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THE TENUOUS ACCESS OF ABANDONED SEAFARERS TO THE EUROPEAN COURT OF HUMAN RIGHTS: THE CASE OF THE OLGA J

SŁABY DOSTĘP PORZUCONYCH MARYNARZY DO EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA: PRZYPADEK STATKU OLGA J

Artykuł poświęcony jest zjawisku porzucania marynarzy przez ich pracodawców morskich. Kwestia ta od kilku lat jest przedmiotem zainteresowania dwóch organizacji międzynarodowych: Międzynarodowej Organizacji Pracy (ILO) i Międzynarodowej Organizacji Morskiej (IMO). Wydały one w tej materii wspólne wytyczne – ponieważ nie mają one jednak charakteru wiążącego, armatorzy nadal naruszają prawa marynarzy.

Spektakularnym przykładem takiego naruszenia jest przedstawiona w artykule sprawa statku "Olga J". Przypadek ten jest charakterystyczny dla współczesnej żeglugi, gdyż statek był własnością spółki zarejestrowanej w Belize, czarterowany był przez armatora cypryjskiego, a podnosił banderę Hondurasu. Załoga międzynarodowa: kapitan Grek, marynarze z Ghany, Wysp Zielonego Przylądka i Senegalu. Statek zatrzymany w bułgarskim porcie Burgas, początkowo przez PSC, następnie aresztowany przez władze bułgarskie. Kapitan porzucił załogę, zostawiając ją bez środków do życia, doszło do incydentów z władzami bułgarskimi. Członkowie załogi przez kilka lat starali się o pomoc w różnych organizacjach, w tym w związkach zawodowych. Wreszcie próbowali wykorzystać przepisy o ochronie praw człowieka. Autor przedstawia reperkusje prawne z tym związane.

The rule of law, precisely in a situation where such factors pose a problem. Isolated persons are hardly in a position to bring such legal action, which leads to the need for the support of relevant iThe European Court of Human Rights, fifth section, on 22 January 2008 decided on the inadmissibility of complaint n° 8718/02, introduced by Francis KOOMY and others against Bulgaria. The eight applicants were seafarers, Mr Francis Koomy (Koomson), Mr Félix Dwemena, Mr Ato Blankson, Mr Barnabas Aicherku, Mr Ransford Eshun, Mr Emmanuel Dodoo and Mr Ernest Amorabeng, Ghanaian nationals and residing

in Ghana, whereas Mr Dominic Mauricio, a native of Cape Verde, was residing in Senegal[1].

In February 1998, they were recruited as crew of a cargo vessel, the Olga J, property of a company registered in Belize, chartered by a Cypriot shipowner, J.C., and flying the Honduras flag. In March 1998, the ship, having on board the captain, A.M., and 13 crew-members, sailed from Dakar for Greece, where she was due to undertake some repairs. On 24 September 1998, the ship called at the port of Burgas. On 12 October 1998, the port State control authorities ordered the detention of the ship.

1. FROM PORT STATE CONTROL TO REPATRIATION: 2 YEARS AND 6 MONTHS

1.1.THE SHIP'S IMMOBILISATION FROM OCTOBER 1998 TO 2001

The crew members remained on board. The Bulgarian authorities had planned to escort them to the border, but the seafarers showed their employment contracts and were left on the ship, without being able to go beyond the harbour area.

During the first few months, a police officer or a guard was posted near the ship to prevent anyone leaving. Seafarers had very few contacts onshore; they had access to Internet in a cybercafe and were able to send e-mails; and thus make contact with seafarers' international organisations, human rights defence organisations, and embassies. They were also able to meet representatives of the Bulgarian seafarers' trade union (STU), a lawyer, M ^{e} D. Todorova-Vasileva, representing the Bulgarian branch of the Helsinki committee, and a French journalist, Olivier Aubert.

The International Transport workers' Federation (ITF) offered to organise their repatriation and to give them a little money to allow their return home. The seafarers refused, being unwilling to leave before getting their wages; as they wished in particular to wait for the sale of the ship. During their stay in the harbour, the seafarers could not have access to medical care. One of the crew members, Mr Jacob Andoh, suffering from pneumonia, went to the hospital where he underwent a short examination, but was requested to pay 100 USD. Being unable to do so, no treatment was given to him. He was later repatriated to Ghana, with the support of ITF, where he died on 30 August 1999.

