



**CONSTITUTIONAL COURT**

**HIS HONOUR THE CHIEF JUSTICE  
SILVIO CAMILLERI**

**THE HON. MR. JUSTICE  
GIANNINO CARUANA DEMAJO**

**THE HON. MR. JUSTICE  
NOEL CUSCHIERI**

Sitting of the 28 th September, 2012

Civil Appeal Number. 67/2011/1

**The Police**

**v.**

**Nelson Arias**

**The Court**  
**Preliminary**

1. This is an appeal by the Attorney General and the Commissioner of Police from a judgment of the 29<sup>th</sup> February 2012 delivered by the First Hall of the Civil Court in its constitutional competence by which that Court in response to the reference made to it by the Court of

Magistrates as a Court of Criminal Inquiry gave its decision, for the reasons given in the same judgment, as follows:

“...that Nelson Arias suffered a violation of his fundamental human right to be granted provisional freedom under conditions pending proceedings since his continued detention is deemed by this Court unreasonable and excessive under article 5(3) of the European Convention and also in the light of what has been stated above regarding his continued detention in violation of the Criminal Code articles 575(5) and 575(6).

“Moreover the Court finds that the prosecution unjustifiably prolonged the conclusion of its evidence when it transpired that 23 months elapsed for the prosecution to conclude its evidence at inquiry stage taking into account the few witnesses involved and the relevance of other evidence tendered as well as the way in which it was tendered and therefore also finds that article 5(3) in conjunction with article 6(1) and article 39 of the Constitution of Malta relating to trial within a reasonable time has been breached.

“The Court finds that Nelson Arias should be compensated for these violations by being granted non pecuniary damages and after taking into account the nature of the violations involved and that Nelson Arias only requested provisional freedom at the initial stages of the criminal proceedings, the Court deems it just that Nelson Arias be awarded the sum of €1,500 in connection with the violations falling under article 5(3) and 6(1) of the European Convention and article 39 of the Constitution of Malta.

“The Court orders the records of this case and a copy of this decision be transmitted to the Court of Magistrates so that proceedings resume in accordance with that decided by this Court.

“The Commissioner of Police shall bear all costs.”

**The terms of the reference by the Court of Magistrates as a Court of Criminal Inquiry**

2. On the 18<sup>th</sup> October 2011 the Court of Magistrates (Malta) as a Court of Criminal Inquiry made a number of considerations ending with a decree as follows:

“That most definitely the time within which accused could be held in preventive custody has elapsed, so the Court today is granting bail as per attached bail conditions. Furthermore Court after going through the records of the case realised that there were certain instances – at least four, where no effective sitting was held due to the fact that Court had no interpreter to assist accused in translating the proceedings from the English into the Spanish language. An anomaly also exists in the records of the case, considering that Prosecuting Officer had declared that he had rested the case at least on three occasions dating back to 2009, and after such declaration Attorney General remitted a very lengthy request and refers this to the Constitutional Court, First Hall, Civil Court, to examine such reference”.

**The Attorney General’s and Commissioner of Police’s reply to the constitutional reference before the first Court**

3. The Attorney General and Commissioner of Police replied to the reference in the Maltese language as follows after reproducing the above text of the reference:

*“L-esponenti jixtiequ jipprecizaw illi r-referenza ma saritx skont ir-Regolament 5 tar-Regolamenti dwar il-Prattika u l-Procedura tal-Qrati u l-Bon-Ordni stante li ma tikkontjenix liema hi d-disposizzjoni tal-Kostituzzjoni ta’ Malta jew tal-Konvenzjoni Ewropeja li allegatament gew miksur. Madankollu mill-verbal tas-seduta tat-18 ta’ Ottubru 2011 jidher illi l-lanjanza hija fis-sens illi hemm allegat dewmien fil-proceduri penali liema trapass taz-zmien allegatament jilledi jew x’aktarx jilledi d-drittijiet tar-rikorrenti kif sancit fl-artikolu 39 tal-Kostituzzjoni u l-Artikolu 6(1) tal-Konvenzjoni Ewropeja (Kap. 319 tal-Ligijiet ta’ Malta) kif*

*ukoll allegata vjolazzjoni tal' l-Artikolu 5(3) tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem in kwantu nzamm taht arrest preventiv ghal massimu permess mill-ligi.*

*“L-esponenti xtaqu jirrilevaw illi qabel ma saret dina r-riferenza, l-esponenti qatt ma gew notifikati b’verbal, nota jew rikors li kien juri bic-car liema fatti u artikoli qed jillamenta minnhom l-imputat u dan wassal sabiex l-esponenti gie mcahhad mill-opportunita’ illi juru illi t-talba tar-rikorrenti hija semplicement frivola u vessatorja u tikkostitwixxi biss tattika u manuvra sabiex itawwal il-proceduri penali b’mod illi l-proceduri penali tar-rikorrenti jinstemghu l-ahhar u cioe’ wara li jkun ntemmghu l-kawzi ta’ l-imputati l-ohra li huma involuti fl-istess cirku ta’ droga li huwa involut fih ir-rikorrent.”*

4. The same reply continued by contesting all applicant’s allegations of violations of Article 5(3) and 6(1) of the Convention and of Article 39 of the Constitution rejecting them as being unfounded in fact and at law for the reasons given in the reply.

