MALTA

CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

HON. MR. JUSTICE
GIANNINO CARUANA DEMAJO

Sitting of the 6 th December, 2007

Rikors Number. 43/2006

Dr Muhammed Mokbel Elbakry

Versus

Onorevoli Prim'Ministru, Onorevoli Viċi Prim'Ministru u Ministru ta' l-Intern u Ġustizzja, Avukat Ġenerali u l-Bord ta'l-Appelli dwar ir-Rifuġjati

In these proceesings applicant Dr Elbakry is seeking a remedy against an alleged breach of his right to a fair trial, protected under art. 39(3) of the Constitution of Malta ["the Constitution"] and art. 6(1) of the European Convention of Human Rights ["the Convention"], and of his right to freedom of expression, protected under art. 41(1) of the Constitution and art. 10 of the Convention.
The relevant facts, as set out in the application, are as follows:

On the 10 January 2005 applicant reached Malta from Cairo, Egypt. On the 19 January 2006 he filed an application to be granted the status of refugee in Malta; this application was acknowledged on the 27 April 2005.
The Refugee Commissioner by letter dated 10 May 2005 refused the application. On the 22 May 2005 applicant filed an appeal before the Refugee Appeals Board in terms of the Refugees Act (Chapter 420 of the Laws of Malta). By letter of the 3 March 2006 the Chairman of that Board advised the the appeal was refused.
In his application before this court applicant cited various examples where he claims that his fundamental rights were violated by the totalitarian regime in Egypt, such that his return to Egypt would expose him to the danger of further violations of his rights. For the purposes of these proceedings, he is claiming that the proceedings before the Refugee Commissioner and the Refugee Appeals Board, and, in particular, the provisions of artt. 5, 6, and 7(6) and (9) of the Refugees Act, are in breach of his rights to a fair trial and to freedom of expression. His specific grounds of complaint, insofar as they can be ascertained from his application, are as follows:

1. The provisions of art. 7(6) of the Refugees Act

Art. 7(6) of the Refugees Act provides as follows:

7. (6) Provided all the parties agree thereto, the sittings of the Board shall be held i*n camera*.

Applicant claims that this provision is in violation of the requirement of publicity in terms of art. 39(3) of the Constitution and art. 6(1) of the Convention. He cites the judgement delivered on the 26 September 1995 *in re* **Diennet *v.* France** wherein the European Court of Human Rights stated that “the holding of court hearings in public constituted a fundamental principle enshrined in article 6(1)”.

2. The provisions of artt. 5 and 6 of the Refugees Act

Applicant further states that the mode of appointment of the members of the Refugee Appeals Board, in terms of art. 5 of the Refugees Act (which provides that members are appointed to the board for a renewable period of three years by the minister), and the possibility of their removal in terms of art. 6 (which provides that a member of the

Board may only be removed from office by the Prime Minister on the grounds of gross negligence, incompetence, or acts, omissions or conduct unbecoming a member of the board) negatively affect the independence and impartiality of the Board because its members are subject to the executive branch of government. This, according to applicant, does not guarantee that the judgement of the board will be independent of the whims of the government or of the requirements of its diplomatic relations with another country.

3. The proceedings before the Refugee Appeals Board

Applicant also complains about the proceedings before the Refugee Appeals Board because, according to him, the board did not give a correct interpretation of the terms "torture" and "inhuman treatment". Furthermore, the board did not make a correct assessment of the danger to applicant's life and the risk of forced detention, in breach of art. 34 of the Constitution and of art. 5 of the Convention, to which he would be subjected in case he were to return to Egypt. Also, the board did not consider the measures taken by the Egyptian authorities in breach of applicant's right to freedom of expression and his right to protection against persecution on the grounds of race, religious belief, nationality, membership of a social group or political opinion.

Applicant therefore submits that the denial of refugee status by the Refugee Appeals Board amounts to a clear breach of his fundamental rights. He is therefore asking this court to grant him a remedy in terms of art. 39(3) of the Constitution and of art. 6(1) of the Convention, protecting his right to a fair trial, and in terms of art. 41(1) of the Constitution and art. 10 of the Convention, protecting his right to freedom of expression.

After being served with a copy of the application, respondents filed a reply whereby they entered the following preliminary pleas:

1. the Prime Minister is not the proper defendant because he does not answer for the Refugee Appeals Board;

2. the Refugee Appeals Board also is not a proper defendant because it is an adjudicating authority and cannot be sued in judicial proceedings;
3. in so far as these present proceedings are intended as an appeal from a decision of 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; recourse to consititutional proceedings to achieve the same aim – namely, to appeal from a decision of the board – is an abuse of the judicial process;
4. in so far as applicant is alleging that articles 5 and 6 of the Refugees Act violate the fundmental right to a fair hearing, without making that allegation within the context of facts which affect him personally, his action lacks the element of juridical interest required by art. 46(1) of the Constitution; and
5. 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 art. 46(1) of the Constitution.

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***[1]:

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.

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 Egyption 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

[1] Constitutional application nº 25/2002.

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 artt. 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 ths point, **Mamatkulov and another *v.* Turkey**[2]:
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).

[2] 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.

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.

< Final Judgement >

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