CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

HON. JUDGE
ROBERT G. MANGION

TODAY, 30TH SEPTEMBER 2020

Case No: 3

Application No: 141/2019

The Police

(Inspector Malcolm Bondin and Inspector Herman Mula)

vs.

Alexander Hickey

The Court

Having seen the constitutional reference made on the 5th of August 2019 by the Court of Magistrates (Malta) as a Court of Criminal Judicature (hereinafter referred to as the Referring Court) presided by Magistrate Dr Natasha Galea Sciberras whereby this Court is requested to examine the constitutional matter

raised by the applicant qua defendant in the criminal proceedings through an application filed on the 5th of June 2019 to which there was an addition to this request during the sitting held on the 5th of August 2019. The questions addressed to this Court by the Referring Court are the following:

1) "Whether the release of two statements by applicant on 5th and 9th April 2012 respectively without the right to legal assistance during both interrogations was in breach of Article 6 (1) and (3) of the Convention and Article 39 of the Constitution and whether his rights under the said Articles would be breached should his statements be deemed by this Court as admissible evidence against him;
2) And whether in the circumstances of this case, an eventual judgement by this Court based on applicants' guilty plea entered during these proceedings on 16th November 2015 would be in breach of Article 6(1) and (3) of the Convention and Article 39 of the Constitution."[1]

Having seen the written reply filed by the Attorney General and the Commissioner of Police on the 19th of November 2019.

Having seen the acts of the case together with the acts of the Court of Magistrates (Malta) as a Court of Criminal Judicature;

Having heard Police Inspector Malcolm Bondin under oath;

Having seen the note of submissions of the applicant filed on the 7th of May 2020[2];

Having seen the note of submissions of the Attorney General and the Commissioner of Police filed on the 12th of June 2020[3];

Having seen that the case was adjourned for today for judgement.

[1] Page 9 of the constitutional proceedings.
[2] Page 37of the constitutional proceedings.
[3] Page 46 of the constitutional proceedings.

Considerations of this Court

Relevant Facts

On the 13th of October 2014, the applicant was brought under arrest before the Court of Magistrates (Malta) as a Court of Criminal Judicature accused that between the month of September 2011 and 4th April 2012, together with others he conspired, promoted, constituted, organised or financed the conspiracy with others to import, sell or deal in drugs, specifically cannabis grass and cannabis resin. Hickey was also charged that he associated and / or conspired with others for the purpose of selling, importing or dealing in any way in Ecstasy, LSD and Methamphetamine. Furthermore, he was also accused of importing or caused to be imported or took any preparatory steps to import Cannabis Grass, Cannabis Resin, Ecstasy, LSD and Methamphetamine. Furthermore, he was charged with producing, selling or otherwise dealing in the whole or any portion of the cannabis plan and in the resin obtained from the cannabis plant. Hickey was also charged with supplying or distributing or offering to supply or distribute Ecstasy and LSD. Hickey was charged that these offences where committed within 100 meters of the perimeter of a school, youth club or centre or such other place where young people frequently meet. The accused was charged with the possession of the whole or any portion of the cannabis plant as well as the possession of the resin obtained from the cannabis plant between October 2010 and 4th April 2012. Finally, the applicant was charged that in the month of March 2011 and in the month of February 2012 he had in his possession the drug Ecstasy.

During the first sitting held on the 8th of June 2015, the accused assisted by Dr Stephanie Abela pleaded not guilty before the Court of Magistrates (Malta) as a Court of Criminal Judicature. He also declared that he does not find any objection that the case is dealt with summarily and this declaration was made after he was given reasonable time to reply.[4] This court notes that during the first

[4] Page 9 of the criminal proceedings.

sitting held before the Referring Court, a number of process verbal were presented, namely

a. the sworn statements of Patrick Fountain and Gary Falzon dated 3rd April 2012,
b. the sworn statement of Jean Marc Portanier dated 5th April 2012,
c. the process verbal drawn by then Magistrate Dr Francesco Depasquale on the 2nd of May 2013 regarding a sworn statement of the applicant dated 9th April 2012,
d. another process verbal drawn by then Magistrate Dr Francesco Depasquale on the 2nd of May 2013 regarding a sworn statement released by Mark Bonello on the 9th of April 2013,
e. a process verbal drawn by then Magistrate Dr Antonio Mizzi dated 22nd May 2012 regarding a sworn statement given by Gavin Borg on the 5th of April 2012, and
f. another process verbal was drawn by then Magistrate Dr Antonio Mizzi dated 22nd May 2012 regarding a sworn statement given by Stefan Mintoff.

Of relevance to this case is the process verbal drawn by then Magistrate Dr Francesco Depasquale regarding a sworn statement of the applicant, Alexander Hickey which was presented during the proceedings before the Court of Magistrates as a Court of Criminal Inquiry in the names Il-Pulizija vs. Gavin Borg[5]. From the said process verbal it came to light that the police on the 4th of April 2013 carried out a search in an apartment in Imsida where Stefan Mintoff and Alexander Hickey were present. Resin obtained from the cannabis plant and Ecstasy were found on their person and they were informed that they were under arrest. Police Inspector Malcolm Bondin informed the Magistrate that Alexander Hickey was willing to assist the Police in its investigation and that he released a statement which he was willing to swear under oath. The Police Inspector informed the Magistrate that the statements released by Hickey had relevant information on third parties who were involved in drug trafficking. On the 9th of April 2012 Alexander Hickey gave his testimony under oath before the Inquiring Magistrate, confirming everything that he said in the statements. He was asked

[5] Page 74 et seq of the criminal proceedings.

by the court to identify three other persons from a series of photos, to which Alexander Hickey complied and indicated who they were.

On the 5th of April 2012 Alexander Hickey, aged 17 released a statement after he was cautioned, in the English language, by the Police Inspector Malcolm Bondin in the presence of Police Inspector Herman Mula and in the presence of Alexander Hickey's mother, Jennifer Pace Hickey, that he does not have to say anything unless he wishes to do so, but what he says may be given in evidence. He was also cautioned that should he "refuse to say anything or omit to state some fact, a rule of inference amounting to corroborative evidence may be drawn by the court or any other adjudicator if during the trial you will put forward any defence based on a fact which you did not state during interrogation".[6] Alexander Hickey confirmed at the very start of his statement that before being interrogated he consulted his lawyer Dr Cedric Mifsud. He also confirmed that in October 2010 he started attending Higher Secondary in Naxxar where he is studying Philosophy and English both at 'A' Level and Sociology at Intermediate. In the statement that he released one finds information about the drugs he allegedly made use of and how he allegedly obtained the drugs both the ones he made use of as well as those that were for trafficking. With this information he provided a few names of persons that were allegedly trafficking drugs. He also provided information of where and to whom he allegedly sold the drugs as well as other information on the quantity he bought and sold and at what value. Alexander Hickey released another statement on the 9th of April 2012 after the same caution as above was given to him by Police Inspector Malcolm Bondin in the presence of the same persons. In this second statement Hickey made some clarifications and additions to the information provided in the previous statement.

On the 16th of November 2015, Alexander Hickey, assisted by his lawyer Dr Stephanie Abela, pleaded guilty to all the charges brought against him. "The court, after having warned the accused about the consequences of such a guilty

[6] Page 81 of the criminal proceedings. Copy of original statements found in page 174 et seq of the criminal proceedings.

plea, and after being given ample time to reconsider said plea, the accused confirmed his guilty plea."[7] Following this confirmation, the defence requested that a pre-sentencing report be compiled, which request was acceded to. On the 16th of November 2015 the Court of Magistrates (Malta) as a Court of Criminal Judicature was informed of a plea bargain, namely the imposition of 3 years imprisonment and a fine of seven thousand Euros (€7,000).

A pre-sentencing report was drawn up by Joanna Farrugia and presented during the sitting held on the 29th of February 2016. In this report, there is the version of the accused, as given to the probation officer, stating the facts of how he started doing drugs and how he started trafficking. The report states also that "even though he admits his guilt he plays down his role in everything and is not taking full responsibility for his action".[8] Bernard Caruana, a psychologist, gave evidence before the Court of Magistrates (Malta) as a Court of Criminal Judicature and even presented a detailed report about Hickey's behaviour and attitude - reference to this report will be made by this Court further on in this sentence.

The reference and the totality of the judicial process

As far as the legal aspects related to the reference are concerned, this Court reiterates that it is bound to consider the constitutional issue in accordance to the parameters of the reference made to it. Thus, it is imperative that a constitutional reference is drawn up in such a way that the said reference contains, in a concise and clear manner, the facts which gave rise to the question/s as well as the question/s to be answered. Furthermore, the matter referred should not be frivolous or vexatious. In the case under examination, the Referring Court made specific reference to these criteria and even quoted jurisprudence and concluded that "the question raised by the defence [is] neither frivolous nor vexatious"[9].

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[7] Page 169 of the criminal proceedings.
[8] *ibid.*
[9] Page 5 of the constitutional proceedings.

Despite the fact that the Referring Court has shown that it is well aware of the latest jurisprudential updates of the Maltese Courts and the European Court of Human Rights (hereinafter referred to as ECtHR) on the aspects of the exercise of a fundamental right regarding the release of statements to the Police by a person who was not assisted by a lawyer during the release of his statement, the Referring Court deemed best to refer the question given "the different stance adopted" by the Constitutional Court "in Brian Vella v. L-Avukat Generali" and where each claim is treated by the Constitutional Court on a case by case basis.

It has been held in the case **Bank of Valletta p.l.c. vs. Joseph Attard et** (Rik Kost 65/2006)[10] that once a reference has been made to this Court, the 'question' will no longer belong to the party who raised it, but will become that of the referring Court. This therefore means that

> l-"kwistjoni" imqanqla trid tkun, f'ghajnejn il-qorti li quddiemha titqanqal, verament ta' ostakolu ghalbiex dik il-qorti tkun tista' tipprocedi 'l quddiem biex tidderimi l-vertenza bejn il-partijiet. Ghalkemm il-kwistjoni tkun tqanqlet mill-parti, bid-decizjoni li tirreferiha, il-qorti tkun ghamlet dik il-kwistjoni taghha, b'mod ghalhekk li l-parti ma tistax in segwitu "tirtira" il-kwistjoni jew tirtira "it-talba…ghal referenza".
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> […]
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> […] isegwi li jekk ikun hemm xi ostakolu procedurali iehor li minhabba fih il-qorti li quddiemha tkun tqanqlet il-kwistjoni ma tkunx tista' fi kwalunkwe kaz tipprocedi oltre, "il- kwistjoni" ta' indoli kostituzzjonali ma tibqax wahda li tkun tista' tigi riferuta lill-Prim Awla, ghax id-decizjoni tal-Prim Awla tassumi f'dak il-kaz in-natura ta' semplici esercizzju akkademiku u mhux decizjoni li tkun tivvinkola lill-qorti li tkun ghamlet ir-referenza fid-determinazzjoni tal-vertenza, determinazzjoni li ma tkun qatt tista' tasal ghaliha."

[10] Decided by the Constitutional Court on 19th February 2008.

The Civil Court (Constitutional Jurisdiction) in **Ir-Repubblika ta' Malta vs. Matthew-John Migneco** (42/2011 JRM) decided on the 15th of November 2011 observed that

> "[…] quddiem Qorti li ma tkunx il-Prim'Awla, titqajjem 'kwestjoni' ta' xejra kostituzzjonali jew konvenzjonali li bħalha tkun tqajmet qabel, u fejn dik il-'kwesjoni' tkun diġa' tqieset mill-ogħla Qorti kompetenti u tat il-provvedimenti tagħha dwarha, ma jidhirx li jkun hemm għalfejn li Qorti oħra għandha tirreferi l-każ mill-ġdid lil din il-Qorti kull darba li tqum quddiemha kwestjoni bħal dik, sakemm il-'kwestjoni' ma tkunx tqanqal xi punt ġdid. Ikun xieraq li l-Qorti li quddiemha titqanqal il-'kwestjoni' tieħu qies tad-direzzjoni murija mill-Qorti ta' kompetenza kostituzzjonali dwar 'kwestjoni' bħal dik u timxi ma' dik id-direzzjoni indikata fil-każ li jkollha quddiemha. B'daqshekk, ma jfissirx li dik il-Qorti tkun qiegħda tarroga għaliha kompetenza li m'hijiex tagħha, iżda biss li tkun qiegħda tapplika u tħaddem il-liġi fl-għarfien ta' punti li jkunu ġew stabiliti mill-Qorti kompetenti. B'dan il-mod ukoll, jonqos it-tkattir fl-għadd ta' kawżi riferiti, bħalma ġara quddiem il-Qrati Maltin f'dawn l-aħħar żminijiet b'rabta ma' każi li jixbhu lil dan li għandha quddiemha din il-Qorti llum dwar stqarrijiet magħmula lill-Pulizija minn persuni li ma kenux mgħejjuna minn avukat;
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> [...]
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> Illi l-Qorti tħoss li għandha tiċċara wkoll li, ladarba l-każ tressaq quddiemha permezz ta' riferenza minn Qorti oħra, ma tistax tagħżel li ma teżerċitax is-setgħa kostituzzjonali tagħha milli tqis l-aspetti kostituzzjonali jew konvenzjonali tar-riferenza. Dan jingħad għaliex ir-riferenza nnifisha torbot lil din il-Qorti li tiddeċidi l-kwestjoni riferuta u ma tapplikax għaliha d-diskrezzjoni li hija miftuħa għal din l-istess Qorti taħt l-artikolu 46(2) tal-Kostituzzjoni (jew l-artikolu 4(2) tal-Kap 319) meta l-kawża tkun tressqet b'rikors mill-persuna aggravata"

This final observation links perfectly in reply to the first plea raised by the Attorney General and Commissioner of Police, that is, in order for this court to

determine whether there is a violation of the right to a fair hearing, “it is necessary that the judicial process is examined in its totality and that one should not examine only a part of the process”.

The Constitutional Court in case **Mark Formosa vs. Segretarju Permanenti fi hdan il-Ministeru ghal Ghawdex et** (Rik Kost 8/2019MH) delivered on the 20th of July 2020 reaffirmed that when there is a constitutional reference, the Court is to reply the questions asked:

> “Illi l-eccezzjoni ta’ intempestivita hija legalment insostenibbli fi proceduri ta’ referenza kostituzzjonali/konvenzjonali, ghaliex la tkun saret ir-referenza lilha il-Qorti hija tenuta tirrispondi. Dan kif jinstab kkonfermat ukoll fis-sentenza fl-ismijiet **Il-Pulizija v. Silvio Zammit** (Appell Kostituzzjonali, 13/07/2018) fejn intqal illi:
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> > “…din il-Qorti bhall-ewwel Qorti qabilha, ma tistax tiddeklina li tezercita l-funzjoni kostituzzjonali taghha gialadarba tkun giet mitluba li twiegeb ghat-talba maghmula mill-qorti referenti fit-termini hekk impostati. Kif diga` ritenut diversi drabi minn din il-Qorti, meta kwistjoni ta’ natura kostituzzjonali titqieghed quddiem il-Prim’Awla fil-funzjoni kostituzzjonali taghha mhux direttament permezz ta’ rikors tal-parti li tilmenta bil-ksur ta’ jedd fondamentali, izda permezz ta’ referenza a tenur tal-Artikolu 46(3) tal-Kostituzzjoni, allura la l-ewwel Qorti u wisq anqas din il-Qorti ma ghandha ebda diskrezzjoni li tiddeklina li twiegeb ghall-kwezit imqeghda quddiemha, inkluz billi tistenna sakemm il-process kriminali kontra l-appellat jinghalaq qabel twiegeb ghar-referenza”.

