



**FIL-QORTI CIVILI  
(SEZZJONI TAL-FAMILJA)**

**L-ONOR. IMHALLEF ANTHONY VELLA**

**Seduta ta' nhar l-Erbgha 16 ta' Marzu 2022.**

**Rikors nru: 52/2018 AGV**

**AG**

**Vs**

**ADV (ID nru; 129914 A) u permezz ta' digriet datat 6 ta' Marzu 2018, gew nominati Dr Leontine Calleja u PL Quentin Tanti bhala kuraturi deputati biex jirraprezentaw lill-assenti ADV**

**Il-Qorti,**

**Rat ir-rikors guramentat ta' AG datat 1 ta' Marzu 2018 fejn espona bir-rispett:**

- 1. Illi r-rikorrenti, AG u l-intimata, ADV kellhom relazzjoni intima, waqt li l-istess intimata kienet mizzewga lil GAVA;**

2. Illi minn l-imsemmija relazzjoni li kellu r-rikorrenti ma l-intimata ADV , twieldet AVA, issa G, fil-31 ta' Awwissu 2015. Minkejja li kien intlahaq ftehim mill-partijiet kollha sabiex il-minuri tigi registrata fuq isem ir-rikorrenti, ADV , b'mod frawdulenti u malizzjuz, konxjament irregistrat lill-minuri fuq ir-ragel taghha minghajr il-kunsens tieghu u minghajr il-kunsens u l-konjizzjoni tar-rikorrent. Dan ghamlitu f'inqas minn erbgħa u ghoxrin (24) siegħa mill-kirurgija ta' emergenza li kellha l-minuri fil-kranju wara li nstab demm qadim f'rasha u wara li l-istess rikorrent kien beda jissuspetta li dan seta' irrizulta minn trauma li ADV ikkawzat lill-minuri. Ir-rikorrenti rraporta dawn il-fatti lill-Pulizija permezz ta' kwerela datata 19 ta' Ottubru 2016 (vide Dok A);
3. Illi r-rikorrenti fetah proceduri fejn talab lil Qorti Civili (Sezzjoni Familja) tiddikjara li r-rikorrenti huwa l-missier naturali tal-minuri A a bazi ta' diversi ragunijiet fosthom it-testijiet tad-DNA li saru mill-partijiet kollha. L-istess Qorti fil-fatt kkonfermat li l-missier naturali ta' A huwa tabilhaqq r-rikorrenti permezz tas-sentenza datata 5 ta' Lulju 2017 (vide Dok B), liema sentenza ma gietx appellata, u liema sentenza ghandha effett retroattiv u legalment vinkolanti sa mid-data tat-twelid ta' A;
4. Illi huwa principju bensaput li meta l-paternita ta' persuna tigi ddikjarata permezz ta' sentenza, l-obbligi u responsabbilitajiet ta' dak il-missier japplikaw mid-data tat-twelid 'il quddiem u mhux biss mid-data tas-sentenza. Inoltre, ADV , fil-kuntratt ta' separazzjoni ma zewgħa li gie ppubblikat nhar it-tletin (30) ta' Jannar 2017 fl-atti tan-Nutar Dr Sean Critien, li qieghed jigi hawn anness u mmarkat bhala Dok C gie espressament ddikjarat is-segwent:

*“2. Out of the said marriage, the Parties had two children that is, GAVA who was born on the fifth (5th) of May of the year two thousand and eleven (2011) and AVA who was born on the thirty-first (31st) August of the year two thousand and fifteen (2015). However, since it has been proven beyond reasonable doubt that the minor child AVA is the biological daughter of a third person, the parties are declaring that the said agreement shall regulate solely and exclusively their rights and obligations vis-a’-vis only their biological son (GAVA) amongst other matters whilst the Wife shall endeavour to do all that is necessary so that the minor child AVA’S irth certificate will not indicate the husband appearing on this contract as the real biological father.”*

Illi mhux talli ADV m’ghamlitx dak kollu li kien necessarju sabiex A tigi registrata fuq ir-rikorrenti izda ghall-kuntrarju ghamlet minn kollox biex tahrab kwalunkwe notifika tal-procedura ta’ paternita’ li ghamel ir-rikorrenti hawn Malta.

5. Illi t-tarbija ghandha bzonnijiet specjali li jirrizultaw minn marda serja fil-kranju maghrufa bhala hydrocephalus (vide Dok D). Hi kienet tghix primarjament mar-rikorrenti u man-nanny tal-istess minuri, sat-22 ta’ Dicembru 2016. Dakinhar, ADV u GAV bdew iwettqu l-pjan taghom li jpartu minorenni ma iehor. Dan kien possibbli unikament minhabba l-fatt li ADV kienet konxjament gidbet dwar l-identita’ tal-missier veru ta’ A meta kisbet d-dokumenti ufficjali tal-minuri. Ghalkemm ma kellu ebda relazzjoni mal-minuri A, G V xtaq li jikseb kustodja shiha ta’ ibnu li kellu flimkien mal-mara li kien telaq, u cioe GAVA (“G J”). Ghaldaqstant, f’dan il-komplott ADV qablet li taghti l-kura u kustodja tal-minuri GJ filwaqt li

GAV minn naha tieghu qabel li jaghti l-kura u kustodja tal-minuri A lill-ADV.

Fil-fatt gara ezattament hekk, A, minkejja li kienet tghix esklussivament mal-missier bijologiku taghha ghal perjodu ta' tmien (8) xhur, fir-residenza tieghu f'Marsaxlokk, f'liema zmien ADV kienet sparixxiet ghal bosta gimghat minghajr ma avvzat lil hadd. Matul dan iz-zmien u tul hajjiet il-minuri, kien missierha li dejjem ha hsiebha, habbha u mantniha bl-ahjar mod li qatt seta'. Minkejja dan kollu u b'rizultat tal-azzjonijiet frawdulenti ta' ADV il-minuri giet mcahhda minn dak l-ambjent ta' mhabba u sigurta'. Dan kollu sehh minkejja l-fatt li r-rikorrenti, waqt li kien qieghed jiehu hsieb lill-bintu, inkariga lil *nanny* li kienet ilha tiehu hsieb lil minuri minn twelidha, li ukoll tghix fir-residenza tieghu, sabiex jaccerta ruhu li l-minuri tkun taht osservazzjoni erbgha u ghoxrin (24) siegha kuljum, minhabba l-kundizzjoni medika taghha. In-*nanny*, J B, ghadha tghix fir-residenza tar-rikorrenti bit-tama li A terga' tigi ritornata lura f'darha Malta;

6. Illi esperti fil-qasam tal-medicina jtennu l-importanza ta' trattament adegwat sabiex tigi evitata sitwazzjoni fejn ikun hemm xi tip ta' pressjoni madwar il-kranju li eventwalment iwassal ghal hsara permanenti fil-mohh, jew aghar, mewt. ADV, minkejja li kienet taf b'dan il-fatt, falliet erba' (4) appuntamenti in fila gewwa l-isptar Mater Dei. Inoltre, hi ma wriet ebda interess fit-trattament li kienet tircievi meta l-minuri kienet tghix mar-rikorrenti. Tajjeb li wiehed jinnota fil-hamsa (5) ta' Mejju 2016, ADV sparixxiet ghal ghaxar (10) gimghat shah u halliet lir-rikorrenti u lir-ragel taghha minghajr l-awtorita legali li jagixxu fl-ahjar interess tal-minuri. Dan l-agir jirrifletti l-karattru tal-konvenuta ADV fejn l-interess tal-minuri qieghed jigi ttraskurat u bi konsegwanza A tinsab f'riskju serju u imminenti;

7. Illi permezz ta' digriet ta' din l-Onorabbli Qorti datat 3 ta' Marzu 2016 fl-atti ta' kawza ta' separazzjoni personali bejn ADV u r-ragel taghha, giet appuntata social worker sabiex jsir rapport bl-iskop li jigi stabbilit l-ahjar interess tal-minuri. Illi fl-istess rapport, li qieghed jigi hawn anness u mmarkat bhala Dok E, Adriana Grech innotat is-segwent:

*“At this point the Social Worker met the nanny but due to a language barrier no communication could be held however the nanny’s face lit up as soon as she shook hands with the Social Worker. The Social Worker observed that there is a strong bond between the nanny, A and Al.”*

Illi fl-istess rapport gie konkluz u rrakomandat li l-omm ADV ghandha jkolla biss access hekk kif gej:

*“The mother is granted supervised access with the children which will be on Mondays, Wednesdays and Fridays from 4:00p.m. till 6:00p.m. It is recommended that the parties communicate between them in the best interest of the minor children.”*

Illi huwa car li l-unika haga stabbli fil-hajja tal-minuri AG hija n-nanny u l-missier, hawn rikorrenti;

8. Illi l-konvenuta ADV fethet proceduri ta' kura u kustodja kontra zewgha fil-Kroazja pero' il-Qorti ta' Sisak permezz ta' sentenza datata fil-21 ta' Marzu 2017 (vide Dok F) iddikjarat li m'ghandiex gurdizzjoni li tisma' il-kaz peress li diga kien hemm proceduri quddiem din l-Onorabbli Qorti u ghalhekk l-gurdizzjoni esklussiva ta' A hija Malta, in linea mal-principju *lis alibi pendens* ;

9. Illi ADV ghandha storja ta' kriminalita' hekk kif tixhed is-sentenza tal-Qorti Amministrativa fil-Germanja li qieghda tigi hawn annessa u mmarkata bhala Dok G, u r-rapport tal-Kummissarju tal-Pulizija fil-Germanja (Vide Dok H). Illi, inoltre, l-istess ADV ghandha storja ta' mard mentali hekk kif jikkonferma r-rapport mahrug minn psikjatra appuntata mill-Qorti Germaniza li qieghed jigi hawn anness u mmarkat bhala Dok I. Dan gie wkoll ikkonfermat minn omm ADV, hekk kif ser jigi ppruvat fil-mori ta' din il-kawza.

Illi huwa ferm importanti li jigi osservat li l-intimata, ADV issofri minn disturb mentali li jaghmilha ta' periklu kemm ghaliha nniffisha kif ukoll ghan-nies ta' madwarha. F'dan ir-rigward, referenza ghandha ssir ghad-dijanjosji li saret minn psikjatra appuntata minn qorti Germaniza fis-sena 2008, fejn gie osservat li ADV kellha "*histrionic personality disorder with anti-social and paranoid tendencies as well as of a moderate depressive state*".

