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

CASE OF T.W. v. MALTA

(application no. 25644/94)

JUDGMENT

STRASBOURG

29 April 1999

In the case of T.W. v. Malta,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr A. FERRARI BRAVO
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A. BAKA,
Mrs S. BOTOUCHAROVA,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 13 January and 31 March 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the Maltese Government ("the Government") on 31 July 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 25644/94) against the Republic of Malta lodged with the European Commission of Human Rights ("the Commission") under former Article 25 by a United Kingdom national on 2 November 1994. In the proceedings before the Commission the applicant was identified only as

Notes by the Registry
1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.
3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

T.W. At the wish of the applicant's representative this practice was maintained in the proceedings before the Court.

The Government's application referred to former Article 48. The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 § 3 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30).

The Government of the United Kingdom, having been informed by the Registrar of their right to intervene (former Article 48 (b) of the Convention and former Rule 33 § 3 (b)), indicated that they did not intend to do so.

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, the President of the Court at the time, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the memorials of the applicant and the Government on 18 and 20 November 1998 respectively. The applicant filed further details of his claims for costs and expenses under Article 41 of the Convention on 23 November 1998. On 1 December 1998 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions. On 9 December 1998 the Government submitted comments on the applicant's claims under Article 41 of the Convention.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr G. Bonello, the judge elected in respect of Malta (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr J. Makarczyk, Mr P. Kūris, Mr R. Türmen, Mrs F. Tulkens, Mrs V. Strážnická, Mr P. Lorenzen, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A. Baka and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4). Subsequently Mr Lorenzen was prevented from taking part in

1. *Note by the Registry.* Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

the further consideration of the case and was replaced by Mr L. Ferrari Bravo (Rule 24 § 5 (b)).

5. The President decided that it was not necessary to invite the Commission to delegate one of its members to take part in the proceedings before the Grand Chamber (Rule 99).

By letter dated 11 December 1998 the President of the Grand Chamber notified the Agent of the Government of a provisional question which he proposed should be put to the Government. On 4 January 1999 the Government filed with the Registry their answer to the question. On 19 January 1999 the Government sought to file additional observations following the hearing. The President refused the Government leave to do so.

6. In accordance with the President's decision, the hearing, together with that in the case of Aquilina v. Malta[1], took place in public in the Human Rights Building, Strasbourg, on 13 January 1999.

There appeared before the Court:

(a) *for the Government*
Mr A. BORG BARTHET, Attorney-General of Malta, *Agent*,
Mr S. CAMILLERI, Deputy Attorney-General,
Mr L. QUINTANO, Senior Counsel, *Counsel*;

(b) *for the applicant*
Mr J. BRINCAT, Advocate,
Mr B. BERRY, Advocate, *Counsel*.

The Court heard addresses by Mr Borg Barthet and Mr Brincat as well as their reply to a question put by one judge.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, T.W., is a United Kingdom national, born in 1943. At the relevant time, he resided in Luqa, Malta, and was a storekeeper.

8. On the evening of Thursday 6 October 1994, at approximately 8.30 p.m., he was arrested by the police.

1. Application no. 25642/94.

9. On Friday 7 October 1994 the applicant was brought before a magistrate of the Court of Magistrates. The charge was read out by a police inspector and alleged that the applicant had defiled his minor daughter (an offence involving sexual acts) and committed acts of violent assault on her. The applicant pleaded not guilty.

10. After the hearing, the applicant contacted a lawyer who arranged to meet with him the next day, 8 October, which was a Saturday. On the morning of Monday 10 October 1994 the applicant's lawyer filed a written application for bail. It stated that the applicant lived in Malta, was employed there, and although he had problems with his Maltese wife he had nevertheless very good relations with his in-laws. There was no fear of him absconding. Even if he were to go to the United Kingdom, extradition provisions would make it impossible for him to avoid being brought to trial if the Attorney-General decided to indict him. The application further stated that the applicant strenuously denied the charges and was being detained on the basis of mere unfounded allegations. The magistrate before whom he had been brought had no power to order his release. He had not been assisted by a lawyer and his application was being filed with the registry of the Court at the first opportunity. He requested the court to release him as there were no reasons justifying his continued detention.

The application was immediately sent to the Attorney-General who was given twenty-four hours in which to reply.

11. On the same day, that is on 10 October 1994, the Attorney-General, by a declaration in writing, stated his opposition to the applicant's release.

