MALTA

CONSTITUTIONAL COURT

HON. JUSTICE -- ACTING PRESIDENT
NOEL CUSCHIERI

HON. JUSTICE
JOSEPH AZZOPARDI

HON. JUSTICE
JOSEPH ZAMMIT MC KEON

Sitting of the 29 April, 2013

Civil Appeal Number: 53/2008/1

Essa Maneh and by decree of the 20 November 2012 Dr Katrine Camilleri was appointed as the mandatory of the absent Essa Maneh

v.

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

Preliminaries

1. This is an appeal submitted by the applicant Essa Maneh [the appellant] from a judgment given by the Honorable First Hall of the Civil Court on the 16 December 2009 by which that Court found that there was no violation of Articles 34 and 36 of the Constitution of Malta [the Constitution], and Articles 3 and 5 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms [Chap. 319 of the Laws of Malta] [the Convention].

2. It is only the applicant Essa Maneh who appealed from this decision.

Claims

3. The appellant based his appeal on the following claims: [1] the illegality of the appellant's detention in terms of Article 5[1][f] of the Convention; [2] the breach of Article 5[2] and 5[4] of the Convention; and [3] inhuman and degrading treatment in terms of Article 3, which the appellant suffered during his detention in the Safi centre.

The Facts

4. The relevant facts are the following.

5. On the 23rd June 2008 a group of persons coming from Third World countries, amongst them the appellant, mistakenly entered Malta by boat whilst on their way to Italy. The police from the department of immigration followed the usual procedures in cases such as this. Therefore, upon their arrival in Malta, this group, including the appellant, were examined by doctors and immediately given a copy of a removal order because they were being considered as prohibited migrants, according to Article 5[1] of the Immigration Act [Chapter 217 of the Laws of Malta]. They were detained as a consequence of this order. In the order there was an indication of the right granted by law to a prohibited migrant to appeal from that order within three working days.

6. With the mentioned order, they were also given a leaflet in which there was explained in the English language, and in a way in which one may easily understand, the rights which the prohibited migrant has according to law, as well as his obligations. Amongst the indicated rights, is the right of the immigrant to appeal before the Immigration Board [the Board] so as to be released from detention, as well as the right to apply for refugee status. It is also indicated that in the case where he applies for this status, he will still be held in detention pending the application, until a maximum of 18 months, although he would have a right to access the labour

market after 12 months from the date of his application. The right to legal assistance is also indicated.

7. Superintendent Sandro Zarb explained that, taking into account the circumstances of the moment and also the condition in which the prohibited migrants are when they arrive in Malta, a procedure was introduced whereby the mentioned leaflet is given so that it is assured that upon being detained every immigrant has the necessary information on his legal situation. He states that, as a rule they are not given a verbal explanation except for being told of the right to appeal the order within three working days, however if any one of them asks for information they will tell them. All this while they are still in Floriana. When they are taken to the detention centre the prohibited migrants have “immediate access” to various non-governmental organizations [NGOs] whose members would be present there.

8. Commander Brian Gatt, responsible for detention centers, states that the centre in Block B, where the appellant was taken, had just been refurbished ten months ago, and it basically consists of two storeys, and on each floor there are five large rooms and 4 small rooms, as well as a bathroom, in the first floor there is also a clinic. There is a television in each floor.

9. On the back part of the block, there is a space of around the size of half a football ground where detainees in the centre may go out, although not altogether, some in the morning and some in the afternoon, because at the time the centre was hosting one hundred and ninety-eight (198) detainees.

10. Maintenance work is carried out everyday because of many damages resulting from vandalism.

11. As soon as the immigrants enter this centre they are each given a bag with essential items for their hygiene, clothes and other items. They are given three meals a day, provided by a contracted private company. Every two months they are given an *easy-line* card to be able to telephone outside Malta, and they can receive telephone calls whenever they want. Whosoever wishes to do maintenance work in the centre may do so, and he is paid for this work in cigarettes and *telephone cards*, as he choses.

