STUDII JURIDICE:

Ad interim proceedings and the right to a fair trial

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"*In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same*."
Albert Einstein

Abstract:
The case of Micallef versus Malta has been a turning point in the Court's jurisprudence regarding interim measures. It proved that no distinction should be artificially made between interim proceedings and proceedings on the merits of the case, in regard to the guarantees for a fair trial provided by article 6 of the Convention. As a rule, the guarantees in article 6 should apply during interim proceedings. Not complying with some of these guarantees is only acceptable under exceptional circumstances.

Rezumat:
Cauza Micallef împotriva Maltei a reprezentat un punct de cotitură în jurisprudența Curții în ce privește măsurile provizorii. Aceasta a dovedit că nu trebuie făcută nicio distincție între procedurile prin care se iau măsuri provizorii și procedurile pe fondul cauzei, în ce privește aplicarea garanțiilor din articolul 6 din Convenție. Ca regulă, garanțiile privind un proces echitabil statuate de articolul 6 trebuie aplicate în cadrul acestor proceduri. Doar în cazuri excepționale este permis să nu se respecte unele dintre aceste garanții.

Keywords: ECHR case-law, the right to a fair trial, interim measures, case of Micallef v. Malta, procedural guarantees

I. Introduction

The acknowledgement of the right to a fair trial has been a major step towards striking a fair balance between human rights and any discretionary acts of the member states. After centuries of implementation in practice, the right to a fair trial was finally codified in the international human rights instruments following World War II and it is now universally recognised[798] .

[798] *The Right to a Fair Trial in International Law with Specific Reference to the Work of the ICTY*, Patrick Robinson, Colloquium on International Justice in Rome, 16 October 2009.

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter called "the Convention") places the right to a fair trial safeguarded by article 6 on a central place as well[799]. Not only do its content and meaning enshrine the principle of the rule of law upon which any democratic society should be based and built[800], but they also reflect the common heritage of the member states, according to the Preamble of the Convention.

From the very beginning, the right to a fair trial was designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms[801]. We wonder if such rights would be more than marvelous delusions in the absence of the guarantees established in article 6. Providing any human right would be void of substance in the absence of a fair, equitable procedure through which the person whose right has been infringed would be able to seek judiciary protection[802]. Naturally, there is always the alternative of honest people, flawless domestic law and practice and functional social justice but if this was the case, we wouldn't need the Convention at all.

Regarding the concept of fairness, from a general point of view to be fair is to be just and equitable. However, fairness does not require perfection.[803] The Court's jurisprudence itself leads us to the conclusion that the European judges have never demanded perfection, but have stated countless times that flaws found in an early stage of the procedure are not to be censored by the Court if national courts have mended them subsequently.[804] Therefore, although member states must obey to certain rules and principles established by the Convention or the jurisprudence, the "burden", heavy as may be, is not impossible to carry.

Given the significance of article 6, "the guardian" of the other human rights, there is hardly any surprise that it is the most frequently invoked provision and it has generated substantial case-law. As far as the text of the article is concerned, it can be deemed only as a starting point, a mere sketch of what is required and needed in order to provide genuine protection. It is the Court's case-law which grants the necessary and additional interpretation and enrichment that the text lacks. Consistent with the premise that the Convention is a living instrument[805], the jurisprudence in the realm of article 6 has developed progressively over the years only to encompass an ever-increasing variety of legal proceedings. In its dynamic and evolutive approach of the Convention, the Court has recently included the interim measures within the ambit of article 6[806].

II. What are interim measures?

Interim measures are sought by the plaintiff, before or pending a civil trial. They have similar effects to the expected

[799] *Droit européen des droits de l'homme*, Jean-François Renucci, 3e édition, Librairie Générale de Droit et de Jurisprudence, 2002, p. 228.

[800] ECHR, *Golder v. United Kingdom*, Judgement of 21 February 1975, §34.

[801] *Droit européen et international des droits de l'homme,* Frédéric Sudre, 6 e édition refondue, Presses Universitaires de France, 2003, p. 299.

[802] *Droit européen des droits de l'homme*, Jean-François Renucci, *idem*, p. 208.

[803] *Role of Police in Criminal Justice System,* S.K.Chaturvedi, B.R.Purb. Corp, 1996.

[804] ECHR, *Feldbrugge v. Holland*, Judgment of 29 May 1986, § 45.

[805] ECHR, *Airey v. Ireland*, Judgment of 9 October 1979, § 26; *La Convention européenne des droits de l'homme. Commentaire article par article*, L.E. Pettitti, E. Decaux, P.-H. Imbert, Economica Press, 1995, p. 61.

[806] ECHR, *Micallef v. Malta*, Grand Chamber Judgment of 15 October 2009, § 81.

judgment on the merits of the case, but only for a limited period of time (usually, until a final judgment on the merits is rendered). Most frequently, the object of an interim measure is to protect the plaintiff from irreparable loss during the inevitable delay pending the determination of his claim against the defendant. A comparison of national legislation of the member states shows that there is an almost total absence of any definition of interim measures and that legal systems differ rather widely. There are quite substantial differences in the conditions for ordering these measures. The urgency requirement and temporary effects are, though, present in every member state.

As a specific interim measure, **the injunction order** is sought and obtained in a proceedure in which the plaintiff has to prove that, at least apparently, he has a case. This is what the doctrine calls a "*prima facie*" claim, which the judge has to be able to see. Still, the evidence that needs to be brought in front of him is much less than that needed in the main proceedings, only allowing the judge to catch a glimpse of the merits of the case. This is also justified on the urgent character of the measures.

