



**CIVIL COURT
(FAMILY SECTION)
MR. JUSTICE ANTHONY G. VELLA**

Sitting of Monday 20th June 2022

Application number : 100/2020 AGV

AS

Vs

MS

The Court,

Having seen the Sworn Application of AS

Humbly submits and confirms on oath the facts as set out in this sworn application:-

1. Whereas, this application is being filed in accordance with Article 6 of the Child Abduction and Custody Act, Chapter 410 of the Laws of Malta, which enables Malta to ratify two international Conventions relating respectively to the civil aspects of international child abduction and to the recognition and enforcement of custody decisions.
2. Whereas, the present proceedings are being instituted by the applicant by virtue of Article 6(2) of Chapter 410 of the Laws of Malta, whereby an interested person may make an application under sub-article 6(1) for redress.
3. Whereas, the contendents married on the 24th February 2013 in Australia and from this marriage two children were born, LS born on the 8th May 2014, and AS born on the 19th May 2016.
4. Whereas, although the relationship between the spouses was deteriorating, the respondent began discussing with the applicant around October 2018 the possibility for their family to start living in Malta, since according to him their conjugal life would improve.
5. Whereas, the respondent clarified and insisted that they will be visiting Malta on trial and if the applicant would not get accustomed to living in Malta or their conjugal relationship would not improve she could return to Australia together with her two children.

6. Whereas, consequently the applicant agreed to move to Malta on trail and the family Spiteri arrived in Malta on the 1st September 2019.
7. Whereas, as soon as the family arrived in Malta, the applicant realised that the situation was different from what was originally portrayed by the respondent, as he was not ready to improve their conjugal relation, but had rather premeditated a plan to bring the children within Malta to retain them here through deception.
8. Whereas, immediately after arriving in Malta, the respondent became abusive and aggressive towards the applicant.
9. Whereas, on the 19th September 2019 and thus 18 days after their arrival in Malta, the respondent presented the application with a letter informing her with his intention to separate and consequently keep the children in Malta.
10. Whereas, the applicant informed the defendant of her intention to return to Australia amidst the present circumstances, he asserted that whilst she could return to Australia, he would not allow her to take the children with her.
11. Whereas, this retention on the part of the defendant, falls within Article 3 of the Convention which specifies that the said retention is considered wrongful when it is in breach of rights of custody attributed to a person (the applicant), under the law of the state in which the child was habitually resident immediately before the retention and at the time of retention those rights were actually exercised.

12. Whereas, despite the applicant's objection and the contentents agreement the respondent still continued to retain the children within Malta;

13. Whereas, as defined in Chapter 410 of the Laws of Malta the country where in the minor children of the contentents are habitually residents is Australia and thus the applicant prefers to return to Australia;

14. Whereas, Article 12 of the Convention establishes that when a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

15. Whereas, despite several attempts by the applicant to voluntary return the minors to Australia, the respondent refused to return the child voluntarily.

16. Whereas, in view of this, these proceedings had to be instituted.

Now therefore, by means of this application, the applicant humbly requests that this Honourable Court:-

1. Save another declaration which the Court deems necessary, declare that the retention of the minors LS and AS by the respondent in Malta, as unlawful in terms of Article 3 of the Convention on the aspects of International Child Abduction as enacted in Chapter 410 of the Laws of Malta.

2. Save any other declaration which the Court deems necessary, to order the return of the minors LS and AS to Australia.
3. Save any other declaration which the Court deems necessary, to issue those directives in the interests of the minors, including a notice to the concerned authorities to safeguard the minors from being unlawfully taken back from Malta to another country, which removal makes the return of the minors to their habitual residence more difficult and this in explicit breach of the Convention on the Civil Aspects of International Child Abduction and
4. Save another declaration which the Court deems necessary, to give the necessary instructions to the competent authorities including the police, the Court Marshal, the Child Protection Agency and the Court Registry to make the practical arrangements for the return of the minors.

The Court,

Having seen Sworn Reply of MS

Respectfully replies and on oath confirms:-

1. That the defendant is filing this reply by declaring himself notified of the plaintiff's initial application despite not being formally notified, after obtaining an informal copy of the same initial application and also since in the meantime he was notified with an application filed in the acts of these proceedings, which is being replied to by means of a reply being filed

contemporaneously, without prejudice to all that is being pleaded hereunder.

2. That it is preliminarily being pleaded that the procedure brought forward by the plaintiff can never be considered applicable to the present case given that there has been no International Abduction, (removal or retention) from one country to another as contemplated in the *Convention on Civil Aspects in the International Abduction of Minors* since months before the minors Land AS ended up living with the applicant in Malta (after the plaintiff actually decided to abandon her family and go to live elsewhere in Malta on 28 October 2019), the plaintiff, the defendant and their children had in fact emigrated to Malta on 31 August 2019, thus definitively leaving Australia and consequently establishing their domicile of choice and habitual residence here in Malta (over and above any citizenship which the children may be deemed to possess), so much so that the parties rented a residence here in Malta for ten years, the children of the parties had already started going to school in Malta and the plaintiff even obtained Maltese Citizenship after a process which had even begun before the parties relocated to Malta, as will be amply demonstrated by all the evidence that will be produced in this regard.

Therefore the element of International removal or retention leading to the applicability of the same Convention (and Chapter 410 of the Laws of Malta) is missing taking into account amongst others but not limitedly, what is stated in Articles 3 and 4 of the same Convention as reproduced in the first Schedule to Chapter 410 and the relative jurisprudential interpretation on the applicability or otherwise of the same Chapter 410 and Convention including the interpretation of what is deemed to be the habitual residence of the parties and of the children.

3. That without prejudice to the aforesaid but also preliminarily it is being pleaded that the procedure submitted by the plaintiff is invalid given that it was not accompanied by a decision in terms of article 15 of the first schedule of Chapter 410, Laws of Malta (i.e the Notice of removal or lawful retention by the Central Authority in Australia) and this as further confirmation that the procedure being used by the plaintiff is not applicable in the present case precisely because there is no unlawful removal or retention and much less so any removal or retention from one country to another, whilst at the time when the plaintiff proceeded with these proceedings, the parties' children had been residing with the defendant in Malta for a number of months after the plaintiff abandoned her family and went living elsewhere.

4. That also without prejudice to the above, it should also transpire that it was in fact the defendant himself who, after the plaintiff abandoned him and their children, proceeded with mediation proceedings (which are in fact still pending) aimed at addressing the Matrimonial Separation of the parties and all matters concerning the care and custody, access and maintenance referable to the children of the parties, which proceedings should therefore also be considered as having precedence over any other proceedings subsequently brought by the plaintiff, also taking into account that the Maltese Local Courts should be considered as having the necessary competence and jurisdiction to consider any aspect concerning care and custody, access and maintenance relating to the same children including the decision on where and with whom it is to be decided that they should live (including taking into account what is provided by article 742 of the Code of Organization and Civil Procedure, Chapter 12 Laws of Malta) as well as taking into account what is provided in the second schedule of

Chap. 410 including amongst others article 10(2)(b) and other provisions in article 10 insofar as they might result applicable.

At the same time the applicant was and still is raising the children of the parties alone without any financial contribution from the plaintiff who at the same time was still given free access by the applicant to the children of the parties according to the times that were in fact agreed with the same plaintiff and this despite a number of reservations that the applicant had and still has regarding the same plaintiff including the fact that she has moved to a place where two adults reside with her, and even in spite of a negative attitude which in certain circumstances the same plaintiff exhibits towards the same child.

5. That without prejudice to the aforesaid it is also pleaded that the claims submitted by the plaintiff are in any case unfounded in fact and in law, and that there was no illegal retention on the basis of Chap. 410 and the relative Convention, and this among others given that:-

a) It is not true that the parties had come to Malta on a trial basis as alleged by the plaintiff but rather the parties emigrated to Malta after months of preparations and this after the parties had realized and agreed that they were not coping financially with the cost of living in Australia so much that they ended up with various debts, while also lacking family support as the plaintiff had several disagreements with her family in Australia while the defendant's closest relatives live here in Malta.

At the same time the parties came here to Malta after relocating all their movable effects to Malta, rented a house here in Malta for ten years, started refurbishment and several improvements of the same property,

started sending their children to school here in Malta while the plaintiff even applied for and obtained Maltese citizenship with a process that began even before the parties relocated to Malta, among other acts confirming how much the decision of the parties to live here in Malta was a definitive one that was not on a trial basis and one that in any case led to a change of domicile as well as a change of habitual residence here in Malta.

- b) Nor is it true that the applicant ever promised the plaintiff that in case the plaintiff did not get used to or like living here in Malta or in case the conjugal life did not improve, she would have been able to go back to Australia with the children of the parties and this is also because after all the difficulties that the parties had ended up facing in Australia, it certainly made no sense for the parties to go and live there again and much less so that the plaintiff returns to Australia alone with the children of the parties when the parties were not even able to cope in Australia when they were together, *multo magis* if the plaintiff were to return alone with the children of the parties!

In addition, and in any case, after the parties emigrated to Malta, the plaintiff, from practically the very beginning, made no effort to get used to living here in Malta or to improve the marriage of the parties and in fact from a few weeks after the parties came to Malta, she immediately started telling the applicant that she no longer loved him, that she wished they had never had children, that she would have confidences with third parties and even be aggressive with the applicant and whereas, after the defendant was compelled to send a legal letter to the same plaintiff with a view to changing her conduct and focusing so that at least an attempt would be made to save the marriage of the parties,

she continued showing that she had no interest in this scope and instead decided to abandon the applicant and his children.

Therefore, taking into account that the plaintiff did not make any effort whatsoever as explained above, she cannot at the same time point her finger at the defendant, claiming that the parties and children of the parties should go back to the Australia and worse than that, taking into account the merits of these proceedings) makes such a serious but untrue allegation that the applicant abducted or is retaining the children illegally in breach of Chapter 410 and the relative Convention, as this is certainly not the case - and that rather, it was her who abandoned her family without just case and consequently it should transpire that the plaintiff's requests should be dismissed even taking into account what is provided by Article 13(a) of the Convention as contained in Chap 410 insofar as this would result applicable.

- c) As already mentioned earlier, it was in fact the plaintiff who chose to abandon her family including her children and move to another address here in Malta without her children for reasons that the defendant cannot be blamed given that it was actually the plaintiff's conduct that led to the break-up of the parties' marriage.

In this regard, even if in fact the question concerning the fault for the break-up of the parties' marriage is one which must be addressed in proceedings for separation which have already been initiated by the applicant, and not in the present proceedings. The plaintiff denies that it was he who was in any way guilty of breaking up the marriage due to alleged physical or psychological abuse, and rather insists that it was the plaintiff who was solely guilty of breaking up the marriage for

various reasons attributable to her as explained above and as can be shown in more detail during the course of this case in so far as it may be relevant to show this for the purpose of these proceedings.

Consequently it should also result that there was no illegal retention and that no order for the return of the children to Australia or any other order should be issued even in view of the provisions of the applicable parts of section 13 (a) of the first schedule of Chapter 410, Laws of Malta as will be shown in more detail during the course of this procedure since as a matter of fact, the respondent was not exercising any rights of care and custody in respect of the children of the parties at the time of the alleged retention precisely because it was the plaintiff who abandoned the same children and left the defendant to take care of them alone.

- d) That consequently there was neither illicit retention nor removal on the part of the defendant in respect of the children of the parties, nor is it the case in any case that the country in which the children are to be considered as having been habitually residing in it before the alleged retention or removal was Australia for the purposes of Chapter 410 and the Convention on Civil Aspects in the **International** Abduction of Minors;

In fact the Central Authority of Malta which had initially been requested to assist the Central Authority of Australia following false and incorrect complaints that had allegedly been brought by the Plaintiff against the defendant, even withdrew any proceedings that were were filed against the defendant where a Warrant of Prohibitory Injunction restraining a person from taking a minor outside Malta number 50/2020 which had been filed against the applicant, was even withdrawn

whereas when the defendant subsequently presented a similar Warrant against the plaintiff, this was acceded to in a definitive manner.

- e) Likewise is the third claim submitted by the plaintiff equally unfounded as the defendant had no intention of taking the children of the parties from Malta to another country!

- f) In any case, but always without prejudice to the above, it will also transpire that it is in the best interests of the children of the parties that they continue to live and be raised in Malta with the defendant not only because he is the most suitable parent considering that it was the plaintiff herself who left them with him, while the same children are happy with him and are not deprived of anything despite his financial limitations, but also taking into account that the return to Australia with the plaintiff alone, as she claims should be done, can never be in the best interests of the same children for all the reasons that will be shown during the course of these proceedings, including but not limited to the difficulties which the parties were facing when they were still in Australia and which led them to actually decide to emigrate to Malta. Thus in the worst case, what is provided by article 13 (b) of the first schedule of Chapter 410 and the subsequent paragraphs shall be considered to be also applicable in favor of the defendant with the consequence that the plaintiff's claims are also to be rejected for such a reason, with reservation to any other legal aspect which may be applicable in the remainder of the same Chapter 410 and the relative Convention also taking into consideration that the children have also adapted to life in Malta, and that in any case, it should be concluded that it is in their best interests to keep living in Malta.

Therefore in view of all the above and all that may transpire during the course of these proceedings, the defendant humbly requests that this Honorable Court reject all the claims submitted by the plaintiff both for the procedural reasons given on a preliminary basis and in view of the fact that in any case and with reference to the first request, no unlawful retention or removal has taken place in terms of Chapter 410 and the Convention on Civil Aspects in the International Child Abduction and consequently there should be no decision as requested by the plaintiff in the third request made by her or any statement or decision ordering the same minor children of the parties to be returned to the Australia in accordance with the second and/or fourth request submitted by her also because afterall, this would not be in the childrens' interest.

With expenses, for these proceedings and any other connected proceedings against the plaintiff who is from now being summoned with reference to oath.

Having seen all acts and documents exhibited.

FACTS

1, The parties were married on the 24th February, 2013 in Melbourne, Australia, from which marriage, they had two children LC and AJ. The children were born in Australia, hold Australian citizenship and they also received their education there. Plaintiff adds that in 2017, Defendant had accrued a number of debts and since they could not afford to pay the rent any longer, they moved in with her parents for a time in Melbourne and then once again with her mother, once her parents separated.

To be able to maintain the family, Plaintiff states that she had found a job as a paralegal within the legal team at Enrizen Financial Group PTY Ltd. Defendant did not have any academic qualifications nor was he skilfully trained, so he was employed by Plaintiff's aunt and uncle with their company CC Royal Pty Ltd as a service technician. Plaintiff returned to work in 2018.

However, since Plaintiff had long hours at work, Defendant was not pleased and finally she had to give up her job and she moved with another company PK Simpson & Co always as a paralegal. It was at this point that Defendant started putting pressure on her to move to Malta and started creating problems with her family, so much so that there was a period when she did not talk to her mother and also her grandparents. He was insisting that they would be better off as a family. Meanwhile, Defendant was brainwashing both Plaintiff and her mother to make her seem to be the culprit of all their problems.

Around February, 2018, Defendant informed her that there was an apartment for rent above his mother's in Luqa and that if they move to Malta their relationship would be better off and it would be in the best interest of the family. She denies that they had financial problems since at the time she had an increase in her pay and they only had one child in day care, for which fees, they received a rebate from the government.

As to the other reason that Defendant mentioned why they left, namely that they had no family support, this is rejected by Plaintiff since she argues that the children are theirs and they didn't have to depend on any one to raise them.

Plaintiff states that her grandmother had confronted Defendant to see whether he was prepared to let her and the children return to Australia, if they could not settle down in Malta and he had told her that he was prepared to accept their decision to return to Malta. Infact, Plaintiff adds that she accepted to come to Malta only on a trial basis, in that if things did not work out she would return to Australia. To this effect, infact she had kept her bank account and her contact number in Australia and they had also agreed to put aside 10, 000 Australian dollars to be used in case they decided to return to Australia. She also confirms that she had applied for a Maltese citizenship.

They did bring a container of things mostly white goods and personal effects. They also sold the car and all this for the reason that they did not know for how long they were going to be in Malta. She also mentioned that Defendant used to spend excessively on unnecessary things. They had a debt on the car and it was part of their debts.

There was a time when they were reconsidering their decision to come to Malta, since her boss offered her a pay rise by 20, 000 Australian dollars and they had inquired about cancelling their flights.¹ Defendant himself had contacted the airline to see what the chances were to add a return ticket to their booking, but ultimately they did not get it as it was cheaper to book it separately.

She then made an arrangement with him that he would keep the job for six months.

¹ Dok. H.

For their move to happen, Plaintiff confirms that she was the one who forked out most of the funds. They left for Malta on the 30th August, 2019. The minute they set foot on the plane, Plaintiff explains that Defendant changed completely. He became verbally abusive and he was rude and nasty. By making use of his Ipad she realised that he was messaging a woman, confirming that they were on their way to Malta and there was no turning back.² In cross-examination, she admits that Defendant was accusing her of an extra-marital affair with a colleague. She explains that she had to work very closely with this colleague because she was helping him manage his practice and as a result he openly told her that he had feelings for her and he made advances on her, something which she never hid from Defendant and she used to show him all the messages. However, at a point he didn't believe any longer that there was no affair going on and she denied it completely.

