COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF STEPHENS v. MALTA (no. 2)

(Application no. 33740/06)

JUDGMENT

STRASBOURG

21 April 2009

FINAL

14/09/2009

This judgment may be subject to editorial revision.

In the case of Stephens v. Malta (no. 2)**,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 31 March 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 33740/06) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Mark Charles Kenneth Stephens ("the applicant"), on 9 August 2006.

2. The applicant was represented by Dr J. Brincat, a lawyer practising in Malta. The Maltese Government ("the Government") were represented by their Agent, Dr S. Camilleri, Attorney General.

3. The Government of the United Kingdom, who had been notified by the Registrar of their right to intervene in the proceedings (Article 48 (b) of the Convention and Rule 33 § 3 (b)), did not indicate that they intended to do so.

4. Invoking Article 5 §§ 3 and 4 of the Convention the applicant alleged that the domestic courts failed to address the issues raised by the defence about the lawfulness of his arrest and had imposed on him the burden of proving that his arrest had not been lawful. Moreover, the Constitutional Court had failed to provide him with a speedy and efficient remedy.

5. On 1 June 2007 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1963 and is currently serving a prison sentence in Malta.

A. The background of the case

7. On 30 November 2004, pursuant to an arrest warrant issued by the Maltese authorities on 23 November 2004, the applicant was arrested and detained in Spain on suspicion of having conspired in the traffic of cocaine, ecstasy and cannabis.

8. On 3 May 2005 the applicant, through his legal counsel, challenged the lawfulness of his arrest and detention in so far as the arrest warrant had not been issued in accordance with the European Arrest Warrant requirements (in force on 7 June 2004).

9. In a judgment of 16 August 2005, the Constitutional Court of Malta rejected the applicant's claim as the extradition request had been made prior to the new arrest warrant procedure with the result that the previous law applied.

10. On 9 September 2005 the applicant was extradited to Malta to stand trial on charges of drug trafficking.

B. The proceedings before the Court of Magistrates

11. On 10 September 2005 the applicant was brought before the Court of Magistrates as a Court of Criminal Inquiry. He challenged the legality of the arrest warrant of 23 November 2004. He claimed that the prosecution had to satisfy the Court of Magistrates that the arrest had been lawful and that this could not be assumed, given in particular that the accused had not been personally heard. The applicant argued that the procedure followed by the prosecution, whereby it simply confirmed on oath the report containing the legal provisions on which the charges were based, did not satisfy the requirements of Article 5 § 3 of the Convention. He made reference in this connection to the European Court's judgment in *Kadem v. Malta*, (no. 55263/00, 9 January 2003).

12. The applicant pleaded not guilty. He also pointed out that he was contesting the Maltese courts' jurisdiction to try him, claiming that the facts he was accused of did not constitute an offence under the laws of Malta.

13. The prosecution submitted that the applicant had been brought to Malta following the issue of an arrest warrant by the duty magistrate. Upon the applicant's arrival and within six hours of the arrest, the duty magistrate

was informed of the arrest and confirmed its continuation. Within fifteen hours of the arrest, during which time he was interrogated, the applicant was arraigned before the court. The prosecution further submitted that the case which carried a maximum punishment of life imprisonment was based on the testimony of various civilian witnesses and corroborating evidence.

14. At the hearing the Court of Magistrates took account of the applicant's not-guilty plea. The hearing minutes read as follows:

> "In regard to whether the accused is going to plead guilty or not guilty as charged the same accused would like to point out that first of all he is contesting the jurisdiction of the Maltese courts to try him and secondly that the facts do not constitute, in his regard, an offence under the laws of Malta and thirdly that he is not guilty of any fact alleged against him. To all intents and purposes of law, the Court [of Magistrates], having heard what has just been put down in the records of the proceedings, is considering the accused as pleading not guilty as charged."

The Court of Magistrates did not require the arresting officer to justify why the applicant had been arrested or why his detention was necessary. It declared, without entering a minute to that effect in the records, that the warrant had been issued by a magistrate and confirmed by another magistrate and both sets of proceedings had been held *in camera* and the arrest had been authorised. Moreover, the case had been examined by the Spanish courts in the context of their consideration of Malta's request for the applicant's extradition. In the minutes it further referred to the fact that the validity of the warrant as regards its procedural aspects was affirmed by the Constitutional Court in a further set of proceedings which took place while the applicant was still in Spain. Thus, the warrant was sufficient to enable the arrest to be considered lawful at that stage of the proceedings. Nothing had been brought to the attention of the court which enabled it to say that the person charged was under arrest without justification.

15. Since the applicant insisted that his arrest was unlawful and unjustified no request for bail was made and he was remanded in custody. His case file was transmitted to another magistrate sitting in the Court of Magistrates in order to proceed with the committal stage.

16. In the meantime, on 19 September 2005, the applicant applied for bail.

17. On 27 September 2005 the Court of Magistrates in the committal stage heard the parties. The applicant advanced once again his argument that the Maltese authorities lacked jurisdiction to try him.

18. On 29 September 2005 the Court of Magistrates rejected the application for bail, which had been lodged on 19 September 2005, on the grounds that there was a real danger that the applicant might abscond, leave the island or interfere or attempt to interfere with witnesses. It further held that it was not competent to give a ruling on the question of jurisdiction and decided that there were enough grounds to commit the applicant for trial.

C. The applicant's constitutional claim

19. On 3 October 2005 the applicant applied to the Civil Court (First Hall) in its constitutional jurisdiction, alleging that both at his first hearing and at the committal stage, Article 5 §§ 3 and 4 of the Convention had been violated. The Court of Magistrates had failed to assess the lawfulness of the arrest by refusing to decide on the defence's objections, namely that the Maltese courts did not have jurisdiction to try the defendant and that the facts alleged against him did not constitute a criminal offence under Maltese law. The applicant therefore requested the Civil Court to declare that his arrest and continued detention were unlawful and to order his release and provide him with adequate redress.

20. In a judgment of 12 January 2006, the Civil Court rejected the applicant's claim. It held that the Court of Magistrates as a Court of Criminal Inquiry was bound to examine solely the lawfulness of the arrest and, if necessary, to order release on bail according to Article 412B of the Criminal Code (see paragraph 41 below). The question of jurisdiction related to the merits of the case and therefore could be examined only by the Criminal Court. This was not in violation of the Convention.

21. The applicant appealed to the Constitutional Court. He reiterated his claims and emphasised that Article 412B of the Criminal Code was not an effective remedy as it provided only for provisional release under guarantee or against payment of bail and not unconditional release as required by Article 5 § 4 of the Convention.

