



**CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)**

**THE HON. MR. JUSTICE
GIANNINO CARUANA DEMAJO**

Sitting of the 19 th February, 2010

Rikors Number. 28/2005

Olina Tretyak

Versus

Attorney General

1. In these proceedings applicant Olina Tretyak [“the applicant”] is seeking a remedy for what she says are violations of her fundamental rights protected under artt. 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [“the Convention”].

2. In her application filed on the 26 April 2005, applicant, who is a citizen of the Ukraine, states that from a relationship with a certain Mark Lombardi she gave birth to a child, Dolph Lee Lombardi. Until a few days before the filing of the present constitutional application, applicant had the care and custody of the child, who is a

naturalised Maltese citizen. Applicant further states that she is a good mother who takes good care of her three children, especially those who are minors.

3. On the 7 January 2005 Mark Lombardi had filed an urgent application in the records of letter number 397/2004 whereby he requested the Family Section of the Civil Court to divest applicant of the care and custody of the minor child and to entrust such care and custody to him. A copy of the application was served on applicant who replied thereto. The application was set down for hearing on the 23 February 2005 but a copy of the notice of hearing of the case was not served on applicant because, as appears from a certificate issued from the court registry, the relative fee had not been paid.

4. On the day of the hearing applicant happened to be in the court building. A court officer called her and told her to enter the hall; applicant's counsel was however not present. Mark Lombardi's application was heard and Therese Micallef, a social worker with *Appoġġ* Agency, gave evidence. The court then appointed a judicial assistant to hear the cross-examination and the remaining evidence, and adjourned the hearing for the 11 March 2005. Applicant states, however, that the order given by the court was not implemented because Mark Lombardi insisted that proceedings be conducted in Maltese, a language which applicant does not understand. Furthermore, applicant had not been served with a copy of the notice of the hearing of the 23 February 2005, or of any subsequent sitting.

5. The witness Therese Micallef again gave evidence on the 7 April 2005, when she confirmed her report on oath. Applicant was not present for that sitting because she did not know about it. The court then delivered a decree whereby it granted the request made by Mark Lombardi in his application of the 7 January 2005 and entrusted the care and custody of Dolph Lee Lombardi – then two years and ten months old – to him, with visiting rights for applicant.

6. In the light of the above, applicant makes the following comments:

a. she had not been given notice of the hearing of the 23 February; consequently, she had not prepared for that sitting and was not assisted by counsel;

b. during that sitting an important witness was heard in the absence of applicant's counsel;

c. applicant's counsel did not have the opportunity of cross-examining the witness on that or any other subsequent occasion;

d. neither applicant nor her counsel was present for the sitting of the 7 April 2005, which was held before a different judge, not the one who had presided over the sitting of the 23 February 2005, because applicant was not aware of the adjournment of the sitting (which had been a short adjournment from the 5 April to the 7 April 2005);

e. applicant also had not been informed of the change of presiding judge; and

f. in the circumstances, applicant had been deprived of the opportunity of producing witnesses and other evidence.

7. Applicant therefore submits that she had not been given a fair hearing in the determination of her right to the care and custody of her minor child, in breach of her rights under art. 6 of the Convention.

8. Applicant filed two requests for the court to revoke its decree of the 7 April 2005, but these were turned down by a decree of the 14 April 2005 and another decree of the 19 April 2005 respectively. Applicant also criticises the report by Therese Micallef, of *Appoġġ* Agency, for making no reference to what applicant considers as crucial facts.

9. As a result of the abrupt changes brought about by the decree of the 7 April 2005, the minor child is now living with his father in what applicant considers to be an inadequate environment; he is also being deprived of the social and educational events in which he used to participate when under applicant's care and custody. Applicant is therefore of the view that, since the decree of the 7 April 2005 is having an adverse effect on the upbringing of her minor child, her right to respect of her family life under art. 8 of the Convention is also being violated. She also contends that, considering Mark

Lombardi's environment, life-style and personal history, entrusting the care and custody of the minor child to him gravely imperils the child's well-being.

10. For these reasons applicant requested this court to take all necessary measures and to give appropriate remedies – particularly by revoking the decree of the 7 April 2005 and the proceedings leading thereto, and by revoking also the decrees delivered on the 14 April 2005 and the 19 April 2005 – to ensure that applicant's rights under art. 6 and art. 8 of the Convention are safeguarded and observed.

