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

FOURTH SECTION

DECISION

Application no. 39783/15
Darryl Luke BORG
against Malta

The European Court of Human Rights (Fourth Section), sitting on 5 September 2017 as a Chamber composed of:
Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Egidijus Kūris,
Iulia Motoc,
Georges Ravarani,
Marko Bošnjak,
Péter Paczolay, *judges,*
and Marialena Tsirli, *Section Registrar,*
Having regard to the above application lodged on 4 August 2015,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Darryl Luke Borg, is a Maltese national who was born in 1986 and lives in Birkirkara. He was represented before the Court by Dr D. Camilleri and Dr J. Gatt, lawyers practising in Valletta.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background to the case

3. The applicant suffered from Attention-Deficit Hyperactivity Disorder (hereinafter referred to as "ADHD"), and was the subject of a treatment

order. In view of the treatment order, he was being kept at Mount Carmel Hospital (the State mental health hospital).

4. On 4 August 2013 a shop in Birkirkara, Malta, was burgled.

5. On 6 August 2013 the applicant was arrested by the police on suspicion of committing the burglary in question. The applicant was questioned at police headquarters and detained overnight.

6. On 7 August 2013, the applicant was arraigned before the Court of Magistrates (as a Court of Criminal Inquiry) charged with aggravated theft and other related offences. During the arraignment procedure the applicant requested that he be released on bail, but this was refused. Since the applicant was the subject of a treatment order, the court ordered that he be kept under arrest at the Forensic Section of Mount Carmel Hospital. However, the applicant was kept under arrest at the Corradino Correctional Facility rather than the hospital.

7. On 9 August 2013, the applicant's lawyers became aware that on 8 August a certain R.G. had admitted committing the burglary in Birkirkara (of which the applicant had been accused), and that that person had, on the 9 August, confirmed his admission before the Court of Magistrates. On the same day, the applicant applied to the Court of Magistrates to be released on bail.

8. Later on 9 August 2013, the police inspector who had arrested the applicant was informed of R.G.'s arrest for the same incident the applicant had been accused of, and that R.G. had admitted to committing the crime. The inspector communicated later that day with the Attorney General (hereinafter referred to as "the AG"), who directed him to submit an urgent application to the Court of Magistrates for the applicant's release.

9. At 6.00 p.m. that day, in the light of the applicant's and the police's applications for his release on bail, the Court of Magistrates ordered the applicant's conditional release against a personal guarantee of 7,000 euros (EUR). He was forbidden to leave the country, approach witnesses or commit any other crimes. He was also obliged to sign in at the police station every day and a curfew was imposed from 10 p.m. to 8 a.m.

10. On 12 August 2013, the police withdrew the charges against the applicant. According to the applicant, he lost his right to the treatment order at Mount Carmel Hospital as a result of the arrest and arraignment.

2. Constitutional redress proceedings

11. On 14 August 2013, the applicant filed proceedings before the Civil Court (First Hall) in its constitutional jurisdiction. He argued that he had been arraigned without there having been a reasonable suspicion against him. Moreover, on the basis of that arraignment he had been denied release on bail. The applicant further submitted that the Commissioner of Police, despite realising that the applicant had been detained for no reason (because R.G. had admitted to committing the crime the applicant had been accused

of), had failed to withdraw immediately the accusations against the applicant. In the applicant's view, all those facts, either taken together or separately, had resulted in an infringement of his right to liberty under the Convention and the Constitution.

12. On 27 June 2014, the Civil Court (First Hall) in its constitutional jurisdiction found that the applicant had not suffered any violation of his rights. The costs of the proceedings were to be paid by the applicant.