22. The Constitutional Court heard submissions on 7 and 9 February 2006.

23. In a judgment of 14 February 2006, the Constitutional Court upheld the applicant's appeal in part. It first held that at the hearing of 10 September 2005 the Court of Magistrates had satisfied its duty under Article 5 §§ 3 and 4 of the Convention as provided by Article 574A of the Criminal Code (see paragraph 40, *in fine*, below). In particular, it had heard the parties' submissions regarding the lawfulness of the arrest and it had not been satisfied that the arrest was unlawful. Moreover, the plea of jurisdiction had not been dealt with because of the particular circumstances of the case, the way in which the matter had been raised (seemingly only for purposes of record) and because it would have substantially amounted to a plea that the facts of the case did not constitute a crime. Thus, further evidence would have been necessary in order to decide the matter.

24. The Constitutional Court did, however, find a violation of Article 5 § 4 of the Convention in so far as on 29 September 2005 the Court of Magistrates at the committal stage (Article 401 (2) of the CC) had abstained from deciding the issue of jurisdiction, thus disregarding its duty to determine the lawfulness of the applicant's detention under the Convention. Even though questions of jurisdiction would, in principle, be dealt with by

the Criminal Court, in the applicant's case this issue was interconnected with the factual requirements of the criminal offence. In the absence of solid factual grounds against the defendant, the Court of Magistrates could not commit him for trial. The Constitutional Court annulled the Court of Magistrates' order of 29 September 2005 committing the applicant for trial as well as all subsequent acts. It remitted the case to the Court of Magistrates to be decided afresh after taking cognisance of the applicant's plea of lack of jurisdiction. It awarded the applicant 400 Maltese Liras (MTL – approximately 960 euros (EUR)) for just satisfaction, and ordered the payment of the costs of the proceedings to be divided between the parties.

D. Other attempts by the applicant to obtain release pending these proceedings

25. On 2 December 2005 the applicant applied for bail before the Criminal Court, the competent court at the time. On the same date the Attorney General sent the records of the proceedings back to the Court of Magistrates. Thus, on 6 December 2005 the Criminal Court refused to take cognisance of the request as it no longer had jurisdiction in the matter.

26. On 9 December 2005 the same application was filed with the Court of Magistrates.

27. On 14 December 2005 the Court of Magistrates refused to release the applicant, having regard to the nature and seriousness of the offence, the real danger of the accused absconding or leaving the island and obstructing or attempting to obstruct the course of justice.

E. The proceedings following the Constitutional Court's judgment

28. On 14 February 2006 the President of Malta issued a warrant extending the legal time-limit for concluding the proceedings to 6 March 2006.

29. On 15 February 2006 the applicant, still under arrest, was brought before the Court of Magistrates. He alleged that the law imposed a peremptory time-limit of twenty days for the conclusion of the committal proceedings. In the applicant's view, this time-limit could not be extended by the Constitutional Court, as had occurred in his case. Furthermore, the applicant challenged the magistrate sitting in his case on the ground that she had already sat in the hearings preceding the constitutional proceedings. He invoked the principles laid down by the Court in *Ferrantelli and Santangelo v. Italy* (see judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III). He also raised once again his plea based on the Maltese authorities' lack of jurisdiction to try him.

30. On 23 February 2006 the Court of Magistrates considered that the twenty day time-limit had not been exceeded since the Constitutional Court had placed the applicant in a *status quo ante*. Moreover, the warrant of the President of Malta extending the term of the inquiry had been valid according to law. It rejected the challenge to the magistrate on the ground that that court had refrained from giving a definitive judgment on the merits of the case, thus satisfying the objective impartiality test. The Court of Magistrates further stated that the interpretation of Article 22(1) (f) of the Dangerous Drugs Ordinance extended the principle of territorial jurisdiction and that it therefore had jurisdiction to proceed against the applicant. It decided to commit the applicant for trial.

31. On 27 February 2006 the applicant filed an application with the Criminal Court, the competent court at the material time, to challenge the lawfulness of his detention according to Article 412 B of the Criminal Code. He requested it to order his release from custody. He also complained that the committing magistrate, who delivered the decision of 29 September 2005, had erred when she refrained from stepping down once she had been challenged.

32. On 3 March 2006 the Criminal Court dismissed the application as being unfounded for the purposes of Article 412 B. It held that even if the magistrate had erred, this did not render the detention unlawful. Moreover, the proceedings leading to the decision of 23 February 2006 appeared to have been properly initiated and conducted, as indicated by the Constitutional Court's judgment of 14 February 2006, which upheld only the applicant's complaint about the irregularity related to the refusal to consider the plea of jurisdiction.

33. On 13 March 2006 the applicant filed a new application with the Court of Magistrates, claiming that the Attorney General had exceeded the time-limit allowed for filing the bill of indictment. On an unspecified date the Magistrates' Court rejected the claim.

34. On an unspecified date the Attorney General filed the bill of indictment. As a consequence, the Criminal Court became competent to take cognisance of any application for release.

35. On 4 April 2006 the applicant applied for bail, making reference to *Labita v. Italy* ([GC], no. 26772/95, ECHR 2000-IV).

36. On 7 April 2006 the applicant was granted bail against payment of a deposit of MTL 12,000 (approximately EUR 28,800). He was put under house arrest at his mother's home. He was only allowed to go out for two hours in the morning to report to the police station.

37. On 2 December 2006, the Criminal Court had started examining the plea of lack of jurisdiction. The applicant was still under house arrest.

38. On an unspecified date the applicant made another request for his detention arrangements to be alleviated. On 5 February 2007 the Criminal Court rejected his request, emphasising that it could not be said that the

applicant was under arrest but was simply confined and limited in the hours during which he could leave his house as a condition of his being granted provisional liberty.

39. By a judgment of the Criminal Court of 18 July 2007, confirmed by the Criminal Court of Appeal on 18 January 2008, the applicant was found guilty of the charges against him and sentenced to a term of imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

40. According to recent amendments to the Criminal Code adopted in 2002, a police inspector may no longer arrest a suspect under his own authority but has to apply to a magistrates' chamber for an arrest warrant.

Article 355V

"Where there are lawful grounds for the arrest of a person, the police may request a warrant of arrest from a magistrate, unless in accordance with any provision of law the arrest in question may be made without a warrant."

41. Following amendments adopted in 2002 and 2006, the Articles of the Criminal Code, in so far as relevant, read as follows:

Article 401 (2)

"(2) On the conclusion of the inquiry, the court shall decide whether there are or not sufficient grounds for committing the accused for trial on indictment."

