MALTA

QORTI CIVILI

PRIM' AWLA

ONOR. IMHALLEF

SILVIO MELI

Seduta tat-3 ta' Marzu, 2015

Citazzjoni Numru. 885/2012

Yitagesu Legesse Weldemariam (11C-187),

Mohadmed Ali Ibrahim (11D-045),

Fadiala Traore (11F-164) and

Tahir Ali Kallo (11D-047)

vs

The Chief Executive Officer of the Agency for the Welfare of Asylum Seekers (AWAS),

The Minister for the Interior and Parliamentary Affairs as Minister responsible for Immigration,

The Attorney General

The Court,

1.0. Having seen the sworn application that gave rise to these proceedings dated the 5th September, 2012, through which applicants synthetically submitted the following:

1.1. That they were all detained at the Hal Safi detention centre;

1.2. That they arrived in Malta as hereunder indicated:

1.2.1. Weldemariam: on the 29th March, 2011;

1.2.2. Ibrahim and Kallo: on the 8th April, 2011;

1.2.3. Traore: on the 19th May, 2011;

1.3. That they were released from said detention centre as hereunder indicated:

1.3.1. Traore: in May 2012;

1.3.2. As a result of his state of mental health;

1.3.3. That Ibrahim and Kallo were still in the said detention centre up to the date of submission of this sworn applicaton, (paragraph number one point zero, (1.0.), above);

1.4. That upon reaching Malta applicants Traore, Ibrahim and Kallo declared that they were born in 1994;

1.5. That upon reaching Malta applicant Weldemariam was seemingly more precise and declared that he was born on the 21st March, 1994;

1.6. That according to the evalution team specifically established within the defendant Agency to evaluate and determine the age of asylum seekers, applicants were informed, by means of separate letters dated April, 2011, that following an oral interview to that effect, the said evalution team had concluded that they had attained the age of majority and could therefore not be considered as minors as they had originally informed the said evaluation team;

1.7. That according to applicants all the said letters upheld the same conclusion, namely:

1.7.1. That following the due interview of the applicant it resulted that each applicant had attained the age of majority;

1.7.2. That as a result, the interview applicant was henceforth considered to be an adult;

1.7.3. That the case was now submitted to the Refugee Commission so that applicant's request for asylum would be duly processed;

1.8. That a few days after the aforementioned decision, applicant Traore obtained an extract of his birth certificate together with his official certificate from Namala, Mali, where he was born;

1.9. That on the basis of the certificates referred to in the previous paragraph, applicant Traore is indicated as having been born on the 15th May, 1994, (see folio 15);

1.10. That applicant Weldemariam, also subsequent to the said decision of the evaluation team, (see paragraph number one point six, (1.6.), above), received a birth certificate issued by the Orthodox Church of Tewahido, in Ethiopia, which shows that the said applicant was born in a date that corresponds to the 23rd March, 1994, of the Gregorian Calender, (see folio 3 and 16), and not as declared by the same applicant when duly interrogated by the said evaluation team, (see paragraph number one pont five, (1.5.), above);

1.11. That even applicant Ibrahim managed to acquire an official copy of his birth certificate dated the 16th May, 2011, which allegedly shows that he was born on the 21st February, 1994, (see folio 17);

1.12. That even applicant Kallo managed to acquire an extract of his birth certificate which shows that the said applicant was born on the 12th October, 1994, (see folio 18);

1.13. That on the basis of the afore-mentioned documents the said applicants submitted an application before the said Agency by means of a letter dated the 28th February, 2012, so that the conclusions arrived at by the evaluation team referred to above concerning the age of the applicants would be reconsidered and thus have them declared to be minors instead of being of age;

1.14. That by means of an e-mail dated the 28th March, 2012, applicants were informed that the Agency in question was unable to re-consider its previous decision in their regards;

1.15. That by the same said e-mail referred to in the previous paragraph, the Agency in question also informed the applicants that they could submit an appeal before the Immigration Appeals Board *qua* independant entity duly empowered to take such decisions;

1.16. That applicants invite the court to see and examine the said e-mail of the 28th March, 2012;

1.17. That by the time applicants were invited to submit their appeal to the said Board, the two-month appeal period had already expired;

