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

FIRST SECTION

DECISION

Application no. 19090/20
Yorgen FENECH
against Malta

The European Court of Human Rights (First Section), sitting on 23 March 2021 as a Chamber composed of:

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Alena Poláčková,
Péter Paczolay,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*

and Renata Degener, *Section Registrar,*

Having regard to the above application lodged on 6 May 2020,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Yorgen Fenech, is a Maltese national, who was born in 1981 and lives in St Julian's. He is represented before the Court by Mr W. Jordash, a lawyer practising in Den Haag, the Netherlands.

THE CIRCUMSTANCES OF THE CASE

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

A. Background to the case

2. The applicant is a businessman and the former head of the Tumas Group. He was arrested on his yacht on 20 November 2019 on suspicion of involvement in the murder of Maltese journalist

Daphne Caruana Galizia in October 2017. On the same day he was released on bail.

3. On 30 November 2019, the applicant was arraigned before the Court of Magistrates acting as a court of criminal inquiry, and was accused of promoting, organising or financing an organisation with a view to committing a criminal offence, and complicity in wilful homicide. The applicant pleaded not guilty to the charges. He was remanded in custody and has since then been detained in the Corradino Correctional Facility, Paola, Malta.

B. Bail applications made prior to the spread of the Covid-19 pandemic

1. First bail application

4. On 18 December 2019 the applicant made his first bail application before the Court of Magistrates.

5. At a hearing of 23 December 2019, after examining the request and hearing the parties, as well as the witnesses, and examining the material evidence produced, the court rejected the application as it was not satisfied that the risks listed in Article 575 of the Criminal Code, Chapter 9 of the Laws of Malta (see paragraph 58 below) did not exist.

6. In particular, it referred to the risk of manipulation of evidence and interference with the course of justice at a point in time when police investigations relating to the murder were highly active. It considered that granting the accused bail at that stage would have the effect of disturbing public order in the sense of the Court's decision in the case of *Letellier v. France* (26 June 1991, Series A no. 207) and other more recent case-law.

7. On the same day it considered that for the purposes of Article 401 (2) of the Criminal Code there existed sufficient grounds for committing the accused for trial. It sent the case file to the Attorney General and adjourned the hearing to 30 January 2020.

2. Second bail application

8. On 30 January 2020, the applicant made his second bail application, which was rejected by the Court of Magistrates on 20 February 2020 after hearing the parties and relevant witnesses.

9. The Court of Magistrates noted that while the existence of reasonable suspicion was a *sine qua non* for the validity of the continued detention, under domestic law when dealing with a crime punishable by life-imprisonment according to Article 575 (1) of the Criminal Code, bail was to be denied if at least one of the dangers enlisted therein existed. It considered that since the rejection of his application a few weeks earlier, there had been no new elements which could justify a different conclusion.

To the contrary, from the testimonies and evidence produced, it transpired even more clearly than before that there were third parties who might have been involved in the murder, as well as other persons who might also have had a role in the murder, or whose testimony was relevant, who had not yet been summoned to give evidence. Thus, there still existed a real danger of manipulation of the course of justice, which could not be minimised by granting bail subject to conditions. That danger had in fact assumed more significant proportions and was sufficient to justify a denial of bail. Nevertheless, on top of that, the release of the applicant at that stage concerning such a sensitive matter could give rise to elements of social disturbance and public disorder (see *Kubicz v. Poland*, no. 16535/02, 28 March 2006) particularly against the backdrop of the instability and disorder which had evidently taken a grip of Maltese society at the time of the murder and on the applicant's arrest.

10. On the same day the committal proceedings were adjourned to the 27 March 2020 and the case file was sent to the Attorney General who had a six-week window to return the file.

C. Legal measures introduced during the Covid-19 crisis in Malta

11. Due to the spread of the coronavirus, on 13 March 2020, the Superintendent of Public Health declared, by virtue of Legal Notice ('L.N.') 115 of 2020, in accordance with Article 14 of the Public Health Act and with effect retrospectively from 7 March 2020, that a public health emergency existed in Malta.

12. On 13 March 2020 the Maltese Department of Information published L.N. 65 of 2020, namely "Closure of the Courts of Justice Order, 2020" (further amended on 23 March 2020 by way of L.N. 97 of 2020), as well as L.N. 61 of 2020, namely "Epidemics and Infectious Disease (Suspension of Legal and Judicial Times) Order, 2020" (further amended on 18 March 2020 by way of L.N. 84 of 2020, and again on 10 April 2020 by way of L.N. 141 of 2020) ("Emergency Measures").

13. Cumulatively, the Emergency Measures closed the courts of justice and the court registry with effect from 16 March 2020 and suspended the running of any legal or judicial times as well as any time period under any substantive or procedural law - such orders remaining in force until seven days following the lifting of the said orders of the Superintendent.

14. Regulation 3 of L.N. 61 of 2020 provided for "the power of any court to order the opening of its registry, the hearing of any case and anything consequential and incidental thereto in urgent cases or in cases where it deemed that the public interest in having the case heard should prevail, subject to any specific arrangements for the guarding against and, or controlling dangerous epidemics or infectious disease as the court may determine."

D. Applications made during the Covid-19 crisis

1. Habeas corpus *petition*

15. On 1 April 2020 the applicant's lawyers filed a *habeas corpus* application (an application by a person in custody pending criminal proceedings alleging unlawful detention under Article 412B of the Criminal Code – see paragraph 58 below) before the Criminal Court.

16. The applicant argued that in light of Article 34 (3) of the Constitution of Malta, which is reflected in Article 5 § 3 of the European Convention on Human Rights, the decision to suspend all criminal proceedings until an unspecified date amounted to a *sine die* suspension, which meant that the applicant could not be tried within a reasonable time while he was detained. This, in his view, rendered his detention unlawful and therefore he considered that he should be granted bail. He also argued that in the absence of any certainty, specificity or foreseeability concerning when the courts might reopen, his continued detention lacked any legal basis, making his detention unlawful. Moreover, he noted that the cessation of proceedings was depriving him of his right to contest the legality of his detention, which again, in his view meant that the detention was unlawful.

17. On 2 April 2020 his petition was rejected. The Criminal Court noted firstly that since the suspensory measures had been put in place - that is the period since when the applicant claimed to have been detained unlawfully - no hearing had taken place in the applicant's case which was pending before the court of inquiry – this he had claimed made his detention unlawful. However, as argued by the Attorney General, the applicant had not made a request to have his proceedings continued, a safeguard provided for under Regulation 3 (2) of L.N. 61 of 2020 which stipulated that the courts had the power to hear urgent cases or cases where they deemed that the public interest in having the case heard should prevail. Nor had he requested bail during such period. It was indeed necessary for the courts to provide legal remedies for individuals, and the law provided for such remedies, so much so that the court was also determining the applicant's present application within twenty-four hours of it having been lodged. It was therefore wrong to claim that his detention was unlawful, given that he had access to such remedies.