#### **The judgment appealed from**

5. In its judgment dated 29th February 2012, the First Hall of the Civil Court in its constitutional competence, after having reproduced the text of the constitutional reference already reproduced above and having reproduced the respondents’ reply also referred to above, made the following preliminary considerations:

“By a decree of the 11 January 2012 the parties agreed that the reference did not specify the articles of the law constituting the alleged violations of human rights but in this regard the Attorney General and Commissioner of Police were withdrawing their plea of nullity in the interests of justice;

“During the sitting of the 9 February 2012 Counsel to the Commissioner of Police submitted that the applicable article of law relevant to the alleged violations in the Constitutional reference was only article 5(3) of the

European Convention. Counsel to Nelson Arias submitted that the reference by the Magistrates Court was the consequence of formal submissions made by defence counsel and the allegations referred to violations in connection with article 5(3) and 6(1) of the European Convention and article 39 of the Constitution of Malta. However the parties adhered to the Court's decree of the same sitting that even though the Constitutional reference was unclear this Court would consider the relevant provisions in the light of the evidence submitted.

"The Court therefore being bound primarily by the wording of the Constitutional reference will be delivering its decision based on an alleged violation of article 5(3) of the European Convention since the alleged violations can be summed up as follows:

"a. the unjustified length of time taken by the prosecution to conclude their evidence before the Inquiry Magistrate;

"b. the prolonged custody of Nelson Arias without being given freedom from arrest on certain conditions;

"Both allegations fall within the parameters of the abovementioned article of the European Convention, however the Court will, in the interests of all concerned, refer to article 6 and article 39 of the Constitution in so far as these articles might be relevant and connected with article 5(3) of the European Convention;"

6. Following these considerations the first Court passed on to give a summary of the facts of the case and then proceeded to make the following further deliberations:

**"Other available remedies**

"The Court notes that respondents are pleading that the accused had a practical and legal remedy to address his prolonged incarceration and this was a request to the

Court to grant bail. This request could have been filed several times over if his request was declined since the law did not limit this redress.

“Respondents quoted several judgments to support this issue amongst which **Vella vs Commissioner of Police** (05/04/1991), **Clifton Borg vs Commissioner of Police** (09/03/12996), **David Axiaq vs Public Transport Authority** (14/05/2004).

“This Court considers it discretionary whether the First Hall of the Civil Court should or should not decline to exert its jurisdiction depending on the nature of the violation, the availability of a remedy (as opposed to its success) and the effectiveness of the remedy.

“Respondents have argued that Nelson Arias chose not to apply for provisional freedom throughout the gathering of evidence at inquiry stage of proceedings when the law clearly provided for this right.

“This Court agrees that Nelson Arias could have requested at any stage to be granted provisional freedom following the refusal when he was arraigned. The Court will take this into account its deliberations and concessions but as shall be seen later in this judgment, the law also provides for an automatic grant of provisional freedom after a certain lapse of time in custody and this is a legal obligation imposed on the National Authorities.

“Therefore the fact that Nelson Arias could have applied for provisional freedom at any stage of the inquiry does not exclude or diminish the relevant authority’s responsibility in safeguarding the rights of the accused unless these are or were renounced by the accused which is now the case.

“In this case therefore the Court decides to exercise its discretion and examine Nelson Arias complaints.”

7. Following the above evaluation of the plea of non-exhaustion of ordinary remedies the first Court went on to

consider the alleged violation of Article 5(3) of the European Convention and, after reproducing the relevant article of the Convention, deliberated as follows in regard to this issue:

“The first part of the Constitutional reference deals with the lack of provisional freedom from detention of Nelson Arias pending the procedures before the Magistrates Court as a Court of Criminal Inquiry.

“Following Nelson Arias’s arraignment on the 4 November 2008 and the rejection of his request for provisional freedom on the same day, Nelson Arias remained in custody till defence counsel made a statement raising this issue of continued uninterrupted detention for more than twenty months before the Magistrates Court on the 14 October 2011. It was as a result of this statement that the Magistrates Court issued its decree of the 18 October 2011 granting provisional freedom from detention under certain conditions.

“The parties agree that Nelson Arias is still in custody. Defence counsel to Nelson Arias has submitted before this Court that the conditions imposed by the Court for provisional freedom from custody were unreasonable (vide Court record of the 11 January 2012). This Court notices that no submissions or indeed a formal request for provisional liberty was made before the Magistrates Court issued its decree on provisional liberty. This Court invites the Magistrates Court to consider the conditions of bail if and when an application is made before it asking it to review the conditions already imposed, taking into account all the circumstances including the personal and financial status of Nelson Arias and to what extent if any the reasons in rejecting provisional liberty in 2008 are still valid in the present circumstances when balancing the conditions to be imposed in the grant of provisional freedom as a safeguard to ensure the presence of the accused in the criminal proceeding taking into account the right to liberty of the accused.

“Having said this, this Court make it clear that the Constitutional reference does not extend to a review as to the reasonableness of the bail conditions imposed by the Magistrates Court on the 14 October 2011 as a condition to provisional freedom from detention but only whether the time spent by Nelson Arias in detention since his arraignment was in violation of his fundamental human right to freedom. Article 575(5) and 575(6) of Chapter 9 of the Laws of Malta render illegal continued uninterrupted arrest without the grant of provisional freedom in certain circumstances.”

8. At this junction the first Court reproduced the full text of Article 5(5) and 5(6) of the Criminal Code and continued:

“It has been proved that 23 months elapsed from the date of arraignment of Nelson Arias till the grant of provisional freedom from arrest on 18 October 2011, during which period Nelson Arias remained in custody. The length of time under continued detention of Nelson Arias rendered his arrest illegal and therefore unjustified taking into account the longest period of time in which an arrested person can be kept in custody depending on the nature of the punishment tied to the offence with which the arrested person is charged (vide **Jovica Kolakovic vs Attorney General**, Constitutional Court, 14/02/2012).

“This Court is not taking account that Nelson Arias is still under custody as was jointly declared by the parties, since his continued detention following the Magistrates Court decree of the 18 October 2011 is a consequence of other issues not relevant to the reference in question, and over which the parties are at liberty to take whatever remedial action is available to them.

“The reasons given by the Magistrates Court in the refusal to grant provisional freedom pending proceedings on the 4 November 2008 were based on (a) the nature of the charges relating to drug offences, (b) the possibility of tampering with the evidence, (c) the lack of ties of the accused with Malta.

“Taking into account the limited Constitutional reference and the relevance of these reasons to the continued detention of Nelson Arias for 23 months, this Court finds that even though these reasons might have had a certain weight at the time of arraignment, when the prosecution’s case was only at the initial stages, these reasons lost their weight with the passing of time and when the evidence tendered in the records of the criminal proceedings do not sustain the necessity of Nelson Arias detention for such a long period, taking into account the fragmentary and lax manner in which the evidence was brought forward by the prosecution. Following the sitting of the 18 November 2008 the evidence of three primary witnesses resulting from the respective *proces verbal* in connection with these witnesses was exhibited in the proceedings against Nelson Arias. Evidence resulting from a *proces verbal* is considered as valid and permissible in proceedings against third parties (article 580 Criminal Code). Furthermore as early as 2 September 2009 the prosecution had already on one occasion closed its case only to reopen it some weeks later. The length of time itself lessened the threats which might have been present at the early stage of proceeding and that freedom from detention could have been granted by the Court earlier (as the Magistrates Court has the duty to look into as empowered to do by the Criminal Code itself in the proviso to article 401) under such conditions as would have insured the accused’s presence during proceedings and in conformity with established case law on this issue [vide **Tomasi vs France**, A-241 (1992)].

“The nature of the charges (drug related) and the lack of any connection with Malta cannot be considered as a justification for the prolonged detention of an arrested person especially where, as in this case, there is no evidence to show that the arrested person was in any way a threat to justice being meted out having regard to the fundamental human rights of the arrested person. It is dangerous and unjust to treat criminal cases as mere problems which have to be solved by the relevant authorities whilst not giving due weight or at worst

disregarding the dignity of the human being who is the subject of the proceedings being conducted against him.”

**9.** The first Court then cited the decision of the European Court of Human Rights in the case **Assenov and others v. Bulgaria**<sup>1</sup> and on this issue concluded as follows:

“It is true however that Nelson Arias through his defence counsel did not, following the first rejection of provisional freedom on 4 November 2008 again request the grant of provisional freedom pending proceedings and this shall be taken into account in this Court’s decision on the remedy available.

“The Court therefore finds that Nelson Arias right to provisional freedom pending proceedings against him was violated in view of what has been stated above.

“The second violation alleged by Nelson Arias is founded on the issue of the delay in the proceedings before the Court of Criminal Inquiry which delay it is being alleged was unreasonable and unjustified and prolonged Nelson Arias detention.

“Since detention was not justified on the ground of the violation of the provisions of the Criminal Code which led to a violation of Nelson Arias is right to freedom from detention under article 5(3) there is in principle no need to assess the further alleged violation under the same article arising from the allegation that Nelson Arias’s detention was prolonged beyond a reasonable time because the proceedings were not conducted with the required expedition.”

**10.** In respect of the alleged violation of Article 5(3) of the Convention in conjunction with Article 6(1) of the same and the alleged violation of Article 39 of the Constitution the first Court’s considerations were the following:

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<sup>1</sup> 28 October 1998

“However this Court deems it necessary in the circumstances of this case to deal with this issue since the guarantee in article 5(3) which overlaps that in article 6(1) and its Maltese counterpart article 39 of the Constitution requires that in respect of a detained person the authorities show special diligence in the conduct of the proceedings [vide on this requirement **Herczegfalvy vs Austria**, A-244(1992)] without hindering the efforts of the judicial authorities to carry out their tasks with proper care.

