CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

MR JUSTICE
TONIO MALLIA

Sitting of the 16th December, 2009

Application Number: 53/2008

Essa Maneh (Police No. 08AA-019)
Stephen Anyiam (Police No. 08AA-024)
Emanuel Onyaka Udem (Police No. 08TTT-022)
Austin Jimmy (Police No. 08TTT-023)

Vs

Commissioner of Police as Principal Immigration Officer
and
Minister for Justice and Home Affairs

The Court:

Has seen the applicant's application which reads as follows:

That the applicant Essa Maneh was born in Sanyang in Gambia on the 11th May 1991 and left his country on the 16th October 2005;

That he travelled and arrived in Libya but felt that he could not stay there, as he wished to obtain adequate protection in a democratic country which effectively embraces human rights protection;

That the applicant Stephen Anyiam was born in Imo state in Nigeria on the 1st January 1975, and left his country on the 29th January 2008;

That after having travelled for six months, he arrived in Libya but felt that he could not stay there, as he wished to obtain adequate protection in a democratic country which effectively embraces human rights protection;

That the two applicants Essa Maneh and Stephen Anyiam arrived in Malta on the same boat, in an irregular manner on the 23rd June 2008 and, because a removal order was issued in their regard, upon their arrival in Malta they were detained in Safi Barracks Detention Centre, Hal Safi, where they remain detained to this day;

That the applicant Emanuel Onyaka Udem was born in Anambra state in Nigeria on the 20th October 1984 and he left his country on the 22nd February 2006;

That he travelled and arrived in Libya but he felt that he could not stay there, as he wished to obtain adequate protection in a democratic country which effectively embraces human rights protection;

That the applicant Austin Jimmy was born in Delta State in Nigeria on the 3rd April 1979 and he left his country on the 2nd February 2006;

That he travelled and arrived in Libya but he felt he could not stay there, as he wished to obtain effective protection in a democratic country which effectively embraces human rights protection;

That the two applicants Emanuel Onyaka Udem and Austin Jimmy arrived in Malta on the same boat, in an irregular manner on the 3rd September 2008 and, because a removal order was issued in their regard, upon their arrival in Malta they were detained in Safi Barracks Detention Centre, Hal Safi where they remain detained to this day;

That after the applicants arrived in Malta they applied for refugee status and they are awaiting to be interviewed by the Office of the Refugee Commissioner as per the Refugees Act 2000, Chapter 420 of the Laws of Malta.

That the refugee status determination procedure takes time and this is because it is a delicate procedure which requires a meticulous examination of the facts as well as because the procedure by which the Office of the Refugee Commissioner calls asylum seekers for their interview is neither known, certain nor fixed, and to a certain extent depends on the discretion of the Refugee Commissioner.

That according to government policy with regards to irregular immigration, applicants who apply for asylum after being held by immigration authorities may be detained for a maximum period of twelve months, whilst awaiting the outcome of their application. In the case where they are granted protection before this time elapses, according to law they must be released from detention immediately; however should their claim be rejected and no form of protection granted, they remain detained.

That to this day, while the applicants Essa Maneh and Steve Anyiam have already been detained for more than a month, both of them are still waiting for the refugee status determination procedures to commence.

That the applicants believe that not only is their detention unnecessary but that it is also illegal and arbitrary, even though initially it might have been authorised by the Immigration Act - it is now illegal and not in accordance with Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 34 of the Constitution of Malta.

That the applicants therefore maintain that their long-term detention and the fact that there is no certainty on the period of time during which they shall be detained, as explained above, impinge on their fundamental rights which are protected under Article 3 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Cap. 319) and Article 34 and 36 under the Constitution of Malta.

The applicants have requested this Honourable Court to:

Declare that the detention of the applicants violates their fundamental rights, as protected by Articles 34 and 36 of the Constitution of Malta and Articles 3 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Cap. 319);

Give all provisions, orders or remedies which it deems fit and necessary in the applicants' regard, so as to safeguard their fundamental rights, including, but not limited to, their immediate release from detention.

With expenses.

Has seen the defendants' reply in which they have submitted that:

In their application, the applicants are alleging that their detention allegedly violates their fundamental rights, specifically in Articles 3 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Cap. 319 of the Laws of Malta) and Articles 34 and 36 of the Constitution of Malta.