13. The court held that it would not substitute its own discretion for that of the police. Its role was to analyse whether the police could have had a reasonable suspicion that the applicant had committed the crime, in the light of the evidence they had had before them at the time they had made the decision to arrest and eventually arraign the applicant. It noted firstly that when the applicant had been arraigned he had failed to contest the validity of his arrest. In determining whether the police could have had a sufficiently reasonable suspicion, the court considered factors, including, but not limited to: the fact that the police had received a tip-off/confidential information that the applicant had committed the crime; CCTV footage of the shop that had been held-up and CCTV footage of some of the neighbours of the shop. According to the court, in the light of other information the police had had in its possession, it had been reasonable for them to conclude that the person seen in the footage was the applicant, especially given the similar build and hair style. Indeed, once the police had seen the applicant in person they had confirmed that he looked like the person in the CCTV footage. Moreover, the court noted that, according to the police, the applicant's mother had failed to confirm that her son had been at home at 9 p.m. (the time of the commission of the offence), leading the chief investigator to believe that he had no alibi for the time of the crime. Also, the police had found out that on the weekend where the burglary occurred the applicant had been on leave from the hospital. In addition, the applicant's past had been taken into account, including: the fact that the applicant was known to the police as a person taking drugs; that he had ongoing proceedings against him for theft with aggravated assault allegedly committed in March 2013; and that he had previously been found guilty of crimes related to theft and drug abuse. Furthermore, the police had discovered that on the day of the hold-up the applicant had argued with his mother about money and drugs-related issues. Taking all those factors into account, the Civil Court (First Hall) in its constitutional jurisdiction confirmed the existence of a reasonable suspicion and thus a justification for the arrest.

14. It also concluded that the Court of Magistrates' refusal to grant the applicant release on bail had not been unreasonable. The Court of Magistrates had considered the applicant's regular visits to Mount Carmel Hospital; his past involvement in crimes involving violence; and factors associated with the risk and gravity of the crime at issue.

15. With regard to the applicant's complaint that the criminal proceedings against him had not been withdrawn immediately upon R.G.'s arrest and admission to the crime, the court noted that the only person who could have shed light on what had happened was the inspector, but he had not been produced as a witness. Nevertheless, based on the evidence before it, the court observed that as soon as the inspector who had carried out the applicant's arrest had found out that another person (R.G.) had been arrested for the same crime, he had requested direction from the AG. The inspector had then proceeded to submit an urgent application to the Court of Magistrates for the applicant's release. The first time a third person had come into the scene had been on 9 August 2013, when R.G. had been arraigned. The applicant had been released from detention later the same day. In the light of those facts the court concluded that there had been no failings by the police. It noted that Article 5 concerned protection from arbitrary arrest or detention and that the applicant had been released on 9 August 2013. The fact that the accusations against the applicant had only formally been withdrawn on 12 August 2013 did not raise any issue under Article 5 of the Convention or Article 34 of the Constitution.

16. On 11 July 2014, the applicant lodged an appeal with the Constitutional Court. He reiterated his claims and argued, *inter alia*, that there had been no reason for the Court of Magistrates to fear that he would not attend court proceedings, or that he would in any way influence the proceedings against him because he had been undergoing a treatment order at Mount Carmel Hospital. The applicant also stated that the police had found out about R.G.'s involvement in the hold-up on 8 August 2013 but had waited until 9 August 2013 (when R.G. had been arraigned before the Court of Magistrates and had pleaded guilty to the charges) to take action towards remedying the applicant's situation. He argued that the police were obliged to remedy a situation of unlawful detention as soon as they became aware of it, as was also contemplated under Article 137 of the Criminal Code. He complained that as a result of their delay he had spent an extra day in detention and had later been subject to conditional release.

17. The Constitutional Court upheld his claims in part. It found a violation of the applicant's rights as protected under Article 5 § 1 (c) of the Convention and Article 34(1)(f) of the Constitution for the limitation of liberty the applicant had suffered between 9 August and 12 August 2013, but rejected his other complaints. It awarded him EUR 150 as compensation for non-pecuniary damage.

18. The Constitutional Court confirmed the first-instance court's finding in respect of the existence of a reasonable suspicion justifying arrest which had persisted until the applicant's arraignment before the Court of Magistrates. The applicant had thus not suffered a violation of his rights protected by Article 5 § 1 (c) of the Convention during that period.

19. The Constitutional Court considered that until 9 August 2013 the applicant's situation had remained the same as on 7 August 2013. However, it had changed on 9 August 2013, when a third party had been arraigned before the Court of Magistrates for the same crime. The Constitutional Court observed that as soon as the inspector responsible for the applicant's arrest had been informed that another person had been arrested for the same offence the inspector had taken action. On the same day, as requested by both the police and the applicant himself, the Court of Magistrates had ordered the applicant's conditional release. The applicant had been released later that day, against a personal guarantee. The Constitutional Court found that the amount of time that had passed between the third party being arrested and the applicant's release had been reasonable. Therefore, the applicant's detention until his release on 9 August 2013 had not been arbitrary and had not violated his rights protected under Article 5 § 1 (c).