“It is to be noted that article 6(1) and article 39 of the Constitution of Malta speaks in general of a person’s entitlement to a fair and public hearing within a reasonable time. The relevant factors to be taken into account in considering the ‘reasonable time’ factor are the complexity of the case, the conduct of the accused and the efficiency of the national authorities. Obviously the facts of each case have to be considered individually.

“The Court finds that the issue of excessive time in detention on the part of Nelson Arias has already been dealt with by this Court and that a violation of his fundamental right to liberty under article 5(3) has been prejudiced thereby. This further alleged violation leads this Court to the same conclusion since the length of time taken up by the prosecution to conclude its case at inquiry stage proceedings is unjustified. This is being stated by this Court on account of the fact that few witnesses were brought during the 23 months it took the prosecution to conclude its case whether or not the prosecution had to rely on the Attorney General’s conduct of the case and the production of further evidence. There were significant gaps of time wherein the prosecution brought little or not evidence and no diligent effort was shown by the prosecution to conclude its case within a reasonable period of time vide [**Chraidi vs Germany** (2006)]. The records of the case are practically taken up with adjournments for one reason or another over which accused had not control but over which the prosecution could have used its wide and far reaching powers to avoid, and thus conclude its evidence.

“The Court does not agree with the prosecution’s submissions that this allegation could only be brought following the conclusion of proceedings since the proceedings had to be taken as a whole. Once the prosecution had closed its case at inquiry stage it is within the accused’s rights and this Courts’ power to review whether the prosecution had acted diligently in ensuring that the procedures brought against Nelson Arias by the Police are concluded within a reasonable period of time in so far as this concerns the part played by the prosecution.

“This was not proven to be so.”

11. In conclusion the first Court replied to the constitutional reference made to it by the Court of Magistrates as stated earlier in this judgment in its preliminary section.

### **The appeal filed by the Attorney General and the Commissioner of Police**

12. The respondent Attorney General and Commissioner of Police felt aggrieved by the judgment of the first Court and by an application dated 12<sup>th</sup> March 2012 appealed therefrom and requested the annulment and revocation of the same with costs against the other party.

13. The appellants’ grievances can be summed up as follows:

1. The first Court was wrong when it concluded that the applicant Nelson Arias did not have an ordinary effective remedy at his disposal notwithstanding the fact that the said applicant could have requested at any stage to be granted freedom from preventive arrest.

2. The first Court based its judgment on a wrong interpretation of Article 5(3) of the Convention since the applicant Arias had requested bail only on his first appearance before the Court when the circumstances did not militate in his favour but failed to request bail when the circumstances changed in such a way that the Court

might have considered to be such as to lead it to grant him bail. In respect of this grievance the appellants cite the judgment of the European Court of Human Rights **Scott v. Spain**<sup>2</sup>.

3. The first Court's finding of a violation of Article 6(1) of the Convention and of Article 39 of the Constitution is premature once the proceedings are still pending since in terms of the said articles the Court must make an assessment of the proceedings as a whole and not focus on individual aspects.

4. The first Court based its judgment on a wrong interpretation of Article 6(1) of the Convention and of Article 39 of the Constitution since the Court failed to assess the reasonableness of the length of the proceedings in the light of the circumstances of the case including the complexity of the case, the conduct of the applicant and of the relevant public authorities, and what was at stake for the applicant Arias.

5. The remedy granted by the first Court is not a just one since in a constitutional reference as the present one the Court which takes cognizance of the reference has its competence circumscribed by the terms of the reference and is limited to a determination of whether the alleged violation results and the Court is not bound to establish a quantum of damages.

14. The defendant Nelson Arias did not file a reply to the appeal application.

### **Facts of the case**

15. The appellant Nelson Arias was arraigned before the Court of Magistrates as a Court of Criminal Inquiry on the 4<sup>th</sup> November 2008 charged with conspiracy to sell and deal in a dangerous drug; an attempted offence against the provisions of the Dangerous Drugs Ordinance; complicity in the same offence. The offences carry a maximum punishment of life imprisonment upon trial on

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<sup>2</sup> 18 December 1996

indictment or a maximum of ten years imprisonment in the case of trial by the Court of Magistrates as a Court of Criminal Judicature. On the date of the arraignment Arias pleaded not guilty and it was declared that since Arias does not understand Maltese but could understand English a little the proceedings were to be conducted in English to which Arias consented but reserved the right to request an interpreter to the Dutch language at a later stage. The defendant requested bail which was opposed by the prosecution due to the nature of the offence, the danger of tampering with the evidence and in particular because the defendant did not have any fixed address in Malta, has no ties with Malta, and there was the consequent fear that he would abscond. The Court, for the reasons given by the prosecution, rejected bail at that stage. During the next sitting an interpreter from English into Dutch was appointed and in subsequent sittings, at the request of the defendant Arias, an interpreter from English to Spanish was appointed. Whenever an interpreter was not present the sitting was put off.

**16.** On the conclusion of the inquiry according to law within the period of one month from arraignment the Court, on the 18<sup>th</sup> November, 2008, found there were sufficient grounds to commit the defendant for trial on indictment and the record was referred to the Attorney General according to law. The Attorney General referred the inquiry back to the Court of Magistrates requesting it to hear the list of witnesses which he indicated. The hearing of this list of witnesses together with some other witnesses whose need to be heard arose in the course of the proceedings was exhausted on the 10<sup>th</sup> October 2009, after a number of referrals back (*rinviji*) by the Attorney General, on which date the police prosecuting officer declared that the prosecution rested its case.

