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

SECOND SECTION

CASE OF SABEUR BEN ALI v. MALTA

(Application no. 35892/97)

JUDGMENT

STRASBOURG

29 June 2000

FINAL

29/09/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form.

In the case of Sabeur Ben Ali v. Malta,

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

Mr C.L. ROZAKIS, *President*,
Mr B. CONFORTI,
Mr G. BONELLO,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mr E. LEVITS, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 25 May 2000 and on 22 June 2000,

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

PROCEDURE

1. The case originated in an application (no. 35892/97) against Malta lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Tunisian national, Mr Ben Nasr Sabeur Ben Ali ("the applicant"), on 21 February 1997.

2. The applicant was represented by Mr J. Brincat, a lawyer practising in Malta. The Maltese Government ("the Government") were represented by their Agent, Mr A.E. Borg Barthet, Attorney General.

3. The applicant alleged that, throughout the entire period of his detention on remand, he could not obtain a review of the reasonableness of the suspicion against him and could not have the lawfulness of his arrest and detention reviewed speedily by a court.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 6 July 1999, the Court declared the application partly admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. On 17 March 1995 the applicant was arrested in Malta for drug-related offences. On 19 March 1995 he was brought before the Court of Magistrates, composed by a single magistrate, to be arraigned. He was charged with possession of drugs that were not intended for personal use, importation of drugs, conspiracy to commit drug-related offences and various breaches of the customs legislation. In accordance with section 27 of the Dangerous Drugs Ordinance, the applicant was remitted to custody pending the conclusion of the criminal inquiry.

8. On conclusion of the inquiry on 4 April 1995, the applicant was committed for trial. On 29 July 1996 he applied to the Court of Magistrates for provisional release relying on the fact that "he ha(d) been under arrest for a considerable time" and that "he (was) in a position to give the guarantees required to appear for any part of the proceedings and the trial, as the Court (might) order". The application was communicated to the Attorney General who was given twenty-four hours to reply. After the observations of the Attorney General had been obtained, a magistrate heard the parties on 31 July 1996. On 1 August 1996 the magistrate rejected the application because he was not satisfied that, if the applicant was released, there would be no interference with the due administration of justice.

9. The trial commenced on 4 February 1997. On 5 February 1997 the applicant was acquitted of all charges and was released from custody.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Arrest and detention

10. Section 34 § 3 of the Constitution of Malta provides:

> "Any person who is arrested or detained -
>
> (a) for the purpose of bringing him before a Court in execution of the order of a Court; or
>
> (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,
>
> and who is not released, shall be brought not later than forty-eight hours before a Court, and if any person arrested or detained in such a case as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either

unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

11. Section 353 of the Criminal Code provides:

"1. Every officer of the Executive Police below the rank of inspector shall, on securing the person arrested, forthwith report the arrest to an officer not below the rank of inspector who, if he finds sufficient grounds for the arrest, shall order the person arrested to be brought before the Court of Judicial Police; otherwise he shall release him.

2. Where an order is given for the person arrested to be brought before the Court of Judicial Police, such order shall be carried into effect without any undue delay and shall in no case be deferred beyond forty-eight hours."

12. In its judgment of 8 January 1991 in the Nicholas Ellul case, the Constitutional Court of Malta upheld a decision taken by the Civil Court, in the exercise of its constitutional jurisdiction, on 31 December 1990 to the effect that Article 5 § 3 of the Convention did not impose any obligation on the magistrate before whom an arrested person appeared to examine whether that person's arrest had been made on a reasonable suspicion or not. Moreover, according to the judgment of the Civil Court, as upheld by the Constitutional Court, Article 5 § 3 of the Convention did not impose on the prosecution any duty, on presenting the arrested person, to adduce evidence that the police had a reasonable suspicion at the time of the arrest.

13. In its judgment of 13 June 1994 in the Aquilina case, the Constitutional Court followed the same approach.

B. Bail

14. The Criminal Code contains the following sections concerning bail:

"574. (1) Any accused person who is in custody for any crime or contravention may, on application, be granted temporary release from custody, upon giving sufficient security to appear at the proceedings at the appointed time and place.