[1] The procedure was led by Maître William Bourdon, lawyer at the Paris bar, at the request of a collective of associations and with funding from the French catholic Committee against Hunger and for Development (CCFD).

On 29 December 1999, the captain left the Olga J, leaving the crew without fuel or provisions. The sanitary arrangements on the ship deteriorated, the heating and lighting were insufficient and the seafarers were short of food. They sometimes begged for food in the harbour. They got aid from the seafarers' trade union and from the Caritas association : especially food, medicines, hygiene products or telephone cards. At the time of their rare outings ashore, they were subjected to hostility and demonstrations of racism from the population. They were refused access to the port canteen, whereas the Greek captain of the ship used to go there.

1.2. THE INCIDENT OF 9 MARCH 2000

On 9 March 2000, at around 9 a.m. in the morning, the captain went back to the ship. He was accompanied by police officers and wanted to retrieve the ship's log, various documents and the navigation equipment. Some seafarers tried to oppose this and were allegedly beaten with truncheons by the police force. In the interview published in a local newspaper, the head of the Bulgarian frontier police stated about the incident that the captain had gone back to the ship with a Court authorisation to retrieve an official rubber stamp; and when he was met with threats from the crew, he asked for the assistance of the police. One of the seafarers tried to prevent the captain from entering the cabin and attacked a police officer, while attempting to grasp his truncheon. In these circumstances, the police officer had to push him back. An investigation was opened further to the seafarers' complaint, in order to determine if the police officers had exceeded their powers. From the applicants' statements, no follow up was given to this investigation and they were not informed of its result.

Further to the information request from the ECHR clerk's office concerning the outcome of this investigation, the seafarers' French lawyer indicated that he had not been in a position to obtain information on the subject and, in particular, that the Bulgarian lawyers he had contacted were not willing to cooperate with him.

1.3. THE SEAFARERS' ACTIONS TO OBTAIN PAYMENT OF THEIR WAGES FROM DECEMBER 1998 TO AUGUST 2000

Further to the immobilisation of the ship in the port of Burgas, the seafarers of the Olga J, who had not received any pay for several months, contacted the Bulgarian STU seafarers' Trade union to request assistance and to assert their rights. By an act established with a notary on 17 December 1998, the seafarers transferred their claims concerning their unpaid wages and the damages arising from their employment contracts to the trade union. As a guarantee for the payment of the wage claims, the STU trade union requested the arrest of the ship.

By a decision of 18 January 1999, the Burgas regional court admitted this action and granted a two-month deadline to lodge the action in substance. The trade union lodged an introductory request of authority before the regional court, calling for the payment of the equivalent of 240,614 USD in wages, plus damages of USD 50,000 and compensation to ensure the applicants' repatriation.

By a decision of 4 March 1999, the regional court declared the request inadmissible notably on the grounds that the trade union did not justify its right to act on behalf of the seafarers and that the Bulgarian court was not qualified in view of the foreign residence of the defendant. Further to the action brought by the trade union, the Supreme Court of cassation noted on 30 July 1999 that there had been a transfer of the claim in favour of the trade union, which acted consequently in its own name; it cancelled the inadmissibility prescription and referred the matter back to the regional court. By a decision of 16 August 1999, the regional court returned the request on the grounds that it was not complete; the court stipulated in particular that the applicant had to quantify the repatriation compensation request and had to pay a legal tax amounting to USD 11,624, ie. 4% of the total value of the dispute. The trade union supplied the required precise details and asked to be exonerated from the payment of the legal tax. By two decisions of 24 and 27 August 1999, the court confirmed that the trade union had to pay the required tax, it was noted that its instructions in this respect had not been followed and, accordingly, put an end to the procedure.

The trade union appealed the decision, but on 1 September 1999 the Burgas Court of Appeal considered that it was not qualified to re-examine the decision of the regional court. In a mail dated 11 May 2000 that M[e]D. Todorova-Vasileva, a lawyer working in collaboration with the Bulgarian Helsinki committee, addressed to the latter after talking with the seafarers, she indicated that she did not understand why a transfer of the seafarers' claims had been carried out to the benefit of the STU trade union, while it would have been more judicious that the trade union assist them in referring to the jurisdictions in their own names, in particular in view of the applicable legal taxes. She also mentioned that the seafarers had not realised at the time of the transfer that they had given up their rights, but thought that they had simply given their agreement to be represented by the trade union.

Pursuant to Article 99 of the Bulgarian law on civil obligations and contracts, a creditor can transfer his claim to a third party, free of charge or not. The credit is transferred to the new creditor with all its accessories. The employees' actions in the event of a dispute relating to the conclusion, the implementation or the termination of the employment contract are governed by Articles 357 and following of the Labour code. Under the terms of Article 359, the legal action of the employees for wages or other claims resulting from their employment contract is not subjected to the payment of legal taxes and of court expenses.

According to the applicants, they would not have had access to the decisions taken within the framework of this procedure until December 2000. An auction

sale of the ship was organised on 7 March 2000 and again on 21 August 2000, with an asking price of USD 39,000. No purchaser showed up on these occasions.

1.4. THE SEAFARERS' REPATRIATION, ON 11 APRIL 2001

The eight seafarers left the ship on 11 April 2001 and reached Ghana thanks to the combined assistance of a French diplomat, a French journalist, Olivier Aubert, a collective of associations, including CCFD, and ITF. Repatriation was financed by ITF (F 140,000). Each crew member got between USD 1,500 and 2,000, which is a long way short of the amount due to them and only represents pocket money. On their arrival at their destination, they were given a medical check-up in the Korle-Bu hospital in Accra. The medical certificates issued on 26 April 2001 attested the seafarers' state of fatigue and stress. The doctor noted that Mr Aicherku had respiratory pains perhaps due to pleurisy; that Mr Koomson had hypertension and that Mr Blankson had a slight reduction in hearing ; that Mr Dodoo had an inguinal hernia. The last two cases were mentioned as resulting from an attack in a Bulgarian port. Their health was deplorable, in the absence of care and of suitable food. The seafarers had accepted their repatriation only on condition that an action before the European Court would be lodged, which required that CCFD pay for a specialised lawyer's services. In addition, a part of the funds gathered by the collective of associations was to enable Roy LEKUS to produce a film entitled "Return of the lost seafarers", which was broadcast on the Arte television channel.

2. THE INADMISSIBILITY OF THE REQUEST AT THE ECHR: 6 YEARS

The case of the Olga J is typical of cases of seafarers' abandonment in the 1990s, when old substandard ships were not worth much and seafarers were not worth much more either. The shipowner is Cypriot, the heir of an ancient civilisation which he had forgotten. His company was registered in Belize, his ship in Honduras, an old flag of convenience which had lost some of its importance. The captain was Greek; the seafarers were mainly Ghanaian, with one from Cape Verde. Recruited in February 1998, the seafarers had not been fully paid from September onwards. The ship, which had been chartered by the United Nations for a while for the transfer of refugees, had undergone light repairs in Greece. Being 25 years old and poorly maintained, she was inspected by the port authorities and detained for maintenance purposes. Restricted on board or in the harbour area, the seafarers were badly considered and not supported by

a seamen's club. Only the Greek captain had access to the port canteen so that his welfare was protected thanks in particular to his being able to find lodging onshore.

2.1. THE EXHAUSTION OF INTERNAL RECOURSES TO LAW

The Bulgarian seafarers' trade union carried out a claim transfer which was misconstrued as assistance by the seafarers. Further to a ship arrest, the Court declared its lack of jurisdiction, on the grounds that the case concerned wage claims which were not located in Bulgaria, which involved foreign seafarers, embarked on a foreign ship, owned by a foreign employer, resulting from contracts governed by a foreign law. These seafarers were not to have access to law and justice even if the ship was alongside a quayside in a Bulgarian port, which is only a detail. French law encountered the same difficulties[2]. The Supreme Court of cassation admitted the Bulgarian judge's competence, due to the action of the Bulgarian trade union, in its own name, but it ran up against the requirement of a legal tax of USD 11,624, i.e. 4% of the value of the dispute, although this tax is not due with regard to wage claims. In short, the seafarers' legal action, as well as the trade union's, led to a deadlock (on the difficult return to their country of the Turkish crew of the Turkish ship OBO Basak)[3].

