CIVIL COURT – FIRST HALL

THE HON. MADAME JUSTICE MIRIAM HAYMAN

Application Number: 10/2016/1

Today, 7th February 2020

Clement Okoro K.I. Nru 0053608A

vs

Refugee Appeals Board

The Court:

Having seen **the decree of the Administrative Review Tribunal dated 14th July 2016** in the case bearing the above-mentioned names stating that:

"After having taken cognizance of the Application submitted by Clement Okoro on the 11th February 2016 by means of which he requests the Tribunal to declare the decision by the Refugee Appeals Board dated 28th July 2015, by means of which his request to be granted asylum was rejected, ultra vires in the sense that it does not respect the principles of natural justice since the Board adopted the

line of least resistance in his regard with the consequence that a great injustice has been perpetrated against him in a situation which is essentially a life or death situation, and consequently: (i) to order the Refugee Appeals Board to re-hear, in his presence duly assisted and in conformity with the principles of natural justice, the appeal lodged by him from the decision by the Refugee Commissioner regarding the granting of asylum; (ii) grant him asylum or in default, subsidiary protection; (iii) alternatively, apply the principle of non refoulement which prohibits Member States signatories to the European Convention from resending a refugee, including a failed asylum seeker, to his country of origin when the refugee does not want to go back because of a clear and founded fear of persecution, torture, inhuman treatment and/or physical violence towards him, or (iv) if the Tribunal deems it appropriate in terms of justice and equity and in line with the right to a fair hearing in terms of Section 3(2)(a) of the Administrative Justice Act, uphold ope legis his appeal filed on the 10th July 2014 by either granting him asylum in terms of the Law or in default, subsidiary protection and/or alternatively apply the principle of non refoulement; with costs against the Refugee Appeals Board;

After having taken cognizance of the documents submitted by the Applicant by means of a Note filed on the 12th February 2016, marked Doc. "A" to Doc. "E" at folios 11 to 28 of the records of the proceedings;

After having taken cognizance of the Reply by the Refugee Appeals Board by means of which it pleads that: (i) the Tribunal must order the Applicant to declare in terms of which provisions of the Law he is filing these proceedings; (ii) the Tribunal is not competent to decide and determine the requests put forth by the Applicant since the competent forum in this case is the Civil Court, First Hall; (iii) if the Applicant is founding his requests on Section 469A of Chapter 12 of the Laws of Malta, then the Tribunal is most definitely not competent to decide and

determine these proceedings since proceedings for judicial review in terms of the above-mentioned provision of the Law fall within the competence of the Civil Court, First Hall; (iv) should it result that the Applicant is founding his requests on Section 469A of Chapter 12 of the Laws of Malta and should the Tribunal declare that it is competent to decide and determine the requests put forth by the Applicant, the Applicant's proceedings are time-barred since he submitted the same after the lapse of six months provided for in Section 496A of Chapter 12 of the Laws of Malta; (v) the proceedings as put forth by the Applicant against the Refugee Appeals Board cannot so be put forth since the remedy in this case definitely does not involve suing the adjudicating authority; and (vi) on the merits, the decision by the Refugee Appeals Board bearing number 3644A/14 is just and has been given in terms of Law and therefore must be upheld and confirmed;

After having taken cognizance of the declaration by the parties that in view of the preliminary plea raised by the Refugee Appeals Board regarding the lack of competence of the Tribunal to decide and determine the requests put forth by the Applicant, the Tribunal must first decide and determine said preliminary plea prior to considering the proceedings on the merits[1]*;*

After having taken cognizance of the Note of Submissions by the Refugee Appeals Board regarding the plea of the lack of competence of the Tribunal to decide and determine the requests put forth by the Applicant filed on the 4th April 2016[2] *and of the Note of Submissions by the Applicant regarding the same plea filed on the 27th April 2016*[3]*;*

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[1] Sitting held on the 16th March 2016, folio 44 of the records of the proceedings.

[2] Folio 47 to 53 of the records of the proceedings.

[3] Folio 54 to 59 of the records of the proceedings.

After having heard final oral submissions by the parties regarding the plea of the lack of competence of the Tribunal to decide and determine the requests put forth by the Applicant;

After having taken cognizance of all the records of the proceedings;

Considers:

By virtue of these proceedings the Applicant is requesting the Tribunal to declare the decision by the Refugee Appeals Board dated 28th July 2015, by means of which his request to be granted asylum was rejected (hereinafter referred to as the Decision), ultra vires in the sense that it does not respect the principles of natural justice since the Board adopted the line of least resistance in his regard with the consequence that a great injustice has been perpetrated against him in a situation which is essentially a life or death situation, and consequently: (i) to order the Refugee Appeals Board to re-hear, in his presence duly assisted and in conformity with the principles of natural justice, the appeal lodged by him from the decision by the Refugee Commissioner regarding the granting of asylum; (ii) grant him asylum or in default, subsidiary protection; (iii) alternatively, apply the principle of non refoulement which prohibits Member States signatories to the European Convention from resending a refugee, including a failed asylum seeker, to his country of origin when the refugee does not want to go back because of a clear and founded fear of persecution, torture, inhuman treatment and/or physical violence towards him, or (iv) if the Tribunal deems it appropriate in terms of justice and equity and in line with the right to a fair hearing in terms of Section 3(2)(a) of the Administrative Justice Act, uphold ope legis his appeal filed on the 10th July 2014 by either granting him asylum in terms of the Law or in default, subsidiary protection and/or apply the principle of non refoulement.

The Applicant founds his requests on the following grounds: (i) the Decision makes no reference to the arguments and submissions put forth by him in his appeal to the Refugee Appeals Board from the recommendation by the Refugee Commissioner; (ii) the Refugee Appeals Board failed to summon him with the consequence that he did not directly give and further elaborate on his version of events but it merely gave a decision on the basis of the documents available to it; (iii) the Refugee Appeals Board failed to duly consider his fear of persecution, torture, inhuman treatment and/or physical violence towards him should he be re-sent to this country of origin; (iv) the Refugee Appeals Board failed to take into account the fact that he is a political refugee and/or a member of a particular social group or political opinion, and therefore qualifies as a refugee in terms of Section 2 of Chapter 420 of the Laws of Malta; (v) he was not granted a fair hearing by the Refugee Appeals Board and consequently he has been denied the right to an effective remedy provided for by the Law; (vi) by not summoning him to the give evidence, the Refugee Appeals Board denied him the opportunity to submit further relevant and vital proof in support of his request to be granted asylum; and (vii) the Refugee Appeals Board failed to consider the principle of safe country of origin when it failed to consider that Nigeria, his country of origin, is not a safe place for him to return to due to his political inclinations.

