CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. JUDGE

JACQUELINE PADOVANI GRIMA LL.D. LL.M. (IMLI)

Court hearing of Monday 21st of May 2018

Constitutional Reference No.: 62/2017JPG

Case No.: 3

The Police

(Inspector Keith Arnaud)

Vs

Kristjan Zekic also known

As Adhamjon Niyazov

The Court,

Having seen the Constitutional Reference dated 1st August 2017, of the Courts of Magistrates (Malta) precided by Magistrate Dr. Aaron M Bugeja M.A. Law, LL.D (melit);

Having seen the application filed by the accused wherein he stated that:

"That on the 23rd January 2017 applicant was arraigned under arrest.

That on the 8th march, 2017, applicant raised the pleas of ne bis in idem. This Honourable Court adjourned the case to the 10th April, 2017 for the relative decree.

That on the 6th April, 2017 applicant filed his first application requesting bail. Since then applicant has repeatedly been denied bail.

That the decrees refusing bail were delivered in camera. These decrees referred to the reasons mentioned in the Attorney General's reply, which replies, and consequently their contents, were never notified to applicant. Thus applicant was never given the opportunity to contest, or at least make submissions on, such reasons.

That since applicant has reaised the ne bis in idem plea, the merits of the case have been held in abeyance, and the last time that evidence regarding the said merits was heard beforethis Honourable Court was on the 8th March, 2017.

That the decree upon the ne bis in idem pleas is currently stillpending and the case is adjourned eache time without applicant being-brought to Court nothwithstanding that he is still under arrest.

That on the 22nd June, 2017, applicant once again filed an application for bail. On the 17th Julu, 2017, that is four weeks after the 22nd June, 2017, this Honourable Court rejected this new request. Once again this decree, which was deliverd in camera, simply referenz to the reasons mentioned in the Attorney General's reply. This, reply, once again, was never notified to applicant and its contents are unknown to applicant. Suffice to say that applicant was never in a position to register submissions regarding the said reasons given by the Attorney General which apparently led to the Court's decree.

That applcant humbly submits that this is in breach of his fundamental right as guaranteed by Article 5 of the European Convention and by Article 34 of the Constitution of Malta.

For the above-mentioned reasons applicant requests this Court to refer the matter to the First Hall fo the Civil Court in its consitutional jurisdiction."

Having seen the decree of the court of the 21st August 2017, whereby this court order a notification to all parties concerned of the said Constitutional Reference and appointed it for hearing;

Having seen the reply of the Attorney General of the 19th September 2017, which reads as follows;

Respectfully submits:

1. *That respondent was notified with the constitutional reference issued on the 10th August 2017 by the Court of Magistrates (as a court of Criminal Judicature). This reference was made following a request by applicant to refer a constitutional question to this Honourable Court for an alleged violation of article 5 of the European Convention on Human Rights and article 34 of the Constitution of Malta.*

2. *That the terms of constitutional question refer to the compatibility of certain legal aspects governing the law regulating bail and their compliance with article 5 of the European Convention and article 34 of the Constitution. In particular it seems that applicant is alleging breach of his fundamental human rights because the written replies filed by the Attorney General to his applications requesting bail were not notified to him. This reference calls into question the legality of the applicant`s continued detention resulting from the Courts` refusal to grant him release on bail in spite of numerous requests to that effect;*

3. *That articles 5 of the European Convention and 34 of the Constitution (which are very similar) do not grant an absolute right to freedom from arrest and in fact both articles list a number of exceptions to this right to liberty. That the principle goal of the above mentioned articles is that of minimising the risk of arbitrariness by providing, within the ambit of the rule of law, a form of expeditious and meaningful judicial control over the executive`s interference with the liberty of an individual at all phases of a criminal process. These provisions require that an individual who has been arrested on reasonable suspicion of having committed an offence should be promptly brought before a judge or other officer similarly empowered who is to determine whether the arrest is legal and whether the further detention is required pending the trial. There is no doubt that the continued arrest of applicant falls under the exceptions listed in article 5(1)(c) of the European Convention and article 34(1)(e)(f) of the Constitution. In the case Kubicz vs. Poland the European Court held on the 28th June 2006 that "the question whether a period of detention is reasonable cannot be assessed in the abstract but must be considered in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention".*

4. *That applicant is facing criminal charges relating to the falsification and use of identification documents and this is indicative of the fact that there are problems regarding the true identity of applicant. This is a legitimate concern of the prosecution especially when considering that in the event of applicant absconding from these islands it would be very difficult to trace him back. Applicant until recently was only known as Kristijan Zekic however after investigations from the police it transpired that this identity might after all be fictitious and that his real name might be Adhamjon Niyazov. The accused is still considered as an unidentified person since his identity has not yet been confirmed with certainty*

and consequently respondent is of the humble opinion that bail should not be given to an unidentified person. In fact when one takes a look at the "okkju" of the criminal case this in itself is proof of the prosecution`s concerns - is applicant Kristijan Zekic born in Russia on the 9th February 1982 or is he Adhamjon Niyazov born in Uzbekistan on the 31st August 1983? In light of this state of affairs the Prosecution had no other option but to repeatedly object to the release on bail of applicant who apart from lacking a certain/true identification, has no ties with Malta.