**17.** Following this declaration, however, the Attorney General again referred back the record on the 16<sup>th</sup> December 2009 with a new list of witnesses and queries. The last witness on this list, the Court appointed expert Martin Bajada, was heard on 19<sup>th</sup> January 2011. This too was not the end of the story. Because in the meantime the

Attorney General wanted to hear two other witnesses who had separate criminal proceedings pending against them and who were therefore refusing to testify before the conclusion of the proceedings against them for fear of incriminating themselves. The inquiry is still pending to date.

### **This Court's assessment**

**18.** It is with considerable consternation that this Court notes once again that, as correctly pointed out by the Attorney General in his reply to the reference before the first Court, the referring Court in this case failed to comply with the requirements of rule 5(1) of the Court Practice and Procedure and Good Order Rules<sup>3</sup> when drawing up the reference to the First Hall Civil Court in its constitutional competence. The reference made is totally vague, unclear as to the nature of the constitutional questions to which the referring Court required answers, completely deficient in the nature of the actual or potential violations of the Constitution and/or of the Convention, with not the slightest indication of the article or articles, to say nothing of the relevant paragraphs, of the Constitution or of the Convention which are alleged to have been or are likely to be breached. This Court repeats that this is unacceptable as it has pointed out on several occasions<sup>4</sup> but apparently to no avail.

**19.** Nevertheless the, Attorney General, in the same reply pointed out that from the minute dated 18<sup>th</sup> October 2011 entered by the defence in the record of the proceedings before the Court of Magistrates and to which reference is made in the order of reference of that Court, it would appear that the questions to which the said Court required answers concerned the length of the proceedings in relation to Articles 39 of the Constitution and Article 6(1) of the Convention as well as the defendant's continued detention in the criminal proceedings for the maximum

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<sup>3</sup> L.N. 279/2008

<sup>4</sup> See among others *Pulizija v. Belin sive Benigno Saliba*, 10/4/1991; *Pulizija v. Lawrence Cuschieri*, 8/1/1992; *Pulizija v. Longinu Aquilina*, 23/1/1992; *Pulizija v. Pauline Vella*, 30/9/2011.

period allowed by law in relation to Article 5(3) of the Convention.

**20.** Moreover, on the invitation of the first Court, by a minute dated 9<sup>th</sup> February, 2012 entered in the record of the case the Commissioner of Police through his legal counsel submitted that the reference should be limited to an examination of an alleged violation of Article 5(3) of the European Convention whereas legal counsel to Nelson Arias submitted that the alleged violations fell under Article 5(3) of the Convention and Article 6(1) of the same Convention concurrently with Article 5(3), as well as under Article 39 of the Constitution.

**21.** Of course, this is a very unhappy and unfortunate way of dealing with the reference since such a reference, although possibly triggered by the parties, is never a reference by the parties but a reference by the referring Court and therefore it is the latter which is bound to indicate the relevant provisions allegedly contravened and not the parties. Moreover, it is up to the referring Court to also state concisely and clearly the facts and the circumstances out of which the question arises as well as the terms of such question and the parties cannot substitute themselves for the referring Court in this regard.

**22.** It is incumbent on this Court to note that the total disregard by the Court of Magistrates of the requirements laid down in rule 5(1) of the Court Practice and Procedure and Good Order Rules to “state concisely and clearly the facts and the circumstances out of which the question arises, the terms of such question and indicate the provision or provisions of the Constitution allegedly contravened” has led, as expected, to considerable difficulty on the part of the first Court to identify what the Court of Magistrates was seeking from it. Moreover, the fact that the Court of Magistrates granted bail contemporaneously with its decision makes the task more complicated since the original complaint raised on behalf of defendant in the minute dated 14<sup>th</sup> October 2011, and which triggered the reference procedure, complained of precisely the fact that he had not been granted bail. That

minute could not have been referring to the nature of any conditions attached to the granting of bail simply because no bail had at the time been granted. In fact the only basis cited by the defendant as a basis for his complaint was the consideration that he had been in detention for over 20 months and this was, according to the defendant, contrary to law. A further ground given by the defendant to justify his complaint was the delay in the proceedings of the inquiry.

**23.** The first Court, however, by a decree of the same date decided that it was not opportune to return the reference to the referring Court for amendment and taking into account the nature of the proceedings and what is at stake as well as the fact that legal counsel of both parties adhered to the decree of the first Court this Court will also proceed accordingly, although it may not always be possible or opportune to do so.

