CONSTITUTIONAL COURT

JUDGES

THE HON. CHIEF JUSTICE JOSEPH AZZOPARDI
THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE NOEL CUSCHIERI

Sitting of Friday, 31st May 2019.

Number: 23

Application number: 62/17 JPG

The Police (Inspector Keith Arnaud)

v.

Kristjan Zekic also kwown as Adhamjon Niyazov

Preliminary

1. This is an appeal lodged by the Attorney General [The Appellant] from a judgment [the Appealed Judgment] given on the 21st May 2018 by the First Hall of the Civil Court [The First Court] in its constitutional competence, whereby that Court decided on the reference made to it by The Court of Magistrates as a Court of Criminal Judicature [The Magistrate's Court] on the 1st August 2017 following an application filed by Kristjan Zekic [The Respondent] claiming a breach of Article 34 of the

Constitution of Malta [The Constitution] and Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [The Convention] and.

2. The First Court decided that:

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

The Reference

3. During the proceedings before the Magistrates Court, the accused had raised an issue under the above-mentioned constitutional and conventional articles on the following points[1]:

> "**The main issues raised by the accused:-**
>
> "1. The accused has been repeatedly denied bail since the 6th April 2017;
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> "2. The decrees refusing bail were delivered *in camera*;
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> "3. These decrees referred to the replies given by the Attorney General which were never notified to the accused;
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> "4. The applicant was never given the opportunity to contest or at least make submissions on such reasons;

[1] As per decree ordering the reference

"5. The merits of the case were held in abeyance pending the determination of the ***ne bis in idem*** *plea*;

"6. The *ne bis in idem* plea was still pending on the day of the filing of the application and each time the applicant was not brought to Court despite that he was still under arrest;

"7. That his last request for bail dated 22nd June 2017 was decreed on the 17th July 2017, that is four weeks after the filing of the reply and once again the courts decree made reference to the Attorney General's reply without this being served on the accused;

"8. That this was in breach of the fundamental rights of the accused as guaranteed by Article 5 of the European Convention and Article 34 of the Constitution of Malta;

"**Considers the following:-**

"1. The Court has consistently denied bail because it consistently found that the reasons given by the Attorney General in his recorded replies were well founded.

"2. The Court decrees denying bail were issued *in camera*. The requests for bail were made in terms of Article 575 of the Criminal Code. Unlike provisions of Article 575A (1) of the Criminal Code, the provisions governing applications made in terms of Article 575 of the Criminal Code do not specifically require the Court to issue its bail decrees in open Court.

"3. According to Article 575 (11) of the Criminal Code, in refusing to grant bail the Court is obliged to state the reasons for such refusal in its decree refusing bail which decree is to be served on the person accused. In its decrees dismissing bail, the Court mentioned the reasons by making a cross reference to the reasons mentioned in the Attorney General's recorded replies. These decrees were always sent to the Legal Office of the accused via e-mail.

"4. The Attorney General is not legally obliged to notify the accused with his reply; nor is this Court legally bound to notify the replies of the Attorney General to the accused. This Court does not have record of its past Deputy Registrar sending copies of the Attorney General's replies to the applicant, except for the last reply.

"5. By reference to the latest bail application, the present Deputy Registrar of this Court sent a copy of the latest reply of the Attorney General to the Legal Office of the accused. A scanned copy of this reply dated 26th June 2017, was sent a week before the last decree denying bail was issued. The Court adopted the reasons mentioned by the Attorney General in his reply and the Court's decree was served on the accused as well. The Court's decree specifically mentions that bail was

not being granted due to the reasons mentioned by the Attorney General in his reply. This is already a reason in itself and on its own. But the main substantive reasons supporting this Court's decision lie in the detailed replies filed by the Attorney General for each and every bail application filed by the accused, which replies are all found in the Court file.

"6. The replies of the Attorney General were always very detailed. These replies were filed and held in the Court file. The Court file was and still is freely open to inspection by the accused and his Lawyers. The accused could freely request copies of any document found in the file, which could be seen, retrieved or received by e-mail at his Lawyer's e-mail accounts. The Court file and the documents contained in it were always freely accessible to the accused and they were under no circumstance withheld from the accused. The accused's Counsel and their Legal Office kept constant contact with the past and present Deputy Registrar of this Court in relation to the facts of this case as e-mails in this Court file show. However the Court notes that no request was lodged by the accused or his Lawyers for a copy of any one of the Attorney General's replies.

