



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

**CASE OF CENTRAL MEDITERRANEAN DEVELOPMENT  
CORPORATION LIMITED v. MALTA (No. 2)**

*(Application no. 18544/08)*

JUDGMENT

STRASBOURG

22 November 2011

**FINAL**

***22/02/2012***

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Central Mediterranean Development Corporation Limited v. Malta (no. 2),**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President*,

Lech Garlicki,

Päivi Hirvelä,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić, *judges*,

David Scicluna, *ad hoc judge*,

and Fatoş Aracı, *Deputy Section Registrar*

Having deliberated in private on 3 November 2011,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in an application (no. 18544/08) against Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Central Mediterranean Development Corporation Limited (“the applicant company”), a company registered in Malta, on 27 March 2008.

2. The applicant company was represented by Dr A. Mifsud-Bonnici, a lawyer practising in Valletta. The Maltese Government (“the Government”) were represented by their Agent, Dr Silvio Camilleri, Attorney General.

3. The applicant company alleged that the Court of Appeal as composed on 14 November 2005 had not been an impartial tribunal.

4. On 6 January 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mr V. De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber accordingly appointed Mr David Scicluna to sit as an *ad hoc* judge (Rule 29 § 1(b)).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

#### A. The Background of the case

6. On an unspecified date the applicant company was sued in relation to its failure to honour a contractual obligation, namely to construct roads and keep them in a good state of repair. On 27 June 2003 the first-instance court found against the applicant company and gave it three months to execute the works. The decision was confirmed, in part (in relation to certain roads), on appeal on 25 February 2005 by the Court of Appeal sitting in a three judge formation.

7. On 17 May 2005 the applicant company lodged a request for retrial under Article 811(e) of the Code of Organisation and Civil Procedure (“COCP”) (see Relevant domestic law below), and a request for a stay of execution of the judgment under Article 823 (2) of the COCP, pending the decision on the retrial request.

8. On 3 November 2005 the Court of Appeal, sitting in the same composition as in the appeal on the main proceedings, rejected the request for a stay of execution. It considered that the bank guarantee of 100,000 Maltese liras (“MTL”) offered by the applicant company was not a sufficient guarantee for the execution of a judgment which might involve expenses amounting to MTL 400, 000. A further request by the applicant company to be allowed to lodge the sum of MTL 400, 000 was also rejected on the same day.

9. On 9 November 2005 the applicant company requested the Court of Appeal to reconsider the said decision and asked for its revocation. It invoked Article 229 (4) of the COCP (see Relevant domestic law below). The matter, yet again, fell to be heard before the same composition of the Court of Appeal which gave the decision appealed against. The applicant company therefore lodged a request for the withdrawal of the three judges, under Article 734 (1) (d) (ii) of the COCP, on the basis that they could not be considered impartial since they had determined the merits of the claim subject to “appeal”.

10. On 14 December 2005, the Court of Appeal, in the same composition, dismissed the applicant company’s request for withdrawal and declared the appeal null and void. It held that a request for reconsideration under Article 229 (4) of the COCP did not require the said judges to withdraw. On the contrary, it implied that the case had to be reconsidered by precisely the same judges, and the claim was therefore frivolous and vexatious. As to the appeal, it considered that the decision of

3 November 2005 amounted to a final judgment against which no appeal lay, it being covered by Article 227 and not 229 of the COCP (see Relevant domestic law below).

## **B. The constitutional redress proceedings**

11. On 2 April 2006 the applicant company instituted constitutional redress proceedings, claiming that its appeal proceedings culminating in the decision of 14 December 2005 had not been heard by an impartial tribunal.

12. On 10 October 2006 the Civil Court in its constitutional jurisdiction found against the applicant company. It considered that, while it was true that the provisions of Articles 227 and 823 (6) of the COCP appeared contradictory, the logical interpretation of the provisions was that an appeal for dismissal of a request for a stay of execution was available only if the decision had been taken by a court other than the Court of Appeal. Had this not been the case, the applicant company would have had reason to question the Court of Appeal's impartiality. However, the latter court had not reconsidered its decision of 3 November 2005, but abstained from taking cognisance of the request on the basis that it was null and void. Thus, the applicant company's claim was unfounded.

13. The Constitutional Court on 17 October 2007 confirmed the Civil Court's judgment. Noting that it had not been necessary for the Civil Court to enter into the interpretation given by the Court of Appeal, it held that on 14 December 2005 the Court of Appeal had not assessed its own previous conduct. It delivered a decision on a new legal question, namely the legal and procedural question of whether the appeal application was null and void, *viz*, whether the method of appeal used by the applicant company was one envisaged and allowed according to the COCP. It therefore did not decide on the merits of its previous decision. Moreover, it found that it had not been sufficiently proved that there was a real risk that the relevant judges had been biased. Indeed, the applicant company had not contested the impartiality of the Court of Appeal at the beginning of the proceedings, namely on the basis that the appeal in respect of the decision of 25 February 2005 had also been decided by the same formation of the Court of Appeal. Furthermore, the judicial code of ethics, the judicial oath and the relevant law provisions in respect of withdrawal and abstention of judges offered a sufficient guarantee of impartiality.

## **II. RELEVANT DOMESTIC LAW**

14. The pertinent provisions of the COCP, in so far as relevant, read as follows:

## **A. As to the possibility to appeal**

### **Article 227**

“Judgments delivered by the Court of Appeal are not appealable.”

### **Article 229**

“(1) An appeal from the decrees mentioned hereunder shall only lie after the final judgment and together with an appeal from such judgment, and such decrees may not be challenged before the final judgment is delivered: ...

(*m*) a decree disallowing a request for stay of proceedings.

(2) A decision of the court in the cause listed hereunder shall be given by a decree to be read out in open court on a day duly notified to the parties, and an appeal from such decree may be entered before the final judgment subject to the procedure laid down in sub-article (4) and (5): ...

(*e*) a decree ordering the stay of proceedings.

(3) Save as otherwise specifically provided for in this Code an appeal from any other interlocutory decree not included in subarticles (1) and (2) may be entered before the definitive judgment only by special leave of the court hearing the case, to be requested by an application to be filed within ten days from the date on which the decree is read out in open court. The court, after hearing the parties, may grant such leave of appeal if it deems it expedient and fair that the matter be brought before the Court of Appeal before the definitive judgment and the time limit for the filing of such an appeal shall commence to run from the date of the said decree.

(4) In the case of any decree under subarticles (2) and (3), provided that any application for an appeal has not been filed, the aggrieved party may file an application within six days from the date on which the decree is read out in open court, requesting the court which delivered the decree to reconsider its decision.

(5) The court shall decide, as expeditiously as possible by decree to be read out in open court, the application for special leave to appeal in terms of sub-article (3) or the application to reconsider its decision in terms of sub-article (4), expounding fully therein the reasons for the decision. ”

## **B. As to the challenging of judges**

### **Article 734**

“(1) A judge may be challenged or abstain from sitting in a cause -

(*d*) (ii) if he had previously taken cognisance of the cause as a judge or as an arbitrator:

Provided that this shall not apply to any decision delivered by the judge which did not finally dispose of the merits in issue or to any judgment of non-suit of the plaintiff;”

### **C. As to retrial requests**

#### **Article 811**

“A new trial of a cause decided by a judgment given in second instance or by the Civil Court, First Hall, in its Constitutional Jurisdiction, may be demanded by any of the parties concerned, such judgment being first set aside, in any of the following cases:

(e) where the judgment contains a wrong application of the law;

For the purposes of this paragraph there shall be deemed to be a wrong application of the law only where the decision, assuming the fact to be as established in the judgment which it is sought to set aside, is not in accordance with the law, provided the issue was not in reference to an interpretation of the law expressly dealt with in the judgment;”

#### **Article 823**

“(1) The demand for a new trial shall not operate so as to stay the execution of the judgment sought to be set aside.

(2) Notwithstanding the provisions of sub-article (1), the court before which a new trial is demanded may, at the instance, by application both before the Court of Appeal and before the court of first instance, of the party making such demand, order a stay of execution of the judgment if -

(a) together with his demand such party gives sufficient security for the execution of the judgment, if it is not set aside, including such security as is mentioned in Article 266(10); and

(b) it is shown to the satisfaction of the court that the execution of the judgment is likely to cause greater prejudice to such party than the stay of execution would cause to the opposite party.

(5) Where the enforcement of a judgment has been authorised by the judgment sought to be set aside the provisions of sub-articles (2), ... shall not apply.

(6) An appeal from a judgment disallowing the demand for the stay of execution of the judgment sought to be set aside shall in no case operate as a stay of execution of the latter judgment.”

