

**CIVIL COURT
(FAMILY SECTION)**

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

Today, Monday 24th June 2019

Application no. : 92/2019/2 JPG

**ATK
vs
AXK**

The Court:

Having seen the sworn application filed by ATK dated 10th May 2019, a fol 1 et seqq., wherein it held:

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

That the respondent is the person having, or who might have, the legal or actual custody of the said minor child;

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

Particulars of the minor children

1. *AKM born on the X, V old, who has Y hair, W eyes and a Maltese citizenship and English passport (See photo hereby attached and marked as Doc AK1);*

That the applicant has filed mediation proceedings in order to regulate anything that relates to the minor child. That the father AXK is a S citizen and has family members living outside the country;

That the applicant is afraid that the defendant will take the minor child outside of the country and this due to the fact that in the past weeks he has been acting in a very erratic manner. That she also saw messages sent by the defendant indicating that he wants to go back to live with his family abroad;

That for this reason, it is necessary for this of prohibitory injunction restraining the person from taking the minor child outside of the country to be issued.

Having seen the Court's decree dated 10th May 2019, provisionally upholding the demand for the prohibitory in junction, ordering notification and a right of reply to the defendant, and appointing the application for hearing for the 30th May 2019;

Having seen the urgent application filed by the Director (Civil Registration) as the Officer in charge for the issuing of passports and of the Commissioner of Police as the Principal Immigration Officer, dated 13th May 2019, a fol 16, wherein is helds:

That the applicants have been served with the Warrant of Prohibitory Injunction in the given names, together with the decree of the 10th May 2019 whereby this Honourable Court has has provisionally acceded to the applicant's request on order to enjoin AXK from taking the minor AKM out of Malta;

That from investigations that the applicants have conducted is resulted that the minor has a passport issued by the B authorities;

That passports issued by foreign authorities cannot be deposited at the Passports Office;

Wherefore, the applicants while bringing the above to the formal attention of this Honourable Court, respectfully request this Honourable Court that in the circumstances an order is given to the parents to deposit the passport of the minor under its authority. Subject to any other measures which this Honourable Court may deem appropriate and opportune.

Having heard oral submissions of counsel to both parties;

Having seen the sworn reply file by AXK, dated 6th June 2019 a fol 23 et seqq., where it helds:

That the demand of the Plaintiff for the issuance of the Warrant of Prohibitory Injunction against the Defendant so as to restrain him from taking the minor AKM outside Malta is completely unfounded in fact and at law and is to be rejected with the expenses for the following reasons:

1. That on a factual basis it has to be said:

- a. That the Defendant has solid and stable ties with Malta, so much so that he has his qualifications recognized from the Maltese Chamber of Architects so that he can practice the profession as an P in Malta and in fact he works locally on a full-time basis;*
- b. That the Defendant never showed or gave an indication that he was going to abandon his professional practice in Malta, neither did he act in such way that he was going to tarnish his professional reputation in Malta by committing a crime;*

- c. That the Defendant never showed or gave an indication that he intended to leave Malta with the minor AKM without the knowledge of his wife;*
- d. That recently there were instances where his wife exercised physical and verbal violence on the Defendant and therefore possibly the minor needs to be protected from the actions of his mother, that is the Plaintiff ATK, and not from conjectures being made up with the intention of putting the Defendant in a bad light for the Court proceedings of personal separation;*
- e. That in the recent weeks it was the Plaintiff that was acting in an erratic manner as she is being dominated by an obsession that has no reasonable basis that something is going to happen to the minor AKM;*
- f. That it is so much so that the Plaintiff is acting in an erratic manner and that the situation is so much alarming that she has even manifested suicidal thoughts that include also the minor AKM and this as evidenced in the document here exhibited and marked as 'Dok A';*
- g. That such obsession has escalated so much that the father of the Plaintiff is residing in the matrimonial home, leading to a situation that is not pleasant at all and is leading to a hostile and suffocating environment;*
- h. That as it has already been submitted earlier, the Plaintiff conveniently is fabricating and interpreting situations out of context so as to attempt to obtain an illicit advantage in the procedures for personal separation that she declared she has instituted;*
- i. That for all intents and purposes it is being stated that although the Defendant suffers from a neurological condition, he does not suffer from any mental/psychological illness or condition and this as evidenced in the medical report issued from the Consultant Dr. Josanne Aquilina that is being annexed and marked as 'Dok. B';*

