



MALTA

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Today, the 28th of June, 2016

**First Hall of the Civil Court
(Constitutional Jurisdiction)**

Application Number 33/2015 SM

Stephen Nana Owusu

vs.

the Attorney General

and by decree dated the 9th of July, 2015:

**The Director Correctional Services,
and the Minister of the Interior and
National Security**

The Court,

- 1.0. Having seen the application dated the 28th April, 2015, wherein the applicant synthetically referred to the following:
 - 1.1. That upon entering in Malta on the 13th July, 2009, he was arrested as he was suspected of importing drugs;
 - 1.2. That on the 26th September, 2012, he was condemned to imprisonment for eleven (11) years and fined thirty thousand Euros, (€30,000.00), by the competent court;
 - 1.3. That the said judgement of the first court was confirmed on appeal by a judgement dated the 12th December, 2013;
 - 1.4. That cumulatively, the applicant has been held in the correctional facility since the 13th of July, 2009;
 - 1.5. That since his detention he was forced to live in a cell:
 - 1.5.1. Without adequate drinking water;
 - 1.5.2. Without clothing to help him keep warm throughout winter;
 - 1.6. That he had to depend on charitable institutions to be able to have clothes;
 - 1.7. That in his cell there is a significant quantity of asbestos that is causing him physical harm;
 - 1.8. That furthermore, his cell is infested with rats and cockroaches;
 - 1.9. That the Korrardino Correctional Facility lacks adequate sanitary facilities;
 - 1.10. That the cell only has one small window which cannot be used as it is quite high;

1.11. That during winter he is only given one thin blanket notwithstanding that the facility is cold and so, he finds it difficult to sleep;

1.12. That all detainees are allowed to smoke wherever and whenever they want, and as a consequence, inmates, like the applicant, who do not smoke, are being subjected to passive smoke;

1.13. That these conditions of arrest amount to a breach of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 36 of the Constitution of Malta;

1.14. That he adhered this Court so that it:

1.14.1. Declares that the conditions in which the applicant is kept are tantamount to a breach of his fundamental rights in terms of article 3 of the said European Convention and of article 36 of the same said Constitution referred to above;

1.14.2. Imparts all those necessary remedies so that the fundamental rights of the complainant applicant are safeguarded;

2.0 Having seen the reply dated the 23rd June, 2015, the defendants synthetically replied as follows:

2.1. That preliminarily the names of the contending parties call for several corrections, (see fol 16);

2.2. That the Attorney General and the Minister of the Interior and National Security should not have been dragged into these proceedings as the issue focused upon by the complainant merely refers to the treatment that he receives at the Correctional Facility and has absolutely nothing to do with any act undertaken by the said defendants;

- 2.3. That on the basis of articles 181B of Chapter 12 of the Laws of Malta, the presence of the Director of the Correctional Facility or, of the Director of Correctional Services, would have been enough;
- 2.4. That on the very merits of the case focused upon by the complainant, the defendants underline the following:
 - 2.4.1. That the complainant was in no way ever subjected to inhuman and degrading treatment as sanctioned by article 3 of the European Convention and article 36 of the Constitution referred to above;
 - 2.4.2. That the judgement meted out on the complainant, considering the fact that he was caught drug trafficking *in flagrante*, cannot be held to be disproportionate;
 - 2.4.3. That the Korrardino Facility is adequately designed and furnished to accomodate inmates;
 - 2.4.4. That correctional officers always gave their best possible service with due diligence;
 - 2.4.5. That it is utterly unjust that such dedicated personel are attacked in this manner;
 - 2.4.6. That the complainant has always been given the best service possible and no one has ever abused or diminished his dignity;
 - 2.4.7. That the allegation that the water supplied in the complainant's cell has no factual basis as the water so supplied is duly certified by the Water Services Corporation as potable and therefore good for consumption;
 - 2.4.8. That as regards the complaint concerning the availability of blankets or clothing - all that an inmate has to do is to inform a division official of one's needs;

