MALTA

CONSTITUTIONAL COURT

HIS HONOUR THE CHIEF JUSTICE
VINCENT DE GAETANO

THE HON. MR. JUSTICE
JOSEPH D. CAMILLERI

THE HON. MR. JUSTICE
JOSEPH A. FILLETTI

Sitting of the 29 th May, 2009

Civil Appeal Number. 43/2006/1

Dr Muhammed Mokbel Elbakry

v.

Onorevoli Prim Ministru, Onorevoli Vici-Prim Ministru u
Ministru ta' l-Intern u Gustizzja, Avukat Generali u l-Bord ta'
l-Appell dwar ir-Refugjati

The Court:

1. This is a decision pursuant to an appeal entered by Dr Elbakry from a judgment of the First Hall of the Civil Court (in its constitutional and "conventional" jurisdiction) delivered on the 6 December 2007 whereby that Court had, after allowing a number of preliminary pleas raised by respondents, dismissed applicant's claims, with costs.

2. It must be stated at the very outset that appellant's application before the First Hall of the Civil Court is not drawn up in the clearest of terms; indeed, in its judgment of the 6 December 2007 the court of first instance, in identifying and spelling out his specific grounds of complaint, had to premise the appropriate paragraph with the words "in so far as they can be ascertained from his application". Moreover, this judgment, like the judgment of the first court, is being delivered in the English language after the parties had agreed that proceedings be continued in that language (see the minutes of the sitting of the 12 October 2006, fol. 210).

3. In the said application (which was drawn up in the Maltese language) before the court of first instance, appellant stated that after coming to Malta from Egypt in January 2005 he had applied for refugee status – in effect for asylum[1] – which application was dismissed by the Refugee Commissioner and also, upon appeal, by the Refugee Appeals Board. He then states that he is prepared to show that he had suffered discrimination and violation of his fundamental rights at the hands of the "totalitarian regime of Egypt", including violation of his right not to be subjected to inhuman and degrading treatment or torture, his right not to be discriminated against, and his right to freedom of expression. He further states that the denial of refugee status is unreasonable, without foundation at law and exposes his life to clear danger. Applicant Elbakry goes on to state that certain provisions of the Refugees Act, Chapter 420, to wit articles 5, 6 and 7(6)(9) (dealing with the composition, appointment and removal of the members of the Board,

[1] See articles 8 and 23 of the Refugees Act, Cap. 420.

and with certain aspects of the procedure before the same board[2]) violate his right to a fair hearing as protected by Article 39(3) of the Constitution and 6(1) of the European Convention. He further contends that in his particular case there was a further violation of his right to a fair hearing in view of the fact that the Appeals Board failed to understand or appreciate the proper definition of "torture", "cruel treatment" and "serious risk of persecution". Finally he also states that the said Board failed to consider that the way that the Egyptian authorities acted towards him amounted to a violation of his right to freedom of expression as protected by Article 10 of the European Convention, so that by denying him refugee status the Appeals Board was sanctioning the violation of this fundamental right. Having premised all this, applicant requested the First Hall of the Civil Court to give him "dawk ir-rimedji kollha xierqa u opportuni ai termini tal-artikoli 39(3) tal-Kostituzzjoni ta' Malta u artikolu 6(1) [FAIR TRIAL] ta' l-Ewwel Protokol tal-Konvenzjoni Ewropeja[3] kif ukoll artikolu 41(1) tal-Kostituzzjoni u l-artikolu 10 [FREEDOM OF EXPRESSION] ta' l-Ewwel Protokol tal-Konvenzjoni Ewropeja, u b'hekk tiddeciedi billi taghtih ir-rimedji li jidhrilha xierqa u opportuni skond il-ligi". It will be noticed that, contrary to what is provided in the Rules of Court, even as then in force, applicant did not specify the redress sought. A considerable amount of documents (see fol. 10 to 197), mainly computer downloads, were appended to the said application.

4. In their joint reply, filed on the 1 September 2006, respondents pleaded, by way of preliminary pleas: (**1**) that the Prime Minister was not the proper defendant because he does not answer for the Refugee Appeals Board; (**2**) that the said Board is also not a proper defendant because it is an adjudicating authority and cannot be sued in judicial proceedings; (**3**) that in so far as the present proceedings are intended as an appeal from a decision of

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2 Sub-article (9) of Article 7 deals with the limitation of the right of appeal, without prejudice to the right of constitutional redress. In the application as filed before the first court applicant does not actually spell out how this sub-article infringes the right to a fair hearing.

3 Presumably – and this was, in fact, what the First Hall understood this reference to be – applicant here is referring to the First Schedule to Chapter 319.

the Refugee Appeals Board, and as a request for the court to reconsider the merits of the decision of that Board, the present action lacks a legal basis because the Refugees Act does not allow any such appeal, and therefore recourse to constitutional proceedings to achieve the same aim – namely, to appeal from a decision of the Board – amounts to an abuse of the judicial process; (**4**) that in so far as applicant is alleging that articles 5 and 6 of Cap. 420 violate the fundamental right to a fair hearing, without making that allegation within the context of facts which affect him personally, his action lacks the elements of juridical interest required by article 46(1) of the Constitution; and (**5**) that the documents filed by applicant which concern the situation in Egypt and which do not concern his case should be removed from the records because they are not relevant to the case in view of the lack of juridical interest in terms of article 46(1) of the Constitution.

5. At the sitting of the 16 October 2007, the court of first instance put off the case for judgment to the 6 December 2007 notwithstanding the request by applicant for the court not to proceed to deliver judgment on the preliminary pleas but to deal with the pleas in the final judgment. The minutes of that sitting read as follows: "Applicant requests also that the Court do (*sic!*) not proceed to deliver judgment on the preliminary pleas at this stage but to deal with the said pleas in the final judgment. The Court reserves decision on this issue and puts the case off for the 6th of December, 2007 at 9.00am for a decision on the issue whether to deliver judgment on the preliminary pleas and in that case for the judgment itself on those pleas." In fact on the said date – 6 December 2007 – the First Hall of the Civil Court decided to deliver judgment on the preliminary pleas and, as already indicated, dismissed applicant's claims. The court reached its decision after making the following observations:

"During the sitting of the 16 October applicant requested that this court do not give judgement on the preliminary pleas at this stage, and to decide on those pleas together

with the final judgement on the merits. This court however is of the view that it is expedient to consider these preliminary pleas at this stage because, if these pleas are justified, there would be no point in going into a more detailed consideration of the merits of the case.

"**1. *On the plea that the Prime Minister and the Refugee Appeals Board are not proper defendants***

"The defendant in these proceedings is the state, which, in judicial proceedings, is represented by the executive branch. Furthermore, in terms of art. 181B of the Code of Organisation and Civil Procedure, the proper officer to represent the state in proceedings such as the present is the Attorney General. This matter was decided by this court in a judgment delivered on the 15 October 2002 *in re* **Abera Woldu Hiwot *et versus* Prof. Henry Frendo *et nomine***[4]:

""Fil-fehma ta' din il-qorti, il-kawża tallum setgħet issir biss kontra l-Avukat Ġenerali f'isem il-Gvern ta' Malta. Id-dmir illi joħloq l-istrutturi meħtieġa sabiex jitħarsu l-art. 39 tal-Kostituzzjoni ta' Malta u l-art. 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet u l-Libertajiet Fondamentali tal-Bniedem huwa dmir ta' l-istat. Jekk dik l-istruttura mwaqqfa mill-istat tonqos milli twettaq il-ħarsien tal-jeddijiet fondamentali jkun l-istat li jwieġeb għal dak in-nuqqas; it-tribunal innifsu, fl-interess ta' l-indipendenza tiegħu li wkoll hija kwalità meħtieġa għall-ħarsien tal-jeddijiet fondamentali, ma jistax jissejjaħ biex iwieġeb għall-għemil tiegħu.

"Għalhekk kontradittur leġittimu skond id-dispożizzjonijiet ta' l-art. 181B(2) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili huwa l-Avukat Ġenerali f'isem il-Gvern ta' Malta … … …"

"It is evident, therefore, that the Prime Minister and Refugee Appeals Board are not proper defendants and should be non-suited.

[4] Constitutional application nº 25/2002.

"**2. *On the plea that the present proceedings are a disguised appeal from the decision of the Refugee Appeals Board***

"In the view of this court it is evident on the face of the application that, in effect, these present proceedings are an attempt to secure a reconsideration of the decision of the Refugee Appeals Board on the merits.

"Applicant does not agree with the interpretation given by the board of the terms "torture" and "inhuman treatment"; also he does not agree with the conclusions of the board on whether the measures taken by the Egyptian authorities constitute a danger to his life and liberty, and expose him to persecution and discriminatory treatment. However, the board is empowered by law to decide on those matters, and its decision is not subject to appeal, either to this court or to any other authority.

"Therefore, in so far as the application requires this court to reconsider the conclusions of the board on the merits, it is making a request which does not lie within the functions and competence of this court.

"Therefore, the request that this court review the decision of the Refugee Appeals Board on the merits cannot be considered.

"This leaves the question whether art. 7(6), on proceedings *in camera*, and art. 5 and 6 of the Refugees Act, on the method of appointment and removal of members of the Refugee Appeals Board, are in violation of applicant's fundamental rights.

"Although this question does not strictly fall within the ambit of the preliminary pleas, the answer thereto in the view of this court is so obvious, and the allegations made by applicant are so evidently an attempt to grasp at straws, that it should be answered at this stage to avoid unnecessary delays in the proceedings.

"Art. 7(6) clearly says that the sittings before the board are taken *in camera* only "provided all the parties agree thereto". Applicant therefore had a very obvious and very easy remedy under the ordinary law: namely, to withhold his consent.

"Applicant's complaint under this head is very clearly a frivolous one.

"On the matter of the independence and impartiality of the Refugee Appeals Board, it is now settled law that proceedings before the Refugee Appeals Board do not fall within the ambit of the fair hearing provisions of the Constitution and of the Convention. See, on this point, **Mamatkulov and another *v.* Turkey**[5]:

""82. The Court reiterates that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention (see *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X; *Penafiel Salgado v. Spain* (dec.), no. 65964/01, 16 April 2002; and *Sardinas Albo v. Italy* (dec.), no. 56271/00, ECHR 2004-I).

"83. Consequently, Article 6 § 1 of the Convention is not applicable in the instant case."

"For the above reasons, none of applicant's complaints can be entertained at this stage. Accordingly, it is no longer necessary to rule on the remaining preliminary pleas.

"The court therefore declares respondents the Honourable Prime Minister and the Refugee Appeals Board non-suited and dismisses applicant's claims.

"All judicial costs are to be paid by applicant."

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[5] E.C.H.R. 15 December 2004, App. 46827/99 u 46951/99. See also **Abera Woldu Hiwot *et versus* Prof. Henry Frendo *et nomine***, Civil Court, First Hall, 18 November 2004, constitutional application nº 25/2002.

6. By an appeal (drawn up in the Maltese language) filed before this Court – the Constitutional Court – on the 18 December 2007[6] appellant Dr Mohammed Mokbel Elbakry requested that this Court revoke the judgment of the 6 December 2007 and, after dismissing all the pleas of respondents, allow his claims, with all costs for respondents. Respondents, in their reply to the said application of appeal, claim that the decision of the First Hall of the Civil Court is correct and should be upheld.

7. Appellant's grievances are, essentially, two. Regarding the plea that, except for the Attorney General[7], other respondents were not the proper defendants, appellant states that one cannot exclude the possibility that other persons may qualify as proper defendants in a case involving violation of fundamental human rights. It was for this reason that he sued the other defendants. The second grievance is that the first court erroneously allowed the plea that his application was a veiled appeal from the decision of the Refugee Appeals Board. Appellant underscores the fact that that the First Hall of the Civil Court, in its constitutional and "conventional" jurisdiction is obliged in terms of law to decide on alleged violations of fundamental human rights and cannot abdicate "the function entrusted to it by the Constitution and the law". It would be strange, according to appellant, if "the decision...whether the fundamental rights of an individual have been violated or not is taken by a tribunal which in its turn is not bound by those guarantees of independence and impartiality provided for in the law". Moreover appellant contends that the decision of the Refugee Appeals Board "also involves a decision on the fundamental human rights of the applicant, and it necessarily involves a decision on civil rights, and must be taken by an impartial and independent tribunal...". Moreover, the procedure before this Board is of a quasi-judicial nature and this requires respect for the principles of natural justice.

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6 Fol. 1 of the record of appeal.

7 Appellant seems to have ignored the Deputy Prime Minister and Minister for Home Affairs and Justice.

8. The Court, having heard also counsel for the parties, is of the view that the appeal application is manifestly unfounded. It is patently obvious from even a cursory reading of the application of the 31 July 2006 that by this application Dr Elbakry was in reality seeking a reversal of the decision that he did not qualify for refugee status, that is for asylum, and this notwithstanding that the law clearly states that such a decision is not appealable on the merits (see article 7(9) of Cap. 420). This he did in a most curious and roundabout way, that is by alleging that the proceedings before the Refugee Appeals Board violated his right to a fair hearing and, even more strange, his right to freedom of expression. These are the parameters of the application that the First Hall of the Civil Court had before it, and these are the parameters within which this Court – the Constitutional Court – must now determine the appeal. Apart from the fact that, contrary to what is stated in the application of appeal, a decision pursuant to a request for refugee status is not "a decision on the fundamental human rights of the applicant" but merely a decision as to whether there exist the factual circumstances justifying the granting of asylum or some lesser form of protection, there is a string of judgments of the European Court of Human Rights (and of the European Commission of Human Rights before the Commission was merged into the Court) to the effect that proceedings relating to asylum, expulsion and nationality do not involve the determination of "civil rights and obligations" – an expression which, save for the use of a different conjunction which does not in any way alter the significance of the expression, is used both in Article 6(1) of the Convention and in Article 39(3) of the Constitution. Apart from the **Mamatkulov** judgment referred to in the judgment of the first court, one can also refer to the leading case in this respect – decided by a Grand Chamber of the ECHR, which is **Maaouia v. France**. In this judgment, delivered on the 5 October 2000, the ECHR observed as follows:

"35. The Court has not previously examined the issue of the applicability of Article 6 § 1 to procedures for the expulsion of aliens. The Commission has been called

upon to do so, however, and has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention (see, for example, Uppal and Singh v. the United Kingdom, application no. 8244/78, Commission decision of 2 May 1979, Decisions and Reports (DR) 17, p. 149; Bozano v. France, application no. 9990/82, Commission decision of 15 May 1984, DR 39, p. 119; Urrutikoetxea v. France, application no. 31113/96, Commission decision of 5 December 1996, DR 87-B, p. 151; and Kareem v. Sweden, application no. 32025/96, Commission decision of 25 October 1996, DR 87-A, p. 173).

“36. The Court points out that the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols. In that connection, the Court notes that Article 1 of Protocol No. 7, an instrument that was adopted on 22 November 1984 and which France has ratified, contains procedural guarantees applicable to the expulsion of aliens. In addition, the Court observes that the preamble to that instrument refers to the need to take “further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention ...”. Taken together, those provisions show that the States were aware that Article 6 § 1 did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere. That construction is supported by the explanatory report on Protocol No. 7 in the section dealing with Article 1, the relevant passages of which read as follows:

““6. In line with the general remark made in the introduction ..., it is stressed that an alien lawfully in the territory of a member state of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective

remedy before a national authority) of the ... Convention ..., as interpreted by the European Commission and Court of Human Rights ...

“7. Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the ... Convention ... in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and allows such protection to be brought within the purview of the system of control provided for in the ... Convention ...

...

“16. The European Commission of Human Rights has held in the case of Application No. 7729/76 that a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6.”

“37. The Court therefore considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention.

“38. In the light of the foregoing, the Court considers that the proceedings for the rescission of the exclusion order, which form the subject matter of the present case, do not concern the determination of a “civil right” for the purposes of Article 6 § 1. The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention (see, *mutatis mutandis*, the Neigel v. France judgment of 17 March 1997, *Reports* 1997-II, pp. 410-11, §§ 43-44, and the Maillard v. France judgment of 9 June 1998, *Reports* 1998-III, pp. 1303-04, §§ 39-41).

“39. The Court further considers that orders excluding aliens from French territory do not concern the determination of a criminal charge either. In that connection, it notes that their characterisation within the domestic legal order is open to different interpretations. In any event, the domestic legal order's characterisation of a penalty cannot, by itself, be decisive for determining whether or not the penalty is criminal in nature. Other factors, notably the nature of the penalty concerned, have to be taken into account (see Tyler v. the United Kingdom, application no. 21283/93, Commission decision of 5 April 1994, DR 77, pp. 81-86). On that subject, the Court notes that, in general, exclusion orders are not classified as criminal within the member States of the Council of Europe. Such orders, which in most States may also be made by the administrative authorities, constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of Article 6 § 1. The fact that they are imposed in the context of criminal proceedings cannot alter their essentially preventive nature. It follows that proceedings for rescission of such measures cannot be regarded as being in the criminal sphere either (see, *mutatis mutandis*, Renna v. France, application no. 32809/96, Commission's decision of 26 February 1997, unreported).

“40. The Court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention.”

9. More specifically in connection with asylum proceedings, the same court, in **Katani v. Germany** (decided on the 31 May 2001) stated:

“4. Les requérants se plaignent finalement de ce qu’ils n’ont pas bénéficié d’un procès équitable, garanti par l’article 6 § 1 de la Convention dont la partie pertinente se lit ainsi:

« Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal (...), qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »
"D'après les requérants, les juridictions allemandes n'ont pas pris en considération toutes les sources d'informations disponsibles pour évaluer les risques auxquels s'exposent les requérants en cas d'expulsion vers la Géorgie. Elles ont notamment refusé de demander l'avis d'un expert indépendant quant à la situation des yézidies en Géorgie et de tenir dûment compte des rapports que les requérants avaient présentés. En outre, ils se plaignent que la Cour constittionnelle fédérale a décidé de ne pas retenir leurs recours constitutionnels entre autres pour insuffisance de motivation.
"La Cour rappelle que les garanties de l'article 6 de la Convention ne sont pas applicables aux procédures en matière d'asile politique (voir récemment l'arrêt *Maaouia c. France* [GC], n° 39652, §§ 33-40, CEDH 2000-..., confirmant ainsi la jurisprudence constante de la Commission en la matière).
"Il s'ensuit que ce grief de la requête est incompatible *ratione materiae* avec les dispositions de la Convention, au sens de l'article 35 § 3, et doit être rejetée en application de l'article 35 § 4."

10. Reference is also made to the decision of the First Hall of the Civil Court of the 13 July 2007 in the case **Hekmat Mohammed Moatti El Fraie v. L-Onor. Prim Ministru et**, and to the judgments of the ECHR therein referred to. Asylum proceedings under our law are and remain essentially administrative proceedings, and the right granted in sub-article (9) of Article 7 of Chapter 420 to apply for constitutional redress does not mean that those proceedings, whether before the Commissioner or the Board, are proceedings leading to a determination of a civil right or obligation within the meaning of Article 6(1) of the Convention and Article 39(3) of the Constitution.

11. This Court is of the opinion that the first court, on the basis of this constant case-law, should have dismissed the application as merely frivolous in terms of Article 46(5)

of the Constitution and the corresponding provision of Chapter 319. The fact that it did not expressly do so – although this is clearly implied when it stated that the applicant was evidently attempting to grasp at straws – does not preclude this Court from so doing. As to the allegation that by its decision not to grant refugee status the Refugee Appeals Board was somehow becoming party or privy to a denial of the right of freedom of expression of applicant in Egypt, this allegation is equally merely frivolous. It is significant, in fact, that in his application of appeal appellant makes no specific reference to the alleged violation of this right of freedom of expression.

12. Consequently, the First Hall of the Civil Court was perfectly justified in upholding respondents third preliminary plea to the effect that the whole application was merely a veiled appeal on the merits from the decision of the Refugee Appeals Board. For these reasons it is not necessary to consider appellant's first grievance regarding the question of the proper defendant.

13. For these reasons the Court dismisses the appeal and confirms the judgment of the first court. All costs are to be borne by appellant.

< Final Judgement >

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