

## CASE N. 3267/04 R.G.N.R. - *CAP ANAMUR* -

### Facts

In June 2014, the German *Cap Anamur* ship detected, on international waters, an inflatable vessel with 37 African irregular migrants on board. It had departed from Libya. The migrants' vessel was leaking air, taking on water, and releasing smoke from the engine. Weather and sea conditions were highly adverse. The Captain of *Cap Anamur* thus ordered the rescue of the migrants. The Captain informed the President of the NGO *Cap Anamur*, who was then in Cologne (Germany). After a few days in international waters assessing the possibilities, both decided to head to Porto Empedocle, Sicily (Italy).

On 30 June 2014, *Cap Anamur* initiated formal contacts with authorities aimed to ensure the safe disembarkation of migrants in Italy. Initially, Italian authorities did not consent. As time went through, the Captain warned that some migrants presented serious psychological problems (e.g. beating their heads against the walls, threatening to attempt to reach Italy swimming). The vessel was facing shortage of water. After days of negotiation, *Cap Anamur* was allowed to dock in Porto Empedocle. The decision of the Italian authorities was much based on their understanding that a humanitarian emergency had unfolded on board. However, upon inspection, experts concluded that this was not the case.

In addition to the crew and migrants,

seven Italian and German passengers were on board, including journalists, photographers and maritime lawyers.

Defendant 1 was the Captain of *Cap Anamur*, Defendant 2 was the First-Officer of the vessel, and Defendant 3 was the President of the NGO *Cap Anamur*. All were arrested and accused of (i) migrant smuggling aggravated by virtue of intent of obtaining a financial or other material benefit, (ii) participation in an organized criminal group intended to facilitate migrant smuggling. On trial, the Prosecution requested the acquittal of Defendant 2. The *Cap Anamur* was confiscated.

### Elements of success

- Holistic investigative approach
- Constructive and systemic legal interpretation
- International cooperation

### Challenges

- Migrants' protection and support
- Financial and other material benefit

### Background

The *Cap Anamur*, property of the NGO of the same name, was registered as a "cargo ship" and a "rescue and support vessel". In the course of a humanitarian mission to the Middle East, the Captain stopped in Malta for repairs to the engines. On 20 June 2004, the Captain ordered – as he had been doing in the previous days - the performance of maneuvers at sea to verify the reliability of the repairs. During this exercise, *Cap*

*Anamur* came across the migrants' vessel.

While Libya was the closest port from the site of rescue, Porto Empedocle was the closest among those that could provide the most appropriate support to migrants, i.e. medical and legal assistance, and respect for human rights. Porto Empedocle was also the nearest harbour able to provide the necessary logistical support to the tonnage of a vessel such as the *Cap Anamur*.

Italian authorities initially denied entry in national waters for different reasons, including misunderstandings in communications and divergent interpretation of legal obligations. They also found a number of circumstances suspicious, such as the (i) “*abnormal*” itinerary of the vessel in the previous days, which could indicate the intent of patrolling international waters in search of irregular migrants, and (ii) the fact that in the ten-day period that between the day of rescue and the day of communication thereof to Italian authorities, the *Cap Anamur* had not informed the Maltese authorities even though it had navigated close to Malta.

There was an ongoing complex diplomatic exchange on the State competent to address asylum claims by the 37 irregular migrants; that is, Germany, Italy, and Malta were in disagreement and did not recognize themselves as the proper jurisdiction to that effect.

The *Cap Anamur* venture received intense media coverage. All migrants requested asylum in Italy. After proper verifications, it was determined that from the 37 migrants, 31 were Ghanaian

and 6 were Nigerian. Asylum claims were denied and the migrants were ultimately deported.

## Key issues

- ❖ Humanitarian exemption
- ❖ Obligation of rescue
- ❖ Evidence
- ❖ International cooperation
- ❖ Financial or other material benefit

## Investigation

The analysis of data from *Data Voyage Recording* – a type of “black box” of ships and vessels that allows reproducing the itinerary taken thereby – confirmed that in the period 4-19 June 2004, the *Cap Anamur* alternated between docking at the port of Valletta (Malta) and navigating Southwest of Lampedusa (Italy), on varying speed, stopping and initiating the engine several times and, on occasion, remaining adrift. In addition, information was shared with Italy through the Maritime Rescue Coordination Centre (MRCC), a mechanism of international maritime cooperation foreseen in the 1979 International Convention on Maritime Search and Rescue. It was through the MRCC that Italian authorities were able to assess a series of suspicions regarding the movements of the *Cap Anamur*.

The Court also took into account as evidence, a number of videos and reports made by journalists on board the *Cap Anamur*, including the film recordings aimed at preparing a documentary (on the basis of the events of that mission) for the celebration of the 25<sup>th</sup> anniversary of the NGO *Cap Anamur*.

## Reasoning

The Prosecution argued, *inter alia*, that the defendants had falsely presented the situation on board the *Cap Anamur* as a humanitarian emergency. In addition, it considered that the lapse of time between the day of rescue (20 June 2004) and the date of appeal to Italian authorities (30 June 2004) implicated the migrants' loss of the status of shipwrecked. This would release Italy from the obligation to provide rescue.

The Court of Agrigento (Italy) determined that Defendants 1 and 3 benefited from exemption of criminal responsibility as they had acted in the exercise of a duty imposed by law, i.e. providing rescue to persons in danger at sea. The migrants were under serious risk to life or safety. The defendants acted under a state of necessity. The obligation of rescue at sea - under Italian and international law - does not exclude that the rescue might be initiated by a vessel flying a foreign flag. The obligation of rescue is fulfilled only when the endangered persons are taken to a 'place of safety' (rather than merely transferred to a safer vessel). For the purpose of determining whether the defendants acted under the duty of providing rescue, as long as the persons are in distress, the time they spent in the rescuing vessel before being disembarked in the place of safety is irrelevant.

There were reasonable objective grounds to consider that Italy was the closest 'place of safety'. The fundamental rights of migrants take precedence over the EU system of management of refugee claims known as *Dublin II*.

The intellectual property rights over the documentary filmed on board the *Cap*

*Anamur* belonged to a third-party enterprise. It was not proven that the defendants had invited journalists into the vessel or that the latter had paid the defendants for information. Nonetheless, the intense media coverage brought significant international momentum to the NGO *Cap Anamur*. At least in theory, under the spectrum of teleological interpretation, this publicity could fall within the scope of financial or other material benefit ("*profitto*"). In criminal law, "*profitto*" comprises a landscape of utility that goes much beyond the economic aspect alone.

## Verdict/Decision

Defendants 1 and 3 were acquitted as their actions did not constitute a crime. Defendant 2 was acquitted because he had no involvement in the conduct evaluated in the proceedings. The release of confiscated assets was ordered.

## Opinion

The route taken by *Cap Anamur* was of particular importance in assessing whether there had been the intent of facilitating illegal entry in Italy. In this respect, the data available through *Data Voyage Recording* showed a pattern of movement consistent with a malfunctioning vessel undertaking tests of navigability and technical reliability. Importantly, while the matter was not analysed in detail given that no crime was deemed to have occurred, the judgment offers a significant contribution to the understanding of the concept of "financial or other material benefit".