MALTA

CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. MR. JUSTICE
JOSEPH R. MICALLEF

Sitting of the 18 th November, 2009

Rikors Number. 44/2008

Anthony **XUEREB**

vs

Helen **MILLIGAN** u l-Avukat Ġenerali

The Court:

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 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[1], 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[2], relating to his second preliminary plea;

[1] Pg. 111 of the records
[2] Pgs. 138 – 9 of the records

Having seen the Note of Submissions filed by applicant on August 12th, 2009[3], in reply to those of respondent;

Having seen the Note of Submissions filed by respondent Helen Milligan on September 22nd , 2009[4], 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 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

[3] Pgs. 140 – 7 of the records
[4] Pgs. 151 – 160 of the records

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[5], 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

[5] Dok "AM1" (Applic 06/07TMT)

previous day and had filed a fresh, but identical, application on the 19th January[6]. 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[7]), 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;

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

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

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[8], 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[9], 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 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 <u>legal considerations relating to the plea under discussion</u>, it is to be pointed out that the applicant himself seems to have anticipated that such a plea would be raised[10], suggesting that it has become fashionable to

[8] Doc "AM3" (Applic. 62/07AE)
[9] Doc "AM4" (Applic. 28/08AE)
[1010] Par. 9 of the Application

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 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[11];

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[12]. 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[13];

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[14]. He argues that the only remedy which would be attained only through this Court is for "a judicial pronouncement which puts the parties in the situation prior to the decree of the 19th January 2007"[15];

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[16]. 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

[11] E.g. Cons. Ct. **16.1.2006** in the case ***Olena Tretyak vs Direttur tać-Ċittadinanza u Expatriate Affairs***
[12] Cons. Ct. **5.4.1991** in the case ***Vella vs Kummissarju tal-Pulizija et*** (Kollez. Vol: **LXXV.i.106**)
[13] P.A. Cons **9.3.1996** in the case ***Clifton Borġ vs Kummissarju tal-Pulizija*** (unpublished)
[14] Par. 3 of his Note of Submissions, at pg. 140 of the records
[15] *Ibid.*, par. 11 at pg. 146 of the records
[16] Par. 3 of the Note of Submissions, at pg. 138 of the records

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 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[17];

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

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.

Read and delivered

[17] 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)

< Final Judgement >

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