

**CIVIL COURT
(FAMILY SECTION)**

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

TODAY 5TH OF OCTOBER 2021

Warrant No.: 134/2021/2 JPG

RZ

Vs

DZ

The Court:

Having seen the sworn application filed by RZ dated the 20th 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/s is/are the persons having, or who might have, the legal or actual custody of the said minor;

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

Particulars of the minor: REZ born on the X, find attached two photos, as an indication and a clear description of the minor. The minor's eyes are green.

Presently having short hair, as indicated in the first photo attached, previously sporting long hair as indicated in the second photo. Both attached.

The parties are the parents of the minor, presently undergoing separation proceedings which unfortunately are very contentious, and such proceedings have been going on for the past year and a half. Recently, that is the past recent days, the mother started declaring that she has intentions to leave Malta together with the son, and she even declared threats towards the father, in the sense that the father won't be able to visit and meet his son. According to the Plaintiff, these are words that have been uttered by the mother more than once. Version of all events of the Plaintiff, is being given herein by an affidavit, attached and marked as Doc.A.

The Minor resides with the mother, and she currently has in her possession the minor's passport which she is refusing to hand over or else make a copy to the Plaintiff. Most of the time, the Plaintiff is not aware of this son's whereabouts and where his mother takes him as the communication between the parties is not good. All of this when combined with the fact that DZ's childhood and early teenage and younger age was spent abroad, that is in the United Kingdom, meaning that she still has a lot of contacts abroad, is of concern to the Plaintiff.

That is why the Plaintiff is afraid that DZ is going to leave the Maltese Islands together with their three year and two month old, minor son and thus whilst attaching the affidavit, 2 photos showing the likes of the minor son as already listed, requests with respect this Honorable Court to uphold this warrant of prohibitory injunction restraining the minor's travels provisionally up until a final and definitive judgment is taken by the Court.

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

Having seen the reply filed by DZ dated 3rd September 2021, where it stated that:

- 1. That although the Defendant does not intend to depart from these islands with the child, rather she hopes that the Applicant will at some time realise that he is*

responsible for the economic and social stability of his wife and son and therefore accepts to pay maintenance which approximates even remotely the Applicant's life style – she is still opposing the issuance of a warrant vexatiously demanded, for the following reasons:

- a. That the minor child does not have a passport and the issuance of a passport depends on the consent of the Applicant or on a Court order after the Applicant is heard. That therefore the minor's travel without a passport is not possible, this warrant is absolutely not necessary according to article 873 of Chapter 12 of the Laws of Malta and according to the – rigorous– teachings of jurisprudence cannot be issued ;*
- b. That the Defendant has been de facto separated from her husband for the last year and a half. Never until today has the "fear" of her fleeing with the child been ventilated. This warrant has been demanded only in order for the Defendant to "learn" that the Applicant has great powers at his disposal. It has been retained by the Honourable Court that where no reasonable fear of travel exists there is no need for a warrant to be issued;¹;*

That finally the Defendant is well aware of her obligations even those arising from international treaties, she knows that if she "flees" Malta with the minor child to practically all of the countries in the world, she will be forced to return to Malta in a few weeks. She also knows that it would never be in the minor child's best interest to be kept from his father even if the father is not behaving as he should with the mother and with the minor child. The Defendant would never therefore do anything illegal to damage the report between the minor and the father. If for the child to live a better life style and for the mother to be capable of maintaining herself and her son, she needs to go abroad with the child, she will proceed according to law and will only leave Malta with the authorisation of the Court and only after the father would have been given time to bear his paternal responsibilities, without the need of a court order to do so.

Having seen all the documents exhibited;

¹ Warrant of prohibitory injunction number 156/18 in the names Adade George Kweku Asante vs Borg Sarah-Jo, 31 of October 2018.

Having heard Final Submissions;

Considers:

Plaintiff RZ testified on the 23rd September 2021 explains that his primary concern is that Defendant has links with the Z and in fact he met her when she was living and working in the Z. To date she still has friends and family in the Z who could help her. Plaintiff makes reference to a number of messages which he transcribed, wherein Defendant mentioned on numerous occasions that she will be filing for divorce in the Z, and thus implying that she will be taking their minor son abroad, and this is his biggest concern. Plaintiff asserts that while he has no problem with the filing of the divorce in the Z, he obviously wants to continue seeing his son regularly.