III. ECHR jurisprudence before *Micallef*

Prior to the jurisprudence change which took place in Micallef, the European Commission and the Court developed a constant approach whereas article 6 of the Convention is applicable or not to interim measures, including the injunction. When analysing the admissibility of an application, a general rule establishing the unlikelyness that measures of such nature involved the determination of civil rights and obligations was always set forth[807].

The Court usually stated right from the beginning that interlocutory proceedings relating to an interim measure, in which no decision on the merits of the case is made, do not involve a determination of civil rights and obligations[808]. After defining the type of proceedings in each case as of interim character (that is, not involving a decision on the merits), the application would be declared inadmissible without any other consideration.

Still, this brief analysis that was made in each case after stating the Court's former principles on the matter led, in some of the cases, to a different solution.

For instance, when the guarantees offered by article 6 of the Convention were not met with by the national authorities when deciding whether the applicant's claim for transfer in a social protection centre instead of a psychiatric wing of a prison is founded or not, the Court admitted that, when a civil right such as the right to liberty was at stake, there had been a violation of the above mentioned article even if the claim had been judged as a summary procedure[809].

Another example of the Court taking into consideration the nature of the right discussed involved in interim measures refers to the question of custody of children. The Court emphasised the importance of the nature and consequences which may occur when the length of proceedings is not reasonable in cases regarding civil status. In such matters, when the right to respect for family life is as stake, summary proceedings should by definition not be delayed, even at the appeal stage[810].

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[807] ECHR, *Wiot v. France*, Decision of 15 March 2001; ECHR, *Dogmoch v. Germany*, Decision of 18 September 2006.

[808] ECHR, *Verlagsgruppe News GmbH v. Austria*, Decision of 16 January 2003.

[809] ECHR, *Aerts v. Belgium*, the 30th of July 1998, § 59-60.

[810] ECHR, *Boca v. Belgium*, Judgment of 15 November 2002, § 24 and § 29.

In respect of the length of proceedings, acording to the Court's case-law, the preliminary applications made in order to obtain the appointment of an expert were not taken into account[811]. Such interim proceedings do not determine the merits of a case, but have the main purpose of quickly establishing some piece of evidence which could later on be aduced in a trial[812].

Moreover, the analysis made by the Court went even further when assessing that some interim measures had such a decisive character on the merits of the case due to the fact that they were drastic and disposed of the main action to a considerable degree that the measures taken by the national authorities did concern the civil rights and obligations of the applicant. This case regarded an ordered suspension of the performance of the privatisation contract and the eviction of the applicant company from the hotel, a prosecutor decision which was placed under a certain doubt in regard of its lawfullness[813]. This latter detail may consist in the essential aspect that set apart this situation from the case where the applicant's request for the suspension of a court order, filed as an injunction, was dismissed because throughout the proceedings the house in question had already been demolished at the time of the ruling. In this case, the applicant was trying to obtain the suspension of a decision issued by a criminal court of law which clearly stated that the house had been built as a result of the applicant's husband's illegality[814].

Regarding the above mentioned cases in which the Court found that article 6 of the Convention was applicable to proceedings of interim nature, we cannot agree with the statement of "automatic characterisation of injunction proceedings as not determinative of civil rights or obligations"[815], even though it was regarded as a guiding principle in its former case-law.

IV. Causes that led to the change of jurisprudence in *Micallef*

There appear to be three major causes, for which the ECHR has decided to take a step forward in its continuing evolving jurisprudence regarding article 6 of the Convention: the "widespread consensus" between the Member States of the Council of Europe on the applicability of article 6 safeguards to interim measures, the European Court of Justice's jurisprudence and the fact that, very often, the interim measures will produce effects for a long period of time.

Firstly, in Micallef, the Court itself makes a very interesting analysis of the national systems of the Member States in regard to the safeguards applicable to interim proceedings[816]. The conclusion reached by the Court is that most Member States do ensure the applicability of the safeguards in article 6 to interim proceedings, although the ways in which they do that are different. Some states make no distinction between the stage or type of the proceedings (Spain, Italy, Greece). In this way, the guarantees enshrined in article 6 apply in the same manner to proceedings on the merits as to interim proceedings. Others states, who have specific provisions governing interim measures, ensure the applicability of the safeguards in article 6 either by specifying that provisions governing proceedings on

[811] ECHR, *Kress v. France*, Judgment of 7 June 2001, § 90.
[812] ECHR, *Jaffredou v. France*, Decision of 15 December 1998.
[813] ECHR, *Zlínsat, SPOL. S R.O. v. Bulgaria*, Judgment of 15 June 2006, § 72.
[814] ECHR, *Libert v. Belgium*, Decision of 08 July 2004.
[815] *Micallef*, G.C., § 72.
[816] *Micallef*, G.C., § 31.

the merits apply *mutatis mutandis* to injunction proceedings (Poland), or by providing that they will do so, unless otherwise stipulated (Germany).

Secondly, the European Court of Justice has had the chance to express its view in regards to the characteristics interim proceedings should have, in order to be recognized under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, in the case of ***Denilauler v. SNC Couchet Frères***[817] . Since the relevant provisions of the Brussels I Regulation correspond to the ones of the Convention, the ECJ's findings in Denilauler could be transferred to Art. 32, 34 no. 2[818] Brussels I Regulation[819] .