12. The detainees have continuous medical assistance. During the week there is a doctor and nurse every day, provided by the Government in the morning and the NGOs in the evening. They are given free medical care and they are also provided with the necessary medicines. If there is need they are taken to hospital and indicated above.

13. Regarding legal assistance the witness states that "all one has to do is inform us that he wishes to speak with a lawyer and we will provide him one with the normal procedure."[1] When the application for refugee status is rejected and there is an appeal, the detainee is provided with legal assistance from the Government. "A lot of them take legal advice from the NGOs and receive assistance from there."[2] The witness stressed that the centers have an *'open door policy'* for NGOs, in fact they are encouraged to attend the centers.

14. He also states that even though they do not provide them with stationary, "if an immigrant comes and states that he wants to write to the Ombudsman or that he wants to write to the President of Malta, and I am mentioning these cases because they have in fact occurred, I provide him with the necessary stationary so that he can make his letter."[3]

15. Regarding the appellant, it results from the evidence that although he was given the leaflet with the removal order, and although, if not upon his arrival in Malta, then when he was taken to the centre, he could have sought the necessary assistance in this regard; he still did not appeal from the removal order, and not even to be released from detention under Article 25A of Chap. 217, but instead, he presented an application in order to be recognized as a refugee.

16. In June of 2009, a year after his arrival in Malta, the appellant was released from detention, and in the sitting of 30 October 2012 the defendants' counsel verbalized that according to information given to her by the Principal Immigration Officer the appellant "has absconded from Malta and on the 25 November 2011 he was in Austria."[4] In the following sitting, the defense

[1] Page 48
[2] Page 51
[3] Page 50
[4] Page 371

counsel of the appellant presented a special power of attorney given by the applicant to Dr Katrine Camilleri in order to represent him in these proceedings.

The Appealed Judgment

17. That in the initial application the appellant, together with another three applicants, requested the first Court to declare that there was a breach of the constitutional and conventional articles cited above; and [2] that it give an adequate and necessary remedy so that his fundamental rights are safeguarded, including, but not limited to immediate release from detention.

18. The first Court came to its decision after making the following considerations:

"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 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 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 noted 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."

The first claim

19. This claim is based on the interpretation of Article 5 of the Convention which guarantees the right to liberty, as well as exceptions to this principle contained in the same subparagraph, notably in paragraph [f]. In the relevant part this Article reads as follows:

"No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

"… … …

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

20. The appellant claims that, in his case, the detention does not fall within the parameters of the mentioned sub-article, and although initially it may have been legal, this subsequently became illegal in terms of the mentioned sub-article, because a person may only be detained in order to be prohibited from entering in the country or if action is being taken for removal from the country.

21. The claim continues as follows:

"… … it cannot be said that the exponent's detention finds justification in terms of article 5[1][f] of the European Convention. This is because,

although in the case in question a removal order was issued against the applicant, at no point in the twelve months during which he was detained could procedures be initiated to effect his removal from Malta… … … this article may in no way be understood that it is authorizing the detention of every person who has had a removal order issued against him, but it requires in an unequivocal manner that action is being taken to remove the person concerned for the detention to be justified."

22. In this regard, this Court noted that the scope of the mentioned Article 5[1] is that of protecting the right to individual's right to liberty against arbitrary interference of the State, while at the same time recognizing that there exist circumstances which merit a derogation from this right, among which are those contemplated in paragraph [f] of the same sub-article, when the arrest or detention is intended to avoid unauthorized entry in a country or for deportation from the country. This circumstance gives the State the right to take those measures in order to avoid unauthorized entry.

23. In conformity with this, the Immigration Act [Chap. 217] provides, in Article 5, that:

"(1) Any person, other than one having the right of entry, or of entry and residence, or of movement or transit under the preceding Parts, may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer, he shall be a prohibited immigrant."

24. Therefore, as soon as the appellant entered Malta by boat without the authorization of the Principal Immigration Officer, he became a prohibited migrant, and as such the Maltese State had the right to arrest and detain him in order to "prevent unauthorized entry" in this country.

25. As noted by the European Court in the case of **Saadi v. The United Kingdom[5]:**

"Until a State has 'authorised' entry to the country, any entry is 'unautorised' and the detention of a person who wishes to effect entry and ho needs, but does not yet have authorisation to do so, can be, without any distortion of language, to "prevent his effecting unauthorised entry". It does not accept that, as soom as an asylum

[5] Appl. 13229/03 – 29 January 2008

seeker has surrendered himself to the immigration authorities he is seeking to effect 'an unathorised entry' with the result that detention cannot be justified under the first limb of Article 5[1][f]. To interpret the first limb of Article 5[1][f] as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provisions and on the power of the State to exercise its undeniable right of control referred to above."

"Such interpretation would, moreover be inconsistent with Conclusion N.44 of the Executive Committee of the United Nations High Commissioner for Refugees' Programme, the UNHCR Guidelines and the Committee of Ministers Recommendation [see paragraphs 34-35 and 37 above, all of which envisage the detention of asylum seekers in certain circumstances, for example while identity checks are taking place or when elements on which the asylum claim is based have to be deterimined."[6]

26. Therefore the appellant's detention upon his arrival in Malta, was legal in terms of the convention article being examined, and his application for refugee status neither rectifies his position as a prohibited migrant nor does it render his detention and illegal one, because as the European Court acknowledged in the mentioned case, the right of the State to take measures to avoid unauthorized entry of prohibited migrants also extends to cases where there is such an application. In other words, the application does not rectify the position of the prohibited migrant unless he obtains the necessary authorization to remain in the country legally. Therefore, there is a right of the State to keep him in detention in these circumstances.

"It is a necessary adjunct to this right [to control aliens' entry and residence] that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. It is evident from the tenor of the judgment in Amuur that the detention of potential immigrants including asylum seekers is capable of bieng compatible with Article 5."[7]

27. Having established that detention may be in conformity with Article 5, it is now necessary to examine whether, in the circumstances of the case, the appellant's detention was a legal one,

[6] Para. 65
[7] ***Saadi*** – para. 64

or an arbitrary one. It has to be clear that each case has to be examined on its own merits[8].

28. The appellant states that his detention, even if it initially may have been legal, became arbitrary and illegal in terms of the cited article.

29. Succinctly, the appellant claims that his continued detention was illegal considering that it was not necessary, it was not *"with a view to deportation"*[9] and therefore the bona fide element was absent because the authorities were aware of the fact that applications for refugee status take months to be concluded, that the law which regulates the detention of prohibited migrants is not clear and precise enough, and it does not provide the necessary procedural safeguards for the protection of the right emanating from paragraph [f].

30. In the first place it is noted that on the concept of arbitrariness the European Court identified the following principles: that this concept is not limited to the parameters of national law,[10] and that the absence of bona fide on the part of the authorities of the member State renders the detention arbitrary and it therefore violates Article 5[1].

"It is a fundamental principle that no detention which is arbitrarjy can be compatible with Article 5 [1] and the notion of arbitrariness in [this article] extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law, but still arbitrary and thus contrary to the Convention."[11]

31. Regarding the concept of arbitrariness the European Court noted the following:

"To avoid being branded as arbitrary, therefore such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country' [see Ammur para.43]; and the length of the detention should not exceed that reasonaly required for

[8] **Rehbock v. Solvenia** – para. 84 – 28 November 2000
[9] Art.5 [f]
[10] *Saadi para 67*
[11] *Saadi - para 67*

the purpose pursued."[12]

32. In addition, and regarding the second part of Article 5[1][f], the European Court noted that the element of necessity in detention is not necessary as long as *"action [was] being taken with a view to deportation".* Furthermore, the principle of proportionality applies to this Article *"only to the extent that the detention sould not continue for an unreasonable length of time..... and any deprivation of liberty under Article 5[1][f] will be justified for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, detention will cease to be permissible [see also Gebremedhin v France no.25389/05 para.74]*[13]

33. That in the case of the appellant it cannot validly be said that in his continued detention the element of bona fide was lacking, taking into account that he entered Malta without authorization from the Principal Immigration Officer and therefore against domestic law with the result that he was served with a removal order, and therefore detained and continued to be detained *"to prevent his effecting an unathorised entry into the country".*[14] This order remained in force throughout the entire period of detention. Furthermore, the execution of the order was not continued when the appellant applied for refugee status because domestic law, notably regulation 12 [1] of Legal Notice 243/2008 impedes the execution of this removal order in such circumstances, until the application is decided.

