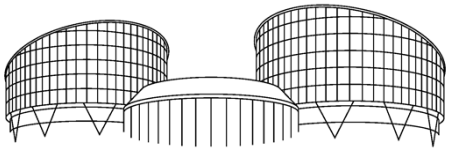

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF FENECH v. MALTA

(Application no. 19090/20)

JUDGMENT

Art 3 (substantive) • Positive obligations • Adequate and proportionate measures during Covid-19 pandemic protecting health of detained applicant, lacking a kidney, and limiting spread of virus in the prison • Not shown that applicant within category of most vulnerable prisoners requiring separation from others
Art 3 (substantive) • Conditions of detention not amounting to inhuman or degrading treatment • Limitations imposed during exceptional and unforeseeable public health emergency on important health grounds, affecting all prison detainees and society at large • Alternative measures in place ensuring contact with family during suspension of visits
Art 2 (substantive) • Life • Applicability of Article 2 in certain Covid-19 related cases not excluded but assessed on an individual case basis • Applicant's failure to substantiate real and imminent risk to his life from potential Covid-19 infection due to any acts or omissions by the State

STRASBOURG

1 March 2022

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 Fenech v. Malta,

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

Péter Paczolay, *President,*
Krzysztof Wojtyczek,
Alena Poláčková,
Gilberto Felici,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 19090/20) 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 Maltese national, Mr Yorgen Fenech ("the applicant"), on 6 May 2020;

the decision to give notice to the Maltese Government ("the Government") of the complaints concerning Articles 2 and 3 and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 22 February 2022,

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

INTRODUCTION

1. The case concerns the applicant's conditions of detention in the Corradino Correctional Facility and whether the Maltese authorities took adequate measures to safeguard the applicant, who only has one kidney, against any potential future Covid-19 infection in the prison.

THE FACTS

2. The applicant was born in 1981 and is currently detained at the Corradino Correctional Facility ('CCF'), Paola. The applicant was represented by Mr W. Jordash, a lawyer practising in the Hague, the Netherlands.

3. The Government were represented by their Agents, Dr C. Soler, State Advocate, and Dr J. Vella, Advocate at the Office of the State Advocate.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

5. 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.

6. 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 CCF, Paola, Malta.

II. CONSTITUTIONAL REDRESS PROCEEDINGS

7. Following the refusal of a number of requests for release, the last ones (at the time) being rejected in April 2020 (see for details *Fenech v. Malta* (dec.) no. 19090/20, §§ 4-33, 23 March 2021) on 1 May 2020 the applicant instituted constitutional redress proceedings 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. The proceedings came to an end by a judgment of 23 November 2020 by which the Constitutional Court rejected the applicant's complaints. The applicant had not raised any complaints under Articles 2 or 3 of the Convention during these proceedings, as he considered that constitutional redress proceedings would not be an appropriate remedy given their duration and the urgency of the matter.

III. OTHER RELATED PROCEEDINGS

8. On 17 November 2020, the applicant's legal counsel at the domestic level (CM) filed an application before the Court of Magistrates asking for the court's protection in view of the prison authorities' refusal to allow the lawyer even to show certain documents to the applicant. According to the applicant, in its decree of 23 November 2020 (not submitted to the Court), the court observed that a lawyer should not be prevented from taking documents with him to prison in order to discuss them with the detainee. However, the court also observed that, pursuant to Regulation 54(1) of the Prisons Regulations, any document may be read or examined by the Director if he suspects that such correspondence is unrelated to the proceedings.

9. On 23 November 2020 the applicant filed a further application before the Court of Magistrates by which he sought an order by the court to ensure confidential communications whilst he was in detention. He pointed out his lack of opportunity to communicate verbally or in written form with his lawyers, the lack of any opportunity to bring and show documents to him in prison, and to have a secure telephone line without recording. According to the applicant, in its decree of 24 November 2020 (not submitted to the Court), the Court of Magistrates declined to intervene, claiming that the issue was solely within the jurisdiction of the Director of Prisons, and the court had no

jurisdiction to intervene on issues concerning the management of the prison or the implementation of the relevant legal provisions regulating the prison facility. With particular reference to the request for an unrecorded telephone line, the court denied the request, referring to Regulation 59 of the Prisons Regulations, which specifically allowed the monitoring and recording of all conversations in prison.

10. The applicant did not lodge constitutional redress proceedings complaining about the above.

IV. CONDITIONS OF DETENTION AT THE CORRADINO CORRECTIONAL FACILITY

11. In his application to the Court the applicant claimed that ever since he had been remanded in custody, he had endured a mixture of abusive, unsanitary and unhealthy conditions of detention as follows.

12. 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.

13. 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. (sic.) 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.

14. 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 ten persons who left the prison at least weekly. 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 (according to his application). 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.

V. THE APPLICANT'S MEDICAL BACKGROUND

15. The applicant was, at the time of lodging the application in 2020, thirty-eight years of age and has only one kidney. On 12 April 2020, a Consultant Surgeon AA wrote a report (submitted to the Court at the time of lodging the application) stating that the applicant 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".

RELEVANT LEGAL FRAMEWORK

I. CRIMINAL CODE

16. Article 9 of the Criminal Code, Chapter 9 of the Laws of Malta, concerning solitary confinement reads as follows:

> "(1) The punishment of solitary confinement is carried into effect by keeping the person sentenced to imprisonment, during one or more terms in the course of any such punishment, continuously shut up in the appointed place within the prison, without permitting any other person, not employed on duty nor specially authorized by the Minister responsible for the prisons, to have access to him.
>
> (2) No term of solitary confinement shall exceed ten continuous days.
>
> (3) More terms of solitary confinement may only be applied with an interval of two months between one term and another.
>
> (4) Nevertheless, solitary confinement may be applied during those intervals in case of any infringement of the prison regulations or for any other offence committed during the said intervals, provided that the terms be of short duration and that they shall not together exceed fifteen days in any one interval.
>
> (5) Where the law prescribes the punishment of solitary confinement and does not specify the particular number of terms, it shall not be lawful to inflict more than twelve terms of solitary confinement.
>
> (6) The punishment of solitary confinement is applied in the cases prescribed by law.

(7) Before awarding the punishment of solitary confinement the court shall satisfy itself, if necessary by medical evidence, which may include a medical examination of the person convicted, that the person convicted is fit to undergo the said punishment.

(8) Where, in the course of the execution of the punishment of solitary confinement, the medical officer of the prison certifies in writing that the prisoner is no longer fit to undergo such punishment, the execution of that punishment shall be suspended until such time as the prisoner is again certified to be medically fit to undergo such punishment."

II. PRISONS ACT

17. Section 8 of the Prisons Act, Chapter 260 of the Laws of Malta, provides for the establishment of the Board of Visitors of the Prisons, which as of 2015 is called the Corradino Correctional Facility Monitoring Board. In so far as relevant, as amended in 2015, it reads as follows:

"(1) There shall be a Corradino Correctional Facility Monitoring Board, composed of such members as shall be appointed every two years by the President.

(2) If any vacancy in the Board occurs on account of death, resignation or for any other cause, the President shall, as soon as practicable, appoint another person to fill the vacancy:

Provided that the Board and the members thereof may act notwithstanding any such vacancy.

(3) The members of the Board shall exercise such functions as shall be assigned to them by regulations made under article 6 of this Act.

(4) The Minister responsible for the Prisons, the Chief Justice, the judges, the magistrates and the Attorney-General shall be *ex officio* Special Visitors of the prisons, and as such it shall be lawful for them to have at any time access to the prisons for the purpose of inspecting such prisons and any of the prisoners therein. They shall enter in the official Visitors' Book any remarks which they may deem proper in regard to the prisons and prisoners, and the book shall be produced to the members of the Corradino Correctional Facility Monitoring Board on their next visit to the prisons.

(5) The Director of Prisons shall ensure that all prisoners are made aware of the Corradino Correctional Facility Monitoring Board and its functions thereof and to make available the necessary mechanism in order that the prisoners can make their requests or complaints to the Board."

III. PRISONS REGULATIONS

18. In so far as relevant the Prisons Regulations, Subsidiary Legislation 260.03, as amended in 2016 and later, but not including the amendments introduced by means of Legal Notice 475 of 2021, Prisons (Amendment No. 2) Regulations, 2021, published in the Government Gazette on 17 December 2021(*), read as follows:

Regulation 8(1)

"(1) An unconvicted prisoner may keep, if he has them with him on his admission to prison, or have supplied to him at his expense and retain for his own use, books, newspapers, writing materials and other means of occupation, unless this is objectionable to the Director on the grounds that they are not compatible with the interest of the administration of justice or the security or good order of the prison."

Regulation 17

"(1) Every request by a prisoner to see the Director, the [the Corradino Correctional Facility Monitoring] Board or a member thereof, and any complaint made by a prisoner, shall be recorded by the prison officer to whom it is made and promptly passed on to the Director.

(2) The Director shall, without undue delay, see prisoners who have asked to see him and take cognizance of any request or complaint made to him.

(3) Where a prisoner has asked to see the Board, or a member thereof, the Director shall ensure that the Secretary of the Board is informed of the request within a reasonable time.

(4) Prison officers in direct contact with prisoners, shall, at their request, supply prisoners with an appropriate form approved by the Director for the purpose of making requests, complaints or petitions. Prisoners may, however, submit any request, complaint or petition in any other proper written form and even verbally."

Regulation 18

"(1) If a prisoner so requests the Director may interview him without any other person being present.

(2) If a prisoner requests an interview with the Board, the Secretary and any two other members thereof may interview him without the Director or any other person being present.

(3) Every prisoner shall be allowed to make a request or complaint to the Director, to the Board or to the Minister, or to petition the President of Malta, or to an internationally recognized human rights body, under confidential cover.

(4) Every request, complaint or petition of a prisoner shall be dealt with and replied to without undue delay."

Regulation 19

"(1) Where accommodation is shared it shall be occupied by prisoners suitable to associate with each other in those conditions.

(2) The accommodation provided for prisoners, and in particular all sleeping accommodation, shall meet the requirements of health and hygiene, due regard being had to climatic conditions and especially the cubic content of air, a reasonable amount of space, lighting and ventilation. Such accommodation shall also allow the prisoner to communicate at any time with a prison officer."

Regulation 20

"In all places where prisoners are required to live or work –

(a) the windows shall be such as to enable the prisoners to read or work by natural light in normal conditions and shall be so constructed that they can allow the entrance of fresh air, and shall, with due regard to security requirements, present in their size, location and construction as normal an appearance as possible;

(b) artificial light shall satisfy recognised technical standards and, as regards the cells, shall be capable of being dimmed at night in such a way as to permit supervision."

Regulation 21

"Every prisoner shall be provided with a separate bed and separate bedding appropriate for warmth and health, which shall be kept in good order and changed often enough to ensure its cleanliness in accordance with the orders of the Director."

Regulation 23

"(1) Prisoners shall be required to keep their persons clean, and to this end they shall be provided with such toilet articles as are needed for health and cleanliness, which articles shall be replaced as necessary.

...

(3) Each cell shall be provided with a wash hand basin with running water and with a toilet. If there is no flushing equipment each prisoner shall be allowed to have a sufficient quantity of water for keeping the toilet clean.

(4) Proper toilet facilities shall also be provided in other parts of the prison.

..."

Regulation 25

"(1) Prisoners sentenced to imprisonment shall be provided at the normal times with food which is suitably prepared and presented, and satisfies in quality and quantity modern standards of diet and hygiene, and which takes into account the age, sex, and health of the prisoners, the nature of their work and so far as possible, their religious or cultural requirements.

(2) The Director shall regularly inspect food provided to the prisoners and shall ensure that no prisoner shall be given food which is less than or different from that which is ordinarily provided, except upon the written recommendation of the Medical Officer.

(3) The provisions of this regulation shall also apply to unconvicted prisoners and prisoners sentenced to detention, provided that the Director may establish a system under which such prisoners may be supplied with reasonable amount of food at their own expense or at the expense of their family. In no case can such food be passed to other prisoners without the permission of the Director.

(4) No prisoner sentenced to imprisonment shall be allowed, except as authorised by the Director or by the Medical Officer, to have any food other than that ordinarily provided.

(5) In this regulation "food" includes drinking water."

Regulation 28

"(1) Prisoners not engaged in outdoor work shall be given exercise in the open air for not less than a total of one hour, each day, if weather permits: Provided that exercise consisting of physical training maybe given indoors instead of in the open air.

(2) The Director may in exceptional circumstances authorize reduction of the period aforesaid.

(3) The Medical Officer shall decide on the fitness of every prisoner for exercise and physical training, and may excuse a prisoner from, or modify, any such activity on medical grounds. Special arrangements shall be made for remedial physical education and therapy for those prisoners who need it."