5. *When considering requests by the accused for bail, the Court of Magistrates is obliged to ensure that if bail is indeed granted there aren`t the dangers found in article 575 (1) of the Criminal Code. In its decree the Court of Magistrates exhaustively highlighted the fact that it repeatedly rejected applicant`s requests for bail because the Court held as well founded the detailed replies lodged by respondent objecting to bail and this in accordance with the provisions of the law. According to the procedure laid down in article 575 of the Criminal Code the Attorney General has the right to file a written reply to applicant`s application and there is no legal obligation to notify the accused with it. Neither is the Court obliged to issue its bail decrees in open court. It is very important to point out that if applicant wanted to know what the objections of the Attorney General consisted of, he could very easily inspected the acts of the proceedings and requested copies of any document found in the Court file. The Court file and the documents contained in it were always freely accessible to the accused and they were under no circumstance withheld from the accused. Moreover the Court decisions on bail were always sent to the Legal office of the accused via electronic mail. The Court of Magistrates in this case proceeded diligently and has also motivated its refusal to grant bail by giving a reasoned ruling. Article 575(11) of Chapter 9 makes it mandatory for a Court to motivate its reason for denying bail.*

6. *That in this case the reasonable suspicion, the fear of absconding and the possibility of interfering with the proper course of justice are all circumstances which, viewed collectively, are not only remote and hypothetical possibilities but they are sufficient and relevant grounds generally accepted as justifying a denial of release on bail. When one examines the criminal proceedings in their totality and in particular the issue of bail there is nothing which may lead to the conclusion that there has been a flagrant denial of justice or that the continued detention of applicant is unreasonable or unlawful and therefore respondent argues that the continued detention of applicant is justified and in accordance to a prescribed procedure by law.*

7. *That in view of this there is no violation of article 5 of the European Convention and/or article 34 of the Constitution of Malta*

8. *With costs.*

Having heard the witnesses on oath;

Having taken cognizance of all the acts of the proceedings;

Having seen the note of submission of the Attorney General;

Having heard the oral submissions of the parties.

Considers;

Kristjan Zekic testified,[1] that after being duly notified of his right not to incriminate himself, in proceedings filed against him before the Court of Magistrates, he spent

[1] Fol 19 *et seqq.*

approximately four months without being brought before the Court for a hearing, and that in the mean-time he was still being held in custody. He stated that on three occasions he had been brought to court from prison but remained in the court's lock-up, and was not taken up to the court room, as he was told that the sitting had been adjourned, and then taken back to prison, without being given the date of the adjournment.

Inspector Keith Arnaud testified[2] that the applicant had been investigated by the police on suspicion of being in possession of forged documents, and from this investigation it resulted to the police that the Slovenian ID card he was in possession of belonged to a third party, and that he was also in possession of an Uzbek passport which had been issued on a certain Adam John Niyazov. He continued that this led the police to arrest applicant on the 20th of January 2017, question him and subsequently charge him in Court on the 23rd of January 2017. He explained that the first sitting before Magistrate Dr. Aaron Bugeja was held on the 30th of January 2017, another sitting was held on the 8th of March 2017, at which point the defence raised a *ne bis in idem* plea. The case was then adjourned to the 10th of April, however on that day no sitting was held, and the case was adjourned to the 10th of May. On the 8th of May however, he was informed by means of an email sent by the Deputy Registrar of Magistrate Bugeja that the case would not be heard on the 10th of May and was instead being adjourned to the 21st of June. He continued that after phoning the Deputy Registrar, he was informed that the sitting could not be held because the Magistrate was working on an urgent case, and that he therefore asked her whether they should still bring applicant to court, since usually when this happens the accused is brought to court just for procedural matters and then taken back to prison, but he was informed that there was no need to take applicant to court and he had phoned the prison to inform them as such. He stated that the sitting of the 21st of June was also not held, and confirmed that on that day applicant had not appeared before the Magistrate, and instead the case was adjourned to the 24th of July. He confirmed that for two consecutive adjournments, applicant was brought to court but simply kept

[2] Fol 132 *et seqq.*

downstairs in the lock-up, as opposed to being brought up to the court room before the Magistrate. He continued that after the Court gave its decree regarding the *ne bis in idem* plea, evidence continued being heard as from the sitting on the 21st of August 2017. He then stated that on the 10th of April, the Court had heard submissions on *ne bis in idem* and that **therefore the period during which no court sittings were held was between the 10th of April and the 24th of July**, when the decree of *ne bis in idem* was read out in open court in the presence of the accused.