11. The Attorney General replied on the 9 June 2005. Apart from pleas on the merits, stating that there were no breaches of art. 6 and art. 8 of the Convention, the Attorney General filed two preliminary pleas, namely, the plea of lack of jurisdiction, because this court has no jurisdiction to hear appeals from decisions of the Civil Court (Family Section), and the plea that applicant has not exhausted ordinary remedies. The Attorney General also asked that Mark Lombardi be called into the suit.

12. The request that Mark Lombardi be called into the suit was turned down on the 15 July 2005. However, in view of Mark Lombardi's evident interest in the case, the court ordered that he be served with a copy of the pleadings so that he may consider requesting that he be admitted in the proceedings *in statu et terminis*. Mark Lombardi was eventually served with a copy of the pleadings on the 26 April 2007, but he made no request to be admitted into the suit.

13. On the plea of lack of jurisdiction, it must be stated at the outset that this case is not an appeal on the merits of the decree delivered by the Civil Court (Family Section) on the 7 April 2005; what is at issue here is whether applicant's procedural rights to a fair hearing under art. 6 of the Convention were violated in the proceedings which led to the delivery of the decree, and whether the effects of the decree are such as to violate her rights to family life under art. 8. These issues – which are distinct from appeal proceedings – do fall within the jurisdiction of this court, and the plea of lack of jurisdiction is therefore rejected.

14. The question of availability of remedies under the ordinary law, in the circumstances of the present case, entails a review of the *iter* of the proceedings. The relevant facts are as follows:

a. On the 7 January 2005 Mark Lombardi filed an application in the records of mediation proceedings pending in the Civil Court (Family Division) for the care and custody of the minor child to be entrusted to him. A copy of the application, which was drafted in the Maltese language, was served on applicant who filed a reply, also in Maltese, on the 4 February 2005. There is no record of any request made by applicant in terms of the Judicial Proceedings (Use of English Language) Act (Chapter 189 of the Laws). However, there is also no record of the provisions of art. 5(5) of the Act having been complied with.

b. The application was then set down for hearing on the 23 February 2005 but notice of the hearing was not served on applicant because Mark Lombardi had failed to pay the relevant fee.

c. Nevertheless, applicant was present for the hearing of the 23 February 2005, although she was not assisted by counsel. During that sitting, the court heard the evidence of Therese Micallef from *Appoġġ* Agency and appointed a judicial assistant to hear further evidence. Although the sitting was conducted in the Maltese language, Therese Micallef gave her evidence in English. The court then adjourned the hearing for the 11 March 2005 at 10:45 *a.m.*

d. A sitting was held on an undisclosed date before the judicial assistant. Applicant was present for this sitting and she was assisted by counsel. It was at this stage that applicant requested that proceedings be conducted in English, but Mark Lombardi refused, whereupon applicant declared that she would be filing “a formal application in order that the proceedings be conducted in the English language”. In view of this, the sitting was suspended pending directions from the court, and a further sitting was set for the 8 March 2005. By a decree of the 7 March 2005, however, the court revoked the appointment of the judicial assistant and ordered that the hearing continue before the court itself.

e. The sitting before the court of the 11 March 2005 was adjourned to the 5 April 2005 when it was to be held before a different judge.

f. On the 5 April 2005 the hearing was again adjourned to the 7 April 2005.

g. On Thursday 7 April 2005 Theresa Micallef confirmed on oath a report filed by her. The court then, after considering Mark Lombardi's application, the reply thereto, the sworn report and the other evidence in the records, decided on the application by granting Mark Lombardi's request to be entrusted with the care and custody of the minor child, subject to visiting rights for applicant.

h. On Monday 11 April 2005 applicant filed an application in the Maltese language asking for the revocation of the decree of the 7 April 2005 on the ground that she had not been served with a copy of the notice of hearing. This request was turned down on the 14 April 2005. On the 19 April 2005 applicant filed another application, again in the Maltese language, this time asking for a reconsideration of the decree on the merits. This request also was refused that same day on the ground that there had not been any material change in the circumstances since the decree was first delivered.

15. The *iter* of the proceedings shows that applicant did seek a remedy under the ordinary law, both for the alleged violation of her right to a fair hearing – her application of the 11 April 2005 – and for the alleged violation to respect for her family life – her application of the 19 April 2005. The Attorney General, in his written submissions on the present case, observes that applicant did not avail herself of the further remedy of filing an appeal from the decree; in the view of the Attorney General, such appeal would have been possible with leave of the court in terms of art. 229(3) of the Code of Organisation and Civil Procedure since the decree of the 7 April 2005 was an interlocutory decree.