…

575. …

(2) The demand for bail shall be made by an application, a copy whereof shall be communicated to the Attorney-General on the same day, whenever it is made by –

…

(c) persons accused of any crime punishable with more than three years' imprisonment...

(3) The Attorney-General may, within the next working day, by a note, oppose the application, stating the reasons for his opposition.

…

582. (1) The Court may not *ex officio* grant bail, unless it is applied for by the person charged or accused.

…"

C. The Dangerous Drugs Ordinance

15. Section 27 of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) provides:

"Notwithstanding the provisions of the Criminal Code, and saving the extensions by the President of the term of the inquiry as provided in subsection (1) of section 401 of that Code, where the Attorney General has directed that a person charged with selling or dealing in a drug against this Ordinance or charged with promoting, constituting, organising or financing a conspiracy under paragraph (f) of subsection (1) of section 22 or with the offence mentioned in subsection (1C) of the said section 22 is to be tried in the Criminal Court, such person shall be arraigned under arrest and the Court of Judicial Police as a Court of Criminal Inquiry shall conclude the inquiry within the term of twenty days from the arraignment, and until the expiration of that term or, if the inquiry is concluded at an earlier date, until such day, the person accused shall not be granted temporary release from custody, but at the end of those twenty days or such earlier date as aforesaid, the Court may grant temporary release from custody in accordance with the provisions of that Code.

Provided that if the term of the inquiry is held in abeyance for the reason specified in paragraph (c) of subsection (1) of section 402 of the Criminal Code, the Court may nonetheless grant temporary release from custody after the lapse of twenty days from the arraignment."

16. On 7 March 1999 Godfrey Ellul was arrested for drug-related offences. He applied for release relying on Article 5 § 3 of the Convention and section 137 of the Criminal Code and claiming that section 27 of the Dangerous Drugs Ordinance was in violation of the Convention. The Court of Magistrates refused to order his release. He subsequently lodged a constitutional application in the First Hall of the Civil Court. On 7 May 1999 the Civil Court, relying on the Aquilina v. Malta judgment of 29 April 1999 of the European Court of Human Rights (to be published in *Reports of Judgments and Decisions 1999*), found section 27 of the ordinance to be in violation of Article 5 § 3 of the Convention. However, it did not order Godfrey Ellul's release. Godfrey Ellul and the Attorney General appealed to the Constitutional Court. The Constitutional Court is expected to deliver its judgment on 19 June 2000. In the meanwhile Godfrey Ellul was released on bail on 3 November 1999.

D. Section 137 of the Criminal Code

17. Section 137 of the Criminal Code provides:

> "Any Magistrate who, in a matter with his powers, fails or refuses to attend to a lawful complaint touching an unlawful detention, and any officer of the Executive Police, who, on a similar complaint made to him, fails to prove that he reported the same to his superior authorities within twenty-four hours, shall, on conviction, be liable to imprisonment for a term from one to six months."

18. On 13 April 1983 the police arrested Anthony Price for a breach of the Immigration Act. During his detention he became suspect of a serious offence concerning the public security of Malta. On 17 June 1983 the applicant applied to the Court of Magistrates requesting that he should be either charged or released. On 20 June 1983 the Court of Magistrates considered that it had the power under section 135 (currently section 137) of the Criminal Code to attend to a lawful complaint touching on unlawful detention. It also found that the police had not brought Price before the Court of Magistrates within 48 hours as required by section 365 (currently section 353) of the Criminal Code. As a result, the court ordered Price's release.

19. On 13 June 1990 the First Hall of the Civil Court ordered Christopher Cremona to be detained for twenty-four hours for contempt of court. The detainee appealed under section 1003 of the Code of Organisation and Civil Procedure. The Attorney General, with reference to Cremona having invoked section 137 of the Criminal Code, requested the Court of Magistrates to order the Acting Registrar of the Court and the Commissioner of Police to bring Cremona before the Court and order either of them to set him free at once. According to the Attorney General, Cremona's appeal had suspensive effect on the execution of the judgment and, as a result, his continued detention was illegal. The Court of Magistrates acceded to the Attorney General's request.

