MALTA

QORTI KOSTITUZZJONALI

S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO

ONOR. IMHALLEF
JOSEPH A. FILLETTI

ONOR. IMHALLEF
GEOFFREY VALENZIA

Seduta tas-6 ta' Settembru, 2010

Appell Civili Numru. 44/2008/1

Anthony Xuereb

v.

Helen Milligan u l-Avukat Generali

The Court,

This is an appeal filed by applicant Anthony Xuereb from a judgment dated November 18th, 2009 delivered by the First Hall, Civil Court, in its Constitutional Jurisdiction which upheld the preliminary plea raised by respondents and availed itself of its discretion to decline to exercise its

"constitutional" and "conventional" jurisdiction in terms of article 46(2) of the Constitution and article 4(2) of Chapter 319 of the Laws of Malta, on the basis that the action filed by applicant was premature in that he had not yet exhausted all the ordinary remedies still available to him to redress any of the complaints raised by him in the said application. That Court ordered that costs were to be borne by the applicant but entirely without prejudice to any remedy which he would be entitled to request at the proper time and if the need arises.

This judgment was delivered in English following a decree of the First Court dated 18th September 2008[1] allowing a request to that effect by respondent Helen Milligan.

For a better understanding of this appeal, the judgment delivered by the First Court is being hereunder reproduced in its entirety:

"Having taken cognizance of the Application filed by Anthony Xuereb on the 11th of August, 2008, by virtue of which and for the reasons therein mentioned, he requested that this Court (a) declare that he has suffered a breach of his fundamental human rights in terms of Article 39 of the Constitution of the Republic of Malta (hereinafter referred to as "the Constitution") as well as under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), during the procedures held before the Court of Magistrates (Gozo) in their Superior Civil Jurisdiction – Family Division (hereinafter referred to as the "Gozo Court") relating to the granting care of his minor son to respondent Helen Milligan, the child's mother, whereby at various stages and in more than one instance, he was denied the right to be heard or without being given due opportunity to make submissions; and (b) to grant him any other remedy or to issue any directive which the said Court may consider expedient in the circumstances. The applicant reserved the right to

[1] Page 105.

institute any other action or to seek any other remedy as may be competent to him at law;

“Having taken cognizance of the Reply filed by respondent Attorney General on August 29th., 2008, whereby, by way of preliminary pleas, it was claimed that it was to be established whether the proceedings to which applicant refers were in actual fact concluded and, in any case, that this Court should consider declining to exercise its jurisdiction to hear the case owing to the fact that applicant has failed to avail himself of other effective procedural remedies to redress his grievances. As to the merits, respondent rebutted the claims and stated that there is nothing to show that applicant did indeed suffer any violation of any of his rights to a fair hearing within the meaning of the law;

“Having taken cognizance of the Reply filed by respondent Helen Milligan on August 29th., 2008, whereby, by way of preliminary pleas, she raised the issue of whether she was non-suited as not being the proper defendant regarding the allegations raised by applicant. Furthermore, applicant failed to specify what remedies he was requesting, as provided for under article 3(2) of the relative Legal Notice (12.09). Thirdly, she pleaded that applicant had not exhausted the ordinary remedies available to him, besides the fact that proceedings between them were still not concluded. As to the merits, she claimed that the granting of provisional orders and decrees is typical in the kind of proceedings in which the parties were involved. She asserts that applicant had actually been repeatedly given due opportunity to state his case and that he is now using these proceedings as a way of appealing from decrees which he did not agree with;

“Having ruled, on an application filed by respondent Milligan on September 16th. 2008 to that effect, that all proceedings of this case be heard in English, and that, before proceeding further into the merits, this Court should rule on the validity of the two preliminary pleas, and gave orders relating to the production of court records

in order to address respondent Attorney General's first preliminary plea;

"Having heard the evidence of witnesses produced by applicant and seen the documentary evidence submitted;

"Having noted the declaration made by respondent Attorney General during the hearing of November 11th, 2008[2], whereby he withdrew his first preliminary plea;

"Having ordered that parties file their submissions by way of written pleadings;

"Having seen the Note of Submissions filed by respondent Attorney General on June 2nd, 2009[3], relating to his second preliminary plea;

"Having seen the Note of Submissions filed by applicant on August 12th, 2009[4], in reply to those of respondent;

"Having seen the Note of Submissions filed by respondent Helen Milligan on September 22nd , 2009[5], in reply to those of applicant;