"7. The accused and his Lawyers had open, easy and unrestricted access to the Attorney General's replies at all times. The accused has a positive duty to follow his own proceedings, to know what documents are contained in the Court file and to act upon them should he feel proper.

"8. The statement made by the accused that he was never given any opportunity to contest or make submissions is not legally correct. While the accused's applications were detailed enough to contain various reasons why bail ought to be granted to him, where filed in terms of Article 575 of the Criminal Code. This Article does not grant to an applicant a specific right of audience or a right to make submissions. This is unlike the procedure set in terms of Article 574A of the Criminal Code regulating bail requests lodged by a person who is first brought before the Court of Magistrates.

"9. However, despite this difference, given that by default criminal proceedings in Malta are to be held *viva voce*, if the accused wished to make submissions he was still free to lodge a request to the Court to consider granting him this possibility. No such request was ever lodged.

"10. This Court did not continue dealing with the merits of the case pending the determination of the ***ne bis in idem*** plea. The Court deemed this necessary given that the ***ne bis in idem*** plea is not a dilatory plea but a peremptory plea which if upheld leads to the acquittal of the accused. The Court could not continue hearing evidence if this peremptory plea was timely lodged and if it was founded in fact and at law.

"9. On the day when this application was filed, (18th July 2017) the decision on the ***ne bis in idem*** plea was still pending. But the parties knew well before that the date of the next sitting was scheduled on the 24th instant, that is only six days after the date of the filing of this application. Moreover, (unlike what happened for the previous sittings of the 10th May 2017 and 21st June 2017 that had to be adjourned, and notice of adjournment was given to the public several days in advance), in the case of the sitting of the 24th July 2017 no notice of adjournment was given – on account of the fact that the Court was going to hold this sitting.

"10. Of course the accused could not know whether the Court was going to issue its decree on the ***ne bis in idem*** plea before the actual sitting took place. However he decided to pre-empt this uncertainty by lodging this application on the 18th July 2017. The ***ne bis in idem*** plea was decreed during the same sitting of the 24th instant where this Court found that the request was procedurally pre-mature.

"11. On the date of this decree the accused was still in custody because his last bail request had been dismissed. This last application for bail was filed on the 22nd June 2017. Unlike what is stated by Defence in its present application, the last bail application was not decreed on the 17th July 2017 but, as can be seen from fol 208, it was decided on the 13th July 2017. This is three weeks (and not four as erroneously claimed by Defence) following the filing of the application. It happens to be slightly more than two weeks from the date of the Attorney General's reply, and one week after the latter's reply was sent to the Office of the accused's Lawyer by e-mail.

"12. Furthermore, apart from the above, this Court has fully respected the time limits set out in terms of Article 575(7) (8) and (9) of the Criminal Code.

"Having premised the above, the Court considers that certain legal aspects governing the law regulating bail raised in this case and mentioned above may require further elaboration by the competent Court in relation to their compliance with Article 34 of the Constitution of Malta and Article 5 of the European Convention.

"Therefore since this Court does not deem these questions to be merely frivolous or vexatious, in terms of Article 46 (3) of the Constitution of Malta, it refers these questions to the Civil Court, First Hall for its decision on their merits."

The Facts

4. Respondent was arraigned before the Magistrates' Court on the 23rd January 2017 charged with crimes carrying a maximum penalty of two years imprisonment. Evidence was heard during the sittings held on the 30th January, the 8th March and also on the 10th April during which submissions on the plea of *ne bis in idem* were also heard by that Court.

5. After the last date mentioned, the magistrate sitting in that court had to postpone all the Court's sittings for a number of weeks since he was conducting an urgent inquiry. However, during that time 4 applications for bail were lodged by Respondent, on the 6th and on the 10th of April, on the 9th of May, and on the 22nd June 2017. All these applications were served on Respondent who filed a detailed reply containing the reasons for his objection to the Appellant's request. In the relative decrees, the magistrate referred to the reasons contained in the Attorney General's reply in denying bail to Respondent who on his part was never notified with a written copy of the Attorney General's reply and, allegedly, was never given the opportunity to rebut those reasons.