12. Still on 10 October 1994, a magistrate of the Court of Magistrates took the decision to reject the applicant's bail application. The recollection of the magistrate is that this decision was taken either late in the morning or early in the afternoon of 10 October 1994. The magistrate in question was not the same magistrate before whom the applicant had appeared on 7 October 1994 and had not himself examined the applicant. On 11 October 1994 the registrar of the Court of Magistrates entered the second magistrate's decision in the court's records.

13. On 20 October 1994 the second magistrate began hearing evidence and on 25 October 1994 he ordered the applicant's release on bail.

14. On 8 May 1995 the Court of Magistrates convicted the applicant and gave him a two-year suspended prison sentence. On 8 January 1996 the Court of Criminal Appeal upheld the applicant's conviction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Section 137 of the Criminal Code

15. Section 137 of the Criminal Code provides as follows:

> "Any magistrate who, in a matter within his powers, fails or refuses to attend to a lawful complaint touching an unlawful detention, and any officer of the Executive Police, who, on a similar complaint made to him, fails to prove that he reported the same to his superior authorities within twenty-four hours shall, on conviction, be liable to imprisonment for a term from one to six months."

16. In its judgment of 7 January 1998 in *Carmelo Sant v. Attorney-General* the Constitutional Court rejected the appellant's argument that section 137 of the Criminal Code only provided for a penalty and not for a remedy. According to the Constitutional Court, if the way in which this section had been applied were to be examined, the conclusion would be the same as that reached by Chief Justice John J. Cremona. The latter in his academic writings asserted that although habeas corpus is not essentially a part of the ordinary law of Malta, there are in the Maltese Criminal Code two provisions, namely sections 137 and 353 which, taken together, may be regarded as providing an equally effective safeguard of personal freedom.

17. The parties before the European Court referred to the following examples of cases in which section 137 had been invoked.

On 13 June 1990 the First Hall of the Civil Court ordered Christopher Cremona to be detained for twenty-four hours for contempt of court. The detainee appealed under section 1003 of the Code of Organisation and Civil Procedure. The Attorney-General, with reference to Cremona having invoked section 137 of the Criminal Code, requested the Court of Magistrates to order the acting registrar of the court and the Commissioner of Police to bring Cremona before the court and order either of them to set him free at once. Cremona's appeal had suspensive effect on the execution of the judgment and, as a result, his continued detention was illegal. The Court of Magistrates acceded to the Attorney-General's request.

Ibrahim Hafes Ed Degwej, later christened Joseph Leopold, invoked section 137 of the Criminal Code to challenge his prolonged and indefinite detention further to a removal order. He claimed that his detention, which had started in November 1983, had been rendered illegal because of its length and indefinite duration. On 4 July 1995 the Court of Magistrates ordered that the Attorney-General be notified and, having heard his views,

still on 4 July 1995, decided to reject the application.

On 28 April 1997 Joachim *sive* Jack Spagnol relied on section 137 of the Criminal Code to challenge the lawfulness of his prolonged detention pending an investigation into his assets, which had been sequestrated by court order. He claimed that the detention had been unduly prolonged. Moreover, he asserted that he had very little property. On 28 April 1997 the Court of Magistrates transmitted the case file to the Attorney-General and abstained from further consideration of the application.

On 5 October 1994 the Court of Magistrates rejected an application for release by Emanuela Brincat. It observed:

> "As results from the records several applications have been filed, before this Court and before the Criminal Court, so that the person charged may be released, which applications have always been dealt with expeditiously, which fact makes it manifest in the most glaring manner *how superfluous and incomprehensible* the first paragraph of the present application is, where it refers to section 137 of the Criminal Code." (unofficial translation from Maltese)

18. Moreover, the Government claimed that if it appeared to the magistrate that the arrest was unlawful the magistrate was obliged to order the arrested person's release. The magistrate had this obligation by virtue of the provisions of section 137 of the Criminal Code. Every person in Malta was assured that an arrest could not last beyond forty-eight hours and the appearance before the magistrate ensured that if the arrested person had any submissions to make, he or she could do so in the presence of a totally independent person and not before a representative of the prosecuting authority. In connection with habeas corpus decisions, under section 137 of the Criminal Code the magistrate did not need to hear the Attorney-General. However, since this was an adversarial procedure where the prosecution was led by the police, the magistrate was expected to hear the police as parties to the case in observance of the principle *audi alteram partem* and the principle of equality of arms. This was a power quite separate and distinct from the power to grant bail. If the arrest was found by the magistrate to be unlawful then the magistrate had to order the release of the person arrested and the question of bail did not therefore arise. Only if there was nothing to show that the arrest was unlawful did the question of bail arise.