Regulation 31

"... (7) The Medical Officer shall inform the Director if he suspects any prisoner of having suicidal intentions, and such prisoner shall be placed under special observation."

Regulation 32

"(1) The Medical Officer shall ensure the care of the physical and mental health of the prisoners and shall also ensure that medical doctors see, under proper conditions and with such frequency as is reasonably required, all sick prisoners, those who report illness or injury, and any prisoner who may require medical attention.

...

(3) (a) The Medical Officer shall report to the Director whenever he considers that a prisoner's physical or mental health has been or will be adversely affected by continued imprisonment or by any condition of imprisonment.

(b) If any prisoner is found to have any infectious or contagious disease, a report thereof shall be made forthwith to the Director by the Medical Officer, under whose direction steps shall be taken to treat the condition and to prevent its transmission to others."

Regulation 33

" ... (1) (a) Every prisoner shall, as soon as possible after admission, and prior to his release, be separately examined by a medical practitioner of the prison medical services. A record is to be entered of the state of health of the prisoner and other necessary particulars in a register kept for the purpose (...)"

Regulation 34

"(1) The Medical Officer shall regularly advise the Director on:

(a) the quantity, quality, preparation and serving of food and water;

(b) the hygiene and cleanliness of the prison and prisoners;

(c) the sanitation, heating, lighting, and ventilation of the prison; and

(d) the suitability and cleanliness of the prisoners' clothing and bedding.

(2) The Medical Officer shall at least once every six months make a report to the Director on the health of the prisoners and on the general sanitation of the prison."

Regulation 37

"The medical services of the prison shall seek to detect and shall treat any physical or mental illness or defect or drug-related condition which may affect a prisoner's well-being in prison or which may impede a prisoner's re-settlement after release. All necessary medical, surgical and psychiatric services available without charge to the community outside prison shall also be provided to the prisoner."

Regulation 39

"(1) The Medical Officer shall ensure that the prison medical service keeps proper medical records for each prisoner, and such other records as may be necessary including the times of attendance of medical practitioners, all examinations, inspections and visits carried out, all prescriptions and orders issued, any advice given to the Director relating to any prisoner or prison officer. The stocks of medicines and medical equipment, and generally of all matters relevant to the performance of the duties pertaining to the prison medical service.

(2) All records under this regulation shall be kept in the prison and shall be accessible, subject to their confidentiality, to the Minister, the Director, the Board and to any properly authorised person: Provided that as regards the medical records of prisoners the provisions of regulation 7(4)[1]shall, *mutatis mutandis*, apply. (...) "

Regulation 47

"An adequately stocked library containing books and periodicals of a suitable instructional and recreational range shall be provided at the prison and, subject to any directions of the Director, every prisoner shall be allowed to have library books and periodicals and to exchange them. The library shall, as far as practicable be organised in co-operation with public and community library services."

Regulation 51

"(1) Except as provided by these regulations, every letter and communication to or from a prisoner may be read or examined by the Director or a prison officer deputed by him, and the Director may stop any letter or communication if its contents are objectionable or if it is of inordinate length.

(2) Every visit to a prisoner shall take place within the sight of a prison officer.

(3) Visits to a prisoner may, with the consent of the Director, take place within the hearing of a prison officer.

(4) No object may be handed over to a prisoner during any visit without the approval of the Director.

(5) The Minister may give directions, generally or in relation to any visit or class of visits, concerning the days, times, duration and any other condition of visits to prisoners."

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[1] "The register of admissions and other personal records, including the records of the prisoner's property, shall be securely kept in the custody of the Director. Their contents shall not be divulged to any person except with the consent of the prisoner himself, or on the order of the Attorney General or of a court, or with the authorisation of the Director, or in fulfilment of any international obligation assumed by the Government of Malta."

Regulation 52

"(1) Subject to the provisions of sub regulation (11), an unconvicted prisoner may send and receive as many letters and may receive as many visits within such limits and subject to such conditions, as the Minister may direct, either generally, or in particular cases.

...

(3) The Director may allow a prisoner to send or receive an additional letter or visit where necessary for his welfare or that of his family.

(4) The Director may allow a prisoner entitled to a visit to send and receive a letter instead.

(5) The Director may defer the right of a prisoner to a visit until the expiration of any period of cellular confinement.

(6) A prisoner shall not be entitled under this regulation to receive a visit from any person other than those as are referred to in regulation 50 except with the leave of the Minister.

(7) Subject to any direction of the Minister under regulation 51(5), the duration of any visit and the number of visitors in respect of any particular visit shall be established by the Director according to the needs of security, discipline and good order.

(8) Visits, other than those referred to in regulations 53 and 54,shall take place in the room or rooms designated for such purpose by the Director who may also permit visits to take place outside such rooms on special grounds and under appropriate supervision.

(9) A full record shall be kept in an appropriate register of all visits to prisoners and such record shall include the date and time of the visits and particulars relating to the identity of the visitor."

Regulation 53

"(1) The legal adviser of a prisoner in any judicial proceedings, civil or criminal, to which the prisoner is a party shall be afforded reasonable facilities for interviewing the said prisoner in connection with those proceedings.

(2) With the permission of the Director, the legal adviser of a prisoner may interview him in connection with legal matters other than those referred to in the foregoing sub regulation.

...

(4) The interviews referred to in the foregoing sub regulations shall be conducted out of hearing but in the sight of a prison officer.

(5) Visits under this regulation shall take place in a room different from the room or rooms where visits referred to in regulation 52 are held, but shall also be recorded in the register of visits under sub regulation (9) of that regulation."

Regulation 54(1)

"A prisoner who is a party to any legal or judicial proceedings may correspond with his legal adviser in connection with those proceedings and, unless the Director has reason to suspect that any such correspondence contains matter not relating to the proceedings, the said correspondence shall not be read or stopped under regulation 51(1)."

Regulation 59(1)

"Telephone calls by prisoners shall be subject to the needs of security, discipline and good order of the prison and shall be considered as a privilege in terms of regulation 13. All telephones within the Prisons shall be equipped for monitoring and recording of conversations, and the Director may authorise the intentional hearing of such conversations to safeguard members of the public or the security or safety within the prison, or to prevent the furtherance of any illegal activity."

Regulation 67

"(1) Where it appears desirable, in the interests of security or for the maintenance of good order or discipline or in his own interest, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the Director may arrange for the prisoner's removal from association accordingly. During such periods the Director may also order the cancellation of visits, other than those referred to in regulations 53, 54 and 55.

(2) A prisoner shall not be removed from association under the foregoing sub regulation for a period of more than forty-eight hours without the authority of the Minister. An authority given under this sub regulation shall be for a period not exceeding fifteen days, but may be renewed for similar periods. Such an authority shall be immediately notified to the Chairman of the Board.

(3) The Director may, in his discretion, direct that the prisoner resume association with other prisoners, and shall so direct if the Medical Officer advises accordingly on medical grounds:

Provided, that when such removal had been effected under the Minister's authority in terms of the preceding sub regulation, the Minister and the Chairman of the Board shall be notified immediately of such direction."

Regulation 73

"Particulars of every case dealt with under regulations 67,68, 69 and 71 shall be forthwith recorded by the Director in a register kept for the purpose."

Regulation 78

"(1) If the Director finds a prisoner guilty of an offence against discipline he may impose one or more of the following punishments: ...

(f) cellular confinement not exceeding thirty days; ..."

Regulation 82

"(1) Cellular confinement in respect of offences against discipline shall be undergone in a cell which meets the standards of these regulations.

(2) The Medical Officer shall monitor the condition of prisoners undergoing cellular confinement and shall advise the Director if the termination or alteration of the relative punishment is considered necessary on grounds of physical or mental health. If the Director, acting on such advice, terminates or alters the punishment of cellular confinement, he shall substitute for it an alternative punishment specified in regulation 78.

(3) It shall also be the duty of the Medical Officer to monitor the condition of any prisoner sentenced to solitary confinement by any court."

Regulation 90

"... (3) Saving his powers to give orders, whether verbally or in writing, as he may deem fit for the proper running of the daily administration of the prison, the Director may also make orders in writing relating to any aspect of the administration of the prison and the maintenance of discipline, security and good order therein, as well as to any other matter forming part of his duties as set out in these regulations: Provided that nothing in such orders shall be contrary to the provisions of the Act or of these regulations.

(4) The Director shall take strict care to ensure that these regulations and any direction or order given thereunder, as well as any order relating to the prison, are complied with and enforced. (...)"

Regulation 107*

"It shall also be the duty of the Board to hear and decide upon, as soon as practicable, any request or complaint made to it by a prisoner including on matters relating to the conditions of their detention directly to the Secretary or to any of its members during the course of a visit or inspection."

Regulation 108*

"(1) The decisions of the Board shall be taken by a majority of the members present and voting. In the case of an equality of votes the Chairperson shall have a casting vote in addition to his original vote.

(2) The decisions of the Board shall not be binding upon the Director but it shall be the duty of the Director to take serious cognizance of the recommendations of the Board following a decision taken as provided in sub regulation (1) and to enter into a dialogue with the Board on possible implementation measures.

Subject to the provisions of sub regulation (3), where the Director, or any other prison officer acting on his behalf, is of the opinion that the recommendations of the Board cannot be implemented for reasons which are in the best interests of the prison administration, an explanation in writing of these reasons shall, within one month of the date of receipt of the Board's recommendations, be forwarded to the Chairperson of the Board and copied to the Minister, or to a person delegated by him. The Minister, or the person delegated by him, may confirm or vary the decision of the Director.

(3) Where the recommendation of the Board entails, in the opinion of the Director, a security issue requiring strict confidentiality the Director, within the period of one month mentioned in sub regulation (2), shall make a statement to this effect to the Chairperson of the Board and shall concurrently submit a personal report directly to the Minister, or to the person delegated by him, giving his own comments on the recommendation, together with his opinion as to whether or not such recommendation should be accepted. The Minister's decision, or that of the person delegated by him, shall be final and conclusive.

(4) It shall also be lawful for the Board to decide on complaints and requests made by the prisoners relating to the conditions of their detention within a period of two months of the date of receipt of the request or complaint and after consulting the Director in relation to the said requests and complaints."

Regulation 114

"The Board shall inquire into any report made to it, or any information otherwise coming to its knowledge, that a prisoner's health, mental or physical, has been or is likely to be injuriously affected by any conditions of his imprisonment."

RELEVANT INTERNATIONAL MATERIALS[2]

I. COVID-19

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

20. 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

21. 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

22. 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 and its follow up of July 2020 https://rm.coe.int/16809ef566

23. 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 and its follow up of October 2020 https://rm.coe.int/pc-cp-2020-10-e-rev-follow-up-to-pc-cp-wg-statement-covid-19/16809ff484

24. On 15 March 2020 the World Health Organisation ('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

[2] All available links in this Section were last accessed on 21 February 2022

II. GENERAL PRISON STANDARDS

25. The United Nations Standard Minimum Rules for the Treatment of Prisoners -
https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

26. Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules - Adopted by the Committee of Ministers on 11 January 2006, at the 952nd meeting of the Ministers' Deputies and revised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers' Deputies -
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d8d25

27. Combatting ill-treatment in prison, Council of Europe handbook -
https://rm.coe.int/combating-ill-treatment-in-prison-2-web-en/16806ab9a7

28. Good governance for prison health in the 21st century. A policy brief on the organization of prison health (2013), compiled by the United Nations Office for Drugs and Crime and the WHO, regional office for Europe -
https://www.euro.who.int/__data/assets/pdf_file/0017/231506/Good-governance-for-prison-health-in-the-21st-century.pdf

29. Office of the High Commissioner for Human Rights, *Human rights in the administration of justice,* A/HRC/42/20, 30 July 2019 -
https://www.ohchr.org/Documents/Issues/RuleOfLaw/Violence/A_HRC_42_20_AUV_EN.pdf

III. OTHER MATTERS

A. Solitary confinement

30. Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006, at the 952nd meeting of the Ministers' Deputies and revised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers' Deputies (link at paragraph 26 above), in so far as relevant at the time of the present case, reads as follows:

> "53.1 Special high security or safety measures shall only be applied in exceptional circumstances.
>
> 53.2 There shall be clear procedures to be followed when such measures are to be applied to any prisoner.
>
> 53.3 The nature of any such measures, their duration and the grounds on which they may be applied shall be determined by national law.
>
> 53.4 The application of the measures in each case shall be approved by the competent authority for a specified period of time.

53.5 Any decision to extend the approved period of time shall be subject to a new approval by the competent authority.

53.6 Such measures shall be applied to individuals and not to groups of prisoners.

53.7 Any prisoner subjected to such measures shall have a right of complaint in the terms set out in Rule 70.

...