According to Art. 33 Brussels I: "A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required." There is no requirement that the judgment should be final or conclusive. Also provisional and protective measures are covered. Sufficient is that a judgment is provisionally enforceable in the Member State of origin, even if the judgment is susceptible of appeal[820] .

The ECJ held in Denilauler that a judgment relating to provisional measures falls outside the scope of the Brussels I regime in so far as it is delivered without that party against which the measures have been awarded being summoned and are intended to be enforced without prior service[821] . The case concerned a French order to freeze a bank account of the debtor held in Frankfurt am Main. Under French law, such a seizing order was possible without prior service of documents of the debtor initiating the legal action. The ECJ held that the regime of recognition and enforcement is only possible because of the protection afforded to the defendant in the original proceedings. The Brussels regime would thus only apply to adversarial proceedings where the defendant had the possibility to make an appearance before the court.

Still, later on, the ECJ decided that it is not necessary that both parties have the opportunity to participate in the proceedings in their initial phase. The requirement of adversarial proceedings will be fulfilled if the parties have the possibility to launch an appeal and can participate in that procedure[822] .

Therefore, the guarantees of article 6 of the Convention, such as the requirements aimed at guaranteeing the effective participation of both parties in adversarial proceedings are already safeguarded by the exclusion of judgments where one of the parties has no possibility to participate in the proceedings.

Last but not least, the Court has to bear in mind the "overburdened justice systems"[823] of many of the Member States, which lead to excessively long

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[817] Case *Denilauler v. SNC Couchet Frères* [1980] 125/79, ECR 1533.

[818] Art. 34 (2) Brussels I: "*A judgment shall not be recognized: 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so*".

[819] The Decision of 21 December 2006 of the German Federal Supreme Court (*German Federal Supreme Court: Adversary Proceedings in the State of Origin necessary for Recognition under Brussels I Regulation*, Veronika Gaertner, January 23 January 2007, http://conflictoflaws.net).

[820] Under art. 37 and art. 46, the court before which recognition and enforcement is sought may stay the proceedings if an actual appeal against the original judgment has been lodged.

[821] *The Right to a Fair Trial and the Free Movement of Civil Judgments*, Jan-Jaap Kuiper, p. 12-13.

[822] Case C-474/93 *Hengst Import* [1995] ECR I-2113, § 14; Case C-39/02 *Maersk Olie & Gas v. Firma de haan* [2004] ECR I-9647, § 51.

[823] *Micallef*, G.C., § 79.

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proceedings. Consequently, interim measures, initially meant to safeguard an urgent situation where there was an imminent risk of irreparable damage to the applicant which a favorable judgment could not undo, tend to be in force for an extended period of time. That is why a much more careful approach is required: a measure which decides the same "civil rights or obligations" as the main proceedings and has a long lasting (or even permanent) effect can only be taken in proceedings that provide all the guarantees enshrined in article 6.

Doing otherwise would mean not to take into consideration the interest of the person against whom the interim measures are sought and obtained. This person could, as well, suffer damages from faulty interim proceedings, damages which may become irreversible. She would have to wait until a judgment of the merits of the case is rendered, in order to obtained redress. Still, even if a defect in the interim proceedings could be remedied at a later stage, it is inappropriate to keep that person in a situation of uncertainty regarding the redress of her damages, for a long period of time.

V. The case of *Micallef v. Malta* (Grand Chamber Judgment of the ECHR)

The case of Micallef is said to have been a turning point in the evolving jurisprudence of the Court regarding the applicability of the guarantees enshrined in article 6 of the Convention in the injunction proceedings. It originated in a rather minor claim brought in a Maltese court: the claimant was disturbed by the fact that his neighbour's wet clothes were hanged over his courtyard.

The applicant went through three different stages in the internal procedure. First of all, the applicant was a defendant in a civil lawsuit in which the plaintiff sought and obtained an injunction warrant against him. During this injunction proceedings, a crucial incident for the case took place: the presiding magistrate changed the date of the future hearing, which had already been fixed, after the applicant and her lawyer had left the court room. Consequently, the applicant and her lawyer weren't present at the next hearing and the injunction measure was issued without hearing them.

Bearing in mind that, in the Maltese legal system, there lay no appeal in interlocutory proceedings, the applicant brought an action before the Civil Court (First Hall), complaining about the fact that she had not been heard during the injunction proceedings. The Civil Court found that, according to the Maltese domestic law, the judge issuing an injunction didn't have the obligation to hear the involved parties, if he didn't consider it necessary. Still, if he felt the need to hear the parties in order to clarify some aspects of the case, he had to hear them according to the principles of natural justice. Therefore, a warrant issued by denying one party's right to be heard, is null and void.

Later on, the plaintiff in the original lawsuit filed an appeal against this judgment. Here is where the applicant claims to have been deprived of one of the guarantees enshrined in article 6: the court was presided over by the brother of the lawyer of the other party (the Maltese legal system did not prohibit that).

Furthermore, this court revoked the judgment given by the first court in favor of the applicant, without hearing oral submissions regarding the merits of the appeal.

The Grand Chamber of the ECHR began its analysis by reiterating the conditions which need to be fulfilled in order for article 6 § 1 in its "civil" limb to be applicable. Firstly, there has to exist a dispute (*contestation*) over a "civil right" which can be said, at least on arguable grounds, to be recognized under domestic law. Secondly, the dispute must be genuine and serious. It may relate not only to the actual exercise of the right, but also to its scope and the manner of its exercise. Last, but not least, the outcome of the proceedings must be directly decisive for the right in question[824] .

