



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

FOURTH SECTION

CASE OF STEPHENS v. MALTA (no. 1)

(Application no. 11956/07)

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. 1),

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. 11956/07) 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 Stephens (“the applicant”), on 6 December 2004.

2. The applicant was represented by Mr J. Brincat, a lawyer practising in Marsa. 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. The applicant alleged he suffered a number of procedural and substantive violations of Article 5 § 1 alone and in conjunction with Article 7 of the Convention, as well as of Articles 5 § 4 and 13.

5. On 1 June 2007 the President of the Fourth Section decided to communicate to the Government the complaints under Article 5 § 1 regarding the applicant’s detention after the arrest warrant issued against him had been declared invalid; under Article 5 § 4 regarding the alleged inequality of arms between the parties according to Article 409 of the Maltese Criminal Code and the failure of the Constitutional Court to release the applicant. 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 prior to the events in question he had been living in Alicante. He is currently serving a prison sentence in Malta.

1. The background of the case

7. On 5 August 2004, the applicant was arrested and detained in Spain following a request for his extradition (quoting the Council of Europe's European Convention on Extradition) by the Maltese authorities, pursuant to an arrest warrant issued by the Court of Magistrates as a Court of Criminal Inquiry.

8. The arrest warrant had been issued on the basis of an allegation that the applicant had in Spain conspired with another person or persons in Spain to transport drugs to Malta.

9. While detained in Spain, the applicant, through his legal counsel, lodged proceedings in Malta contesting the legality of the arrest warrant.

2. Proceedings before the Court of Magistrates as a Court of Criminal Inquiry

10. On 12 October 2004, while he was in Spain, the applicant, through his legal counsel, requested the Court of Magistrates to re-examine the lawfulness of his arrest on the ground that it had not been competent to issue the warrant and that Malta did not have jurisdiction to try the applicant.

11. On 28 October 2004 the Court of Magistrates rejected both claims. It held that the facts which formed the basis of the charges against the applicant amounted to a crime falling under the Maltese authorities' jurisdiction and that in the referral stage ("*rinviju*"), it had been competent to issue the warrant.

3. Proceedings before the Civil Court (First Hall)

12. On 29 October 2004 the applicant complained under Article 5 §§ 1 and 4 of the Convention. He maintained that his arrest in Spain had occurred consequent to an arrest warrant which was unlawful on the grounds, first, that the Maltese Courts did not have jurisdiction on the facts as alleged. According to section 5 of the Maltese Criminal Code (hereinafter "CC"), the Maltese courts had jurisdiction over foreigners acting outside Maltese territory only in cases specifically provided for in law and this could not be extended by means of interpretation. There was no specific law

and none of the legal provisions cited in the arrest warrant (section 22 (1) (f) of the Dangerous Drugs Ordinance and the 120 A (1) (f) of the Medical and Kindred Professions Ordinance) referred to the alleged facts. Secondly, the applicant claimed that the warrant had been issued by an authority which was not competent to issue it. Moreover, he complained that the Court of Magistrates which had been requested to examine speedily the lawfulness of his arrest did not satisfy the requirements of Article 5 § 4 of the Convention in so far as, according to section 409A of the CC (see paragraph 35 below), only the prosecution had a right of appeal, not the accused. He requested the court to uphold the alleged violations, revoke the arrest warrant and the consequential request for extradition, and to grant him compensation.

13. On 12 November 2004 the Civil Court partly upheld the applicant's claims. It held that the arrest warrant of 5 February 2004 should be rescinded as the court issuing it had acted *ultra vires*. Indeed, the Court of Criminal Inquiry in its referral stage had no competence to issue the arrest warrant, even more so since the issuing of such warrant had not been requested by the Attorney General and such action did not fall within the ambit of Article 405 of the CC regarding the examination of witnesses; therefore the applicant's arrest was devoid of any legal basis and contrary to Article 5 § 1 and the applicant should accordingly be released. Moreover, it held that the Court of Magistrates when examining the lawfulness of the arrest warrant did not comply with the requirements of Article 5 § 4 in so far as it granted the Attorney General (hereinafter "AG") an "appeal" and no equivalent remedy to the applicant. The Civil Court granted the applicant compensation amounting to 250 Maltese Liri (MTL – approximately 600 euros (EUR)).

14. However, it held that according to the CC the Maltese courts had jurisdiction over any individual who committed a crime expressly stated in law even if such crime had been committed outside Malta. In the present case there was no doubt that the relevant laws, namely section 22 (1), (e) and (f) of the Dangerous Drugs Ordinance and section 120 A (1), (e) and (f) of the Medical and Kindred Professions Ordinance (see paragraphs 29-30 below), which were similarly worded, covered crimes considered as such in Malta, notwithstanding that they had occurred outside Malta. While subsection (e) covered only persons who were Maltese citizens or residents, subsection (f) covered any person in Malta or outside the territory of Malta, and was not a follow-up to the previous subsection; therefore it did not carry the same limitations. Had the legislator wanted to limit subsection (f) he would have done so explicitly but no such qualification had been made. Further, nothing else provided reason to believe that subsection (f) had to be read as a continuation of subsection (e); indeed, the use of the word "or" suggested that the contrary interpretation applied. Moreover, since subsection (f) particularly contemplated crimes against the Maltese State

and which were to the detriment of Maltese society, it was plausible to infer that there was no qualification to the subsection.

4. Proceedings before the Constitutional Court

15. On 12 November 2004 the applicant appealed requesting that his arrest be declared unlawful on the additional ground that Malta lacked jurisdiction to try a British national, who was not a permanent resident in Malta, for acts committed outside Malta and that the alleged conspiracy conferred jurisdiction solely on those who had acted on or from Maltese soil. Moreover, he complained that the sum granted by way of compensation was too low in view of the fact that he had been under arrest since August.