60.6.*a* Solitary confinement, that is the confinement of a prisoner for more than 22 hours a day without meaningful human contact, shall never be imposed on children, pregnant women, breastfeeding mothers or parents with infants in prison.

60.6.*b* The decision on solitary confinement shall take into account the current state of health of the prisoner concerned. Solitary confinement shall not be imposed on prisoners with mental or physical disabilities when their condition would be exacerbated by it. Where solitary confinement has been imposed, its execution shall be terminated or suspended if the prisoner's mental or physical condition has deteriorated.

60.6.*c* Solitary confinement shall not be imposed as a disciplinary punishment, other than in exceptional cases and then for a specified period, which shall be as short as possible and shall never amount to torture or inhuman or degrading treatment or punishment.

60.6.*d* The maximum period for which solitary confinement may be imposed shall be set in national law.

60.6.*e* Where a punishment of solitary confinement is imposed for a new disciplinary offence on a prisoner who has already spent the maximum period in solitary confinement, such a punishment shall not be implemented without first allowing the prisoner to recover from the adverse effects of the previous period of solitary confinement.

60.6.*f* Prisoners who are in solitary confinement shall be visited daily, including by the director of the prison or by a member of staff acting on behalf of the director of the prison."

31. In so far as relevant, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *21st General Report on the CPT's activities*, 2011, deals with solitary confinement at pages 39-50, and can be accessed -
https://rm.coe.int/1680696a88

32. See below the findings of the CPT in relation to solitary confinement in Malta, at point 90 of the report.

B. CPT report Malta (2016)

33. The Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 25 October 2016, in so far as relied on by the applicant, reads as follows:

"56. The delegation noted that some renovations had been undertaken in CCF (for example, of Divisions IV and VII). Further, two of the previously most problematic divisions (Divisions VI and XV) had been closed down. Nevertheless, the remaining

divisions provided generally poor living conditions for the inmates, and this was particularly the case in Divisions II, III and XIII. While most cells were sufficient for single occupancy (measuring some 9m²), the dormitory rooms at CCF (for example in Division XIII) were cramped, with nine inmates held in approximately 30m² (i.e. significantly less than the minimum standard of 4m² of living space per prisoner in a multiple-occupancy cell recommended by the CPT).19 Many of the cells were excessively hot (over 30 degrees Celsius at the time of the visit) with poorly functioning ventilation. Further, some of the cells were in a bad state of repair, with mould or ingrained dirt evident on the walls and around the windows. Many of the washrooms were dirty, some showers lacked shower-heads and there were problems with drainage, which reportedly caused water to leak into the nearby cells (especially on the ground floor of Division XIII). The in-cell toilets were unscreened, had mal-functioning flushes, and the water was cut off intermittently. This was particularly problematic given an outbreak of diarrhoea among the prisoners during the delegation's visit (see paragraph 76). Prisoners did not believe that in-cell water from the sinks was safe to drink and the staff concurred with them. Many prisoners, especially those inmates who only lived off the basic €27 monthly allowance, complained to the delegation about the lack of ready access to safe drinking water and the need to buy bottled water. The divisions had individual or shared exercise yards, which consisted merely of a stretch of bare tarmac. They were not equipped with any means of rest (let alone any sports or recreational equipment) or any shelter to protect prisoners from sun or rain. The yards were extremely hot, and at the time of the visit, the delegation noted that not a single prisoner made use of them during the day.

...

76. In the course of the delegation's visit to CCF, there was an outbreak of diarrhoea. On 4 September 2015, 15 prisoners complained of diarrhoea at CCF, followed by another 20 inmates the following day. Various stool samples from inmates were also sent by CCF to the hospital laboratory on the evening of 4 September. Health Inspectors attended the prison on the morning of 5 September and took samples of water and food from the kitchen. Initially, prison management stated that all inmates affected had been in single cell accommodation and remained there; however, the delegation found nine of the affected prisoners were sharing cells with at least one other person and one inmate was in a large dormitory. The prison management explained that this was their first experience of a new phenomenon and the delegation observed that they were unsure how to contain and deal with the outbreak. On 9 September, some five days after the outbreak had commenced, it was confirmed that the cause of the outbreak was salmonella, which was presumed to have come from tuna in the kitchen. In total, 41 prisoners had been affected by this outbreak.

...

77. The CPT knows that the risk of disease transmission is enhanced in a closed institution (such as a prison), in particular when general hygiene and environmental conditions are poor. Consequently, prison health-care services should adopt a proactive approach, with a view to minimising the risk of the spread of certain infections. The CPT recommends that the Maltese authorities put in place robust policies to deal immediately with health (and other) crises that may take place within the prison, including adopting a proactive approach, with a view to minimising the risk of the spread of certain infections and ensure the speedier analysis of test results. To this end, regular health checks of the food quality, storage procedures and hygiene standards and procedures in the CCF kitchen should be undertaken.

...

90. As regards solitary and cellular confinement for discipline purposes, section 68 of the Prison Regulations stipulates that 'the Director may order a violent prisoner to be confined temporarily in an appropriate cell [and] if the Director keeps such order in force for more than forty-eight hours he shall consult the Medical Officer and shall inform the Chairman of the Board'. In CCF, solitary confinement on account of violence was resorted to in one of three adjoining cells, built in 2000 and designated as single rooms used for medical and disciplinary isolation purposes, situated next to the Infirmary. Each of the three cells had a bed plinth with a mattress and a toilet annexe. The cells had access to natural light and adequate ventilation and each had a call-bell. From examination of the relevant registers and interviews with prisoners and staff, it was clear that these cells were only occasionally used. Of the nine placements from January 2015 until the date of the CPT delegation's visit, seven had been for medical observation reasons and two for disciplinary purposes. The disciplinary cases had both involved the same person and each had lasted less than 48 hours. The seven medical cases had lasted seven, four, seven, five, two, one and three days respectively. As regards the sanction of cellular confinement for up to a period of 30 days, the CPT understands that this measure means that the inmate is kept in his or her cell. Therefore, in most cases in CCF (given that most of the prisoners have single-cell accommodation) this measure means being placed in effective solitary confinement for 30 days. The CPT recalls that solitary confinement as a disciplinary sanction should not last for a period of more than 14 days consecutively. Thus, it recommends that the Prison Regulations be amended to reflect this."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

34. The applicant complained about his conditions of detention which he considered were in breach of Article 3 of the Convention, which reads as follows.

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

A. Admissibility

1. Non-exhaustion of domestic remedies

(a) The parties' submissions

(i) The Government

35. The Government submitted that the applicant had failed to exhaust domestic remedies as he had failed to raise these complaints before the constitutional jurisdictions. While the Court had previously found that such proceedings were too lengthy for the purposes of complaints under Article 3 of the Convention, in relation to conditions of detention, those considerations were no longer valid. This was shown by the speed within which the applicant's complaints under Articles 5 and 6 of the Convention had been determined, namely less than seven months over two levels of jurisdiction, during a pandemic. It followed that the domestic courts adequately responded

to cases requiring expeditious and urgent conclusions. The Government further relied on the cases of *Alfred Degiorgio v. the Attorney General* (no. 29/2019), instituted on 26 February 2019, decided at first instance on 28 February 2019 and, on appeal, by the Constitutional Court on 12 July 2019; *Victor Buttigieg (Joseph Victor) v. the Attorney General* (no. 97/2018) instituted on 28 September 2018, and decided at first instance on 11 March 2019 and, on appeal, by the Constitutional Court on 12 July 2019; *Onor. Simon Busuttil v. the Attorney General* (no. 86/2017) instituted on 19 October 2017, decided at first instance on 12 July 2018 and, on appeal, by the Constitutional Court on 29 October 2019, which concerned other Convention complaints. The Government explained that cases concerning ongoing ill-treatment, in detention, were extremely rare and it was therefore difficult to provide examples of cases under Article 3, with similar circumstances as those in the instant case, to show the speed with which they were decided. Moreover, they noted that this avenue of redress was still open to the applicant.

36. They further noted that raising such complaints in the context of his bail applications had not been an appropriate course of action as such courts were not intended to determine the Convention compatibility of the applicant's conditions of detention, but rather whether he qualified for bail.

37. The Government further submitted (in the context of the merits of the complaint) that, despite his allegations (see paragraph 40 below), the applicant had not filed complaints with the Corradino Correctional Facility Monitoring Board which was specifically tasked to hear complaints concerning detention conditions. Furthermore, the Government questioned whether the matters raised by the applicant in respect of his confidential communication with lawyers could be relevant for a claim under Article 3 since such issues were normally raised in a complaint under Article 6 or Article 8, or exceptionally Article 34. They highlighted in particular that according to the Court's case-law, national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries.

(ii) The applicant

38. The applicant submitted that he had not lodged constitutional proceedings in respect of these complaints, because unlike the ones under Article 5 which in his view would be dealt with more swiftly (as was in fact the case), he considered that they would take too long, as shown by other domestic examples. Notably, a constitutional application filed by an activist in September 2020, challenging the CCF authorities' prohibition of his access to the prison premises (for the purpose of assessing the veracity of claims of

egregious prison conditions by prison inmates), was still being heard by the Constitutional Court on 25 June 2021, i.e. nine months later.

39. He further noted that in his applications before the Criminal Court of 1 April 2020 and 16 April 2020 (see *Fenech* (dec.), cited above, §§ 15-16 and 29), which were dismissed, he had explicitly raised the issues of the risk to his life and health in detention due to Covid-19, and the alleged violation of Article 3 of the ECHR owing to the prison conditions, respectively. After that, following a further request concerning access to his lawyer, by a decree of 24 November 2020 (not submitted to the Court) (see paragraph 9 above), the Court of Magistrates declined to intervene, claiming that it had no jurisdiction on issues concerning the management of the prison or the implementation of the relevant legal provisions regulating the prison facility. In consequence the applicant had no effective judicial remedy to pursue.

40. According to the applicant, during his solitary confinement from 30 November 2019 till 3 January 2020, he complained to the prison authorities every day, requesting them to remove him from such isolation, but his complaints were always rejected. The applicant further submitted that he had approached the prison director for the rectification of his poor prison conditions several times – approximately fifteen times during informal meetings, as well as three formal requests – and had been reassured each time that his conditions would change. However, his conditions never materially changed. Thus, the prison's internal complaints mechanism did not exist in practice. Lastly, the applicant had also complained, to no avail, about the lack of confidentiality in communication with his lawyers, both with the detention authorities and the Court of Magistrates (see paragraph 9 above).

(b) The Court's assessment

41. The Court refers to the general principles stemming from its case-law and the assessment of the constitutional redress proceedings it made in *Story and Others v. Malta* (nos. 56854/13, 57005/13 and 57043/13, §§ 72-76 and 82-86, 29 October 2015) and reiterated in, for example, *Yanez Pinon and Others v. Malta* (nos. 71645/13 and 2 others, § 76, 19 December 2017) and *Abdilla v. Malta* (no. 36199/15, § 24, 17 July 2018), finding that detainees in situations similar to that of the applicant in the present case were not required to have recourse to constitutional redress proceedings, and in the latter case a consequent violation of Article 13 taken in conjunction with Article 3 (§ 72). The Court further refers to its more recent findings confirming those considerations in *Feilazoo v. Malta* (no. 6865/19, § 59, 11 March 2021).

42. The Court notes that the cases relied on by the Government, including that of the applicant, were decided by the constitutional jurisdictions in periods ranging between four and a half months to two years. Such periods cannot be considered to conform to a timely determination of complaints of inhuman conditions of detention and to put an end to the treatment complained of rapidly (compare *Torreggiani and Others v. Italy*,

nos. 43517/09 and 6 others, § 97, 8 January 2013, and contrast, *Domján v. Hungary* (dec.), no. 5433/17, § 21, 14 November 2017, and *Antanasov and Apostolov v. Bulgaria* (dec.), nos. 65540/16 and 22368/17, § 52, 27 June 2017, concerning periods of between fourteen and seventeen days). The Court thus finds no reason to alter the conclusions already reached in the above-cited cases against Malta. Thus, while the Court cannot rule out the possibility that constitutional redress proceedings dealt with speedily may in a future case be considered an effective remedy for the purposes of complaints of ongoing conditions of detention under Article 3, current domestic case-law does not allow the Court to find that the applicant was required to have recourse to such a remedy concerning the crux of his complaints (see paragraph 45 below).