B. Section 353 of the Criminal Code

19. Section 353 of the Criminal Code, read together with section 137, is considered by the Government to provide an effective safeguard of personal freedom equivalent to habeas corpus (see paragraph 16 above). Section 353 addresses the powers and duties of the police in respect of criminal prosecutions and reads as follows:

"353. (1) Every officer of the Executive Police below the rank of inspector shall, on securing the person arrested, forthwith report the arrest to an officer not below the rank of inspector who, if he finds sufficient grounds for the arrest, shall order the person arrested to be brought before the Court of Judicial Police; otherwise he shall release him.

(2) Where an order is given for the person arrested to be brought before the Court of Judicial Police, such order shall be carried into effect without any undue delay and shall in no case be deferred beyond forty-eight hours."

20. The powers of the Court of Magistrates in respect of arrested persons who are brought before it under section 353 of the Criminal Code were discussed *in extenso* in the Ellul case.

On 23 December 1990 Nicholas Ellul, who had been arrested on suspicion of having committed a criminal offence punishable with more than three years' imprisonment, was brought before the Court of Magistrates. He claimed that the prosecution at that stage was obliged to convince the magistrate that the arrest was lawful.

This request was dealt with by the Court of Magistrates on the same day in the following manner:

"The procedure which should be followed by the Court of Magistrates as a Court of Inquiry is set out in sections 389 to 409 of the Criminal Code. Subsection (1) of section 390 provides how proceedings should start before this court: it 'shall hear the report of the police officer on oath, shall examine, without oath, the party accused, and shall hear the evidence in support of the report'. The time-limit for the conclusion of this inquiry is one month as indicated in section 401. In no way is the Court bound to hear any evidence in support of the report. Moreover, the fact that the prosecuting officers confirm the report on oath is meant to satisfy the Court that there is a reasonable suspicion for the person charged to be presented under arrest in view of the charges brought against him.

This Court does not find anything to censure in the fact that the report confirmed on oath consists of a confirmation on oath of the charges; after all, in this contest, the word 'report' means 'charge'. This is the procedure followed in this case and it is the correct procedure.

Consequently, the Court declares that the requests of the person charged are unfounded and therefore rejects them." (unofficial translation from Maltese)

Mr Ellul lodged a constitutional application arguing that there had been a breach of Article 5 § 3 of the Convention. On 31 December 1990 the First Hall of the Civil Court found that Article 5 § 3 did not impose any obligation on the magistrate before whom an arrested person appeared to examine whether or not that person's arrest had been made on a reasonable suspicion. Moreover, the court considered that Article 5 § 3 did not impose on the prosecution any duty, on presenting the arrested person, to adduce evidence that the police had a reasonable suspicion at the time of the arrest.

On 8 January 1991 the Constitutional Court upheld the decision of the First Hall of the Civil Court.

21. On 5 January 1999 Francis Xavier Borg, who had been arrested forty hours earlier on suspicion of having committed a criminal offence punishable with more than three years' imprisonment was brought before the Court of Magistrates. His counsel drew the court's attention to Article 5 § 3 of the Convention which, according to him, obliged the court to examine of its own motion whether the circumstances of the case justified his continued detention. The Court of Magistrates ruled as follows:

> "According to the constant practice of this Court and according to the Criminal Code, this Court cannot consider any circumstances at this stage and has to regulate itself according to the charges brought forward by the prosecution.
>
> The Court, furthermore, cannot enter into any question to consider *ex officio* the release from arrest, but first an application has to be filed which has to be notified to the Attorney-General, and after his reply or failing such a reply after the time set by law, it may decide on release under guarantees.
>
> Therefore what the defence is requesting is outside the functions of this Court.
>
> Having regard to sections 574(1), 575(2) and 582(1) of the Criminal Code, the Court declares itself not competent to comply with the request and directs the person charged, that if his request for release is to be considered, he has to comply with what is provided in the sections heremention**ed**." (unofficial translation from Maltese)

C. Provisions in the Criminal Code governing bail

22. The Criminal Code contains the following sections concerning bail:

> "574. (1) Any accused person who is in custody for any crime or contravention may, on application, be granted temporary release from custody, upon giving sufficient security to appear at the proceedings at the appointed time and place.
>
> …
>
> 575. ...
>
> (2) The demand for bail shall be made by an application, a copy whereof shall be communicated to the Attorney-General on the same day, whenever it is made by –
>
> ...
>
> (c) persons accused of any crime punishable with more than three years' imprisonment…

(3) The Attorney-General may, within the next working day, by a note, oppose the application, stating the reasons for his opposition.

…

576. The amount of the security shall be fixed within the limits established by law, regard being had to the condition of the accused person, the nature and quality of the offence, and the term of the punishment to which it is liable.

