MALTA

# QORTI KOSTITUZZJONALI

**ONOR. IMHALLEF -- AGENT PRESIDENT**
**JOSEPH A. FILLETTI**

**ONOR. IMHALLEF**
**ALBERT J. MAGRI**

**ONOR. IMHALLEF**
**GEOFFREY VALENZIA**

Seduta ta' l-14 ta' Frar, 2011

Appell Civili Numru. 26/2010/1

**Jovica Kolakovic**

**v.**

**Avukat Generali**

**The Court:**

## Introduction

1. This is an appeal from a decision delivered by the First Hall, Civil Court on the 12th August, 2010, pursuant to an application filed by appellant Jovica Kolakovic on the 25th March 2010. The decision, to which this appeal

refers, is being reproduced *in toto* hereunder and is to be considered as an integral part of this judgment:
**"The Court:**

"Having taken cognizance of the Application filed by Jovica Kolakovic on the 25th of March, 2010, by virtue of which and for the reasons and arguments therein mentioned, he requested that this Court (a) declare that he has suffered a breach of his fundamental human rights in terms of Article 5(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") in conjunction with article 14 of the said Convention; (b) orders his immediate release from detention on remand on the basis of article 5(4) of the Convention; and (c) to grant him due redress and compensation for the aforesaid breaches;

"Having seen the decree dated March 25th, 2010, whereby it ordered service upon respondent and set the application for hearing;

"Having taken cognizance of the Reply filed by respondent on April 5th., 2010, whereby, by way of preliminary pleas, he claims that this Court does not have the jurisdiction to act as a court of review over other courts as to whether they have correctly applied the law or otherwise in their decisions, but may only consider whether the Court of Magistrates as a Court of Judicial Inquiry has given due consideration to all the relevant factors and circumstances when denying applicant his requests for conditional liberty or bail. As to the merits, and for the reasons stated, respondent denies that applicant has indeed suffered a breach of his rights under article 5(3) of the Convention or of article 14 thereof read in conjunction with article 5(3);

"Having seen its decree of the 3rd of May, 2010, whereby on an application filed by applicant on April 29th, 2010, it brought forward the hearing of the case;

"Having ruled by a decree during the hearing of May 7th, 2010, that all proceedings of this case be heard in

English, in terms of article 3 of Chapter 189 of the Laws of Malta, and that judgment will be likewise delivered in English;

"Having seen the documentary evidence produced by applicant and the judicial references contained in attached compact discs;

"Having heard the evidence tendered by parties;

"Having authorised parties to file their submissions by way of written pleadings;

"Having read the Note of Submissions filed by applicant during the hearing of May 25th, 2010[1], together with an attached judgment reference file in disc form;

"Having seen its decree of May 25th, 2010, whereby it ordered the necessary corrections in the records of the proceedings;
"Having seen the additional Note of Submissions filed by applicant on June 2nd, 2010[2];

"Having seen the Note of Submissions filed by respondent on the June 4th, 2010[3], in reply to the Submissions filed by applicant;

"Having taken due notice of the Note filed by respondent on June 4th, 2010[4], containing copies of court documents relating to applicant's requests for bail before the Maltese Courts;

"Having put off the case for judgment by decree dated May 25th, 2010;

***"Having Considered:***

"That this case calls into question the legality of applicant's continued detention, resulting from the Courts'

[1] Pp. 40 – 9 of the records
[2] Pg. 57 of the records
[3] Pp. 21 – 5 of the records
[4] Pp. 72 to 89 of the records

refusal to grant him release on bail in spite of numerous requests to that effect;

“That applicant claims to be suffering a breach of his fundamental human right protecting him from arbitrary arrest and detention. He has been held in detention on remand since September of 2009 and, in spite of repeated requests on his part, has so far been denied bail. He suggests that the reasons brought up to resist his requests are that he has no meaningful ties with this country and that there is a likelihood that he would therefore abscond. He claims that there exist no relevant and sufficient reasons by virtue of which his prolonged detention under reasonable suspicion of his having committed a crime can be further lawfully extended. Nor have the relevant authorities displayed special diligence in the conduct of the proceedings. Furthermore, he claims that under the present circumstances, he is being discriminated against by being treated differently to other persons implicated in the same facts with which he has been charged, and insofar as those persons have been granted bail;

“That respondent rebuts these claims by arguing that article 5 of the Convention does not grant an absolute right to freedom from arrest and that the violation alleged by applicant has to be read in conjunction with what is provided for under article 5(1)(c) of the Convention. He adds that whereas the judicial references on which applicant relies cater for circumstances different to his, the facts show that the sufficient and reasonable grounds under which his detention has been maintained have been duly identified by the various decrees pronounced as a result of his various applications for bail. He furthermore stresses that the reasons for which applicant has been denied release on bail are not exclusively founded on the reasonable fear that applicant may abscond, but also on the similarly pertinent grounds of failure to appear when ordered as well as obstruction or interference with the course of justice. Respondent argues that applicant has not shown that he has any tangible connection to Malta other than his intention to

stay at a hotel, but even if one were to accept that applicant was habitually resident on the Island this was not, in itself, sufficient guarantee that he would not abscond. Nor was recourse to the European Arrest Warrant in the case of applicant of any solace, considering that applicant could transfer himself to a non-member State of the European Union and thus frustrate the efficacy of that procedure. Respondent further rejects applicant's other claims about discrimination and the element of time-wasting in the phase of the criminal inquiry, which in no way bar applicant from applying for release from arrest, adding further that the twenty-month maximum period mentioned in article 575(6) of the Criminal Code has not been exceeded in the case of applicant;

"That as to the relevant facts arising from the records evidence shows that applicant is an ethnic Serbian but holds British nationality and has been regularly resident in the United Kingdom for the last twenty eight years[5]. He is married to a British national and four children were born to their marriage. The children are currently pursuing studies in the United Kingdom. Applicant and his wife run a family concern in the manufacturing sector. Applicant's immediate family still reside in Serbia and he visits them occasionally;

"That it results that on arrival at Malta in early September of 2009, applicant was arrested by the Police on suspicion of being involved in a drug-related offence. Applicant was arraigned in Court on September 10th, 2009, together with another two persons who were also charged with participating in the same alleged offences. The other two persons – a Maltese national and a Lithuanian man – were subsequently granted bail. On arraignment, applicant requested bail, but that request was denied. Applicant was remanded in custody. Furthermore, a Scotsman also suspected of being involved in the said offence, was extradited to Malta but has since been granted bail[6];

[5] Evidence of Kay Kolakovic 7.5.2010, at pg. 34 – 5 of the records
[6] Evidence of Inspector Pierre Grech 7.5.2010, at pp. 31 – 3 of the records

"That towards the end of October[7], applicant filed an application before the Court of Magistrates as a Court of Criminal Inquiry requesting that he be granted bail. By a decree dated December 17th, 2009[8] (which in actual fact dealt also with a similar request for bail filed by the Lithuanian national allegedly involved with the matter[9]) the request was denied. Applicant filed another application for release on bail on January 20th, 2010[10], which was again denied by the Magistrates' Court by decree dated January 26th, 2010[11], and which referred to its previous decree of December 17th, 2009, and to that of the Criminal Court of December 28th , as the basis of its reason to deny the request;

"That on February 5th, 2010[12], applicant again filed another application for bail under fair conditions before the Magistrates' Court, but the application was denied[13]. Applicant filed a fresh application on February 23rd, before the Criminal Court[14]. The request was again denied by a decree pronounced on March 1st, 2010[15], after that Court heard submissions by the parties. In all cases where applicant filed requests for bail, the respondent Attorney General opposed the request. This lawsuit was filed on March 25th, 2010;

"That as to the <u>legal considerations applicable to this case</u>, it is manifest that applicant bases his claims on the provisions of article 5(3) of the Convention which provides that "*Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees*

[7] Dok "AG1", at p. 73 of the records
[8] Dok "AG2", at pp. 74 – 5 of the records
[9] A request for a review filed by Mr. Mikalauskas on December 24th, 2009, was rejected by a reasoned decree handed down by the Criminal Court on December 28th, 2009 [Dok "AG3", at pp. 76 – 7 of the records]. Applicant Kolakovic does not seem to have filed a similar request.
[10] Dok "AG5", at p. 80 of the records
[11] Dok "AG4", at. Pp. 78 – 9 of the records
[12] Dok "AG7", at p. 82 of the records
[13] Dok "AG9", at pp. 84 – 5 of the records (the decree is undated)
[14] Dok "AG10", at p. 86 of the records
[15] Pp. 28 – 9 of the records

*to appear for trial*". It is equally manifestly evident that the said provisions have to be read in conjunction with the first paragraph of the same article, and in particular, with paragraph (c) thereof, which provides that "*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*";

"That the principal goal of the above-mentioned provisions of the Convention 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 during a criminal process. In brief, those 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 further detention is required pending further investigation of trial. This notwithstanding, those provisions still require that such individual be tried within a reasonable time;

"That any lawful detention under article 5(1)(c) of the Convention ceases to be so and falls foul of the provisions of article 5(3) whenever there is no good reason in the public interest to continue the accused person's detention pending trial or when it is extended merely to cover up for an investigation which is not carried out expeditiously;

"That the present case does not raise any issue regarding the lawfulness of applicant's initial arrest. Neither does the applicant argue that he was not promptly brought before a judge who could determine the legality of his arrest or the reasonableness of his continued detention. The main thrust of applicant's request is that there is no

justifiable reason why he should be kept in detention on remand and denied bail;
"That the Convention does not grant an automatic right to bail as such, and bail itself may be "conditioned by guarantees to appear for trial". Furthermore, under our current laws[16], it may safely be stated that the guarantee to appear for trial is not the only reason why bail should be favourably considered or denied[17]. In this context, the "*role of the domestic authorities is seen as ensuring that the pre-trial detention of an accused person does not exceed a reasonable period. They must examine all the circumstances arguing for or against the existence of a genuine public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in decisions on the applications for release. It is essentially on the basis of the reasons given in these domestic decisions and of the established facts mentioned by the applicant in his appeals that the [Strasbourg] Court considers it is called upon to decide whether or not there has been a violation of Art. 5, para. 3*"[18];

"That from the above, this Court derives the conviction that the assessment which the domestic courts have to provide in order that refusal to grant bail can be kept within the ambit of a lawful continued detention in terms of Article 5(3) of the Convention, is that such assessment be an effective one and not just perfunctory. Besides hearing the person detained in a bail application, the domestic court must also show that it has proceeded diligently. Within this requirement, one assumes that not only has that court acted expeditiously, but also that it has motivated its acceptance or refusal to grant bail by giving a reasoned, even if concise, ruling. "*In the absence of reasons, or where an uninformative stereotyped form of decision is given by the courts, it would be unnecessary to consider whether they acted with particular diligence since there would be no sufficient grounds for the continued*

[16] Art. 575(1) of Chap 9
[17] Cons. **1.6.2007** in the case ***John Aquilina et vs Avukat Generali***
[18] Reid *A Practitioner's Guide to the European Convention on Human Rights* (3rd Edit., 2007) § IIB-291, pg. 457

*detention*"[19]. Maltese domestic law makes it mandatory for a Court to motivate its reason for denying bail to an accused person[20];

"That one important function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice[21]. While Article 5 of the Convention does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the judge, relying on domestic law and practice, could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting in doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty[22]. In this context, arguments for and against release must not be 'general and abstract'[23];

"That the Convention speaks about reasons which are both "relevant" **and** "sufficient" enough to justify the denial of release on bail of a person charged with a criminal offence. Having established the existence of these concomitant reasons, then it becomes incumbent on the national Courts to demonstrate "special diligence" in the conduct of the proceedings[24];

"That among the relevant and sufficient grounds generally accepted as justifying a denial of release on bail, one finds (a) seriousness of the alleged offence for which the person has been arrested and the persistence of serious suspicion of guilt, (b) the protection of public order, (c) the risk of applying pressure on witnesses or of colluding with

