CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 30651/03
by Cecil and Henry PACE
against Malta

The European Court of Human Rights (Fourth Section), sitting on 8 December 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Ms L. MIJOVIĆ, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 26 August 2003,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Cecil Pace and Mr Henry Pace, are two Maltese nationals who were born respectively in 1930 and 1933 and live in Ta'Xbiex (Malta). They are represented before the Court by Mr M. Pace and Mr T. Azzopardi, two lawyers practising in Ta'Xbiex.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The suspension of the Bank of Industry's licence and the lawsuits initiated by the applicants

The applicants are principal shareholders of the Bank of Industry, Commerce and Agriculture Limited (hereinafter, the "Bank of Industry").

On 25 November 1972 the licence of the Bank of Industry was temporarily suspended. Pursuant to Section 18 of the Banking Act 1970 and after consultation with the Central Bank of Malta, the Minister of Finance appointed a controller and charged him to assume all the powers of the Board of Directors and of the shareholders of the Bank of Industry. The controller was requested to take care of the assets and liabilities of the Bank of Industry and of its associated companies with a view to safeguarding the rights and interests of the depositors, creditors and shareholders and to liquidate the assets for eventual distribution.

Between 1986 and 1989 the applicants filed several lawsuits before the Civil Court (First Hall) against the controller, alleging that he was responsible for mismanagement and that his behaviour had been abusive and illegal. They claimed that the assets of the Bank of Industry were being dissipated or sold for a derisory price, that debts were not being collected and recovered, that inventories were not being made and that proper documentation of the transactions was not being kept.

Several sittings took place before the Civil Court and evidence started to be collected.

2. The enactment of Act XVII of 1995

While the proceedings were pending, Act XVII of 1995 (Controlled Companies Act – Chapter 383 of the Laws of Malta) was enacted. It created a body called "Appeals Board". All the lawsuits and claims made by the applicants and pending before the Civil Court were transferred to this body, which had become competent to hear and determine them.

The Appeals Board was to be composed of three members, a Chairman and two experts in banking or financial services appointed by the Minister of Finance. The duration of their office, which would have been established in the Minister's letter of appointment, could not exceed three years. An Appeal on points of law before the Court of Appeal was available against the decisions of the Appeals Board.

According to Article 16 of Act XVII of 1995 no action lay against the controller, the Appeals Board or the Government for anything which had been done in accordance with the provisions of the Act from the date of the appointment of the controller.

Under Article 15 of Act XVII of 1995 the controller had the power of striking off the names of a bank and of its associated companies from the register of companies. He could also decide to deliver documents to the registrar. These documents were to be destroyed after ten years.

3. The applicants' first constitutional claim before the Civil Court

In 1996 the applicants introduced a claim (no. 533/96) before the Civil Court (First Hall) in its constitutional jurisdiction. They alleged that the changes introduced by Act XVII of 1995 were specifically aimed at depriving them of the possibility of having a fair trail.

The applicants submitted that, in view of its nature and composition, the Appeals Board could not be regarded as an impartial and independent tribunal.

In a judgment delivered on an unspecified date, the Civil Court dismissed the applicants' claim. It found that there had been no violation of Article 6 § 1 of the Convention, since this provision did not require a body such as the Appeals Board to have the same level of independence and impartiality as a "tribunal".

The Civil Court held that the Appeals Board was objectively independent as its decisions were not based on directives issued by any authority. Furthermore, it was free from subjection to any other party. The fact that the members of the Appeals Board were appointed for three years with a possibility of reappointment at the expiry of their term of office did not mean that they would not enjoy sufficient guarantees against outside pressures.

4. The applicants' first appeal before the Constitutional Court

The applicants appealed to the Constitutional Court.

In a judgment of 3 December 1997, the Constitutional Court rejected the applicants' appeal and confirmed the Civil Court's judgment. It noted that the Constitution of Malta referred to a court or other authority instituted by law, while the Convention referred to an "impartial tribunal". Thus, civil rights might be determined by both these institutions.

In the Constitutional Court's view, there were no doubts as to the personal impartiality of the members of the board. As to the applicants' argument that a lack of objective impartiality could be inferred from the fact that the members of the board were nominated by the Minister of Finance, who was the defendant in the lawsuits they had introduced, the Constitutional Court observed that the law applied equally to everybody and that the authority who appointed the board was of little relevance. In any case, the manner of appointment of the Chairman and of the members of the Appeals Board did not raise any objectively justified doubts as to their impartiality and independence, as they had no relationship of employment or dependence with the Minister of Finance. The board was allowed to make its decisions freely and independently of any pressure or influence. Its members could not be arbitrarily dismissed. The Constitutional Court also held that Act XVII of 1995 guaranteed a fair trial.

5. The applicants' second constitutional claim before the Civil Court

In the meantime, the applicants had introduced another claim (no. 549/96) before the Civil Court (First Hall) in its constitutional jurisdiction. They submitted that since the decisions of the Appeals Board were final in so far as they determined points of fact, the previous existing benefit of double examination had been lost. Furthermore, in view of the retroactive immunity granted by Article 16 of Act XVII of 1995 to the controller, to the Appeals Board and to the Government, nobody could be held legally responsible for the dissipation of their assets and negligent and illegal behaviour in administrating their financial interests. Therefore, even if their lawsuits were well-founded, the applicants could not obtain a judgment against the defendants or enforce it. In addition, they submitted that Article 15 of Act XVII of 1995 also provided for the removal of a company's name from the register of companies, which entailed the archiving and destruction of the company's files. This could result in the obliteration of evidence which the applicants might need to use.

In a judgment of 28 May 1999, the Civil Court declared that Act XVII of 1995 had breached the applicants' right to continue their pending cases within a reasonable time and to have an effective remedy before a national authority. Therefore, it held that the lawsuits instituted by the applicants before the entry into force of this Act should be decided by the Civil Court in accordance with the pre-existing rules, and not by the Appeals Board.

The Civil Court held that it was not competent to decide upon the alleged legal immunity of the controller. It also rejected the applicants' complaint regarding the destruction of the documents as ordinary remedies were available to avoid such actions being taken.

6. The applicants' second appeal before the Constitutional Court

The Attorney General appealed to the Constitutional Court. The applicants lodged a cross appeal.

In a judgment of 27 February 2003, the Constitutional Court confirmed the Civil Court's decision in so far as it concerned the finding of a violation of the applicants' right to a trial within a reasonable time.

It observed that in its previous judgment of 3 December 1997, it had held that the Appeals Board had the necessary requirements of independence and impartiality. However, this did not mean that a transfer of cases from the Civil Court to the board would have been licit and legal, especially since it might have diminished the rights and remedies enjoyed by the parties.

In particular, under Act XVII of 1995 the parties were not entitled to an appeal on points of fact (as guaranteed by the previous rules), but could only challenge the points of law decided by the Appeals Board before the Court of Appeal. Therefore, the parties had lost *pendente lite* the right to a full appeal. This constituted a violation of Article 13 of the Convention

The Constitutional Court furthermore held that it was legitimate to grant immunity to the controller and to the Minister of Finance. However, Article 16 of Act XVII of 1995 could not be interpreted as conferring a general immunity. As no one could be considered to be above the law, the controller could have been protected against judicial actions only in so far as he had acted in good faith. He would still be liable if it was proved that he had acted in bad faith.

As to the powers given to the controller by Article 15 of Act XVII of 1995, the Constitutional Court observed that under domestic law the applicants could have made use of other ordinary remedies in order to obtain the production of any relevant document. It had not been shown that the applicants had been illegally denied this right.

7. The applicants' lawsuits current status

In a fax of 14 November 2005, the applicants informed the Court that they had not introduced any lawsuit after 1995. The lawsuits filed against the controller of the Bank of Industry and against the Minister of Finance before 1995 were suspended awaiting the outcome of the applicants' constitutional claims. They were resumed after the delivery of the Constitutional Court's judgment of 27 February 2003 and were, on 14 November 2005, still pending.

B. Relevant domestic law

1. The Appeal's Board

The composition and the method of appointment of the Appeals Board are described in Article 7 of Act XVII of 1995, which reads as follows:

> "(1) For the purpose of this Act there shall be constituted a Board to be styled the Appeals Board which shall consist of a Chairman and two other members appointed by the Minister.
>
> (2) The members of the Board shall, before entering upon their office, take before the Attorney General the oath to examine and decide any matter referred to them with equity and impartiality.
>
> (3) The Chairman shall be an advocate with a minimum of twelve years' legal practice.
>
> (4) The two other members mentioned in sub article (1) shall be persons who in the opinion of the Minister, possess the necessary expertise and experience in banking or financial services.
>
> (5) The members of the Board shall be appointed for such period that the minister may establish in the letter of appointment, which period shall not exceed three years, and may only be removed by the Minister on the advice of the Commission for the Administration of Justice on the grounds of proved inability to perform the functions of their office whether arising from infirmity of body or mind or any other cause, or proved misbehaviour."

According to Article 12 of the Act,

> "The decisions of the Board shall be final except with respect to points of law decided by the Board from which an appeal shall lie to the Court of Appeal."

2. The controller appointed by the Minister

Under Act XVII of 1995, the Minister of Finance is required to appoint a controller in order to manage the assets and interests of a company whose licence has been restricted or revoked.

The controller is granted an immunity under Article 16 of the Act, which reads as follows:

> "No action shall lie against the Controller, the Appeals Board or the Government for anything done under the authority of this Act or of the Banking Act and this article shall apply from the date of appointment of the Controller even if that date happens to be before the date of the coming into force of this Act."

The controller's power to strike off names of companies from the register of companies is provided for by Article 15 of the Act, according to which:

> "(1) The Controller shall also, in accordance with article 161 of the Commercial Partnerships Ordinance or any other provision of any other law substituting the said Ordinance, deliver to the Registrar for registration by him a notice of such approval, and the Registrar shall thereupon strike the name of the company or partnership off the register.

(2) The Controller shall, together with the aforesaid notice, deliver the books and other documents of the company to the Registrar, who shall keep them for a period of ten years from the date at which the name of the company or partnership was struck off the register."

COMPLAINTS

1. The applicants complained under Articles 6 and 13 of the Convention about a lack of independence and impartiality of the Appeals Board and about the absence of an appeal on points of fact against this body's decisions.

2. Invoking Articles 6 and 13 of the Convention, the applicants complained about the immunity granted to the controller, the Appeals Board and the Government and about the powers of the controller.

THE LAW

1. The applicants considered that the Appeals Board was not an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. They furthermore observed that the Appeals Board's decisions could be challenged only on points of law, a fact which, contrary to Article 13 of the Convention, would deprive them of their right to a full double degree of jurisdiction in civil matters.

In so far as relevant, Article 6 § 1 of the Convention 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 ..."

According to Article 13 of the Convention,

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The applicants observed that according to Act XVII of 1995, all their lawsuits had been transferred to the Appeals Board, a body which could not be described as independent and impartial.

The applicants reiterated the arguments exposed in their constitutional claim no. 533/96 and submitted that it was not acceptable to let the other party (the Minister of Finance) appoint the members of the board which was to decide the outcome of their cases. They furthermore claimed that the appointed Chairman of the Appeals Board was the Minister of Finance's personal lawyer, an executive member of the political party to which the Minister of Finance belonged and the lawyer of that party.

Referring to the content of their constitutional claim no. 549/96, the applicants furthermore observed that as the decisions of the Appeals Board would be final as far as they determined points of fact, they would lose their right to a double examination both on points of fact and law, which existed under the previous legislation.

The Court first notes that the applicants' allegations concerning a lack of independence and impartiality of the Appeals Board have been raised and examined in the ambit of the first constitutional claim (no. 533/96). The final decision on this claim is the Constitutional Court's judgment of 3 December 1997, given more than six months before the date of introduction of the application (26 August 2003).

However, the Court does not consider it necessary to determine whether this complaint has been introduced out of time, since, even assuming that the requirements of Article 35 § 1 of the Convention have been satisfied, this part of the application is in any case inadmissible, for the following reasons.

The Court observes that in a subsequent judgment of 28 May 1999, the Civil Court decided that all the lawsuits introduced by the applicants before the entry into force of Act XVII of 1995 were to be decided by the ordinary jurisdictions and not by the Appeals Board. This part of the Civil Court's judgment was confirmed by the Constitutional Court on 27 February 2003.

According to the information provided by the applicants, the latter did not introduce any lawsuit after 1995. It follows that at present there is no judicial claim lodged by the applicants which has been decided by the Appeals Board or is pending before this body.

Under these circumstances, the Court considers that the applicants cannot claim to be victims, within the meaning of Article 34 of the Convention, of the facts complained of.

It follows that this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

2. The applicants considered that their rights under Articles 6 and 13 of the Convention were violated by the immunity provided for by Article 16 of Act XVII of 1995 and by the powers given to the controller.

The applicants noted that the controller, the members of the Appeals Board and of the Government were granted an immunity with retroactive effect. It was true that according to the Constitutional Court this immunity was not unfettered, as the said persons could be attacked on grounds of bad faith. However, this meant that no one was any longer legally responsible for the negligent and illegal dissipation of their assets.

The applicants furthermore alleged that under Article 15 of Act XVII of 1995 the controller was given the power to destroy all existing evidence in respect of his wrongdoings.

The Court first notes that according to the information provided by the applicants on 14 November 2005, all the lawsuits introduced by the latter against the controller of the Bank of Industry and against the Minister of Finance were, on that date, still pending.

The Court recalls that the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, i.e. once they have been concluded. However, it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see *R.D. v. Spain*, no. 15921/89, Commission decision of 1 July 1991, Decisions and Reports (DR) 71, pp. 236, 243-244). The Court, noting that the proceedings in question have not yet been completed, finds that the applicants' submissions do not disclose any such circumstances (see *Arrigo and Vella v. Malta* (Dec.), no. 6569/04, 10 May 2004, and *Putz v. Austria*, no. 18892/91, Commission decision of 3 December 1993, DR 76-A, pp. 51, 64).

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President