On being cross-examined she explains that when she spoke to her friend SD and wrote that she did not believe that Defendant was being unfaithful. She states that this was due to her state of mind, because Defendant was always inconsistent, one minute begging her to save the marriage, and the minute later, mentally abusing her.

After four days in Malta, Plaintiff felt betrayed and that Defendant had brought her to Malta under false pretences. He used to be out all day and never informed her where he was. The apartment was in a bad state and she feared for her children's safety. It was at this point that on the 4th September, 2019, she informed him that she wanted to return to Australia, but he objected stating that they were now in Malta.³ He was

² Dok. I

³ Dok. J.

prepared to extend the 6-month trial period to 12 months and he insisted that they continue with their sexual relations for a whole 12 months to avoid him being unfaithful and maybe he would reconsider moving back to Australia. Defendant told her that he would only accept returning to Australia if she accepted these conditions. Plaintiff denies telling him that she was ready to leave him so as to move back to Australia and it was subsequent to that that he sent her a legal letter.

She denies not giving a helping hand with the chores to arrange their apartment as it was not in a good state. She also states that they had also discussed that irrespective of whether they decided to stay in Malta, they would keep and maintain their apartment.

On the 5th September, 2019 they were messaging, wherein Defendant told her that he was considering leaving to Australia, if she was unhappy, only to receive a separation letter on the 19th September, 2019.⁴ He explained to her that if she was not going to accept his terms and conditions he was going to seek for the full care and custody of the children.

Until they were in Australia, she explains that they did not have any particular problems in their marriage, but when they came to Malta, Defendant became verbally and sexually abusive. He also became violent at times and when she reported to the police, they advised her to stay home and try and save money to return to Australia. However, when the abuse became too much she left the apartment, but she remained in Malta to fight for her children. She did not move out immediately because she did not have money or a job and besides she did not have an identity card.

⁴ Dok. L and M

From that moment, Defendant made her life a misery, he even locked her out of the house and she got access through the intervention of her mother-in-law. Their life continued to be a misery. She states that she was suicidal and depressed and there were days that she could not get out of bed. She realised that he had taken possession of their passports. She had to seek help from the Australian Embassy in Malta and her mother was in contact with the Australian Government to see how they could assist her. It was at this point that she was made aware that she fit the criteria to file proceedings under the 1980 Hague Convention here in Malta and she started to work on her case, through the help of a lawyer BH.

In February, 2020 she proceeded to draft an affidavit that would be presented to the Australian Central Authority for their consideration, Her application was accepted, but when the Maltese Central Authority sent for Defendant he rejected this request.

They started to meet through their respective lawyers, wherein it transpired that Defendant had been planning to come to Malta and he had been collecting evidence before coming to Malta.

After making her life very difficult, where she had no privacy in their own apartment, he removed all the doors and took photos and also video recordings of her. Defendant gave her 500 euros and her passport and she left as she was unable to take the children with her and this was beyond her control.

It took time for her to recover from the stress. On the 11th November 2019, she secured a job with Kane LPI Solutions in Zebbug as a clerk.

Plaintiff also claims that her reason for asking for the children to be returned to Australia had to do with the fact that the children didn't get

on well with their paternal grandmother.⁵ She is prepared to take them to Australia and support them as she has always done.

2. Defendant explained that the main reasons why they decided to come to Malta was a financial one, as well as problems with Plaintiff's family. This was creating a lot of stress in their marriage and most of the time their life was a day from work to home.

The financial problems were related mainly to a car which cost around 31,000 dollars as well as 19,000 dollars which was a personal loan. The problem was also that his mother-in-law promised to move in with them and help them out with the children, but then she decided not to, so they had to send them to childcare and that set them back around 400 dollars a month. Coming to Malta meant that they would have free childcare so it was another reason to come.

He confirms that Plaintiff had already been twice to Malta, so she was quite familiar with it. She liked it at the time. She was prepared to come and she was interested in reading law at the University of Malta.

The plan was to apply for a citizen application for Plaintiff so that she would then qualify for free entrance to University.

Defendant states that he cannot understand what Plaintiff meant when she said that they had come to Malta only on a trial basis. He tried very hard to fix up the house where they were living, however, he states that Plaintiff did not help out.

Defendant confirmed that he had sent an email to the travel company in Australia to inquire about return tickets and also to move the ticket

⁵ Dok. U annexed to Plaintiff's affidavit.

further, since they still did not have enough money to move to Malta. However, since the children were meant to start school in September, they decided to come to Malta anyway. He was not in a position to confirm whether and why Plaintiff sent five emails on the 31st May, 2019 inquiring about return tickets.

He confirms that he was carrying the passports and the money they brought with them approximately 10,000 Euros was in a bag. He states that Plaintiff had access to the money and also for a while to the passports as these were in a pink file, but when she started to tell him she wanted to return to Australia he was scared and he had hid the passports, however he believes that she could have found them as they were always around the house and there was not much where to hide them since they did not have much furniture.

He denies however that when they came to Malta there was the possibility of returning to Australia, otherwise he wouldn't have got Plaintiff the citizenship as well as bringing over a whole container with their belongings. They had also applied together for the children's school on the 6th September, 2019. Moreover, since he had declared himself to be bankrupt in Australia as he had around sixty thousands AUD debts mainly with the Bank, it was very difficult for him to return there and also between him and Plaintiff things were not right, so it was pointless to return to Australia. If he had spent three years in Australia they would have forgiven him the debt but he was only there for a year and a half.

Regarding the messages between himself and YA he said that she was a very good friend of his and he was telling her that he was no longer with Plaintiff and that he did not love her any longer. She was an old friend of his. In cross-examination he said that when he came to Malta

he did not have plans to separate. They had their problems and they came to Malta to sort them out without the interference of Plaintiff's family who were always causing trouble between them. He also caught Plaintiff chatting with her colleague, who had admitted to her that he was in love with her. So, he sent her a letter warning her to stop acting in the way she was so that they could live a happy life.

He rejects that they came here on trial.

He also denies ever being physically violent with her. When Plaintiff decided to leave she asked him for money that they had brought with them. He also tried to convince her not to leave. Throughout the time that she left, she admitted to only be able to take the children once a week.

He claims that someone signed the abduction papers on behalf of Plaintiff and moreover they had issued a warrant of prohibitory injunction to prevent him from taking the children abroad, but then it was withdrawn.

Presently he admits that he is in good relations with Plaintiff and she visits the children who want to stay in Malta. They are happy, he has help from his family and he also earns and saves money, so there is absolutely no reason to go to Australia.

As to his income, Defendant explained that he works part time for 20 hours a week, and he earns approximately 333 Euros a month. He also earns a subsidy for the rent in the amount of 250 euros from the Government. When Plaintiff left she had given him half the amount they had saved from the larger sum of 9000 euros.⁶

2. Dr. Lynn Faure' explained that the Malta Central Authority was informed of the child abduction proceedings on the 9th April, 2020. She also confirmed that the Malta Central Authority did not continue the procedures and this was because it was advised by the State Advocate that the application should be dismissed on the grounds of Article 5 of Chapter 410 of the Laws of Malta since the mother was in Malta. Moreover, she admits that they did not proceed in Malta because there was the risk of the case being dismissed under Article 5 and as a result her rights to proceed under different jurisdictions would have been prejudiced, such as opening proceedings in Australia.

3SP managing solicitor of PK Simpson and Company, a law firm based in Sydney, Australia, confirmed that Plaintiff worked with him as his assistant and secretary. In August, 2019 she had informed him that she was attempting a trial relocation to Malta with her family. She had also spoken to him about her marital issues and that she was apprehensive about going to Malta, but was doing so in an attempt to save her family. She had also informed him that the trial period was of six months and if she and her daughters were not happy, they would return to Australia and that was all done in agreement with her husband.

She had explained all this to him because she wanted to secure her job in case she returned. He was happy to reemploy her as long as her position was still available if she decided to return.

5. NR, Plaintiff's cousin confirmed that Plaintiff was apprehensive to leave Australia and so Defendant had spoken to her and the family about their intentions so as to help out in reassuring Plaintiff.

6. SD an ex colleague of Plaintiff at Enrizen Financial Group. Around March, 2019 Plaintiff had informed her that they would be relocating to Malta because Defendant was having financial trouble in Australia and he made her believe that if they move to Malta they would have an easier life. As a friend, she felt that she had to warn Plaintiff of the dangers she could encounter by leaving, such as losing her job as she was very good at it.

Plaintiff also informed her that they were going for a trial of around six months. This was also confirmed by Defendant in her presence when she happened to be at their house.

In August 2019, she had received a phone call from Defendant because he could not trace Plaintiff and he discussed with her the move saying they were trying it out with the hope of saving their marriage and their financial troubles, failing which they would return back.

Once they moved to Malta, she confirms that she received several phone calls from Plaintiff and only after a couple of weeks, she informed her that Defendant had kicked her out and he kept their daughters. He also took her passport and that of the children and did not give her money. It was obvious that Defendant did not want to go back to Australia.

7. SS Plaintiff's aunt confirms that they had employed Defendant for a while and they used to discuss their move to Malta. He was convinced that they would have opportunities here in Malta and that he had surpassed his time in Australia and it was time to go to "his land."

She explained that she had warned him to be careful for Plaintiff's move would be difficult as she would not have relatives, but from what he discussed with her and having spoken to Plaintiff she understood that they

would try to settle within a year, but if they were unhappy Plaintiff and children would be free to return.

8. CS, Plaintiff's grandparent confirmed that the parties had discussed their move to Malta with her and that if they did not like Malta, the plan was for them to return to Australia.

9. JC Plaintiff's mother was not in good relations with the parties when they moved to Malta and she was concerned about this move because she felt that Defendant was very manipulative and she felt that their marriage was not the best. She explains that she had left parties in Sydney because she had had a rift with them. She could not recall sending a message to Defendant to inform him that Plaintiff had punched him. She confirms that she had left for various reasons, but in no way would she have tried to put them in financial difficulty. She also confirmed that they were not on speaking terms when the parties came to Malta.

Plaintiff's mother confirms that she was a good mother and she was very protective of her children.

She confirms that on the 8th September, 2019, she received a video call from Defendant, wherein he informed her that he was leaving Plaintiff, he was keeping the children and this was his plan all along, that is never to return to Australia, but then she also states that Defendant used to say that they would always go to Malta on a trial basis. He warned her that she would no longer see her grandchildren in Australia. She also confirmed that Defendant was a spend thrift and spent money excessively on unnecessary things.

Since she was not on speaking terms with the parties before they left Malta, but she was contacted by Defendant on the 8th September to inform her of their problems. Defendant also told her that he thought she was speaking intimately to a certain Mark. It was then that she contacted her daughter, who by time opened up and admitted that her life in Malta was very hard as Defendant was verbally and physically abusive. She decided to help her and she sought help from the Australian Department of Foreign Affairs and Trade.

She also confirmed that she has built a new house, with an added flat for Plaintiff to live together with her children and she would in such a case be able to give her a helping hand.

10.RF a family friend confirms that the parties were in contact with him when they were planning to come to Malta. He admits to spending a lot of time chatting with Plaintiff and she was asking him about schools and the University because she wanted to further her studies. So, from this he concluded that their plans to come to Malta were long term.