16. In the view of this court, it is doubtful whether such an appeal would have been possible, considering that the application of the 19 April 2005 was, in effect, a request for reconsideration of the decree in terms of art. 229(4) of the Code, and that the generally accepted interpretation is

that a request for reconsideration and an appeal are alternative, not, concurrent, remedies¹.

17. The Attorney General further submits that applicant could have availed herself of other remedies during the proceedings before the Civil Court (Family Section) by taking a more active part in her defence. However, since, in the view of this court, this matter is closely connected with the actual merits of the present application concerning the complaint under art. 6 of the Convention on the right to a fair hearing, the court is of the opinion that it should not decline jurisdiction; the Attorney General's argument will therefore be considered within the context of an examination of the actual merits of the case.

18. Applicant's complaint concerns (i) the lack of service of the notice of hearing and (ii) the fact that proceedings were conducted in a language which she did not understand.

19. On the matter of the lack of service, the court observes that, notwithstanding the lack of formal service, applicant was made aware – albeit at the last moment – of the first sitting in the case. Although it is true that she was not given time to prepare for that sitting, she did not suffer any prejudice thereby since no decision on the merits of Mark Lombardi's application was taken on that day.

20. Moreover, since the record of the sitting is public, and the date of the adjournment is visible on the record, applicant could very easily have taken note of the next sitting, whereupon she could have instructed counsel and have taken an active part in the proceedings. The same can be said for the subsequent sittings, including the one where the case was adjourned to another date to be assigned to a different judge; the date of the next sitting and the identity of the judge are clearly indicated in the record of that sitting. The failure of applicant and of her counsel to look up the record and to follow the sitting was due to culpable negligence on their part.

21. Since fundamental rights are not a trivial matter, nor a pretext which dissatisfied litigants may make use of to

¹ *Vide Fortunato Farrugia et versus Sovrintendent tas-Sahha Pubblika et*, Court of Appeal (Superior Jurisdiction), 29 May 2009, and *Hugh Peralta nomine versus Match Music Stores Malta Limited*, Court of Appeal (Superior Jurisdiction), 18 September 2009.

reopen a closed case, the court must look at the proceedings as a whole to see whether any real and substantial breach occurred. The lack of formal notice of the first sitting was, in the circumstances, remedied by applicant's presence for that sitting. It would perhaps have been different had the case been closed during that first sitting, because then applicant would not have had sufficient time to instruct counsel. In the circumstances of the present case, however, applicant had ample time and opportunity to take a more active part in the proceedings, and she suffered no material prejudice from the lack of formal notice of the first sitting.

22. Applicant also complains that proceedings were conducted in Maltese. It must first of all be observed that her own reply to the original application was also filed in Maltese. At that point she was assisted by counsel who, no doubt, was aware of the provisions of the Judicial Proceedings (Use of English Language) Act. Even the applications of the 11 April 2005 and the 19 April 2005 were drafted in Maltese. Moreover, notwithstanding applicant's failure, at the proper time, to make a request for the proceedings to be conducted in English or, alternatively, for the appointment of an interpreter, the evidence of Therese Micallef was given in English. Since applicant, due to her own negligence, was not present for the subsequent sittings, she suffered no prejudice due to the fact that those sittings were conducted in Maltese.

23. The court therefore finds that there was no breach of applicant's right to a fair hearing in terms of art. 6 of the Convention.

24. Applicant is also alleging that, in entrusting the care and custody of the minor child to its father, the decree of the 7 April 2005 violates her right to respect for her family life guaranteed under art. 8 of the Convention.

25. The right to respect for family life does not preclude a competent court from depriving a parent of care and custody of a minor child and from regulating visiting rights, when circumstances so warrant and when this is required in the interests of the child.

26. Since these present proceedings are not and cannot be an appeal on the merits of the decree delivered by the Civil Court (Family Section), this court is precluded from

reviewing the merits of the decree. Since the limitation of applicant's parental rights are the result and consequences of a legitimate decree, delivered by a competent court after due process, regulating the matter of care and custody and visiting rights, there is no breach of the right to respect for family life; rather there was a perfectly legitimate exercise by the proper judicial authority, acting within the margin of appreciation allowed to it by law, to balance the rights and interests of the parents with those of the child.

27. The court therefore finds that there was no breach of applicant's right to respect for her family life in terms of art. 8 of the Convention.

For these reasons applicant's requests set out in her application of the 26 April 2005 are rejected, with costs.

< Final Judgement >

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