Article 409A

"(1) Any person who alleges he is being unlawfully detained under the authority of the police or of any other public authority not in connection with any offence with which he is charged or accused before a court may at any time apply to the Court of Magistrates, which shall have the same powers which that court has as a court of criminal inquiry, demanding his release from custody. Any such application shall be appointed for hearing with urgency and the application together with the date of the hearing shall be served on the same day of the application on the applicant and on the Commissioner of Police or on the public authority under whose authority the applicant is allegedly being unlawfully detained. The Commissioner of Police or public authority, as the case may be, may file a reply by not later than the day of the hearing.

(2) On the day appointed for the hearing of the application the court shall summarily hear the applicant and the respondents and any relevant evidence produced by them in support of their submissions and on the reasons and circumstances militating in favour of or against the lawfulness of the continued detention of the applicant.

(3) If, having heard the evidence produced and the submissions made by the applicant and respondents, the court finds that the continued detention of the applicant is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the applicant it shall allow the application. Otherwise the court shall refuse the application.

(4) Where the court decides to allow the application the record of the proceedings including a copy of the court's decision shall be transmitted to the Attorney General by not later than the next working day and the Attorney General may, within two working days from the receipt of the record and if he is of the opinion that the arrest

and continued detention of the person released from custody was founded on any provision of this Code or of any other law, apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released from custody. The record of the proceedings and the court's decision transmitted to the Attorney General under the provisions of this sub-article shall be filed together with the application by the Attorney General to the Criminal Court."

Article 412B

"(1) Any person in custody for an offence of which he is charged or accused before the Court of Magistrates and who, at any stage other than that to which Article 574A applies, alleges that his continued detention is not in accordance with the law may at any time apply to the court demanding his release from custody. Any such application shall be appointed for hearing with urgency and together with the date of the hearing shall be served on the same day of the application on the Commissioner of Police or, as the case may be, on the Commissioner of Police and the Attorney General, who may file a reply thereto by not later than the day of the hearing.

(2) The provisions of Article 574A(2) and (3) shall apply *mutatis mutandis* to an application under this article.

(3) Where the application is filed in connection with proceedings pending before the Court of Magistrates as a court of criminal inquiry before a bill of indictment has been filed and the record of the inquiry is with the Attorney General in connection with any act of the proceedings, the application shall be filed in the Criminal Court and the aforegoing provisions of this Article shall apply *mutatis mutandis* thereto."

(4) The provisions of Article 409A(4) shall apply to a decision of the Court of Magistrates under this Article."

Article 574A

"(1) When the person charged or accused who is in custody is first brought before the Court of Magistrates, whether as a court of criminal judicature or as a court of criminal inquiry, the Court shall have the charges read out to the person charged or accused and, after examining the person charged as provided in Article 392 as the proceedings may require, shall summarily hear the prosecuting or arraigning officer and any evidence produced by that officer on the reasons supporting the charges and on the reasons and circumstances, if any, militating against the release of the person charged or accused.

(2) After hearing the prosecuting or arraigning police officer and any evidence produced as provided in sub-article (1) the court shall inform the person charged or accused that he may be temporarily released from custody on bail by the court under conditions to be determined by it and shall ask him what he has to say with respect to his arrest and his continued detention and with respect to the reasons and the circumstances militating in favour of his release.

(3) Where any of the offences charged consists in any of the offences mentioned in Article 575(2) the court shall, after hearing the person charged or accused as provided in sub-article (2) of this article, ask the prosecuting or arraigning officer whether he has any submissions to make on the question of temporary release from custody on bail of the person charged or accused and the latter shall be allowed to respond.

(5) At the end of submissions as provided in the preceding sub-articles of this Article the court shall review the circumstances militating for or against detention.

(6) If the court finds that the continued detention of the person charged or accused is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the person in custody it shall unconditionally release that person from custody.

(7) If the court does not find cause to release unconditionally the person charged or accused ... it may nevertheless ... release that person from custody on bail subject to such conditions as it may deem appropriate.

(8) If the court does not find cause to release unconditionally the person charged or accused and refuses to grant that person bail the court shall remand that person into custody ...”

42. The European Convention Act, in so far as relevant, reads as follows:

Article 3

“(4) The Constitutional Court shall ... have jurisdiction to hear and determine all appeals under this Act and exercise all such powers as are conferred on it by this Act.”

Article 4

“(1) Any person who alleges that any of the Human Rights and Fundamental Freedoms, has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.

(2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, of the Human Rights and Fundamental Freedoms to the enjoyment of which the person concerned is entitled:

Provided that the court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other ordinary law.

...

(4) Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this article shall have a right of appeal to the Constitutional Court.”

Consequently, a complaint must be lodged with both instances before it is introduced with the Strasbourg Court. However, in *Sabeur Ben Ali v. Malta*, (no. 35892/97, 29 June 2000, § 40) and *Kadem v. Malta*, (cited above, § 53), the Court held that this procedure was rather cumbersome and therefore lodging a constitutional application would not have ensured a speedy review of the lawfulness of the applicant’s detention. Consequently in the cited cases the applicants had not had at their disposal, under

domestic law, a remedy for challenging the lawfulness of their detention under Article 5 § 4.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

43. The applicant complained that the Court of Magistrates sitting as a Court of Criminal Inquiry had failed to address the issues raised by the defence about the lawfulness of his arrest and that it had imposed on him the burden of proving that his arrest had not been lawful, contrary to the requirements of Article 5 § 3 of the Convention, which reads as follows:

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

44. The Government contested that argument.

A. Admissibility

45. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

46. The applicant complained that the Court of Magistrates sitting as a Court of Criminal Inquiry had failed to address the issues raised by the defence about the lawfulness of his arrest. Moreover, it had not required the arresting authority to justify the arrest, but had imposed on the accused the burden of proving that his arrest had not been lawful. Indeed, the Court of Magistrates was satisfied by the fact alone that a warrant had been issued by a magistrate and confirmed by yet another one, and before whom the applicant had never been brought. Thus, on 10 September 2005 the applicant's remand in custody had been ordered without a magistrate having examined the circumstances of the case and the matters which had been raised.

47. The applicant referred to domestic case-law which showed that, domestically, the only questions which had to be addressed by the Court of

Magistrates at the first hearing were whether the prosecution had a reasonable suspicion, whether what was alleged was according to Maltese law an arrestable offence and whether the person charged had been brought promptly before such court. It followed that the reasonable suspicion did not have to be shared by the magistrate. The applicant noted that in the cases of *Aquilina v. Malta* (see GC judgment of 29 April 1999, *Reports* 1999-III) and *T.W. v Malta* (see GC judgment of 29 April 1999, *Reports* 1999-III) the Court found a violation of Article 5 § 3 of the Convention on the ground that the Court of Magistrates had no power to establish whether the deprivation of the individual's liberty was justified and to order release. The Maltese law had consequently been amended, but the practice before the Court of Magistrates as a Court of Criminal Inquiry had remained substantially the same, as shown by the events in his own case. Appearing before a duty magistrate was a ritual and a mere formality. Indeed, the applicant failed to see how such a fundamental issue as jurisdiction could be considered as having no impact on the lawfulness of the arrest, given that an arrest not justified by jurisdiction was clearly unlawful. If there was no jurisdiction, then the courts lacked competence, and if the issue of jurisdiction was postponed then the element of promptness required by Article 5 § 3 would be disrespected.