[19] Reid *op cit* pg. 457
[20] Art. 575(11) of Chap 9
[21] ECHR **1.7.2003** in the case ***Suominen vs Finland*** (Applic. No. 37801/97, § 37
[22] ECHR [GC] **25.3.1999** in the case ***Nikolova vs Bulgaria*** [Applic No. 31195/96) § 61
[23] ECHR **24.7.2003** in the case ***Smirnova vs Russia*** (Applic. Nos. 46133/99 and 48183/99) § 63
[24] ECHR **26.1.1993** in the case ***W vs Switzerland*** (Applic. No. 14379/88) § 30

co-accused, (d) the risk of relapse (although a reference to the person's antecedents is not a sufficient reason to justify a refusal to release)[25] and (e) the danger of the released person absconding. These circumstances are not miles apart from those which Maltese domestic law itself outlines as the criteria upon which a Maltese competent Court ought to rely upon in considering a request for release on bail;

"That it is interesting to note that, in regard to the last ground, namely the fear of the arrested person absconding if released, it has been pointed out that "*The risk of absconding has to be assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted. The expectation of heavy sentence and the weight of evidence may be relevant but not as such decisive and the possibility of obtaining guarantees (e.g. payment of security, other forms of judicial supervision) may have to be used to offset any risk. The Convention organs have criticised domestic courts which rely on this ground without indicating any factual basis, repeat stereotyped decisions or fail to consider the possibility of obtaining guarantees from applicants to ensure their appearance, e.g. financial conditions … However, findings of links with foreign countries, including funds or family have provided sufficient grounds (to deny release for fear of absconding). … Regarding the type or level of guarantees that may be legitimately required by domestic authorities, these are not limited to money but can include residence and movement restrictions*"[26];

"That in this context, this Court believes the above considerations to be rather pertinent to the case before it. In its decree of March 1st, 2010, the Criminal Court motivated its decision not to accede to applicant's request to grant him bail on the following considerations: (i) that he has no fixed ties with Malta, (ii) that the European Arrest warrant is no panacea in matters concerning bail,

[25] ECHR **17.3.1997** in the case ***Muller vs France*** (Applic. No. 21802/93) § 44
[26] Reid *op cit* pp. 459 – 460

and (iii) that applicant has not satisfied it that, should he be released pending trial, he would not fail to appear when ordered by the authority specified in the bail bond, or that he would not abscond or attempt to leave Malta or that he would not interfere or otherwise attempt to interfere with witnesses or attempt to obstruct the course of justice in relation to himself or to any other person. Furthermore, the said Court made it clear that it was taking that position "at least at this stage of the proceedings", thereby clearly indicating that it would not exclude that bail would be granted at a more propitious stage if requested;

"That these motivations, taken collectively, do provide reasonable grounds to enable a Court, properly seised of the matter, to determine whether or not a person ought to be released from continued pre-trial detention. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities[27]. Care must, however, be had not to impose on any applicant for release on bail the burden of having to establish the grounds for his release, as this would be tantamount to overturning the purpose of Article 5(3) which makes detention an exceptional departure from the right to liberty[28];

"That the fact that the alleged offences with which applicant is charged involve more than one suspect may also be relevant in considering the lawfulness of the detention and even its extension. Indeed, the existence of a general risk flowing from the organised nature of the alleged criminal activities of the applicant may be accepted as the basis for his detention at the initial stages of the proceedings[29] and in some circumstances also for subsequent extensions of the detention. It is also accepted that in such cases, involving numerous accused, the process of gathering and hearing evidence is often a difficult task and that there is often in the nature of things a high risk that a detainee, if released, might bring

[27] ECHR **8.4.2004** in the case ***Belchev vs Bulgaria*** (Applic. No. 39270/98) § 82
[28] ECHR **26.7.2001** in the case ***Ilijkov vs Bulgaria*** (Applic. No. 33977/96) § 85
[29] ECHR **4.10.2005** in the case ***Górski vs Poland*** (Applic. No. 28904/02) § 58

pressure to bear on witnesses or other co-accused or otherwise obstruct the proceedings. In this regard the Convention has been found to uphold that the reasonable suspicion against the applicant of having committed serious offences could initially warrant his detention. Also, the need to obtain voluminous evidence, to determine the degree of alleged responsibility of each of the defendants who had acted in a criminal group and against whom numerous charges of serious offences had been laid, and the need to secure the proper conduct of the proceedings, in particular the process of obtaining evidence from witnesses, constitutes valid grounds for the applicant's initial detention[30];

"That furthermore, in the case of applicant, the offences with which he has been charged carry potentially heavy penalties on conviction. The likelihood that a severe sentence might have been imposed on the applicant given the serious nature of the offences at issue is a relevant element in the assessment of the risk of absconding or re-offending[31]. However, the Court has repeatedly held that the gravity of the charges by itself cannot serve to justify long periods of detention on remand[32];

"That although all the above-mentioned considerations could justify a relatively longer period of pre-trial detention however, they do not give the authorities unlimited power to extend this preventive measure. Firstly, with the passage of time, the initial grounds for pre-trial detention become less and less relevant and the domestic courts should rely on other "relevant" and "sufficient" grounds to justify the deprivation of liberty[33]. Secondly, even if, due to the particular circumstances of the case, detention is extended beyond the period generally accepted under the Court's case-law, particularly strong reasons would be required to justify this[34];

[30] ECHR **8.7.2008** in the case ***Konrad vs Poland*** (Applic. No. 33374/05) § 34
[31] ECHR **26.6.1991** in the case ***Letellier vs France*** (Applic. No. 12369/86) § 43
[32] ECHR **4.5.2006** in the case ***Michta v. Poland*** (Applic. No. 13425/02) § 49
[33] ECHR **6.4.2000** in the case ***Labita vs Italy*** (Applic. No. 26772/95) § 153
[34] For instance, grave acts of terrorism or widespread carnage, see ECHR **26.10.2006** in the case ***Chraidi vs Germany*** (Applic. No 65655/01) §§ 39 – 40

"That it has been repeatedly asserted that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified 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[35]. Furthermore, when deciding whether a person should be released or detained the authorities have an obligation under Article 5(3) to consider alternative measures of ensuring his or her appearance at the trial[36];

"That there is reliable authority regarding the legality of pre-trial detention pursuant to article 5(3) which holds that "*If there are sufficient indications and guarantees for a bail, but this possibility is not offered to the detainee, the detention loses its reasonable, and as a consequence also its lawful, character. This will be the case in particular if the only ground for the detention is the risk of flight. If the detainee declines the offer without suggesting an acceptable alternative, he has only himself to blame for the continued detention. On the other hand, the guarantee demanded for release must not impose heavier burdens on the person in question than are required for obtaining a reasonable degree of security*"[37]. The successful application of this desired goal depends therefore on co-operation on the applicant's behalf. Thus, the accused whom the judicial authorities declare themselves prepared to release on bail must faithfully furnish sufficient information, that can be checked if need be, about the amount of bail to be fixed. 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 appropriate bail as in deciding whether