"Having heard declarations by counsel to applicant and to respondent Attorney General at the hearing of September 29th., 2009, to the effect that they have no further submissions to offer;

"Having put off the case for to-day's hearing for judgment on the said preliminary plea as to whether this Court should exercise its jurisdiction to hear the case on the merits;

"***Having Considered:***

"That the applicant claims to have suffered a breach of his fundamental human right to a fair hearing before an independent and impartial court during the proceedings

[2] Pg. 111 of the records
[3] Pgs. 138 – 9 of the records
[4] Pgs. 140 – 7 of the records
[5] Pgs. 151 – 160 of the records

relating to the issue of the care of his minor son. He claims that, on three separate occasions during those proceedings, he was effectively denied the right to make his submissions and be heard, and that instead the Gozo Court proceeded to issue orders before he was actually served with the applications filed by respondent Milligan. Applicant states that as a result of such events, his legal standing in regard to the minor was irretrievably prejudiced in that, in one fell swoop, the child was effectively removed from his home and put into the home where respondent dwells. He is therefore also requesting this Court to grant him the necessary remedies whereby the situation resulting from said decrees be reversed in order to afford him an even legal standing in regard to his minor son;

"That both respondent Attorney General and respondent Milligan raised, amongst other pleas, a preliminary plea to the effect that this Court should abstain from exercising its "special" constitutional jurisdiction in terms of Article 46(2) of the Constitution and Article 4(2) of Chapter 319 of the Laws of Malta since applicant has not exhausted all the other "ordinary" remedies which were and still are available to him to redress any perceived grievances he may hold against any interim rulings pronounced by the Gozo Court;

This judgment relates to an examination of the said preliminary plea;

"As to the facts of the case which are relevant to the issue at this juncture, the records show that applicant and respondent Milligan had a relationship for a number of months. A child was born of this relationship on December 18th, 2006. At the time, both applicant and respondent Milligan shared the same house as their common dwelling. For some undisclosed reason, respondent Milligan was denied further access to applicant's house a short time after the child's birth. The child, a boy, was kept by applicant under his exclusive

care. On January 18th, 2007[6], respondent Milligan filed an application before the Gozo Court requesting it to hear the matter with urgency and to grant her immediate interim care of the infant and to determine the right of access of applicant to said infant. That Court ordered that the application be served on the applicant, giving him three days to file a reply, and appointed the hearing for February 7th, 2007. Applicant was served on that same day. After applicant consulted a lawyer of his trust, a reply was drafted. Applicant presented it in person at the Gozo Court's Registry on the morrow. As he was about to file that reply, he was informed that, a short while before, respondent had withdrawn the application filed the previous day and had filed a fresh, but identical, application on the 19th January[7]. Applicant's reply to respondent's first application was filed in the records of respondent's second application, but applicant was informed that the second application had already been provisionally decreed to the effect that the Gozo Court had acceded to the first two requests and appointed the hearing for the 23rd of January. Whereupon, as soon as applicant could leave the Gozo Court Registry (he alleges that the Registrar forbade him from leaving the premises until he was served with a copy of the court decree[8]), he rushed to his lawyer and had him draft an application requesting the Gozo Court to revoke *contrario imperio* the said decree and to appoint the case to be heard with urgency. The Gozo Court acceded to the second request and brought forward the hearing for that very same evening. After that hearing, the Gozo Court issued another decree, substantially confirming the previous one conferring care to the respondent Milligan, establishing access rights and times to the applicant, ordering a social worker to monitor regularly the infant's progress and report to the Court, and appointed a psychiatrist as an expert to report on respondent Milligan's mental state. That Court adjourned the hearing to the following week;

[6] Dok "AM1" (Applic 06/07TMT)
[7] Doc "AM2" (Applic. 07/07PC)
[8] Applicant's evidence 11.11.2008 at pg 117 of the records

"That from then onwards, parties filed a number of applications and cross-replies (at times becoming applications in their own right) and the Gozo Court issued relative decrees, while reports were filed by the social worker as to the infant's welfare. At one stage, a social worker filed an application requesting the Gozo Court to curb the applicant's access to his son from one on a daily basis to one on a lesser frequency but for the same aggregate number of hours. The Gozo Court rejected that application by a decree dated June 4th 2007. Following a spate of episodes, the Gozo Court appointed a mediator to assist the parties to agree on matters of access and maintenance. This process ended without success in December of 2007, and the Gozo Court, by a decree dated January 15th 2008, increased the maintenance due to respondent Milligan and established new access times to the applicant on alternate days. Subsequently, an issue arose about the inoculation for purposes of immunisation of the child, and about which a court decree dated April 17th, 2008, rejected all of respondent Milligan's requests;

