MALTA

CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. MR. JUSTICE
ANTHONY ELLUL

Sitting of the 2 nd August, 2012

Referenza Kostituzzjonali Number. 49/2012

The Police

Vs

Austine Eze and Osita Anagboso Obi

On the 20th June 2012 the Court of Magistrates (Malta) as a Court of Criminal Inquiry, following a request by Osita Anagboso Obi, ordered:-

"That the constitutional issue raised by accused be referred to the First Hall of the Civil Court in its Constitutional Jurisdiction so that the said Court decides whether there has been violation of art 34 and 39(1) of the

Constitution of Malta and Articles 5 and 6 of the European Convention of Human Rights due to the fact:

1. That the accused is being deprived of his freedom by the fact that he is unable to pay the bail bond odered by this Court when granting him bail on the 2nd May, 2011, which Court order was subsequently amended by the decree of 13th June 2011 and the 21st November 2011.
2. *That the case is bot being tried by the Court in a reasonable time according to law due to the fact that the Prosecution has requested the Court to hear evidence by Letters Rogatory at a late stage in the proceedings."*.

On the 25th July 2012 the Attorney General and the Commissioner of Police filed a reply:-

"the respondents rebut the above mentioned allegations and claims of the accused Osita Obi Anagboso as manifestly factually and legally unfounded in that there is no breach of his fundamental human rights in terms of the European Convention as being alleged by him for the following reasons which are hereby being listed without prejudice to one another:

Respondent opposes any claims and allegations by the accused that he is being deprived of his freedom by the fact that he is unable to pay the bail bond ordered by this Court when granting him bail on 2nd May 2011, which Court order was subsequently amended by the decree of 13th June 2011 and 21st November 2011. It results that the Court of Magistrates as a Court of Criminal Inquiry which is the competent Court to decide on the issue of bail decided that bail shall be granted to the accused provided that the accused adheres to certain conditions *in terms of Article 576 of the Criminal Court. It must be stated that in the particular circumstances of this case the Prosecution objected to the grant of bail. However, the competent Court was correct in imposing as one of the conditions for the grant of bail, the payment of a deposit of (€6000) six thousand Euros as a deterrent to ensure that*

the accused appears for trial and does not abscond from the administration of justice in view of the fact that:

(i) the accused used the services of a private advocate thus it is obvious that he has effected payment for such a service throughout the proceedings of the pending serious charges against him concerning money laundering;
(ii) the accused does not reside in Malta and he came to Malta solely on the occasion to commit the crime therefore he has no ties with our Islands thus the probability that he absconds once he is granted bail is very high;
(iii) the accused who holds a Nigerian passport is being investigated by the German authorities on drug trafficking where he previously used to reside, so if he absconds from Malta the probability is that he absconds to a non EU Member State where the Prosecution would be placed in the impossibility of tracing the accused and requesting his extradition since no Police co-operation agreements exist with such countries.

Thus, with all due respect, the imposition of a deposit of €6000 by the competent Court as a deterrent is definitely not in breach of the accused's fundamental human rights.

(III) The accused's allegations of breach of his fundamental human rights under the European Convention due to the fact that allegedly he is not being tried by the Court in a reasonable time according to law since the Prosecution allegedly requested the Court to hear evidence by Letters Rogatory at a late stage in the proceedings are also unfounded due to the following reasons:

Respondents deny that the case is not being tried by the Court in a reasonable time due to the fact that the Prosecution requested the Court to hear evidence by Letters Rogatory at a late stage in the proceedings. In fact, the Court of Magistrates as a Court of Criminal Inquiry allowed the request of the Prosecution for Letters Rogatory in terms of Article 399 of Cap 9 on 28th September 2011 and the Defence only objected to such

Letters Rogatory two months after the Prosecution filed its request. Moreover, it results from the criminal proceedings that as a result of the Defence's subsequent objection, the Inquiring Magistrate requested the advice of the Attorney General as to whether the evidence was indispensable or otherwise as was being claimed by the Defence.

In fact, the reason why the Prosecution made the request after the expert appointed by the Court Mr Martin Bajada filed his Report is legally justified, that is, to avoid having to file an additional request for Letters Rogatory on any findings included in the said Expert's Report. Moreover, the Prosecution and the Attorney General are not responsible in any manner for any delays by the foreign competent authorities to reply to such Letters Rogatory and the respondents had been consistently enquiring with the foreign competent authorities abroad as to the state of execution of the Letters Rogatory. In fact, it results that the only outstanding replies to said Letters Rogatory are from the United Kingdom competent authorities. In the respondents humble opinion, the accused is objecting to the replies of the Letters Rogatory since certain evidence which could eventually result from same could possibly be prejudicial to the accused, that is, the outcome of the assets that the accused might hold in various Banking Institutions would be confiscated in favour of the Maltese Government in the event of the conviction of the accused.

(IV) It is also imperative to point out that the accused admitted blatantly his guilt to the Police in a statement wherein he refused the assistance of an advocate, after he was caught in flagrante *at Malta International Airport about to board a flight to Spain with a substantial amount of money, that is, [€31,492] thirty-one thousand, four hundred and ninety-two Euros which were found in his luggage. In the said statement he admitted being involved in money laundering for the scope of drug trafficking.*

(V) Respondents reserve the right to make further pleas, if the need arises.

That for the above-mentioned reasons and in view of the particular circumstances in this case, there is no breach of fundamental human rights of the accused of the European Convention;

Therefore, the respondents respectfully request this Honourable Court to reply to the Constitutional Reference made by the Honourable Court of Magistrates (Malta) as a Court of Criminal Inquiry of 20th June 2012 by dismissing all of applicant's allegations and claims, with costs against same applicant.".

From the records of the criminal proceedings it transpires that:-

i. Osita Anagboso Obi was arrested on the 11th March 2010.
ii. On the 13th March 2010 he was arraigned and charged with having committed acts of money laundering, as defined in Article 2 of the Prevention of Money Laundering Act (Chapter 373 of the Laws of Malta)[1]. He was remanded in custody and to date is still in detention.
iii. By application filed on the 18th March 2011[2] he requested bail. An identical request was made by application filed on the 29th April 2011[3].
iv. On the 2nd May 2011 the court granted bail under certain conditions, amongst which was a deposit of €10,000 and €10,000 guarantee.
v. On the 10th June 2011 he filed another application[4] requesting the court to reduce the €10,000 deposit due to his financial means.
vi. On the 13th June 2011 the court reduced the deposit to the sum of €7,000 and a guarantee of €15,000[5].
vii. He filed another application on the 17th November 2011 requesting the court to reduce the

[1] In case of guilt a person is liable to a fine up to €2,329,373.40 or imprisonment for a period not exceeding 14 years, or to both.
[2] Fol. 879.
[3] Fol. 953.
[4] Fol. 1044.
[5] Fol. 1046.

deposit[6]. The court upheld his request by a decree delivered on the 21st November 2011[7], and reduced the deposit to €6,000.

viii. A further application was filed on the 25th January 2012 whereby the accused requested the court to further reduce the sum to be deposited in court[8]. The Attorney General objected to the request since the court had already revised the amount and due to the fact that the accused had no connection with Malta. On the 30th January 2012 the court denied the request.

Complaint with regards to his detention.

Article 5(3) of the European Convention provides:-

"Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.".

It is evident that the point at issue is not whether Osita Anagboso Obi should be granted bail, since this was granted on the 2nd May 2011. Unfortunately he is still in detention as he claims that he does not have the sum of €6,000 to deposit in court. As a matter of principle, *"Where the danger of absconding can be avoided by bail or other guarantees, the accused must be released, and there is an obligation on the national authorities to consider such alternatives to detention. Moreover, in those countries which have the system of bail on financial sureties, the amount of the sureties must not be excessive, and must be fixed by reference to the purpose for which they are imposed, namely to ensure that this particular defendant appears for trial. The sum must never be set exclusively by reference to the seriousness of the charge without considering the accused's financial*

[6] Fol. 1227.
[7] Fol. 1233.
[8] Fol. 1236.

circumstances." (*The European Convention on Human Rights*, Jacobs, White, & Ovey[9]).

There is no doubt that the bail conditions imposed by the court are intended to serve as a deterrent to the accused from absconding. The accused has absolutely no ties with Malta. On the 10th March 2010 he arrived in Malta, on his first visit, and was supposed to leave the day after. In fact he was arrested at the Malta International Airport.

The Constitutional Court, in the case **Richard Grech vs Avukat Generali[10]** held:

"*L-ewwel Qorti wara li ghamlet referenza ghall-principji stabbiliti mill-Qorti Kostituzzjonali fir-rikors fl-ismijiet* ***Carmel Mifsud et v. Onor. Prim Ministru*** *deciz fl-10 ta' Lulju 1990 u r-rikors Kostituzzjonali fl-ismijiet* ***Mario Pollacco v. Kummissarju tal-Pulizija et*** *deciz fis-6 ta' Ottubru 1999, sahqet li meta tigi fissata l-garanzija pekunjarja, il-Qorti trid thares ukoll lejn il-mezzi finanzjarji tal-imputat u ta' dawk il-persuni li jistghu joffru li jghinu lill-imputat, ghax altrimenti jigi daqs li kieku ma jkunx inghata l-liberta' provvizorja xejn."*.

Absconding from Malta can only be by sea or air. The Constitutional Court, in the case **Kolakovic Jovica vs Avukat Generali[11]**, agreed with first court that:-

"At this juncture, this Court, whilst not oblivious to the reality emerging in some spectacular cases in the past, feels that it ought to subscribe to the view held recently by the Strasbourg Court to the effect that it is hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have at their disposal measures other than the applicant's protracted detention (vide ***Louled Massoud v. Malta****, ECHR 27th July 2010). Nor should the authorities' inability to adequately monitor movements into and out of*

[9] Oxford, Fifth Edition (2010) page 223.
[10] 28th May 2010.
[11] 14th February 2011.

Malta be shifted as a burden of denial of release from detention on a person accused of an offence, particularly if such a person is of foreign nationality".

In all applications requesting the reduction of the sum to be deposited, the accused claims that his financial circumstances do not permit the deposit of the money. The Attorney General always objected to the request. From the records of the criminal proceedings there is no record whether any information was requested to assess the financial circumstances of the accused.

This Court has no doubt that had the accused's financial position permitted him to deposit this sum or had it been possible to bring forward a third party who is prepared to help him, he would have immediately done so. A conclusion based on the fact that:-

i. €6,000 is a minimal amount when one considers that the deposit would mean no further pre-trial detention.
ii. Osita Anagboso Obi has been in custody for more than twenty eight (28) months.

In the court's opinion the repercussions which the accused would face if he absconds from Malta while the trial is still pending, serve as a more effective safeguard than the deposit of €6,000. This more so in view of the fact that he has strong family ties in Germany where he has lived for many years, has a partner and two children. From the records of the proceedings it appears that complainant's travelling documents have been exhibited in court. This makes his departure from Malta more difficult. If the complainant decides to leave Malta in breach of the bail conditions, a European Arrest Warrant will be issued and he will be brought back to Malta.

If what the accused stated in the statement he signed on the 12th March 2010[12], is true, that is that he was acting as a courier for €31,500 and got into all this trouble for €500, then he is truly in dire straits.

[12] Fol. 54.

Having heard the complainant testify, the court does not have reason to doubt that he is saying the truth that he does not have the sum of €6,000 to deposit in court. Obviously in similar circumstances there is not much one can do but to decide on what the accused states. It is up to the court to consider whether his statement of facts is credible. The court cannot expect the accused, a foreigner non-resident who has been in detention for more than 28 months, to produce evidence that corroborates his claim that he has no assets in Germany or in his country of origin that could be transferred to Malta to effect payment. What is certain is that he has no assets in Malta[13].

The fact that the accused is not making use of the legal aid service does not mean that he lied when he declared that his financial circumstances do not permit the deposit of €6,000. The court has no idea of what type of agreement he has with his defence counsel with regards to the payment of professional fees. An accused has every right to choose a lawyer of his own choice. Furthermore, there is no evidence that Obi is being investigated by the German authorities with regards to drug trafficking[14], and this claim is irrelevant for the purposes of this judgment. Although it is true that the accused has no ties with Malta, the court does not agree that the deposit of €6,000 is essential to deter the accused from absconding from Malta. Objectively, the forfeiture of such a small amount of money would certainly not be one of the considerations a person would make in taking such a risk. This more so when you consider that he has been in detention for more than 28 months, and taking into account that there is no certainty as to when the criminal proceedings will be concluded. In fact on the 24th September 2011 the court declared:-

".....after having seen Section 402(1)(c) of Chapter 9 of the Laws of Malta order that the time limits for the conclusion of the inquiry shall be held in abeyance until

[13] Vide report compiled by Dr Anthony Cutajar.
[14] Vide arguments made by the Attorney General in the reply filed on the 25th July 2012.

the Letters Rogatory are filed and puts off the case for the 9th November 2011.".

In the court's opinion insisting that the complainant deposits the sum of €6,000 under the prevailing circumstances is tantamount to denying him release, a fundamental right under Article 5(3) of the Convention. In the circumstances there is no need to consider whether there is also a breach of Article 34 of the Constitution.

Therefore the requirement that Obi deposits the sum of six thousand euro (€6,000) is unjustly depriving him from his right to be released pending his trial, and therefore is in breach of Article 5(3) of the European Convention.

Complaint of lack of a trial within a reasonable time.

The right to a fair trial derives from Article 39 of the Constitution and Article 6 of the European Convention.

The criminal proceedings have been pending since the 13th March 2010, the date of arraignment of the complainant. What time is reasonable is assessed by a cumulative test involving three main criteria:-

i. The nature and complexity of the case;
ii. The conduct of the applicant;
iii. The conduct of the authorities;

Complainant is co-accused. As a matter of principle the charge of money laundering is complex to prove, although in his reply the Attorney General seems to be convinced of the complainant's guilt[15]. However, in the case **Abdoella v the Netherlands**, 25th November 1992, the court held that *"perons held in detention pending trial are entitled to special diligence on the part of the competent authorities"*. Similarly in Kalashnikov v Russia the Court

[15] "*...the accused admitted blatantly his guilt to the Police in a statement wherein he refused the assistance of an advocate, after he was caught in flagrante at Malta International Airport about to board a flight to Spain with a substantial amount of money, that is [€31,492]…. In the said statement he admitted being involved in money laundering for the scope of drug trafficking."*.

observed: *"…throughout the proceedings the applicant was in custody – a fact which required particular diligence on the part of the courts dealing with the case to administer justice expeditiously."*. From the records it would seem that proceedings have been delayed after the court authorized the request made by the prosecution to hear witnesses in the United Kingdom, Netherlands and Germany. According to Article 399 of the Criminal Code the letter of request is to be upheld solely where the court decides that the witness is ***"indispensably necessary"***. Unfortunately the court decree delivered on the 28th September 2011 does not contain any reasons that led the court to uphold the prosecuting officer's request. In this court's opinion the court should give reasons that motivate the decision of considering the witnesses as *"indispensably necessary"*. In terms of Article 402 of the Criminal Code, such an order brings about the indefinite suspension of the court proceedings. There is no doubt that after the court order of the 28th September 2011, it is not within the control of the local authorities as to when the replies are received.

From the record of the criminal proceedings it transpires that on the 29th March 2010[16] the court ordered the closure of the inquiry and stated that *"there are sufficient grounds for the trial of the person/s charged on indictment"* and sent the complainant to trial before the competent Court. Under our legal system this is the point where the *"yo-yoing"* commences between the Attorney General office and the court by application of Article 405 of the Criminal Code. Unfortunately, as the law stands there is no certainty as to how long this stage of the proceedings will take, and it appears that the court conducting the inquiry has limitede control over its duration.

In the case under review the records of the inquiry were sent back to the court by the Attorney General's office on the 5th May 2010[17], 5th July 2010[18], 19th August 2010, 9th

[16] Fol. 82.
[17] Fol. 87.
[18] Fol. 101.

November 2010, 14th January 2011[19], 2nd February 2011[20], 5th April 2011[21], 31st May 2011[22], 14th July 2011[23], 30th August 2011[24]. Since the arraignment (13th March 2011), various witnesses have been heard by the court. Sittings when witnesses were heard are the following: 29th March 2010, 19th July 2010, 21st July 2010, 27th October 2010, 26th January 2011, 9th March 2011, 21st March 2011, 2nd May 2011, 13th June 2011 and 2nd August 2011. From what Inspector Raymond Aquilina stated during the sitting held on the 25th July 2012, all that remains to be done, from the prosecution's end, relates to the information requested from the foreign countries. The court would like to make a brief comment on the report filed by Dr Martin Bajada. Both accused declared that they did not object to his appointment. Dr Bajada was appointed by court orders dated 27th July 2010 and 27th October 2010 to extract information from seized movables which included laptops, four hard disks, a pen drive and mobile phones. He filed his report on the 2nd August 2011. The court appreciates that Dr Bajada is literally flooded with similar appointments and has a considerable workload, however it is up to the courts to adopt alternative measures. Although it might not be that easy to have a group of people who are willing to do this type of work, an attempt is essential. On reading the report, the court has no doubt that its compilation should not have taken more than a few weeks. In the documents attached to the report it results that the information from the mobile phones was extracted in July 2011, which confirms the concern expressed by the court. From the contents of the report it is evident that all data was extracted by the use of forensic software which certainly makes the procedure faster. During the 16 months from date of arraignment all the prosecution's evidence was heard, with the exception of the evidence which has been requested from abroad.

[19] This was due to the fact that the sitting scheduled for the 15th December 2010 was not held due to a bomb threat, a problem which is persistantly creating unnecessary obstacles.
[20] Fol. 829.
[21] Fol. 952.
[22] Fol. 1043.
[23] Fol. 1119.
[24] Fol. 1222.

Under the prevailing circumstances a period of 16 months is reasonable. Although it is not contested that *"…it is for the Contracting States to organize their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable time in the determination of his civil rights and obligations."*[25], one has also to consider the considerable workload that each court has.

However the reference made by Court of Magistrates (Malta) as a Court of Criminal Inquiry is limited to the complaint on the lack of a trial within a reasonable time ***"…due to the fact that the Prosecution has requested the Court to hear evidence by Letters Rogatory at a late stage in the proceedings."***[26], and this is the issue that this court has to decide upon.

From the records of the proceedings there is no indication of the reason that led the Police to request that evidence from abroad is sought. Therefore it is impossible for the court to comment on whether such witnesses were *"indispensably necessary"*. The request was made during the sitting of the 28th September 2011. No explanation has been given as to why the prosecution made such a request more than 18 months after the date of arraignment, although the co-accused did not object to the request. It is common knowledge that some time will elapse prior to the transmission of the evidence from abroad. In the court's opinion ten (10) months for the requested parties (members of the European Union) to provide the information, is too long. In the records there is a reply that was sent by the Prosecution Service of the Netherlands dated 3rd May 2012 that confirmed that no records were retrieved in the police or justice system of the co-accused. In the case **Messina v Italy**, the European Court held that *"in view of the nature of the charges preferred against the applicant, the Court accepts that the judicial authorities must have encountered some difficulties linked to the number of persons to be*

[25] **Frydlender vs Frane** 27th June 2000.
[26] Order dated 20th June 2012.

questioned and the number of witnesses to be heard ***as well as to the need for evidence to be taken on commission."***[27]. Unfortunately there is no evidence whether during the past ten (10) months the Attorney General's office has tried to expedite matters with the foreign authorities in order to ensure that the requested information is transmitted without further delay. Although the local authorities have limited control as to when the information is sent by the requested State, they have a positive obligation to pursue the matter in a reasonable manner, more so where a person is in pre-trial detention, is a foreigner and not resident in Malta. The court would have expected that through Eurojust[28], which serves as a go-between for the transmission of rogatory letters, such matters are dealt with swiftly and expeditiously. It is essential that in this case and similar cases, the court is frequently informed of what is going on and whether explanations have been given by the foreign authority as to what is causing the delay. Furthermore, documents should be filed which prove that the matter is being pursued with the foreign authorities, including any response received from abroad. It is not enough for the prosecuting officer to attend the sitting and simply state that the information has as yet not been received. The explanation should also be recorded in the proces verbal of the sitting. A sitting was held on the 25th July 2012 in the criminal proceedings. In the proces verbal of that sitting it is stated that the prosecuting officer informed the court that the information from the United Kingdom has not been received, and the case was adjourned for the sitting of the 17th September 2012. In the court's view this is not sufficient. Undoubtedly courts have an obligation to intervene when necessary to expedite proceedings so as not to jeopardize the effectiveness and credibility of the administration of justice.

[27] 2nd February 1993.

[28] Under Article 85 of the Lisbon Treaty its mission is defined as *"to support and strenghten coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States."*.

Notwithstanding the court is of the opinion that the fact that the request was made after the prosecuting officer produced all evidence that was in Malta, in itself was not the cause for undue delay. One would have reasonably expected that within the European Union, each member state who receives a similar request performs his obligations within a short time. Under these circumstances the court does not agree that the complainant's right to a fair trial within a reasonable time has been breached simply because the request for letters rogatory was not made at an earlier stage of proceedings.

The court therefore decides as follows:-

1. The condition that Osita Anagboso Obi deposits the sum of six thousand euro (€6,000) is, under the circumstances, in breach of Article 5(3) of the European Convention.
2. The court orders that the bail conditions are not to include a deposit of money by Osita Anagboso Obi.
3. Rejects Osita Anagboso Obi's claim that his right to a fair trial within a reasonable time as guaranteed by Article 39 of the Constitution and Article 6 of the European Convention has been breached for the reason mentioned in the order dated 20th June 2012. However the court advises the Court of Magistrates (Malta) as a Court of Criminal Inquiry to immediately take appropriate measures to establish:-
i. What is the reason for the delay by the United Kingdom to forward the replies to the request, and if necessary to establish direct contact with the judicial authorities in that country.
ii. What measures have been taken and are being taken, if any, by the Attorney General to have matters expedited by the requested State/s, and to give any order it deems appropriate to ensure that the Attorney General is diligently pursuing this matter with the foreign authorities.

Expenses are to be incurred by the Attorney General and the Commissioner of Police.

The court orders that a copy of this judgment is immediately sent to the Court hearing the case The Police vs Austine Eze et.

< Final Judgement >

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