2. That in the light of these facts, the following submissions of a legal nature are now being made:

- a. *That in relation to the Warrant of Prohibitory Injunction restraining a person from taking a minor outside Malta, the rules and general principles established for the Warrant of Prohibitory Injunction in general still apply ('Marie Claire Gatt vs Jonathan James Borg' deciza 3 ta' Dicembru 2018, 244/18/2 JPG);*
 - b. *That the Warrant of Prohibitory Injunction is an exceptional procedural and not a normal legal procedure;*
 - d. *That the law sets out that the pretended right on a prima facie basis is required for the issuance of the Warrant of Prohibitory Injunction;*
 - e. *That merely a difficulty, an inconvenience or concern are not enough to justify the issuance of the Warrant of Prohibitory Injunction (Qorti tal-Kummerc – 26 ta` Mejju 1995 fl-atti tar-Rikors ghall-hruġ ta' Mandat ta' Inibizzjoni fl-ismijiet "Cassar Pulliċino noe vs Caruana Curran noe et" Kollez. Vol: LXXIX.iv.1387);*
 - f. *That taking note of the facts and circumstances of the case in question, there is absolutely no real risk that the Defendant is going to take his minor son AKM outside of Malta without the consent of the Plaintiff;*
3. *That the right that the law seeks to protect in the application of the Plaintiff is that, if without the issuance of the Warrant the pretended right that the Plaintiff or the minor have is going to be taken away once and for all in an irremediable manner. The examination that this Honourable Court is to carry out is that what the Plaintiff is fearing, that is the real risk that the defendant is going to take his minor child AKM outside of Malta, really exists;*
4. *That therefore, it is being respectfully submitted that for this Honourable Court to accede to the request of the Plaintiff and orders the issuance of the*

said Warrant of Prohibitory Injunction in a definitive manner, this Honourable Court needs to be convinced that the specific rights appertaining to the Plaintiff are being breached in an irreparable way in case her demand is not acceded to;

5. *Having made these considerations, it is being submitted that the demand of the Plaintiff lacks on a prima facie basis the existence of the right that she is entitled to safeguard through her application for the issuance of the said Warrant of Prohibitory Injunction since there is no real fear that the Defendant is going to take his minor son AKM outside of Malta without the consent of the Plaintiff;*

In the light of the aforesaid therefore, the Defendant humbly requests this Honourable Court to reject the demand of the Plaintiff for the issuance of the Warrant of Prohibitory Injunction, as well as to revoke contrario imperio the decree handed on the 10th of May, 2019 where the demand of the Plaintiff was provisionally acceded to, with the expenses against the Plaintiff.

Considers;

ATK testified that in the last couple of months she noticed that her husband, the defendant, has been acting erratically, and has been very negligent with their young son. She explained that defendant starting goading her to hit him in face, tried to prevent her from buying medicine for their son, and refused to accompany her to the doctor when the child was ill. She continued that all this came to a head when on the 5th of May he called for an ambulance after repeatedly accusing her of suffering from a mental illness after they had had a disagreement. She said that she even found messages that defendant sent to his sister and mother in which he was claiming that she was paranoid and that he was going to tie her up and call an ambulance. She continued that when she confronted him about this he said that he was angry about their situation and how their marriage had degenerated, and that he did not really mean what he said in the messages, which he had sent only out of anger. She testified that defendant has filed reports with the police that she is mentally ill, and that when once they were at the Emergency Department together, he was telling the doctor that she has a mental illness.

She explained that she feels very concerned that defendant might abduct their child since she saw messages sent by defendant to his sister, were they agree that the best place for the child to be is in the United Kingdom. She continued that in various chats with her, he denigrated Malta, claimed that Malta was not good for her, and to her made it appear like he plans to end up in the United Kingdom.

Under cross-examination she confirmed that there were instances where the defendant was violent with her before the birth of their child, but that she never filed a police report against him. Asked whether she has ever been violent against her husband, she responded that she defended herself from him. Asked to explain where her concerns that defendant might abduct the child stem from, she reiterated that she saw various texts messages that he sent to his sister in which he claimed that it would be better from the child to live in the United Kingdom, which made her feel very worried when coupled with all the critical things he told her about Malta. She added that on top of all this, he has family in the United Kingdom, which makes it easier for him to move, and that also she is worried by the fact that there are prolonged periods where he says that he is going to quit his job in Malta.

AXK testified that since A was born he has been working full-time to sustain the family, and has also been doing his share with regards to A's care, trying to make sure that plaintiff has time to rest and recuperate. He explained that sometime after the parties went to Sicily in mid-March, A got sick, which made the plaintiff very concerned, and that's when her anxiety and inability to sleep started to manifest themselves. He said that after the incident relating to the ambulance, he had taken A to his room, since parties were sleeping in separate rooms. He stated that he was willing to maintain this arrangement so that plaintiff could sleep better.

Asked by the Court to explain the incident relating to the ambulance, he explained that the parties had had an argument the day before relating to a misunderstanding about the time when he was meant to pick plaintiff and A up from the airport. He continued that the next day plaintiff was still agitated, and she took the baby out in the buggy. He disagreed, went looking for her and pulled her back in the house, at which point she punched him several times in the chest. He said that he felt that plaintiff needed someone to talk to, and he went to a psychiatrist, Dr. David Mamo, for advice, who recommended that he call the ambulance if plaintiff's behaviour continued to escalate and she kept refusing to see a doctor about her issues. He

added that since plaintiff was punching him when the baby was in the buggy between them, he felt that it was time to call the ambulance.

