CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 16631/04
by Nazzareno ZARB
against Malta

The European Court of Human Rights (Fourth Section), sitting on 27 Septembre 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 5 April 2004,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Nazzareno Zarb, is a Maltese national who was born in 1971 and is currently detained at Corradino prison (Malta). He is represented before the Court by Mr C. Soler and by Mr C. Cardona, two lawyers practising in Birkirkara (Malta).

A. The circumstances of the case

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

1. The criminal proceedings against the applicant

On 5 April 1991, the applicant, accused, together with other persons, of various counts of aggravated theft (including theft in various factories and car theft), was arraigned before the Court of Magistrates sitting as a Court of Criminal Inquiry.

The Court of Magistrates subsequently appointed certain experts, who were members of the police. They were charged, *inter alia*, to check and take the fingerprints on the scene of the crimes. The experts drafted reports and testified on the findings and conclusions thereof. The applicant alleged that the police was also entrusted with the management of the prosecution's case.

The prosecution concluded the case on the merits on 12 October 1993. It produced further evidence on charges of recidivism on 14 January 1994.

The legal qualification of charges was presented on 14 April 1994, on which date the Court of Magistrates started to hear the evidence of the defence.

In a judgment of 15 February 1995, the Court of Magistrates acquitted the applicant on two of the charges, namely receiving stolen goods and theft of a car. It found the applicant guilty of the remaining six charges of theft and sentenced him to four years' imprisonment.

The applicant appealed against this judgment both on the merits and with regard to the punishment. Four of his co-accused appealed, challenging exclusively the reasonableness of the penalty which had been inflicted.

The defendants introduced a number of requests for release on bail, for the examination of new witnesses and for leave to present further submissions. This led to the adjournment of the case on several occasions, in particular on 29 February 1996 and on 13 March 1997, dates scheduled for the delivery of the judgment. The examination of the case was suspended from 14 January until 8 October 1999 because the presiding judge was ill.

The delivery of the judgment was scheduled first for 9 January, then for 30 October 2001; however, the proceedings were adjourned as some of the accused wished to present further submissions and because the presiding judge had been assigned to a foreign tribunal. By an order of 3 October 2002 the Court of Criminal Appeal adjourned the proceedings *sine die* awaiting the outcome of the constitutional claim which the applicant had introduced in the meanwhile (see *infra*, under "The applicant's constitutional claim").

The proceedings were resumed after the determination of the applicant's constitutional claim, and on 15 January 2004 the Court of Appeal gave its final judgment. It reaffirmed that its role was not to interfere with the first court's appreciation of evidence, as long as it was satisfied that the conclusions reached by the Court of Magistrates were lawful and reasonable. In the light of the material before it and having regard to the fact that the applicant had admitted his guilt, the Court of Criminal Appeal confirmed the first instance judgment.

2. The applicant's constitutional claim

(α) Before the Civil Court

In the meanwhile, on 5 April 2002, the applicant had filed a constitutional claim before the Civil Court (First Hall). Invoking Article 6 of the Convention and Article 39 of the Constitution of Malta, he complained about the length of the criminal proceedings brought against him. He also alleged that his trail had not been fair, as the courts admitted in evidence reports drawn by experts who were members of the police.

In a judgment of 15 May 2003, the Civil Court dismissed the applicant's claim.

It observed that the applicant did not question the competence or the impartiality of the experts, but was solely relying on the fact that they were members of the police. In a judgment of 6 July 1998, given in the case of *Saliba v. Attorney General*, the Constitutional Court had held that the members of the police could not be considered independent experts and had revoked a judgment of the Criminal Court. However, the Civil Court could not agree with the approach of the Constitutional Court (which, moreover, had decided in the opposite way in a previous judgment, given on 30 April 1993 in the case of *the Police v. Camilleri*). In the first place, it was to be noted that the applicant had at his disposal other ordinary remedies which he failed to use. In particular, he could have raised the matter through his lawyer in the course of the criminal proceedings.

The Civil Court furthermore noted that both the Convention and the Constitution of Malta required that the domestic tribunal be independent and impartial, but did not say anything about the experts. The latter were in fact not called upon to determine the merits of the criminal charges against

the accused, but could only express a simple advice on a technical issue. The trial court was obliged to examine carefully their opinions, but could eventually decide to ignore them. It was therefore doubtful whether Article 6 of the Convention could apply with regard to experts.

It should also be taken into consideration that at the relevant time, it was difficult, if not impossible, to find appropriate experts in fingerprints from outside the police force. It was true that experts in photography could have been found even amongst people who were not employees of the police; however, the role of photographers was to state objective facts rather than to express opinions, and any doubt of partiality could have been removed by the supervisory role exercised by the trial court.

As to the length of the proceedings, the Civil Court observed that no delay could be imputed to the prosecution or to the trial court. The case was a rather complex one, as it involved many counts and a number of accused persons. Moreover, the Court of Magistrates had to hear several witnesses and to collect many documents. Notwithstanding this, most of the requests for bail were decided on 17 April 1991, which was only twelve days after the date of the arraignment. Some of the accused failed to appear at several hearings, thus obliging the trial court to adjourn the proceedings. There were also difficulties in controlling the various accused, as their behaviour during the hearings had obstructed the normal course of justice. As some of them did not respect the bail conditions, the police had to take action for the revocation of bail and the Court of Magistrates had to decide on this issue. Some witnesses were untraceable and others, albeit regularly summoned, did not attend the sittings. There had been no excessive delay in the inquiries, and it should be taken into account that it was necessary to exhibit the record of the inquiry for any single charge. The prosecution had concluded the case within a reasonable time and the proceedings before the Court of Magistrates were conducted without any unnecessary delay.

As to the proceedings before the Court of Criminal Appeal, they were prolonged because of the great number of claims presented by the defence and because of the need to obtain several reports by prison officials and/or psychiatric experts on the behaviour of the defendants, with a view to considering the progress they had made while in prison. Apart from the period between 14 January and 8 October 1999, the case was never left dormant.

Therefore, and notwithstanding the fact that the case had been pending for about eleven years, there had been no substantial waste of time. It was true that most of the delay had been caused by the requests of other accused and not of the applicant himself. However, the Court of Criminal Appeal considered that, the crimes being connected, it would not have been consonant with the proper administration of justice to separate the positions of the defendants.

(β) Before the Constitutional Court

On 27 May 2003 the applicant appealed against the Civil Court's judgment before the Constitutional Court.

In a judgment of 31 October 2003, the latter revoked the impugned judgment in so far as it concerned the applicant's complaint relating to the length of the criminal proceedings and declared that there had been a breach of the "reasonable time" principle. It also ordered the Attorney General to pay the applicant 100 Maltese liras (Lm – approximately 240 Euros) as just satisfaction. The Constitutional Court confirmed the Civil Court's judgment for the remainder.

The Constitutional Court observed that, when appointed as experts in criminal proceedings, the members of the police could testify on factual events but could not express opinions. Therefore, it was lawful to charge a police officer to take fingerprints, since the taking and the preservation of evidence collected on a crime scene was part of the duties of the police. The same could be said regarding the taking of photographs. On the contrary, the comparison of fingerprints implied an advice or an opinion based on "ability or special skill".

The Constitutional Court further noted that the applicant could have challenged the nomination or confirmation of the experts before the Court of Magistrates and/or before the Court of Criminal Appeal, but he omitted to do so. He could also have objected to the probative value of the experts' testimonies, arguing that they had expressed opinions. In view of the absence of a reaction from the applicant, it could not be excluded that the nomination, confirmation and depositions of the experts had benefited the defence.

It should further be noted that the facts of the judgment of *Saliba v. Attorney General*, invoked by the applicant, were different from the facts of the present case. In *Saliba* the whole case rested on one fingerprint which was lifted "in not so laudable circumstances" and the member of the police appointed as an expert was not the person who had taken the fingerprint. Moreover, the defence had objected to the nomination of the expert. In the applicant's case the prosecution did not rely only on the fingerprints, but rather on the statements in which the applicant himself had admitted his guilt in the several cases of theft, and on the statements of one co-accused. Moreover, the court appointed experts were the same persons who had taken the fingerprints or the photographs during the inquiry. They were therefore free to testify on the facts they had witnessed. It was true that some of the experts had also compared the fingerprints taken with the fingerprints of the persons working or living in the place where the thefts had occurred. However, this was only an "eliminatory examination" which could not be considered as evidence against the applicant. When later, in the course of the preliminary inquiry, the prosecution requested the comparison of fingerprints taken from several places with those of the accused, the court

appointed a new expert – X –, who was not a member of the police. In his report, submitted on 12 February 1993, X concluded that none of the fingerprints matched with those of the applicant.

In any event, even assuming that a comparative examination of fingerprints had been done by a member of the police, the question of whether the trial had been fair depended on the proceedings as a whole, including the appeal proceedings which were still pending.

As to the length of the proceedings, the Constitutional Court considered that there had been a certain delay during the appeal stage. The case was not particularly complex as the appeals concerned almost exclusively the measure of the penalty. Notwithstanding this, the case was not decided for almost six years and six months and in November 2001 it was eventually referred to a new presiding magistrate. Even if it was true that the defendants presented a number of claims which had the effect of slowing down the proceedings, the Court of Criminal Appeal had the duty to ensure that the duration of the trial would not be excessive. As most of these claims had been introduced by the other defendants, and not by the applicant himself, there had been a violation of the "reasonable time" principle in respect of the latter.

COMPLAINTS

1. The applicant complained under Article 6 § 1 of the Convention about a violation of his right to a fair trial by an independent and impartial tribunal.

2. The applicant complained under Article 6 § 1 of the Convention about the length of the criminal proceedings brought against him.

3. Invoking Article 13 of the Convention, the applicant alleged that he did not have at his disposal an effective remedy before a national authority with regard to his complaint concerning the length of the proceedings.

