

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

FOURTH SECTION

DECISION

Application no. 57171/10
Lawrence BORG
against Malta

The European Court of Human Rights (Fourth Section), sitting on 26 June 2012 as a Chamber composed of:

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva, *judges,*
David Scicluna, ad hoc *judge,*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 30 September 2010,

Having regard to the declaration submitted by the respondent Government on 17 June 2001 requesting the Court to strike the application out of the list of cases and the applicant's reply to that declaration,

Having regard to the fact that Mr Vincent 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 decided to appoint Judge David Scicluna to sit as an *ad hoc* judge (Rule 29 § 1(b)).

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Lawrence Borg, is a Maltese national, who was born in 1949 and lives in Zabbar. He was represented before the Court by Dr J. Brincat, a lawyer practising in Malta.

2. The Maltese Government ("the Government") were represented by their Agent, Dr Peter Grech, Attorney General.

A. The circumstances of the case

1. Background of the case

3. The applicant was a co-director and shareholder, and subsequently just the handling agent, of a company registered in the United Kingdom. The applicant in his own name and on behalf of the company (CHL), was a tour operator bringing British tourists to Malta on chartered planes for a number of years.

4. In 1986 the Government introduced a "Special Guaranteed Pound Sterling Rate Scheme" ("the scheme"), providing for an advantageous rate of exchange for sterling *vis-á-vis* the Maltese lira, namely a "Forward Buying Rate". This system was operated by the Central Bank, except for one year, when it was operated by the National Tourist Organization of Malta (NTOM). The applicant's company initially benefited from this scheme but the application lodged in 1988 and all the subsequent applications (1989, 1990, 1994, and 1995), except for that lodged in 1996, were rejected, on the basis that such a benefit was discretionary.

2. The criminal proceedings

5. In January 1988, following an investigation and the drawing up of a report based on certain documents by the Central Bank, the applicant was charged in the criminal courts with violations of exchange control regulations, *inter alia,* of abusing the scheme to enrich himself at the Government's expense in the period 1986-87. On 28 November 1994 he was acquitted by the Court of Magistrates for lack of evidence. The prosecution appealed and on 25 July 1996 the Court of Criminal Appeal declared the appeal null and void as a result of procedural irregularities.

3. Ordinary proceedings

6. The following proceedings were joined on 15 July 1997.

a) First set

7. Subsequently, on 17 April 1990 the Central Bank of Malta instituted civil proceedings against the applicant and his company, claiming sums they

stated were due to them following the applicant's enrichment as a result of the abuse of the scheme.

8. By a judgment of 1 March 2004 the Civil Court rejected the allegations made by the Central Bank as being unfounded in fact and in law. It held that the Central Bank had not managed to prove any of the three requirements for the purposes of upholding their claim, namely that the applicant's company had misused the scheme, that the company had retained money which should have been put in bank accounts as provided for in the scheme and that as a result the Central Bank had suffered losses.

No appeal having been lodged the judgment became final.

b) Second set – judicial review

9. Simultaneously, on 14 October 1996, the applicant, in the name of his company, brought an action against the Central Bank. He submitted that the company's requests to benefit from the scheme had been rejected by the Central Bank from 1986 until 2004 with the exception of its request in 1996 which had been accepted by the NTOM. He argued that this constituted an abuse of power, and that the action was taken for improper purposes or on the basis of irrelevant considerations which were arbitrary and discriminatory. In particular, other companies that had also been found to have acted irregularly had their actions pardoned. He therefore requested the court to grant the said benefit and to order payment in compensation for the damage sustained.

10. By a judgment of 1 March 2004 the Civil Court, bearing in mind the decision in the joined case (first set mentioned above), rejected the claim. It reiterated that the grounds of judicial review of administrative action were limited (see Relevant domestic law below) and in the present case it had not been shown that the Central Bank's decision had been discriminatory or irregular, namely incorrect, abusive or unreasonable. The Central Bank had adduced evidence that it had not acted in a discriminatory fashion and that it had decided applications on the basis of their merit. As to the applicant's company, the Central Bank had made certain verifications and on the basis of the documents provided and investigations made by the bank's top management, rather than the criminal proceedings which had taken place, it appeared that there had been some irregularities in the management of money, contrary to exchange regulations. Consequently, the bank had decided to reject the application. Thus, the Civil Court was satisfied that the authority had reasonably applied its discretion without prejudice to whether their decision was correct on the merits. Moreover, the applicant's statement as to his involvement in the company did not tally with the documents provided. This conflict weakened the applicant's credibility and reinforced the bank's argument that they had a reason to mistrust the applicant's declarations in respect of eligibility to the scheme.