20. According to the Constitutional Court, the same could not be said of the period between 9 and 12 August 2013, during which the prosecution had no longer held a reasonable suspicion against the applicant. At that point, the restriction of liberty had, according to the Constitutional Court, no longer been justified under Article 5 § 1 (c) of the Convention.

21. In awarding compensation, the Constitutional Court considered that the applicant had contributed to the violation himself by only requesting conditional release on 9 August 2013, rather than unconditional release. The court ordered the applicant to pay three-quarters of the costs of the proceedings before the first-instance court and the Constitutional Court and the Commissioner of Police to pay one-quarter.

COMPLAINTS

22. The applicant complained under Article 5 § 1 of the Convention that he had been arrested and deprived of his liberty in connection with his initial detention and subsequent refusals of bail in the absence of any reasonable suspicion. He had later again been denied full liberty in the absence of a "reasonable suspicion" since the police had not immediately withdrawn the charges against him when a third party had been arraigned and convicted of the same crime.

23. The applicant also invoked Article 5 § 5 of the Convention, arguing that the Constitutional Court should have awarded a greater sum for the violation he had suffered.

THE LAW

24. The applicant complained under Article 5 § 1 of the Convention that he had been arrested and deprived of his liberty in connection with his initial detention without reasonable suspicion. Despite that lack of suspicion he had been arraigned in court and his bail requests refused unnecessarily. In particular, he argued in that connection that since he had regular appointments at Mount Carmel Hospital, there had been no reason to fear that he would flee or fail to appear in the proceedings.

25. He further complained that his detention, once it had become known that he was not the author of the crime, given that another person had admitted to it, had been in breach of Article 5 of the Convention. In that regard, he noted that the police had requested bail rather than unconditional release. He thus submitted that he had been denied full liberty in the absence of a "reasonable suspicion" and that the police had not immediately withdrawn the charges against him when a third party had been arraigned and convicted of the same crime.

26. The applicant also complained that the domestic courts, having found a violation of his right to liberty in part, had failed to award him appropriate compensation, contrary to Article 5 § 5 of the Convention.

27. Article 5, in so far as relevant, reads as follows:

> "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;
>
> 3. 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.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

28. The Court reiterates that Article 5 of the Convention protects the right to liberty and security. This right is of the highest importance "in a democratic society" within the meaning of the Convention. All persons are entitled to the protection of this right, that is to say, not to be deprived, or continue to be deprived, of their liberty save in accordance with the conditions specified in paragraph 1 of Article 5. The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one, and only a narrow interpretation of those exceptions is consistent with the aim of that

provision (see *Medvedyev and Others v. France* [GC], no. 3394/03, §§ 76-78, ECHR 2010).

29. A person may be detained under Article 5 § 1 (c) only in the context of criminal proceedings, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence (see *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX, and *Włoch v. Poland*, no. 27785/95, § 108, ECHR 2000-XI). The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c). Having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will, however, depend upon all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182 and *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 116, 17 March 2016).

30. Moreover, according to the Court's established case-law under Article 5 § 3, the persistence of a reasonable suspicion is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and (2), where such grounds were "relevant" and "sufficient", whether the national authorities displayed "special diligence" in the conduct of the proceedings (see, among many other authorities, *Idalov v. Russia* [GC], no. 5826/03, § 140, 22 May 2012 and *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 87, ECHR 2016 (extracts)). The Court has also held that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative means of ensuring his or her appearance at trial (ibid.). The requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest (ibid, § 102).

31. The question of whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV; and *Buzadji*, cited above, § 90).

32. Lastly, the Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4. The right to

compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions (see *N.C. v. Italy*, no. 24952/94, § 49, 11 January 2001).

33. Turning to the instant case, the Court observes that the applicant was arrested and detained for the purposes of Article 5 § 1 (c) in the context of criminal proceedings, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence. As regards "reasonable suspicion", the Court reiterates that the fact that an applicant has not been charged or brought before a court does not necessarily mean that the purpose of his detention was not in accordance with Article 5 § 1 (c). The existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5 § 1 does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant was in custody (see *Labita*, cited above, § 155 and the case-law cited therein). The Court notes that the applicant was arrested on 6 August 2013 and was arraigned in court the following day, when he was denied bail. The Court considers that, as established by the constitutional jurisdictions (see paragraphs 13 and 18 above), at that stage there were various elements capable of giving rise to a reasonable suspicion that the applicant was the author of the crime and that such a suspicion persisted at least until the time when the real author of the crime admitted before the Court of Magistrates. The Court considers that while it was true that the author of the crime had made a statement to that effect to the police a day earlier, that will not always immediately entail the elimination of any reasonable suspicion against another party. The Court thus considers that, in the present case, it was reasonable for the authorities to have waited for such a guilty plea to be made before the judicial authorities, namely the Court of Magistrates, before taking any steps in connection with the applicant's release. It follows that the applicant's detention between 6 and 9 August 2013 was in line with Article 5 and that this complaint is therefore manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