[35] ECHR [GC] **3.10.2006** in the case ***McKay vs United Kingdom*** [GC] (Applic. No. 543/03), § 42, and ECHR **26.10.2000** in the case ***Kudla vs Poland*** (Applic. No. 30210/96) § 110, amongst others
[36] ECHR **15.2.2005** in the case ***Sulaoja vs Estonia*** (Applic. No. 55939/00) § 64
[37] Van Dijk, van Hoof, van Rijn, Zwaak *Theory & Practice of the European Convention on Human Rights* (4th Edit, 2006), pg. 497

or not the accused person's continued detention is indispensable[38];

"That the evidence tendered during the hearing of this case was principally concerned with the likelihood that applicant would abscond once bail has been granted. Submissions by respondent emphasised that applicant has no "real" connections with Malta and that his being a person of Serbian extraction would even be a serious threat to the adequacy of recourse to the European Arrest Warrant should he decide to return to his country of birth. Indeed, both the Criminal Court decrees pronounced in applicant's regard flatly dispel the idea of the efficacy of the European Arrest Warrant should applicant repair to a territory to which that instrument of enforcement would not apply;

"That this Court is not satisfied that, in the application of the guarantees accorded under article 5(3) of the Convention, the hypothetical possibility put forward by respondent is sufficient to overwhelm the right of applicant to freedom under sufficient guarantees pending eventual trial. This argument could equally apply to any other person who, facing the daunting possibility of a trial for an offence with which he has been charged, could be tempted to forego that ordeal even at the risk of forfeiting the guarantees which he has provided as a basis of his conditional release. This argument could apply irrespective of the nationality of the person concerned. At this juncture this Court, whilst not oblivious to the reality emerging in some spectacular cases in the past, feels that it ought to subscribe to the view held recently by the Strasbourg Court to the effect that "it is hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have at their disposal measures other than the applicant's protracted detention"[39]. Nor should the authorities' inability to adequately monitor movements into and out of Malta be shifted as a burden of denial of release from

[38] ECHR **15.11.2001** in the case ***Iwanczuk vs Poland*** (Applic. No. 25196/94) § 66
[39] ECHR **27.7.2010** in the case ***Louled Massoud vs Malta*** (Applic. No. 24340/08) § 68

detention on a person accused of an offence, particularly if such a person is of foreign nationality;

"That, therefore, in order for respondent to succeed in promoting his arguments, it has to be shown that the various Courts of criminal judicature had in reality founded their decrees on given facts and not mere apprehensions, and that those facts militated against release on the basis of accepted serious gravity as well as the interplay of other relevant factors. This Court will deal with this matter in due course;

"That furthermore, this Court is reluctant to accept that the mere lack of material or proprietary connections in Malta of a person detained here under remand automatically translates into an *a priori* "blank cheque" justifying that person's continued detention or denial of bail. This attitude seems to run counter to the demands of lawful detention as understood under article 5 of the Convention generally. Nor does it seem to be borne out by the relative provisions of Maltese law which lays down alternative conditions for the granting of bail and which have been highlighted already. Nowhere in our local legislation[40] nor even within the provisions of the Convention is it categorically laid down that the assets or effects which an arrested person offers to the domestic court as a guarantee for the granting of release on bail should be assets or effects which are already within that court's jurisdiction. To this Court, it should suffice if such assets or effects are effectively made available to or within control of the national authorities who have granted release on bail. What is more important is that the assets or effects offered up as guarantee are effectively relevant or valuable enough to deter the bailed person from parting with them in breach of the conditional release[41];

"That it has not been shown in this case that applicant has refused to offer suitable and effective guarantees upon which an eventual release on bail could reasonably be anchored. Nor has it been shown that he has rejected a request by the authorities to this effect. This Court has no

[40] Artt. 576, 577 and 584 of Chap 9
[41] ECHR **10.11.1969** in the case ***Stogmuller vs Austria*** (Applic. No. 1602/62) § 15

reason to believe that the Courts of Criminal judicature have treated this question lightly or excluded it altogether, because reason dictates that otherwise they would have relied solely on this ground in their decrees. This is evidently not the case. Counsel to applicant has not made submissions to suggest so. He has focused on the fact of the repeated denial of requests for release on bail and the lack of relevant and sufficient reasons for such denial;

"That it is not within the remit of this Court in the present case nor is it within its competence to determine under which specific conditions applicant deserves to be granted bail, if at all. This Court is vested with the jurisdiction to examine whether, in the treatment meted out to applicant, he has actually suffered or is likely to suffer a breach of a fundamental human right. In the exercise of this jurisdiction, this Court neither encroaches upon nor usurps the functions and powers vested in the competent Courts of Criminal judicature, but merely reviews the facts brought before it and weighs them against the standards upheld by the Convention or the Constitution where the protection of fundamental rights and freedoms is brought into play. It is a delicate balance which has to be achieved in pronouncing itself in any such judgment, and it is a balance which must be scrupulously observed by this Court, notwithstanding the ample powers which are vested in it by the same Constitutional and Conventional provisions, and notwithstanding the occasional promptings which some applicants are wont to include in their requests for redress. This consideration addresses **respondent's first preliminary plea** which, in so far as it suggests that this Court should wash its hands of examining applicant's request, is therefore being rejected as unfounded at law;

"That **as to the merits of the alleged unlawfulness of the continued detention**, this Court has considered that, to date, the applicant would have been in uninterrupted detention for almost eleven (11) months since his arraignment. This, by itself and on the general parameters accepted by the Conventional organs in their

recent judicial pronouncements, is not an unduly excessive period of pre-trial detention[42]. Maltese law establishes clear criteria regarding the maximum duration of detention at the lapse of which time bail must be granted[43]. None of these time-periods has so far lapsed in regard to applicant. To that extent, the applicant's detention is within the parameters of prescribed law – and, in this context, is therefore 'lawful' – and applicant has not called into question the validity or "constitutionality" of those provisions of law;