6. The court decrees were sent by email to Respondent's lawyers and the last decree was given after the Attorney General's reply had been notified *via* email to Respondent's lawyers.

7. During the above-mentioned period Respondent remained in custody till the 24th August 2017 following another application filed during that same month, when he was eventually granted bail on a personal guarantee.

The Appealed Judgment

8. The First Court arrived to its conclusion after have made the following considerations:

> "**Kristjan Zekic** testified,[2] that after being duly notified of his right not to incriminate himself, in proceedings filed against him before the Court of Magistrates, he spent approximately four months without being brought before the Court for a hearing, and that in the mean-time he was still being held in custody. He stated that on three occasions he had been brought to court from prison but remained in the court's lock-up, and was not taken up to the court room, as he was told that the sitting had been adjourned, and then taken back to prison, without being given the date of the adjournment.
>
> "**Inspector Keith Arnaud** testified[3] that the applicant had been investigated by the police on suspicion of being in possession of forged documents, and from this investigation it resulted to the police that the Slovenian ID card he was in possession of belonged to a third party, and that he was also in possession of an Uzbek passport which had been issued on a certain Adam John Niyazov. He continued that this led the police to arrest applicant on the 20th of January 2017, question him and subsequently charge him in Court on the 23rd of January 2017. He explained that the first sitting before Magistrate Dr. Aaron Bugeja was held on the 30th of January 2017, another sitting was held on the 8th of March 2017, at which point the defence raised a *ne bis in idem* plea. The case was then adjourned to the 10th of April, however on that day no sitting was held, and the case was adjourned to the 10th of May. On the 8th of May however, he was informed by means of an email sent by the Deputy Registrar of Magistrate Bugeja that the case would not be heard on the 10th of May and was instead being adjourned to the 21st of June. He continued that after phoning the Deputy Registrar, he

[2] Fol 19 *et seqq.*
[3] Fol 132 *et seqq.*

was informed that the sitting could not be held because the Magistrate was working on an urgent case, and that he therefore asked her whether they should still bring applicant to court, since usually when this happens the accused is brought to court just for procedural matters and then taken back to prison, but he was informed that there was no need to take applicant to court and he had phoned the prison to inform them as such. He stated that the sitting of the 21st of June was also not held, and confirmed that on that day applicant had not appeared before the Magistrate, and instead the case was adjourned to the 24th of July. He confirmed that for two consecutive adjournments, applicant was brought to court but simply kept downstairs in the lock-up, as opposed to being brought up to the court room before the Magistrate. He continued that after the Court gave its decree regarding the *ne bis in idem* plea, evidence continued being heard as from the sitting on the 21st of August 2017. He then stated that on the 10th of April, the Court had heard submissions on *ne bis in idem* and that **therefore the period during which no court sittings were held was between the 10th of April and the 24th of July**, when the decree of *ne bis in idem* was read out in open court in the presence of the accused.

"**Under cross-examination**[4] he testified that the defence had made no request for the case to be suspended while the plea of *ne bis in idem* was being considered by the court.

"**Deliberates:**

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

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

[4] Fol 137.

appear before the Magistrate, until the 24th of July 2017, as sittings in between these dates were cancelled by the Magistrate who was busy investigating an urgent matter of grave Statal importance. In the interim, the accused filed a number of requests for release from custody, which were denied by the Court[5]. The reason given by the Court every time it denied the accused's request for release from custody was always "*for the reasons given in the Attorney General's reply"*; a reply which was never notified to the accused, either at the time when it was filed, or as an addendum to the Court's decree. It also transpires that on the dates when sittings were not held, the accused was nonetheless brought to court, but kept in the lock-up, before being told that the sitting had been adjourned and taken back to prison. The applicant was granted bail on the 24th of August 2017 on a personal guarantee.

"**Delibarates;**

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

"It has been argued before this Court, that there is no requirement at law for the note of the Attorney General opposing release from custody to be notified to the accused. Furthermore, while the law does not grant the accused a specific right of audience or to make submissions, in Malta, proceedings are held *viva voce,* and had the applicant wished to make oral submissions, he should filed an application requesting the Court to consider granting him this possibility. No such request was ever made by the accused.

