

Punishment in drug trafficking cases under Maltese law not foreseeable enough

In today's Chamber judgment in the case of **Camilleri v. Malta** (application no. 42931/10), which is not final¹, the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 7 (no punishment without law) of the European Convention on Human Rights

The case concerned the discretion of the public prosecutor to decide in which court to try a drug trafficking case and therefore the punishment bracket (six months to ten years if tried in the Court of Magistrates, or four years to life if tried in the Criminal Court). The Court found that Maltese law was not sufficiently foreseeable in that it did not provide for any guidance on what would amount to a more serious offence or a less serious one.

Principal facts

The applicant, John Camilleri, is a Maltese national who was born in 1968 and lives in Malta. On 16 November 2005, the Criminal Court found him guilty of possession of illegal drugs (Ecstasy) and sentenced him to 15 years' imprisonment and a 35,000 euro fine. Mr Camilleri brought constitutional redress proceedings, complaining that the discretion of the public prosecutor under Maltese law to decide in which court to try an accused ran counter to the impartiality requirement of Article 6 of the European Convention on Human Rights. The Civil Court rejected his complaint.

On appeal, on 12 February 2010, the Constitutional Court confirmed the Civil Court's judgment. It held in particular that the power of the public prosecutor to choose the forum in which to try the accused did not give him the powers of a judge, essentially because the public prosecutor had no control over the finding of guilt or innocence of an individual. Nevertheless the Constitutional Court considered that it would be desirable, for the sake of fairness and transparency, that criteria to be used by the public prosecutor when choosing the appropriate forum should be established.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial) and Article 7 (no punishment without law), Mr Camilleri complained about the discretion of the public prosecutor to decide in which court to try him. He alleged that, had he appeared before the Court of Magistrates instead of the Criminal Court, the maximum punishment for a verdict of guilt would have been ten years' imprisonment and a lower fine.

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

The application was lodged with the European Court of Human Rights on 26 July 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Ineta **Ziemele** (Latvia), *President*,
David Thór **Björgvinsson** (Iceland),
Päivi **Hirvelä** (Finland),
George **Nicolaou** (Cyprus),
Zdravka **Kalaydjieva** (Bulgaria),
Krzysztof **Wojtyczek** (Poland) and,
Lawrence **Quintano** (Malta), *ad hoc Judge*,

and also Lawrence **Early**, *Section Registrar*.

Decision of the Court

The Court decided to examine the complaint firstly under Article 7. It noted that the applicable provision, section 120A (2) of the Medical and Kindred Professions Ordinance, provided for two different possible punishments applicable in respect of the offence with which Mr Camilleri had been charged, namely four years to life imprisonment in the event of his being tried before the Criminal Court, or six months to ten years in the event of his being tried before the Court of Magistrates. The law had not made it possible for him to know which of the two punishment brackets would apply to him and he had become aware of the punishment bracket to be applied only when he was charged, after the prosecutor had determined the court where he was to be tried.

Furthermore, the case-law of the Maltese courts which the parties had presented to the Court confirmed that Mr Camilleri would not have been able to know which punishment was applicable to him, as it was entirely dependent on the prosecutor's discretion to determine the trial court. The criteria to be applied by the prosecutor when taking his decision were not specified in any legislative text and had not been clarified over the years by the courts. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one. The lack of such guidelines had also been noted by the Maltese Constitutional Court in its judgment in Mr Camilleri's case. Thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied and the prosecutor had an unlimited discretion to decide which minimum penalty would be applicable with respect to the same offence. His decision was inevitably subjective and left room for arbitrariness.

Moreover, if an accused was tried before the Criminal Court, a lesser sentence than the minimum punishment before that court could not be imposed, as provided by the Medical and Kindred Professions Ordinance. The Maltese Government had further not provided any examples of decisions showing that a national court had imposed a sentence below the minimum punishment.

The Court concluded that the relevant legal provision failed to satisfy the foreseeability requirement and to provide effective safeguards against arbitrary punishment as provided in Article 7. There had accordingly been a violation of that Article.

Having regard to that finding, the Court considered that it was not necessary to examine the case separately under Article 6.

Just satisfaction (Article 41)

The court held that Malta was to pay the applicant 1,000 euros (EUR) in respect of non-pecuniary damage and EUR 5,000 in respect of costs and expenses.

Separate opinions

Judges Kalaydjieva and Quintano each expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.