



QORTI TA' L-APPELL

**S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO**

**ONOR. IMHALLEF
ALBERT J. MAGRI**

**ONOR. IMHALLEF
TONIO MALLIA**

Seduta tad-9 ta' Gunju, 2009

Appell Civili Numru. 90/2008/1

Alexandra Mifsud in her own name and as curator *ad litem* of her minor son Lucas Mifsud

v.

**Sigrid Baron by Court decree of the 27th March, 2008
was confirmed deputy curator to represent the absent
Klaus Zinser**

The Court:

Preliminary

1. Having seen the application filed by Alexandra Mifsud on the 10th December 2008 (fol. 10 of the record of proceedings) which reads as follows:

“That this year she was accepted and awarded a scholarship to study for full time Ph.D. in Education for Sustainable Development at the London Southbank University (DOK A).

“That this opportunity means that she will have to leave and take up residence at the end of the present school term this year in order to be able to settle down before the beginning of the January term.

“That she has been in correspondence with her Professor and if she does not take up her study post with immediate effect she will forfeit her scholarship with drastic and prejudicial consequences for her.

“That it is a condition of her current working contract with the University that she obtains a Doctorate as is sustained [recte: as can be confirmed] by the documentation hereto attached signed by the Dean of the Faculty of Education. Furthermore, without the acquisition of her Ph.D., the department she works in is unable to offer postgraduate courses in her field of expertise;

“That this opportunity would not only be to her advantage but to that of her family namely Lucas and Andreas who would benefit from salary increases and better conditions on her return. She would be studying from home and would be in a position to care for Lucas and give him her attention.

“That her contract with the University of Malta would dictate her return to Malta to reprise [recte: resume] her work with the University on completion of her Doctorate.

“That she would return to Malta during vacations including Summer and Christmas and other periods, the latter finances permitting since she intends to maintain and

strengthen her children's roots in their country of birth, that is, Malta.

"That in view of this development she requests authorisation to travel to the United Kingdom with Lucas for the purpose of pursuing her doctoral studies in third week of December although applicant will have to confirm dates and flights.

"That she will visit Malta during Summer vacations and Christmas vacations for respondent to have access as this Honorable Court may order.

"That she can also oblige herself to allow access in the United Kingdom as agreed between the parties.

"That she can furnish this Honorable Court with details of her residence in the United Kingdom and contact numbers prior to travel.

"That under these circumstances, applicant requests that this Honorable Court would:

"1. Authorise her to travel with her minor son Lucas Mifsud to the United Kingdom and reside with her for the duration of her doctorate studies at the London South Bank University as aforementioned;

"2. Authorise her to apply for and obtain a passport for Lucas Mifsud, which passport shall be open for travel;

"3. Regulate access during the forthcoming Summer period and Christmas of the year 2009 having regard to the extent of vacation allowed her and subject to advance notice to respondent;

"4. Subject to all such terms and conditions as would be necessary in the best interests of the child."

2. Having seen the reply filed by respondent on the 19th December 2008 (fol. 15) which reads as follows:

“That ‘Doc. A’ attached to application of Alexandra Mifsud in no way shows that she was awarded a scholarship to study for full-time Ph.D in Education for Sustainable Development at the London South Bank University. Indeed, from enquiries made by respondent, it results that Alexandra Mifsud **applied and was refused a scholarship to study for full-time Ph.D** from the University of Malta and nor was she given any scholarship from the London Southbank University.

“Therefore, the allegation that “if she does not take up her study post with immediate effect she will forfeit her scholarship with drastic and prejudicial consequences for her” is factually untrue in that it does not correspond to reality.

“That the only scholarship that Alexandra Mifsud had been given was that of being a part-time distance learning student (which programme was commenced on April 2007) while remaining a full-time lecturer at her post in Malta. This is also brought out from her own application that “she would be studying from home and would be in a position to care for Lucas and give him her attention.” It is also interesting to note that respondent was also informed that Alexandra Mifsud did not even apply to leave her full-time lecturing post in Malta.

“That respondent is also informed that Alexandra Mifsud can achieve her Ph.D both from her present situation as at now, i.e. part-time distance learning student, as well as if she were to go to London to further her studies and respondent was also informed that the speed at which both part-timers and full-timers can achieve the Ph.D depends solely on the students’ input in their studies.

“That respondent was also informed that students can further their studies whether they are part-time or full-time through withdrawing data referable to respective studies and then proceeding to work on it at home and also that Alexandra Mifsud is well advanced in her initial collection

of data (something she did not need to take up residence in London for).

“Respondent wishes to observe that this application was, in his opinion, made by Alexandra Mifsud to attempt once again to thwart the directions of the Court for the father to have proper access to his son and was prepared to uproot her children from their Maltese home simply to achieve her own objective of not making the child Lucas available to his father.

“Therefore, respondent requests that Alexandra Mifsud’s application to authorise her to travel with her minor son Lucas to the United Kingdom be refused as well as her request to obtain a passport for Lucas, which passport shall be open for travel.

“Respondent wishes to observe in this context that even in Malta the Police authorities were not able to discover where Alexandra Mifsud had hidden herself and her son Lucas in order to render futile the specific direction of the Court to show Lucas to his father, how much more would she be able to do so in the United Kingdom!

“That, insofar as the other requests are concerned, in particular paragraph 3, these should therefore be refused at law and ultimately this application of Alexandra Mifsud, being based on an untrue fact, and certainly independently of its veracity or otherwise, the trustworthiness of Alexandra Mifsud having proven to be very negative, be refused.”

The decision of the Court of first instance

3. Having seen the decision of the Family Section of the Civil Court (The Hon. Mr Justice Noel Cuschieri presiding) delivered on the 30th day of April 2009, which decided the issue raised by the said application and by the opposition thereto in the following manner:

“.....this Court is of the opinion that Applicant’s request is justified in fact and at law, and is therefore acceding to her

request to take the minor child Lucas outside these Islands, to the United Kingdom, under the conditions listed hereunder aimed primarily at securing as much as possible the effective exercise of Respondent's contact rights:

"[1] That, prior to her leaving these Islands with the child, the Mother is to present a sworn note in the Registry of this court indicating in detail her full residential contact address in the United Kingdom; and she is also bound to present such note each time she changes her residential contact address when in the UK;

"[2] That the child's passport be restricted to Malta/UK/Malta, and for the period extending from the date of departure till the 30th April 2010; and, that within a week of her arrival in the UK, this passport be deposited in the Registry of the court of the locality or place where she will be residing with the child; and also, that the Mother is not to apply or obtain a foreign passport for the child Lucas;

"[3] That, the Mother will return the child to Malta for good by not later than the 30th April 2010;

"[4] That during her stay abroad, the Mother is hereby bound to make possible and allow personal contact by the father with the child on a monthly basis for ten [10] hours spread over a period of two days. That in view of the conflictual situation between the parents over the child, a social worker, is to be engaged by them, at the expense of both, to assist during the access-visits of the father; the social worker engaged is hereby empowered to exercise her [recte: his/her] professional discretion, within the parameters of this court order, and take on-the-spot decisions, where necessary in the interests of the minor child.

"The Father is to send to the Mother a six monthly schedule of his intended visits; if necessary, the Father is to present this list in the Registry of the UK Courts, to be officially served to the Mother according to UK law.

“[5] That, the Mother is to bring the child to Malta, or send him accompanied, during his scholastic vacations in summer, and in Christmas to spend seven [7] days with the Father during these periods.

“That the Mother is bound to follow scrupulously the above conditions; and prior to leaving these Islands, she is to enter into a bond in the amount of €7,000 that she will observe scrupulously the above conditions; which sum will be forfeited to the Father on a judicial declaration that the Mother has failed to abide by these conditions. Accordingly the Mother is to sign the Schedule ‘A’ hereby attached. This sum is to be forfeited in favor of Defendant with a view to assisting him in meeting judicial expenses which he may incur in endeavoring to secure his rights in a foreign court.

“Furthermore, prior to leaving these Islands, the Mother is to effect a deposit in the Registry of the Court for the amount of €5,400 in guarantee of the payment of the expenses which the Father had had to incur to obtain access in Malta in execution of the orders of this Court. These expenses relate to the fees due to the Social Workers, Court Marshals and Police Officers involved, including the unnecessary expense the Father had to go through in order to see his son in a hotel in Gozo [notwithstanding that this Court had refused two applications made by her requesting that that the March-access be exercised by the Father in Gozo].

“The parties are to bear their own costs relating to these two applications¹, and the present court order.”

4. The reasons given by the first Court for its decision are the following:

¹ The reference here to “two” applications is due to the fact that after the application of the 10th December 2008, Alexandra Mifsud filed another application on 22nd December 2008 requesting that the first application be heard with urgency. The request for urgency was dismissed on the same day, that is on the 22/12/08.

“On the 4th March 2008 the Mother, who resides in Malta, filed a sworn application against the Father requesting care and custody of their son Lucas, as well as the payment of maintenance. The Father, who resides in Germany, filed a counter-claim requesting that custody of the child be joint. The parties are not married. The child was born on the 30th May 2004, and is now over four years old.

“During the course of the mediation proceedings, temporary care and custody of the child was entrusted to the Mother, with visitation rights in Malta in favour of the Father; ten hours access was granted monthly, spread over two specified dates. This modality continued to be adopted during the present proceedings.

“However, the Mother has shown an acute and manifest resistance to complying with the court decree, and, notwithstanding the efforts of this Court to try to arrive at a temporary modus vivendi on this aspect, even by initially allowing her to be present for some time during the access, still she remained intransigent, either by interfering unduly during the access, or by not turning up with the child, and literally going into hiding till after the access-days, when the father left these Islands.

“This persistent behaviour on her part has caused the Father much stress and anxiety, apart from the expense incurred by him on a monthly basis to be present in Malta to exercise his visitation rights. Moreover, it has severely hampered the child from establishing a good relationship with his father who has shown, and is showing, much commitment to his son.

“This is the factual scenario in the context of which this Court has to decide on the plaintiff’s applications.

“In this regard, the Court is of the opinion that sufficient and satisfactory evidence has been brought showing that at present the Mother holds the post of Assistant Lecturer at the University of Malta, and specifically within the Department of Environment Education within the Centre

for Environmental Education & Research. Her appointment dates from the 3rd April 2006, and is for a period of four years, during which period she is obliged to obtain doctoral qualifications relating to her academic post.²

“Also, in a joint declaration signed by them, Doctor Valarie Sollars, Dean of the Faculty of Education, and Doctor Paul Pace, Director of the above centre, confirm that Plaintiff, as an Assistant Lecturer at the Faculty of Education “has been awarded a scholarship which, together with other sources of funding will enable her to pursue her doctoral studies on a full-time basis in the UK. All study-related financial assistance from the University of Malta is being granted to Alexandra Mifsud in order to enable her to meet her contractual obligations as per letter of appointment dated 19th April 2006 In this respect, Ms. Mifsud has successfully undertaken all the preparatory work in relation to her doctoral studies, and has in fact been accepted to pursue her studies at a university in the UK. Ms. Mifsud’s successful completion of her Ph.D studies is of particular importance for the development of the academic programmes offered by the Centre for Environmental Education & Research [CEER] as it will facilitate the realisation of postgraduate courses in environmental education.”³

“In their evidence before this Court, the authors of this joint-declaration, confirmed its contents on oath. Dr.Sollars⁴ also stated further that all Assistant Lecturers in the faculty are expected to continue pursuing their studies towards the attainment of a Ph.D with a view to moving up to a lectureship on its completion, and then later on to a senior lectureship, associate professorship “and so on, so without the completion of the Ph.D study, that upgrading promotion is not possible.” This is beneficial both for the student concerned since promotions entail increase in salary and improvement in work conditions, as well as for the faculty in order to be in

² Dok.VC2 – Letter dated 19th April 2006 signed by the Rector of the University of Malta

³ Doc.VC1 – dated 15th December 2008

⁴ Deposition dated 18th February 2009

a position to “develop power programmes.” Dr.Sollars also confirms that it is easier to pursue these studies abroad, and Assistant Lecturers are “definitely” encouraged by the University to go abroad, by paying for all their tuition fees abroad, and by continuing to give them the full salary even when residing abroad, as well as making available an amount under the Work Resource Fund to help these Assistant Lecturers in their needs whilst abroad.

“The above is applicable to Applicant Mother, and in a letter dated 9th March 2009 sent to her lawyer by the Director of Finance of the University, the latter confirmed that as a result of the scholarship agreement, Ms. Alexandra Mifsud whilst abroad will be entitled, *inter alia*, to receipt of her salary, and to “work resources amounting to €3,261.12 per annum, two return airfares and return train tickets, annually till 2010, and also that her tuition fees will be borne by the University of Malta.”⁵

“Dr. Paul Pace⁶ explained that is a requisite for Assistant Lecturers working in the CEER to obtain a Ph.D in their field of study for the benefit of the development and completion of programmes within the centre. He explains that “as a Director [of the Centre] the longer it takes for Alexandra to finish her Ph.D, basically this is restricting the development of my Centre in the sense that we are being asked to produce Masters programmes in this particular area, and we cannot do it.” Also, Dr. Pace explained that her tutor, Professor Malcom Plant who resides in the UK and who has been supervising her work for the last eight [8] years has expressed his concern that he may have to retire before she completes her studies; and this will lower her chances of obtaining her doctorate in the stipulated time rendering her liable to penalties.

“Having considered further;

⁵ DoI.A1

⁶ Deposition dated 18th February 2009

“[1] That, although the mother’s reluctance to allow the Father contact with his son has been manifest during these proceedings, the evidence of the Dean of the Faculty of Education, and the Director of the CEER from the University of Malta, has thrown more weight in favour of her request. These have confirmed that it is in her interests as Assistant Lecturer to further her doctoral studies abroad, and the University authorities encourage this, offering financial help and accommodating those who wish to complete their Ph.D studies in the UK.

“This evidence given by two high ranking academic officials at the University and who are extraneous to the case at issue, weakens in no small measure the validity of the Father’s submission that this is “yet another of her tricks” on her part to keep the minor child away from him.

“[2] That at present the Mother has the exclusive care and custody of the minor child who has been in her material care since birth; and there should be no doubt that she loves the child a great deal, and takes good care of him. Unfortunately, her strong attachment to her son is the cause of her innate fear of losing him to his father who resides in a different country.

“[3] That as primary carer having care and exclusive custody of the child, the Applicant has, at law, the right to determine the residence of the child [Brussels II Art.2[9]] bearing in mind the interests of the child. In this respect reference is made to English case-law quoted in a judgment of this court in the names *Simona Marchetti pro et noe vs Joseph Ellul Sullivan*⁷, and particularly *Payne vs Payne [2001]* and *Poel vs Poel [1970]* where, after emphasizing that prime consideration was to be given to the welfare of the child, the Court observed that “The way in which the parent who properly has the custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of

⁷ Decided on the 20th June 2007 Cit.436/04NC – this was a case of permanent emigration

the results.” Also in *Nash vs Nash* [1973] Davies LJ observed that “when one parent has been given custody it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody.”

“The above militate in favour of the Mother’s request, even more, considering that the relocation requested is of a temporary nature, and the parents are not married whilst the Father is living abroad, and no obstacle has been proved impeding him from exercising his visitation rights in the UK.

“[4] That the fact that the child, who is in his fifth year, is to be uprooted from his present environment to spend a few years in another country, should not be a “traumatic” experience, since the child understands, and presumably can speak the language with ease, considering that his mother is fluent in the language. Moreover there is no radical difference in culture between the two countries who have long-standing friendly ties, which may support the Father’s submission that the exposure to a different environment may be prejudicial to the child. On the contrary this Court considers such an experience to be beneficial to him.

“[5] That due consideration must be given to the fact that Respondent is not the left-behind-father, since he resides in Germany, and travels to Malta monthly to exercise his visitation rights accorded to him by this Court; and apart from the fact that Lucas will be residing temporarily in a much larger country, this Court sees not obstacle impeding the Father from exercising his visitation rights in the UK, which like Malta is a Member of the European Union.

“Thus basically the issue boils down to the effective exercise of visitation rights by the Father, and more precisely, whether the fact that his son will be temporarily residing in the UK will result in a reduction, or loss, of contact with his son to whom he is very committed and who he loves very much. Therefore, a balance must be

sought between the Mother's right on the one hand, as primary carer having the exclusive care and custody of the child, to relocate temporarily with the child to pursue her studies abroad and further her career; and on the other hand, the rights and interests of the child and those of Father to have as much contact as possible with one another with a view to developing a strong and healthy father-son relationship.

The decision of this Court

5. Both parties filed an appeal⁸ from this decision, the father requesting that this Court disallows the mother from taking the minor child out of its jurisdiction, and in default, requesting the imposition of more stringent guarantees to ensure that the mother observes all terms and conditions imposed by the Court when allowing temporary relocation of the child; the mother, on her part, requested that the terms and conditions imposed by the first Court be modified as she contends that they are too burdensome in her regard.

The father filed a written reply to the mother's application of appeal, while the mother did not file a written reply to the father's appeal application; both parties, however, through their respective lawyers, made oral submissions before this Court on the 19th May 2009 in order to put forward the respective position of the mother and the father on the matter in issue;

7. This Court, having examined all the relative acts of the proceedings, including all the documents filed before the Family Section of the Civil Court, is today delivering its decision in connection with the application originally filed by Alexandra Mifsud on the 10th December 2008.