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

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

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

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

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

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

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

> ""*In the present case, it is evident that* ***the parties to the proceedings before the Supreme Court were not on equal footing. As a matter of domestic law and established practice – still in force – the prosecution authorities had the privilege of addressing the judges with arguments which were not communicated to the applicant. The proceedings were therefore not adversarial*****.***[7]*"*

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

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

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

"Maltese law has to be interpreted in line with standards and principles of the ECHR. In this respect, the ECHR has stated that a court must give ***"valid and sufficient reasons"*** for its decisions refusing temporary release from custody and has found that a court's failure to give such valid and sufficient reasons when refusing release from custody amounts to a violation of Article 5(3) of the Convention.[8] For instance, in **Becciev v. Moldova** the ECHR found such a violation after considering that:

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

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

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

> ***record, family ties and links (home, occupation, assets) with his country.*"[9]"**

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

> ""…***under Article 5 § 3 the authorities are obliged to consider alternative measures of ensuring the appearance of the accused at trial when deciding whether he or she should be released or detained****. Indeed, the provision proclaims not only the right to "trial within a reasonable time or to release pending trial" but also lays down that "release may be conditioned by guarantees to appear for trial" (see Sulaoja v. Estonia, no. 55939/00, § 64 in fine, 15 February 2005; Jabłoński v. Poland, no. 33492/96, § 83, 21 December 2000).*
>
> *""In the present case, during the entire period of the applicant's detention the authorities did not consider the possibility of ensuring her attendance by the use of a more lenient preventive measure, although many times the applicant's lawyers asked for her release on bail or under an undertaking not to leave the town – "preventive measures" which are expressly provided for by Russian law to secure the proper conduct of criminal proceedings (see paragraph 45 above).* ***Nor did the domestic courts explain in their decisions why alternatives to the deprivation of liberty would not have ensured that the trial would follow its proper course****."*[10]**"**

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

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

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

[9] *Ibid.,* par. 62.
[10] **Mamedova v. Russia**, ECHR 7064/05 decided on the 1st of June 2006, par. 77 – 78.

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

> **""*…at no point in the proceedings did the domestic authorities consider whether the length of the applicant's detention had exceeded a "reasonable time". Such an analysis should have been particularly prominent in the domestic decisions after the applicant had spent many months in custody, however the reasonable-time test has never been applied*."[11]"**

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

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

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

> ""*The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty.* ***Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings***."[12]"

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

> **""*The Court…does not dispute the fact that corruption is an endemic scourge which undermines citizens' trust in their institutions, and it understands that the national authorities must***

[11] *Ibid.*, par. 82.
[12] **Kudla v. Poland,** ECHR 30210/96 decided on the 26th of October 2000, par. 111.

> ***take a firm stance against those responsible. However, with regard to liberty, the fight against that scourge cannot justify recourse to arbitrariness and areas of lawlessness in places where people are deprived of their liberty.'"[13]"***

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

"For this to be at all possible, the State must ensure that there is a sufficient number of Magistrates to be able to take the added workload. As it is, the Bench of Magistrates is stressed to breaking point with its normal workload, and certainly may not be reasonably expected to shoulder the further burden of additional duties. It is also pertinent note that there are other Magistrates who are investigating equally crucial matters of grave Statal importance.

"With reference to Inspector Arnaud's testimony that he had asked the Magistrate's Deputy Registrar whether the accused should be nonetheless brought to court, despite the sitting being cancelled because "*we usually bring the accused and then just for procedural matters we take him back"*[14] the Court holds *obiter* that the existence of a practice, whereby the prosecution attempts to circumvent procedural requirements intended to guarantee fundamental human rights, by simply bringing the accused to Court while no sitting takes place, is deplorable. The aim of these procedural requirements is to guarantee to those accused, and held in detention, their right to a speedy trial, and to ensure that the State exercises special diligence in their regard. These procedural requirements may therefore only be satisfied when there is an actual hearing, presided over by a Magistrate.

"**Deliberates;**

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

[13] **Creanga v. Romania,** ECHR 29226/03 decided on the 23rd of February 2012, par. 108.
[14] Fol 134.

ordinarily resident in Malta to enter into a written recognisance of €10,000 and that he was also to enter into a written recognisance of €10,000.

