The Constitutional Guarantees of Rights and Political Freedoms

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Your Excellency, Chief Justice Abd-elwahed,
Excellencies,
Dear Colleagues:

First of all allow me to convey to the Supreme Constitutional Court of Egypt the greetings and congratulations of the Constitutional Court of Malta on the auspicious occasion of the 40th anniversary of the foundation of the Constitutional Judicature in Egypt. It is, indeed, highly commendable that this occasion should be marked by the organisation of two symposia on topics which are of extreme interest to all those who work within the field of constitutional law and fundamental human rights.

In the brief time allotted to me, I would like to share with you a few thoughts on the relationship between human rights and political freedoms on the one hand and constitutional courts on the other. In doing so I will draw on the experience of the Constitutional Court of Malta which is, after all, only five years older than that of our host country.

Constitutional courts, in the sense of a court, separate and distinct from the ordinary courts, with a special jurisdiction to rule primarily on the constitutionality or otherwise of laws passed by the legislature, are, by and large, a creation of the twentieth century. In some jurisdictions, constitutional courts are composed rather differently from the ordinary courts, as the exercise of constitutional jurisdiction sometimes necessitates taking into account considerations which go beyond the purely legal and juridical. In other jurisdictions, on the other hand, the functions of a constitutional court are exercised by Supreme Courts. After the Second World War and with the adoption by the United Nations of the Universal Declaration of Human Rights, more specific emphasis began to be given, particularly in the post-war emergent states and within the context of post-war constitutions, to these rights. Many constitutional courts were given the specific task to enforce these fundamental human rights and to guarantee their observance by the state. It is trite knowledge, however, that constitutional courts do not operate in a vacuum: constitutional courts, like ordinary courts for that matter, are as efficient and as functional as the social, economic and particularly political context within

which they operate allows them to be. On the other hand it is undeniable that strong independent courts, including constitutional courts, can play a leading role as catalysts in promoting social, economic and political development. Where this development occurs naturally and without the need of "judicial intervention", it will more often be the case that such development will bring to the fore new and sophisticated issues of human rights.

Malta was a British Crown Colony from 1800 to 1964. During this entire colonial period, the Maltese courts and judiciary enjoyed an independence and stature which, I would submit, was unparalleled in the British Empire, with the exception of Britain itself and of those territories which had Dominion status. The reason was very much a social and political one. When in the very beginning of the nineteenth century the Maltese, having rid themselves of the French with the help of the British and of the Portuguese, placed themselves under the protection of the British Crown, the British found in Malta a fairly sophisticated – at least for that time – legal and judicial system. What is more, they also found that Malta had a reputable and influential "legal class" – persons trained in civil and canon law mainly in Malta but also in Italy and France, from whom judges and prosecutors had invariably been drawn for more than a hundred years previously. The British needed the help of these people, and of other "influential" sections of the population, like the clergy and the nobility, to ensure that the Maltese Islands could be transformed into a strategic military base. For this reason, although successive Royal Commissions regularly provided the necessary impetus for reform, the legal and judicial system was not "replaced" by a "British" system, but was allowed to "develop". English common law was never introduced into Malta, although it undoubtedly played a part in influencing the development of Maltese law. The Maltese were allowed to retain (up till 1933) Italian as the language of the courts – a fact which also ensured that throughout the one hundred and sixty four years of British rule there were only two expatriate, that is English, members of the judiciary, and they were both Chief Justices: Waller Rodwell Wright (1819 – 1826) and Sir John Stoddart (1826 – 1838). Otherwise during this entire period all the British people in Malta – and there were thousands in view of the British military presence – were always subject to Maltese law, administered in Maltese courts by Maltese judges and magistrates (and, in the case of trial by jury, by Maltese jurors). Very early in the nineteenth century the basic principles guaranteeing the independence of the judiciary – security of tenure and security of financial remuneration – were introduced, and by the middle of that century the basic principles, as we know them to-day, guaranteeing a fair trail in both civil and criminal proceedings were also in place. Trial by jury was also introduced. During the entire period of colonial rule, the few cases coming up before the Maltese courts which to-day we would classify as "constitutional" or "human rights" cases dealt mainly with the extent of the powers of the Governor (especially his power to enact laws by way of "Ordinances"), with judicial review of

administrative action, and with the distinction between "acta iure imperii" and "acta iure gestionis" and the immunity attaching thereto and non-responsibility arising therefrom. One notable exception, however, was the case of the so-called Maltese Internees – a group of Maltese people (including the former Chief Justice, Sir Arturo Mercieca, who was illegally forced to resign by the Governor) who, after being interned, were ordered by the British Governor to be deported to Uganda in 1942 because it was alleged that they harboured pro-Italian sentiments and were therefore a security risk in time of war. Both the Civil Court and the Court of Appeal ruled against the Governor and held that the deportation order was illegal under both Maltese and Imperial law. Unfortunately in between the first decision and the decision by the Court of Appeal the internees had been placed in the hold of a steamship and transported to Alexandria, from where they continued their journey overland to Uganda. The decision of the Court of Appeal was very much a Pyrrhic victory for the deportees.