Under cross-examination[3] he testified that the defence had made no request for the case to be suspended while the plea of *ne bis in idem* was being considered by the court.

Deliberates:

This Constitutional Reference was brought to the cognizance of this Court after the accused, who had filed a number of applications for bail before the Court of Magistrates, which were all denied, moved the Court of Magistrates to refer the matter to this Court. He complained that in its decrees denying bail, the Court of Magistrates failed to give reasons for its decisions, and that the trial had been unduly delayed, submitting that this was in breach of his fundamental right to liberty as guaranteed by Article 5 and Article 34 of the Constitution of Malta.

From the acts of the case before the Court of Magistrates, and the testimony heard by this Court, it results the accused was arraigned under arrest on the 23rd of January 2017. He then appeared again before the Court on the 30th of January 2017, during which sitting Inspector Keith Arnaud testified and produced documents as evidence on the merits of the case. The next sitting was held on the 8th of March 2017, during which the Court heard a number of witnesses produced by the prosecution, and during this same sitting the defence raised a plea of *ne bis in idem.* The next sitting was held on the 10th of April 2017, during which the parties made their oral submissions on the plea of *nes bis in idem*,

[3] Fol 137.

and the case was adjourned to the 10th of May 2017 for the Court's decree on the plea. It turned out however that the sitting of the 10th of April 2017 would be the last time that the accused would appear before the Magistrate, until the 24th of July 2017, as sittings in between these dates were cancelled by the Magistrate who was busy investigating an urgent matter of grave Statal importance. In the interim, the accused filed a number of requests for release from custody, which were denied by the Court[4]. The reason given by the Court every time it denied the accused's request for release from custody was always "*for the reasons given in the Attorney General's reply"*; a reply which was never notified to the accused, either at the time when it was filed, or as an addendum to the Court's decree. It also transpires that on the dates when sittings were not held, the accused was nonetheless brought to court, but kept in the lock-up, before being told that the sitting had been adjourned and taken back to prison. The applicant was granted bail on the 24th of August 2017 on a personal guarantee.

Delibarates;

From the acts of the case it results, and this is not contested by the Attorney General, that after every request for release from custody made by the accused, the Attorney General filed a note, in accordance with the law, objecting to this request, which note however was never notified to the accused. It further results, and it is not contested, that every request for bail made before the 21st of August 2017, had been denied by the Court of Magistrates, and the motivation for such denial was; "*for the reasons given by the Attorney General in his reply*."

It has been argued before this Court, that there is no requirement at law for the note of the Attorney General opposing release from custody to be notified to the accused. Furthermore, while the law does not grant the accused a specific right of audience or to make submissions, in Malta, proceedings are held *viva voce,* and had the applicant

[4] Until the 24th of August 2017 when it was stated that he was granted bail on a personal guarantee. (Vide fol 153)

wished to make oral submissions, he should filed an application requesting the Court to consider granting him this possibility. No such request was ever made by the accused.

This Court finds however, that in order for the accused to be able to file the request for oral submissions, he would necessarily have to know first that it was necessary to proffer further submissions due to the note filed by the Attorney General. In other words, he would at least have to know that the Attorney General filed a note of objections in the first place. It results that the note of the Attorney General opposing release from custody was never notified to the accused. In fact, the accused was not even notified with the mere fact that the Attorney General was opposing his request for release from custody. It follows therefore that it was impossible for the accused to make the suggested request, since he was not put in a position to even know that he might require to make further submissions relating to his request.