11. This judgment was confirmed on appeal on 9 March 2007. The Court of Appeal held that it was competent and had to assess the authorities' exercise of their discretion. It was important to verify that the authority assessed the facts of the case independently of any interference and that it acted within the parameters of the law, in good faith and upon relevant considerations. It observed that at the time when the Central Bank was assessing the relevant applications, the bank was in possession of documents which raised a suspicion in respect of the management of CHL's funds. Thus, the Central Bank's decision was not unreasonable or inappropriate. On the basis of the evidence adduced and the witnesses heard it did not appear that the decision had been capricious or based on irrelevant considerations. On the contrary, it was based on documents and other indicators that the company had irregularly taken advantage of the scheme. Moreover, the applicant had repeatedly failed to provide documentary evidence in support of his allegation and it was only at the end of the proceedings that some documents were produced. Without this documentation it had been reasonable for the bank to reject subsequent applications. It further noted that trust was an important aspect of the scheme, this factor depended on subjective considerations and the court did not find the assessment inappropriate. Moreover, while it was true that other companies had also acted irregularly and that they had reached agreements with the Government to reimburse the sums due, the applicant had also been approached but had refused to settle. The Court of Appeal considered that in determining the issue of trust a distinction had to be drawn between irregularities relating to minor amounts, where such persons accepted responsibility, and those related to higher amounts, where the person persisted in claiming damages. Thus, the applicant could not be considered to be in the same situation as his competitors. Similarly, it could not be said that the applicant had been discriminated against in view of the accepted application by the NTOM, since this related to a different scheme with a different scope. Lastly, it confirmed the doubts of the first-instance court as to the extent of the applicant's involvement in the company, and on this basis held that there was no reason to distinguish between the applicant in his own name and the company, notwithstanding that they had different legal personalities. In consequence, it adopted the Civil Court's assessment of evidence and refused to interfere with the latter's discretion.

4. Constitutional redress proceedings

12. The applicant instituted constitutional redress proceedings before the Civil Court (First Hall) in its constitutional jurisdiction. He complained under Article 6 about the length of the proceedings and that he had limited access to court against the actions of a public authority. Moreover, invoking Article 6 § 2 and Article 4 of Protocol No. 7 he contended that he was presumed guilty, despite the fact that he had been acquitted by the Criminal

Court. He further complained of a violation of Article 1 of Protocol No.1 to the Convention, as he had been deprived of the benefits of the scheme and of a violation of Article 14 in conjunction with Article 6 and Article 1 of Protocol No. 1, in that, unlike others, the applicant had not been called upon to settle the matter with the authorities, and that *vis-á-vis* the Government the scope of the judicial review available was too limited.

13. By a judgment of 7 October the Civil Court in its constitutional competence found a violation of the reasonable time principle in relation to the ordinary proceedings instituted by the applicant (and eventually joined to the proceedings instituted by the Central Bank) and awarded the applicant 1,200 euros (EUR). It rejected the remainder of the application. It considered that according to Strasbourg case-law Article 6 was not applicable in the present case. However, even assuming Article 6 was applicable, the applicant had had full access to court according to Article 469A of the COCP and that both the first-instance court and the appeal court considered that the authorities had exercised their discretion in *rite et recte* (correctly and within the established parameters). As to the complaint regarding the presumption of innocence, it found that the ordinary courts had not assumed the applicant was guilty. They had only assessed the authorities' discretion and concluded that it was reasonable, specifying that the basis for their decision was the documents and report drawn up, rather than any criminal proceedings. The court found that the applicant did not have a possession under Article 1 of Protocol No. 1, and thus the provision did not apply. Lastly, while finding that the complaint under Article 14 had not been presented in detail, even assuming it was applicable, it referred back to the conclusions of the ordinary courts that had established that the applicant had not received discriminatory treatment.

14. On appeal, by a judgment of 28 May 2010, the Constitutional Court confirmed the above judgment but varied the award of compensation and partition of costs. It raised the award to EUR 3,000. In respect of the remaining complaints it held that, even assuming Article 6 was applicable, the right to court was not absolute and the applicant had had access to court at two levels in the ordinary jurisdictions, thus, any limitations present in the law did not restrict his access rights such as to impair the essence of the right. Under Article 6 § 2 it considered that the statement that the bank had at the time documents capable of raising suspicion about the applicant's management of funds was not tantamount to a criminal condemnation, which would have had to be dealt with by the criminal courts, but solely a judicial reflection arising out of the result of the bank's own investigations. While the applicant had a right to have an opinion about the matter, and to disagree with the court's conclusion, this could not amount to a violation of Article 6 § 2. It further held that once all the requirements had been fulfilled, the applicant had a legitimate expectation to benefit from the scheme and that his application would be considered and accepted.

However, the mere hope of obtaining this benefit did not amount to a possession which would have only come into being had he obtained the benefit. Lastly, while Article 14 could be applicable, it considered that according to the evidence adduced there was no appearance of discriminatory treatment. Indeed the authorities had tried to reach an agreement with the applicant. Moreover, the authorities had considered that the applicant had been involved in irregularities and had subsequently claimed damages from them. In consequence, there was justification for different treatment in his respect.

B. Relevant domestic law

15. The Special Guaranteed Pound Sterling Rate Scheme provided for a special exchange rate applicable for a specified period of time in a given year to tour operators bringing tourists to Malta from the United Kingdom. This rate was available subject to the fulfilment of certain conditions as specified in a circular published by the Central Bank on 31 October 1986, which reads as follows:

> "It has been decided to offer tour operators engaged in tourist traffic to Malta from the U.K. a 'guaranteed rate of Lm 1 = Stg 1.50 throughout the period 1st July 1988 to 31st October 1988 herein referred to as 'the period covered' on the following terms and conditions:
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> 1. Tour operators are to submit an estimate of the expected monthly payments in Lm terms during the period covered. 50 % of this estimate will be on a 'fixed' contract basis and the remaining 50% on an 'option' basis to be exercised at the discretion of the operator.
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> 2. As soon as the final figures are accepted by the Central Bank of Malta but not later than 3l st June 1988, tour operators should lodge with one of the local banks a prime U.K. bank guarantee of 10% of the amounts on a fixed contract. Failure to comply with this condition by the last date mentioned, will automatically exclude tour operators from this scheme. No guarantee is required in respect of "option amount turned into fixed contracts."
>
> 3. Monthly amounts which are required to be covered under the scheme will be received by local commercial banks up to seven working days following the end of each month when operators are in a position to state their Maltese Liri commitments. Any unutilised amount of the option portion will be cancelled at the end of the scheme. During the first seven working days following the end of each month, tour operators must advise whether they intend to take up the option (or part thereof) for that month. Any option confirmed into a fixed contract has to be utilised within one month following notification of same advice. Transfer of the option portion to the following month may only be exercised during the period 1st July to 31st October.
>
> 4. Any balance of the fixed contract not utilised during a specified month will be closed out at the spot rate prevailing at the end of that particular month, provided

however that should the prevailing Stg rate fall against Lm no credit is passed to tour operators.

5. Applications for additional funds required during a particular month after the final month's amount has contracted for may be approved at the Bank's discretion.

6. Tour operators will have to provide the name and branch of the Maltese Commercial bank with whom an Lm account is to operated solely for the purpose of routing transactions connected with the scheme.

7. Local agents can only authorise payments provided a valid power of attorney has been given by tour operators.

8. At the time tour operators request delivery of funds or enter into a firm contract they have to submit to the banks details of number of tourist nights and payments to be made in Malta (...). Invoices issued by beneficiary should be submitted to local bank when instructions to effect drawings from the account are issued. Central Bank reserves the right to request any other information it may deem necessary for control purposes.

9. Expenditure in respect of items of a capital nature are not covered under the scheme. Pre-payments within the period covered under the scheme may be allowed provided these are in respect of the period covered.

10. All deals/contracts opened with Maltese commercial banks will be free of commission. However, out of pocket expenses will be borne by the tour operator.

The scheme will cover local payments including bed-night, flying costs, handling charges and other local expenses in respect of tourist business, package tours, conventions and stop overs in Malta during the period covered.

Tour operators who wish to, avail, themselves of the scheme are advised to inform the Central Bank of Malta directly by not later than 24 April 1988 giving the information required in item 1 above supported by statistical information of the number of tourist nights spent monthly in Malta during 1987/88. On the basis of this information the Central Bank of Malta may review estimates given under 1 above. The Bank binds itself to advise tour operators by 1st June 1988 whether their estimates are acceptable or not."

16. In so far as relevant, Article 469A of the Code of Organisation and Civil Procedure ("COCP") relating to Judicial Review of Administrative Actions, reads as follows:

"(1) Save as is otherwise provided by law, the courts of justice of civil jurisdiction may inquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:

(*a*) where the administrative act is in violation of the Constitution;

(*b*) when the administrative act is *ultra vires* on any of the following grounds:

(i) when such act emanates from a public authority that is not authorised to perform it; or

(ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or

(iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or

(iv) when the administrative act is otherwise contrary to law."