They used to meet regularly when the parties came to Malta.

He confirms that the place they were going to reside in was not in a good condition, but today it has been done up and Defendant lives there with the children.

He also states that Plaintiff had tried to contact him when she left, but he was in Spain, then she blocked him from all social media, so he concluded that she was not interested in retaining contact with him.

Before coming to Malta, Plaintiff was seeking reassurance from him and he used to chat with her a great deal. He confirmed that she did have doubts about coming to Malta, like anyone else, but he told her that their priority

should first be to settle the children. She was worried that she could get depressed and he told her that she just had to take it easy. She also told him that she was coming to Malta because she did not have any help from her family and she was not on speaking terms with them.

On the 30th September, 2019, when he was in contact with Defendant he knew that he was trying his utmost to make things work out and if he could he wanted to solve things.

When they were going to separate, he had recommended that they keep the children out of their issues.

11.AC, headmaster St.Ignatius College, Luqa Primary, explained that the minor children of the parties L and A were described by their teachers to be lovely characters, polite and caring and they were well taken care of. They also did well academically. Their attendance is also very regular.

With regards the application to attend the school he confirmed that both parents would have signed it, otherwise, the office of the College Principle would not have accepted the application. There were issues after the first lockdown, because the parents were given the option to either send the children to school or to keep them at home due to the pandemic. Defendant had opted to keep them at home, but they required Plaintiff's signature, which never came. Then, on the 30th January, 2021, both parents signed so that the children could return to school. From the 1st February, 2021, the children attended school regularly.

He also confirms that when it came to school related issues, the contact person was always their father. There was one occasion when Plaintiff

contacted him and this was with regards the decision to keep the children at home during the pandemic, to see whether they were attending. Between October and December, 2020 the children did not attend school.

CONSIDERATIONS

Having considered

Plaintiff has filed this case claiming that the retention of the minor child LS and AS by Defendant here in Malta is wrongful and illegal in terms of Article 3 of the Convention on Civil Aspects in the International Abduction of Minors as promulgated by Chapter 401 of the Laws of Malta. For the aforementioned reasons she is asking this Court to order the return of the said minors from their wrongful retention or removal committed by Defendant.

In defence to this claim, apart from pleas on the merits of the case, Defendant raises a number of preliminary pleas upon which he requests the Court to reject Plaintiff's claims, foremost amongst which that the procedure brought forward by Plaintiff can never be considered applicable to the present case, given that there has been no international abduction (removal or retention) from one country to another in terms of the Convention and Chapter 410 of the Laws of Malta.

First Plea

Defendant pleads that the Plaintiff has actually not exercised her request, in terms of the requirements imposed by law she refers to herself and that as a consequence these proceedings are procedurally flawed and cannot even be entertained.

He basis this plea on Article 15 of the First Schedule of Chapter 410 of the Laws of Malta which states as follows:-

“The judicial or administrative authorities of a contracting state may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State.”

Defendant goes on to state that once no decision was obtained from the Maltese Central Authority, prior to the commencement of these proceedings, since Malta, according to him is the state of the habitual residence of the minors since they relocated to Malta, this case had to be rejected.

From the evidence collected it results that the Malta Central Authority went on to withdraw the warrant of prohibitory injunction that had initially been filed against Defendant and this when it realised that the children had been brought to Malta by mutual agreement and that the application was filed by Plaintiff who was not living abroad.

Likewise Dr. Lynn Faure’ also confirmed that when she had sought advice from the State Advocate, she was given advice that the application for wrongful removal or retention would have to be dismissed on the grounds that Article 5 requires that the application is submitted by a person outside Malta and this advice was still retained, even when Plaintiff went to Sicily for the purposes of being outside Malta to satisfy the requirements the law contemplated.

Defendant also insists that even if the Court had to consider that the habitual residence of the minors was considered to be Australia, nonetheless there was no decision or determination made from the

Australian authorities nor was any such document confirming such decision or determination presented to Court.

The Court examined once again the interpretation of Article 15 of the First Schedule and considers that this request is discretionary and not mandatory and considering that this Court did not request any decision or determination, the Court cannot uphold Defendant's plea that the proceedings instituted by Plaintiff are procedurally null and void.

Second Plea

Defendant also pleads that he has not committed any wrongful removal or retention of the minor children in terms of Chapter 410 of the Laws of Malta, as the evidence brought forward proves. Thus the procedure adopted by Plaintiff is not tenable for there exists no abduction in terms of the Convention of Civil Aspects in the International Abduction of minors, once the said retention is not wrongful.

Consequently, in the instant case, therefore as in any other case to which articles 3 and 12 are said to apply, the Court is not determining the merits of residence or contact issues as between the parties. Nor is the Court at this point deciding where or with whom the children should live. The Court has firstly to decide whether or not the Convention applies and secondly, if it does whether or not the children should be promptly returned to Australia in order for the courts of that country to decide with whom they should reside and where. In other words, the Court has to first to determine whether the said retention by Defendant was "wrongful" or not.

Plaintiff filed for abduction proceedings, once Defendant asked for a separation and insisted that he was going to seek to acquire the care and custody of the children, having every intention to remain in Malta.

The parties had come to Malta by mutual agreement, with the intention of relocating here. The plans had long been in the pipe line, mainly because Defendant had financial problems and declared himself bankrupt in Australia. They also had problems with Plaintiff's family and they had no help from them with the children, ending up having to pay for the childcare, which added to their financial problems.

Plaintiff insists that they came to Malta only on a trial basis and if she and her children did not settle or remained unhappy within a period of six months, they would go back to Australia. In this respect, there are conflicting views as to whether in actual fact they came on a trial period or not. For Plaintiff it was six-months, for SS, Plaintiff's aunt it was for a period of one year. For Redeemer Fenech, the parties common friend it was a long-term stay.

From the evidence produced, it results that the parties had found an apartment that they rented for a ten-year period. They had also registered the children at a school. This was confirmed by the headmaster himself, who confirms that they would not have accepted the children at the school if there was not the consent of both parents. Redeemer Fenech too explained that prior to the parties relocating to Malta, he was in contact with Plaintiff and she asked him to inquire about the law course at the University of Malta as she was interested to read law once here and above all he confirmed that Plaintiff was very excited to come to live in Malta and if she could she would have come as soon as possible. She also admitted to him, that at the time they were relocating to Malta she was not on speaking terms with her mother.

Quite sometime before coming to Malta, Plaintiff had also acquired her Maltese citizenship.

Defendant also produced evidence to show that he had done everything in his capacity to renovate the apartment they had rented, since it was in a bad state.⁷

Plaintiff insists that when she came to Malta, Defendant's attitude changed in her regard, he became abusive and insulted her regularly and she was convinced that this was all part of a plan to bring her to Malta, only to leave her soon after and take the kids away from her, by retaining them here in Malta. She even accuses him of having been in contact with a friend of his EA even before they landed in Malta.

On the other hand, Defendant states that once they came to Malta, Plaintiff did not make any simple effort to try and make their marriage work out. From the evidence produced, Defendant admits to one of his friends, whom he was communicating with it before coming to Malta, that he and Plaintiff had broken up, but nonetheless, she was still coming to Malta, to try and start a life here. Although, Defendant states this, he was still willing to try and make his marriage work and he actually begged Plaintiff to make an effort to try.

After only being in Malta for around six days, Plaintiff told Defendant that she wanted to leave. He was convinced that she was still in love with her colleague Mark, with whom she was in contact with regularly, because she felt he calmed her down. She did not deny telling Defendant that she did not love him any longer, although she admits that things were also said on the spur of the moment.

It was then that Defendant decided to send her a legal letter on the 19th September, 2019, asking her to give their marriage another chance, but if she was not prepared to save it, then he had no alternative but to proceed

⁷ Pendrive a fol. 868

with a separation and he would insist to be granted the care and custody of the children.

Plaintiff remained living with Defendant for a time, as she did not have any work and could not afford to rent a place. Meanwhile, Defendant kept on insisting that they try once again to make things work out, but she was not interested.

As soon as she found a place, she asked Defendant to give her back her passport and some money and she moved out. She left the children with Defendant, mainly because she did not have the finances to maintain them, but she was prepared to proceed with the divorce and custody schedule. Through the messages exchanged between the parties, Defendant made it very clear that Plaintiff was free to contact him any time to see the children.

At the time effectively, both parties were exercising care and custody over the children and when they decided to come to Malta, they came through mutual agreement and despite their marital problems, the aim was to start afresh and to try to make things work out between them.

Plaintiff attempts to build her abduction case stating that Defendant took a unilateral decision when he decided that he was going to ask for the care and custody of the children. She argues that they came here on a trial basis and therefore, if she was unhappy and wanted to leave, she could leave with the children.

Nonetheless, evidence goes to show, that their relocation to Malta was for an indefinite period and if Plaintiff had an after thought once she arrived here to Malta and felt this was not the place for her, she cannot expect, on the other hand, Defendant to pack everything and return to Australia, within a week from coming over to Malta, having got most of their belongings here, moreover when he made it clear that it was risky for him

to return to Australia because he had declared bankruptcy there, even more so when she made it clear she had no intention of saving their marriage.

Moreover, it results that apart from it being her decision to leave the children with Defendant because she felt she needed some space and time to be alone, she also had them at her on a weekly basis, including sleep overs for a number of months before she filed the present proceedings. Thus, she was not even impeded from seeing her children.

Article 3 of the 1980 Hague Convention spells out when a removal or a retention of a minor is deemed unlawful. It provides:-

“The removal or the retention of a child is to be considered wrongful where:-

- a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
- b) At the time of the removal those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

As previously mentioned, under the Hague Convention one “**wrongfully remove**” a child if one takes the child away from his or her habitual residence. Moreover, a wrongful removal or retention of children occurs when, through the removal or retention, rights of custody are violated.

The notion of custody rights is provided in Article 2, section 9 of the Regulation, as including the rights and duties relating to the care and support of the person of the child, as well as the right to determine the child's habitual residence. Finally, regarding the acquisition of rights of custody, according to Article 2, section 11, it is the law of the Member State where the child had his habitual residence before the abduction, which determines the conditions under which the acquisition of the rights of custody of the child by the parent or parents is done.

Wrongful removal or retention

In the decision of the House of Lords in *In re H. (Minors) (Abduction: Custody Rights)* {1991} 2 A.C. 476 it was made clear that *“to establish that a child has been wrongfully retained within article 3, the complaining parent must prove an event occurring on the specific occasion which constitutes the act of wrongful retention. Wrongful retention under the Convention is not a continuing state of affairs. Thus in the instant case the father must point out to a specific event at a specific point in time which constitutes the act of wrongful retention. Wrongful retention must in every case be an issue of fact.”*

Plaintiff is insisting that they came here for a trial period for up to six months, where if she and her children were not happy, they would return to Australia. As this Court has already reiterated there are conflicting interpretations as to whether the parties came here mindset to stay her indefinitely, or whether the plan was to return after a short period of time. In any case, the Court finds it hard to believe that the family came to Malta for a short trial period, especially since they shipped all their belongings here, as was clearly evidenced by the photographs exhibited by plaintiff herself. It appears more credible that the decision was to relocate to Malta permanently.

