

- *whether precautionary acts of the COCP are applicable to constitutional proceedings*
- *alleged breach of the right to family life where Court allows mother to go to China with minor child*



IN THE FIRST HALL OF THE CIVIL COURT

(CONSTITUTIONAL JURISDICTION)

MR. JUSTICE GRAZIO MERCIECA LL.D.

Decree in camera

Warrant of Prohibitory Injunction No. 275/2021 in the names:

Volodymyr Baran (Ukranian Passport No. EX62805)

vs

1. The State Advocate,

**2. Wei Sun (Chinese Passport E 11718527 for any interest which she
may have, and**

**3. Karmel Marie Louise Baran daughter of Wei Sun and of
Volodymyr Baran, born on the 11th August 2013 in Washington,
United States of America and residing in Hamrun Malta holder of
United States passport number 566100403.**

The Court :

The facts :

These are precautionary proceedings, instituted on the 23rd February 2021, for the issue of a warrant of prohibitory injunction instituted by the applicant, father of the minor Karmel Marie Louise Baran, who claims that a judgment of the Family Section of this Court delivered on the 12th October 2020 (Sworn Application No. 198/19) is violating his rights under Article 8 of the European Convention. The Court granted exclusive care and custody of the child to the child's mother, Wei Sun, and authorised her to take the child with her to China. The mother is Chinese ; the applicant is Ukranian, and the child has a United States passport but was brought up in China with her sister and parents until she was brought to Malta by her father.

The issues :

Applicant is claiming that should the minor leave Malta, he would suffer an irremediable prejudice since he would not be able to see her for the rest of his life. He states his intention of filing an application claiming breach of his human rights, of which he filed a copy, and which in fact he subsequently filed before this Court (presided by the Honourable Madame Justice Miriam Hayman) on the 1st March 2021 (Constitutional Application No. 1121/2021). In the latter application, Mr. Baran in addition to a breach of Article 8 of the Convention, as he does in these proceedings, additionally claims breach of Article 32(c) of the Constitution because the judgment of the family court makes it impossible for him and his minor daughter to develop a relationship between them and also because the Maltese Courts do not have the power to ensure that the right of access which they granted to the applicant would be a real and effective one once the minor is in China. He further

claimed that the minor is being denied her right to education whilst in Malta in breach of Article 2 of the First Protocoll of the Convention, and that in this regard is being discriminated against in breach of Article 45 of the Constitution and Article 14 of the Convention.

During the course of the present proceedings, that is, on the 25th February 2021, the Court of Appeal delivered its judgment from an appeal from the judgment of the family court, partially altering it by giving applicant the right of remote access to his minor child when in China.

In the present proceedings applicant exhibited an e-mail dated 1st March 2021 containing an advice by a Chinese lawyer stating that « as a matter of China Supreme Court policy and common practice in China, unless there is a bilateral judicial treaty prescribing otherwise, foreign courts judgments of family courts are generally not enforced in China. In other words, if the plaintiff in the case denies access to the child by the defendant, there is nothing the defendant can do based on the Maltese court judgment. He will have to sue in China to protect his vission rights. »

Wei Sun and the State Advocate filed separate written replies. These are the main points of their respective replies :

Wei Sun :

1. The warrant is not necessary because there is one issued already.
2. no parent has any right to prohibit the other parent from going abroad with their minor child.
3. This Court does not have the power to issue precautionary warrants

but only *interim measures*.

4. Applicant is trying to make this Court his accomplice in subverting the Maltese judicial process.

5. The minor should not be a party in these proceedings.

The State Advocate :

1. The State Advocate should not be a party to these proceedings.

2. A warrant of prohibitory injunction cannot be issued by this Court.

3. Subsequently to the initiation of these proceedings the Court of Appeal has issued a judgment mainly confirming the judgment of the family court, after a careful evaluation of the facts of the case. It held that it was applicant who had uprooted the child from China against the wishes of the mother, and brought her to Malta where he has set up another family by having a new partner and another child. It was in the supreme interest of the child to go back to its country of origin. The Court of Appeal provided for access and so it was not true that he would never see his child again if she went back to China. The child was separated from her sister who lived in China.

4. In case of conflict, the interests of the child prevail over that of the parent.

Considerations of this Court :

A. Points of procedure

The warrant of prohibitory injunction already issued may be revoked in view of the judgment of the Court of Appeal. The law does not state that a parent does not have the right to prohibit the other parent from taking

their minor child anywhere in this world. The first and second pleas of Wei Sun are manifestly unfounded and are therefore being rejected.

It has been held that a person may be a party in proceedings relating to alleged breaches of human rights for various reasons and not necessarily because they are a party to the breach. For instance they may be included as a party because they have an interest in the eventual judgment. In the present case the minor (represented by her mother) evidently has an interest in the eventual decision of this Court to accept or reject the issue of the warrant of prohibitory injunction against the mother. The fifth plea of Wei Sun is therefore also unfounded.

The State Advocate's presence is necessary because he represents the State and the present proceedings are intended to preserve a pretended right against the State of which these courts form part. The first plea of the State Advocate is therefore unfounded.

Both the State Advocate and Wei Sun plead that a warrant of prohibitory injunction cannot be demanded in « constitutional » proceedings.