The Refugee Appeals Board objects to the requests put forth by the Applicant and requests that the same be denied on the basis of the following pleas: (i) the Tribunal must order the Applicant to declare in terms of which provisions of the Law he is filing these proceedings; (ii) the Tribunal is not competent to decide and determine the requests put forth by the Applicant since the competent forum in this case is the Civil Court, First Hall; (iii) if the Applicant is founding his requests on Section 469A of Chapter 12 of the Laws of Malta, then the Tribunal is most definitely not competent to decide and determine these proceedings since

proceedings for judicial review in terms of the above-mentioned provision of the Law fall within the competence of the Civil Court, First Hall; (iv) should it result that the Applicant is founding his requests on Section 469A of Chapter 12 of the Laws of Malta and should the Tribunal declare that it is competent to decide and determine the requests put forth by the Applicant, the Applicant's proceedings are time-barred since he submitted the same after the lapse of six months provided for in Section 496A of Chapter 12 of the Laws of Malta; (v) the proceedings as put forth by the Applicant against the Refugee Appeals Board cannot be so put forth since the remedy in this case definitely does not involve suing the adjudicating authority; and (vi) on the merits, the decision by the Refugee Appeals Board bearing number 3644A/14 is just and has been given in terms of Law and therefore must be upheld and confirmed.

During the sitting held on the 16th March 2016[4], the parties to these proceedings agreed that in view of the preliminary plea raised by the Refugee Appeals Board to the effect that this Tribunal is not competent to decide and determine the requests put forth by the Applicant, the Tribunal should first consider and decide this particular plea prior to entering into the merits of the case. Therefore, this Decree is limited to the preliminary plea raised by the Refugee Appeals Board regarding the lack of competence of the Tribunal to decide and determine the requests put forth by the Applicant.

From a proper reading of the Application filed by the Applicant it is evident that he is requesting the judicial review of the Decision delivered by the Refugee Appeals Board by virtue of which his request to be granted asylum has been rejected. In fact in his application the Applicant clearly states that: ir-Rimedju li huwa hawn imfittex bil-proċedura preżenti, huwa eżattament dak li qegħda hawn

4 Folio 44 of the records of the proceedings.

tintalab "Judicial Review" ta' l-att amministrattiv eżegwit mill-Bord ta' l-Appelli dwar ir-Rifuġjati, li ċaħad it-talba ta' l-esponent għall-asil f'Malta, u dan kif sostnut – minħabba proċedura u raġunamenti inġusti fil-konfront tiegħu. Tant li l-Bord imsemmi naqas milli jeżamina b'reqqa suffiċjenti l-każ in eżami kif tirrikjedi l-liġi u speċjalment id-direttivi u regolamenti ewropei, kif ukoll naqas milli jaġixxi skond il-prinċipji ta' ġustizzja naturali li tagħti vuċi lill-parti Appellanti u li jirrispetta l-'audi alteram partem'[5].

Faced with the preliminary plea raised by the Refugee Appeals Board in the sense that the competent forum before which he should have filed his proceedings for a judicial review of the Decision is the Civil Court, First Hall and not the Administrative Review Tribunal, the Applicant, in his Note of Submissions, submits that the Application to the present Tribunal was therefore made not, as such, in terms of article 469A of the COCP and was not so much intended as an application for review, but more so, and specifically, as a form of appeal to this impartial and independent Tribunal, deemed the protector of the citizen against administrative decisions that deny, disregard or otherwise misinterpret the citizen's rights[6]*. It is very clear that in his Note of Submissions the Applicant is seeking to vary the nature of the proceedings filed by him from proceedings for judicial review of the Decision to appeal proceedings from the said Decision. Apart from the fact that from a juridical point of view what the Applicant is seeking to do at this stage of the proceedings is completely unacceptable, his submissions in any case cannot be upheld since they are not valid at Law.*

In terms of Section 5 of the Administrative Justice Act, Chapter 490 of the Laws of Malta, as applicable prior to the amendments which came into force on the 15th February 2016, there shall be set up in accordance with the provisions of

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5 Folio 1 of the records of the proceedings.

6 Note of Submissions filed by the Applicant, folio 54 to 59 of the records of the proceedings.

this Part of this Act, an independent and impartial tribunal, to be known as the Administrative Review Tribunal, for the purpose of reviewing administrative acts referred to it in accordance with this Act or any other law, and for the purpose of exercising any other jurisdiction conferred on the Administrative Review Tribunal by or under this or any other law, whether before or after the coming into force of this Act. The Administrative Review Tribunal shall have jurisdiction to review administrative acts. In terms of Section 7 of the above mentioned Act, also as applicable prior to the amendments which came into force on the 15th February 2016, the Administrative Review Tribunal shall be competent to review administrative acts of the public administration on points of law and points of fact. It shall also be competent to decide disputes referred to it unless any court or other administrative review tribunal is already seized of such dispute.

From these provisions it is very clear that the Tribunal's jurisdiction is two-fold: the ***review on points of fact and points of law of administrative acts by the public administration****, provided that the review is not requested in terms of Section 469A of Chapter 12 of the Laws of Malta (now made even more clear following the amendments which came into force on the 15th February 2016), and to decide and determine* ***appeals from administrative decisions*** *lodged before it in terms of specific provisions of the relevant laws, as is the case for example with appeals from assessments issued by the Commissioner of Revenue as per Section 35 of Chapter 372 of the Laws of Malta. Therefore, for there to be a* ***right of appeal from an administrative decision*** *before the Administrative Review Tribunal, such right must specifically be provided for in the relevant law.*

In the present case Section 7(9) of Chapter 420 of the Laws of Malta specifically provides that notwithstanding the provisions of any other law, but without prejudice to article 46 of the Constitution of Malta and without prejudice to the provisions of article 4 of the European Convention Act the decision of the Board

shall be final and conclusive and may not be challenged and no appeal may lie therefrom, before any court of law, saving the provisions of article 7A. From this provision of the Law it is very clear and evident that there is no right of appeal, least of all a right of appeal before the Administrative Review Tribunal, from a decision of the Refugee Appeals Board. This therefore effectively means that the only way how a decision by the Refugee Appeals Board can be challenged is by review proceedings, specifically by judicial review proceedings instituted before the Civil Court, First Hall.