This Court must state at the outset that it fully agrees with the decision of the first Court to allow the mother to temporarily take the child out of its jurisdiction, but only, as indeed was emphasized by the first Court, to the

⁸ Both applications of appeal were filed on the 11th May 2009

United Kingdom, to enable the mother to continue with her studies at one of the Universities of that country. The child is, at this point, under the care and custody of the mother, with whom the child has lived since birth four years ago. Although the father has offered to look after the child for the duration of the mother's studies, this Court does not feel it would be wise to relocate the child not only to a new country, but also with a different parent. Moving house and country is already difficult for a four (4) year old child, and to minimise the effects of the change, it is best that the child be left under the custody of that parent with whom he has been living since with. It would also be unfair to deprive the mother of her temporary custodial rights due to her decision to continue with her studies in another country. Relocation for the purpose of advancing ones studies is a good motive and the Court is very reluctant to make any other order which will prevent the following of a chosen career by the parent who has custody. As was noted by the Court of Appeal in the United Kingdom in the case known as Re: B (leave to remove: impact of refusal) (2005 2FLR 219), it is important to give greater weight to the emotional and psychological well-being of the primary carer, and not merely to take note of the impact of refusal on the same primary carer. Interference by this Court with the way of life reasonably chosen by the custodial parent (albeit temporary) was likely to end in frustration and anger which would adversely affect the child.

8. The Court, therefore, concurs with the views put forward by the first Court for allowing the mother's application and it so allows accordingly.

9. As to the terms and conditions for such a temporary relocation, this Court has examined the various arguments put forward by the parties in support of their request for a change in some of the conditions. This Court, taking into account what motivated the first Court to impose such stringent conditions namely, the mother's constant refusal (verging, in some instances, on the pathological) to follow and faithfully execute the directions of the Court when granting access to the father, agrees

that the conditions should indeed be stringent, and shall, in fact, proceed to impose further guarantees on conditions on the mother.

10. It feels for example, that the first Court was amply justified in limiting the effects of its decision to the end of April, 2010. The mother argues that she would definitely need more than a year to complete her studies abroad. That may well be so, but the Court feels that, in such an eventuality, the mother could apply for an extension of the temporary relocation order, in which case her application would be examined in the light of all the circumstances of the case, including the behaviour of both parties, particularly with regard to the total and faithful application of the terms and conditions imposed by the order of the first Court as modified by this judgment.

11. This Court does not feel it should order any changes to the first Court's order with respect to the exercise and the extent – ten hours per month over two consecutive days – of the visiting rights by the father, and feels that the first Court has struck a reasonable balance between the interests of the parties to these proceedings. The only thing that this Court will be clarifying is that the two days are to be consecutive days.

12. The Court, however, is of the opinion that it should accept certain changes or additions proposed by the father in order to facilitate access and secure, as much as possible, the mother's adherence to these terms and conditions. The financial conditions which the court will impose on the mother are not intended in any way to limit her right to freedom of movement, nor her right to an extended residence in a particular country with the aim of continuing her studies in her chosen career, but solely to protect the child who has a right to have both his parents looking after his welfare; this is not only a duty incumbent on both parents, but a right of the child, and in light of experience – where the mother has persistently and repeatedly disobeyed the Court's orders relating to the time the son is to spend with his father – such conditions are indeed justified. The child's contact with his father is

not only regarded as a necessity, but some studies show that normally the children themselves wish to have increased contact with the non-custodial parent, and that they would regret the loss of contact if that should happen. Furthermore, various studies show that the existence of a relationship between contact and the child's adjustment is proved by the fact that children who have regular contact with their non-custodial fathers "are less likely to show externalising behaviour (such as disruptive, aggressive, or bullying behaviour, or conduct disorder) or internalising behaviour (depressive, anxious, withdrawn behaviour)" – see Bainham, "Children and their Families" (Hart Publishing, Oxford 2003, page 22).

13. Therefore, in the light of the above considerations, this Court disposes of the appeals filed by both parties by confirming the decision of the first Court, with these variations:

(i) further to condition 2, the mother is to file in the Registry of the first Court a note giving the details of the Registry of the foreign Court where the child's passport has been deposited, and this within ten (10) days from said deposit;

(ii) further to condition 1, the mother is, in addition, to give the address and other details of the school which the child will be attending and this within five (5) days from the registration of the child with the school; such note is to be filed in the registry of the first Court and is also to be confirmed on oath by the mother;

(iii) further to condition 4, the mother is to present to the father a six (6) monthly schedule of her visits to Malta in connection with her lectures and research work in Malta, so as to enable the father to plan his visits to the United Kingdom; moreover the two days mentioned in condition 4 are to be understood as two consecutive days;

(iv) the bond in security for compliance with the conditions is hereby increased from €7,000 to €10,000 (ten thousand Euros); and to avoid problems in the future, it is made clear that this sum or part of it will be forfeited in

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favour of the father on a judicial declaration that the mother has failed to abide by any or all of these conditions, or any part thereof.

14. A copy of this judgment is to be forthwith served, at the expense of the Registrar, upon the Principal Passport Officer, the Principal Immigration Officer and the Director, Social Welfare Standards.

15. Each party is to bear his own costs relative to these proceedings.

< Sentenza Finali >

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