



**CIVIL COURT
FIRST HALL**

**THE HON. MR. JUSTICE
JOSEPH R. MICALLEF**

Sitting of the 22 nd October, 2013

Citation Number. 511/2013

Sadek Mussa **ABDALLA**

VS

BORD TAL-APPELLI DWAR IR-RIFUĠJATI u l-Avukat
Ġenerali

The Court:

Having taken cognizance of the Sworn Application filed by Sadek Mussa Abdalla on the 29th of May, 2013, by virtue of which and for the reasons therein mentioned, he requested that this Court (a) declare that (i) he has a right to appeal from a decision which rejected his claim for subsidiary protection status as a form of internationally-

recognised protection, and that (ii) either the decision handed down by the defendant Refugees Appeals Board on November 23rd, 2012, from a decision by the Refugee Commissioner in his regard denying him asylum was the result of a wrong interpretation of the law, or (iii) that Maltese law is not in conformity with the requirements of article 39(1) of Council Directive 2005/85/CE of December 1st, 2005 regarding minimum procedural standards in Member States for granting and withdrawing refugee status; (b) declare that, in the present case, the defendant Board failed to observe the principles of natural justice and procedural obligations when determining his case for the purposes of regulation 9(2) of the Procedural Standards in Examining Applications for Refugee Status Regulations 2008 (Legal Notice 243 of 2008; S.L. 420.07) and generally in terms of the principles upheld in the Maltese legal system; (d) consequently, quash the decision handed down by the defendant Board as aforesaid; and (d) otherwise remit the matter to the defendant Board to reconsider the merits of his application and otherwise to grant him any other remedy which the Court may deem expedient to grant in the circumstances. Plaintiff requested also payment of costs;

Having seen its interlocutory decree of the 6th of June, 2013, whereby it ordered service of the Application on the defendants and gave orders to the plaintiff as to the production of evidence on his part;

Having taken cognizance of the Sworn Reply filed by defendants jointly on July 1st, 2013, whereby, by way of preliminary pleas, they claimed that plaintiff's action cannot be raised against the defendant Board by a person aggrieved by a decision handed down by it since no action lies against a quasi-judicial tribunal in that respect. Furthermore, the present action is procedurally null and void in terms of article 7(9) of Chapter 420 of the Laws of Malta which provides that the decision of the Board shall be final and conclusive and shall not be enquirable by any Court, since the present action is neither based on an alleged breach of a fundamental right in terms of article 46 of the Constitution nor on an alleged breach of a

fundamental right protected under article 4 of Chapter 319 of the Laws of Malta. Defendants then proceeded to raise pleas on the merits;

Having ruled by decree made during the hearing of July 11th, 2013, on a request to that effect by counsel to plaintiff, that all proceedings of this case would henceforth be conducted in English;

Having also directed that, before proceeding any further, the Court will hear submissions on the defendants' first two preliminary pleas, and that such submissions were to be made in writing within established time-limits;

Having seen the Note of Submissions filed by respondents on August 12th, 2013¹, relating to the said preliminary pleas;

Having seen the Note of Submissions filed by plaintiff on September 27th, 2013², in reply to those of defendants;

Having examined all the relevant documents in the records of the case;

Having put off the case for to-day's hearing for judgment on the said preliminary pleas;

Having Considered:

This is an action for judicial review. Plaintiff is aggrieved by a decision handed down by the defendant Refugees Appeals Board on November 23rd, 2012, from an appeal lodged by him against a decision made by the Refugee Commissioner on October 8th, 2011 which refused applicant subsidiary protection status. Plaintiff's case rests on the claim that the defendant Board did not adequately motivate its decision by giving the reasons which led it to reject his appeal. He claims that this is in

¹ Pgs. 55 – 8 of the records

² Pgs. 60 – 7 of the records

violation of the express provisions of the law regarding administrative tribunals in general (article 3(h) of the Administrative Justice Act, Chapter 490 of the Laws of Malta) as well as the law relating to refugee applications in particular (regulation 9(2) of Legal Notice 243 of 2008). Secondly, he claims that the impugned decision is based on a wrong interpretation of the law leading to an incorrect application thereof;

Defendants raised two preliminary procedural pleas to plaintiff's action. Firstly, they plead that the defendant Board has no legal standing as defendant, being an administrative tribunal. Secondly, they plead that the action is null as the law (article 7(9) of the Refugees Act, Chapter 420 of the Laws of Malta) declares that, unless there is a claim alleging a breach of a fundamental human right under either the Constitution or under the European Convention on Human Rights Act, no action lies before any court of law from a decision handed down by that Board, nor may a further appeal from any such decision be lodged. They also raised other pleas on the merits. But these are not of any relevance at this juncture;

This judgment will deal with the said two preliminary pleas in the order that they have been raised;

The relevant facts which emerge from the records of the case show that plaintiff hails from the Sudan and was born there in 1991. He landed in Malta on April 8th 2011 after a voyage by sea from Libya. Some time after his arrival on the Island, he requested asylum on the basis of persecution he had been subjected to in the Darfur Region. Plaintiff's request was turned down by the Refugee Commissioner six (6) months later, for the reasons therein stated³ with a recommendation being made to the Minister of Justice and Home Affairs that the request be rejected⁴. A copy of this recommendation was served on plaintiff, informing him also of his right to lodge an appeal;

³ Dok "SMA1", at p. 10 of the records

⁴ Dok "SMA2", at p. 11 of the records

Plaintiff duly appealed to the defendant Refugees Appeals Board (hereinafter referred to as “the Board”) on March 16th, 2012, by filing a detailed and profusely motivated application reiterating his request that he be granted refugee status in Malta or, failing this, that he be granted at least subsidiary protection on the grounds that he would face serious harm in terms of article 17 of the Refugees Act were this protection not be accorded to him⁵;

The Board unanimously rejected the appeal by a decision handed down on November 23rd, 2012⁶, but went on to state that the present circumstances surrounding the plaintiff could avail him of “some other form of asylum protection” which was, however, beyond its remit. A copy of that decision was served, amongst others, on plaintiff’s legal counsel;

Plaintiff filed this action on May 29th, 2013;

The Court’s legal considerations relating to the pleas under examination have to focus upon the issue of jurisdiction. It is precisely because of this prevailing procedural aspect that the Court had ruled that, before proceeding any further to examine the merits, it had to rule on the validity or otherwise of the said pleas. By virtue of the first plea, the defendant Board raises the question of its standing as the proper defendant to the plaintiff’s action; whereas under the second plea, the defendants submit that decisions by the Board, being final, are subject to no review or appeal by any court at law, unless the grievance amounts to an allegation of a breach of a fundamental human right;

Regarding **the first preliminary plea as to whether the Board is a proper defendant** to the plaintiff’s action, the main drift of the defendants’ argument relies on the fact that, in an action for review, the adjudicating tribunal or board which pronounce or hand down a decision is not

⁵ Dok “SMA3”, at pp. 13 – 29 of the records

⁶ Dok “SMA4”, at pp. 39 – 40 of the records

itself either actionable nor is it a proper defendant. Defendants rely on case-law to buttress their argument;

Plaintiff counters by stating that the remedy he is seeking makes it imperative that he cites the quasi-judicial organ which handed down the very decision which he now seeks to have this Court review. He furthermore argues that the law of procedure has not been rendered any clearer by the introduction of the special provisions on representation of the Government and organs of State in 1995 as to who shall be deemed to be representative of the State as regards boards or other quasi-judicial organs. He, therefore, holds that the Board is indeed a proper defendant and supplements his argument by quoting English judgments;

The Court understands that the plea under review does not purport to deny its competence in reviewing any decision of the defendant Board: what the plea raises in the issue of whether the Board itself can be sued in an action of review of this kind, in other words, whether it is a proper defendant in the type of action filed by the plaintiff. As to the former, the Court would not hesitate to state that such a plea is unfounded; as to the latter, it is very arguable. In this present case, the plaintiff would be excused to argue that, unlike the situation in the vast majority of cases, the proceedings before the Board are not “adversarial”, in the sense that the issue or matter is not a contention between two or more parties to the case. In proceedings before the Board, there is no “adversary” to the applicant for refugee status or any other subsidiary status. But this should not be a criterion on the correctness or legitimacy of suing an adjudicating or quasi-judicial tribunal directly in an action of review;

The Court finds that the plea is well-founded, in so far as the Board’s *locus standi* is concerned. Although plaintiff is impugning the defendant Board’s decision, the Board itself cannot be cited as defendant in such an action. The Board – in its function as a quasi-judicial tribunal – enjoys the same protection accorded to ordinary courts in accounting for the exercise of their judicial functions,

unless it can be shown that such tribunal or board has acted in a fraudulent manner⁷. This is not to say that the exercise of those functions is not subject to judicial scrutiny: it means that those tribunals themselves may not be cited in proceedings. This protection is extended to the persons who sit on such tribunals⁸, although in certain cases this immunity is lifted where it transpires that they have acted in breach of the procedures set up at law for that particular tribunal, or where such person has acted in a discriminatory manner or where the actions of such person amount to a breach of the aggrieved party's fundamental rights. The reasoning behind such an immunity lies in guaranteeing the independence they require to exercise their judicial functions, rather than in providing them with a preferential privilege. This means that for an action of judicial review relating to a decision of such an administrative tribunal or quasi-judicial board, the action has to be filed against the proper person whom the State has ordained to stand in its name in judgment in similar cases. This person is, in terms of Maltese Law, the other defendant in this case, namely the Attorney General;

This position has persisted even after the introduction in 1995 of the procedural provisions relating to judicial representation in matters of judicial review of quasi-judicial tribunals and the application of this principle has received consistent judicial backing without fail⁹;

The Court is not convinced of plaintiff's argument in this regard, and the fact that in some cases involving refugees the plea was not raised by and cases proceeded against the defendant Board does not overrule a procedural rule that has to date stood the test of time. This is so because the issue of the proper defendant in litigation is a matter of public policy and is a plea peremptory of the action, may be raised at any stage of the proceedings (even at an

⁷ Civ. App. 7.8.2013 in the case *Gatt Tarmac Ltd vs Kunsill Lokali ta' Victoria (Ghawdex) et*

⁸ Civ. App. 13.2.1997 in the case *Mallia noe et vs Debono et* (Kollez. Vol: LXXXI.ii.262)

⁹ Cfr, for example, First Hall PS 16.6.2003 in the case *Power Projects Ltd vs Stephen Agius et* (not appealed)

appellate stage) and could be raised by the Court of its own motion (*ex officio*)¹⁰;

However, the fact that plaintiff's action cannot proceed against the Board shall in no way impair its validity against the Attorney General as the other defendant. As a matter of fact, in no part of the submissions did the Attorney General raise the argument that he, too, was non-suited. The provisions of article 181B of the Code of Organisation and Civil Procedure would, in any case, have made short shrift of any such argument, had it been raised;

For the above-mentioned reasons, the Court upholds the defendant Board's first plea and declares the said Board to be non-suited to stand as defendant in plaintiff's action. But holds that the action for review may proceed against the other defendant the Attorney General as a proper defendant;

Regarding **the second preliminary plea as to whether the Court can review the Board's decision**, defendants rely on the wording of article 7(9) of the Refugees Act¹¹ which 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*". In their note of submissions¹², they clarified that their plea was not to be construed as an outright preclusion of this Court's power to exercise its function to review the Board's actions and decisions. They state that the second request of plaintiff's action is actually tantamount to a request for this Court to take up the merits of his appeal from the Commissioner's decision afresh and to exercise the functions which the law reserves to the Board. This is all apart from the fact that there lies no action for review on the basis of the wrong application of

¹⁰ Civ. App. 29.1.1997 in the case *Carmela Bonanno pro et noe vs A.I.C. Carmelo Bonanno et* (unpublished)

¹¹ Act XX of 2000 (Chapter 420 of the Laws of Malta)

¹² § 6 at p. 56 of the records

the law by an administrative judicial tribunal. Furthermore, they submit that since plaintiff's action does not allege a breach of any of his fundamental human rights, the provisions of article 7(9) of the Act provide an insurmountable obstacle to the sustainability of his action;

On his part, plaintiff avers that his action for review is well founded and correct. He emphasizes that his requests lie on two specific complaints – both of which are matters about which a Court may exercise its powers of judicial review. These complaints are (i) breach of a principle of natural justice, and (ii) improper application of the law. He supplements his arguments by copious references to decided judgments;

The Court considers this plea to be unfounded and indefensible. A proper reading of the plaintiff's requests and the premises leading to them manifestly shows that he is not asking this Court to convert itself into the Board and reconsider the merits of his appeal afresh. His action is one alleging a breach of the Board's duty to observe a rule of natural justice – that of giving a reasoned decision – as well as requesting a finding that either the Board applied the law wrongly in its decision or else the law as applied falls short of what the Directive on which it is based prescribes;

The competence of this Court to exercise its power to review decisions of the Board is tried and tested and has been affirmed even with regard to a plea relating to article 7(9) of the Act¹³. The power of the Court to review an administrative tribunal's decision arises wherever such tribunal has exceeded its jurisdiction, or where it has failed to strictly observe the rules of natural justice¹⁴. In the latter instance, it has been said that a breach of any of these rules is enough to give this Court the power to

¹³ Cfr. P.A. RCP 30.11.2010 in the case *Teshome Tensea Gebremariam vs Bord tal-Appelli dwar ir-Rifuġjati et* (preliminary judgement where, incidentally, plaintiff withdrew his action against the defendant Board) and Civ. App. 5.4.2013 in the case *Saed Salem Saed vs Bord tal-Appelli dwar ir-Rifuġjati et*

¹⁴ Civ. App (Inf.) PS 19.5.2004 in the case *Joseph Debono vs Phonica Systems Ltd.*

review, in spite of any legal provision purporting to limit or exclude such power¹⁵;

This Court understands that proceedings relating to requests for the granting of refugee status or asylum should be as expeditious as possible and not hampered by cumbersome or lengthy procedures which could drag on indefinitely. Nevertheless, in spite of the rather sweeping wording of article 7(9), the Court is fully convinced that not even the legislator had in mind granting such unfettered immunity to the Board as would make it unaccountable for breaches which, in the case of other administrative tribunals, ground an action for judicial review. A proper construction of the provisions of article 7(9) cannot therefore uphold an immunity from judicial scrutiny for the very breaches which plaintiff, in this case, alleges;

Furthermore, it may be argued that breaches of any of the recognized rules of natural justice are, in essence, breaches of a right to a fair hearing as upheld in the relative provisions of Chapter IV of the Constitution as well as article 6 of the Convention. This would make the exception referred to in article 7(9) itself applicable to empower this Court to exercise its review functions;

The Court cannot, therefore, uphold the defendant Attorney General's second plea as proposed and will be rejecting it;

The Court therefore decides and rules that:

It **upholds the first preliminary plea** and declares the defendant Refugees Appeals Board non-suited, with costs against plaintiff; but rejects the said plea as regards the other defendant, the Attorney General, who is the proper defendant; and

¹⁵ Civ. App. 27.6.2008 in the case *Charles Mattocks vs Dr. Anthony Gruppetta noe et*

Informal Copy of Judgement

It **rejects the second preliminary plea** as untenable at law, with costs against the Attorney General, and orders that the case proceed on the merits.

< Partial Sentence >

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