rents his apartment.

When re-examined Defendant explains that he had come to Malta to learn English and that Plaintiff was his teacher, and that he fell in love with her. However, it was after the lapse of six (6) months into the pregnancy that Plaintiff informed Defendant that she was pregnant with his child.

Considers:

This is a decree following a warrant of injunction filed by Plaintiff to restrain the Defendant from taking their minor child S, born on the 16th August 2018, out of the Islands of Malta. Plaintiff contends that Defendant wants to take the child to Italy and that she has reason to fear that he would not return with the child.

Defendant denies this allegation, arguing that while it is true that he intended to take the minor with him to Italy to visit his parents, that is the minor's paternal grandparents, he only sought to take the minor for a short holiday between the 13th and the 15th August 2021 and had in fact suggested that Plaintiff ought to travel with them.

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. (See *Panorama Company Limited vs Enemalta Corporation* decided by the First Hall of the Civil Court on the 14th of February 2013; *Emanuel Sammut vs Josephine Sammut* decided by the First Hall Civil Court on the 5th of June 2003). The two elements must subsist and if they do not subsist, the Court has to reject the claim for an issue of a warrant of Prohibitory injunction. (See *Mary Borg vs Commissioner of Lands* decided by the First Hall Civil Courts on the 15th of December 2008; *The Golden Sheperd Group Limited vs Enemalta Corporation* decided by the First Hall Civil Court on the 17th March 2009).

Deliberates:

It appears that the parties were involved in an intimate relationship, from which the minor S was born on the 16th August 2018 and is currently three (3) years old. It also appears that the parties' relationship was a brief one, wherein Defendant was only informed of the pregnancy, six (6) months into the pregnancy.

While the Court notes that the requisites indicated in subarticle (2) of article 877 have been fully satisfied since from the minor's birth certificate *a fol 5*, it transpires that by means of a judicial letter dated 5th February 2020, the Defendant was formally acknowledged as the minor's father. The minor thereafter was given the surname S. Jurisprudence has consistently affirmed that however, the degree of prejudice suffered by the Applicant, should the Applicant's rights not be safeguarded by the issuing of the warrant, must be irremediable:

Anke jekk rikorrent ghandu jedd prima facie x`jigi tutelat, il-grad ta` pregudizzju li jkun se jgarrab jekk il-jedd tieghu prima facie ma jkunx tutelat bil-hrug tal-Mandat, irid ikun irrimedjabbli – dan skond il-gurisprudenza tal-Qrati taghna. Mhux bizzejjed li jkun semplici diffikulta', disagju jew thassib [Vide – Qorti tal-Kummerc – 26 ta` Mejju 1995 fl-atti tar-Rikors ghall-hrug ta' Mandat ta' Inibizzjoni fl-ismijiet "Cassar Pullicino noe vs Caruana Curran noe

et” (Kollez. Vol: LXXIX.iv.1387)]

B`irrimedjabbli wiehed ghandu jfisser illi l-hsara li minnha r-rikorrent ikun qed jilmenta, tkun wahda tali illi ma tistax tisewwa mod iehor. Jekk l-inkonvenjent jew in-nuqqas lamentat jista’ jitnehha, mqar b’decizjoni wara li jiġi mistharreg il-kaz fil-mertu, jiġi nieqes dan l-element mehtieg għall-hrug tal-Mandat (ara – Prim`Awla tal-Qorti Civili – 2 ta` Jannar 1993 - Atti tar-Rikors għall-hrug tal-Mandat ta’ Inibizzjoni fl-ismijiet “Avukat Victor Borġ Grech vs Joseph Gasan et noe”)

The Courts have always categorically held that:

“Mhux bizzzejjed li jkun sempliċi diffikulta’, disagju jew thassib ...”

- A simple difficulty, discomfort or concern, does not suffice.

The Court considers that in these proceedings the Court must be guided by the best interests of the child, which are paramount.¹ This Court has always held that such proceedings should only be availed of to safeguard the best interest of the minor and to protect one of the parents from being arbitrarily deprived of a relationship with the minor, and not as an attempt to hold the other parent hostage in a particular country. This Court has always maintained that a child needs the presence of both parents in his or her life and adequate time with both so as to have the possibility to develop a good and strong relationship with both.

The Court observes that Defendant, remained in Malta to be able to spend more time with his daughter, and merely asked Plaintiff to authorize him to take the minor for a couple of days to Italy in order to visit his parents, that is the minor’s grandparents, for a short holiday. He even extended an invitation to Plaintiff to travel with them. It also appears that once Plaintiff did not give her consent, Defendant did not bring up the matter of travelling again, and in fact made arrangements to bring his parents over to Malta. Moreover, the Court also notes that the minor’s passport is allegedly expired and is in Plaintiff’s possession. Similarly, the relative authorities have also confirmed that the minor does not have an Italian passport.

^{1 1} Vide per eżempju **Gordon Caruana Dingli vs Michelle Caruana Dingli**, Prim`Awla tal-Qorti Civili deciza 13 ta’ Lulju 2001.

After having considered the law and jurisprudence on the matter, and having seen the evidence produced in these proceedings, it is this Court's considered opinion that Plaintiff will not suffer an irremediable prejudice if this warrant is not upheld, since it appears that the Defendant's intention was merely to spend a couple of days with his parents and daughter in Italy, and even invited the Plaintiff to travel with them, but the latter refused because: "*I do not get a sufficient amount from him and I can't afford that...*"²

The Court also notes that Italy is a signatory to the Hague Convention on the Civil Aspects of Child Abduction, which would not make it too difficult, for Plaintiff to be reunited with the child should Defendant fail to return the child back to Malta.

Therefore, and in light of the above considerations, this Court rejects Plaintiff's requests as delineated in her application dated 22nd July 2021, and revokes contrario imperio that part of its decree dated 22 July 2021 wherein it provisionally upheld Plaintiff's request.

Costs are to be borne by the Plaintiff.

Given in Camera.

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

**Christabelle Cassar
Deputy Registrar**

² Vide fol 36.