



MALTA

COURT OF APPEAL

HIS HONOUR THE CHIEF JUSTICE

SILVIO CAMILLERI

THE HON. MR. JUSTICE

TONIO MALLIA

THE HON. MR. JUSTICE

JOSEPH AZZOPARDI

Sitting of the 29 th May, 2015

Civil Appeal Number. 345/2004/1

Mark Lombardi

v.

Olena Tretyak

Having seen the writ of summons of plaintiff dated 12th October 2004 which reads as follows:

“Premess illi kontestwalment ma’ din ic-citazzjoni, l-attur ipprezenta Mandat ta’ Inibizzjoni kontra l-konvenuta sabiex iwaqqafha milli tiehu lill-minuri Dolph Lee Karen li tweeked fis-27 ta’ Mejju, 2002, barra minn Malta.

“Premess illi l-attur jixtieq li l-minuri jitnehha minn fuq il-passaport tal-konvenuta jekk hu l-kaz; li l-konvenuta tiddepozita l-passaporti tal-minuri, jekk ikun il-kaz fil-Qorti jew ma’ awtorita` kompetenti ohra; li l-minuri ma jitnizzilx fuq il-passaport tal-konvenuta; u ma jinharigx passaport ghall-minuri minghajr il-kunsens taz-zewg genituri.

“Premess illi l-attur jixtieq li l-minuri ma jithallix johrog minn Malta minghajr il-permess tal-Qorti.

“Peress illi l-imsemmi minuri diga` ghandu passaport Malti fejn hu ndikat bhala **Dolph Lee Karen Lombardi** u huwa mnizzel fil-passaport Ukrajn numru AH 404683 mahrug f’isem il-konvenuta fejn il-minuri huwa ndikat bhala **Dolph Lee Karen Tretyak**.

“Peress illi l-konvenuta hija cittadina tal-Ukrajina u ghalhekk wara bosta theddid u minhabba biza’ tal-attur li l-konvenuta tiehu lit-tifel minuri minn Malta u tahrab bih, l-attur ipprezenta ’l fuq imsemmi Mandat ta’ Inibizzjoni u l-prezenti procedura.

“Ghaldaqstant, fl-isfond tas-suespost, l-attur jitlob bir-rispett sabiex din l-Onor Qorti joghgobha:

“1. Tordna li t-tifel minuri Dolph Lee Karen Lombardi, maghruf ukoll bhala Dolph Lee Karen Tretyak, ma jithallix johrog minn Malta minghajr il-permess ta’ din l-Onorabbli Qorti;

“2. Tordna li l-konvenuta tiddepozita l-passaport tal-minuri, jekk ikun il-kaz, ma’ din l-Onorabbli Qorti jew ma’ awtorita` kompetenti ohra li jidhrilha opportune li tinnomina din il-Qorti;

“3. Tordna lid-Direttur tal-Passaporti sabiex il-minuri ma jgħidni fuq il-passaporti tal-konvenuta;

“4. Tordna lid-Direttur tal-Passaporti sabiex ma jinharigx passaport għall-minuri minghajr il-kunsens taz-zewg genituri;

“5. Tordna lid-Direttur tal-Passaporti sabiex inehhi lit-tifel minuri minn fuq il-passaport tal-konvenuta jekk dan hu l-kaz;

“6. Tordna n-notifika tad-decizjoni mogħtija mill-Qorti lill-Ufficial Ewlieni tal-Passaporti u lill-Ufficial Ewlieni tal-Immigrazzjoni.”

“Bi-ispejjez inkluzi dawk tal-Mandat ta’ Inibizzjoni pprezentat kontestwalment, kontra l-konvenuta li hija minn issa stess ingunta għas-subizzjoni.”