It is an established principle at Law that it is the Courts in their ordinary jurisdiction, namely the Civil Court, First Hall, which are competent and have the jurisdiction to review acts and decisions by quasi-judicial tribunals or tribunals set up by Law. In this regard reference is made to that observed by the Civil Court, First Hall in the judgment in the names ***SM Cables Limited v. Carmelo Monaco, Writ No. 2661/00,*** *delivered on the 14th February 2002: illi, qabel xejn, ghandu jinghad li dawn il-Qrati ghandhom gurisdizzjoni generali biex jistharrgu l-imgieba ta' kull tribunal kwazi-gudizzjarju jew mahluq statutorjament. Dan jinghand ghaliex, fi stat ta' dritt, hadd mhu mhelus mir-rabta li jimxi kif tridu l-ligi, u jekk issir xilja li dik il-persuna ma mxietx skond il-ligi huma l-Qrati li ghandhom is-setgha li jqisu l-ilment u li jaghtu r-rimedju jekk ikun il-kaz.*

In the judgment in the names ***Salon Services Limited v. Elaine Dimech, Writ No. 5/02****, delivered by the Civil Court, First Hall on the 13th November 2003, the said Court once again observed that: l-ewwelnett, tajjeb li jigi carat li kif osservat l-Onorabbli Qorti ta' l-Appell fis-sentenza taghha fil-kawza "Eden Leisure Group v. Borg D'Anastasi" moghtija fis-27 ta' Gunju 2003, "illum hu car li l-Qorti Civili tista' tissindika l-operat ta' kwalsiasi Tribunal amministrattiv, l-ewwelnett biex tassigura li l-principji ta' gustizzja naturali huma osservati, u t-tieni biex*

tassigura li ma kienx hemm xi enunzjazzjoni hazina jew inkompleta ta' l-ipotesi tal-ligi, u dana minghajr ma tipprova b'xi mod tissostitwixxi d-diskrezzjoni taghha ghal dak tat-Tribunal". Pronunzjament fuq l-istess linji kien inghata minn din il-Qorti fil-kawza "Power Projects Ltd. v. Agius", deciza fis-16 ta' Gunju 2003 and in the judgment in the names ***Mario Magri v. HSBC Bank Malta p.l.c., Writ No. 2641/00*** *delivered on the 14th March 2002, the Civil Court, First Hall observed that: ghalkemm Tribunal jew Bord jista' jinghata b'ligi l-gurisdizzjoni esklussiva sabiex jiddeciedi kazijiet specifici, bl-eskluzzjoni tal-Qrati ordinarji, l-istess Qrati ordinarji xorta huma kompetenti biex jissindakaw l-operat ta' l-istess Tribunal u s-sentenzi tieghu però limitatament ghal tlett kategoriji ta' difetti – (a) eccess ta' gurisdizzjoni; (b) non-osservanza ta' l-istess ligi kostitwita; u finalment (c) non-osservanza ta' xi wiehed mill-principji fondamentali tal-gustizzja*[7].

From the above-mentioned judgments it clearly results that it is only the Civil Court, First Hall, which has the necessary jurisdiction to review acts/decisions by quasi-judicial tribunals or tribunals set up by Law and that this Tribunal, definitely does not have such jurisdiction. The Tribunal is well aware that the above-mentioned principles have been set out in judgements delivered prior to the coming into force of the Administrative Justice Act, Chapter 490 of the Laws of Malta, and the setting up of the Administrative Review Tribunal, but in its opinion the coming into force of the Administrative Justice Act and the setting up of the Tribunal did not in any way vary or shift the competence of review of acts/decisions of quasi-judicial tribunals or tribunals set up by Law from the Civil Court, First Hall to the Administrative Review Tribunal.

[7] Wilfred Privitera v. Anthony Bonello, delivered by the Court of Appeal on the 11th February 1993.

As already observed above, in terms of Section 7 of Chapter 490 of the Laws of Malta, the Administrative Review Tribunal shall be competent to review administrative acts of the public administration on points of law and points of fact. It shall also be competent to decide disputes referred to it unless any court or other administrative review tribunal is already seized of such dispute. In terms of Section 2 of Chapter 490 of the Laws of Malta 'administrative act' includes the issuing by the public administration of any order, licence, permit, warrant, authorization, concession, decision or a refusal to any demand of a member of the public, but it does not include any measure intended for internal organization or administration within the said public administration and 'public administration' means the Government of Malta, including its Ministries and departments, local authorities and any body corporate established by law. From these definitions it clearly results that a tribunal set up by law or a quasi-judicial tribunal, as is the Refugee Appeals Board, does not fall within the definition of public administration in terms of Chapter 490 of the Laws of Malta and therefore the acts and decisions by the said Board cannot be reviewed by the Administrative Review Tribunal.