16. According to the Government, on the same day Interpol Malta informed Interpol Spain by e-mail that the warrant had been declared unlawful. However, in line with the Government's interpretation, Interpol Spain was also informed that the judgment was not final and had no effect until the appeal, yet to be lodged, had been decided.

17. In the meantime the AG lodged a cross-appeal.

18. It appears that the applicant's legal counsel had informed the Spanish authorities of the judgment in favour of the applicant and had requested the applicant's release on this basis. According to the Government, on 16 November 2004 a Spanish court decided that the applicant's release was a matter to be decided on the basis of Spanish law without any reference to Maltese law. The applicant was not released.

19. Consequently, pending the main constitutional proceedings, on 16 November 2004, the applicant filed another application with the Constitutional Court requesting the execution of his release according to the judgment of 12 November 2004. He claimed that according to Maltese law, namely section 267 of the Code of Organisation and Civil Procedure (hereinafter "COCP"), a judgment declaring an arrest unlawful was immediately enforceable, notwithstanding any pending appeal.

20. On 17 November 2004 the AG filed a reply making reference to Article 22 of the European Convention on Extradition (hereinafter "ECE"), submitting, *inter alia*, that section 267 of the COCP was not applicable to situations such as the present where a person was detained in a foreign jurisdiction under the law of that jurisdiction. Moreover, although the applicant had so requested, the judgment of 12 November 2004 had not ordered the cancellation of the extradition request.

21. On 22 November 2004 the applicant limited his ancillary claim lodged on 16 November 2004 to the applicability of section 267 of the COCP, thus *de facto* withdrawing his request for release under these proceedings in favour of a more generic request on the applicability of the law. The Constitutional Court upheld the applicant's request stating that the judgment at issue was indeed provisionally enforceable in terms of

section 267 (b) of the COCP in so far as it provided remedies against unlawful arrest.

22. On 23 November 2004 the Constitutional Court, dealing with the main proceedings, delivered judgment on the applicant's appeal and the AG's cross-appeal. It revoked the first judgment in so far as it had found *inter alia* a violation of Article 5 § 4, and in so far as it had ordered the applicant's release. It ruled that the arrest warrant was null and void, but only on the ground that the Court of Magistrates in the referral stage ("*rinviju*") had not been competent to issue the warrant and that consequently the arrest was unlawful and in violation of Article 5 § 1. However, in the particular circumstances of the case, where the person was not being held in Malta, his release could not be ordered by the court. Furthermore, in its view, the arrest warrant had been validly grounded in law. Notwithstanding the general provisions of the CC, particularly section 48 A, which might have provided otherwise, section 22 (1), (e) and (f) of the Dangerous Drugs Ordinance and section 120 A (1), (e) and (f) of the Medical and Kindred Professions Ordinance prevailed, according to section 5 of the CC, given that they were special laws. Nevertheless, the Constitutional Court could not usurp the function of the Criminal Court, which was the only court competent to decide on the matter of jurisdiction. Having regard to the fact that the unlawfulness was solely due to a procedural defect, it found the compensation granted by the first court to be adequate and confirmed the sum. It further held that the parties were to bear their own costs and advised that a new warrant under section 355 V of the CC could be issued and would be perfectly legal.

5. The situation after the judgments

23. On 22 November 2004 the applicant was granted bail by the Spanish authorities with the obligation to report daily to a police station. His passport was impounded.

24. On 1 December 2004 the applicant was re-arrested by the Spanish authorities on the basis of a new request by the Maltese authorities, but as a continuation of the previous extradition proceedings.

25. On 28 March 2005, the *Audiencia Nacional* in Spain confirmed the applicant's extradition to Malta. On 9 September 2005 the applicant was extradited to Malta to stand trial.

26. By a decision of the Court of Magistrates of 23 February 2006, and by the judgment of the Criminal Court of 18 July 2007 confirmed by the Criminal Court of Appeal judgment of 18 January 2008, it was held that the Maltese Courts had the necessary jurisdiction over the facts of which the applicant was accused. The latter judgment found the applicant guilty of the said charges. The applicant has been in prison ever since.

27. On 9 August 2006 the applicant, who at the time was under house arrest in Malta, also introduced another application with the Court with

further complaints regarding later stages of his proceedings in Malta (application no. 33740/06).

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. As regards the Maltese courts' jurisdiction over the offence at issue

28. Section 5 of the Maltese Criminal Code, in so far as relevant reads as follows:

“(1) Saving any other special provision of this Code or of any other law conferring jurisdiction upon the courts in Malta to try offences, a criminal action may be prosecuted in Malta –

...

(i) against any person who commits an offence which, by express provision of law, constitutes an offence even when committed outside Malta.”

29. Section 48 (1) of the Maltese Criminal Code, reads as follows:

“Whosoever in Malta conspires with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to a punishment of imprisonment, not being a crime in Malta under the Press Act, shall be guilty of the offence of conspiracy to commit that offence.”

30. Section 22 of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, in so far as relevant, reads as follows:

“(1) Any person –

...

(d) who in Malta aids,... ;or

(e) being a citizen of Malta or a permanent resident in Malta, who in any place outside Malta does any act which if committed in Malta would constitute an offence of selling or dealing in a drug against this Ordinance or an offence under paragraph (f); or

(f) who with another one or more persons in Malta or outside Malta conspires for the purposes of selling or dealing in a drug in these Islands against the provisions of this Ordinance or who promotes, constitutes, organises or finances the conspiracy, shall be guilty of an offence against this Ordinance.”

31. This same wording is reproduced in section 120 A (1), (e) and (f) of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta, in defining the offences related to psychotropic drugs.