Having seen defendant’s sworn reply by virtue of which she pleaded:

“1. Preliminarjament, ic-citazzjoni hija nulla peress illi t-talbiet attrici huma mmirati lejn id-Direttur inkarigat mill-Passaporti u dan ma giex imharrek bhala konvenut. Għalhekk kwalunkwe sentenza li talvolta tista’ tinghata minn din l-Onorabbli Qorti ma tistax torbtu. L-eccezzjonijiet l-ohra qegħdin jinghataw subordinatament u minghajr pregudizzju għal din l-eccezzjoni preliminari.

“2. Illi rigward l-ewwel talba, l-eccipjenti tirrimetti ruhha għall-gudizzju ta’ din l-Onorabbli Qorti in vista tal-mandat ta’ inibizzjoni mahrug minnha.

“3. Illi rigward it-tieni talba, jekk il-passaport li qed jirreferi ghalih l-attur huwa passaport tal-Ukrajna, din l-Onorabbli Qorti m’ghandhiex gurdizzjoni fuq passaporti mahruqa minn pajjizi ohra lic-cittadini taghhom.

“4. Illi rigward it-tielet talba, id-Direttur tal-Passaporti, bhala l-awtorita` kompetenti f’Malta, m’ghandux is-setgha li jnizzel jew ma jnizzilx ‘entries’ fuq passaporti mahruqa minn pajjizi ohra lic-cittadini taghhom.

“5. Illi rigward ir-raba’ talba, id-Direttur tal-Passaporti, bhala l-awtorita` kompetenti f’Malta, ghandu s-setgha li johrog passaport f’isem il-minuri Dolph Lee Lombardi, li hu cittadin ta’ Malta u tal-Unjoni Ewropeja.

“6. Illi rigward il-hames talba, id-Direttur tal-Passaporti la minn jeddu u lanqas jekk jigi ordnat minn din l-Onorabbli Qorti ma jista’ “inehhi lit-tifel minuri minn fuq il-passaport tal-konvenuta” stante li l-passaport tal-eccipjenti ma nharigx mill-Gvern ta’ Malta izda mill-Gvern tal-Ukrajna, u ghalhekk hemm karenza ta’ gurdizzjoni biex tkun tista’ tinhareg ordni bhal din.

“7. Illi rigward is-sitt talba, ladarba l-Ufficjal inkarigat mill-Passaporti ma giex imharrek bhala konvenut u m’ghandux ‘*locus standi judicii*’ f’dina l-kawza, ikun inutile li hu jigi notifikat b’kopja tad-decizjoni ta’ din l-Onorabbli Qorti ladarba din ma tistax taghmel stat fil-konfront tieghu u ladarba lilu ma tistax torbtu.

“8. Illi rigward l-istess (sitt) talba, l-Ufficjal Ewlieni tal-Immigrazzjoni – cioe` l-Kumissarju tal-Pulizija – m’huwiex parti fil-kawza ghaliex ma giex imharrek bhala konvenut u ghalhekk kwalunkwe decizjoni ma tistax taghmel stat fil-konfront tieghu.

“9. Illi din il-kawza hija mahsuba biex tipprova ssahhah il-pozizzjoni tal-attur, li, **bi ksur palesi tal-principju ta’ smigh xieraq**, ottjena abbuzivament u illegalment il-kura u kustodja ta’ binha, il-minuri Dolp Lee Lombardi, fi procedure li bihom l-eccipjenti ma gietx innotifikata u li tmexxew b’lingwa (Maltija) li l-attur kien jaf li l-eccipjenti Olena Tretyak ma tifhimx peress li hi cittadina tal-Ukrajna. Ghalhekk, l-ewwel kwistjoni li din l-Onorabbli Qorti ghandha tindirizza hija l-istharrig dwar il-proceduri civili mmexxija bl-ilsien Malti (li l-eccipjenti ovvjament ma tifhimx), liema procedure wasslu ghat-tnehhija tal-

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kura u kustodja minghand l-eccipjenti minghajr ma hija kienet innotifikata bis-smigh tal-kaz. B’rizzultat tal-isemmi digriet zbaljat, l-eccipjenti u wliedha qeghdin ibatu trattament inuman u degradanti f’pajjizna.”

