

IN THE SUPREME COURT OF FLORIDA

KRISHNA MAHARAJ)
)
)
 Appellant,)
)
)
 v.) CASE NO: 91,854
)
)
 STATE OF FLORIDA,)
)
)
 Appellee.)
)
)

BRIEF OF *AD HOC* GROUP OF MEMBERS OF THE EUROPEAN PARLIAMENT
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

MEMBERS OF EUROPEAN PARLIAMENT
AMICUS CURIAE BRIEF

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NATURE OF AMICUS

1. Amicus is an ad hoc group of Members of the European Parliament (the Parliament). The members of this group are listed in Annex 1.

2. The Parliament is an elected body of members from each of the 15 Member States of the European Union. The Parliament has 626 Members elected by means of direct universal suffrage, representing views across the political spectrum. It has an important role in the European Union's legislative process together with other constitutional powers.

3. Amicus has been formed solely for the purpose of petitioning this Court on behalf of Krishna Maharaj, a citizen of the United Kingdom, and a citizen of the European Union pursuant to Article 17(1) of the European Community Treaty of the European Union. The United Kingdom is a Member State of the European Union and elects 87 Members of the Parliament (MEPs). Amicus includes MEPs elected both from the United Kingdom and from other European Union Member States who are members of various different political parties, groupings and affiliations. Amicus is non-partisan.

4. The Parliament takes a strong interest in the rights of European Union citizens. Much of the legislation that it approves has as its purpose the protection of the rights of individuals and

the application across all the Member States of the European Union of the highest standards in such matters. The law of the European Union has been fundamental in many Member States in securing rights for individuals to provide remedies against discrimination, control of environmental risks, consumer protection, food and drug safety, protection of the rights of the defendant, privilege against self-incrimination and so forth. Although the Parliament currently has no competence in the criminal field, some of the rights that European Union law creates may be protected by criminal sanctions at the Member State level.

5. Further, as explained below, European Union law incorporates general principles of human rights law and, in particular, jurisprudence of the European Commission on Human Rights (the HR Commission) and the European Court of Human Rights (the European Court). In particular, the Parliament is subject to challenge on the basis that it is acting unconstitutionally and outside its powers if it approves legislation which conflicts with the protection of human rights provided for by, *inter alia*, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the ECHR).

6. Amicus takes as its guiding principle the belief that the principles of the protection of civil liberties that apply in

Europe represent standards to which all nations should aspire. These include the principles that:

- A) No person should be punished for any crime except after a trial and appeals process which accords with the highest standards of fairness and the rule of law; and
- B) Those standards of fairness preclude a lengthy period of incarceration facing a death penalty as inhumane treatment.

INTEREST OF AMICUS

7. Mr. Maharaj is a citizen of the United Kingdom, and, by virtue of Article 17(1) of the European Community Treaty, a citizen of the European Union.

8. Although Member States of the European Union no longer use capital punishment, it is not the purpose of Amicus to challenge the right of the United States to implement capital punishment in a manner consistent with legal notions of justice and fairness.¹ Rather, Amicus seeks an opportunity to be heard, on behalf of a

¹ The abolition of the death penalty within the European Union is set out in the Sixth Protocol to the ECHR. The signing of this protocol by the member states is encouraged, but not mandatory. As such, the abolition set out therein is not one of the inviolable human rights unequivocally guaranteed by the signatory states to the ECHR. The UK, however, has announced it will sign the protocol.

citizen of the European Union. Amicus seeks to explain the rights to which that citizen would be entitled within the European Union. Amicus does this in the hope that a brief exposition of those rights may be of assistance to this Court in determining what the appropriate approach should be in Florida or, at the least, in the exercise of any discretion that this Court might have in this particular case.

9. Amicus does not accredit itself with any particular insight into the facts of Mr. Maharaj's case, or any superior right to instruct the courts of a highly competent and advanced jurisdiction as to the law which should apply to determine the outcome of the appeal. Amicus respects absolutely both the law which must apply and the courts responsible for implementing that law. Rather Amicus seeks to make known to the Court certain matters of European Union and Human Rights Law which Amicus believes to be highly relevant to Mr. Maharaj's case. To the extent that the law of Florida is open to progressive judicial interpretation and development, Amicus hopes that the European Union and ECHR precedents and perspectives it presents may be of assistance to this Court.

10. For these reasons, it is respectfully submitted that this Court should admit this brief in support of Mr. Maharaj.

SUMMARY OF THE ARGUMENT SUBMITTED BY AMICUS

11. The ECHR enshrines certain fundamental human rights and sets minimum standards which signatory states must observe in order to ensure the protection of such rights. Chief amongst those rights which are relevant to the case of Mr. Maharaj are:

- a) The right not only to a fair trial before a neutral tribunal but to a process which is demonstrably and incontestably fair, as a matter of public record (Article 6(1)); which also imports
- b) The right to be presumed innocent until proved guilty according to law (Article 6(2));
- c) The right to present fully and effectively evidence in one's defense (Article 6(3)); and
- d) The right not to be subject to inhuman or degrading treatment (Article 3).

12. By virtue of the case law of the Court of Justice of the European Communities (the ECJ), these rights (as elaborated by the case law of the European Court and the Human Rights Commission, both created under the ECHR) form part of the general principles of the law of the European Union. As such they operate on all European Union bodies exercising powers under European Union law, which includes the Parliament.

13. Amicus is concerned that the trial of and associated treatment received by Mr. Maharaj does not meet the standards of basic protection that would be available under the ECHR. In

particular:

- a) The failure (whatever the views of the defendant or those advising him) by Judge Solomon to have the original hearing reheard *de novo* after the arrest of Judge Gross for corruption in the middle of the trial;
- b) The manner in which Judge Solomon allowed the prosecution to write the sentence order of death before him *before* the jury had considered the evidence and returned their recommendation for the death penalty;
- c) The appointment of Judge Glick to hear the application for a fresh hearing on the evidence when (1) Judge Glick had been involved in the presentation of the original case for the prosecution when he had been a member (at that time) of the prosecutor's office and (2) the hearing on the evidence would have enabled Mr. Maharaj to present fresh evidence (including alibi evidence placing him some 40 miles away at the relevant time and failed polygraph records from leading prosecution witnesses) undermining that very prosecution case and which, on any view of the merits ought properly to be considered in the context of a capital trial; and
- d) The speed with which the process has moved leaving Mr. Maharaj facing a death sentence for over ten years;

would all be seen as very serious breaches of the protection of individuals within the European Union.

14. Amicus bases these submissions on the facts summarized in Annex 2 which Amicus understands are not contested. Amicus recognizes that these issues have been put before this Court in connection with various submissions and thought it likely to be of greater assistance and courtesy to the Court not to reiterate them in the main body of this brief.

FUNDAMENTAL HUMAN RIGHTS WITHIN THE EUROPEAN UNION

15. The most clear enunciation of human rights to be afforded to the citizens of the European Union can be found in the ECHR. The ECHR was drafted in 1950 by the Council of Europe, an international body established in 1949 in an attempt to bring a degree of unity to the continent of Europe by means of inter-governmental cooperation. The Council of Europe is not an institution of the European Union, although all European Union Member States form part of the Council of Europe (along with many other states which are not part of the European Union). The ECHR, itself, has the status of a treaty, operating at the level of public international law. It has been ratified by all Member States of the European Union, but its implementation within the domestic legal systems of the various signatory states takes place as a matter of sovereign decision, and hence varies considerably from country to country.²

16. However, European Union law, as interpreted by the Court of Justice of the European Communities, has embraced the fundamental rights arising under the ECHR. The interaction between

² The UK has recently enacted the necessary implementing domestic legislation. The Human Rights Act 1998, though not yet in force, will incorporate the ECHR into UK law.

rights provided under international law by the ECHR and rights provided directly by the legislative institutions of the European Union are further explained below.

A. RIGHTS ARISING UNDER THE ECHR - ARTICLE 6

17. The ECHR's Article 6, "Right to a Fair Trial," states, *inter alia*, that:

"(1) In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.....

"(2) Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.

"(3) Everyone charged with a criminal offense has the following minimum rights:

"(a) ...

"(b) to have adequate time and facilities for the preparation of his defense;

"(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

"(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions

as witnesses against him..."³

Independent and Impartial Tribunal - Article 6(1)⁴

18. In Hauschildt v. Denmark (12 E.H.R.R. 266) the European Court stated that if there was a legitimate doubt as to a judge's impartiality, he must withdraw from the case. Impartiality means lack of "prejudice or bias."⁵

19. In Mr. Maharaj's case there has been legitimate doubt as to the impartiality of all three judges in previous hearings.

20. Judge Gross was removed from the case on his arrest on charges of bribery in another case, but having also solicited

³ Analogous to the rights provided by the ECHR, and binding on U.S. courts under international law, are the rights contained in the United Nations Universal Declaration of Human Rights (UNUDHR) and the International Covenant on Civil and Political Rights (ICCPR). These include; the right to a fair hearing, the presumption of innocence, the minimum guarantees for the defense, trial without undue delay and the right to review by a higher tribunal.

⁴ The right to a hearing by an independent and impartial tribunal contained in Article 6(1) of the ECHR is reflected in Article 10 of the UNUDHR and Article 14 of the ICCPR and is consistent with the laws in legal systems of civilized jurisdictions throughout the world, including some which retain the death penalty.

⁵ Piersack v. Belgium 5 E.H.R.R. 169

bribes from Mr. Maharaj in this case.

21. Although Mr. Maharaj was aware of the arrest of Judge Gross, and purportedly waived his right to a mistrial, such a purported waiver cannot be said to be valid. The European Court has consistently held that the waiver of a right guaranteed by the ECHR--insofar as it is permissible--must be established in an unequivocal manner.⁶ This indicates that there are certain circumstances where a waiver will not be permissible, and even where a waiver is theoretically permissible the test will be a rigorous one.

22. In Pfeifer and Plankl v. Austria (14 E.H.R.R. 1992), both judges in a case were disqualified by law as they had been investigating judges in the same case. The defendant declined the opportunity to lodge a plea of nullity and the State argued that he had thereby waived his right to have the court composed differently. The European Court, in dismissing the purported waiver as invalid, stated that the right to an independent and impartial tribunal was of "essential importance" and the exercise of such a right *cannot depend upon the parties alone*.

23. Amicus respectfully draws the attention of the Court to

⁶ Oberschlick v. Austria A 204 (1991), Pfeifer and Plankl v. Austria 14 E.H.R.R. 1992.

this precedent as relevant to the case of Mr. Maharaj who, suffering from apparently poor advice from his Counsel and without any apparent detailed consideration of the matter, should not have been permitted by the Court to waive such a fundamental right save in the clearest circumstances; his case should have been re-heard *de novo* following Judge Gross' arrest.

24. The breach of the protection enshrined, within Europe, by the ECHR, arising from the lack of impartiality of Judge Solomon is demonstrated by Borghers v. Belgium (15 E.H.R.R. 92). In that case, the Procureur General of the Belgian Court of Cassation was allowed to state his opinion in open court as to whether the appellant's appeal in a criminal case should be allowed. He was further allowed to retire with the Court and take part in its private deliberations on the appeal (although he could not vote). This is, in substance, the position in Mr. Maharaj's case where Judge Solomon and the Office of the State's Attorney entered into private communications to implement a sentence *before* the sentencing hearing began.

25. In relation to the position of Judge Glick, the European Court has held in Piersack v. Belgium (5 E.H.R.R. 169) that a violation of Article 6(1) occurred where the presiding trial court judge had earlier been the head of the section of the public

prosecutor's department that had investigated the applicant's case and instituted proceedings against him. In De Cubber v. Belgium (7 E.H.R.R. 236), the European Court extended this reasoning to the case of an investigating judge who, although independent from the prosecution, had links with the public prosecutor's department.

26. Amicus submits that this is analogous to the position of Judge Glick, who had been a supervising prosecutor in the office of the State's Attorney at the time of the trial and was subsequently appointed to the case in post-conviction proceedings. This direct authority shows that, whatever the personal integrity of Judge Glick, his connection with the case would, as a matter of appearance and presentation, be sufficient to bring the treatment that Mr. Maharaj received into breach of the ECHR.

Presumption of Innocence - Article 6(2)

27. Judge Solomon's behavior could also be viewed as a presumption of Mr. Maharaj's guilt before he was proved guilty by the court. This would constitute a breach, vis-à-vis a citizen of the European Union, of the ECHR right under Article 6(2) to be presumed innocent.

28. Under Article 6(2) members of a court, when carrying out their duties, must, pending proof of guilt, proceed on the basis that the accused has not committed the offense charged. The

presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty (see Barberà, Messegué and Jabardo v. Spain (A 146, 1989) See also Minelli v. Switzerland (A 62, 1983)).

Presentation of Evidence - Articles 6(1), (3)

29. In criminal cases, and, *a fortiori*, in a case involving capital punishment, it is imperative that the taking and presentation of evidence is subject to the guarantees as those reflected in Article 6 of the ECHR.

30. For example, there is a requirement under the law emanating from the ECHR that the prosecution disclose all material evidence for or against the accused (see Edwards v. UK (A 247-B)). In Edwards, the failure to disclose that a witness had failed to identify the applicant from a police photograph album, and the existence of fingerprints (not the applicant's) at the scene of the crime, was found to be a defect.

31. Amicus submits that the facts in Edwards are similar to the facts in Mr. Maharaj's case, where the prosecution was in possession of a large amount of evidence favorable to Mr. Maharaj and damaging to prosecution witnesses. This included the knowledge that a member of the prosecutor's office had been involved in

soliciting bribes.

Effective Legal Representation - Article 6(3)

32. The right to legal assistance, as embodied in Article 6(3)(c) of the ECHR, was expounded in Poitriminol v. France (A 277-A 1993):

"The right of everyone charged with a criminal offense to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial" (emphasis added).

33. Counsel's advice to Mr. Maharaj to refuse a fresh trial on the arrest of Judge Gross, and Counsel's failure to call eight alibi witnesses, to counsel Mr. Maharaj to testify, and to adduce further evidence subsequently discovered indicating Mr. Maharaj's innocence, seriously calls into question the effectiveness of Mr. Maharaj's defense representation. This issue is particularly critical in a case involving capital penalties.

34. Article 6(3)(d) of the ECHR provides for a defendant's right to obtain the attendance and examination of witnesses on his behalf. The essential aim of Article 6(3)(d) is to ensure the equality of arms in examining witnesses, though considerations of equality do not exhaust the provision.⁷ The fact that no alibi witnesses were called for the defense would appear to be a distinct

⁷ Vidal v. Belgium A 235-B (1992)

inequality.

35. Clearly, the defense must, in general, be allowed to determine its own case. However, it is extremely disturbing that, in a capital trial, there are still significant numbers of witnesses who apparently have fundamental, relevant evidence to give, which seems likely to prove the innocence of a man otherwise condemned to death, who have not been heard. Whatever the procedural history of the matter, the principles of Article 6(3)(d) can not be respected if this evidence is not presented for proper testing and evaluation before a neutral tribunal. To execute a man in such circumstances would be a fundamental breach of the ECHR.

Conclusion on ECHR Process Issues

36. As the brief factual summary set out in the Annex 2 shows, from Mr. Maharaj's trial and post-conviction proceedings right through to the hearing before Judge Glick, there are issues which, irrespective of the personal integrity of the individuals actually involved, raise enormous doubts as to whether internationally recognized standards of fairness and justice, as reflected in Article 6 of the ECHR, were observed.

B. ARTICLE 3: INHUMAN AND DEGRADING TREATMENT

37. Article 3 of the ECHR states that: "No one shall be

subjected to torture or to inhuman or degrading treatment or punishment."

38. This provision reflects the principles inherent in the United States Constitution's Eighth Amendment. A similar safeguard is set out in Article 7 of the ICCPR which provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

39. It is the opinion of Amicus that the development and interpretation of the provisions would benefit from the experience of each other and it submits that the way in which a European citizen's protection against possible 'inhuman or degrading treatment or punishment' has been developed in case law affords a relevant precedent for this Court.

40. The leading European authority⁸ on what amounts to "inhuman and degrading" treatment in the execution of capital sentences is Soering v. United Kingdom (1989, 11 E.H.R.R.). In Soering, the practice in the State of Virginia of holding condemned men on death row for 6-8 years was considered in the light of Article 3.⁹ The European Court established the following important

⁸ The case has been described in one recent Federal Court case as "an important precedent... It reflects a persuasive though non-binding international standard." (Ahmad v. Wigan 726 F. Supp. 389 at 414).

⁹ The European Court was ruling on the practice of the State of Virginia as a result of a German national raising an ECHR

points:

- A) The prohibition is absolute, and enshrines a fundamental value of democratic society now generally recognized as an internationally accepted standard (para. 88).
- B) The treatment is "inhuman" if it causes, not bodily injury, but premeditated prolonged and intense physical or mental suffering; and "degrading" if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. Account must be taken "where there is considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted upon him" (para. 100).¹⁰
- C) The death sentence may infringe Article 3 of the ECHR by the manner in which it is carried into execution in the

defense in a UK case in which he was facing extradition to the State of Virginia where he would face the death penalty. The case is particularly relevant as it considers the US practice of implementing capital punishment in the light of the standards set by the ECHR and applicable in Europe.

¹⁰ Amicus notes that the method of execution in the State of Florida is still the electric chair. Amicus is also aware of the malfunction of the electric chair which resulted in flames appearing around the metal skull-cap of the inmate being executed at the time. This can only have made more acute the torment and anguish of Mr. Maharaj.

circumstances of a particular case. Factors to be assessed include (para 108):

i) **Length of detention prior to execution:** Although possibly of the prisoner's own making in using a well-intentioned complex system of post-sentence procedures, "The consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death" (para. 106);¹¹

(ii) **Conditions on death row:** notably the extra security for condemned men and the "severity of a special regime" lasting for a protracted period;¹² and

(iii) **The applicant's age and mental state.**¹³

41. In Soering, having regard to the above factors, the court

¹¹ In Mr. Maharaj's case the events with which he has been charged took place in October 1986, 12 years ago; his trial took place in October 1987, 11 years ago. Since then he has been under sentence of death (save only since September 1997, when the sentence was suspended, while still subject to an application to be re-imposed).