The defendants contest the allegations and claims made by the applicants as they are unfounded in fact and in law for the following reasons:

That on a preliminary basis, the applicants are abusing of the constitutional process since they are making use of an extraordinary procedure such as this one when they could have used ordinary remedies to safeguard the rights they are claiming were not safeguarded. In this regard, the defendants refer to Articles 46(2) of the Constitution and the proviso to Article 4(2) of Chapter 319 of the Laws of Malta.

That Article 25A of the Immigration Act (Chapter 217 of the Laws of Malta) provides for a procedure which is aimed at providing for the circumstances such as those of the applicants. That upon the illicit arrival of the applicants in Malta, a Removal Order was issued in their regard, and this because as per Article 5 of Chapter 217 of the Laws of Malta, they are considered as prohibited immigrants. There is a right of appeal from this Removal Order before the Immigration Appeals Board.

That since the applicants applied for asylum, they could and can still make a request to the Immigration Appeals Board relative to their detention. In fact, Article 25A(9) of Chapter 217 of the Laws of Malta provides for the following:

"(9) The Board shall also have jurisdiction to hear and determine applications made by persons in custody in virtue only of a deportation or removal order to be released from custody pending the determination of any application under the Refugees Act or otherwise pending their deportation in accordance with the following subarticles of this article."

That the defendants' behaviour towards the applicants is totally legitimate. Their detention is one in accordance with the Immigration Act (Chapter 217 of the Laws of Malta) and this is because the applicants are considered to be prohibited immigrants. This was also confirmed by the Court of Magistrates in the case of **Napoleon Merbrahtu vs Commissioner of Police** decided on the 25th June 2003 where it was held that the detention of ten months of a person who applied for asylum was not illegal, since this detention was in accordance with the Immigration Act. The same was held by the Court of Criminal Appeal in the case of **Karim Barboush vs Commissioner of Police** where it was held that the detention in question was not illegal.

No violation of Article 34 of the Constitution of Malta and of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms

As the applicants do not qualify as exempted persons under Article 4 of Chapter 217 of the Laws of Malta, Section 4 of the same Chapter 217 applies, and therefore the applicants are considered as prohibited immigrants.

That the state has every right to control entry into its territory and if a person is found not to have any right or permission to enter or disembark in Malta, the state has a right to detain that person in terms of Chapter 217.

That the detention of the applicants frames itself under one the exceptions provided for by the second part of Article 5 of the Convention, since if falls under Article 5(1)(f) which provides for "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition," as well as under paragraph (j) of Article 34 of the Constitution which provides the equivalent.

That the fact that the applicants applied for asylum does not mean that they regularised their position and that they are no longer classified as prohibited immigrants, and this is because their application is still being processed by the competent authorities.

In view of the above there is no violation of this Article.

No violation of Article 36 of the Constitution of Malta and of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms

That the applicants are alleging that the period of their detention is in breach of their fundamental rights. The defendants submit that the fact that the applicants are being detained in terms of Chapter 217 does not mean that they are being subjected to degrading treatment.

The defendants refer to the case of **Abdulaziz, Cabales and Balkandali vs UK** (1985) where the European Court held that there must be an intention to humiliate in order for the requisite of degrading treatment to be satisfied. The European Court observed that distinctions made between the spouses of a man and a woman in immigration regulations were not degrading as "it was not designed to, and did not, humiliate or debase but was intended solely to achieve specified non discriminatory aims."

Therefore, there is no breach of this Article.

Save further submissions.

With expenses.

Heard the evidence brought by the parties;

Examined all acts relating to the case and the exhibited documents;

Examined the written submissions of the parties;

Considered;

The applicants allege that their detention is in violation of Articles 34 and 36 of the Constitution of Malta and of Articles 3 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, incorporated in Maltese law by the European Convention Act (Cap. 319 of the Laws of Malta).

Article 34 of the Constitution corresponds to Article 5 of the European Convention which provide that no one may be deprived of his personal liberty unless this is authorised by law and in the instances listed in the same articles. In the context of these procedures, what is

important is clause (j) of Article 34 of the Constitution, and clause (f) of Article 5 of the European Convention.

Article 34(j) of the Constitution provides that a person may be deprived of his/her personal liberty,

"for the purpose of preventing the unlawful entry of that person into Malta, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Malta or the taking of proceedings relating thereto or for the purpose of restraining that person while he is being conveyed through Malta in the course of his extradition or removal as a convicted prisoner from one country to another."