32. As regards practice, it appears that the Maltese courts have regularly convicted persons (particularly drug couriers) of the crime of conspiracy where the offence is alleged to have taken place outside Malta (see, for

example, *The Republic of Malta v. Gregory Robert Eyre*, 4 October 2004 and *The Republic of Malta v. Winnie Wanjiku Kanmaz*, 5 October 2004).

2. As regards the basis of the extradition

33. The Council of Europe's European Convention on Extradition ("ECE") (Paris, 1957) which came into force in respect of Malta ninety days after its ratification on 13 July 1979, requires that a request made by a requesting State shall be supported by the original or a copy of the warrant of arrest issued in accordance with the procedure laid down in the law of the requesting Party. Except where the ECE otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party (extraditing State). Articles 12 and 22 of the said Convention, in so far as relevant, read as follows:

Article 12

"The request shall be in writing and shall be communicated through diplomatic channels. Other means of communication may be arranged by direct agreement between two or more Parties.

The request shall be supported by:

the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party; ..."

Article 22

"Except where this Convention otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party."

34. The European Union ("EU") Member States now make use of a European arrest warrant ("EAW"), which discontinues the use of the extradition procedure. The new procedure takes the form of a judicial decision issued by a EU Member State with a view to the arrest and surrender by another Member State of a person being sought in connection with a criminal prosecution or a custodial sentence. The European Union scheme makes procedures faster and simpler without requiring any political involvement. The EU Member States were required to introduce legislation to bring the EAW into force by 1 January 2004. However, Malta having joined the European Union at a later date, this legislation came into force there on 7 June 2004 by virtue of the Extradition (Designated Foreign Countries) Order, 2004.

3. As regards the remedies against unlawful detention

35. Section 409A of the Maltese Criminal Code regarding an application by a person in custody alleging unlawful detention, reads as follows:

“ (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 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 subarticle shall be filed together with the application by the Attorney General to the Criminal Court.”

36. Section 267 of the Code of Organisation and Civil Procedure, in so far as relevant reads as follows:

“The following shall be in all cases provisionally enforceable:

(b) any judgment ... providing remedies against illegal arrest...;”

4. As regards the role of the Constitutional Courts

37. 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, 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 case the applicant had not had at his disposal, under domestic law, a remedy for challenging the lawfulness of his detention under Article 5 § 4.

THE LAW

38. The applicant complained that he had not been “lawfully arrested” on a reasonable suspicion of having committed “an offence” and that his entire detention had violated Article 5 § 1 of the Convention.

39. Invoking Article 5 § 1, the applicant complained about the inaction of the Maltese authorities *vis a vis* his release in Spain after the arrest warrant had been declared invalid, resulting in a further ten-day period of detention.

40. Invoking Article 5 § 4 of the Convention the applicant complained that the Court of Magistrates had refused to take cognisance of the question of jurisdiction. Moreover, the right to apply for a reversal of a decision about the lawfulness of the arrest was solely given to the prosecution, thus limiting the applicant's access to court and creating an inequality of arms between the parties.

41. The applicant claimed that his arrest had violated Article 7 of the Convention.

42. Invoking Article 13 of the Convention, the applicant claimed that the Constitutional Court had not provided an adequate remedy as it had kept in force the effects of an arrest warrant which it had found defective.

43. The Articles of the Convention relied on, in so far as relevant, read as follows:

Article 5

“1. 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;

(...)

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(...)

4. 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.”

Article 7

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

44. The Government contested these arguments.

I. THE COURT’S JURISDICTION TO EXAMINE THE APPLICATION AGAINST MALTA

45. On 11 April 2007 the Court, sitting as a Committee of three judges pursuant to Article 27 of the Convention, decided under Article 28 of the Convention to strike the applicant’s complaints, lodged against Spain, out of its list of cases. However, the applicant, although detained in Spain during the period in question, maintained his complaints against Malta by means of the current application. Although the Maltese Government have not raised an objection to being held accountable under the Convention for the facts alleged against them, the Court will of its own motion deal with the matter. The question to be decided is whether the facts complained of by the applicant can be attributed to Malta.

A. General principles

46. Article 1 of the Convention provides:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.”

47. It follows from Article 1 that Contracting States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their “jurisdiction”.

48. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia*, [GC], no. 48787/99, § 311, ECHR 2004 - ...).

49. According to established case-law Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case. The Court refers to its case-law on the notion of “jurisdiction” and how that notion has been interpreted and applied in different contexts (see *Ilaşcu and Others* [GC], no. 48787/99, cited above; *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII; *Assanidzé v. Georgia*, [GC], no. 71503/01, ECHR 2004 -...; *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161;

Cruz Varas and Others v. Sweden, 20 March 1991, Series A no. 201; *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310; *Loizidou v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004; *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007; *Drodz and Janousek v. France and Spain*, 26 June 1992, Series A no. 240, and *Hess v. the United Kingdom*, no. 6231/73, 28 May 1975, *Decisions and Reports* (DR) no. 2, p. 72).

B. The Court's assessment

50. The Court considers that for the purposes of the examination of this application and in view of its conclusions in respect of the applicant's various complaints, it suffices to consider the matter of Malta's jurisdiction solely in respect of the Article 5 complaints.

51. The Court notes that the applicant was under the control and authority of the Spanish authorities in the period between his arrest and detention in Spain on 5 August 2004 and his release on bail on 22 November 2004. In so far as the alleged unlawfulness of his arrest and detention is concerned, it cannot be overlooked that the applicant's deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities pursuant to the arrangements agreed on by both Malta and Spain under the European Convention on Extradition.