Din il-kundizzjoni kienet twassalha sabiex tipprogetta ruhha bhala persuna estroverta ta' kapacita' intelletwali superjuri sabiex tahbi l-karattru egocentriku, antisocjali u vjolenti li kellha. Il-psikjatra sahsitra ddiskriviet n-nuqqas ta' empatija socjali u l-egocentricita' ta' ADV bhala "*remarkable*" fil-kuntest tal-esperjenza professjonali taghha. L-intimata diga wriet li tista tkun ta' periklu ghaliha nniffisha tant li fi tlett okkazonijiet separati hi kienet intbaghtet f'istituzzjoni tal-mard mentali sabiex tigi sorveljata waqt li tiehu l-kura. Skond ir-rapport tal-psikjatra, l-intimata wriet ukoll li tista' tkun ta' periklu ghal haddiehor meta hi thoss "*intolerance to pressure and frustration due to insult, ideas of relationships and insufficient attention*". In vista tas-suespost, b'mod partikolari t-tendenzi paranoici u vjolenti, l-intimata tirraprezenta riskju

serju u reali ghal dawk kollha li jistghu jigu percepiti bhala theddida, irrispettivament jekk dik il-persuna tkunx adulta jew minuri b'kundizzjoni medika serja;

10. Illi GAVA kien diga talab ordni ta' kura u kustodja lil din l-Onorabbli Qorti permezz ta' rikors datat 4 ta' Jannar 2016 fejn bil-gurament tieghu kien qal li fl-ahjar interess tat-tfal l-omm m'ghandiex jkollha access mhux supervizzat (vide Dok J);

11. Illi, fit-22 ta' Dicembru tas-sena elfejn u sittax (2016), ADV b'qerq kisbet il-pussess ta' A, wara li hi u GAVA ghamlu rapport falz lill-Pulizija Ezekuttiva, li l-minuri A kienet qed tinzamm ghand r-rikorrenti kontra l-ligi. Dan kien parti minn pjan premeditat ta' ADV sabiex titlaq minn Malta bil-minuri AG, fejn GA seta' jiehu l-kura u kustodja tal-minuri GAVA (Junior) filwaqt li jcedi l-kura u kustodja tal-minuri A, lil ADV.

12. Illi, l-ghada li ADV hadet pussess tat-tifla, ir-rikorrenti, AG talab u ottjena l-hrug ta' mandat ta' inibizzjoni fl-ismijiet AG v GAVA u ADV (numru 299/2016/1 AL) fejn GAVA u ADV gew ordnati li ma jiehdux u li ma jippermettu lil hadd jiehu lill-minuri A barra it-territorju ta' Malta;

13. Illi li din l-Onorabbli Qorti laqghet it-talba tar-rikorrenti ghal mandat ta' impediment ta' safar b'mod provvizorju permezz ta' digriet datat it-23 ta' Dicembru 2016 (vide Dok K), digriet datat is-16 ta' Marzu 2017 (vide Dok L) u digriet datat id-29 ta' Marzu 2017 (vide Dok M) kif ukoll sussegwentament b'mod definittiv permezz ta' digriet datat l-10 ta' Mejju 2017 (vide Dok N);

14. Minkejja din l-ordni u minkejja li l-kunsens tal-missier, hawn rikorrenti, qatt ma inghata, ir-rikorrenti gie infurmat li ADV harbet minn Malta flimkien mal-minuri A u dan billi sgiccat mill-Awtoritajiet kompetenti inkluz il-Pulizija Ezekuttiva tal-Immigrazzjoni. Illi l-mod ta' trasport li uzat ADV sabiex tohrog minn Malta jikkonferma l-fatt li l-imsemmija ADV aggxixxiet b'mod dirett kontra l-ordni tal-imsemmija Qorti;
15. Illi ADV kienet ben saputa dwar l-mandat ta' inibizzjoni ghaliex kienet ghamlet rapport lill-Pulizija, f'Dicembru 2016, fl-ghassa tas-Sliema, kontra r-rikorrenti sabiex dan jigi sfurzat li jghaddi l-passaport Kroat tal-minuri lilha. Fi Frar tas-sena 2017 il-Pulizija kienet ghamlet kuntatt mar-rikorrenti sabiex tivverifika jekk il-passaport kienx fil-pussess tieghu u f'dak l-istadju l-Pulizija kienet giet infurmata li l-passport kien gie depozitat permezz ta' cedola fl-atti tal-mandat ta' inibizzjoni hawn fuq citat. Il-Pulizija kienet ghalhekk suppost infurmat lill-ADV b'dan kollu;
16. Illi finalment irid jinghad illi l-aktar haga li qieghda tinkwieta lir-rikorrenti huwa il-fatt illi l-minuri tilfet l-appuntamenti taghha gewwa l-isptar Mater Dei (vide Dok O). ADV, minkejja li taf li t-tifla taghha ghandha bzonn kura kontinwa, ma ddejjet xejn tahrab minn Malta bil-minuri u tpoggi l-hajja ta' bintha stess fil-periklu tal-mewt.
17. Illi jirrizulta ghalhekk bl-aktar mod car li fl-ahjar interess tal-minuri AG, l-kura u kustodja ghandha tigi fdata b'mod immedjat u eskluzzivament lill-missier, hawn rikorrenti. Il-hajja tal-minorenni A tinsab f'riskju serju, illum iktar minn qatt qabel, ghal hafna ragunijiet, fosthom in-nuqqas ta' trattament li jista' jhalli lill-minuri bi hsara fil-mohh b'mod permanenti, jew aghar, mejta.