Article 5(f) of the European Convention provides that a person may be deprived of his/her personal liberty in case of,

"the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

Whilst the Constitution permits the detention of a person "*for the purpose of effecting*" the removal of that person from Malta or so that procedures are initiated in this regard, the European Convention also permits detention "*pending the decision on his admission, deportation or extradition*" – "Theory and Practice of the European Convention on Human Rights", Van Dijk, Van Hoof, Van Rijn and Zwaak (4th Edit. 2006 page 481). Whilst the language used in the Constitution and the European Convention is slightly different, the meaning in both cases is the same, that is, in the case of a foreigner, his detention is legitimate as long as there is an ongoing process pertaining to his removal from Malta.

As the aforementioned book also says (op. Cit. pg. 481):

"Article 5 Paragraph 1 under (f) does not require that the detention of a person against whom action is being taken with a view to deportation or extradition must be reasonably considered necessary, for example to prevent his committing an offence or fleeing. In this respect Article 5 (1) under (f) provides a lower level of protection than Article 5 Paragraph 1 under (c): all that is required under (f) is that action is being taken with a view to deportation or extradition. It is, therefore, immaterial whether the underlying decision can be justified under national or Convention law."

Obviously, this does not mean that a person may be held indefinitely, until the relative proceedings in that person's regard are decided. In the context of a continuance of detention, the same authors go on to say (op. Cit. pg. 482):

"Article 5(1) under (f) implies the guarantee that the detention must have no purpose other than that of preventing the admission of the alien in question to the country or of making it possible to decide on his deportation or extradition. Article 18 of the Convention, which prohibits restrictions of the rights and freedoms for any purpose other than that for which they have been prescribed, applies here as well. In the first place, this means that the deprivation of liberty is unlawful if the deportation order, and the way in which it is enforced constitute a misuse of power. In the second place, it follows that the detention must not be attended with more restrictions for the person concerned and must not last longer than is required for a normal conduct of the proceedings. In the Quinn Case the Court held: 'It is clear from the wording of both the French and the English versions of Article 5 1(f) that deprivation of liberty under this sub-paragraph is justified only for as long as extradition proceedings are actually taking place. It follows that if such proceedings are not being conducted with due diligence, the detention ceases to be justified under Article 5 1 (f).' Thus,

although the duration of detention is only mentioned in paragraph 3 of Article 5 and this provision refers only to detentions under paragraph 1(c), the Court stipulates that the period of detention may not exceed a reasonable time. The reasonableness of the length of detention has to be assessed in each individual case. In this respect not only the length of this extradition or deportation proceedings is properly relevant, but also the length of connected procedures such as, for instance, summary proceedings which may result in a stay of execution of the extradition. If it has been decided to prolong the detention in the interest and at the request of the person concerned, e.g. in order to find a suitable country which is prepared to admit him, or in order to obtain certain guarantees from the extradition-requesting State with regard to his treatment, he cannot claim afterwards that he is the victim of this prolonged detention."

Hence, everything is centred on the fact as to whether the period of detention, in this particular case, may or may not be considered to be reasonable.

In this case, there is no question that the applicants entered Malta in an illegal manner and without all the necessary documents. In these circumstances they have no right to reside in Malta and are subject to deportation. However, the same applicants applied for refugee status, in which case they would have the right not to be sent back from where they came; the deportation is stopped even if although they do not qualify for refugee status, it is declared that for humanitarian reasons they do not deserve to be expelled.

The proceedings for expulsion in the applicants' regard were therefore suspended, pending the final determination of their status, and during such time, the applicants are being held in a place of detention, with an obvious deprivation of their personal liberty. The duration of detention, however, is not tied to the time taken for these proceedings to be finalised, since the law provides for a maximum period of 12 months. In the case where the foreigner does not apply for refugee status, he has to be released from detention after 18 months. This means that if the status determination process of the foreigner and/or his eventual deportation are concluded before the expiration of the 12 or 18 month period according to the case, the same foreigner is released or deported according to the case, and therefore he is released from the place of detention where he is being held. If, on the other hand, the proceedings take long, whatever the reason, the applicants need to be released from detention after the fixed period of time. However, the applicants are claiming that this period of 12 or 18 months is too long and is unreasonable.

