CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF KADEM v. MALTA

(Application no. 55263/00)

JUDGMENT

STRASBOURG

9 January 2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kadem v. Malta,

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

Mr C.L. ROZAKIS, *President,*
Mrs F. TULKENS,
Mr G. BONELLO,
Mr P. LORENZEN,
Mrs N. VAJIC,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY, *judges,*
and Mr S. NIELSEN, *Deputy Section Registrar,*

Having deliberated in private on 12 December 2002,

Delivers the following judgment, which was adopted that date:

PROCEDURE

1. The case originated in an application (no. 55263/00) 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 Dutch national, Mr M'hmed Kadem ("the applicant"), on 11 February 2000.

2. The applicant was represented by Mr J. Brincat, a lawyer practising in Marsa (Malta). The Maltese Government ("the Government") were represented by their Agent, Mr A.E. Borg Barthet, Attorney General, and by Mr S. Camilleri, Deputy Attorney General.

3. The applicant alleged, in particular, that contrary to Article 5 § 4 of the Convention, there were no means available to him under Maltese law to challenge speedily his arrest and detention with a view to extradition.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. By a decision of 20 September 2001 the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Court having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1952 and lives in Rotterdam, the Netherlands.

9. On 25 October 1998 the applicant was arrested on the strength of a provisional arrest warrant issued by a duty magistrate in connection with a request for his extradition made by the Kingdom of Morocco. The request was relayed to Malta through Interpol. The charge related to the applicant's involvement in international drug trafficking in cannabis. The information laid before the magistrate by the Attorney General referred, *inter alia,* to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("the Vienna Convention"), to Legal Notice 120 concerning designated countries and Government Notice 332 published in the Government Gazette of 24 May 1996

which reproduced the text of the Convention to which Malta acceded on 28 February 1996. Attached to the request was a Red Notice issued by Interpol bearing the applicant's description and fingerprints as well as a certificate issued by the Prime Minister under subsection (4) of section 4 of the 1996 Order on Extradition (Designated Foreign Countries).

10. On 26 October 1998, pursuant to section 15(1) of the Extradition Act, the applicant was brought before the Magistrates' Court acting as a court of criminal inquiry in connection with extradition proceedings. A defence counsel was appointed for him. The presiding magistrate was different from the one who issued the provisional arrest warrant. The applicant did not challenge the lawfulness of his arrest and the proceedings were adjourned until 3 November 1998.

11. On 28 October 1998 the applicant filed a judicial act with the First Hall of the Civil Court alleging that the provisional arrest warrant was unlawful because, *inter alia*, there were no bilateral extradition arrangements between Malta and Morocco and the Vienna Convention had not been incorporated into domestic law.

12. On 30 October 1998 the Prime Minister as the minister responsible for justice matters replied to the act. The Prime Minister rejected the applicant's claim as frivolous and vexatious. He stressed that both Malta and Morocco were parties to the Vienna Convention even though the Convention had not been incorporated into domestic law. On the latter point, he noted that Maltese law was already sufficiently equipped and adequate to implement Malta's obligation under the Vienna Convention.

13. At its next sitting on 3 November 1998, the applicant's lawyer pleaded that the Magistrates' Court did not have jurisdiction to hear the case for extradition, that the provisional arrest warrant was therefore unlawful and that the applicant should be released. The prosecution disputed the applicant's reasoning. The case was adjourned to 13 November 1998.

14. At the further hearing on 13 November 1998 the applicant again pleaded that the Maltese courts lacked jurisdiction to examine the extradition request as there was no extradition treaty in force between Malta and Morocco and that the Vienna Convention, although signed by Malta, had not been duly ratified in accordance with Maltese law.

15. On 20 November 1998 the Magistrates' Court rejected the plea of lack of jurisdiction and declared that it had jurisdiction to hear the case. The Magistrates' Court took into account, in particular, the applicant's argument according to which the Vienna Convention had not been ratified as required by the Ratification of Treaties Act. It observed, however, that the said Act only provided for the ratification of certain treaties, indicated in section 3(1). The applicant argued that the Vienna Convention fell under section 3(1)(c), which imposed the ratification of any treaty affecting or concerning the relationship of Malta with any multinational organisation, agency, association or similar body. The Magistrates' Court could not accept such an interpretation, on the ground that the Vienna Convention was binding for the States which signed it, but not for the United Nations. Therefore, it could not give rise to a relationship between Malta and the United Nations. The Magistrates' Court moreover observed that the Extradition Act authorised arrest with a view to extradition of any person accused of an offence in a "designated foreign country". As Morocco had been designated foreign country by Legal Notice 120 of 1996, the applicant's deprivation of liberty could not be regarded as unlawful.