"In light of these facts, the Court considers it pertinent to make reference to the judgement delivered by the Constitutional Court on the 18th of July 2017 in the names **Il-Pulizija (Assistent Kummissarju Norbert Ciappara) vs Mario Zammit**, wherein the Constitutional Court considered that it has the power to bring to the referring court's attention the possibility of a violation of an article of the Convention which is different from the one mentioned by the referring court in its reference, where it feels like the situation so necessitates.[15] After making this consideration the Court went on to examine the matter under Article 7 of the Convention, which had not been a part of the reference made to it, and found that there was a possibility of a violation of the rights of the accused under this article.[16] In light of this judgement, the Court is of the opinion that it should also take into consideration the fact that while the accused has now been granted release from custody, he had been nonetheless held in custody for a significant period of time as he could not meet the financial requirements imposed by the Court of Magistrates as a condition for his release.

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

> ***"'"must be assessed principally by reference to the accused, his assets and his relationship with the persons who are to provide the security, in other words to the extent to which it is felt that the prospect of loss of the security or of action against the guarantors in the event of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond (see Neumeister v. Austria, 27 June 1968, § 14, Series A no. 8).[17]***
>
> ***"'"As the fundamental right to liberty as guaranteed by Article 5 of the Convention is at stake, the authorities must take as much care***

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

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

[17] **Piotr Osuch v. Poland,** ECHR 30028/06 decided on the 3rd of November 2009, par. 39. See also **Bojilov v. Belgium,** ECHR 45114/98 decided on the 22 of December 2004, par. 60: " *La Cour rappelle que selon sa jurisprudence, le montant d'un tel cautionnement doit être appréciée principalement « par rapport à l'intéressé, à ses ressources (...) et pour tout dire à la confiance qu'on peut avoir que la perspective de perte du cautionnement (...) en cas de non-comparution à l'audience agira sur lui comme un frein suffisant pour écarter toute velléité de fuite » (Neumeister c. Autriche, arrêt du 27 juin 1968, série A no 8, p. 40, § 14). S'agissant du droit fondamental à liberté, garanti par l'article 5 de la Convention, les autorités doivent vouer autant de soin à fixer un cautionnement approprié qu'à décider si le maintien d'une personne accusée en détention demeure ou non indispensable (Iwańczuk c. Pologne, no 25196/94, § 66, 15 novembre 2001 ; Schertenleib c. Suisse, no 8339/78, rapport de la Commission du 11 décembre 1980, Décisions et rapports 23, p. 137, § 170*)."

> ***in fixing an appropriate amount of bail as in deciding whether or not the accused's continued detention is indispensable (see Iwańczuk v. Poland, no. 25196/94, § 66, 15 November 2001, and Skrobol v. Poland, no. 44165/98, § 57, 13 September 2005)*.”[18]”**

“This was reiterated in **Richard Grech vs l-Avukat Generali,** wherein it was held that where pecuniary guarantees are set by a court, regard must be had to the financial means of the accused and those persons who can offer help in that respect, as otherwise it would be as if the accused was not granted provisional release at all.[19] Similarly in **Jonathan Attard vs Il-Kummissarju tal-Pulizija et,** this Court, presided over by Judge Anthony Ellul, held that since the accused could not meet the financial conditions set the court for his release, the decree granting release from custody had been rendered useless, and that this led to violation of his right to liberty.[20]

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

> **“”*there is no evidence that before deciding on that sum the domestic court made any effort to determine what would be an appropriate amount of bail in the circumstances, for example by requiring the applicant to furnish information on his financial standing*.”[21]”**

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

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

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

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

[21] ***Peter Osuch v. Poland,*** see above note 21*,* par. 47.

"Similary, in **Georgieva v. Bulgaria,** after finding that the applicant had had to remain detained for the duration of the proceedings against her because she was unable to pay the amount of approximately €750 that the domestic court had fixed as bail, and after also finding that the domestic court had failed to give reasons to substantiate the amount so fixed, [22] the ECHR held that the applicant's right to liberty as guaranteed by Article 5(3) of the Convention had been breached. **It reiterated that the amount of bail set by the domestic courts should be primarily assessed with reference to the personal circumstances and resources of the accused.[23]**

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

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

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

> **""*…the amount set for bail must be duly justified in the decision fixing bail (see Georgieva, cited above, §§ 15, 30 and 31) and must take into account the accused's means (see Hristova, cited above, § 111). In that connection, the domestic courts' failure to assess the applicant's capacity to pay the sum required was one of the reasons why the Court found a violation in the Toshev v. Bulgaria judgment (no. 56308/00, §§ 68 et seq., 10 August 2006).*"[24]"**