Although the Attorney General and Commissioner of Police are correct in stating that judicial proceedings are to be examined in totality, however one should not stop at that juncture. According to local case law as well as that of the European Court of Human Rights (hereinafter referred to as ECtHR), Article 39 of the Constitution and Article 6 of the Convention does not impede the Court from investigating alleged breaches (actual or potential) before the judicial process is

concluded. Both in accordance with the Constitution and under the European Convention as adopted in Chapter 319, any person can seek protection not only when his rights and his fundamental freedoms are being violated but even if it is likely to be violated.[11]

In **Arrigo and Vella v. Malta**[12] the ECtHR held that:

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

In light of the above judgement, together with the fact that the matter at hand is a constitutional reference, this Court is bound to decide the matter referred to it. Article 46 (2) of the Constitution and Article 4 (2) of Chapter 319, European Convention Act, does not apply when a matter is referred to this Court by another Court. This Court, therefore, finds no valid reason to accede to the first plea of the Attorney General and shall proceed to consider the alleged breach of the fundamental right to a fair hearing.

Fair hearing

11 Article 46 (1) of the Constitution and Article 4 (1) of Chapter 319.

12 Appl. No. 6569/04 decided on the 10th of May 2005. See also **Dimech v. Malta** (Appl. No. 34373/13) decided by the ECtHR on the 2nd of April 2015 § 43.

The Court is to consider whether the statements released by the accused back in April 2012 are in breach of Article 39 of the Constitution and Article 6 (1) and (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Court will also discuss, under a separate heading, whether there would be a breach of the said articles if the Court of Magistrates (Malta) as a Court of Criminal Judicature will deliver a judgement based on the guilty plea.

a. Two statements given by Alexander Hickey not in the presence of a lawyer

In his application requesting the Court of Magistrates (Malta) as a Court of Criminal Judicature to make a reference to the First Hall (Constitutional Jurisdiction), the applicant cited from il-Pulizija vs. Aldo Pistella (Rik 104/2016). It must be noted however that the constitutional reference was decided on the 27th of June 2017 by the first court while the Constitutional Court delivered its judgements on the 14th of December 2018. This Court studied this judgement and observes that at both stages the main consideration was based on the leading case of Malcolm Said vs. L-Avukat Generali and other similar decisions. However the ECtHR, in case Beuze v. Belgium decided by the Grand Chamber on the 9th of November 2013 and more recently Farrugia v. Malta decided on the 4th of June 2019, made changes to the way Article 6 and assistance by a lawyer should be interpreted. Thus, due consideration must be given to recent judgements delivered by the Constitutional Court as well as by the ECtHR.

The most recent judgement delivered by the ECtHR and which is of great relevance to the merits of this case is **Farrugia v. Malta** (Appl. 63041/13) decided on the 4th of June 2019. In that case Farrugia argued that his fundamental right for a fair hearing was breached due to the fact that he was not given the opportunity to consult with his lawyer prior interrogation and during the taking of the statement. The ECtHR concluded that there was no breach of fair hearing. Given that this is a leading judgement in this matter and for better understanding, the Court will proceed to quote extensively from this judgement:

2. "The Court's assessment

(a) General principles

96. 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 *Salduz, cited above, § 51, and Ibrahim and Others v. the United Kingdom* [GC] nos. 50541/08 and 3 others, § 255, 13 September 2016). The right becomes applicable as soon as there is a "criminal charge" within the meaning given to that concept by the Court's case-law and, in particular, from the time of the suspect's arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period (see *Beuze v. Belgium*, [GC], no 71409/10 § 124, 9 November 2018 and Simeonovi v. Bulgaria [GC], no 21980/04, §§111, 114 and 121, 12 May 2017).

97. In *Beuze*, drawing from its previous case-law the Court explained the aims pursued by the right of access to a lawyer (§§ 125-130) and elaborated on the content of the right of access to a lawyer reiterating, in particular, that suspects must be able to enter into contact with a lawyer from the time when they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview or even where there is no interview and that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (§§ 133-134).

98. Prior to the recent *Beuze* judgment, in a number of cases, the Court found that systematic restrictions on the right of access to a lawyer had led, *ab initio*, to a violation of the Convention (see, in particular, *Dayanan v. Turkey*, no 7377/03 § 33, 13 October 2009 and *Boz v. Turkey*, no. 2039/04, § 35, 9 February 2010). That same approach was followed by the Court in relation to the Maltese context in *Borg* (no. 37537/13, 12 January 2016).

99. Subsequently, being confronted with a certain divergence in the approach to be followed in cases dealing with the right of access to a lawyer,

the Court had occasion to further examine the matter in *Ibrahim and Others*, *Simeonovi* and more recently in *Beuze*, all cited above, where the Court departed from the principle set out in the preceding paragraph. In *Beuze*, the most recent authority on the matter, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness

[...]

(iii) Relevant factors for the overall fairness assessment

104. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account:

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon

which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice (ibid., § 150).

(b) Application to the present case

(i) Extent of the restriction and compelling reasons

105. The Court observes that the impugned restriction on the right of access to a lawyer in the present case was particularly extensive, as it derived from a lack of provision in the law and was applied throughout the entire pre-trial phase during which the applicant gave several statements.

106. The Court reiterates that restrictions on access to a lawyer for compelling reasons, at the pre-trial stage, are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see *Beuze*, cited above, § 161). There was clearly no such individual assessment in the present case, as the restriction was one of a general and mandatory nature. Furthermore, the Government have failed to demonstrate the existence of any exceptional circumstances which could have justified the restrictions on the applicant's right, and it is not for the Court to ascertain such circumstances of its own motion (ibid., § 163).

107. Thus, the Court finds that the restrictions in question were not justified by any compelling reason.

(ii) Overall fairness

108. The Court must apply very strict scrutiny to its fairness assessment, especially where there are statutory restrictions of a general and mandatory nature. The burden of proof thus falls on the Government, which, must

demonstrate convincingly that the applicant nevertheless had a fair trial as a whole. The Government's inability to establish compelling reasons weighs heavily in the balance, and the balance may thus be tipped towards finding a violation of Article 6 §§ 1 and 3 (c) (ibid., § 165).

109. In the course of this exercise, the Court will examine, to the extent that they are relevant in the present case, the various factors deriving from its case-law.

110. Irrespective of whether or not the applicant had previously been questioned in connection with other crimes - a matter disputed by the parties - the Court considers that he was not in a greater state of vulnerability than that in which persons interviewed by investigators would generally find themselves in. The interviews conducted were not unusual or excessively long.

111. The applicant did not allege, either before the domestic courts or before it, that the Police had exerted any pressure on him, nor that the evidence obtained had been in violation of another Convention provision.

112. The Court reiterates that where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against self-incrimination takes on particular importance (see *Ibrahim and Others*, cited above, § 273, and case-law cited therein). It is noteworthy that, in the present case, the applicant was informed repeatedly in a sufficiently explicit manner of his right to remain silent and the privilege against self-incrimination (see, *a contrario*, *Beuze*, cited above, § 184), and, at the time, no inferences could be drawn by the trial courts from the silence of the accused (see paragraph 33 above) (see, *a contrario*, *Ibrahim and Others*, cited above, § 15). It follows that the applicant could have chosen to remain silent and avoid any statement which could later substantially affect his position. Nevertheless, the Court notes that this did not mean that the applicant had waived the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law (see *Borg*, cited above, § 61, and *Salduz,* cited above, § 59; see also *Pishchalnikov v. Russia*, no. 7025/04, § 79, 24 September 2009).

113. The Court further notes that evidentiary elements, other than the applicant's statements, were used to arrive at the conclusion of the applicant's guilt, in particular the testimony of A.F., corroborated by the findings of the police, as well as other circumstances capable of amounting to circumstantial evidence such as the non-functioning of the CCTV. Indeed as noted by the Court of Criminal Appeal, A.F.'s statement would have been sufficient to find for the applicant's guilt (see paragraph 26 above). The Court observes further that given the nature of the crime in the present case, that is, the simulation of an offence, the absence of any evidence corroborating the applicant's initial report to the police is also of substantial evidentiary value. Thus, the Court of Criminal Appeal based its decision on a plurality of factors.

114. In connection with the nature of the crime, while it appears that there was no actual victim of the hold up in the present case, the Court nevertheless considers that there was at least some public interest in prosecuting the applicant for the crime at issue.

115. Against that background the Court will now assess the use made of the statement, its nature, and whether the applicable legal framework afforded sufficient safeguards.

116. The applicant's statements given pre-trial were admitted as evidence at his trial. Given the framework applicable at the time of the applicant's trial, while the applicant was free to raise the issue before the courts of criminal jurisdiction, there would have been little point in so doing given the inexistence of such a right in Maltese law at the time (compare *Dimech v. Malta*, no. 34373/13, § 42, 2 April 2015 in relation to a request to the police to be assisted by a lawyer). In fact the Court observes that the Court of Criminal Appeal did not address, as it could have done of its own motion, the procedural defect at issue, but on the contrary it proceeded to refer to the statements tainted by that procedural defect.

117. The Government referred to the applicant's possibility of having his statement recorded, which was the case. While it is true that this enabled his lawyer at a later stage to prepare for his defence in the light of that statement, it could not help the applicant prepare for his questioning by the police. Nor did it have any other utility in the present case given that the Court

of Criminal Appeal - the only court which pronounced the applicant's guilt - did not hear the recording. Thus, in the present case, this safeguard had no compensatory effect in practical terms. In the circumstances of the present case the Court finds that the applicant's conduct during the police interviews was capable of having such consequences for the prospects of his defence that there was no guarantee that either the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the period of police custody (see, *mutatis mutandis*, *Beuze*, cited above, § 171). Further, while it was true that he had the possibility of undertaking constitutional redress proceedings, which are not subject to a time-limit, these were only subsequent to his being found guilty and thus could have no impact on his criminal proceedings.

118. However, the nature of the statements and their use is of particular relevance in the present case. The Court notes that they did not contain any confessions nor was their content self-incriminating. However, the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see, for example, *Schmid-Laffer v. Switzerland*, no. 41269/08, § 37, 16 June 2015). Indeed, the statements given by the applicant, at pre-trial stage in the absence of a lawyer, were relied on by the Court of Criminal Appeal in connection with the applicant's credibility. In particular, in its judgment the Court of Criminal Appeal had noted certain inconsistencies in his statements of 1 and 2 February 2002 (see paragraph 22above) and it had considered that he was not reliable as the applicant had replied in an evasive and hesitant way to police questions concerning his business, profitability, rent, and profits of the previous year (see paragraph 26 above). Nevertheless, the Court cannot but note that the Court of Criminal Appeal had found that A.F.'s statements had been enough to determine the applicant's guilt. In consequence its assessment of the applicant's credibility on the basis of his pre-trial statements can be considered as having been made *exabundanti cautela* (out of an abundance of caution). In the light of the Court of Criminal Appeal's finding concerning the sufficiency of A.F.'s statements, the Court considers that the use it made

of the applicant's statements to assess his credibility cannot be considered as having substantially affected his position.

(iii) Conclusion

119. In conclusion, while very strict scrutiny must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court, in the specific circumstances of the case, finds that having taken into account the combination of the various above-mentioned factors, despite the lack of procedural safeguards relevant to the instant case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.

120. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention."

The case **Beuze v. Belgium** (Appl. 71409/10) decided on the 9th of November 2018, mentioned in the above quoted judgement, was also considered by the Constitutional Court in its sentence delivered on the 31st of May 2019 in the names **Paul Anthony Caruana vs. Avukat Generali** (Rik Kost 64/2014)[13] where it was found that the appellant had not suffered any breach of his right to a fair hearing. The said court made the following observations:

"8. L-ewwel aggravju tal-attur huwa msejjes fuq l-argument illi:

»… … … ġie stabbilit illi l-fatt waħdu illi persuna li tkun instabet ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil-liġi maltija, awtomatikament ikun ifisser illi saret vjolazzjoni tad-dritt fundamentali tas-smigħ xieraq ta' dik l-istess persuna taħt l-artikolu 6 tal-Konvenzjoni Ewropea«.

[13] See also **Il-Pulizija vs. Anthony McKay** (App 77/2018) decided by the Court of Criminal Appeal on the 18th of June 2020.

9. Dan, igħid l-attur, ġie stabbilit f'dik li sejħilha "s-sentenza kjavi mogħtija mill-Qorti Ewropea fit-12 ta' Jannar 2016 kontra Malta fil-kawza Mario Borg *v.* Malta".

10. Qabel ma tikkummenta fuq il-każ ta' Borg il-qorti tosserva illi s-Sezzjonijiet Magħquda (*Grand Chamber*) tal-Qorti Ewropea tad-Drittijiet tal-Bniedem kienet ġà qieset il-kwistjoni tad-dritt għall-għajnuna ta' avukat fil-każ ta' Salduz *v.* It-Turkija [Q.E.D.B. 27 ta' Novembru 2008 (rik. 36391/02)] u fil-parti relevanti qalet hekk"

> » ... 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.« [§ 55]

11. Għalkemm din is-silta tista' tagħti x'tifhem illi huwa biss meta hemm "raġunijiet impellenti" ("*compelling reasons*") biex ma titħalliex tingħata l-għajnuna ta' avukat illi dan in-nuqqas ma jwassalx għal ksur tal-jedd għal smigħ xieraq, din hija biss regola ġenerali ("*as a rule*"). Fil-fatt, ukoll fil-każ ta' Salduz il-qorti, għalkemm sabet li ma kienx hemm raġunijiet impellenti biex il-persuna interrogata ma titħalliex tkellem avukat, madankollu xorta qieset jekk, meqjus kollox, il-proċess kienx wieħed ġust, għalkemm fiċ-ċirkostanzi partikolari tal-każ sabet li ma kienx. Imbagħad, fil-każ ta' ta' Ibrahim u oħrajn *v.* ir-Renju Unit [Q.E.D.B. 13 ta' Settembru 2016, rikk. 50541/08, 50571/08, 50573/08 u 40351/09] il-Qorti Ewropeja fis-Sezzjonijiet Magħquda kompliet tfisser illi:

»250. The right to a fair trial under Article 6 § 1 is an unqualified right. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § 53, ECHR 2007-III). The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010; and *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, ECHR 2015).

»251. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings … … …

»… … …

»262. The Court accordingly reiterates that in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves. The absence of compelling reasons does not, therefore, lead in itself to a finding of a violation of Article 6 of the Convention.«

12. Effettivament, dan ifisser illi l-fatt waħdu li ma tkunx tħalliet tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni, ukoll jekk ma kienx hemm raġunijiet impellenti għal dan in-nuqqas, ma huwiex biżżejjed biex, *ipso facto*, jinsab ksur tal-jedd għal smigħ xieraq: trid tqis il-proċess fit-totalità tiegħu ("*having regard to the development of the proceedings as a whole*").