16. On 27 November 1998 the applicant appealed to the Court of Criminal Appeal. In a judgment of 12 December 1998, the Court of Criminal Appeal found that there was no right of appeal at that stage of the proceedings under Maltese law and that an appeal was only possible when a person was subject to an order committing him to custody to await his removal. Furthermore, the applicant had filed his appeal out of time.

17. On 23 December 1998, while the extradition proceedings were still pending, the applicant filed an application with the First Hall of the Civil Court in its constitutional jurisdiction. He alleged that his case gave rise to violations of Article 5 §§ 1(f) and 4 of the European Convention on Human Rights. The applicant based his claim on the words "lawful arrest or detention" of a person in connection with extradition proceedings. His main argument was that Malta had not duly ratified any international treaty giving the State "legal authority" to arrest him with a view to his extradition to Morocco. As to his plea concerning Article 5 § 4, the applicant stated that there was no possibility to have the legality of the detention for extradition examined before the case was decided and an appeal lodged.

18. The First Hall of the Civil Court listed the case for hearing on 8 January 1999. However, the case had to be adjourned to 29 January 1999 to enable the applicant's lawyer to produce witness evidence.

19. In the meantime, the Magistrates' Court, under whose order the applicant was kept in detention, continued to hear the case, in anticipation of obtaining the relevant evidence to support the extradition request from the Kingdom of Morocco. The court had a one-month time-limit in which to conclude the hearings and render its decision. This period could be extended by further periods of up to a maximum of three months by the President of the Republic.

20. On 15 January 1999 the applicant was discharged on the grounds that there was no evidence to justify his extradition to Morocco. The Attorney General did not appeal against the decision. The applicant was ordered by the police, acting as the Immigration Authority, to return to the Netherlands within hours.

21. The applicant's application to the First Hall of the Civil Court was still pending when the applicant's case was being heard by the Magistrates' Court. However, on 16 January 1999 the applicant had to leave Malta, having been refused permission to stay in Malta pending the examination of his application to the First Hall of the Civil Court. On 27 January 1999 the applicant's lawyer, who had been instructed by the applicant to file the constitutional case, requested that the Commissioner of Police, as Principal Immigration Officer, be ordered to allow the applicant to return to Malta for the hearing of the case which was pending before the First Hall of the Civil Court.

22. On 29 January 1999 the First Hall of the Civil Court ordered that a lawyer be appointed for the applicant. According to the applicant, under domestic law any voluntary assumption of this mandate by the lawyer who filed the application to the First Hall would imply that the person assuming it would be personally responsible to the Government of Malta for all costs and expenses incurred in the proceedings. The applicant had no relatives in Malta. Furthermore, the lawyer acting on his behalf could not assume the position of a "party" in the proceedings had he applied to act as his lawyer in addition to being his legal representative since this would have raised serious issues of professional ethics. The acceptance of a voluntary mandate would make the lawyer personally involved in the proceedings as if it were his own case.

23. In the event, the applicant never gave a power of attorney to a legal representative in Malta to enable his claim to be dealt with by the First Hall of the Civil Court. Furthermore, the applicant was never granted permission to enter Malta and the domestic court never ordered that permission be granted.

24. On 29 January 1999 the First Hall of the Civil Court adjourned the case pending the applicant's confirmation that he intended to issue a power of attorney to a legal representative for the purposes of the proceedings.

25. On 3 March 1999, in the absence of the parties at the resumed hearing, the First Hall adjourned the case *sine die*. The applicant still could not enter the country to continue the proceedings in the Maltese courts regarding the lawfulness of his detention.

26. On 1 September 1999 the applicant's action was declared deserted and his case was struck off the list.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The extradition Act

27. In so far as relevant, Article 15 of the Extradition Act reads as follows:

> "(1) A person arrested in pursuance of a warrant under section 14 of this Act shall (unless previously discharged under subsection (3) of that section) be brought as soon as practicable and in any case not later than forty-eight hours from his arrest before the Court of Magistrates (Malta) as a court of criminal inquiry (in this Act referred to as the court of committal) which shall have for the purposes of the proceedings under this section the same powers, as nearly as may be, including power to remand in custody or on bail, as the said court has when sitting as aforesaid. (...).
>
> (3) Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the return of that person or on behalf of that person, that the offence to which the authority relates is an extraditable offence and it is further satisfied
>
> (a) where the person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the Courts of Criminal Justice of Malta;
>
> (b) where the person is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large,
>
> the court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his return thereunder; but if the court is not so satisfied or if the committal of that person is so prohibited, the court shall discharge him from custody.
>
> Provided that notwithstanding any order discharging him from custody such person shall remain in custody until the expiration of three working days from any such order and, where an appeal has been entered by the Attorney General, until the appeal is disposed of or abandoned, or the Attorney General consents to the release of such person".