48. According to the applicant, the Government's argument that jurisdiction was not a matter to be dealt with by the Court of Magistrates at this stage of the proceedings had its parallel in domestic case-law which stated that prescription was not a matter that could be decided by the Court of Magistrates as a Court of Criminal Inquiry. Consequently, this was further evidence that the Court of Magistrates did not meet the necessary requirements of Article 5 § 3.

49. The Government submitted that the applicant had complained under Article 5 § 3 before the Court of Magistrates without giving explanations. At the hearing of 10 September it was only after the Court of Magistrates had decided about the lawfulness of his arrest that he raised the issue of jurisdiction and then again in his final submissions at the hearing of 27 September.

50. The Government submitted that according to Article 574A (1), (5) and (6) of the CC, as soon as a person who is in custody is arraigned, the court must examine whether the arrest is founded on a provision of Maltese law. This was the procedure followed in the applicant's case as evidenced by the minutes of the proceedings. According to the Government, the Court of Magistrates had both the competence and a legal obligation to deal with such matters. Indeed, it entered into all the issues raised except for the question of jurisdiction, which in fact resulted at a later stage in a finding of a breach of Article 5 § 4 by the domestic court. The Government submitted that the examination of the lawfulness of an arrest cannot be interpreted as requiring an objective examination of all proof and evidence in a given case.

Such an examination was limited rather to those elements of lawfulness which can be ascertained before proceeding to the examination of the evidence.

51. The Government further submitted that the allegation that the burden of proof of the lawfulness of the arrest was placed on the applicant was unfounded. The applicant's allegation was based on the expression used by the court – "the court, having heard the parties, and in view of the fact that nothing was brought to the notice of this court which would enable this court to say that the person charged was brought before it without his arrest being justified" – and not on any real procedural defect. As transpires from the minutes of the proceedings, the court took its decision after hearing both parties, whose views regarding the warrant were subsidiary to their main arguments regarding the justification of the arrest. Moreover, the Government contested the applicant's interpretation of domestic case-law (see paragraph 47 above) and stated that it was clear that the existence of a reasonable suspicion had to be shared by the magistrate too.

2. General principles

52. The Court recalls that Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (see *Aquilina v. Malta* [GC], no. 25642/94, § 47, ECHR 1999-III). It is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see *T.W. v. Malta* [GC], no. 25644/94, § 49, 29 April 1999). Thus, what is described in the case-law as "the opening part of Article 5 § 3" guarantees the right to be brought promptly before a judge or "other officer"; the second part of the provision guarantees the right to trial within a reasonable time or release pending trial (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3264).

53. The initial automatic review of arrest and detention must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person had committed an offence, in other words, that detention falls within the permitted exception set out in Article 5 § 1(c). When the detention does not, or is unlawful, the judicial officer must then have the power to release (see *McKay v. the United Kingdom* [GC], no. 543/03, § 40, ECHR 2006-...). According to the Court's case-law, the review of the merits of the detention must be prompt and automatic (see the above-mentioned *Aquilina* judgment, *loc. cit.*). Whereas promptness is to be assessed in each case according to its special features (see *De Jong, Baljet*

and Van den Brink v. the Netherlands, judgment of 22 May 1984, Series A no. 77, p. 25, § 52), the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 § 3, that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, p. 32-33, § 59).

3. The Court's assessment

54. The Court notes that the complaint refers to the hearing of 10 September 2005 and therefore refers to the first limb of Article 5 § 3. It considers that although the Maltese State satisfied the obligation to bring him promptly and automatically before a tribunal, the applicant's complaint relates to the quality of the review which that tribunal provided, in particular as regards the Court of Magistrates' failure to deal with the issue of jurisdiction at the first hearing.

55. To make the latter analysis, the Court considers that it should first establish whether, as argued by the Government, the applicant failed to raise the issue of lack of jurisdiction before the Court of Magistrates.

56. The Court observes that, after having analysed the minutes of the proceedings, the applicant invoked Article 5 § 3. Although the specific reasons for so doing are not explained, the said minutes state that the complaint was along the lines of, *inter alia*, the extradition case *Kadem v. Malta*, (cited above). The Court notes that one of the issues in the *Kadem* judgment (op cit. § 36) was indeed an objection concerning the lack of jurisdiction of the Magistrates' Court. Moreover, according to the minutes (see paragraph 14 above) the Court of Magistrates noted down the plea relating to the court's lack of jurisdiction when recording the applicant's reply to the charge. The applicant also explicitly reiterated the argument at a later stage. Consequently, the Court considers that the Court of Magistrates had understood the substance of the complaint and it cannot be said that the Court of Magistrates was not aware of the applicant's plea.

57. The Court must now examine whether the Court of Magistrates' review of the lawfulness of the detention was in accordance with Article 5 § 3 and in particular whether it should have dealt with the plea of lack of jurisdiction at this stage of the proceedings.

58. The Court observes at the outset that although the examination of lawfulness is indeed a requirement of Article 5 § 3 of the Convention, such examination may be more limited in scope in the particular circumstances of a given case than under Article 5 § 4.

59. As to the present case, the Court notes that jurisdiction is not a collateral issue since it forms the basis of any criminal proceedings. However, in view of the complexity of the matter, the Court considers that the Court of Magistrates cannot be reproached for not having entered into

such an intricate issue on the applicant's first appearance. For the Court, the issue of jurisdiction fell more appropriately to be dealt with at a later hearing or stage of the proceedings, and during which the applicant enjoyed the full adversarial safeguards provided for in Article 5 § 4.

60. As far as the general review made by the Court of Magistrates as a Court of Criminal Inquiry is concerned, it appears that following the *Aquilina* and *T.W.* judgments (cited above), this court now has the power to examine all the issues related to the lawfulness of a deprivation of liberty, and must take into account the various circumstances militating for or against detention and to order release if there are no such reasons.

