QORTI ĊIVILI – PRIM'AWLA

(Sede Kostituzzjonali)

ONOR. IMĦALLEF MIRIAM HAYMAN LL.D.

Illum it-Tnejn 3 ta Frar, 2025

Fl-Atti tar-Rikors.: 553/2024/1 MH

Dr. Nicholas Valencia bħala mandatarju
Speċjali, għall-iskopijiet ta' dawn il-proċeduri
Tal-kumpanija AM Asia M14 Limited.
Vs
L-Avukat ta' L-Istat
North By Northwest GmbH
MS "MSC Valencia" Schiffahrtsgessellschaft Mbh
MS "Malta II" Schiffarts GmbH & Co. KG.

Il-Qorti.

Rat ir-rikors tas-16 ta' Jannar għall-ħrug ta' mizura interim kif hemm mitlub.

Rat ir-risposti fil-konfront ta' kull intimat, kollha oppositorji għar-raġunijiet hemm premessi.

Rat id-digriet tagħha datat 30 ta' Jannar 2025 fejn laqgħet din it-talba b'mod provviżorju.

Ikkunsidrat.

Rat li l-partijiet kollha dehru fis-seduta appuntata u trattaw din il-vertenza.

Rat l-atti kollha tal-kawża.

Ikkunsidrat.

Illi dan hu provvediment biex tiġi kkunsidrat t-talba għall-ħrug ta' mizura interim biex jinżamm il-bejgħ bl-irkant approvat mill-Qorti, tal-vapur MSC Valencia biex kif sostnut mir-rikorrenti ma jiġux kalpestati d-drittijiet ta' proprjeta' tagħhom ukoll in rispett tad-dritt ta' smiegħ xieraq. Dan ir-rikors ma jolqotx il-mertu tar-rikors Kostituzzjonali pendenti.

Ikkunsidrat.

Insibu li fl-artikolu 39 tar-Rules Of Court tal-Qorti tal-Ewropeja Għad-Drittijiet tal-Bniedem (QEDB) li-:

> *"1. The Court may, in exceptional circumstances, whether at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted.* ***Such measures, applicable in cases of imminent risk of irreparable harm to a Convention right****,* ***which, on account of its nature, would not be susceptible to reparation, restoration or adequate compensation****, may be adopted where necessary in the interests of the parties or the proper conduct of the proceedings".* **(Tipa grasa enfasi tal-Qorti.)**

Ġia mill-qari ta' din ir-regola huwa ovju u ċar fejn din il-miżura provviżorja ssib l-applikazzjoni tagħha.

Ta' min jgħid ukoll illi l-istess fakulta' ta' miżura provviżorju/interim joħroġ ukoll mill-artikolu 46(2) tal-Kostituzzjoni ta' Malta li jippermetti lill-Qorti tal-Prim'Awla fil-ġurisdizzjoni tagħha kostituzzjonali li tagħmel ordnijiet ukoll li

> *"...tagħti dawk id-direttivi li tqies xierqa sabiex twettaq, jew tiżigura t-twettiq ta' kull waħda mid-disposizzjonijiet tal-imsemmija artikolu 33 u 45 (magħdudin) li għall-protezzjoni tagħhom tkun intitolata dik il-persuna."*

Ġia mad-daqqa t'għajn jidher illi l-artikolu ċitat mill-Kostituzzjoni nostrali hu aktar wisgħa' fl-applikazzjoni tiegħu.

Pero', u dan il-Qorti tissenjalaħ minħabba diversi kontroversi miktuba li nqalgħu matul il-milja ta' żmien fuq hekk, ma jfissirx li kull miżura provviżorja li tintalab għandha tiġi miluqgħa b'mod laxk u bla kunsiderazzjonijiet serji ta' dak li jkun l-effett tagħha fil-kuntrarju.

Dan jingħad għaliex kull miżura hawn maħsuba trid tintqies bħal kull att ieħor simili ta' natura kawtelatorja[1] bħala waħda ta' indolu straordinarju, li jkun wieħed meħtieġ u verament mistħoq biex jikkawtela dritt fundamentali li verament jkun se jiġi kalpestat b'mod tali li wara l-eżitu finali tal-vertenza ma jinstabx rimedju jew riparazzjoni.