B. The decision in the case of The Police v. Pierre Gravina

28. The Magistrates' Court of Malta, acting as a court of criminal inquiry, gave on 27 February 2001 the following decision in the case of The Police v. Pierre Gravina:

> "Dr. J. Brincat [the lawyer of the accused] points out that the arrest is illegal since it does not conform with the necessary conditions laid out in Art. 5(1) of the European Convention in view of the fact that even the Criminal Code lays down the circumstances in which a person can be brought under arrest before the Court, but in the circumstances no one is entitled to once again formally arrest the person charged so as to initiate proceedings.
>
> Having heard both parties as to whether the arrest is justified or not.
>
> Having heard submissions by the parties regarding the case, in the circumstances the arrest is not justified and thus orders the release of the person charged".

C. The remedy of *habeas corpus*

29. Article 137 of the Criminal Code provides for the remedy of *habeas corpus*. This provision reads as follows:

> "Any magistrate who, in a matter within his powers, fails or refuses to attend to a lawful complaint touching an unlawful detention, and any officer of the Executive Police, who, on a similar complaint made to him, fails to prove that he reported the same to his superior authorities within twenty-four hours shall, on conviction, be liable to imprisonment for a term from one to six months."

30. On 13 April 1983 the police arrested Anthony Price for a breach of the Immigration Act. During his detention he became suspect of a serious offence concerning the public security of Malta. On 17 June 1983 the applicant applied to the Magistrates' Court requesting that he should be either charged or released. On 20 June 1983 the Magistrates' Court considered that it had the power under section 135 (currently section 137) of the Criminal Code to attend to a lawful complaint touching on unlawful detention. It also found that the police had not brought Price before the Magistrates' Court within 48 hours as required by section 365 (currently section 353) of the Criminal Code. As a result, the court ordered Price's release.

31. On 13 June 1990 the First Hall of the Civil Court ordered Christopher Cremona to be detained for twenty-four hours for contempt of court. The detainee appealed under section 1003 of the Code of Organisation and Civil Procedure. The Attorney General, with reference to Cremona having invoked section 137 of the Criminal Code, requested the Magistrates' Court to order the Acting Registrar of the Court and the Commissioner of Police to bring Cremona before the Court and order either of them to set him free at once. According to the Attorney General, Cremona's appeal had suspensive effect on the execution of the judgment and, as a result, his continued detention was illegal. The Magistrates' Court acceded to the Attorney General's request.

32. In a judgment given on 7 January 1998 in the case of Carmelo Sant v. Attorney General, the Maltese Constitutional Court decided as follows:

> "The applicant criticises the decision of the first Honourable Court on the use which could have been made of Article 137 of the Criminal Code.
>
> The applicant reasoned as follows: "With all due respect this is an offence in itself, it is a punishment and not a remedy".
>
> During oral submissions applicant's counsel made reference to a similar comment made by the European Commission on Human Rights with regard to a case still pending before the European Commission [application n^{o} 25642/94]. ...
>
> "The Commission further considers that, in the circumstances of the case making use of Article 137 of the Criminal Code might have led to the punishment of the public officials involved but would not have secured the rights of the applicant under Article 5 § 3 of the Convention. It follows that this is not an effective remedy, within the meaning of Article 26 of the Convention"
>
> If one delves more deeply into the practice of a country, one will note that history is different. More than forty-three years ago, former Chief Justice J.J. Cremona was writing ... about the existence of *Habeas Corpus* in Malta and he traced its roots precisely on this. It is true that this remedy is not often used ... but from the fact that the remedy is not often made use of one cannot infer that the remedy does not exist. In fact recently this remedy was resorted to in the cases of El Digwi (arrest alleged to be illegal) as well as in the Cremona case (contempt of court or the air conditioner case)."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

33. The Government alleged that the applicant did not exhaust domestic remedies, as he failed to make use of the so-called *habeas corpus* procedure provided by Article 137 of the Criminal Code. They moreover pointed out that the applicant had decided not to await for the decision of the Magistrates' Court's on

the merits of the extradition request. In its decision on admissibility the Court considered that the question of exhaustion of domestic remedies was linked to the substance of the applicant's complaint under Article 5 § 4 of the Convention and that it should therefore be joined to the examination of the merits of the case.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

34. The applicant complains that there were no means available to him to challenge speedily his arrest and detention. He invokes Article 5 § 4 of the Convention, which provides:

> "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."