The fact is that within a week or so from their arrival to Malta, Plaintiff wanted to leave because she felt that Defendant was not the same person and he was abusive. There is an issue between the parties as to precisely what the agreement between them was. For reasons already aforementioned, the Court does not think it necessary to express a concluded view on the precise terms of the agreement. It is sufficient for the present purposes to conclude that the agreement was to move here long-term and not for a short period, considering all the preparations that they made, schools, searching for a place to rent, transferring all their belongings here, citizenship as well as inquiring into university applications and moreover, not even booking flights with a return, though this was looked into for a while, when they reconsidered their move since Plaintiff was offered a better job opportunity.

Under Chapter 410, the Maltese law necessitates that the wrongful removal or retention takes place by the movement of the child from one contracting state, being the habitual residence of the child, to another contracting state, without the consent of the other parent.

When Plaintiff expressed her wish to be alone, she found herself slammed with a legal letter sent on behalf of Defendant asking for a chance to reconciliation, failing which he would proceed with a separation and insist to take the care and custody of the children. Plaintiff not having the finances and not even the children's passports, had no choice and when she felt she could not tolerate the circumstances any longer she decided to move out as she needed some time to be alone, agreeing that the children would remain living with Defendant, whilst she rented an apartment here in Malta. They also agreed that Plaintiff would have access to the said minors.

Is therefore, the Defendant's decision to keep the children with him here in Malta, in breach of Plaintiff's rights, given that she agreed to relocate to Malta for an indefinite period, but had always expressed her wish to return to Australia if things did not work out, obviously not so imminent on their arrival?

Plaintiff's case would argue that she was here on a trial basis and she realised she was going to be unhappy, so she wanted to leave, within a couple of weeks from their relocation. Moreover, she believes that Defendant planned to convince her to come here and to leave her once in Malta. Defendant took a unilateral decision when he send the legal letter, asking for a separation as the last resort, with his intentions to fight for the care and custody of the children.

The reality of the situation is that when the parties decided to relocate to Malta, this was done by mutual agreement. The mere fact that the relationship between the parents has come to an end, not surprising, since even before coming to Malta, there were underlying problems, cannot entitle one parent to unilaterally overturn that that had been agreed upon.

Plaintiff accepted, as of course, she had to, that the removal of the children from Australia to Malta was not in breach of her rights and that she consented to it. Indeed, she submitted that she was in effect, exercising her rights by bringing the children to Malta together with Defendant.

The Court's question at this point is does the fact that the Defendant has stated his intention to seek remedies to acquire full care and custody of the children mean that he was committing a wrongful retention or removal? When he communicated his intentions to the Plaintiff, it was as a result of his contemplating a separation, due to Plaintiff's attitude towards him and their marriage. If he had intentions to attain the childrens' care and custody,

he was expressing his intentions and in no way was he taking a unilateral decision that in any case could have never amounted to a wrongful removal or retention since both parties had come to Malta in total agreement. Defendant had not removed the children from Australia without Plaintiff's consent, nor had he decided to retain them in Malta once Plaintiff had moved overseas, since she remained in Malta and actually consented to the children residing with Defendant, since she did not have the finances to look after them and she was unemployed, having rights of access as she definitely was not going to give up on her children.

It is also true, that Plaintiff did not have the passports of the children at hand and as Defendant claimed he had to resort to hiding them because he feared that Plaintiff would abduct them.

In reality, the Plaintiff's case is legally unfounded in that once Defendant sent her the legal letter, he did so because of the situation that arose after the parties came to Malta, when he was shocked at Plaintiff's negative attitude when it was meant to be a fresh start for both of them.

Although Plaintiff insists that Defendant brought her to Malta with preconceived intentions to leave her and to keep the children, this is not the truth according to the Court as the recordings exhibited before this Court is that Defendant was feeling unhappy with Plaintiff's attitude and actions when they relocated to Malta.

The sending of the legal letter was a warning to Plaintiff to try to change her attitude and work towards saving the marriage, otherwise there would be consequences. In no way was Defendant changing the terms of the understanding the parties had before coming to Malta.

Under Chapter 410, the Maltese law necessitates that the wrongful removal or retention takes place by the movement of the child from one contracting

state, being the habitual residence of the child, to another contracting state, without the consent of the other parent.

So, essentially, Defendant was simply warning Plaintiff of his intentions, to which temporarily she agreed to since the circumstances did not permit otherwise. She agreed to let the children live with Defendant pending the outcome of proceedings and she also agreed to her access rights considering that she felt she needed to move out and be alone for a while. These facts *per se* do not reflect any wrongful retention or removal because all decisions were taken in agreement, with them both present in Malta.

Her course of action should not have been abduction proceedings, but to defend her separation case, on the basis that relocation to Australia would be in the best interests of her children and hence attempt to win the care and custody of the children.

Evidence has proved that the parties were never in disagreement as to this arrangement, so much so that Defendant gave Plaintiff flexibility in seeing the children.

Up to this point there can be no mention of any wrongful removal or retention, but it is simply an arrangement that took place between a couple, whose marriage was being torn apart, to be later followed by mediation proceedings, to regularise their positions.

Today, undoubtedly the children's habitual residence is Malta, where the children have settled down, attend school regularly and are doing well. The eldest also speaks the Maltese language and moreover, the Plaintiff is still residing in Malta, ironically, she moved in with the Defendant and the children for a while, since she had problems with her tenants. It would neither be ambitious to state that even Plaintiff seems to have set up her

habitual residence here in Malta. Therefore, reference to any abduction is a far call!

Thus, in consideration of all the above, for the Court there exists no removal or retention, but a simple arrangement between the parties before resorting to mediation and separation proceedings.

Therefore, Plaintiff has failed to prove her case on the basis of Article 3 of the First Schedule of Chapter 410 of the Laws of Malta.

DECIDE:

Having considered all the above, upholds the Defendant's second plea, whilst it rejects all Plaintiff's claims.

Given the particular circumstances of this case, all costs are to be shared equally between the parties.

Hon. Mr. Justice Anthony J. Vella

Registrar

