AS TO THE ADMISSIBILITY OF

Application No. 13867/88
by Joseph BRINCAT
against Italy

The European Commission of Human Rights sitting in private on 13 July 1990, the following members being present:

MM. J.A. FROWEIN, Acting President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 8 January 1988 by Joseph BRINCAT against Italy and registered on 13 May 1988 under file No. 13867/88;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to the Commission's decision of 4 September 1989 to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits;

Having regard to the observations submitted by the respondent Government on 18 December 1989 and the observations in reply submitted by the applicant on 30 January 1990;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case as submitted by the parties may be summarised as follows :

The applicant is a Maltese citizen, born in 1944 and resident in Marsa (Malta). He is a lawyer and member of the Maltese Parliament and of the Parliamentary Assembly of the Council of Europe.

On 19 November 1987, Mr. S., a client of the applicant, was seriously injured in a road accident near Maratea (Italy). His damaged car was taken to a junkyard in the village of Tortora (Province of Cosenza). Having been instructed from an insurance company to report on the circumstances of the accident, the applicant went in the early afternoon of Saturday 5 December 1987 accompanied by his client's wife to the place where the car had been taken. When Mrs. S. tried to retrieve personal belongings concealed in the petrol tank of the car,

the owner of the junkyard called the police. Among other objects of value the police discovered a banknote which formed part of a ransom sum paid for the release of a kidnapped person.

The applicant and Mrs. S. were taken to the Maratea police station where they were interrogated. At 9 p.m. they were arrested.

On Sunday 6 December 1987 at about 3 a.m. they were transferred to the prison of Lagonegro (Province of Potenza) pending investigations by the Public Prosecutor of Lagonegro. On the same day the Public Prosecutor informed the applicant's lawyer that he would interrogate the applicant and Mrs. S. on Monday 7 December 1987.

In the prison of Lagonegro, the applicant was confined to an isolation cell which on the first day he had to share with another prisoner. The cell contained two beds separated by a distance of barely thirty centimetres. Over the applicant's bed was a sort of table fixed to the wall and covering the greater part of his bed. Behind the prisoners' heads separated by a low wall were toilet facilities. The defective flushing system disturbed the inmates of the cell day and night with shattering and penetrating noise. At the same time there was no water in the tap. A dustbin contained refuse of several days, stenching remains of food.

On Monday 7 December 1987, at about 2.30 p.m., the applicant, assisted by two lawyers, was interrogated by the Substitute Prosecutor of Lagonegro who, by a decision of the same day, confirmed the applicant's arrest.

The applicant was then transferred to a part of the prison where he was detained with other prisoners. He had to ask for their help since, unlike them, he was refused to buy essential things out of his own money.

In the next days the investigations of the Public Prosecutor of Lagonegro proceeded as follows:

- on Tuesday, 8 December 1987 he inquired about Mrs. S.'s health;

- on Wednesday, 9 December 1987 he again heard the applicant, according to the latter's request of the same day, and asked for information from Interpol with a view to ascertaining the statements made by the applicant;

- on Thursday 10 December 1987 he received a telex from the Public Prosecutor of Palermo confirming that one of the banknotes found among the confiscated objects formed part of a ransom sum paid for the release of a kidnapped person;

- on 10 and 11 December 1987 he sent telegrams to the Ministry of Foreign Affairs and the Ministry of Justice requesting information on the applicant's parliamentary immunity.

Having interrogated the chief officer of the Maratea police station and another witness on Monday 14 December 1987, the Public Prosecutor of Lagonegro recognised his lack of jurisdiction for reasons of territorial competence and sent the applicant's file to the competent Prosecutor's Office of Paola where it arrived on Friday 18 December 1987 by post. He also revoked the applicant's permission to consult with lawyers, to correspond with others and to receive visits in prison, even from his sister, although she had travelled from Malta.

In the meantime the applicant's lawyers had attempted to contest the warrant of arrest issued by the Public Prosecutor of Lagonegro. However, the Prosecutor's Office of Lagonegro was no longer

competent and the competent Prosecutor's Office of Paola had not yet received the applicant's file preventing thus the Court of Cosenza from dealing with the matter.

On Friday 18 December 1987 the applicant was notified a warrant of arrest issued by the Public Prosecutor of Paola, identical to that issued by the Public Prosecutor of Lagonegro, followed by an order for his transfer to the Cosenza prison.

On Saturday 19 December 1987, early in the morning, the applicant was handcuffed and put in a prison van. He had to keep the handcuffs during the whole trip. At one time, the driver had to put on the brake abruptly and the applicant, without any possibility of using his hands, was thrown against the partition separating him from the driver.

At the Cosenza prison the applicant was informed that all the bans about correspondance, visits and telephone contacts with his family had been lifted by the Substitute Prosecutor of Paola. On the same day, i.e. on 19 December 1987, the applicant filed an application with the Court of Cosenza, to have the warrant of arrest examined in accordance with Article 5 para. 4 of the Convention and the relevant provisions of the Italian Code of Criminal Procedure. He also invoked Article 5 para. 3 of the Convention alleging that he had not been brought "promptly before a judge or other officer authorised by law to exercise judicial power".

On 22 December 1987 the applicant was interrogated by the Public Prosecutor of Paola.

On 28 December 1987 the Court of Cosenza quashed the warrant of arrest issued by the Public Prosecutor of Paola on 18 December 1987 and ordered the applicant's immediate release. The Court considered that the warrant of arrest was not based on sufficient evidence.

COMPLAINTS

1. The applicant alleges a violation of Article 5 para. 3 of the Convention. He contests that the Public Prosecutor is an officer autorised by law to exercise judicial power within the meaning of this provision.

In the applicant's view, the Italian Code of Criminal Procedure grants the Public Prosecutor the same powers of coercion as are attributed to a judge, but in no way gives him the independence, impartiality and equidistance from the parties, essential requisites for the exercise of any judicial function.

The applicant also complains that, in any event, he was not brought "promptly" before an officer authorised by law to exercise judicial power.

In his submission the Public Prosecutor of Lagonegro has failed to send his file with urgency to the competent Public Prosecutor's Office. Arrested on 5 December 1987, the applicant was only heard by the competent Prosecutor on 22 December 1987.

2. The applicant further complains that he was subjected to inhuman and degrading treatment, in violation of Article 3 of the Convention, namely

- during his detention in the isolation cell in the Lagonegro prison,

- when being kept several days in that prison without the possibility of contacting his family,

- during the time his file was being sent from the Prosecutor's Office of Lagonegro to that of Paola as no one was in a position to deal with his complaints, and

- during his transport, handcuffed, in a prison van from the Lagonegro prison to that of Cosenza with a great potential and almost actual risk to his personal safety causing a mental trauma about the possibility of an accident.

3. Finally in his submissions of 30 January 1990 in reply to the Government's observations the applicant added the complaint that from 14 to 18 December 1987 during the transmission of his file by mail from the Public Prosecutor's Office of Lagonegro to that of Paola he was deprived of his right to have the lawfulness of his detention examined speedily by a court. He alleges a violation of Article 5 para. 4 of the Convention in this respect.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 8 January 1988 and registered on 13 May 1988.

On 4 September 1989 the Commission decided to communicate the application to the respondent Government and to invite them pursuant to Rule 42 para. 2 (b) of the Rules of Procedure to submit observations on its admissibility and merits, in respect of the complaints under Article 5 para. 3 of the Convention.

The respondent Government's observations were submitted on 18 December 1989 and the reply thereto by the applicant on 30 January 1990.

THE LAW

1. The applicant complains that his arrest was confirmed by a Public Prosecutor who, in his opinion, could not be regarded as having been independent and impartial and was not "a judge or other officer authorised by law to exercise judicial power" within the meaning of Article 5 para. 3 (Art. 5-3) of the Convention.

The applicant further complains that, in any event, he was not brought "promptly" before a judge or other officer authorised by law to exercise judicial power as required by the above provision. He stresses that when the court decision to release him was taken on 28 December 1987, he had then been detained for 23 days.

The Government submit that even before the new Code of Criminal Procedure came into force in Italy on 24 October 1989 the Public Prosecutor had the attributes of a "judge or other officer authorised by law to exercise judicial power" within the meaning of Article 5 para. 3 (Art. 5-3) of the Convention. Referring to the Schiesser case (see Eur. Court HR, Schiesser judgment of 4 December 1979, Series A No. 34, p. 13 and seq. para. 31) the Government consider that the Public Prosecutor of Lagonegro met the requirements established by the Convention organs, namely that he was independent of the executive and of the parties, that he was under an obligation to hear the individual brought before him and that he had to review the circumstances militating for or against detention.

The Government further submit that the applicant was brought "promptly" before a judge or other officer authorised by law to exercise judicial power. He was indeed interrogated by the Substitute Public Prosecutor of Lagonegro on the third day of his detention about 40 hours after his arrest. The fact that the Public Prosecutor of Lagonegro had no jurisdiction for lack of territorial competence did not make his activity ineffective for the purposes of Article 5 para. 3 (Art. 5-3) of the Convention.

The Commission considers, in the light of the parties' submissions, that the applicant's complaints under Article 5 para. 3 (Art. 5-3) of the Convention, relating primarily to the functions of the Public Prosecutor concerned, raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits. This part of the application is therefore not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and must be declared admissible, no other grounds for declaring it inadmissible having been established.

2. The applicant also complains that he was subject to inhuman and degrading treatment, in violation of Article 3 (Art. 3) of the Convention, during his detention in the Lagonegro prison and during his transport, handcuffed, in a prison van from the Lagonegro prison to that of Cosenza and by reason of the impossibility to deal with his complaints during the time his file was sent from one Prosecutor's Office to the other.

The Commission recalls that, according to the case-law of the Court and the Commission, treatment must attain a certain minimum level of severity in order to constitute "inhuman" or "degrading" treatment within the meaning of Article 3 (Art. 3) of the Convention (cf. Eur. Court H.R., Ireland v. the United Kingdom judgment of 18 January 1978, Series A No. 25, pp. 66-67 and 68, paras. 167 and 174 and Tyrer judgment of 25 April 1978, Series A No. 26, pp. 14 and 15, paras. 29 and 30). In the present case, the treatment to which the applicant was subjected during his detention, although in some respects harsh, did not, in the Commission's view, attain that minimum level of severity.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. In his observations of 30 January 1990 in reply to the Government's observations, the applicant also complained that, while his file was transmitted from one public prosecutor's office to another, he had been unable to request an examination of the lawfulness of his detention as required by Article 5 para. 4 (Art. 5-4) of the Convention.

The applicant himself admitted that this was a new complaint, although he considered that the Commission would nevertheless be entitled to deal with it. The Commission notes however, that according to Article 26 (Art. 26) of the Convention any complaint shall be submitted within six months from the date of the final domestic decision. When, as in regard to the present complaint, there is no domestic decision, the six months time-limit shall be calculated from the date when the facts occurred which form the basis of the complaint. The relevant facts in this case relate to December 1987, whereas the complaint was made on 30 January 1990.

It follows that this part of the application must be rejected according to Articles 26 (Art. 26) and 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission :

1. DECLARES ADMISSIBLE WITHOUT PREJUDGING THE MERITS, THE COMPLAINT RELATING TO ARTICLE 5 PARA. 3 (Art. 5-3) OF THE CONVENTION (PARA.1 OF THE LAW); AND

2. DECLARES INADMISSIBLE THE REMAINDER OF THE APPLICATION.

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(C.A. NØRGAARD)