In the Kolompar Case, decided by the European Court of Justice on the 24th September, 1992, it was held that detention for more than two years is a long and unreasonable period of time. In our case, the fixed time is that of either a year or a year and a half, and in this Court's opinion it cannot be considered to exceed "a reasonable time". In cases like these, the Court understands the need to strike a balance between the individual's liberty, and the right of the State right to protect and guard our country's socio-cultural aspect. Malta is found in the middle of the route taken by people from various less developed states in Africa who cross over to Europe in an illegal manner in the hope that they find a better standard of living. Because of this, many of these people stop in Malta with the intention that from here they will have easier access to a larger European country. Very often, these people stop in Malta not because they want to, but because while crossing the Mediterranean, their boat is damaged or their fuel runs out, with the consequence of them having to be saved from a tragedy at sea. If they are in seas which are close to Maltese territory, they are brought to Malta after they are rescued so that their case is examined by the competent authorities. If the person is in possession of identity and citizenship documents the investigation and/or eventual deportation proceeds at a fast pace. Very often, however, these people would not be in possession of the necessary documents because they would not want to be sent back to their country, and so the process of identifying their status takes a long period of time. For a person to be granted refugee status, it is not enough for him to say that he comes from a

country in which there is fighting and confusion with danger to his health, but it has to be determined that he does, in fact, come from that country, and since, as aforementioned, these people do not have the relevant documents, the procedures necessarily take a long period of time. In addition, a large number of people come to our country in this way, especially during the summer months, in such a way that every person who arrives in Malta has to necessarily await his turn before the case is duly investigated.

In Malta's case, the length of time is therefore determined not only by the large number of persons who disembark on our shores, but by the fact that most of these people, if not all, do not collaborate with the authorities by not providing them with their personal documents.

Being aware of this problem, the Maltese State decided that in each case, the process of investigation should not lead to the person in question being deprived of his/her personal liberty for more than 12 or 18 months. Whilst, on one hand, the state needs to exercise control over these persons who land in Malta illegally and needs to provide a form of deterrent to those who want to do the same, at the same time [the state] understands the personal situation of these persons and even though they do not always fully cooperate with the authorities, it does not deprive them of their liberty for an unreasonable length of time. This Court agrees with the way in which the Maltese state has created this balance between the right of each individual to his personal liberty, and the state's right to protect its socio-cultural interests.

The position of the applicants is tied to the need to maintain this balance. Whilst it has not been shown if they are in possession of the official documents pertaining to their identity (probably not) their case is being investigated according to law by the competent authorities so it is decided whether they should be granted refugee status, whether they should be deported or kept in Malta on a humanitarian basis. Until this process is determined, the state has the right to keep the applicants in detention, and in this Court's opinion, in the circumstances, the period of detention "does not exceed a reasonable time".

The applicants also complain that their detention is to be considered as subjecting them to inhuman and degrading treatment, and this in breach of what is provided in Article 36 of the Constitution and Article 3 of the European Convention.

First of all, this Court notes that as observed by the Honourable Constitutional Court in "Calleja v. Commissioner of Police, decided on the 19th February, 2008, the standard of proof required is not that of "proof beyond reasonable doubt". After analysing the jurisprudence on the subject, that Court observed that:

"It agrees that, as a rule, the use of the expression "beyond reasonable doubt" for purposes of evidence, not only in the context of cases of a civil nature, but even more so when it concerns something which often occurs in such a way that it could be that everything is being done to conceal facts, is not desirable. The evidence which the appellant needed to produce in this case is only that of the level of probability. Of course, being such a serious allegation, this means that the Court needs to be cautious before accepting the truthfulness of what the witness says."

In that case, the Honourable Court also insisted on the need for the Court to distinguish between inhuman treatment and degrading treatment, as while it is true that inhuman treatment is inherently and necessarily degrading, the inverse is not necessarily the case.

According to the now copious jurisprudence of the Strasbourg Court, "inhuman treatment covers at least such treatment as deliberately causes severe mental and physical suffering" – Reid, "a Practitioner's Guide to the European Convention on Human Rights (2nd Edit. 2004 page 522). The treatment is considered inhuman when it is planned and premeditated so as

to cause "intense physical and mental suffering" – in the case "Tekin v. Turkey", decided on the 9th June, 1998. Obviously this has to result independently from the fact that the permitted detention as shown, for a reasonable period of time under Article 34(j) of the Constitution and Article 5(f) of the European Convention.

In this case, it does not result that detention in a determined place, together with other people, as opposed to solitary confinement, for 12 or 18 months, is considered as leading to "intense physical and mental suffering". Obviously, the applicants' experience until they arrived in Malta, and the fact that they were then deprived of their liberty, led to them suffering from sadness and suffering, however, it did not result that there was the level of mental or physical suffering which would lead to the treatment being held as inhuman.

