MALTA

QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
MARK CHETCUTI

Seduta tas-16 ta' Jannar, 2012

Rikors Numru. 50/2011

Jovica Kolakovic
vs
Attorney General

The Court,

Having seen the application filed by Jovica Kolakovic of the 12 August 2011 which states as follows:

That on the 14th February 2011 the Constitutional Court in the proceedings Jovica Kolakovic v. Avukat Generali [appell civili numru 26/2010/1] found that applicant's continued detention was in violation of Article 5(3) and (4) of the Convention and awarded applicant Kolakovic the sum of one thousand Euros;

It has to be pointed out that to date respondent has yet to effect payment to applicant for the sum aforementioned!

a. First violation.
The above necessarily spurs antagonism towards the prosecution and further physical and psychological inhuman distress to applicant. This is further augmented especially when upon a review of the acts of the proceedings currently pending before the Court of Magistrates (Malta) as a Court of Criminal Inquiry, no police officer claims nor declares that he or she arrested applicant and thus neither does any police officer upon applicant's "apprehension" declare that they cautioned him nor that they informed him in detail of the nature of the charges to be brought against and the consequences of same, on what and whose order such an arrest was effected nor in connection to what was he stopped[1].

Applicant humbly contends that the above is not only in breach of article 355AC of the Criminal Code but also in direct breach of articles 3 and 5(2) of the Convention.

b. Second Violation
It has to be noted that unfortunately, applicant was also denied access to a lawyer during the time he spent at police headquarters and that his first contact with a lawyer[2] was upon arraignment at Court. The ECHR has held that "the denial to the applicant of access to his solicitor during the first twenty-four hours of detention failed to comply with the requirements of Article 6 § 3 (c) of the Convention"[3].

In terms of equality of arms, it is "primarily to place the accused in a position to put his case in such a way that he is not at a disadvantage vis-à-vis the prosecution"[4].

[1] The prosecution has repeatedly claimed that it has brought forward all of its witnesses and it would be certainly surprising should after the filing of this application a police officer or more be brought forward to contradict the statement made herein! From this instant applicant reserves his rights at law to counter such "evidence" if brought forward by the prosecution.
[2] Naturally applicant being a foreigner knew no lawyer in Malta and was assited by a legal aid lawyer who did not discuss with applicant this case but only assisted him during the initial arraignment under arrest.
[3] Vide *Averill v. The United Kingdom*, application no. 36408/97 decided on the 06.06.00
[4] *X v. FRG* No. 10098/82, 8 EHRR 225 (1984)

The question to be asked at this stage in light of the jurisprudence of the European Court of Human rights, is such that, in light of the entirety of the proceedings, has applicant suffered and been deprived of a fair hearing[5]? Applicant without any shadow of a doubt answers in the affirmative. Not only was he denied access to a lawyer prior to being interviewed by the police, but furthermore, without having access to such a lawyer, precious time was lost to preserve evidence that would have demonstrated his innocence from the very beginning. Having been denied such a right, the damage that applicant has received is such that in no manner can he bring back such evidence nor can the principle of equality of arms be respected.

The prejudice suffered by applicant for not having had access to a lawyer during the first forty-eight hours of investigation has lead to a situation which is further elaborated upon in the third violation hereunder.

Applicant humbly contends that the above is in direct breach of article 6(3)(c) of the Convention.

It has to be pointed out that a declaration of this Court that applicant's rights were prejudiced, is not sufficient to counter-balance the damage suffered by applicant. This is being said since in light of the maximum punishment that applicant is currently facing, the Criminal Code stipulates that his case has to be heard by a trial by jury. Thus his case will be decided by people untrained in the legal spheres who on the basis of probability will not give due weight to such a declaration, even if so directed by the presiding judge.

c. Third Violation

The Executive Police, who is responsible for the prosecution of criminal cases in front of the Court of Magistrates, in terms of article 346(1) of the Criminal Code is obliged "to collect evidence, whether against or in

[5] Vide *Murray (John) v. United Kingdom*, 1996-I; 22 EHRR 29 para 63 GC

favour of the person suspected of having committed that offence …";

As the records of the acts of the proceedings demonstrate, applicant had on several occasions requested that certain telephonic data be obtained from the United Kingdom, which data is necessary for his defence. Applicant through his defence counsel always stressed the point that such a request has to be dealt with expeditiously since United Kingdom law on data retention stipulates a maximum obligatory period for telephony providers of one calendar year.
After several attempts by defence counsel and after several interventions by the representative of the Attorney General, and after the filing of the letters rogatory eventually said letters were submitted! Precious time was lost to the detriment of applicant[6]. Time lost which could have been easily been utilized properly had the police abided by article 346 of the Criminal Code, and in a timely and proper manner requested such evidence themselves[7].

Applicant humbly contends that the above is not only in breach of article 346 of the Criminal Code but also in direct breach of article 6 of the Convention.

d. Fourth Violation
Prior to the decision of the Constitutional Court referred to supra, applicant had applied[8] yet again to the Magistrates Court (Malta) as a Court of Criminal Inquiry [per Mag. M. Hayman] for the granting of bail, which application was upheld by the Court and granted applicant bail with a bail bond of Euro50,000[9], amongst other conditions;

It has to be noted at the outset that the Court of Magistrates (Malta) as a Court of Criminal Inquiry, granted applicant bail only four months prior to the maximum

[6] Applicant shall be producing evidence to quantify the time lost during the hearing of this complaint
[7] It has to be highlighted that in drug related offences, mostly when foreigners are concerned, and on a very regular basis if not always when Maltese nationals are involved, such evidence is requested for by the police themselves.
[8] Vide Dok. A – application by applicant dated 17th December 2010
[9] Vide Dok. B – decree dated 18th January 2011

period of preventive arrest, as per article 575(6) of the Criminal Code, lapsed[10].

Further to the first decree of the Court of Magistrates (Malta) as a Court of Criminal Inquiry, applicant applied[11] for a reduction in the amount of bail deposit to be placed since applicant could not place such an amount. Further to aforementioned application, the bail deposit was reduced from Euro 50,000 to Euro 40,000[12] whilst increasing the personal guarantee from Euro 15,000 [as per condition 9 of the decree dated 18.01.11] to Euro 60,000!

This second decree in itself is tantamount to a violation of applicant's rights under the Convention since in case of forfeiture of the bail bond and personal guarantee, applicant would have been obliged to pay or serve in jail the total sum of Euro 65,000, whilst as a result of the second decree [Dok. D] applicant would have to pay or serve in jail the total sum of Euro 100,000 – an increase of Euro 35,000;

Applicant could not meet and place a bail bond of Euro 40,000 either and asked for a further reduction and by means of a further decree, the Court of Magistrates (Malta) as a Court of Criminal Inquiry further reduced the bail bond to be placed to Euro 15,000. The Court left unaltered the amount of personal guarantee as at Euro 60,000 and ordered a further third party surety for the amount of Euro 30,000[13].