"That in the meantime, respondent had filed another separate application on October 23rd 2007[9], requesting permission to take the minor with her to England on a holiday the following month and for a temporary passport to be issued to her son. Her requests were denied by a decree dated November 21st 2007, after the Gozo Court had received written pleadings and heard oral submissions;

"That in April of 2008[10], respondent Milligan filed a letter before the Gozo Court in terms of regulation 4(1) of Legal Notice 397 of 2003 asking that mediation proceedings be put under way with a view to addressing her request to be granted exclusive care and custody of the minor, with a right of access to the applicant and with the corresponding determination of the amount of maintenance due by him to their common child. By virtue of a decree dated 30th May, 2008, and the mediation process having yielded no

[9] Doc "AM3" (Applic. 62/07AE)
[10] Doc "AM4" (Applic. 28/08AE)

positive outcome, the Gozo Court authorised respondent Milligan to commence proceedings against applicant as requested. The said suit is to date pending before the Gozo Court;

"That in August, 2008, applicant filed the present suit;

"***Having considered:***

"That as to the legal considerations relating to the plea under discussion, it is to be pointed out that the applicant himself seems to have anticipated that such a plea would be raised[11], suggesting that it has become fashionable to raise such plea in similar cases in an attempt to avoid examining an alleged violation of a fundamental right on its merits. This Court is very much aware that such a preliminary plea features practically in all cases of this nature brought before it nowadays, but having said that, it does not appear to this Court that our Courts have adopted it as an expedient to shy away from exercising their jurisdiction in a proper manner and given the proper circumstances. Certainly, this Court will not treat the applicant's grievances lightly nor will it consider upholding the plea unless it is assured that the strict conditions whereby the Court may exercise its discretion not to hear the case truly apply;

"That the plea under discussion is based on two related issues. Both are intimately connected. Respondents suggest that the action filed by the applicant was otherwise remediable under the ordinary mode of attacking decrees laid down in the Code of Civil Procedure. Furthermore, applicant himself realised that he had sufficient "ordinary" remedies at his disposal which he actually resorted to but which did not yield him the immediate result he hoped for;

"That when considering whether or not to exercise its exclusive jurisdiction, this Court has to be wary not to

[1111] Par. 9 of the Application

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 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 by the country's highest tribunals which amply and authoritatively illustrate the point[12];

"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[13]. However, it does not have to be shown that 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[14];

"That in the present case, applicant argues that **the manner** by which the impugned decree was emanated before he was effectively allowed to state his case caused him to irretrievably suffer a prejudice which was not remediable by recourse to any procedures other than the present ones[15]. He argues that the only remedy which would be attained only through this Court is for "a judicial

[12] E.g. Cons. Ct. **16.1.2006** in the case ***Olena Tretyak vs Direttur tać-Ċittadinanza u Expatriate Affairs***
[13] Cons. Ct. **5.4.1991** in the case ***Vella vs Kummissarju tal-Pulizija et*** (Kollez. Vol: **LXXV.i.106**)
[14] P.A. Cons **9.3.1996** in the case ***Clifton Borġ vs Kummissarju tal-Pulizija*** (unpublished)
[15] Par. 3 of his Note of Submissions, at pg. 140 of the records

pronouncement which puts the parties in the situation prior to the decree of the 19th January 2007"[16];

"That both respondents robustly counter this argument by claiming that applicant was well aware of the remedies available to him. They argue that applicant did, in actual fact, attempt to have the said decree overturned *contrario imperio*, thereby admitting that "ordinary" remedies were actually available to him. Respondent Attorney General actually refers to four kinds of procedure of which applicant could have availed himself[17]. Respondent Milligan relies on other arguments as well, including the one that underlines applicant's grievances against what are, essentially, "*interim*" measures which are temporary of their very nature and thus not irrevocable. She furthermore shoots down the main thrust of applicant's argument of a reversal to a stage prior to the issue of the January 2007 decree as being simply a futile ploy at putting the clock back two years achieving nothing in the process;