18. Illi r-rikorrenti gie awtorizzat jipprocedi ghal din il-kawza permezz ta' digriet tal-Qorti Civili (Sezzjoni tal-Familja), li qiegħed jigi hawn anness u mmarkat Dok P;

Tghid ghalhekk il-konvenuta għalfejn dina l-Onorabbli Qorti m'għandiex:

1. Tordna li l-kura u kustodja tal-minuri AG tkun f'data immedjatement u esklussivament f'idejn il-missier;
2. Tawtorizza lir-rikorrenti li jitlob, jekk jkun hemm bżonn, l-assistenza tal-Pulizija, ta' l-Awtorita Centrali, jew kwalunkwe awtorita' ohra kompetenti sabiex jizgura li l-ordni ta' kura u kustodja tigi effettwata u sabiex jigbor l-affarijiet personali tal-minuri.
3. Tordna li l-omm ADV jkollha dritt ta' access sorveljat hekk kif suggerit mir-rapport mahrug mis-social worker Adriana Grech.
4. Tawtorizza lir-rikorrenti japplika wahdu ghal cittađinanza Germaniza u passaport Germaniz għall-minuri AG mingħajr il-htiega tal-kunsens tal-intimata assenti.

Bl-ispejjez kontra l-konvenuta li hija mharrkha minn issa għas-subizzjoni.

Il-Qorti rat ir-risposta guramentata tal-kuraturi Dr. Leontine Calleja u PL Quentin Tanti datata 12 ta' April 2018 ;

1. Illi fl-ewwel lok l-esponenti jirrilevaw illi l-kawza kellha titmexxa kontra kuraturi deputati, stante li dawn kienu gew nominati ghal assenti waqt il-medjazzjoni ;

2. Kif jirrizulta mid-dokumenti annessi mar-rikors l-attrici, gie ikkonfermat bhala missier il-minuri fil- 5 ta' Lulju, 2017 u dan wara li l-assenti fil-fatt telqet minn Malta;

3. Illi jirrizulta ukoll li qed isiru numru ta' allegazzjonijiet kontra l-assenti ADV liema allegazzjonijiet ghandhom jigu ppruvati;

4. Illi b' referenza ghar-rapport tal-Psikjatra li gie anness mar-rikors dan ma seta' qatt jigi pprezentat f' dal-proceduri, u esebit b' mod li jista' jarahom kulhadd ghax huwa ksur tal-Kap. 440, l-att dwar il-protezzjoni, u l-privatezza tad-Data u ghalhekk ghandhom jigu sfilzati;

5. Illi hemm bzonn li jigi mistharreg jekk hux fl-ahjar interess tal-minuri il ilha tghix ma' ommha 'il boghod minn Malta ghal aktar minn sena li tigi separata mill-kustodja ta' ommha u terga' tinghaqad ma' missierha li stante l-eta' tenera taghha, l-probabilita' hija li lanqas biss tgharrfu;

6. Illi l-esponenti ma humiex edotti mil-fatti u jitolbu issa lill-attur, sabiex jekk ghandu mezz ta' komunikazzjoni jghaddieha lil esponenti sabiex isir tentattiv sabiex jikkomunikaw mal-assenti;

7. Salv eccezzjonijiet ohrajn.

Rat ir-Risposta Guramentata ta' Dr.Lara Dimitrijevic bhala mandatarja ta' ADV fejn eccepiet:-

1. Illi fl-ewwel lok, issir referenza ghall-prokura specjali esebita in atti, li biha l-konvenuta appuntat lill-avukat sottoskritta sabiex tirrapprezenta l-interessi taghha fil-procedura prezenti.
2. Illi l-partijiet kellhom relazzjoni minn liema twieldet il-minuri AVA.
3. Illi b'mod preliminari, it-talbiet tal-esponenti ghandhom jigu michuda fl-intier taghhom u dan stante li l-Qorti Civili (Sezzjoni tal-Familja) f'Malta m'ghandhiex il-gurisdizzjoni biex tisma' l-kaz odjern. Illi fil-fatt prezentement jinstabu ghaddejjin proceduri tal-Hague, liema proceduri jinsabu fi stadju ta' appell u f'liema proceduri jrid jigi determinat f'liema pajjiz il-minuri hija resident.
4. Illi in effetti, l-esponenti tikkontendi li l-pajjiz ta' residenza tal-minuri huwa fil-Kroazja u fil-fatt hija qatt ma kellha xi forma ta' permess biex tirisjedi hawn.
5. Illi minghajr pregudizzju ghall-ewwel talba, it-tieni eccezzjoni preliminari hija dik ta' *lis alibi pendens* u dana peress li hemm diga' kawza ohra li tiringwarda t-talbiet in kwistjoni u cioe' l-kura u kustodja ta' A fil-Kroazja. Illi in effetti din il-kawza hija bejn l-istess partijiet (*eadem personae*), hija fuq l-istess oggett (*eadem rea*) liema talbiet ghandhom l-istess meritu (*eadem causa petendi*).

Illi fit-3 ta' Awissu, 2017, ir-rikorrenti istitwixxa proceduri ta' medjazzjoni fil-qorti Maltin u dana meta kien jaf li l-minuri mhix qed tirisjedi Malta. Illi l-esponenti madanakollu kienet diga' ukoll ordnat li l-minuri tirisjedi mal-esponenti omm. Illi jidher ghalhekk car li kienet il-qorti Kroata, li

kienet prezentata bil-kaz odjern l-ewwel u ghalhekk ghandha tkun hija li ghandha tisma' l-kaz.