The Court notes that a request for temporary release from custody made under Article 574A of the Criminal Code (Chapter 9 of The laws of Malta), sub-article (4) of the same article requires that the accused be given time to respond to any submissions made by the Attorney General on the question of temporary release from custody. On the other hand, Article 575, which regulates requests for temporary release from custody made after the first hearing, does not expressly require that the accused be given a right to respond to the Attorney General's objection to the accused's request to be granted temporary release from custody. The Court does not see any objective reason for the law to treat requests made under Article 574A and 575 differently, in relation to the accused's right to respond to the Attorney General's objection to his request for temporary release from custody. As has been stated by the European Court of Human Rights (ECHR):

> "***A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person.*** (…)

> *These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court's case-law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of "criminal charge" – that this provision has some application to pre-trial proceedings (see Imbrioscia v. Switzerland, judgment of 24 November 1993, Series A no. 275, p. 13, § 36). It thus follows that,* ***in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon*** *(see, mutatis mutandis, Brandstetter v. Austria, judgment of 28 August 1991, Series A no. 211, pp. 27-28, § 67).*"[5]

On a similar note, in **Ilijkov v. Bulgaria,** the ECHR found a violation of the right to liberty of the accused after holding that:

> "*…A court examining an appeal against detention must provide guarantees of a judicial procedure. Thus, the proceedings must be*

[5] **Lietzow v. Germany,** ECHR 24479/94 decided on the 13th of February 2001. 44. See also **Schops v. Germany,** ECHR 25116/94 decided on the 13th of Febraury 2001, par. 44, **Nikolova v. Bulgaria**, ECHR 31195/96, decided on the 25th of March 1999. par. 58, **Becciev v. Moldova**, ECHR 9190/03 decided on the 4th of October 2005, par. 71.

> *adversarial and must adequately ensure "equality of arms" between the parties, the prosecutor and the detained…*
>
> *In the present case, it is evident that* ***the parties to the proceedings before the Supreme Court were not on equal footing. As a matter of domestic law and established practice – still in force – the prosecution authorities had the privilege of addressing the judges with arguments which were not communicated to the applicant. The proceedings were therefore not adversarial.****"*[6]

The Court considers that this reasoning is also applicable to the case at hand which deals with a review of the Court's Bail decisions rather than an appeal on the same matter. Indeed the accused, who by the time of the first application for temporary release had already been detained for nearly four months, was seeking to obtain a review from the Court of Magistrates as to whether his detention was still justified and whether he ought to be temporarily released from custody, conditionally or otherwise. The Attorney General objected to each request, and neither the objection, nor at least the existence thereof, was notified to the accused, who therefore had no opportunity to make his submissions in its regard. The Court therefore finds that the proceedings for review of the accused's detention **were not adversarial, and therefore in violation of his rights under Article 5(4).**

Regarding the issue of whether the Court of Magistrates gave sufficient motivation in denying bail to the accused, the Court begins by noting that the law itself obliges the court to state its reasons for refusing bail. Article 575 (11) of Chapter 9 of the Laws of Malta espressly provides that:

> "***In refusing to grant bail the court shall state the reasons for such refusal in its decree refusing bail*** *which decree shall be served on the person accused*."

[6] **Ilijkov v. Bulgaria,** ECHR 33977/96 decided on the 26th of July 2001, par. 103 – 104.

Maltese law has to be interpreted in line with standards and principles of the ECHR. In this respect, the ECHR has stated that a court must give **"*valid and sufficient reasons*"** for its decisions refusing temporary release from custody and has found that a court's failure to give such valid and sufficient reasons when refusing release from custody amounts to a violation of Article 5(3) of the Convention.[7] For instance, in **Becciev v. Moldova** the ECHR found such a violation after considering that:

> **"[t]*he domestic courts gave no consideration to any of* [the accused's] *arguments, apparently treating them as irrelevant to the question of the lawfulness of the applicant's remand. Nor did the courts make any record of the arguments presented by the applicant* […]. *Further, they did not give any assessment to such factors as the applicant's good character, his lack of criminal record, family ties and links (home, occupation, assets) with his country.*"[8]

In **Mamedova v. Russia,** the ECHR also held in this regard that:

> "…***under Article 5 § 3 the authorities are obliged to consider alternative measures of ensuring the appearance of the accused at trial when deciding whether he or she should be released or detained***. *Indeed, the provision proclaims not only the right to "trial within a reasonable time or to release pending trial" but also lays down that "release may be conditioned by guarantees to appear for trial" (see Sulaoja v. Estonia, no. 55939/00, § 64 in fine, 15 February 2005; Jabłoński v. Poland, no. 33492/96, § 83, 21 December 2000).*
>
> *In the present case, during the entire period of the applicant's detention the authorities did not consider the possibility of ensuring her attendance*

[7] **Becciev v. Moldova,** ECHR 9190/03 decided on the 4th of October 2005, par. 64. See also **Boicenco v. Moldova,** ECHR 41088/05 decided on the 11th July 2006, par. 144 – 145.
[8] *Ibid.,* par. 62.

