AS TO THE ADMISSIBILITY OF

Application No. 25642/94
by Joseph AQUILINA
against Malta

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 7 July 1994 by Joseph AQUILINA against Malta and registered on 14 November 1994 under file No. 25642/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 6 February 1996 and the observations in reply submitted by the applicant on 11 March 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Maltese citizen, born in 1974 and resident in Qormi, Malta. He is represented before the Commission by Mr. Joseph Brincat, an advocate practising in Marsa, Malta.

The facts as submitted by the parties may be summarised as follows.

a. Particular circumstances of the case

The applicant was arrested by the police on 20 July 1992 and detained for interrogation for two days.

On 22 July 1992 the applicant was brought before the Magistrates Court. The charge was read out by the police inspector and alleged that the applicant had defiled his girlfriend in a public place (an offence

involving sexual acts) and threatened her family. The applicant pleaded not guilty.

The applicant's counsel lodged an application for bail. Since the applicant was facing charges attracting a maximum sentence of three or more years, the application had to be served on the Attorney General. The Acting Registrar however did not serve the application on the day it was submitted but the next day, i.e. on 23 July 1992. The Attorney General was granted two days by the court to reply.

On 23 July 1992 the applicant made a constitutional application to the First Hall of the Civil Court arguing that there had been a violation of Article 5 para. 3 of the Convention in that the magistrate before whom he had appeared the day before did not have the power to order his release at that stage; since he was facing charges attracting a maximum sentence of three or more years, the application for bail had to be first communicated to the Attorney General. It was decided that the applicant's constitutional appeal would be heard on 30 July 1992.

On 24 July 1992 the Attorney General opposed the applicant's application for bail and the Magistrates Court decided to adjourn its examination.

On 30 July 1992 the First Hall, having noted that the applicant had not been notified of the hearing, decided to adjourn the examination of his constitutional application until 6 August 1992.

On 31 July 1992 a different magistrate, acting as a Court of Inquiry, after hearing evidence from the alleged victim, ordered the applicant's release.

On 1 March 1993 the applicant was found guilty of the charge of defilement in a public place but having regard to the absence of violence, his young age (18), his previous good conduct, the fact that he was engaged to the girl, and that most of the sexual acts took place while he was under eighteen, he was discharged on probation.

On 25 November 1993 the First Hall held that the provisions of Article 575 of the Criminal Code which require written notification of the Attorney General were inconsistent with the provisions of Article 5 para. 3 of the Convention in failing to provide for the prompt consideration of the application for bail. It also found a breach of Article 5 para 3 in the delay taken by the Acting Registrar to notify the Attorney General. The Court awarded LM 100 by way of compensation.

The respondents (Commissioner of Police, the Acting Registrar, the Attorney General and Prime Minister) in the action appealed to the Constitutional Court.

On 13 June 1994 the Constitutional Court reversed the decision of the First Hall. It found that the applicant had been brought before a magistrate within a short period and that Article 5 para. 3 did not require the magistrate to have the power to order release at that moment.

b. Relevant domestic law

Section 137 of the Maltese Criminal Code provides:

> "Any Magistrate who, in a matter within 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."

Section 575 provides as relevant:

"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 that 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."

Section 582 para. 1 provides:

"The Court may not ex officio grant bail, unless it is applied for by the person charged or accused."

COMPLAINTS

The applicant complains under Article 5 para. 3 that:

1. the magistrate had no power on the applicant's appearance in court to order his release;

2. the magistrate made no enquiry as to the reasonableness of the arrest, the grounds for the charge or of the social threat posed by the alleged offence - in particular since the element of violence would have been relevant to the magistrate's power to order release (a maximum of two years would be imposable where no element of violence was present);

3. he was only released twelve days after his arrest, ten days after his first appearance before the magistrate.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 7 July 1994 and registered on 14 November 1994.

On 29 November 1995 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 6 February 1996. The applicant replied on 11 March 1996.

THE LAW

The applicant complains of a violation of Article 5 para. 3 (Art. 5-3) of the Convention in that he was not brought promptly before a judge who could examine the reasonableness of his arrest and order his release.

Article 5 para. 3 (Art. 5-3) of the Convention, insofar as relevant, provides as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ..."

The respondent Government argue that the magistrate before whom the applicant appeared on 22 July 1992 was vested with the power to order his release. However, the Attorney General who was responsible for the prosecution of serious cases had to be consulted first. If the

applicant had considered that the Registrar of the Magistrates Court had illegally prolonged his detention by failing to communicate to the Attorney General his bail application on the day when it had been lodged, he should have made use of Article 137 of the Criminal Code. In any event, the Attorney General replied two days after the applicant had been arraigned in court and this was fully compatible with Article 5 para. 3 (Art. 5-3) of the Convention.

The applicant submits that, when an arrested person is brought before the magistrate, the prosecution is represented by the Officer of the Executive police and not the Attorney General. Article 137 of the Criminal Code is not an effective remedy, since it does not envisage the release of the detainee. Article 5 para. 3 (Art. 5-3) of the Convention was violated because the appearance of the applicant before the first magistrate forty eight hours after his arrest was a mere formality, as the magistrate had no power to order his release.

Insofar as the Government appear to be arguing that the applicant has not exhausted all domestic remedies, because he did not make use of Article 137 of the Criminal Code, the Commission recalls that, in accordance with its case-law, the obligation to exhaust domestic remedies contained in Article 26 (Art. 26) of the Convention is limited to making "normal use" of remedies likely to be effective and adequate to remedy the matters of which the applicant complains (No. 11208/84, Dec. 4.3.86, D.R. 46 p. 182). The Commission further considers that, in the circumstances of the case, making use of Article 137 of the Criminal Code might have led to the punishment of the public officials involved but would not have secured respect for the rights of the applicant under Article 5 para. 3 (Art. 5-3) of the Convention. It follows that this is not an effective remedy within the meaning of Article 26 (Art. 26) of the Convention (see, mutatis mutandis, No. 12747/87, Dec. 12.12.89, D.R. 64 p. 97).

Moreover, the Commission, having taken note of the parties' other observations, considers that the application serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The application cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE,
without prejudging the merits of the case.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber