Mandat ta' Inibizzjoni

Fil-Prim'Awla tal-Qorti Civili

BirdLife Malta [V.O./0052]

kontra

Il-Prim Ministru,

Il-Ministru ghall-Ambjent, l-Energija u l-Intrapriza,

Il-Ministru ghal Ghawdex,

It-Taqsima tar-Regolamentazzjoni ghall-Ghasafar Selvaggi

Rikors ta' BirdLife Malta [V.O./0052]

Jinghad bil-qima u jigi kkonfermat bil-gurament: -

Illi l-esponenti ghandha interess li jitharsu l-jeddijiet taghha taht id-dritt Ewropew;

Illi l-esponenti, sabiex tikkawtela d-drittijiet taghha, tixtieq izzomm lill-intimati milli jifthu l-istagun tal-kacca fir-Rebbiegha ghas-sena 2022 fuq l-ispeci *Streptopelia turtur;* u

L-esponenti ghalhekk jitolbu lil din l-Onorabbli Qorti tordna s-sospensjoni ta' dawk id-dispozizzjonijiet kollha tal-Avviz Legali 116 tas-sena 2022, kif gie ppubblikat fil Gazzetta tal-Gvern nru. 20,830 tat-8 ta' April 2022 (u li jgib l-isem "Regolamenti tal-2022 dwar il-Konservazzjoni tal-Għasafar Selvaġġi (Dikjarazzjoni dwar Deroga għal Staġun tal-Kaċċa fir-Rebbiegħa tal-2022 għall-Gamiem u s-Summien"), li jawtorizzaw il-ftuh tal-istagun tal-kacca fir-rebbiegha ghall-gamiem bejn is-17 ta' April u t-30 ta' April 2022, ossija s-sospensjoni tar-regolamenti 3, 4 u 5 tal-istess Avviz Legali safejn huma jirreferu ghall-kacca tal-gamiema, u/jew tirrendiehom bla ebda effett fil-fatt u fil-ligi; u

L-esponenti titlob ukoll li l-intimati jigu ordnati li ma jifthux l-istagun tal-kacca fir-Rebbiegha ghas-sena 2022 fuq l-ispeci *Streptopelia turtur* b'kwalunkwe mod iehor; u

L-esponenti titlob ukoll li l-intimati, u l-ufficcjali li jahdmu fi hdanhom, jigu mizmuma milli b'kwalunkwe mod jaghtu effett lill-Avviz Legali 116 tas-sena 2022;

L-esponenti titlob ukoll illi l-mandat jigi milqugh provizorjament, sakemm il-prezenti rikors jigi deciz b'mod definittiv;

Illi, għall-aħjar ftehim ta' dak li qed jiġi mitlub illum, jinghad mill-ewwel li dan huwa mandat t'inibizzjoni ghal *interim relief* kif ghandu jkun permess fl-ordni guridiku Malti skont il-linja gurisprudenzjali kkreata mill-Qorti tal-Gustizzja tal-Unjoni Ewropea fis-sentenza taghha tad-19 ta' Gunju 1990 fl-ismijiet ***The Queen v Secretary of State for Transport, ex parte Factortame Ltd e.a.***, c-213/89, Gabra 1990 I-02433;

Illi l-Qorti Kostituzzjonali Maltija rrikonoxxiet il-possibilità li rikorrent jitlob tali *interim relief* fis-sentenza taghha tas-27 ta' Settembru 2019 fl-ismijiet ***Marion Pace Axiaq et. noe. V. l-Onorevoli Prim Ministru et.*** **(**Rik. Kost. Nru. 63/19/1), fejn qalet fil-paragrafu 12:

> *"Ma huwiex għal kollox korrett dak li qalet l-ewwel qorti illi "l-Kodiċi ta' Proċedura ma jagħtix ... jedd ġeneriku ta' interim measures". Il-liġi domestika taħseb għal interim measures: insejħulhom mandati kawtelatorji, u, ladarba hemm proċedura speċifika li tirregola dawn il-mandati li ma ntweriex li hija inkompatibbli mal-liġi ewropea, l-atturi kellhom jinqdew b'dik il-proċedura u mhux jippretendu li tinħoloq proċedura speċjali għalihom."*

Illi, minkejja l-protest gudizzjarju pprezentat fl-1 ta' April 2022 kontra taghhom u d-dispozizzjonijiet tal-ligi tal-Unjoni Ewropea hemm iccitati, l-intimati ghogobhom jghaddu l-Avviz Legali 116 tas-sena 2022 li effettivament tiftah l-istagun ghall-kacca fir-Rebbiegha ghas-sena 2022 fuq l-ispeci t'ghasfur *Streptopelia turtur*;

A. Fuq il-fumus boni iuris tal-esponenti

Illi l-esponenti hija organizzazzjoni volontarja li ghandha bhala vokazzjoni il-protezzjoni tal-ambjent u l-konservazzjoni tal-popolazzjoni ta' ghasafar f'Malta;

Illi hija ghandha interess guridiku titlob kemm dak li huwa kontenut f'dan il-mandat kif ukoll il-*judicial review* tad-deroga li tawtorizza l-kacca fir-Rebbiegha tal-i*Streptopelia turtur* matul is-sena 2022;

Illi, kif ser jintwera iktar 'l isfel, l-esponenti tinvoka direttament id-dispozizzjonijiet tal-ligi Ewropea li juru l-inkompatibilità tal-qafas legali Malti ghall-addottazzjoni ta' deroga ghall-kacca fir-Rebbiegha mal-Artikolu 7(4), tielet subparagrafu, tad-***Direttiva 2009/147/EC tal-parlament ewropew u tal-kunsill tat-30 ta' Novembru 2009 dwar il-konservazzjoni tal-għasafar selvaġġi***;

(i) Id-Direttiva 2009/147/EC tal-parlament ewropew u tal-kunsill tat-30 ta' Novembru 2009 dwar il-konservazzjoni tal-għasafar selvaġġi, fl-Artikolu 7(4), tielet subparagrafu taghha (id-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi)

Fuq l-applikabilità diretta tad-Direttiva fl-ordni guridiku Malti -

Illi sabiex dispozizzjoni ta' Direttiva tkun direttament effettiva fi Stat membru jehtieg li jigu sodisfatti tliet elementi:

(a) Li d-dispozizzjoni invokata tkun ***cara***, ***preciza*** *u* ***inkondizzjonali****;*

Illi *l-ewwel element* huwa riempjit ghaliex **l'artikolu 7(4), tielet subparagrafu**, tad-Direttiva 2009/147/EC jipprovdi bhala principju generali li l-iStati membri tal-Unjoni Ewropea "ghandhom jaraw partikolarment li l-ispeci li japplikaw ghalihom il-ligijiet tal-kacca ma humiex suggetti ghal kacca fl-istagun tat-trobbija u lanqas waqt l-istadji differenti tar-riproduzzjoni". Dan l-artikolu jikkontjeni obbligu indirizzat lill-iStati Membri u li huwa **car**, **preciz u inkondizzjonali** tali li ghandu **effett dirett** u jista' jigi ezegwit mill-Qrati Maltin kontra l-iStat Malti (ara s-sentenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea tal-10 ta' Settembru 2009, ***Kummissjoni v ir-Repubblika ta' Malta*****,** C-76/08, Gabra p. I-08213, §47);

(b) Li l-perjodu ghat-traspozizzjoni tad-Direttiva tkun ghaddiet;

Illi *t-tieni element* huwa riempjit ghaliex d-Direttiva 2009/147/EC (già d-Direttiva 79/409/CEE tal-Kunsill) kellha tigi trasposta fil-ligi Maltija mal-accessjoni ta' Malta ghall-Unjoni Ewropea;

(c) Li d-Direttiva ma tigix trasposta jew ma tigix trasposta sew mill-awtoritajiet Maltin;

Illi t-*tielet element* huwa riempjit ghaliex id-Direttiva hija attwalment trasposta b'mod hazin u kontra l-ezigenzi tad-dritt Ewropew;

Illi l-Gvern Malti iddecieda jintroduci l-principju ta' projbizzjoni generali tal-kacca fir-Rebbiegha permezz tal-Ligi Sussidjarja 549.42, *Regolamenti dwar il-Konservazzjoni tal-ghasafar selvaggi*. Il-projbizzjoni generali attwali ghall-kacca fir-Rebbiegha tinstab fit-tielet sentenza tar-regolament 5(1) tal-Ligi Sussidjarja 549.42. L-istess Ligi Sussidjarja, fir-regolament 9 taghha, tippermetti lill-Ministru tal-Ambjent sabiex jidderoga mid-dispozizzjonijiet tar-regolament 5;

Illi tezisti ukoll Ligi Sussidjarja 549.57, *Regolamenti dwar qafas biex tigi permessa deroga li tiftah l-istagun ghall-kacca tal-gamiem u summien fir-Rebbiegha.* Din tikkontjeni numru ta' kondizzjonijiet ta' sustanza u ta' forma li fuqhom ghandu jimxi l-Ministru tal-Ambjent meta jawtorizza deroga ghall-kacca fir-Rebbiegha;

Illi peress li d-deroga attwali hija mfassla f'Avviz Legali li *gie aktar tard fiz-zmien* mir-regolament 5 tal-Ligi Sussidjarja 549.42 u d-dispozizzjonijiet tal-ligi sussidjarja 549.57 m'huwiex permess, skont l-ordni guridiku Malti, li jintalab *judicial review* tad-deroga kontenuta fl-Avviz Legali abbazi tar-regolament 5 tal-ligi sussidjarja 549.42 jew id-dispozizzjonijiet tal-Ligi Sussidjarja 549.57. Dan ghaliex skont il-ligi Maltija qatt ma jista' jintalab *judicial review* ta' ligi sussidjarja fuq il-bazi ta' ligi sussidjarja li giet promulgata iktar qabel fiz-zmien – fis-sistema kostituzzjonali Maltija, meta zewg ligijiet li jaqghu fl-istess livell tal-gerarkija tan-normi huma konfliggenti, id-duttrina tal-*implied repeal* tezigi li tal-ahhar tkun meqjusa li *abrogat tal-ewwel*, ghaliex "*lex posterior abrogat priori"* (ara fuq dan il-punt ***Vauxhall Estates Ltd v Liverpool Corporation*** **(1932) 1 KB 733**);