It seems that Bulgaria needs to improve its practices as regards globalisation and private international law. This case illustrates the relevance of the IMO-ILO Working group on ship and crew abandonment, which has been meeting since 1999, but is taking its time to reach concrete conclusions[4]. Its 7th meeting in Geneva, from 4 to 8 February 2008, under the presidency of Jean-Marc SCHINDLER, noted that the Convention of maritime Labour, adopted by ILO in 2006, has to be supplemented by the taking into account of Resolutions A.930 (22) and A.931 (22) of the IMO. The maritime labour Convention foresees the regular payment of wages (Regulation 2.2), a monthly payment (standard A2.2), financial security for seafarers' repatriation (Regulation 2.5§2), but not a guarantee of payment of wages. The shipowners consider that a binding instrument is not necessary in view of the low frequency of abandonment and request that the International Union of maritime Insurers be consulted. Another joint IMO/ILO working group was formed in June 2004 to deal with the fair treatment of seafarers in the event of a maritime accident; it drafted Resolution

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[2] Cass. Civ. 1 cra, 18 July 2000, vessel OBO Basak, *DMF* 2000..725, n. Y. Tassel – CA Rennes, on 30 November 2004, vessel Zamoura of Zermatt, *DMF* 2005.151 n. P. Chaumette – Cass. Com., on 7 December 2004, vessel Jerba, *DMF* 2005.133 n. J.P. Rémery.

[3] E. Khaveci, *Neither at sea nor ashore: the abandoned crew of the OBO Basak,* Annuaire de Droit Maritime et Océanique, Université de Nantes, 2006, t. XXIV, pp. 281–322.

[4] P. Chaumette, *Quelle garantie du paiement des salaires dans une activité internationale?*, Annuaire de Droit Maritime et Océanique, Université de Nantes, t. XXV, 2007, pp. 125–139.

A.987 (24), which was adopted by the General assembly of the IMO in November 2005. The legal Committee of the IMO adopted, in April 2006, "Directives on seafarers' fair treatment in the event of a maritime accident", which entered into force in July 2006. The questionnaire of the international maritime Committee shows that difficulties are even encountered during the interventions of the US Coast Guards[5].

The land is wary of ships and of seafarers, when it comes to security, pollution, accidents or abandonment: aren't they just dummies made of cloth and string?

2.2. THE REASONS FOR INADMISSIBILITY

The inadmissibility of the complaint against Bulgaria in the Olga J case is primarily based on procedural difficulties, showing the inaccessibility of this action for isolated, unorganised persons. The suit was not supported by the Bulgarian trade union, nor by the Bulgarian lawyers; consequently, it was not anticipated as regards the evidence. The seafarers' stay in Burgas lasted from September 1998 to 11 April 2001; they were cold, hungry, without care, without money, were not informed about the legal actions and their failure in Bulgaria, and had few contacts.

The seafarers complain that during the immobilisation of their ship in the port of Burgas between 24 September 1998 and 11 April 2001, they in fact underwent deprivation of their freedom in breach of Article 5 of the Convention, being unable to return home, nor to go ashore; that their living conditions constituted inhuman and degrading treatment with respect to Article 3 and that a disproportionate breach of their private and family life had taken place in violation of Article 8. In the light of Article 13, they denounced the effective lack of recourse to remedy the alleged violations.