34. In this regard it is noted that, although according to the information contained in the leaflet given to the appellant upon his arrival in Malta, as well as upon his arrival at the detention centre, where he had the opportunity and all the assistance to know his rights and obligations, it was specified that detention does not stop with the submission of his application, he felt that he had to submit this application <u>without taking any steps provided by law in order to attack the removal order and without even taking direct steps for his release from detention.</u>

35. In relation to Article 25A of Chap. 217, while it provides for the possibility of appeal within three working days before the Immigration Appeals Board[15] it also gives the appellant, as a person who is

[12] *Saadi*i – para 74
[13] *Saadi* para. 72; u **Chahal v. The United Kingdom** – 15 November 1996 – [Supra] 113
[14] Art.5[1][f]
[15] Art.25A [5]

"arrested or detained", the right to even verbally request provisional release. In addition, sub article 9 of the same Article also gives the Board the jurisdiction to decide 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… …".

36. Therefore, it cannot be validly stated that the appellant's detention was not in bona fide, or that it was not *"closely connected to the purpose of preventing unauthorized entry"*. Furthermore, it cannot be validly stated there were no *"proceedings in progress".*[16] Despite this, the appellant, for his part, remained entirely passive in this regard, and he failed to make use of the means which the law gives him for his release, even on a provisional basis.

37. That in the case **Louled Massoud v. Malta**[17] the European Court expressed its opinion that *"… the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation",* and this because the maximum limit on detention, of eighteen months, does not result from the law but from a policy implemented by the Government, and also because the procedure before the Appeals Board was not a speedy one, and this apart from the limits imposed by Article 25A[11].

38. In this regard this Court notes that in the first place the maximum period of one year detention for the application for refugee status emanates from regulation 22 of Legal Notice[18] three hundred and twenty (320) of the year 2005, and not from a policy. In the second place it noted that although it is true that certain safeguards emanate from policies and not from Chap. 217, and although it is true that sub article 11 of Article 25A imposes restrictions on the jurisdiction of the Board, the fact remains that in the case of the appellant it was not proven that he falls within the conditions contemplated in sub article 11, and therefore it was not proven that the Board's jurisdiction was excluded in his regard. Furthermore, although the term of eighteen months emanates from a Government policy[19], these were applicable even during the time when the appellant, as was mentioned in the regulation, so much so that after the period of one year from his

[16] *Chahal* [supra]
[17] Appl.24340/08 – 27 July 2010 – para. 71
[18] Which implements Directive 2003/9 EC of the year 2005
[19] Based on European Union Directive 2008/115/EC *"On commonstandards and procedures in Members States for retruning illegally staing third-country nationals"*

arrival in Malta expired, he was released from detention even though his application was still at appeal stage.

39. It is opportune to note that the appellant's case is different from that of Loulel Massoud indicated above, where the applicant was detained for about 18 months after his application for refugee status was rejected, and he was being detained only because the local authorities were making attempts for his deportation. When it resulted that his deportation was no longer possible due to the lack of documents, the Maltese authorities released him.

40. Regarding the conditions of the place of detention, the Court notes that from the testimony of Commander Brian Gatt it does not result that the conditions in the centre where the appellant was being detained were not "appropriate". In the case of Malta, the examination of this requisite needs to take into account the following factors, also raised by the first Court: the small size of the country and the density of the local population, as well as the large number of prohibited immigrants who continuously, particularly in the summer months, are disembarking in Malta.