13. Il-Qorti Kostituzzjonali ta' Malta meta ġiet biex tinterpreta s-sentenza ta' Salduz kienet sa ċertu punt antiċipat din il-preċiżazzjoni f'sentenza mogħtija fit-8 ta' Ottubru 2012 *in re* Charles Steven Muscat *v.* Avukat Ġenerali [Rik. kost. 75/2010], meta osservat illi:

»14. … … … Il-jedd għal smigħ xieraq jingħata kemm biex, wara proċess fi żmien raġonevoli u bil-garanziji xierqa, min ma huwiex ħati ma jeħilx bi ħtija, u biex jingħata l-mezzi kollha meħtieġa għalhekk, u kemm biex min huwa tassew ħati ma jaħrabx il-konsegwenzi tal-ħtija tiegħu. … … …
»15. Għalhekk, li trid tagħmel din il-qorti ma huwa la li tara jekk l-attur huwiex ħati jew le tal-akkużi li nġiebu kontrieh u lanqas li tara biss jekk l-attur kellux l-għajnuna ta' avukat waqt l-interrogazzjoni u tieqaf hemm: li għandha tagħmel din il-qorti hu illi tara jekk dak in-nuqqas wassalx għall ksur tal-jedd għal smigħ xieraq u hekk inħoloqx il-perikolu illi l-attur jinstab ħati meta ma kellux jinstab ħati. Jekk ma hemmx dak il-perikolu, mela ma hemmx ksur.«

14. Fi kliem ieħor, trid tqis il-proċess fit-totalità tiegħu ("*having regard to the development of the proceedings as a whole*") u mhux biss il-fatt waħdu illi l-persuna interrogata ma tħallietx tkellem avukat.

15. Din kienet il-posizzjoni li baqgħet tiġi segwita minn din il-qorti sakemm ingħatat is-sentenza ta' Borg imsemmija mill-attur, li kienet sentenza tar-Raba' Sezzjoni tal-Qorti Ewropea. Dik is-sentenza tgħid illi l-fatt waħdu li l-liġi ma kinitx tippermetti li tingħata l-għajnuna ta' avukat waqt jew qabel l-interrogazzjoni kien biżżejjed biex jinsab ksur tal-art. 6 tal-Konvenzjoni:

»61. … … … 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 «

16. Fid-dawl ta' din is-sentenza, il-Qorti Kostituzzjonali, għalkemm baqgħet temmen illi l-interpretazzjoni ta' Salduz li kienet adottat fil-każ ta' Muscat kienet dik korretta u ta' buon sens, għarfet illi wara s-sentenza ta' Borg dik il-posizzjoni ma baqgħetx tenibbli u għalhekk bidlet il-posizzjoni tagħha. Hekk, fil-każ ta' Malcolm Said v. L-Avukat Ġenerali [Kost. 24 ta' Ġunju 2016, rik. 74/2014] il-Qorti Kostituzzjonali qalet hekk:

> »17. Għalkemm din il-qorti temmen u ttenni illi l-interpretazzjoni minnha mogħtija fil-każ ta' Charles Stephen Muscat u sentenzi oħra mogħtija wara hija interpretazzjoni korretta u proporzjonata billi tilqa' għal abbużi min-naħa tal-prosekuzzjoni u tħares id-drittijiet ta' persuna akkużata b'reat kriminali, jidher li din l-interpretazzjoni – għallinqas fejn il-proċess kriminali jkun intemm – illum ma għadhiex aktar tenibbli fid-dawl tas-sentenza fuq imsemmija ta' Borg v. Malta mogħtija dan l-aħħar mill-Qorti Ewropea.
>
> »18. Din il-qorti għalhekk illum hi tal-fehma li ma jkunx għaqli li tinsisti fuq l-interpretazzjoni li kienet tat fil-każ ta' Muscat, għalkemm ittenni li għadha temmen illi hija interpretazzjoni korretta, proporzjonata u ta' buon sens.«

17. Ir-raġuni iżda fl-aħħar mill-aħħar tegħleb. Fid-dawl tal-inkonsistenzi fis-sentenzi tal-Qorti Ewropea fl-interpretazzjoni tal-jedd għall-għajnuna ta' avukat fil-kuntest tal-jedd għal smigħ xieraq, il-Qorti Ewropea kienet imsejħa, fil-każ ta' Beuze *v.* il-Belġju [Rik. 71409/10], biex tippreċiża aħjar x'inhi l-posizzjoni korretta. Tajjeb jingħad illi fil-każ ta' Beuze, bħal fil-każ tallum, il-liġi domestika fiż-żmien relevanti ma kinitx tippermetti li tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni [Fil-fatt, kif jidher minn qari ta' §§ 154 *et seqq.* tas-sentenza, ir-restrizzjonijiet fuq il-jedd tal-persuna

suspettata li tkellem avukat kienu ferm aktar restrittivi milli kienu fil-każ tal-lum] u ma kien hemm ebda raġuni impellenti għala ma tħallietx tingħata l-għajnuna ta' avukat [Ara §§ 161 u 163-4]. Fis-sentenza mogħtija mis-Sezzjonijiet Magħquda fid-9 ta' Novembru 2018 il-qorti qalet hekk:

> »120. The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see *Ibrahim and Others*, … § 250). The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings … … …
>
> »121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. … … …
>
> »… … …
>
> »139. The stages of the analysis as set out in the *Salduz* judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case-specific decisions taken by the competent authorities.
>
> »140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, *ab initio*, to a violation of the Convention … … … Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form … and sometimes in greater detail …

»141. Being confronted with a certain divergence in the approach to be followed, in *Ibrahim and Others* the Court consolidated the principle established by the *Salduz* judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those stages and the relationship between them (see *Ibrahim and Others*, … §§ 257 and 258-62).

… … …

»144. In *Ibrahim and Others* the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see *Ibrahim and Others*, … § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer … to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. However, as can be seen from the *Ibrahim and Others* judgment, followed by the *Simeonovi* judgment, the Court rejected the argument of the applicants in those cases that *Salduz* had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the *Dayanan* case and other judgments against Turkey.

»145. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see *Ibrahim and Others*, … § 265).

»… … …

»147. Lastly, it must be pointed out that the principle of placing the overall fairness of the proceedings at the heart of the assessment is not limited to

the right of access to a lawyer under Article 6 § 3 (c) but is inherent in the broader case-law on defence rights enshrined in Article 6 § 1 of the Convention … … …

»148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused.

[...]

18. Din hija interpretazzjoni li hija eqreb mal-posizzjoni li kienet ħadet din il-qorti qabel is-sentenza ta' Borg milli mal-interpretazzjoni mogħtija mir-Raba' Sezzjoni f'Borg u effettivament tfisser li kellha raġun il-Qorti Kostituzzjonali ta' Malta fil-posizzjoni li kienet ħadet fil-każ ta' Muscat u fis-sentenzi li segwew, qabel ma kienet kostretta tbiddel dik l-inter-pretazzjoni fid-dawl ta' Borg.