¹² Mr. Maharaj was confined to his cell at the Union Correctional Institute for upwards of twenty three hours a day and not permitted to engage in the day-to-day tasks of the other inmates;

¹³ Mr. Maharaj is now fifty nine years old. Eleven years on death row have taken a heavy toll on his health. He is a diabetic and suffers from a heart condition, any further threat of death is likely to increase his suffering in a way not envisaged by the court or the jury that sentenced him.

concluded that a decision by the UK to extradite the applicant to face the death penalty in the US would violate Article 3 of the ECHR.

42. Mr. Maharaj's case is a much more extreme example of inhuman and degrading treatment than that contemplated in Soering. Mr. Maharaj's rights to humane treatment under internationally recognized standards, as reflected in Article 3 of the ECHR, have been and continue to be breached.

43. Furthermore, the fact that Mr. Maharaj has been incarcerated on death row for over ten years can be seen as a breach of his fundamental right to a fair trial and appeals process, as reflected in Article 6(1) of the ECHR, by virtue of the principle that justice delayed is justice denied.

C. THE DEVELOPMENT BY THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (ECJ) OF A HUMAN RIGHTS POLICY FOR THE EUROPEAN UNION

44. The European Coal and Steel Community Treaty of 1951, The European Atomic Energy Community Treaty of 1957 and the European Economic Community Treaty of 1957 form the basis of what has since evolved into the European Union. These treaties were essentially economic in character. Accordingly, they contained no express provisions relating to the protection of human rights in the conduct of European Community affairs. Nonetheless, the Court of

Justice of the European Communities has since developed, by judicial activism, a charter of basic human rights for the Community. This development has gradually been given increasing formal recognition by the institutions of the Community and within the amended European Union and European Community Treaties.

45. In Internationale Handelsgesellschaft, (Case 11/70, [1970] E.C.R. 1125) the ECJ stated that:

"Respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."

46. Having established that protection of fundamental rights forms part of the general principles of law recognized by the Member States of the Community, the ECJ developed its jurisprudence in Nold, (Case 4/73, [1974] E.C.R. 491)¹⁴ indicating that the types of rights which it might be expected to protect could be evinced not only from the Member States' constitutions, but also from

¹⁴ "As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."

international human rights treaties to which the Member States were party. The most important of these is the ECHR.¹⁵

47. Thus the status of international declarations of rights such as the ECHR in the Community legal order is not that of a positive and direct source of Community law. Rather, it derives from the fact that they represent basic principles to which Member States subscribe. The standard set by such international treaties is seen by the ECJ as an important expression of the common values shared by the Member States, and as a valuable indicator of the general legal principles of the Community. This position has been recently reiterated by the ECJ in its Opinion on Accession by the Community to the ECHR (Opinion 2/94, [1996] E.C.R. I-1759).¹⁶

48. The ECJ's judicial incorporation of human rights law within the law of the European Union is important. By virtue of the doctrine of supremacy of European Union law,¹⁷ within the scope of matters dealt with in the European Community Treaty, European Union law is supreme and takes primacy over national laws. Therefore, the adoption into European Union law of the rights

¹⁵ There are others; for example, the ECJ in Defrenne v. Sabena (Case 149/77) derived fundamental rights from the European Social Charter 1961 and the International Labour Organisation 1958.

¹⁶ Opinion 2/94, [1996] ECR I-1759. Here the ECJ declared the Community not to be competent to accede to the ECHR.

¹⁷ As developed in Costa v. ENEL (Case 6/64) and Simmenthal (Case 106/77)

enshrined in the ECHR under the general principles of law has the effect that, within the scope of European Union law, those rights are directly effective and binding in each Member State, irrespective of whether a Member State has implemented the ECHR fully and effectively and/or is proposing to apply it in any given case. In appropriate circumstances, these rights can be raised in the national courts of each Member State even against the state itself. These rights must be given primacy by such national courts over any contrary provision of national law, irrespective of the degree of domestic implementation of the ECHR. A clear body of ECJ jurisprudence has now developed to the effect that human rights and the ECHR may be used to challenge Member State action within the scope of European Union law.¹⁸

**Examples of Challenges to Community
Action on a Human Rights Basis**

49. Fundamental human rights have been relied on in numerous cases to challenge the validity of Community legislation and administration action. The ECJ has often held that Community laws--as well as national laws seeking to implement Community law--detract from Community law, or indeed have general effect in areas also covered by Community law. They must therefore be subject to

¹⁸ ERT (Case C-260/89); Vereinigte Familienpress Zeitungsverlags (Case C-368/95); Konstantinidis (Case C-168/91).

review by the ECJ on a human rights basis.

50. The ECJ's development of its fundamental rights jurisprudence has touched on most provisions of the ECHR. Indeed, the recent case of Kremzoh v. Austria (Case T-83/96), is authority for the proposition that the ECHR is, in its entirety, now part of the general principles of European Union law.

51. Specifically, the right to a fair hearing enshrined within Article 6 of the ECHR, has been categorized in several ECJ cases as a fundamental human right and has often been used as a grounds of challenge to action by the institutions of the European Union.¹⁹ For example, in Transocean Marine Paint v. Commission, (Case 17/74), the ECJ annulled a proviso to a Commission exemption granted to the complainant because it was imposed without the complainant ever being given an opportunity to comment on the possibility of insertion of such a proviso. Additionally, in the recent case of Baustahlgewebe v. Commission (Case C-185/95P), the ECJ held that the European Court of First Instance (the junior court to the ECJ) had infringed the applicant's right to a hearing within a reasonable time under Article 6(1) of the ECHR (there had been a delay of over five years between the case first coming

¹⁹ Hoffman-la Roche (Case 85/76); Solvay (Case 27/88); Hoechst (Case T-10/89); van de Wal (Case T-83/96); Dufay v. European Parliament (Case 257/85); Al-Jubail (Case C-49/88)

before the Court and the Court giving judgement).

52. The right under Article 3 of the ECHR not to be subjected to inhuman or degrading treatment has not yet been raised specifically in an action under European Union law. However, its place within the general principles of European Union law was given support by Advocate General Jacobs in his opinion in Konstantinidis, (Case C-168/91, see para. 45).

53. Other specific provisions of the ECHR have been raised before the ECJ, for example the principle of non-retroactivity of criminal provisions in Article 7,²⁰ the right to respect for one's private life in Article 8,²¹ freedom of religion in Article 9,²² and freedom of expression in Article 10.²³

54. Clearly, therefore, the ECJ has firmly established a broad coverage for the rights enshrined in the ECHR within its own jurisprudence and within the law of the European Union. Moreover, the approach of the ECJ to human rights has now met with the enthusiastic approval and affirmation of the other European Union institutions and Member States.

Approval by the Parliament - Express Adoption

55. The ECJ's approach was given official legitimacy and

²⁰ Kent Kirk (Case 63/83)

²¹ X v. Commission (Case C-404/92P).

²² Prais (Case 130/75).

²³ Oyowe & Traore (Case 100/88).

political approval by the Parliament, Council and Commission, the European Union's three major legislative and executive institutions in a Joint Declaration on Fundamental Rights, [1997] OJ C 103/1 (5 April 1997). In that Joint Declaration, the European Parliament, along with the other institutions, stressed the importance attaching to the protection of fundamental rights. They also approved the approach of the ECJ and pledged to respect human rights in the exercise of their powers and in pursuance of the aims of the Community. The Joint Declaration is of great political importance, underlining as it does the ECJ's derivation of those human rights which it may be expected to protect, stating the willingness of the institutions to respect those rights in the exercise of their powers and cementing the human rights policy of the European Union.

**Approval from the Member States
- Treaty amendments**

56. Approval from the European Union Member States for the ECJ's importation of human rights principles into European Union law has come in the form of amendments to the original treaties, promoting and fostering respect for human rights.

57. The Treaty on European Union (1992) made reference to human rights and freedoms in a number of its provisions. Article F(2), in particular, provided that the European Union would respect

the fundamental rights guaranteed by the ECHR and by the constitutional traditions of the Member States. The Treaty of Amsterdam 1997 amended Article F (now Article 6). The amended provision declares that the European Union *is founded on* the principles of liberty, democracy and respect for human rights and fundamental freedom. This provision has now been rendered justiciable. Thus the ECJ will now have treaty-based jurisdiction upon which to review the conduct of the European Union institutions for compliance with these principles.

58. These amendments constitute express legitimacy by the Member States of the practice of the ECJ in relation to fundamental rights. The amendments mark the culmination of the process of integration of the ECHR within the law of the European Union.

SUMMARY

59. For these reasons set out above, Amicus believes that the legal process afforded to, and treatment of, Mr. Maharaj have not complied with internationally recognized standards of fairness and human rights as clearly and effectively enshrined in European Human Rights and European Union law.

60. Amicus is particularly concerned that in a capital case, where human life is at stake, utmost emphasis should be placed to

ensure that such procedural standards and rights are upheld.²⁴

²⁴ On this point, the Human Rights Committee of the United Nations has repeatedly ruled that, in capital punishment cases in particular, it is the duty of States to rigorously observe all the guarantees for a fair trial as set out in its International Covenants.

CONCLUSION

61. Amicus respectfully urges this Court to grant its Motion for leave to file this Amicus Curiae brief and to exercise its discretion to prevent any further pursuit of the death penalty for Krishna Maharaj by the State's Attorney's Office.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served a copy of the foregoing document upon Anita Gay, Assistant State Attorney, 1350 N.W. 12th Avenue, Miami, Fla. 33136-2111; to the Office of the Attorney General, Department of Legal Affairs, Rivergate Plaza Suite 950, 444 Brickell Avenue, Miami, Florida 33131; to Benedict P. Kuehne, Sale & Kuehne, Nationsbank Tower, Suite 3550, 100 S.E. 2nd Street, Miami, Florida 33131-2154; and to Clive A. Stafford Smith, Louisiana Crisis Assistance Center, 636 Baronne Street, New Orleans, Louisiana 70113 this 2nd day of March, 1999.

Annex 1

Names and Constituencies of Member of the European Parliament

Constituting Amicus

MEMBER OF THE EUROPEAN PARLIAMENT	PARTY	CONSTITUENCY
1. James Moorhouse	Conservative	London South and Surrey East
2. Richard Balfe	Labour	London South Inner
3. Christine Oddy	Labour	Coventry and North Warwickshire
4. Stanley Newens	Labour	London Central
5. Ken Coates	Labour	Nottinghamshire and Chesterfield
6. Dr. Wolfgang Ullmann	The Green Party	Berlin Central

ANNEX 2

SUMMARY OF FACTUAL MATTERS RELEVANT TO AMICUS' SUBMISSIONS

1. Amicus' understanding of the relevant facts is as follows (Amicus will not review in detail the facts of this case, since the details are not relevant to the general submissions that it seeks to make).

A. CHARGES

2. Mr. Maharaj was charged by an indictment dated November 5, 1986, with two counts of first degree murder and related offenses (Transcript, 1-5a), arising from the deaths of Derrick and Duane Moo Young in the Dupont Plaza Hotel on October 16, 1986.

B. MR. MAHARAJ'S COUNSEL

3. Several weeks after being arrested Mr. Maharaj retained Eric Hendon, who was Counsel at trial. This was apparently Counsel's first capital case and he had no experience in this kind of litigation. Counsel was a sole practitioner and had no assistance from a second lawyer or any support of any kind in preparing this case.

C. ISSUES ARISING AT TRIAL

4. Mr. Maharaj pleaded not guilty and was tried by a jury

from October 5 to October 19, 1987.

5. On the fourth day of Mr. Maharaj's trial, the trial judge, Judge Howard Gross was removed from the case. He was arrested, in the Court room, in the midst of hearing Mr. Maharaj's case, on charges that he solicited a bribe to act favorably in another criminal case. Judge Gross was subsequently disbarred. This Court has held, in other proceedings, that the evidence supported the finding that Judge Gross had lowered a criminal defendant's bail in return for a bribe; there was "strong circumstantial evidence of guilt." The Florida Bar v. Gross 610 So. 2d 442 (1992);²⁵ also see The Florida Bar v. Swickle 589 So. 2d 901 (1991).

6. However, the Maharaj trial continued. Judge Gross was simply replaced by Judge Harold Solomon, mid-trial. Judge Solomon had not heard the previous three days of important evidence, in particular the evidence of the two main witnesses against Mr. Maharaj.

7. Moreover, during the initial phase of the procedure of this case, Judge Gross had also attempted to solicit a bribe from Mr. Maharaj, through a third party. Mr. Maharaj was outraged and

²⁵ Judge Gross was charged with certain Rules Regulating The Florida Bar including rule 4-8.4(a), (c) & (d) (violating the rules of professional conduct; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct prejudicial to the administration of justice).

rejected this advance. Judge Gross then reacted with hostility towards the defense. Mr. Hendon has conceded that he believed he was treated unfairly in the pre-trial proceedings and the first three days of the trial as a result of Mr. Maharaj's declining Judge Gross' offer of a bribe.

8. However, Mr. Hendon did not bring this to his client's attention at the time. When first advised by Mr. Maharaj that the approach had been made, Mr. Hendon did not take steps to protect his client. He notified the prosecution, Mr. Maharaj's adversary, but did not contact law enforcement. It subsequently transpired that the Florida Department of Law Enforcement was even then conducting an investigation into similar allegations against Judge Gross. In particular, Mr. Hendon apparently learned that the person who had solicited the bribe from Mr. Maharaj had then been a member of the Office of the State's Attorney. However, Mr. Hendon still chose not to bring this to his client's attention.

9. It came to light in recent appeal hearings that the trial prosecutors knew of the allegations, knew that the third party was a member of their office and clearly appreciated their significance when the judge was later arrested.

10. Mr. Maharaj was offered a mistrial but, on advice from Mr. Hendon, purportedly waived that right. (Tr. 2852-2858)

11. Counsel for Mr. Maharaj and the State failed to inform

Judge Solomon of Judge Gross's approach (through the third party) to Mr. Maharaj.

12. The Jury returned verdicts of guilty as to the two counts of first degree murder, two counts of kidnaping with a firearm, and unlawful possession of a firearm while engaged in a criminal offense. (Tr. 4184-4187)

13. Judge Solomon solicited an order from the prosecution imposing a sentence of death *before* the judicial sentencing hearing began. Amicus understands that it is alleged that he apparently had more than one *ex parte* contact with the prosecution, as part of the drafting process.

14. After a brief penalty phase, the jury recommended life imprisonment for the murder of Derrick Moo Young and the death penalty, by a vote of 7 to 5, for the murder of Duane Moo Young. (Tr. 4498-4499).

15. On December 1, 1987, the trial court imposed the death penalty for the first degree murder of Duane Moo Young. (Tr. 1783-1784).

D. ADDITIONAL EVIDENCE

16. Amicus understands that there was considerable evidence that the jury did not hear before it convicted Mr. Maharaj and recommended a death sentence.

D) The prosecution was in possession of a large amount of

evidence that strongly impeaches the witnesses against Mr. Maharaj and undermines their testimony.²⁶

- E) Mr. Hendon failed to call eight alibi witnesses at trial, who would have placed Mr. Maharaj forty miles away, in another city, at the time of the crime.
- F) The prosecution told the jury at Mr. Maharaj's trial that he was the only one with the motive to kill the two victims - because they had stolen over \$400,000 from his business. The prosecution apparently knew this to be false as they were in possession of evidence that the victims were heavily involved in laundering and defrauding other people out of millions of dollars. As the prosecution also knew, but did not disclose to the defense, the victims knew that they were in danger and had recently taken out one million dollar life insurance policies on themselves.

²⁶ Amicus is aware that there are some issues where there would be a question of admissibility of the evidence. For example, Mr. Maharaj passed a lie detector test performed by a highly respected expert. It was the conclusion of this expert that he was not responsible for the deaths of Derrick and Duane Moo Young. Mr. Maharaj's main accuser, Neville Butler, failed a lie-detector test on substantial portions of his testimony, yet the prosecution represented to the trial court that he had passed. It is not Amicus' intention to debate the admissibility of this evidence, but it does add to the serious questions concerning Mr. Maharaj's guilt.

E. POST-CONVICTION PROCEEDINGS

17. Judge Leonard Glick was appointed to the case in post-conviction proceedings. Judge Glick denied an evidentiary hearing on issues that included allegations that the State had presented perjured testimony and suppressed evidence favorable to the defense.

18. It subsequently came to light that Judge Glick had been a supervising trial prosecuting attorney in the Office of the State's Attorney at the time of Mr. Maharaj's trial. As a result of his failure to reveal his prior potential involvement in the case, this Court ordered Judge Glick to be excused from hearing the case.²⁷

19. On appeal, this Court ordered an evidentiary hearing held in September 1997, before Judge Jerald Bagley. Mr. Maharaj did not have proper finance for legal representation and, owing to lack of funds, was unable to prepare and present a large proportion of the evidence that would prove his innocence. At the evidentiary hearing, Judge Bagley did not order a new trial but temporarily suspended Mr. Maharaj's death sentence for the first degree murder of Duane Moo Young pending a new sentencing hearing. Judge Bagley made this decision after finding that Judge Solomon, in *ex parte*

²⁷ See Maharaj v. State, 684 So. 2d 726 (Fla. 1996).

communications with the State's Attorneys, had allowed the prosecution to write his sentencing order for him before the jury had considered the evidence and returned their recommendation. The State is seeking the reimposition of the death sentence.