Thus in case of forfeiture, applicant would now have to pay or serve the sum of Euro 105,000 – an increase of a further Euro 5,000 from the last decree[14]! Thus in case of a breach of bail conditions, applicant would have to serve

[10] Applicant was detained since the 10th September 2009 and bail was granted on the 18th January 2011 – thus the period of preventive arrest served by applicant at that point in time was of circa 16 months

[11] Vide Dok. C – application filed by applicant on the 18th February 2011

[12] Vide Dok. D – decree dated 22nd February 2011

[13] Vide Dok. E – decree dated 4th May 2011

[14] It has to be pointed out also that the co-accused, Tomas Mikalauskas, in these proceedings that has had the same conditions imposed upon him, for him to be released from CCF had to place as an effective bail bond the sum of Euro 30,000 rather than Euro 15,000!!! Confusion worse confounded.

24 years and a half[15] of imprisonment – this is tantamount to the maximum punishment that applicant is facing should he be found guilty[16].

It has to be noted that "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"[17]. Other alleged accomplices both Maltese and Foreign, who are being charged with their involvement of the same substance but in larger quantities have been granted bail with bail bonds much lighter than applicant and immediately!

Irrespective of the amount of bail bond to be placed under all previously mentioned decrees, applicant brought forward evidence before the Court of Magistrates (Malta) as a Court of Criminal Inquiry, in that, he cannot meet such a bail bond since, his wife can no longer work due to her serious health issues, the business had to be closed down since applicant is still being held under preventive arrest, the family savings are being utilised to pay the mortgage on their house and also to cover the family's living costs[18] (literally being used for a rainy season rather than day), and naturally also to meet the financial expenses of applicant and the continued rent being paid for an apartment whereat applicant shall reside upon being released from CCF – which apartment has to date not been utilised by applicant for obvious reasons.

Although evidence was to the effect mentioned supra, the Court of Magistrates issued a decree claiming that since the business "was sold" (sic!) the bail deposit was not to be reduced! Evidence through applicant's wife Kay Kolakovic, stated in very clear terms that the business had to be closed down[19].

[15] €105,000 ÷ €11.65 [i.e. the rate at which fines are converted into imprisonment daily] ÷365 [the number of days in a calendar year]
[16] On this point it is worth noting the judgement delivered by the ECHR on application 28221/08 delivered on the 27.07.10 in the names of *Gatt v. Malta*
[17] Theory and Practice of the ECHR, van Dijk, van Hoof and van Rijn Zwaak, 4th Ed., 2006, page 497

[18] which family is composed of applicant, his wife and their four children.
[19] Vide Dok. F – decree dated 22nd July 2011

It has been repeatedly affirmed by both the Constitutional Court[20] and also by the European Court of Human rights that the bail bond has to be such that an individual can meet such a condition.

Applicant humbly submits for recollection purposes that applicant has now been under arrest since the 10th September 2009 thus he has been so held for over 22 months[21];

The current state of affairs clearly brings about a situation wherein the judgement of the Constitutional Court of the 14th February 2011 is rendered ineffective in so far as the contested decrees delivered by the Court of Magistrates, although prima facie through the granting of bail honours said judgement, created an impossibility on the part of applicant to honour said conditions, with the end result being the same – i.e. effective imprisonment.

Considering that the prosecuting officer has repeatedly affirmed that there is no further evidence to be brought forward in this case;

Considering also that the proceedings before the Magistrates Court (Malta) as a Court of Criminal Inquiry are only awaiting the results of a letter rogatory filed by applicant;

Applicant asks whether the reasons for his continued detention are relevant and sufficient[22] (and this especially in light of the fact that the Constitutional Court has already found a breach of applicant's human rights)?

Applicant humbly submits that all of the above is in direct breach not only of article 575(6) of the Criminal Code but is also in direct breach of article 5(3) of the Convention.

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[20] *Richard Grech v. Avukat Generali* decided by the Constitutional Court on the 28.05.10 appeal 32/2009/1

[21] When the maximum period of preventive arrest in terms of article 575(6) of the Criminal Code is 20 months

[22] Vide *Wemhoff v. FRG* A 7 (1968); 1 EHRR, Letellier v. France A 207 (1991); 14 EHRR; Neumeister v. Austria A 8 (1968)

It must be clarified that since the Court of Magistrates (Malta) as a Court of Criminal Inquiry had upheld a request made by applicant for the transmission of letters rogatory in accordance with article 399 of the Criminal Code, to the United Kingdom, the terms at law for the conclusion of the inquiry, were suspended according to article 402(1)(c) of the Criminal Code and thus no "appeal" on the aforementioned decrees could be filed in front of the Criminal Court.

e. Fifth Violation
As a result of applicant's continued detention, applicant's dental health ended in a piteous state. Such a state of affairs is uniquely due to lack of access to proper dental care, inadequate medical services offered by government. Applicant contends that had he been granted bail, according to law, such a state of affairs would not have occurred and he would not have suffered such inhuman treatment. It has to be clarified at the outset that as a result of the denial to dental care, applicant's porcelain bridge became loose and eventually broke, with applicant having serious difficulties in eating normally for a period of circa 12 months. To further compound matters, the numerous decrees issued by the Court of Magistrates instructing the powers that be, to grant applicant recourse to dental care expeditiously were to no avail.

Applicant humbly contends that the above is in direct breach of article 3 of the Convention.

Request
Now therefore, applicant humbly requests this Honourable Court to declare that applicant's rights in terms of articles 3, 5(2), 5(3) as read in conjunction with article 14, 6(1), and 6(3) of the Convention were violated, and consequently:

a. In the eventuality that the first and/or second and/or third violation be upheld, to order that the proceedings against applicant be stayed or that the Attorney General respondent be ordered to issue a nolle prosequi or any

other due redress which can compensate for such a violation; and

b. In the eventuality that the fourth violation be upheld to order applicant's immediate release from preventive arrest and award applicant compensation for the violations suffered; and

c. In the eventuality that the fifth violation be upheld to award applicant compensation for the violation suffered.

Having seen the reply filed by the Attorney General which states as follows:

As a preliminary plea, although respondent has no objection to the said proceedings being conducted in the English language and is in fact submitting this reply in English for practical reasons, the formalities set out by virtue of Chapter 189 of the Laws of Malta should first be adhered to prior to the continuation of the proceedings in this case.

That subordinately and without prejudice to the above, in merit, applicant's allegations of breach of his fundamental human rights under several provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms are all unfounded in fact and in law for the following reasons:

a. Regarding the first alleged breach: Articles 3 and 5(2) of the above mentioned Convention

In this respect respondent rebuts applicant's allegations by confirming that in full compliance with Article 355AC of the Criminal Code the Police lawfully arrested applicant Joviac Kolakovic and informed him that he was under arrest.[23]

[23] Vide evidence of PS 1174 Adrian Sciberras at fol 140 of the acts of the criminal proceedings

That moreover at the time of his arrest applicant was duly cautioned and informed in a language that he could understand of the reasons of his arrest. He was also cautioned again during the interviews in the investigation. The caution given during these interviews is even recorded in Kolakovic's two statements.

That subordinately and without prejudice to the above, even if during applicant's pending proceedings before the Court of Magistrates (Malta) as a Court of Criminal Inquiry, the Police, in giving evidence, did not 'formally specify' every detail mentioned above, it certainly does not mean that in reality they had not done their duty according to law.

That therefore in the light of the above there is no breach of article 5(2) and also by no stretch of the imagination can it result to this Honourable Court that applicant was in any way "subjected to torture or to inhuman or degrading treatment" in terms of article 3 of the European Convention.

b. Regarding the second alleged breach: Article 6(3)(c) of the European Convention

Respondent rebuts from the outset that the applicant was arrested and questioned prior to the introduction of the relevant amendments to the Criminal Code in February 2010. Therefore Kolakovic's statements were taken in strict compliance with the laws prevailing at that time.

That moreover, even in the light of recent related case law both in Malta and in the European Court of Human Rights, it is to be reiterated that one of the most important principles that resulted therein was that NO Court, at any time established as a universal principle that the absence of legal assistance during the first hours of detention and questioning is automatically tantamount to a breach of article 6(3) of the Convention.

Respondent moreover rebuts that in the case law referred to in the preceding paragraph the Courts analysed the

particular and individual circumstances of each case, and it was only after considering all the circumstances of that particular case that a decision was taken.

That keeping in mind the above principles, respondent rebuts that the particular circumstances of this case are very different from the case law that applicant referred to in his application and so there can be no breach of article 6(3) of the European Convention on Human Rights.

c. Regarding the third alleged breach: Article 6 of the European Convention

In the light of the fact that article 6 of the Convention is very wide and encompasses a multitude of rights in itself and considering that in his application applicant did not specify which part of article 6 is allegedly being breached in his regard, respondent can only assume in the context of his claims under the heading ‘third violation’, that he is referring to an alleged breach of article 6(1) specifically a delay of a fair hearing ‘within a reasonable time’.

Respondent immediately therefore reserves the right to reply further in the eventuality that applicant specifies any other part of article 6 that according to him is allegedly being breached.

That without prejudice to the above, with respect to the claims made by the applicant, respondent declares that the letters rogatory were in the first place requested by the defence counsel. Although the Police did not object, it is to be stressed that they never requested them, nor did they deem them necessary as evidence for the purpose of the proceedings before the Court of Magistrates. In fact article 346 of the Criminal Code puts a duty on the Police only to collect evidence and not to collect any piece of information that may exist that is ultimately irrelevant for the case in question.

Respondent further adds that during investigation Jovica Kolakovic himself did not give any information to the Police.

Thus in the light of the above, the applicant cannot now complain that precious time in the proceedings before the Court of Magistrates was wasted, because besides his lack of information to the Police, when he eventually made the request for letters rogatory, he did so in full knowledge that such procedure involving a foreign authority necessarily will take time.

And in any case, the time used to request and wait for the procedure of the letters rogatory to take its course, is still not too long to the extent that it can prejudice the applicant from having a fair hearing 'within a reasonable time' before the Court of Magistrates.

Therefore respondent cannot be found to have in any way breached article 6 of the European Convention.

d. Regarding the fourth alleged breach: Article 5(3) of the European Convention

With respect to this allegation respondent rebuts that when bail is granted, the amount of the security shall be fixed by the Courts within the limits established by law, regard being had to several factors namely the condition of the accused person, the nature and quality of the offence, and the term of the punishment to which it is liable.[24]

Respondent reiterates that the Court of Magistrates as a Court of Criminal Inquiry in this case abided by the terms of the law in granting bail, and especially in so far as the fixing of quantum of the security is concerned, the Court heard and evaluated all evidence brought before it to that effect.

In fact the said Court as the applicant himself admits, reduced the amount of bail imposed on Kolakovic more than once and considering that when compared to the original decree of bail set at €50,000 the applicant finally

[24] Article 576 of the Criminal Code

was accorded a mere €15,000 bail, there is little room for doubt that the Court was very generous with Kolakovic (keeping also in mind the nature and quality of the offence, and the term of the punishment to which it is liable).

The sum of €15,000 is certainly not a phenomenal sum at all especially in view of the fact that as resulted from the Acts of the case, the Kolakovics are certainly not a standard family and therefore their financial means can certainly afford the payment of the sum in question.

So there is more than a fair balance between the sum that the applicant has been ordered to fork out for bail on the one hand and the necessary guarantees needed to be given by Kolakovic on the other hand.

Respondent further rebuts that the personal surety of €60,000 and third party surety of €30,000 are liable to forfeiture ONLY in case of serious breach of bail conditions. Once the latter two sums are only a bond and not effectively paid there is no financial burden on the applicant.[25] Thus the applicant's mathematical exercise in this respect is a mere hypothetical expedition of figures and calculations, and should be discarded as such by this Court.

Therefore in the light of the above there is no breach of article 5(3) of the European Convention.

e. Regarding the fifth alleged breach: Article 3 of the European Convention

Respondents rebuts that as can be verified from the Acts of the case pending before the Court of Magistrates, there is ample evidence to prove that the Prison Authorities provided Kolakovic the necessary dental treatment by more than one dentist, so surely any deterioration of the dental health of applicant cannot be attributed to respondent.

[25] Unless applicant's assertions are implying that he already intends to breach the bail conditions!

Moreover despite the fact that this matter had no connection at all with the collection of evidence, the Court of Magistrates upon repeated requests made by the defence counsel, went all out of her way to delve into the dental treatment issues of the applicant.[26]

In the light of the above respondent asserts that applicant's allegations in connection with his dental issues are simply frivolous and vexatious and cannot remotely be considered to fall within the meaning of "torture" or "inhuman or degrading treatment" under article 3 of the European Convention and should be therefore discarded accordingly by this Honourable Court.

Respondent reserves the right to make further pleas.

That therefore in the light of the above respondent humbly requests this Honourable Court to dismiss all of applicant's allegations and claims, with costs against same applicant.

The Court

Having heard the parties and witnesses, taken cognisance of all documents filed in the records of the proceedings and following written submissions by the parties;

Having adjourned the case for judgement for the 30th January 2012.

