

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

FIFTH SECTION

CASE OF KOLAKOVIC v. MALTA

(Application no. 76392/12)

JUDGMENT

STRASBOURG

19 March 2015

FINAL

19/06/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Kolakovic v. Malta,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 17 February 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 76392/12) 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 Jovica Kolakovic ("the applicant"), on 14 November 2012.

2. The applicant, who had been granted legal aid, was represented by Mr A. Peebles, a lawyer practising in Newcastle upon Tyne. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged that he had suffered a violation of Article 5 § 3 of the Convention on account of his sixteen-month detention following the granting of bail.

4. On 23 September 2013 the complaint was communicated to the Government and the remainder of the application was declared inadmissible.

5. The United Kingdom Government, which had been informed of their right, under Article 36 § 1 of the Convention, to intervene in the proceedings, gave no indication that they wished to do so.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1956 and lives in Msida.

A. Background to the case

7. On 8 September 2009 the applicant was arrested. A search of a hotel room close to where he was apprehended revealed a number of packets of cannabis (weighing approximately 15 kg). The following day he was questioned and made a statement. On 10 September 2009, two days after his arrest, he and some other Maltese and foreign suspects were charged with the possession of cannabis not for their own exclusive use and conspiracy for the purposes of drug trafficking. They were brought before a magistrate (sitting in the Court of Magistrates as a Court of Criminal Inquiry) and remanded in custody.

8. On 25 March 2010, following multiple bail requests which were rejected by the relevant courts, the applicant lodged constitutional redress proceedings, complaining – *inter alia* – that there had been a breach of his rights under Article 5 § 3 of the Convention and requesting his immediate release as per Article 5 § 4.

9. By a judgment of 12 August 2010, following a thorough assessment of the factual circumstances and the Court's relevant case-law, the Civil Court (First Hall) in its constitutional jurisdiction dismissed the applicant's claims, and thus did not order his release. It pointed out, however, that the decision was without prejudice to any remedies which he would be entitled to request at the proper time and if the need arose.

10. The applicant appealed. On 18 January 2011, pending the constitutional appeal proceedings, the applicant was granted bail subject to certain conditions (including a curfew order and reporting to the police twice daily, as well as residing in an apartment rented for that purpose) against a number of guarantees, including a bail bond in the form of a deposit of 50,000 euros (EUR) and a further personal guarantee of EUR 15,000.

11. Since the specified amount was not paid, he remained in custody.

12. By a judgment of 14 February 2011 the Constitutional Court found a breach of the applicant's rights under Article 5 § 3 [and § 4] in view of the ongoing passage of time since the first-instance judgment, during which period the applicant's requests had continued to be repeatedly rejected. Although the court was empowered to order release and alter the bail conditions imposed – noting that by the time of the judgment the applicant had been formally granted bail – it did not deem it appropriate to order release as or take any other action. It awarded the applicant EUR 1,000.

B. Further bail decisions

13. On 18 February 2011 the applicant asked the investigating court (Court of Magistrates as a Court of Criminal Inquiry) to reduce the amount of the bail deposit.

14. By a decision of 22 February 2011 the Court of Magistrates, having heard submissions, reduced the deposit to EUR 40,000 and increased the personal guarantee to EUR 60,000.

15. On 29 March 2011, still unable to pay, the applicant asked the court to reduce the deposit even further. He referred to his wife's testimony to the effect that the applicant and his family did not possess such funds.

16. By a decision of 4 May 2011 the Court of Magistrates, having heard the submissions, reduced the deposit to EUR 15,000 and reduced the personal guarantee to EUR 30,000 (allowing the option of a third-party surety for that amount). However, it required that, before any surety could assume the obligation, proof of the surety's financial capacity to furnish the requested amount be submitted.

17. A further request to reduce the amounts was filed by the applicant on 19 July 2011. He reiterated that he did not have the financial means to pay the specified deposit. He stated that he had four dependent children and a wife back in the United Kingdom who barely had enough money to live on and struggled to meet their financial obligations, including paying the children's school fees and the mortgage. He further submitted that since he had been detained in Malta, the family business had had to be wound up and, to make matters worse, his wife's medical condition, which prevented her from being gainfully employed, had deteriorated. The family had been living on their meagre savings, of which very little was left at that stage. The amount required for the deposit was, in his view, not reasonable considering his means and financial status. Moreover, he had been in custody for over twenty months and despite the Constitutional Court having found a violation of his rights under Article 5 § 3 in respect of the bail refusals, he had to date not been able to enjoy that right in practice. The applicant's wife testified to this effect.

18. By a decision of the Court of Magistrates of 22 July 2011, after hearing the parties' submissions and the applicant's wife's testimony, the court rejected the request. It noted that, according to the documents presented, the matrimonial home (which was a substantial property, demonstrating they were not an average family) was still owned by the applicant and his wife, although burdened with a substantial mortgage. Moreover, the applicant's wife had sold off the family shoe business in 2010 "implying the inflow of a substantial amount of money within the family." In the light of previous decisions, and the fact that the accused had no ties with Malta, the court considered that a bail deposit of EUR 15,000 was commensurate with the charges preferred against him.

19. The applicant filed a further request on 26 July 2011, pointing out that his wife had not stated that the family business had been sold but rather that it had closed down since the applicant was in detention and the applicant's wife was too ill to run the business. She had also emphasized that the financial means at their disposal were limited since the applicant

had not been working for the past two years and she was precluded from working due to her illness, meaning that their savings had been used to meet the daily needs of the family and to pay the mortgage. Moreover, although the house seemed to be of a certain value, this had to be seen in the context of the British property market and the fact that putting the house up for sale was not envisaged. The applicant thus asked the court to review his wife's testimony and the documents produced by her.

20. On 12 August 2011 the applicant instituted constitutional redress proceedings (see below).

21. Following the first-instance judgment of the constitutional jurisdiction (see below), by a decision of 14 March 2012 the Court of Magistrates – after hearing further submissions – reduced the bail deposit to EUR 7,000 and increased the personal guarantee to EUR 60,000. It drew the applicant's attention to the other bail conditions previously imposed which were still in effect.

22. Following a further request submitted on 23 April 2012, the Court of Magistrates on the same day allowed his request for modification of the bail conditions, reducing the deposit to EUR 5,000 and increasing the personal guarantee to EUR 70,000. There were other changes to some of the original conditions (such as having to report only once a day to the police station). The applicant deposited the sum of EUR 5,000 and was released on the same day.

C. The second set of constitutional redress proceedings

23. In the meantime, on 12 August 2011 the applicant instituted a new set of constitutional redress proceedings, complaining, *inter alia*, of a breach of Article 5 § 3 in the light of the high guarantees set by the Court of Magistrates, as a result of which it had not – in practice – been possible for him to be released on bail. The applicant's wife gave evidence on 20 September 2011. She stated that the shop had closed down as she could not run it due to childcare and health problems, and she explained that she had sold the stock at rock-bottom prices. She described her health problems, substantiating them by means of medical reports. She further testified that the bank had foreclosed due to failure to pay the mortgage on the house, resulting in them losing their family home with all the money from the sale going to the bank. The wife stated that the family was living on state benefits, that they had no savings, that their household effects and their car had been sold, and that she had been sending money to her husband to buy necessities and was renting a flat in Malta as a bail address for the applicant.

24. By a judgment of 16 January 2012 the Civil Court (First Hall) in its constitutional competence rejected the applicant's complaint under the aforementioned provision. It observed that the Court of Magistrates had based its decision on information supplied by the applicant and as of the

date of its last decree the financial and personal details available to the court had been insufficient to permit any assessment of the reasonableness of the conditions imposed. Only at a later date did more information become available, demonstrating that the applicant was to blame "when he himself brought no clear evidence of his financial and presence [*recte*: present] situation until late 2011." In the light of this, the court held that the applicant's claim was not justified. However, since by this time the applicant's personal and financial situation was clearer, though the information was not exhaustive, the court invited the Court of Magistrates to re-evaluate the conditions imposed following the application filed by the applicant.

25. The applicant appealed, arguing that various items of documentation including bank statements had been presented to the court; moreover, factual mistakes had been made, such as the misconception that his business had been sold and not closed down.

26. By a judgment of 12 November 2012 the applicant's appeal was rejected by the Constitutional Court. It observed that evidence before the Court of Magistrates had been scanty, with the exception of documents showing that the couple owned a house worth GBP 700,000 (approx. EUR 807,000) – subject to a mortgage of GBP 381,000 – as well as a shoe business. However, on presentation of further evidence the level of financial guarantees was lowered, the relevant court having realised that, despite the passage of time, the applicant remained unable to pay and the grounds for pre-trial detention were becoming less relevant.

27. The applicant lodged a request for retrial, which was rejected by a judgment of 28 April 2014.

D. Further requests

28. Following his actual release on bail, the applicant made various requests for alteration of the conditions imposed, in particular permission to return to the United Kingdom for specific events or short intervals between court hearings to see his family. One such request was granted upon condition of presentation of the air ticket and deposit of a EUR 20,000 guarantee. It would appear that this condition could not be fulfilled. Subsequent requests were denied in view of the applicant's inability to give any financial guarantees and considering that the applicant's family could join him in Malta.

E. The criminal proceedings

29. As mentioned above, on 10 September 2009 the applicant was arraigned in court (the Court of Magistrates as a Court of Criminal Inquiry), where he pleaded not guilty to the charges. The following is a list of

hearings which took place subsequently, as is apparent from the documents submitted:

30. On 14 September 2009 the prosecuting officer and eight other police officers gave evidence, and documents were produced. On 22 September 2009 further documents were produced, and a pharmacist, another police officer and a third person gave evidence. An expert in communications technology and a translator were appointed. The former was instructed to obtain all phone data relating to the applicant between 20 August and 10 September 2009.

31. On 3 November 2009 a copy of the inquiry was produced and one person gave evidence and produced documents. On 13 November 2009 another two police officers and a lawyer gave evidence and produced documents. A fingerprints expert was appointed. Another hearing was held on 11 December 2009. On 16 December 2009 the communications technology expert and two other individuals gave evidence. On 21 January 2010 the fingerprints expert gave evidence. On 2 February 2010, three witnesses who had already been heard gave further evidence, together with another two individuals. On 11 February 2010 another witness gave evidence and on 12 February 2010 a decree was issued by the court.

32. On 23 March 2010 the case was adjourned as the magistrate was indisposed. On 25 March 2010 a doctor and the prosecuting officer gave evidence; the latter declared that only three witnesses remained to be heard.

33. On 4 May 2010 the case was adjourned as the magistrate was indisposed. On 5 May 2010 a police inspector and another person gave evidence and were cross-examined. The co-accused's lawyer complained that the proceedings were protracted. On 11 May 2010 the case was adjourned due to technical problems. On 22 June 2010 two witnesses who had already given evidence were further heard and cross-examined. The applicant's lawyer reserved the right to further cross-examination, and requested that a witness be re-heard.