Illi mhux talli hekk, izda r-rikorrenti tant kien jaf b'dawn il-proceduri li kien prezenti waqt il-medjazzjoni fil-Kroazja u kif ukoll kien prezenti personalment ghall-proceduri tal-Hague. Illi ghalhekk, in ogni caso, ir-rikorrenti ghandu jigi kkunsidrat li accetta l-gurisdizzjoni tal-Qorti Kroata.

6. Illi l-esponenti tissottometti ukoll li hija qatt ma giet notifikata mill-kuraturi deputati bil-proceduri odjerni u kif ukoll kwalunkwe proceduri li ttiehdu fil-konfront taghha fir-rigward tal-minuri. Illi fil-fatt hija qatt ma kienet taf bil-proceduri ta' paternita' istitwiti u saret taf biss wara li nghatat sentenza mill-ex ragel taghha. Illi kien hemmhekk li l-esponenti ppruvat tappella mid-decizjoni tal-Qorti tal-Familja partikolarment rigward kunjom il-minuri, fejn giet infurmata li ma kinitx ghada fit-terminu legali sabiex taghmel dan (Ara Dok. AV hawn anness).

7. Illi dana fil-fatt gara minhabba l-agir malizzjuż tar-rikorrenti li kif ikkonferma fil-Qorti Kroata, kien qed jircievi l-posta kollha tal-esponenti fir-residenza tieghu f'Malta.

8. Illi in kwantu ghall-mertu tar-rikors, l-esponenti tichad li qatt agixxiet b'mod frawdolenti u malizzjuż fir-registrazzjoni tal-minuri. Illi fil-fatt hija kellha tirregistra lill-minuri sabiex din tal-ahhar tkun tista' taghmel operazzjoni f'Malta. Illi di piu' u ghall-kuntrarju ta' dak li qed jigi allegat, ir-registrazzjoni tal-minuri ssir necessarjament fuq il-konjugu l-iehor minhabba l-presunzjoni tal-ligi u ghalhekk l-esponenti ma kellha l-ebda poter biex twaqqaf dan il-fatt.

9. Illi l-esponenti qatt ma ostakolat il-fatt li r-rikorrenti b'xi mod jigi rikonoxxut bhala missier il-minuri. Illi fil-fatt hija kienet issottomettiet ghall-testijiet tad-DNA, liema testijiet gew esebiti. Illi di piu', l-esponenti ukoll kienet offriet lir-rikorrenti sabiex jara lill-minuri l-Kroazja izda rrifjuta, kif jista' facilment jigi vverifikat mill-istess proceduri Kroati.
10. Illi ghal dak li jirrigwarda l-minuri, l-esponenti tissottometti li din ghexet maghha ghal-seba' xhur shah meta abbużivament ttiehdet mill-kura taghha mir-rikorrenti, l-ex ragel taghha u n-nanny tal-minuri. Illi kien fil-fatt permezz tal-assistenza tal-pulizija li l-esponenti din il-posizzjoni giet remedjata.
11. Illi huwa minnu li l-minuri ghandha bzonn assistenza u kura kontinwa, liema assistenza dejjem provdjet ghaliha l-esponenti omm billi tiehu lill-minuri frekwentement ghall-visti medici gewwa l-Kroazja.
12. Illi t-talbiet tar-rikorrenti ghandhom jigu michuda fl-intier taghhom u dana stante li huwa, minghajr ebda bazi legali izda biss biex ihammeg l-isem tal-esponenti, iddikjara li hija xi forma ta' *child abductor*, qabel mal-proceduri tal-Hague gew konkluzi. Illi huwa injora kompletament il-privatezza tal-minuri u ghazel li jippubblika diversi ritratti tal-minuri u tal-esponenti.
13. Illi b'referenza ghall-mandat ta' inibizzjoni, jigi sottomess li r-rikorrenti ma kienx ghadu rikonoxxut bhala l-missier naturali meta ghamel tali mandat u ghalhekk ma kellu l-ebda jedd li jistitwixxi dawn il-proceduri. Illi nonostante, l-esponenti tissottometti li hija qatt ma giet notifikata bl-istess u fil-fatt kienet siefret mal-minuri permezz tal-ajruplan.
14. Illi r-rikorrenti huwa ukoll persuna vjolenti. Illi in effetti fl-1 ta' Ottubru, 2017 huwa kien fizikament vjolenti fil-konfront taghha u dana fil-presenza

tal-minuri. Illi fil-fatt il-Qorti tal-Magistrati ta' Zagreb harget ordni ta' protezzjoni fil-konfront tal-esponenti. Illi madanakollu, din ma kinitx l-ewwel darba li r-rikorrenti kien vjolenti fil-konfront taghha.

15. Illi finalment, il-minuri qatt ma ghexet esklussivament mar-rikorrenti u fil-perjodu qasir li hija kienet tghix mieghu, hija kienet tigi akkurata minn nanny. Illi fil-fatt ir-rikorrenti qatt ma ha hsieb il-minuri.

16. Illi l-esponenti dejjem agixxiet fl-ahjar interess tal-minuri, kif jista' jigi vverifikat ukoll mid-dokumenti medici tal-istess minuri u r-rapporti skolastici tal-minuri.