**24.** This Court, to conclude on the nature and scope of the constitutional reference before it, notes that although defence counsel had submitted that the reference was to be considered to raise also a possible violation of Article 6(1) of the Convention the first Court, in the judgment appealed from, held that the terms of the reference could only be held to involve an alleged violation of Article 5(3) of the Convention and not also of Article 6(1) thereof although it added that, in the interests of all concerned, it will refer to Article 6 and Article 39 of the Constitution in so far as these articles may be relevant to and connected with Article 5(3) of the Convention. It logically also held that the reference did not extend to a review of the reasonableness or otherwise of the bail conditions imposed by the Court of Magistrates on the 14<sup>th</sup> October 2011 but was limited to an examination of “whether the time spent by Nelson Arias in detention since his arraignment was in violation of his fundamental human right to freedom. No appeal by either party was entered from this delineation by the first Court of the scope of the reference it had received and this Court will now therefore limit itself to the parameters of the reference as identified

and determined by the first Court in its judgment saving any clarifications that this Court may consider necessary.

**25.** It is unfortunate that this preliminary but vital issue had to take up so much of the Court's deliberations when the nature and scope of the reference should have been clear and unequivocal from the very terms of the reference itself.

**26.** The Court shall now proceed to an assessment of the various grievances raised by the appellants.

**27.** The **first grievance** raised by the appellants is to the effect that the first Court dismissed their plea that the defendant Nelson Arias had not exhausted his ordinary remedies when such remedy was still available before he raised the constitutional issue before the Court of Magistrates. The appellants argue that the defendant could, at any stage before the Court of Magistrates, request to be granted bail which he failed to do for the whole duration of the proceedings following his arraignment and his initial request for bail which was refused by that Court.

**28.** This first grievance may be summarily disposed of by this Court because this same Court as presided has already held that when a constitutional question comes before the First Hall Civil Court not by way of an application by a complaining party but by way of a reference by the referring Court itself then the First Hall Civil Court has no discretion to decline giving a reply to the questions referred to it by the referring Court<sup>5</sup>. Where the first Court was wrong, therefore, is not where it affirmed its competence to take cognizance of the case but where it held that it had a discretion to decide whether to decline or not from exercising its constitutional competence. It clearly did not have such discretion and was bound to reply to the questions referred to it by the referring Court. This grievance is therefore being rejected.

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<sup>5</sup> See Const Court: **Il-Pulizija (Assistant Kummissarju Lawrence Cauchi) v. Carmel sive Charles Ellul Sullivan et** 19<sup>th</sup> April 2012. See also First Hall Civil Court: **Il-Pulizija v. Frank Cachia et**, 16<sup>th</sup> February 2011

**29.** The **second grievance** in effect addresses the first Court's decision on the merits of the alleged violation of Article 5(3) of the Convention and essentially disagrees with the first Court's assessment and conclusion finding a violation. In this regard the appellants object that the applicant Arias had requested bail only on his first appearance before the Court when the circumstances did not militate in his favour but failed to request bail when the circumstances changed in such a way that the Court might have considered to be such as to lead it to grant him bail.

**30.** This Court notes that the appellants do not contest the first Court's finding that on account of the nature of the charges against the defendant Arias he could not, according to law<sup>6</sup> be kept in detention without bail for a period in excess of 23 months. They also do not contest the fact that the said period had been exceeded when the constitutional question was raised by the defendant. The only issue they raise is that the defendant failed to request bail to allow a review of his detention in order to determine whether circumstances had changed since when he had first demanded bail and his demand refused.

**31.** This Court does not share all the considerations of the first Court on this issue. This Court, for example, does not concur with the first Court's reasoning that the fact that the defendant had been detained without bail in excess of 20 months this "rendered his arrest illegal"<sup>7</sup>. The continued detention would have become illegal had a request for bail<sup>8</sup> been made by the defendant and that request denied. None of this occurred in this case.

**32.** Nevertheless, it remains up to the public authorities to ensure that a person's continued detention is at all times in conformity with Article 5 of the Convention. Therefore, the fact that the defendant failed to request bail as required by the Criminal Code is an irrelevant

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<sup>6</sup> Article 575(5)(6)(a)(iii) of the Criminal Code

<sup>7</sup> page 13 of the judgment appealed from

<sup>8</sup> See Articles 574(1), 575(10) and 582(1) of the Criminal Code.

consideration for the purpose of a determination as to whether his current detention is in conformity with the said Article 5. The defendant's failure to request bail could have a bearing on the nature of the remedy, where appropriate, which the Court could grant the defendant should a violation be found in his regard but not for the purpose of determining whether Article 5 is being violated by his continued detention.

**33.** The issue raised here by the appellants could have been relevant for the purpose of determining whether the detention was lawful in the sense of being authorised according to law. This is not in issue in this case. What is in issue is whether the continued detention, although according to law, is at this stage justified under Article 5(3) of the Convention; and the first Court held that it was no longer so justified.

**34.** In so far as the appellants state that this grievance ties in with the first ground of appeal which has just been rejected as aforesaid this consideration does not require any further elaboration.

**35.** This grievance is therefore being rejected.

**36.** In their **third ground of appeal** the appellants argue that any alleged violation of Article 6(1) of the Convention and of Article 39 of the Constitution is simply premature.

**37.** In the first place it should be pointed out that the first Court did not find a violation of Article 6(1) of the Convention and of Article 39 of the Constitution independently of Article 5(3) of the Convention. In fact it declared at the outset that it was going to consider the said Articles 6(1) and 39 only to the extent necessary to determine whether there was a violation of Article 5(3) from the perspective that the said Article 5(3) required the public authorities to be particularly diligent in the conduct of the proceedings.