Having seen the judgment delivered by the Civil Court, Family Section, on the 26th of January 2012, by virtue of which it decided the case by rejecting defendant’s plea of nullity, and provided as to plaintiff’s requests as follows:

“[1] accedes to the first request, thereby prohibiting defendant from removing the minor child Dolph Lee Karen from these Islands, without this Court’s authorization;

“[2] accedes to the second request, in the sense that if defendant is in possession of the child’s Maltese passport, she is bound to deposit it in the registry of this Court within one week;

“[3] rejects the third request;

“[4] accedes to the fourth request;

“[5] accedes to the fifth request;

“[6] accedes to the sixth request, and orders that this judgment be served, by plaintiff at his expense, on the Principal Officer of Passports and the Principal Immigration officer.

“The parties are to bear their own costs.”

The reasons which led the said Court to deliver its decision are as follows:

“The Action

“That by virtue of these proceedings plaintiff [Father], a Maltese national, is requesting this Court to issue an order prohibiting defendant [Mother], a Ukrainian national, from taking the minor child Dolph Lee Karen out of these Islands, and to issue the necessary and consequential orders to the Director of Passports with a view to ascertaining the observance of the Court’s decision.

“The Facts

“That from a relationship between the parties, the child Dolph Lee Karen was born on the 27th May 2002, and was initially registered as being of unknown father. Subsequently, after DNA tests have been carried out, the Father recognised the child as his son, and a contract was signed between the parties, granting care and custody of the child to the Mother with free and unlimited access to the Father. Agreement was also reached on the payment of a monthly maintenance allowance by the Father to the Mother for the needs of the child.

“Unfortunately, the relationship between the parties turned sour when the Father refused to marry the Mother; and, as a result of this, on the 20th January 2003, the latter left for the Ukraine with her three sons, including the parties’ common child, attributing abusive behaviour of the Father in her regard, and his refusal to marry her, as her main reasons for leaving these Islands.

“On the 9th February 2003 the Mother returned to Malta with the child, after repeated promises by the Father that he would marry her. The Mother states, that, when she returned to Malta, and was initially staying with the Father in his parents’ house, the latter went back on his promise, and also resumed his abusive behaviour towards her.

“Eventually, following a letter sent by the Mother to a relative of the Father wherein she, *inter alia*, threatened to leave with the child for the Ukraine for good, if the Father persisted in his refusal to marry her, since in Malta she, as a single Mother, was being humiliated and treated as a foreigner, and life here was difficult for her, the Father obtained a warrant of impediment of departure on the 12th October 2004 impeding the Mother from leaving the Island with the child.

“That during these proceedings this Court, on the 7th April 2005 granted provisional care and custody of the minor to the Father with regulated visitation rights to the Mother.¹ This decree was later confirmed in a detailed decision² given by this Court on the 22nd August 2005. In this latter decision, the Court observed, *inter alia*, after having heard all the evidence relating to the care and custody issue, that “*it is in the best interests of the child, that care and custody be granted to the Father, whilst access be given to the Mother.*”³ and observed further that “*this Court is convinced that the home environment provided by the Father in his parents’ home are more likely to give more stability – social, emotional and even moral – to the child than the environment provided at present by the Mother.*”⁴

“The Court’s Considerations

“In her note of submissions the Mother raised the following issues, basically: [1] that the child has a Ukrainian passport, and this Court has no jurisdiction over this passport; [2] that the rights of the Mother to the choice of place of access is being violated by not allowing her to take the child to the Ukraine to meet his relatives and stay there for a period of two or three weeks during the summer holidays; [3] that the rights of the minor to relate with his maternal grandparents and his relatives from his mother’s side are also being violated; [4] that the Mother is not requesting a relocation order, but a temporary order to enable her to take the child from these Islands for a short period.