577. (1) Security for bail is given by the production of a sufficient surety who shall enter into a written recognisance in the sum fixed.

(2) It may also be given, whenever the court shall deem it proper, by the mere deposit of the sum or of an equivalent pledge, or by the mere recognisance of the person accused.

…

582. (1) The Court may not *ex officio* grant bail, unless it is applied for by the person charged or accused.

…"

D. Status of the European Convention on Human Rights in Maltese law

23. By virtue of the European Convention Act of 19 August 1987 the Convention became part of the law of Malta.

24. In its Aquilina judgment of 13 June 1994, the Constitutional Court held that judges in Malta have to take into consideration the case-law of the European Court of Human Rights.

PROCEEDINGS BEFORE THE COMMISSION

25. T.W. applied to the Commission on 2 November 1994. He relied on Article 5 §§ 3 and 4 and Article 6 § 3 (c) of the Convention, complaining that he had not been brought promptly before a judge who had the power to order his release, that there was no remedy whereby the lawfulness of his arrest or detention could be challenged "speedily" and that he was not given the opportunity to instruct a lawyer prior to his appearance in court or have one appointed for him.

26. The Commission (First Chamber) declared the application (no. 25644/94) admissible on 17 January 1997 in respect of the applicant's complaints under Article 5 §§ 3 and 4 of the Convention. In its report of 4 March 1998 (former Article 31 of the Convention), it expressed the

unanimous opinion that there had been a violation of Article 5 § 3 but no violation of Article 5 § 4. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

27. The applicant in his memorial requested the Court to find the respondent State in breach of Article 5 § 3 of the Convention and to award him compensation for non-pecuniary damage as well as costs and expenses under Article 41.

The Government for their part requested the Court to hold that there had been no breach of Article 5 §§ 3 or 4.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

28. As before the Commission, the Government pleaded that the applicant had failed to exhaust domestic remedies in relation to his complaint under Article 5 § 3 of the Convention. At no stage in the proceedings, they pointed out, had the applicant sought to rely on section 137 of the Criminal Code. This section, in addition to providing for the punishment of any official who delayed the hearing of a complaint about unlawful detention, constituted along with section 353 the legal basis of Malta's version of the writ of habeas corpus (see paragraphs 16 and 19 above). Although section 582(1) of the Criminal Code required the filing of applications for provisional release (see paragraph 22 above), it could not limit the competence of magistrates to hear habeas corpus applications. This would be against the Constitution and the Convention, which is part of Maltese law (see paragraphs 23-24 above).

29. The Government submitted that the magistrate before whom the applicant appeared on 7 October 1994 could have dealt with any complaint by the applicant concerning the lawfulness of his arrest. In such a case, the magistrate would have had to hear submissions by the arrested person and the police – not the Attorney-General. If it had then appeared to the magistrate that the arrest had been unlawful, the magistrate would have been

1. *Note by the Registry.* For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

obliged to order release under section 137 of the Criminal Code read in conjunction with the Convention and the case-law of the European Court of Human Rights. Although the applicant had produced some decisions which seemed to indicate that the powers of the magistrate before whom the accused first appeared were more limited than the Government maintained, these decisions emanated from lower courts and, in any event, the accused in these cases had not contended that the law did not allow arrest in their case or that there was no reasonable suspicion to justify arrest.

30. The applicant replied that the provisions of the Criminal Code referred to by the Government did not provide an effective remedy. Section 137 made provision for the punishment of any magistrate or other officer who did not attend to a lawful complaint concerning an unlawful detention. It did not address the issue of the release of the detainee.

31. The applicant contended that the magistrate before whom he appeared on 7 October 1994 had had no power to review the lawfulness of his arrest. Although the law spelt out in great detail what happened when the accused first appeared before a magistrate, it made no provision concerning release in cases of unlawful arrest. Moreover, there was no instance of an arrested person being released on being brought before a magistrate on the ground that the magistrate had decided that the arrest was unlawful. Additional arguments could be drawn *a contrario* from sections 353 (see paragraphs 19-21 above) and 397(5) of the Criminal Code. The latter provision provided that the court could also order the arrest of an accused person who was not already in custody. In any event, even assuming that the applicant could have made an application under section 137 of the Criminal Code, this would not have ensured compliance with Article 5 § 3 of the Convention which required an automatic review. Finally, the applicant's arrest and detention could not have been considered unlawful because in the Ellul case the Constitutional Court had found that the limitations imposed by the system in force on the magistrate's power of release did not raise any issues under Article 5 § 3 of the Convention (see paragraph 20 above).