Illi l-intimati huma ben konxju tal-fatt li qed jimminaw l-oggettiv tad-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi meta huma stess irrkonoxxew fis-subtitolu tal-Avviz Legali 116 tal-2022 li l-Ministru tal-Ambjent, l-Energija u l-Intrapriza qieghed jirrikorri ghad-deroga bis-"setghat moghtija bl-artikolu 54 u 55 tal-Att dwar il-Protezzjoni tal-Ambjent", liema Att ma jsemmi xejn dwar il-kondizzjonijiet li ghandhom jigu mharsa fit-thaddim tad-deroga;

Illi dan kollu juri li l-Avviz Legali 116 tal-2022 inhareg minghajr ebda konsiderazzjoni ghall-kundizzjonijiet imposti mid-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi, hekk kif trasposti fil-Ligi Sussidjarji 549.42 u 549.57, bil-konsegwenza li tali Avviz Legali jivvjola d-dritt Ewropew;

Illi fis-sentenza ***Commission of the European Communities v Kingdom of the Netherlands*** tal-15 ta' Marzu 1990, c-339/87, Gabra 1990 I-00851, il-Kummissjoni Ewropea pprezentat kaz ta' kostatazzjoni ta' nuqqas ta' rispett tal-obbligi taht it-Trattat ghaliex il-ligi Olandiza ma ppermettietx *judicial review* tad-decizjoni tal-Ministru Olandiz ghall-kacca li jawtorizza derogi taht l-Artikolu 9 tad-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi. L-Avukat Generali van Gerven qies li : "*As a result of the forementioned requirement of legal certainty, and the concomitant requirements of consistency, publicity and reviewability, those conditions must be reproduced with sufficient precision in generally binding and published rules, so that derogations granted contrary thereto may be identified and, if necessary, **declared void**.* (§18) u "*The Netherlands Government's defence comes down to this : the provisions of the Directive are not infringed in the case of competitions with hunting dogs or the training of such animals, because the competent Minister **in actual fact** makes the decisions to grant the relevant permits subject to conditions which ensure this. As I have already demonstrated, at paragraph 18 above, **this is not sufficient**. These conditions to which the issue of permits is subject must be laid down in rule-making provisions*" (§46).

Illi fis-sentenza ***WWF Italia and others v Regione Lombardia*** tat-8 ta' Gunju 2006, c-60/05, Gabra 2006 I-05083, il-Qorti tal-Gustizzja qalet li: "*the relevant national procedural framework applicable **must guarantee not only that the lawfulness of decisions granting authorisations derogating from the system of protection laid down by the Directive may be verified in a timely manner but also that the conditions attached to those decisions are complied with***" (§44). Ghalhekk, "*the obligation on the Member States to ensure that hunting of birds is carried out only in 'small numbers', in accordance with Article 9(1)(c) of the Directive, requires that the administrative procedures provided **for are organised in such a way that both the decisions of the competent authorities authorising hunting derogations and the manner in which those decisions are applied are subject to effective control exercised in a timely manner**.*" (§47)

Illi bil-qafas legali li ghazel l-iStat Malti sabiex jintroduci d-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi fl-ordni guridiku intern, il-Ministru tal-Ambjent jista' effettivament jghaddi deroga li hija "judge proof" ghaliex m'ghandux obbligu legali li jirregola ruhu mal-Ligi Sussidjarja 549.42 jew mal-Ligi Sussidjarja 549.57. *Inoltre*, m'hemm ebda possibilità li tigi

pprezentata quddiem il-Qrati Maltin xi forma ta' *judicial review* tad-deroga li jkun imsejjes fuq il-projbizzjoni generali kontenut fir-regolament 5 tal-Ligi Sussidjarja 549.42 (ugwali ghall-artikolu 7(4), tielet subparagrafu, tad-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi), jew id-dispozizzjonijiet tal-Ligi Sussidjarja 549.57;

Illi d-diskrezzjoni tal-Ministru tal-Ambjent li japplika deroga ghal-kacca fir-Rebbiegha hija, skont il-ligi Maltija vigenti, assoluta, ghaliex kontenuta f'ligi sussidjarja li lanqas tista' tigi evalwata minn qorti jew tribunal independenti fid-dawl tal-kundizzjonijiet imposti mill-artikolu 9 tad-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi;

Illi ghalhekk, il-ligi Maltija ma tonorax l-obbligi mposti fuq Malta taht id-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi, u dan ghaliex l-oggettiv essenzjali tad-Direttiva li decizjonijiet li jawtorizzaw derogi ghandhom jistghu ikunu ikkontrollati mill-Qrati Maltin, bhala awtoritajiet independenti minn min qed japplika d-deroga, mhuwiex qed jigi rispettat;

Illi fejn il-ligi Maltija tfalli fit-traspozizzjoni taghha tad-direttivi ewropej billi tonqos milli taghti *binding effect* genwin lid-dispozizzjonijiet taghhom, dawk id-direttivi jigu rezi direttament effettivi fl-ordni guridiku Malti, u bhala tali jaqghu fl-oghla livell tal-gerarkija tan-normi rikonoxxuta mis-sistema kostituzzjonali Malti;

Fuq il-parti sostantiva tad-Direttiva -

Illi fis-sustanza taghha d-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi tipprotegi partikolarment l-ispeci *Streptopelia turtur* fil-Parti B, tal-Anness II taghha, li jgib bhala konsegwenza li tali speci ma tistax titkacca fir-Rebbiegha (u dan skont l'artikolu 7(4), tielet subparagrafu, fuq imsemmi);

Illi, tenut kont tal-istat attwali ta' konservazzjoni tal-livell tal-popolazzjoni tal-*iStreptopelia turtur*, l-uzu mill-intimati tad-deroga taht l-artikolu 9(1)(c) tad-Direttiva hija illegali;

Illi jinghad li fi Frar tal-2022, it-Taqsima tar-Regolamentazzjoni ghall-Ghasafar Selvaggi ("rapport WBRU") harget rapport dwar l-istatus tal-*iStreptopelia turtur* (gamiema) li jghid: "*The breeding population trend in the EU28 is decreasing in both the short-term and the long-term*" (p. 28) u li "*This species is listed as Vulnerable at the European and global levels and Near Threatened within the territory of the European Union (BirdLife International, 2015a: 41). A ten-year (2018–2028) international single species action plan is in place to restore the European Turtle-dove to a favourable population status so that it can be safely removed from the Globally Threatened categories of the IUCN Red List*." (p.49) (**Dok. BLM1**);

Illi l-istess rapport WBRU jinnota li l-popolazzjoni tal-gamiema qed tonqos minhabba kacca mhux sostenibbli (pp. 28-29), li l-*International Species Actions Plans* jidentifikaw il-kacca fir-Rebbiegha bhala theddida magguri (p. 31), u r-rapport mkien ma jghid li l-*favourable status* jista' jintlahaq anki jekk il-kacca fir-Rebbiegha tinfetah (**Dok. BLM1**);

Illi minkejja li dan ir-rapport tal-WBRU gie ipprezentat lill-Kumitat Ornis, huwa xorta iddecieda jirrakkomanda l-ftuh tal-istagun tal-kacca fir-Rebbiegha ghaxart ijiem biss qabel l-ahhar elezzjoni generali fil-pajjiz;

Illi, *inoltre*, fit-18 ta' Marzu 2022 l-*EU Task Force on the Recovery of Birds* organizzat laqgha, (li fiha kienu prezenti rapprezentanti tal-Awtorità ghall-Ambjent u r-Rizorsi u tat-Taqsima tar-Regolamentazzjoni ghall-Ghasafar Selvaggi), fejn gie ipprezentat rapport pubbliku ta' esperti nominati mill-Kummissjoni Ewropea. Fih jinghad li tenut kont tal-istatus attwali tal-i*Streptopelia turtur* ghandu jigi addottat *"a zero harvest stance"* kemm matul ir-Rebbiegha kif ukoll il-Harifa tas-sena 2022: "*The zero-harvest decision adopted in 2021 should be maintained in 2022, because neither of the three conditions for lifting the moratorium are yet being met*." (p. 3 taht "Recommendations for 2022") (**Dok. BLM2**);

Illi huwa ghal kollox inkoerenti u irragonevoli li l-iStat Malti jawtorizza l-kacca fir-Rebbiegha fuq l-ispeci in dizamina meta hemm *"Action Plan"* mondjali li qed jipprova jgib lura l-*favourable status* tal-ispeci;

Illi fis-sentenza tat-8 ta' Ġunju 2006, ***WWF Italia et***, C-60/05, Ġabra p. I-5083, §32, il-Qorti tal-Gustizzja tal-Unjoni Ewropea iddecidiet li derogi taht l-Artikolu 9 tad-Direttiva "*jistghu jigu implementati biss jekk jigi ggarantit li l-popolazzjoni tal-ispeci kkoncernati ser tinzamm **f'livell sodisfacenti** u li, fin-nuqqas ta' din il-garanzija, il-kacca tal-ghasafar ma tistax, fi kwalunkwe kaz, titqies li hija ragonevoli u, ghaldaqstant, li hija sfruttament ammissibbli, fis-sens tal-hdax-il premessa tad-Direttiva*" [*sic: "tal-ghaxar premessa*" wara l-emendi introdotti fid-Direttiva iktar recenti tal-2009];

Illi l-popolazzjoni tal-i*Streptopelia turtur* ma tinstabx attwalment f'"livell sodisfacenti" tant li l-istatus tal-ispeci *Streptopelia turtur* qieghed jinbidel ghall-aghar u hija issa klassifikata bhala "Vulnerabbli" mill-*International Union for Conservation of Nature* (**Dok. BLM3**). F'dak il-kaz kull forma ta' kacca fir-Rebbiegha fuq din l-ispeci trid tkun projbita kullimkien fl-Unjoni Ewropea, kif rilevat mill-Qorti tal-Gustizzja tal-Unjoni Ewropea fis-sentenza tat-23 ta' April 2020, ***Kummissjoni Ewropea v Ir-Repubblika tal-Finlandja***, ECLI:EU:C:2020:291:

> *"§69: ...it is appropriate to examine whether the population of the species concerned is maintained at a 'satisfactory level', failing which, as recalled in the case-law mentioned in the preceding paragraph, the other conditions under Article 9(1) of the Birds Directive, in particular that relating to 'judicious use', cannot be fulfilled."*

(ii) Il-principju ta' prekawzjoni fl-artikolu 191(2), tieni sentenza, tat-Trattat dwar il-funzjonament tal-Unjoni Ewropea

Illi l-Qorti tal-Gustizzja tal-Unjoni Ewropea irrilevat li meta speci ta' ghasfur jaqa f'*unfavourable conservation status*, l-awtorizzazzjoni ta' deroga tista' issir biss

eccezzjonalment u li tali deroga trid tigi evalwata fid-dawl tal-principju ta' prekawzjoni (ara §§83-84 tas-sentenza ***Kummissjoni Ewropea v Ir-Repubblika tal-Finlandja,*** fuq citata);

Illi l-principju ta' prekawzjoni huwa principju generali tad-dritt u bhala tali huwa sors primarju tad-dritt Ewropew li huwa direttament applikabbli fl-ordni guridiku intern (***Pfizer Animal Health SA v Council of the European Union***, sentenza tat-Tribunal tal-11 ta' Settembru 2002, T-13/99 §§114-115);

Illi dan il-mandat qed jintalab precizament ghaliex il-popolazzjoni tal-i*Streptopelia turtur* ghandha bzonn tigi protetta u li kwalunkwe kacca imposta fuqha se tkompli tikkawza deklin f'dik il-popolazzjoni;

Illi ghalhekk l-iStat Malti huwa fl-obbligu li japplika metodi ta' prekawzjoni sabiex itejjeb l-istatut tal-i*Streptopelia turtur* fir-regjun Ewropew u juri solidarjetà mal-iStati Membri ohrajn tal-Unjoni;

Illi fil-pagna 24 tal-*Guide to Sustainable Hunting under the Birds Directive (2008)* tal-Kummissjoni Ewropea, jinghad li l-*Kumitat tal-Parlament Ewropew fuq l-Ambjent, is-Sahha Pubblika u l-Protezzjoni tal-Konsumatu*r wera li: "*Where a species is declining, hunting cannot by definition be sustainable unless it forms part of a properly running management plan that also involves habitat conservation and other measures that will slow and ultimately reverse the decline."*

Illi bizzejjed jinghad li Malta lanqas addottat *management plan* ta' kif se tigi ripristinata l-popolazzjoni tal-i*Streptopelia turtur* fir-regjun, u jinghad ukoll li r-rapport WBRU (**Dok. BLM1**) pprezentat lill-Kumitat Ornis fil-laqgha tas-16 ta' Marzu 2022 ma jghid imkien li l-popolazzjoni tal-iStreptopelia turtur qeghda tmur ghall-ahjar;

(iii) Il-principju ta' proporzjonalità bhala principju generali tad-dritt Ewropew u li d-deroga tal-Ministru tal-Ambjent trid tirrispetta

Illi l-principju ta' proporzjonalità huwa principju generali tad-dritt u bhala tali huwa sors primarju tad-dritt Ewropew li huwa direttament applikabbli fl-ordni guridiku intern (***Internationale Handelsgesellschaft mbH***, 17 ta' Dicembru 1970, c-11/70, ECLI:EU:C:1970:114);

Illi tali principju jirrikjedi li meta tigi awtorizzata deroga ghall-kacca fir-Rebbiegha din ghandha tkun uzata b'tali mod li tippermetti biss il-kacca fuq numru minimu possibbli ta' ghasafar sabiex jista' jigu bilancjati l-ezigenzi ta' "judicious use" fl-Artikolu 9 tad-Direttiva dwar konservazzjoni tal-ghasafar u l-ezigenzi tal-protezzjoni tal-ispeci mkacca;

Illi l-iStat Malti qieghed jimponi *bag limit* ta' 500 ghasfur biss ghall-kacca fil-harifa fuq l-i*Streptopelia turtur*, izda *bag limit* ta' 1,500 ghasfur waqt il-kacca fir-Rebbiegha;

Illi l-principju ta' proporzjonalità tirrikjedi koerenza assoluta fil-politika ta' konservazzjoni tal-iStat Malti, li m'huwiex il-kaz f'Malta bhalissa;

Illi l-esponenti ggib a konjizzjoni ta' din l-Onorabbli Qorti li jekk l-iStat Malti ihoss li l-konservazzjoni tal-ispeci *Streptopelia turtur* tezigi *bag limit* ta' 500 biss matul il-harifa, ghaliex ghandu jkun it-triplu fir-Rebbiegha meta l-ispeci tkun iktar vulnerabbli u fil-process li tirreproduci f'artijiet iktar 'l fuq mit-territorju Malti?

Illi jekk l-iStat Malti ihoss li *bag limit* ta' 500 ghasfur huwa l-massimu li jista' jigi kkaccat sabiex il-popolazzjoni tal-gamiema ma tmurx ghall-aghar, huwa ghandu jkun hafna iktar kawt meta japplika deroga ghall-kacca tal-gamiema fir-Rebbiegha. Minflok qed jgholli n-numri kaccabbli waqt din l-istagun (**Dok. BLM4**);

B. Fuq id-dannu irreparabbli li se jsehh jekk ma jintlaqax il-mandat

Illi huwa car li jekk tinfetah l-istagun tal-kacca fir-Rebbiegha fil-jiem li gejjin fuq l-ispeci *Streptopelia turtur*, ghasafar ta' din l-ispeci se jispiccaw maqtulin u iktar hsara se ssir lill-popolazzjoni tal-ispeci;

Illi l-principju tal-prekawzjoni rikonoxxut mid-dritt Ewropew jezigi li mizura ma tittehidx jekk hemm riskju car ta' dannu ghall-ambjent kif deskritt mill-aqwa xjenzati internazzjonali specjalizzata fil-qasam tal-avifawna u l-ornitologija. Fuq dan il-punt jigi reiterat li stagun tal-kacca fir-Rebbiegha imur ghal kollox kontra r-rekomandazzjonijiet tal-*EU Task Force on the Recovery of Birds*, li Malta ghandha obbligu tiehu in konsiderazzjoni fit-tfassil ta' azzjoni kemm nazzjonali kif ukoll Ewropea ghall-konservazzjoni tal-ispeci;

Illi, finalmet, ladarba maqtula l-ghasafar, il-pratticità u l-interess ta' kawza ulterjuri ghal *judicial review* tintilef (i.e. dikjarazzjoni ta' inkompatibilità tal-Avviz Legali 116 tas-sena 2022 mad-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi);

C. Fuq l-urgenza tal-mandat u t-talba specifika tal-esponenti li jigi sospiz l-Avviz Legali 116 tas-sena 2022

Illi, fuq dan il-punt, jintqal qabel kollox li procedura fuq il-meritu se tinfetah kontestwalment ma' dan il-mandat li se titlob *dikjarazzjoni ta' inkompatibilità tal-ligi Maltija mad-Direttiva u l-principji generali tad-dritt Ewropew*.

Illi dan huwa rez possibbli mid-dritt proceduralі Malti permezz tal-*actio popolaris*, li hija l-ghodda utilizzata sabiex tigi kkontrollata l-kompatibilità ta' ligijiet Maltin ma' dawk Ewropej. Dan gie rikonoxxut mis-sentenzi tal-Qrati Maltin recenti fl-ismijiet ***Marion Pace Axiaq et noe v L-Onorevoli Prim Ministru et.***, Qorti Kostituzzjonali, tas-27 ta' Settembru 2019, paragrafu 32; kif kkonfermat ***Av. Dr. Anna Mallia v Il-Kumitat dwar il-Hatriet tal-Gudikatura***, Prim'Awla tal-Qorti Civili, tat-2 ta' Dicembru 2021, pagni xiv-xv);

Illi matul dik il-procedura se tintalab li ssir *renvoi préjudiciel* ai termini **tal-Artikolu 267 tat-Trattat *dwar il-funzjonament tal-Unjoni Ewropea*** sabiex il-Qorti tal-Gustizzja tippronuncja ruhha dwar il-kompatibilità tal-Avviz Legali 116 tas-sena 2022 mad-dritt Ewropew;

Illi l-urgenza tal-affari hija ghalhekk sinjifikanti, u jinghad li f'sitwazzjonijiet simili l-Qorti tal-Gustizzja tal-Unjoni Ewropea frekwentement tohrog *interim measures* sabiex tipprotegi l-biodiversità tal-avifawna fl-Ewropa pendenti d-decizjoni tal-Qorti tal-Gustizzja (ara ***Commission of the European Communities v Republic of Malta***, c-76/08 R, ordni tal-24 ta' April 2008 li waqqfet il-kacca fir-Rebbiegha fuq il-gamiema f'Malta, kif ukoll ***Commission of the European Communities v Italy***, c-503/06R, ordni tad-19 ta' Dicembru 2006 li ssospendiet l-uzu ta' deroga ghall-kacca fl-Italja);

Illi skont il-gurisprudenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea, fejn Stat membru jghaddi ligi li hija ikompatibbli mad-dritt primarju jew derivat tal-Unjoni, il-qrati ta' dak l-iStat ghandhom ikollhom il-poter li jordnaw is-suspensjoni tal-ligi inkompatibbli sakemm dawk il-qrati, jew jekk hemm bzonn il-Qrati tal-Gustizzja stess fuq *renvoi préjudiciel*, jiddikjaraw l-inkompatibilità tal-ligi nazzjonali mad-dritt Ewropew;

Illi fis-sentenza ***ex parte Factortame I*** (fuq citata), il-Qorti tal-Gustizzja tal-Unjoni Ewropea ordnat lill-House of Lords tinjora norma kostituzzjonali britannikka li ma hallietx lill-qrati Inglizi jissospendu l-*Merchant Shipping Act 1988* ghaliex inkompatibbli mad-dritt Ewropew. Il-House of Lords kellha, taht il-ligi Ewropea, tordna s-sospensjoni ta' Att tal-Parlament sovran britanniku minkejja l-fatt li f'sentenza precedenti hija qalet li: *"under national law, the English courts had no power to grant interim relief in a case such as the one before it. More specifically, it held that the grant of such relief was precluded by the old common-law rule that an interim injunction may not be granted against the Crown, that is to say against the government, in conjunction with the presumption that an Act of Parliament is in conformity with Community law until such time as a decision on its compatibility with that law has been given."* (§3 tas-sentenza ***ex parte Factortame I***, fuq citata);

Illi d-decizjoni tal-Qorti tal-Gustizzja taqra hekk:

> *§17: It is clear from the information before the Court, and in particular from the judgment making the reference and, as described above, the course taken by the proceedings in the national courts before which the case came at first and second instance, that the preliminary question raised by the House of Lords seeks essentially to ascertain whether a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disappty that rule.*
>
> *§18: For the purpose of replying to that question, it is necessary to point out that in its judgment of 9 March 1978 in Case 106/77 Amministrazione delle finanze dello Stato v Simmenthal SpA [1978] ECR 629 the Court held that directly applicable rules of Community law 'must be fully and uniformly applied in all the Member*

States from the date of their entry into force and for so long as they continue in force' (paragraph 14) and that 'in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures... by their entry into force render automatically inapplicable any conflicting provision of ... national law' (paragraph 17).

§19 In accordance with the case-law of the Court, ***it is for the national courts****, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty,* ***to ensure the legal protection which persons derive from the direct effect of provisions of Community law*** *(see, most recently, the judgments of 10 July 1980 in Case 811/79 Ariete SpA v Amministrazione delle finanze dello Stato [1980] ECR 2545 and Case 826/79 Mireco v Amministrazione delle finanze dello Stato [1980] ECR 2559).*

§20 The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power ***to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements****, which are the very essence of Community law (judgment of 9 March 1978 in Simmenthal, cited above, paragraphs 22 and 23).*

§21 It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

§22 That interpretation is reinforced by the system established by Article 177 of the EEC Treaty ***whose effectiveness would be impaired if a national court****, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling,* ***were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice****.*

Illi l-esponenti jiccitaw ukoll is-sentenza fondamentali tal-*Grand Chamber* tal-Qorti tal-Gustizzja tat-13 ta' Marzu 2007, ***Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern,*** c-432/05, ECLI: ECLI:EU:C:2007:163;

Illi f'dak il-kaz gew decizi tliet punti importanti;

Illi, l-ewwel, fil-punt 38 tas-sentenza l-Qorti tal-Gustizzja tghid: "Under the principle of cooperation laid down in Article 10 EC, **it is for the Member States to ensure judicial protection of an individual's rights under Community law** (see, to that effect, Case 33/76 *Rewe*, [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 12; Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 22; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12)."

Illi l-Qorti tal-Gustizzja tkompli, fil-punt 43: "In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and **must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)** (see, inter alia, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Courage and Crehan*, paragraph 29; *Eribrand*, paragraph 62; and *Safalero*, paragraph 49).";

Illi ghalhekk il-possibilità li ssir forma ta' *judicial review* fejn Qrati Maltin jistghu jevalwaw il-kompatibilità ta' ligijiet Maltin mad-dritt Ewropew tifforma parti mill-principju ta' *effective judicial protection* tutelat mill-Qorti tal-Gustizzja;

Illi, fit-tieni lok, fejn ir-rikorrent f'dak il-kaz kien applika ghall-interim relief sabiex tigi sospiza ligi Svediza dwar il-lotteriji, il-Qorti tal-Gustizzja ddecidiet hekk:

> *"§75 As the Advocate General stated at point 74 of her Opinion and as was noted at paragraph 67 above, the national court seised of a dispute governed by Community law* ***must be able to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law****.*
>
> *§76 Consequently, where the competent national court examines, in the context of the claim for damages, whether the Law on Lotteries is compatible with Community law, it must be able to grant the interim relief sought, provided that such relief is necessary, which it is a matter for the national court to determine, in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.*
>
> *§77 It follows from the foregoing that the answer to the second question must be that the principle of effective judicial protection of an individual's rights under Community law must be interpreted as requiring* ***it to be possible in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with Community law****, where the grant of such relief is necessary to ensure* ***the full effectiveness of the judgment to be given on the existence of such rights****."*

Illi, fit-tielet lok, fejn il-qorti Svediza staqsiet safejn setghet tiddeciedi dwar is-sospensjoni tal-ligijiet Svedizi pertinenti, il-Qorti tal-Gustizzja qalet li dan ghandu jkun possibbli sabiex “the interim judicial protection” tad-drittijiet tar-rikorrent ma jigux rezi “practically impossible or excessively difficult” (§83);

Illi l-esponenti ghandhom biza’ reali u mpellenti illi jekk tinfetah l-istagun tal-kacca fir-Rebbiegha ghas-sena 2022 fuq l-ispeci *Streptopelia turtur (gamiema)* ser jinqatlu ghasafar ta’ din l-ispeci kontra dak li jezigi d-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi u li se ssir hsara addizzjonali ghall-ispeci ta’ ghasfur li digà huwa klassifikat bhala vulnerabbli;

Illi l-esponenti jirrelevaw il-fatt li l-Qrati Maltin huma l-ewwel fruntiera ta’ difiza ghas-salvagwardja tal-principji u d-drittijiet stabbiliti kemm mid-dritt primarju kif ukoll mid-dritt derivat tal-Unjoni Ewropea. F’dan ir-rigward l-esponenta taghmel riferenza ghall-fatt li s-*section du contentieux* tal-*Conseil d’Etat* fi Franza digà kellha l-opportunità tohrog mandat identiku ghal dak li qed jigi mitlub quddiem din l-Onorabbli Qorti, f’kaz li fl-ahhar kien gie quddiem il-Qorti tal-Gustizzja tal-Unjoni Ewropea permezz ta’ *renvoi préjudiciel* fl-ismijiet ***Association One Voice et Ligue pour la protection des oiseaux v Ministre de la Transition écologique et solidaire***, sentenza tas-17 ta’ Marzu 2021, c-900/19, ECLI:EU:C:2021:211. F’dak il-kaz, gie mitlub li decizjoni tal-Ministru tal-ambjent fi Franza li jippermetti metodu ta’ kacca kontra d-Direttiva dwar il-konservazzjoni tal-ghasafar tigi iddakjarat inkompatibbli mad-dritt Ewropew, kif filfatt kien. Fl-***Ordonnance Nº. 457535 du 25 octobre 2021*** il-*Conseil d’Etat* issospenda l-entrata in vigore deroga li ppermettiet il-ftuh tal-kacca fuq il-malvizz iswed pendenti s-sentenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea, kif kien obbligat li jaghmel skont il-gurisprudenza tal-Qorti tal-Gustizzja (ara pagni 14-16 tal-*ordonnance*) (**Dok. BLM5**);

Illi jekk ma jintlaqax il-mandat, Malta se tkun qed tfalli fl-obbligi taghha li tipprotegi d-dispozizzjonijiet tad-Direttiva dwar il-konservazzjoni tal-ghasafar selvaggi fl-ordni guridiku intern, kif ukoll fl-obbiligu taghha li tirrispetta l-principju ta’ kooperazzjoni leali lejn l-Unjoni sabiex jitwettqu l-kompiti li johorgu mit-trattati (**artikolu 4(3) tat-Trattat dwar l-Unjoni Ewropea**);

Illi ghalhekk kellu jsir dan il-mandat sabiex l-esponenti tikkawtela l-jeddijiet taghha taht id-dritt Ewropew;

Illi l-esponenti se tigi ppregudikata jekk l-intimati ma jigux inibiti kif inghad;

Ghaldaqstant, l-esponenti umilment titlob lil din l-Onorabbli Qorti joghgobha tordna l-hrug ta’ mandat ta’ inibizzjoni sabiex izommu lill-intimati milli jaghmlu jew ikomplu jaghmlu l-hwejjeg hawn fuq imsemmija.

Illi minhabba l-urgenza u s-serjetà tas-sitwazzjoni u l-impatt li tista’ jkollha l-kacca fuq il-konservazzjoni tal-ispeci *Streptopelia turtur* l-esponenti titlob bir-rispett illi dan il-mandat jigi milqugh anke provizorjament.

Avv. Mark Soler

52, Triq is-Swieqi,
Is-Swieqi

P.L.

Rikorrent: 57/28 Triq Abate Rigord, Ta' Xbiex, XBX1120

Intimati (notifiki)*:*

Prim Ministru – Auberge de Castille, Valletta

Il-Ministru ghall Ambjent, l-Energija u l-Intrapriza – Barriera Wharf, Valletta

Ministru ghal Ghawdex – St. Francis Square, Victoria, Ghawdex

Taqsima tar-Regolamentazzjoni għall-Ghasafar Selvaggi – Wild Birds Regulation Unit 122, Triq Misrah il-Barrieri, St Venera, Malta

Lista ta' dokumenti

Dok. BLM1: *Report on the Conservation Status of the European Turtle-dove and Common Quail, Wild Birds Regulation Unit, February 2022 update*

Dok. BLM2: *Technical conclusions and recommendations for 2022 hunting season, Carles Carboneras and Beatriz Arroyo, EU Task Force on the Recovery of Birds, 18th March 2022*

Dok. BLM3: *IUCN Red List, Streptopelia Turtur, available at: "iucnredlist.org"*

Dok. BLM4: *Legislazzjoni Sussidjarja 549.144, Regolamenti dwar il-Konservazzjoni tal-ghasafar selvaggi (dikjarazzjoni dwar l-istagun tal-kacca fil-harifa ghall-gamiem)*

Dok. BLM5: *Conseil d'Etat, section du contentieux, Ordonnance n. 457535 et. Du 25 octobre 2021, « Association One Voice et Ligue de Protection des Oiseaux »*