"That both respondents add, however, that the reason alone that applicant's attempts to have the original decree overturned did not yield the desired immediate result is not to be interpreted as an admission that applicant did not have remedies available to redress his grievance. Furthermore, it is not proper that, once a party to judicial proceedings fails to achieve its aims after recourse to some procedure, such party resorts to the constitutional process in order to obtain a fresh review of the matter or an added appeal thereon;

"That as regards the availability of other effective remedies, the Court finds that applicant has indeed not yet exhausted all such remedies nor reached a stage when he needs to have recourse to them. Some of these remedies are, as yet, untapped;

"That it furthermore results to this Court from the records, even during this preliminary phase of the suit, that at

[16] *Ibid.*, par. 11 at pg. 146 of the records
[17] Par. 3 of the Note of Submissions, at pg. 138 of the records

some stage of the proceedings, applicant relied on the very decree which he is now impugning in order to maintain a *status quo* in view of new requests made by respondent Milligan subsequent to the decree dated January 19th, 2007. The same records belie applicant's claim to the effect that he neither had nor that he still does not have any other adequate judicial remedy but the present one. As a matter of fact, it results that as a direct aftermath of the impugned decree and the events which followed, rather than succumbing to an impaired legal standing, the applicant has since been granted joint custody of the minor child. It is not amiss to point out also that litigation between applicant and respondent Milligan regarding the matter raised in the impugned proceedings is ongoing and this makes any further comment at this stage rather inappropriate;

"That, in the Court's considered view, all these circumstances show that respondents have shown good reason to convince it that their plea is well founded and should receive due consideration by this Court. This Court is also actively keeping in mind that the basic allegation of applicant's claim – namely, the issue of a lack of fair hearing and due process – may only fruitfully be investigated within the context of concluded proceedings. As things stand between the parties and at this juncture, this Court will necessarily have its exercise into a proper and comprehensive examination of the alleged violations raised by applicant curtailed by the mere fact that the judicial process before the Gozo Courts is still unravelling. It is established case-law that in order for a proper appraisal to be made of a complaint regarding a breach of Article 39 of the Constitution or Article 6 of the Convention, a Court takes cognizance of the whole process impugned and not of scattered or select episodes forming part thereof[18];

"For the above-mentioned reasons, the Court hereby declares and decides:

[18] Harris, O'Boyle & Warbrick *Law of the European Convention on Human Rights* pp. 202 – 3 . and Cons. Ct. **16.10.2002** in the case ***Anthony Żarb et vs Ministru tal-Ġustizzja et*** (unpublished)

"**To uphold the preliminary plea** raised by respondents, and declares that it is availing itself of its discretion to decline to exercise its "constitutional" and its "conventional" jurisdiction in terms of article 46(2) of the Constitution and article 4(2) of the Convention, on the basis that the action filed by applicant is premature in that he has as yet not exhausted all the ordinary remedies still available to him to redress any of the complaints raised by him in this Application; and

"**To dismiss the Application** on the grounds above-mentioned, with costs against applicant, but entirely without prejudice to any remedy which applicant would be entitled to request at the proper time and if the need arises."

Appeal Application by Anthony Xuereb

By application dated 30th November 2009 Anthony Xuereb appealed from the judgment delivered by the First Court on November 18th 2009 against both respondents. His grounds of appeal may be thus summerised:

1. The first Court failed to appraise certain facts and evidence in a proper manner.
2. Article 4(2) of Chapter 319 and article 46(2) of the Constitution should not have been applied.
3. The incompatibility of the proviso of article 4(2) of Chapter 319 with articles 6 and 13 of the Convention in terms of the right to an effective remedy from interim orders.

Appellant therefore asked this Court to reverse the judgment delivered by the First Court, to dismiss the second preliminary plea and to take the appropriate measures so that the case can proceed to be heard on its merits, with costs against respondents.

Reply by the Attorney General

The Attorney General filed his reply on the 11th December 2009. In it he declared that he aggreed with the decision of the First Court and submitted that, for the reasons

spelled out in the same reply, the judgment is correct and should be confirmed by this Court in its entirety, with appellant being mulct in costs.

Reply by respondent Helen Milligan

Respondent Helen Milligan replied to the appeal on 17th December 2009 and for the reasons stated in her reply, asked this Court to confirm the judgment delivered by the First Court, with costs against appellant.

Considers:

This is an appeal from a judgment upholding the preliminary plea submitted by respondents in the sense that the court should exercise its discretion not to hear the case on the merits owing to the fact that the applicant failed to avail himself of the ordinary remedies available to him to redress his grievance.

Appellant claimed in his application that he has suffered a breach of his fundamental right to a fair hearing in terms of Article 39 of the Constitution and Article 6 of the Convention during the proceedings held before the Court of Magistrates (Gozo) in its Superior Jurisdiction – Family Division – relating to the granting of care of his minor son to respondent Helen Milligan, the child's mother, because at various stages in those proceedings he was denied the right to be heard or was not given due opportunity to make submissions. Applicant specifically referred to the decrees of the Court dated 19th January 2007 and 14th September 2007[19].

In its judgment the Civil Court, First Hall, in its Constitutional Jurisdiction, found that applicant had not yet exhausted all the remedies available to him, nor, indeed, reached the stage when he needs to have recourse to them and that some of these remedies are still untapped.

[19] Pages 14 and 52 respectively.

In his first ground of appeal applicant submits that the first court failed to appraise certain facts and evidence in a proper manner. Appellant indicates in his reply some instances where, in his opinion, the court was not correct in its exposition and examination of the facts of the case.

In the opinion of this Court, however, the instances indicated by appellant are just minor details and issues in the long and voluminous proceedings before the Gozo Court. In any case, they do not affect the major thrust of the preliminary plea of respondents, which is basically of a legal nature and which does not depend so much on the evidence produced in Court.

This grievance is therefore being dismissed.

The second ground of appeal is the submission made by appellant that Article 4(2) of Chapter 319 and article 46(2) of the Constitution should not have been applied as the remedies mentioned by respondents do not fulfill the criteria set out by the Court in the interpretation of these articles.

Appellant says that the burden of proof that ordinary remedies were available to him rested with respondents. While the First Court considered that according to the Attorney General four kinds of remedial procedures were available to appellant, that Court did not review or examine these remedies. Applicant submits that these remedies fail the test of availability, effectiveness and adequacy.

Appellant's grievance is that he suffered a material prejudice following the first decree of 19th January 2007, which practically put him in an irreversible position with regard to access rights to the child, in as much as these temporary orders tend to become permanent, given that one of the criteria adopted by the family section of the Court is the stability in the life of the child, and what appellant calls the *rebus sic stantibus principl*. In appellant's words: "The decree of 19th January 2007

radically changed the state of facts. It took our boy from his home"[20] (Court's emphasis).

Briefly, the relevant facts which gave rise to appellant's grievance are the following:

On January 18th, 2007, respondent Milligan filed an application before the Gozo Court requesting access to their child who was being kept exclusively by appellant. That Court ordered that the application be served on applicant and appointed the case for hearing for February 7th 2007. Applicant was served on that same day and he presented a reply on the 19th January, and was informed that, a short while before, respondent had withdrawn the application and that she had filed a new application, but which was identical. Appellant's reply to respondent's first application was therefore filed in the records of the second application. However, appellant was then informed that the second application had already been provisionally decreed and that the Court had acceded to respondent's requests without him being heard, but had appointed the application for hearing for the 23th January. Appellant, thereupon, presented an application requesting the Court to revoke *contrario imperio* the said decree and to hear his application with urgency. The Court brought forward the hearing in open court for that same evening and, after having heard both parties, issued another decree substantially confirming the previous one, and adjourned the hearing to the following week.

This Court, like the First Hall of the Civil Court, is of the view that the preliminary plea of respondents is justified as appellant had ordinary remedies available to him to redress his grievance and there was absolutely no need for him to proceed by way of an application for constitutional redress. The proviso of article 4(2) of Chapter 319 of the Laws of Malta states that:

"Provided that the court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article

[20] Page 126.

in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other ordinary law.

In the same vein is article 46(2) of the Constitution.

In the case **Nardu Balzan Imqareb vs Registratur tal-Qrati tal-Gustizzja** decided on 18th May 2006 it was held that:
"Rikorsi Kostituzzjonali huma, min-natura taghhom, specjali u straordinarji, u meta s-sistema ordinarja ta' ridress tipprovdi mod ta' soluzzjoni effettiva, dik is-sistema ordinarja trid tigi uzata u adottata qabel ma' l-Gvern, jew l-amministrazzjoni taghha, jigi akkuzat bi ksur tad-drittijiet fundamentali tieghu. Ma jistax jinghad li l-Gvern ikun kiser id-drittijiet fundamentali tac-cittadin, meta lic-cittadin ikunu pprovduti u hemm disponibbli ghalih rimedji ghal-lanjanzi tieghu".