A definition of the "civil" rights and obligations is nowhere to be found in the text of the Convention. According to the Court's case-law, the concept of "civil rights and obligations" cannot be interpreted solely by reference to the domestic law of the respondent State. The Court has to take into account the actual effect that particular right or obligation produces in that domestic legal system. On several occasions has the Court affirmed the principle that this concept is "autonomous", within the meaning of article 6 § 1 of the Convention [825] .

The Court proceeds to a short review of its jurisprudence concerning interim proceedings (*Micallef*, §75), in order to explain the necessity of a new approach in this matter. It concluded that only two conditions need to be fulfilled in order for art. 6 to be applicable to interim proceedings. Firstly, the right at stake in both main and injunction proceedings needs to be "civil" within the autonomous meaning of that notion under article 6 of the Convention. Secondly, that certain interim measure must effectively determine the civil right or obligation at stake, no matter how long it is in force.

Still, the Court is aware of the fact that, in exceptional cases, complying with all the procedural safeguards enshrined in article 6 could have negative consequences on the effectiveness of the interim measure which has to be taken. This is why, in certain situations, such as those in which the interim measure has to be taken extremely urgently, it is acceptable not to comply with all the procedural safeguards. The Government of the state where the interim measure has been taken will have the duty to prove the prejudice which had to be avoided by not providing all the procedural safeguards in those certain injunction proceedings. However, the Court notes that the independence and impartiality of the tribunal or the judge taking that measure represent an inalienable safeguard.

The Court then proceeded to an analysis of the right at stake in the domestic proceedings. The Maltese Government submitted that the preliminary measure had no determination whatsoever on the merits of the case[826] . Moreover, it held that no right to be heard in injunction proceedings was established in the Maltese law.

After a thorough analysis of the merits of the case, the Court points out that the injunction proceedings and the following proceedings challenging their fairness should be seen as a whole. Although no appeal lay in the Maltese legal system against the way the injunction

[824] ECHR, *Rolf Gustafson v. Suède*, Judgment of 1 July 1997, § 38; ECHR, *Frydlender v. France,* Judgment of 27 June 2000, § 27.

[825] See, among other, *König v. Germany*, Judgment of 28 June 1978, § 88-89, and *Baraona v. Portugal*, Judgment of 8 July 1987, § 42.

[826] *Micallef*, G.C., § 62.

proceedings had been carried out, a fresh new action could be brought before the civil courts contesting them, allowing two levels of jurisdiction.

Dismissing the Government's arguments, the Court reached the conclusion that the injunction proceedings (in all their different stages) concerned the same right to use of property, only the result being temporary. The interim measure obtained by the claimant in the initial lawsuit had the purpose of preventing the plaintiff from hanging her wet clothes over the claimant's courtyard, therefore limiting the use of her right of property. The Court concludes that both the main and injunction proceedings concerned the use of property rights between neighbors, which are undoubted rights of **civil character**.

The Government argued that the proceedings contesting the fairness of the initial injunction proceedings weren't determinant for the rights that had to be determined in the main action. It held that, by the time the proceedings concerning the interim measure ended, on the 5th of February 1993, the original claim had been conclusively decided (judgment of 6 March 1992). A more effective action for the applicant would have been to submit arguments regarding the right to be heard in the injunction proceedings when defending the substantive action[827] .

Still, the Court could not agree with that. Although the applicant's complaint against the initial injunction proceedings ended at a time when the merits of the claim had already been determined, the date which should be taken into account is when the proceedings were instituted (1990). All in all, the result of the proceedings concerning the fairness of the injunction proceedings was directly **determinant** for the rights and obligations which had to be decided upon in the main action.

VI. Critical approach to *Micallef v. Malta*

Is the alleged violation of article 6 really connected to the injunction proceedings? Or did the second civil trial only concern a right to be heard (audi alteram partem proceedings) as the Maltese Government submitted? In order to answer that, it is very useful, in our opinion, to throw a glance at the first decision that has been given by the Fourth Section of the ECHR in the case of Micallef[828] , before it was sent to the Grand Chamber, and also to the dissenting opinions to that decision. The dissenting opinion of judge Bonello to the Chamber's decision holds that "what was at stake in the second set proceedings had nothing to do with wet washing and everything to do with determining finally the plaintiff's autonomous right enshrined in Maltese law to be heard when a court opts to set down a judicial controversy for hearing".

It is hard to conceive a right to be heard, in abstracto, and it is even harder to award it the title of "civil right". In the absence of an appeal in the interlocutory proceedings, the applicant brought an action before the Civil Court complaining about the fact that he hadn't been heard in the first procedure. After winning in first instance, the appeal of the original plaintiff led to a new trial in which the composition of the court "was not such to guarantee its impartiality", as the Chamber decided. (Chamber's decision, *Micallef*, §80). We must therefore conclude that all the applicant's claims (his deprivation of the right to be heard in the first procedure,

[827] *Micallef*, G.C., § 64.

[828] ECHR, *Micallef v. Malta*, Judgment of the Fourth Section of 15 January 2008.

the lack of impartiality of the court in the Court of Appeal) were deriving and were indissolubly linked to the initial injunction proceedings. Had the first proceedings been conducted in a correct manner, none of these subsequent actions would have been brought in court.

This is why we believe that the strong connection between the injunction proceedings and the proceedings in which the impartiality of the court was impaired cannot be denied.

Another issue worth discussing is whether the principle the ECHR settled in the case of ***Vilho Eskelinen v. Finland*** was applicable in the situation of the injunction proceedings. In discussing the admissibility of the application in Micallef, the Chamber had to answer the Government's objection ratione materiae. One of the arguments the Chamber of the Court used was that of the new concept introduced in its judgment in *Eskelinen v. Finland*. That is: "If a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of article 6. If it does not, then there is no issue and article 6 § 1 will apply."

In the second dissenting opinion to the Chmaber's decision in Micallef, signed by three of the seven judges the question that rises is weather this was not an inappropriate extension of the principle in Eskelinen which, as the Court stated at that time, was limited to the situation of civil servants[829] . Still, in Micallef[830] , the Court only uses the example of Eskelinen in order to prove that the protection offered by the ECHR cannot be weaker than that provided by the domestic systems of the different member states. The Court stresses that neither the Maltese Government, nor the domestic Maltese courts ever raised a plea as to the inapplicability of article 6 during the domestic procedure. Although the complaint was subsequently rejected by the Court of Appeal, the ECHR cannot ignore that a certain practice of the respondent state in recognizing the right to be heard as "civil" existed and must therefore offer a protection at least as strong as the domestic tribunals.

Still, we can't help noticing that, in the Grand Chamber's decision in Micallef, the Court let aside the argument of the Fourth Section regarding Vilho Eskelinen, as it felt no need to reiterate it.

VII. Practical consequences deriving from Micallef

The change in the jurisprudence of the Court cannot remain without consequences as far as the domestic law of the member states is concerned, but also the following cases the ECHR is confronted with.

As to the national legislation of the member states, it must be said that the legal procedure for interim measures didin't offer all the guarantees article 6 implies. At the moment, taking into consideration the Court's decision in Micallef, the domestic law which is not in accordance with the european standards anymore must change. Otherwise, non-satisfactory legislation will lead to troublesome application and non-compliance with the newly-established standards.

However, if member states choose to maintain their legislation in the present

[829] There are a number of matters, like those of assessment of tax (ECHR, *Ferazzini v. Italy*, Judgment of 12 July 2001), asylum, nationality and residence in a country (ECHR, *Maaouia v. France*, Judgment of 5 October 2000) which are regarded as falling outside the scope of art. 6 of the Convention, even if they are recognized as "civil" in the member states' domestic law.

[830] *Micallef*, Fourth Section, § 40-44.

form and refuse to modify it in the above mentioned manner they still have an alternative which enables them to obey to the Court's new rule. In other words, when national courts are called to rule in a case where an interim measure is requested and they observe that the national law has not been modified in accordance with the Court's decision, the courts are to replace national rules with the ECHR rules on the basis of their membership to the European Convention. Any contradiction between domestic law and European law and jurisprudence is to be solved by recognising the priority of the latter.

Nevertheless, such contradiction can generate numerous problems and potential erroneous solutions. Not adapting national law to the new european standards and compelling judges to replace domestic law with european case-law and motivate this substitution extensively every time this kind of problem arises appears to be a less effective alternative.

In any case the most importance consequence of the Court's decision in Micallef is by far the increased protection guaranteed to human rights by the ECHR. Given the fact that interim measures can be requested in areas such as family relations, property issues**,** commercial relations which imply an impressive diversity of rights and interests[831] the importance of applying the gurantees enshrined by article 6 is paramount when it comes to safeguarding the rights.

Although it is undeniable that the reasonable term requirement remains a hard-achievable goal for many european states, the Court found a manner of safeguarding the rights decided upon in interim measures procedures. For, if a decison on the merits of the case can be long-awaited by the parties, at least the determination of their civil rights in injunction procedures will benefit from the guarantees of a fair trial.

The Court's ruling in Micallef on the applicability of article 6 was reiterated in further cases in its subsequent jurisprudence. One of the first cases in which the Court cited Micallef and its previous reasoning is ***Udorovic v. Italy***. The applicant, an Italian national is a member of the Sinti community and lives in Italy. In decisions of 1996 and 1999 the Rome City Council ordered the evacuation of the travellers' encampment where he lived. He sought judicial review of those decisions in the administrative courts and he also brought an action in the civil courts alleging that the same decisions had been discriminatory. Relying on article 6 he complains that the civil proceedings were unfair because of the lack of publicity.

In ***Udorovic v. Italy*** the position of the opposing parties is somewhat surprising. On one hand, the Government admits that the procedure is a preliminary one meant to establish a temporary and urgent measure but claims at the same time that article 6 is not applicable. The Government cites as a strong argument the Court's 'well-established jurisprudence' which considers preliminary procedures not to determine civil rights and obligations and places them outside the scope of article 6. Whether the Government's position is a consequence of its ignorance of the newly changed case-law regarding interim measures or rather an attempt of bringing into discussion again the applicability of article 6 (though another change in such a short time would be inconceivable) remains unknown.

On the other hand the applicant also seems to leave aside the Court's reasoning in Micallef and instead of

[831] *Dispute Resolution Around the World*, Baker and McKenzie, www.bakermckenzie.com.

holding that the procedure is a preliminary one, especially that the national Court of cassation had tagged it accordingly, makes efforts to convince the Court that the procedure is an ordinary one and this is the reason why the guarantees of a fair trial should be applicable.