52. By setting in motion a request for the applicant's detention pending extradition, the responsibility lay with Malta to ensure that the arrest warrant and extradition request were valid as a matter of Maltese law, both substantive and procedural. In the context of an extradition procedure, a requested State should be able to presume the validity of the legal documents issued by the requesting State and on the basis of which a deprivation of liberty is requested. It is to be noted that in the instant case the arrest warrant had been issued by a court which did not have the authority to do so, a technical irregularity which the Spanish court could not have been expected to notice when examining the request for the applicant's arrest and detention. Accordingly, the act complained of by Mr Stephens, having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain.

53. The Court would also add that both the Civil Court and the Constitutional Court accepted without further inquiry that Malta has breached Article 5 of the Convention as a result of the applicant's arrest and detention on the strength of a defective arrest warrant.

54. In the light of the above, the Court considers that the applicant's complaints under Article 5 engage the responsibility of Malta under the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION.

A. The period of detention from 5 August 2004 to 12 November 2004

55. With reference to the period of his detention from 5 August until 12 November 2004, the applicant alleged that he had not been "lawfully arrested" on reasonable suspicion of having committed "an offence". Firstly, the court issuing the warrant for his arrest did not have the authority to do so and, secondly, the facts of which he was accused did not amount to a triable offence in Malta.

56. He claimed that the lawfulness of an arrest referred to both procedure and substance and therefore the question of jurisdiction had to be decided at the outset, and not by the Criminal Court as had been stated by the Constitutional Court, as this could lead to a person's indefinite arrest pending extradition.

57. Furthermore, according to the European Convention on Extradition, for an arrest for the purposes of extradition to be legal, a triable offence had to exist within the jurisdiction of the arresting or requesting country. The applicant claimed that the acts of which he was accused did not constitute a crime in Malta. According to his interpretation of the law, conspiracy outside Malta to sell drugs in Malta was not actionable, while conspiracy in Malta, with other persons, even if they were outside Malta, was liable to prosecution. Section 22 (1) (f) of the Dangerous Drugs Ordinance and the 120 A (1) (f) of the Medical and Kindred Professions Ordinance had to be read in context. Consequently, this charge applied only to persons who "in Malta" conspired to sell drugs. Indeed, in the instant case the applicant had been detained for a considerable period of time and the unlawfulness of his arrest, in view of Malta's lack of jurisdiction to try him and to issue an arrest warrant, could not be questioned before the courts.

1. The complaint in relation to the authority of the court to issue the arrest warrant

58. 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, for example, *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 32, §§ 69 et seq; and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

59. In the present case, the national courts recognised that the Court of Magistrates in the referral stage was not competent to issue the warrant and redressed this breach (see paragraph 22 above).

60. It follows that the applicant no longer has victim status in relation to this part of the complaint, which is therefore incompatible *ratione personae* with the provisions of the Convention and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

2. *The complaint in relation to the existence of a triable offence in Malta*

61. The Court notes that the main issue to be determined is whether the disputed detention was “lawful”, including whether it complied with “a procedure prescribed by law”. According to the Court’s established case-law (*Steel and Others v. the United Kingdom*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, p. 2735, § 54, and *Lucas and Others v. the United Kingdom*, (dec.), no. 39013/02, 18 March 2003), three requirements must be met in order for arrests and detention to be “lawful” and “in accordance with a procedure prescribed by law”: (i) any arrest or detention must have a legal basis in domestic law. However, these words do not merely refer back to domestic law; they also relate to the quality of the law. The applicable national law must meet the standard of “lawfulness” set by the Convention, which requires that all law be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail; (ii) there must be full compliance with the procedural and substantive rules of national law; (iii) the deprivation of liberty must be consistent with the purpose of Article 5 and not arbitrary.

62. It must therefore be determined whether the domestic law provisions dealing with the alleged criminal offences committed by the applicant constituted a “law” of sufficient “quality”.

63. The Court notes the reasoning of the Civil Court and the Constitutional Court (see paragraphs 14 and 22 above), which both gave a full explanation of how the law was to be interpreted, making it clear that the facts of which the applicant was accused fell to be considered as an offence under Maltese law. Furthermore, such interpretation has become customary in domestic practice and was further reaffirmed by the criminal courts which later convicted the applicant. Consequently, the Court considers that the offences of which the applicant was accused constituted a “law” of sufficient “quality” within the meaning of the Court’s case-law and nothing suggests that the Maltese courts interpreted the relevant domestic

law provisions unreasonably or in such a way as to make punishable acts which would otherwise have remained outside the scope of the relevant criminal law. Their interpretation was not therefore arbitrary so as to render the applicant's detention unlawful also under this respect. Consequently his detention was in accordance with Article 5 § 1 (c) of the Convention.

64. It follows that this part of the complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be declared inadmissible in accordance with Article 35 § 4 thereof.

B. The period of detention from 12 November 2004 to 22 November 2004, following the Civil Court's judgment

1. Admissibility

(a) The Government's objection of lack of victim status

65. In respect of the complaint relating to the inaction of the Maltese authorities in dealing with his release, the Government submitted that even if, in the ten-day period following the Civil Court's decision, the detention had been unlawful, the Constitutional Court was aware of such when it gave judgment on 23 November 2004 and it granted a remedy for the violation of Article 5 § 1. Thus, the applicant was no longer a victim in respect of that period.

66. The Court notes that the Constitutional Court confirmed the first-instance judgment in so far as it had found a violation of Article 5 § 1 because the arrest warrant was null and void on the ground that the Court of Magistrates in the referral stage ("*rinviju*") had not been competent to issue the warrant. Having regard to the fact that the unlawfulness was solely due to a procedural defect, the Constitutional Court found the compensation granted by the first court to be adequate.