Ghaldaqstant, it-talbiet tar-rikorrenti ghandhom jigu michuda *in toto*.

Salv eccezzjonijiet ohra.

Bl-ispejjes kollha kontra r-rikorrenti li hu minn issa ngunt in subizzjoni.

B'digriet tat-28 ta' Ottubru, 2019, il-kontendenti gew ordnati jipprezentaw kopji tar-rikors u r-risposta tradotti ghal-lingwa Ingliza fi zmien erba' gimghat, izda sallum dan ma sarx u ghalhekk dina l-Qorti ser tghaddi biex taghti biss il-fatti u l-konsiderazzjonijiet bil-lingwa Ingliza.

## **FACTS**

1. Plaintiff and defendant had a relationship, from which a child AG was born on the 31<sup>st</sup> August, 2015 and according to Plaintiff she was abducted by Defendant on the 20th February, 2017. Further to which, Plaintiff filed the present court case, wherein he asked the said Court to decide which of the

parents should exercise care and custody over the child. He insists that this was done in terms of Article 10 of EC Regulation 2201/2003 given that according to him, the Maltese Courts have exclusive jurisdiction.

2. When the minor A was born, Defendant was married to GAVA she insists when she went to register the child, given that she was still married, the legal presumption at law applied, that is, the minor child was automatically registered on her spouse's name GADV.
3. Subsequently, on the 5<sup>th</sup> July, 2017, by means of a Maltese Court judgement, in the names **AQG vs GAVA et.**, Plaintiff was declared to be the natural and biological father of the child.<sup>1</sup>
4. When Defendant had child in her custody, Plaintiff filed a warrant for prohibitory injunction so as to prevent the minor from being taken out of the country, which warrant was authorised provisionally by a decree from this Honourable Court dated 23<sup>rd</sup> December, 2016, 16<sup>th</sup> March, 2017 and again on the 29<sup>th</sup> March, 2017, which warrant was then definitely confirmed on the 10<sup>th</sup> May, 2017.<sup>2</sup>
5. This notwithstanding, the defendant managed to leave the Maltese Islands in defiance of the said warrant with the minor and went to Croatia.
6. In July, 2017, Defendant filed proceedings in the Croatian Court to regulate the custody of the minor child and an interim order was granted whereby

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<sup>1</sup> Vide Dok a fol. 31 of the court acts.

<sup>2</sup> Vide Dok. N a fol. 148 of the court acts.

Defendant was awarded custody of the minor child by the Municipal Civil Court of Zagreb.

7. On the 3<sup>rd</sup> August, 2017, Plaintiff had initiated mediation proceedings here in Malta for the care and custody of the child. He also had filed an application prior to that, precisely in May 2017, before the acts of the case that was being held between Defendant and her then husband. Once again, Plaintiff filed another application for care and custody in November, 2017 in the acts of the mediation proceedings. Furthermore, he proceeded to file the present case, on the 1<sup>st</sup> March, 2018.
8. Defendant had initiated mediation proceedings before the Croatian court for which Plaintiff was present on the 24<sup>th</sup> October, 2017. On the 26<sup>th</sup> October, 2017, the Croatian Court gave an interim order whereby it was established that the minor child A was to live with her mother and she was granted a partial independent custody of the child.
9. A few days before the first hearing of the care and custody proceedings (case no. Pob – 1154/17), Defendant discovered that Plaintiff had filed abduction proceedings under the 1980 Hague Convention and EC Regulation 2201/2003 claiming that Defendant had wrongfully abducted the minor child from Malta on the 7<sup>th</sup> February, 2018, practically a year after the Defendant and their minor daughter according to Plaintiff, had left Malta by boat to Italy and then got to Croatia. Defendant insists she was never notified with the warrant and left Malta by air. Consequently, the proceedings for care and custody in Croatia (Pob – 1154/17) were put on hold pending the outcome of the Hague application (case no. R1 Ob- 237/18).



10. On the 6<sup>th</sup> April, 2018 the court ordered the return of the child to Malta, which decision was reversed on appeal and sent back to the Court of First Instance in Croatia, which by a judgement delivered on the 24<sup>th</sup> March, 2021 ruled that the child should not be returned to Malta, because the applicant was not exercising custody rights at the time of removal. As a consequence, the Court issued an order for non-return of the child pursuant to Article 13 of the 1980 Hague Convention. On the 1<sup>st</sup> June, 2021, Plaintiff's appeal was dismissed and it was once again decided that there was no abduction.

11. In pursuance to this, Defendant filed a request on the 14<sup>th</sup> June, 2021 in the Civil Court of Zagreb for the civil case regarding the custody of the child to continue given that the proceedings of abduction were concluded. Such a request was acceded to on the 18<sup>th</sup> June, 2021 and thus, there is currently a custody case being heard by the Croatian Court.

12. Plaintiff, on the other hand insists that the Maltese Courts has jurisdiction and therefore, after having been notified with the decision of the 24<sup>th</sup> March, 2021, they still have the ultimate say on the custody matters of the child and this in accordance with Article 11 of EC Regulation 2201/2003. Infact, Plaintiff insists that according to the said Article, the Malta Central Authority transmitted a copy of the judgement for the Maltese Court to conclude and give its final decision.