“The Court observes that unfortunately the parties involved have suffered a lot, and are still suffering, mainly due to their abusive behaviour towards each other resulting from the issue of custody and access. Also, in the midst of this tug-of-

¹ As per Mr.Justice Joseph Azzopardi – fol. 122

² As per Chief Justice Vincent Degaetano – fol.163

³ Free translation

⁴ Ibid.

war between the parents, the most vulnerable is the child whose interests this Court is bound to safeguard and protect, and which must prevail over those of his parents. In short, in deciding this case this Court gave priority to the child's interests, after having taken into account his wishes considering that today he is almost ten [10] years old, and therefore capable of expressing his wishes clearly.

“Article 149 of the Civil Code states that “Notwithstanding any other provision of this Code, the Court may, upon good being shown, give such directions as regards the person or the property of a minor as it may deem appropriate in the best interests of the child.”

“In the case at issue, the Court, after having examined the acts of the case, and after having spoken to the child, is of the opinion that, *rebus sic stantibus*, it would not be in the interest of the child to authorize that he be taken out of these Islands by the Mother. It appears that at present the child is in a stable environment, and given the psychological ordeal he had to endure due to the constant bickering between his parents on the custody and access issue, this Court considers that, at this stage, an order authorizing the Mother to leave these Islands with his Mother alone, would be a cause of further anxiety for the child, and harmful to him. This consideration must prevail over the rights of the Mother in this regard. Also, since prime consideration is being given to the interests of the child it cannot be validly argue that the child's rights freedom of movement is being trampled upon by acceding to the Father's request.

“That, regarding defendant's preliminary plea that the writ of summons is null as the Director of Passport has not been sued as defendant, the Court observes that this manifestly is not a valid legal basis for her plea. On the contrary, defendant's plea that this Court has no jurisdiction to alter defendant's Ukrainian passport, is valid.

“That given the nature and the circumstances of the case, and that the conduct of both parties, in certain respects, has been reciprocally abusive, the Court deems it just that the parties are to bear their own costs of the proceedings.”

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Having seen the appeal application filed by defendant by virtue of which, for the reasons set out in the application, she requested this Court:

“... ... to modify said judgement by confirming it in so far as it rejected plaintiff's third demand, while revoking it in so far as it upheld the remaining demands of plaintiff Mark Lombardi, and consequently upholding appellant's pleas and objections. With costs against the plaintiff.”

Having heard submissions by the parties;

Having seen all the records of the case and the documents submitted;

Considers:

That this case concerns a request by the Maltese father of a minor child, Dolph Lee Karen, who is nearly 13 years of age, for this Court to order that the child be not removed from these islands. The parents of the child are not married, but the parties had entered into an agreement granting care and custody of the child to the mother, with free and unlimited access to the father. Plaintiff refused to marry defendant, with the result that, for a brief period of time, defendant returned to Ukraine, her native country, with the child. On her return to Malta and due to plaintiff's persistent refusal to marry her, she threatened to leave Malta for good as she felt humiliated living here as a

single mother. Plaintiff thereupon, obtained a warrant of impediment of departure against the child, and instituted these proceedings. In the course of these proceedings, the first Court delivered two decrees giving provisional care and custody of the minor to the father, with regulated visitation rights to the mother. Eventually, the first Court gave a final decision acceding to plaintiff's request that defendant be prohibited from taking the child out of the island without the Court's authorization.

The defendant appealed from the decisions raising various issues, even of a procedural nature, and claiming on the merits that there exists no justification for the various orders made by the Court.

Defendant's main grievance is that the first Court failed to make a proper assessment of the facts, an assessment which this Court will not disturb unless it feels that the ultimate decision fails to consider the best interests of the child. This Court, having taken into consideration the situation of the parties, agrees with the reasoning of the first Court that taking the child out of Malta in the present circumstances would be harmful to the child.

The abusive behavior of the parties towards each other has only limited effect in these proceedings, as the important thing is for this Court, as far as is humanly possible, to provide for the continued welfare of the child.

This Court understands that it cannot be said that a proper upbringing of the child can only be given in Malta, but in the circumstances sees, in conformity with the evidence, that the care and stability given to the child in the home of his father's parents, where plaintiff also resides, should not be disturbed at this stage. This view is in conformity with that expressed by the legal referee appointed by the first Court to assist it in its deliberations.

Furthermore, in the care and custody proceedings which are still pending before the Courts (application no. 138/11), the Court had appointed a family therapist to examine the situation of the child. In her report, the therapist noted that the child was adversely affected by the arguments of his parents, and suggested a session of therapy for the child. During the sitting of the 9th October 2014, held before the Family Court, both parties declared that they agree with the suggestions of the family therapist, and the Court appointed Dr. Mireille Villa to provide therapy to the minor child. It certainly would not be proper to disrupt what is being organized by that Court for the well being of the child. Furthermore, given that the issue of the care and custody of the minor child is being debated before the local courts, it would not be proper to allow the child to be taken out of the jurisdiction of the local courts.

Defendant alleges that plaintiff has himself often acted abusively with respect to the child. This is not a matter to be considered by the Court in these

proceedings, but should be highlighted and discussed in the other proceedings intended to provide for the care and custody of the child. These proceedings are only intended to prevent the child being taken out of the jurisdiction of the Maltese Courts, as requested by plaintiff, which, given the circumstances, is the proper action to take.

Defendant is, however, correct on two points relative to the judgment of the first court. The Court in its judgment prohibited defendant from removing the child from these islands. There was, however, no such request from plaintiff. Plaintiff requested simply that the child be not removed from these islands without the Court's authorization, and this Court agrees that, in the present circumstances, the prohibition should apply to both parents, at least until it may be otherwise provided for in the custody case between the parties. As stated earlier, the child is presently under the jurisdiction of the local Courts, and the child should not therefore be removed from these islands if not with the authority of the courts. It follows, that if either party wishes to go abroad with the child for short periods, he or she should request authorization from the Court hearing the custody case, who alone can decide on whether to accede to such a request and, if so, under what terms and conditions.

The other point to which defendant refers is the order of the first Court directed towards the Director of Passports to strike off the name of the child from defendant's Ukrainian passport. The issue of a passport is a government

prerogative, and the Maltese authorities have no jurisdiction on its issuance by a foreign country and on who is to be included. The Court can order, however, that the child be not included in any Maltese passport both parties may have obtained, and it is so ordering. It therefore, orders both parties to submit their Maltese passports to the local authorities to have the name of the child removed there from. It is true that plaintiff's request is limited to defendant's passport, but given that the child is under the jurisdiction of the local courts, it is in the best interest of the child that travel abroad with the child is limited to in so far as authorized by the local courts.

As to the first Court's decision to hear the child in chambers after notifying the respective lawyers of the parties, this Court sees nothing wrong with the procedure adopted. Lawyers may not be "messengers" of the parties, but they certainly are mandatories of their clients and as such could be properly advised with the decree whereby the Court decided to hear the child in camera.

The fact that the Director of Passports is not a party to the suit does not lead to nullity of the proceedings. The said Director has no direct interest in the case, and in so far as he has to abide by any orders of the relevant Court, once such orders are issued, it is expected that he acts in conformity with same.

Now, therefore, for the above reasons, disposes of the appeal application of defendant by accepting same only in parte, confirming the judgment of the first Court subject to the following two variations: (i) in the first head of the operative part of the judgment of the first Court it substitutes the words "both parties" for the word "defendant"; and (ii) provides that the effects of the fifth request acceded to by the first Court shall apply to the Maltese passports of both parties.

In the circumstances, it is just, that even in their appeal stage, both parties are to bear their own costs.

< Final Judgement >

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