AS TO THE ADMISSIBILITY OF

Application No. 25644/94
by Thomas WIFFEN
against Malta

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

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

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

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

Having regard to the application introduced on 2 November 1994 by Thomas WIFFEN against Malta and registered on 14 November 1994 under file No. 25644/94;

Having regard to:

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

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born 1943 and resident in Luqa. At the time of introduction of the application, he was held in detention in the Civil Prisons. He is represented before the Commission by Dr. Joseph Brincat, an advocate practising in Marsa.

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

a. Particular circumstances of the case

On 6 October 1994, the applicant was arrested by the police. On 7 October 1994, the applicant appeared before a magistrate of the Magistrates Court and was charged with defilement of his minor daughter (an offence involving sexual acts) and having committed acts of violent

assault on her in violation of Article 203 (1) a, b and c of chapter 9 of the Laws of Malta. The applicant pleaded not guilty.

The applicant contends that he had not been allowed to contact a lawyer before the hearing. The Government submit that, although the applicant had been informed of his right to be assisted by counsel at the hearing, he failed to make such a request.

After the hearing, the applicant contacted a lawyer who arranged to meet with him the next day, 8 October, which was a Saturday. On the morning of 10 October 1994 the applicant's lawyer filed a written application for release. The application was sent to the Attorney General immediately as prescribed by law, since the applicant was facing charges attracting a maximum sentence of three or more years. The Attorney General was given 24 hours to reply. The Attorney General made written opposition to release on the same day, i.e. on 10 October 1994. A magistrate of the Magistrates Court took the decision to reject the applicant's bail application on 10 October 1994. This magistrate was different from the magistrate before whom the applicant appeared on 7 October 1994. On 11 October 1994 the registrar of the Magistrates Court entered the second magistrate's decision in the court's books.

On 20 October 1994, the second magistrate began hearing evidence and on 25 October 1994 he ordered the applicant's release on bail. On 8 May 1995, the Court of Magistrates convicted the applicant and gave him a suspended prison sentence of two years. On 8 January 1996 the Court of Criminal Appeal upheld in essence the applicant's conviction.

b. Relevant domestic law and practice

Section 575 of the Maltese Criminal Code provides as relevant:

> "2. The demand for bail shall be made by an application, a copy of whereof shall be communicated to the Attorney General on the same day, whenever it is made by -
>
> ...
>
> (c) persons accused of any crime punishable with more that three years imprisonment...
>
> 3. The Attorney General may, within the next working day, by a note, oppose the application, stating the reasons for his opposition."

Section 582 para. 1 provides:

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

In its judgment of 8 January 1991 in the Ellul case, the Constitutional Court of Malta upheld a decision taken on 31 December 1990 by the Civil Court in the exercise of its constitutional jurisdiction to the effect that Article 5 para. 3 of the Convention did not impose any obligation on the magistrate before whom an arrested person appeared to examine whether that person's arrest had been made on a reasonable suspicion or not. Moreover, according to the judgment of the Civil Court, as upheld by the Constitutional Court, Article 5 para. 3 of the Convention did not impose on the prosecution any duty, on presenting the arrested person, to bring any evidence that the police had a reasonable suspicion at the time of the arrest.

In its judgment of 13 June 1994 in the Aquilina case, the Constitutional Court reversed a decision taken on 25 November 1993 by the Civil Court in the exercise of its constitutional jurisdiction to the effect that the provisions of Article 575 of the Criminal Code, which required written notification of the Attorney General, were

inconsistent with the provisions of Article 5 para. 3 of the Convention in failing to provide for the prompt consideration of the bail application. The Constitutional Court considered that Article 5 para. 3 of the Convention required the arrested person to be brought before a magistrate within a short period from the arrest. It did not require the magistrate to have the power to order release at that moment.

COMPLAINTS

The applicant submits that there is violation of Article 5 para. 3 of the Convention. He argues that since pursuant to Section 575 of the Criminal Code a magistrate had no power to release he has not been brought promptly before a person complying with the requirements of that provisions. Having regard to the fact that he was not allowed to contact a lawyer until Friday afternoon (the Court registry closed at 15.00h), it was not possible to lodge an application until the following Monday, and the earliest date at which the magistrate could hear the application with power to release was 11 October 1994, a lapse of 5-6 days.

The applicant also invokes Article 5 para. 4 in respect of his allegation that there is no remedy whereby the lawfulness of his arrest or detention can be challenged "speedily".

The applicant complains under Article 6 para. 3 (c) that he was not given the opportunity to instruct a lawyer prior to his appearance in court on 7 October 1994, nor was one appointed for him. This was, he submits, of particular importance since he was a foreign citizen, did not know any Maltese lawyers and was not in a position to defend himself.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 November 1994 and registered on 14 November 1994.