13. Plaintiff is insisting that the Croatian Court in its decision of the 24<sup>th</sup> March, 2021 reached a wrong decision when it decided on the non-return of the child, firstly because the fact that he was not listed on the birth certificate at the time of the child's removal and secondly because it failed to recognize a private agreement signed between the parties that regulated custodial rights and this because the agreement had no force of law.

Furthermore, Plaintiff insists that the Court also failed to consider that Defendant presented a fabricated birth certificate to the Public Registry, in such a way that the Plaintiff is not identified as the natural and biological father of the child, as well as the midwife's signature was falsified.

14. Defendant rebuts these allegations and insists that Plaintiff's requests are unfounded in law and fact mainly because there was no abduction and this has been confirmed by the Hague proceedings on the basis of Article 3 of the Hague Convention as decided on the 1<sup>st</sup> June, 2021.

She also insists that his requests are unfounded because the Maltese courts cannot have exclusive jurisdiction over the minor child since Plaintiff's request was not rejected under Article 13 of the Hague Convention, but it was rejected under Article 3 of the Hague Convention.

Defendant believes that the Maltese Court does not have jurisdiction due to the fact that the child is not resident in Malta and there are ongoing proceedings in the Croatian Court determining the same matter.

15. Defendant asks for the Court to reject Plaintiff's requests due to the fact that he is forum shopping by stating that the Croatian court was wrong in declaring that when the child was moved from Malta he did not have custody, since this matter was appealed and also decided by the Croatian court and by no means should he use this case as an excuse to appeal from the Croatian judgement.

Moreover, declaring that Plaintiff disagrees with the Court's reasoning that the private agreement between the parties is not valid since it wasn't certified by the competent court, is irrelevant at this stage since the Croatian judgement is *res judicata*.

16. Defendant also rebuts the defences raised by Plaintiff that Defendant falsified the birth certificate by giving false information about the child's father, when defendant insists this was not the case as she had no choice, once she was still married to another man and at law he had to appear on the birth certificate.

17. Defendant also asks this court to reject Plaintiff's requests, since the habitual residence of the child is Croatia and the Croatian court is hearing the same matter and since it was instituted before it has to decide the issue of care and custody and moreover it has jurisdiction to decide the matter once a Croatian court had decided that there was no abduction under the Hague Convention.

## **Having considered;**

### **Lack of Jurisdiction**

### **Defendant's arguments**

1. Respondent, in replying to Plaintiff's application to be granted care and custody pleaded the lack of jurisdiction of the Maltese courts and this mainly because there were pending procedures under the Hague Convention before the Croatian Court that decided against abduction and therefore she reiterates that it must thus be assumed that the habitual residence is Croatia in terms of Article 13 (1) of the Council Regulation.
2. According to Article 9 of Council Regulation (EC) No 2201/2003 of the 27<sup>th</sup> November, 2003 the country whereby the child had formerly habitually resided shall only continue to have jurisdiction for up to 3

months elapsing from the moment when the child had left its jurisdiction.

3. Defendant had already instituted proceedings with regards to the custody of the minor child in question against Plaintiff in 2017 within the remit of the Croatian courts, which proceedings were pending too due to the abduction proceedings under the Hague Convention, which were finally decided. In terms of the Council Regulation, matters related to *lis pendes* fall within the purview of the Croatian Courts and according to Article 19, the regulation states that competence lies within the first court that is seized and it is thus the obligation of the second court to decline jurisdiction in favour of the first court, in this case Maltese courts have to decline in favour of the Croatian one.

### **Plaintiff's arguments**

1. Plaintiff rejects Defendant's submission that Croatian Courts have jurisdiction based on recital 12 of the Council Regulation (EC) 2201/2003 since Defendant failed to emphasize the important caveat to this general principle that this recital does not apply in "***certain cases of a change in the child's residence,***" as is the case in the current proceedings.
2. As to Defendant's reasoning on the basis of Article 9, Plaintiff argues that again Defendant failed to quote the qualification of the said Article 9, in that it reiterates that the said article applies only where the "***child moves lawfully from one Member state to another and acquires a new***

*habitual residence there...*” In this case, the child was abducted according to Plaintiff and she was never moved lawfully to Croatia.

3. Plaintiff also raised the plea that Article 8 of the said Regulation is one of general applicability, but it is superseded by Article 10 that invokes the conditions for jurisdiction in case of child abduction. Plaintiff believes that the grounds necessitated for the applicability of Article 10 have not been satisfied and therefore the jurisdiction remains before the Maltese Courts.
4. Article 19 of the said Regulation was also deemed applicable by Plaintiff, so as to further strengthen his case that the Maltese Courts have jurisdiction over his care and custody case and this considering that the Maltese court was the first to be “seised” with the case.

### **Having Considered.**

The case instituted by the Plaintiff is clearly a case requesting care and custody rights over the minor A. On the 5<sup>th</sup> June, 2018, after having accepted the Defendant’s appeal and annulled the decision of the Municipal City Court in Zagreb of the 6<sup>th</sup> April, 2018, the County Court in Zagreb, where the child’s habitual residence was considered to be Malta, returned the case to the first instance court for a renewed proceeding (case no. 15 GZ Ob – 635/2018-2).<sup>3</sup>

By a decision dated 24<sup>th</sup> March, 2021, confirmed on appeal on the 1<sup>st</sup> June, 2021, the Croatian Court concluded that there was no abduction committed by Defendant in terms of the Hague Convention since

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<sup>3</sup> Vide Dok. D attached to Respondent’s note of submissions.

