



**QORTI CIVILI PRIM'AWLA
(GURISDIZZJONI KOSTITUZZJONALI)**

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 4 ta` Lulju 2019

Rikors Nru. 108/2019 JZM

**Dinah Aquilina (K.I. 0337590M)
f` isimha proprijju u bhala
kuratrici *ad litem* tal-minuri
Denzel u Xyzel ahwa Grech**

kontra

**Id-Direttur tad-Dipartiment
ghal Standards fil-Harsien
Socjali**

u

L-Avukat Generali

**Dan huwa provvediment dwar rikors li pprezentat ir-rikorrenti
fit-28 ta` Gunju 2019 a fol 24 sa 26 tal-process.**

Il-Qorti :

Rat ir-rikors prezentat ir-rikorrenti fit-28 ta` Gunju 2019 fejn, ghar-ragunijiet li ndikat, talbet sabiex din il-Qorti taghti :

dawk l-ordnijiet bhala "interim measure" billi twaqqaf ossia tissospendi l-esekuzzjoni tas-sentenza tal-Onorabbli Qorti Civili (Sede Familja) fl-ismijiet "Direttur tad-Dipartiment ghall-Istandards fil-Harsien Socjali vs Dinah Aquilina" kif ghaddiet in gudikat u dan sakemm ikun hemm ezitu finali u definittiv fil-kawza odjerna. Dan hu mehtieg ghaliex dak li qed jintalab fil-kawza odjerna jigi stultifikat kemm -il darba l-intimati jithallew inehhu lill-minuri mi9nn Malta u mill-kustodja tal-esponenti.

Rat illi fir-rikors kostituzzjonali taghha, li kien ukoll prezentat fit-28 ta` Gunju 2019, ir-rikorrenti talbet li din il-Qorti sabiex :

Tiddikjara u tiddeciedi illi l-proceduri fl-ismijiet "Direttur tad-Dipartiment ghall-Istandards fil-Harsien Socjali v. Dinah Aquilina" li ghaddew in gudikat fit-28 ta` Gunju 2019 u l-ordni ghar-ritorn tal-minuri lejn l-Awstralja :

1. *Jikkostitwixxu ksur tad-dritt ghal smiegh xieraq tal-esponenti u tal-minuri Denzel u Xyzel ahwa Grech, sen jatament stante li ma jharsux dak li jghidu l-Artikolu 39(2) tal-Kostituzzjoni ta` Malta u l-Artikolu 6(1) tal-Konvenzjoni Ewropeja tad-Drittijiet u Libertajiet Fundamentali tal-Bniedem, kif sancita that il-Kap 319 tal-Ligijiet ta` Malta u that l-obbligi internazzjonali tal-Istat ta` Malta.*

2. *Jikkostitwixxu ksur tad-dritt ghall-hajja familjari tal-esponenti u tal-minuri Denzel u Xyzel ahwa Grech, senjatament stante li ma jharsux dak li jghidu l-Artikolu 8 tal-Ewwel Skeda tal-Kap 319 tal-Ligijiet ta` Malta u l-Artikolu 8 tal-Konvenzjoni Ewropeja tad-Drittijiet u Libertajiet Fundamentali tal-Bniedem, kif sancita taht il-Kap 319 tal-Ligijiet ta` Malta u taht l-obbligi internazzjonali tal-Istat ta` Malta.*

3. *Taghti dawk ir-rimedji li jidhrilha xierqa u opportuni fosthom dawk li tiddikjara li r-ritorn tal-minuri Denzel u Xyzel ahwa Grech kif ordnat fis-sentenza moghtija fl-ismijiet "Direttur tad-Dipartiment ghall-Istandards fil-Harsien Socjali v. Dinah Aquilina" m`ghandux isehh u/jew jigi enforzat.*

Rat ir-risposta li pprezentaw l-intimati fl-1 ta` Lulju 2019 ghar-rikors li dwaru qed jinghata l-provvediment odjern, kif ukoll ir-risposta li pprezentaw l-intimati wkoll fil-1 ta` Lulju 2019 ghar-rikors kostituzzjonali. Ghar-ragunijiet li kienu ndikati, l-intimati talbu lill-Qorti sabiex tichad it-talbiet li saru mir-rikorrenti fiz-zewg rikors.

Rat is-sentenza li tat il-Qorti tal-Appell fit-28 ta` Gunju 2019 fil-kawza fl-ismijiet : *Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali v. Dinah Aquilina (Rik. Nru. 476/17 AL)*.

Rat il-verbal tal-udjenza tat-2 ta` Lulju 2019.

Semghet is-sottomissjonijiet li saru dwar ir-rikors de quo fil-kors ta` dik l-udjenza.

Rat illi r-rikors thalla ghal provvediment ghal-lum.

Rat l-atti l-ohra.

Ikkunsidrat :

Effettivament li dak li qed jintalab mir-rikorrenti huwa illi, nonostante s-sentenza li tat il-Qorti tal-Appell fit-28 ta` Gunju 2019 fil-kawza fl-ismijiet "Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali v. Dinah Aquilina" (Rik. Nru. 476/17 AL) u minkejja li huwa accettat miz-zewg nahat li dik is-sentenza ghaddiet in gudikat, din il-Qorti ghandha tissospendi l-ezekuzzjoni ta` dik is-sentenza sakemm tkun deciza l-kawza kostituzzjonali bejn l-istess partijiet.

Ikkunsidrat :

Talbiet ghall-*interim measures* huma regolati bir-**Rule 39 tar-Rules of Court** tal-Qorti Ewropea tad-Drittijiet tal-Bniedem ("**ECTHR**").

Rule 39 taqra hekk :-

1. *The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.*

2. *Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the [Council of Europe] Committee of Ministers.*

3. *The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.*

4. *The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.*

Il-Qorti tirreferi għall-“**Factsheet - Interim measures**” li harget mill-Ufficcju tal-ECtHR f` Jannar 2019 fejn jinghad hekk :-

Interim measures are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm. Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question ...

The Court grants such requests for an interim measure only on an exceptional basis, when the applicant would otherwise face a real risk of serious and irreversible harm ...

In linea generali, l-Factsheet tagħmel rassenja ta` kazi fejn *interim measures* kienu akkordati :

Expulsion or extradition cases

Risk to life or of torture, inhuman or degrading punishment or treatment.

Asylum seekers fearing persecution, ill-treatment or other serious harm.

Risk of persecution for political, ethnic or religious reasons

Abdollahi v. Turkey 3 November 2009

F.H. v. Sweden (no. 32621/06) 20 January 2009

Y.P. and L.P. v. France (no. 32476/06) 1 September 2010

W.H. v. Sweden (no. 49341/10) 8 April 2015 (Grand Chamber)

F.G. v. Sweden (no. 43611/11) 23 March 2016 (Grand Chamber)

Risk of ill-treatment related to sexual orientation

M.E. v. Sweden (no. 71398/12) 8 April 2015 (Grand Chamber)

Risk of stoning for adultery

Jabari v. Turkey 11 July 2000

Risk of being subjected to genital mutilation

Abraham Lunguli v. Sweden 1 July 2003

Risk of social exclusion

Hosseini v. the Netherlands 16 December 2008

Risk of sexual exploitation

M. v. the United Kingdom (no. 16081/08) 1 December 2009

Expulsion cases with a health / medical element

D. v. the United Kingdom (no. 30240/96) 2 May 1997

N. v. the United Kingdom (no. 26565/05) 27 May 2008 (Grand Chamber)

Paposhvili v. Belgium 13 December 2016 (Grand Chamber)

Öcalan v. Turkey 12 May 2005 (Grand Chamber)

Nivette v. France 3 July 2001

Babar Ahmad and Others v. the United Kingdom 10 April 2012

Risk of a flagrant denial of justice

Rule 39 of the Rules of Court may also be applied in cases where Articles 5 (right to liberty and security) and 6 (right to a fair trial) of the Convention are engaged, where there is a risk of a "flagrant denial of justice" in the event of expulsion or extradition.

Soering v. the United Kingdom 7 July 1989

Othman (Abu Qatada) v. the United Kingdom 17 January 2012

Il-Factsheet taccenna wkoll ghal kazi fejn ikun hemm **a risk to private and family life**

In vista tan-natura tal-kaz odjern, il-Qorti sejra tissofferma fuq din il-materja.

Jinghad hekk :

Exceptionally Rule 39 of the Rules of Court has been applied in cases that engage Article 8 (right to respect for private and family life) of the Convention, where there is a potentially irreparable risk to private or family life.

Issir referenza ghal tliet decizjonijiet tal-ECtHR.

1. Amrollahi v. Denmark **(11 July 2002)**

Jinghad hekk :

The applicant alleged that his deportation to Iran would sever his family relationship with his Danish wife, two children and daughter-in-law, since they could not be expected to follow him to that country. In this case the Court decided to apply Rule 39 of the Rules of Court to prevent the applicant's expulsion until his application had been examined. The Court ultimately reached the conclusion that there would be a violation of Article 8 of the Convention if he were deported to Iran.

**2. Eskinazi and Chelouche v. Turkey
(6 December 2005)**

Jinghad hekk :

This case concerned the obligation to return a child to Israel under the terms of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction. The applicants, the child and her mother, contended in particular that sending the child back to Israel would amount to a violation of Article 8 of the Convention. Enforcement of the judgment ordering the child's return was stayed in accordance with the interim measure indicated by the Court to the Turkish Government under Rule 39 of the Rules of Court. After examination, the Court declared the application inadmissible as manifestly ill-founded and decided to lift the interim measure in question. See also, among others: Neulinger and Shuruk v. Switzerland, judgment (Grand Chamber) of 6 July 2010; B. v. Belgium (no. 4320/11), judgment of 10 July 2012.

**3. Soares de Melo v. Portugal
16 February 2016**

Jinghad hekk :

This case concerned an order for seven of the applicant's children to be taken into care with a view to their adoption and the prohibition of her access to them. In this case the Court allowed a request from the applicant for an interim measure granting her a right of contact with her children. In its judgment, it held that there had been a violation of Article 8 of the Convention, finding in particular that the measures taken by the Portuguese courts in ordering the placement of the applicant's children with a view to their adoption had not struck a fair balance between the interests at stake, and that the Portuguese authorities should reconsider the applicant's situation with a view to taking appropriate measures in the children's best interests.

Ikkunsidrat :

Id-dottrina wkoll hija konkordi dwar il-parametri li ghandhom ikunu segwitu fil-konsiderazzjoni ta` *interim measures*.

Fil-pag 113 et seq tal-ktieb "**Theory and Practice of the European Convention on Human Rights**" (Raba` Edizzjoni – 2006 - Intersentia) l-awturi van Dijk, van Hoof, van Rijn u Zwaak, ighidu –

*... it is only in cases of extreme urgency that interim measures are indicated : the facts must prima facie point to a violation of the Convention, **and** the omission to take the proposed measures must result or threaten to result in irreparable injury to certain vital interests of the parties or the progress of the examination.* (enfasi u sottolinear tal-qorti)

Fil-pag 20 et seq tal-ktieb "**A Practitioner`s Guide to the European Convention on Human Rights**" (4th Edition – Sweet & Maxwell) Karen Reid izzid id-doza tas-sinjifikat reali ta` *an imminent risk of irreparable harm* meta tghid :-

As a general practice, measures (riferibbilment ghal *interim relief*) ***are applied only where there is an apparent real and imminent risk of irreparable harm to life and limb*** ... *While the procedure has been invoked in respect of other types of cases e.g. adoption of children, which may be arguably be of an irreparable nature, r.39* (riferibbilment ghar-Rule 39 tar-Rules of Court tal-ECHR) *has not been applied save in a few exceptional cases.*

Ikkunsidrat :

Kull qorti li ssib ruhha rinfaccjata b` talba ghall-hrug ta` *interim measure* ghandha timxi b` galbu u b` kawtela. Bla ma tixref fil-mertu tal-kawza kostituzzjonali, ghandha tqis it-talba fil-kuntest taghha, u tkun gwidata mid-dottrina u mill-gurisprudenza.

Din il-Qorti hasbet fit-tul dwar il-kwistjoni tal-lum, u qaghdet attenta ferm li tqis b` reqqa s-sottomissjonijiet li saru fl-udjenja tat-2 ta` Lulju 2019.

Bhala *interim measure*, ir-rikorrenti qeghda titlob lil din il-Qorti sabiex twaqqaf l-ezekuzzjoni tas-sentenza fuq riferita li ghaddiet in gudikat wara s-sentenza tal-Qorti tal-Appell tat-28 ta` Gunju 2019.

Kif diga` kien rilevati aktar kmieni, *interim measure* hija procedura li minnha nfisha hija eccezzjonali.

Tinghata fil-kazi fejn tirrizulta l-prova mqar fuq bazi ta` *prima facie* ta` *an imminent risk of irreparable harm*.

Eccezzjonalment biss kienet applikata f`kazi ta` allegati vjolazzjonijiet tal-Art 6 u tal-Art 8 tal-Konvenzjoni.

Tant hija eccezzjonali l-mizura li diversi kienu d-drabi meta l-ECtHR, wara li tkun tat *interim measure*, tkun pronta tregga` lura l-mizura meta ssib li ma jkunx hemm aktar htiega ghaliha.