**38.** The first Court was undoubtedly correct in pointing out that where a person was in detention in the course of

criminal proceedings the authorities concerned had a particular duty towards the person charged to see that the proceedings against him are conducted in a particularly diligent manner<sup>9</sup>.

**39.** The appellants are wrong in their apparent belief that it is only the trial which must last a reasonable time. On the contrary the continued detention must also not exceed a reasonable time and this independently of whether the length of delay of the trial might still be considered as reasonable when taken as a whole. "The long delay of the trial may in itself be reasonable in view, for instance, of the complexity of the case or the number of witnesses to be summoned, but this does not mean that the continued detention is therefore also reasonable"<sup>10</sup>. In fact the Commission under the European Convention had from an early stage made it clear that one of the objectives of Article 5(3) of the Convention was to keep any arrest or detention as short as possible<sup>11</sup>.

**40.** The appellant's contention under this head that the first Court's finding of a violation is premature is, therefore, a result of the appellants' misconstruction of the judgment of the first Court which correctly, as it had itself pre-announced in its judgment, limited itself to considering whether there had been a violation of Article 5(3), although in conjunction with Article 6(1) of the Convention and Article 39 of the Constitution. The same contention is also a result of the appellants' belief that the continued detention of the person charged cannot be unreasonable and in violation of Article 5(3) of the Convention if the conduct of the trial as a whole cannot be considered as unreasonably delayed. This has been shown to be wrong at law.

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<sup>9</sup> See for example, **Matznetter v. Austria**, Court, 10<sup>th</sup> November 1969, As to the Law #12

<sup>10</sup> van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3<sup>rd</sup> Ed., pp. 374-375; see also **Matznitter v. Austria**, Court, 10<sup>th</sup> November, 1969, As to the Law #12

<sup>11</sup> **McGoff v. Sweden**, Commission, Report 13<sup>th</sup> July 1983, #26; **Skoogstrom v. Sweden**, Commission, Report, 15<sup>th</sup> July 1983.

**41.** This grievance is consequently also not well founded and is therefore being rejected.

**42.** The appellants also raised a **fourth grievance** whereby they submit that the first Court based its judgment on a wrong interpretation of Article 6(1) of the Convention and of Article 39 of the Constitution since the Court failed to assess the reasonableness of the length of the proceedings in the light of the circumstances of the case including the complexity of the case, the conduct of the applicant and of the relevant public authorities, and what was at stake for the applicant Arias.

**43.** In connection with this grievance the Court reiterates that from the judgment itself appealed from it clearly results that the first Court, in terms of the reference made to it, did not concern itself with the delay that the trial as such was taking to be concluded in virtue of Article 6(1) of the Convention but it limited itself to examine whether the continued detention was in violation of Article 5(3) of the Convention although for the purpose it took account also of Article 6(1) of the Convention and Article 39 of the Constitution.

**44.** Since the first Court concluded that the scope of the reference included a question on whether the continued detention was in violation of Article 5(3) of the Convention in conjunction with Article 6(1) thereof on account of the delay in the conduct of the criminal inquiry the first Court correctly had to also address this issue.

**45.** Moreover it is difficult to conceive how the Court could have missed taking into account the circumstances mentioned by the appellants when it explicitly pointed out those factors as being the ones which were relevant for the purpose of assessing the reasonableness of the duration of the detention. In fact in its judgment the first Court clearly said that “The relevant factors to be taken into account in considering the ‘reasonable time’ factor are the complexity of the case, the conduct of the accused and the efficiency of the national authorities.” And when one examines the judgment one can immediately note

that this is what the Court did both when considering Article 5(3) alone as well as when it considered Article 5(3) in conjunction with Article 6(1).

**46.** In its considerations the first Court took account of the fact that the legal time limit for detention without bail before the filing of the indictment had been exceeded, “the fragmentary and lax manner in which the evidence was brought forward by the prosecution”, what it considered as the reopening of the case for the prosecution after it had already closed its case on a previous occasion, the fact that few witnesses were produced by the prosecution during the first 23 months of the proceedings, the fact that there were significant delays wherein the prosecution brought little or no evidence, and the lack of diligence which according to the first Court was manifested by the prosecution in the conduct of the proceedings pointing out that the case was characterised by adjournments for various reasons over which the defendant had no control but which the prosecution could have avoided by the exercise of its powers at law.

**47.** It is true that, as pointed out by the appellants, the fact that the police prosecution “closes its case” does not preclude the Attorney General from demanding further evidence. In this sense, in the case of a criminal inquiry, the prosecution can never be said to have been closed, whatever the police prosecuting officer may declare, before the Attorney General remits the proceedings for judgment either summarily or upon indictment. Nevertheless, the fact that the police prosecuting officer had declared on the 10<sup>th</sup> October 2009 that he rested his case and 28 months later the bill of indictment had not, and still has not, yet been filed remains a relevant consideration for the purpose of a determination as to whether there was a violation of Article 5(3) in conjunction with Article 6(1) of the Convention.