43. In so far as the parties referred to the Corradino Correctional Facility Monitoring Board (also known as the Board of Visitors), the Court notes that the Government have not raised this in their exhaustion objection, nor – at any stage of their submissions – have they claimed that this was a remedy which the applicant should have exhausted before bringing proceedings before the Court. In fact, the Court has already had the opportunity to examine this procedure and found that it fell short of Article 13 requirements (see *Story and Others*, cited above, § 78). Nothing has been brought to the Court's attention to dispel the Court's concerns set out at the time, which *prima facie* were still relevant in 2020 when the applicant raised his complaints before the Court, despite slight changes to the law in 2016. The Court further observes that while the regulations and procedure pertaining to the Board were again recently amended, *via* Legal Notice 475 of 2021 – Prisons (Amendment No. 2) Regulations, 2021, *Government Gazette of Malta No. 20,752 – 17.12.2021,* the parties have not brought this to the Court's attention, and thus they fall outside of the scope of the Court's examination.

44. Indeed the Court notes that in *Story and Others*, cited above, the Court had solicited the Government to introduce a proper administrative or judicial remedy capable of ensuring the timely determination of such complaints, and where necessary, to prevent the continuation of the situation (ibid., § 85). More than six years later the situation remained unchanged (see also *Abdilla*, cited above, § 71). It follows that the Government's objection of non-exhaustion of domestic remedies must be dismissed in relation to the main complaint under Article 3.

45. However, other considerations apply as regards the applicant's complaints, which he raised under Article 3, concerning the use of surveillance cameras in his cell or during visits with his legal counsel and the interception of telephone calls or documents brought to the prison by his legal counsel, as expounded in his observations.

46. The Court observes that it has held that placing a person under permanent video surveillance whilst in detention – which already entails a considerable limitation on a person's privacy – has to be regarded as a serious

interference with the individual's right to respect for his or her privacy, as an element of the notion of "private life", and thus brings Article 8 of the Convention into play (see *Van der Graaf v. the Netherlands* (dec.), no. 8704/03, 1 June 2004, and *Vasilică Mocanu v. Romania*, no. 43545/13, § 36, 6 December 2016). Similarly, the Court has held that, while the surveillance of communication in the visitation area in prison may legitimately be done for security reasons, a systemic surveillance and recording of communication for other reasons represents an interference with the right to respect for private life and correspondence under Article 8 of the Convention. In this context, Court has placed particular emphasis on the requirement of lawfulness, including clarity and foreseeability of the relevant law (see *Wisse v. France*, no. 71611/01, §§ 29-34, 20 December 2005, and *Doerga v. the Netherlands*, no. 50210/99, §§ 44-54, 27 April 2004, concerning the tapping, recording and retention of telephone conversations). Such measures require an adequate framework regulating their use and guaranteeing safeguards against abuse by the State (see, for example, *Gorlov and Others v. Russia*, nos. 27057/06 and 2 others, §§ 97-100, 2 July 2019).

47. In this connection the Court notes that the applicant's complaints in this respect, as elaborated in his observations, constitute autonomous complaints under Article 8 of the Convention, and thus should have been raised before the constitutional jurisdictions which are effective remedies for the purposes of that provision (see, for example, *Story and Others,* cited above, § 132, and *Knoess v. Malta*, (Committee dec.), no. 69720/11, §§ 75-76, 9 December 2014). Thus, the Court considers that in the absence of any issues arising under Article 34 (see, *a contrario*, *Peňaranda Soto v. Malta*, no. 16680/14, §§ 99-102, 19 December 2017, and *Feilazoo*, cited above, § 124), in the circumstances of the present case, it would be contrary to the principle of subsidiarity to assess the case under Article 3, as stands before it, that is, including the above-mentioned issues falling more appropriately, if not exclusively, under Article 8.

48. Without prejudice to the applicant's possibility of bringing the latter complaints again before the Court at a later stage – after having exhausted domestic remedies in that respect (see, for example, *Roche v. Malta* (Committee dec.), nos. 42825/17 and 66857/17, § 102, 12 June 2018, and, in practice, *Cutajar v. Malta* (Committee dec.), no. 55775/13, 23 June 2015) – the Court considers that at this point in time this part of the complaint under Article 3 must be declared inadmissible, in accordance with Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies, and thus cannot form part of the scope of the applicant's complaint under Article 3.

2. Conclusion

49. The Court notes that the complaint under Article 3, within the scope delimited above, is neither manifestly ill-founded nor inadmissible on any

other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The period from 30 November 2019 to 3 January 2020

(a) The parties' submissions

(i) The applicant

50. The applicant's submissions at the time when he lodged his application are set out in paragraph 12 above. In his later observations he admitted that the cell had a window but explained that only one small part of the three-part window could be opened, which did not allow adequate ventilation, and the cell lacked temperature control. The clothes provided did not protect from the cold and the harsh artificial lighting switched on all through the night was oppressive and prevented any semblance of peace or relaxation. Challenging the Government's submissions and the affidavit by the prison director, the applicant reiterated that he had never been allowed to go outside for sunlight or fresh air. During his one-hour break, he was taken to a room adjacent to the solitary confinement chamber, and was expected to bathe, clean the cell, exercise, and call his family. Moreover, the cell did not have any running water or toilet paper, and the applicant had no access to any basic necessities (water, food, cigarettes) between the hours of 10 p.m.- 6 a.m. and he had been forced to tolerate the foul smell and lack of hygiene as a result of the non-flush toilet. Admitting that this could be flushed from the outside, he claimed that such service was not available during nighttime. Thus, if he used the toilet during these hours, he had no means to flush but had to endure these conditions until 6 am. To add to the humiliation, a CCTV camera pointed directly on the toilet with no shielding or screening to protect the applicant's privacy or dignity. The applicant insisted that he had not been allowed to speak to his wife or family at all for the first fourteen days, and while he did visit the Chaplain once every week, this had not constituted sufficient human or personal contact.

51. The applicant relied on the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (*21st General Report on the CPT's activities*, 2011), the United Nations General Assembly (*United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, A/RES/70/175, Rule 45) and the Council of Europe's European Prison Rules (See Relevant International Materials above), as well as the Court's case-law, all setting out standards relating to solitary confinement.

52. He noted that although in Malta, solitary confinement could be imposed pursuant to a criminal conviction under Article 9 of the Criminal

Code (see paragraph 16 above) or else as a disciplinary sanction under Prison Regulation (hereinafter 'Regulation') 82 (see paragraph 18 above) (both of which didn't apply in his case), there was no law regulating the solitary confinement applied to him as a purportedly protective measure. Moreover, whilst according to the Criminal Code solitary confinement "shall not together exceed fifteen days in any one interval", the Prisons Regulations contradictorily allowed solitary confinement on disciplinary grounds for a period of thirty days. Despite recommendations by the CPT that the Prisons Regulations be amended such that the maximum period of solitary confinement would be fourteen days (see paragraph 33 *in fine* above), no such changes ensued.

53. The applicant considered that the prison authorities had unfettered and unregulated "discretion" and the manner in which it had been exercised in his case had been retributive, abusive, and dangerous. He believed he was being punished due to the nature of the charges against him, or for having tested positive for cocaine. Moreover, the decision on his solitary confinement had been taken by the prison director without, at the time, providing any written reasoning or justification for this extreme course of action. The applicant had merely orally and briefly been informed of this, without being provided with detailed reasons, any adequate support, or any avenue for complaint or appeal.

54. The Government's attempts to substantiate their claim (that it had been a protective measure), were based on 'a single entry by a medical officer in the bottom corner of a report dated 30 November 2019', which in the applicant's view appeared to have been appended to the medical report at a later date, to provide retroactive justification for the abusive treatment. The report, *inter alia*, had noted the good health and calm nature of the applicant, marked 'NIL' against the question of 'Withdrawal Symptoms', and had not noted any other danger to his health or psychiatric issues, nor found any requirement for Methadone or any detox, and the applicant's last cocaine use had been a full (sic.) week before the medical assessment. Then, inexplicably, the report had concluded that the applicant was showing an "idea of self-harm" and "suicidal intention" and needed to be placed in a single room. Strikingly, the medical officer did not check the boxes for 'Psychiatrist' and 'Psychological' review as being necessary on the very same page. Indeed, the applicant had only been checked by a psychologist once at the beginning of his detention, and he had not been placed on regular supervision by a medical officer at any point during the thirty-five days, nor had he been offered any rehabilitation programme. Further, the medical report did not detail what the risks had been, why the prison authorities concluded that solitary confinement, without proper clothing or proper bedding, would have provided any required support or reduced the danger and the applicant had never been notified of his purported medical risk. Equally, the prison director's decision to move the applicant from solitary confinement to a

mixed dormitory had not been based on medical evaluation or risk – as none had been carried out. Nor had any written decision been communicated to the applicant or his lawyers regarding his change in detention conditions.

55. The applicant submitted that the Government's claim that the applicant had also been kept in isolation to reduce the risk of hindering the investigation had to be dismissed as untruthful. Indeed, no such risk assessment had been undertaken neither at the time of incarceration nor at the time of his move into a mixed dormitory. Instead, the applicant's treatment had been consistent with the CCF's brutal policy of dealing with those who may have drug addiction problems. Relying on various press articles, the applicant submitted that – at date of submissions, July 2021 – twelve prisoners had died whilst serving prison sentences over the last three years, with four of them being supposed suicide cases, while six were of cases where the detainees had been found "unconscious" or died under mysterious circumstances in their cell. One example, which fuelled questions about the system used by the prison in dealing with drug addicts and with people contemplating suicide was that of a young woman who died following a suicide attempt after having been denied a drug rehabilitation programme. The applicant referred to the self-proclaimed attitude of the prison director – a former army officer known for his military-style leadership – whose methods had been questioned and several had asked for his resignation. In January 2021, it was revealed in public that a notice hung on the walls of the prison, signed by the prison director which read: "The inmate does not fear the police, the judge or the jury. Therefore, it is our job to teach fear. Welcome to prison!". The notice had since been taken down, however, the prison authorities' continuous attempt to conceal the real circumstances of the prison conditions had also been noted by members of the press.

(ii) The Government

56. The Government submitted that while it was true that during these thirty-four days the applicant was kept separately in a single room, his detention did not amount to solitary confinement as defined in the European Prison Rules of 2020 (see paragraph 30 above), or the Maltese Criminal Code. During such time, the applicant had had regular (unlimited) meetings and calls with his legal counsel for long stretches of time as well as regular contact with the prison authorities, including the Chaplain, and contact with his family. Furthermore, the prison division in which the single rooms had been situated was designed in such a way that the inmates were able to speak with one another, albeit from behind their cell door. The Government noted that the Court had previously held that the separation of an inmate from the rest of the prison population 'for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment.' In this case, the applicant had not been subject to complete sensory deprivation nor total isolation.

57. The applicant had been placed in a single room, upon the decision of the prison director, upon medical advice, for security and protective reasons, as, following his medical examinations on entry, it transpired that he was positive for cocaine and that he had a history of drug abuse (heroin and marijuana). The Government noted that that his initial drug result, together with the fact that he had been accustomed to a lavish lifestyle, made him a risk profile. In his affidavit the prison director noted that CCF was 'Drug Free' and explained that it was the facility's policy for everyone testing positive for drug use not to be allowed to mix with other inmates until they tested negative; He explained that this was the applicant's case, where he had remained in the cell at issue until 3 January 2020, date when the medical staff declared that, according to regular testing, the applicant was no longer positive for cocaine; Having determined that he was mentally stable, arrangements were put in place for his transfer to another division.

58. According to a report of 30 November 2019, submitted to the Court, the medical doctor had suggested that the applicant be kept under constant watch and that he be given "non-tearable clothing" and a "Luna blanket". In so far as the applicant shed doubt on the authenticity of those findings, the Government noted that the notes had been clearly written by the same person with the same handwriting and the same pen on the same day, thus the applicant's allegations in this respect were false and unsubstantiated. The Government explained that the single room was designed to reduce the risk of self-harm and that the applicant had been subject to continuous watch, *via* CCTV, for the same purpose – contrary to his allegation that he had not been monitored. It was for the same reasons that the applicant had been provided only with shorts and a T-shirt at the time, and that the single room had not contained a proper bed frame. He had, however, been provided with two blankets and could have requested more.

59. The Government also considered that placement in a single room limited the risk of someone communicating with the applicant and attempting to hinder the important investigations being carried out at the time into the assassination. According to the Government all decisions concerning placements of inmates were taken following a thorough risk assessment to ensure that the prison remained as calm and as safe an environment as possible and that any tensions between inmates were avoided.

60. The Government explained that the room had been equipped with a Turkish-style squat toilet and while no flushing had been available (to avoid ligature points and prevent from self-harm), the applicant could, at any time during the night or day (contrary to that alleged by the applicant), ask the prison guards to flush the toilet from outside the cell. It had also had a large window which could be freely opened by the applicant for fresh air and ventilation. As regards the continuous lighting complained of by the applicant, while it was true that there was no such control from inside the cell, again the guards could see to this. The reason for this design was, once again,

to avoid ligature points to the greatest extent possible. The applicant had had sixty minutes of out-of-cell activity during which he had been expected to clean his cell, take a shower and make a phone call (other than to his legal counsel – to whom phone access was unlimited) but he had not been required to eat within that same hour. While cigarettes had not been allowed during the night, a cigarette could be given to the applicant every hour throughout the rest of the day.