20. Ibrahim Hafez Ibrahim Ed Degwej later christened Joseph Leopold invoked section 137 of the Criminal Code to challenge his prolonged and indefinite detention further to a removal order. He claimed that his detention, which had started in November 1983, had been rendered illegal because of its length and indefinite duration. On 4 July 1995 the Court of Magistrates ordered that the Attorney General be notified and, having heard his views, still on 4 July 1995, decided to reject the application.

21. On 5 October 1994 the Court of Magistrates rejected an application for release by Emanuela Brincat. It observed:

> "As results from the records several applications have been filed, before this Court and before the Criminal Court, so that the person charged may be released, which applications have always been dealt with expeditiously, which fact makes it manifest in the most glaring manner how superfluous and incomprehensible the first paragraph of the present application is, where it refers to Article 137 of the Criminal Code."

E. The Convention in domestic law

22. Section 4 subsection (3) of the Constitution provides as follows:

> "If in any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the provisions of the Human Rights and Fundamental Freedoms, that court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious; and that court shall give its decision on any question referred to it under this subsection and, subject to the provisions of subsection (4) of this section, the court in which the question arose shall dispose of the question in accordance with that decision."

23. By virtue of the European Convention Act of 19 August 1987 the Convention became part of the law of Malta. Section 4 subsection (3) of the Act provides:

> "If in any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the provisions of the said sections 33 to 45 (inclusive), that court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious; and that court shall give its decision on any question referred to it under this subsection and, subject to the provisions of subsection (4) of this section, the court in which the question arose shall dispose of the question in accordance with that decision."

24. Article 5 § 4 of the Convention has been invoked before or relied on by the domestic courts in the following cases:

Edwin Bartolo u Alfred Desira, decided by the First Hall of the Civil Court on 11 April 1989 and by the Constitutional Court on 15 February 1991;

the above-mentioned Nicholas Ellul case;

Anthony Mallia, decided by the First Hall of the Civil Court on 24 July 1991 and by the Constitutional Court on 9 March 1992;

George Mifsud, decided by the First Hall of the Civil Court on 2 December 1994 and by the Constitutional Court on 11 April 1995;

Joseph Grech, filed on 5 October 1995 and finally decided by the Constitutional Court on 21 February 1996;

Emmanuela Brincat, decided by the First Hall of the Civil Court on 19 December 1994 and by the Constitutional Court on 21 February 1996;

Carmelo Sant, decided by the First Hall of the Civil Court on 13 March 1997 (on 31 December 1997 the case was still pending before the Constitutional Court).

THE LAW

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

25. The applicant complains under Article 5 § 3 of the Convention that the Court of Magistrate before which he appeared on 19 March 1995 did not have the power to examine the reasonableness of the suspicion against him. Article 5 § 3 of the Convention provides:

> "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."

Article 5 § 1 (c) of the Convention provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so …".

26. The Government submitted that the applicant's appearance before the Court of Magistrates on 19 March 1995 satisfied the requirements of Article 5 § 3 of the Convention. They also argued that there was nothing precluding States Parties from requiring arrested persons to lodge a complaint concerning the lawfulness of their detention or a bail application in order to obtain the review envisaged under Article 5 § 3.

27. The applicant argued that his appearance before the Court of Magistrates on 19 March 1995 could not satisfy Article 5 § 3 of the Convention because of the limitations that national law imposed on the Court of Magistrates' competence. In the applicant's view, the only way in which one could effectively obtain release from detention pending trial was by applying for bail. The applicant considered that the violation of Article 5 § 3 continued until the date of his release from custody.

28. 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 the Aquilina v. Malta judgment of 29 April 1999, *op. cit.*, § 47). 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 the Assenov and Others v. Bulgaria judgment of 28 October 1998, *Reports 1998-VIII,* p. 3264).

29. According to the Court's case-law, the opening part of Article 5 § 3 requires prompt automatic review by a judicial officer of the merits of the detention (see the above-mentioned Aquilina judgment, *loc. cit.*).

30. Turning to the circumstances of the present case, the Court considers that the applicant's appearance before the Court of Magistrates on 19 March 1995 was not capable of ensuring respect for Article 5 § 3 of the Convention because, as established in the above-mentioned Aquilina v. Malta judgment (*op. cit.*), that court had no power to review automatically the merits of the detention.

31. Since Article 5 § 3 guarantees an automatic right to be brought before a judge, the Court is not convinced by the Government's argument that Article 5 § 3 has been complied with because national law gave the applicant the possibility, which he did not use, of lodging an application challenging the lawfulness of his detention and a bail application – the latter after the conclusion of the inquiry.

32. It follows that, the applicant could not obtain an automatic ruling by a domestic judicial authority on whether there existed a reasonable suspicion against him. This constitutes a breach of Article 5 § 3 of the Convention.

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

33. The applicant complained that, throughout the entire period of his detention on remand, he could not have the lawfulness of his arrest and detention reviewed speedily by a court in breach of the requirements of Article 5 § 4 of the Convention, which provides:

> "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."

34. The Government submitted that the applicant could have lodged an application under section 137 of the Criminal Code challenging the lawfulness of his arrest or detention. They cited in this connection the Anthony Price, Christopher Cremona, Ibrahim Hafez Ibrahim Ed Degwej and Emanuela Brincat cases where this section was invoked before domestic courts. Alternatively, according to the Government, the applicant could have complained of a breach of Article 5 § 4 of the Convention to the Court of Magistrates, which would have had to refer the matter to the First Hall of the Civil Court in its constitutional jurisdiction. The Court of Magistrates would have been bound by the decision of the Civil Court or of the

Constitutional Court in the case of an appeal. The Government cited the Edwin Bartolo u Alfred Desira, Nicholas Ellul, Anthony Mallia, George Mifsud, Joseph Grech, Emanuela Brincat and Carmelo Sant cases where such a complaint was raised before the courts.

35. According to the Government, a distinction could be drawn between a request for provisional release, i.e. a request to be released on bail, and a *habeas corpus* application under section 137 of the Criminal Code. A request for provisional release on bail conceded the lawfulness of detention. A *habeas corpus* application was lodged when the detention was unlawful and aimed at unconditional release. Nothing precluded a person who had been refused bail from contesting at any time the lawfulness of his or her detention by applying to the Court of Magistrates, which would order immediate release if satisfied that the detention was indeed unlawful.

36. The applicant argued that most of the cases cited by the Government as regards section 137 of the Criminal Code did not concern arrest and detention on suspicion of a criminal offence. These cases were, therefore, irrelevant to the complaint. The Anthony Price case belonged to a special category since it concerned the 48-hour time-limit beyond which nobody could be detained without being brought before a Court of Magistrates in Malta. In the Emanuela Brincat case the Court of Magistrates considered the reference to section 137 of the Criminal Code as incomprehensible and superfluous.

37. Furthermore, the applicant submitted that proceedings for failure to respect Article 5 § 4 involving the Civil Court and possibly the Constitutional Court could not by definition lead to a "speedy" decision as required by Article 5 § 4 of the Convention. As for the rest he reiterates his submission that the only way in which one could effectively obtain release from detention pending trial was by applying for bail.

38. 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 the Sakik and Others v. Turkey judgment of 26 November 1997, *Reports 1997-VII*, p. 2625, § 53). Moreover, the Court recalls that the aim of Article 5 § 4 is to ensure a "speedy" review of the lawfulness of detention. The Court has considered, for example, that a period of approximately eight weeks from the lodging of an application to judgment appears *prima facie* difficult to reconcile with the notion of "speedily" (the E v. Norway judgment of 29 August 1990, Series A no. 181-A, p. 27, § 64).