COMPLAINTS

17. The applicant complained under Article 6 § 1 of the Convention that he was still a victim of a violation in respect of the length of proceedings, as a result of the low amount of compensation awarded and the lack of an award for non-pecuniary damage. He also complained that judicial review in Maltese law was limited and in consequence he did not have effective access to court to complain about the Central Bank's actions depriving him of his alleged right to benefit from the scheme. He further complained under Article 6 § 2 that the Court of Appeal rejected his claim by repeatedly referring to the applicant's illegal actions, despite the fact that he had been acquitted by the criminal courts. Invoking Article 1 of Protocol No. 1 to the Convention, the applicant complained that he was deprived of his legitimate expectation to be part of the scheme. Lastly, he complained under Article 14 in conjunction with Article 1 of Protocol No. 1 and Article 6 that he was treated differently from his competitors, in that only he was taken to court, while others reached amicable settlements with the Government, and obtained the benefits of the scheme.

THE LAW

A. Article 6 § 1 – length of proceedings

18. The applicant complained about the length of the civil proceedings. He relied on Article 6 § 1 of the Convention which, in so far as relevant, provides as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

19. By letter dated 17 June 2011 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving

the issue raised by this application. They further requested the Court to strike out the application in accordance with Article 37 of the Convention.

20. The declaration provided as follows:

> "Whereas the efforts with a view to securing a friendly settlement of the case have been unsuccessful, the Government wishes to express – by way of its unilateral declaration – its acknowledgement that, in the circumstances of the present case, the length of the criminal (*sic*.) proceedings have failed to fulfil the requirement of "reasonable" within the meaning of Article 6 § 1 of the Convention.
>
> Consequently, the Government are prepared to pay to the applicant the amount of one thousand and five hundred Euro (EUR 1,500) which they consider reasonable in the light of the Court's case law. The sum referred to above, which is to cover any pecuniary and non-pecuniary damage as well as costs and expenses, will be free of any taxes that may be chargeable to the applicants. It will be payable within three months from the date of notification of the decision taken by the Court pursuant to Article 37 § 1 of the Convention. In the event of a failure to pay this sum within the said three-month period, the Government undertake to pay simple interest on it, from the expiry of that period until settlement, at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.
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> The Government, therefore, request that the application be struck out of the Court's list of cases pursuant to Article 37 § 1(c) of the Convention."

21. In a letter of 12 September 2011 the applicant expressed the view that the declaration should not be accepted particularly because the Government had not paid the sum awarded by the Constitutional Court, and also because the declaration referred to the entire application, which he believed deserved an assessment on the merits.

22. The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified, under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

23. It also recalls that in certain circumstances, it may strike out an application or part thereof under Article 37 § 1(c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued.

24. To this end, the Court will examine carefully the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment ([GC], no. 26307/95, §§ 75-77, ECHR 2003-VI).

25. The Court has established in a number of cases, including those brought against Malta, its practice concerning complaints about the violation of one's right to a hearing within a reasonable time (see, for example, *Central Mediterranean Development Corporation Limited v.*

Malta, no. 35829/03, § 42, 24 October 2006 and *Bezzina Wettinger and Others v. Malta*, no. 15091/06, § 93, 8 April 2008).

26. Having regard to the nature of the admissions contained in the Government's declaration and noting that its reference to criminal proceedings is evidently a misprint, as well as the amount of compensation proposed – which is consistent with the amounts awarded in similar cases – and lastly, that the award made by the Constitutional Court remains due, the Court considers that it is no longer justified to continue the examination of this part of the application (Article 37 § 1(c)).

27. In light of the above considerations, and in particular given the clear and extensive case-law on the topic, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of this part of the application (Article 37 § 1 *in fine*).

28. Accordingly, it should be struck out of the list.

B. The remaining complaints

29. The Court has examined the remaining complaints but finds, having regard to all the material in its possession and in so far as the matters complained of are within its competence, that the remaining complaints do not disclose any appearance of a violation of the Convention.

30. It follows that the remainder of the application is inadmissible under Article 35 § 3 (a) as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Takes note of the terms of the respondent Government's declaration under Article 6 § 1 of the Convention in respect of the length of proceedings complaint and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases in so far as it relates to the above complaint in accordance with Article 37 § 1 (c) of the Convention;

Declares the remainder of the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President