The ECHR practically does nothing else but restate the principle in Micallef and analyse the conditions mentioned in the previous decision[832] . In any case *Udorovic v. Italy* is important from multiple points of view, not only the position of the parties. After deciding on the applicability of article 6 to the procedure in question, the Court had to rule on the aspect of whether the lack of publicity is equivalent to an infringement of the applicant's right to a fair trial.

On this occasion the Court has the opportunity to quote its reasoning in Micallef not only on the aspects of the rule established there, but also on the aspects the exception referred to. Confronted with the alleged violation of article 6 the european judges appeal to the fact that in exceptional cases applying all the guarantees of a fair trial to an interim measure would compromise the purpose of the measure and diminish its efficiency.

In other words *Udorovic v. Italy* is an opportunity for the European Court to consolidate the new directions of its case-law and to 'make a statement' that the departure from its previous case-law is a general one and its ruling in Micallef is a starting point of a new approach. Despite the fact that Udorovic cannot be deemed as a step forward because it does not actually offer anything new compared to Micallef, it is a further example of how the principle and exception formerly established are to be analysed in another concrete case. What is more, Udorovic v. Italy certainly proves that the exceptions to the applicability of article 6 are genuine ones and at the moment of the case-law change the Court has not lost sight of the particular aspects of the measures in question.

The newly-established principle of the Court is strongly reinforced whenever the opportunity arises. Since provisional measures are widely spread and used in all member countries by many litigants the Court's expectations were not deceived. Consequently, shortly after *Udorovic v. Italy*, other applicants addressed the Court in order to obtain a condemnation of the Italian state for violation of article 6 in injunction proceedings.

Belperio and Ciarmoli filed an action in 1988 before their national court in order to obtain an injunction order which compelled the defendant, the construction company of V.S., to restore the building they had worked in. They were given the order but because of the irregularity of its notification the applicants were required to file another action before the court in the attempt of obtaining a ruling on the merits of the case. Ten years later, in 1998, their action was dismissed.

The two applicants asked the European Court to observe that the length of the injunction proceedings could not be considered compatible with article 6. What is interesting to emphasize in this case is the entirely different approach of the Italian Government. If previously in the Udorovic case the question of the applicability of article 6 was raised, in Belperio and Ciarmoli the Government accepts the change of the Court's case-law and makes no effort to convince the court that the guarantees of a fair trial cannot be engaged to the present procedure. Undoubtedly, there would

[832] ECHR, *Udorovic v. Italy*, Judgment of 18 May 2010, § 43

have been little chance of success but still the fact that no attempt was made to bring upon this issue is a clear and indisputable indication that the change of case-law was fully understood and acknowledged by the states.

Nonetheless, the Court appears not to be wholly convinced of that or rather wishes to further secure its position towards the engagement of article 6 in provisional measures. That is the reason why it mentions its ruling in Micallef although it does not find it necessary anymore to repeat the conditions stated there or to make a thorough analysis of the present circumstances. It is the Court's subtle and elegant manner to remind the member states of its new approach and their deriving obligations.[833]

In the following case of the 'Micallef chain', ***Kübler v. Germany***, the Government strived to remove any discussion on a potential violation of article 6 by maintaining that neither the interim proceedings, nor the main proceedings concerned a civil right. Mr. Kübler, the applicant, applied in 2001 for a post of advocate notary but he was refused. Consequently, he informed the Ministry of Justice that he intended to apply for interim legal protection to the Federal Constitutional Court and he requested it to await the outcome of the proceedings before appointing other advocate notaries. Although the Constitutional Court granted the applicant interim protection, the Ministry ignored it and on the following two days appointed advocate notaries for all the posts.

The German Government decided not to dispute the applicability of article 6 to the provisional measures on the grounds that they were not determinant of the right in question. Out of the two conditions required in Micallef in order to engage the guarantees of a fair trial the one which refers to the nature, object, purpose and effects of interim proceedings seems more likely to be disputed by the governments claiming that a measure is not determinant of the right and therefore the applicant is not entitled to the guarantees of a fair trial.

However, in the case of Kübler it was obvious enough that the measure was undeniably decisive of the right of the applicant since once the notaries were appointed even if the claim of the applicant proved to be successful it was impossible to revoke the previous appointments. Examining the conditions in Micallef the government tried to use the first one in order to escape from the imminent condemnation. Accordingly, without denying the rule in Micallef but actually relying on it, the Government claimed that the right itself was not civil so article 6 was to be dismissed out of hand. Although the Court decided otherwise[834] the Government's attempt to prove the inapplicability of article 6 caused by the non-fulfilment of one of the two conditions stated in Micallef is remarkable. Unlike former attitude of the governments which denied the change of jurisprudence or preferred not to debate it, the present position of the government proves a deeper understanding of what the Court requires and the way national authorities could actually contest the applicability matter.

VIII. Article 6 guarantees in interim proceedings

In the final part of our essay, we will try to make a concise analysis of the specificity of the safeguards provided in article 6 of the Convention, in regard to the interim measures.

[833] ECHR, *Belperio and Ciarmoli v.Italy*, Judgement of 21 December 2010, § 19-20

[834] ECHR, *Kübler vs. Germany*, Judgment of 13 January 2011, § 48

1) The right to an independent and impartial tribunal

As asserted by the Court in the case of Micallef[835], this is a guarantee which cannot, under any circumstances, be left aside in a procedure concerning an interim measure. It is of the essence of a fair trial, that the judges taking the decision are free of personal prejudice or partiality. This implies both a subjective and an objective test[836]. The subjective test refers to the personal conviction and behavior of a certain judge[837], while the objective test must ascertain whether the tribunal itself (through composition, ways of appointment of judges etc.) offers substantial guarantees to exclude any legitimate doubt in respect of its impartiality[838]. There are no reasons which may justify not complying with this fundamental guarantee.