The Court can be referred to only after the exhaustion of all the internal recourses and this has to be within six months from the date of the final internal decision. When there are no internal recourses to denounce acts allegedly in violation of the Convention, the six-month deadline in theory starts to run from the day on which the offending acts were committed. Special considerations can apply in exceptional cases where applicants have brought an internal action and become aware at a later date, or should have been aware at a later date, of circumstances making this action ineffective. In such a case, the six-month period has to be calculated from the moment when the applicant became aware or should have become aware of these circumstances, for example when the com-

[5] I. Corbier, *Le traitement équitable des marins en cas d'accident maritime*, Droit Maritime Français 2006, n° 673, pp. 705–709, www.cmi2006capetown.info/documentation.asp.

plaint does not identify the author of the incriminated act[6]. In this case, the Court considers that the denounced violations, because of their very nature, necessarily ceased at the time when the applicants left the port of Burgas, on 11 April 2001. Thus the Court points out that the action was brought on 22 February 2002, i.e. more than six months after the litigious events. It follows that this part of the complaint is late and has to be rejected in accordance with Article 35 § 1 and 4 of the Convention.

Acts of violence by the police were not sufficiently followed up by the local lawyer; the seafarers did not provide medical certificates which should have been drawn up within a short time after the incident, attesting possible injuries. Likewise, the acts of violence were not sufficiently established medically speaking at the time of repatriation to Ghana. It emerges from the press articles produced for the file that the police officers allegedly intervened due to the applicants' aggressive behaviour on the occasion of the captain's visit on the ship. Consequently, it is not shown that the force used was excessive or disproportionate. The seafarers do not show that they endeavoured to find out the results of the investigation conducted on these events, while they were in the port of Burgas, in contact with a lawyer and with the seafarers' Bulgarian trade union.

The seafarers complain of being deprived of the access to a court to seek payment from the captain and from the owner of the ship of their wages and of damages arising from their employment contracts. They invoke Article 6 § 1 of the Convention in this respect, which lays out: "1. Any person is entitled to have his/her cause heard (...) by a court (...) which will decide (...) on the disputes on rights and obligations of a civil nature (...)." The Court notes that the seafarers gave up their wage claims to the Bulgarian seafarers' trade union (STU) and that it is the latter which thereafter tried to undertake legal action for the payment of the amounts due. The Court considers that, in these circumstances, the applicants were no longer bearers of the claims in question and that they were not consequently in possession of "rights and obligations of a civil nature" involving the guarantees of Article 6. Consequently, this provision does not find application and the objection is incompatible *ratione materiae*. Insofar as the applicants complain that the imposition of a legal tax for the introduction of the action by the STU trade union affects their right of access to a court, the Court notes that the litigious measure was imposed on the trade union and not on the applicants and that their objection in this respect was consequently inadmissible for incompatibility *ratione personae*.

The transfer of the wage claims to the Bulgarian seafarers' trade union deprives the seafarers of their rights. The trade union becomes the creditor, alone entitled to refer to the ECHR. The trade union is not regarded as the representative of the workers, acting on their behalf and for their account; it takes their

[6] ECHR, 1 February 2000, *Aydin, Aydin and Aydin c. Turkey*, (déc.) n° 28293/95, 29494/95, 30219/96, ECHR 2000-III.

place in the procedure by claim transfer and subrogation. Consequently, only the trade union can bring a suit before the ECHR regarding the non payment of wages. The Court does not take into account the argument according to which the seafarers did not understand the transfer of their claims, believing only that they had mandated the trade union for its assistance in the legal field.

There is matter for discussion about the mandatory role of the trade union which the court chooses to ignore, leading to the seafarers being stripped, as it were, of the defence of their rights. The ECHR only recognises individual actions; so it is not likely to recognise the function of defence of the profession, admissible in French law, through legal action in substitution. The Convention does not allow *actio popularis*[7]. Yet the mandatory role of the trade union is essential. It would not occur to anyone to consider that an applicant transfers his/her claims to his/her lawyer, and therefore gives up his/her rights. The respect by the European judges of the interpretation of the Bulgarian jurisdictions results from the subsidiary character of their competence: the national margin of discretion, which is both a functional necessity and an element of respect for cultural and legal pluralism, reconciles common law and national autonomy. When the European judges substitute their appreciation for that of the internal judge in the interpretation of a private act, or of a testamentary clause, the doctrine considers that the principle of subsidiarity is misused[8]. However in this case, how can one not admit the fraudulent character of the claim transfer, which deprives the seafarers of any involvement in the procedures for payment recovery?

