QORTI ĊIVILI – PRIM'AWLA

(Sede Kostituzzjonali)

ONOR. IMĦALLEF MIRIAM HAYMAN LL.D.

Seduta tal-lum, Il-Ġimgħa 5 t' April, 2024

Rikors 306/23MH

Numru:1

Roy Joseph Cremona

Vs

L-Avukat tal-Istat

Reġistratur tal-Qrati u Tribunali Kriminali.

Il-Qorti;

Rat ir-rikors promotur fejn ir-rikorrenti jattakka inter alia il-proċeduri li saru fl-atti tal-kawża fl-ismijiet Il-Pulizija vs Roy Joseph Cremona appell 90/2017 in kwantu dawn huma leżivi tad-dritt fundamentali tiegħu għal smiegħ xieraq minħabba nuqqas ta' salvagwardja ta' l-artikoli 39 tal-Kostituzzjoni u 6 tal-Konvenzjoni u dan minħabba l-użu bħala prova unika fl-imsemmija proċeduri penali ta' l-istqarrija rilaxxata mir-rikorrenti meta dan ma kellux u ma ġiex mogħti dritt ta' assistenza legali tul dan it-Theddid.

Rat ir-risposta ta' l-intimati li laqgħet għal din ix-xilja.

Rat lir-rikorrenti fil-mori tas-smiegħ ta' dawn il-proċeduri kostituzzjonali u konvenzjonali preżenta rikors għal proċediment interim, miżuri proviżorji[1] fejn talab illi

Pendenti l-eżitu tar-rikors kostituzzjonali promotur il-Qorti tordna *"..s-sospensjoni tal-eżekuzzjoni tas-sentenza tal-Qrati tal-Maġistrati (Malta) bħala Qorti ta' Ġudikaturi Kriminali fil-kawża fil-pulizija vs Roy Joseph Cremona mogħtija fl-20 ta' Frar 2023;*

Tordna s-sospensjoni tal-eżekuzzjoni tas-sentenza tal-Qorti tal-Appell Kriminali bin-numru 90/2017/1 fl-ismijiet il-Pulizija vs Roy Joseph Cremona mogħtija fil25 ta' Mejju, 2023;

..."

L-intimati bir-risposta tagħhom jopponu dawn il-proċeduri interim ta' sospensjoni.[2]

Ikkunsidrat

Illi dawn il-proċeduri għal provediment proviżorju ġew xprunati minn ittra uffiċjali li l-intimat rċieva mingħand il-Kummissarju tat-Taxxi u Dwana biex in sostenn tas-sentenza tal-Qorti tal-Appell imsemmija huwa jħallas is-somma ta' €4906.80 dovuta bħala dejn ċivili.

Konsegwentement in kwantu l-Kummissarju tat-Taxxi u Dwana qiegħed kif tagħtih il-liġi jitlob terz tas-somma dovuta. Hija fil-konfront ta' din l-eżekuzzjoni lir-rikorrenti jitlob l-għoti ta' miżura proviżorja.

Ikkunsidrat.

[1] Folio 25 datat 15 ta' Frar, 2024
[2] Folio 47

Illi fil-fact sheets dwar dan in tematika insibu lit-tagħlim tal-Qorti Ewropeja huwa li:- *What are interim measures?*

The European Court of Human Rights may, under Rule 39 of its Rules of Court, indicate interim measures to any State party to the European Convention on Human Rights. 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. In the majority of cases, the applicant requests the suspension of an expulsion or an extradition. The Court grants requests for interim measures only on an exceptional basis, when applicants would otherwise face a real risk of serious and irreversible harm[3]. Such measures are then indicated to the respondent Government. However, it is also possible for the Court to indicate measures under Rule 39 to applicants[4]

Fl-istess pubblikazzjoni nsibu li l-iskop ta' dawn il-miżuri kif tadottahom il-Qorti Ewropeja huma:

Scope of interim measures In practice, interim measures are applied only in a limited number of areas[5] and most concern expulsion and extradition. They usually consist in a suspension of the applicant's expulsion or extradition for as long as the application is being examined[6]. The most typical cases are those

[3] . In the case Rackete and Others v. Italy (no. 32969/19), for example, the Court decided, in June 2019, not to indicate to the Italian Government an interim measure requiring that the applicants (nationals of Niger, Guinea, Cameron, Mali, Ivory Coast, Ghana, Burkina Faso and Guinea-Conakry) be authorised to disembark in Italy from the ship Sea-Watch 3; at the same time, however, the Court indicated to the Government that it was relying on the Italian authorities to continue to provide all necessary assistance to those persons on board Sea-Watch 3 who were in a vulnerable situation on account of their age or state of health (see press release of 25 June 2019).