32. In its decision on the admissibility of the application, the Commission considered that the question of non-exhaustion of domestic remedies had to be considered together with the merits.

33. Article 35 § 1, formerly Article 26, of the Convention reads as follows:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

34. The Court recalls that the only remedies which an applicant is required to exhaust are those that relate to the breaches alleged and which are at the same time available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, among other authorities, the Navarra v. France judgment of 23 November 1993, Series A no. 273-B, p. 27, § 24). Moreover, an applicant who has exhausted a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see, *mutatis mutandis*, the A. v. France judgment of 23 November 1993, Series A no. 277-B, p. 48, § 32).

35. The Court notes that before the Commission the applicant had not only complained that he did not have available to him, in accordance with Article 5 § 4 of the Convention, a habeas corpus remedy to obtain a court decision on the lawfulness of his detention under Maltese law. He had also alleged the absence of a procedure ensuring the specific kind of judicial control required by Article 5 § 3. In so far as the Government's argument is that, if the applicant had invoked section 137 of the Criminal Code in conjunction with section 353 he would have obtained a review of his detention by a judge as envisaged by Article 5 § 3, this is an argument going directly to the issue of compliance with that provision. Accordingly, the Government's preliminary objection is to be joined to the merits.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

36. The applicant complained that he had been the victim of a breach of Article 5 § 3 of the Convention, which provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

37. The applicant acknowledged that the magistrate before whom he was brought within forty-eight hours of his arrest was an independent and impartial officer exercising judicial power. However, domestic law did not require the police to substantiate the grounds militating in favour of his arrest and the magistrate could release him only if he submitted a bail application. Since the offence for which the applicant had been arrested carried a penalty exceeding three years' imprisonment, the bail application

had to be communicated to the Attorney-General, who had one working day in which to decide whether he would oppose it or not. During that period the magistrate was not competent to decide on the applicant's release. According to standard practice, after the accused's first appearance before a magistrate the case went to the registrar who chose by lot the magistrate who would hear the evidence. This system was introduced to eliminate the possibility of forum-shopping by the police. The magistrate who heard the evidence also examined the bail application after the Attorney-General had had the opportunity of expressing his view. As a result, the bail application was often examined by a different magistrate from the one before whom the accused had first appeared.

38. The applicant alleged a breach of Article 5 § 3 on three grounds. Firstly, the powers of the magistrate before whom he had first appeared were limited. The magistrate could only order his release following a bail application which, moreover, had to be communicated to the Attorney-General. Secondly, the review of his detention, which in reality did not take place until 25 October 1994, that is nineteen days after his arrest, had not been prompt. Thirdly, the magistrate who reviewed the case had not heard him in person.

39. The Commission considered that there had been a violation of Article 5 § 3 of the Convention because the judicial review of the applicant's detention had not been automatic and had not been exercised by a magistrate who had himself heard the applicant.

40. The Government submitted that, if the charges against the applicant had been such that the law did not allow his arrest, the magistrate before whom he had appeared on 7 October 1994 would have raised the matter himself and ordered the applicant's immediate release. Moreover, the applicant could have invoked section 137 of the Criminal Code to raise any other complaints he might have had concerning the lawfulness of his arrest.

Quite apart from this consideration, the Government submitted that, in cases where the court had found an arrest to be lawful, it was open to the arrested person to request provisional release on bail. In this connection, the Government argued that although Article 5 § 3 required that the accused be brought promptly before a judge it did not require that the decision on the bail application be taken immediately. The reason why certain bail applications were communicated to the Attorney-General was to ensure that the principles of *audi alteram partem* and equality of arms were respected. In any event, the Attorney-General replied expeditiously and, as a result, the review of the accused's detention could be concluded within the time-frame of Article 5 § 3. If the Attorney-General did not reply within the time-limit

set by the magistrate, the latter could give a ruling on the bail application without hearing the Attorney-General's views, which were not in any event binding. In the circumstances of the case, the magistrate's decision on the bail application was issued on 10 October 1994 and the applicant's counsel could have had access to it immediately. Furthermore, the Government stressed that the applicant had had ample opportunity to present his case in writing and could have made oral submissions. The Convention did not require that the magistrate who decided on an arrested person's bail application should be the same as the magistrate before whom the arrested person initially appeared. Although the second magistrate had not heard the applicant in person, he had had at his disposal all the information required and was totally independent of the executive. In any event, the applicant could have asked the second magistrate to hear him in person.

41. As the Court has pointed out on many occasions, Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (see, *inter alia*, the Assenov and Others v. Bulgaria judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3187, § 146). It is essentially the object of Article 5 § 3, which forms a whole with paragraph 1 (c), to require provisional release once detention ceases to be reasonable. The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3. This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons (see the De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, pp. 21-24, §§ 44, 47 and 51). In other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention.

42. To be in accordance with Article 5 § 3, judicial control must be prompt. Promptness has to be assessed in each case according to its special features (see the De Jong, Baljet and Van den Brink judgment cited above, pp. 24 and 25, §§ 51 and 52). However, the scope of flexibility in interpreting and applying the notion of promptness is very limited (see the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, pp. 33-34, § 62).

43. In addition to being prompt, the judicial control of the detention must be automatic (see the De Jong, Baljet and Van den Brink judgment cited above, p. 24, § 51). It cannot be made to depend on a previous application by the detained person. Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a

court (see the De Jong, Baljet and Van den Brink judgment cited above, pp. 25-26, § 57). It might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny (see, *mutatis mutandis*, the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1185, § 123). Prompt judicial review of detention is also an important safeguard against ill-treatment of the individual taken into custody (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, p. 2282, § 76). Furthermore, arrested persons who have been subjected to such treatment might be incapable of lodging an application asking the judge to review their detention. The same could hold true for other vulnerable categories of arrested persons, such as the mentally weak or those who do not speak the language of the judicial officer.

44. Finally, by virtue of Article 5 § 3 the judicial officer must himself or herself hear the detained person before taking the appropriate decision (see the De Jong, Baljet and Van den Brink judgment cited above, p. 24, § 51).

45. Given that the applicant was arrested on 6 October 1994 and was brought before the magistrate on 7 October 1994 (see paragraphs 8 and 9 above), the Court shares the parties' view that the applicant's appearance before a magistrate on the latter date could be regarded as "prompt" for the purposes of Article 5 § 3.

46. However, the parties disagreed as to the extent of the power of the magistrate to order release of his or her own motion. While the applicant argued that the magistrate before whom he had first appeared could order his release only following a bail application, the Government contended that magistrates had the power to order release of their own motion if the person appearing before them faced charges that, according to the law, did not allow his or her detention. Even assuming the Government's interpretation of national law to be correct, the Court considers that Article 5 § 3 would not be complied with. The matters which, by virtue of Article 5 § 3, the judicial officer must examine go beyond the one ground of lawfulness cited by the Government. The review required under Article 5 § 3, being intended to establish whether the deprivation of the individual's liberty is justified, must be sufficiently wide to encompass the various circumstances militating for or against detention (see paragraph 41 above). However, the evidence before the Court does not disclose that the magistrate before whom the applicant appeared on 7 October 1994 or any other judicial officer had the power to conduct such a review of his or her own motion.

47. The Government argued that the applicant could have obtained a wider review of the lawfulness of his detention, going beyond the issue of whether the charges allowed such detention, by lodging an application under section 137 of the Criminal Code read in conjunction with

section 353 with the judge before whom he appeared on 7 October 1994. However, compliance with Article 5 § 3 cannot be ensured by making an Article 5 § 4 remedy available. The review must be automatic (see paragraph 43 above). Furthermore, even in the context of an application by an individual under section 137 and having regard to section 353, the scope of the review has not been established to be such as to allow a review of the merits of the detention. Apart from the cases where the forty-eight hour time-limit was exceeded, the Government have not referred to any instances in which section 137 of the Criminal Code has been successfully invoked to challenge either the lawfulness of or the justification for an arrest on suspicion of a criminal offence. Moreover, from what the Court can deduce from the domestic cases cited before it, the absence of a reasonable suspicion or of reasons militating in favour of the applicant's continued detention would not necessarily have rendered the applicant's arrest and detention unlawful under Maltese law (see paragraphs 17, 20 and 21 above). It follows that the Government have not substantiated their preliminary objection that the applicant has not exhausted domestic remedies because he did not seek to rely on section 137 of the Criminal Code read together with section 353. Accordingly, the Court dismisses the Government's preliminary objection.

48. In the light of the above, the Court considers that the applicant's appearance before the magistrate on 7 October 1994 was not capable of ensuring compliance with Article 5 § 3 of the Convention since the magistrate had no power to order his release. It follows that there has been a breach of that provision.

49. In reaching this conclusion, the Court would nevertheless agree with the Government that the question of bail is a distinct and separate issue, which only comes into play when the arrest and detention are lawful. In consequence, the Court does not have to address this issue for the purposes of its finding of a violation of Article 5 § 3.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

50. The Court observes that the Commission also declared admissible the applicant's complaint that there had been a breach of Article 5 § 4 of the Convention, which provides:

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

51. In their application bringing the case before the Court the Government sought a decision only in respect of the issue under Article 5 § 3 of the Convention (see paragraph 1 above).

52. The Court reiterates that it has full jurisdiction within the limits of the case referred to it, the compass of which is delimited by the Commission's admissibility decision; within the framework so traced, the Court may take cognisance of all questions of fact and law arising in the course of the proceedings instituted before it (see the Erdagöz v. Turkey judgment of 22 October 1997, *Reports* 1997-VI, pp. 2310-11, §§ 31-36).

53. Although the scope of the present case is not, therefore, confined to the sole provision of the Convention mentioned in the Government's application bringing the case before it, the Court notes that, apart from a brief reference to Article 5 § 4 in the Government's memorial, the parties have not addressed this issue in the proceedings before it. This being so and having regard also to the conclusion set out in paragraph 48 above, the Court does not consider it necessary to examine the complaint under Article 5 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. The applicant sought just satisfaction under Article 41 of the Convention, which reads as follows:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

55. The applicant claimed 1,000 Maltese liras (MTL) in respect of non-pecuniary damage.

56. The Government submitted that there was no evidence that the applicant had suffered any non-pecuniary damage.

57. The Court considers that in the special circumstances of the case the finding of a violation of Article 5 § 3 of the Convention constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

58. The applicant claimed, as reimbursement of costs incurred, MTL 200 in connection with the domestic proceedings until bail was granted and MTL 1,600 in connection with the Convention proceedings, plus necessary expenses for his lawyers' attendance at the hearing before the Court in Strasbourg.

59. The Government replied that the applicant should not be awarded more than MTL 50 for the domestic proceedings. The amount claimed for costs and expenses before the Commission was excessive. In general, the normal tariffs for proceedings before the Strasbourg organs should apply. The applicant's costs for his lawyers' attendance at the hearing before the Court should be reimbursed in half. The case was heard together with Aquilina v. Malta, in which the applicant was represented by the same lawyers.

60. The Court awards the applicant the sum claimed in respect of the domestic proceedings in full. It also awards the applicant MTL 2,400 for the costs and expenses of the proceedings before the Convention bodies.

C. Default interest

61. According to the information available to the Court, the statutory rate of interest applicable in Malta at the date of the adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. *Joins* unanimously *to the merits* the Government's preliminary objection concerning the applicant's complaint under Article 5 § 3, and *dismisses* it unanimously;

2. *Holds* unanimously that there has been a breach of Article 5 § 3 of the Convention;

3. *Holds* unanimously that it is not necessary to examine the applicant's complaint under Article 5 § 4 of the Convention;

4. *Holds* by fourteen votes to three that the present judgment constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained;

5. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months, 2,600 (two thousand six hundred) Maltese liras for costs and expenses together with any value-added tax that may be chargeable;
(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 April 1999.

Signed: Luzius WILDHABER
President

Signed: Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) partly dissenting opinion of Mr Bonello;
(b) joint partly dissenting opinion of Mrs Tulkens and Mr Casadevall.

Initialled: L. W.
Initialled: M. de S.

PARTLY DISSENTING OPINION OF JUDGE BONELLO

In the present case the Court has unanimously found that the applicant's fundamental right enshrined in Article 5 § 3 of the Convention has been violated. When it came to determine how the breach of that core guarantee was to be redressed, the majority of the Court opted to recite that the finding of the violation in itself constituted just satisfaction.

I do not share the Court's view. I consider it wholly inadequate and unacceptable that a court of justice should "satisfy" the victim of a breach of fundamental rights with a mere handout of legal idiom.

The first time the Court appears to have resorted to this hapless formula was in the Golder case of 1975 (Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18). Disregarding its own practice that full reasoning should be given for all decisions, the Court failed to suggest one single reason why the finding should also double up as the remedy. Since then, propelled by the irresistible force of inertia, that formula has resurfaced regularly. In few of the many judgments which relied on it did the Court seem eager to upset the rule that it has to give neither reasons nor explanations.

In the recent judgment of Nikolova v. Bulgaria of 25 March 1999, the Court has somehow tried to overcome that reticence by referring to its recent case-law and remarking that "just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the guarantees of Article 5 § 3". Why? I cannot find any plausible justification, in the judgment or elsewhere.

The Convention confers on the Court two separate functions: firstly, to determine whether a violation of a fundamental right has taken place, and secondly, to give "just satisfaction" should the breach be ascertained. The Court has rolled these two distinct functions into one. Having addressed the first, it feels absolved from discharging the second.

In doing so, the Court fails in both its judicial and its pedagogical functions. The State that has violated the Convention is let off virtually scot-free. The award of just satisfaction, besides reinstating the victim in his fundamental right, serves as a concrete warning to erring governments. The most persuasive tool for implementing the Convention is thus lying unused.

The only "legal" argument used so far in favour of refusing to award any compensation at all for non-pecuniary damage has been based on the admittedly infelicitous wording of Article 41, which states: "If the Court

finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only a partial reparation to be made, the Court shall, *if necessary*, afford just satisfaction to the injured party."

The Court seems to feel authorised to deny just satisfaction to the victim on the strength of the "if necessary" condition. This, I submit, places an improper construction on Article 41. "If necessary" is applicable *only* where there is a concurrence of both the conditions posited by Article 41, i.e. the finding of a violation of the Convention *and* the ability of the domestic system to provide for some partial reparation. When these two conditions combine (and only then) may the Court find it unnecessary to award additional just satisfaction. This is what Article 41 clearly states.

In cases like the present one, in which the internal law provides for no satisfaction at all, the "if necessary" condition becomes irrelevant and the Convention leaves the Court no discretion at all as to whether to award compensation or not.

Article 46 § 2 reinforces this reading: "The final judgment of the Court shall be transmitted to the Committee of Ministers, *which shall supervise its execution*." This presupposes a specific judgment that has still to be put into effect. Merely declaratory judgments, like the present one, are always self-executing, and require no further acts of implementation. Article 46 § 2 rules out declaratory, self-executing judgments.

It is regrettable enough as it is, albeit understandable, that, in the sphere of granting redress, the Court, in its early days, imposed on itself the restriction of never ordering performance of specific remedial measures in favour of the victim. That exercise in judicial restraint has already considerably narrowed the spectrum of the Court's effectiveness. Doubling that restraint, to the point of denying any compensation at all to those found to have been the victims of violations of the Convention, has further diminished the Court's purview and dominion.

Finding a violation of a fundamental right is no comfort for the government. Stopping there is no comfort for the victim. A moral thirst for justice is hardly different from a physical thirst for water. Hoping to satisfy a victim of injustice with cunning forms of words is like trying to quench the thirst of a parched child with fine mantras.

Except for those courts that now rely on the Golder incantation, I am not aware of any national court settling for a mere finding of breaches of rights as a substitute for a specific remedy or, failing that, compensation. If that is indeed so, ordinary rights enjoy better protection than fundamental rights. And again, if I am right, fundamental liberties receive fuller redress in national courts than they do in the international one. I consider this demeaning.

Of course, the Court is called upon to carry out a careful balancing exercise when assessing the quantum of compensation to be awarded. In certain cases that award could, and should, be nominal or even token. I would not vote for awarding substantial compensation to a convicted serial rapist, should some aspect of his right to family life have been formally breached. Nor would I be excessively generous with awards to a drug trafficker because the interpreter at his trial failed the test of high competence.

What I am disenchanted with is that any court should short-change a victim. I voted against that.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS AND CASADEVALL

(*Translation*)

The Court has held unanimously that there has been an infringement of the applicant's rights under Article 5 § 3 of the Convention. However, as regards reparation for this infringement, the majority of the Court has opted for the formula "the present judgment constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained".

We regret that we are unable to agree, for the following reasons.

1. It is not contested in the present case that the first two conditions laid down by Article 41 of the Convention, namely the existence of a violation of the Convention and the lack of any possibility under domestic law of obtaining even partial reparation, are satisfied. Admittedly, the Court still has wide discretion in that it affords satisfaction only "if necessary", having regard to what is equitable in the light of all the circumstances of a given case.

2. In the present case, the applicant was detained for nineteen days, from 6 October 1994, when he was arrested by the police, to 25 October 1994 when his release was ordered. The Court of Magistrates subsequently found him guilty but gave him a suspended prison sentence. We cannot of course maintain that the applicant's detention would have ended if he had been able to obtain speedy judicial review of his detention, but on account of the absence of that safeguard the applicant may well have suffered a certain amount of non-pecuniary damage not wholly compensated by the finding of a violation (see the Duinhof and Duijf v. the Netherlands judgment of 22 May 1984, Series A, no. 79, p. 19, § 45).

3. Lastly, since Article 5 § 5 of the Convention, in specifying what is required of domestic law, expressly provides: "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation", there is all the more reason in our opinion to consider that the mere fact that the Court has found a violation is not sufficient to make good any damage. In the instant case, therefore, the Court should have awarded some measure of pecuniary satisfaction, especially as the sum claimed by the applicant was reasonable and could on that account constitute satisfaction on an equitable basis.