41. The length of time during which the appellant was detained, the Court notes that in the first place his removal from Malta was suspended because of his application for refugee status, in the second place the appellant failed to make use of the means given to him by law to request provisional release until the application is decided. In addition, one cannot ignore the above indicated fact that Malta hosts a large number of prohibited migrants and many apply for refugee status with the consequence of delays in the processing of applications. It is opportune to note in this regards that the Government issued the Legal Notice[20] which created two divisions in the Board of Appeal. This will certainly contribute towards the speedier processing of applications.

42. It is also noted that this large influx of prohibited migrants may be a threat to public order in the country, as well as national security, because of their number and also because of the time necessarily required to verify their identity.

43. That when one considers the factors indicated above, particularly the failure on the part of the applicant to apply for provisional release,

[20] LN 246/2011

also considering the just balance which has to be achieved between the interests of society in general and the need to protect the right enshrined in Article 5, it cannot be said that his detention exceeded that which was reasonable in the circumstances.

44. Therefore this claim is being rejected.

The Third Claim

45. This is based on Article 5[2] and 5[4]. Article 5[2] stipulates:

"[2] Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

46. The appellant claims that in this case *"in no way can it be said that the information requested by the Convention was given to him at any time after he arrived in Malta."* He states that the only documents which were given to him when he was detained were the removal order and the *pamphlet* issued by the Ministry of Justice and Home Affairs, and he cites Inspector Sandro Zarb when he stated that *"we do not give them more information verbally because as I said it is all written in this booklet."* He cites Inspector Edel Mary Camilleri when she says, *"they would be very tired, and we cannot really explain these things to them."*

47. He states that *"while the removal order gives the reasons why the applicant's removal from Malta is being ordered, the reasons why the immigrants in question are placed under arrest do not result from anywhere."*

48. In the case of the appellant, not even the *pamphlet* could have been of comfort to him because he does not know how to read and write. In this regard he states that: *"it is clear that the lack of information regarding the reason for detention and even the length of time of this detention gives rise to a lot of anxiety."*

49. This Court notes that the legal principles relating to Article 5[2] of the Convention were listed by this Court in the case of **Jovica Kolakovic v. Attorney General[21]:**

[21] App. 50/2011 – para.- 29 October 2012

"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."[22]

"Two aspects to the application of Art.5[2] have been at the heart of the Court's jurisprudence: firstly whether the content of the information conveyed to a detainee is sufficient, and, secondly, the issue of the promptness of that information provision. Both are assessed case by case according to the special features of the application before the Court"[23]

"Also, an arrestee must be told in simple non-technical language which he understands of the essential legal and factual grounds of his arrest so that he may attack the lawfulness by challenging it in Court. This does not necessarily have to be made in writing or through a warrant, nor does this information guarantee a right of access to a lawyer[24]*. In fact a person need not be expressly informed of the reasons for his arrest in so far as they are apparent from the surrounding circumstances*[25]*. Also, Art.5[2] does not require that the reasons for an arrest be given in any particular way*[26] *and the information given need not be related in its entirety by the arresting officer at the very moment of the arrest*[27]*; provided he is so informed within a sufficient period following the arrest*[28]

"An arrest on suspicion of committing a crime does not require that information be given in a particular form, nor that it consists of a complete list of charges held against the accused person [App.no.4949/99 Bordovsky v Russia – 8th February 2003]. A bare indication of the legal basis for an arrest does not suffice, but a 'fairly precise indication' of the suspicions against applicant such that he could promptly gain some idea of what he was suspected of would be deemed enough. [X v Germany1978; Fox, Campbell and Hartley v UK 1990 para 41]"

50. In this case, although in his testimony the appellant admits that upon his arrival in Malta he was given the mentioned leaflet together