Plaintiff also contends that Defendant told him that they would obtain separation in the Z very quickly as things are done faster and she had done her research, implying that her intention is that of leaving. Plaintiff explains that his concern is also due to the fact that Defendant has lived the majority of her life in the Z, she was born there moved to Malta for around nine years, and moved back to the Z for a further eight years in the Z. He adds that she kept in touch with her former employer who was also her ex-boyfriend at the time, and throughout their entire marriage. Indeed, he has seen correspondence between the two. Plaintiff asserts that this person, is very well off, would have no difficulty in providing Defendant with accommodation, and help her out with whatever it was needed, rendering it even easier for her to take the child abroad. Plaintiff maintains that the Defendant has always considered the Z as her home of sixteen years, and that to date she still holds a Z passport.

With regards to the minor's Z passport, Plaintiff confirms that he has obviously seen Defendant's Z Passport, and recalls having signed some documentation for his son's Z passport which Defendant also mentions in their conversations.

When **cross-examined Plaintiff** confirms that Defendant knows that he always records their conversations and in fact he has been carrying two phones for this purpose, one of which, Defendant has no access to since she is not permitted to reach Plaintiff in light of police reports of harassment, threats etc. Plaintiff confirms that recording number 1, dates back to the 20th of July 2021, recording number 2 dates back to the 12th of July, 2021, recording number 3 dates

back to 28th June, 2021, while recording number 4 dates back to the 13th of February 2021. Plaintiff also asserts that he only got to know that the minor's Maltese passport has expired during these proceedings. With regards to the issue involving the minor's application for the Z passport, Plaintiff maintains that he does not even recall signing the relative documentation but he adds that there is no reason why Defendant lied about him signing these documents. However, when Plaintiff was asked whether he remembers signing the said documents before a lawyer, he asserted that he does not recall and neither does he remember whether they had gone to the Z Embassy in person.

Confronted with the fact that he only filed the present injunction circa three to four months after the conversations with Defendant were exchanged, Plaintiff explains that the conversation that took place in February related only to access and had nothing to do with passports. Plaintiff confirms that the argument involving the passport happened in June but at the time, he explains that even though he was a lawyer, he does not practice in Family Law and thus was not aware of the availability of such proceedings. When he was informed of the availability of such procedures by his counsel he initiated these proceedings.

Defendant DZ testified on the 23rd September 2021, wherein she explained that the minor's Maltese Passport expired in March 2021 and is at the Immigration Office. Asked whether she applied for an English passport, Defendant contends that she did not since Plaintiff did not give her the money to pay the relative fees. The parties also required a marriage certificate, a birth certificate which had to be apostilled from the Ministry of Foreign Affairs, together with other legal documents that needed to be provided to the English Consulate in Ta' Xbiex. Defendant contends that she has a Maltese and a Z passport, however, the latter has expired.

When cross-examined, Defendant confirms that she deposited the Maltese passport at Immigration Office because of the current proceedings and also confirms that she does not work and Plaintiff did not give her the money to pay the relative fees for the Z passport. When asked about the fees in question, Defendant asserts that the fees for the passport add up to circa two hundred and eighty euros (EU 280).

Considers:

This is a final decree following an application for the issuance of a prohibitory warrant of injunction filed by the Applicant, father to the minor REZ, born on X, who is X years old, against Respondent, the mother of said minor child, enjoining her not to take or allow anybody to take the said minor outside of Malta.

In his sworn application, Applicant maintains that the parties are undergoing contentious separation proceedings which have now been going on for the past year and a half. He asserts that recently Respondent has declared that she has intentions to leave Malta together with the minor and even threatened the Applicant, in the sense that he would not be able to visit and see the minor. Applicant adds at presently the minor is residing with the Respondent mother, and that the latter has possession of the minor's passports and refused to hand over the actual passport or a copy thereof to the Applicant. He maintains that most of the time, he is not aware of his son's whereabouts, since communication between the two is almost negligible. Applicant reiterates that all of the above, coupled with the fact that Respondent still has strong connections with the Z, where she has spent most of her childhood and her adolescence, is of concern.