18. Further, it could not be ignored that the applicant was charged with serious criminal offences, he was arrested and arraigned before the court within forty-eight hours of his arrest – that court validated his arrest. His case was being heard according to law, and the compilation of evidence was proceeding before the court of inquiry in accordance with the law and in line with all the judicial and legal timeframes, until the suspension came to be. His bail requests were also heard and rejected given that the applicant's detention was necessary in the circumstances - the requirements of

Article 575 of the Criminal Code (see paragraph 58 below) not having been satisfied.

19. Thus, in the court's view the applicant's request was premature, but also unfounded considering that his detention was lawful and therefore that there was no room for an unconditional request for bail [release]. He could however request bail [conditional temporary release] under Article 574 *et sequitur* of the Criminal Code (see paragraph 58 below). The applicant could not decide, *a priori*, of his own accord that his requests would be refused.

20. It was for the national authorities to consider, in a given case, that the duration of the detention on remand does not exceed a reasonable time. According to the Criminal Court although Malta had not submitted a derogation to this effect under Article 15 of the ECHR, the right to liberty was not an absolute right in a state of emergency such as the Covid-19 pandemic which was an international emergency. In its view, the applicant's arrest could not be considered neither unlawful nor arbitrary, even more so given the remedies open to him.

2. Third bail application

21. On 6 April 2020 the applicant filed a bail application before the Criminal Court arguing, *inter alia*, that: (i) the suspension of the court proceedings *sine die*, amounted to a change in circumstances justifying bail; and that (ii) there were no relevant grounds pursuant to Article 575 of the Criminal Code to deny bail. He noted in particular that the travel ban imposed *via* the emergency measures made it inconceivable to abscond, and that had there been fear of manipulating witnesses, the prosecution should have presented them earlier.

22. On 7 April 2020 the Criminal Court denied bail. It noted that the applicant was charged with the serious crime of voluntary homicide and he had only been arraigned four months prior, during which time proceedings were being heard in an expeditious manner.

23. It noted that the applicant had lodged two bail requests within such time, both of which had been rejected. Thereafter the suspension of court work was decreed at a time when the case file was in the hands of the Attorney General (Article 405 of the Criminal Code, see paragraph 58 below) who could not send it back to the court of inquiry in view of the suspension, thus impeding the continuation of the proceedings. Nevertheless, there had been no change in circumstances since his last bail request eight weeks earlier, and all the dangers indicated then had not disappeared because of a global pandemic which necessitated the closure of the courts of justice.

24. Moreover, the applicant could ask the courts, under Regulation 3 (2) of L.N. 61 of 2020 to resume his proceedings, while taking all the necessary

precautions and measures to ensure the health of all those present at such hearing.

25. Referring to the Court's case-law it noted that in the present case there was no doubt that the facts of the case were much wider than those reflected in the procedural acts. The *in genere* inquiry [an inquiry conducted by a Magistrate for the purposes of listing and preserving the material traces of an offence] into the murder of Daphne Caruana Galizia was still ongoing and there were still strong suspicions that some of the wrongdoers involved in the crime had not yet been intercepted. Thus, in view of the wide-reaching active investigation there was a risk that the granting of bail would pose a threat to the administration of justice. Further, the Criminal Court reiterated that in cases concerning organised criminal activity or gangs, the risk that a detainee, if released, might bring pressure to bear on witnesses or co-suspects, or otherwise obstruct proceedings, was often high. Indeed, the applicant himself had admitted that he had been approached to carry out acts of obstruction. According to the Criminal Court, the vast and serious facts surrounding the case were causing fear of public disorder, and quite apart from the particular subject matter of the case and the seriousness of the charges, the proceedings were still at an early stage with a number of witnesses who had yet to testify. Thus, the applicant's detention at this stage remained justified.

3. Application pursuant to Regulation 3 of L.N. 61 of 2020

26. On 8 April 2020, the applicant filed an application before the Criminal Court pursuant to Regulation 3 (2) of L.N. 61 of 2020, asking the Criminal Court to order the Attorney General to send the case file to the Court of Magistrates as a court of criminal inquiry for resumption of the compilation of evidence proceedings and the hearing of evidence.

27. On the same day the Criminal Court rejected his request. It noted that the three legal notices suspending court work as of 7 March 2020 until seven days after its eventual revocation, had been issued in the interest of public health, due to the exceptional state of affairs related to the pandemic. Nevertheless, the courts continued to hold regular sessions where there were reasons of urgency and public interest (as evidenced by this decree, and two other decisions given in reply to the applicant's applications during such time – see paragraphs 17 and 22 above).

28. It considered that, while all criminal proceedings were of importance, in view of the public health emergency situation other considerations had to be weighed in. One of the main reasons for the closure of the courts was to prevent large numbers of people gathering in closed places contributing massively to the spread of Covid-19. The Criminal Court thus considered that the applicant's case could not benefit of the exception provided in Regulation 3 (2) of L.N. 61 of 2020 given that the proceedings were still at inquiry stage, namely, the compilation of evidence

proceedings in front of the Court of Magistrates as a court of criminal inquiry. This stage was regulated by strict procedural laws that mandated the presence of the parties in a building and physical space and that required the presence in the court room of a substantial amount of people in a confined space and for a considerable amount of time. It would see large numbers of the public, who had a right to be present in the hearings and would further require commuting for each person in order for such proceedings to take place. This was even more so in the applicant's case where proceedings had been followed by a large number of people. Although some witnesses could be heard by video conferencing, the current criminal procedure did not exempt the physical presence of the accused and court officials including the defence lawyers, the public prosecutors and lawyers from the Attorney General's office, the civil party and their lawyers, other police officers, as well as court personnel including marshals, messengers, the deputy registrar as well as the judge or magistrate. This was besides the inevitable element of movement and commuting again involved for each person. Moreover, there was insufficient digital infrastructure and logistics allowing the proceedings to be heard electronically. Thus, bearing in mind, on the one hand, the element of urgency and public interest in the applicant's case, and, on the other hand, the risk of contagion should the proceedings be resumed, the Criminal Court considered that the prevailing consideration was that of the public health of all those involved directly or indirectly in these criminal proceedings including the applicant himself.

4. Fourth bail application

29. On 16 April 2020 the applicant made another application for bail before the Criminal Court, again raising the issue of the *sine die* suspension of court proceedings, which he considered, combined with the risks of contracting Covid-19 whilst incarcerated, violated his right to life and freedom from ill-treatment. In particular, he noted that his medical condition - the previous loss of a kidney - placed him at a significant danger to his health and survival if he contracted Covid-19. An expert medical note was relied upon according to which the applicant was at a higher risk than a normal person to develop severe complications from the Covid-19 infection (see paragraph 40 below). The applicant also referred to the fact that the prison being under lockdown since 8 April 2020 he was being denied family visits and his meeting with his lawyers had been subject to formalities. The applicant submitted that he was willing to produce a sufficient surety in terms of Article 577 (1) of the Criminal Code, and that there existed none of the dangers enlisted in Article 575 of the Criminal Code. *Inter alia*, in reply to the Attorney General's pleadings, he insisted that when he had been arrested on his yacht, he had not intended to abscond but only to leave Malta to effect planned repairs to his boat.