61. For the Court, and from the standpoint of Article 5 § 3 requirements, what is important is that the Court of Magistrates examined the applicant; it heard both parties and was satisfied that the arrest was justified. It had understandable regard in this latter connection to the fact that the validity of the arrest warrant had already been confirmed on multiple occasions (see paragraph 14 above). The fact that the Court of Magistrates did not go into further details, a point which is criticised by the applicant (see paragraph 46 above), cannot be taken to mean that it had not analysed all the circumstances and that it had not satisfied itself that the prosecution had made out a case for the existence of a reasonable suspicion against the applicant (see paragraph 13 above). Therefore, in the present case, the Court considers that the Court of Magistrates exercised its powers in compliance with Article 5 § 3.

62. There has accordingly been no violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

63. The applicant complained that the first hearing (10 September 2005) he had attended on Maltese soil had failed to address the lawfulness of his arrest. Moreover, on 14 February 2006, by remitting the case to the Court of Magistrates, the Constitutional Court had failed to provide him with a speedy and efficient remedy, contrary to Article 5 § 4 of the Convention, which reads as follows:

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

64. The Court notes that the complaint relating to the hearing of 10 September 2005 has already been dealt with under Article 5 § 3 and refers to the conclusions set out above.

65. In so far as the same complaint is submitted in respect of Article 5 § 4, the Court notes that the Constitutional Court examined this complaint and found that at the said hearing the Court of Magistrates had complied

with Article 5 §§ 3 and 4 of the Convention (see paragraph 23 above). The Court would observe, however, that the Convention does not necessarily require the application of the guarantees provided by Article 5 § 4 at an applicant's first hearing. Whether such is required by the Convention will depend on the particular circumstances of the case in question. The Court recalls that in the applicant's case it has found that the Court of Magistrates cannot be reproached for not having entered into the matter of jurisdiction at the first hearing on 10 September 2005 (see paragraph 59 above). It follows that the complaint under Article 5 § 4, in so far as it relates to the hearing of 10 September 2005, does not require further examination.

66. The Court will therefore examine the remainder of the complaint under Article 5 § 4, namely whether the Constitutional Court failed to provide him with a speedy and efficient remedy.

A. Admissibility

1. Victim status

67. The Government submitted that the Constitutional Court had granted a sufficient remedy for the applicant's complaint, by granting both a pecuniary remedy and a remedy in kind, namely that of placing the applicant in the *status quo ante*. Consequently, the applicant could not claim to be a victim of the alleged violation.

68. The Court considers that this matter is closely related to the merits of the complaint. Accordingly, it joins the issue to the merits.

2. The Government's objection of non-exhaustion of domestic remedies

69. In so far as the applicant alleged that the Constitutional Court itself had acted in violation of Article 5 § 4, the Government submitted that this complaint had not been brought before the domestic courts and therefore the applicant had failed to exhaust domestic remedies.

70. The applicant accepted that, as suggested by the Government, he could have introduced a new set of proceedings before the Civil Court and if necessary filed an appeal with the Constitutional Court. If this had proved ineffective, he could have restarted those proceedings. However, this would have led to a self-perpetuating remedy *ad infinitum* and not an effective remedy which could be exhausted once and for all.

71. The Court recalls that, according to its case-law, Article 5 § 4 of the Convention refers to domestic remedies that are sufficiently certain, otherwise the requirements of accessibility and effectiveness are not fulfilled (see *Sakik and Others v. Turkey*, 26 November 1997, *Reports 1997-VII*, p. 2625, § 53). It is to be recalled that the aim of Article 5 § 4 is to ensure a "speedy" review of the lawfulness of detention (see, for instance,

Baranowski v. Poland, no. 28358/95, § 68, 28 March 2000, ECHR 2000-III).

72. As concerns the applicant's failure to pursue this claim before the two constitutional jurisdictions, the Court notes that lodging a constitutional application involves a referral to the First Hall of the Civil Court and the possibility of an appeal to the Constitutional Court. This is a cumbersome procedure especially since practice shows that appeals to the Constitutional Court are lodged as a matter of course and that the relevant proceedings are invariably longer than what would qualify as "speedy" for Article 5 § 4 purposes (see *Sabeur Ben Ali*, cited above, § 40 and *Kadem*, cited above § 53). In the present case, the applicant did use this procedure: his claim to the Civil Court was lodged on 3 October 2005 (see paragraph 19 above) and was still pending on 14 February 2006, the date on which the Constitutional Court decided to send the applicant back to the Court of Magistrates (see paragraphs 23 and 24 above). It is precisely this procedure which he is contesting before this Court. For the Court, the applicant could not have been expected to recommence this process.

73. The Government's objection as to the exhaustion of domestic remedies should therefore be rejected.

3. Conclusion

74. Bearing in mind that the issue of the applicant's lack of victim status has been joined to the merits (see paragraph 68 above), the Court considers that this part of the complaint raises complex issues of fact and law which cannot be resolved at this stage in the examination of the application, but requires examination on the merits. Accordingly, this part of the complaint cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Court further finds that there are no other grounds at this stage for declaring this part of the complaint inadmissible and therefore declares it admissible.

B. Merits

1. The parties' submissions

75. The applicant submitted that in order to provide him with a speedy and effective remedy, the Constitutional Court should have used its preventive competence and dealt with the merits of the lawfulness of his arrest, ordering, if need be, his release; instead, it decided to remit the case back to the Court of Magistrates. The applicant also complained that the amount granted as just satisfaction was insufficient.

76. The applicant submitted that the Constitutional Court had the competence to anticipate a violation *in fieri* and to provide a remedy; consequently, it also had the power to provide an effective remedy when

establishing a factual violation. The applicant submitted that putting him in the *status quo ante* should have entailed his release. Bearing in mind that freedom is calculated *ad horas* it was clear that the fact that the applicant had to wait for over two years before being brought before a court which was competent to decide the matter of jurisdiction could not be compatible with the Convention. Lastly, the applicant submitted that the fact that the question of jurisdiction might have been complex had no bearing on the requirement of speediness announced in Article 5 § 4.

77. The Government submitted that the issue whether the Court of Criminal Inquiry should determine questions of jurisdiction had never arisen before the domestic courts. Upon deciding that there had been a violation of Article 5 § 4 at that stage of the proceedings for failure to consider the issue, the Constitutional Court granted monetary compensation and placed the applicant in the *status quo ante*, thus satisfying the requirements of Article 5 § 4. The Constitutional Court did not share the reasoning of the applicant, namely that a violation of Article 5 § 4 rendered his arrest and detention unlawful and therefore he should have been released. It therefore afforded the most appropriate remedy in the particular circumstances of the case.

78. Indeed, the Constitutional Court did not enter into the issue of the lawfulness of the arrest and consequently could never order release. As a matter of practice, although the Constitutional Court is entitled to grant a remedy which it deems appropriate, it is not obliged to usurp the functions legally entrusted to other courts and it will normally choose not to do so and respect the competence of the ordinary courts. Indeed, the Government were not aware of any instance where the Constitutional Court had taken over a case from another court and decided it, or only part of it, itself.

79. The Government submitted that it was fair to consider that the compensation granted to the applicant also covered the time taken up by the referral back to the Court of Criminal Inquiry. Moreover, after the Constitutional Court's judgment of 14 February 2006, the issue of jurisdiction was debated before the Court of Criminal Inquiry on the next day and decided upon on 23 February 2006.

80. In so far as the complaint refers to whether the Constitutional Court had the power to look into the lawfulness of the arrest and order the applicant's release, the Government relied on the very wide discretion arising from Article 4 of the European Convention Act. They further submitted that an appropriate remedy always depended on an applicant's demands. In the present case the applicant's request for the court to declare his arrest and continued detention unlawful proceeded on the basis and as a consequence of his claim that there had been a violation of Article 5 §§ 3- 4. The Constitutional Court did not think that, as a consequence of the finding of a violation, his arrest and detention were unlawful, which is precisely why they annulled the decision committing the applicant to stand trial and remitted the case to the first court to take cognisance of the plea of

jurisdiction. In this way the Constitutional Court fully addressed the issue it was requested to address by the applicant within the terms set out by him in his application. Moreover, the applicant had not asked the Constitutional Court to exercise its preventive competence. He did not complain that his fundamental rights were likely to be contravened but only that his right had been or was being contravened.

81. Finally, the Government submitted that each of the applicant's challenges to the lawfulness of his detention was determined almost immediately. Moreover, even considering that the lawfulness of the pre-trial detention was only fully decided on 23 February 2006, the requirement of speediness of Article 5 § 4 was still complied with.

2. General principles

82. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Jensen v. Denmark* (dec.), no. 48470/99, 20 September 2001, ECHR 2001-X). The Court notes that the Constitutional Court found a violation of Article 5 § 4, restored the applicant to the position he was in four and a half months before and granted him the sum of 1,000 euros. It remains to be determined whether this was enough to deprive the applicant of his victim status.

83. The Court reiterates that the purpose of Article 5 § 4 is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, § 76). The remedies must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release. The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see *Čonka v. Belgium*, no. 51564/99, § 46 and 55, ECHR 2002-I).

84. Moreover, Article 5 § 4, in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention (see *Musial v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II). The question whether a person's right under Article 5 § 4 has been respected has to be determined in the light of the circumstances of each case (see *Rehbock v. Slovenia*, no. 29462/95, § 84, 28 November 2000). While Article 5 § 4 of the Convention does not impose an obligation on a judge

examining an appeal against detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the judge could treat as irrelevant, or disregard, particular facts invoked by the detainee which could cast doubt on the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 91, ECHR 1999-II).

3. The Court's assessment

85. The Court notes that the applicant first challenged the lawfulness of his detention on 10 September 2005 and subsequently on 27 September 2005. On 14 February 2006 the Constitutional Court failed to determine the issue and remitted the case to the Court of Magistrates. The latter court determined the matter of jurisdiction and consequently the lawfulness of his detention on 23 February 2006.

86. The Court observes that on 14 February 2006 the Constitutional Court found that there had been a violation of Article 5 § 4 in so far as the Court of Magistrates on 29 September 2005, at the committal stage, had abstained from deciding the issue of jurisdiction. It remitted the case to the Court of Magistrates to be decided afresh and awarded the applicant approximately 960 euros for just satisfaction (see paragraph 24 above) for the breach of Article 5 § 4. The Court considers therefore that by acknowledging the said violation and awarding compensation of 960 euros, which is comparable to its own standards (see, for example, *Petar Vasilev v. Bulgaria*, no. 62544/00, § 42, 21 December 2006, where the Court granted 800 euros for a violation of Article 5 § 4 of the Convention, on account of the limited scope, or lack, of judicial review of the lawfulness of detention), the applicant can no longer be considered a victim in respect of the period of time up to the Constitutional Court's judgment. Therefore, the Government's preliminary objection must be accepted in part in relation to this period of time, and rejected as to the remaining period.

87. Unlike cases in general where the period to be taken into consideration starts running from the date on which the applicant filed his request to have the lawfulness of his detention reviewed, in the present case the length of the period at issue is to be calculated from 14 February 2006, when the Constitutional Court remitted the case back to the Court of Magistrates, to 23 February 2006, when the issue of jurisdiction and hence the lawfulness of his detention were decided. Therefore the period to be taken into consideration in the applicant's case lasted ten days.

88. The Court observes that the case was listed for hearing one day after the Constitutional Court had remitted the case. It then took the Court of Magistrates ten days to rule on the matter of jurisdiction. No hearings were held. The Court recalls that the matter of jurisdiction was complex and

considers that the lawfulness of the applicant's detention can be considered to have been decided "speedily" by the Magistrates' Court. In these circumstances it is unnecessary to examine whether the Constitutional Court should have determined the issue itself.

89. In view of the above, and having regard to the speedy determination of the applicant's challenge to the lawfulness of his detention, the intervention of the Constitutional Court must be considered to have fulfilled the requirements of Article 5 § 4. There has therefore been no violation of that provision.

90. The Court would observe that the above conclusion is to be seen in the light of the particular circumstances of the instant case, in particular the fact that the applicant cannot be considered a victim in respect of the initial period of delay lasting more than four months. It notes in this connection that in its judgments in *Sabeur Ben Ali* and *Kadem* (both cited above) the Court found that lodging a constitutional application would not have ensured a speedy review of the lawfulness of an applicant's detention for the purposes of Article 5 § 4 of the Convention. The Court's present judgment should not be seen as casting doubt on that finding.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

91. Lastly, the applicant invoked Article 13 of the Convention in relation to the speedy determination of his claim. The Court notes that this complaint is linked to that examined above and must therefore likewise be declared admissible. However, the Court recalls that according to its established case-law Article 5 § 4 of the Convention constitutes a *lex specialis* in relation to the more general requirements of Article 13 and therefore no separate issue arises in this case.

FOR THESE REASONS, THE COURT

1. *Joins* unanimously to the merits the Government's preliminary objection to the applicant's victim status regarding the complaint under Article 5 § 4 of the Convention and *declares* the application admissible;

2. *Holds* by five votes to two that there has been no violation of Article 5 § 3 of the Convention;

3. *Holds* by six votes to one that there has been no violation of Article 5 § 4 of the Convention and *upholds* the Government's above-mentioned preliminary objection in part;

4. *Holds* unanimously that there is no need to examine the complaint under Article 13 of the Convention.

Done in English, and notified in writing on 21 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Nicolas Bratza
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Dissenting opinion of Judge Bonello;

(b) Partly dissenting opinion of Judge Bianku.

N.B.
T.L.E.

DISSENTING OPINION OF JUDGE BONELLO

1. I felt compelled to vote for a violation of Articles 5 § 3 and 5 § 4 as I believe the facts of the case fully justified this vote. I fight back a chilling doubt that this judgment has inflicted a blow to the protection of individuals against arbitrary arrest and detention, far more critical than a superficial reading might suggest.

Violation of Article 5 § 3 – The fundamental right to take it easy

2. This Article embraces two separate guarantees against arbitrary deprivation of liberty by requiring that any person arrested on suspicion of having committed a criminal offence shall be brought promptly before a judicial authority. Its second limb covers the right of a person detained to be tried within a reasonable time or released pending trial. To satisfy the precepts of Article 5 § 3, procedural and substantive requirements have to be observed. Procedurally, the judicial authority before whom the arrested person is brought must "hear" the detainee personally or through his lawyer. The 'substantive' duty places on the judicial authority the obligation of reviewing carefully, by reference to legal criteria, all the reasons militating for and against continued detention.

3. The initial "prompt and automatic" review by a judicial authority (in Malta, the Court of Magistrates) must be able to examine and determine (a) whether there exists a reasonable suspicion that the person detained has committed the crime charged, and (b) all other 'lawfulness' issues relevant to that arrest and detention. The basic aim pursued is the immediate release of the person arrested should either of these tests fail.

4. The present complaint refers to the hearing of 10 September 2005, and, thereafter, until 29 September. The period complained of lasted until 29 September as the inaction in dealing with the control of lawfulness of the applicant's detention after 29 September was, as to quality, remedied by the judgment of the Constitutional Court delivered on 14 February 2006. That judgment, however, gave no remedy for the failure of the control of lawfulness from 10 to 29 September as to its quality. There is no question that the Government satisfied their obligation to bring the arrested person promptly before the Court of Magistrates – and the applicant does not complain about this. He complains about the "quality" of the review that the Court of Magistrates had failed to provide, in particular the refusal by that court to deal with his plea of lack of jurisdiction from 10 to 29 September 2005.

5. Following the judgments of this Court in *Aquilina and TW v. Malta*[1], Parliament had amended the Maltese Criminal Code to enable Magistrates charged with the "prompt and automatic review" to examine all the grounds of "lawfulness" of a deprivation of liberty, and to release an accused where no reasons against release are established. What remains to be seen is if in the present case the Court of Magistrates, notwithstanding this amendment, in fact exercised the new powers conferred on it by law to comply with Article 5 § 3.

6. The majority accepts that the applicant raised the plea of lack of jurisdiction immediately on being brought before the Court of Magistrates[2]. He had already spent nine months detained in legal limbo in Spain at the request of the Maltese authorities, and raised this fundamental plea of "lawfulness" of his detention at the very first hearing in Malta, on 10 September 2005. A more radical challenge to the lawfulness of his detention in Malta would be difficult to conceive since jurisdiction (or lack of it) goes to the very essence of the legitimacy of arrest and detention.

7. Postponing any examination and determination of this core issue to some indeterminate later stage, as the Court of Magistrates did, amounted to a dereliction of a seminal duty expressly mandated by Article 5 § 3 of the Convention. The Court of Magistrates, domestic watchdog over Article 5 § 3 rights, passed the buck to the trial court to decide the issue of jurisdiction, months, usually years, later. Personally I have clear views about Malta's ample jurisdiction to try the applicant, but surely that is not what is at stake. What concerns me is that this eminently overriding issue of lawfulness (jurisdiction) was placed on the back burner and it eventually took over five months to be examined at all.

8. This Court had, so far (in Article 5 scenarios different from the present one), showcased exemplary sensitivity where unlawful deprivation of liberty was alleged and has held that even a few hours detention without adequate legal basis attracts censure as a breach of the preeminent right to enjoy liberty[3]. This was a Court I would not feel shy to identify with. The present judgment probably records the very first time in the history of the ECHR that five months' lingering over a plea of unlawfulness of detention receives the green light from the Court. Article 5 § 3 has been devoutly emptied of substance. Its programmatic purpose has been perverted, and with some flair too.

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[1] GC judgments of 29 April 1999, *Reports* 1999-III

[2] At § 56 of the judgment.

[3] See, for example: *Quinn v. France*, 22 March 1995, Series A no. 311; *Mazzoni v. Italy*, 1 July 1997, *Labita v. Italy* [GC], no. 26772/95, ECHR 2000-IV.

9. The Court justified this by having recourse to what in my view only amounts to a contrived legal fiction. The Court accepted that a plea of lack of jurisdiction "is not a collateral issue since it forms the basis of any criminal proceedings" [1]. However, in view of some perceived "complexity" of the matter, the Court found that it was reasonable for the domestic courts to postpone the question of jurisdiction to some later hearing or stage of the proceedings.

10. Complexity? What complexity? The Government, which in Strasbourg are now reaping handsome returns from the so-called "complexity" of the jurisdiction plea, in Malta had (rightly) argued exactly the opposite: that it was blatantly manifest from express provisions of the Dangerous Drugs Ordinance and the Criminal Code, that the plea of jurisdiction was unfounded, and glaringly so. The case-law of the domestic court had moreover just determined the very same issue of jurisdiction in similar cases [2] – there was simply nothing further to argue.

11. In fact, the Court of Magistrates chose to disregard the plea of jurisdiction, not because of any alleged complexity (that only surfaces now in Strasbourg), but because, as it wrongly held later (29 September), it had no competence to decide that plea and that it was for the Criminal Court, during the trial proper, to deal with that plea, and not the Court of Magistrates. Never did the Court of Magistrates invoke "complexity" as the reason for its refusal to consider the plea of jurisdiction. It had to be the ECHR that, for the first time, stepped in to throw a totally inexistent 'complexity' into the equation.

12. The plea of jurisdiction could have been, and eventually was, determined in the briefest of times. Strasbourg has now discovered the mythical "complexity" of this plea – the only escape hatch left to justify five months' dithering in a decision which, to mean anything at all, the Convention requires should be promptly [3] taken. When toying with a human being's personal liberty, over five months' delay would have been monstrous even had the issue been genuinely bedevilled by diabolical complexity. How to qualify it when – as in the present case - it was simplicity personified? I would go one step further. In my view, in matters of personal freedom, the more complex the issue to be resolved, the more

[1] At § 59 of the judgment.