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

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

THE LAW

1. The applicant complains under Article 5 para. 3 (Art. 5-3) of the Convention that he was not brought promptly before a judge who had the power to order his release. He also complains under Article 5 para. 4 (Art. 5-4) of the Convention that there is no remedy whereby the lawfulness of his arrest or detention can be challenged "speedily".

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

> "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.
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> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government submit that the applicant should have made an application to the First Hall of the Civil Court and the Constitutional Court in which he could have raised his complaint concerning lack of

legal assistance prior to and during his appearance before the magistrate on 7 October 1994.

The Commission recalls that, in accordance with its case-law, the obligation to exhaust domestic remedies contained in Article 26 (Art. 26) of the Convention is limited to making "normal use" of remedies likely to be effective and adequate to remedy the matters of which the applicant complains (No. 11208/84, Dec. 4.3.86, D.R. 46 p. 182). For a remedy to be effective it must be capable of remedying directly the situation complained of (No. 11660/85, Dec. 19.1.89, D.R. 59 p. 85).

The Commission considers that making an application to the First Hall and the Constitutional Court concerning access to counsel before and during the applicant's appearance before the magistrate on 7 October 1994 would not have secured direct respect for the rights of the applicant under Article 5 para. 3 (Art. 5-3) of the Convention. It follows that this is not an effective remedy within the meaning of Article 26 (Art. 26) of the Convention insofar as the applicant's complaints under Article 5 para. 3 (Art. 5-3) are concerned (see, mutatis mutandis, No. 10868/84, Dec. 21.1.87, D.R. 51 p. 62 and No. 12747/87, Dec. 12.12.89, D.R. 64 p. 97). Moreover, the Commission considers that, in the particular circumstances of the case, the question of whether lodging an application would have provided redress for the applicant's complaints under Article 5 para. 4 (Art. 5-4) of the Convention is linked to the substance of these complaints (see, mutatis mutandis, No. 9920/82, Dec. 13.3.84, D.R. 37 p. 75).

As regards the substance of the applicant's complaints under Article 5 paras. 3 and 4 (Art. 5-3, 5-4) of the Convention, the Government argue that, although the Attorney General who was responsible for the prosecution of serious cases had to be consulted, the magistrate before whom the applicant appeared on 7 October 1994 was vested in principle with the power to order his release. The applicant had the right to lodge the bail application himself. Moreover, as it is expressly mentioned in the minutes of the hearing of 7 October 1994, the applicant was informed of his right to be represented by counsel before the Magistrates Court.

The Government further submit that the applicant was able to consult a lawyer after the hearing on Friday afternoon. This lawyer need not have waited until Monday morning to lodge the bail application, since he could have asked for the urgent opening of the court's registry. When the application was lodged, it was immediately sent to the Attorney-General who replied on the same day. The magistrate issued his decision on the applicant's bail application as soon as it was practicable in the circumstances of the case and, in any event, "promptly" within the meaning of Article 5 (Art. 5) of the Convention.

The applicant argues that, when an arrested person is brought before the magistrate, the prosecution is represented by the Officer of the Executive Police and not the Attorney General. Article 5 para. 3 (Art. 5-3) of the Convention was violated because the appearance of the applicant before the first magistrate after his arrest was a mere formality, as the magistrate had no power to order his release. The applicant further argues that a bail application had to be signed by a lawyer. Moreover, his lawyer had no right to ask for the opening of the court registry during the weekend. The magistrate who rejected his bail application on 11 October 1994 was not the same as the magistrate before whom the applicant appeared on 7 October 1994.

The Commission has examined the parties' other observations and considers that the complaints under Article 5 paras. 3 and 4 (Art. 5-3, 5-4) of the Convention raise serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This part of the application cannot, therefore, be regarded as being manifestly ill-founded within the

meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

2. The applicant complains under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention that he was not given the opportunity to instruct a lawyer prior to his first appearance before a magistrate after his arrest.

Article 6 para. 3 (c) (Art. 6-3-c) of the Convention provides as follows:

> "Everyone charged with a criminal offence has the following minimum rights:
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> ...
>
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

The Commission notes that there is no indication that the applicant raised this complaint when appealing to the Court of Appeal against his first instance conviction by the Magistrates Court.

However, even assuming that the applicant has exhausted domestic remedies, the Commission considers that the complaint should be rejected as manifestly ill-founded. Even assuming that the authorities are to be held responsible for the applicant's not having legal assistance during the first two days of his detention, the Commission finds no indication that this delay prejudiced in any manner the applicant's defence at his trial (see Eur. Court HR, Murray v. United Kingdom judgment of 8 February 1996, unpublished, para. 62).

It follows that this part of the application must be rejected as inadmissible, being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE as regards the issue arising in connection with the fairness of the criminal proceedings against the applicant from the delayed access to counsel,

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

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber