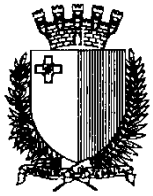

CIVIL COURT FIRST HALL
THE HON. MADAME JUSTICE ANNA FELICE
(CONSTITUTIONAL JURISDICTION)

Sitting of the 31st January 2017

Application Number: 10/2014 AF

John Udagha Omeh

vs

Attorney General,

Commissioner of Police,

Director General (Courts),

Registrar of Criminal Courts and Tribunals

The Court,

Having seen the application of John Udagha Omeh which reads as follows:

The applicant was charged with having with another one or more persons in Malta or outside Malta conspired for the

purpose of selling or dealing in a drug in violation of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), specifically of importing and dealing in any manner in the drug cocaine and having promoted, constituted, organized and financed such conspiracy, meant to bring or caused to bring or caused to be brought into Malta a dangerous drug cocaine contrary to the provisions of the Dangerous Drug Ordinance (Chapter 101 of the Laws of Malta) and for having in his possession a dangerous drug (cocaine) contrary to the provisions of the Dangerous Drug Ordinance (Chapter 101 of the Laws of Malta) so, however that such offence was under such circumstances that such possession was not for the exclusive use of the applicant.

The applicant was convicted after a trial by jury and on the 13th of January, 2010, following a guilty verdict of seven (7) votes to two (2) on all three counts, the applicant was condemned to a term of imprisonment of twenty (20) years and to a fine multa of seventy thousand (€70,000) euro and to pay the sum of one thousand and nineteen euro and forty two cents (€1979.42) being the court expenses incurred in this case which judgement was confirmed by the Court of Criminal Appeal on 14th June, 2012;

From the first sitting on the day of arraignment the applicant was assisted by legal aid lawyers in terms of article 977 of the Code of Organization and Civil Proceedings and article 570 of the Criminal Code.

That the right of an accused to be assisted by a lawyer of his choice and to be provided free legal assistance by the State when he has not sufficient means is protected both under the Constitution (article 39(6)(c) and the European Convention of Human Rights (article 6(3)(c) of Chapter 379).

That in fact according to article 6(3)(c) of the European Convention of Human Rights, any person accused of a criminal offence has the right:

> *"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;"

The current situation in the Maltese Legal system is that the person accused who does not have sufficient means is being assigned a legal aid lawyer from a restricted choice of about ten (10) lawyers which lawyers are assigned on a roster basis and have to give their assistance and services both in civil suits and criminal cases without any consideration to various specializations such as civil law, commercial law, criminal law and others and moreover in the case of trials by jury the choice is more restricted as there is only one legal aid lawyer available.

The spirit of the constitutional right above mentioned should be in the sense that the legal aid lawyer is to be sufficiently remunerated by the State to guarantee a proper defence.

The current legal sifuation, and as it was applied in the current proceedings does not satisfy the criteria according to the Constitution (Article 39(6)(c)) and the European Convention on Human Rights (article 6(3)(c) of Chapter 379).

That the current situation is of prejudice to the applicant and precluding him from a proper and adequate defence in terms of the above mentioned articles of the Constitution (article 39 (6)(c) Chapter 319) and the European Convention of Fundamental Human Rights (Pakelli vs Germany -25th April 1993, Lagerblom vs Sweeden -'14th April 2003).

Furthermore, before and at interrogation stage, the applicant was denied legal assistance since Maltese Law at that time did not afford such right.

It is now an established principle that the lack of legal assistance at the stage of interrogation of a suspect in fact constitutes a violation of the accused person's right to a fair hearing as enshrined in Article 6 (3)(c) as well as article (6)(1) of the European Convention.

This point was established by the Constitutional Court in its judgement delivered on the 11th of April, 2011 in the case of

Il-Pulizija vs Alvin Privitera. This violation was further confirmed by the Constitutional Court in the case of il-Pulizija vs Esron Pullicino.

In the circumstances and in the light of the judgements of the Constitutional Court and the judgements of the European Court of Human Rights (Salduz vs Turkey and Bruscoe vs France), the applicant is submitting that the fact that he released a statement without him having been given the right to consult a lawyer of his choice before and during the stage of interrogation and the fact he had no access to his police file constitutes a violation of his right to a fair trial in terms of article 39 of the Constitution and Article 6 of the European Convention on Human Rights.

The applicant furthermore humbly submits that the discretion afforded to the Attorney General to decide whether the accused should be tried by the Courts of Magistrates as a Courts of Criminal Judicature or to issue the bill of indictment in order for the accused to be tried by a trial by jury violates article 39 of the Constitution and Article 7 of the European Convention on Human Rights.

Reference is made to the case of John Camilleri vs Malta (App nru 42931/10) decided by the European Court on Human Rights on the 22nd of January, 2013 whereby the Court held that:

> *"While it may well be true that the Attorney General gaae weight to a number of criteria before taking his decision, it is also true that any such criteria were not specified in any legislative text or made the subject of judicial clarification over the years. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one (based on enumerated factors and criteria). The Constitutional Court (see paragraph 14 above) noted that there existed no guidelines which should aid the Attorney General in taking such a decision. Thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. An insoluble problem was posed by fixing different*

minimum penalties. The Attorney General had in effect an unfettered discretion to decide which minimum penalty would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards. Neither could such a decision be seen only or mainly in terms of abuse of power, even if, as the Government suggested without however substantiating their view, this might be subject to constitutional control (see paragraph 29 above). The Court is not persuaded by the Government's argument to the effect that it was possible that the minimum punishment before the Criminal Court would not be handed down. The Court considers that the domestic courts were bound by the Attorney General's decision as to which court would have been competent to try the accused. The Court observes that Article 21 of the Criminal Code provides for the passing of sentences below the prescribed minimum on the basis of special and exceptional reasons. However, section 120A of the Medical and Kindred Professions Ordinance, which provides for the offence with which the applicant was charged, specifically states in its subsection (7) that Article 21 of the Criminal Code shall not be applicable in respect of any person convicted of the offence at issue. On an examination of the provision, the Court finds that it would not be possible to interpret the wording of that provision otherwise. Moreover, this interpretation has been confirmed by the domestic courts, the most recent decision being that of 2008 in the above-mentioned case of The Republic of Malta v. Stanley Chircop, in which the Criminal Court considered that the application of Article 21 to the relevant offences was excluded and therefore the court could not impose a sentence belout the minimum established by law. Furthermore, the Government have not provided any examples of decisions showing that a domestic court had actually done so. Thus, a lesser sentence could not be imposed despite any clncerns the judge might have had as to the use of the prosecutor's discretion."

Furthermore the applicant humbly submits that this exercise of discretionary power enjoyed by the Attorney General precluded him from his fundamental right as stipulated in Article 39 of the Constitution and Article 6 and 7 of the European Convention on Fundamental Human Rights when the Attorney General exercised his sole discretion as envisaged in Article 22 (2) of Chapter 101 when he decided whether or not to issue a bill of indictment against the applicant.

In addition in line with the reasoning of the above mentioned judgement John Camilleri vs Malta, when the order which initiates the proceedings under Chapter 101 violates the applicant's fundamental human rights, the subsequent proceedings and the proceedings which depend on the said order are likewise affected by this violation.

It is delineated that the Attorney General has a role of a prosecutor vis a' vis the accused with powers to decide where the accused should be tried and which punishment should apply and this signifies that the Attorney General has the power to do a binding statement before the actual proceedings commence and this not on the basis of a stipulated rule but on the basis of subjective and arbitrary discretion that cannot be censored, which decision is binding upon the Court.

Therefore for this reason the applicant is also being precluded from his fundamental right to be tried by an independent and impartial tribunal as provided in Article 39 of the Constitution and Article 6(1) of the European Convention of Fundamental Human Rights.

Therefore the applicant humbly requests this Honourable Court to:

1. Declare that his right a fair hearing as enshrined in Article 6(3) of the European Convention on Human Rights and article 39(6)(c) of the Constitution have been violated;

2. Declare that the order issued under article 22(2) of Chapter 101 of the Laws of Malta where the Attorney General is granted discretion to decide whether the

applicant be tried by the Criminal Court or the Court of Magistrates as a Court of Criminal Judicature as unconstitutional and in breach of article 39 of the Constitution and Article 7 of the European Convention on Human Rights;

3. Declare that because of the lack of legal assistance during the stage of investigation the applicant's right for a fair hearing in terms of article 39 of the Constitution and Article 6 of the European Convention on Human Rights has been violated;

4. To provide the applicant with all those remedies which are the most effective and adequate, including by annulling and revoking the judgement delivered by the Court of Criminal Appeal on the 14th of June, 2012 in the name of The Republic of Malta vs John Udagha Omeh.

Having seen the reply of the respondents Attorney General and the Commissioner of Police which reads as follows:

1. That preliminarily, in terms of article 181B of Chapter 12 of the Laws of Malta, the Commissioner of Police is not the legitimate defendant in these proceedings;

2. That with respect to the merits and without prejudice to the above, all the allegations and claims of the applicant are manifestly, factually and legally unfounded for the following reasons which are hereby being listed without prejudice to one another:

Regarding the alleged breach of article 39(6)(c) of the Constitution of Malta and article 6(3)(c) of the European Convention of Human Rights

3. That the allegation that the applicant’s right to defend himself in terms of article 39(6)(c) of the Constitution of Malta and article 6(3)(c) of the European Convention of Human Rights was breached in view of the fact that the applicant was assisted by a legal aid lawyer from the list of lawyers on the roster is manifestly unfounded;

4. That firstly, that the fact that the applicant was assisted by a legal aid lawyer does not automatically mean that he was not duly legally assisted as being implied by in the constitutional application;

5. That moreover, the respondents reject the applicant's allegation that `*the spirit of the constitutional right above mentioned should be in the sense that the legal aid lawyer is to be sufficiently remunerated by the State to guarantee a proper defence'*. The ability, integrity, competence and quality of assistance given by any lawyer should never be measured in terms of what he is being paid for his services. Moreover, and without prejudice to this, once any lawyer, including legal aid lawyers, accept to assist any person, they are duty bound and legally bound to duly assist said person;

6. That moreover, the fact that the State is duty bound to provide free legal assistance to a defendant who does not have the financial means to engage the services of a lawyer, cannot be interpreted as meaning that said lawyer must necessarily guarantee a favourable outcome for the person he is assisting. No lawyer can offer said guarantee;

7. That although in our legal system legal aid lawyers give their services in both civil and criminal cases, this does not mean that they are less capable or less competent than others. Actually, it is quite the opposite. Moreover, many lawyers in private practice in Malta effectively assist clients in both civil and criminal fields and there is absolutely no reason why legal aid lawyers cannot do so also;

8. That moreover, the assistance given by the legal aid lawyer in the criminal proceedings against the accused referred to in the constitutional application was independent, autonomous, fair and just and duly safeguarded the right of John Udagha Omeh to defend himself in terms of article 39(6)(c) of the Constitution of Malta and article 6(3)(c) of the European Convention;

9. That throughout the legal proceedings the legal aid lawyer duly assisted John Udagha Omeh. In fact, nowhere in the constitutional application is the applicant alleging that he was poorly assisted;

10. That therefore, the first claim of the applicant is manifestly unfounded in fact and at law;

Regarding the alleged breach of article 39 of the Constitution of Malta and article 6 of the European Convention of Human Rights

11. That the allegation that the applicant's right to a fair hearing in terms of article 39 of the Constitution of Malta and article 6(3)(c) and 6(1) of the European Convention of Human Rights was breached in view of the fact that the applicant's lack of legal assistance when he was interrogated and that '*he had no access to his police file'* is also manifestly unfounded;

12. That moreover the jurisprudence of the European Court of Human Rights quoted by the applicant cannot be applied retrospectively to the criminal proceedings against John Udagha Omeh which have been conclusively decided by the Court of Criminal appeal on the 14th June 2012 since those proceedings are *res judicata*. In terms of the judgments delivered by the Constitutional Court in the cases '***Il-Pulizija (Spettur Victor Aquilina v. Mark Lombardi***' decided on the 12th April 2011 and '***Simon Xuereb vs l-Avukat Ġenerali***' decided on the 28th June 2012, '*il-ġurisprudenza tal-Qorti Ewropea iżda m'għandiex ikollha effett retroattiv u taffettwa dawk id-deċiżjonijiet li llum huma res judicata. Din hi l-istess linja li ħadet il-Qorti Ingliża fil-każ ta' Cadder ... "The retrospective effect of a judicial decision is excluded from cases that have been finally determined"'*;

13. That without prejudice, in the light of recent related case law both in Malta and in the European Court of Human Rights, it is to be reiterated that one of the most important principles that resulted therein was that NO court, at any

time established as a universal principle that the absence of legal assistance during the first hours of detention and questioning is automatically tantamount to a breach of Article 6 of the Convention;

14. That in the case-law on this issue the Courts have always analysed the particular and individual circumstances of each case, and it was only after considering all the circumstances of each individual and particular case that a decision was taken. The circumstances of the case leading to the criminal proceedings against the applicant John Udagha Omeh were that he was caught red handed on the 9th December 2007, when he arrived in Malta from Tripoli carrying luggage containing containing 3021.9 grams of Cocaine with a purity of 61.2% with a total street retail value of €229,664 which was intercepted by the Police, in collaboration with the Customs Officers, at the Malta International Airport;

15. That the Constitutional Court, in the proceedings ***Charles Steven Muscat vs Avukat Ġenerali*** decided on the 8th of October 2012, decided that the right given by the Constitution and the Convention is the right to a fair hearing. Said right is not granted so that a person who is indeed guilty, for some reason or other, does not answer for his crime. What the court must do is analyise instead whether the lack of legal assistance gave rise to the danger of the applicant being found guilty when he should not have been found guilty. If there is no such danger, then there is no breach;

16. That moreover, the applicant gave his statement spontaneously after being duly cautioned. Indeed, during the criminal proceedigns against him he never raised any objection with respect to his statment, which proves that he never felt that his statement was of any prejudice to him or that it was taken abusively;

17. That hence, the alleged breach of the applicant's right to a fair hearing in view of the fact that '*he released a statement without him having been given the right to*

consult a lawyer of his choice before and during the stage of interrogation, and the fact he had no access to his police file' is also unfounded and should be rejected;

Regarding the alleged breach of article 39 of the Constitution of Malta and article 7 of the European Convention of Human Rights

18. That the respondent's office as established by article 91 of the Constitution of Malta, grants him the power to institute, undertake and discontinue criminal proceedings and of any other powers conferred on him by any law in terms which authorise him to exercise that power in his individual judgment.[1] Moreover, this discretion merely gives direction and does not constitute the criminal proceedings which continue independently of the respondent;

19. That in the context of the proceedings against the applicant, the discretion of the respondent with respect to the choice of forum in front of whom the present accused has been brought to be judged in terms of law was exercised in terms of these parameters, in that, conscientiously the respondent reached his decision in the light of established criteria which may easily be traced and identified in local jurisprudence, namely, the type and quantity of drugs in question, the level of participation of the accused in the crime, his statement, as well as aggrieving circumstances and other facts relevant to this particular case;

20. That the respondent submits that even though the criteria he took into account in view of determining which court should try the case are not listed in the law, this fact alone should not automatically lead to a breach of the rights of the accused in terms of article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 39 of the Constitution of Malta;

[1] In the exercise of these powers the Attorney General shall not be subject to the direction or control of any other person or authority

21. That the exercise of the respondent's discretion in determining which court is to try and punish the accused may be scrutinised in court since the latter have discretion to determine whether the respondent's decision is *ultra vires* or otherwise;

22. That the respondent reiterates that every case has its particular circumstances and the order he gave in terms of which the present accused is to be tried before the Criminal Court was given conscientiously taking into account the particular circumstances of his case;

23. That with respect to the decision of the European Court of Human Rights in the names ***Camilleri v Malta***[2] referred to by the applicant, the respondent submits that there are major distinctions that need to be drawn between the present proceedings and those in the John Camilleri case;

24. That moreover and without prejudice, in the mentioned judgment of the European Court in the names ***Camilleri John v Malta*** the breach of article 7 was only found in the context of what the European Court defined as '*lack of forseeability'* of the mentioned provision of the Dangerous Drugs Ordinance <u>in the particular circumstances of that case</u>. In the present proceedings respondent humbly submits that the accused John Udagha Omeh had every possibility to anticipate and predict, well in advance of the moment when he was actually brought before the Criminal Court, which court would have tried and punished him;

25. That finally and without prejudice to the above and with all due respect, respondent does not agree with the decision of the European Court in the names ***Camilleri v Malta*** and embraces instead the *partly dissenting opinion of Judge Quintano* which forms part of that judgment since it is the humble opinion of the respondent that the latter reflects the correct interpretation of both article 7 of the European

[2] App. no. 42931/10) decided on the 22nd January 2013

Convention for the Protection of Human Rights and the local laws and jurisprudence;

26. That therefore, the respondent respectfully submits that that there is no breach of article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms nor of article 39 of the Constitution of Malta;

Regarding the requested remedy

27. That finally, without prejudice to the above and only for arguments' sake, given but not granted that the fundamental rights of the applicant were breached during the criminal proceedigns in question, the applicant's claim requesting this Honourable Court to '*provide the applicant with those remedies which are the most effective and adequate, including by annuling and revoking the judgment delivered by the Court of Criminal Appeal on the 14th June 2012 in the name of* ***The Republic of Malta vs John Udagha Omeh***' are not justified;

28. Respondents reserve the right to make further pleas;

That in view of the above, respondents respectfully request this honourable court to reject all the allegations and claims made by the applicant with costs.

Having seen the reply of the respondents Director General (Courts) and the Registrar of Criminal Courts and Tribunals which reads as follows:

In linea preliminari l-eccipjenti mhumiex il-legittimi kontraditturi u ghalhekk ghandhom jigu lliberati mill-osservanza tal-gudizzju bl-ispejjez kontra r-rikorrent.

F'dan il-kaz ir-rikorrent bl-ebda mod ma hu qed jattribwixxi l-allegat ksur tad-dritt ta' smiegh xieraq jew drittijiet ohra, ghal xi nuqqas minn naha tal-esponenti anke ghaliex l-esponenti ma jwiegbux u ma jahtux ghal tali lanjanzi u ghalhekk anke minn

dan il-lat, it-talbiet tar-rikorrent fil-konfront tal-esponenti huma infondati fil-fatt u fid-dritt.

F'dan il-kaz ir-rikorrenti qed jattribwixxi l-ilment tieghu minhabba allegat nuqqas fis-sistema tal-ghajnuna legali maltija u minhabba li ma kienx assistit minn avukat waqt l-investigazzjoni tal-Pulizija liema lanjanzi bl-ebda mod ma jwiegbu ghalihom jew huma fil-mansjoni jew ghandhom xi tort dwarhom l-esponenti. Dan apparti li tali allegati nuqqasijiet huma infondati fil-fatt u fid-dritt.

Fil-mertu m'hemm ebda ksur tad-drittijiet lamentati mir-rikorrenti la taht il-Kostituzzjoni u lanqas taht il-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem kif qed jallega ir-rikorrenti.
Fi kwalunkwe kaz it-talbiet attrici huma infondati fil-fatt u fid-dritt.

Salvi, jekk ikun il-kaz, eccezzjonijiet ossia risposti ulterjuri.

Ghaldaqstant l-esponenti jitolbu bir-rispett illi dina l-Onorabbli Qorti joghgobha tichad in toto t-talbiet tar-rikorrenti bl-ispejjez kontra l-istess rikorrenti.

Having ruled during the first hearing of the 9th April 2014 that the acts of the criminal proceedings in the name of **The Republic of Malta vs John Udagha Omeh** should form part of acts of these proceedings.

Having seen the parties' notes of submissions.

Having seen all exhibited documents and the records of the proceedings.

Considers that by means of his application, the applicant John Udagha Omeh requests the Court to declare that his right to a fair hearing in terms of article 6 of the European Convention on Human Rights and article 39 of the Constitution have been violated due to the fact that he was not assisted by a lawyer during his interrogation by the police and consequently that he gave a statement without the assistance of a lawyer since at that time Maltese law did not afford him such a right. The

applicant is also requesting the Court to declare that his right to a fair hearing in terms of article 6(3)(c) of the European Convention and article 39(6)(c) of the Constitution has been breached as he claims he was not provided with adequate legal assistance during the course of the criminal proceedings instituted against him. Lastly, he is requesting the Court to declare that the discretion granted by law to the Attorney General in terms of article 22(2) of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) to decide whether an accused person should be tried by the Court of Magistrates as a Court of Criminal Judicature or the Criminal Court is unconstitutional and violated his rights in terms of article 39 of the Constitution and articles 6 and 7 of the European Convention on Human Rights.[3]

By way of remedy, the applicant requests the Court to provide him with all those remedies which are most effective and adequate, including by annulling and revoking the judgment delivered by the Court of Criminal Appeal on the 14th June 2012 in the name of **The Republic of Malta vs John Udagha Omeh**.

The facts of the case are as follows. The applicant arrived in Malta on the 9th December 2007 aboard a flight from Tripoli. Upon arrival, he was intercepted by the Customs Department at the airport and a search of his luggage revealed that the applicant was carrying over 3 kilograms of cocaine, hidden beneath a false bottom in his luggage. The drugs where established to be 61.2% pure with a street value of approximately €299,644.

The applicant claimed that he did not know that the luggage contained drugs. He was arrested and interrogated by the police wherein he released a statement declaring that he was a businessman and that when he arrived at the airport in Togo, from where he began his journey to Malta, he met an old friend by the name of Simon Oko who he claims told him was also on his way to Malta. The applicant claimed that Oko requested him to bring his luggage to Malta for him since he (Oko) had a

[3] The applicant does not mention article 6 in his application but written submissions were made by him to this effect.

problem with his ticket and could not make his flight. The applicant stated that Oko told him that upon arrival in Malta he would be contacted by a certain Chief Joe Uka to hand over the said luggage. The applicant also claimed that his friend told him the luggage contained only clothes and that when he opened it at the airport in Togo that is what he saw.

By means of a bill of indictment dated 9th March 2009, the applicant was charged with having:

1. With another one or more persons in Malta or outside Malta, conspired for the purpose of selling or dealing in a drug in these islands against the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), and specifically of importing and dealing in any manner in the drug cocaine, and having promoted, constituted, organized and financed such conspiracy;

2. Meant to bring or caused to bring or caused to be brought into Malta in any manner whatsoever a dangerous drug (cocaine), contrary to the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta);

3. Had in his possession a dangerous drug (cocaine) contrary to the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), so, however, that such offence was under such circumstances that such possession was not for the exclusive use of the offender;

The applicant was convicted by the Criminal Court after a trial by jury. On the 13th January 2010, following a guilty verdict of 7 votes to 2 votes on all three counts, he was condemned to a term of imprisonment of 2 years and to a fine (*multa*) of €70,000 and was ordered to pay the sum of €1919.42 in court expenses. This judgment was confirmed by the Court of Criminal Appeal on the 14th June 2012.

The Commissioner of Police, Director General (Courts) and the Registrar of Criminal Courts and Tribunals raised a preliminary plea contending that they are not the legitimate defendants in these proceedings.

Franklin Calleja, Deputy Registrar, confirmed on oath that the choice of legal aid lawyers is within the remit of the Ministry for Justice. He explained that there are 17 lawyers who offer legal aid and that they are assigned to a case according to roster, depending on who is next on the list. He explained that in trials by jury, the legal aid lawyers appointed by the Court were only two up until 2011 - Dr Joseph Mifsud and Dr Malcolm Mifsud but that following Dr Joseph Mifsud's retirement in 2011, it is only Dr Malcolm Mifsud who represents defendants in trials by jury.

The Court considers that the presence of the Comissioner of Police, Director General (Courts) and the Registrar of Criminal Courts and Tribunals is unnecessary in these proceedings and that consequently their plea should be upheld. It is evident from the acts of the case that the Director General (Courts) and the Registrar of Criminal Courts and Tribunals have nothing to do with the appointment of legal aid lawyers in each individual case in that it is simply a matter of appointing the lawyer who is next on the list.

With regard to the Commissioner of Police, the Court considers that notwithstanding that the applicant complains of the fact that he gave a statement to the police before he was provided with assistance of a lawyer, the presence of the Attorney General in this proceedings is sufficient in view of article 181B of the Code of Organization and Civil Procedure (**Daniel Alexander Holmes vs L-Avukat Ġenerali et**, decided by the First Hall Civil Court in its Constitutional Jurisdiction on the 3rd October 2014[4] and **Aaron Cassar vs L-Avukat Ġenerali et**, decided on the 28th January 2016 and confirmed by the Constitutional Court on the 11th July 2016).

With regards to the merits of the case, applicant claims a breach of his right to a fair trial in terms of article 39 of the Constitution and article 6 of the European Convention on Human Rights generally, and articles 6(3)(c) and 39(6)(c)

[4] No appeal was filed from this part of the First Court's decision.

specifically. He also claims a breach of article 7 of the Convention. The above mentioned articles read as follows:

39. (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(6) Every person who is charged with a criminal offence –
(c) shall be permitted to defend himself in person or by a legal representative and a person who cannot afford to pay for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense;

<u>The Convention</u>

6. (1) In the determination of his civil rights and obligations or of 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

(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;

7. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed

than the one that was applicable at the time the criminal offence was committed.

As can be construed from the wording of the Constitution and the Convention, the right to legal assistance is linked to the right to legal aid where the circumstances of the applicant so merit.

Before the Court of Magistrates as a Court of Criminal Inquiry, the applicant was asissted by legal aid lawyer Dr Mark Busuttil whilst during the trial by jury legal aid lawyer Dr Malcolm Mifsud was defence counsel. It is established in the case law of the European Court of Human Rights that there is no absolute right to choose one's own court-appointed legal aid lawyer. An individual who requests a change of legal aid lawyer must present evidence that the lawyer failed to perform satisfactorily (**Lagerblom v Sweden**, 14th January 2003).

Legal assistance cannot be effective if a defendant lacks the time and facilities to take advise and prepare his case properly (**Goddi v Italy**, 9th April 1984). However, actual conduct of the defence is a matter between the accused and his lawyer. Nonethless, if the relevant authorities are alerted to manifest shortcomings on the part of the lawyer, they are required to act (**Daud v Portugal**, 21 April 1998). Undoubtedly, this also applies to legal aid lawyers. However, the state's obligation to intervene arises only where the failure to provide effective representation was manifestly or sufficiently brought to it's attention (**Imbrioscia v Switzerland**, 24th November 1993) since only shortcomings which are attributable to the state authorities can give rise to a violation of article 6(3)(c) of the European Convention (**Tripodi v Italy**, 22nd February 1994).

The applicant complains that his right to a fair trial was breached due to various shortcomings in the legal aid system. In his written submissions, the applicant clarifies that his complaint is directed at the system and not at the individual lawyers who assisted him before the Court of Magistrates or before the Criminal Court and the Court of Criminal Appeal.

Specifically, the applicant complains of the restricted number of lawyers available to act as legal aid lawyers, the fact that they are assigned to a particular case without any reference being made to any specialisation which may be required in that case, that in the case of a trial by jury there is currently only one lawyer who offers his services as a legal aid lawyer, that the renumeration paid to legal aid lawyers is disproportionate to the committment required, and the fact that legal aid lawyers are paid by the Attorney General's Office. The applicant also complains of the fact that he was assisted by one lawyer before the Court of Magistrates and another when he was tried before the Criminal Court.

The Court shall begin by considering those complaints directed at the legal aid system generally. From the acts of the proceedings before this Court and those of the criminal proceedings brought against the applicant, it is evident to the Court that the applicant never complained about any shortcomings committed by his court appointed lawyer, so much so that in his submissions he specifically states that his complaints are only directed at the system. However, he fails to give concrete examples of how the system breached his rights, just as he fails to explain why his case merited a specialised lawyer.

Whilst the Court agrees with the applicant that the right to a fair hearing includes the right to effective and proper legal assistance especially in view of the fact that in his specific case he faced a lengthy prison sentence, in order for the Court to find a breach of his rights, it was essential that the applicant present concrete proof of his claims that there were shortcomings in his defence brought about by the failure of the current legal aid system and that this was thus attributable to the state. In the case of **Rutkowski v Poland** (19th October 2000), the European Court stated that '*The obligation to intervene arises when the lawyer's failure has rendered the defence ineffective taking the proceedings as a whole.*' In the instant case this does not appear to have been so.

In their book **Law of the European Convention on Human Rights**' (Second Edition), Harris, O"Boyle & Warbrick state:

> "*The right in Article 6(3)(c) is to 'practical and effective' legal assistance (Artico v Italy, 1980). But a state cannot be held responsible for every shortcoming of a lawyer acting for the defence. As stated in Kamasinski v Austria, it 'follows from the independence of the legal profession of the state that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed.' Because of the state's lack of power to supervise or control his or her conduct, a lawyer even though appointed by the state, is not an 'organ' of the state who can engage its direct responsibility under the Convention by his or her acts, in the way, for example, a policeman or soldier may (Alvarez Sanchez v Spain, 2001). Instead, the 'competent national authorities', who may be the courts or other state actors, 'are required by Article 6(3)(c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention' (Kamasinki v Austria, 1980).*"[5]

In the case of **Huseyn and Others vs Azerbaijan**, decided on the 26th July 2011, the European Court stated:

> "*In this connection, the Court reiterates that, under Article 6 § 3 (c) of the Convention, an accused is entitled to legal assistance which is practical and effective and not theoretical or illusory. This Convention provision speaks of "assistance" and not of "nomination": mere nomination does not ensure effective assistance since a lawyer may be prevented from providing such assistance owing to various practical reasons, or shirk his or her duties. A State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes. However, if a failure by legal-aid counsel to provide effective representation is manifest or is sufficiently brought to the authorities' attention in some other way, the authorities must take steps to ensure that the accused effectively enjoys the right to legal assistance (see Artico v. Italy, 13 May 1980, §§ 33-37, Series A no. 37, and Kamasinski v.*

[5] Page 319.

Austria, 19 December 1989, § 65, Series A no. 168). Moreover, where it is clear that the lawyer representing the accused before the domestic court has not had the time and facilities to organise a proper defence, the court should take measures of a positive nature to ensure that the lawyer is given an opportunity to fulfil his obligations in the best possible conditions (see, mutatis mutandis, Goddi v. Italy, 9 April 1984, § 31, Series A no. 76)."

Insofar as the applicant alleges that the legal aid lawyers appointed by the Court were inefficient, the applicant has not substantiated his claims with any examples of their failures. The applicant did not bring forward any proof of how the system failed him. Although the Court agrees that the current system leaves much to be desired, this does necessarily mean that in present case the system has effectively failed the applicant to the point that his right to a fair hearing has been breached. The Court refers to the above mentioned case of **Daniel Alexander Holmes vs Avukat Ġenerali et**, decided on the 16th March 2015, wherein the Constitutional Court held that the fact that the current system is not perfect and requires improvement does not necessarily mean that there has been a breach of fundamental rights.

Regarding the applicant's complaint that there is only one lawyer to defend accused persons in trials by jury, it is established in the case law of the European Court of Human Rights that the defendant does not have the right to choose the legal aid lawyer assigned to him. In this case it does not appear that the lawyer appointed to defend the applicant did not have the required specialisation to take on the applicant's case, on the contrary, the fact that there is only one legal aid lawyer who is appointed to all those defendants who are granted legal aid when they are tried by jury effectively means that the lawyer appointed is an expert in the field. Once again, the applicant failed to show how the fact that the same lawyer is appointed as defence counsel in trials by jury where the defendant is granted legal aid has infringed his right to a fair hearing. The applicant has also failed to show what shortcomings arose from the fact that he was defended by one lawyer before the Court of Magistrates and another when he

was tried before the Criminal Court. The Court reiterates that the right to free legal assistance does not include the right to choose the assigned lawyer and certainly does not require that the same lawyer be appointed during the criminal inquiry and during the actual trial.

Finally, the court considered the applicant's complaint regarding the fact that legal aid lawyers are remunerated by the Attorney General's Office. The Court appreciates that justice must not only be done but must also be seen to be done. In these circumstances the Court considers that it would be more appropriate if legal aid lawyers were not paid out of the budget allocated to the Attorney General. However, the fact that the renumeration is so paid, does not mean that legal aid lawyers are in some way under the control of the Attorney General in a way that their integrity and independece would be put into doubt, necessarily giving rise to a breach of an individual's right to a fair trial. Both Dr Mark Busuttil and Dr Malcolm Mifsud testified that the Attorney General in no way interferes with their work as legal aid lawyers and that they are in no way answerable to the Attorney General. Additionally, Adrian Tonna on behalf of the Attorney General's Office testified that legal aid lawyers are appointed by the Ministry for Justice and that the Attorney General is in no way involved in the choice of appointed lawyers. He also confirmed that legal aid lawyers do not report to the Attorney General in any way. The Court also notes that the renumeration that legal aid lawyers are paid is a fixed amount and so it is certainly not the case that the Attorney General has some sort of say as to what the lawyers should be paid for their services.

As a result the Court finds the applicant's complaint is unfounded and ought to be rejected.

The discretion enjoyed by the Attorney General in terms of article 22(2) of the Dangerous Drugs Ordinance

The applicant also claims that his rights under article 39 of the Constitution and articles 6 and 7 of the Convention have been breached owing to the discretion granted by law to the

Attorney General to choose to try him before the Court of Magistrates or the Criminal Court.

At the time of the applicant's arrest, article 22(2) of the Dangeorus Drugs Ordinance read as follows:

> "*Every person charged with an offence against this Ordinance shall be tried in the Criminal Court or before the Court of Magistrates (Malta) or the Court of Magistrates (Gozo), as the Attorney General may direct...*"

The law did not provide established criteria to determine whether an accused would be tried before the Court of Magistrates as a Court of Criminal Judicature or the Criminal Court but rather the decision was taken by the Attorney General notwithstanding the fact that the punishment varies greatly from that which may be imposed by the Court of Magistrates (a maximum of 10 years imprisonment) and the Criminal Court (a maximum of life imprisonment). The pecuniary consequences also vary greatly.

By virtue of recent amendments to the law (Act XXIV of 2014), persons who are charged with an offence against the Dangerous Drugs Ordinance have been granted the right of appeal, pending the criminal proceedings, to the Criminal Court, from the Attorney General's decision to submit them to trial before the Criminal Court. The amendments also oblige the Attorney General to exercise his discretion in accordance with established guidelines which have been included in the Forth Schedule of the Ordinance.

This means that the law was only amended after the Court of Criminal Appeal's judgment confirming that of the Criminal Court against the applicant, and consequently, the applicant could not contest the Attorney General's decision to try him before the Criminal Court.

In recent years the Constitutional Court has been called upon time and time again to cast judgment on the subject of the Attorney General's discretion, bestowed on him by the above

quoted article 22(2) of the Dangerous Drugs Ordinance.[6] The matter was also the subject of the case **Camilleri v Malta** decided by the European Court in Strasbourg on the 22nd January 2013. Therefore, it can be said that case law on the matter is more or less established.

The Court shall begin by considering whether the Attorney General's discretion breached the applicant's right to a fair hearing in terms of article 39 of the Constitution and article 6 of the Convention.

The discretion bestowed on the Attorney General by virtue of the above mentioned article 22(2) of the Dangerous Drugs Ordinance most certainly had an implication on the maximum punishment which the applicant could receive, but the Attorney General's decision did not breach the applicant's right to a fair hearing. The Attorney General's discretion did not determine the innocence or guilt of the applicant, it only determined the court before which he was to be tried and consequently the applicable sentence. This means that all of the principles that are part and parcel of the right to a fair hearing were guaranteed independently of the decision of the Attorney General as both the Court of Magistrate and the Criminal Court are independent and impartial, they respect the principle of equality of arms and safeguard all the requirements which together make up the right to a fair hearing in terms of articles 39 of the Constitution and article 6 of the European Convention.

In the case of **Godfrey Ellul vs Attorney General**, decided on the 27th April 2006, the Constitutional Court stated that article 6 of the Convention regulates the procedures before the court and not the way in which an accused person is brought before the court. The Court continued by stating:

> "*Sew quddiem il-Qorti Kriminali u sew quddiem il-Qorti tal-Maġistrati, min ikun mixli b'akkuża kriminali jkollu l-*

[6] **Godfrey Ellul vs Avukat Ġenerali** (Constitutional Court, 27th April 2006); **Claudio Porsenna vs Avukat Ġenerali** (Constitutional Court, 16th March 2012); **Joseph Lebrun vs Avukat Ġenerali** and **Martin Dimech vs Avukat Ġenerali** (both decided by the Constitutional Court on the 16th December 2014), **Daniel Alexander Holmes vs Avukat Ġenerali** (Constitutional Court), 15th March 2015); **Jean Pierre Abdilla vs Avukat Ġenerali** (Constitutional Court, 16th May 2016); **Stephen Nana Owusu vs Avukat Ġenerali** (Constitutional Court, 30th May 2016) amongst others.

garanziji kollha li jrid dan l-artikolu u ma nġiebet ebda prova illi l-appellant kien imċaħħad minn xi waħda jew aktar minn dawn il-garanziji. Imkien f'dan l-artikolu ma tingħata garanzija illi l-prosekutur ma għandux ikollu diskrezzjoni bħal dik mogħtija lill-Avukat Ġenerali fl-art. 22(2) tal-Kap. 101. Din il-Qorti, għalhekk, bħall-ewwel qorti ma ssibx li kien hemm ksur ta' l-art. 6 tal-Konvenzjoni."

The same conclusion was reached in the cases of **Repubblika ta' Malta vs Mario Camilleri** decided by the Court of Criminal Appeal on the 23rd January 2001 and more recently in the cases of **Joseph Lebrun vs Avukat Ġenerali**, decided by the Constitutional Court on the 16th September 2014 and **Stephen Nana Owusu vs Avukat Ġenerali**, confirmed by the Constitutional Court on the 30th May 2016 amongst others.

Consequently, the Court finds that the discretion bestowed on the Attorney General by virtue of article 22(2) of the Dangerous Drugs Ordinance did not breach the applicant's right to a fair trial in terms of article 39 of the Constitution or article 6 of the European Convention.

The applicant also claims that the discretion enjoyed by the Attorney General prior to the 2014 amendments was in breach of article 7 of the European Convention which provides that there shall be no punishment without law. The applicant bases his claim on the lack of forseeability of the applicable punishment, that the discretion was an absolute one, that the criteria on which the Attorney General based his decision was not established by the law and that consequently it was the Attorney General's discretion to determine the parameters of the applicable punishment.

By virtue of article 7, the European Convention establishes the basic principle that it is only the law which can define a crime and impose a punishment – *nullum crimen sine lege nulla poena sina lege.* It follows that crimes and their consequences must be established by law in a way that one may know from the wording of the law what is prohibited by that same law (**Scoppola v Italy**, 17th September 2009).

The First Hall Civil Court in its Constitutional Jurisdiction in the case of **Stephen Nana Owusu vs Avukat Ġenerali** of the 14th January 2015 referred to the study conducted by Professor J.J. Cremona in **The Rule of Law as a Fundamental Principle of the European Convention on Human Rights**[7] wherein he wrote:

> "*The link between foreseeability and the conferment of discretion is a crucial one. A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference*. (...) *Arbitrariness is the precise antithesis of the rule of law. In fact the Court has considered that the principle of the rule of law in a democratic society requires a minimum degree of protection against arbitrariness.*"

In the case of **Kokkinakis v Greece** (25th May 1993) the European Court stated the following about article 7 of the Convention:

> "*It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.*"

In the case of **Mark James Taylor v United Kingdom** (3rd December 2002) the European Court held:

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[7] Prof J.J. Cremona 'Selected Papers 1990-2000' Vol. 2 'Human Rights and Constitutional Studies'

"[-.] it has had occasion to stress in the context of its judgments under Article 7 that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege), from which it follows that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the domestic courts interpretation of it, what acts and omissions will make him liable and, it would add for the purposes of the instant case, what penalties can be imposed (see the Kokkinakis v Greece judgment of 25 May 1993, Series A no. 260-A, §52; Streletz, Kesllser and Krenz v. Germany [GC], nos.34044/96, 35532/97 and 44801/98, ECHR 2001-II, §50)."

In the case decided by the European Court in the names of **Camilleri v Malta**, the European Court found that article 120A(2) of the Medical Kindred Ordinance which was similar to article 22(2) of the Dangerous Drugs Ordinance before it too was amended in 2014, in that the Attorney General had an absolute discretion to decide whether to try an accused before the Court of Magistrates or the Criminal Court, breached article 7 of the Convention because *'it failed the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7.'*

The European Court held:

"39. The issue before the Court is whether the principle that only the law can define a crime and prescribe a penalty was observed. The Court must, in particular, ascertain whether in the present case the text of the law was sufficiently clear and satisfied the requirements of accessibility and foreseeability at the material time.

40. The Court finds that the provision in question does not give rise to any ambiguity or lack of clarity as to its content in respect of what actions were criminal and constituted the relevant offence. The Court further notes that there is no doubt that section 120A (2) of the Medical and Kindred Professions Ordinance provided for the punishment

applicable in respect of the offence with which the applicant was charged. In fact, it provided for two different possible punishments, namely a punishment of four years to life imprisonment in the event that the applicant was tried before the Criminal Court, or six months to ten years if he was tried before the Court of Magistrates. While it is clear that the punishment imposed was established by law and did not exceed the limits fixed by section 120A (2) of the above-mentioned Ordinance, it remains to be determined whether the Ordinance's qualitative requirements, particularly that of foreseeability, were satisfied, regard being had to the manner of choice of jurisdiction, as this reflected on the penalty that the offence in question carried.

41. The Court observes that the law did not make it possible for the applicant to know which of the two punishment brackets would apply to him. As acknowledged by the Government (see paragraph 31 above), the applicant became aware of the punishment bracket applied to him only when he was charged, namely after the decision of the Attorney General determining the court where he was to be tried.

...

43. While it may well be true that the Attorney General gave weight to a number of criteria before taking his decision, it is also true that any such criteria were not specified in any legislative text or made the subject of judicial clarification over the years. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one (based on enumerated factors and criteria). The Constitutional Court (see paragraph 14 above) noted that there existed no guidelines which would aid the Attorney General in taking such a decision. Thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. An insoluble problem was posed by fixing different minimum penalties. The Attorney General had in effect an unfettered discretion to decide which minimum penalty

would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards (...)

44. In the light of the above considerations, the Court concludes that the relevant legal provision failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7.'

45. It follows that there has been a violation of Article 7 of the Convention."

The Constiutional Court has established that the law must not be applied in abstract but to the concrete cases at hand. In the case of **Daniel Alexander Holmes vs L-Avukat Ġenerali et**, decided on the 16th March 2015, the Constitutional Court stated the following in reaction to the **Camilleri** judgment:

"*Jekk din hija l-interpretazzjoni prevalenti – biex ma nsejħulhiex korretta – tal-art. 7, u jidher ukoll illi hija l-interpretazzjoni adottata fis-sentenzi ta' dawn il-qrati wara Camilleri xejn ma jiswa li ngħidu illi l-attur kien jaf, qabel ma qatagħha li jwettaq ir-reat, li seta' jeħel minn sitt xhur sa għomru l-ħabs; jekk ma setax, f'dak il-waqt, ikun jaf jekk setax jeħel minn sitt xhur sa għaxar snin jew minn erba' snin sa għomru, mela ma kienx hemm il-prevedibilità li jrid l-art. 7 kif interpretat.*

Fil-verità iżda – għax il-liġi trid titħaddem fil-każ konkret u mhux fl-astratt – seta' jew ma setax jobsor l-attur illi l-gravità tar-reat minnu mwettaq la kienet żgħira u lanqas borderline, b'mod illi jekk jinqabad x'aktarx illi jitressaq quddiem il-Qorti Kriminali?"

In the case before the Court today, the applicant was caught red handed with over 3 kilograms of cocaine with a purity of 61.2% and having a street value of €299,644. Whilst it is true that the applicant only found that that he was going to be tried by the Criminal Court when he was formally charged, the

seriousness of his crime cannot have had escaped him. By no stretch of the imagination could the applicant be considered a 'borderline case' to the effect that he could have reasonably been under the impression that the crime merited that he be tried before the Court of Magistrates. Therefore, he could surely have forseen that he would be tried before the Criminal Court.

The Court therefore concurs with the interpretation given by the Constitutional Court in the above mentioned case of **Daniel Alexander Holmes vs Avukat Ġenerali** amongst others and that therefore, the applicant's complaint in this regard should also be rejected.

Right to legal assistance during investigation and access to the police file

The applicant complains that his right to a fair trial in terms of article 39 of the Constitution and article 6 of the Convention was breached because at the time when he was interrogated by, and gave his sworn statement to, the police, Maltese law did not afford him the right to be assisted by a lawyer. The applicant also complains that he was not given access to his police file.

The right to legal assistance at the pre-trial stage was introduced by means of Act III of 2002. However, the law only came into force in 2010 by means of Legal Notice 35 of 2010 which means that the applicant is correct in stating that when he gave his statement to the police, the law did not provide for legal assistance during pre-trial investigations, specifically during questioning, whether this was done by the police or by a Magistrate in his or her investgative role. Before questioning, suspects such as the applicant at the time, would be cautioned, that is, informed of their right to remain silent and that anything that they said could be written down and produced as evidence against them. At the time, no inferences could be drawn by the court during the trial from the silence of the accused during questioning.

Insofar as the applicant's complaint is based on a breach of article 39 of the Constitution, it has been established by the Constitutional Court that article 39 applies to persons who have been charged with a criminal offence and so it does not apply to pre-trial proceedings such as the police interrogation. As a result the applicant's complaint cannot be held validaccording to article 39 of the Constitution.[8]

Article 6(3)(c) of the European Convention provides that everyone who is charged with a criminal offence has the right to '*defend himself in person or through legal assistance of his own choosing.*' However, the applicability of article 6 of the Convention has been intrepreted by the case law of the European Court to include the moment when a person is charged with a criminal offence. Specifically, the Court has defined 'charge' for the purposes of article 6 of the Convention as '*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence*' or some other act which carries '*the implication of such an allegation and which likewise substantially affects the situation of the suspect*' (**Corigliano v Italy**, 10th December 1982).

The Court is therefore satisfied that the applicant's complaint is admissible in terms of article 6 of the European Convention.

On the matter of the right to legal assistance in the pre-trial stage, in the case of **A.T. v Luxembourg**, decided on the 9th April 2015, the European Court held:

> "*62. The Court reiterates that although the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial before a "tribunal" competent to determine "any criminal charge", it may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see Salduz, cited above, § 50, and Panovits v. Cyprus,*

[8] **Peter Joseph Hartshorne vs Avukat Ġenerali et**, decided by the First Hall Civil Court in its Constitutional Jurisdiction on the 30th May 2014 amongst others.

no. 4268/04, § 64, 11 December 2008). Furthermore, the right set out in paragraph 3 (c) of Article 6 is one element, amongst others, of the concept of a fair trial in criminal proceedings contained in paragraph 1 (see Imbrioscia v. Switzerland, 24 November 1993, § 37, Series A no. 275, and Brennan v. the United Kingdom, no.39846/98, § 45, ECHR 2001-X).

63. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see Krombach v. France, no. 29731/96, § 89, ECHR 2001-II). In order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict that right. The Court specifies that even in such cases, denial of access to a lawyer must not unduly prejudice the rights of the accused under Article 6, and that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see Salduz, cited above, § 55). The Court found a violation of Article 6 §§ 1 and 3 (c) notwithstanding that the applicant had subsequently benefited from legal assistance and adversarial proceedings, having noted, in particular, that the restriction in question on the right to a lawyer had been based on the systematic application of legal provisions (see Salduz, cited above, §§ 56 and 61).

64. The fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or otherwise remanded in custody, whether interrogations take place or not. The Court emphasises in that respect that the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance, pointing out that discussion of the case,

organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention were fundamental aspects of the defence which the lawyer must be able to exercise freely (see Dayanan, cited above, §§ 31-33). Moreover, an accused often finds himself in a particularly vulnerable position at the investigation stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself (see Pavlenko v. Russia, no. 42371/02, § 101, 1 April 2010).