[2] When the applicant raised the plea of jurisdiction, that very recent case-law may have been subject to appeal.

[3] According *to Aquilina v. Malta*, the obligation of 'promptness' requires not only the prosecution to bring a detained person before a judicial authority 'promptly' but also that the control of the lawfulness of the detention should equally be 'prompt' (*vide* §§ 48, 49).

compelling the duty placed on the judicial authority to take it in hand right away.

13. The Court of Magistrates, once prodded by the Constitutional Court, could, and did, dispose of the plea of jurisdiction in ten days flat. So how can Strasbourg ever justify a failure to control the lawfulness of detention for five months and ten days on the pretext of 'complexity', when that plea could have been, and was, actually determined in ten days? Marketplace wisdom refers to that as the proof of the pudding.

14. This judgment gives carte blanche, in a matter in which urgency is of the essence, for courts to fiddle around only with what seems easy to resolve, and put off indefinitely any control of lawfulness that appears to them less simple to crack. If the supervisory court brands the legality issue as "complex", the applicant has plenty of time to meditate about his tough luck behind bars. This judgment says explicitly that Article 5 § 3 henceforth means that the review court no longer has a duty to enquire fully into the lawfulness of the detention; it only has the duty to investigate those issues of lawfulness easily resolvable. All the others can wait. The very *raison d'être* of Article 5 § 3, which I misguidedly believed entrenched the fundamental right of a detainee to have the lawfulness of his deprivation of liberty determined "promptly and automatically", has been well and truly sacrificed. Only 'easy' issues have to bother the review court. The *Aquilina*, *T.W.*, *Sabuer ben Ali* and *Kadem* blooms now wither under Strasbourg frostbite. Control of lawfulness of detention cannot be allowed to interfere with the more fundamental right of the supervising judge to take it easy.

Article 5 § 4 – The right of asking for two and settling for one

15. The purpose of this guarantee is to assure, to persons who are detained, the right to a judicial review of the continued lawfulness of that detention, and this at any stage after their first "presentation" before a judicial authority.

16. A speedy review of that continued lawfulness, leading, where appropriate, to release, underscores the essence of this safeguard. This Article not only guarantees the right to take proceedings to challenge the lawfulness of continued detention, but equally the right to obtain "a speedy judicial decision" concerning the lawfulness of that detention [1]

17. In the present case, the applicant had formally pleaded the lack of jurisdiction of the Maltese courts; this, if correct, would have negated the

[1] *Musial v. Poland, (no. 24557/94)*, 25 March 1999.

principal basis of the lawfulness of his continued detention. He had been imprisoned in Spain, at the request of the Maltese authorities, since 30 November 2004. On 14 February 2006, the Constitutional Court failed to determine his plea of jurisdiction and remitted the issue to the Court of Magistrates that should have determined it in the first place. That court finally disposed of that plea over fifteen months after the applicant's arrest, and over five months after the jurisdiction plea had been formally raised immediately on his extradition to Malta.

18. The majority held that the applicant had lost victim status the moment the Constitutional Court found that there had been a violation of Article 5 § 4 since the Court of Magistrates had refused to determine the plea of jurisdiction and had granted a remedy for that violation. [1] The ten days which the Magistrates' Court then took to determine the issue after it was referred back to it by the Constitutional Court were not, in their view, in violation of the 'speediness' requirement. Even if with the scantiest passion, I could bring myself to endorse that.

19. But, with the profoundest respect due to my colleagues, this analysis seems to me to be compellingly wrong. The applicant had complained to the Constitutional Court that Articles 5 §§ 3 and 4, had been breached when the committal court, twice requested, had refused to assess the lawfulness of his arrest and detention on the basis of lack of jurisdiction. In Strasbourg he also complained that this issue had only been determined five months and ten days after he had raised it. The Constitutional Court decided (in favour of the applicant), only on the (poor) quality of the review – and not on its speediness. It only examined, and censured, the failure of the Court of Magistrates to determine the plea of lack of jurisdiction – but did not consider at all, let alone give any remedy for, the lack of promptness in determining that issue. No remedy was ever given for the inordinate length of time the applicant's plea to be released had taken to reach determination – from 10 September 2005 to 23 February 2006. The constitutional procedures lasted from 3 October 2005 to 14 February 2006 and the jurisdiction plea was only disposed of on 23 February 2006. It is this delay that was the subject matter of the complaint before this Court.

20. In brief. The ECHR had before it two separate complaints. Firstly, that the referral court had exercised badly its function of supervision by refusing to consider the plea of jurisdiction – the quality of the review. Secondly, that the process to ensure this supervision had taken on excessively long time: the delay in the review. The ECHR could have examined and remedied this delay both under Article 5 § 3 and under

[1] See § 86 of the judgment.

Article 5 § 4. In fact it remedied it under neither. This somnolent handling of the control of lawfulness of detention has passed through Strasbourg uncensured under both Articles. Nowhere in the Strasbourg judgment or in the domestic ones, do I find a hint that five months and ten days' delay to control the lawfulness of detention is right, neutral or wrong.

21. It is inconceivable to me why the Court should have found the applicant no longer to be a victim because, of two separate violations, one had been remedied. And the other? Do five months and ten days' delay to determine a plea of release from unlawful detention, with no remedy at all given against that delay, either in the domestic forum and in the Strasbourg one, raise no eyebrows at all?

22. A remedy for delay could only have been granted by Strasbourg. This Court has already held that the cumbersome proceedings before the Constitutional Court would not have ensured a speedy review of lawfulness of detention. [1] This means both that no effective remedy for that delay was available under the domestic system, and that the applicant did not have to exhaust before the Constitutional Court a complaint about the slowness of the review (caused by long proceedings before the Constitutional Court). [2] As no remedy for this delay is available in the domestic system, that left the applicant only able to search for a remedy for the breach of the speediness requirement, in the Strasbourg Court. This Court, for unexplained reasons, no longer considers him a victim of a violation lasting over five months, as the domestic courts had provided a remedy for a totally different one.

23. The applicant could not obtain any remedy for delay from the Maltese courts. The present judgment makes sure he does not obtain any from Strasbourg either.

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[1] *Sabeur Ben Ali v. Malta* (no. 35892/97), 29 June 2000) and *Kadem v. Malta* (no. 55263/00), 9 January 2003).

[2] At § 72 of the judgment.

PARTLY DISSENTING OPINION OF JUDGE BIANKU

Like Judge Bonello, I too have voted for a finding of a violation of Article 5 § 3 of the Convention. I consider that my concerns on the Article 5 § 3 issue have been fully covered in Judge Bonello's dissenting opinion in so far as it addresses that particular complaint.