The circumstances in which a Court is to decide to exercise its discretion not to hear a case are well established. Suffice it to say that:
"Illi meta jinghad li jkun hemm rimedju iehor xieraq, dejjem ikun qieghed jitfisser li tali rimedju jrid jitqies fid-dawl tal-ksur tal-jedd fondamentali li jkun qed jigi allegat li nkiser jew li jkun mhedded li sejjer jinkiser: ghandu jkun rimedju accessibbli, xieraq, effettiv u adegwat biex jindirizza l-ksur jew theddid ta' ksur lamentat[21]. M'hemmx ghalfejn li, biex jitqies bhala effettiv, ir-rimedju jintwera bhala wiehed li se jaghti lir-rikorrent success garantit, bizzejjed il jintwera li jkun wiehed li jista' jigi segwit b'mod prattiku, effettiv u effikaci[22].

"Illi d-diskrezzzjoni li l-Qorti taghzel li tiehu jekk twettaqx jew le s-setghat taghha kostituzzjonali biex tisma' kawza ghandha tigi ezercitata bi prudenza, b'mod li fejn jidher li hemm jew sejjer ikun hemm ksur serju ta' drittijiet fondamentali, il-Qorti xxaqleb lejn it-twettiq ta' dawk is-

[21] Constitutional Court 5.4.1991 Vella v. Kummissarju tal-Pulizija et (Kollez. Vol: LXXV.i.106).
[22] P.A. 9.3.1996 Clifton Borg v. Kummissarju tal-Pulizija .

setghat [23]. Irid dejjem jitqies li din id-diskrezzjoni ghandha dejjem tigi wzata fl-ahjar amministrazzjoni tal-gustizzja u tohloq bilanc biex, mill-banda l-wahda, twaqqaf lil min jipprova jabbuza mill-process kostituzzjonali, u mill-banda l-ohra zzomm milli jigi mahluq xkiel bla bzonn lil min genwinament ifittex rimedju kostituzzjonali[24].”

According to respondents alternative remedies, other than the constitutional remedy, were and are available to the appellant. The first decree of 19th January 2007 was not final and could be changed pursuant to a simple application, and in fact was changed in the course of the proceedings before the Gozo Court.

Appellant disagrees and argues that his position was irreversably compromised. With regard to a possible request for a revocation ‘contratio imperio’ of the first decree of 19th January 2007, appellant submits that he did file a subsequent application in that regard but claims that it was not addressed by the Court.

From the record of the proceedings it transpires that the Gozo Court actually did hear what the parties had to say on the very same day the first decree was issued. The Court heard what the parties had to say but decided to confirm the first decree. The fact that appellant did not succeed in having the first decree reversed does not mean that the remedy was not available or adequate. Moreover, appellant could have filed other similar applications to have the decree revoked ‘*contrario imperio’* and this was possible if he could have shown that the circumstances had changed or that there were other impelling reasons why the order should be changed, and this, especially in the Family Court, where relevant circumstances abound and tend to change from day to day, so that such remedy is available up to the end of the proceedings. In confirmation of what just has been said, article 56(4) of the Civil Code provides that: “The court may at anytime revoke or vary the directions respecting

[23] Constitutional Court. 14.5.2004 David Axiaq v. Awtorita` Dwar it-Trasport Pubbliku.
[24] Constituonal Court 31.10.2003 Mediterranean Film Studios Limited v. Korporazzjoni ghall-Izvilupp ta’ Malta et.

the children where the interest of the children so requires". Therefore in the matter of custody of minor children, no decree is final because it can be modified anytime by the Court, always in the interest of the children up to the end of the case.

Respondents contend that appellant could also have challenged, and in fact did challenge, the presiding Magistrate. Appellant however argues that challenging the Magistrate does not change at all the situation created by the impugned decree. This Court does not agree as this remedy is adequate because once there is a change in the presiding Magistrate, the second Magtistrate can amend or revoke whatever decision or condition was imposed in the contested decree if good and sufficient grounds (including arguments to show that the first Magistrate had made an incorrect uppraisal of the facts or an incorrect application of the law) are brought forward.