19. Uħud mill-imħallfin membri tal-qorti li tat is-sentenza ta' Beuze, f'opinjoni għalihom, ikkritikaw is-sentenza fejn qalet illi, f'kull każ, trid tqis il-proċess fit-totalità tiegħu u mhux biss in-nuqqas ta' għajnuna ta' avukat, għax dehrilhom illi, iżjed milli preċiżazzjoni tal-interpretazzjoni ta' Salduz fid-dawl ta' Ibrahim, is-sentenza ta' Beuze hija kapo-volġiment ta' dik il-ġurisprudenza. Hu x'inhu, hijiex preċiżazzjoni, elaborazzjoni, evoluzzjoni jew kapovolġiment, din hija sa issa l-aħħar kelma, u tagħti raġun lill-Qorti Kostituzzjonali ta' Malta fil-ġuris-prudenza li segwiet is-sentenza ta' Muscat.

20. Fid-dawl ta' dawn il-konsiderazzjoniiet, l-aggravju tal-attur – safejn igħid illi "l-fatt waħdu illi persuna li tkun instabet ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil-liġi maltija, awtomatikament ikun ifisser illi saret vjolazzjoni tad-dritt fundamentali tas-smigħ xieraq ta' dik l-istess persuna taħt l-artikolu 6 tal-Konvenzjoni Ewropea" – huwa ħażin u huwa miċħud."

Having considered recent jurisprudence on the matter under examination, the Court is to apply the guidelines outlined by the ECtHR to this constitutional reference.

The law

The Court considers that the constitutional reference is based on both Article 39 of the Constitution as well as Article 6 of the Convention. With regards to the alleged breach of Article 39 of the Constitution of relevance to this particular case are the following sub-articles:

> (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.
>
> […]
>
> (5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty […]
>
> (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 been titled to have such representation at the public expense;
>
> (10) No person who is tried for a criminal offence shall be compelled to give evidence at his trial.

The applicant alleges that the breach to his right of fair hearing occurred the moment he gave his statement without assistance of a lawyer. Article 39 of the Constitution of Malta makes it clear that the right to a fair hearing in the framework of criminal proceedings depends on an accusation being heard by an

independent and impartial court established by law. This article has been defined by our courts as applying only where a proceeding has been instituted before a court which, at the close of that proceeding, may come to give a decision determining whether the accused person is guilty or otherwise.

From the facts of the case it is clear that the applicant is referring to a situation which existed before the applicant was brought before a court to answer an accusation made against him, therefore the provisions of Article 39 of the Constitution do not apply. However, in line with what was said by the Constitutional Court in the judgment in **Malcolm Said vs. Avukat Generali et** (Rik Kost 74/2014)[14], it does not mean that what was done before the applicant was accused cannot affect, to his detriment, what happens after he is accused. Therefore, if the taking of the statement was made in breach of the applicant's rights, the infringement would not occur by the simple fact that the statement was taken while the plaintiff was still being investigated, but infringement might occur by the fact that the statement can be eventually used against the accused during proceedings brought against him. Thus the court will delve, together with further observations on Article 6 of the Convention, whether Hickey's right for fair hearing would be breached if his statements would be deemed admissible.

Article 6 of the European Convention, similar to the above cited article, provides the principles which need to be safeguarded by the Court:

> (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. […]
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

[14] Decided by the Constitutional Court on 24th of June 2016

(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;

[…]

The applicability of the protection of the right to a fair hearing under Article 6 of the Convention is wider than that granted to the same right under Article 39 of the Constitution. The provisions found in the article of the Convention are applicable even before the case is brought before the courts, provided that it is shown that the proceeding is likely to be seriously compromised by any failure at an early stage to comply with any of the provisions of that article. There is no doubt today that, for the purposes of Article 6 (3) of the Convention, the right to be assisted by a lawyer of one's choice or, if he has not sufficient means to pay for legal assistance, to be given by the state the legal assistance for free, applies from when the person is still being held on suspicion of committing an offense or during the investigation of the same offense and before specific charges have been brought against her[15], unless there are good reasons to prevent the accused from consulting a lawyer, such as situations of emergency. It is the public authority which must show that there was a good reason for depriving the person of being assisted by a lawyer and also that that person indeed and without threats waived that right.[16]

This Court asserts that the current case-law shows that it is no longer the case that the mere fact that the law did not allow the assistance of a lawyer before or during interrogation automatically leads to a finding that there has been a breach of fair hearing, as the applicant claims, but this Court must take into account several factors before reaching its conclusion.

[15] See **Stephen Pirotta vs. Avukat Ġenerali** (Rik. Kost. 13/2016JRM) decided on the 28th of Feburary 2019 by the Civil Court (Constitutional Jurisdiction) and on the 27th of September 2019 by the Constitutional Court.

[16] See **Dominic Cassar vs. Avukat Ġenerali** (Rik. Kost. 47/2016) decided by the Constitutional Court on the 2nd of March 2018.

Vulnerability

According to psychologist Bernard Caruana giving evidence on the 17th of June 2016,[17] although Alexander Hickey suffers from autism, this does not cause intellectual impairment. In the report it was noted that Hickey was assessed on the 2nd of November 2004 by Ms. Denise Borg, Clinical Psychologist from which it "was found to fall within the high average range of intellectual ability. His Global IQ being 112 (average range between 85 and 115) with his Verbal IQ being 106 (average range[)] and his Performance IQ being 118 (above average)"[18] although it was also found that he had Mathematics difficulties as well as attention difficulties. The psychological report prepared by Bernard Caruana clearly shows that he scored low on "vulnerability [which] indicated that he perceives himself as capable of handling himself in difficult situations".[19] Thus it is very clear that Alexander Hickey is an intelligent person, with no intellectual impairment and cannot be considered as a vulnerable person.

Although the applicant had been duly cautioned in the English language that he can remain silent but whatever he says may be given in evidence, Hickey voluntarily chose to reply to the questions put to him by the police. Hickey released two statements – one on the 5th of April 2012 and another one 4 days later, on the 9th of April 2012. In the second statement, Hickey was cautioned again. In this latter statement, the applicant made some corrections to his first statement and gave further information. This Court also notes that both statements were released in the presence of his mother and this due to the fact that he was seventeen (17) years of age when he released his statements. This Court however remarks that although Hickey was still a minor, he was on the verge of celebrating his eighteenth (18th) birthday in less than two months from his arrest. It was not shown by the accused that he was forced to sign both his statements. Furthermore, both statements were confirmed before Magistrate Dr Francesco Depasquale. It also results to this court, from the report drawn up by

[17] Page 200 of the criminal proceedings.
[18] Page 210 of the criminal proceedings.
[19] Page 225 of the criminal proceedings.

the probation officer, Joanna Farrugia, that "he had to testify in the cases of the other persons connected in the case".[20]

This Court therefore concludes that the element of vulnerability is missing.

The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial

Although the law, when the statement was given, did not require the accused to have legal assistance during interrogation, it is uncontested that he was cautioned : "you do not have to say anything unless you wish to do so, but what you say may be given in evidence". This Court notes that the accused was given the opportunity to consult with a lawyer prior his interrogation, so much so that he confirmed that he consulted Dr Cedric Mifsud. The content of such exchange is irrelevant, what matters thus is the fact that the applicant had been given the opportunity to consult a lawyer and could therefore have sought legal advice.

Opportunity to challenge the authenticity of the evidence, the quality of that evidence and the manner in which that evidence was gathered

Given the early guilty plea, the only evidence presented were several process verbal as well as the statements of Alexander Hickey. It does not appear that in this case the Police obtained the above-mentioned evidence against the Law and the taking of these statements was done regularly according to the Law in force at that time. Neither did Hickey raise the issue that he was forced by the police to release a statement or to answer all the questions that he was asked. Therefore, it is presumed that the statements were released voluntarily.

[20] Page 191 of the criminal proceedings.

Futhermore, given that the proceedings are still pending before the Court of Magistrates (Malta) as a Court of Criminal Judicature, the accused, depending whether his guilty plea is withdrawn (as explained further on), will have the opportunity to challenge the evidence brought against him, cross-examine any witness and even produce his own testimony and witnesses.

In the case of a statement, the nature of the statement and whether it was promptly retracted or modified

It does not appear that the applicant raised, *in limine litis*, any complaint about the manner in which his statements were taken by the Police or any irregularities or abuses by them during the taking of the same. Neither were they modified except that with the second statement, which was given 4 days after the first statement, the applicant made some corrections to the statement that he gave earlier and he even added further information.

It is observed by this Court that the applicant insists that the statement should not form part of the criminal proceedings, after new legal considerations were adopted by the Constitutional Court back in 2017 and 2018. This is apparent from the criminal proceedings *verbale* where the lawyer of the accused requested "an adjournment so that the defence may reconsider its positions" following the judgements delivered by the Constitution Court in the names "Christopher Bartolo vs. Avukat Generali" and "Pulizija vs. Aldo Pistella".[21] The applicant did not insist on the non-use of the statement on the day it was presented but almost four (4) years later. Till-to-date the applicant did not withdraw what he said in the statements. On the contrary he confirmed to the probation officer everything he said in the statement.

Who will carry out the assessment of guilt?

Without any doubt it will be a Magistrate who will carry out the assessment of guilt, an independent and impartial court set up by Law.

[21] Page 278 of the criminal proceedings.

In answer to the first limb of the first question, the Court concludes that the release of two statements by the applicant without the right to legal assistance during interrogation does not breach Article 6 (1) and (3) of the Convention and Article 39 of the Constitution.

Considers;

The second limb of the first question refers as to whether there would be breach of fair hearing if the statements are deemed as admissible evidence. To substantiate his argument, the accused insists in his final note of submissions that he made various self-incriminating statements and that such statements constitute crucial evidence in the case against him. He also states that the guilty plea was based on the statements. This latter matter will be dealt with later in this judgement. Regarding the fact that the statement of the accused is crucial evidence, this court notes, as observed also by the accused himself in the note of submissions, that the prosecution have in their possession other evidence which supports their case.

In order to determine what constitutes self-incrimination, the Court deems fit to refer to the **Guide on Article 6 of the European Convention on Human Rights** – Right to a fair trial (criminal limb) updated on 31st December 2019 and published by the Council of Europe/European Court of Human Rights:

> "185. The privilege against self-incrimination does not protect against the making of an incriminating statement *per se* but against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence (*Ibrahim and Others v. the United Kingdom* [GC], § 267).
>
> 186. Through its case-law, the Court has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of

Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies as a result (*Saunders v. the United Kingdom* [GC], *Brusco v. France*) or is sanctioned for refusing to testify (*Heaney and McGuinness v. Ireland*; *Weh v. Austria*). The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements (*Jalloh v. Germany* [GC]; *Gäfgen v. Germany* [GC]). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (*Allan v. the United Kingdom*; contrast with *Bykov v. Russia* [GC], §§ 101-102).

[…]

189. Early access to a lawyer is part 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. In order for the right to a fair trial under Article 6 § 1 to remain sufficiently "practical and effective", access to a lawyer should, as a rule, be provided from the first time a suspect is questioned 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 (*Salduz v. Turkey* [GC], §§ 54-55; *Ibrahim and Others v. the United Kingdom* [GC], § 256).

[…]

192. Conversely, in the case of *Bykov v. Russia* [GC] (§§ 102-103), the applicant had not been placed under any pressure or duress and was not in detention but was free to see a police informer and talk to him, or to refuse to do so. Furthermore, at the trial the recording of the conversation had not been treated as a plain confession capable of lying at the core of a finding of guilt; it had played a limited role in a complex body of evidence assessed by the court."

Applying these observations to the current case, the court observers that the applicant failed to show that he was threatened, forced or deceived into releasing his statements. Moreover, the accused had the opportunity to consult with his lawyer before his interrogation. This Court takes also into into account what has been reported by the probation officer, namely, that "Alexander stated that the police have portrayed him as the mastermind in this case but he states that everyone had their part and that not everything that was said is true. Eventhough he admits his guilt he plays down his role in everything and is not taking full responsibility for his actions."[22]

Given that the statements were not obtained in breach of the applicant's right to a fair hearing, the Court declares that the statements are to be considered as admissible evidence.

Considered;

A judgement based on the applicant's guilty plea

The second question to be answered is whether a sentence based on a guilty plea would result in a breach of Article 39 of the Constitution and Article 6 of the Convention. In his application dated 5th June 2019, the accused explains that he registered an admission to all the charges due to the statements which he had "released to the Police wherein he had already admitted to his involvement with drugs"[23]. The applicant submits "that since such admission was based on his previous statements, which statements breach his rights as safeguarded by the European Convention and the Constitution of Malta, such admission should not

[22] Page 191of the criminal proceedings.
[23] Page 282 of the criminal proceedings.

be considered and he should be granted the opportunity to change his guilty plea"[24].

On the basis of that submission the Referring Court requests this court for direction as to whether the Court of Magistrates would be in breach of the accused's fundamental right to a fair hearing were it to take into account the accused's guilty plea.

The accused submits that the only reason he filed a guilty plea was due to the statements he had released to the police during interrogation. His argument is that had it not been for the statements he released he would not have admitted to the charges levelled agsinst him.

This Court observes that applicant has not asked the Court of Magistrates (Malta) as a Court of Criminal Judicature to withdraw his guilty plea. On the contrary he asked the Referring Court to accept his request for a constitutional reference claiming that were the court to take into account his guility plea his fundamental rights would be infringed.

The Attorney General and the Commissioner of Police submitted that "such a matter falls within the competence of the criminal courts and so it should firstly be decided by the Court of Criminal Judicature rather than this Honourable Court. The Court of Magistrates did not give a decision as to whether applicant can or cannot retract his admission of guilt registered on the 16th November 2015".[25]

Whether the accused can at this stage of the penal proceedings ask to withdraw his guily plea is a matter which this court has not been asked in the constituional reference to pronounce itself.

[24] *ibid.*
[25] Page 17 of the constitutional proceedings.

The question before this court is therefores not whether an eventual refusal to change a guilty plea would lead to a breach of human rights; but whether a judgment based on the accused's guilty plea would lead to a breach of Article 39 of the Constitution and Article 6 of the Convention.

Of relevance to this case is the judgement delivered by the **Constitutional Court** on the 5th of October 2018 in the names **Christopher Bartolo vs. Avukat Generali et** (Rik. Kost. 92/2016 JPG) which held that

> "27. Fir-rigward tat-tezi tar-rikorrenti li l-kontenut tal-istqarrijiet, skont hu mehuda in vjolazzjoni tad-dritt ta' smigh xieraq tar-rikorrent, kellu effett fuq l-ammissjonijiet tieghu quddiem il-qrati kriminali u stante li f'dak iz-zmien skont hu, huwa kien fi stat ta' vulnerabbilita` huwa ma kellux ghazla hlief li jammetti, din it-tezi giet sostnuta mill-ewwel Qorti meta fis-sentenza appellata tghid:
>
>> "Meta wiehed iqis x' kienet l-ghazla li kellu quddiemu r-rikorrent, f'mument fejn kien kompletament vulnerbbli ghall-poter tal-Istat waqt li kien qed jissielet ma' kondizzjoni medika severa u terminali, huwa facli jifhem il-ghaliex ghazel li jammetti l-akkuzi migjuba kontra tieghu. Il-Qorti zgur ma tistghax tqis illi dan it-tip ta' *Hobson's choice* jista' jsarraf f'ghazla libera ghar-rikorrent sabiex ammetta l-akkuzi kontra tieghu." [Sent. Pga.26]
>
> 28. <u>Din il-Qorti ma taqbel xejn ma' din it-tezi li fil-fehma taghha hija fattwalment u legalment insostenibbli,</u> [sottolinear ta' din il-Qorti] anke jekk jigi kkonsidrat li huwa minnu li qabel ma ttiehdet l-ewwel stqarrija huwa kien ghadu gej mill-isptar fejn kien qed jiehu trattament mediku u anke jekk l-istqarrijet jitiqiesu bhala vjolattivi tal-artikolu konvenzjonali fuq citat, dan il-fatt ma jistax idghajjef l-effetti legali tal-ammissjonijiet quddiem il-qrati kriminali meta allura r-rikorrent kien legalment assistit matul dawk il-proceduri. Fil-fehma ta' din il-Qorti jirrizuta car li l-ghazla tar-rikorrent li jammetti ghall-akkuzi kienet ittiehdet meta kien legalment assistit u meta