On the other hand, in her reply, Defendant opposes the issue of the warrant, and states that she has no intention of departing from these islands the minor, and rather hopes that Applicant will start contributing towards the economic and social stability of the minor. Respondent contends that the minor child does not have a valid passport and that the issuance of a passport depends on the consent of the Applicant or on a Court order following a hearing. Thus, the minor's travel is not possible, and therefore this warrant is absolutely unnecessary. Even though the parties have been de facto separated for the past year and a half, Respondent asserts that Applicant has never voiced his fear of Respondent's fleeing with the child and this was only raised in these proceedings. Respondent contends that she would never do anything illegal to damage the report between the minor and the father. Respondent declares that in the event that she would need to go abroad to better her prospects and for the child to have a better life style, she will proceed in accordance with the law and will only leave Malta following authorisation from a Court only after the father would have been given time to bear his paternal responsibilities.

Considers:

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 concur, 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 are currently undergoing separation proceedings which regrettably have become very bitter. The parties have a minor son, REZ, born on the X, who is X years old, and is currently residing with the Defendant mother.

The Court notes that even where the requisites indicated in sub article (2) of Article 877 are satisfied, jurisprudence has also consistently affirmed that Applicant's degree of prejudice suffered, 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-Qorti taghna. Mhux bizzejjed li jkun sempliċi diffikulta’, disagju jew thassib [Vide – Qorti tal-Kummerc – 26 ta` Mejju 1995 fl-atti tar-Rikors ghall-hruġ 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 tissewwa mod ieħor. Jekk l-inkonvenjent jew in-nuqqas lamentat jista’ jitnehha, mqar b’decizjoni wara li jiġi mistharreġ il-kaz fil-mertu, jiġi nieqes dan l-element mehtieg ghall-hrug tal-Mandat (ara – Prim`Awla tal-Qorti Civili – 2 ta` Jannar 1993 - Atti tar-Rikors ghall-hruġ tal-Mandat ta’ Inibizzjoni fl-ismijiet “Avukat Victor Borg Grech vs Joseph Gasan et noe”)

The Court has always categorially held that: *Mhux bizzejjed li jkun sempliċi diffikulta’, disagju jew thassib-* a simple difficulty, or concern, does not suffice.

The Court observes that record of the proceedings show that the parties have presented two diametrically opposed versions that is Plaintiff adamant that Defendant is about to abscond with the child to the Z where she has lived for the better part of her life, with Defendant denying this and stating that she will observe all the dictates of the Law.

With regards to the issue relating to the minor’s Z Passport, the Court notes that both parties concur that the relative applications have been duly signed by both parties, however, Defendant alleges that she has not submitted the applications as she is not in a position to pay the relative fees of circa two hundred and eighty euros (EUR 280) stating that she is not gainfully employed and Plaintiff has not forwarded the said payment for the fees.

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 irremediable prejudice should this warrant be denied. The Court considers that in these proceedings, the Court must be guided by the best interests of the child, which are paramount.² This Court has always held that such proceedings should only be availed of to safeguard the best

^{2 2} Vide per eżempju **Gordon Caruana Dingli vs Michelle Caruana Dingli**, Prim`Awla tal-Qorti Civili deciza 13 ta’ Lulju 2001.

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.

The Court also notes that the Z is a signatory to the 1980 Hague Convention on the Civil Aspects of Child Abduction, which would not make it too difficult, for Plaintiff to be reunited with the child even in the unlikely event that the Defendant absconds the island with the parties' minor son.

Therefore, and in light of the above considerations, this Court rejects Plaintiff's requests as delineated in his application dated 20th July 2021, and revokes contrario imperio that part of its decree dated 20th July 2021 wherein it provisionally upheld Plaintiff's request.

The Court orders that this decree be notified to the competent authorities.

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