61. Overall, the Government submitted that the applicant's submissions had been littered with inaccuracies, contradictions, and outright fabrications. On occasions he had changed his submissions only once the Government had provided proof of his false allegations, as for example, in relation to the claim that the cell had only artificial lighting, which then had been turned around to say that the window did not provide adequate ventilation.

(b) The Court's assessment

(i) General principles

62. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. In assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Enea v. Italy* [GC], no. 74912/01, § 55, ECHR 2009; *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 117-119, ECHR 2006-IX, and the case-law cited therein).

63. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (ibid., § 118).

64. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving

a person of his liberty may often involve such an element. Nevertheless, Article 3 requires the State to ensure that prisoners are detained in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured. The measures taken must also be necessary to attain the legitimate aim pursued. Further, when assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (ibid., § 119, and the case-law cited therein).

65. The Court reiterates that removal from association with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or degrading punishment and solitary confinement is not in itself in breach of Article 3. In assessing whether solitary confinement falls within the ambit of Article 3, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned (see *Rohde v. Denmark*, no. 69332/01, § 93, 21 July 2005, and *Rzakhanov v. Azerbaijan*, no. 4242/07, § 64, 4 July 2013). On the other hand, complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason (see *Ramirez Sanchez*, cited above, § 120). Where a period is particularly lengthy, a rigorous examination is called for by the Court in order to determine whether it was justified, whether the measures taken were necessary and proportionate compared to the available alternatives, what safeguards were afforded the applicant and what measures were taken by the authorities to ensure that the applicant's physical and mental condition was compatible with his continued solitary confinement (ibid., § 136).

66. In order to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure. First, solitary confinement measures should be ordered only exceptionally and after every precaution has been taken, as specified in paragraph 53.1 of the European Prison Rules. Second, the decision imposing solitary confinement must be based on genuine grounds both *ab initio* as well as when its duration is extended. Third, the authorities' decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behaviour and must provide substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes by. Finally, a system of regular monitoring of the prisoner's physical and mental condition should also be put in place in order

to ensure that the solitary confinement measures remain appropriate in the circumstances (ibid., § 139, and *Onoufriou v. Cyprus*, no. 24407/04, §§ 119-121, 7 January 2010). Such safeguards are relevant even in cases entailing only relative isolation (see, for example, *Rzakhanov,* cited above, § 73, and *A.T. v. Estonia (no. 2)*, no. 70465/14, § 73, 13 November 2018).

(ii) Application of the principles to the present case

67. The Court notes that the situation in the present case was not one of solitary confinement imposed as a sanction resulting from a disciplinary measure, or a conviction – the only two confinement regimes provided in domestic law (see paragraphs 18 and 16 above). Nor has the Government claimed that the situation was one of removal from association falling under Regulation 67 (see paragraph 18 above), although this Regulation could have been applicable to the applicant's situation.

68. The Government submitted that the decision to keep the applicant in a single cell had been taken by the prison director, upon medical advice, for, *inter alia*, security and protective reasons. The Court finds no reason to doubt the veracity of the medical report of 30 November 2019 submitted to the Court, and the justification it provides. Indeed, the relevant notes concerning the risk (*inter alia* self-harm) are set out in the middle of the page and the suggested action is set out at the end of the page, covering therefore the entirety of the allotted page and the notes are set out in the same handwriting and format as the rest of the report. Further, the urine test results also dated 30 November 2019 (also submitted to the Court) finding the applicant positive for cocaine are counter-signed by the applicant. The Court thus considers that the measure to keep the applicant separately, in a single cell, was for medical reasons and protective purposes in line with the CCF's policy that everyone testing positive for drug use was not allowed to mix with other inmates until they test negative, coupled with the need to ensure, *inter alia,* the applicant's safety. Admittedly it is unclear to the Court whether anyone testing positive for drugs would automatically be considered to be at risk of *inter alia* self-harm, or whether such conclusions are those resulting from the applicant's specific situation. In the present case the Government relied on both grounds, supported by the medical report. That having been established the Court need not consider whether there were other plausible reasons for keeping the applicant separately in a single cell.

69. The Court considers that it is regrettable that the Government did not indicate a legal basis for this measure and that written guidelines for the above-mentioned policy have not been submitted. While there can be merit in opting to separate and monitor new arrivals who test positive for drugs, the Court considers that this procedure, together with relevant safeguards, should be expressly set out in the law with relevant detail. This is even more so where this procedure seems to overlap with the necessity of keeping detainees separately for fear that they might harm themselves (as appears to have been

the situation in the instant case). While some leeway can be allowed for a director to take certain urgent and imperative decisions for the well-being of prison inmates, the discretion to apply such measures cannot be unfettered thus leaving room for arbitrariness.

70. In the present case the Court notes that the decision was based on a prior and complete medical assessment (physical and psychological) and on the medical recommendations listed in that assessment, and that the applicant – who did not deny his history of drug consumption – was being monitored thereafter *via* the use of CCTV, in line with the indications of the medical report which had indicated that the applicant should be under constant watch.

71. Nevertheless, the Court takes issue with the fact that the decision and the details pertaining to it were not made known to the applicant in writing at the time, enabling him to challenge it (see, *mutatis mutandis*, *Peňaranda Soto*, cited above, § 76), particularly had it been prolonged (contrast, *A.T. v. Estonia*, cited above, § 85). In this respect, the Court observes that the applicant admitted to having been informed of the measure orally (see paragraph 53 above). Moreover, the applicant did not state that he was unaware of the existence of this policy, nor did he question the necessity of the policy in itself, or the fact that he tested positive for the drug cocaine, and, indeed, countersigned this finding.

72. Quite apart from the above concerns, the Court notes that the applicant's detention during this period was for no longer than thirty-five days, as he was moved to a common dormitory once he tested negative for drugs, following regular testing (see paragraph 57 above) and did not suffer any harmful psychological or physical effects as a result of this custodial regime. The Court notes that, the Government have not explained whether drug testing was available at an earlier date, but the applicant has presented no argumentation in this respect.

73. Conversely, the parties are in dispute as to whether any further assessment was done to determine the applicant's state of mind at that stage (see respectively paragraphs 57 and 54 *in fine*). It does not appear that there had been any further medical or psychiatric assessment conducted in respect of the applicant for the duration of the period of his separation from others. Such a course of action could only be explained if the determination of the applicant's risk factors (self-harm/suicide/harming others) was an automatic result of his testing positive for drugs. In that case CCTV monitoring could be considered sufficient. However, if the applicant's risk factors were established for reasons other than his drug consumption, a medical follow up would have been necessary to monitor the risk the applicant could have posed to himself and/or to others prior to his release and the Court draws attention to this serious shortcoming. Indeed, the Court is preoccupied that such a situation could place particularly vulnerable inmates at risk, and it emphasizes that such a measure requires regulation and rigorous adherence to medical protocols to safeguard against such risk. However, in the absence

of any clarification on the matter, the Court notes that in the present case the applicant has not claimed that he in fact needed psychiatric or even medical help during such time, quite the contrary (see paragraph 54 above) nor did the CCTV surveillance indicate any erratic behaviour calling for specific attention. Moreover, the applicant did not argue that there existed reasons militating against his release into the dormitory, and the Government submitted that all inmates were assessed prior to their placement in the general population. While they gave no proof relevant to this particular case, nor indicated who made such an assessment, the Court considers that no harmful consequences having ensued in the present case, such shortcoming has no impact on the assessment of the present complaint, but calls for the authorities attention on a more general level.

74. Importantly, the Court notes that the restrictions applied during this period did not amount to complete sensory isolation, coupled with total social isolation, but relative social isolation. In particular, the applicant has not disputed that he had had regular meetings and calls with his legal counsel for long stretches of time as well as regular contact with the prison authorities, including the Chaplain, and that after the first fourteen days he had also had contact with his family – in this connection the Court also notes the applicant's contradictory allegation that in his one hour out-of-cell activity he had to call his family in respect of which he didn't exclude the first fourteen days (see paragraph 50 above). In any event, it is clear that he had only been isolated from other inmates (compare *Podeschi v. San Marino*, no. 66357/14, § 116, 13 April 2017, concerning a *de facto* isolation as opposed to a *de jure* one, and *Peňaranda Soto*, cited above, §§ 76-77), and even in that context, the Government claimed that communication was still possible from behind their cell doors and the applicant did not dispute that. Moreover, it has not been claimed that correspondence was in any way limited during such period – and it does not appear that the applicant has suffered any harmful physical or psychological effects in consequence of this regime (compare *Bastone v. Italy* (dec.), no. 59638/00, ECHR 2005-II (extracts)).

75. The Court will nevertheless examine the material conditions in which he had been detained during this custodial regime.

76. While it is unclear to the Court why the applicant was only allowed one hour of "out-of-cell activity", but not proper outdoor activity during this thirty-five day period, and why he had had no access to books for the first twenty-seven days (despite the applicable limitations of his custodial regime), the Court notes that the applicant was given the possibility of exercising indoors as allowed by the Prisons Regulations (see Regulation 28 at paragraph 18 above), and that despite having the possibility of requesting his own books or writing materials (see Regulation 8(1) at paragraph 18 above), the applicant has not submitted that he had made such request and was denied. In that light and given the limited periods at issue, these factors on their own do not justify a conclusion that the applicant was held in conditions in breach

of Article 3 (compare, *mutatis mutandis*, *Mahamed Jama v. Malta*, no. 10290/13, § 101, 26 November 2015, and contrast, for example, the conditions applicable to an applicant for a period of eleven months, for protective purposes, during his pre-trial detention in *X v. Turkey*, no. 24626/09, §§ 36-45, 9 October 2012, or those in *Csüllög v. Hungary*, no. 30042/08, §§ 33-38, 7 June 2011, and *Iorgov v. Bulgaria*, no. 40653/98, § 82, 11 March 2004, which concerned periods of two or three years). In this connection, the Court however finds it opportune to recall that according to relevant CPT standards, prisoners, without exception, must be allowed at least one hour of exercise in the open air every day and preferably as part of a broader programme of out-of-cell activities, bearing in mind that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather. Indeed, according to the relevant international standards, prisoners should be able to spend a reasonable part of the day outside their cells, engaged in purposeful activity of a varied nature (work, recreation, education) (see *Muršić v. Croatia* [GC], no. 7334/13, § 133, 20 October 2016).

77. In so far as the applicant complained about the conditions in his single occupancy cell, the Court notes that:

The applicant had available to him "makeshift" bedding and he had been kept in shorts and T-shirt and refused access to his own clothing, for protective purposes, upon medical advice. It is not for the Court to second guess those findings. In particular the Court notes that the applicant had nonetheless his own bedding, namely a foam mattress, albeit of limited comfort. However, the applicant claimed that the clothes he had been given were not sufficiently warm (see *Nazarenko v. Ukraine*, no. 39483/98, § 139, 29 April 2003) and that he had not been allowed access to his own clothes. In this connection, the Court notes that although the requirement for prisoners to wear prison clothes may be seen as an interference with their personal integrity, it is undoubtedly based on the legitimate aim of protecting the interests of public safety and preventing public disorder and crime (ibid.). In the present case, the tear-proof clothing provided to the applicant further served the purpose of protecting him from any possible self-harm – an option favoured by the CPT (see *Hellig v. Germany*, no. 20999/05, § 56, 7 July 2011, and the references therein). The Court notes that the applicant complained about the cold, and the Court considers that the applicant's attire was certainly light, even for a Maltese winter. While suffering from the heat or the cold are conditions which cannot be underestimated as they may have effects on a person's well-being and may in extreme circumstances affect health (see, *inter alia*, *Aden Ahmed v. Malta*, no. 55352/12, § 94, 23 July 2013), the Court observes that the applicant had been provided with two blankets. The provision of blankets must have aided the situation to some extent, and it does not transpire that the applicant suffered any health related concerns in this connection (see, for example, *Moxamed Ismaaciil and Abdirahman Warsame*

v. Malta, nos. 52160/13 and 52165/13, § 90 *in fine*, 12 January 2016). According to the Government he could also have requested more blankets, and it has not been shown or claimed that the applicant requested further blankets and was refused (see *Story and Others*, cited above, § 118, and *Yanez Pinon and Others*, cited above, § 110).

78. In relation to the sanitary facilities, the Court has previously taken issue with cells which were not equipped with automated flushing systems, even more so when water was not readily available to flush them (see *Story and Others*, cited above, § 121, and the case-law cited therein). However, in the present case, not only was there justification for this situation - namely to avoid ligature points and prevent from self-harm - but the guards could flush the toilet from the outside all throughout the day, as admitted by the applicant, and the Court has no reason to doubt the Government's contention that this was possible also at night time. Further, while there appears to have been no wash hand basin or running water available, nor, according to the applicant, toilet paper, it has not been claimed that no water (bottled or in a bucket) had been available to the applicant (see Regulation 23 (3), at paragraph 18 above), at least during the day, to see to any hygienic needs. Moreover, while the absence of an adequate supply of toilet paper in a prison may raise an issue under Article 3 of the Convention (see *Valašinas v. Lithuania*, no. 44558/98, § 104, ECHR 2001-VIII), it has not been claimed that the applicant requested this and was denied.

79. As to lighting and ventilation, the applicant has eventually admitted that the cell had been equipped with a window, which, from the photos submitted to the Court, appears to be of a reasonable size and allowed both for natural light and ventilation, despite that only one third of it could be opened. Further, while the artificial lighting which remained on, day and night, could undeniably contribute to a detainees frustration (see *Starokadomskiy v. Russia*, no. 42239/02, § 46, 31 July 2008) the Government submitted that the lights could be seen to by the guards upon request (see also Regulation 20, at paragraph 18 above).

80. Lastly, the Court notes that the applicant also complained that he had not been provided with (presumably drinking) water, food and cigarettes from 10 p.m. to 6 a.m. In the absence of any detailed submissions from the parties, the Court refers to Regulation 25 (see paragraph 18 above) and observes that the cases brought before the Court concerning the CCF, in fact show that convicted detainees are allowed three meals a day (see, for example, *Abdilla*, cited above, § 51). Moreover, according to Regulation 25 detainees on remand may also be allowed food from other sources. Thus, in the absence of any contrary allegation, it cannot be said that the applicant suffered hunger or thirst (compare and contrast *Kadiķis v. Latvia (no. 2)*, no. 62393/00, § 55, 4 May 2006; *Stepuleac v. Moldova*, no. 8207/06, § 55, 6 November 2007; and *Korneykova and Korneykov v. Ukraine*, no. 56660/12, § 141, 24 March 2016)

nor that the deprivation of any other products over limited periods can be considered as a deprivation of the applicant's vital needs.

81. It follows that, from the material available to it, bearing in mind the limited stringency of the measure, its duration, the objective pursued, and the conditions in which it was imposed, as well as the lack of significant effects on the applicant, whilst reiterating its concern about the matters highlighted above, the Court cannot find that the applicant's situation during the first period of his detention amounted to treatment contrary to Article 3.

82. There has therefore been no violation of that provision.

2. The period from 4 January 2020 onwards

(a) The parties' submissions

(i) The applicant

83. The applicant's submissions, at the time of lodging his application, are set out in paragraphs 13 and 14 above. In his observations he further claimed that occupation in the dormitory often increased to six persons and that owing to the presence of large furniture the effective free space per prisoner was closer to 2.5 - 4 sq.m. He considered that a detainee's living space could not possibly include a yard where he could, on occasion, take a stroll, as argued by the Government. Moreover, the yard could only be accessed for a maximum of one hour between 8 a.m. - 12 p.m. and then from 2 p.m.- 7 p.m. - not continuously as falsely stated by the Government.

84. Additionally, the applicant had been denied any form of exercise, cultural, or social activities, and had been restrained to his cell for over twenty-three hours a day. He had also not been allowed to call his family members on Skype in March 2020, and later had been allowed to call them only once a week, with a prison guard sitting next to him throughout the call. While in August 2020 his cell had been furnished with a toaster, kettle, TV, fire extinguisher, fridge and washing machine following complaints lodged in January 2020, prior to this, he would wash his clothes in the wash basin.

(ii) The Government

85. The Government submitted that the applicant's claims were untrue and incoherent, for example in relation to his skype access and yard access. Further, the Government submitted that, during his detention, the total number of occupants had been largely maintained at between three and four occupants, including the applicant. According to the affidavit of the prison director (submitted to the Court) it was only in exceptional circumstances that the number of occupants had increased to five. The dormitory was 30 sq.m. large (29.843 sq.m. to be exact), meaning that inmates had 7.5 sq.m. under normal circumstances (where there had been up to four inmates at one time) and 6 sq.m. when the number of inmates had increased to five in exceptional circumstances and for a short period of time. Connected with the dormitory

itself, the inmates had continuous and uninterrupted access to a yard of 18 sq.m. in size, from 8 a.m. until 7 p.m. every day. Therefore, throughout most of the day, the applicant's personal space increased to 12 sq.m. (9 sq.m. in the above-mentioned exceptional circumstances). In this connection the Government noted that the applicant was also inconsistent in his submissions concerning the use of the two different yards and the time allotted (see paragraph 83 above). The Government clarified that he had had access to the small yard of 18 sq.m. (attached to the dormitory) throughout the entire day (from 8 a.m. until 7 p.m.) and then he had also had access, for one hour per day, to the much larger yard for his out-of-cell activity. The Government strongly disputed that the applicant was only allowed to walk in the yard for thirty minutes per day, as alleged.

86. Contrary to that stated by the applicant, the detainees were provided with a washing machine within their dormitory which they could use freely. In so far as the applicant had relied generally on the CPT report of 2016, the Government submitted that the situation had greatly improved so much so that the applicant had never complained to the Visitors Board during his stay.

87. In so far as the applicant had not been allowed to use the gym, this had been intended to protect the inmates from possible exposure to Covid-19. Indeed at the time (May 2020) all gyms in the entire country had been closed, and the applicant had been once again allowed to use the gym at the time of the Government's submissions. The same held for his submissions concerning mass at a time when all church services had been stopped throughout the country. He, however, had had access to a chaplain during that time. The Government considered that it was contradictory that, on the one hand, the applicant complained about these measures but, on the other hand, he complained that the Government had not taken enough measures to protect him against Covid-19 (see paragraph 98 below). It was also true that family visits had been suspended, in order to protect inmates from the outbreak (as had been the case for care homes), however, they were allowed to contact their family *via* skype once a week, and had continuous access to a telephone. If the applicant chose not to make use of those services, it could not be blamed on the State.

(b) The Court's assessment

(i) General principles

88. The Court has stressed on many occasions that under Article 3 it cannot determine, once and for all, a specific number of square metres that should be allocated to a detainee in order to comply with the Convention. Indeed, the Court has considered that a number of other relevant factors, such as the duration of detention, the possibilities for outdoor exercise and the physical and mental condition of the detainee, play an important part in deciding whether the detention conditions satisfied the guarantees of

Article 3. Nevertheless, extreme lack of space in prison cells weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" within the meaning of Article 3 (see *Muršić v. Croatia* [GC], no. 7334/13, § 103, 20 October 2016, and the case-law cited therein).

89. The Court finds it important to clarify the methodology for the calculation of the minimum personal space allocated to a detainee in multi-occupancy accommodation for its assessment under Article 3. The Court considers, drawing from the CPT's methodology on the matter, that the in-cell sanitary facility should not be counted in the overall surface area of the cell. On the other hand, calculation of the available surface area in the cell should include space occupied by furniture. What is important in this assessment is whether detainees had a possibility to move around within the cell normally (ibid., § 114).

90. The Court considers that a strong presumption of a violation of Article 3 arises when the personal space available to a detainee falls below 3 sq.m. in multi-occupancy accommodation. It then remains for the respondent Government to demonstrate convincingly that there were factors capable of adequately compensating for the scarce allocation of personal space. The cumulative effect of those conditions should inform the Court's decision whether, in the circumstances, the presumption of a violation is rebutted or not (ibid., §§ 124-126).

91. More generally, when assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). Quite apart from the necessity of having sufficient personal space, other aspects of material conditions of detention are relevant for the assessment of whether they comply with Article 3 (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 149 et seq., 10 January 2012).

(ii) Application of the principles to the present case

92. The Court notes that the parties are in disagreement as to different elements related to the space available to the applicant. The Court observes that from the plans of the dormitory submitted to the Court it is clear that the dormitory, measuring according to the Government 30 sq.m, (while the applicant claimed it was 34.8 sq.m.), is adjacent to a small yard measuring 18 sq.m. to which the detainees of the dormitory had access all day long. The Court also observes that according to the plans submitted to the Court, the bathroom within the dormitory consisted of an area of around 3 sq.m. The dormitory also contained three bunk beds, a regular six-person table and a fridge. Thus, with reference to the methodology and the principles cited-above (at paragraphs 89 and 90), it is clear that even assuming that the dormitory measured 30 sq.m. including the bathroom, hosted six people all throughout, and that the yard adjacent to the dormitory (to which the applicant

had access all day) was to be excluded from the surface area, the applicant still had available an individual sleeping place and 4.5 sq.m. of personal space and thus could move around normally (given the limited furniture).

93. Of the other elements relevant for the assessment of the conditions of detention, special attention must be paid to the availability and duration of outdoor exercise and the conditions in which prisoners could take it. As noted in the assessment of the previous complaint, the Prison Standards developed by the CPT make specific mention of outdoor exercise and consider it a basic safeguard of prisoners' well-being that all of them, without exception, be allowed at least one hour of exercise in the open air every day and preferably as part of a broader programme of out-of-cell activities (see *Ananyev and Others*, cited above, § 150). The Court notes that the applicant had access to the small yard (attached to the dormitory) all throughout the day (from 8 a.m. until 7 p.m.) and had access for one hour per day to the much larger yard (or to the gym, an option he often preferred) for his out-of-cell activity. Indeed, the applicant has not substantiated, nor in any way attempted to explain, why he – unlike others – would have allegedly only been allowed thirty minutes of exercise time (as alleged in the application form), at any point or all throughout his detention. Moreover, in his later submissions he admitted that the yard could be accessed for a maximum of one hour per day.

94. With respect to the applicant's other material complaints – the mere fact that detainees in the dormitory slept on bunk beds and shared a toilet, shower, and handbasin (between four to six people), does not constitute inhuman or degrading treatment, as is the case with washing clothes and dishes in the same basin. Moreover, in this respect the applicant admitted that he had eventually been provided with a washing machine.

95. Lastly, the Court notes that the applicant complained that for a certain unspecified period he had had no access to the gym, to his family, to church or other activities. The Government submitted that this limited access, in around May 2020, had been the result of measures aimed at preventing the arrival and spread of the Covid-19 virus within the detention facility. Moreover, similar limitations had been imposed on all the population.

96. The Court notes that the limitations complained of occurred within a very specific context, namely during a public health emergency (see *Fenech* (dec.), cited above, § 11) and were put in place in view of significant health considerations, not only on the applicant but on society at large. Indeed, the Court has already had occasion to note that the Covid-19 pandemic is liable to have very serious consequences not just for health, but also for society, the economy, the functioning of the State and life in general, and that the situation should therefore be characterised as an "exceptional and unforeseeable context" (see *Terheş v. Romania* (dec.), no. 49933/20, 13 April 2021). With that in mind the Court considers that the mere fact that for a limited time (presumably three months, see *Fenech*, cited above, § 88) the applicant could not use the gym or attend mass (while still having access to a Chaplain) -

measures which moreover were applicable to all the prison detainees, and the population at large – cannot be considered to have caused him distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention during a pandemic. Similarly, with respect to the limitation on his family contacts, the Court notes that detention, like any other measure depriving a person of his liberty, entails inherent limitations on one's private and family life. However, it is an essential part of a prisoner's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family (see *Khoroshenko v. Russia* [GC], no. 41418/04, § 106, ECHR 2015). Indeed, in the present case, while the restrictions related to the pandemic were in place, family visits had been suspended to secure the detainees' well-being. It has not been argued that this measure was not necessary, proportionate, or restricted in time. Indeed, following a brief period, which the Court considers would have been necessary to make the relevant arrangements, the applicant had been allowed to call his family *via* skype once a week, and he could contact them over the phone regularly all throughout the relevant period. Thus, alternative measures had been put in place and the applicant had been able to maintain regular contact with his family and have news of their well-being during the difficult times pertaining to the pandemic. This was a situation endured by persons at liberty all over the world, and the applicant was no exception.

97. Bearing in mind all the above, the Court considers that the applicant's conditions of detention were not in breach of Article 3.

II. ALLEGED VIOLATION OF ARTICLE 2 AND 3 OF THE CONVENTION

98. The applicant complained about 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, as provided in Articles 2 and 3 of the Convention. Article 2 in so far as relevant, reads as follows:

> "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."