"That therefore, in the present case, this Court has to determine the issue on the basis of other criteria, seen either severally as well as conjointly. The principles underlying these criteria have already been reviewed in passing, and the Court will refrain from repeating them;

"That if all the grounds which the competent Courts of criminal judicature have adopted in their decrees were to be considered and applied to the applicant's case concretely, one would arrive at the conclusion that they are reasons relevant and sufficient enough to warrant applicant's continued detention pending the conclusion of the inquiry stage of the proceedings. The reasonable suspicion, the fear of absconding, the possibility of interference with the proper course of justice are all circumstances which, viewed collectively, are not remote and hypothetical possibilities only. Furthermore, the type of crime with which applicant has been charged is one which is serious and which bears wide deleterious effects on Maltese society[44];

"That this Court observes that the records of the case provide scant detail, by way of supporting evidence, as to the circumstances surrounding the applicant's case. This Court understands that such was not the case when the various applications for release filed by applicant were dealt with by the competent Courts. In passing, applicant

[42] ECHR **25.4.2000** in the case ***Punzelt vs Czech Republic*** (Applic. No. 31315/96) §§ 70, 76 , ECHR **16.1.2007** in the case ***Bak vs Poland*** (Applic. No. 7870/04) §§ 56 – 65 and ECHR **1.4.2010** in the case ***Gultyayeva vs Russia*** (Applic. No. 67413/01) § 183
[43] Artt. 575(5) and 575(6) of Chap. 9
[44] ECHR **13.7.1995** in the case ***Van der Tang vs Spain*** (Applic. No. 19382/92) §§ 63, 67 and 76

complains that those Courts gave short shrift to his requests and merely relied on “normal staple fare in local judgements on human rights”. This criticism is not borne out by the documents this Court has before it. The decrees – particularly that pronounced by the Magistrates’ Court on December 17th, 2009 – suggest that the hearing of applicant’s case was accompanied by “lengthy submissions” and the reasoning behind the denial for the request for bail was founded on a number of considerations which, as far as this Court could ascertain, fall within the parameters of relevant and sufficient considerations;

“That being the case, this Court has to determine whether the competent authorities have displayed ‘special diligence’ in the conduct of the proceedings. In this regard, applicant complains about the fact that as regards his status under article 401 of the Criminal Code, he is not accorded any special treatment in relation to an accused person who has been granted bail. In this regard, the Court agrees with respondent’s submissions to rebut the applicant’s argument and adopts them as representing a correct appraisal of the situation at law. Furthermore, it has not been shown that the proceedings applicable to applicant have stalled or have not been carried out in an expeditious manner as warrants a charge of that nature. Certainly, those Courts of criminal competence which dealt with applicant’s requests for bail were in a much better position to appraise the situation, particularly to establish the lack of progress or otherwise of the inquiry stage, than this Court might endeavour to be at this juncture;

“That in view of these considerations and the facts emerging from the records, the Court is unable to reach the conclusion that the continued detention of applicant is unreasonable or unlawful and consequently does not find a breach of his fundamental right as safeguarded under article 5(3) of the Convention, at least at this present juncture;

"That consequently, and in view of the fact that this Court has arrived at the conclusion that applicant's continued detention is not in breach of the law, there is no further need to examine whether such detention is in violation of the provisions of article 5(4) of the said Convention;

"That this Court must address the applicant's other complaint of discriminatory treatment. Applicant founds this claim in terms of article 14 of the Convention in conjunction with article 5. It must be stated that the fact that no apparent breach of the right guaranteed under article 5 has been detected in the case of applicant does not preclude the Court from examining the validity or otherwise of his claim under article 14[45]. Applicant compares his predicament to the more favourable treatment – to wit, the granting of bail – accorded to another person accused of the same offence, namely Scotsman Scott Dixon;

"That for the purpose of the current exercise, it is sufficient that this Court reiterates that in order to ascertain whether a person has been discriminated against in breach of article 14 of the Convention, it has to be satisfied that there was a difference in the way different persons have been treated in any of the rights upheld under the Convention, that this difference in treatment was meted out in analogous situations, that this difference in treatment was geared towards the attainment of a legitimate aim, and that there was a degree of proportionality between the treatment accorded and the desired aim[46];

"That the Strasbourg Court has also defined treatment to be discriminatory for the purpose of article 14 of the Convention "*if it has 'no objective and reasonable justification'. In other words, the notion of discrimination includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not*

[45] Harris, O'Boyle & Warbrick *Law of the European Convention on Human Rights* (1995), pp. 465 – 6
[46] P.A. (Kost) GCD **15.2.2006** in the case ***Joseph Grech et vs Il-Ministru Responsabbli mill-Familja u s-Solidarjeta' Soċjali et*** (confirmed by the Constitutional Court on **9.2.2007**)

*called for by the Convention. Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background, but the final decision as to observance of the Convention's requirements rests with the Court*"[47];

"That there is no contestation regarding the fact that Mr Dixon has been charged with similar offences arising out of the very circumstances about which the applicant himself has been charged. Nor is there contestation between the parties about whether Mr Dixon has actually been granted bail. The point of divergence between the parties lies in whether the situations applicable to applicant and to Mr Dixon were indeed identical or analogous. "The evidence tendered before this Court[48] reveals that there were at least eight circumstances which differed between the two persons. Some of those circumstances are substantial enough to render comparisons between those persons well nigh pointless. Applicant has barely contested those findings (except to challenge whether Mr Dixon has actually retained gainful employment in Malta);

"That furthermore, it cannot be said that applicant's continued detention lacks a legitimate aim. This aim has been spelled out in the various Court decrees which ruled on his applications for release under bail. This Court strongly believes that if those reasons were relevant and sufficient enough to sustain the lawfulness of applicant's continued detention, they are more than adequate to

[47] ECHR **12.2.2008** in the case ***Kafkaris vs Cyprus*** (Applic. No. 21906/04) § 161
[48] Police Inspector Pierre Grech 25.5.2010, at pp. 52 – 4 of the records

answer the question of whether that ostensibly different treatment pursues a legitimate aim;

"That, principally for these reasons, the Court finds that it has not been satisfactorily shown that applicant has suffered a breach of his rights under article 14 of the Convention;

"For the above-mentioned reasons, the Court hereby declares and decides:

**"To dismiss the Application** on the grounds above-mentioned, with costs against applicant, but entirely without prejudice to any remedy which applicant would be entitled to request at the proper time and if the need arises."