Appellant also says that he could not appeal from a decree *in camera*, which is true. However he could always contest that decree by filing a sworn application and he could even appeal in that case in the event that such application was not successful.

Appellant submits, moreover, that respondent Milligan took advantage of a situation resulting from her shady attempts and clear case of 'magistrate shopping' (sic) when she withdrew her first application and substituted it by another identical application in order to have it appointed before a different magistrate. Respondent Milligan explained in her reply to the appeal that she withdraw the first application and submitted another identical one, not because of 'forum shopping' but her action was dictated by urgency and expediency since the first application was filed at the end of the magistrate's term in Gozo, and she would have had to wait another fifteen days before the next sitting for her case to be heard, so she had to withdraw her original application and file another one before the next Magistrate 'on duty' who would appoint the application in a matter of a few days, as in fact happened.

This Court finds that the reason given by respondent Milligan is plausible and finds that there was nothing shady or irregular in her attempt to have her case heard urgently.

This second ground of appeal is also being declared unfounded.

The last ground of appeal deals with the incompatibility of the proviso to article 4(2) of Chapter 319 with articles 6 and 13 of the Convention in regard to the right to an effective remedy from interim orders.

Appellant submits that though an interim order may not determine rights in a definitive way, it clearly creates rights and obligations for some length of time, so that this should not happen without the basic protection of Article 6 of the Convention. This would, according to appellant, in reality "often be tantamount to a decision on the merits of the claim for a substantial period of time" and, according to him, this was in fact the effect of the impugned decree of 19th January 2007 in the present case. Appellant then goes on to quote extensively from the decision by the Strasbourg Court in the case **Micallef vs Malta** given by the Grand Chamber (Application No. 17056/06) to the effect that Article 6 of the Convention applies also to interim measures which in reality have a permanent effect.

In this Court's view, the question here, however, is whether the applicant had available to him alternative ordinary remedies to contest the said decree without the need of having to institute the present constitutional case.

In the **Micallef vs Malta** case, referred to by appellant, the Grand Chamber of the Strasbourg Court pointed out in the first place that in such cases:
"It is more appropriate to take a global approach when considering the proceedings".

Then the Court proceeded to explain why, in the light of the considerations made in that particular case, the fact that interim decisions, which also determine civil rights or obligations, are not protected by Article 6 under the Convention, called for a new approach.

The Grand Chamber explained that preliminary proceedings, like those concerned with the granting of an interim measure such as an injunction, are not normally considered to determine civil rights and obligations and do not therefore normally fall within the protection of Article 6. Nevertheless, in certain cases, the Court has applied Article 6 to interim proceedings, notably by reason of their being decisive for the civil rights of the applicant. Moreover, it held that an exception is to be made to the principle that Article 6 will not apply, when the character of the interim decision exceptionally requires otherwise because the measure requested was drastic, disposed of the main action to a considerable degree, and unless reversed on appeal would have affected the legal rights of the parties for a substantial period of time.

In this Court view, it has been established in the present case that the decree of 19th January 2007 dealing with an interim order regarding the custody of a minor child, had no permanent character, and it has been shown that it could be, and in fact it has been, altered and changed several times by the Gozo Court according to the ordinary means available in the code of civil procedure. Moreover, this Court was authorized (see declaration of the 3rd May 2010 in the acts of this appeal) to refer to the case on the merits between the parties, which case was decided by Magistrate Anthony Ellul on 25th June 2010, Application No. 10/2008 in the name Helen Milligan vs Anthony sive Tony Xuereb. The Gozo Court granted care and custody of Tyrell Xuereb Milligan to the plaintiff Milligan and that defendant's (that is Anthony Xuereb's) approval has to be sought with regards to major decisions concerning health issues.

This Court is therefore not convinced that the alleged defect in the proceedings could not be remedied at a later

stage both in the preliminary stage and in the proceedings on the merits. In actual fact even if there could have been an initial procedural error, there was a normal remedy available at law which applicant availed himself of immediately after the delivery of the first decree, and even later during the proceedings of the custody case pending, and now decided, between the parties. Any prejudice which might have been suffered by appellant was not, in the opinion of this Court, irreversible or without a realistic opportunity of being redressed by ordinary means. The interim order did not dispose of the main action nor did it have any permanent effect.

This ground of appeal is also dismissed.

Decision

For these reasons the Court dismisses the appeal and confirms the judgment of the first Court, with costs against appellant.

< Sentenza Finali >

----------TMIEM----------