In his concluding submissions in his Note of Submissions the Applicant with reference to that provided for in Section 7(9) of Chapter 420 of the Laws of Malta, in particular the proviso thereto, quoted further above in this Decree, submits that there is plenty of jurisprudence to confirm that a proviso such as that inserted into the quoted art. 7(9) of the Refugees Act 2000, making exceptional reference to article 46 of the Constitution of Malta, as also Art. 4 of the Convention, gives power to the judicial authority seized with the case to override the prohibition of appeal if the underlying basis (as in this case) of the recourse to a court or tribunal is one related to the denial of human rights, the right to a fair hearing, the right to be heard. ... It is submitted that this Tribunal was approached specifically because, in exercise of these rights, the Appellant insisted that he was

not given a fair hearing the Appeal before the RAB was decided after the Appellant was kept waiting for almost one year, then not sent for, not heard viva voce, case decided in absentia, and disposed of without warning based on an internal sitting of the Refugee Appeals Board held 'in camera' on Appellant's absence, without the prior agreement of the parties. For the sitting of RAB to be done IN CAMERA the mutual agreement of the parties is required by the Procedural Rights for Sittings of the Refugee Appeals Board. ... should the Tribunal in fact decide itself to be incompetent, it is respectfully asked to consider the application of article 46(3) of the Constitution which empowers any 'court' other than the First Hall of the Civil Court that deems itself incompetent to refer the matter to the said First Hall of the Civil Court, if any question arises as to the contravention of any of the provisions of sections 33 to 45 inclusive, unless the raising of the question is merely frivolous or vexatious. (The term 'court' is explained in Section 47 of the Constitution as meaning 'any court of law in Malta'... There is precedent to confirm that when 'court' is used so loosely and spelt in small letters, it can include a tribunal or other judicial authority, as the case by be). ALTERNATIVELY to apply the provisions of the NEW PROVISO to Article 20 of Act IV of 2016 amending article 741 of the Code of Organisation and Civil Procedure (Cap.12) which states that: 'PROVIDED THAT IF THE COURT CONSIDERS THAT THE PLEA IS JUSTIFIED THE COURT SHALL BY DECREE IN CAMERA, WHICH SHALL NOT BE SUBJECT TO APPEAL, ORDER THAT THE ACTS OF THE PROCEEDINGS BE TRANSFERRED TO THE COURT, BOARD OR OTHER TRIBUNAL BY WHICH IT CONSIDERS THAT SUCH ACTION IS COGNIZABLE' (Subject to the further provision commencing 'provided further' which is not applicable hereto).

The Applicant is here clearly claiming a violation of his fundamental human right to a fair hearing by the Refugee Appeals Board and is requesting the Tribunal to refer his case to the Civil Court, First Hall in its Constitutional Jurisdiction.

Without going into the merits of whether or not there has been a violation of the Applicant's right to a fair hearing by the Refugee Appeals Board, since the Administrative Review Tribunal is not competent to do so, it is hereby being declared that the Tribunal cannot refer the Applicant's case to the Civil Court, First Hall in its Constitutional Jurisdiction since it, that is the Tribunal, does not qualify as a 'court' in terms of Section 46(3) of the Constitution and of Section 4(3) of Chapter 319 of the Laws of Malta.

This particular matter has already been addressed by the Tribunal in various proceedings, amongst which the proceedings in the names ***Karl Heinrich Guenter Hobein v. Director General (Inland Revenue), Application No. 45/09*** *decided on the 26th November 2013, the proceedings in the names* ***Malcolm Ellul v. Kummissarju tat-Taxxi Interni, Application No. 68/09VG*** *in a decree dated 18th April 2011 and in the proceedings* ***Emanuel Falzon v. Awtorità ghat-Trasport f'Malta, Application No. 3/10VG*** *in a decree dated 3rd May 2011, wherein it stated that fi kwalunkwe każ però anke kieku stess is-sitwazzjoni kienet tali li tagħti lok għal referenza kostituzzjonali, fil-fehma tat-Tribunal it-talba tar-rikorrenti xorta waħda ma tistax tiġi milqugħa in kwantu dan it-Tribunal ma huwiex fakoltizzat biex iressaq referenza kostituzzjonali ai termini ta' l-Artikolu 46(3) tal-Kostituzzjoni u l-Artikolu 4(3) tal-Kap.319 tal-Liġijiet ta' Malta, billi ma jaqax taħt it-tifsira ta' "qorti" kif intiża fl-imsemmija artikoli tal-Kostituzzjoni u tal-Liġi. Mhux kull awtorità ġudikanti għandha s-setgħa li tressaq referenza kostituzzjonali quddiem il-Prim' Awla tal-Qorti Ċivili (Sede Kostituzzjonali). Biex tali setgħa tissussisti l-awtorità ġudikanti in kwistjoni trid tkun qorti għall-finijiet ta' l-Artikolu 46(3) tal-Kostituzzjoni u fl-Artikolu 4(3) tal-Kap.319 tal-Liġijiet ta' Malta. Dan il-prinċipju ġie stabbilit fis-sentenzi fl-ismijiet Kummissarju ta' l-Artijiet v. Ignatius Licari noe, Rikors Nru. 9/01 u Anthony Grech v. Claire Calleja et, Rikors Nru. 11/07, entrambe deċiżi mill-Qorti Kostituzzjonali fit-30 ta' Ġunju 2004 u 29 ta' Frar 2008 rispettivament – fejn*