- 2.4.9. That in this particular case the complainant had never approached the said officials on said issues, something which he may always do if the need arises;
- 2.4.10. That there is no asbestos in cells;
- 2.4.11. That the complainant's cell is not infested with mice and cockroaches, as the authorities concerned routinely fumigate the cells;
- 2.4.12. That the cells are all equipped with appropriate and adequate sanitary facilities;
- 2.4.13. That the particular window situated in the complainant's cell affords adequate lighting and one is also permitted to open the gate adjacent to the cell door to allow more air to circulate;
- 2.4.14. That the complainant's affirmation that one may smoke whenever and wherever he likes is not supported by evidence;
- 2.4.15. That in this regard, there are many zones where smoking is prohibited amongst which there are:
 - 2.4.15.i. The Division's visiting room;
 - 2.4.15.ii. The M1 room;
 - 2.4.15.iii. The Playroom;
- 2.4.16. That as the complainant occupies a cell on his own, no smoking at all takes place in the cell;
- 2.4.17. That furthermore, like all other inmates, the complainant also has access to the Division's yard where he has access to further air therefrom;
- 2.4.18. That in any case the complainant has been in the Correctional Facility for the past four (4) years

and had never previously complained from the conditions he was living in;

2.4.19. That furthermore, had the complainant submitted any such request or complaint, these would have been duly investigated and acted upon as required;

2.4.20. That the complainant's silence in this regard throughout these years is indicative that all this is trumped up;

2.4.21. That therefore the claim that he has been subjected to inhuman and degrading treatment cannot find the sustenance and support required;

2.4.22. That on the basis of the above, the requested remedy sought by the complainant cannot be forthcoming;

2.4.23. That hence, all the pleas of the complainant must be rejected, with costs;

3. That after the request of the complainant dated the 9th July, 2015, the court decreed that proceedings continue in the English Language, (see fol 22);
4. That following the complainant's request for corrections concerning the defendants, and the relative reply thereto by the defendants' legal representative, ordered that the corrections therein addressed be duly undertaken, (see fol 22);
5. That as a result thereof, the defendant's legal representative duly withdrew the first preliminary reply submitted by the defendants, (see fol 23, 16 and paragraph number two point one, (2.1.), above);
6. Having heard the evidence submitted;
7. Having examined the documents presented in the records of the proceedings;

8. Having heard the legal representative of the defendants declare that he rests his case on the facts as presented in the records of the proceedings, (see fol 124);
9. Having heard the complainant declare that he had nothing else to add, (see fol 124);

Considers:

- 10.0. That the complainant decided to pursue his case merely by giving direct evidence only on the 10th November, 2015, (see fol 25), where he submitted the following:
 - 10.1. That he arrived in Malta on the 13th July, 2009;
 - 10.2. That whilst disembarking at the Airport he was found to be carrying a considerable amount of drug capsules in his stomach;
 - 10.3. That he was immediately taken to hospital where he stayed for two (2) days;
 - 10.4. That he was subsequently arraigned in Court;
 - 10.5. That thereafter he was escorted to the Correctional Facility;
 - 10.6. That in prison he claims to have felt hot and was advised by a correctional officer to buy a fan;
 - 10.7. That after asking for water he was further advised to either buy it or drink it from that supplied in the said Correctional Facility;
11. That nothing further was submitted by or on behalf of the complainant;
12. That on the 2nd March, 2016, the following was recorded in the records of the case:

“... it transpires that the complainant has not submitted any evidence and has consistently failed to appear before the Court since the 10th of November, 2015”, (see fol 72);

Considers:

13.0. That the Correctional Facility’s medical doctor synthetically affirmed the following:

13.1. That he was present at complainant’s admission, but did not conduct the medical examination as this was carried out by another doctor, (see fol 74);

13.2. That having been asked whether he abused of any drugs, the complainant answered that he did not, (see fol 74 and fol 106);

13.3. That the complainant informed the medical examiner that he had had a motor vehicle accident in 2001, where he had sustained facial injuries, (see fol 74);

13.4. That he also informed the said medical officer that: (see fol 74)

13.4.1. He smoked about five (5) cigarettes a day, (see fol 74 and 113);

13.4.2. He uses alcohol socially;

13.4.3. He was single without off-spring;

13.5. That on physical examination there were no resultant issues with the complainant, (see fol 74);

13.6. That he was also found to be mentally stable, (see fol 74);

13.7. That following the urine test that was conducted upon admission, the complainant was found to be positive for cannabis, (see fol 75);

13.8. That notwithstanding that all inmates have the right to seek medical attention, the complainant never sought such attention, (see foll 75);

Considers:

14.0. That as regards the structural complaints submitted by the complainant the person therein responsible for maintenance synthetically submitted the following evidence:

14.1. That the Division in which the complainant is held consists of sixty (60) cells, one (1) of which is not presently being used, (see fol 76);