30. On 21 April 2020, the applicant's request for bail was rejected. The Criminal Court considered:- the serious crime with which the applicant was charged; the evidence collected to date which shed light on the alleged involvement of the applicant in the crimes with which he was charged; the time during which he was detained, that is as of 30 November 2019; the complex nature of the investigations (including an *in genere* inquiry which was still ongoing, as well as other investigations by the Police, multiple involved persons including the physical perpetrators whose trials where ongoing, and foreign assistance in investigations requiring the collaboration of the police, the judicial authorities and various experts) which required more time and exceptional resources when compared to other cases; the stage of proceedings which involved further witness testimony to be heard and potential procedural pleadings heightening what it considered as a real risk of witnesses being influenced and the applicant obstructing the course of justice. It also considered the accused's previous conduct, namely his clean record; his community ties and the risk of absconding (largely debated in his previous application) – in particular in view of the maximum penalty the applicant could incur and the limited places of hiding available on a small island like Malta; as well as the fact that if he absconded proceedings would be stopped, since under Maltese law proceedings could not continue *in absentia*. This was also in the light of his sound financial means and various contacts with foreign jurisdictions, including outside of the European Union.

31. Moreover, other circumstances gave specific indications of a genuine requirement of public interest which outweighed the rule of respect for individual liberty. In particular, the homicide with which he was charged had a bigger impact than other homicides as it concerned a journalist who had been killed by means of a car bomb; in connection with her work, her published writings and inquiries; and it occurred at a very specific time and within a historical and socio-political context. The murder had an impact at an international level drawing the attention of media worldwide and reactions by organisations including the Council of Europe.

32. The Criminal Court highlighted the importance of the stage of proceedings which under domestic law gave a large number of rights to the accused during the inquiry stage and which required time and special diligence. Unfortunately, this case had been struck by the unnecessary complications linked to the Covid-19 pandemic. However, this had led to the limitation of the freedoms of all person in Malta, including businesses and workplaces, as well as restricting visits to institutions and hospitals. All these restrictions had been justified for public health reasons, as was the decision to close the courts, which, moreover, was only a temporary measure. Nevertheless, the Criminal Court called for logistical and legal arrangements so that the courts of justice be able to operate in virtual mode and at least part of the applicant's complaints would be resolved.

33. The Criminal Court considered, however, that bail could not be granted as any changes to the circumstances were minimal. The applicant had mainly reiterated his claims despite a decision being given only two weeks earlier. Moreover, the Criminal Court was not convinced that if bail were to be granted, the applicant would be able to provide sufficient guarantees that he would appear for trial, or that he would not abscond or that he would respect all conditions imposed on him, or that he would not commit other crimes, or manipulate witnesses and obstruct the courts of justice. Given his medical situation the Criminal Court nonetheless ordered the director of prisons to pay particular attention to the applicant's medical needs in this time of pandemic.

E. The continuation of the criminal proceedings

34. By a decision of 19 May 2020 (before the decision of the constitutional jurisdiction – see paragraphs 42 and 47 below), upon the request of the Attorney General, the Criminal Court authorised the latter to return back the records of the inquiry, which where thus returned on (or before) 25 May 2020 for the continuation of the proceedings. The proceedings resumed on 1 June 2020 (while the courts were still closed according to the emergency measures).

35. According to a list published by the Registrar of Courts on 11 May 2020, seventeen hearings had taken place till then, in committal proceedings other than those of the applicant, during the closure of the courts.

F. Conditions of detention at the Corradino Correctional Facility

36. The applicant claimed that ever since he had been remanded in custody, he endured a mixture of abusive, unsanitary and unhealthy conditions of detention.

37. According to the applicant, from 30 November 2019 to 3 January 2020, he was placed in solitary confinement. During that time i) he was not given any warm clothing or socks, was left in a cell in used shorts and t-shirt provided by the prison and refused access to his own clothing; ii) he did not have proper bedding in his cell, which had a makeshift bed which was a piece of foam on the floor, without any sheets or pillows; iii) he was forced to use a hole in the ground of his cell as a bathroom, and there was no provision for flushing, and no hand basins to wash his hands; iv) the cell had only artificial lighting, and the neon tube was left on twenty-four hours and seven days a week; v) the applicant was only allowed sixty minutes out of his cell a day, within which time he was expected to eat, wash up, clean his cell, and finally take a break. During this break, the applicant was not allowed to go outside for fresh air or sunlight, and his movement was restricted to visiting another room; vi) he was not given any

water or cigarettes from 10 p.m. - 6 a.m.; and was not allowed access to any books from the library for the first twenty-seven days.

38. Since 4 January 2020 onwards, the applicant was moved to a dormitory, the conditions of which he also considered unsanitary and unhealthy. He shared his cell with four or five other detainees (whose identity could change). The cell measured 34.8 sq. m. and each detainee had less than 4 sq. m. of free space. The detainees slept on bunk beds and shared a toilet, shower, and handbasin. They had to wash their clothes, dishes and plates in the same handbasin. The applicant was not allowed to use the gym for exercise. Instead, he was able to walk in a yard for thirty minutes per day. The remainder of the day, he was confined to the shared cell.

39. The applicant submitted that he was in daily contact with guards (who were rotated every week) and nurses and a chaplain (who also rotated). On any single day, the applicant was exposed to 10 persons who left the prison at least weekly[1]. The applicant was not allowed to go to mass or church; was subjected to CCTV surveillance in his cell; was deprived of family visits and was only allowed to speak to his family by Skype once. While he was able to discuss legal issues with his counsel on a confidential basis in person, all legal documents were (temporarily) seized and could be read or photocopied by the prison authorities. Moreover, confidential meetings with the applicant and his lawyers were under surveillance through a CCTV.

G. The applicant's medical background

40. The applicant is thirty-eight years of age and has only one kidney. On 12 April 2020, a Consultant Surgeon AA wrote a report stating that he was "susceptible in any infective situation such as Corona virus infection leading to Covid-19 which has been shown to be associated not only with respiratory complications but also with the development of renal complications which will be aggravated in a patient like the applicant who at present already has a reduced renal reserve as a consequence of only having one kidney".

H. Constitutional redress proceedings

41. The applicant instituted constitutional redress proceedings before the Civil Court (First Hall) in its constitutional competence on 1 May 2020, seeking a declaration of breaches of Articles 5 § 1 (c) and 5 § 3 and 5 § 4 of the Convention and asked the court to release him.

[1] Note by the Registry: During the Covid-19 confinement, prison guards were maintaining week-long shifts, to avoid a daily rotation of persons and limit any possible contagion.

1. First-instance

42. By a judgment of 29 May 2020 the Civil Court (First Hall) in its constitutional competence found a breach of the applicant's rights under Article 5.

43. The court referred to the meaning of a State of Emergency under Article 47 of the Constitution and that of the right to liberty under the Constitution and the Convention. It was of the view that all compilation of evidence proceedings in respect of persons who were remanded in custody pending trial (and who were presumed innocent unless they pleaded guilty) should, *a priori*, have been considered urgent and should not have been subject to any urgency or public interest application [under Regulation 3 of L.N. 61 of 2020]. In the court's view, the discretion given to judges under L.N. 61 and 65 of 2020 could lead to conflicting decisions. In fact in certain cases proceedings continued despite the accused being on bail, while those of others, including the applicant were suspended *sine die*.