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

15. The applicant company complained that the Court of Appeal as composed on 14 November 2005 had not been an impartial tribunal as provided in Article 6 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

16. The Government contested that argument.

#### A. Admissibility

17. The Government argued that Article 6 was not applicable to the stay of execution proceedings since the proceedings did not relate to a determination of any civil rights or obligations. In the present case, any civil rights or obligations had been finally determined by the judgment of the Court of Appeal of 25 February 2005 which had given the plaintiffs an executive title against the applicant company, then defendant. Therefore, the only subject matter of the impugned proceedings was simply whether or not to stay the execution of the said judgment. The decision on the matter depended on whether a sufficient guarantee had been given for the execution of the judgment and whether its execution would have caused greater prejudice to the requesting party than the stay would have had on the other party. Thus, at no point did the court decide on any civil right or obligation, either definitely or provisionally.

18. The Court reiterates that for Article 6 § 1 in its “civil” limb to be applicable, there must be a dispute (“contestation” in the French text) over a “civil right” which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is also protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, *inter alia*, *Mennitto v. Italy* [GC], no. 33804/96, § 23, ECHR 2000 X, and *Gülmez v. Turkey*, no. 16330/02, § 28, 20 May 2008).

19. Moreover, the execution of a judgment given by a court must be regarded as an integral part of the “trial” for the purposes of Article 6 (see *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II).

20. The Court notes that the impugned proceedings concerned the applicant company's request for the reconsideration and revocation of the decision on the stay of execution of the judgment (ordering the applicant company to perform works), pending the outcome of its application for retrial, and its request for withdrawal of the relevant judges.

21. It notes that Article 6 cannot be made to apply on the basis of the request for withdrawal of the said judges which is entirely procedural in nature and not determinative of civil rights and obligations. However, the Court considers that the applicant company's other demand, namely its request for a stay of execution of the judgment of the Court of Appeal of 25 February 2005, constitutes a corollary of the execution phase of that judgment which is an integral part of the proceedings determining civil rights and obligations and therefore engages the protection of Article 6. That Article is therefore applicable to the stay of execution proceedings.

22. The Court considers that this conclusion is reinforced by the Grand Chamber's judgment in *Micallef v. Malta* ([GC], no. 17056/06, ECHR 2009-...) which confirmed the applicability of Article 6 to preliminary or interim proceedings, such as cases of injunctive relief, where certain conditions are fulfilled. First, the right at stake in both the main and the injunction proceedings should be "civil" within the autonomous meaning of that notion under Article 6 of the Convention. Second, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable (§§ 83-85).

23. It follows that Article 6 is applicable to the stay of execution proceedings in the present case.

24. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## **B. Merits**

25. The applicant company argued that when the members of the Court of Appeal refused to withdraw from the case and continued to hear an appeal against their own previous judgment, it suffered a violation of its right to a fair hearing by an impartial tribunal. It was clear that a bench of judges confirming their own judgment could not be considered objectively impartial.

26. The Government submitted *a priori* that the applicant company had never requested the withdrawal of the said judges on the basis that they had delivered the appeal judgment on the merits of the claim on

25 February 2005. Thus, it appeared that the applicant company had had no doubts as to the impartiality of the bench in that respect.

27. The Government submitted that it was evident that there had not been any signs of subjective impartiality on behalf of the bench of judges.

28. As to objective impartiality, the Government contended that the court's application of the law was consonant with the law as it stood in respect of both requests. As to the judges' refusal to withdraw from the case, the law expressly provided that reconsideration was to be made "by the court which delivered the decree". As to the dismissal of the request for reconsideration, after postponing the case to later on that same day, the court concluded that the judgment of 3 November 2005, rejecting the request for a stay of execution, constituted a final judgment (as opposed to "a decree") and therefore Article 229 of the COCP, invoked by the applicant company, did not apply. Thus, the court abstained from taking cognisance of the merits of the claim. Therefore, the Court of Appeal's decision was purely of a procedural nature, and it could not be said that it had decided a question of merits already decided by the same formation. In such circumstances, there had not been any violation of the fair trial principle.

29. The Court reiterates that according to its constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Fey v. Austria*, 24 February 1993, Series A no. 255, §§ 27, 28 and 30, and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII).