Plaintiff was not exercising custody rights at the time of removal and therefore the child's habitual residence was Croatia.

The parties now have conflicting views on which court has jurisdiction. Plaintiff insists that the Maltese Courts has jurisdiction to decide the care and custody of the child. He disagrees with the decision of the Croatian Court dated 1<sup>st</sup> June, 2021 that decided against the unlawful and wrong removal of the child, that reasoned the Plaintiff did not have custodial rights over the said minor since he had not been legally acknowledged as the lawful and biological father of the minor and moreover, that the private agreement he signed together with Defendant did not have any validity at law, since it was not authorised by the competent courts.

In this respect, Plaintiff went on to plead that the Croatian Court's decision is unfounded at law since the birth certificate presented by Defendant to the Public Registry is completely false and fabricated by her. To strengthen his defence, Plaintiff also produced Inspector Daryl Borg who confirmed that after a report was filed against Defendant by Dr. John Axiaq for the falsification of the birth certificate, a European Arrest Warrant was issued against her.

In addition, Dr. Lynn Faure' in her capacity as Senior Professional at the Malta Central Authority, confirmed that she was carrying out assisting the Public Registry to determine whether the birth certificate was issued correctly from the Public Registry to determine whether there was any falsification from Defendant's end.

The affidavit of Carmen Scerri was also exhibited, the midwife who assisted Defendant in giving birth, wherein she confirmed that she had

issued and signed one document confirming the minor's birth details, and denied signing the other.<sup>4</sup>

Defendant reiterates that the Croatian court has already decided the issues of the birth certificate and custodial rights, as well as the private agreement's legal validity and therefore these issues are *res iudicata*. She accuses Plaintiff of forum shopping and using the said case as a form of appeal from the Croatian judgement delivered on appeal on the 1<sup>st</sup> June, 2021.

This Court believes that Plaintiff had all the time to raise these pleas before the Croatian Court, that ultimately was not convinced and with regards the birth certificate concluded that in terms of Maltese domestic law, the natural and biological father, in other words Defendant could not in any case be acknowledged on the birth certificate, since Plaintiff was still married to another man at the time of birth of the said minor.

With reference to the private agreement, the Croatian Court also delved into this matter and concluded that it could not be enforced once it was not approved by the competent court.

Thus, this Court agrees with Defendant, that these legal issues have all been dealt with and decided upon by the Croatian Court and consequently, it confirms that there was no wrong and unlawful removal of the minor child.

Plaintiff also insists that Article 10 of the Hague Convention grants exclusive jurisdiction to the Maltese courts. This Court, cannot agree with the reasoning of Plaintiff, but agrees with Defendant's argument that this Article could only have been invoked, if the Croatian Court had

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<sup>4</sup> Dok. JAC 1 (Dok. C & D)

rejected the abduction plea only in terms of Article 13 of the Hague Convention. Instead, the Croatian Court rejected the abduction plea on the basis of Article 3 of the Hague Convention, though it substantiated its decision in terms of Article 13 of the Hague Convention too.

Moreover, the Court went on to establish that the habitual residence of the child is Croatia, since she has been living there with her mother for the last four years.

Consequently, Article 10 and 11 of the Hague Convention cannot be applied.

Defendant has also tried to justify that jurisdiction lies with the Croatian Courts in terms of Article 19. Article 19 of the Regulation provides:-

***“(2) Where proceedings related to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.”***

***(3) Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that Court.”***

Defendant insists that the Croatian court was first seized with the issue of care and custody and therefore should retain jurisdiction. Plaintiff insists otherwise, considering that he had instituted mediation proceedings way before Defendant initiated proceedings before the Croatian courts.

In July, 2017, Defendant filed proceedings in the Croatian Court to regulate the custody of the minor child and on the 3<sup>rd</sup> August, 2017, Plaintiff had initiated mediation proceedings here in Malta for the care



and custody of the child. He also had filed an application prior to that, precisely in May 2017, before the acts of the case that was being held between Defendant and her then husband. Once again, Plaintiff filed another application for care and custody in November, 2017 in the acts of the mediation proceedings. Furthermore, he proceeded to file the present case, on the 1<sup>st</sup> March, 2018.

On the 26<sup>th</sup> October, 2017, the Croatian Court gave an interim order whereby it was established that the minor child Aurelia was to live with her mother and she was granted a partial independent custody of the child.

Furthermore, the County Court in Zagreb dated 18<sup>th</sup> June, 2021 decided that the proceedings related to the care and custody of the minor are to be continued before the Croatian courts and this after the abduction plea was rejected. This was confirmed by the court of Appeal dated 10<sup>th</sup> August, 2021. Furthermore there was the judgement of the 10<sup>th</sup> September, 2021 that dismissed Plaintiff's appeal and re-confirmed that the court is to continue with the hearing of the care and custody case.<sup>5</sup>

In consideration of all the above, the Court can conclude that the Croatian Court was first seized with the care and custody case and furthermore since it has been established that the minor's habitual residence is Croatia, the Croatian Court's jurisdiction is thereby confirmed.

Defendant's plea on lack of jurisdiction of the Maltese Courts is being upheld.

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<sup>55</sup> Docs. AVi, Av ii, Av iii a fol. 424

All costs are to be borne by Plaintiff.

**Mr. Justice Anthony. J Vella**

**Judge**

**Registrar**