1.18. That applicants are complaining of the procedure adopted by the evaluation team referred to above;

1.19. That as an administrative entity, AWAS is duty-bound to observe the rules of proper administration, as otherwise, persons effected by said improper observance of regulations, would be entitled to submit the issue before the ordinary courts;

1.20. That in Garner's Administrative Law, B.L. Jones holds that, (pp.107, 108):

> "... in circumstances where the gravamen of the complaint cannot be brought with the terms of one of the ordinary causes of action, the citizen may nevertheless have a remedy in the courts in the following situations: (a) where a statute expressly confers a right of appeal to a named court; or (b) where he can invoke the inherent supervisory jurisdiction of the High Court to review the conduct of persons or bodies purporting to exercise statutory function, to ensure that they remain within the confines of their statutory powers (*intra vires*) and do not stray beyond the limits of that authority (*ultra vires*), and also to ensure that duties owed to the public are duly performed";

1.21. That AWAS is a public authority and its decisions fall within the definition of administrative act;

1.22. That according to article 469A of Chapter 12 of the Laws of Malta:

> "administrative act includes the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal to any demand of a claimant, but does not include any measure intended for internal organisation or administration with the said authority ..."

1.23. That the decisions therein mentioned are therefore subject to judicial review;

1.24. That AWAS decided the above-mentioned cases without giving the due reasons for the said decisions;

1.25. That this omission goes against the principle that an administrative entity is duty-bound to give its reasons for its decisions;

1.26. That in Ridge vs Baldwin ((1964) AC40), the right to a fair hearing was declared as a rule of universal application;

1.27. That in Board of Education vs Rice ((1911) AC179) it was held that the principle of natural justice is a duty lying upon everyone who decides anything;

1.28. That in "Administrative Law", Wade and Forsyth held: (10th Edition, OUP 2009, p. 408)

> "Experience has shown that there are remarkably few true exceptions to this 'duty lying upon everyone who decides anything', at any rate anything which may adversely effect legal rights or liberties";

1.29. That in Borg vs The Transport Authority of Malta, 21st May, 2009, the First Hall of the Civil Court held that:

> "It need hardly be said that a tribunal or administrative authority need to scrupulously follow the dictates of

the principles of natural justice and these do not really need express statute to be applied. The observance of these principles should be the minimum standard that garantees the righteousness and transparency of administrative acts. On the contrary, not to follow these principles would be tantamount to non-observance of these rules";

1.30. That the evaluation team under review was:

1.30.1. Duty bound to give its reasons for its refusals;

1.30.2. To clearly point out the procedure that the applicants had to adopt;

1.30.3. To clearly show that the applicants had a right of appeal before the Immigration Appeals Board – nothwithstanding the fact that applicants hold that this right of appeal does not result anywhere in the law;

1.31. That in extant legislation concerning asylum seekers there is not even a single hint as to the method of the assessment of age or of the establishment of a specific age assessment team;

1.32. That the methodology used in this respect only emerges from a policy drafted by AWAS itself and the act of statutory provisions in this regard renders the discretion of this particular Agency overtly wide and may give rise to abuse of discretion;

1.33. That this further goes against the law that holds that persons who are seeking asylum are vulnerable and the State is in such cases, duty-bound to provide for their material reception;

1.34. That it is essential that in such cases there is the possibility of revision of the decision at first instance before the evaluation team;

1.35. That in these cases the possiblitity of such revision is all the more essential as otherwise this vulnerable category - unaccompanied minors – would end up in detention;

1.36. This would go against:

1.36.1. Government policy, and

1.36.2. The Convention on the Rights of the Child;

1.37. That applicants were kept under detention for considerable periods of time, nothwithstanding the very probable possibility that they were minors when they arrived in Malta;

1.38. That the evalution team's decisions were not reasonable, (see Stephen Galea vs Frans Farrugia, of the 30th March, 1990, First Hall of the Civil Court);

1.39. That it is not reasonable to:

1.39.1 Decide a person's age after a simple interview;

1.39.2. Deprive applicants from an appeal from such decision;

1.39.3. Deprive applicants from revising their applications for asylum in view of new evidence that was retrieved;

1.40. That in view of the above the applicants adhered to the Court so that the defendants would have the opportunity to submit their answers for the following requests and that the Court should:

1.40.1. Annul the decisions of the age assessment team within the AWAS concerning the applicants as the procedures that were applied led to decisions that went counter to article 469A(1)(6) of Chapter 12 of the aforementioned laws and against the general principles of natural justice;

1.40.2. Orders the Minister of the Interior to release the applicants who are still under detention at the

Detention Centre at Hal Safi or at whatever centre they may be transferred;

1.40.3. Orders the same said Minister to enact rules and procedures, even through a Legal Notice, to establish an effective test that would help determine the age of asylum seekers thereby guaranteeing the proper running of administrative procedures including the giving of reasons behind the decisions that are taken, and the possibility of revision of the same said decisions;

1.40.4. Orders the granting of damages to the applicants by the defendants because of the unreasonable decisions given by AWAS;

1.40.5. Expenses of this procedure is to be borne by the defendants;

2.0. Having seen the sworn reply submitted by the defendants dated the 15th October, 2012, whereby they synthetically submitted the following:

2.1. That the submissions and requests of the applicants are unfounded;

2.2. That the facts that result to the defendants are as follows:

2.2.1. That as the applicants arrived in Malta they each alleged that they were minors – i.e. under the age of eighteen (18);

2.2.2. That following such declaration each applicant was submitted to an interview by the age assessment team within AWAS;

2.2.3. That as a result of said interview none of the applicants resulted to be a minor;

2.2.4. That applicants were duly informed of the findings of the said assessment team, and this, by means of a letter dated the 20th April, 2011;

2.2.5. That subsequent to such information being given to the applicants the same said applicants presented photocopies of documents allegedly claiming to be their birth certificates;

2.2.6. That after internal consideration of the issue on the 28th March, 2012, AWAS informed the applicants that it was in no position to re-open the proceedings to re-examine the age issue;

2.2.7. That AWAS also informed the applicants that if they deemed fit, they could appeal before the Immigration Appeals Board;

2.2.8. That no such appeal was submitted by the applicants;

2.2.9. That applicants instituted proceedings before the Refugee Commission seeking either refugee status or subsidiary protection;

2.2.10. That both requests were refused both by the Refugee Commissioner and subsequently by the Immigration Appeals Board;

2.3. That in the light of the above syntheseis of the resultant facts, the defendants synthetically submit:

2.3.1. That it is the applicants who are duty-bound to give concrete and credible proof as to their age;

2.3.2. That it is the applicants' duty to prove the authenticity of the documents they submitted as proof of their age;

2.3.3. That the interviews conducted by the age assessment team with regards to the applicants were conducted according to common standards and practices used throughout the European Union;

2.3.4. That the decisions of the age assessment team concerning the applicants are fair and just, and deserve to be confirmed;

2.3.5. That the procedures used by the age assessment team and the resultant decisions:

2.3.5.i. Observed the rules of proper administration;

2.3.5.ii. Granted the reasons upon which the decisions were based;

2.3.5.iii. Were in conformity with articles 469A of Chapter 12 of the above-mentioned Laws;

2.3.5.iv. Observed the principles of natural justice as applicants were given ample opportunity to voice their concerns and to promote their course of action;

2.3.5.v. Were given the opportunity to appeal the subsequent decision before the Immigration Appeals Board which they did not utilize;

2.4. That the limits of the functions of the Asylum Agency are established by Legal Notice 205 of 2009;

2.5. That this same said Legal Notice provides for the giving of particular services to specifically identified categories of persons;

2.6. That the aim of the establishment of the age assessment team is precisely a result of the aim indicated in the proceeding paragraph;

2.7. That this particular structure finds its origins in an administrative policy does not, as a result thereof, render it illegal;

2.8. That in fact, such policy is legitimate as it falls within the ambit of the powers that were statutorily granted to AWAS in

order to be able to examine and assess persons claiming to be minors;

2.9. That such policy also awards AWAS the necessary discretion to enable it to give this highly sensitive service in a manner that is fair and just to both applicants and to Maltese society that nurtures them;

2.10. That defendants categorically refuse the allegation that AWAS somehow abused their discretion with regards to the applicants;

2.11. That in the light of the above, no law, subsidiary legislation or UN Convention on the Rights of the Child were infringed by the defendants;

2.12. That hence, no damages are due to the applicants;

2.13. That without prejudice to the above, all that this court may do in this case, which is bound by the limits of judicial review, is that it cancels and revokes the decision of the age assessment team and not issue those orders against the Minister of the Interior that are being requested by the applicants;

2.14. That therefore all the requests submitted by the applicants should be refused;

2.15. That costs are to be borne by the applicants;

2.16. Saving any other reply that the defendants may deem fit to submit;

3. That by means of its decree dated the 22nd November, 2012, as a direct consequence of the applicants' defence, the Court authorised that the proceedings be conducted in the English language, (see folio 32);

4. Having heard the evidence submitted:

5. Having examined all the documents submitted together with the sworn declarations put forward;

6. Having seen the decree dated the 25th June, 2014, whereby on the basis of the request of the parties' legal representatives authorised same to submit written pleadings as therein duly indicated;

7. Having seen the note of submissions of the applicants dated the 29th August, 2014, (see folio 463);

8. Having seen the decree dated the 24th November, 2014, whereby, following the defendants' non-opposition to same, authorised the applicants to submit their note of submissions according to the extended time-limit therein indicated, (see folio 482 and 483);

9. Having seen the decree dated the 2nd February, 2015, whereby a further extension was granted to the defendants following the lack of opposition by the applicants, (see folio 485);

10. Having finally seen the note of submissions of the defendants dated the 30th January, 2015, (see folio 486);

Considers:

11.0. That the following considerations of a preliminary nature need to be immediately addressed:

11.1. That although applicants refer to the documents concerning their birth attached to their sworn application as “birth certificate” it transpires that:

11.1.1. That of applicant Traore, (see folio 15), is a “copy of the extract of the act of birth” in question;

11.1.2. That of applicant Weldemariam, (see folio 16), is a church document and in no way attests to be an official state document;

11.1.3. That of applicant Ibrahim, although it purports to show applicant’s date of birth, still fails to clearly show other necessary indicators;

11.1.4. That of applicant Kallo, (see folio 18), seems to be the best preserved of all the documents submitted;

11.2. That however, the documents submitted have not been duly authenticated as requested by the law of evidence;

11.3. That therefore, said documents do not satisfy the rigors of what is statutorily requested as documented proof thereof;

Considers:

12.0. That although the complainants essentially portray the same versions of the facts of the case, these may synthetically be drawn out in the following manner;

12.1. That upon their arrival in Malta the applicants were interviewed by the Agency for the Welfare of Asylum Seekers, (AWAS), an agency established in accordance with article 34(4) of Chapter 217 referred to above to determine the status of the applicants in question;

12.2. That as the applicants all claimed to be unaccompanied minors, a special age assessement team was entrusted with the task of establishing whether these claims were truly authentic;

12.3. These bodies were empowered so to act on the basis of:

12.3.1. The Immigration Act, Chapter 217 of the Laws of Malta;

12.3.2. The Agency for the Welfare of Asylum Seekers Regulations, Legal Notice 205 of 2009; and

12.3.3. Various other laws concerning refugees, asylum seekers and minors;

12.3.4. Various policies adopted both in Malta, the European Commission and elsewhere;

12.3.5. The European Convention for the Protection of Human Rights and Fundamental Freedoms;

12.3.6. The United Nations Convention for the Rights of the Child, 1990;

12.4. This assessment team is composed of specifically trained personnel, (see folios 170, 172, 177 and 179);

12.5. That as a result of evidence, submitted the resultant interviews conducted by this assessment team with the applicants show:

12.5.1. That the chairman thereof introduced himself and the other members of the panel to each interviewed applicant (see folios 170 and 177);

12.5.2. That the role of the assessment team was then explained, (see folio 170 and 177);

12.5.3. That the panel followed a pre-established formal set of questions which are aimed to determine the real issue at hand – i.e. whether the interviewer's claim of being a minor is objectively proved – (see folio 170 and 177);

12.5.4. That the panel is free to depart from said pre-ordained set of questions, (see folio 172);

12.5.5. That each of the interviews conducted with the applicants were:

12.5.5.i. Conducted with the assistance of a translator, (see folio 447, 451, 455 and 53), although the interpreter does not seem to have been a professional in this field;

12.5.5.ii. Took quite some time, one even taking almost an hour, (see folio 174);

12.5.5.iii. That the applicants were actually interviewed only after a few days after their arrival in Malta and not as claimed by said applicants, (see folio 174);

12.6. That as applicants claimed that they were minors and that their physical stance threw very serious doubts as to the veracity of their claim, each could be submitted to a specific bone test to be able to establish or quash this claim in an objective manner, (see folio 173);

12.7. That further observations of the applicants led the assessment team to conclude that none of the applicants were minors;

12.8. That amongst these observations the assessment team observed the following: (see folio 173 and 174)

12.8.1. A clean shaven face;

12.8.2. A shaved head;

12.8.3. White-haired individuals would give the game up;

12.8.4. Mature responses and behaviour;

12.8.5. That one of the interviewees, (Weldemariam) was utterly inconsistent in his answers as regards his age claiming that in 2007 he was 16 years old and then, in 2011, he was 17 years old, (see folio 174);

12.8.6. That applicant Ibrahim was also blantantly inconsistent with regards to his age, (see folio 174), and so, his claim to being a minor at the time of his entering Malta could not be upheld as it was not a safe affirmation;

Considers:

13. That the age assessment team was operating in accordance within the standards as established by the European Union, (see folio 207, 263, 307, 326, 333, 350, 355, 380 and 400);

14. That the applicants felt aggrieved that the decision concerning their welfare and their future was handed to them in a letter contained in a sealed envelope which linguistically they could not even understand;

15. That this is a delicate issue, further taking into account the different cultural divide that emerges in this particular context, needs to be further fine-tuned by the authorities concerned;

16. That however, it is to be understood that a negative response to one's aspirations is a very difficult message to transmit under any circumstances – let alone under those under review;

17. That the composition of the age assessment team was that of qualified social workers who already hold some experience in this particularly delicate field;

18. That the said age assessment team is not a mere one-sided entity engaged solely in the interest of those seeking asylum locally but is also an entity that is duty-bound to act justly also in the interest of society;

19. That as the age assessment team had serious reservations as to the veracity of the claims of the applicants they were duty-bound, and therefore, had no other alternative, but to dismiss such claims as they did not prove to be objectively founded;

20. That it goes without saying that this was the limit of the remit of said assessment team;

21. That the fact they also indicated other avenues which the applicant could undertake to have their claims re-examined, and therefore, prolong their stay in Malta, should in no way be used in such a manner so as to portray them as having acted *ultra vires*;

22. That indeed, this task should have been undertaken by other independent entities, whose task it is to see to the applicants' plight and not leave it to this team to indicate such procedures;

Considers:

23. That the procedures adopted by the Refugee Commission and by the age assessment team in this particular regard all indicate that they were in accordance to the aforementioned standards of local and international law, (see paragraph number twelve point three, (12.3.), above);

24. That notwithstanding the applicants' request to be released from detention, all said applicants have since been duly so released from said detention and therefore, this specific request proves to have been overcome by events and is consequently superfluous;

Considers:

25. That the applicants had free access to a local non-government organization with long well-proven experience in this field;

26. That such access and assistance therefore overcome the position here being submitted by the applicants that they did not know how to protect their rights – including their rights to appeal from the decision of the age assessment team itself;

Considers:

27. That as regards the applicants' complaint that they were not given reasons for the decisions of the age assessment team it should be pointed out that such proceedings are not to be equated to the rigid procedures one encounters in court;

28. That it is to be understood that such proceedings are administrative in nature although they may have the trappings of judicial proceedings – which they are not;

29. That hence, said proceedings do not qualify as judicial proceedings and, as such, although they still attract certain principles deemed necessary for the proper exercise of discretion like the principle of natural justice, yet, they do not attract all the guarantees established under article 6 of the European Convention of Human Rights;

DECIDE:

30.0. That in view of the above, the court is satisfied that the applicants failed to prove their submissions and consequently:

30.1. Dismisses all requests submitted by the applicants;

30.2. Upholds the replies thereto submitted by the defendants;

30.3. That the expenses of this procedure are to be borne by the applicants.

< Sentenza Finali >

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