Considered as follows

Applicant is alleging five violations to his fundamental human rights which shall be addressed separately. The case concerns the arrest of applicant by the Police on the 8th September 2009 outside a hotel in Bugibba. He was

[26] In this respect respondent adds that the Court hearings dedicated to deal with this issue are the major reason for the loss of precious time in this case and not the issue of the letters rogatory as applicant claimed in page 4 of his application!

arrested together with another person who is also undergoing criminal procedures filed against him.

First violation

Applicant claims that during the proceedings before the Court of Magistrates as a Court of Criminal Inquiry, no Police officer claimed or declared that applicant was arrested or that during applicant's apprehension he was informed of the reason for this apprehension or was cautioned or informed in detail of the nature of the charges to be brought against him. He claims that this is in breach of article 355AC of the Criminal Code and articles 3 and 5(2) of the Convention.

Article 355AC of the Criminal Code states that
355AC. (1) When a person is arrested, the arrest is not lawful unless the person arrested is informed that he is under arrest, even though the arrest may be obvious.
(2) The arrest is not lawful unless the person arrested is informed at the time of his arrest or detention, in a language that he understands, of the reasons for his arrest or detention:

Article 3 states that no one shall be subjected to inhuman or degrading treatment or punishment.

Article 5(2) states that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Applicant alleges in his evidence that he was in a car with a friend (a certain Mikalauskas who is also a co-accused) after having a drink in a bar of a hotel from where they had emerged. They were about to drive off when they were apprehended by the Police.

They were taken inside the hotel. He was put in a bathroom on an upper floor of the hotel opposite a hotel room which he knew his friend had rented. He heard them

speaking to his friend on the room but he could not hear what was said because the bathroom door was closed.

He was then taken to the Police station and interviewed by Police Inspector Pierre Grech twenty four hours later. He had not been informed he was under arrest but on apprehension he had been searched and divested of his passport and phones. Applicant goes so far as to say that he only saw the written charges brought against him a month prior to testifying before this Court (applicant testified on the 20th September 2011). On being questioned by the Court applicant stated the Police officers who apprehended them (there were at least six according to the applicant) were in plain clothes. They showed him a Police badge and a gun. He understood they were police officers. They searched him and took him inside the hotel. He could not remember if he said anything to the Police about what was happening. Whilst he was in the bathroom he was under the supervision of two policemen who did not address him. An hour later he was taken to the Police station in a Police vehicle, and put in a cell without being spoken to, where he remained for twenty four hours. Even when he was interrogated no reason was given to him for his arrest. Asked whether the circumstances leading to his arrest could have led him to understand he was being apprehended on suspicion of an offence, applicant claimed he realised he was being detained but not arrested and presumed the detention would be clarified by the Police Inspector or the Court. Applicant presumed he was being detained because of something in connection with his friend.

The Court notes that this evidence runs counter to the deposition of PS1174 Adrian Sciberras who testified during the Criminal Inquiry procedures and said that he had informed applicant he was under arrest but had not cautioned him. PS579 Antoine Micallef who was the other officer assisting PS579 Antoine Micallef in relation to applicant, stated he had searched applicant outside the hotel and had taken him in the hotel but had not cautioned him nor asked him any questions. The prosecuting officer Inspector Pierre Grech testified before this Court and

stated that he had gone to the hotel less than an hour after applicant had been apprehended and he spoke to him in the hotel in a small room opposite a hotel room where suspicious items had been found. He had cautioned applicant but had made no charges at that preliminary stage. He had accompanied applicant to Police headquarters in the same Police car. This evidence had not been given during the preliminary inquiry but the witness stated that he had not been asked to state the details of applicant's apprehension and arrest. He interviewed applicant the following day.

Case law on the issue has established that a person arrested should be informed promptly in a language which he understands of the reasons for his arrest and any charges brought against him. This article of the European Convention of Human Rights is intended to safeguard that any person arrested should know why he is deprived of his liberty and to enable him to deny and obtain release without the necessity of Court procedures (**Van der leer vs Netherlands, 1990**). An arrestee must be told in simple non technical language in a language which he understands of the essential legal and factual grounds of arrest so that he may attack the lawfulness by challenging it in Court. This does not necessarily have to be made in writing or through a warrant, nor does this information guarantee a right of access to a lawyer (**V vs Netherlands, 2621/65**) and (**X vs Netherlands, 1211/61**) and (**Schiesser vs Switzerland, 1979**).

Aspects to consider when dealing with the requirement of 'promptness' are firstly whether the content of the information given to the detainee is sufficient and secondly the issue of the 'promptness' of that information. The information should relate to facts which 'raise a suspicion' and not necessarily such as to justify a conviction or even the bringing of a charge (**Murray vs UK, 1994)**. The Courts have indicated that this information should be given to the detainee 'within a few hours of his arrest' and it is assumed that the time frame has been fulfilled if applicant has been interviewed soon after his arrest (**Kerr vs UK, 1999**). This information does not

necessarily have to be given in its entirety by the arresting officer at the time of the arrest provided he is informed of the factual and legal grounds of the arrest within a sufficient period following the arrest. Whether this has been achieved has to be seen with reference to the facts of the particular case (**X vs Denmark, 1982**). European case law shows that Courts are flexible in the application of article 5(2) regarding the reasons for initial detention. Arrest on suspicion of committing a crime does not require that information be given in a particular form nor that it consist of a complete list of charges held against the accused person. A bare indication of the legal basis for an arrest does not suffice but a fairly precise indication of the suspicions against applicant such that he could promptly gain some idea of what he was suspected of would be deemed enough (**X vs Germany, 1978**) and (**Fox, Campbell and Martley vs UK, 1990**). In fact a person need not be expressly informed of the reasons for his arrest in so far as they are apparent from the surrounding circumstances. However such an argument should be considered with caution so as not to dilute the real effects of article 5(2).

Applying the principles to the present case, it has been proven that late morning or early afternoon on the 8th September 2009 applicant was apprehended and detained by the Police in front of a hotel together with another person who was with applicant. He was searched on the spot and PS1174 states that he cautioned applicant. Police Inspector Pierre Grech further stated that he had spoken briefly to applicant whilst in the hotel.

It is therefore likely that applicant understood that he was being detained in connection with an offence which he or/and his friend were suspected of having committed and which in some way was connected with the hotel. This is further confirmed when applicant adds during his evidence before this Court that when he was taken to the Police station from the hotel he was shown a box which was opened in front of him and which contained packets of cannabis. He was asked to sign that he had seen this box being opened in front of him. At this stage the Court is

of the firm opinion that applicant should and was in a clear position to know that he was being detained in connection with an offence concerning drugs.