With regard to degrading treatment, generally, this is held to refer to that treatment which would lead to the breaking down of the resistance, both physical and moral, of the victim or which leads to the victim to act contrary to his will. In the case, "Ranninen v. Finland" decided by the European Court on the 16th December, 1997, it was held:

"In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, regard should be had as to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3".

As held in the case "Peers vs Greeze", decided by the European Court on the 19th April, 2001,

"The Court recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental affects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, Ireland v. the United Kingdom, judgement of 18 January 1978, Series A no. 25, p. 65, 162).

Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affect his or her personality in a manner incompatible with Article 3 (see Ranninen v. Finland, judgment of 16 December 1997, Reports of Judgements and Decisions, 1997-VIII, pp. 2821-22, 55).

...

In the light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see V. v. the United Kingdom [GC], no. 24888/94, 71, ECHR 1999-IX)".

More recently, in the case "Yancov v. Bulgaria", decided by the same Court on the 11th December 2003 it was held:

"In considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Even the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (see, for example, Peers v.

Greece, no. 28524/95, 74, ECHR 2001-III; and Kalashnikov v. Russia, no. 47095/99, ECHR 2002-VI).

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, Ireland v. The United Kingdom, judgement of 18 January 1978, Series A no. 25, p. 65, 162).

The Court has consistently stressed that the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. The state must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (Kudla v. Poland [GC], no. 30210/96, 93-94, ECHR 2000-XI)".

In this case it does not result that the detention in question is intended to 'humiliate and debase' the applicant. Detention can be considered, in the particular circumstances of our country, as a necessary measure required for the stability of the country so as to, as much as possible, avoid a deluge of 'irregular' people running around Malta, and this without having established the prima facie interest and disposition of the person. As mentioned, it must result that the treatment "must go beyond that inevitable element of suffering or humiliation connected with a given forum of legitimate treatment", and since in this case detention for 12 months is a reasonable period, in the circumstances of our country, and since it does not result that these are being detained in conditions which are incompatible with the respect due to human dignity, it cannot be said that there resulted a breach of the articles of law invoked.

With regards to the environment in the detention centre, this Court says that, although the situation is not ideal and there is scope for things to improve, it does not result that the irregular immigrants who are being accommodated in the place Block B, Hal Safi Detention Centre, are being subjected "to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention". Given the fact that the applicants entered our country in an illegal way or that they do not have any means to sustain themselves (without being a burden on public funds), their detention is not one which is not allowed, and the health and the well-being of the applicants are, in the circumstances, well protected. From the testimony given by Commander Brian Gatt, who is responsible for the services in the detention Centres, although it seems that the applicants are in a place which is a little "over crowed", their situation is not one which is terrifying or humiliating.

The applicants grumble about the very fact of detention and that they want to go to Europe to look for a better life; apart from any political decision in this regard, it has already been shown that the Maltese Government is entitled to provide for the detention of these persons until their status is determined (as long as the period of detention is reasonable, as it is in these cases). While they are in these detention centres, they are well-fed, and their state of health is, in the circumstances, also looked after.

It would also appear that the irregular immigrants unite in ethnic groupings, and very often, a group resorts to acts of vandalism on the centre's amenities to spite another group. It would be better if each ethnic group is housed in a different section from that where other ethnic groups are housed, however this Court understands and should take into consideration the logistical problems which an influx of illegal immigrants in a large numbers creates for a

small country which is already “over-populated”. This Court needs to look at not whether the situation of these persons is a bad one and whether it can be arranged, but whether the situation, even if it is a bad one, is so grave that it leads to the conclusion that they are being treated in an inhuman manner. As has been shown to the Court, it does not seem that these people are being subjected to “inhuman treatment” within the meaning of jurisprudence on the matter. The situation could be better, especially at the time when the migrants disembark in Malta and the first interrogation takes place (when they can be treated better than mere numbers), however, even considering the complaints as formulated in the application, this Court cannot hold that there was any violation of the rights mentioned therein.

The applicants’ complaints, at least for this Court, are too insignificant to merit consideration. They complain, for example, that the potatoes in the food are too white or that they do not have enough sauce with the food. Obviously, they have a right to insist that their stay in Malta is as comfortable as possible, however when the Court hears these things, it has to necessarily consider the seriousness of their complaints. All in all, this Court does not feel that the applicants have shown that they were treated with disrespect or in an inhuman manner by the authorities, and it therefore rejects their requests.

Therefore, for the above-mentioned reasons, the Court decides upon the requests of the applicants’ by rejecting the claims, with expenses against them.