wkoll il-qorti kienet tatu zmien sabiex jahsibha sewwa, fatt li jindika li dik il-qorti kienet qed taghtih l-opportunita` li jirtira l-ammissjoni tieghu; izda ir-rikorrent baqa' jinsisti fuq l-ammissjoni tieghu, ovvjament bi skop li jottjeni mitigazzjoni tal-piena. Dawn il-konsiderazzjonijiet huma sorretti ukoll mill-fatt li, meta r-rikorrent kien deher quddiem il-Qorti tal-Magisrati, huwa naqas milli jattakka l-validita` tal-istqarrijiet maghmula minnu u kkonfermati minnu bil-gurament quddiem il-magistrat inkwirenti. Li kieku r-rikorrent verament hass li l-istqarrijiet ittiehdu b'lezjoni tad-drittijiet fondamentali tieghu, kien mistenni li mill-bidu tal-proceduri kriminali meta allura kien legalment assistit, huwa jew jattakka l-validita` tal-istqarrijiet bi proceduri kostituzzjonali jew ma jammettix ghall-akkuzi, izda huwa ghazel it-triq li jammetti, u ma hemm xejn li jsostni t-tezi tieghu li l-ghazla li jammetti ma kinitx wahda libera. Fid-dawl ta' dawn il-konsiderazzjonijiet din il-Qorti tqis bhala gratuwita u mhux sorretta mill-provi l-osservazzjoni tal-ewwel qorti li l-ghazla li r-rikorrent jammetti saret meta huwa kien *"kompletament vulnerabbli ghall-poter tal-Istat"*, anzi din tinsab kontradetta mill-fatt pacifiku li matul il-proceduri kriminali u allura meta ammetta ghall-akkuzi ghal diversi drabi huwa kien dejjem assistit minn avukat.

29. Fid-dawl tal-konsiderazzjonijiet premessi din il-Qorti tosserva li l-intimati ghandhom ragun li jsostnu li l-ammissjonijiet tieghu u l-istqarrijiet lill-pulizija huma elementi ta' prova separati u m'humiex, fi kliem l-ewwel Qorti, *"instrinsikament konnessi*." [Sent. Pga. 26]"

The European Commission of Human Rights (First Chamber) in the case **R.O. v. The United Kingdom** (Appl. 23094/93) decided on the 11th May 1994 declared inadmissible the complaint that Article 6 of the Convention was breached because, amongst other complaints, "his guilt was determined not by reference to evidence as to whether he had committed the offence, but by reference to the events surrounding his initial guilty plea". The said Commission reached to its conclusion after making the following observations:

"The Commission considers that a rule which militates against changes of pleas which are unequivocal and voluntary cannot be said to compromise the

> fairness of proceedings as such. The Commission will therefore consider the impact of the refusal to permit the applicant to change his plea on the proceedings as a whole.
>
> In the present case the applicant was fully represented up until his guilty plea on 4 January 1991, and only applied for leave to change his plea (after he had changed representation) on 18 October 1991. The trial judge considered the question of the events leading up to the applicant's guilty plea in some depth, as is apparent from the Court of Appeal judgment, and found that the plea was unequivocal and voluntary. He therefore did not permit the change of plea. The Court of Appeal scrutinised the way in which the trial judge approached the issue, recalled that he had a discretion to permit the change of plea but had preferred the evidence given by the applicant's former representatives to the applicant's own evidence. The Court of Appeal accepted that the judge had heard all the material necessary to decide the case, and considered that he had "handled the matter admirably".
>
> In these circumstances, the Commission finds that the fairness of the proceedings against the applicant was not impaired by the refusal to permit him to change his plea, and that in the light of this finding the Commission is not required to consider separately the applicant's other complaints."

It must be pointed out that even when an accused pleads guilty, it is in the discretion of the Court whether to accept that guilty plea and this is clear from the second sub-article of **Article 453 of the Criminal Code** which provides that:

> "(2) Nevertheless, if there is good reason to doubt whether the offence has really taken place at all, or whether the accused is guilty of the offence, the court shall, notwithstanding the confession of the accused, order the trial of the cause to be proceeded with as if the accused had not pleaded guilty."

Back to the second question in the constitutional reference, the Referring Court is requesting guidance on whether a future judgment by that court "based on

applicant's guilty plea.......would be in breach of Article 6(1) and (3) of the Convention and Article 39 of the Constitution.

This Court observes that during the sitting of the 16th November 2015 before the Magistrates Court, the accused was duly assisted. In the minutes of that sitting it is stated in alia that:

"The parties are suggesting [to the Court] that in view of the circumstnances of the case, namely that he was a minor when the case was committed, that he cooperated fully with the police during the investigations, considering also his early guilty plea and that he has made substantial improvement since the time of his arrest, the Court imposes a punishment of 3 years imprisonment and a fine of 7000 Euro. The Court makes it clear and also explained to the accused that it is not bound by this suggestion."

The case was then adjourned for the filing of the report by the probation officers.

As stated above this Court is of the view that the release of the two statements by applicant/accused on the 5th and 9th April 2012 during both interrogations were not in breach of his fundamental rights as protected by Article 6 (1) and (3) of the Convention and Article 39 of the Constitution. Given that the only reason given by the accused for alleging a breach of his fundamental rights is that he admitted the charges brought against him due to the two statements he released during the interrogations; and given that this Court finds that the release of those two statements do not constitute a breach of applicant's fundamental human rights, this Court concludes that the Referring Court will not be in breach of the accused's fundamental rights in the event that in its judgment that court takes into account the accused's guilty plea.

Decision

For these reasons, this Court responds to the reference of the Court of Magistrates (Malta) as a Court of Criminal Judicature by declaring that:

(1) As to the first question by the Referring Court - The release of the two statements by Alexander Hickey on the 5th and 9th April 2012 without legal assistance during interrogation do not breach Alexander Hickey's fundamental rights as protected by Article 39 of the Constitution and Article 6 of the Convention. This Court further declares that the Court of Magistrates (Malta) as a Court of Criminal Judicature will not be in breach of Alexander Hickey's fundamental rights as protected by the above mentioned articles if his two statements are deemed admissible by the Referring Court.

(2) As to the second question by the Referring Court - This Court declares that the Referring Court will not be in breach of Alexander Hickey's fundamental rights as protected by Article 6 (1) and (3) of the Convention and Article 39 of the Constitution if it takes cognisance of his guilty plea when pronouncing judgment.

The Court therefore orders that the acts of the case in the names "The Police (Insp. M. Bondin) vs Alexander Hickey" be remitted back to the Court of Magistrates (Malta) as a Court of Criminal Judicature.

Each party to bear its own costs.

Hon. Mr Justice Robert G. Mangion

Lydia Ellul

Deputy Registrar