inter alia ngħad illi l-organi gudizzjarji ordinarji huma dawk li jikkwalifikaw bħala jew Qorti Superjuri jew Qorti Inferjuri fit-termini tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, u huwa għal dawn il-'qrati' li l-leġislatur qed jirreferi fl-Artikoli 46(3) u 47(1) tal-Kostituzzjoni (eċċettwati dejjem il-qrati marzjali limitatament ghall-Artikoli 33 u 35). Din id-differenza bejn dawk l-organi li jiffurmaw parti mill-istruttura ġudizzjarja ordinarja u dawk l-organi l-oħra li, għalkemm jamministraw il-ġustizzja (u jistgħu anke jissejħu "qrati"), ma jiffurmawx hekk parti ġiet senjalata minn din il-Qorti, ukoll diversament komposta, fis-sentenza tagħha tat-3 ta' Diċembru 1997 fl-ismijiet "Cecil Pace et v. Onorevoli Prim' Ministru et" fejn ingħad hekk: Tribunal jew, kif grafikament espress fil-Kostituzzjoni, "awtorità ġudikanti" imwaqqfa b'liġi biex ikun jista' jikkwalifika bħala tali jeħtieġ li jkun karatterizzat bil-fatt li jkun korp b'funzjoni ġudizzjarja bil-fakoltà li jiddetermina u jiddeċiedi materji li skond dik il-liġi jaqgħu fil-kompetenza tiegħu. Hu korp li jeħtieġ li jipproċedi skond ir-regoli preċiżi u ben stabbiliti fil-liġi li tikkostitwih u li jiddeċidi skond dawk ir-regoli. Għandu jkollu l-poter li jorbot lill-partijiet li jidhru quddiemu in kontestazzjoni u d-deċiżjoni tiegħu jeħtieġ allura li jkollha effett vinkolanti anke jekk mhux neċessarjament b'mod finali. Mill-banda l-oħra dan il-korp mhux bilfors – kif ġa aċċennat – għandu jkun jifforma parti mill-istruttura ġudizzjarja ordinarja però jrid jinkorpora fih dawk il-karatteristiċi fondamentali assoċjati mal-proċess ġudizzjarju li jkunu jiggarantixxu s-smigħ xieraq fosthom dak il-minimu ta' indipendenza u imparzjalità essenzjali biex juru li mhux biss il-ġustizzja tkun qed issir sewwa u kif mistenni imma li jkun hemm jidher fid-deher li jkun qed isir. Biex tikkonkludi, għalhekk, din il-Qorti tafferma li l-qrati li l-leġislatur qed jirreferi għalihom fis-subartikolu (3) tal-Artikolu 46 tal-Kostituzzjoni (moqri fid-dawl kemm ta' l-Artikolu 47(1) kif ukoll tad-disposizzjonijiet l-oħra tal-Kostituzzjoni), kif ukoll fis-subartikolu (3) ta' l-Artikolu 4 tal-Kap.319 li ġie meħud testwalment mill-Kostituzzjoni, huma, fil-kamp ċivili, il-Qorti, Ċivili, il-Qorti ta' l-Appell u l-Qorti Kostituzzjonali kwantu Qrati Superjuri, u l-Qorti tal-

Maġistrati (Malta) u l-Qorti tal-Maġistrati (Għawdex) kwantu Qrati Inferjuri; u fil-kamp penali l-Qorti tal-Maġistrati (Malta) u l-Qorti tal-Maġistrati (Ghawdex) għal dak li huma l-Qrati Inferjuri, u l-Qorti Kriminali u l-Qorti ta' l-Appell Kriminali għal dak li huma Qrati Superjuri. Fis-sentenza Kummissarju ta' l-Artijiet v. Ignatius Licari noe, Rikors Nru. 9/01 minn fejn ittieħed il-bran appena ċitat, il-kwistjoni trattata kienet dwar jekk il-Bord ta' Arbitraġġ dwar Artijiet huwiex fakoltizzat li jagħmel referenza kostituzzjonali u, fil-fehma ta' dan it-Tribunal, dak li ingħad mill-Qorti Kostituzzjonali in sostenn tar-risposta Tagħha fin-negattiv għal tali kweżit japplika b'mod partikolari għat-Tribunal ta' Reviżjoni Amministrattiva: Il-Bord ta' Arbitraġġ dwar Artijiet la jista' jiġi ikkunsidrat bħala Qorti Superjuri u anqas bħala Qorti Inferjuri f'dan is-sens [ossia fis-sens premess fil-bran iktar 'l fuq ċitat]; u għalhekk l-Artikolu 46(3) tal-Kostituzzjoni u l-Artikolu 4(3) tal-Kap.319 ma japplikawx għalih. Din il-Qorti hi konfortata f'din id-deċiżjoni tagħha minn żewġ konsiderazzjonijiet oħra. Skond l-Artikolu 23(2) tal-Kap.88, ic-Chairman tal-Bord jista' jkun "... persuna li jkollha jew kellha l-kariga ta' mħallef jew persuna li jkollha l-kariga ta' maġistrat." Għalhekk, kieku wieħed kellu jiehu l-kriterju tal-presidenza tal-Bord bħala xi kriterju determinanti għad-deċiżjoni jekk l-istess Bord hux "qorti" o meno ... ikun ifisser li dana l-Bord ikun xi mindaqqiet "Qorti Superjuri" u xi mindaqqiet "Qorti Inferjuri" – sitwazzjoni ta' inċertezza li hi ċertament kontroindikata għall-fini biex jiġi determinat il-post ta' organu ġudizzjarju fis-sistema ġudizzjarja tal-pajjiz. Inoltre, il-Bord jista' jkun presjedut minn persuna li kellha l-kariga ta' mħallef (u meta jkun hekk dik il-persuna trid tieħu l-gurament kif preskritt fl-Artikolu 24(1) tal-Kap.88). Il-Kostituzzjoni, invece, b' "qorti" tifhem biss qorti li tkun presjeduta minn Imħallef jew minn Maġistrat li jkun għadu fil-kariga (ossia jkun għadu ma rtirax bl-età jew ma irriżenjax jew tneħħa) jew minn Aġent Imħallef nominat skond l-Artikolu 98(2) ta' l-istess Kostituzzjoni. Konsiderazzjoni oħra temani mill-Artikolu 25(2)(a) tal-Kap.88. Tanti l-Bord ma hux, u ma jistax jitqies li hu, la Qorti Superjuri u lanqas Qorti