**The Appeal**

2. By means of his appeal, appellant Kolakovic "humbly prays that this Honourable Court, in as far as is necessary confirms the rejection of the plea that the first Court should refrain from exercising its jurisdiction, and revokes it as to the remainder, by allowing this appeal, decides to uphold the complaints of the appellant with costs of both instances."

Appellant then goes on to specify three aggravations.

**The First Aggravation**

3. In essence, appellant is firstly aggrieved by the fact that while the Court of First Instance rightly concluded that the plea raised by him (i.e. appellant) that the Court should decline from exercising jurisdiction, such a decision was "in contradiction to the final conclusion". Appellant submits that the first Court had "made it clear that it was rejecting any argument about the fear of absconding. This naturally comprises the 'fear' of not appearing for the trial." Appellant further submits that;

"The Court without relying on substantial evidence brought by the prosecution before the Courts examining bail, reached the gratuitous conclusion that the other courts had good and sufficient reasons to justify the continued detention. At least, it should have said the question of 'fear of absconding' could not be relied on, consistently with what it held".

In a particular paragraph of the judgment, appellant then refers extensively to a recent judgment of the European Court delivered on 14th September 2009 in the names of **Makarov v. Russia**.

In this regard, appellant submits that there is a burden of proof on the prosecution, which it must discharge, even in the case of bail applications. 'Fear' is not enough to refuse bail.

**The Second Aggravation Concerning Discrimination**

4. Considering the general principles laid by the first Court in its judgment about the 'fear of absconding', there is no valid argument to support the decision that the treatment was not discriminatory vis-à-vis the appellant. Appellant asks: How is it that the same Court presided by the same Magistrate, grants release from custody to a foreigner who could go to Australia or the United States, without the need of a visa and in the same proceedings, this right is denied to a foreigner holding a similar passport? Appellant is being treated in a different manner and "paying a price" for entering a non-guilty plea.

**The Third Aggravation on Due Diligence**

5. The manner in which proceedings were conducted were incorrect. A person held under arrest, during the compilation of evidence, should not be dealt with "as if he was on bail and on the same time schedule."

That part of the judgment referring to "other remedies" that appellant could resort to, defies comprehension, he submits.

The need for a proper remedy already exists and the more time passes, appellant's aggravation increases.

**The Fourth Aggravation: The Power of the Court**

6. Article 5(4) of the Convention makes it incumbent on a Court before which a detainee takes his case on "illegality of his arrest or detention" to order his release, if it results that the arrest is illegal in terms of the Convention. This is a specific remedy laid down in the Convention itself.

**The Reply by the Attorney General to the Appeal Application**

7. The Attorney General replied that the conclusions reached by the first Court are just and correct and the judgment merits confirmation.

With regard the "facts of the case" as submitted by appellant, no additional points should be made arising out of "new facts" not resulting from the acts of the proceedings.

**Regarding the First Aggravation**

8. There are no contradictions in the judgment under appeal. The first Court's motivations and conclusion are sound and correct. It is important to point out that under Art. 5 of the Convention the right to liberty is not absolute in that a state can detain a person in the public interest. Also, Art. 5(3) must be read together with Article 5(1)(c).

**Regarding Alleged Discrimination**

9. Compared to the other co-accused, appellant's personal circumstances are in fact different and no proof to the contrary has been provided by him. The personal circumstances of Mr. Scott Dixon, a co-accused, are different from his and reference is here made to the acts of the proceedings.

When one speaks of discrimination one must compare like with like.

**On the Issue of Due Diligence**

10. On this point, respondent refers the Court to the note of submissions filed by him before the first Court.

In any case, the allegations made by appellant under this aggravation are as yet “untimely”, respondent submits.

**On Appellant’s Request to be Released on Bail**

11. According to respondent, appellant’s submissions on this point are “totally unfounded”.

Appellant has not and is not suffering a breach of his fundamental human rights.

In any case, respondent submits that “it should not be this Court to order his release on bail”. This function falls within the competence of the Criminal Court and not the Constitutional Court.
Appellant’s appeal should thus be rejected with all costs.

**The Considerations of this Court**

12. In his application, appellant Jovica Kolakovic is alleging a violation of his fundamental human rights as enshrined in Article 5(3), and Article 14 in conjunction with afore-mentioned Article 5(3) of the European Convention on Human Rights. For these reasons, appellant is requesting his immediate release from detention on remand on the basis of Article 5(4) of the Convention as well as to be granted due redress and compensation for the alleged violations so committed by the respondent.

13. It is opportune for the Court, at this stage, to refer, in brief, to the facts surrounding this case as these arise from the records of the proceedings.

It results that upon arrival at Malta in early September 2009 appellant was arrested by the local police on suspicion of being involved in drug-trafficking and related offences. Applicant was duly arraigned before the Magistrates' Court on 10th September 2009, together with another two persons who were also charged with taking part in the same alleged offences.

From the evidence so far produced in Court, it results that the appellant is an ethnic Serbian but holds British nationality. He has been a regular resident in the United Kingdom for the last twenty-eight (28) years. He is moreover married to a British national and the couple has four children. The children are currently pursuing studies in the United Kingdom. Applicant and his wife run a family concern in the manufacturing sector. Appellant's other immediate family members still reside in Serbia, his country of origin, and he visits them from time to time.

On arraignment, Mr. Kolakovic requested bail, but his request was denied and he was remanded in custody. The other two co-accused – a Maltese national and a Lithuanian – also asked for bail and their request was acceded to under a number of conditions. Furthermore, a Scotsman by the name of Scott Dixon, also suspected of being involved in the same alleged offences, was extradited to Malta but has since been also granted bail. Following repeated requests for bail, in October 2009 in January 2010, February 2010 and once again on March 1st 2010, all of these requests were turned down by the competent Court. In all of these instances respondent Attorney General opposed the request made by applicant.

During the previous Court sitting, counsel for appellant stated that a fresh application requesting bail is pending before the competent Court and that a lease agreement is being finalised whereby appellant will be renting a local apartment under his name, thereby establishing some link with Malta.

On 25th March 2010 Mr. Kolakovic filed a Constitutional case which has led to the present appeal proceedings by

Mr. Kolakovic. By means of a note dated 18th January 2011, appellant informed this Court that bail was granted to him on a number of conditions by way of a guarantee. This note *inter alia* includes the following:

"For the record also, appellant is still under preventive arrest, since he does not afford to deposit the sum of €50,000 as ordered by the Court of Magistrates'."

14. Appellant is once more calling into question the legality of his continued detention, in connection with serious criminal charges that he is being accused of, as a result of the Magistrates' Courts refusal to grant him release on bail in spite of numerous requests to that effect as well as the other co-accused, on similar charges, have been granted bail. Appellant is alleging a breach of Article 5(3) of the Convention which provides as follows:

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

Paragraph (c), to which specific reference is found in Article 5(3), in turn provides as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty same in the following cases and in accordance with a procedure prescribed by law…

"(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

15. There is no shadow of doubt that the Court of First Instance, in its judgment, took into consideration all the various aspects that come into play whenever Article 5(3) of the Convention is involved, as is the case under review. The final assessment of the Court of First Instance, however, was not favourable to appellant in that it held:

"That in view of these considerations and the facts emerging from the records, the court is unable to reach the conclusion that the continued detention of applicant is unreasonable or unlawful and consequently does not find a breach of his fundamental right as safeguarded under Article 5(3) of the Convention, at least at this present juncture"

(Added emphasis by this Court)

16. Upon a careful examination of the judgment under appeal, it is quite evident that although the majority of the first Court's observations are well-argued and sound, the element known as "the passage of time" was also underlined by the phrase "at this juncture". It results that appellant was arraigned in Court on 10th September 2009, and the judgment delivered by the First Hall, Civil Court, was delivered on 12th August 2010, that is, after a period of eleven (11) months. Since that time, another six (6) months have elapsed and appellant's position with regard to his detention had until bail was finally granted remained unchanged. In particular, this Court notes the following part of the judgment under appeal where the first Court stated:

"That although all the above-mentioned considerations could justify a relatively longer period of pre-trial detention, however, they do not give the authorities unlimited power to extend this preventive measure. Firstly, with the passage of time, the initial grounds for pre-trial detention become less and less relevant and the domestic courts should rely on other 'relevant' and 'sufficient' grounds to justify the deprivation of liberty (vide also **Labita v. Italy**, ECHR 6th April 2000). Secondly, even if due to the particular circumstances of the case,

detention is extended beyond the period generally accepted under the Court's care, particularly strong reasons would be required to justify this (for instance, grave acts of terrorism on wide-spread carnage, vide **Chraidi v. Germany**, ECHR 26th October 2006)."

Moreover, as rightly pointed out in the Makarov Case (ECHR 14th September 2009) a pre-trial detention of this length – seemingly at a standstill – is a matter of concern for the Court. This Court is fully aware of the gravity of the charges against the accused, but this Court, as well as the Court in Strasbourg, has repeatedly stressed that the gravity of the charges cannot by itself serve to justify long periods of detention (vide **Panchenko v. Russia**, ECHR 8th February 2005, **Goral v. Poland**, ECHR 30th October 2003, among others). This is more so considering that the other co-accused facing similar charges have been granted bail.

17. Now, although it is true, as respondent has submitted, that appellant's position vis-à-vis the other co-accused is different from the point of view of the lack of providing a sufficient guarantee against the possibility of absconding, on account of the fact that his links with Malta are far more tenuous, yet at the same time, as the first Court, once again rightly pointed out,

"Care must, however, be had not to impose on any applicant for release on bail the burden of having to establish the grounds for his release, as this would be tantamount to overturning the purpose of Article 5(3) which makes detention an exceptional departure from the right to liberty (vide **Iljikov v. Bulgaria**, ECHR 26th July 2001).

18. This Court, as was indeed likewise affirmed by the Court of First Instance in its judgment, is not satisfied that, in the application of the guarantees accorded under Article 5(3) of the Convention,

"the hypothetical possibility put forward by respondent is sufficient to overwhelm the right of applicant to freedom under sufficient guarantees pending eventual trial."

As regards measures that can be adopted by local authorities, in the eventuality that bail be accorded to appellant, this Court is once again in full agreement with the first Court wherein it held that,

"At this juncture this Court, whilst not oblivious to the reality emerging in some spectacular cases in the past, feels that it ought to subscribe to the view held recently by the Strasbourg Court to the effect that it is hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have at their disposal measures other than the applicant's protracted detention."

(vide **Louled Massoud v. Malta**, ECHR 27th July 2010). Nor should the authorities' inability to adequately monitor movements into and out of Malta be shifted as a burden of denial of release from detention on a person accused of an offence, particularly if such a person is of foreign nationality.

(Underlined emphasis by this Court).

19. For the above-mentioned reasons, as well as taking also into account that since judgment under appeal was delivered until today, a number of months have gone by and appellant was still, until very recently, being detained by the police. Considering, moreover, that it does not seem likely that any substantial changes to this *status quo* is envisaged, save for a possible lease agreement to be concluded on appellant's part conferring a local place of abode to him, should bail be granted, and that no other developments are envisaged from respondent's present position, it would therefore appear that more months of detention would have inevitably gone by, thereby aggravating further appellant's position. This Court is therefore of the opinion that there is now sufficient and

reasonable cause to depart from the previous position held by the Court of First Instance and hold that the continued detention of appellant and the Magistrates' Court's previous refusal from bail indeed constitutes a breach of his fundamental rights as proclaimed and safeguarded under Article 5(3) of the Convention.

This Court thus holds that the first aggravation lodged by appellant on the basis of Article 5(3) of the Convention is justified and is being upheld.

20. It is procedurally opportune to consider at this stage whether the fourth aggravation as based on Article 5(4) is justified or otherwise. Appellant criticised the Court of First Instance in respect of Article 5(4) on the ground that he failed to understand what the Court meant by implying that it "could not usurp the functions of the Criminal Courts". He argues that Art. 46 of the Constitution "gives it wide ranging powers, and without any restrictions." He therefore submits that if the arrest is illegal, then the effective remedy would be for the Constitutional Court to order his release.

Respondent's reply on this point is principally based on the assumption that appellant's detention was not in breach of the Convention.

21. This Court has already decided that such a detention was indeed in breach of appellant's fundamental rights in terms of Article 5(3), and that bail has since been granted to appellant and, therefore, the question as to whether this Court was empowered to order appellant's release from preventive custody or not by way of a remedy has now been superseded by events. Nevertheless, this Court notes that strictly speaking the Court of First Instance did not pronounce itself on the matter for the simple reason that it had already concluded that appellant was not suffering from any violation of his fundamental rights and therefore it follows that there was no remedy to be granted to him forthwith. The position is now clearly a different one because of the breach found

by this Court concerning appellant's fundamental right to liberty. Art. 5(4) of the Convention states as follows:

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

A careful reading of this article, subsection 4, makes it abundantly clear that once the Court had found that the detention of appellant is unlawful, it can order his release on bail. As far as the imposition of conditions for the granding of bail is concerned, this Court is even empowered, should it deem it proper and in the interests of justice, to establish these conditions itself as well. This issue has already been decided by this Court in the case **Richard Grech v. Avukat Generali** of the 28th May 2010, where it was held that contrary to what had been decided in re: **Mario Pollacco v. Kummissarju tal-Pulizija** (6th October 1999, Constitutional Court) where the Criminal Court had already deliberated and decided the conditions of bail, in the Grech case it held that;

*"Kuntrarjament ghal dak il-kaz, fil-kaz odjern, il-Qorti Kriminali ghadha ma ppronunzjatx ruhha dwar it-talba tar-rikorrent wara d-decizjoni tal-ewwel Qorti. Ghalhekk, u biex ma jigux introdotti proceduri godda ghall-intendiment tal-liberta` provvizorja minn Qorti, li ghalkemm kompetenti, m'hiex il-forum l-aktar adatt biex tikkunsidra talba simili, sejra tipprovdi mod iehor minn kif iddecidiet l-ewwel Qorti."*

This Court, while declaring appellant's aggravation concerning a breach of Article 5(4) of the Convention, further decides that there is now no need for it to order that bail be granted to appellant since this has already happened as above mentioned.

22. Despite the fact that this Court has already found violation of Art. 5(3) of the European Convention on the part of respondent in so far as concerns the continued

detention of appellant, this Court deems it proper to consider also appellant's other two grievances concerning alleged discrimination to his detriment as well as the alleged lack of due diligence on the Criminal Courts' part in connection with the Criminal proceedings. Such consideration into the validity, or otherwise, of these two grievances is also necessary on account of the fact that, by way of redress, apart from the granting of bail, appellant is also seeking compensation and payment of all the relative costs of these proceedings.

23. With regard to the aggravation alleging discrimination in terms of Article 14 taken in conjunction with Article 5(3) of the Convention, this Court firmly believes that appellant's factual and legal submissions are unfounded. To begin with, the Court notes that in his "summary of the facts of the cases", appellant chooses to refer to facts and circumstances which do not entirely result from the Court proceedings, whereas the appellant should know that the guiding rule here is that *"quod non est in acti non est in mundo".* Where this otherwise, one would be inviting a state of uncertainty and speculation which might well end up in chaos.

Appellant puts forward the argument that he is being discriminated against, amongst others, on account of the fact that he is of Serbian origin. He argues that the other co-accused, especially with respect to co-accused Scott Dixon, who is from Scotland, had their requests for bail granted, although for example the said Mr. Dixon has been charged with similar offences arising out of the very circumstances about which the appellant himself has been charged. Why was appellant treated differently from the other co-accused, defendant asks, once the surrounding circumstances are similar?

24. The grievances raised by appellant are not any different from those issues that were raised for the consideration of the first Court and which in this Court's considered opinion, there is absolutely nothing to reproach or vary from what has been decided. As rightly pointed out by the first Court,

"The point of divergence between the parties lies in whether the situations applicable to applicant and to Mr. Dixon were indeed identical or analgous. The evidence before this Court reveals that there were at least eight circumstances which differed between the two persons. Some of these circumstances are substantial enough to render comparisons between those persons well-nigh pointless. Appellant has barely contested those findings (except to challenge whether Mr. Dixon has actually retained gainful employment in Malta)."

It is unnecessary to repeat here the various differentiating circumstances pertaining to the appellant from those of the other co-accused. Reference to the testimony delivered by Police Inspector Pierre Grech is enough to militate against accepting appellant's claim alleging discrimination.

For above reasons, this aggravation regarding discrimination is being declared unfounded in fact and in law.

**The Aggravation concerning due Diligence**

25. Appellant further submits that a person who is under arrest should not be dealt with in the same manner as if he was out on bail. In this respect, the argument put forward by the first Court that his detention was within the legal time limits set up in the Criminal Code "does not of itself absolve the state from exercising special diligence in the case of detained persons."

Now apart from the fact that appellant's arguments on this issue fall rather short of a clearly brought out aggravation, the fact remains that appellant has failed to show that the Criminal Court (in this instance the Magistrates' Court) acted in an improper manner in his case from a purely procedural stand-point. Indeed, a careful examination of the acts of the proceedings from the initial stage forward show otherwise.

For these reasons, this aggravation concerning lack of due diligence is being declared unfounded and consequently rejected.

**Decide**

For the above reasons, this Court decided as follows:

(1) It upholds the appeal *in parte*, thereby reforming the judgment of the Civil Court, First Hall, by revoking that part of the judgment which held that there was no breach under Article 5(3) and 5(4) of the Convention, and declares instead that appellant's continued detention was in violation of the said Article 5, subsections (3) and (4) of the Convention;

(2) it confirms the rest of the judgment of the Court of First Instance be rejecting all the other aggravations in so far as they are based and refer to Articles 5(1) and 14 of the Convention;

(3) it takes note of the Magistrates' Court decree granting bail to appellant under a number of conditions as pointed out by the appellant himself;

(4) it awards appellant the sum of one thousand Euros (€1,000) under Article 41 (just satisfaction) of the Convention in respect of non-pecuniary damage in connection with the violation of Article 5(3) and (4);

(5) finally, it orders that the acts of the proceedings and a copy of this judgment be transmitted to the Magistrates' Court for it to proceed with the hearing of the case according to law.

Court expenses are to be borne out equally by parties involved.

**< Sentenza Finali >**

----------TMIEM----------