U dan hu propju l-eżami li trid tagħmel il-Qorti f'din l-istanza għalhekk mhux jekk hemmx ksur, għax hawn il-Qorti mhux se tidħol *in funditus* fuq il-ksur allegat ċioe' l-artikolu 6 u l-Ewwel artikolu ta' l-Ewwel Protokol tal-Konvenzjoni Ewropeja għad-drittijiet tal-Bniedem (Konvenzjoni) u l-artikolu 39 tal-Kostituzzjoni, u dan fejn si tratta ta' proċeduri *in rem*. Hawn trid tħares biss jekk mad-daqqa ta' għajn hux meħtieġ li jingħata miżura provviżorja biex iżżomm lir-rikorrenti milli jinkorri dannu irrimedjabbli u rriparabbli fin-nuqqas.

[1] Bħal mandat ta' inibizzjoni.

Speċifikat dan tara illi b'mod sintetiku u telegrafiku din il-veretenza segwit din il-linja;

Quddiem din il-Qorti kif preseduta tressqet kawża bil-proċedura tal-giljottina u dan fl-ismijiet **North by North GmbH soċjeta' reġistrata ġewwa l-Ġermanja kif irrapreżentata hawn Malta mill-Avukat Dottor Adrian Camilleri vs Il-bastiment "MSC Valencia" (IMO 9301471)** fejn din il-Qorti kkundannat il-vapur konvenut għall-ħlas tas-somma ta' debitu ta' €1,931,303.22.

L-Ewwel Qorti iddeċidiet favur il-proċedura sommarja u għaddiet għall-kundanna għall-ħlas. F'din il-proċedura dehru *bareboat charterers* kif rappresentati mill-kaptan tal-vapur, li ammettew id-debitu msemmi u dan għall-*bunkers* mhux imħallsa.

Aktar tard magħluqa l-proċedura u wara li l-Ewwel Qorti tat is-sentenza fuq skorta ta' l-artikolu 167 tal-Kap 12, daħħlu l-avukati li jirrappreżentaw sidien il-vapur u ċioe' r-rikorrenti jipprotestaw dan il-ġudizzju.

Is-sidien tal-bastiment konvenut intavolaw appell. Il-Qorti in suċċint hawn qalet li kien il-*bareboat charterers* **MS MSC Valencia Sciffarhrtsgessellschaft** li

kellhom r-rapprezentanza tal-bastiment konvenut, għalhekk f'din l-azzjoni **in rem** kien in-nolleġġatur li kellu jirrappreżenta l-vapur allura mhux is-sid propju tal-bastiment.

Is-sentenza ta' l-ewwel Qorti ġiet ikkonfermata.

Konsegwentement il-kreditur North by Northwest GmbH ottjena kontra l-vapur titolu eżekuttiv. Ovja li fin-nuqqas ta' sodisfazzjon ta' dan il-kreditu l-eżekuttriċi kreditriċi għaddiet biex teżegwixxi s-sentenza billi tipproċedi għall-bejgħ tal-bastiment debitur.

Konsegwentement quddiem din il-Qorti diversament preseduta saru proċeduri ai terminu ta' l-artikolu 364 tal-Kap 12 biex jiġi awtorizzat il-bejgħ privat tal-bastiment debitur.

Dan ġie awtorizzat b'digriet tas-27 ta' Diċembru, 2024 Rikors 1258/2024.[2]

Sidien il-bastiment Valencia, għax aggravati b'dan il-bejgħ, anzi bil-proċeduri kollha msemmija fejn huma ma kellhom ebda *locus standi*, speċjalment meta l-

[2] Dok C folio 46, ukoll l-atti ta' din il-proċedura allegati.

bareboat charterers ammettew dejn li nkorrew huma kontra l-bastiment, mxew biex jwaqqfu dan il-bejgħ awtorizzat billi ppreżentaw mandat ta' inibizjoni. Dan ġie miċħud.[3]

Ir-rikorrenti, sid il-bastiment f'din il-proċedura ta' miżura interim jargumentaw li kien dan id-digriet li ċaħad l-inibizzjoni li xpruna din it-talba in eżami.

Tqis li filfatt f'dak id-digriet il-qorti hemm id-diriġiet lis-sidien illi ġaladarba kien ġia' ressqu lment kostituzzjonali/konvenzjonali, li kellhom jindirizzaw il-lanjanza tagħhom f'dik il-fora permezz ta' din il-proċedura in kwantu azzjoni sussidjarja tagħha.

Għandu jingħad ukoll illi ftit ġimgħat qabel ma ġiet ntavolata t-talba għall-ħruġ tal-mandat ta' inibizzjoni biex jinżamm il-bejgħ tal-vapur, is-sidien għaddew biex iressqu rikors quddiem il-Prim'Awla fil-ġurisdizzjoni tagħha kostituzzjonali fejn in suċċint talbu li jiġi dikjarat ksur fil-konfront tiegħu ta' l-artikolu wieħed ta' L-ewwel Protokol tal-Konvenzjoni wkoll l-artikolu 39.2 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni dejjem fejn huma ġew milquta bil-proċeduri i*n rem.*

[3] Dok D folio 50 ukoll atti tal-mandat allegati.

Dan wassal għal din il-proċedura fejn qed jintalab li din il-Qorti

> *"....tagħti dawk l-ordnijiet provisorji jew interim fis-sens illi l-intimati jitwaqqfu milli jipproċedu bil-bejgħ privat tal-bastiment MSC Valencia ...wara d-digriet tal-Prim'Awla tal-Qorti Ċivili tas-27 ta' Diċembru. 2024 sakemm jiġu deċiżi l-proċeduri Kostituzzjonali fl-ismijiet ....."*

Rat illi fil-maġġor parti minn qed jopponi din it-talba, l-intimati jisħqu illi din mhux mistħoqqa għaliex is-sidien mhux se jsofru ebda preġudizzju f'dak l-estrem li jirrendi l-eżitu tal-bejgħ bħala ħsara irreparabbli jew irrimedjabbli.

Sew jispjegaw illi l-qliegħ ta' dan il-bejgħ se jiġi depożitat taħt l-Awtorita' ta' din il-Qorti, oltre jekk kif jallegaw is-sidien tal-bastiment, il-*bareboat charterers* kienu abbużivi u qarrieqa meta ammettew t-talbiet fil-proċeduri bil-giljottina, dawn *alla fine* dejjem għandhom dritt ta' jivvalsa kontra in-nolleġġatur. Isostnu wkoll li għalkemm is-sidien jipprotestaw kif ingħad, żammew viġġenti l-kuntratt tal-*bareboat charterers* sallum.

Ikkunsidrat

Illi in soluzzjoni ta' din il-vertenza ikun opportun li l-Qorti tagħmel referenza għal dak li nsibu fil-*Fact Sheet-Interim Measures* maħruġ f'Marzu 2024 kif adottati mill-QEDB kif pubblikat mil-Kunsill Ewropew.

> *"Scope of interim measures*
>
> *In practice, interim measures are applied only in a limited number of areas4. 3 and a majority of them 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.*[4]
>
> *The most typical cases are those 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*[5]*. More exceptionally, such measures may be indicated in response to certain requests concerning the right to a fair trial (Article 6 of the Convention)*[6]*, the right to respect for private and family life (Article 8 of the Convention)*[7] *and freedom of expression (Article 10 of the Convention)*[8]*..*
>
> *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*[9]*, imminent insolvency, or the enforcement of an obligation to do military service; to obtain the*

[4] See, for example, the case of *Khasanov and Rakhmanov v. Russia* (nos. 28492/15 and 49975/15) where the interim measure granted on 6 June and 12 October 2015 respectively came to an end on 29 April 2022 upon the delivery of the judgment by the Grand Chamber.

[5] See, for example, the press release of 28 November 2023 concerning the case of *I.A. v. France* (no. 40788/23), where the Court decided to grant an interim measure, accepting the request of a Russian national of Chechen origin to suspend his expulsion to Russia, for fear of imminent risk of irreparable harm to his rights under Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment) of the Convention

[6] See, for example, the case of *Othman (Abu Qatada) v. the United Kingdom* (no. 8139/09), where the Court granted an interim measure on 19 February 2009 to stop the applicant's removal to Jordan pending the Court's decision, in view of a real risk of, *inter alia*, flagrant denial of justice, contrary to Article 6 of the Convention, that his removal would entail

[7] See, for example, *Evans v. the United Kingdom* (no. 6339/05), where the Court decided to indicate to the respondent Government, under Rule 39, that, without prejudice to any decision as to the merits of the case, it was desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos that were the subject matter of the case were preserved until the Court had completed its examination of the case under Article 8 of the Convention.