Regarding the lack of medical care leading to the death of one of the seafarers, only he or his heirs, or his parents, can lodge a complaint about it. The crew is not recognised as it is a community; the action must be individual and patrimonial. It could be considered to be represented by a representative, or by a delegate, and as having collective interests: but such is not the case in a strictly individual approach.

The seafarers' welfare during the stopover in Bulgaria is not of the standard expected by ILO Convention n° 163[9]. Bulgarian justice is hardly accessible for unpaid seafarers of foreign ships during a stopover. ITF would do well to train the Bulgarian seafarers' trade union in the internationalisation of maritime labour, and in solidarity. The ECHR procedures are hardly accessible to African seafarers in distress.

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[7] ECHR on 29 October 1992, Open door and Dublin Welle Woman c/Ireland, series A, n° 246, p. 22 § 44 – ECHR on 27 June 2000, Ilhan c/Turkey, § 52.

[8] ECHR, on 13 July 2004, Pla and Puncernau c/Andorra.

[9] A. Charbonneau, *La convention 163 de l'OIT concernant le bien-être des gens de mer: fondement à l'action des foyers d'accueil*, Annuaire de Droit Maritime et Océanique, University of Nantes, 2004, t. XXII, p. 307–346.

2.3. THE MANAGEMENT OF LEGAL COMPLAINTS

The right of individual recourse instituted by Article 25 of the 1950 Convention, which has become Article 34 of the revised text, is the keystone of the Human Rights safeguard mechanism, and therefore an essential provision. The multiplicity of the individual complaints, facilitated by the free procedure and the establishment of a legal aid system led to a congestion of the Court: currently almost 30,000 complaints per year. The inadmissibility decision is final and cannot be the subject of any appeal. Between 1955 and 2005, only 10,676 complaints were declared admissible out of 145,706, i.e. 7.4 %. The 6-year deadline (2002-2008) between the introduction of the complaint and the decision is here rather long, the average being closer to four years. Inadmissibility is here partially, *ratione temporis, ratione materiae and ratione personae*[10]. It should be noted that the victims' nationality is of little importance, that possible *ratione loci* incompetence was not retained, for while the ship was flying the flag of Honduras, it was in a Bulgarian port; despite flying a foreign flag, the ship was located in a place falling within the jurisdiction of a state that is a party to the Convention. The development of the competence of states in maritime zones ever further away from the coasts has been taken into account by the ECHR[11]. The state exerts its jurisdiction on board the ships flying its flag[12] . The same is true in its ports, for example following a death during a shipwreck in the "port Guardian" of Saintes-Maries-de-la-Mer[13].

2.4. ON WHICH CONDITIONS WOULD THE COMPLAINT HAVE BEEN ADMISSIBLE?

The lawyer in charge of the case was able to establish the exhaustion of the internal recourses concerning the wage claims. The seafarers should have previously defended themselves on their own or not transferred their wage-claim to the Bulgarian trade union; there should have been a Ghanaian seafarers' trade union in a position to lodge such a complaint; and to convince the ITF in due course of the merit of such a procedure. The deceased's relatives could have

[10] F. Sudre, *Droit européen et international des droits de l'homme*, PUF, Paris, 8th éd. 2006, n° 314–323, pp. 627–646.

[11] P. Tavernier, *La Cour européenne des Droits de l'Homme et la mer, La Mer et son droit*, Various papers offered to L. Lucchini and J.P. Quéneudec, Pédone, Paris, 2003, pp. 575–589.

[12] The EDH Commission, on 16 April 1998, Angelos Rigopoulos c/Spain, req. n° 37388/97, high sea arrest by a Spanish military ship of a Panamanian vessel transporting cocaine – the EDH Commission, on 16 January 2001, Leray and a. c/France, req. n° 44617/98, wreckage of the François Vieljeux cargo off the Spanish coast.

[13] The EDH Commission, 2nd CH, on 17 May 1995, consorts D. c/France, req. n° 21166/93, a penal trial still pending after 9 years, a non reasonable delay.

acted, but they were in Ghana. The Bulgarian lawyer should have managed the case in such a manner that the Bulgarian authorities' inertia or their acts of violence were established and challenged before the ECHR. The complaint implies respect for the access to rights and justice, respect for tnstitutions, such as an NGO or an international trade union federation.