A. Admissibility

1. Incompatibility ratione personae/materiae in respect of Article 2

(a) The parties' submissions

99. The Government submitted that the applicant had failed to show that the alleged shortcomings had truly placed his life at imminent risk. On the contrary, his allegations were completely hypothetical. They noted that (at

the date of submissions - 25 May 2021) more than one year since the first case of Covid-19 in Malta, there had not been a single case of "community transmission"[3] of Covid-19 within the CCF, nor any death of someone who had tested positive for the virus. They further noted that, as a general rule, Article 2 was applicable only where death had ensued or where the life of an identified individual had been placed in manifest jeopardy when such state of affairs was imputable, in one way or another, to the acts or omissions of the State. This was not the situation in the present case, where the applicant's life had never been in danger.

100. The applicant submitted that whether others or himself had been infected was irrelevant and did not render his complaint devoid of merit. His complaint was that the prison authorities and the Maltese courts had failed to take into account the applicant's special status as a vulnerable individual who lacked a kidney. By virtue of being both a pre-trial detainee, as well as a detainee with a serious health risk, he had to be specifically safeguarded against any potential future Covid-19 infection in the prison. He relied on the medical report submitted to the Court (see paragraph 15 above) and was of the view that a Covid-19 infection was likely to present a serious risk to his life and/or or irreparable and serious injury, owing to a combination of his medical condition, his age, and the particularly lethal nature of the disease. Thus, due to the absence of any individualized planning around the applicant's vulnerability, his anxiety and fear of imminent death persisted, and he was clearly a victim of the violation complained of.

(b) The Court's assessment

101. The Court reiterates that, in order to be able to lodge a petition by virtue of Article 34, a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention (see *Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010). In order for applicants to be able to claim to be a victim, they must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014).

102. The Court has previously held that the question whether or not the applicant could claim to be a victim of the violation alleged was relevant at all stages of the proceedings under the Convention (see *Tănase*, cited above, § 105, and the case-law cited therein). The Court notes that the provisions of the Convention are to be interpreted in a manner which renders its safeguards practical and effective. In assessing whether an applicant can claim to be a

[3] According to the WHO – community transmission relates to outbreaks with the inability to relate confirmed cases through chains of transmission for a large number of cases, or by increasing positive tests through sentinel samples.

genuine victim of an alleged violation, account should be taken not only of the formal position at the time when the application was lodged with the Court but of all the circumstances of the case in question, including any developments prior to the date of the examination of the case by the Court (ibid.). Thus, the question whether an applicant has victim status falls to be determined at the time of the Court's examination of the case where such an approach is justified in the circumstances (ibid., § 106).

103. The Court reiterates that it has applied Article 2 both where an individual has died (see, for example, *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII) and where there was a serious risk of an ensuing death, even if the applicant was alive at the time of the application (see for a series of examples *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, § 82, 24 July 2014). In particular, in *Brincat and Others* the Court found that Article 2 applied in respect of an applicant who died of malignant mesothelioma which was known to be a rare cancer associated with asbestos to which the applicant had been exposed for a decade in the Malta Drydocks. It however found (§ 83) that the provision did not apply to the remaining applicants whose respiratory problems and other complications related to exposure to asbestos, had not indicated malignant mesothelioma as their conditions did not constitute an inevitable precursor to the diagnosis of that disease, nor where their conditions of a life-threatening nature.

104. The Court considers that in his application lodged in May 2020, at the beginning of the pandemic when little was yet known about the virus, the applicant sufficiently explained why he considered that the domestic authorities had not taken sufficient measures to fight the spread of Covid-19 in prison and to protect him personally, as a vulnerable individual lacking a kidney, who could be directly affected by such a virus (see, *a contrario*, *Zambrano v. France* (dec.), no. 41994/21, § 43, 7 October 2021). Today, more information is publicly available about the virus, its several mutations and their specific effects on the body as well as their contamination capacity. According to the World Health Organisation ('WHO') as of 21 February 2022, worldwide there have been 423,437,674 confirmed cases of Covid-19, including 5,878,328 deaths, reported to the WHO[4]. Given these figures and without diminishing the seriousness of this sometimes deadly virus, the Court cannot consider that individuals are a victim of an alleged violation of Article 2 without substantiating that in their own circumstances the acts or omissions of the State have or could have put their life at real and imminent risk.

105. In the present case the Court cannot ignore that – while some inmates at CCF have been infected through traceable chains, and survived – more than a year and half after the start of the pandemic, that is at the date of the last

[4] WHO Coronavirus (COVID-19) Dashboard | WHO Coronavirus (COVID-19) Dashboard With Vaccination Data (last accessed on 21 February 2022)

observations (20 October 2021), the applicant had not been infected. Moreover, vaccination had been made available to the applicant at the latest in April 2021 – although it is not known if he availed himself of this opportunity.

106. In any event, even assuming that the applicant were to be infected eventually, the Court notes that according to the applicant's medical report, drawn up on his entry into prison, apart from the lack of a kidney, the applicant has no underlying health conditions, and it has not been claimed that the absence of a kidney has ever affected the applicant's quality of life or required any treatment to date – any vulnerability is therefore relative. In relation to his condition of having only one kidney, the applicant relied solely on a report of a Consultant Surgeon (see paragraph 15 above), dated April 2020 at the start of the pandemic, which states that the applicant would be at risk of more serious complications had he to be infected with the virus. However, despite the passage of time, the applicant has not relied on any studies or relevant materials capable of giving a clear picture of the chances that a man of his age (early forties), lacking a kidney, would certainly or quite likely die of the disease, had he to be infected (pre or post vaccination). Thus, the Court cannot speculate as to whether his condition in such case would be of a life-threatening nature which would therefore attract the applicability of Article 2 (compare *Shelley v. the United Kingdom* (dec.), no. 23800/06, 4 January 2008, concerning a complaint about the authorities' decision not to implement a needle-exchange programme for drug users in prisons to help prevent the spread of viruses, where the Court stressed that irrespective of the higher levels of infection of HIV and HCV within prison populations, it was not satisfied that the general unspecified risk, or fear, of infection as a prisoner was sufficiently severe as to raise issues under Articles 2 or 3 of the Convention).

107. The Court does not exclude the applicability of Article 2 in certain Covid-19 related cases. However, in the circumstances of the present case, it considers that the provision is not applicable and that the applicant cannot claim to be a victim of the alleged violation under Article 2.

108. It follows that the Government's objection is upheld and that the applicant's complaint under Article 2 of the Convention is incompatible with the provisions of the Convention within the meaning of Article 35 § 3 (a), and must be rejected in accordance with Article 35 § 4.

2. Exhaustion of domestic remedies

109. The parties maintained their submissions made in the context of the objection under Article 3 examined above also in relation to this complaint.

110. For the reasons set out at paragraph 41 above, also relevant to the present complaint, the Court dismisses the Government's objection.

3. Conclusion

111. The Court notes that the complaint under Article 3 is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

112. Relying on the Court's case-law, the applicant submitted that Article 3 obliged States to adequately ensure the health and well-being of a prisoner and, where necessitated by the nature of a medical condition, the State must ensure regular and systematic supervision, involving a comprehensive strategy aimed at either curing the detainee's medical conditions or preventing their aggravation. In an exceptional situation, a conditional release of a seriously ill prisoner may be required under the Convention. Article 3 also imposed a positive obligation on States to put in place effective methods for the prevention and detection of contagious diseases in prisons. This included the duty to identify the carriers of a germ or a contagious disease upon arrival in prison, to isolate them and treat them effectively, as the prison authorities cannot ignore the infectious state of their prisoners and expose others to the real risk of contracting serious diseases.

113. The applicant argued that despite imprisoning him *sine die,* the authorities had failed to prevent his life from being unavoidably put at risk thus, causing him distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. Medical evidence showed that "prisons and centres of detention were well recognized 'epidemiological pumps''[5] and the related mortality rates were as much as 50% higher for prisoners than for people in the wider community, especially as such communicable diseases were often not adequately treated with potential lethal consequences[6]. The WHO had noted that the health risks related to the spread of communicable diseases in prisons was frequently aggravated by the unhealthy conditions of imprisonment[7].

114. According to the applicant, as outlined by the WHO, the minimum steps that Malta should have taken to ensure adequate safeguarding against infection included: ensuring good hygiene standards and food quality; ensuring systematic medical screening for transmissible diseases for every

[5] Prof. Richard Coker, *Report on Coronavirus and Immigration Detention,* 17 March 2020, pg. 16.
[6] OHCHR, *Human rights in the administration of justice,* A/HRC/42/20, 30 July 2019, para. 30.
[7] *WHO, Good governance for prison health in the 21st century: A policy brief on the organization of prison health, 2013 ("WHO Good governance for prison health"),* para. 1.2.

newly arrived detainee or prison staff; separating the most vulnerable prisoners; and enforcing "strong infection prevention and control ("IPC") measures, adequate testing, treatment and care". The CPT had, in 2016, noted the CCF's inability to handle outbreaks of disease, in that instance the critique related to a poorly handled outbreak of diarrhoea, and consequently recommended that the Maltese authorities put in place robust policies to deal immediately with health (and other) crises that may take place within the prison, including adopting a proactive approach, with a view to minimising the risk of the spread of certain infections and ensure the speedier analysis of test results (see paragraph 33 above). However, the Government failed to heed those warnings and continued to expose the applicant to a regime wholly at odds with the WHO recommendations.

115. In sum, the authorities should have ensured appropriate measures to prevent the introduction and spread of the disease in the prison, as well as enforced comprehensive, preventative, hygiene measures and strengthened medical support, particularly tailored according to the applicant's medical needs. In particular, the prison authorities had failed to insulate the applicant from exposure to the risk of contracting serious diseases, particularly Covid-19 despite his condition. He argued that the Maltese authorities should have made regular health and risk assessments for the applicant, and that the prison should have made arrangements for him to be moved into safer living conditions when infection does strike the prison (sic.). This included alternatives to detention or transfer to a safer medical/rehabilitative centre. According to the applicant the State could not ignore the applicant's sensitive health situation and rest on the basic and general Covid-19 regime designed to protect the detainees in the prison facility as a whole, which in his observations, he admitted had been put in place.

116. The applicant also considered that the authorities' actions were wholly contrary to those obligations. First, they failed to genuinely prioritize bail for the applicant (as a pre-trial detainee), and to take into account the applicant's health (the loss of one kidney). He had been denied any prospect of abiding by the essential requirement of physical distancing, and the detainees shared facilities. His food was delivered by hand without any attempt to ensure hygiene or insulation from infection. Further, the prison exposed the applicant through daily contact with guards and nurses and a chaplain (who rotated and left the facility every week). On any single day, the applicant had been exposed to ten persons and the authorities had done little but provide the applicant with a mask and hand washing sanitiser.

(b) The Government

117. The Government submitted that, even before there was the first case of Covid-19 in the country, the prison administration had put in place a contingency plan which had been approved by the domestic public health authorities, to safeguard the well-being of the inmates (900) and the prison

staff. According to that plan, upon the finding of the first case of Covid-19 in the country, several 'drastic' steps were to be taken, including that visits from family members would be suspended, that each CCF official would be checked for fever prior to entering the facility, and that any official with a high temperature would be immediately sent home. If any prisoner was found to run a fever, he would be immediately transferred to another zone of the prison which was specifically designed as a 'quarantine zone'. According to the plan further measures would be put in place if a prisoner were to be infected.

118. In that case, according to the contingency plan, any externals were no longer allowed into the facility save for catering and cleaning services. The temperature of new detainees was to be taken on entry and precautionary measures were to apply for transfers to court hearings. Staff had also to be properly equipped with masks and gels, as well as the option to wear a disposable suit to avoid any contamination.

119. The contingency plan also prepared for the possibility of more than ten positive inmates. In such case, a lockdown of the prison would have been called, meaning that all inmates would remain in their respective cells for a period of time determined by the authorities and food would be distributed directly in the cells. No items would be allowed in or out of the prison.

120. The Government submitted that, apart from these planned measures, the authorities took other measures, some of which reflected the measures taken nationwide. Thus, all inmates and all staff had been provided with masks, and hand sanitiser had been installed everywhere. Care had been taken to ensure a high degree of cleanliness within the whole facility.

121. Furthermore, for several months, CCF was effectively in a lockdown. The prison administration worked on a system of weekly shifts, where the administration slept at the facility for a full week without any person going in or out of the facility. The details thereof were outlined in the contingency plan. The contingency plan had also provided that in the case of a complete lockdown for quarantine purposes of the entirety of the prison, including of the staff, three doctors, as well as nurses, would be called to work and live within the facility so as to provide all the necessary medical assistance that may be required to both inmates and staff. The authorities also purchased two decontamination pumps in order to decontaminate the property in the event of infected persons being detected.