44. The court reiterated that the law had to be precise, accessible and foreseeable, so as to avoid any risk of arbitrariness. It required safeguards against arbitrariness which included the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention. In the court's view a complete suspension of proceedings could never be considered reasonable, and according to the Court's case-law the fact that detention was prolonged for an unlimited and unforeseeable period of time was contrary to the principle of legal certainty.

45. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT') had also stated that any restrictive measure taken vis-à-vis persons deprived of their liberty to prevent the spread of Covid-19 should have a legal basis and be necessary, proportionate, respectful of human dignity, and restricted in time. Fair Trials International [a United Kingdom Non-Governmental Organisation] had also stated[2] that it was essential that States continue to carry out essential functions, including the processing of criminal cases, and safeguarding the rights and welfare of criminal defendants, especially those who were detained. Moreover, according to the court, had the health situation necessitated such measures, then they should have applied to everyone and no exceptions should have been made.

46. The court noted that the Superintendent of Public Health had testified that it was not within her remit to deal with situations concerning the continuation of compilation of evidence proceedings, which was to be decided by the courts, after which she would give [logistical] advice according to the specific circumstances. However in the court's opinion, it was for the Superintendent of Public Health together with the Court

[2] Coronavirus (COVID-19): The impact on prison, probation and court systems Fair Trials submission to the Justice Committee.

Services Agency to undertake a risk assessment on the publicly accessible areas of the courts, in a real scenario of compilation of evidence proceedings had they to be continued. It should not have been left to the courts to determine whether considerations of public health prevailed over the fundamental rights of such accused persons, and whether the court environment was sufficiently safe, and if not, what measures should be taken. In the court's opinion, since the President had not issued a proclamation under Article 47 (2) (b) of the Constitution (and not derogated in terms of Article 15 of the Convention), and the current measures were solely the result of a declaration of a public health emergency in terms of the Public Health Act, the legal notice could not prevail over fundamental rights. Thus, the suspension of the compilation of evidence for persons held in custody was in breach of Article 5, and its equivalent in the Constitution. For that reason, the court held that the Attorney General should not have relied on those legal notices to refrain from sending the case file back to the court for proceedings to continue.

47. The court thus ordered that the suspension be lifted and that the case file be sent back to the inquiry court for the compilation of evidence proceedings to resume. It would then be for that court to decide on any requests for release.

2. Appeal

48. On appeal by the State Advocate, on 23 November 2020 the Constitutional Court reversed the first-instance judgment.

49. The Constitutional Court held that the applicant had not suffered an indefinite detention. Indeed, the impugned legal notice had given the courts discretion as to whether or not to continue proceedings as well as to decide on bail requests. On that basis, the multiple bail requests presented by the applicant throughout the time when the courts had been closed, had nevertheless all been decided by the courts on the basis of an individualised assessment.

50. Furthermore, on the basis of that discretion, on 19 May 2020 the Criminal Court lifted the suspension (see paragraph 34 above) and the applicant's proceedings had been resumed while the courts had still been closed. Thus, the impugned legal notices had not affected him.

51. However, even assuming that he had been affected, the State had opted for a state of public health emergency instead of a state of public emergency. The former could legitimately be issued by the Superintendent of Public Health under Article 14 of Chapter 465 of the Laws of Malta, in view of the Covid-19 pandemic which amounted to an actual or imminent risk to public health under its Article 2 and which had been justified. Moreover, Regulation 3 (2) of L.N. 61 of 2020 gave the courts the above-mentioned discretion.

52. Provided that the legislature remained within the bounds of its margin of appreciation, it was not for the Constitutional Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way. This was even more so when the competing interest was the protection of public health, where the State had a wide margin of appreciation in determining what measures where necessary in a context of public health emergency. The first-instance constitutional jurisdiction had failed to take into account that a State had a positive obligation to safeguard the right to life.

53. The protection of public health was clearly a legitimate aim under the Convention, so much so that Article 5 [§ 1 (e)] also allowed the detention of persons to prevent contagion. While that provision was not applicable in the present case, the court could nevertheless draw inspiration from its principles. The Constitutional Court considered that restrictions on personal liberty were allowed to protect public health, as long as they were necessary to achieve the aim pursued and a fair balance had been achieved. Indeed, the United Nations Economic and Social Council had recognised that public health "may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population". The Siracusa principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights also allowed for such measures in the interest of public health as long as they were lawful, necessary and proportionate.

54. The jurisprudence of various countries in the world was testimony to this. In particular in a German case concerning similar complaints (see HEs 1 Ws 84/20 (OLG Karlsruhe, 30/03/2020)), the Karlsruhe Higher Regional Court held that in view of the high risk of infection and the lack of knowledge about the extent of the illness and of the risk of contagion for the persons involved in criminal proceedings the continued detention of the accused was proportionate to the aim pursued and not unlawful, irrespective of the fact that there was no certainty as to when proceedings could continue. This was so as long as there was a continuous monitoring of the situation and that the case would resume as soon as possible, if necessary, by putting in place specific measures and that the examination of the lawfulness of the arrest would be facilitated. Similarly, on 20 March 2020, the French *Conseil d'État* (*statuant au contentieux* N.439674 *Syndicat Jeunes Medecins* (22/03/2020)) held that the State had the power and the obligation to take measures for the protection of public health and to limit the propagation of the epidemic, as long as they were necessary and proportionate. In particular, in relation to the measures affecting courts and tribunals, the French *Conseil d' État* considered that these were not in breach of fundamental rights given the legitimate aim pursued and since

they nevertheless provided for access to court. Also, in *Adrian Doru Cosar v. Governor of HMP Wandsworth et* and *Mateusz Chmurzynski v. Governor of HMP Wandsworth et* ([2020] EWHC 1142 (Admin), [2020] All ER (D) 64 (11/05/2020) the courts of the United Kingdom found that the prolonged detention of a person due to a lengthening of the extradition process as a result of the Covid-19 pandemic was not in breach of the right to liberty given that the individual had had access to apply for temporary release, and there existed judicial review of his eventual extradition.

55. Thus, according to the Constitutional Court, while it was true that the legal notices had not set a time limit for the measures put in place, the fact that the courts were given discretion - and in fact in the applicant's case they resumed proceedings while the courts were still closed - limited the impact such measures had on the applicant. This was besides the fact that the measures had been put in place in exceptional circumstances and were in place for less than three months. The measures were thus temporary and of a limited nature and therefore not in breach of the applicant's rights.

56. Furthermore, the measures had been put in place on the basis of the available scientific knowledge at the time and therefore they had not been arbitrary. They were thus legitimate, necessary and proportionate, and the applicant's detention could not be considered arbitrary or indefinite, nor could it be said that he had had no remedy in respect of his detention. Indeed, between the 13 March and 19 May 2019 the applicant had made one request challenging the lawfulness of his detention, which was decided on the following day, three requests for bail which were decided in a few days and initiated these constitutional redress proceedings. Furthermore, the legal basis of his detention was the Criminal Code not the impugned legal notices, which could not therefore have given rise to an unlimited or unforeseeable detention. The domestic decision on his bail request had clearly shown that the courts had not been satisfied that the applicant had given sufficient guarantees for his appearance at trial, listing a number of risks which had existed irrespective of any suspension of the courts. It followed that the applicant's complaint concerning a period of detention of less than two months was manifestly ill-founded, in view of the above considerations.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

A. The Constitution

57. Article 47 of the Constitution of Malta, in so far as relevant, reads as follows:

> "(2) In this Chapter "period of public emergency" means any period during which –

(a) Malta is engaged in any war; or

(b) there is in force a proclamation by the President declaring that a state of public emergency exists; or

(c) there is in force a resolution of the House of Representatives supported by the votes of not less than two-thirds of all the Members of the House declaring that democratic institutions in Malta are threatened by subversion."

B. The Criminal Code

58. The relevant articles of the Criminal Code, in so far as relevant, read as follows:

Article 405

"(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. Attorney General to forward record of inquiry together with demand.

(2) The Attorney General shall, for such purpose, transmit to the court the record of inquiry together with the demand, stating therein the subject on which the examination or re-examination is to take place.

(3) The witnesses shall be examined or re-examined in the presence of the accused in order that he may have the opportunity of cross-examining them, and, for such purpose, the court shall order the accused, if in custody, to be brought up, and, if not in custody, to be summoned to appear before it.

(...)"

Article 412B [*Habeas corpus*]

"(1) Any person in custody for an offence for which he is charged or accused before the Court of Magistrates and who, at any stage other than that to which article 574A applies, alleges that his continued detention is not in accordance with the law may at any time apply to the court demanding his release from custody. Any such application shall be appointed for hearing with urgency and together with the date of the hearing shall be served on the same day of the application on the Commissioner of Police or, as the case may be, on the Commissioner of Police and the Attorney General, who may file a reply thereto by not later than the day of the hearing.

(...)

(3) Where the application is filed in connection with proceedings pending before the Court of Magistrates as a court of criminal inquiry before a bill of indictment has been filed and the record of the inquiry is with the Attorney General in connection with any act of the proceedings the application shall be filed in the Criminal Court and the aforegoing provisions of this article shall *mutatis mutandis* apply thereto. (...)"

Article 574(1) [Bail]

"Any person charged or accused who is in custody for any crime or contravention may, on application or as provided in article 574A, be granted temporary release from

custody, upon giving sufficient security to appear at the proceedings at the appointed time and place under such conditions as the court may consider proper to impose in the decree granting bail which decree shall in each case be served on the person charged or accused."

Article 574A

"(1) When the person charged or accused who is in custody is first brought before the Court of Magistrates, whether as a court of criminal judicature or as a court of criminal inquiry, the Court shall have the charges read out to the person charged or accused and, after examining the person charged as provided in article 392 as the proceedings may require, shall summarily hear the prosecuting or arraigning officer and any evidence produced by that officer on the reasons supporting the charges and on the reasons and circumstances, if any, militating against the release of the person charged or accused.

(...)

(8) If the court does not find cause to release unconditionally the person charged or accused and refuses to grant that person bail the court shall remand that person into custody and the provisions of article 575(11) shall apply."

Article 575

"(1) Saving the provisions of article 574(2), in the case of -

(ii) a person accused of any crime liable to the punishment of imprisonment for life, the court may grant bail, only if, after taking into consideration all the circumstances of the case, the nature and seriousness of the offence, the character, antecedents, associations and community ties of the accused, as well as any other matter which appears to be relevant, it is satisfied that there is no danger that the accused if released on bail -

(*a*) will not appear when ordered by the authority specified in the bail bond; or

(*b*) will abscond or leave Malta; or

(*c*) will not observe any of the conditions which the court would consider proper to impose in its decree granting bail; or

(*d*) will interfere or attempt to interfere with witnesses or otherwise obstruct or attempt to obstruct the course of justice in relation to himself or to any other person; or

(*e*) will commit any other offence.

(...)

(5) Where in the case of a person accused of a crime in respect of which the Court of Magistrates has proceeded to the necessary inquiry, the Attorney General has not either -

(*a*) filed the indictment, or

(*b*) sent the accused to be tried by the Court of Magistrates as provided in paragraph of article 370(3)(*a*) or in article 433(5) or in similar provisions in any other law within the terms specified in subarticle (6), to run from the day on which the person accused is brought before the said court, or from the day on which he is arrested as provided in article 397(5), that person shall be granted bail.

(6) (*a*) The terms referred to in the preceding subarticle are:

(iii) twenty months in the case of a crime liable to the punishment of imprisonment of nine years or more.

(b) The terms mentioned in paragraph (a) shall be held in abeyance for the corresponding period during which the terms referred to in articles 401, 407 and in article 432(3) are held in abeyance for any of the reasons mentioned in article 402(1) and (2), as well as for such period during which the court is unable to proceed with the inquiry except after the determination of any issue before any other court.

(c) The terms mentioned in paragraph (a) shall also be held in abeyance for the corresponding period during which the record of the inquiry is with the Court of Magistrates for the examination of witnesses as provided in article 405(5).

(7) Bail shall also always be granted to a person accused of an offence unless, within the terms specified in subarticle (9), to run as provided in subarticle (8), there has been a final judgment acquitting, convicting or sentencing the person so accused.

(8) The terms specified in subarticle (9) shall run:

(a) where no inquiry has taken place, from the day when the person accused has been brought before the Court of Magistrates or from the day on which he has been arrested as provided in article 397(5);

(b) where there has been an inquiry, from the day that the Attorney General sends the accused to be tried by the Court of Magistrates as provided in article 370(3)(a) or in article 433(5) or in similar provisions in any other law, or from the day of the filing of the indictment:

Provided that where the accused makes objection to the case being dealt with summarily as provided in article 370(3)(d), the term shall commence to run from the date of the filing of the indictment.

(9) (a) The terms referred to in subarticles (7) and (8) are:

(...)

(v) thirty months in the case of a crime liable to the punishment of imprisonment for a term exceeding fifteen years.

(b) The terms mentioned in paragraph (a) shall be held in abeyance –

(i) for such period during which the court is unable to proceed with the hearing of the cause except after the determination of any issue before any other court of for any of the reasons mentioned in article 402(1) and (2);

(ii) for the corresponding period during which the record of the inquiry is with the Court of Magistrates for the examination of witnesses demanded by the accused as provided in article 406;

(iii) for such period as the case is before the Court of Criminal Appeal on an appeal entered by the accused from an interlocutory decree or on an appeal entered by the accused or by the Attorney General as provided in article 499;

(iv) where the cause has been adjourned at the request of the accused or his counsel, for the period from the date of the request to the date of the next hearing.

(10) The provisions of subarticles (5) and (7) shall not apply if at the time the request for bail is made or within a week thereafter the indictment shall have been filed, or when a warrant of arrest against the person accused has been issued as

provided in article 579, whether in the same or in any other cause still pending against him before any court of criminal justice.

(11) In refusing to grant bail the court shall state the reasons for such refusal in its decree refusing bail which decree shall be served on the person accused."

C. The Public Health Act

59. Article 14 of the Public Health Act reads as follows:

"(1) The Superintendent may, if he is so satisfied, declare that a public health emergency exists.

(2) The declaration shall specify:

(a) the nature of the public health emergency; and

(b) the area to which the declaration applies."

II. RELEVANT INTERNATIONAL MATERIALS

A. Council of Europe

60. The Council of Europe issued a number of statements in connection with the Covid-19 pandemic and prisons, as follows.

61. The Council of Europe Secretary General's Toolkit for member States "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis" (Doc. SG/Inf(2020)11 of 7 April 2020);

https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40

62. The Statement of the Council of Europe Commissioner for Human Rights made on 6 April 2020: "COVID-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe";

https://www.coe.int/en/web/commissioner/-/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe

63. Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic issued on 20 March 2020 - European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Council of Europe;

https://rm.coe.int/16809cfa4b

64. Covid-19 Related statement by the members of the Council for penological co-operation working group (PC-CP WG) CPT/Inf(2020)13.

https://rm.coe.int/pc-cp-wg-covid-19-statement-17-04-2020/16809e2e55

B. United Nations World Health Organisation (WHO)

65. On 15 March 2020 the WHO issued interim guidance concerning the Pandemic entitled "Preparedness, prevention and control of COVID-19 in prisons and other places of detention".
https://apps.who.int/iris/bitstream/handle/10665/336525/WHO-EURO-2020-1405-41155-55954-eng.pdf?sequence=1&isAllowed=y

COMPLAINTS

66. The applicant complains under Articles 2 and 3 of the Convention about his conditions of detention and the State's failure to protect his health. He also complains under Articles 5 §§ 1, 3 and 4 of the Convention about the lawfulness of his detention and the relevant remedies. Lastly, relying on Article 6 § 1 the applicant complained that he was deprived of his right to access to court and to trial within a reasonable time.

THE LAW

I. ARTICLES 2 AND 3 OF THE CONVENTION

67. Relying on Articles 2 and 3 of the Convention the applicant complained about his conditions of detention and the risk to his life due to the Covid-19 pandemic and his vulnerable status, in relation to which the authorities had taken no steps to safeguard his life and health while in detention. In so far as relevant, the provisions read as follows:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

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

II. ARTICLES 5 §§ 1 AND 3 OF THE CONVENTION

69. Relying on Article 5 § 1 (c) and Article 5 § 3 the applicant complained that the emergency measures put in place and their execution had not been clearly defined and foreseeable. These provisions read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> 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."

A. The applicant's submissions

70. First, the applicant noted that the Maltese Government's emergency measures governing the *sine die* postponement of criminal proceedings provided only that criminal proceedings would commence at some wholly unspecified time, namely seven days from the lifting of the measures by the Superintendent. Thus, the applicant had no means of knowing when relevant criminal proceedings might recommence or when his detention might end. They were therefore not precise. Second, the application of the measures in the applicant's case exacerbated the lack of foreseeability. Despite claims by the Maltese Criminal Court [based upon Regulation 3 of L.N. 61 of 2020] that the applicant's proceedings could continue if found urgent or in the public interest, this guarantee was wholly illusory in practice, as shown by the Criminal Court decree of 8 April 2020. In reality, the inadequate technological logistics and public health concerns rendered the continuation of proceedings impossible.

B. The Court's assessment

1. General Principles

71. As is apparent from its wording, which must be read in conjunction with both sub-paragraph (a) and paragraph 3, which forms a whole with it, the first limb of Article 5 § 1 (c) only permits deprivation of liberty in connection with criminal proceedings (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 182, 28 November 2017).

72. To be compatible with that provision, an arrest or detention must meet three conditions. First, it must be based on a "reasonable suspicion" that the person concerned has committed an offence, which presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence. Secondly, the purpose of the arrest or detention must be to bring the person concerned before a "competent legal authority" – a point to be considered independently of whether that purpose has been achieved. Thirdly, an arrest or detention under sub-paragraph (c) must, like any deprivation of liberty under Article 5 § 1 of the Convention, be "lawful" and "in accordance with a procedure prescribed by law" (ibid., §§ 184-186, with further references).

73. In the context of sub-paragraph (c) of Article 5 § 1, the reasoning of the decision ordering a person's detention is a relevant factor in determining whether the detention must be deemed arbitrary. In respect of the first limb of sub-paragraph (c), the Court has found that the absence of any grounds in the judicial authorities' decisions authorising detention for a prolonged period of time was incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1. Conversely, it has found that an applicant's detention on remand could not be said to have been arbitrary if the domestic court gave certain grounds justifying the continued detention, unless the reasons given were extremely laconic and did not refer to any legal provision which would have permitted the applicant's detention (see *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 92, 22 October 2018, with further references).

74. The Court reiterates that the question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110 et seq, ECHR 2000-XI, and *Idalov v. Russia* [GC], no. 5826/03, § 139, 22 May 2012).

75. The persistence of a reasonable suspicion that the detainee has committed an offence is a *sine qua non* for the validity of his or her continued detention. But when the national judicial authorities first examine, "promptly" after the arrest, whether to place the arrestee in pre-trial detention, that suspicion no longer suffices, and the authorities must also give other relevant and sufficient grounds to justify the detention. Those other grounds may be a risk of flight, a risk of pressure being brought to bear on witnesses or of evidence being tampered with, a risk of collusion, a risk of reoffending, or a risk of public disorder and the related need to

protect the detainee (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, §§ 87-88 and 101-102, 5 July 2016, with further references). Those risks must be duly substantiated, and the authorities' reasoning on those points cannot be abstract, general or stereotyped (see *Merabishvili,* cited above, § 222, with further references).

76. The risk of flight cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other factors, such as the accused's character, morals, assets, links with the jurisdiction, and international contacts. Moreover, the last sentence of Article 5 § 3 of the Convention shows that, when the only remaining reason for detention is the fear that the accused will flee and thus avoid appearing for trial, he or she must be released pending trial if it is possible to obtain guarantees that that appearance will be ensured (see *Merabishvili*, cited above, § 223, with further references).

77. Similarly, the risk of pressure being brought to bear on witnesses cannot be based only on the likelihood of a severe penalty, but must be linked to specific facts (see *Merabishvili*, cited above, § 224, with further references).

78. It primarily falls 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. Accordingly, they must, with respect for the principle of the presumption of innocence, examine all the facts militating for or against the existence of the above-mentioned requirement of public interest or justifying a departure from the rule in Article 5, and must set them out in their decisions on applications for release (see *Buzadji*, cited above, § 91, and *Idalov*, cited above, § 141).

79. It is essentially on the basis of the reasons set out in the decisions of the national judicial authorities relating to the applicant's pre-trial detention and of the arguments made by the applicant in his requests for release or appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see *Merabishvili*, cited above, § 225, with further references).

80. Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *S., V. and A. v. Denmark*, cited above, § 77, and *Idalov*, cited above, § 140).

81. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I). When deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial (see *Idalov*, cited above, § 140). The pre-trial detention must be necessary (see *S., V. and A. v. Denmark*, cited above, § 77).

2. Application of the above principles to the present case

82. The Court notes at the outset that it has not been contested that the applicant's detention was based on a "reasonable suspicion" that he had committed the offences with which he was charged.

83. As to whether the purpose of the continued detention was to bring the applicant before a "competent legal authority" the Court makes the following findings.

84. It reiterates that this is a point to be considered independently of whether that purpose has been achieved (see paragraph 72 above). Indeed, the Court has recognised that the purpose requirement is to be interpreted and applied with a certain flexibility when the intention which once existed of "bringing the applicant before the competent legal authority" does not materialise for some reason (see *S., V. and A. v. Denmark*, cited above, § 118).

85. In particular, the Court has previously held that the fact that an arrested person was neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance with Article 5 § 1 (c) (see, for example, *Brogan and Others v. the United Kingdom*, 29 November 1988, § 53, Series A no. 145-B). In *Brogan*, concerning detention on suspicion of involvement in acts of terrorism, where the applicants were released a few days later and never charged, the Court found that the provision does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody. There are indeed instances where such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. However, the authorities must be capable of demonstrating that in arresting an individual they pursued in good faith the purpose of further investigation by way of confirming or dispelling the concrete suspicions which grounded their arrest (ibid., § 53, and *Petkov and Profirov v. Bulgaria*, nos. 50027/08 and 50781/09, § 52, 24 June 2014).

86. On the merits, in *Brogan* (§ 54) the Court found that had it been possible, the police would, it could be assumed, have laid charges and the applicants would have been brought before the competent legal authority, thus there had been no violation of Article 5 § 1. Conversely, in *Petkov and Profirov* (cited above) the Court was not convinced that the intention of the police was to bring the applicants before a competent legal authority and therefore found a violation of Article 5 § 1.

87. Turning to the present case, the Court notes that, unlike the above cases, it concerns proceedings which have already been initiated before a court of criminal inquiry, whose role is to collect evidence and to decide whether to commit the applicant for trial or discharge him. Under domestic law, the applicant had a right to be present during such proceedings.

88. Despite the different context, the above mentioned principles remain relevant and the Court considers that the mere fact that due to the emergency measures, enacted in the light of the Covid-19 pandemic, the committal proceedings were suspended *sine die*, and could not be continued unless authorised (Regulation 3 of L.N. 61 of 2020) does not mean that the prosecution had no intention of bringing the applicant before the competent legal authority. The Court believes that, had it been possible and without risk to the different persons involved, including the applicant, the committal proceedings would have continued, as they in fact were resumed on 1 June 2020 (see paragraph 34 above). Moreover, the Court observes that the suspension in the present case did not exceed three months. It follows that it cannot be said that the applicant's detention in that period, during which the emergency measures were in place, was not for the purposes of bringing him before the competent legal authority.

89. As to whether the applicant's detention was "lawful" for the purposes of Article 5 § 1, the Court reiterates that the terms "lawful" and "in accordance with a procedure prescribed by law" in that provision also relate to the "quality of the law". "Quality of law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application (see *Merabishvili*, cited above, § 86).

90. The Court notes that, as held by the Constitutional Court (see paragraph 56 above), the applicant's detention had its basis in the Criminal Code, and the applicant has not argued that the provisions of the Criminal Code were not of the adequate quality. While he did argue that the Legal Notices where not of sufficient quality the Court observes that the latter had no impact on his detention but solely a marginal effect on the continuation of his committal proceedings. The Legal Notices were not the legal basis for his detention decided on 30 November 2019 and confirmed in the subsequent bail refusals. His complaint in that regard is therefore misconceived.

91. At this juncture the Court would point out that Article 5 § 1 (c) is mostly concerned with the existence of a lawful basis for detention within criminal proceedings (as shown above), whereas Article 5 § 3 deals with the possible justification for the continuation of such detention (see *Mikalauskas v. Malta*, no. 4458/10, § 101, 23 July 2013).

92. In so far as the applicant also relied on Article 5 § 3, the Court observes that he did not articulate any specific complaint which goes beyond the issuance of the emergency measures, which he repeatedly reiterated throughout the entirety of his application. Nevertheless, for the sake of completeness, the Court notes that between the date of his arraignment/detention on remand and the last decision on his bail request (according to the application), that is to say a period of less than five months (see paragraphs 3 and 30 above) during which the applicant was detained on

suspicion of *inter alia*, murder, he lodged four bail applications. The applications were decided speedily by the domestic courts in all circumstances, and two of them were decided by the Criminal Court despite the closure of the courts because the court deemed it necessary and applied the discretion granted to it under Regulation 3 of L.N. 61 of 2020 (see paragraphs 21-25 and 29-33 above).

93. The Court has already held above that the applicant's detention continued to be for the purposes of being brought before the competent authority. It further notes that the domestic courts gave detailed decisions, on the basis of the Court's case-law (set out at paragraphs 74-77 above) and the evidence available to them, substantiating the several grounds justifying the continuation of that detention. It was further considered that no other alternatives to the detention could have achieved the aim pursued (see paragraphs 9 and 33). Thus, the Court considers that each of those decisions was based on relevant and sufficient reasons to justify holding him in custody for the entire period in question (compare *Podeschi v. San Marino*, no. 66357/14, §§ 147-53, 13 April 2017; and *a contrario*, *Mikalauskas,* cited above, § 121; and *Calleja v. Malta*, no. 75274/01, §§ 108-11, 7 April 2005).

94. Furthermore, even though certain reasons persisted all throughout the relevant period, it cannot be said that the applicant's challenges were rejected using the same formula. While various decisions referred to the previous decisions refusing bail (see, for example, paragraph 33 above), they gave details of the grounds for the decisions in view of the developing situation and stated whether and why the original grounds remained valid despite the passage of time (see, *a contrario*, *Mikalauskas*, cited above, § 120). This was so despite the particularly brief intervals between the bail applications (see paragraph 92 above).

95. Lastly, in the light of the applicant's argument about the denial of bail of 21 April 2020 in the context of Article 5 § 4 (see paragraph 100 below), the Court notes that the Criminal Court in the contested decision considered the stage reached in the proceedings - involving further witness testimony to be heard and potential procedural pleadings - which, in its view, heightened the risk of witnesses being influenced and obstructing the course of justice (see paragraphs 30 above). The Court finds that a temporary suspension of hearings did not affect the validity of this ground for detention, as there was no doubt that once the suspension was lifted (either by decision of the Criminal Court on the basis of L.N. 61 of 2020, or of the Superintendent) the proceedings would resume. Once proceedings would resume, the Attorney General could again ask for the hearing of witnesses under Article 405 of the Criminal Code, and if that were not the case, the applicant having been committed for trial, witnesses would once again be heard at trial. It follows, that reliance on this ground, amongst

others (see paragraph 33 above) was also justified, it being a relevant consideration for the bail assessment.

96. As to whether the authorities had acted with due diligence, the Court notes that the applicant has not referred to any failings, delays or omissions on the part of the authorities, apart from the time during which the proceedings were suspended due to the emergency measures. As already noted above, the proceedings were suspended for a little less than three months (see paragraph 88 above) until their resumption on 1 June 2020. There is no indication that they were not being actively pursued before the emergency measures were put in place (see paragraph 22 above) or afterwards. Moreover, this temporary suspension was due to the exceptional circumstances surrounding a global pandemic which, as held by the Constitutional Court (see paragraph 55 above), justified such lawful measures in the interest of public health, as well as that of the applicant. It follows that it cannot be said that in the circumstances of the present case the duty of special diligence was not observed.

97. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. ARTICLE 5 § 4 OF THE CONVENTION

98. Relying on Article 5 § 4 the applicant claimed that the Criminal Court, in its decree of 2 April 2020, refused to consider the lawfulness of his detention. The provision reads as follows:

> "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 applicant's submissions

99. The applicant claimed that the Criminal Court in its decree of 2 April 2020 refused to consider the lawfulness of his detention, erroneously considering that Regulation 3 of L.N. 61 of 2020 and the possibility of bail meant that his arrest was not unlawful. In so ruling, the Criminal Court merely presumed the lawfulness of his detention. Moreover, neither remedies relied on by that court were meaningful, effective or accessible in his case, and it had not assessed the real effectiveness of those remedies.

100. Under this heading the applicant further complained about the Criminal Court's denial of his bail application on 21 April 2020, which was based on the fact that not all evidence had been heard, yet at that time no more evidence was being heard.

B. The Court's assessment

1. General Principles

101. The Court reiterates that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, such that a detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1. The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 128, 15 December 2016, with further references).

2. Application of the above principles to the present case

102. The Court notes that the applicant does not complain about the scope (in law) of the review of the Criminal Court deciding on the *habeas corpus* application, nor the speediness of that review. His complaint refers solely to the outcome of the Criminal Court's decision as to the lawfulness of his detention, which he describes as having been presumed based on erroneous considerations.

103. In this connection the Court notes that a period of detention is, in principle, "lawful" if it is based on a court order (see *Jėčius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX, and *Nevmerjitski v. Ukraine*, no. 54825/00, § 116, ECHR 2005-II (extracts)). However, by virtue of Article 5 § 4, a detainee is entitled to ask a "court" having jurisdiction to decide "speedily" whether or not his or her deprivation of liberty has become "unlawful" in the light of new factors which have emerged subsequent to the initial decision to order his or her remand in custody (see *Ismoilov and Others*, no. 2947/06, § 146, 24 April 2008). While Article 5 § 4 of the Convention does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the judge, relying on domestic law and practice, could treat as

irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting in doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 61, ECHR 1999-II).

104. The Court notes that the main argument behind the applicant's *habeas corpus* application was the introduction of the emergency measures which suspended the committal proceedings, a situation which, in his view, rendered his detention unlawful (see paragraph 16 above). The domestic court dismissed his claim as it did not agree with his reasoning. In particular, on the premise of his argument that the detention became unlawful since no proceedings could continue, the Criminal Court considered that the proceedings could still continue, had the applicant so requested (under Regulation 3 of L.N. 61 of 2020). That court also noted that the proceedings had continued in respect of his requests for bail and the *habeaus corpus* application it was deciding. Thus, in the Criminal Court's view, his request was premature in that respect, or in any event ill-founded given the access he had to the courts. Therefore his detention could not be considered unlawful on that ground. The Court does not find this decision to be arbitrary. Nor can it be said that the Criminal Court disregarded the applicant's argument or its factual basis.

105. Moreover, despite the limited formulation of the applicant's complaint, the Criminal Court proceeded to ascertain the lawfulness of his detention by i) noting that his arrest had been validated on 30 November 2019, the date on which the Court of Magistrates had ordered his detention on remand ii) that the domestic court's continued to review his detention *via* his bail applications, finding that the continued detention was justified and iii) that all procedural formalities had been followed until the issuance of the emergency measures (see paragraph 18 above). Lastly, it also referred to the requirement that the duration of detention should not be excessive (see paragraph 20 above).

106. Thus, the Court concludes that the decision of the Criminal Court dealt sufficiently with the applicant's complaint based on the arguments in his bail application and went even further covering issues of a substantive and procedural nature not raised by the applicant.

107. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. ARTICLE 6 § 1 OF THE CONVENTION

108. Relying on Article 6 § 1 the applicant complained that the emergency measures put in place and their application deprived him of his right to access to court to challenge the prosecution case and to trial within a reasonable time. The provision reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... within a reasonable time by [a] ... tribunal ..."

109. While there is no right under Article 6 of the Convention to a particular outcome of criminal proceedings or, therefore, to a formal conviction or acquittal following the laying of criminal charges, there is indisputably a right to have one's case heard by a court within a reasonable time once the judicial process has been set in motion. That right is based on the need to ensure that accused persons do not have to remain too long in a state of uncertainty as to the outcome of the criminal accusations against them (see *Wemhoff v. Germany*, 27 June 1968, § 18, Series A no. 7, and *Kart v. Turkey* [GC], no. 8917/05, § 68, ECHR 2009 (extracts)).

110. In criminal matters, the "reasonable time" referred to in Article 6 § 1 begins to run as soon as a person is "charged". A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Kalēja v. Latvia*, no. 22059/08, § 36, 5 October 2017). This period covers the whole of the proceedings in question, including appeal proceedings (see *König v. Germany*, 28 June 1978, § 98, Series A no. 27).

111. The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

112. The Court considers that even assuming that the applicant was not obliged to institute constitutional redress proceedings to complain about the length of his proceedings (see *Galea and Pavia v. Malta*, nos. 77209/16 and 77225/16, § 64, 11 February 2020, and *Marshall and Others v. Malta*, no. 79177/16, § 89, 11 February 2020 in respect of the effectiveness of such proceedings at the time relevant to those cases), the complaint is in any event inadmissible for the following reasons.

113. The Court notes that the applicant was arrested in connection with the murder charge on 20 November 2019; thus, his proceedings have to date lasted sixteen months. A period which, given the complexity of the case, cannot be considered unreasonable. As noted above (see paragraph 96), the applicant has not referred to any failings, delays or omissions on behalf of the authorities, apart from the time during which the proceedings were suspended due to the emergency measures, and there is no indication that the proceedings were not being actively pursued, thus the authorities cannot be reproached for their conduct. The fact that no hearings took place during his committal proceedings before the Court of Magistrates as a court of criminal inquiry for a period of around three months - during which court

work was stalled due to a worldwide pandemic - does not alter that conclusion. Nor can it be said that, as a result of the emergency measures, the essence of the applicant's right of access to a court was impaired in the instant case.

114. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to adjourn the examination of the applicant's complaints under Articles 2 and 3 of the Convention;

Declares the remainder of the application inadmissible.

Done in English and notified in writing on 30 March 2021.

{signature_p_2}

Renata Degener
Registrar

Ksenija Turković
President