14.2. That complainant is hosted in a cell on his own, (see fol 76);

14.3. That this particular cell is a normal one having: (see fol 76)

14.3.1. A normal standard window;

14.3.2. Enough light;

14.4. That the cell in question is built in the way it is for security reasons, (see fol 76);

14.5. That the lighting facilities that the cell has are appropriate;

14.6. That when the cells are open an inmate may freely walk out of his cell whenever he wants, except when under report, (see fol 76);

14.7. That the complainant had access to open spaces from 2.00p.m. to 5.00p.m. just like all other inmates and when so authorised, (see fol 76);

14.8. That the Correctional Facility conducts a yearly analysis of the water supply to see if it is fit for human consumption, (see fol 76 and 77);

- 14.9. That the most recent report, (that of 2015), conducted by a private laboratory concluded that the said water supply:
 - 14.9.1. Is good for drinking;
 - 14.9.2. Is up to standard for human consumption, (see fol 77 and fol 78 to 93);
- 14.10. That the Facility provides potable water from the mains for inmates (see fol 77);
- 14.11. That water is supplied free of charge, (see fol 77);
- 14.12. That inmates are allowed to buy bottled water, (see fol 77);
- 14.13. That furthermore, when inmates enter the Facility they are given a kit consisting of blankets, sheets, pillows and a mattress, (see fol 77);
- 14.14. That if so required, upon request, they are also given extra blankets, (see fol 77);
- 14.15. That complainant had never registered any such complaint requesting more blankets, (see fol 77);
- 14.16. That as regards any infestation of rats and cockroaches as alleged by the complainant the said Head of Maintenance in question presented a report submitted by a private company on these issues, (see fol 77 and 95);
- 14.17. That such inspection is carried out yearly, (see fol 77);
- 14.18. That the report states that three (3) rodent control visits were carried out in 2014 and on the last visit "everything was under control", (see fol 95);
- 14.19. That as regards smoking the following resulted:
 - 14.19.1. Inmates are allowed to smoke in cells, (see fol 77);

- 14.19.2. If some inmates within a particular cell do not smoke, then the other inmates are not allowed to smoke in that particular cell, (see fol 77);
- 14.20. That the complainant does not smoke, (see fol 77), although the prison doctor affirms that the complainant had affirmed upon entry in the Correctional Facility, that he smokes, (see fol 74);

Considers:

- 15.0. That having examined the resulting evidence the following may be surmised:
 - 15.1. That the complainant fails to submit the evidence that is deemed legally necessary to prove his case;
 - 15.2. That the complainant merely alleges the various shortcomings referred to above, but utterly fails to submit the relative evidence to substantiate his allegations;
 - 15.3. That on the contrary the doctor and head of maintenance that submitted their evidence in these proceedings satisfactorily show that the said allegations are unfounded;
 - 15.4. That the judgement meted out by the local courts in respect of the drug trafficking charge addressed in the direction of the complainant is in no way disproportionate;

Considers:

- 16.0. That as regards the constitutional law issues raised by the complainant with regards to article 3 of the European Convention referred to above and article 36 of the Constitution of Malta, the following reflections are made:
 - 16.1. In **Kudla vs. Poland, (Application Number 30210/96), the European Court of Human Rights** held that:

“Under Article 3, the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance”;

16.2. That furthermore, the same said Court held the following in **Ananyev and Others vs. Russia (Application Numbers 42525/07 and 60800/08)**;

“More generally, when assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see **Dougaz vs. Greece: no. 40907/98, 46, ECHR 2001 – II**). Quite apart from the necessity of having sufficient personal space, other aspects of material conditions of detention are relevant for the assessment of whether they comply with Article 3. Such elements include access to outdoor exercise, natural light or air, the availability of ventilation, the adequacy of heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygiene requirements”;

16.3. That the **Constitutional Court in Paul Caruana vs. Director of Prisons and the Attorney General, (Application Number 19/2011/1)**, held the following:

“For a treatment to fall within the limits of Article 3 it is required to reach that minimum of severity that is relative to all the circumstances of the case, like the nature of the treatment, its context, mode of execution, its duration, its physical and moral effects, and in some circumstances sex, age and medical state of the victim may also be relevant. However, for suffering and humiliation to fall within the limits of Article 3 they must go beyond that suffering and humiliation that is necessarily attached to any form of legitimate

treatment or punishment. Measures that take away the liberty of the individual do very often involve the elements under review, yet notwithstanding this, the method of executing such legitimate measures should not subject the individual concerned to that kind of hardship that exceeds that inevitable hardship that is inherent in that particular measure”,

“Treatment is deemed to be inhuman when at least it causes intense physical or psychic suffering, even if it does not cause any wounds or physical offence to the body. This treatment would also be degrading if it is such that it raises sentiments of fear, anxiety and sense of inferiority that humiliate and denigrate the person concerned ... Then, that which distinguishes torture from inhuman and degrading treatment is the grade of higher intensity of suffering inflicted by torture, characterized by deliberate acts that cause suffering ... another element that has been identified as being characteristic of torture is the fact that torture is inflicted with the precise aim of achieving the desired objective like of acquiring information, penalizing or intimidating someone”, (Court’s translation);

16.4. That in ***Saviour Spiteri et. vs. Il-Korporazzjoni EneMalta***, dated the **11th July, 2013**, the ***First Hall of the Civil Court*** held that:

“Degrading treatment in the sense of article 3 is conduct that “grossly humiliates”, although causing less suffering than torture. The question is whether a person of the applicant’s sex, age, health, etc..., of normal sensibilities would be grossly humiliated in all the circumstances of the case”

“... All inhuman treatment is in itself also degrading but, not all degrading treatment becomes inhuman, which treatment ‘covers at least such treatment as deliberately causes severe mental and physical suffering’ ”, (Court’s translation);

Considers:

17. That in view of the above it can safely be held, as pointed out by the **ECHR in The Greek Case (1969) 12 YB1**:

“The word “torture” is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment”;

18. That the same said judgement referred to in the previous paragraph further affirms that an act is degrading:

“... if it grossly humiliates him before others or drives him to act against his will or conscience”;

Considers:

19. That the several complaints submitted by the complainant do not result to have been proven by the said complainant;

- 20.0. That these complaints concerned the following five (5) issues:

- 20.1. **The Water Supply:**

- 20.1.1. That in this regard the Water Services Corporation submitted adequate proof that the water supply used in the Correctional Facilities is potable, good for human consumption and conforms to the Legal Notice on Water intended for Human Consumption Regulation, 2009, after being microbiologically analysed to this effect, (see fol 78 to 84);

- 20.1.2. That notwithstanding the above, reference is made to Chemistry (PHL) – Water Analysis Test Report, (see fol 85 to 91) which all state that the “chloride content exceeds the indicator parameter value in LN 17 of 2009”;

20.1.3. That notwithstanding the above breach of the statutory limit involved, this still does not buttress the complainant's allegation as said complainant could use viable alternatives to overcome the said issue by either using warm potable water or buy bottled water from the "gratuity money" given to him by the Facility's authorities;

20.2. Blankets and Clothing:

20.2.1. That it sufficiently results that upon entering the Correctional Facility, inmates are immediately issued with a residential kit consisting of blankets, sheets, pillows and a mattress, (see fol 77);

20.2.2. That if required, inmates are free to ask their Division officer for more such blankets, (see foll 77);

20.2.3. That as regards clothing, the Facility is assisted by charities in this regard, (see fol 77);

20.2.4. That these charities are allowed to distribute relative clothing as required, (see fol 77);

20.2.5. That it results that the complainant never submitted a complaint on these issues, (see fol 77);

20.3. Asbestos:

20.3.1. That the alleged complaint submitted by the complainant in this particular regard – that there is asbestos in his cell – does not result;

20.3.2. That therefore there is no such danger to the complainant's health and in fact, there was no such complaint submitted by the complainant throughout the period of his stay in the said Facility since 2009;

20.4. Rodents and Cockroaches:

- 20.4.1. That pest control is constantly and periodically undertaken by the Facility's authorities, (see fol 77);
- 20.4.2. That this is actually carried out by a private company that specializes in this particular activity, (see fol 77);
- 20.4.3. That this is carried out yearly, (see fol 77);
- 20.4.4. That according to the pest control treatment report released by the said private company involved dated the 4th July, 2014, the situation was certified to be under control, (see fol 95);

20.5. Smoking:

- 20.5.1. That it results that the complainant is actually situated in a cell on his own, (see fol 76);
- 20.5.2. That notwithstanding this inmates are allowed to smoke in particular areas and at particular times;
- 20.5.3. That in the particular division where the complainant is situated, there is no restricted area where smoking is prohibited, (see fol 77);
- 20.5.4. That therefore the complainant is being subjected to passive smoking;
- 20.5.5. That ideally, non-smokers should be segregated from smokers in order to avoid unnecessary hardship;
- 20.5.6. That notwithstanding the resultant unsavoury situation, it is understood that because of the particular circumstances under review, such obvious segregation might not be actually possible;