122. The inmates of CCF were given priority (irrespective of their age) when the Government began to vaccinate the population. In fact, by 21 April 2021, every single inmate at CCF was fully vaccinated, except for those inmates who refused to be vaccinated. Those measures as well as the result achieved through them showed that the authorities took all the precautions necessary to avoid the proliferation of Covid-19 within the facility.

123. Thus, the Government disputed that they had not considered the applicant's personal situation adequately, noting that the prison authorities

carried out medical assessments upon admission of each and every inmate in order to be able to provide for the inmate's well-being. At the same time, they noted that quite a significant proportion of the CCF community suffered from various ailments and in order to see to their needs, the prison authorities had invested hundreds of thousands of Euros over the past years to strengthen the provision of medical care within CCF, inaugurating a new, state of the art, medical centre in March 2021.

124. Lastly, the Government noted that in view of the above the applicant's fear of contracting Covid-19 did not attain the minimum level of severity which was necessary, for any treatment to fall within the scope of Article 3. Indeed, the fear and anxiety that the applicant has felt has been shared and expressed by many throughout the world, whether they lived inside or outside an institution run by Government.

2. The Court's assessment

(a) General principles

125. It cannot be said that the execution of detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 93-94, ECHR 2000-XI).

126. The state of health, age and a severe physical disability constitute situations in which capacity for detention is assessed under Article 3 of the Convention. Although this provision cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance (see *Mouisel v. France*, no. 67263/01, §§ 38-40, ECHR 2002-IX). A lack of appropriate medical care for persons in custody is therefore capable of engaging a State's responsibility under Article 3. In addition, it is not enough for such detainees to be examined and a diagnosis made; instead, it is essential that proper treatment for the problem diagnosed should also be provided (see *Rooman v. Belgium* [GC], no. 18052/11, § 146, 31 January 2019). Thus, the lack of appropriate medical care and, more generally, the detention of a sick person in inadequate conditions, may in

principle constitute treatment contrary to Article 3 (see *Ghavtadze v. Georgia*, no. 23204/07, § 76, 3 March 2009).

127. In addition to the positive obligation to preserve the health and well-being of a prisoner, in particular by the administration of the required medical care, Article 3 imposes on the State a positive obligation to put in place effective methods of prevention and detection of contagious diseases in prisons. First and foremost is the State's obligation to screen detainees early, upon arrival in prison, to identify carriers of a germ or contagious disease, isolate them and treat them effectively. All the more so since prison authorities cannot ignore the infectious state of their inmates and, in so doing, expose others to the real risk of contracting serious illnesses (see *Fűlöp v. Romania*, no. 18999/04, § 38, 24 July 2012, and *Dobri v. Romania*, no. 25153/04, § 51, 14 December 2010).

128. On the whole, the Court takes a flexible approach in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee but should also take into account "the practical demands of imprisonment" (see *Mikalauskas v. Malta*, no. 4458/10, § 63, 23 July 2013 and the case-law cited therein). Furthermore, medical treatment provided within prison facilities must be appropriate, that is, at a level comparable to that which the State authorities have committed themselves to provide to the population as a whole. Nevertheless, this does not mean that every detainee must be guaranteed the same level of medical treatment that is available in the best health establishments outside prison facilities (see *Blokhin v. Russia* [GC], no. 47152/06, § 137, 23 March 2016, with further references).

(b) Application of the general principles to the present case

129. In the present case, the Court considers that given the nature of Covid-19, its well-documented effects, as well as the fact that it is easily transmitted from one person to another (*via* droplets or airborne particles containing the virus), the fears for the applicant's health in the eventuality of contracting the virus, are not insignificant. Thus, in order to protect his physical well-being, the authorities had the obligation to put certain measures in place aimed at avoiding infection, limiting the spread once it reached the prison, and providing adequate medical care in the case of contamination. Preventive measures have to be proportionate to the risk at issue, however they should not pose an excessive burden on the authorities in view of the practical demands of imprisonment. This is even more so in the present case, where the authorities were confronted with a novel situation such as a global pandemic – unprecedented in recent decades – as a result of a new strain of coronavirus (called Covid-19) to which they had to react in a timely manner.

130. In *limine* the Court observes that on 12 March 2020 the Covid-19 outbreak was declared a pandemic. The Court shares the considerations made by the WHO that "in all countries, the fundamental approach to be followed

is prevention of introduction of the infectious agent into prisons or other places of detention, limiting the spread within the prison, and reducing the possibility of spread from the prison to the outside community. This will be more challenging in countries with more intense transmission" and "Countries should prepare to respond to different public health scenarios, recognizing that there is no one-size-fits-all approach to managing cases and outbreaks of COVID-19"[8]. Furthermore, the Court observes that the passage of time has brought along not only new variants, but also an extended scientific knowledge of the virus as well as relevant responses (both *via* vaccinations and medical treatment). All these factors have made it possible for Governments to adapt their policies and protocols to the changing circumstances. This process is still ongoing, and it is in that light that the Court must not lose sight of the challenges being posed by the constant evolution of the Covid-19 pandemic.

131. Turning to the present case, the Court observes that before the first case of Covid-19 was detected in Malta, the prison authorities had already put in place a contingency plan in collaboration with the national health authorities. Regrettably, the Government failed to explain in detail to what extent that contingency plan was put in place once the pandemic hit Malta, and once the first case of Covid-19 was detected in the CCF. Nor did they give details about the numbers of contaminated inmates throughout the relevant period, but solely submitted that none of the ones who tested positive had died. They also failed to give any temporal context to the measures that were put in place – measures which, however, the applicant admitted had been put in place (see paragraph 115 above).

132. The Government explained that, for several months, at the outbreak of Covid-19 internationally, CCF was effectively in a lockdown, whereby visitors of all kinds were not allowed in and the staff was working weekly shifts to avoid excessive exposure to outside factors. According to the documented plan, staff had to be provided with protective equipment including disposable gears, which they could opt for, when in contact with inmates, to avoid contamination going both directions. The Court considers that these measures certainly diminished the risk of wide-spread contamination within the prison thus preserving the health and safety of inmates and staff.

133. Apart from the specific measures during the lockdown the Court takes account of the general measures listed by the Government, such as disinfection (by means of regular cleaning, hand sanitiser, and relative pumps), and mask wearing (compare *Ünsal and Timtik v. Turkey* (dec.), no. 36331/20, § 38, 8 June 2021), as well as the possibility of physical distancing given the size of the applicant's dormitory and the personal space

[8] WHO, Preparedness, prevention and control of COVID-19 in prisons and other places of detention, 15 March 2020, link at paragraph 24 above.

available to him, as well as the fact that he had access to open air all day long, *via* the yard adjacent to the dormitory (see paragraph 92 above). Moreover, there is no indication that the CCF, which hosts around 900 inmates, was or is generally overcrowded, a factor which could enhance proliferation of the virus. Thus, the Court considers that, contrary to the applicant's wishes, in respect of the situation at the CCF there would be no pressing necessity to consider a greater use of alternatives to pre-trial detention, particularly for persons like the applicant accused of particularly serious crimes.

134. In addition, there had been put in place regular temperature verification of officials who could not enter the facility without such clearance, and hosted inmates who were transferred to a 'quarantine zone' in case of fever, allowing for immediate isolation of suspected cases. According to the contingency plan the same applied to new arrivals (over and above the medical screening on entry). This type of initial screening can be considered as satisfactory, particularly in the early phases of the pandemic (see Preparedness, prevention and control of COVID-19 in prisons and other places of detention, WHO, interim guidance, 15 March 2020, pg. 4, referenced at paragraph 24 above).

135. The parties made no submissions about the applicable procedures on entry in later periods. However, albeit not relied on by the parties, whose observations were submitted prior to the publication of the report, for completeness sake, the Court will not ignore relevant public findings made by a group of experts in the context of an inquiry ordered by the Minister under Chapter 273 of the Laws of Malta, dated 9 December 2021[9]. The report aimed at scrutinizing certain procedures and policies undertaken at the CCF. According to that report: new detainees were subject to a rapid test, with immediate results, which would determine where the new detainee would be placed according to whether the test was positive or not; In certain cases, a PCR test would be administered; Nevertheless, data showed that between 1 September 2020 and 11 October 2021 any new detainee was kept in quarantine for fourteen days; Detainees who tested positive for the virus or were in quarantine underwent medical checks twice daily; More recently, following widespread vaccination and rapid testing, the quarantine period was decreased to 24-48 hours for persons who tested negative. In the Court's view, the above shows that authorities maintained their vigilance and adapted their protocols to the evolving situation.

136. Importantly the Court notes that vaccination against Covid-19 was available to all inmates in early 2021 and by April 2021 all the inmates who wished so had been vaccinated. That instrument was deployed in an extremely timely manner in order to protect CCF inmates and the Government's efforts in this respect must be lauded.

[9] https://content.maltatoday.com.mt/ui/files/pr212241b.pdf (last accessed on 21 February 2022)

137. In so far as the applicant complained that he should have been insulated from exposure and protected more than other detainees, the Court takes note of the Government's submission that various individuals in the prison could qualify as vulnerable. Given the practical demands of imprisonment and the novelty of the situation, the Court can accept that it may not be possible to make arrangements for each vulnerable individual to be moved to safer quarters, before any contamination occurs in the prison. While refined allocation procedures should be considered allowing prisoners at highest risk (such as those having cardiovascular disease, diabetes, chronic respiratory disease, or cancer) to be separated from others – the applicant has not made out a case that he fell within the category of the most vulnerable (see paragraph 106 above).

138. Further, even if that were the case, as noted above, contaminated persons would be moved to other quarters, contacts quarantined, and relevant decontamination processes would take place. Indeed, it is not irrelevant that at the date of filing observations, more than a year and a half since the start of the pandemic, the applicant did not submit that he was at any stage during his detention exposed to a Covid-19 positive individual and the mere fact that a group of detainees (none of whom was known to be positive for Covid-19) shared a dormitory and used the same medical, sanitary, catering and other facilities does not in itself raise an issue under Article 3 of the Convention (contrast, *Feilazoo*, cited above, § 92, where the applicant, who was not in need of quarantine, was placed in quarantine quarters with other persons who could have posed a risk to his health). In this connection it is also noted that water and detergents were readily available to the applicant in his dormitory (see paragraph 94 above), elements which are an asset for general precautionary cleaning. Further, the Court does not take issue with the fact that food was distributed by hand, given the provision of hand sanitiser to both guards and prisoners.

139. While it is true that CCF did not entirely prevent contamination within the prison, there is no indication that the spread of the virus had not been, and continues to be, limited *via* these measures, nor has the applicant claimed that the contaminations had gone out of hand. Admittedly, following the filing of observations, according to the WHO, all European countries have seen a spike in cases due to the highly transmissible Omicron variant. The region of Europe and central Asia saw over 7 million newly reported cases of Covid-19 in the first week of 2022, and the Institute for Health Metrics and Evaluation (IHME) forecasts that more than 50% of the population in the Region will be infected with Omicron in January-February 2022[10]. In consequence, it would be unrealistic to expect that a detainee would never come in contact with a positive person, even more so given that certain

[10] https://www.euro.who.int/en/media-centre/sections/statements/2022/statement-update-on-covid-19-omicron-wave-threatening-to-overcome-health-workforce (last accessed on 21 February 2022)

measures could only be kept in place for as long as reasonably necessary (such as, for example, the suspension of family visits).

140. In light of the above, the Court considers that the authorities have put in place adequate and proportionate measures in order to prevent and limit the spread of the virus.

141. Lastly, the Court reiterates that absent or inadequate medical treatment, particularly when the disease has been contracted in detention, is most certainly a subject for the Court's concern (see *Shchebetov v. Russia*, no. 21731/02, § 71, 10 April 2012). In this connection the Court notes that even assuming that the applicant had to contract Covid-19 while in prison, there is no indication that qualified assistance would not be available, thus dispelling any ulterior anxiety in this respect (see, *a contrario*, *Khudobin v. Russia*, no. 59696/00, § 95, ECHR 2006-XII (extracts). In particular, quite apart from the regular medical staff, a medical centre was also inaugurated in March 2021.

142. In these circumstances the Court does not find that the authorities failed to secure the applicant's health (compare, albeit in a different context, *Artyomov v. Russia*, no. 14146/02, § 109, 27 May 2010), nor that he was subjected to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

143. It follows that there has been no violation of Article 3.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 3 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 3 of the Convention in relation to the period from 30 November 2019 to 3 January 2020;

3. *Holds* that there has been no violation of Article 3 of the Convention in relation to the period from 4 January 2020 onwards;

4. *Holds* that there has been no violation of Article 3 of the Convention in relation to the State's the positive obligation to preserve the health and well-being of the applicant.

Done in English, and notified in writing on 1 March 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Péter Paczolay President