A. The powers of the Magistrates' Court

1. The parties' submissions

(b) The applicant

35. Relying on the Sabeur Ben Ali v. Malta judgment of 29 June 2000, the applicant submits that the Magistrates' Court which had issued the provisional arrest warrant could not review the legality of its own decision and could not order his immediate release since it was dealing with the merits of the extradition request. In this respect, the applicant points out that Section 15 of the Extradition Act specifically lays down that any order of release by the Magistrates' Court cannot come into effect but after the lapse of three days. This situation is even worse than the one examined by the Court in the above cited Sabeur Ben Ali case, as in ordinary criminal proceedings Section 401(3) of the Criminal Code states that if at the end of an inquiry the magistrate is not satisfied that there are sufficient grounds to commit for trial, the release is immediate. Furthermore, as shown by the decision of 12 December 1998 of the Court of Criminal Appeal, it was only possible to seek a remedy from the latter court after an extradition order had been made by the Magistrates' Court.

36. The applicant also underlines that he had raised his objection concerning the lack of jurisdiction of the Magistrates' Court on 3 November 1998 (see paragraph 13 above), and that a decision on this issue was given on 20 November 1998 (see paragraph 15 above), which is seventeen days later.

(b) The Government

37. The Government state that the legal basis of the provisional arrest warrant as well as the lawfulness of the applicant's subsequent arrest and detention were reviewed speedily by the Magistrates' Court which gave its decision on 20 November 1998, just seven days after the applicant had raised the plea of illegality. The fact that no appeal against that decision lay to the Court of Criminal Appeal is irrelevant for the purposes of compliance with Article 5 § 4. The Government further submitted that, in any event, the duty magistrate satisfied himself as to the legality of issuing a provisional arrest warrant against the applicant. The magistrate's review was conducted with respect to the terms of the Extradition Act and the information laid down before him by the authorities. That judicial decision complied with the requirements of Article 5 § 4.

38. The Government emphasise that when the Magistrates' Court, whether as a court of criminal inquiry or as a court of committal for the purposes of extradition, arrives to the conclusion that the arrest is unlawful, it has the authority to order the

immediate release of the person in custody. During the extradition proceedings, the primary function of the Magistrates' Court is to decide whether there are legal obstacles to the requested extradition. It has also the competence to determine any collateral issue which may arise, such as the lawfulness of the arrest of the person brought before it. Its President is in fact a Magistrate who is bound by his duties to attend to any complaint of an unlawful arrest. If he fails to do so, he may be held criminally liable for the offence punished by Article 137 of the Criminal Code. Should the Magistrates' Court find that the arrest is unlawful, it is obliged to order the immediate release. The extradition proceedings will then continue with the person requested free from arrest. The Government refer, on this point, to the decision given on 27 February 2001 in the case of The police v. Pierre Gravina (see paragraph 28 above) and underline that according to Article 15(1) of the Extradition Act, the court of committal in extradition proceedings should have the same powers, as nearly as may be, as the court of criminal inquiry.

39. The Government further note that the reference made by the applicant to Section 15 of the Extradition Act and to Section 401(3) of the Criminal Code is confusing and not relevant in the present case, as these provisions concern discharges which could be granted at the end of the proceedings and have nothing to do with the unlawfulness or otherwise of the arrest. The three day period of further detention provided for in Section 15 of the Extradition Act is therefore not applicable to a finding of the unlawfulness of the arrest.

40. The Government also state that had the Magistrates' Court decided that it lacked jurisdiction to continue examining the case, it would have ordered the applicant's release only in the circumstance that the applicant's unlawful arrest was due to the Court's lack of jurisdiction. However, in the present case the arrest complied with all the conditions laid down in Article 14 of the Extradition Act, and was therefore lawful independently of any issue concerning the jurisdiction of the Magistrates' Court.