> *by the use of a more lenient preventive measure, although many times the applicant's lawyers asked for her release on bail or under an undertaking not to leave the town – "preventive measures" which are expressly provided for by Russian law to secure the proper conduct of criminal proceedings (see paragraph 45 above).* ***Nor did the domestic courts explain in their decisions why alternatives to the deprivation of liberty would not have ensured that the trial would follow its proper course.***"[9]

The Court notes that in the present case the Court of Magistrate's decisions refusing bail were motivated by: "*for the reasons given by the Attorney General in his reply.*" Apart from the fact that the Attorney General's objections were never notified to the accused before the court's decision, nor added as an annex to it, it is this Court's opinion, that the Court of Magistrate's motivation for its decision may never be consider to be sufficient: it makes no reference to the accused's argument, gives no indication as to why his arguments were being rejected and fails to consider why alternatives to detention would not have been sufficient to ensure the accused's presence at the trial.

The Court notes that one of the reasons given by the Attorney General for his objection to the accused being released from custody, was that he had no ties with the island, when the accused had indicated in his application for release that he had a wife and two children living here in Malta and that they had all been living here for nearly a decade. Moreover from the statement given to the police, it appears that he had a fixed place of residence where he lived together with his family, and at the time of his arrest, he was in gainful employment and even had a new job lined up.

The fact that the Court of Magistrates failed to properly motivate its decision refusing bail also means that this Court is not in a position to find that it had considered whether the accused's detention had at any point exceeded a reasonable time. In this respect the

[9] **Mamedova v. Russia**, ECHR 7064/05 decided on the 1st of June 2006, par. 77 – 78.

Court refers to **Mamedova v. Russia,** where one of the considerations that led the ECHR to find a violation of Article 5(3) of the Convention was that :

> **"*…at no point in the proceedings did the domestic authorities consider whether the length of the applicant's detention had exceeded a "reasonable time". Such an analysis should have been particularly prominent in the domestic decisions after the applicant had spent many months in custody, however the reasonable-time test has never been applied.*"**[10]

In light of the above, the Court therefore finds that the decisions of the Court of Magistrates refusing bail to the accused were not sufficiently motivated, and therefore in breach of the accused's rights according to Article 5(3) of the Convention.

The Court further notes that not holding a sitting between the 10th of April and the 24th of July, that is, for nearly three and a half months, while the accused was still in detention, is contrary to the accused's right under Article 5(3) of the Convention to a "*…trial within a reasonable time or to release pending trial*."

In **Kudla** for instance, the ECHR held that in order for the State to be in compliance with its duties under Article 5, it is not enough that an individual's detention is justified, but also that the State **displayed special diligience** in the conduct of the criminal proceedings against him:

> "*The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty.* ***Where such grounds were "relevant" and "sufficient", the***

[10] *Ibid.*, par. 82.

> ***Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings***."[11]

The Court holds that the State has to exercise special diligence in the case of detained persons during the course of criminal proceedings against them, and the proceedings must not be allowed to stall while the accused is being held in custody. While the Court understands that the presiding Magistrate cancelled court sittings during the above-mentioned period as he was heading an investigation of grave Statal importance, the Court makes reference to the teachings of the ECHR in **Creanga v. Romania,** wherein it was held that:

> **"*The Court…does not dispute the fact that corruption is an endemic scourge which undermines citizens' trust in their institutions, and it understands that the national authorities must take a firm stance against those responsible. However, with regard to liberty, the fight against that scourge cannot justify recourse to arbitrariness and areas of lawlessness in places where people are deprived of their liberty*."[12]**

The Court finds that considering that the presiding Magistrate was engaged in an urgent investigation of grave and public importance, the State should have ensured that the cases pending before him, at least those where the accused was being held in custody, were reassigned to a different Magistrate, so that the presiding Magistrate in this case could have continued with the crucial work he was doing unhindered by any other consideration, while the accused and those in the same position as he was, could have have their rights secured by the State, which after all is the State's obligation.

For this to be at all possible, the State must ensure that there is a sufficient number of Magistrates to be able to take the added workload. As it is, the Bench of Magistrates is stressed to breaking point with its normal workload, and certainly may not be reasonably

[11] **Kudla v. Poland,** ECHR 30210/96 decided on the 26th of October 2000, par. 111.
[12] **Creanga v. Romania,** ECHR 29226/03 decided on the 23rd of February 2012, par. 108.

expected to shoulder the further burden of additional duties. It is also pertinent note that there are other Magistrates who are investigating equally crucial matters of grave Statal importance.