Inferjuri fis-sens tal-Kostituzzjoni li l-leġislatur kellu jinkludi fil-liġi disposizzjoni partikolari biex il-Bord ikollu l-istess setgħat tal-Prim' Awla tal-Qorti Ċivili. Differentement, per eżempju, il-leġislatur ipprovda dwar il-Qorti tal-Minorenni mwaqqfa taħt il-Kapitolu 287 – Artikolu 3(2) ta' l-imsemmi Kap.287 jipprovdi espressament li: il-Qorti tal-Minorenni titqies li hi Qorti tal-Maġistrati u jkollha l-istess ġurisdizzjoni dwar is-smigħ ta' akkużi u dawk proċedimenti oħra li għandhom x'jaqsmu ma' tfal jew żgħażagħ li l-Qorti tal-Maġistrati, bħala qorti ta' ġudikatura kriminali u bħala qorti ta' inkjesta, kien ikollha, kieku ma kinux għad-disposizzjonijiet ta' dan l-Att. Fil-każ ta' dan it-Tribunal fl-Att dwar il-Ġustizzja Amministrattiva il-Leġislatur ukoll ipprovda li t-Tribunal ta' Reviżjoni Amministrattiva jkun magħmul minn President li jippresjedi t-Tribunal. Il-President ta' Malta, li jaġixxi fuq il-parir tal-Prim' Ministru, jista' jaħtar iktar minn President wieħed fit-Tribunal ta' Reviżjoni Amministrattiva, iżda f'kull każ partikolari joqgħod President wieħed biss. President, meta jkun ex-imħallef jew ex-Maġistrat, għandu jiġi maħtura għal perijodu ta' erba' snin u għandu jispiċċa minn din il-kariga meta jiskadi l-perijodu ta' dik il-kariga. President għandu jkun persuna li jokkupa jew kien jokkupa l-kariga ta' mħallef jew maġistrat f'Malta – Artikolu 8(1) – (4) tal-Kap.490 tal-Liġijiet ta' Malta u li t-Tribunal ta' Reviżjoni Amministrattiva għandu jkollu l-istess setgħet li huma vestiti fil-Prim' Awla tal-Qorti Ċivili mill-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili – Artikolu 20(1) tal-Kap.490 tal-Liġijiet ta' Malta. Fid-dawl ta' dawn id-disposizzjonijiet tal-Kap.490 tal-Liġijiet ta' Malta u fid-dawl tal-prinċipju enunċjat fil-preċitati sentenzi tal-Qorti Kostituzzjonali ma jistax għajr li jirriżulta li dan it-Tribunal ma huwiex "qorti" għall-finijiet ta' l-Artikolu 46(3) tal-Kostituzzjoni u ta' l-Artikolu 4(3) tal-Kap.319 tal-Liġijiet ta' Malta u għalhekk ma huwiex fakoltizzat li jressaq referenza kostituzzjonali quddiem il-Qorti kompetenti.

Therefore, in the light of the above the Tribunal reiterates that it is not competent to determine claims concerning an alleged violation of Fundamental Human

Rights and Freedoms as protected by the Constitution and by the European Convention for Human Rights and Fundamental Freedoms and neither can it refer issues pertaining to alleged violations of Human Rights and Fundamental Freedoms before the Civil Court, First Hall in its Constitutional jurisdiction.

In this case however the Tribunal can, or rather must, in terms of the first proviso to Section 741 of Chapter 12 of the Laws of Malta, introduced in virtue of Act IV of 2016, order that the records of these proceedings be transferred to the Civil Court, Fisrt Hall in its ordinary jurisdiction for eventual determination of the Applicant's requests since, in its opinion it is the said Court and not this Tribunal which is competent to decide and determine the requests put forth by the Applicant.

For the above reasons the Tribunal, whilst reiterating that it is the Civil Court, First Hall in its ordinary jurisdiction which has the necessary jurisdiction to decide and determine the requests put forth by the Applicant, upholds the preliminary plea raised by the Refugee Appeals Board with regard to the lack of competence of the Tribunal to decide and determine the requests put forth by the Applicant and orders that the records of these proceedings be forthwith transmitted to the Secretary of the Administrative Review Tribunal so that the same can be transferred to the Civil Court, First Hall in its ordinary jurisdiction in terms of Law.

This Decree is to be communicated to Dr. Joseph R. Pace for the Applicant and to Dr. Ariana Falzon for the Refugee Appeals Board."

Having seen that by virtue of decree dated 28th September 2016 this Court ordered that proceedings are heard in the English language.

Having seen all the evidence brought forward by the parties and the Notes of Submissions exchanged between them.

Having seen the acts of the proceedings of the Administrative Review Tribunal.

Having seen that the case was adjourned for judgement for today.

Having seen all the other acts of the case.

Considered:

On the 11th February 2016 applicant filed proceedings in front of the Administrative Review Tribunal by virtue of which he challenged a decision of the Refugee Appeals Board dated 28th July 2015 which had rejected his request to be granted asylum in Malta. For the reasons listed in his application, he claimed that the said decision should be declared *ultra vires* by the Tribunal because it did not respect the principles of natural justice in his regard, creating an injustice which could lead to a matterr of life or death. He thus requested the Tribunal to -

1. order the Refugee Appeals Board to re-hear, in his presence duly assisted and in conformity with the principles of natural justice, the appeal lodged by him from the decision by the Refugee Commissioner regarding the granting of asylum;

2. consider granting him asylum or in default, subsidiary protection; and

3. without prejudice, to alternatively apply the principle of non refoulement which prohibits Member States signatories to the European Convention from resending a refugee, including a failed asylum seeker, to his country of origin

when the refugee does not want to go back because of a clear and founded fear of persecution, torture, inhuman treatment and/or physical violence towards him; or

4. uphold *ope legis* his appeal filed on the 10th July 2014 by either granting him asylum in terms of the Law or in default, subsidiary protection and/or apply the principle of non refoulement (if the Tribunal deems it appropriate in terms of justice and equity and in line with the right to a fair hearing in terms of Section 3(2)(a) of the Administrative Justice Act).

Besides pleas of a preliminary nature, defendant Refugee Appeals Board pleaded that all of applicant's claims are unfounded in fact and at law. Among other things it argued that –

1. if it transpires that the Applicant is founding his requests on Section 469A of Chapter 12 of the Laws of Malta, then applicant's case is time-barred in terms of the provisions of the mentioned article;

2. as a preliminary plea, the proceedings as put forth do not hold ground against the Board since the remedy available to an aggrieved party is certainly not to sue it in Court;

3. Without prejudice to the above, the decision by the Refugee Appeals Board is just and has been given in terms of Law and therefore must be upheld and confirmed.

The Court notes that the Refugee Appeals Board raised preliminary pleas that challenge the basis of the action as put forward by the applicant. Primarily, the

Board pleaded that the applicant should declare in terms of which provisions of the Law he is filing these proceedings since it appeared to be a case of judicial review, but also, if it results that the action is based on article 469A of Chapter 12 of the Laws of Malta then the action is time-barred.
The Court emphasises at the outset that it is bound to decide the case only within the parameters of the nature of action as filed by applicant in his application and not according to evidence or submissions made at a later stage. Otherwise it will be acting ultra petita.

The following was stated by the Court in the case **Michelangelo Cutajar et vs Nicholas Cutajar et decided on the 28 th April 2016 -**

"....hija regola essenzjali vinkolanti għall-Qorti li tiddeċiedi fuq dak li qed jintalab fil-kawża. Tant hu hekk li skont ***l-artikolu 790 tal-Kap 12*** *"Meta quddiem qorti fi grad ta' appell tingieb 'il quddiem eċċezzjoni tan-nullità tas-sentenza appellata, dik l-eċċezzjoni ma għandhiex tintlaqa' jekk is-sentenza tkun ġusta fis-sustanza tagħha, ħlief jekk l-eċċezzjoni tkun ibbażata fuq nuqqas ta' ġurisdizzjoni jew fuq nuqqas ta' ċitazzjoni, jew fuq illeġittimità ta' persuna jew fuq li s-sentenza tal-ewwel qorti hija extra petita jew ultra petita jew fuq kull difett ieħor li jippreġudika l-jedd ta' smigħ xieraq." (emfasi mizjuda).*

Hekk fil-każ deċiż mill-Qorti ta' Appell, tat-12 ta' Lulju, 1965 fl-ismijiet ***Joseph Gatt -vs- Joseph Galea****: 'F'okkażjonijiet oħra din il-Qorti ssenjalat il-prinċipju magħruf illi l-Imħallef Ċivili għandu, fl-għoti tas-sentenzi f'kawżi joqgħod rigorożament fil-limiti tal-kontestazzjoni b'mod illi, waqt li hu obbligat li jokkupa ruħu mill-kwestjonijiet kollha dedotti fil-ġudizzju mill-partijiet, minn naħa l-oħra ma jistax jitratta u jirrisolvi kwestjonijiet li l-partijiet ma ssollevawx u ma*

ssottomettewx għad-deċiżjoni tiegħu, a meno che non si tratta minn kwestjonijiet ta' ordni pubbliku li l-Imħallef hu obbligat li jirrileva ex officio.'

Il-kriterju sabiex tigi determinata it-talba f'kawża titqies minn dak li jissemma fl-att li bih il-kawża tinbeda. Mill-formulazzjoni ta' dak l-att tal-bidu, wieħed ikun jista' jqis jekk dak mogħti fis-sentenza jkunx għal kollox 'il barra minn dak li ntalab (extra petita) jew ikunx aktar minn dak li ntalab (ultra petita).''

In the case **Alfred Cini vs MEPA decided on the 3rd December 2007**[8] the Court also stated -

"M'huwiex permissibbli għall-attur li fil-pendenza tal-kawża jibdel il-kawżali u d-domandi li fuqhom ikun ibbaża l-azzjoni tiegħu; "Huwa prinċipju magħruf illi fl-għoti ta' sentenza l-imħallef ċivili għandu joqgħod rigorożament fil-limiti tal-kontestazzjoni (Kollez. Vol. XLIX P I p 406). Fuq kollox huwa għandu joqgħod strettament għat-termini tal-kawżli u tat-talba kif miġjuba fiċ-ċitazzjoni (Kollez. Vol. XXXIV P I p 85). Is-sentenza għalhekk kellha tirrispekkja dik it-talba konsiderata fid-dawl tal-provi prodotti u tal-prinċipji tad-dritt applikabbli għalihom u tenut kont ta' l-eċċezzjonijiet tal-konvenut. Kif ritenut, ma huwiex leċitu li l-kawża tiġi maqtugha fuq kawżali differenti minn dik espressa fiċ-ċitazzjoni (Kollez. Vol. XLVIII P II p 777)" (Grobett Holdings Limited vs Steve Abela et proprio et nomine deċiża mill-Qorti ta' l-Appell fl-10 ta' Ottubru 2005)."

Applicant claims that his action is not based on article 469A of Chapter 12. In his submissions in front of the Administrative Review Tribunal he had stated as follows –

[8] Confirmed by the Court of Appeal on the 2nd July 2010

"the Application to the present Tribunal was therefore made not, as such, in terms of article 469A of the COCP and was not so much intended as an application for review, but more so, and specifically, as a form of appeal to this impartial and independent Tribunal.".

It is also to be noted that in its considerations in the decree of the 14th July 2016 the Administrative Review Tribunal commented as follows on this assertion –

"It is very clear that in his Note of Submissions the Applicant is seeking to vary the nature of the proceedings filed by him from proceedings for judicial review of the decision to appeal proceedings from the said decision."

In its submissions the defendant Board claims that the wording of the application as filed by applicant show that the action is in fact based on article 469A of Chapter 12 of the Laws of Malta.

Considered:

What the Court observes is that in his application, applicant introduces his complaint by immediately making reference to parts of **article 469A of Chapter 12** as follows –

"Skond l-artiklu 469A tal-Kap 12 tal-Liġijiet ta' Malta, "Saving as is otherwise provided by law, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases: (a) where the administrative act is in violation of the Constitution; (b) when the administrative act is ultra vires on

any of the following grounds: (i).....omissis..... (ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or (iii) .....omissis"

After quoting this article applicant then continues to state that -

"r-rimedju li huwa hawn imfittex bil-proċedura preżenti, huwa eżattament dak li qegħda hawn tintalab "Judicial Review" tal-att amministrattiv eżegwit mill-Bord tal-Appelli dwar ir-Refuġjati, li ċaħad it-talba tal-esponent għall-asil f'Malta, u dan kif sostnut – minħabba proċedura u raġunamenti ngusti fil-konfront tiegħu. Tant li l-Bord naqas milli jeżamina b'reqqa suffiċjenti l-każ in eżami kif tirrikjedi l-liġi u speċjalment id-direttivi u regolamenti ewropei, kif ukoll naqas milli jagixxi skond il-prinċipji ta' ġustizzja naturali li tagħti vuċi lill-parti appellanti u li jirrispetta l-"audi alteram partem."

The rest of his application amplifies in practical terms on these specific complaints and why he felt aggrieved by the decision of the Board. His request primarily is that the decision by the Refugee Appeals Board dated 28th July 2015 - by means of which his request to be granted asylum was rejected - is declared ultra vires in the sense that it does not respect the principles of natural justice and that consequently the Refugee Appeals Board is ordered to re-hear, in his presence duly assisted and in conformity with the principles of natural justice, the appeal lodged by him from the decision by the Refugee Commissioner regarding the granting of asylum.