Jirrizulta kjarament mhux biss mir-rikors, izda anke mis-sottomissjonijiet li ghamlu d-difensuri tar-rikorrenti, illi l-konsiderazzjoni ewlenija tar-rikorrent sabiex titlob l-*interim measure* kienet ghaliex tikkontendi li jekk il-mizura li qeghda titlob ma tkunx akkordata, allura dak il-fatt jistultifika l-iskop persegwit bil-kawza kostituzzjonali u konvenzjonali.

Din il-Qorti tirrileva li *ut sic* din tar-rikorrenti mhijiex konsiderazzjoni tajba u li tiggustifika l-ghoti ta` l-*interim measure* li r-rikorrenti qeghda titlob.

F`kawza kostituzzjonali u/jew konvenzjonali jista` jinghata rimedju biss jekk tirrizulta ppruvata skont il-ligi l-vjolazzjoni tal-Kostituzzjoni u/jew tal-Konvenzjoni lamentata mir-rikorrenti. Mhux biss izda anke jekk tirrizulta ppruvata l-vjolazzjoni, jibqa` d-diskrezzjoni tal-qorti xi kwalita` ta` rimedju taghti. Graw sitwazzjonijiet, u mhux ftit, fejn rikorrenti talbu rimedju u nghataw iehor wara li ghamlu l-prova tal-vjolazzjoni. Graw ukoll kazi ohra fejn d-dikjarazzjoni li kien hemm vjolazzjoni kienet meqjusa mill-qrati bhala bizzejjed minghajr ma nghata rimedju *ad hoc*.

Issa fil-kaz tal-lum, ir-rikorrenti mxiet fuq il-presuppost li tista` titlob il-mizura li talbet meta mhux biss ma nstemghetx imqar prova wahda fil-kawza, izda lanqas saret xi prova li mqar toqrob ghal-livell ta` *prima facie*.

Dak li certament ghandha quddiemha din il-Qorti hija prova, mhux kontestata, li certament tmur ben oltre l-*prima facie* illi tistabilixxi li hemm sentenza ta` l-qrati taghna li saret *res judicata* u li qeghda tordna li l-ulied minuri ahwa Grech imorru lura lejn l-Awstralja.

Jekk ghandha lanjanzi kostituzzjonali u/jew konvenzjonali xi tressaq dwar dan il-gudikat, jispetta lir-rikorrenti li taghmel il-prova skont il-ligi fil-kors tal-kawza. Izda ma tistax taqleb kollox ta` taht fuq billi titlob lil din il-Qorti sabiex, minghajr jkollha prova gustifikattiva attinenti ghal-lanjanzi lamentati, taghti *interim measure* fejn iggib fix-xejn dak il-gudikat.

Imcajpra wkoll hija l-insistenza tar-rikorrenti li, ghall-fini tar-rikors odjern, jigi zvelat x`irrelata s-*social worker* dwar il-minuri lill-Qorti Civili (Sezzjoni tal-Familja) fil-kors tal-proceduri pendenti quddiem dik il-Qorti. Dik materja li *tista`* tkun trattata u dibattuta fil-kors tal-kawza dwar il-mertu tal-lanzjanzi. Pero` mhijiex materja rilevanti ghall-fini tal-provvediment tal-lum.

Fil-kaz tal-lum ma hemmx prova ta` *an imminent risk of irreparable harm* jew addirittura ta` *an apparent real and imminent risk of irreparable harm to life and limb*.

Huwa manifest ghal din il-Qorti illi l-aspettattiva tar-rikorrenti fil-procediment odjern ma jinkwadrax fis-sitwazzjonijiet fejn kien applikat r-Rule 39 tar-Rules of Court.

Din il-Qorti tishaq b`forza li l-provvediment tal-lum mhuwiex u lanqas m`ghandu jigi nterpretat bhala xi pronunzjament dirett jew indirett taghha dwar il-mertu tal-lanzjanzi kostituzzjonali u konvenzjonali tar-rikorrenti kif dedotti fil-kawza. Il-Qorti taghmel il-konsiderazzjonijiet taghha, wara li tkun semghet u rat il-provi tal-partijiet, meta tigi biex taghti decizjoni dwar it-talbiet u dwar l-eccezzjonijiet.

Ghar-ragunijiet kollha premissi, il-Qorti qeghda tichad it-talba tar-rikorrenti kif dedotta fir-rikors taghha tat-28 ta` Gunju 2019 a fol 24 sa 26 tal-process.

L-ispejjez ta` dan il-provvediment jibqghu rizervati għall-gudizzju finali fil-kawza li hija pendenti quddiem din il-Qorti kif presjeduta, u li kienet prezentata kontestwalment mar-rikors tal-lum.

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