4. Invoking Article 8 of the Convention, the applicant complained about a violation of his right to respect for his family life.

THE LAW

1. The applicant considered that he did not have a fair trial before an independent and impartial tribunal. He invoked Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal ..."

He observed that in assessing his guilt, the domestic jurisdictions relied on the findings, the conclusions and the reports of the court appointed experts, who were members of the police. The latter performed a role which was "both investigative and adjudicative", thus violating the principle of equality of arms and rules of natural justice (namely, the concept of *nemo judex in causa propria*).

The Court first notes that, as the Civil Court and the Constitutional Court pointed out, the applicant failed to use ordinary remedies which were at his disposal. In particular, he did not challenge the nomination or confirmation of the experts during the trial and did not object to the probative value of their testimonies. However, the Court does not consider it necessary to ascertain whether the applicant has exhausted all available domestic remedies. Even assuming that these remedies have been exhausted, this complaint is in any event inadmissible, for the following reasons.

The Court reiterates that the requirements of impartiality and independence enshrined in Article 6 of the Convention only refer to the "tribunal" called upon to determine the criminal charges against the accused and do not apply to the prosecuting authorities (see *Forcellini v. San Marino* (Dec.) no. 34657/97, 28 May 2002, *Priebke v. Italy* (Dec.), no. 48799/99, 5 April 2001, and *De Lorenzo v. Italy* (Dec.), no. 69264/01, 12 February 2004) or to experts. However, the position occupied by the experts throughout the proceedings and the manner in which they performed their functions is relevant in assessing whether the principle of equality of arms has been complied with (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 25, § 59). On this point, it is to be recalled that by virtue of their functions as neutral and impartial auxiliaries of the court, the statements of court appointed experts might have carried greater weight than those of an "expert witness" called by the accused (see *Bönisch v. Austria*, judgment of 6 May 1985, Series A no. 92, p. 16, § 33, and *Emmanuello v. Italy* (Dec.), no. 35791/97, 31 August 1999).

Admittedly, the fact that the experts charged to check and take the fingerprints at the scene of the crimes were members of the police – who owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution (see *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 712, § 56) – may have given rise to apprehensions on the part of the applicant. Such apprehensions may have a certain importance, but are not decisive. What is decisive is whether the doubts raised by appearances can be held objectively justified (see, *Brandstetter*, judgment quoted above, p. 21, § 44, and *Emmanuello*, decision quoted above).

Such an objective justification is lacking here: in the Court's opinion, the fact that an expert is a member of the police does not in itself justify fears that he will be unable to act with proper neutrality. To hold otherwise would

in many cases place unacceptable limits on the possibility for courts to obtain expert advice, having regard, in particular, to the technical skills that members of the police have in taking and comparing fingerprints (see *Emmanuello*, decision quoted above). Furthermore, the applicant did not produce any element showing that the experts complained of performed their duties in a way which was not impartial and objective.

In addition, it appears that in the present case evidence providing positive identification of the applicant as the perpetrator of the offences charged was available from sources unrelated to the findings of the experts. In particular, as the Constitutional Court pointed out, the applicant himself had admitted his guilt and a co-accused had made incriminating statements against him. On the other hand, the members of the police limited themselves to making an "eliminatory examination" of the fingerprints, which did not constitute evidence against the applicant. When the fingerprints of the latter had to be compared with those found on the scenes of the crimes, the domestic court appointed an expert who was not a member of the police.

In these circumstances, the Court does not consider that the appointment as experts of members of the police has hindered the principle of equality of arms or has rendered the proceedings unfair.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicant complained that the duration of the criminal proceedings brought against him had been excessive. He invoked Article 6 § 1 of the Convention.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

3. The applicant alleged that the violation of the "reasonable time" principle found in his case was not redressed in an effective manner, as the Constitutional Court granted him only Lm 100 as just satisfaction. He invoked Article 13 of the Convention, taken in conjunction with Article 6 § 1. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

4. The applicant alleged that the violations of his fundamental rights and, in particular, the failure to afford him an effective remedy had "inevitably led to a violation of his right to respect for his family life". He invoked Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The applicant considered that the criminal proceedings against him had caused a rupture of his family ties and a massive hardship for him and his three children.

The Court reiterates that the opening of all criminal proceedings implies an interference with the private and family life of the accused. However, the applicant failed to show that in his case the negative repercussions he had suffered went beyond the normal and inevitable consequences of such proceedings (see *Craxi v. Italy* (Dec.), no. 63226/00, 14 June 2001; *Hermi v. Italy* (Dec.), no. 18114/02, 6 November 2003; *Sannino v. Italy* (Dec.), no. 30961/03, 24 February 2005).

Under these circumstances, the Court cannot find any appearance of a violation of the applicant's rights under Article 8 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the length of the criminal proceedings and the alleged lack of an effective remedy before a national authority;

Declares the remainder of the application inadmissible.

Françoise ELENS-PASSOS	Nicolas BRATZA
Deputy Registrar	President