[4] . For example, in the case of Ilaşcu and Others v. the Republic of Moldova and Russia, where the Court asked one of the applicants to stop a hunger-strike (see paragraph 11 of the Grand Chamber judgment of 8 July 2004). See also the Rodić and Others v. Bosnia and Herzegovina judgment of 27 May 2008. More recently, in the case Saakashvili v. Georgia (no. 54641/21), the Court urged the applicant to call off his hunger strike and, at the same time, it indicated to the Government of Georgia to inform it about the applicant's current state of health, to ensure his safety in prison, and to provide him with app

[5] . On the question of the application of interim measures in inter-State cases, in situations of armed conflicts, see the factsheet on "Armed conflicts"

[6] . For example, on 14 June 2022, the Court has decided to grant an interim measure in the case of K.N. v. the United Kingdom (no. 28774/22), an Iraqi asylum-seeker facing imminent removal to Rwanda. In this case, the Court has indicated to the UK Government that the applicant should not be removed to Rwanda until three weeks after the delivery of the final domestic decision in his ongoing judicial review proceedings (see press release of 14 June 2022 and press release of 15 June 2022)

where, if the expulsion or extradition takes place, the applicants would fear for their lives (thus engaging Article 2 (right to life) of the European Convention on Human Rights) or would face ill-treatment prohibited by Article 3 (prohibition of torture or inhuman or degrading treatment) of the Convention[7]. More exceptionally, such measures may be indicated in response to certain requests concerning the right to a fair trial (Article 6 of the Convention)[8], the right to respect for private and family life (Article 8 of the Convention)[9] and freedom of expression (Article 10 of the Convention)[10]. In the Court's case-law as it currently stands, Rule 39 of the Rules of Court is not applied, for example, the following cases: to prevent the imminent demolition of property[11], imminent insolvency, or the enforcement of an obligation to do military service; to obtain the release of an applicant who is in prison pending the Court's decision as to the fairness of the proceedings; to ensure the holding of a referendum[12]; to prevent the

[7]. See, for example, the press releases of 7 December 2021 (link) and 21 February 2022 (link), regarding requests for interim measures concerning the situation at the borders with Belarus. See also, below, pp. 2-7

[8] . In February 2022, for example, in the case Wróbel v. Poland (no. 6904/22), the Court indicated an interim measure, asking that the respondent government ensure that the proceedings concerning the lifting of the applicant's – a Supreme Court judge – judicial immunity comply with the requirements of a "fair trial" as guaranteed by Article 6 § 1 of the Convention, in particular the requirement of an "independent and impartial tribunal established by law", and that no decision in respect of his immunity be taken by the Disciplinary Chamber of the Supreme Court until the final determination of his complaints by the European Court (see press release of 9 February 2022, press release of 20 April 2022, and press release of 10 August 2022). See also the press release of 24 March 2022 and the press release of 31 March 2022 concerning the indication by the Court of interim measures in cases concerning charges brought against Polish judges. See also the press release of 14 April 2022, concerning the case Stępka v. Poland, in which the Court indicated an interim measure to the respondent Government, asking the Government to ensure that the proceedings concerning the lifting of the judicial immunity of the applicant – a Supreme Court judge –comply with the requirements of a "fair trial", and that no immediately enforceable decision in respect of his immunity be taken by the Disciplinary Chamber of the Supreme Court until the final determination of his complaints by the European Court. See also: press release of 12 July 2022, concerning the case Raczkowski v. Poland (no. 33082/22), in which the Court indicated an interim measure asking that the Polish Government ensure that the proceedings concerning the lifting of the applicant's – a military judge – judicial immunity comply with the requirements of a fair trial as guaranteed by Article 6 § 1 of the Convention and that no decision be taken until the final determination of his complaints by the Court; press release of 17 August 2022 concerning three judges in Poland facing disciplinary proceedings and at risk of imminent suspension from their judicial functions; press release of 7 December 2022, concerning the indication to the Government of Poland of an interim measure requesting that the respondent State should suspend the effects of the decisions to transfer the applicants, experienced specialists in criminal law and judges, from the Criminal Division to the Labour and Social Security Division of the Warsaw Court of Appeal and ensure that no decision to transfer the applicants to another division of the Court of Appeal against their will is taken until the final determination of the applicants' complaints by the Court; press release of 16 February 2023.

[9] . See below, pp. 7-11, for examples

[10]. See, for example, the press release of 10 March 2022, concerning the application in the case ANO RID Novaya Gazeta and Others v. Russia (no. 11884/22).

[11]. See, for example, the press release of 1 September 2020 concerning the case Upravlinnya Krymskoyi Yeparkhiyi Ukrayinskoyi Pravoslavnoyi Tserkvy (Crimean branch of the Ukrainian Orthodox Church of the Kyiv Patriarchate) v. Russia, in which the applicant Church requested the Court to indicate interim measures to prevent the Russian authorities from evicting it from its main premises, a Cathedral in Simferopol, and from demolishing another of its buildings

[12]. See press release of 21 December 2007 concerning the inappropriate use of interim measures procedure

dissolution of a political party[13]*; or to freeze the adoption of constitutional amendments affecting the term of office of members of the judiciary*[14]*.*

Ġia minn dawn l-astratti naraw in-natura straordinarja ta' din il-miżura.

Mil-lat ta' leġislazzjoni domestika, dawn il-miżuri huma maħsuba kemm fl-artikolu 46(2) tal-Kostituzzjoni ukoll l-artikolu 4(2) tal-Kap 319 tal-Liġijiet ta' Malta.

Għandu jingħad li fl-ebda wieħed minn dawn l-artikoli msemmija m'hemm direzzjoni jew imniżżel jew imfassal kif u meta għandhom jingħataw dawn il-miżuri. Fil-fatt hija l-ġurisprudenza li nisslet sensiela ta' regoli fejn tali miżuri eċċezzjonali għandhom jiġu adottati.

Bla dubbju l-ġurisprudenza sabet konfort u imxiet ukoll fuq kitbiet ta' ġuristi u pubblikazzjonijiet legali ferm kwotati.

Mil-lat ta' kitbiet dwar l-istess insibu fost ħafna oħrajn li-:

fil-ktieb "**A Practitioner`s Guide to the European Convention on Human Rights"** (4th Edition – Sweet & Maxwell) Karen Reid tghid illi :-

"*As a general practice, measures (riferibbilment għal 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 għar-Rule 39 tar-Rules of Court tal-ECHR) has not been applied save in a few exceptional cases. Matters of <u>detention</u> or interference with property, for example, are not regarded as necessitating interim measures."* (sottolinear ta' din il-Qorti).

[13]. For example, in the case of Sezer v. Turkey, the Court rejected a request for the adoption of an interim measure to prevent the Turkish Constitutional Court from ordering the dissolution of the AKP (Adalet ve Kalkınma Partisi – Justice and Development Party) (see press release of 28 July 2008).

[14] . See press release of 8 July 2020 concerning the case Gyulumyan and Others v. Armenia

Minn naħa l-oħra l-awturi **Harris, O'Boyle & Warbrick**[15] jsostnu li: "*After articles 2 and 3,*

"..... Another category is when immigrants are to be deported from a contracting party and allege only that the deportation will violate their private and family life, the rest of the family residing in the contracting party concerned. Rule 39 will only be applied exceptionally in such cases (indeed there would be a presumption that it would not be applied) since it is rare that the ' irreparable damage test' will be met."

(sottolinear ta' din il-Qorti).

Hekk ukoll illi fil-paġna 113 *et seq*. tal-ktieb "**Theory and Practice of the European Convention on Human Rights"** (Raba` Edizzjoni – 2006 - Inters entia) l-awturi van Dijk, van Hoof, van Rijn u Zwaak, jgħidu –

"... 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." (enfażi u sottolinear tal-Qorti).

Dawn iċ-ċitazzjonijiet jissottolineaw kemm trid tkun urġenti, impellenti in-neċessita ta' dan ir-rimedju wkoll kemm irid ikun reali u rreparabbli l-preġudizzju li se jiġi soffert jekk din il-miżura proviżorja ma tiġix akkordata.

Mil-lat tal-ġurisprudenza Maltija nsibu

[15] Law of the European Convention on Human Rights (3rd Ed.) p 142

Fil-kaz fl-ismijiet **Lawrence Cuschieri vs Onorevoli Prim Ministru nomine *et*.**[16] intqal li :_

"L-ewwel Qorti - kuntrarjament ghal dak li huwa principju bazi ta' kull procedura, ikkonkludiet li ghaliex hemm pendenti rikors li qed jallega vjolazzjoni ta' xi dritt fundamentali da parti tal-Qorti Kostituzzjonali dan allura ifisser ' li kollox ghadu incert ' mentri sentenza tal-Qorti hija certa u taghmel stat sakemm ma tissopravenix sentenza finali minn Qorti kompetenti li tghid mod iehor. Ghalhekk il-fatt li sentenza tkun giet attakkata billi jigi pretiz li kien hemm ksur tad-drittijiet fundamentali ma jwassalx ghas-sospensjoni ta' l-effetti taghha u ghas-soprasessjoni."

*Fid-decizjoni fl-ismijiet **Joseph Emanuel Ruġġier et v. Joseph Oliver Ruġġier pro et noe et, Rik. Nru. 21/05** moghtija fl-4 ta' Lulju 2005,[17] il-Prim' Awla tal-Qorti Civili (Sede Kostituzzjonali) (per Onor. Imħallef G. Caruana Demajo) ċaħdet it-talba taghhom in bazi ghas-segwenti osservazzjoni: "ghalkemm huwa minnu illi, fil-kompetenza kostituzzjonali taghha, din il-qorti ghandha wkoll is-setgha li tholl lill-partijiet mir-rabta ta' res judicata jekk dan ikun mehtieg biex taghti rimedju kontra ksur ta' drittijiet fondamentali, dan ma ghandux isir leggerment u zgur mhux qabel ma tkun inghatat sentenza li ssib illi tassew kien hemm dak il-ksur. Allegazzjoni ex parte illi sar ksur ta' dritt fondamentali ma hijiex ekwivalenti ghal sejbien gudizzjarju ta' ksur ta' drittijiet fondamentali, u hija ghal kollox inkompatibbli mas-serjetà tal-process gudizzjarju u l-finalità ta' res judicata illi sentenza tinzamm milli titwettaq ghax xi hadd jallega li kien hemm ksur ta' drittijiet fondamentali. Fil-fehma ta' din il-qorti, sentenzi li saru res judicata ghandhom jitqiesu li jiswew u li nghataw rite et recte sakemm ma jintweriex mod iehor."[20] (emfasi ta' din ilQorti).*

Dan għalhekk jibqa' jorbot ma dak ġia riferut li biex il-Qorti tilqa' talba għal mizuri interim u tissospendi l-effett ta' sentenza li għaddiet in ġudikat u li għada

[16] Qorti Kost. 12 ta' Awwissu, 1994

[17] Din il-kawza ikkonfermat talba tad-debituri ezekutati ghat-twaqqif ta' l-esekuzzjoni tassentenza kontra taghhom sakemm tinqata' kawza kostituzzjonali minnhom istitwita b'talba biex il-Qorti tiddikjara li s-sentenza inghatat bi ksur tad-drittijiet fondamentali taghhom. [20] Ara wkoll is-sentenza studjata tal-Magistrat Gabriella Vella fil-kaz **Paul Pace et v Steve Mallia** - Q. Magistrati - 5 ta' Ottubru 2015 li kien jirrigwarda talba ghaz-zamma ta' ezekuzzjoni ta' sentenza finali pendenti proceduri kostituzzjonali u konvenzjonali.

tajba u tiswa, jinħtieg li din il-Qorti tkun rinfaċċata bl-estrem tal-preġudizzju ġia msemmi.

Tqies li l-ilment tar-rikorrenti jistrieħ fuq il-fatt li la hemm ċans li kif issostni hu s-sentenza mogħtja kontrih hija nulla u nvalida għax straħet fuq provi inammissibbli (stqarrija bla assistenza legali) allura hu se jsoffri pregudizzju jekk Il-Kummissarju tat-Taxxi u Dwana jitħalla jeseġwixxi parti mis-sentenza. Pero l-Qorti ma tara xejn ta' pregudizzju f'dan, sempliċement għax jekk il-lanjanza prinċipali dik kostituzjonali u konvenzjonali mressqa mir-rikorrenti taf mis-sewwa, bil-konsegwenza lis-sentenzi ta' indolu penali li jilmenta minnhom hu jitħassru, il-Kummissarju jkun kostrett jirritorna dik is-somma eżegwita.

Konsegwentement it-talab in eżami għal għoti ta' miżura proviżorja qegħda tiġi miċħuda.

Onor.Imħallef Miriam Hayman

Dep.Reg Rita Falzon