Applicant was interviewed the next day at 12.33pm, that is to say twenty four hours later. He was not informed of any particular charge being raised against him but was asked about his movements since he arrived in Malta on the 6th September and with particular relevance he was asked a direct question regarding his involvement with drugs. He signed a statement in connection with this interview.

At 10.04am the next morning he made a second statement, this time at his request, to clarify certain points of the first statement.

He was arraigned and charged with drug related offences on the same day.

This Court finds no reason to uphold applicant's allegation that he was not cautioned on being detained nor given a reason for his arrest. He might not have been quoted chapter and verse regarding the charges to be brought against him but he surely understood or was in a position to understand on arrest and on arrival at the Police station that his detention was in connection with drug related offences. This constitutes in the Court's opinion a fairly precise indication of the legal basis for his arrest and detention till arraignment. Nor can it be said that applicant was subjected to degrading and inhuman treatment. There was no allegation that applicant was ill treated from the time of apprehension till his arraignment in Court. His detention till arraignment lasted for approximately forty eight hours wherein it was clear that he was being detained on drug related offences. He was interviewed twice, once on his initiative wherein he states before this Court that the content of these two interviews were not prejudicial to him. He only alleges as an aggravation that he was not spoken to. But being given the silent treatment before being taken to Police Headquarters is not, in the Court's opinion tantamount to inhuman and degrading treatment unless this silence is used as a means to illicit

undue influence on the accused which is not the case. Nor can it be said that his physical treatment or otherwise on arrest was in any way degrading. Applicant alleges no ill-treatment but emphasises only his segregation from his friend which in the Court's opinion is understandable on the part of the Police to avoid communication between the suspects. As stated in **A and others vs UK**, (19 February 2009):

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 95, ECHR 2008). The Court has considered treatment to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). In considering whether a punishment or treatment was "degrading" within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3.

The Court also notes that on arraignment as can be evidenced from the records of the criminal proceedings (fol. 519 of the records of this reference) the charges were read out in English, that is a language which applicant could understand and he answered not guilty to the charges. Moreover, the defence submitted that it was not contesting the validity of the arrest. This Court deems therefore the allegation of unlawful arrest at this juncture of the case as highly dubious in face of such a declaration made by the Court appointed lawyer, who was substituted

a few days later by another lawyer and later a third lawyer and no withdrawal of such a declaration was made at that stage or any stage except in the present proceedings.

For these reasons the first allegation is being denied.

Second violation

Applicant is alleging that he was denied access to a lawyer before being arraigned and this was in breach of article 6(3)(c) of the European Convention which guarantees the right of a person charged with a criminal offence to ”defend himself in person or through legal assistance of his own choosing or, if he has no sufficient means to pay for legal assistance to be given it free when the interests of justice so requires”. This violation puts him at a disadvantage vis-à-vis the prosecution, precious time was lost in collecting evidence for the defence which was irretrievably lost and this deprived applicant of a fair hearing.

Applicant alleges that even on arraignment he was not informed of the charges brought against him and that the Court appointed lawyer to assist had only a few minutes to discuss the case with applicant. Applicant in his note of submissions states that there was no time for the Court appointed lawyer to discuss the case with applicant and that the Court appointed lawyer did not contest the validity of the arrest. The Court appointed lawyer is the State’s responsibility which should ensure that the accused’s rights are preserved and failure to do so makes the State liable if the accused suffers any violation of his human rights.

The Courts notes that applicant makes no reference to this allegation in his application. He only alleged as a violation the lack of legal counsel prior to arraignment. This court can therefore simply disregard any allegation made in a note of submissions when no allegation of such violation was make in the application or during proceedings themselves.

However, even on the merits of this issue, although the Court agrees in principle that an accused should be aware of the exact charges brought against him on arraignment and access to a lawyer, Court appointed or not, should be effective and not merely perfunctory, applicant has failed to prove that this was not the case. In his note of submissions allegations of a factual nature were made by applicant but these allegations, particularly in regard to the awareness of the charges brought against him and the effective legal aid afforded to him in his arraignment were in no way proven or result from the records of the case at any stage, even after applicant engaged his own legal counsel four days after arraignment and therefore at a very early stage of proceedings wherein these allegations could have been put forward and not two years later in this second constitutional case brought forward by applicant.

The records of the criminal case (fol. 519) furthermore the evidence show that the charges were read in English and amendments were made, and the applicant pleaded not guilty to the charges. Even on the merits applicant's allegation cannot be upheld. It cannot be argued at this stage as applicant has tried to submit that his alleged ignorance of the charges brought against him violated his rights to have adequate time to prepare his defence and consequently call witnesses. The records of the criminal proceedings show otherwise and during these past two years it is highly unlikely that applicant and his lawyer did not discuss the charges brought against him.

Applicant complains about the length of time involved in the letters rogatory which lead to a loss of information crucial to his defence because of the lapse of time involved.

This Court notes that the records of the case show that as early as December 2009 the Court appointed expert Martin Bajada filed a report regarding the extraction of information from mobile phones. Notwithstanding applicant only filed a request for letters rogatory in July 2010 and as will be seen later on in this judgement this

issue of delays was due to circumstances over which the prosecution had no control. Moreover it cannot be said that at a very early stage applicant was not assisted by adequate and able counsel who had every legal means at their disposal to ensure compliance with any request they might have made according to law and procedure.

Applicant also makes a distinction with regard to the criminal proceedings being decided by a magistrate and one, as in this particular case, where the proceedings are directed in front of a panel of jurors. In the latter case it is being submitted, jurors might not appreciate the issue that evidence which in applicant's opinion was crucial to his case, cannot be brought forward because of circumstances beyond his control and wherein he alleges that this did not arise through his fault.

The Court does not agree. There is no evidence to support applicant's claim. Criminal cases before jurors are in no way less solemn or less fair or just than cases decided by a magistrate sitting in the Criminal Court without an empanelled jury. Moreover even in the jury system, the address and recommendations of the presiding judge to the jurors before deliberations are made by jurors give adequate and sufficient factual legal direction to the jurors to ensure a fair and just appraisal by the empanelled jury of all circumstances to enable them to reach a valid verdict albeit one with which prosecution or defence might not agree with.

The Court however relying on established European case law which was extensively and exhaustively examined in a recent Maltese Constitutional law suit **Police vs Alvin Privitera** (11/04/2011), is of the opinion that lack of legal representation at pre trial stage constitutes a breach of the fundamental right enshrined in article 6(3)(c). The facts of this case are similar to the **Privitera** case even though in this case the applicant was not a minor when he was arrested. In all other respects however the iter of events was similar to the present one and to avoid undue and unnecessary repetition, this Court upholds the reasoning of the Constitutional Court in the **Privitera** case

as to the right of access to a lawyer, whether or not such right was enshrined and enforced in the local laws at the time the breach was committed. This is one of the main aims of a fair trail ensuring 'equality of arms' between the parties, that is the prosecution and defence, at all stages from detention till final and absolute judgement.