- 20.5.7. That as a result thereof it cannot be held that this situation reaches that severity and intensity required by article 3 of the said European Convention or article 36 of the local Constitution;
- 20.5.8. That hence, on the basis of the resultant facts previously described this situation under scrutiny does not amount to a violation of the said articles under review;
- 20.5.9. That furthermore, upon examining the medical records presented in the records of the proceedings, (see fol 97), no medical or physical deterioration was recorded in the health of the complainant as a result of the passive smoking herein analysed;

20.6. Cell Window and Consequent Availability of Adequate Lighting:

- 20.6.1. That the complainant's cell results that it is furnished with a window, (see fol 76);
- 20.6.2. That the cell itself is a normal Division cell furnished with a standard window, (see fol 76);
- 20.6.3. That the cell under review is occupied only by the complainant, (see fol 76);
- 20.6.4. That the said window provides enough light in the said cell to serve its purpose;
- 20.6.5. That the complainant is duly allowed to leave the cell in question at the appointed times, (see fol 76);
- 20.6.6. That on the basis of the medical reports that were accumulated throughout the years that the complainant has been detained in the said Facility according to law, no medical conditions have been reported as arising as a result thereof, (see fol 77 and 97 *et sequitur*);

Considers:

21. That as a result of the above, it is to be considered as adequately proven according to law that the complainant is not being subjected to that inhuman and degrading treatment that is required to secure a violation of article 3 of the said European Convention and of article 36 of the Constitution of Malta;
22. That it is obvious that it does not result that the complainant is being subjected by the defendants to do something which goes against his will or against his conscience;
23. That furthermore, it does not result that the said defendants have in anyway belittled or humiliated the complainant, or otherwise acted in a manner that is degrading and inhuman in his regard;
24. That hence, no physical or moral suffering whatsoever was committed by the defendants on the complainant;
25. That consequently, no inhuman and/or degrading treatment was meted out on the complainant by the defendants;

Considers:

- 26.0. That finally, the defendants' preliminary plea concerning the proper address of the complaints at issue, deserves the following adequate review and direction:
 - 26.1. That this preliminary plea submitted by the defendants is adequately resolved by recourse to article **181B of Chapter 12 of the Laws of Malta**;
 - 26.2. That it is therein clearly established that official Government representation in such judicial actions falls squarely on the Head of the Government Department responsible for the issue that has to be analysed from time to time;

26.3. That according to article 181(B) (2) of the said Chapter, it is only in those:

“... judicial acts and actions which owing to the nature of the claim may not be directed against one or more heads of other government departments”

that such judicial representation falls with the Attorney General;

26.4. That as a result of the facts as they unfolded before the court, it should be obvious that the only relevant defendant that should alone carry the burden laid upon him by the said proceedings is the Director of Correctional Services, who alone has the daily management of the Correctional Facility put squarely on his shoulders;

26.5. That the Attorney General is not only far removed from such responsibilities, but results not to have any such responsibilities at all;

26.6. That the Minister focused upon, although he may in certain circumstances be involved in giving broad directions as to the broad management of said Correctional Facility, is still not the person who is responsible for the day-to-day management thereof;

26.7. That the issues raised by the complainant actually only concern such day-to-day running of the Facility concerned;

26.8. That therefore the said procedure cannot be labelled as being also the responsibility of the said defendants – Attorney General and Minister of the Interior and National Security;

26.9. That hence, the preliminary reply submitted by the said defendants are being accepted by the Court;

DECIDE:

27.0. That on the basis of the above the court is satisfied that the complainant did not prove his pleas according to law and therefore:

27.1. Whilst dismissing all the pleas submitted by the complainant;

27.2. Accepts all the replies submitted by the defendants and therefore:

27.2.1. Declares that the Attorney General and the Minister of the Interior and National Security be non suited;

27.2.2. Declares that the Director Correctional Services did not act in breach of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of article 36 of the Constitution of Malta as requested by the complainant;

27.2.3. That all costs of these proceedings are to be borne by the complainant Stephen Nana Owusu.

Onor. Imhallel Silvio Meli

DECIZJONI FINALI