30. As to the objective test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. What is at stake is the confidence that the courts in a democratic society must inspire in the public (see *Castillo Algar v. Spain*, 28 October 1998, *Reports* 1998-VIII, § 45). It follows that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein*, cited above, § 44, and *Ferrantelli and Santangelo v. Italy*, 7 August 1996, *Reports* 1996-III, § 58). In this respect, it is necessary to look at the circumstances of the case (see *San Leonard Band Club v. Malta*, no. 77562/01, § 62, ECHR 2004-IX).

31. In the instant case, the concerns regarding the Court of Appeal's impartiality stemmed from the fact that its bench on 14 December 2005 was composed of the same three judges who had previously decided the applicant company's request for a stay of execution "at first-instance".

32. As regards the subjective test, it has not been shown or argued that the Court of Appeal held or manifested any personal convictions such as to cast doubt on its subjective impartiality.

33. As regards the objective test, the Court reiterates that it is not *prima facie* incompatible with the requirements of this provision if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined (see *Warsicka v. Poland*, no. 2065/03, § 40, 16 January 2007 and Eur. Comm. HR, *R.M.B. v. the United Kingdom*, No. 37120/97, dec. 9 September 1998). The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Article 6 § 1 is to be made on a case-to-case basis, regard being had to the circumstances of the individual case and, importantly, to the characteristics of the relevant rules of civil procedure applied to the case. In particular, it is necessary to consider whether the link between substantive issues determined in a decision on the merits and the admissibility of an appeal against that decision is so close as to cast doubt on the impartiality of the judge (see *Warsicka*, cited above, § 40).

34. It is true that in the present case the applicant company did not have the possibility of a further recourse in the terms of the *Warsicka* case. Unlike in *Warsicka*, where the applicant had recourse to the Supreme Court having a full remit to decide on the applicant's claims, in the instant case, the proceedings the applicant company brought before the constitutional jurisdictions could only deal with the impartiality issue and not with the admissibility or merits of the applicant company's request. Nevertheless, the absence of such a review cannot alone be determinative. The Constitutional Court found that the applicant company's impartiality complaint was unfounded. Having regard to the nature of the issues involved, namely that the Court of Appeal concluded that Article 229 invoked by the applicant company did not apply in those circumstances, as no appeal lay against the final judgment delivered by the Court of Appeal on 3 November 2005, it considered that the fact that the same formation gave a judgment on the merits of a case and subsequently decided that the applicant's request in the form of an appeal application was null and void, could not be in violation of Article 6 (see paragraph 13 above).

35. As in *Indra v. Slovakia*, (no. 46845/99, §§ 51-54, 1 February 2005) the Court considers it appropriate to examine whether there was a close link between the issues examined by the Court of Appeal on the two occasions at issue. In the present case, the question determined by the Court of Appeal on 14 December 2005 was not the same as the question which the Court of

Appeal had determined on 3 November 2005. In the November hearing the court was examining the substance of the applicant company's request for a stay of execution. In the December decision, the court had to determine whether the applicant company's request for reconsideration under Article 229 (4) of the COCP was compatible with domestic law and procedure, and could be allowed. Only if that had been the case could the court have carried out an examination of the merits, a phase which never materialised in the circumstances of the case. Thus, in the Court's view, the scope of the examination involved, which can be considered tantamount to an assessment of admissibility, cannot be said to be the same or intrinsically linked to the merits of the original claim.

36. Hence, the Court considers that, in the instant case, the Court of Appeal when deciding on the applicant company's request for reconsideration under Article 229 was not called upon to assess and determine whether, for example, sitting as a bench, it had correctly applied the relevant domestic law to the applicant's case or whether or not it had committed an error of legal interpretation or application in its previous decision (see *San Leonard Band Club*, cited above). There was no such link between the substantive issues determined on 3 November 2005 regarding the merits of a request for a stay of execution and the decision of 14 December 2005 on whether the applicant company had a legal avenue of access to an appeal or reconsideration of the previous decision, which would cast doubt on the impartiality of that court.

37. Having regard to the circumstances of the case taken as a whole, the Court is of the view that it cannot be said that the applicant company's fears as to the impartiality of the Court of Appeal when examining its request of 9 November 2005 were objectively justified.

38. Accordingly, there has been no violation of Article 6 § 1 of the Convention.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 22 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı  
Deputy Registrar

Nicolas Bratza  
President