This Court does not hesitate therefore in declaring that applicant's right to be assisted by a lawyer from his arrest to his arraignment constituted a breach of his fundamental human right, whether or not he requested, as he asserts, to be assisted by legal counsel at the pre trail stage. This does not however mean that the criminal proceedings have been tainted in such a way that applicant has been deprived of a fair hearing. Applicant is not requesting that the statements made by him be removed from the records. In fact he goes so far as to say in his evidence before this Court that no prejudice resulted from the statements given by him and therefore this Court leaves the issue as to the weight to be given to these statements entirely in the discretion of the Criminal Court. Applicant ties this breach namely that the fact that he was not allowed access to a lawyer during the pre trail stage led to delays within the first forty eight hours that cannot be righted and irretrievably prejudice his defence. He refers specifically to the use of his mobile phone and information to be retrieved from call date records made from such phone between 5th and 8th May 2009. He alleges that this could be done through a request by letters rogatory to England so that the alleged calls emanating from an English service provider could be retrieved. Applicant alleges this was only acceded to in March 2011 and the reply forthcoming from the Home Office by letter dated 27th September 2011 (Dok. A6UK1 fol. 972 of the Criminal Inquiry records) states that call data is not retained by a service provider for more than twelve months.

Applicant states that he asked the prosecution on several occasions for this information but the implication from his evidence is that the prosecution dragged its feet and due to this, the data has been lost. The importance of the data

to his defence and the severity of the charges have gravely prejudiced his defence.

This Court notes that on this particular aspect of the case applicant only refers to article 6 as his allegation of a violation of his human rights. However he does not tie this violation with a specific subarticle or paragraph in the said article 6.

The Court is presuming that applicant is alleging that the general rights under article 6(1) pertaining to the right of a fair trial and therefore compliance with the principle of equality of arms was not adhered to. This requires that each party is granted equal and reasonable opportunity to present his case in such a way and under such conditions that do not place him under a substantial disadvantage vis-a-vis his opponent (**Marus O'Boyle and Warbrick Second Edition pg 251 et seq.)**. This right overlaps those requirements in article 6(3)(b) and (d) to 'adequate facilities' which includes the calling and examining of witnesses and having access to all relevant information. These are basic rights in an adversial system such as ours.

The European Courts have dealt in principle with this issue by examining whether the proceedings taken as a whole were 'fair'.

Applicant alleges that the calls which he wished retrieved were 'necessary' for his defence and puts the blame for their lack of retrieval on the inertia of the prosecution. The records of the criminal case show that the formal request by applicant for the retrieval of this information was only completed and submitted on 12 October 2010 more than a year after his arraignment. The prosecution could not obtain this information from Malta since the service provider was English and according to law a request to the foreign entity through the legal channels of letters rogatory had to be made by the Attorney General's office in Malta and this according to article 399 of the Criminal Code. The first request by applicant was made on the 6 July 2010 but although by the 14 July 2010 defence was

already informed by counsel for the prosecution that the current procedures could only be undertaken by adhering to article 399 of the Criminal Code and not a simple request for police forces from different jurisdictions to liaise with each other, it was only on the 12 October that the documents were finalised to be forwarded to the UK authorities.

There is no allegation that the prosecution refused to cooperate with defence but rather that it dragged its feet, and consequently this evidence which defence states was 'necessary' was lost due to circumstances beyond the control of any of the parties concerned. This Court cannot at this stage decide the issue on whether such evidence was in fact 'necessary' for the defence. This is not the point at issue. What is at issue is whether this evidence was not brought forward through any fault of the prosecution as required by article 346(1) of the Criminal Code and whether this fault could be regarded as a violation of applicant's right to a fair hearing.

The records of the Criminal Inquiry proceedings show that on the 16th December 2009, Martin Bajada appointed by the Court on 22nd September 2009, filed the report pertaining to extraction of information of call profiles from mobile phones, starter packs and sim cards which had been seized from accused's possession. At this stage no requests were made by defence counsel. On the 2nd July 2010 defence counsel examined Martin Bajada relative to the examination of sim cards from abroad. Defence counsel did not make any requests but reserved further questioning.

Following the decree of the 12 October 2010, it seems that there were further problems with the letters rogatory since there was still information to be included therein and on 3 March 2011 defence filed fresh letter rogatory to be forwarded to the UK corresponding authorities. Following this decree there were ten adjournments and corresponding decrees requesting the Attorney General to file a note regarding progress on the letters rogatory with the final decree of the 13 October 2011 which contained

the reply from the UK authorities stating that all data had been lost since more than one year had elapsed. It follows from this chronological order of events that by the time defence filed its complete letters rogatory on 3 March 2011, the information was already irretrievable through no fault of the prosecution and therefore applicant cannot claim a violation of a right which he was not protected in any way from pursuing.

Therefore the Court only upholds that there was a violation of applicant's right to be assisted by counsel when interrogated by the Police, wherein however in applicant's own words, the statements made by him did not prejudice his defence.

Fourth violation

The fourth violation relates to the conditions of bail granted to applicant following his successful application to the Constitution Court wherein he claimed that his continued detention was in violation of articles 5(3) and 5(4) of the Convention. On the 18th January 2011 applicant had been granted bail against a deposit of €50,000 and a personal guarantee of €15,000. Further to this decree applicant had requested a review of these conditions owing to his financial status. The Court by decree dated 22nd February 2011 reduced the deposit to €40,000 and increased the guarantee to €60,000. Applicant asked for a further reduction and by means of a further decree dated 4th May 2011 reduced the deposit to €15,000 but left unaltered the personal guarantee of €60,000 and added a third party surety for the amount of €30,000.

Applicant claims that the guarantees demanded for his release impose a heavy burden more than is required for obtaining a reasonable degree of security. Other alleged accomplices both Maltese and foreign, have been granted bail with bail bonds much lighter than applicant. Applicant also claims that he had brought forward evidence that he could not meet the bail bonds on account of family difficulities since his wife can no longer work because of

health related issues, the business had to be closed down and his family's savings are being utilised to pay the family home mortgage and family costs including the maintenance of four children and rent being paid for an apartment where applicant can reside if released from preventive custody at Corradino Corrective Facility. Moreover he adds that all evidence in his case had been collected by the Court of Criminal Inquiry and there are no sufficient and relevant reasons for his detention.

Applicant alleges that the bail conditions imposed by the Court has rendered ineffective the Constitutional judgement of the 14 February 2011 wherein it had been decided that his continued detention constituted a violation of his fundamental human right to liberty.