34. On 2 July 2010 the communications technology expert was cross-examined, and it transpired that he had not asked the foreign phone providers for the records of the calls in the relevant period (see above). Another witness failed to appear, and the applicant's lawyer requested that another witness be re-heard. On 6 July 2010 the applicant made a request for telephonic data from the United Kingdom (relating to his co-accused). On 14 July 2010 the Attorney General replied that the correct procedure to obtain such data would be by means of letters of request. On 19 July 2010 the Court of Magistrates ordered the applicant to abide by this procedure.

35. On 4 August the hearing was adjourned. On 16 August 2010 the applicant requested the acquisition of text messages from two mobile phones in the period August to September 2009. On 17 August 2010 the Attorney General reiterated the procedure that should be used. On 19 August 2010 the applicant reiterated his request and the parties made oral

submissions. On 20 August 2010 the Attorney General filed a note attaching samples of letters of request to aid the applicant making his request. On the same day and again on 7 September 2010 the applicant contested this procedure. On 15 September 2010 the applicant informed the court of his new legal representatives; the Attorney General gave evidence. On 27 September 2010 the applicant filed a request for letters rogatory to be sent to the United Kingdom. On 30 September 2010 it was noted that the aforementioned request was defective – the court reserved its decision as to whether to suspend the terms applicable to the compilation of evidence.

36. On 1 October 2010 the applicant submitted a correct request for the telephonic data (August – September 2009). On 12 October 2012 the prosecution agreed to forward the letters in question to the relevant authorities – the court suspended the terms applicable to the compilation of evidence. On 29 October 2010 further evidence was submitted and cross-examinations were carried out. Other hearings were held on 10 and 17 November 2010. On 26 November 2010 the hearing was adjourned as one of the inspectors was indisposed.

37. On 3 December 2010 the court noted that the letters rogatory had still not been forwarded to the United Kingdom and urged the Attorney General to inform the court about the progress of the letters. On 6 December 2010 the Attorney General stated that data had been missing in the documentation provided by the applicant. On 10 December 2010 it was noted that the data in question was still missing. On 20 December 2010 the hearing was adjourned because the presiding magistrate was indisposed. On 21 December 2010 the Attorney General returned the letters rogatory filed by the applicant to the court as they had not included all the relevant data, in particular the extract of the law relating to the charges levied against the applicant was missing. The court was informed by its staff that this document had not been submitted by the Attorney General. To avoid further loss of time, the applicant volunteered to re-submit the letters rogatory together with a printout of the relevant law bearing the *visto* of a representative of the Attorney General and the court granted the request. According to the Government, on 29 December 2010 it became apparent that the letters of request could not be processed by the United Kingdom central authority.

38. A further hearing took place on 18 January 2011, at which it was ordered that an update from the United Kingdom authorities be forwarded to the parties. On 1 February 2011 the applicant was asked whether he wished to add or alter anything to the letters rogatory and on 11 February 2011 he was ordered to file a note with all the information necessary for the execution of the letters of request. On 18 February 2011, following an unfavourable reply from the United Kingdom Central Authority, the applicant asked the Attorney General to ascertain whether or not the telephone service provider was still in possession of the data requested in

the letters rogatory. On 22 February 2011 evidence from two witnesses was heard.

39. On 3 March 2011 the applicant filed fresh letters of request, which were sent to the United Kingdom on 17 March 2011. On 9 March 2011 the case was put off as the magistrate was indisposed. On 16 March 2011 an inspector gave evidence and the Attorney General was asked to give an update about the letters rogatory, which was done the following day. On 29 March 2011, the case was postponed for an unspecified reason.

40. On 7 April 2011 one witness was heard and on 19 April 2011 another witness produced a document as evidence. On 27 April 2011 the case was adjourned. On 3 May 2011 the court stated that it would decide pending applications in camera. Another witness was heard on 13 May 2011. On 20 May 2011 the court was still waiting for the letters rogatory, so the case was adjourned. On 2 June 2011 the United Kingdom Central Authority replied, and – following orders by the court of 3 and 15 June on 16 June 2011 – a note was filed in court by the Attorney General, which was read out in open court on 24 June 2011.

41. At the hearings on 6, 19 and 29 July 2011 the court declared that it had no news regarding the letters rogatory from the United Kingdom. On 31 August and 13 September the court urged the Attorney General to submit the information obtained concerning the letters rogatory. On 27 September 2011 a further reply from the United Kingdom central authorities was received, but a hearing of the same day was adjourned due to a bomb threat at the law courts. On 13 October 2011 the court received the response to the letters rogatory, stating that the data requested had been irretrievably lost. It re-activated the terms applicable to the compilation of evidence.

42. On 2 November 2011 a police officer was cross-examined. On 22 November 2011 the case was adjourned to enable the defence lawyers to communicate with the accused. The case file was forwarded to the Attorney General. Apparently another two hearings took place on 21 December and 27 January, when the case was adjourned on the first occasion because the co-accused was not present, and on the second for an unspecified reason. On 2 February 2012 the case was adjourned for no apparent reason and on 3 February 2012 the case was again adjourned to enable the defence lawyers to communicate with the accused. The case file was forwarded to the Attorney General.