Article 46 of the Constitution of Malta (« The Constitution ») gives unfettered and unlimited powers to this Court to « make such orders, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing, or securing the enforcement of any provisions » of human rights provisions in the Constitution. The present warrant is not based upon the Constitution but on Article 8 of the European Convention on Human Rights (« The Convention »). However, Article 4(2) of the European Convention Act (Chap. 319) contains an identical provision with respect to Convention rights.

According to Paragraph 7 of Subsidiary Legislation No. 12.09,

introduced by L.N. 279 of 2008 as amended by L.N. 333 of 2008, the provisions of the code of procedure apply *mutatis mutandis* to « constitutional » proceedings regarding an alleged breach of fundamental human rights under the Constitution and the Convention before this court and the Constitutional Court.

It is true that, as learned counsel for the State Advocate remarked during the oral submissions, in « constitutional » proceedings it is the established practice of the Maltese forum to ask for an interim order and not to make use of the precautionary warrants listed in the Code of Civil Procedure. However, this does not mean that the latter may not be made use of in constitutional proceedings. The law does not impose any such prohibition. On the contrary, as appears from the legal provisions cited above, it expressly makes the provisions of the Code applicable to « constitutional » proceedings, the only restriction being « *mutatis mutandis* » meaning that generally, the provisions of the Code apply but are to be altered when necessary. The provisions of precautionary acts are part and parcel of the Code and therefore apply in the same manner. Given the abovementioned wide powers of the Court in regard to human rights remedies, it is up to the Court in its “constitutional” jurisdiction to make sure that any precautionary acts it may issue are tailored to fit the purpose of the proceedings before it.

Since applications for the issue of precautionary warrants may be filed not only during proceedings on the merits but also before, provided the latter are instituted within the appropriate time-frames granted by the law, there is no reason why such applications cannot be made not only **during**, but also **before** “constitutional” proceedings on the merits are initiated – contrary to what is pleaded by Wei Sun. Tonio Borg,¹ cites this Court² as

¹ Tonio Borg, A Commentary on the Constitution of Malta, 2016, page 269

holding that “precautionary acts, mostly warrants of prohibitory injunction may be issued prior to the commencement of the constitutional action in accordance with the provisions of the Code of Organization and Civil Procedure which applies to human rights actions in virtue of the Rules of Court (LN 279/2008).”

B. Prerequisites for the issue of a warrant of prohibitory injunction :

As is well known, a precautionary warrant is an extraordinary precautionary act, which is not issued unless applicant (i) convinces the Court that he has a right *prima facie* and (ii) that the issue of the warrant is necessary to preserve his rights pending judicial proceedings on the merits.

The Convention allows a wide margin of appreciation to State Parties in deciding on custody.³ The fact that the Court, both at first instance and on appeal, granted exclusive custody of the child to the mother creates no presumption of a breach of human rights. This Court has read both judgments from which it results that a thorough examination and evaluation of the relevant circumstances was carried out and moreover the supreme interests of the child were taken into consideration. Therefore this Court finds no reason *prima facie* to find a breach of the right to family life when the Court granted the custody of the child exclusively to the mother. Nor does it find such a breach because the mother is allowed to take the child to China, which is its country of origin and where her sister also resides.

² Mgr. Paolo Pace v Minister for Justice 21.01.1986 (73/86) First Hall, presided by Mr Justice Victor Borg Costanzi.

³ E.g. Sommerfield v Germany EctHR (GC) 8th July 2003, appl. No. 31871/96 para. 63

For parents who do not or no longer have custody over their children, the right to family life still entails a right of access or contact.⁴ Thus there is no doubt that applicant has a *prima facie* right of access to his child. The Court of Appeal has granted him such an access. Basing himself upon the advice by a Chinese lawyer, applicant is however alleging that the grant of this access is a chimera because judgments by Maltese Courts are not recognized or enforced in China. The Court is assuming this advice to be a correct one at law for the purposes of these proceedings, which do not require the best evidence to be produced. The same lawyer also advises that applicant can ask for the Chinese courts to give him access. This Court has no reason to doubt the integrity of the Chinese courts as far as the application of private family life is concerned. Therefore applicant has not proved that there is any real danger of losing his right of access to the child. Even if the decision of the Maltese courts in this respect is not be recognized, applicant has not proved that he cannot resort to the courts in China to obtain access. It is true that the circumstances may make such access more difficult, but this can in no way be attributed to the Maltese State acting through its judicial organs ; on the contrary it is the applicant who has largely brought them about himself; hence *imputet sibi*.

For these reasons the Court dismisses applicant's claim, and revokes *contrario imperio* its decree of the 23rd March 2021 provisionally

⁴ E.g. Hendricks v the Netherlands, EcomHR 8th March 1982, appl. No. 8427.78, para 94 cited by Pieter van Dijk et. Theory and Practice of the European Convention on Human Rights, 5th Ed., 2018, page 707

upholding the demand for the issue of a warrant of prohibitory injunction.

Costs to be borne by applicant.

Delivered in camera today, 4th March 2021.

THE HON. MR. JUSTICE

GRAZIO MERCIECA