39. The Court has examined the cases invoked by the Government in support of their contention that the applicant could have obtained a review of the lawfulness of his detention by invoking section 137 of the Criminal Code. The Court considers that, as it transpires from its wording, this provision primarily aims at the punishment of officials who fail to attend to complaints about the lawfulness of detention. It is true that in some

instances courts have relied on this provision as a basis for ordering the detainee's release. However, apart from the Anthony Price case which concerned the 48-hour time-limit for bringing arrested persons before a magistrate having been exceeded, the Government did not refer to any instances in which section 137 was successfully invoked to challenge the lawfulness of arrest or detention on suspicion of a criminal offence. In the applicant's case the 48-hour time-limit had not been exceeded. The Court therefore finds that the Government have not shown that the applicant could have obtained a review of the lawfulness of his detention by relying on section 137 of the Criminal Code.

40. The Court has also examined the cases invoked by the parties in which constitutional applications were lodged on the basis of Article 5 § 4 of the Convention, which is part of domestic law. The Court notes that, according to the Government's own description, lodging a constitutional application involves a referral to 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. Moreover, recent practice shows that the relevant proceedings are invariably longer than what would qualify as "speedy" for Article 5 § 4 purposes (see § 24 above). It follows that lodging a constitutional application would not have ensured a speedy review of the lawfulness of the applicant's detention.

41. Finally, as the Government accepted, the applicant could not have obtained a review of the lawfulness of his detention by lodging a bail application, the question of bail coming into play only when the detention is lawful (see the above-mentioned Aquilina judgment, § 55).

42. It follows that it was not shown that the applicant had at his disposal under domestic law a remedy for challenging the lawfulness of his detention. Article 5 § 4 of the Convention was therefore violated.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. The applicant sought just satisfaction under Article 41 of the Convention, which reads:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

44. The applicant claimed 5,000 Maltese liras (MTL), a sum that corresponds to the minimum salary he would have earned if he had worked as an unskilled worker in Malta for the period of time he spent in prison.

45. The Government observed that the applicant, a foreign national, did not have a work permit in Malta. Moreover, he did not establish that if Article 5 §§ 3 and 4 had not been violated he would have obtained earlier release.

46. The Court considers that there is no causal link between the sum claimed for pecuniary damage and the violations found in this case. Therefore it makes no award under this heading.

B. Non-pecuniary damage

47. The applicant claimed MTL 2,000 by way of symbolic compensation for the trauma he suffered as a result of his detention and the problems he continued to face in his country because of the suspicions to which the Maltese proceedings had given rise.

48. The Government submitted that no causal link had been established between the violations and the sum claimed.

49. The Court considers that the applicant must have suffered some non-pecuniary damage as a result of the violation of his rights under Article 5 §§ 3 and 4 of the Convention. Making its assessment on an equitable basis, the Court awards the applicant MTL 1,000 in this connection.

C. Costs and expenses

50. The applicant claimed MTL 1,500 for the domestic proceedings and MTL 900 for the Strasbourg proceedings, by way of costs and expenses.

51. The Government submitted that there was no causal link between the amount claimed in respect of the domestic proceedings and the violations. The claim in respect of the Strasbourg proceedings was reasonable.

52. The Court notes that the applicant did not institute any domestic proceedings in order to seek redress for the violations of the Convention found in this case (see the Mats Jacobsson v. Sweden judgment of 28 June 1990, Series A no. 180-A, p. 16, § 46). The Court therefore considers that it cannot make any award in respect of domestic proceedings. However, the Court considers that the applicant should be awarded the sum of MTL 900 claimed in respect of the Convention proceedings.

C. Default interest

53. According to the information available to the Court, the statutory rate of interest applicable in Malta at the date of adoption of the present judgment is 8 % per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5§ 3 of the Convention;
2. *Holds* that there has been a violation of Article 5§ 4 of the Convention;
3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts: 1,000 (one thousand) Maltese liras in respect of non-pecuniary damage and 900 (nine hundred) Maltese liras for costs and expenses, together with any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 8 % shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 29 June 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President