2. The Court's assessment

41. The Court recalls that under Article 5 § 4 an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty (see *Jecius v. Lithuania*, no. 34578/97, § 100, 31 July 2000, ECHR 2000). In particular, the competent court should examine not only compliance with the procedural requirements set out in domestic law, but also the legitimacy of the purpose pursued by the arrest and the ensuing detention (see *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001) and should have the power to order the termination of the deprivation of liberty if it proves unlawful (see *Musial v. Poland* [GC], no. 24557/94, § 43, 25 March 1999, ECHR 1999-II, and *Vodenicarov v. Slovakia*, no. 24530/94, § 33, 21 December 2000). Moreover, according to the Court's case-law, Article 5 § 4 of the Convention refers to domestic remedies that are sufficiently certain, otherwise the requirements of accessibility and effectiveness are not fulfilled (see *Sakik and Others v. Turkey*, judgment of 26 November 1997, *Reports of judgments and decisions* 1997-VII, p. 2625, § 53).

42. In the present case, the parties disagreed as to the extent of the power of the Magistrates' Court to order release of its own motion. While the applicant argued that the court at issue could not order his release until a decision on his extradition had been adopted, the Government contended that the Magistrates' Court had the power to order release of its own motion if it came to the conclusion that the arrest was unlawful. Even assuming the Government's interpretation of national law to be correct, the Court considers that Article 5 § 4 would not be complied with. The matters which, by virtue of Article 5 § 4, the "court" must examine go beyond the one ground of lawfulness cited by the Government. The review required under

Article 5 § 4, being intended to establish whether the deprivation of the individual's liberty is justified, must be sufficiently wide to encompass the various circumstances militating for or against detention. However, the evidence before the Court does not disclose that the Magistrates' Court before which the applicant filed his claim for immediate release had the power to conduct such a review of its own motion (see, *mutatis mutandis* and in respect of Article 5 § 3 of the Convention, *Aquilina v. Malta*, judgment of 29 April 1999, *Reports* 1999-III, p. 243, § 52).

43. Moreover, the Court recalls that Article 5 § 4, in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention (see *Musial v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II). The question whether a person's right under Article 5 § 4 has been respected has to be determined in the light of the circumstances of each case (see *Rehbock v. Slovenia*, no. 29462/95, § 84, 28 November 2000, unreported).

44. In the present case, the applicant first raised the plea of unlawfulness of his arrest at the hearing of 3 November 1998 before the Magistrates' Court (see paragraph 13 above). The latter gave a ruling on this plea only seventeen days later, on 20 November 1998 (see paragraph 15 above).

45. In these circumstances, the Court finds that the lawfulness of the applicant's detention was not decided “speedily” by the Magistrates' Court as required by Article 5 § 4 of the Convention (see *Rehbock v. Slovenia*, quoted above, §§ 82-86, in which the Court considered that a delay of twenty-three days in deciding on the applicant's claims for immediate release was excessive). It remains to ascertain whether the applicant had at his disposal other effective and speedy remedies for challenging the lawfulness of his detention.

B. The other remedies available to the applicant

1. The parties' submissions

(a) The applicant

46. As concerns the remedy under Article 137 of the Criminal Code, the applicant affirms that there is not one single case showing that this provision has been used as a remedy with some success.

47. In any case, Article 137 is completely irrelevant in the ambit of extradition proceedings, which are regulated by special rules and based on a treaty. According to the applicant, the Extradition Act of Malta does not provide for any right to apply before a Magistrate for *habeas corpus*, and even if a Magistrate decides to release, his decision is not effective immediately and is subject to appeal.

48. In so far as the failure to continue the constitutional proceedings is concerned, the applicant emphasises that under Maltese law the legal counsel who accepts a mandate before the First Hall of the Civil Court substitutes his client, becomes a party in the proceedings and therefore looses his independence. In any case, he considers that an application before the First Hall of the Civil Court could not be seen as an effective remedy and that his claim had not been decided speedily.

(b) The Government

49. The Government observe that the applicant could have made use of the remedy provided for in Article 137 of the Criminal Code. Under this provision, everyone who wants to challenge the lawfulness of his arrest or detention may have recourse to the so-called *habeas corpus* procedure, which is analogous to the well-known English common-law remedy. At the time the Court gave its judgment

in the case of Aquilina v. Malta (see judgment cited above, §§ 33 and following), it was uncertain whether the remedy under Article 137 of the Criminal Code could be invoked with respect to arrests alleged to be unlawful for reasons other than an arrest beyond the forty-eight hours time-limit. However, this uncertainty has been removed by the judgment in the case of Carmelo Sant v. Attorney General, in which the Maltese Constitutional Court stated that the remedy of *habeas corpus* was available in all cases of alleged unlawful arrest and detention (see paragraph 32 above). The Government emphasise that the remedy at issue had been successfully invoked in the cases of Anthony Price and Christopher Cremona (see paragraphs 30 and 31 above).