[22] Art. 5[2] of the Convention
[23] Harris O' Boyle & Warbrick: **Law of the European Convention on Human Rights** [1995] pg.165
[24] Appl.12244/66, 12245/66, 12383/86 -**Fox, Campbell and Hartley v. UK** [1990]
[25] Appl. 1936/63 – **Neumeister v. Austria** [1968]; Appl.8916/80 Freda v Italy [1980]; and Appl.10179/82 **B v. France**
[26] Appl. 2621/65 **X v. Netherlands**
[27] Appl.110/36 **Ladent v. Poland** – 18th March 2008
[28] Appl. 8828/79 - **X v. Denmark** 1982 – 5th October 1982

with the removal order, and they were informed that they could apply for asylum in Malta, nobody explained to him the contents of the leaflet, and taking into account that he does not know how to read, he did not know what it contained. Furthermore, nobody explained to them why they were being held in detention.

51. This Court, taking into account the assistance provided to the prohibited immigrants upon their arrival in Malta, as well as in the detention centre, as it results from the evidence, considers the appellant's thesis that he was not aware of the reasons why he was being detained to be quite improbable; *multo magis*, taking into account the fact that he was amply conscious of the fact that he entered Malta without authorization from the competent authorities.

52. In addition, he states that he did not ask any of the soldiers to explain what his rights are, and he did not ask to see a lawyer. This is quite discordant with his own allegation contained in this claim that the lack of information regarding the reasons for his detention and even on the duration of the detention caused in him a lot of tension and anxiety.

53. Therefore this part of the claim is not justified and is being rejected.

54. The second part of this claim is based on Article 5[4] which stipulates:

"[4] Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

55. In this regard the appellant states that:

"… he did not have the possibility to request the Court of Magistrates in terms of Article 409A of the Criminal Code [Chap. 9] and to submit a request in terms of Article 25A of the Immigration Act [Chap. 217] because all these remedies are inaccessible to detainees, and this because they were not given information on the remedies and what they must do to use them, and neither were they given the benefit of legal aid in order to be able to make effective use of these remedies.

"… even in the case where there is a right to legal aid, as in the case of a constitutional application, in fact it is impossible for the detainee to obtain the services of a legal aid lawyer because in practice this service is inaccessible to those who are detained unless one is accused of a criminal offence."

56. He states that the Immigration Board has the jurisdiction, in terms of Article 25A, not to examine the legality in terms of Article 5 of the Convention, but only whether the detention is a reasonable one in the circumstances. Therefore the remedy that the Board may give is limited and it does not satisfy the criteria of Article 5[4]. He cites the cases of **Kadem v. Malta** and **Sabeur ben Ali v. Malta** where the European Court considered that this is the only remedy in Maltese law which evaluates detention in the light of Article 5 and the principles upon which it is based, and it cannot be considered as a speedy remedy.

57. In this regard, the Court notes that the appellant's allegation that the remedy contemplated in Article 25A of Chap. 217 was inaccessible to detainees because they were not given information on remedies and what they must do to use them, and they were neither given the benefit of legal aid to use them, is in part gratuitous and in part contradicted by the evidence: it is contradicted by the evidence because it results from the record that upon their arrival in Malta and also upon their arrival in the centre they are given this leaflet containing all their rights, including remedies at their disposal. In addition, it is expressly indicated on the removal order itself that there is a right to appeal from the removal order.

58. Furthermore, as Commander Brian Gatt testified, when a detainee asks for legal assistance, they take all measures so that he may speak to a lawyer. In his case, the appellant stated in his own testimony that he did not initially request a lawyer, however he subsequently made contact with his current lawyer through Dr. Roberta Buhagiar.

59. Therefore this part of the claim is unfounded.

60. Regarding the second part of the claim, on whether the appellant had a speedy and effective remedy in terms of Maltese law in order to contest the legality of his detention, the European Court, in the case of ***Louled Massoud***, noted that the remedies available in local law,

those under Article 409A of the Criminal Code and under Article 25A of the Immigration Act are not adequate,

61. Before proceeding to make its observations in this regard, it must be said that the thesis of the defendants that Article 5[4] is not applicable since the appellant is no longer under arrest, is not legally sustainable, because the fact that the appellant was released from detention during proceedings before the first Court is not an obstacle to his request for his claim that his right as protected under this sub article be examined, that is, his right to contest the legality of his detention during the same period, and the delay until he was released.