He further testified that he is an architect, trained and registered in the United Kingdom. He explained that after moving to Malta he registered as an architect here and has been working as an architect full-time for a local company in Birkirkara since September 2017.

He stated that he objects to this warrant being issued because he has no intention of leaving Malta with the baby without plaintiff's permission, so he considers it to be unfair that A would be restricted from leaving the country. Regarding the messages he sent to his sister, he explained that these were taken out of context, since what he meant by them was that he thought that even plaintiff was happier in the United Kingdom because in Malta plaintiff became a completely different person to the person he got engaged to there. He added that the possibility of moving back to the United Kingdom is just speculation for the future, but that that is something that he would want to do together with plaintiff.

Regarding the photos filed by him, he explained that these scratches on his face caused by plaintiff, when on the 10th of December 2017, she simply threw the baby onto the bed, and flew at him, punching him. He said that this incident is linked to his call to the ambulance, since it made him very concerned about the baby's welfare.

Under cross-examination and asked whether he did actually intend to travel to the United Kingdom with A shortly before the incident of the 5th of May, he explained that the parties had discussed the possibility of going on a short trip in September, but that nothing was ever booked. Asked to explain the message he had sent to his sister that it would be better for the child to move to the United Kingdom, he reiterated that he considered that they would be moving together as a family.

CK, defendant's mother, testified that her son would never leave the country with the parties' child, without plaintiff's consent.

Under cross-examination she testified that she is not aware that her son has any intention to leave the country with the parties' child.

Deliberates:

Article 877 of Chapter 12 of the Laws of Malta provides:

877. (1) A warrant of prohibitory injunction may also be issued to restrain any person from taking any minor outside Malta.

(2) The warrant shall be served on the person or persons having, or who might have, the legal or actual custody of the minor enjoining them not to take, or allow anyone to take, the minor, out of Malta.

(3) The warrant shall also be served on:

(a) the officer charged with the issue of passports enjoining him not to issue, and or deliver, any passport in respect of the minor and not to include the name of the minor in the passport of the minor's legal representatives or in the passport of any other person; and

(b) the Commissioner of Police enjoining him not to allow such minor to leave Malta.

The Court begins by noting that in proceedings for the issuance of a precautionary warrant, the Court may not delve into the merits of the case, but rather, it must be satisfied that the person asking for the warrant to be issued has a *prima facie* right and that the warrant is necessary in order to preserve that right.¹

These proceedings were filed by applicant, ATK against defendant AXK in order to prevent that their minor child AKM be taken out of the country. Applicant contends that she has a real and reasonable fear that defendant might try to abduct their child since he keeps insisting on how much he hates living in Malta and because she saw messages that he sent his sister in which he claimed that it would be better for him and A to live in the United Kingdom. Respondent on the other hand contends that this precautionary warrant is not necessary, since he has solid and stable ties in Malta, where he works as an architect on a full-time basis, and has not given any indication that he intends to leave the country.

¹ Vide for instance **Panorama Company Limited vs Enemalta Corporation** decided by the First Hall of the Civil Court on the 14th of February 2013.

The Court has seen that in numerous messages sent by defendant to plaintiff he expressed a great discontent with his life in Malta, as well as a disgruntlement with life in Malta in general. The Court has also seen that in messages sent to his sister, defendant has claimed that it would be better for the child to live in the United Kingdom. Defendant did not deny sending any of these messages. He however justified the message sent to his sister, by saying that while he believes that the parties and their son were happier in the United Kingdom, his idea of leaving involves leaving as a family, and that he would never leave alone with the parties' son without plaintiff's permission.

The Court considers that in these warrants the Court must be guided by the best interests of the child, which are paramount.

Having considered the law and jurisprudence on the matter, and having seen the evidence produced in these proceedings, the Court is of the opinion that applicant's request should be upheld.

While defendant tried to justify the messages that he sent to plaintiff and his relatives, the Court remains nonetheless concerned about their content, which in its opinion constitutes *prima facie* evidence of a real risk that defendant might take the parties' son out of the country without plaintiff's permission. This especially in light of the derogatory messages he sent about plaintiff and her alleged mental health problems, which certainly do not corroborate defendant's testimony that he would never make any decisions regarding their child without her agreement. All this is compounded by the fact that defendant has both familial as well as professional ties in the United Kingdom.

Therefore, this Court, having seen Articles 873 to 877 of Chapter 12 of the Laws of Malta is of the opinion that all the essential elements of the prohibitory injunction concur.

For these reasons the Court orders that the defendant AXK, father of the minor child **AKM**, of V months born on X with Y and W eyes, of Maltese citizenship and holder of an English passport, be prohibited from taking or allowing anybody to take the said child out of the Maltese Islands, and orders Respondent to deposit any passport of the minor child in his possession with the Court Registrar .

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Furthermore, the Court orders that a copy of this decree be notified to all the Authorities concerned in accordance with the law.

All costs are to be borne by Respondent.

Read.

Mhallef Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

**Lorraine Dalli
Deputat Registratur**