67. The Court observes, after having analysed the judgment in question, that no reference is made in that judgment to a violation in respect of the ten-day period. On the contrary, the Constitutional Court insisted that the first court should not have ordered the applicant's release in view of the fact that he was detained in Spain; consequently, it follows that it could not have upheld the finding of such a violation. Moreover, had such a finding been upheld the Constitutional Court would have increased the sum granted to the applicant in compensation in view of the further period of ten days in which he remained in detention, but it did not do so.

68. It follows that it cannot be said that the Constitutional Court judgment expressly or in substance acknowledged a violation of Article 5 § 1 during the said period. Consequently, it did not redress the violation.

69. It follows that in the present case none of the criteria required to deprive the applicant of his victim status (see paragraph 58 above), for the period at issue, is present. The Government's objection is therefore dismissed.

(b) Conclusion

70. The Court notes that this complaint under Article 5 § 1 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.

2. Merits

(a) The parties' submissions

71. With reference to the period between 12 November 2004 and 23 November 2004, the applicant complained about the inaction of the Maltese authorities *vis a vis* his release in Spain. Their refusal to notify the Spanish authorities prolonged his detention on the strength of a warrant which had been declared invalid on 12 November 2004, ten days prior to the appeal judgment which confirmed the invalidity of the warrant.

72. The applicant submitted that by contacting Interpol, the Maltese authorities sent the message to the wrong address and by means of the wrong courier. At the time, before the coming into force of the European Arrest Warrant, a request for extradition was conducted through diplomatic channels, and only the Minister had the power to halt such requests. However, the AG failed to advise the Minister to withdraw the extradition on the basis of the rescinded warrant. Thus, the Spanish authorities were obliged to continue with the extradition proceedings unless they were halted by the Spanish Minister.

73. According to the applicant, Maltese law was clear on the immediate execution of a judgment ordering release. Thus, the action before the Constitutional Court, delaying the decision, was part and parcel of the alleged violation.

74. Moreover, the Constitutional Court's remedy of 23 November 2004 favoured the prosecution and not the applicant. While observing that it had no jurisdiction to rescind a warrant and to cancel its effects, the Constitutional Court solely advised that a new warrant could be legally issued under section 355 V of the CC. Indeed the AG followed this advice and issued another warrant which was immediately transmitted this time through diplomatic channels.

75. The Government contested that argument, providing evidence that Interpol Malta had indeed informed Interpol Spain that a judgment finding the arrest warrant invalid had been delivered, but such notification also

stated that, according to their interpretation of the situation, the judgment was not final and would have no effect until the appeal had been decided.

76. The Government submitted that the period between 12 November 2004 and 22 November 2004 was taken up by disagreement over whether the judgment of 12 November 2004 was provisionally enforceable according to law and, if so, the practical effects of this view of things on the applicant's detention in Spain. The said judgment could only be understood as ordering the applicant's release with respect to the warrant for his arrest in Malta, where he was not at the time detained; it had not included an order to withdraw the extradition warrant nor to inform the Spanish authorities of such. As stated by the Constitutional Court, the first court could not order the applicant's release in Spain since the detention in Spain was governed by Spanish law. Indeed, the applicant filed a request for release with the Spanish courts based on the judgment of 12 November 2004. The Spanish courts did not find the arrest and detention of the applicant in Spain to be unlawful.

(b) The Court's assessment

77. The Court will not speculate on the decision of the Spanish authorities to keep the applicant in detention. Allegedly, according to that decision, his detention under Spanish law was lawful. The latter complaint could only be examined by this Court if the applicant had correctly exhausted all the domestic remedies available to him in Spain.

78. The Court further considers that it is not necessary to examine whether following the judgment of 12 November 2004 the Government of Malta had a duty to inform the Spanish authorities and, if so, whether the correct notification procedure had been used. It will confine itself to determining whether the applicant's detention between 12 November 2004 and 22 November 2004 (the date of the applicant's release) was lawful in terms of Article 5 § 1, including whether it complied with "a procedure prescribed by law".

79. It observes that the failure to comply with the "procedure prescribed by law" requirement at the time of the applicant's arrest was acknowledged by the domestic courts and they accepted that there had been a violation of Article 5 § 1 of the Convention (see paragraph 22 above). The Court considers that the period of detention after the Civil Court's judgment ordering his release, which amounted to another ten days, was also unlawful and not in accordance with Article 5 § 1 (c) (see, *mutatis mutandis*, *Nevmerzhitsky v. Ukraine*, judgment of 5 April 2005, ECHR 2005-II, p. §§ 119 - 121) for the same reasons, namely that his arrest warrant was devoid of any legal basis, since it had been issued by a court acting *ultra vires*. The Court notes that Malta had accepted responsibility for the violation of Article 5 § 1 for the initial period of detention irrespective of the fact that the applicant was being detained in Spain. Consequently, it

follows that the violation arising from the further period of ten days during which the applicant remained in detention was also imputable to Malta.

80. The Court concludes, therefore, that there has been a violation of Article 5 § 1 of the Convention during the period between 12 November 2004 and 22 November 2004, the date on which the applicant was eventually released on bail by the Spanish authorities.

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

81. The applicant invoked the said article under various heads: lack of competence of the Court of Magistrates; disregard of the principle of equality of arms before the Court of Magistrates; shortcomings in the remedial action before the Constitutional Court.

A. Lack of competence of the Court of Magistrates

82. The applicant complained that, notwithstanding the new amendments to the law adopted pursuant to the Court's judgments in *Aquilina v. Malta* ([GC], no. 25642/94, ECHR 1999-III) and *T.W. v. Malta* ([GC], no. 25644/94, 29 April 1999), which conferred on the Court of Magistrates the power to establish whether the deprivation of an individual's liberty was justified and to order release, the applicant remained in detention. In his case the Court of Magistrates had refused to take cognisance of the question of jurisdiction, and this was further confirmed by the Constitutional Court judgment declaring that the question of jurisdiction could only be dealt with by the Criminal Court.

83. The Court observes that this complaint was not invoked in the domestic constitutional proceedings brought by the applicant.

84. It follows that the complaint must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

B. Disregard of the principle of equality of arms before the Court of Magistrates

1. Admissibility

85. The applicant complained that in the procedure before the Court of Magistrates, unlike the prosecution, the applicant did not have a right of appeal against the decision declaring his arrest to be lawful.

86. The Government submitted that the applicant's complaint referred to section 409 A (4), which grants the AG the right of recourse to the Criminal Court when an applicant is released in circumstances where the AG considers that the arrest is, in fact, lawful. However, this provision was

never relied on in the applicant's case, given that he had not been successful in challenging his pre-trial detention. Consequently, the applicant cannot claim to be a victim for the purposes of the Convention.

87. The Court recalls that in order to claim to be a victim of a violation, a person must be directly affected by the impugned measure (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A, no. 25, §§ 239-240). The word "victim", denotes the person directly affected by the act or omission which is in issue, the existence of a violation conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 41 (see *Eckle*, cited above, p. 30, § 66).

88. The Court observes that in the present case the applicant's challenge to the lawfulness of his detention was rejected by the Court of Magistrates. Had the applicant wanted to appeal, he could not have done so. According to the domestic law provisions applicable at the time, an appeal could only be lodged by the prosecution had the applicant been successful in his challenge.

89. The fact that the prosecution did not have to make use of its right to appeal does not alter this conclusion. The Government's objection is therefore dismissed.

90. 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.

2. Merits

(a) The parties' submissions

91. The applicant stressed that according to the procedure before the Court of Magistrates, the right to apply for a reversal of a decision about the lawfulness of an arrest was solely given to the prosecution, who could apply for the person's re-arrest. There was no obligation to hold a hearing or notify the arrested person, thus limiting the latter's access to court and creating an inequality of arms between the parties. This rendered the system incompatible with Article 5 § 4. The Government's suggestion that the applicant could have lodged other applications *ad infinitum* did not take account of the limited number of magistrates in Malta.

92. The Government submitted that section 409 A did not provide any limitation on the number of times a person could resort to this remedy. On the other hand there was no possibility for the prosecution to re-open proceedings decided in favour of the applicant except through the exercise of section 409 A (4). Consequently, this provision did not fall foul of the principle of equality of arms, especially since the prosecution could revert to this subsection only once, after the release had been ordered. Moreover,

pending such an application by the prosecution, the release ordered by the Court of Magistrates was not suspended.

93. The Government further submitted that in proceedings under section 409, the Criminal Court was bound by the principles of natural justice and was therefore bound to treat both parties equally and in accordance with the guarantees of Article 5 § 4 in reaching its decision.

(b) General principles

94. The Court recalls that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of Article 5 § 1, of his or her deprivation of liberty (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, p. 34, § 65).

95. Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation (see the *Megyeri v. Germany* judgment of 12 May 1992, Series A no. 237-A, p. 11, § 22, and *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-II), it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see *Sanchez-Reisse v. Switzerland*, judgment of 21 October 1986, Series A no. 107, p. 19, § 51; *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3302, § 162, and *Trzaska v. Poland*, no. 25792/94, § 74, 11 July 2000). The possibility for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (see *Kampanis v. Greece*, judgment of 13 July 1995, Series A no. 318-B, § 47). Moreover, although Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention. Nevertheless, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance (see, *inter alia*, *mutatis mutandis*, *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, p. 14, § 25 *in fine*, and *Ekbatani v. Sweden*, judgment of 26 May 1988, Series A no. 134, p. 12, § 24).

(c) The Court’s assessment

96. The Court notes that the applicant could have lodged an application for release under section 409 as often as he wished. The fact that such an application might be repeatedly determined by the same magistrate is not incompatible with the Convention. Consequently, the limited number of

magistrates in Malta did not affect the applicant's right to lodge such an application.

97. The Court considers that in substance there is no difference between a determination on the applicant's unlawful detention by means of a fresh application and the same determination as a result of an appeal lodged by the prosecution. Indeed, it appears that a fresh application is no less than an appeal. Thus, the fact that the applicant had a remedy which is equivalent to that offered to the prosecution in terms of law and which offered greater safeguards to him, did not alter the balance which is required to persist throughout such proceedings. Consequently, the Court does not consider that proceedings under section 409, in so far as they relate to the absence of a possibility to appeal, breach the equality of arms principle under Article 5 § 4.

98. Accordingly, there has been no violation of Article 5 § 4 of the Convention.

C. Shortcomings in the remedial action before the Constitutional Court

99. Although the applicant invokes Article 13, the Court considers that since Article 5 § 4 constitutes a *lex specialis* in relation to the more general requirements of Article 13 (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 69, ECHR 1999-II), this complaint should be analysed exclusively under Article 5 § 4.

100. The applicant claimed that the Constitutional Court did not provide an adequate remedy. Notwithstanding its decision recognising a violation of Article 5 § 1 and declaring the arrest warrant defective, it nonetheless kept in force its effects, thereby negating its own conclusion on the unlawfulness. He submitted that the Spanish authorities' activity and his arrest were triggered and kept in place as a result of Malta's request for his extradition. Thus, in order to be effective the Constitutional Court should have ordered the applicant's release, as did the court of first instance by issuing an order to the Maltese authorities to take all necessary steps through diplomatic channels to reverse the effects of the unlawful warrant. Furthermore, the applicant submitted that the European Extradition Convention, which was applicable in the present case, required as a basis for an extradition request a valid arrest warrant issued according to the laws of the requesting Party.