34. As to the refusal on 7 August 2013 of the applicant's request for bail, the Court notes that he failed to give any details about that complaint or submit the relevant decision. In any event, he referred in that connection mainly to the lack of a reasonable suspicion, an argument the Court has dismissed in the foregoing paragraph. Thus, in the absence of any relevant detail, and given that from the judgment of the Civil Court (First Hall) it appears that relevant and sufficient reasons were given (see paragraph 14 above), as well as the fact that the refusal of bail occurred only one day after his initial arrest and led to his detention for just two days, after which he was released on bail, the Court considers that this aspect of the complaint is

also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

35. As to the applicant's complaint concerning the period following his conditional release on bail, namely between the evening of 9 August 2013 and 12 August 2013, when the police withdrew the charges against him and he was thus released unconditionally, the Court notes that during that time the applicant was on bail under conditions (see paragraph 9 above). It is noted that, under the Court's case-law, while house arrest is considered, in view of its degree and intensity, to amount to deprivation of liberty within the meaning of Article 5 of the Convention, an inability to leave home during the night does not amount to house arrest and hence deprivation of liberty (see *De Tommaso v. Italy* [GC], no. 43395/09, § 86, ECHR 2017). Indeed, in all the cases examined by the Court, an obligation on applicants not to leave home at night was found to constitute an interference with liberty of movement, rather than a deprivation of liberty (ibid., § 84, and the case-law cited therein). The Court notes that in the present case there were no restrictions on the applicant's freedom to leave home during the day and he was able to have a social life and maintain relations with the outside world. Thus, despite the Constitutional Court's finding (see paragraph 20 above), the Court considers that the bail conditions imposed on the applicant (see paragraph 9 above) did not suffice to amount to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention.

36. It follows that the complaint under Article 5 of the Convention concerning the period during which the applicant was on conditional release is incompatible *ratione materiae* with the Convention and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

37. In principle, in the absence of a breach of Article 5, the complaint under Article 5 § 5 is inapplicable and thus, inadmissible (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 228, ECHR 2009, and, *a contrario*, in the case of an upheld violation of Article 5, *Stanev v. Bulgaria* [GC], no. 36760/06, § 183, ECHR 2012). However, the Court notes the peculiarity of the present case in that the Constitutional Court did find a violation. In this respect, the Court notes that according to Article 53 of the Convention nothing prevents a High Contracting Party from recognising in its law freedoms or guarantees which go further than those set forth in the Convention. The Court thus considers that even assuming that Article 5 § 5 were to be applicable in connection with the violation of Article 5 upheld by the Constitutional Court (compare, *Shulgin v. Ukraine*, no. 29912/05, §§ 45-47, 8 December 2011) the latter has itself awarded the applicant compensation, and therefore its finding of a violation has given rise to an enforceable right to compensation before the domestic courts, as required by Article 5 § 5 of the Convention. Noting that the provision does not refer to specific amounts (see *Cumber v. The United Kingdom*, no. 28779/95, Commission Decision of 27 November 1996), the Court

considers that, in principle, an award of EUR 150 for a three-day detention would not be entirely disproportionate (see by contrast, *Ganea v. Moldova*, no. 2474/06, § 30, 17 May 2011, where EUR 63 was considered too little for a three-day detention; see also *Attard v. Malta* (dec.), no. 46750/99, 28 September 2000, where the equivalent of EUR 230 – without an order for costs – was found proportionate in respect of detention of some hours). However, in the circumstances of the present case, and specifically the fact that the circumstances which led the Constitutional Court to find a violation of Article 5 do not constitute a deprivation of liberty in the Court's view, it would not be appropriate for the Court to examine whether the compensation awarded by the Constitutional Court was disproportionate in the light of the order to pay costs, given that such an award would not have been made under the Convention. It suffices for the Court to find that the applicant had an enforceable right to compensation, which he pursued successfully. It follows that this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 28 September 2017.

Marialena Tsirli
Registrar

Ganna Yudkivska
President