65. The Court has had occasion to reiterate that, first of all, a person "charged with a criminal offence" within the meaning of Article 6 of the Convention is entitled to receive legal assistance from the time he or she is taken into police custody or otherwise remanded in custody and, as the case may be, during questioning by police or by an investigating judge; secondly, while a restriction of this right may in certain circumstances be justified and be compatible with the requirements of that Article, any such restriction that is imposed by a systemic rule of domestic law is inconsistent with the right to a fair trial (see Simons v. Belgium (dec.), no. 71407/10, § 31, 28 August 2012, and Navone and Others v. Monaco, nos. 62880/11, 62892/11 and 62899/11, § 80, 24 October 2013).

66. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see Kwiatkowska v. Italy (dec.), no. 52868/99, 30 November 2000, and Ananyev v. Russia, no. 20292/04, § 38, 30 July 2009). However, if it is to be effective for Convention purposes, a waiver of the right to

take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see Salduz, cited above, § 59, and Yoldaş, cited above, § 51).'

....

'*The applicant made detailed statements during the impugned police hearing. Although he denied all the charges against him and made no incriminating statements, the Court nevertheless emphasises that the investigation stage of criminal proceedings is of crucial importance as the evidence obtained at this stage determines the framework in which the offence charged will be considered (see Mehmet Şerif Öner v. Turkey, no. 50356/08, § 21, 13 September 2011).*"

Recently in the case **Borg v Malta** (12th January 2016) the European Court had this to say:

"*56. Early access to a lawyer is one of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see Salduz v. Turkey [GC], no. 36391/02, § 54, ECHR 2008).*

57. The Court reiterates that in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the

accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see Salduz, cited above, § 55).

58. Denying the applicant access to a lawyer because this was provided for on a systematic basis by the relevant legal provisions already falls short of the requirements of Article 6 (ibid., § 56).

59. The Court observes that the post-Salduz case-law referred to by the Government (paragraph 53 in fine) does not concern situations where the lack of legal assistance at the pre-trial stage stemmed either from a lack of legal provisions allowing for such assistance or from an explicit ban in domestic law.

60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, Salduz, cited above, § 56; Navone andOthers v. Monaco, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013; Brusco v. France, no. 1466/07, § 54, 14 October 2010; and Stojkovic v. France and Belgium, no.25303/08, §§ 51-57, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, Dayanan v. Turkey, no. 7377/03 §§ 31-33, 13 October 2009; Yeşilkaya v. Turkey, no. 59780/00, 8 December 2009; and Fazli Kaya v. Turkey, no. 24820/05, 17 September 2013).

61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see Salduz, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which

was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).

62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see Salduz, cited above, §§ 52, 55 and 56).

63. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention."

As has already been stated, prior to the above mentioned case of **Borg v Malta**, the European Court delivered many judgments on the subject of the right to legal assistance during police interrogation. In the past, the Constitutional Court interpreted the right to legal assistance during the pre-trial stage restrictively, in that it only found application in cases where the accused was considered to have been a vulnerable person who had been prejudiced by the lack of legal assistance during interrogation or when giving a statement to the police (**Charles Steven Muscat vs Avukat Ġenerali,** delivered by the Constitutional Court on the 8th October 2012 amongst others).

However, in view of the **Borg v Malta** judgment, the Constitutional Court has, most recently in the case of **Aaron Cassar vs Avukat Ġenerali et** (11th July 2016), despite standing by the more restrictive interpretation it had always given to the right to legal assistance during police interrogation, found that this restrictive interpretation is no longer teneble in light of **Borg v Malta**, wherein the European

Court found that the mere lack of right to legal assistance during police interrogation amounted to a breach of article 6(1) read with article 6(3) of the Convention.

In view of the above, this Court finds that the fact that Maltese law did not provide for the right of the accused to be assisted by a lawyer when he was interrogated by, and gave his statement to, the police, amounts to a breach of his fundamental right to a fair hearing in terms of article 6(1) read with article 6(3) of the Convention.

With regard to the lack of access to his police file, the Court finds that the applicant did not specify in which way this amounted to a breach of his right to a fair hearing. It is an established principle that in order for the defendant to receive a fair trial, the principle of equality of arms must be respected. This means that '*each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-a-vis his or her opponent* (**A.B. v Slovakia**, 4th March 2003). In the present case, no allegations were made by the applicant to the effect that he was not afforded the right to present his evidence or to the cross examine the witnesses brought to testify by the prosecution. It follows therefore that the Court cannot find a breach of his right to a fair trial simply because of the fact that he was not given access to his police file.

With regard to the applicant's request for an adequate and effective remedy for the above mentioned breach of his rights, the Court observes that in his sworn statement given to the police, the applicant had denied any knowledge of the fact that the suitcase which he had brought to Malta contained illicit drugs. The Court also observes that in this case the applicant was caught red-handed with over 3 kilograms of cocaine in his luggage. As a result, it does not appear that the applicant was found guilty on the basis of the content of the statement which he gave to the police. It is also worth noting that the applicant did not change his version of events throughout the criminal proceedings in question and as a result the Court certainly sees no reason why the sentence of the Criminal Court or that of the Court of Criminal Appeal should be annulled but that in the

circumstances of the case a declaration that his right to a fair trial has been breached will serve as a just and effective remedy.

For the reasons above, the Court is hereby deciding the case as follows:

1. Upholds the preliminary plea raised by the respondents the Comissioner of Police, Director General (Courts) and the Registrar of Criminal Courts and Tribunals by declaring that they are not the legitimate defendants in these proceedings;

2. Rejects the applicant's first request and declares that his right to a fair trial in terms of article 39(6)(c) of the Constitution and article 6(3) of the Convention has not been breached as a result of the legal assistance provided by his appointed legal aid lawyers or the legal aid system in general;

3. Rejects the applicant's second request and declares that the order issued under article 22(2) of Chapter 101 of the Laws of Malta by virtue of which the Attorney General was granted the discretion to decide whether the applicant be tried before the Court of Magistrate or the Criminal Court was neither unconstitutional nor was it in breach of article 39 of the Constitution and articles 6 and 7 of the European Convention;

4. Upholds the applicant's third request and therefore declares that his right to a fair hearing in terms of article 6(1) read together with article 6(3) of the European Convention on Human Rights has been breached in view of the fact that Maltese law did not permit him to be assisted by a lawyer when he was being investigated by the police;

5. Upholds the applicant's fourth request in part, by finding that a declaration to the effect that his rights have been breached to be a just and effective remedy in view of the

fact that it does not appear that the applicant suffered any substantive prejudice as a result of the said breach.

Costs are to be borne as follows: 1/3 by Attorney General and 2/3 by applicant, provided that the costs of the preliminary plea raised by the Attorney General and the Commissioner of Police and the costs of the Director General (Courts) and the Registrar of Criminal Courts and Tribunals are to be borne by the applicant.

IMHALLEF

DEP/REG