50. Moreover, the Government point out that the applicant had chosen not to wait for the Magistrates' Court's decision on the merits of the extradition request. In the event of a ruling against him he could have appealed to the Court of Criminal Appeal. Instead, he immediately applied to the First Hall of the Civil Court, raising the issue of breach of Article 5 § 4 of the Convention in his application of 23 December 1998. Then, he decided not to pursue these proceedings and his action was declared deserted.

51. According to the Government, there was nothing in Maltese law which prevented the applicant from continuing the constitutional proceedings after his removal to the Netherlands. He simply had to give a power of attorney to a third party to represent him. The Government dispute the claim of the applicant's lawyer that the voluntary assumption of the applicant's case would have raised serious issues of professional ethics. In the Government's view, the lawyer's concerns are in effect linked to the payment of the costs of the action. They further note that the same lawyer was able to obtain and act upon a power of attorney for the purposes of the proceedings before the Court.

2. The Court's assessment

52. The Court has examined the cases invoked by the Government in support of their contention that the applicant could have obtained a review of the lawfulness of his detention by invoking Article 137 of the Criminal Code. The Court considers that, as it transpires from its wording, this provision primarily aims at the punishment of officials who fail to attend to complaints about the lawfulness of detention. It is true that in some instances courts have relied on this provision as a basis for ordering the detainee's release. However, apart from the Anthony Price case which concerned the 48 hour time-limit for bringing arrested persons before a magistrate having been exceeded (see paragraph 30 above) and the Christopher Cremona case, which concerned the suspension of the execution of a judgment in a situation in which both the defence and the prosecution agreed that the arrest was illegal (see paragraph 31 above), the Government did not refer to any instances in which Article 137 was successfully invoked to challenge the lawfulness of arrest or detention of a person against whom action was being taken with a view to extradition. In the applicant's case the 48-hour time-limit had not been exceeded, he had not been convicted by a competent court and the prosecution did not support his claim of unlawfulness of his arrest. The Court therefore finds that the Government have not shown that the applicant could have obtained a review of the lawfulness of his detention by relying on Article 137 of the Criminal Code (see *Sabeur Ben Ali v. Malta*, no. 35892/97, § 39, 29 June 2000, unreported).

53. As concerns the applicant's failure to pursue his claim before the First Hall of the Civil Court, it is to be recalled that the aim of Article 5 § 4 is to ensure a "speedy" review of the lawfulness of detention (see, for instance, *Baranowski v. Poland*, no. 28358/95, § 68, 28 March 2000, ECHR 2000-III). The Court notes that, according to the description given by the Government in the above-quoted Sabeur Ben Ali case, lodging a constitutional application involves a referral to the First Hall of the Civil Court and the possibility of an appeal to the Constitutional

Court. This is a cumbersome procedure especially since practice shows that appeals to the Constitutional Court are lodged as a matter of course. Moreover, recent practice shows that the relevant proceedings are invariably longer than what would qualify as "speedy" for Article 5 § 4 purposes (see the *Sabeur Ben Ali* judgment, cited above, § 40). In the present case, the applicant's claim to the Civil Court was lodged on 23 December 1998 (see paragraph 17 above) and was still pending on 15 January 1999, date on which the applicant was discharged and released (see paragraphs 20 and 21 above). It follows that pursuing the constitutional application would not have provided the applicant with a speedy review of the lawfulness of his detention.

54. It follows that it has not been shown that the applicant had at his disposal under domestic law a remedy for challenging the lawfulness of his detention. Article 5 § 4 of the Convention was therefore violated. As a result, the Government's objection as to the exhaustion of domestic remedies should be rejected.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claims 15 000 Maltese Lire (Lm) for pecuniary damage. He emphasises that the extradition proceedings prevented him from attending his business (he is a shop keeper in the Netherlands) for three months. Moreover, some members of his family came to visit him in Malta, and he had to sustain travel expenses.

57. The applicant moreover claims Lm 5 000 in respect of moral damage. He alleges that he had suffered distress because of the length of the proceedings. He was obliged to live away from his family and was kept in a prison in which, because of the language, he had difficulties to communicate, even with reference to simple needs. The applicant considers that there is a causal link between the alleged violation of the Convention and his moral sufferance, as the warrant for his arrest should not have been issued on the sole request of Interpol.