[8] . 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).

[9] 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.

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[10]; to prevent the dissolution of a political party[11]; or to freeze the adoption of constitutional amendments affecting the term of office of members of the judiciary[12]."

Tara wkoll illi mill-istess *Fact Sheets* hemm stabbiliti l-istanzi fejn din il-miżura provviżorja ġiet milqugħa mill-QEDB.

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

…

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.

…

Risk to private and family life.

…

Persons sentenced to death.

…

Prisoners.

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

[11] 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).

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

…

Patients in state of total dependence and right to life.

….

Right to a fair trial and legal representation.

…

Serious risk to private and family life.

…

Stay of eviction order".

Ġia minn dan ċitat huwa ċar kemm huwa limitat u speċifiku l-applikazzjoni ta' din il-miżura kawtelatorja u li l-applikazzjoni tagħha hija fl-estrem tat-telf tad-dritt sostantivi li tiegħu qed tintalab il-protezzjoni. Dritt fundamentali dejjem sanċit fil-Konvenzjoni l-istess fil-Kostituzzjoni nostrali.

Mhux kull allegat ksur għalhekk jiġbed miegħu u b'mod awtomatiku din l-għodda provviżorja.

-Jidher ċar illi biex tiġi akkordata talba bħal din tallum jinħtieġ li l-Qorti jirriżultalha illi r-rikorrenti jkun qabel ma fittex dan l-estrem eżawrixxa kull triq lilu provduta b'rimedji ordinarji, jekk mil-lat domestiku hemm rimedju u mekkaniżmu effettiv;

-Dan ir-rimedju jiġi akkordat fejn ir-rikorrenti huwa rinfaċċat b'sitwazzjoni ta'*extreme urgency*. Għalhekk fejn hu riżultanti verament dannu rriparabbli.

-Per konsegwenza jinħtieġ li jiġi muri li jekk din il-miżura provviżorja ma tiġix milqugħa, se jiġi soffert dannu u ħsara li ma tistax tissewwa. L-estremi li jidhru li huma maġġorment rikonoxxuti huma *loss of life, torture, inhuman or degrading treatment.*

-ovju li din t-talba trid tolqot wieħed mid-drittijiet fundamentali protetti kemm taħt il-Konvenzjoni ukoll taħt il-Kostituzzjoni.

-ukoll it-theddida riskontrata li se twassal għad-dannu lmentat trid tkun waħda attwali, mhux ipotetika. [13]

Insibu miktub dan per "**Karen Reid** fil-ktieb **A Practitioner`s Guide to the European Convention on Human Rights***"* tgħid li *:-*

[13] Ara f'dan ir-rigward Interim Measures; the Lawyers Practical Guide per Gianluca Piemonte.

> ***"As a general practice, measures*** *(riferibbilment għall-interim procedure)* ***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 (****riferribbilment ghar-Rule 39 tar-Rules of Court tal-ECHR)* ***has not been applied save in a few exceptional cases. Matters of detention or interference with property, for example, are not regarded as necessitating interim measures."*** [14]

Ma dan l-awturi **Harris, O'Boyle & Warbrick**[15] isostnu 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 - Intersentia) l-awturi **van Dijk, van Hoof, van Rijn u Zwaak**, jghidu;

> *"… 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).*

[14] 4th Edition – Sweet & Maxwell pagna 12 et. Seq
[15] Law of the European Convention on Human Rights (3rd Ed.) p 142

Għalhekk dawn iċ-ċitazzjonijiet jissottolineaw kemm trid tkun urġenti w impellenti in-neċċessita' ta' dan ir-rimedju, wkoll kemm irid ikun reali w rreparabbli l-preġudizzju li se jiġi soffert jekk din il-miżura provviżorja ma tiġix akkordata.

Ikkunsidrat

Illi kif sew issottomettew l-intimati opponenti għal din it-talba r-rikorrenti llum jinsabu rinfaċċati b'ġudikat li ma jridux li jiġi eżegwit.

Tajjeb li jingħad ukoll, illi apparti għall-kwistjoni ta' *locus standi*, r-rikorrenti pparteċipaw fil-proċedura tal-bejgħ privat b'irkant tal-Vapur Valencia u setgħu jressqu anke huma l-aħjar stimi għalih.

Tqis ukoll li llum l-kreditu hu kanoniżżat b'żewġ sentenzi tal-Qrati, saħansitra dik tal-Qorti tal-Appell. Bla ma l-Qorti tkun ripettitiva kull sentenza għandha titqies li tiswa' u li ngħatat *rite et recte*. Għalhekk sentenzi u l-eżekuzzjoni tagħhom m'għandhomx jiġu mwarrba b'mod leġġer.

Għalhekk fuq il-prinċipju tal-Ġudikat ingħad dan fid-deċizjoni fl-ismijiet

Harkins v. The United Kingdom[16];-

"…the Court has adopted a more rigorous approach in applying those admissibility criteria whose object and purpose is to serve the interests of legal certainty and mark out the limits of its competence (see, for example, Sabri Güneş v. Turkey [GC], no. 27396/06, §§ 39-42, 29 June 2012 and Walker v. the United Kingdom (dec.), no. 34979/97, ECHR 2000-I, both of which concerned the application of the six-month timelimit). Limitations on the Court's competence provide legal stability by indicating to individuals and the State authorities when its supervision is or is not possible (see, for example, Sabri Güneş, cited above, § 42, and Walker, cited above), ***while legal certainty constitutes one of the fundamental elements of the rule of law which requires, inter alia, that, where a court has finally determined an issue, its ruling should not be called into question (Brumărescu, cited above, § 61). If this were not the case, the parties would not enjoy the certainty or stability of knowing that a matter had been subject to a final disposal by the Court****. It is precisely for this reason that Rule 80 of the Rules of Court restricts the circumstances in which a party may seek revision of a final judgment to the discovery of a fact which might by its nature have a decisive influence and which was unknown to the Court and could not reasonably have been known to that party at the date of judgment.*

"[…] the Court cannot but conclude that the development in its jurisprudence does not constitute "relevant new information" for the purposes of Article 35 § 2 (b) of the Convention. The Court's case-law is constantly evolving and if these jurisprudential developments were to permit unsuccessful applicants to reintroduce their complaints, final judgments would continually be called into question by the lodging of fresh applications. This would have the consequence of undermining the strict grounds set out in Rule 80 for permitting revision of the Court's judgments (see paragraph 54 above) as well as the credibility and authority of those judgments. Moreover, the principle of legal certainty would not apply equally to both parties, as only an applicant, on the basis of subsequent jurisprudential developments, would effectively be permitted to "reopen" previously examined cases,

[16] (QEDB, 15/06/2016

provided that he or she were in a position to lodge a fresh application within the six-month time-limit." [enfażi ta' din il-Qorti".

A prexxindere mir-rikors kostituzzjonali u konvenzjonali promotur, din iċ-ċertezza tal-ġudikat hija wkoll msaħħa bl-eżekuzzjoni tiegħu.

Jerġa jiġi emfasiżżat illi hawn il-Qorti mhux milquta bid-deċizjoni tal-kwistjoni kostituzzjonali/konvenzjonali perse fejn jirrigwarda l-azzjoni in rem, bil-konsegwenza bejgħ tal-vapur u l-allegat ksur ta' l-artikoli Kostituzzjonali u Konvenzjonali fil-konfront tas-sidien tal-vapur.

Li trid biss tqis hu jekk din it-talba tissodisfax il-kriterji biex tinħareġ il-miżura interim; **din il-Qorti mhux ta' dak il-ħsieb**.

Kif sew irrispondew l-intimati u rajna mill-kitba ċitata hawn mhux kwistjoni ta' ħsara irriparabbli. M'hawnx dak il-preġudizzju irrimedjabbli li bih se jkunu mgħobbija s-sidien fil-każ li l-bejgħ isir. Frankament din hi kwistjoni hija solvibbli b'mod pekunjarju allura żgur mhux irriparabbli. Wkoll jekk is-sidien iħossu li ġew mqarrqa u milgħuba mill-*bareboat charterers* hemm toroq oħra ċivili li jistgħu jirrikorru għalihom.

Konsegwentement it-talba hi miċħuda, b'dan li tirrevoka wkoll id-digriet tagħha fejn din it-talba għall-ħruġ ta' miżura interim ġiet milqugħa provviżorjament.

Bl-ispejjeż għar-rikorrenti.

Onor. Miriam Hayman
Imħallef

Rita Falzon
Dep. Reġ