**48.** As is by now well established by this Court, in its role as a Court of review, will not substitute its own assessment of the facts for that of the Court of first instance unless that assessment is manifestly wrong in

such a way that, if undisturbed, would as result in a miscarriage of justice. In this instance this Court finds that the first Court carried out a proper and correct evaluation of the different factors which led it to the conclusion that the prosecution in this case had not discharged its burden to conduct the proceedings in an especially diligent manner as demanded by the fact that the defendant was being kept in detention on remand for the duration of those proceedings.

**49.** There are other circumstances in addition to those pointed out by the first Court which lead this Court to the same conclusion. Thus, the defendant's arraignment was on the 4<sup>th</sup> November 2008. Upon the first referral back of the record, the Attorney General demanded the hearing of a number of witnesses. The hearing of these witnesses and of a few others who needed to be heard as a result of evidence tendered by others was exhausted on the 10<sup>th</sup> October 2009, 11 months later. Up to this date the inquiry, notwithstanding a few procedural delays, can be said to have been, on the whole, reasonably expeditious.

**50.** However, this was not the end of the inquiry. After the conclusion of the hearing of the original list of witnesses the Attorney General again referred back the record, on the 16<sup>th</sup> December 2009, with a new list of witnesses and queries which could have been easily requested and clarified in the course of the preceding year when the record had been returned to the Court of Magistrates several times. This referral resulted in a number of other movements of the record back and forth between the Court of Magistrates and the Attorney General. Moreover, the Attorney General now also requested a hard copy of a CD which had been in the record since September 2009. This copy, which should not have been particularly difficult to produce, was only filed in Court by the Court appointed expert, on the 19<sup>th</sup> January 2011 more than a year after the Attorney General's request.

**51.** Moreover, in the meantime the Attorney General wanted to hear two other witnesses who had separate

criminal proceedings pending against them and who were therefore refusing to testify for fear of incriminating themselves. These witnesses have not yet been heard because the proceedings against them are still pending and the Attorney General insists that they be heard. No evidence was produced to show that the proceedings against these other defendants are being conducted by the prosecution with such diligence as to expedite the conclusion of the inquiry against defendant Nelson Arias which in the meantime remains pending.

**52.** In the circumstances this Court does not find any just cause to depart from the first Court's assessment of the evidence which in fact is shared by this Court.

**53.** Consequently, this grievance is being rejected as well.

**54.** Finally, consideration must be given to the appellants' **fifth and final grievance** whereby they complain about the remedy granted by the Court since they submit that in the case of a constitutional reference the Court which takes cognizance of the reference is bound by the parameters of the reference and must limit itself to determining whether the alleged violation results. They also submit that in this case a declaration of a violation would in itself constitute just satisfaction bearing in mind that the defendant never showed any interest in filing a request for bail.

**55.** In respect of this issue this Court points out that as a rule whenever a constitutional reference is made to the First Hall Civil Court under Article 46(3) of the Constitution that Court's function is circumscribed by the terms of the reference made to it and that Court is required to limit itself to giving its replies to the questions referred to it by the referring Court<sup>12</sup>. The terms of the reference made to the first Court did not extend to the liquidation and order of payment of compensation to the defendant Arias Nelson

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<sup>12</sup> See Const Court: **Glen Bedingfield v. Kummissarju tal-Pulizija et** 31/7/2000, Vol LXXXIV.i.232; Const Court: **Nazzareno Galea et v. Giuseppe Briffa et.**, 30/11/2001, Vol. XXXV.i.540; PA **Kost. Pulizija v. Frank Cachia**, 16/2/2011

who not the person was making the reference since the referring authority was the Court of Magistrates. When, therefore, the first Court liquidated the sum of €1,500 by way of compensation in favour of the defendant it went beyond the limits of its competence as delineated by the terms of the reference<sup>13</sup> and this is sufficient to lead to the revocation of this part of the judgment without there being any need to consider the other aspects raised by the appellants in connection with this issue.

**56.** This grievance is therefore being allowed and the appealed judgment shall be varied accordingly.

### **Decision**

For the above reasons the Court allows in part the appeal and varies the judgment appealed from by revoking it in that part where it found that Nelson Arias should be compensated for the violations established by it by being granted non pecuniary damages and where it found that after taking into account the nature of the violations involved and that Nelson Arias only requested provisional freedom at the initial stages of the criminal proceedings it deemed it just that Nelson Arias be awarded the sum of €1,500 in connection with the violations falling under Article 5(3) and 6(1) of the European Convention and Article 39 of the Constitution of Malta and confirms the remainder of the judgment.

The costs of the case at first instance shall remain as decided by the first Court while the costs of the appeal shall be borne as to one fifth ( $\frac{1}{5}$ ) by Nelson Arias and as to four fifths ( $\frac{4}{5}$ ) by the appellants *in solidum* between them.

### **< Final Judgement >**

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<sup>13</sup> See Const Court: *Carmelo sive Charles Massa et v. Direttur għall-Akkomodazzjoni Soċjali et.*, 30/4/2012

Informal Copy of Judgement

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