This Court notes that in the interval between the Court decrees on bail conditions, the records of the Magistrates Court show that applicant's wife had testified on the 3rd November 2009 wherein she stated the couple were married in 1984 and had four children all being educated, with ages ranging from 15 to 22. They had a shop in London since 2006 wherein they sold shoes which they themselves imported. Prior to that they ran a restaurant.

Following the Court decrees on bail, applicant's wife testified again before the Magistrates Court on the 19th July 2011 wherein she testified in detail on her degenerative spine condition necessitating treatment including surgical intervention. She also confirmed that three of her four children are still students although the eldest now has graduated from university and is working but does not contribute to the family upkeep as he is repaying his student loan. She also stated that the shop in London was closed due to her health problems wherein commuting from home to the shop and taking care of four children on her own has become difficult to cope with. She informed the Court that the family home was worth sterling 700,000 on which there was a mortgage of sterling 385,000. She claims that although they could provide security in equity but there was no money available for a bail deposit since what money they had

was necessary for their livelihood and paying her husband's expenses including dental care in Malta. Applicant further alleges that in the Court's last decree on bail, it mistook the closing down of the business with a sale of the business which was not the case.

When she testified before this Court on the 20 September 2011 applicant's wife stated that the shop which was rented premises had been closed since February 2011 since commuting to and from her home to London to take care of the shop in her husband's absence was impossible due to the long hours, her health and taking care of her children. She also filed medical reports confirming her health problems. The stock was sold off at rock bottom prices. Regarding the family home, the witness stated that the bank had foreclosed because of difficulties in repaying the mortgage. The family is living in rented premises. The house has not been sold but she was told that once the house is sold and all fees and expenses are paid, there will not be any capital left over. The family is living on a partial disability allowance, and children's benefits. All their savings have been spent and all the household effects and car were sold off to enable her to have some extra income.

She also stated that her family are helping out financially. She also adds that she sends approximately €100 a month so that here husband can buy necessities. She also paid €350 for six months rent from January 2011 believing her husband would be granted bail and he would have a place where to live. She could not continue paying this rent whilst her husband was still in prison but she confirms that the premises are still available for rent.

The Court is faced with the issue regarding the conditions being levied against applicant for him to be granted freedom from preventive custody pending Court proceedings against him. He claims that these conditions namely the amounts of deposit and guarantee are still denying him the right to freedom from preventive custody

because of their severity taking into account mainly his financial status.

The Court notes that article 5(3) states inter alia that ’release (pending trial) may be conditioned by guarantees to appear for trial’, whilst article 5(4) gives the right to a person detained to question the lawfulness of detention and his release if detention is not lawful.

In applicant’s first Constitutional case decided on the 14th February 2011 the Court decided that applicant’s detention ran counter to article 5(3) but did not pronounce itself on article 5(4) since pending judgement the Court of Criminal Inquiry by decree dated 18 January 2011 had granted bail to applicant on certain conditions. What is being requested at this point in time is that the conditions imposed, namely pecuniary ones taking into account his financial situation are such as render his release on bail ineffectual and therefore his detention has once again become illegal.

The Court notes that the Magistrates Court had changed bail conditions on two further occasions following its first decree of the 18th January 2011, namely on the 22nd February 2011 and 4th May 2011. In these decrees, it is easily noticeable that the deposit requested by the Court was decreased from €50,000 to €15,000 whereas the guarantee was increased from €15,000 to €60,000 and a third party surety of €30,000.

From the records of the criminal proceedings exhibited in this case, up to the last decree namely that of the 22 July 2011, the only evidence put forward by applicant in respect of his financial and personal situation was that as appeared from the testimony of his wife on 3rd November 2009. Following this testimony she again testified in more detail before the Magistrates Court on the 19th July 2011 wherein only details as the value of the house owned by her and her husband emerged as well as the mortgage due burdening the property but no other documents were filed to show the financial position of the Kolakovic family and further testified in front of the Court on 20th

September 2011, wherein more facts emerged. These were in turn substantiated by some bank documents relating to the business filed by applicant on 2 November 2011 (fol. 353 et seq.).

As stated in **Neumeister vs Austria, 1968** the release on bail pending criminal procedures can be conditioned by guarantees so as to ensure accused's presence at the trial. These guarantees are intended to justify accused's presence at trial and not to compensate for the damage allegedly caused. This means however that the Court can impose monetary guarantees, which guarantees should be examined and imposed with reference to the accused's assets and any relatives or third parties capable of acting as sureties. These guarantees, as authors **Harris, O'Boyle Bates and Buckley (2nd Ed.)** state, should act as a 'sufficient deterrent to dispel any wish on the accused's part to abscond.

The overriding criterion in establishing these guarantees is that they should be reasonable and not excessive taking into account all the personal circumstances of the accused including his financial position, his character, his social status and his past history. Also the seriousness of the offence as well as the probability that the accused might abscond pending trial are to be taken into account. This means that bail conditions may differ from case to case since the circumstances are usually different with every individual.

In fixing the bail conditions, especially monetary ones, great care should be taken by the Court in ensuring that these conditions are not exaggerated, leading to a violation of the right to freedom. Equal importance should be taken in fixing the conditions of bail as in deciding whether an accused should be granted bail pending proceedings. (**Iwanezuk vs Poland, 2001**). However there is a serious obligation on the part of the accused to give all sufficient and clear information in good faith regarding his assets and personal situation to enable the Court to adequately balance the right to liberty pending

proceedings against reasonable and sufficient bail conditions.

The Magistrates Court based its decrees on bail conditions on information supplied by applicant. Up to the date of its last decree there were insufficient financial and personal details available to the Court with which to evaluate the 'reasonableness' of the conditions being imposed. More information has been made available at this stage and applicant cannot criticise the Magistrates Court's decisions when he himself brought no clear evidence of his financial and presence situation, till late 2011.

The Court finds that there is no justification in applicant's allegation that the conditions posed by the Magistrates Court up to its latest decree in any way were unreasonable since the Court had no yardstick to measure the reasonableness of the conditions. At this present state of affairs however, applicant's personal and financial situation are more apparent and more detailed even though not exhaustive. This Court invites the Magistrates Court to re-evaluate the conditions of bail following an eventual application by applicant to revisit these conditions. This Court does not find it expedient or prudent to revisit these conditions itself but would leave it to the Magistrates Court to re-evaluate these new circumstances in the light with that already decided and decreed by the same Court on three separate prior occasions.

In view of the fact that there is no violation of article 5(3), there cannot be any justification for determining whether the detention is justified according to article 5(4). This might and would only arise following a decree of the Magistrates Court on bail conditions taking into account these new facts brought at this stage.