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

[23] *Ibid.,* par. 30: "*La Cour constate de surcroît que même après la modification de la mesure de contrôle judiciaire, le 31 janvier 2002, la requérante est restée détenue faute de pouvoir payer la caution imposée (paragraphe 15 ci-dessus). Elle rappelle que le montant d'une caution doit être apprécié principalement par rapport à la situation personnelle de l'intéressé et à ses ressources (Hristova c. Bulgarie, no60859/00, § 110, 7 décembre 2006). Or, bien que la requérante eût déclaré qu'elle était au chômage et ne disposait pas de revenus stables, le tribunal lui a imposé un cautionnement de 1 500 BGN (soit environ 750 EUR). La Cour note que le tribunal régional n'a pas exposé d'arguments afin de justifier son choix du montant de la caution. Ainsi, les organes de l'Etat n'ont pas démontré qu'ils avaient fixé le montant de la caution en fonction des revenus et de la situation particulière de la requérante*."

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

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

> **""*The amount of the security shall be fixed within the limits established by law, regard being had to the condition of the accused person, the nature and quality of the offence, and the term of the punishment to which it is liable*."[25]"**

"In this regard, the Court makes reference to **Nakach v. The Netherlands,** wherein the ECHR found that there was a breach of Article 5(1) because "…*the procedure prescribed by domestic law was not followed"* since "…*under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention.*"[26] The Court notes that in this case, by failing to assess the accused's financial position in setting the financial conditions, the Court of Magisrates failed to fully comply with the procedure prescribed by the Criminal Code.

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

> **""…*the Court agrees that* [the risk of absconding], *in addition to the suspicion that the applicant had committed the criminal offences in question, could initially suffice to warrant his detention. However, with the passage of time that ground inevitably became less relevant*…"[27]"**

"The Court notes that in the present case, the accused is liable to **a maximum of two years imprisonment if he is found guilty**. The Court has also seen that the accused had been held in preventative detention from January 2017 till October 2017 and this inspite of the date of release cited by the applicant's advocates[28]. In other words, the accused has been held in detention for approximately ten months, which closely approximates half the maximum prison sentence that may be imposed on him if found guilty. It is this Court's opinion, while the risk of absconding might have initially sufficed to warrant his detention, this factor becomes far less relevant at a later stage of the proceedings. The Court finds therefore that any financial conditions imposed on the accused must necessarily have been viewed in the light of all circumstances of the case and that the fear of absconding should have no longer been considered to be a crucial factor in determing the amount of money, if any, to be deposited in Court as part of his bail conditions, when the period of reasonable time was exceeded."

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[25] Article 576, Criminal Code.

[26] **Nakach v. The Netherlands,** ECHR 5379/02 decided on the 30th of June 2005, par. 34 – 44. See also **Ocalan v. Turkey**, ECHR 46221/99 decided on the 12th of May 2005, par. 83.

[27] **Kudla v. Poland,** see above note 12, par. 114.

[28] Vide the note of the record of the proceedings of the 21st May 2018.

The Appeal

9. Appellant is basing his appeal on two grounds: [1] that there was no breach of the above-mentioned articles and [2] that the First Court had gone beyond the terms of the constitutional reference in violation of the principle of *ultra petitum.*

10. On these grounds Appellant is requesting this Court to revoke the appealed judgment and instead, declare that Respondent did not suffer any violation of his fundamental human rights; with costs.

11. No written reply was filed by Respondent.

The Grounds of the Appeal

First Ground

12. Appellant submits that Respondent's arrest was lawful and in accordance with the law. Quoting Article 575 of the Criminal Code, Appellant submits that the Magistrates' Court was not satisfied that the circumstances mentioned in that article for the release on bail could not occur in the case of Respondent. Also, since the crimes mentioned in

the charge sheet carried a maximum punishment of two years imprisonment, then Article 575[9][a][ii] was applicable and the accused who was arraigned in court on the 23rd January 17 was kept under arrest within the time-limits prescribed by the Criminal Code.

13. Appellant submits that the fact that the Criminal Code grants a person the right to file applications for bail *"that of itself is safeguarding the right mentioned in Article 5[4] of the Convention."* With regards to the duration of the detention of Respondent and the special diligence criterion which the Court is bound to exercise in such cases, Appellant makes the following observations:

14. [1] That, notwithstanding that Respondent had been arraigned under arrest in court on the 23rd. January 17 he did not request bail immediately and his first application was made some time after, that is the 6th April 17. The Magistrates' Court denied his request on the basis of the detailed reply filed by Appellant, containing the reasons for his objection and referring to these reasons as contained in the Appellant's reply. Respondent subsequently filed another three bail applications, which were all denied on the basis of Appellant's previous objections. In the last application, unlike in the previous applications, the Magistrates' Court had ordered that a copy of Appellant's objection be served on Respondent's lawyer.

15. [2] That the fact that in the first three applications, Respondent was not notified with Appellant's reply, is not in violation of the Criminal Code and is not in violation of Respondent's fundamental right under Article 5 of the Convention or Article 34 of the Constitution. He submits that under local law the Attorney General is not obliged to serve the accused with a copy of the reply. Besides, Respondent was always assisted by a lawyer and he could easily have requested a copy of those replies. He submits that, as observed by the Magistrates' Court in the decree of referral:

> "The accused and his lawyers had open, easy and unrestricted access to the Attorney General's replies at all times. The accused has a positive duty to follow his own proceedings to know shat documents are contained in the court file and to act upon them should he feel proper."

Court's Assessment

16. Firstly this Court observes that from an examination of the acts of the criminal proceedings[29] it results quiet clearly that, though Respondent was not served with the written reply of Appellant in response to his application of the 6th April 17, Respondent was well aware of the reasons for Appellant's objection. In fact, in his application presented on the 10th April 17 Respondent referred to the reply, which Appellant has filed to his previous application. In this last application Respondent states:

[29] Criminal proceedings – "**The Police v. Kristjan Zekic also k/a Adhamjon Niyazov**"

> "That applicant would like to make reference to reasons given by the Attorney General in his note of reply to application made on the 6th April 2017;
>
> "That Attorney General's objections mainly centre on the allegations that the identity of accused 'until recently was only known as Krtistjan Zekic.'"[30]

17. In the next two paragraphs Respondent rebuts the reasons given by Appellant underlying his objection.

18. It seems that regrettably the First Court has not given the importance this fact has to the issue raised in this case, as even though it results that Respondent was not served with a written copy of the objection raised by Appellant, he was well aware of their contents; possibly he may not have been aware of the contents of the reply following his application of the 6th April, but his application of the 10th April reveals manifestly that Respondent was aware of the reasons for the objection. Also, the reply to which the application of the 10th refers to is identical to the previous reply and to the replies following subsequent applications, that is, that the objection is based on the fact that Respondent has been charged with crimes relating to the falsification of documents of identity, that it resulted to the police that Respondent had used two names which in their view makes him an "unidentified person" and so cannot be trusted that he will not try to abscond from these islands

[30] Foll.164-165

in which eventually it would be difficult for the police to trace him and bring him back to face the criminal proceedings started against him.

19. In the circumstances, this Court cannot therefore agree with the First Court's reasoning and conclusion that, since Respondent was not served with a copy of the written reply of the Attorney General, then his rights under Article 5 of the Convention have been violated. The facts of the case show otherwise.

20. Also, of relevance to the issue is that part of the referring court's decision which states that Respondent had at all times easy and unrestricted access to the documents contained in the court file, including the Attorney General's replies. Also, that the accused has a positive duty to exercise due diligence in following the proceedings.

21. With regards to the Attorney General's second argument that, if Respondent wished to contest the Appellant's arguments in oral submissions before the Magistrates' Court, this Court observes that he had the faculty at law to present an application to the Court requesting that the application be appointed for hearing. However, Respondent thought it sufficient to rebut the Attorney General's arguments by filing a fresh application contesting those arguments.

22. On the strength of the above this Court cannot agree with the First Court's reasoning that, since Respondent was not served with a written copy of the reply or replies he *"had no opportunity to make his submissions in his regard"* to contest the objection.

23. Regarding the First Court's conclusion that the court's decree lacked valid and sufficient motivation since the reasoning in the Magistrate's Court decree was concisely formulated with reference to the reasons given by the Appellant in the decree, this Court observes that what is necessary for the decree to be considered as valid under the Constitution and the Convention, is not its length but the reasoning itself. In this case, the reasoning in the Appellant's replies was clear and was based on factors clearly mentioned by Appellant, that is, the factor of the uncertainty of Respondent's identity and the difficulty of tracing Respondent if he absconds from these Islands. These reasons were clearly stated in the Attorney General's replies and from the conclusion of the decrees, it results quite clearly that the Magistrates' Court was of the opinion that the reasons contained in the replies should prevail over those contained in the bail applications.

24. For the above reasons this Court considers this ground of appeal to be justified in the present case and that there is no violation of Article 5 of the Convention in this respect

Second Ground

25. This is based on the Appellant's submission that the *"First Court ex officio and without the parties knowing anything about it, went literally out of its way to examine and find a breach of other aspects [sic] which have nothing to do with the reference issued by the referring court."* In other words, Appellant complains that the First Court examined issues, which though falling within the ambit of Article 5 of the Convention, were not raised in first instance. Specifically, he mentions the conditions for the granting of bail, the amount of the deposit guaranteeing the observance of those conditions, the lack of evidence on the financial means of Respondent and that the period of the arrest was too long.

26. Citing local case law[31] and author[32], Appellant submits that, though a request for a constitutional reference under Article 46 [3] of the Constitution, is made by one of the parties during the criminal proceedings, at law once the court accedes to the request, then the constitutional reference is considered to be a question of the referring court to a court of constitutional proceedings. Therefore, the deliberation

[31] PA 42/2011 ***Ir-Repubblika ta' Malta v. Matthew John Migneco***, 15 November 2011 [final]; Q.Kos.67/2011 ***The Police v. Nelson Arias***, 28 September 2012; Q.Kos.33/2008 **Carmel Massa et v. Direttur Akkomodazzjoni Socjali**, 30 April 2012.
[32] *Constitutional Procedure relative to Fundamental Rights and Freedoms* by Chief Justice Emeritus Guseppe Mifsud Bonnici [2004 – pg.91]

and decision of the constitutional reference is as a rule limited to the parameters established by the referring court.

Court's Assessment

27. In this respect this Court refers to the case law cited by Appellant and reiterates that the reference is at law considered a question of a constitutional nature made by the referring court to a court with constitutional jurisdiction and that therefore, as a rule, the latter is bound to answer the question within the terms of the reference. However instances may occur where the constitutional courts deem it necessary to bring to the referring court's attention a possible violation of an article protecting a fundamental human right which has not been indicated in the reference. In the latter case, the constitutional courts are in duty bound to raise the issue *ex officio* with a view to guiding the referring court of a possible violation of that fundamental human right, giving the parties concerned the opportunity to be heard on that particular issue prior to delivering judgment.

28. In the present case, the Court observes that, since during the proceedings before the First Court respondent has been granted bail on a personal guarantee, the issue regarding the financial considerations of

respondent has become irrelevant, and *rebus sic stantibus* no further guidance on that matter is required by the referring court.

29. On the strength of the above, since the issue has been superseded as explained above, there is no need for this Court to take further cognizance of this ground of appeal.

Decide

For the above reasons this Court decides Appellant's appeal by accepting it limitedly, and reforms the appealed judgment by revoking the decision *in toto* and instead, responds to the reference made by the Magistrates' Court in the following manner:

[1] That the lack of notification of the Attorney General's notes of objection to the accused's requests to be released from custody does not, in the circumstances of this case, violate the provisions of Article 34 of the Constitution and Article 5 of the Convention;

[2] That in this case the submission that the decrees given by the Magistrates' Court denying bail lacked sufficient motivation is unfounded, and therefore this Court finds no violation of the above articles of the constitution and the convention in this respect;

[3] That the fact that for a long period exceeding three months during which the criminal proceedings against respondent were suspended whilst the accused was being kept in detention, violated the above Articles 34 and 6 of the Constitution and the Convention respectively;

[4] That the issue raised by the First Court that in granting bail the Magistrates' Court had failed to set financial conditions with reference to the accused means, has been superseded as explained above.

Costs relating to the first instance proceedings are to be borne as decided by the First Court, whilst those relating to this appeal are to be borne by the parties in equal shares.

Joseph Azzopardi Chief Justice	Giannino Caruana Demajo Judge	Noel Cuschieri Judge

Deputy Registrar
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