62. Regarding the remedy contemplated in Article 409A of the Criminal Code, as interpreted by the Maltese Courts, the European Court made a just observation that this provision of the law does not constitute *"an effective remedy for the purposes of the Convention in that it stopped short of examaining the lawfulness in the light of the requirements of the Convention"* and therefore it concluded that this Article was not an effective remedy for the purposes of Article 5[4] of the Convention. In this regard, a reference to the case of **Karim Barboush v. Commissioner of Police**[29] was made where the Criminal Court decided that the competence of Article 409A does not extend to the examination of the constitutional aspects of the case.

63. Regarding Article 25A of Chap. 217, the European Court also noted that this does not provide an effective and speedy remedy, in terms of duration as well as due to the restrictions contemplated in sub article [11] which restrict the competence of the Appeals Board.

64. Regarding the local constitutional remedy this Court notes that, although the European Court described the procedure as *"cumbersome"*, taking into account the delay factor, it is however a fact that in the local juridical order there are means to contest the legality of detention with a procedure which is not expensive. Furthermore, there are precise rules entitled *"Court Practice and Procedure concerning Constitutional Matters*[30]*"* intended precisely for these type of procedures to be simplified, as well as expedited[31] as much as possible. Also, in the same way as civil proceedings, a case may be heard with urgency, and in the mentioned regulations it is

[29] Decided on 5 November 2004; a reference was also made to the case PA [SK] Besa Berhe v. Commissioner of Police – decided on 20 June 2007.
[30] Legal Notice 279 and 333 of year 2008.
[31] Regulation 6

provided that the terms for appeal may be abridged.[32]

65. In the case in question the Court notes that the appellant, instead of acting before the Appeals Board so as to attack the removal order, or to be released from detention, chose to institute constitutional proceedings on the 28 October 2008, that is, when he had been in detention for three months; the case started to be heard on the 16 January 2009 when the defense counsel of the applicant duly accepted notification of the hearing of the case. No request was made so that the case is heard with urgency.

66. Therefore this Court does not see that in the circumstances there was a breach of Article 5[4] of the Convention with regards to the appellant, and therefore this claim is being rejected.

The Third Claim

67. This is based on Article 3 of the Convention which protects the fundamental right of each person from being subjected to torture or inhuman or degrading treatment or punishment.

68. The appellant complains that his delay in the centre, as well as the environment in the same centre constitute a breach of this article. He states that the Safi Centre *"was condemned several times by local non-governmental organizations, as well as international organizations and institutions."* He complains on the overcrowding the lack of sanitary facilities and the lack of access to air, and that these have left an emotional effect on him. He states that *"the lack of respect by the centre authorities, as well as the fact that they* [the detainees] *have nothing to do during the day also reach a high level of degrading and humiliating treatment."*

69. In this regard this Court notes that the first Court made a detailed and correct analysis of the law and of jurisprudence about the subject, as well as an appreciation of the facts, and it came to the conclusion that, although one understands the situation of anxiety and sadness which an immigrant in those conditions have, however this does not amount to inhuman treatment and not even degrading treatment, and this Court does not see that, on the basis of the evidence obtained, it should disturb this appreciation.

[32] Regulation 4[3]

70. From the testimony of Commander Brian Gatt, corroborated in certain aspects by the applicant Emanuel Onyaka Udem, and also by the Director General of the Health Services in Government, Dr. John Cachia, it resulted that in the centre there are the necessary sanitary facilities, and there is medical assistance almost continuously, as well as continuous assistance by NGOs who assist detained with their needs. In addition, the mentioned witness, who testified in February 2009 explained that ten months before, the centre was refurbished.

71. Therefore even this claim is unfounded.

Decided

While confirming the appealed judgment, rejects the appeal for the reasons mentioned.
Expenses to be paid by the appellant.

< Final Judgment >

---------- END ----------