43. On 13 March 2012 the case was again postponed until the next day for no apparent reason. On 14 March 2012, following a request by the Attorney General to restart the proceedings (Article 432 of the Laws of Malta), the charge was read out and, sworn under oath, the applicant refused to answer the questions put to him in the examination. His co-accused was questioned. The parties declared they were relying on all the evidence already produced and a *prima facie* decree was handed down. Thus, proceedings were then restarted and hearings were held on 19, 20, and

23 April 2012. On 5 May 2012 the case was adjourned and on 6 July 2012 the applicant requested that a witness be summoned. However, on 17 July the case was again adjourned because the witness in question was in hospital.

44. On 28 August 2012 the applicant complained that the Attorney General had done nothing to preserve the telephone recordings which were crucial to the defence. Further evidence was heard at the hearings of 11 September 2012, 18 October and 19 December 2012, 29 January, 5 February, 14 March (when new letters rogatory were also presented), and 20 March 2013. On 30 April and 16 May 2013 the case was adjourned for an unspecified reason. On 3 May 2013 the applicant reiterated that he would like to proceed with a number of cross-examinations. The prosecution objected to the request to have the same witnesses heard again.

45. On 26 June 2013 the applicant requested an adjournment as his lawyer was not available. A hearing took place on 25 July 2013. Further evidence was heard on 6 August 2013. On 17 September 2013 the applicant requested an adjournment. On 24 September 2013 further oral submissions were made and evidence heard, the prosecution stated that the letters rogatory did not comply with the legal requirements. The court suspended the terms applicable to the compilation of evidence.

46. On 3 October 2013 the case was adjourned for oral submissions. The case was adjourned again on 15 and 25 October 2013 for oral submissions, *inter alia*, by the Attorney General concerning an application for contempt of court in his regard.

47. Replies to the letters rogatory having been received, the court re-activated the terms applicable to the compilation of evidence on 5 November 2013. It adjourned the case once again for oral submissions. Further evidence was heard on 12 November 2013. Oral submissions were made on 28 November 2013.

48. On 15 January 2014 the expert gave evidence and the case was adjourned to 4 February and eventually to 26 February 2014 at the applicant's request. On 11 March 2014 the applicant stated he intended to file fresh letters of request. Letters rogatory, were exhibited in court on 22 April 2014.

II. RELEVANT DOMESTIC LAW

49. Articles 576-578 of the Criminal Code, Chapter 9 of the Laws of Malta, regarding security for the purposes of bail, read:

Article 576

"The amount of the security shall be fixed within the limits established by law, regard being had to the condition of the accused person, the nature and quality of the offence, and the term of the punishment to which it is liable."

Article 577

"(1) Security for bail is given by the production of a sufficient surety who shall enter into a written recognizance in the sum fixed.

(2) It may also be given, whenever the court shall deem it proper, by the mere deposit of the sum or of an equivalent pledge, or by the mere recognizance of the person accused.

(3) Nevertheless, in cases of contraventions or of crimes within the jurisdiction of the Court of Magistrates as court of criminal judicature in terms of article 370(1) and article 371(2), it shall be lawful for the court, if it deems it expedient so to do, to exempt the accused, while the case is pending, from any of the modes of security mentioned in this article.

(4) Persons accused of any crime outside the jurisdiction of the Court of Magistrates as court of criminal judicature may, in the absence of opposition on the part of the Attorney General, be exempted from any of the modes of security mentioned in this article, where it appears from a certificate under the hand of the Commissioner of Police that they are poor and of good moral character."

Article 578

"The effect of the security for bail shall be the temporary release from custody of the person charged or accused:

Provided that it shall be lawful for the court, at any subsequent stage of the proceedings, on the demand of the Police or the Attorney General, as the case may be, on good cause being shown, and after hearing the person charged or accused, to deprive him of the benefit of such temporary release, and to order his re-arrest."

50. Article 401 of the Criminal Code, regarding the terms for the conclusion of an inquiry, reads:

"(1) The inquiry shall be concluded within the term of one month which may, upon good cause being shown, be extended by the President of Malta for further periods each of one month, each such extension being made upon a demand in writing by the court:

Provided that the said term shall not in the aggregate be so extended to more than three months:

Provided further that unless bail has been granted, the accused shall be brought before the court at least once every fifteen days in order that the court may decide whether he should again be remanded in custody.

(2) On the conclusion of the inquiry, the court shall decide whether there are or not sufficient grounds for committing the accused for trial on indictment. In the first case, the court shall commit the accused for trial by the Criminal Court, and, in the second case, it shall order his discharge.

(3) In either case, the court shall order the record of the inquiry, together with all the exhibits in the case, to be, within three working days, transmitted to the Attorney General.

(3A) Where the court has committed the accused for trial by the Criminal Court the court shall, besides giving the order mentioned in subarticle (3), adjourn the case to another date, being a date not earlier than one month but not later than six weeks from the date of the adjournment. The court shall also adjourn the case as aforesaid after

having received back from the Attorney General the record of the inquiry and before returning the record to the Attorney General in terms of any provision of this Code."

51. In so far as relevant Article 405 of the Criminal Code reads as follows:

"(1) After the committal of the accused for trial, and before the filing of the indictment, the court shall, upon the demand in writing of the Attorney General, further examine any witness previously heard or examine any new witness.

...

(5) The provisions of the preceding subarticles of this article shall apply in the case of witnesses whom the accused may wish to examine or re-examine. ..."

52. Article 432 of the Criminal Code, concerning the terms for the filing of the indictment, provides:

"(1) The Attorney General shall be allowed the term of one month for the filing of the indictment, to run from the day of the receipt of the record referred to in the last preceding article. The said term shall, on the demand of the Attorney General, be extended by the court to an additional period of fifteen days, and, on the expiration of this other period, by the President of Malta to a further additional period of fifteen days, and, where the matter is such that the determination of the true nature of the offence necessarily depends upon the lapse of a longer period of time, to such longer period:

Provided, however, that where such longer period extends beyond forty days, the accused shall have the right to be released on bail.

(2) If the record of inquiry is found to be defective through the non-observance of any of the provisions of this Code or of any other law relating to such inquiry, the Attorney General may send back the record to the court from which it was received, together with a demand in writing that the court proceed afresh with the inquiry or that the record be rectified, according to circumstances, pointing out the defect and the relative provisions of this Code or of such other law.

(3) The court shall, within the term of five working days to run from the day on which the record was sent back as aforesaid, (which term may, upon a demand in writing by the court and on a just cause being shown, be extended by the President of Malta to a further period of five working days), conclude the fresh inquiry or rectify the record, and shall send the same to the Attorney General; and in such case the term for filing the indictment shall commence to run from the day on which the Attorney General shall have received the record of the fresh inquiry or the record as rectified."

53. In so far as relevant, Article 435 of the Criminal Code reads as follows:

"(1) It shall be lawful for the Attorney General to collect and produce further evidence besides that resulting from the inquiry:

Provided that he may not include in the indictment any charge for any offence, not founded on the said inquiry."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

54. The applicant complained under Article 5 § 3 about his sixteen-month detention – as a result of the impossibility of meeting the bail guarantees imposed on him by the domestic court – after bail had been granted. He stated that during the lengthy detention no measures had been undertaken by the authorities to ensure due diligence. The provision reads:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

55. The Government contested that argument.

A. Admissibility

56. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

57. The applicant submitted that after he had already suffered a violation (as upheld by the domestic courts) of his Article 5 § 3 rights following persistent bail refusals for the initial fifteen-month detention period, he remained unable to enjoy bail after it had been granted because of the high guarantees required. He was therefore detained for a further sixteen months. He submitted that the financial guarantees imposed on him were disproportionate and rendered the granting of bail illusory. He stated that both the bail deposit and the personal guarantee were of relevance, since the forfeiture of both sums would occur in the event of a breach of bail conditions, even if they had nothing to do with appearance at trial. He recalled that he had been arrested on 8 September 2009 and was detained until May 2012. On 18 February 2011 the Constitutional Court had found a violation of Article 5 § 3, but the authorities nevertheless failed to display the required diligence in the ensuing sixteen months (January 2011-May 2012) during which he was detained.

58. As to the Court of Magistrates' decisions, the applicant noted that while four consecutive decisions (see paragraphs 12-17 above) had reduced

the financial guarantees, none of those decisions had indicated that further information was required in order for the court to make an informed decision. Nor had the decisions refusing his requests stated that the refusal had been the result of a lack of documentation. Indeed on the 26 July 2011 the applicant's wife had explained their situation in detail and further requests had nonetheless still been rejected, again without any indication that insufficient evidence had been provided.

59. The applicant argued that such a long detention could no longer be justified solely on the basis of reasonable suspicion. No other relevant and sufficient reasons had been put forward by the court. There was no real risk of his absconding nor of any other risk envisaged by the Convention arising from his release, and any such lack of justification had only increased with the passage of time. In this light the financial guarantees imposed had breached the applicant's rights under Article 5 § 3. The fact that the applicant remained in detention for a further fifteen and a half months was a strong indication that the courts had failed to take the necessary care when fixing bail. This had to be seen in conjunction with the fact that the applicant really wanted bail, in fact he had repeatedly requested not only bail but also a reduction of the guarantees and he had also instituted constitutional redress proceedings to this effect. His wife had also travelled to give testimony in those proceedings.

60. The applicant submitted that in his co-accused's case (*Mikalauskas v. Malta*, no. 4458/10, 23 July 2013) the Court had upheld a violation of the provision in question in relation to a year's detention. In the present case the period had even been longer. In comparison with that case the applicant in the present case had even made greater efforts to supply relevant information. Moreover, the subsequent sixteen months had followed a period of detention in relation to which the domestic court had already found a violation of the same provision because the applicant's requests for bail continued to be persistently rejected.

61. The applicant further submitted that the authorities had not shown any diligence – let alone any special diligence – in the conduct of the committal proceedings. Four years after his arrest the applicant still had to be served with a bill of indictment, and no date for trial had been set. In that time he had attended 97 hearings before the Court of Magistrates as a Court of Criminal Inquiry. Indeed proceedings had commenced afresh on 20 April 2012, thirty-one months after his arrest, because of irregularities in the proceedings for which the Government was responsible, as a result of which all the evidence had to be disregarded. The law provides that inquiries should be concluded within one month – and that period must not be extended beyond three months – and that where an inquiry is restarted, it should be concluded with a maximum of five working days; however, in the applicant's case the inquiry had spanned over fifty-four months. Indeed, in his co-accused's case (*Mikalauskas v. Malta*, cited above, § 123) the Court

had already concluded that the authorities had failed to conduct the proceedings with the requisite diligence. The same conclusions should clearly apply to the present case relating to the same proceedings, especially as more months had elapsed. The applicant pointed out the multiple adjournments, the substantial gaps between hearings, a lengthy cessation of the inquiry pending the letters rogatory which had to be sent and re-sent by the Attorney General, and a piecemeal approach to calling witnesses, with limited progress being made in the gathering of evidence on the days when the evidence was called. Moreover, there had been no substantiation of the suggestion that the case was complex, which in fact it was not. Nor had it been shown that any steps had been taken to speed up the proceedings. The applicant further noted that, contrary to the Government's allegation that for the purposes of an assessment of Article 5 § 3 special attention needed to be paid to the applicant's conduct, according to the Court's case law it was the authorities' role to speed up proceedings. In any event the applicant could not be blamed for attempting to secure crucial evidence which was eventually lost as a result of Government's shortcomings. Moreover, special attention had to be given to the occurrences at the time of the applicant's post-bail detention, which – as shown from the facts – support the applicant's case.

(b) The Government

62. The Government submitted that the conditions set by the Court of Magistrates were reasonable and reached the right balance taking into account all the circumstances of the case. The same applied to the financial guarantees which the Court of Magistrates had fixed on the basis of information made available to it by the applicant at that stage, mainly his wife's testimony (not corroborated by any documentary evidence until the end of the constitutional proceedings). The Government emphasised that it was the applicant's obligation in law to provide the courts with sufficient and clear information regarding his assets and personal situation as soon as he lodged his requests, yet he had failed to do so. They noted that the applicant was not Maltese and certain information would therefore not be available to the courts. They insisted that nothing barred the applicant from presenting all the evidence in his possession.

63. Furthermore, the Government pointed out that the Court of Magistrates' initial findings were legitimate and based on all the evidence presented, as it was apparent that the family was not one of average means – they owned a home worth GBP 675,000. That being so, the Court of Magistrates should surely not have set bail at a low level based on the presumption that the applicant would have been unable to pay. Nor should the court have been required to 'fish' for information concerning the accused's financial situation. However, the Court of Magistrates gradually reduced the financial guarantees, lowering the deposit to a mere EUR 5,000,

which was surely very generous, given that the nature and quality of the offence/s charged were very serious and that the applicant faced a maximum punishment of life imprisonment.

64. The Government observed that it had only been in the second set of constitutional proceedings that the applicant had brought to the court's attention the fact that the banks had foreclosed and taken possession of the house. However, no documentary evidence to that effect was ever brought before any of the domestic courts. Thus, the applicant's wife's declaration was not sufficient to disprove the only documentary evidence available, namely, certification proving that they did own the house. Similarly, while the Court of Magistrates had taken note of the error concerning the sale of the business, it later transpired that the shoe stock had been sold and although the applicant's wife testified it had been sold at a low price, again no documentary evidence was brought to substantiate that claim. Neither had the applicant complied with the Government's request to submit evidence of his family's (and not just his business-related) financial situation before and after his arrest. The applicant had submitted evidence in a piecemeal fashion over a period of time, and the Court of Magistrates had decreased the financial guarantees accordingly.

65. The Government further pointed out that the personal and third-party surety would have been liable to forfeiture only in the case of a serious breach of bail conditions, and since such sums were only a bond and were not actually paid in court, they did not place a financial burden on the applicant. In addition the amount of time spent in remand by the applicant was much lower than in other cases brought before the Court where such violations had been upheld.

66. The Government stated that there was no cause to transpose the Court's findings in the case of *Mikalauskas* (cited above) to the present case, as they had been based on different circumstances with different evidence put before the domestic courts.

67. Lastly, the Government submitted that the authorities had displayed special diligence in the conduct of the criminal proceedings. They noted that the case was complex as it dealt with two co-accused involved in conspiracy in large-scale drug trafficking. It was therefore necessary to gather a considerable amount of evidence as well as testimony from the police, experts and witnesses regarding both accused. Although the accused was always present at the hearings, he had not positively contributed to the progress of proceedings and in the Government's view he was, to date, still employing tactics to protract them. In particular, ten months after his arrest he had filed a vague request for telephonic data from the United Kingdom. He had engaged in numerous conflicts with the Office of the Attorney General because, according to the Government, he had persistently refused to adhere to the correct procedure laid down in the law. He consequently filed incorrect letters of request on two occasions, and by the time they were

filed, the twelve-month preservation period for telephonic data had expired. The handling of the hearings by the authorities had also been expeditious, hearings being held at regular intervals of a few days or sometimes four or six weeks. The prosecution regularly produced evidence and summonsed the requested witnesses – indeed it had submitted all its evidence in twenty-six hearings over twelve months. It had been prompt in abiding by court decrees, as the Office of the Attorney General had likewise been in remitting the documents relating to the case to the Court of Magistrates and providing the assistance required with letters rogatory, amongst other things, and they could not be blamed for any delays on the part of the foreign authorities. The Government stated that the re-arraignment of the applicant had been done purely as a technicality in order to be comply with Criminal Code requirements. However, the evidence had not been disregarded: as shown by the documents submitted to the Court, the parties had agreed to rely on all the evidence already produced (see paragraph 43 above). To conclude, the Government submitted their interpretation of the time-limits laid down in Maltese law, and argued in particular that by using the term "conclude", Article 401 did not mean that the full process of the inquiry had to be exhausted, but merely that the court had to decide whether there were sufficient grounds for indicting or discharging the accused by issuing a *prima facie* decree. Following that decree, both the Attorney General – before proceeding to the indictment – and the accused, may ask the Court of Magistrates to examine or re-examine relevant witnesses, in relation to which the terms of Articles 405 and 432 were applicable. Furthermore, the terms of Article 402 could be held in abeyance in specific circumstances, for example when the court authorises the issuance of letters rogatory. They considered that in the present case the proceedings had abided by the terms and time-frames laid down by law.

2. The Court's assessment

(a) General principles

68. According to the Court's case-law, the presumption under Article 5 is in favour of release (see *Bykov v. Russia* [GC], no. 4378/02, § 61, 10 March 2009). It falls above all to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time (see *Kudła v. Poland* [GC], no. 30210/96, § 110, ECHR 2000-XI, and *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV). Where the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure his subsequent appearance (see *Wemhoff v. Germany*, 27 June 1968, § 15, Series A no. 7 and *Letellier v. France*, 26 June 1991, § 46, Series A no. 207).

69. According to the Court's case-law, the guarantee provided for by Article 5 § 3 of the Convention is designed to ensure the presence of the accused at the hearing (see *Mangouras v. Spain* [GC], no. 12050/04, § 78, ECHR 2010). The amount of bail must therefore be set by reference to the detainees' assets, and with due regard to the extent to which the prospect of its loss will be a sufficient deterrent to dispel any wish on their part to abscond (see *Neumeister v. Austria*, 27 June 1968, § 14, Series A no. 8). Since the issue at stake is the fundamental right to liberty guaranteed by Article 5, the authorities must take as much care in fixing appropriate bail as in deciding whether or not continued detention is indispensable. Furthermore, the amount set for bail must be duly justified in the decision fixing bail and must take into account the accused's means (see *Mangouras v. Spain*, cited above, § 79). The domestic courts' failure to assess the applicant's capacity to pay the sum required may lead the Court to find a violation. However, the accused whom the judicial authorities declare themselves prepared to release on bail must in good faith submit sufficient information, that can be verified if necessary, about the amount of bail to be fixed (see *Toshev v. Bulgaria*, no. 56308/00, § 68, 10 August 2006).

(b) Application to the present case

70. The Court notes that the applicant was arrested in September 2009 and on 14 February 2011 the Constitutional Court found a breach of the applicant's rights under Article 5 § 3 because the applicant's requests for bail continued to be persistently rejected.

71. Some days before, on 18 January 2011 the applicant had been granted bail upon certain conditions, including a bail bond in the form of a deposit of EUR 50,000 and a further personal guarantee of EUR 15,000. Since he was unable to pay the deposit, he remained in detention. Following repeated requests by the applicant for the court to reduce these sums, on 22 February 2011 the Court of Magistrates reduced the deposit to EUR 40,000 and increased the personal guarantee to EUR 60,000. On 4 May 2011 it reduced the deposit to EUR 15,000 and the personal guarantee to EUR 30,000 (accepting the option of a third-party surety for that amount). On 22 July 2011 it refused to reduce it yet further, but on 14 March 2012 (following another set of constitutional proceedings) after hearing further submissions it reduced the bail deposit to EUR 7,000 and increased the personal guarantee to EUR 60,000. Lastly, on 23 April 2012 the Court of Magistrates reduced the deposit to EUR 5,000 and fixed the personal guarantee at EUR 70,000. The applicant paid the deposit and was released on the same day, more than fifteen months after he had been first-granted conditional bail.

72. The Court considers that the fact that the applicant remained in custody for another fifteen months after being granted bail suggests that the domestic courts had not taken the necessary care in fixing appropriate bail.

The Government argued, on the other hand, that the applicant had failed to substantiate his financial position, at least until the time of the second set of constitutional proceedings, and it was not for the Court of Magistrates to launch a fact-finding mission.

73. The Court observes that none of the domestic courts' initial decisions refers to any inability to make a balanced and reasoned decision on account of a lack of documentation. In point of fact, those decisions seem to have been taken on the basis that – according to the information available – the applicant owned property worth a substantial amount. Further, the Court observes that it appears likely that by July 2011 (see paragraph 17 above) the applicant's financial position had become sufficiently clear. On 22 July 2011 the Court of Magistrates nevertheless refused to reduce the amount of bail, despite the fact that the applicant had already been in detention for six months after having been first granted bail. In any event, by 21 September 2011 the applicant's real financial position had surely become sufficiently clear and thereinafter none of the domestic courts doubted the applicant's wife's testimony or the apparent conclusions about the applicant's financial position. In fact, the applicant's deposit was subsequently reduced to EUR 7,000 on 14 March 2012 and again to EUR 5,000, on 23 April 2012, a sum he was finally able to pay. However, the Court notes that up until that final reduction which allowed him to be released on bail, the applicant had spent at least seven months more in detention after his financial position had been clarified. It has not been explained why the Court of Magistrates took nearly nine months (from 26 July 2011 until 14 March 2012, and then until 23 April 2012) to come to a decision on the applicant's request for a review of bail. It is possible that it chose to wait for the Constitutional Court judgment, but those proceedings did not prevent the Court of Magistrates from carrying out its own examination of the bail conditions (including the amount of the bail bond) in the interim (as occurred during the first set of proceedings). Neither did the decision of 14 March 2012 explain why the amounts thereby established were adequate in the circumstances as apparent to the court at that stage. In consequence the Court finds no justification for the applicant's seven-month detention following clarification of his financial situation (from, at the latest, September 2011 until April 2012), and after it had been decided more than a year earlier that there were no longer any grounds to continue his detention provided he complied with the bail conditions (compare *Iwańczuk v. Poland*, no. 25196/94, § 66, 15 November 2001 and *Bojilov v. Bulgaria*, no. 45114/98, § 60, 22 December 2004, concerning post-bail detention periods of four months).