With reference to Inspector Arnaud's testimony that he had asked the Magistrate's Deputy Registrar whether the accused should be nonetheless brought to court, despite the sitting being cancelled because "*we usually bring the accused and then just for procedural matters we take him back"*[13] the Court holds *obiter* that the existence of a practice, whereby the prosecution attempts to circumvent procedural requirements intended to guarantee fundamental human rights, by simply bringing the accused to Court while no sitting takes place, is deplorable. The aim of these procedural requirements is to guarantee to those accused, and held in detention, their right to a speedy trial, and to ensure that the State exercises special diligence in their regard. These procedural requirements may therefore only be satisfied when there is an actual hearing, presided over by a Magistrate.

Deliberates;

From the acts of the proceedings before the Court of Magistrates, a copy of which was filed in the acts of this case, it appears that in the course of these proceedings, the accused was granted bail on the 24th of Agust 2017, on a number of conditions, including that he makes a deposit of €5,000, gives a further personal guarantee of €5,000 and produces a surety, who is a citizen and ordinary resident of Malta, to make a deposit of €5,000. These conditions were amended by means of a decree of the Court of Magistrates dated **18th of October 2017**, which ordered instead that the accused was to produce a surety ordinarily resident in Malta to enter into a written recognisance of €10,000 and that he was also to enter into a written recognisance of €10,000.

In light of these facts, the Court considers it pertinent to make reference to the judgement delivered by the Constitutional Court on the 18th of July 2017 in the names **Il-Pulizija**

[13] Fol 134.

(Assistent Kummissarju Norbert Ciappara) vs Mario Zammit, wherein the Constitutional Court considered that it has the power to bring to the referring court's attention the possibility of a violation of an article of the Convention which is different from the one mentioned by the referring court in its reference, where it feels like the situation so necessitates.[14] After making this consideration the Court went on to examine the matter under Article 7 of the Convention, which had not been a part of the reference made to it, and found that there was a possibility of a violation of the rights of the accused under this article.[15] In light of this judgement, the Court is of the opinion that it should also take into consideration the fact that while the accused has now been granted release from custody, he had been nonetheless held in custody for a significant period of time as he could not meet the financial requirements imposed by the Court of Magistrates as a condition for his release.

According to the constant jurisprudence of both the Maltese Courts as well as that of the ECHR, when setting bail, the amount:

> **"*must be assessed principally by reference to the accused, his assets and his relationship with the persons who are to provide the security, in other words to the extent to which it is felt that the prospect of loss of the security or of action against the guarantors in the event of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond (see Neumeister v. Austria, 27 June 1968, § 14, Series A no. 8).*[16]**

[14] Par. 20: "*Din il-Qorti tibda bl-osservazzjoni li, **minkejja li t-termini tar-referenza huma cirkoskritti ghad-dritt ta' smigh xieraq, id-determinazzjoni ta' din il-vertenza tinnecissità li tigi ezaminata l-pozizzjoni legali ta' Mario Zammit fl-ambitu wkoll tad-dritt fundamentali protett bl-artikolu 7 tal-Konvenzjoni***."

[15] See also the preliminary judgement given by this Court in **The Police vs Tolga Temuge** dated 11th October 2017.

[16] **Piotr Osuch v. Poland,** ECHR 30028/06 decided on the 3rd of November 2009, par. 39. See also **Bojilov v. Belgium,** ECHR 45114/98 decided on the 22 of December 2004, par. 60: " *La Cour rappelle que selon sa jurisprudence, le montant d'un tel cautionnement doit être appréciée principalement « par rapport à l'intéressé, à ses ressources (...) et pour tout dire à la confiance qu'on peut avoir que la perspective de perte du cautionnement (...) en cas de non-comparution à l'audience agira sur lui comme un frein suffisant pour écarter toute velléité de fuite » (Neumeister c. Autriche, arrêt du 27 juin 1968, série A no 8, p. 40, § 14). S'agissant du droit fondamental à liberté, garanti par l'article 5 de la Convention, les*

> ***As the fundamental right to liberty as guaranteed by Article 5 of the Convention is at stake, the authorities must take as much care in fixing an appropriate amount of bail as in deciding whether or not the accused's continued detention is indispensable (see Iwańczuk v. Poland, no. 25196/94, § 66, 15 November 2001, and Skrobol v. Poland, no. 44165/98, § 57, 13 September 2005).*"**[17]**

This was reiterated in **Richard Grech vs l-Avukat Generali,** wherein it was held that where pecuniary guarantees are set by a court, regard must be had to the financial means of the accused and those persons who can offer help in that respect, as otherwise it would be as if the accused was not granted provisional release at all.[18] Similarly in **Jonathan Attard vs Il-Kummissarju tal-Pulizija et,** this Court, presided over by Judge Anthony Ellul, held that since the accused could not meet the financial conditions set the court for his release, the decree granting release from custody had been rendered useless, and that this led to violation of his right to liberty.[19]

The Court notes that it has been repeatedly held that when setting financial conditions to the grant of temporary release from custody, the Court must assess the financial means of the accused. In **Osuch** for instance, the ECHR found a violation of the applicant's right to liberty, after considering that:

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autorités doivent vouer autant de soin à fixer un cautionnement approprié qu'à décider si le maintien d'une personne accusée en détention demeure ou non indispensable (Iwańczuk c. Pologne, no 25196/94, § 66, 15 novembre 2001 ; Schertenleib c. Suisse, no 8339/78, rapport de la Commission du 11 décembre 1980, Décisions et rapports 23, p. 137, § 170)."

[17] *Ibid.,* par. 40. See also **Toshev v. Bulgaria,** ECHR 56308/00 decided on the 10th of Agust 2006, par. 68.

[18] **Richard Grech vs. L-Avukat Generali,** Constitutional Court, decided on the 28th of May 2010: "*L-ewwel Qorti wara li ghamlet referenza ghall-principji stabbiliti mill-Qorti Kostituzzjonali fir-rikors fl-ismijiet Carmel Mifsud et v. Onor. Prim Ministru deciz fl-10 ta' Lulju 1990 u r-rikors Kostituzzjonali fl-ismijiet Mario Pollacco v. Kummissarju tal-Pulizija et deciz fis-6 ta' Ottubru 1999, sahqet li meta tigi fissata l-garanzija pekunjarja, il-Qorti trid thares ukoll lejn il-mezzi finanzjarji tal-imputat u ta' dawk il-persuni li jistghu joffru li jghinu lillimputat, ghax altrimenti jigi daqs li kieku ma jkunx inghata l-liberta' provvizorja xejn.*"

[19] **Jonathan Attard vs Il-Kummissarju tal-Pulizija et,** First Hall of the Civil Court decided on the 1st of April 2013: "*Fic-cirkostanzi attwali r-realta' hi li l-htiega li jiddepozita somma flus twassal sabiex m'huwiex jinghata l-helsien mill-arrest. Ta' xejn jinghata digriet ta' helsien mill-arrest meta m'huwiex possibbli ghall-imputat li jonora xi kondizzjoni*." Confirmed on appeal by the Constitutional Court on the 3rd of May 2014.

> **"*there is no evidence that before deciding on that sum the domestic court made any effort to determine what would be an appropriate amount of bail in the circumstances, for example by requiring the applicant to furnish information on his financial standing*."**[20]

The Court notes that in the **Bojilov** case, the ECHR considered that the applicant had suffered a violation of his right to liberty guaranteed under Article 5(3) of the Convention after finding that there was not sufficient evidence to show that the domestic court had taken the applicant's resources into consideration when setting bail and that due to this, the applicant had spent an additional four months in pre-trial detention, after the domestic court found that there was no longer any justification for his detention, as he was unable to deposit the amount of bail that had been fixed by the domestic court.

Similary, in **Georgieva v. Bulgaria,** after finding that the applicant had had to remain detained for the duration of the proceedings against her because she was unable to pay the amount of approximately €750 that the domestic court had fixed as bail, and after also finding that the domestic court had failed to give reasons to substantiate the amount so fixed, [21] the ECHR held that the applicant's right to liberty as guaranteed by Article 5(3) of the Convention had been breached. **It reiterated that the amount of bail set by the domestic courts should be primarily assessed with reference to the personal circumstances and resources of the accused.**[22]

Regarding the factors that the domestic court must take into consideration when fixing the amount of bail, the ECHR has held that:

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[20] ***Peter Osuch v. Poland,*** see above note 20, par. 47.

[21] **Georgieva v. Bulgaria,** ECHR 16085/02 decided on the 3rd of July 2008, par. 15.

[22] *Ibid.*, par. 30: "*La Cour constate de surcroît que même après la modification de la mesure de contrôle judiciaire, le 31 janvier 2002, la requérante est restée détenue faute de pouvoir payer la caution imposée (paragraphe 15 ci-dessus). Elle rappelle que le montant d'une caution doit être apprécié principalement par rapport à la situation personnelle de l'intéressé et à ses ressources (*Hristova c. Bulgarie, no*60859/00, § 110, 7 décembre 2006). Or, bien que la requérante eût déclaré qu'elle était au chômage et ne disposait pas de revenus stables, le tribunal lui a imposé un cautionnement de 1 500 BGN (soit environ 750 EUR). La Cour note que le tribunal régional n'a pas exposé d'arguments afin de justifier son choix du montant de la caution. Ainsi, les organes de l'Etat n'ont pas démontré qu'ils avaient fixé le montant de la caution en fonction des revenus et de la situation particulière de la requérante*."

> "***While the amount of the guarantee provided for by Article 5 § 3 must be assessed principally by reference to the accused and his assets it does not seem unreasonable, in certain circumstances, to take into account also the amount of the loss imputed to him (see Moussa v. France, no. 28897/95, Commission decision of 21 May 1997, Decisions and Reports 89-B, p. 92). In the Kudła v. Polandjudgment ([GC], no. 30210/96, ECHR 2000-XI), the Court observed that the domestic court had fixed the amount of bail by reference to the cost of the damage, the serious nature of the offences and, above all, the risk that the applicant would abscond (§ 47). It recognised that the risk of his absconding "was one of the main factors that [the court] took into account when determining the amount of bail" (ibid., § 113)***."

The Court notes that according to the jurisprudence of the ECHR, a domestic court must duly justify the amount of bail that it sets. This was held in the **Georgieva** case, mentioned above, as well as in **Mangouras v. Spain,** wherein the ECHR held that:

> "***…the amount set for bail must be duly justified in the decision fixing bail (see Georgieva, cited above, §§ 15, 30 and 31) and must take into account the accused's means (see Hristova, cited above, § 111). In that connection, the domestic courts' failure to assess the applicant's capacity to pay the sum required was one of the reasons why the Court found a violation in the Toshev v. Bulgaria judgment (no. 56308/00, §§ 68 et seq., 10 August 2006).***"[23]

This position is in fact reflected in Maltese law, according to which:

> "***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***

[23] **Mangouras v. Spain,** ECHR 12050/04 decided on the 28th of September 2010, par. 80.

> ***nature and quality of the offence, and the term of the punishment to which it is liable*.”**[24]

In this regard, the Court makes reference to **Nakach v. The Netherlands,** wherein the ECHR found that there was a breach of Article 5(1) because “*…the procedure prescribed by domestic law was not followed”* since “*…under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention.*”[25] The Court notes that in this case, by failing to assess the accused’s financial position in setting the financial conditions, the Court of Magisrates failed to fully comply with the procedure prescribed by the Criminal Code.

The Court notes further that, considering the contents of the notes filed by the Attorney General in objection to the accused’s requests to be released from detention, the main factor that was taken into account in determining the amount of bail required was the risk of absconding. On this matter, the Court refers to the judgement given in **Kudla**, where it was stated that:

> **“*…the Court agrees that* [the risk of absconding], *in addition to the suspicion that the applicant had committed the criminal offences in question, could initially suffice to warrant his detention. However, with the passage of time that ground inevitably became less relevant…*”**[26]

The Court notes that in the present case, the accused is liable to **a maximum of two years imprisonment if he is found guilty**. The Court has also seen that the accused had been held in preventative detention from January 2017 till October 2017 and this inspite of the date of release cited by the applicant’s advocates[27]. In other words, the accused has been held in detention for approximately ten months, which closely approximates half the

[24] Article 576, Criminal Code.
[25] **Nakach v. The Netherlands,** ECHR 5379/02 decided on the 30th of June 2005, par. 34 – 44. See also **Ocalan v. Turkey**, ECHR 46221/99 decided on the 12th of May 2005, par. 83.
[26] **Kudla v. Poland,** see above note 11, par. 114.
[27] Vide the note of the record of the proceedings of the 21st May 2018.

maximum prison sentence that may be imposed on him if found guilty. It is this Court's opinion, while the risk of absconding might have initially sufficed to warrant his detention, this factor becomes far less relevant at a later stage of the proceedings. The Court finds therefore that any financial conditions imposed on the accused must necessarily have been viewed in the light of all circumstances of the case and that the fear of absconding should have no longer been considered to be a crucial factor in determing the amount of money, if any, to be deposited in Court as part of his bail conditions, when the period of reasonable time was exceeded.

For these reasons, the Court therefore responds to the reference of the Court of Magistrates (Malta) as a Court of Criminal Judicature by declaring that the lack of notification of the Attorney General's notes of objection to the accused's requests to be released from custody, the lack of motivation in the decisions denying bail, the existence of periods during which the proceedings stalled while the accused was still being kept in detention and the failure to set financial conditions with reference to the accused's means, were in breach of the accused's right to liberty as guaranteed by Article 5 of the Convention and Article 34 of the Constitution.

The Court orders that the acts be remitted back to the Court of Magistrates (Malta) as a Court of Criminal Judicature for the continuance of the proceedings before it in light of this decision.

The costs of these proceedings are to be borne by the Attorney General.

Read.

Judge Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli
Deputy Registrar