Fifth violation

Applicant claims he has suffered inhuman and degrading treatment according to article 3 of the Convention

because of lack of access to proper medical care and inadequate medical services offered by government. He claims that as a result of the denial to dental care applicant's porcelain bridge became loose and broke, with applicant having serious difficulty in eating for twelve months. The numerous decrees issued by the Court of Magistrates instructing the authorities to grant applicant recourse to dental care expeditiously were to no avail.

The Court affirms that European and local jurisprudence have reiterated that requisite medical assistance should be given to protect the physical well being of persons deprived of liberty (**Kudla vs Poland, 2000**) and where a lack of medical assistance gives rise to a medical emergency or exposes one to 'severe and prolonged pain', this would be considered as a form of inhuman treatment. Where it does not, a breach may still be found if the humiliation caused to applicant through stress and anxiety he suffers because of the absence of medical assistance may reach the threshold of degrading treatment in the sense of article 3. If the required regime of medical assistance is inadequate or delayed this may in particular circumstances be tantamount to degrading treatment with the ambit of article 3. However article 3 does not contain a general obligation to release a detainee on health issues unless there are humanitarian measures involved.

Applying these principles to the facts in hand, it appears that applicant had an upper dental bridge held in place by some of his natural teeth. Applicant states that this bridge became detached whilst he was in prison. He states that he went to see the prison dentist at the end of November 2009. It was imperative that this condition was seen to because damage would be caused to the denture if it remained loose and infection could be caused to his natural teeth which were holding the denture. Even though the prison dentist said he could arrange the denture, nothing happened until a Court order was given so that applicant be taken to Mater Dei hospital. Even though applicant claims that he was taken to hospital in February 2010, the records of the Criminal Inquiry (fol.

350) show that a complaint was registered by counsel for applicant on 2nd February 2010 with the Criminal Court whereby it was stated that although applicant attempted to have his situation remedied at Mater Dei hospital, it was stated that the treatment requested was not applicable free of charge at State run Mater Dei hospital but had to be done privately and although the Director of Prisons had been informed of a Court decree to that effect nothing had still been done. This extract shows that prior to February 2010, applicant had been seen at Mater Dei.

On 25th March 2010 Dr. Alexander Azzopardi, Head of Dental Department at Mater Dei hospital stated that applicant had been examined by one of the staff dentists and the notes showed that the upper dental bridge of applicant was detached and the three natural teeth holding it were 'broken down'. This meant the bridge could not be put back in place. Applicant was offered a denture replacement but applicant did not accept and wanted the bridge to be fixed to the roots.

Applicant states he went privately to a Dr. Pullicino who only temporarily fixed his bridge but by the end of July 2010 he needed to see the dentist again but she refused to treat him claiming he had not paid the previous bill. Applicant states his wife had sent her the money which were withheld by the prison authorities.

Following further Court applications and decrees applicant stated that in November 2010 he was sent to see a dentist who suggested implants costing €2,500. He spoke to the Director of Prisons, the Deputy Director and made Court applications but nothing happened till June 2011. Meanwhile he could not eat or speak properly. The money was sent in June 2011 and he had eight implants but the result was not satisfactory, even though after more than two years he could start to eat normally.

The records of the Court of Criminal case show that on the 18th February 2011 counsel to applicant making submissions on bail stated that the little money applicant had was to be used for dental care. On 22nd February

2011 PS Stephen Zammit of the Corradino Correctional Facility testified that prison records showed that applicant had a dental appointment at Mater Dei and three at a Zebbug clinic. The only recorded dates were those of the private clinic namely 28th January 2011, 2nd February 2011 and 7the February 2011. On the same date the acts of the criminal case record the testimony of an unidentifiable witness (vide fol. 776 et seq.) who from the evidence appears to be a dentist or has dental knowledge. He states that the bridge could not be reaffixed because the teeth that were holding it were rotten. An appointment had been fixed for an operation for the 15th February 2011 but was postponed because he was informed that applicant could not pay the bill. He also stated that the teeth became rotten with the passage of time and because of poor dental hygiene. He also reiterated that fixed dentures were not available free of charge at Mater Dei hospital. Lack of payment was the reason why the implant was not and could not be carried out.

The Court feels that the issue at stake was one of the remedial procedure which applicant wanted to be carried out on his teeth and the cost of such procedures. There is no doubt that this issue dragged on for too long a period in which applicant's dental health degenerated. This is a factual conclusion from the fragmentary evidence available. However, the Court finds it hard to accept that the delays were the responsibility of the prison authorities. No such direct connection was made by applicant. What transpired from the evidence is that as early as March 2010 when applicant had already been referred to Mater Dei State hospital, there was the possibility that a denture replacement could be effected 'free of charge'. However, applicant wanted implants which procedure was not carried out at Mater Dei Hospital since this procedure was not state funded. There is then a significant gap of time namely till July 2011 till applicant had implants made in a private clinic which he described as still unsatisfactory. The main reason for this undue delay seems to be lack of funds. Although it has been argued by applicant that funds sent to the prison authorities were not channelled to the

proper sources namely for dental treatment no hard evidence was produced to this effect. Evidence shows that before the implants some remedial dental procedures were done privately by applicant but this was stopped because of non payment of bills. Here again no direct link established, at least from the records before this Court, that this was due to the fault of the prison authorities, even though the Court concedes bureaucratic procedures on the part of the prison authorities might not have helped the situation in being resolved at an earlier time. However, this fact alone does not attribute fault for applicant's exacerbated dental problems, directly to the prison authorities, nor can it be said that there was contributory responsibility on their part. The records show, as evidenced by the sworn statement of the Director of Prisons that between February 2010 and November 2011 applicant was granted innumerable visits to see a private dentist and therefore it cannot be said that applicant's dental condition evolved in consequence of a violation of his fundamental human rights.

Therefore the Court concludes that this alleged violation cannot be upheld.

Decision

For these reasons and in the light of all the above, the Court concludes that all applicant's claims are to rejected except the second claim but only limited to the violation of the right to be assisted by counsel in the pre-trial stage in accordance with article 6(1) of the European Convention in accordance with that decided above, but the Court feels that in the circumstances this judicial declaration constitutes sufficient remedy to address this violation.

The Court also finds that there was no violation of Mr. Kolakovic's rights with regard to the conditions of bail as imposed by the Magistrates Court taking into account the information available at the time of the decrees. Without prejudice to Mr. Kolakovic's rights in the future circumstances and further evidence submitted before the Magistrates Court and this Court, following the

Magistrates Court decrees, should be taken into account by the Magistrates Court, if and when Mr. Kolakovic requests a revision of the bail conditions in the light of these circumstances and further evidence, also dealt with by this Court.

Each party shall bear its own costs.

< Sentenza Finali >

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