2) The right of acces to a court

One of the rights which has been developed out of the provisiones of article 6 is the right in certain cases to a hearing or to acces to a court for the determination of a particular issue[839], right which must not only exist, but that must also be effective[840]. Taking into consideration the fact that interim measures could determine the same rights and obligations as the main proceedings, there cannot exist any exceptions from guaranteeing the rights of acces to a court even if a interim measure is concerned[841].

3) The principle of contradictoriality and the equality of arms

The contradictorial procedure gives one of the parties the possibility to acknowledge all pieces and observations presented to the judge, even those coming from an independent magistrate likely to influence the final decision[842]. It also gives the party a right to discuss them[843]. The equality of arms requires that each party is given a reasonable possibility to expose her cause before a court, under circumstances that are not less favorable than those of the other party[844].

Both these principles may be infringed when the party against which the interim measure is taken has not been summoned to the proceedings.

At a first impression, the EU Law provides a higher protection in regard to this matter. As we have seen above, the ECJ held in the case of Denilauler that a judgment relating to provisional measures falls outside the scope of the Brussels I regime in so far as it is delivered without that party against which the measures have been awarded being summoned and are intended to be enforced without prior service. On the other hand, the ECHR held, in Micallef that, in exceptional cases, it may not be possible immediately to comply with all of the requirements of Art. 6. Therefore, it would be possible not to summon the other party in urgent cases,

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[835] *Micallef,* G.C.*,* § 86.

[836] *Law of the European Convention on Human Rights*, D.J. Harris, M. O'Boyle, C. Warbrick, Butterworths, 1995, p. 234.

[837] ECHR, *Lithgow and others v. The United Kingdom*, Judgment of 8 July 1986, § 202.

[838] ECHR, *Ferrantelli and Santagelo v. Italy*, Judgment of 7 August 1996, § 56-58.

[839] ECHR, *Golder v. The United Kingdom*, Judgment of 21 February 1975, § 36; *European Convention on Human Rights*, F. Jacobs, R. White, Second Edition, Clarendon Paperbacks, 1996, p. 127.

[840] ECHR, *Airey v. Ireland*, Judgment of 9 October 1979, § 24.

[841] ECHR, *RTBF v. Belgium*, Judgment of 29 March 2011, § 64 and 69.

[842] *Droit européen et international des droits de l'homme,* Frédéric Sudre, 6e édition refondue, Presses Universitaires de France, 2003, p. 327.

[843] ECHR, *Barberà, Messegué and Jabardo v. Spain*, Judgment 6 December 1988, § 78.

[844] ECHR, *Dombo BeheerB.V. v. Holland*, Judgment of 27 October 1997, § 19; *La Convention européenne des droits de l'homme. Commentaire article par article*, L.E. Pettitti, E. Decaux, P.-H. Imbert, Economica Press, 1995, p. 266.

or when a certain element of surprise is needed, in order to be able to enforce the measure.

In reality, the Court only permits not complying with these guarantees "immediately". That is, as soon at it is possible to summon the other party, the national court is forced to do that. Consequently, not summoning a party when taking an interim measure is compatible with the requirement of article 6 just as long as the other party has the possibility to lodge an appeal against the measure, in which she will be summoned. The ECJ has also decided that it is not necessary that both parties have the opportunity to participate in the proceedings in their initial phase. The requirement of adversarial proceedings will be fulfilled if the parties have the possibility to launch an appeal and can participate in that procedure.

4) The grounds of judgments

One of the requirements of article 6 is that the national courts must indicate with sufficient clarity the grounds on which they based their decision so that the litigants may know the reasons which support the decision and to be able to exercise usefully the rights of appeal available to him[845] . Although it is true that the silence of a court can reasonably be construed as an implied rejection, the courts are bound to review all the submissions made during the proceedings at least in so far as they had been "the subject of argument"[846] . However, article 6 § 1 cannot be understood as requiring a detailed answer to every argument, not to mention that the length of the reasoning depends on the nature and circumstances of the case.[847]

As far as the injunction proceedings are concerned, the guarantee is still applicable and cannot be removed, because the reasons for the litigant to know the motivation of the court are the same, irrelevant of the nature of the procedure. However, it must be borne in mind that the injunction proceedings do not represent a legal framework where claim on the merits of the case are to be considered, but they imply a certain degree of urgency.

Consequently, the courts are not to allow much evidence to be given and they are not to extend the hearings excessively because this could place at substantial risk the execution of the ultimate judgement. Given the fact that the courts take into consideration much fewer elements than they would in a procedure involving the merits of the case and they are expected to deliver their judgement promptly, the grounds substantiating their decision are to be less extensive than usual.

5) The execution of judgments

As to the execution of a decision, the Court reiterates that the right to a court enshrined by article 6 par. 1 would be illusory if a contracting state's domestic legal system allowed a final binding decision to remain inoperative to the detriment of one party[848] . Execution of a judgement given by any court must be regarded as an integral part of the trial for the purposes of article 6[849] . The same

[845] ECHR, *Hadjianastassiou v. Greece*, Judgment of 16 December 1992, § 33.

[846] *The European Convention on Human Rights*, F. Jacobs, R. White, Second Edition, Clarendon Paperbacks, 1996, p. 126.