58. The Government request that the applicant's claims be rejected. As to the pecuniary damage, they observe that the applicant failed to produce any evidence supporting his allegation that he is a shop keeper in the Netherlands and that he incurred a consistent loss of income due to his detention in Malta. In any case, no causal link can be established between the alleged damage and the violation of Article 5 § 4 of the Convention, as nothing shows that if this provision had been complied with the applicant's arrest and detention would have been declared unlawful. In this respect, the Government recall that in its decision on the admissibility of the application the Court concluded that the complaint raised by the applicant under Article 5 § 1 (f) was manifestly ill-founded.

59. As concerns the non-pecuniary damage, the Government point out that the applicant has not substantiated his claim concerning the linguistic difficulties he had to face in prison. The living away from his family was a normal consequence of his detention and the legal proceedings against him were conducted with the requisite expedition. In any case, there is no causal link between the damage claimed by the applicant and the breach of the Convention.

60. The Court dismisses the claim relating to material damage because there is no causal link between the alleged loss and the breach found by the Court. The Court cannot speculate about the outcome of the proceedings. On the other hand, the Court considers that the applicant undoubtedly sustained non-pecuniary damage on account of his lack of access to a court which could have reviewed the lawfulness of his detention. Having regard to the particular circumstances of the case and deciding on an equitable basis as required by Article 41 of the Convention, the Court awards the applicant 5,000 euros (EUR).

B. Costs and expenses

61. The applicant also sought the reimbursement of Lm 1 415,66 for costs incurred before the domestic tribunals and Lm 1 500 for costs incurred before the Court.

62. The Government observe that the expenses before the Magistrates' Court and the Court of Criminal Appeal would have been incurred independently of any breach of Article 5 § 4 of the Convention. The proceedings before the First Hall of the Civil Court were voluntarily abandoned by the applicant, and any cost in this connection - which should have been, in any case, proved by an official taxed bill of costs - was caused unnecessarily. Therefore, the Government consider that the applicant's claim for reimbursement of the expenses incurred before the domestic authorities should be entirely rejected.

63. As concerns the costs before the Court, the Government observe that the complaint under Article 5 § 1 (f) had been declared inadmissible, that there was no hearing in Strasbourg and that the proceedings were exclusively conducted in writing. In the light of the foregoing, the Government consider that the applicant's claim in this respect is excessive both in absolute terms and with regard to the amounts awarded for professional fees in Malta.

64. According to the Court's established case-law, an award can be made in respect of costs and expenses incurred by the applicant only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, p. 573, § 49). In the present case, the applicant has failed to submit a detailed note of the expenses he had sustained. However, it should be taken into account that before introducing his application in Strasbourg the applicant, represented by a lawyer of his own choosing, had tried on many occasions to challenge the lawfulness of his arrest before the Maltese authorities. The Court therefore accepts that the applicant incurred some costs, both at the national and at the European level, in order to put right the violation of the Convention (see, *mutatis mutandis*, *Rojas Morales v. Italy*, no. 39676/98, § 42, 16 November 2000, unreported). Having regard to the particular features of the present case, the Court considers it appropriate to award the applicant 1,000 EUR for the costs incurred before the domestic courts and 1,500 EUR for the proceedings before it, and therefore a total sum of 2,500 EUR.

C. Default interest

65. The Court considers that the default interest should be fixed at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Rejects* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 5 § 4 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 according to Article 44 § 2 of the Convention, the following amounts, to be converted into Maltese liras on the date of settlement:

(i) EUR 5,000 (five thousands euros) in respect of non-pecuniary damage;

(ii) EUR 2,500 (two thousands and five hundreds euros) in respect of costs and expenses;

(b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English, and notified in writing on 9 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

Noot B.P. Vermeulen bij *JV* 2003/129

1. In dit arrest is aan de orde of de rechterlijke toetsing in Malta van een uitleveringsdetentie voldoet aan de eisen van artikel 5 lid 4 EVRM. Het Hof is om twee redenen van oordeel dat dat niet het geval is. Allereerst meent het Hof dat de omvang van de rechterlijke toetsing te beperkt is: deze toetsing betreft blijkbaar enkel de vraag of er een geldig uitleveringsverzoek is, dat betrekking heeft op een feit dat - indien in Malta begaan - strafbaar zou zijn en waarvoor voldoende bewijs is om tot strafvervolging over te gaan (artikelen 14 en 15 van de betreffende Uitleveringswet). Het Hof overweegt: 'The matters which, by virtue of Article 5 § 4, the "court" must examine go beyond the one ground of lawfulness cited by the Government. The review required under Article 5 § 4, being intended to establish whether the deprivation of the individual's liberty is justified, must be sufficiently wide to encompass the various circumstances militating for or against detention' (r.o. 42). Als ik het wel zie komt deze overweging er op neer, dat de detentierechter een inhoudelijke toetsing moet (kunnen) verrichten met betrekking tot de detentie, en zo een toetsing dus niet beperkt mag blijven tot de vraag of de uitlevering toelaatbaar is. Als deze uitleg juist is, dan is artikel 59 lid 2 Vw 2000 niet onverkort te handhaven. Ingevolge de letter van deze bepaling wordt de openbare orde geacht vreemdelingenbewaring te vorderen indien de voor de terugkeer noodzakelijke bescheiden voorhanden zijn of binnen korte termijn voorhanden zullen zijn. De rechter, geroepen om een dergelijke bewaring aan de hand van artikel 5 lid 1f EVRM te beoordelen, zal in het licht van artikel 5 lid 4 EVRM niet kunnen volstaan met de toetsing of voormelde bescheiden voorhanden zijn of binnenkort voorhanden zullen zijn. Overigens bieden de toelichtingen bij artikel 59 lid 2 Vw 2000 voldoende aanknopingspunten voor een verdergaande, meer inhoudelijke toetsing, zie de vindplaatsen in mijn commentaar op deze bepaling in H.W. Groeneweg, I.H. van den Berg, Vreemdelingenwet 2000. Tekst en toelichting, Sdu Den Haag 2002, p. 224-225; zie ook Baudoin, Van de Burgt en Hendriksen, Vrijheidsontneming van vreemdelingen, Den Haag 2002, p. 160-165. Vgl. Rb. Den Haag zp. Zwolle 18 mei 2001, JV 2001/175.

2. Belangwekkend is, ten tweede, dat het Hof van oordeel is dat het tijdsverloop van 17 dagen tussen het aanvoeren van het argument dat de bewaring onrechtmatig is en het tijdstip van beslissen ter zake niet voldoet aan de eis van artikel 5 lid 4 EVRM dat de rechter spoedig over de rechtmatigheid oordeelt (r.o. 44-45). Als ik het goed zie betekent dit dat de rechter ten aanzien van het (eerste) beroep tegen een vorm van vreemdelingendetentie in ieder geval binnen een termijn korter dan 17 dagen moet beslissen. Wat ik niet geheel begrijp is de verwijzing naar het Rehbock-arrest (EHRM 28 november 2000), waarin het Hof tot de conclusie kwam dat een termijn van 23 dagen tussen het indienen van de klacht en de uitspraak niet voldeed aan het spoedvereiste: daaruit vloeit natuurlijk niet uit voort dat een termijn van 17 dagen daar dus (ook) niet aan voldoet.

3. De vraag is hoe wetsvoorstel 28749 zich tot dit arrest verhoudt. Dit wetsvoorstel verlengt onder meer de maximumtermijn ex artikel 94 lid 2 Vw 2000 waarbinnen het onderzoek ter zitting na ontvangst van het beroepschrift dient plaats te vinden van zeven naar veertien dagen. Ingevolge artikel 94 lid 3 Vw 2000 moet binnen zeven dagen na de sluiting van het onderzoek uitspraak worden gedaan. Met gebruikmaking van de mogelijkheid om het onderzoek ter zitting ex artikel 8:64 lid 1 Awb te schorsen (ABRvS 4 juli 2001, JV 2001/239), dan wel met volledige benutting van de ruimte die de voorgestelde termijn van artikel 94 lid 2 jo. lid 3 Vw 2000 zal gaan bieden, zal de rechter al snel in strijd komen met de termijn van artikel 5 lid 4 EVRM. In de Memorie van toelichting bij genoemd wetsvoorstel wordt op deze kwestie helaas niet ingegaan.

4. Het wetsvoorstel wil de termijn waarbinnen de minister mededeling moet doen van vreemdelingenbewaring (artikel 94 lid 1 Vw 2000) verlengen van 3 naar 28 dagen. Door de Raad van State gevraagd naar de verenigbaarheid hiervan met artikel 5 lid 4 EVRM antwoordde de regering dat zich hierbij geen problemen voordoen, nu de wijziging van de kennisgevingstermijn onverlet laat dat de vreemdeling zelf onmiddellijk beroep bij de rechter kan instellen (Kamerstukken II 2002-2003, 28749 nr. 3, p. 3). Dit standpunt lijkt mij juist, mede gezien de door de regering genoemde arresten (EHRM 18 september 2001, Arslan v. Nederland en EHRM 1 oktober 2002, Tekdemir v. Nederland).

BPV