



CONSTITUTIONAL COURT

JUDGES

**THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE ANTHONY ELLUL**

Sitting of Wednesday, 26th January, 2022.

Number 12

Application number: 83/2015/1 JRM

Glen James Scott

v.

The Honorable Prime Minister; The Attorney General today known as State Advocate; The Commissioner of Police and the Director General – Courts of Malta, and by decree dated 18th February 2016 Jolanda Drobez intervened *in statu et terminis*; and by decree of 18th October 2021 Dr Simon Micallef Stafrace and Legal Procurator Joeline Pace Ciscaldi were nominated as curators to represent Jolanda Drobez since she is absent from these islands

1. The applicant appealed that part of the judgement delivered by the Civil Court, First Hall on the 17th December 2020 that upheld the third preliminary plea, that applicant failed to exhaust the ordinary remedies available to him to redress his grievance by filing a lawsuit for judicial

review under Article 469A of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta).

2. From the evidence the Court understands that the Attorney General received a request so that the boat Azimut 55, Number IZ-2152, is returned to Neje Turizem as represented by Jolandi Drobe. A request made by the Slovenian authorities by letter dated 29th October 2015 wherein they referred to the *European Convention on Mutual Assistance in Criminal Matters Strasbourg* (20th April 1959) and *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union* (29th May 2000). In the letter it was stated that the applicant and his wife (Jette Scott) were undergoing a pre-trial procedure for the misappropriation of the boat. However, it was emphasized that “... *no formal – prosecutorial decision has been adopted yet*” and the boat was not required as evidence. The request was based on the Slovenian law which stipulates that property which beyond doubt belongs to the injured party, and not required as evidence in criminal proceedings, may be returned to the injured party prior to the termination of the proceedings.

3. From what the Court could understand, the vessel was not physically seized by the Maltese authorities. However on the basis of the letter and order attached to the same, proceedings were instituted in Malta before the Court of Magistrates (Malta). It seems that there was a

Court order so that the applicant returns the key of the boat (Inspector Christopher Galea Scannura – sitting of the 12th May 2016). However, the witness said that the key was never surrendered by the applicant.

4. Furthermore, on the 3rd April 2013 applicant and his wife signed an agreement declared to be a *Business Co-operation Contract/Agreement*. The other party was Jolanda Drobez who signed on behalf of Nejc Turizem. The parties to the contract declared that Nejc Turizem was the lessee of the boat from VBKS. The company entered into an obligation to transfer ownership of the boat to the Scotts on payment of €349,000. Nejc Turizem also declared that it “... *agrees and allows the boat Azimut 55 to be used in Malta*”. On the same day another agreement was signed whereby Nejc Turizem gave the boat on lease to The 88 Holdings Limited for the period from the 1st May 2013 to 5th October 2016.

5. On the 13th November 2015 Jolanda Drobez on behalf of Nejc Turizem and VBKS Leasing filed judicial proceedings against the applicant and his wife whereby she claimed damages since they did not return the key to the boat, notwithstanding a Court order and a police order. On the same day, applicant filed the case under review wherein he complained of a breach of Article 1 of the First Protocol of the

European Convention on Human Rights and Fundamental Freedoms and Article 37 of the Constitution.

6. It seems that Joland Drobez lost interest in the case she filed on behalf of the two companies, and during a sitting held on the 16th January 2020 the Civil Court, First Hall ordered the cancellation of the lawsuit (Drobez Jolanda nomine et v. Scott Glenn et 1092/2015).

7. In the constitutional case filed on the 13th November 2015, applicant complained that his fundamental right as protected under Article 1 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms and Article 37 of the Constitution were breached. One of the defences raised by respondents was that the applicant failed to exhaust the ordinary remedies he had available.

8. The first Court upheld the third preliminary plea and declared that the applicant failed to exhaust the ordinary remedies since he did not file a lawsuit for judicial review of administrative action under article 469A of the Code of Organization and Civil Procedure. The Court also declared that the Prime Minister, Commissioner of Police and Director-General were non-suited to stand as respondents in the case. Although in his appeal application the appellant requested this Court to revoke the judgement of the first Court, there is no ground of appeal with regards to

the first preliminary plea upheld by the first Court. Therefore, that part of the judgement is a *res judicata*. The only ground of appeal concerns that part of the judgement whereby the first Court decided that the applicant failed to exercise an ordinary remedy under Art. 469A of the Code of Organization and Civil Procedure.

9. The Court's reasoning was the following:

*“Regarding the **third preliminary plea** raised by the respondents, namely that the Court should refrain from exercising its special jurisdiction, owing to the fact that the applicant had not exhausted all the ordinary remedies available to him at law for a proper defence against the charges proffered against him, respondents suggest remedies, of an administrative and civil nature, which were available to the applicant other than this action. Respondents refer to the action for judicial review under article 469A of the Code of Organisation and Civil Procedure and hold that there was nothing holding the applicant from questioning the legality of the action taken by the local authorities in adhering to the request of the Slovenian Authorities. Alternatively, with a precautionary warrant of arrest of sea vessels at hand, the applicant could have proceeded with instituting an action for damages suffered in bringing the boat back to Malta;*

That, on the other hand, applicant rebuts these arguments by claiming that the action of judicial review was not an option given that what is being question is not an administrative act by a public authority but a civil law claim by the party intervening. Furthermore, he claims that any civil proceedings have to be filed in Slovenia and not Malta. Thus, there were no ordinary remedies open to him in Malta;

That when considering whether or not to exercise its exclusive jurisdiction, this Court has to be wary not to relinquish it unless and until it is fully convinced that there exist sufficient reasons which dictate that it should do so, considering that the exercise of such a discretion is an exception to the basic rule and duty of any court to hear and decide any question validly brought to its attention. Nevertheless, such a discretion has been provided for in the basic law of Malta expressly in order to enhance this special and specific jurisdiction, chiefly to protect it from unnecessary recourse where other remedies are available to the aggrieved party;

That the circumstances which a court has to consider before deciding to exercise its discretion not to hear a case on a “constitutional” or “conventional” issue are now well-established in our legal system and this Court is refraining from elaborating further other than to refer to judgements pronounced in this regard by the country’s highest court;

That when it is claimed that an ‘alternative ordinary remedy’ is available to the aggrieved party, it has to be shown (by the party alleging such remedy) that the remedy referred to is accessible, satisfactory, effective and adequate to address the grievance. However, it does not have to be shown that a favourable outcome from such a remedy is assured or guaranteed, as long as the manner of achieving it can be pursued in a practical, effective and meaningful manner;

That it considers the arguments raised by respondents as both valid and pertinent to the examination of the current plea. In the Court’s opinion, an effective and adequate remedy available to the applicant was indeed an action for judicial review in terms of section 469A of the Code of Organisation and Civil Procedure, whereby the applicant could request the quashing of the order to have the vessel seized and taken back to Slovenia. The Court does not see the applicant’s point in attempting to challenge the “constitutional” effects of his being deprived of possession of the said vessel as a result of the request put forward by the Slovenian authorities, when he could have instituted the proper procedures to challenge the action taken by the local authorities in adhering to the request submitted to it by the Slovenian authorities. For some inexplicable reason which applicant has failed to explain to the Court, the reiterated requests made by applicant himself for the issue and execution of precautionary remedies (which were initially granted) betray the idea that even the applicant had entertained the prospect of pursuing those warrants with the requisite judicial actions, and which he failed to pursue;

That from what this Court understands to be the present situation, the procedures before the Court of Magistrates are as yet under way. This circumstance alone, in the light of the considerations just made, makes the inquiry into the alleged violations suffered by applicant utterly premature and of mere academic value, keeping in mind the specific legal provisions upon which the application relies;

That for the above-mentioned reasons, the Court finds that the third preliminary plea is worthy of consideration and valid and thus ought to be upheld”.

10. On the 5th January 2021 the appellant filed an appeal application. He complained that he did not have a remedy under Article 469A of the

Code of Organization and Civil Procedure. He referred to subsection (3) of Article 469A which provides:

“Judicial review cannot be made where an agreement has been reached with the competent authorities of another country that the courts of that country shall exercise jurisdiction over the crime”.

11. He also argued that respondents availed themselves of Art. 355E(3)(b) of the Criminal Code, whereby a warrant may be issued by a Magistrate for seizing property in respect of which an alert has been entered in the Schengen Information System. All the documentation is to be found in the inquiry held by a Magistrate (690/2015). Although he requested that the same is exhibited in this case, the first court rejected his request. In the acts of this case there are no documents which prove that a warrant of seizure was issued by a Magistrate.

12. Unfortunately, in his application filed on the 13th November 2015 the appellant failed to explain what were his complaints against each one of the respondents. The appellant declared that he leased the boat and that although he had a right to purchase the boat, when he offered the balance of the price, Nejc Tourism did all it could to avoid such an obligation. Later on in the application he claimed that he bought the boat, although it is evident that he did not pay the full purchase price.

13. From the evidence it does not transpire that the respondents that were declared to be non-suited gave any particular orders with regards

to the boat that is the subject of these judicial proceedings. The Court understood that the Police merely referred the matter to a magistrate for investigation, and the boat remained in the appellant's possession. However, Inspector Christopher Galea Scannura said that the Court (probably it was the Magistrate once a magisterial inquiry was held) ordered the appellant to surrender the key of the boat and he did not.

14. For the purpose of this judgement, what is relevant is whether or not appellant could have proceeded in terms of Art. 469A of Chapter 12 of the Laws of Malta. In his note of submissions filed while proceedings were still pending in the first Court, the respondents argued:

“One of these ordinary remedies consists in a case for judicial review under article 469A of Chapter 12 of the Laws of Malta. If the applicant believes that the local authorities acted ultra vires and made irrelevant considerations when adhering to the request of the Slovenian authorities under the European Convention on Mutual Assistance in Criminal Matters and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the he could have raised the issue under Administrative Law”.

15. In fact in their third plea the respondents declared:

“3. Illi mingħajr preġudizzju u dejjem in linea preliminari, in kwantu jirriżulta li hemm kontestazzjoni fuq min huwa jew għandu dritt ikun proprjetarju tal-imsemmija biċċa tal-baħar ki fukoll in kwantu t-talba tad-District State Prosecutor tar-Repubblika tal-Islovenja għadha pendent quddiem il-Qrati nostrali, hija l-umli fehma tal-esponenti li din l-Onorabbli Qorti għandha tirrifjuta li teżercita s-setgħat tagħha skont il-proviso tal-artikolu 46(2) tal-Kostituzzjoni ta' Malta u tal-proviso tal-artikolu 4(2) tal-Kap. 319”.

16. That plea had nothing to do with the respondents argument that applicant had an adequate remedy had he filed a judicial review case in

terms of Article 469A of Chapter 12. This notwithstanding towards the end of the proceedings in front of the first Court, the respondents argued that the ordinary remedy was a lawsuit in terms of that provision of the law. The first Court gave a decision based on that defence, and the appeal filed by the appellant concerns whether an action in terms of Art. 469A was an effective ordinary remedy in this particular case which he should have filed instead of the constitutional case for breach of his fundamental human rights.

17. The Court is of the view that since the Attorney General and the Police referred the matter to a Court and/or to an inquiring magistrate, it was futile for the appellant to file proceedings for judicial review under Article 469A of Chapter 12. There is no evidence that the Attorney General and the Police issued an order to have the vessel seized and taken back to Slovenia. Furthermore, the Court and/or inquiring magistrate are not a public authority as defined in Art. 469A of Chapter 12.

For these reasons the Court upholds the appeal and changes that part of the judgement delivered on the 17th December 2020 that upheld the third preliminary plea, and instead rejects that plea. The appeal judicial costs are at the sole charge of the Attorney General.

Appeal Number: 83/15/1

The Court transmits the records of the case back to the Civil Court - First Hall (Constitutional Jurisdiction) for continuation.

Mark Chetcuti
Chief Justice

Giannino Caruana Demajo
Judge

Anthony Ellul
Judge

Deputy Registrar
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