74. Moreover, the Court reiterates that even where domestic courts' decisions refusing bail are based on "relevant" and "sufficient" reasons, the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Yankov*

v. Bulgaria, no. 39084/97, § 55, ECHR 2003-XII (extracts); *Filipov v. Bulgaria*, no. 40495/04, § 22, 10 June 2010; and *Ilijkov v. Bulgaria*, no. 33977/96, § 77, 26 July 2001). The Court considers that this criterion must be of some relevance even in respect of decisions concerning the fixing of bail conditions – including the amount of the bail bond – after bail is formally granted if the individual remains in detention as a result of his inability to pay. In the present case, after four years of inquiry – two and a half of which he spent in detention – the bill of indictment in his regard has still not been filed. The time-line of the proceedings reveals repeated hearings where only one witness was heard and others where nothing substantial happened, as well as repeated adjournments. It is thus apparent that in the present case the authorities also failed to conduct the proceedings with the requisite diligence, and no steps were taken to speed up the proceedings despite the applicant's continued detention following the granting of bail.

75. Taking into account the length of the bail proceedings after the applicant's financial position had become clear – during which the applicant remained in detention despite a decision taken fifteen months earlier granting bail and another decision already finding a violation of Article 5 § 3 of the Convention for other reasons – and the fact that no adequate reasons were put forward by the authorities to justify this delay or the basis for the decision of 14 March 2012 (which was in fact reviewed a little over one month later), together with the authorities' failure to exercise the requisite diligence in pursuing the proceedings while the applicant was in detention, the Court finds that there has been a violation of Article 5 § 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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. Damage

77. The applicant claimed pecuniary damage as follows: EUR 24,000 for loss of income from his online shoe business (1,300 pounds sterling (GBP) per month according to the documents submitted) while he was in detention; EUR 420,000 for the loss of equity in the family home, which the applicant lost to the mortgage provider once his family became unable to continue with the repayments in the absence of the income provided by the business; EUR 200 in telephone calls and EUR 2,100 for the rental of a bail address

(acquired on the advice of his lawyer) which remained unused, given the authorities' failure to release him; EUR 2,050 attributable to travel expenses incurred by his wife for the purposes of giving evidence in Malta; and EUR 2,178 for dental treatment while in detention. He also claimed EUR 8,000 in non-pecuniary damage, and tax and interest on the above sums.

78. The Government submitted that the finding of a violation was sufficient just satisfaction. In any event, they argued that only the travel and accommodation expenses substantiated by the corresponding receipts should be awarded. As to the dental fees, they noted that the applicant had himself chosen a private dentist whose fees he then failed to pay, and this could not be attributed to his detention. They further submitted that the idea that the applicant's online business would have continued running if he had not been in detention was speculative, and that in any event his calculation had not been explained or substantiated by documentation. Although the applicant's claim concerning his home had been substantiated, the Government noted that this was dependent on his business, which they reiterated had no guarantee of being successful. As to the other expenses, the Government pointed out that they had not been substantiated, with the exception of the payment for the first month's rent, namely EUR 350. Similarly, the claim for non-pecuniary damage was not backed up by justifiable evidence – in the Government's view such an award should not exceed EUR 2,000.

79. The Court notes that the documents submitted by the applicant demonstrate only that some business was being carried out in the months prior to his detention. They do not provide substantiation for any established or regular income, and neither did the applicant submit tax forms showing what income he had in fact made in the period immediately prior to his arrest. This being so, the claims connected to the loss of income from his online shoe business are hypothetical and unsubstantiated and must be rejected, as must his claim concerning the loss of the house, which was dependent on the alleged income. The Court further rejects the applicant's claim concerning the rented apartment, in so far as the six-month contract submitted to the Court is dated 17 January 2011 and therefore refers to a period prior to the applicant's detention pursuant to the violation of Article 5 § 3 found by this Court, which occurred just after that period. Furthermore, the Court does not discern any causal link between the violation found and the claims for pecuniary damage referring to the applicant's wife's travel expenses and phone calls, nor his dental treatment, and it therefore rejects those claims. On the other hand, it awards the applicant EUR 1,200 in respect of non-pecuniary damage.

B. Costs and expenses

80. The applicant also claimed EUR 10,015 for costs and expenses incurred before the domestic courts (of which EUR 5,880 pertained to the second set of constitutional proceedings as per bill of costs submitted). The applicant also appears to claim a further and separate EUR 7,015 in lawyers' fees in connection with proceedings in Malta.

81. The Government submitted that the applicant had not yet paid the Government costs which had been decided by the Constitutional Court in its judgment of 2012, and that those sums should therefore not be reimbursed. They further noted that the sums requested in legal fees were high and not supported by official documentation.

82. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that the expenses in connection with the first set of constitutional proceedings were not incurred in connection with the violation upheld by the Court in the instant case. It follows that such sums are not due. As to the second set of constitutional proceedings and the Government's comment in that respect, the Court notes that such costs – if still unpaid – remain due to the Government. As to the lawyers' fees, the Court notes that from the documentation it has not been specified whether any sums paid were in connection with the criminal proceedings or with the actual bail requests with which this case is concerned. In the present case, having regard to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 7,000 covering costs under this head.

C. Default interest

83. The Court considers it appropriate that the default interest rate 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, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds*,

(a) 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, the following amounts

(i) EUR 1,200 (one thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 March 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President