Having seen the parameters of the action as drafted and brought forward by applicant in his application, the Court cannot reach any conclusion other than that

Clement Okoro has based his claims and requests on the basis of article 469A of Chapter 12 of the Laws of Malta. And it is on the basis of this article that the Court has to proceed with the examination of the pleas.

Having reached this conclusion the Court is faced with the preliminary plea that the case is time barred by the lapse of 6 months in terms of subsection 3 of the said article which states –

"An action to impugn an administrative act under sub-article(1)(b) shall be filed within a period of six months from the date when the interested person becomes aware or could have become aware of such an administrative act, whichever is the earlier."

Collectively the allegations raised by the applicant in his application point to a lack of observance of the principles of natural justice under sub-article (1) (b) of article 469A.

Now as established by case-law this time frame cannot be interrupted by a judicial act.

In the case **Sylvana Tanti vs Noel Tanti et decided on the 9th October 2014** the Court stated as follows -

"ż-żmien ta' sitt xhur imsemmi fl-artikolu 469A(3) tal-Kap 12 huwa wieħed ta' dekadenza . Dan ifisser li tali terminu ma jiġix interrott jew sospiż bħalma jiġri fil-każ ta' terminu ta' preskrizzjoni. Fi kliem ieħor, l-atti ġudizzjarji li normalment jitqiesu bħala tajbin biex jinterrompu ż-żmien preskrittiv, jew il-fatt li jkunu għaddejjin diskussjonijiet bejn il-partijiet wara li jkun sar l-egħmil

amministrattiv ma jservu xejn biex iżommu l-mogħdija tas-sitt xhur li ssemmi l-liġi."

The fatality of the passing of time without any action taken within that stipulated at law, irrelevent of the time limit itself, is well elucidated in the judgement in the names of **Joseph u Maria Theresa konjugi Zarb vs. Mira Motors Sales Limited**[9]**:-**

"18. Fl-ahharnett ta' min jissenjala li fil-ġurisprudenza tal-Qrati tagħna jidher li hemm ċertu konflitt dwar il-kwistjoni jekk terminu ta' dekadenza jistax jiġi interrott jew le. Fuq naħa waħda hemm sentenzi fosthom dawk li ġew ċitati mill-atturi appellanti f'din il-kawza, u fuq in-naħa l-oħra hemm diversi sentenzi li jistabilixxu li tali terminu ta' dekadenza huwa wieħed fatali li ma jkunx jista' jiġi interrott jew sospiz. Sentenza reċenti f'dan is-sens ingħatat mill-Prim Awla tal-Qorti Ċivili fid-9 ta' Gunju 2005 fil-kawza fl-ismijiet Joseph Vella noe v. Anthony Migneco et noe. Hemmhekk inter alia intqal: "Perjodu ta' dekadenza mhux suggett għar-regoli ta' sospensjoni jew ta' interruzzjoni; dak it-terminu mhux prorogabbli, u l-inattivita` fil-perjodu ta' xahar irrimedjabbilment jippregudika d-drittijiet tal-kompratur. Skadut dak it-terminu, l-ażżjoni mhix aktar ammissibli (ara "Camilleri v. Micallef ", deċiza mill-Onorabbli Qorti ta' l-Appell fil-5 ta' Ottubru, 1998) u l-Qorti għalhekk tista' u anżi għandha tissolleva dan il-punt ex officio, (ara wkoll "Surprise Yachts Limited v. Rosso", deċiża minn din il-Qorti fil-21 ta' April, 2004, fejn ġie osservat, fuq l-iskorta ta' ġurisprudenza preċidenti, li ladarba t-terminu hu perentorju ta' dritt "lanqas hi ammessa r-rinunzja għal eċċezzjoni bħal din".

The Court notes that applicant was very vague about the date when he claims to have been notified with the decision of the Refugee Appeals Board. In his

[9] Deċiża 2 ta' Dicembru, 2005 Appell Ċivili Numru. 1941/1997/1

application he states that *"dan l-Appell ukoll ġie rifjutat b'ittra deċiżjoni datata 28 ta' Lulju 2015...li waslet għand l-esponent bil-posta ferm wara u x'aktarx lejn nofs Awissu 2015*[10]*"*

However, the evidence brought forward by the Refugee Appeals Board in this respect is concrete. By means of an affidavit of Jackie Marney, secretary of the said Board[11] she stated that the decision of the Board of the 28th July 2015 was sent by post within the same week to both the lawyer and Mr Okoro. The original decision was sent to Mr Okoro at the address he had provided the authorities with and he never gave them any other address. She also filed an email dated **7th August 2015**[12] which legal counsel to Okoro had sent them informing them that he had been served with the decision of the Board and that in relation thereto he was going to register a complaint and a request for re-hearing.

As the defendant Board rightly points out, this email is a proof that by the 7th August 2015 applicant was aware of the decision given. This means that he had until the 8th February 2016 (the 7th was a Sunday) to file the proceedings in question. It transpires however that he filed his case on the 11th February 2016. Although expired by just a few days, there is nothing that can be legally done to rectify the situation. This is a procedural formality of strict application. The Court has therefore no option but to declare the case time-barred by virtue of article 469A (3) of Chapter 12 irrelevant of the fact that it sympathises strongly with the applicant's plight.

For the above mentioned reasons the Court decides the case as follows –

[10] Fol 3 – acts of the case in front of the Administrative Review Tribunal
[11] Fol 10
[12] Fol 17

1. It upholds the preliminary pleas raised by defendant Refugee Appeals Board that the case instituted by applicant Clement Okoro is based on the provisions of Article 469A of Chapter 12 of the Laws of Malta and that the action is time-barred by the 6 month period imposed by that section. It abstains from taking cognisance of the remaining pleas.

2. It therefore rejects the claims raised by applicant who must also bear the costs of the case.

Hon. Dr. Miriam Hayman LL.D.
Judge

Victor Deguara
Deputy Registrar