[847] ECHR, *Hiro Balani v. Spain*, Judgment of 9 December 1994, § 28.

[848] ECHR, *Hornsby v. Greece*, Judgment of 19 March 1997, § 40; *Droit européen et international des droits de l'homme,* Frédéric Sudre, 6 e édition refondue, Presses Universitaires de France, 2003, p. 344

[849] ECHR, *Di Pede v. Italy*, Judgment of 26 September 1996, § 20-24

considerations apply to the execution of an interim measure.

In ***Kübler v. Germany*** the Court has the opportunity to examine the issue in question as the applicant claims the authorities' non-compliance with the interim measure he obtained infringed his right to effective access to a court. The european judges observe that the object of an interim measure is to protect and preserve the rights and interests of a party before a court pending a final decision. It is precisely for the purpose of preserving a court's ability to render such a judgement after an effective examination of the facts and the underlying law that an interim order is granted.

What is more, the fact that the damage which an interim measure was designed to prevent subsequently turns out not to have occurred despite a failure to comply with the interim measure has to be regarded as being irrelevant for the assessment whether there has been a violation of the applicant's rights under Article 6 § 1[850] . As a conclusion, the Court cannot accept the non-execution of a binding decision of a court even if its "binding power" is only temporary until a final judgement is delivered.

6) The right to a public hearing and the public pronouncement of judgement

The right to a public hearing implies a right to an oral hearing at the trial court level[851] , for the purpose of protecting litigants from the administration of justice in secret with no public scrutiny and thereby contributing also to the maintenance of confidence in the courts[852] . Due to the fact that the purpose and the concept of a public hearing remain the same irrespective of the nature of the proceedings, the right to a public hearing is subject only to the extensive restrictions set forth by article 6 § 1[853] .

In contrast with the right to a public hearing, the right to have judgement "pronounced publicly" is not subject to any exceptions in the text of article 6 § 1[854] . In particular the list of restrictions in the final sentence of article 6 § 1 applies only to the hearing of the case. Nor have the Strasbourg authorities as yet applied the idea of a waiver of rights to this second right[855] . Therefore, exceptions as to the application of this procedural guarantee to interim measures are not to be allowed.

7) The right to trial within a reasonable time

The purpose of the "reasonable time" guarantee is to protect "all parties to court proceedings against excessive procedural delays. This guarantee underlines the importance of rendering justice without delays which may jeopardise its effectiveness and credibility[856] . Taking into account interim measure are considered to be of urgent nature in order to protect the plaintiff's rights until the determination of his claim on the merits, a violation of the reasonableness of the length of proceedings would affect the substance of the measure itself.

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[850] ECHR, *Kübler v. Germany*, Judgment of 13 January 2011, § 86

[851] ECHR, *Fredin v. Sweden*, No 2, Judgment of 23 February 1994, § 21

[852] ECHR, *Pretto v. Italy*, Judgment of 8 December 1983, § 21; *Theory and Practice of the European Convention on Human Rights,* P. van Dijk, G.J.H. van Hoof, third edition, Kluwer Law International, 1998, p. 438

[853] *Droit européen des droits de l'homme*, Jean-François Renucci, 3e édition, Librairie Générale de Droit et de Jurisprudence, 2002, p. 276

[854] *Droit européen et international des droits de l'homme,* Frédéric Sudre, 6 e édition refondue, Presses Universitaires de France, 2003, p. 341

[855] *Law of the European Convention on Human Rights*, D.J. Harris, M. O'Boyle, C. Warbrick, Butterworths, 1995, p. 221

[856] ECHR, *H. v. France*, Judgment of 24 October 1989, § 58

IX. Conclusions

Undoubtedly, the enshrinement of human rights in the Convention cannot be considered sufficient in order to secure an effective protection, but it is article 6 which truly offers the necessary guarantees. Over the years the Court's case-law has developed progressively only to extend the ambit of article 6 as to the procedures which fall within its realm. As far as the interim measures are concerned, in a primary stage the Court decided as a general rule that article 6 in not applicable to this kind of procedures mainly because they are not determinant of civil rights and obligations.

Further on, taking into consideration the nature of the right discussed, the european judges concluded in several cases that exceptionally article 6 could be applied to ad interim proceedings. However, due to the "widespread consensus" between the Member States of the Council of Europe on the applicability of article 6 safeguards to interim measures, the European Court of Justice's jurisprudence and the fact that, very often, the interim measures will produce effects for a long period of time, the Court was convinced to change its overview.

The case of *Micallef v. Malta* is the turning point in the Court's jurisprudence. In the case mentioned the Court holds that article 6 is applicable to interim proceedings if two conditions are fulfilled: the right at stake must be of civil nature and the interim measure must effectively determine the right in question. Still, in exceptional cases in which the interim measure has to be taken extremely urgently, it is acceptable not to comply with all procedural safeguards. In the subsequent cases where the European judges were confronted with the same issue the ECHR practically did nothing else but restate the principle in Micallef and consolidate the directions of its newly-established jurisprudence.

Regarding the procedural safeguards that could be left aside we believe that under no circumstances could an interim procedure be devoid of the right to an independent or impartial tribunal, the right of acces to a court or the principle of contradictoriality and the equality of arms (the latter regarding the whole interim proceedings). Furthermore, the guarantees concerning the specification of grounds of judgements, the right to a public hearing, the execution of judgements and the right to trial within a reasonable time are as important for interim proceedings as for the proceedings involving the merits of the case.