101. The Government submitted that Article 5 § 4 does not and cannot require a court to order the release of a person who is being detained by the authorities of another jurisdiction. It can only apply within the jurisdiction where the person is being effectively detained and a remedy should be sought before a court within that jurisdiction, in the present case Spain. In so far as Article 5 § 4 may be applicable, the Constitutional Court freed the applicant from the effects of the warrant in that he could no longer be

considered to be subject to the warrant of arrest issued against him. However, he could not be physically released in Malta since he was not physically detained there. Maltese courts have no jurisdiction over the Spanish authorities. Thus, the remedy granted could only be declaratory, but it could have served as a basis for allowing the applicant to lodge a further request for his release in Spain.

102. The Court, recalls that the right guaranteed in Article 5 § 4 is only applicable to persons deprived of their liberty, and has no application for the purposes of obtaining, after release, a declaration that a previous detention or arrest was unlawful (see *X v. Sweden*, no. 10230/82, Commission decision of 11 May 1983, Decisions and Reports (DR) 32, p. 304, and *A.K. v. Austria*, no. 20832/92, Commission decision of 1 December 1993, unpublished). Consequently, Article 5 § 4 cannot be invoked by a person who is lawfully released (see *mutatis mutandis, Guliyev v. Azerbaijan*, (dec.) no. 35584/02, 27 May 2005). Since Article 5 § 4 does not establish a right to an order of unconditional release (see *D.W. v. the United Kingdom*, no. 21387/93 Commission Decision of 21 October 1996, unpublished) it follows that release on bail is considered to be lawful release for the purposes of this Article.

103. The Court observes that the applicant made his application for release while he was in detention. However, a decision was given by the Constitutional Court only on 24 November 2004, by which time he had been released on bail by the Spanish authorities (see paragraph 23 above). Thus, although at the time of his application to the domestic courts the applicant was entitled to a review in accordance with Article 5 § 4, this provision no longer applied at the time of the Constitutional Court's judgment. Consequently, it is not necessary for the Court to examine whether the proceedings concerning the applicant's detention on remand satisfied the safeguards of Article 5 § 4 of the Convention.

104. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

105. The applicant alleged that an extensive interpretation of a criminal provision to ground jurisdiction for the purposes of issuing a warrant was in violation of Article 7, notwithstanding that the proceedings were in their preliminary stage. He reiterated his interpretation of the relevant law (see paragraph 57 above).

106. The Court recalls that the standards of Article 7 refer to prosecution, conviction and punishment (see *Osthoff v. Luxembourg*, no. 26070/94, Commission decision of 14 January 1998, Decisions and Reports (DR)) and therefore are not applicable to detention under Article 5 § 1 (c),

since that detention is not a result of a conviction or sentence (see also *Ferrari Bravo v. Italy*, no. 9627/81, Commission decision of 14 March 1984, Decisions and Reports (DR) 37 p. 29, and *Lawless v. Ireland*, Commission Report of 19 December 1959, Series B no. 1, p. 66, § 68). The instant case deals with pre-trial detention.

107. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention. Consequently, it must be rejected under Article 35 §§ 3 and 4 thereof.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

108. Article 41 of the Convention provides:

“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

109. The applicant claimed 155,000 euros (EUR) in respect of pecuniary damage. This covered the loss of his two business outlets and what he had paid for goodwill and improvements. It also covered loss of two seasons of earnings amounting to EUR 55,000.

110. The Government submitted that the applicant had not submitted any evidence supporting the said losses. Moreover they could not be held responsible for any loss incurred while the applicant was detained in Spain under Spanish law. As for the period of detention in Malta the applicant would still have suffered the same alleged losses as a result of the criminal proceedings against him, irrespective of whether or not he had been held under arrest.

111. The Court notes that it has only found a violation under Article 5 § 1, as regards the period of detention between 12 November 2004 to 22 November 2004. The violation found could not have had any particular impact on the applicant’s earnings, given the brevity of the period. However, even if it did, the applicant has failed to substantiate his claims by providing any evidence of the said losses. It therefore rejects this claim.

B. Non-pecuniary damage

112. The applicant claimed EUR 10,000 in respect of non-pecuniary damage because of the frustration and mental anguish resulting from the upholding of his unlawful arrest.

113. The Government submitted that the Constitutional Court had already granted compensation for the violation found. Moreover, since the violation was solely procedural, a finding of a violation would be sufficient just satisfaction.

114. The applicant never received any compensation for the unlawful detention subsequent to the Civil Court's judgment. The Court found a violation under Article 5 § 1 in respect of the ten-day period between 12 November 2004 and 22 November 2004. It considers that the applicant must have suffered some non-pecuniary damage as a result of the violation of his rights under Article 5 § 1 of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 500 in this connection.

C. Costs and expenses

115. The applicant also claimed EUR 1,650 (as per attached bill of costs) for the costs and expenses incurred before the Maltese domestic courts; EUR 18,880 (as per attached bill) for those incurred before the Spanish domestic courts and EUR 4,650 for those incurred before the Court.

116. The Government accepted the claim relating to the proceedings before the Maltese domestic courts but opposed the grant of costs for the proceedings before the Spanish courts since there was no causal link between the violation found and the costs incurred. Indeed, the extradition proceedings in Spain continued after the Spanish authorities became aware of the violation found by the Maltese courts, consequent to which the defective warrant was replaced by a second valid warrant. Moreover, these costs appeared to be exorbitant. As to the costs of the proceedings before the Court the Government submitted that the sum of EUR 1,000 would be fair and reasonable in the circumstances.

117. According to the Court's case-law, the Court will award costs and expenses in so far as these relate to the violation found and in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court notes that it has only found a violation of Article 5 § 1 in respect of the ten-day period of unlawful detention subsequent to the Civil Court's judgment. Regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings before the Spanish courts but accepts in part the claim for costs before the Maltese domestic courts and this Court. It considers it reasonable to award the sum of EUR 1,000 covering both costs and expenses in the Maltese domestic proceedings and the proceedings before the Court.

D. Default interest

118. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* by a majority admissible the applicant's complaint under Article 5 § 1 of the Convention concerning his detention between 12 November 2004 and 22 November 2004;
2. *Declares* unanimously admissible the complaint under Article 5 § 4 of the Convention regarding the inequality of arms between the parties arising from Article 409 of the Maltese Criminal Code; and the remainder of the application inadmissible;
3. *Holds* by six votes to one that there has been a violation of Article 5 § 1 of the Convention concerning the applicant's detention after the arrest warrant had been declared invalid;
4. *Holds* unanimously that there has been no violation of Article 5 § 4 of the Convention regarding the alleged inequality of arms between the parties arising from Article 409 of the Maltese Criminal Code;
5. *Holds* by six votes to one that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,
 - (a) EUR 500 (five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and;
 - (b) EUR 1,000 (one thousand euros) plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

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
Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Nicolas Bratza is annexed to this judgment.

N.B.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE BRATZA

1. In finding a violation of Article 5 § 1 in the present case, the majority of the Chamber have divided the applicant's detention in Spain into two periods – the period from 5 August 2004 (the date of the applicant's arrest) to 12 November 2004 (the date of the decision of the Civil Court in relation to the applicant's constitutional challenge) and the period from 12 November 2004 to 22 November 2004 (the date on which the applicant was released on bail by the Spanish authorities).

2. In relation to the former period, the applicant's complaint that he was detained in breach of Article 5 § 1 since the court issuing the arrest warrant did not have the authority to do so has been rejected by the Chamber on the ground that the applicant can no longer claim to be a victim of a violation and that this part of the complaint is, in consequence, incompatible *ratione personae*. As noted in the judgment, the Civil Court held that the arrest warrant of 5 February 2004 should be rescinded on the grounds that the court issuing it had no competence to do so and had acted *ultra vires* and that the applicant's arrest was therefore devoid of any legal basis and contravened Article 5 § 1. The Civil Court went on to award the applicant the sum of 250 Maltese Liri (approximately 600 euros) in compensation (judgment § 13). The Civil Court's decision and the award were confirmed by the Constitutional Court in its judgment of 23 November 2004 (judgement § 22).

3. I am in entire agreement with the Chamber in this conclusion and reasoning. Where I differ from the majority is as to their finding that in respect of the second period the applicant retained his victim status and that his rights under Article 5 § 1 were violated. The majority have rejected the Government's objection of lack of victim status on the grounds that in its judgment the Constitutional Court neither expressly nor in substance acknowledged a violation of Article 5 § 1 during the ten-day period between 12 and 22 November 2004 and, consequently, did not redress such violation. It is argued that, in its judgment confirming the decision of the Civil Court, the Constitutional Court "made no reference...to a violation in respect of the ten-day period". It is said that, on the contrary, the Constitutional Court insisted that the Civil Court "should not have ordered the applicant's release in view of the fact that he was detained in Spain; consequently, it follows that he could not have upheld the finding of such a violation". In the majority's view, had such a finding been upheld, the Constitutional Court "would have increased the sum granted to the applicant in compensation in view of the further period of ten days in which he remained in detention" (judgment, § 67).

4. In my view, the majority's approach is unduly formalistic and does not properly reflect either the intention or the effect of the Constitutional Court's judgment. It is true that the Constitutional Court did not uphold the

Civil Court's order to release the applicant for reasons which would seem to be clear from its judgment, namely that the applicant was detained in Spain and that it was not within the jurisdiction of a Maltese court to direct the courts or authorities of another sovereign State to release a detainee within its own territory. This was indeed underlined by the fact that, when the Spanish court was informed of the order of the Civil Court, it decided on 16 November 2004 that the applicant's release was a matter to be determined on the basis of Spanish law, without reference to Maltese law, and declined to release him (judgment § 18). It does not, in my view, follow from this that the Constitutional Court did not acknowledge that the applicant's rights under Article 5 § 1 had been violated; on the contrary, the court expressly found that the arrest warrant was null and void and that the applicant's arrest was unlawful and in violation of Article 5 § 1.

5. The majority argue that, had the Constitutional Court fully upheld the Civil Court's judgment, it would have increased the sum awarded in view of the further period of ten days during which the applicant remained in detention. I cannot share this view. It is apparent from the reasoning of the Constitutional Court why it considered that an increase in the sum awarded was not justified. Not only had the release of the applicant been a matter outside the control of the Maltese courts, but the breach of Article 5 § 1 was a procedural rather than a substantive one; as the Constitutional Court emphasised, the arrest warrant had been issued by the wrong court but had been validly grounded in Maltese law. It was for the very reason that the unlawfulness was due solely to a procedural defect that the Constitutional Court found the compensation granted by the first court to be adequate, confirmed the sum awarded and went on to note that a new warrant under section 355 V of the Criminal Code could be issued and would be perfectly lawful (see judgment § 22). In the light of this explanation, I see no reason why the compensation awarded by the Civil Court, which was itself not fixed by reference to the number of days which the applicant had spent in detention, should have been increased to reflect the further ten days of detention, six of which were in any event attributable to the Spanish authorities.

6. In my view, the explicit acknowledgment that there had been a breach of the procedural requirements of lawfulness under Article 5 § 1 and the redress provided by way of an award of compensation for such breach are such that the applicant can no longer claim to be a victim of a violation of that Article.