Although human rights provisions were first formally introduced to Malta in the Constitution of 1961, it was the Independence Constitution of 1964 – which is still, with some minor amendments, in force – which provided for the first time for the establishment of a new court, the Constitutional Court, which was to be composed of the Chief Justice and four other judges (in the early 70's the other judges were reduced to two so that to-day this court is a three man court). The 1964 Constitution, in Chapter II thereof, provides for what it calls "Declaration of Principles": for example Article 8: "The State shall promote the development of culture and scientific and technical research". Or, more topical perhaps in Malta to-day, Article 9: "The State shall safeguard the landscape and the historical and artistic patrimony of the Nation." Or Article 18: "The State shall encourage private economic enterprise". But then Article 21 goes on to provide that the provisions of this Chapter "shall not be enforceable in any court, but the principles therein contained are nevertheless fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making law." The same 1964 Constitution then provided, and still provides of course, in Chapter IV for an <u>enforceable</u> Charter of Human Rights, based largely on the European Convention of Human Rights (but with some significant modifications) and on the models which in the 1960's were being dished out by the Westminster Parliament through Orders-in-Council to several former colonies which were attaining independence. This is not to say that Malta, prior to 1964, or prior to 1961, was a country which was not aware of fundamental human rights – the Criminal Code, for instance, which dates back to the mid-1850's, in the part dealing with criminal procedure, is replete with provisions intended to ensure a fair hearing in all criminal matters. This Charter of Human Rights is enforceable through the Civil Court of General Jurisdiction, with an appeal to the Constitutional Court. In fact, although the Constitutional Court's jurisdiction extends also to matters dealing with the validity of laws and questions relating to the validity of general elections and of membership of the House of Representatives,

ninety nine percent of its workload these last thirty years has concerned human rights applications, that is to say applications alleging violation of human rights. In 1987 the Maltese Parliament enacted the European Convention Act, by which the substantive provisions of the European Convention on Human Rights and of Additional Protocols were incorporated into domestic law, and the Civil Court of General Jurisdiction and the Constitutional Court were charged with the task of enforcing these substantive provisions – the idea being, of course, that if we can deal with certain issues at home it would save everyone the embarrassment of having to go to Strasbourg. As I pointed out earlier, there are some significant differences between the Charter of Human Rights in the 1964 Constitution and the substantive provisions of the European Convention, notable among these is the provision dealing with discrimination: whereas the Constitution prohibits discrimination on the grounds of race, place of origin, political opinions, colour, creed or sex, the European Convention, as all of you know, prohibits all kinds of discrimination in the enjoyment of the other rights and freedoms in the same Convention, and is not limited to discrimination based on sex, race, colour etc. Likewise, the provisions dealing with the right to the enjoyment of one's property are substantially different: the Constitution provides some detailed rules regarding expropriation in the public interest; Article 1 of the First Protocol of the European Convention is couched in much more general terms which, again as I am sure most of you are aware, has allowed the ECHR to develop the notion of "proportionality" in matters of expropriation – a notion which the ECHR often applies also in the interpretation of other provisions of the Convention.

To go back to a purely Maltese context, the first point to note is that although the principles contained in the "Declaration of Principles" are *per se* unenforceable, yet the Constitutional Court has held that in interpreting the provisions in the Charter of Human Rights it is prepared to take into consideration these principles – in other words they are not directly enforceable, but may be of considerable importance in the context of interpretation. The second point is that a person applying to the courts for a declaration that his or her human rights have been, are being or are likely to be contravened (and for a remedy for that violation or to prevent the violation occurring) may invoke either the provisions of the Charter in the Constitution or the provisions of the European Convention, or both. The Constitutional Court in Malta has taken the view that even though some of the provisions of the Convention – now part of domestic law – appear to be in conflict with the provisions of the Charter, there is in reality no such conflict: the fact of the matter is that depending on the right which one is seeking to enforce, one of these two instruments may grant a wider measure of protection and redress than the other – a case in point, being, as I have said, the right of freedom from discrimination.

As far as the Constitutional Court and Human Rights are concerned, the period 1964 to 1970 was, to say the least, unremarkable. During this period the Maltese economy was still heavily geared to the presence of the British Armed Forces in Malta, and, notwithstanding all the writings on the wall, it was erroneously assumed that Malta would remain forever an island of strategic importance if not for Britain in particular, for NATO in general. Although the ball had been slowly set in motion to promote tourism and the manufacturing industry, the former naval dockyard, employment with government and employment with the British services were still the mainstay of the economy. During this period of about six years there were two or three cases which came up to the Constitutional Court, and they were all with a political background. They dealt mainly with freedom of association and freedom of expression: the issue in one case, for instance, was that Government banned from state hospitals certain newspapers which openly supported the party in opposition.

In the period 1970 to 1987 we have a different economic and political background. This was the time when the foundations for an economy not dependent on the presence of the British Armed Forces in Malta were being laid. Major industrial development was undertaken, key projects, like the setting up of the national airline and the creation of a container transhipment port, or freeport, were launched. But it was also the time when many felt that the Government was authoritarian and heavy handed. Recourse to the courts, including the Constitutional Court, both for judicial review and for alleged violation of human rights, began to be resorted to much more frequently. Government sought to restrict the right of judicial review, but the courts managed to skirt round the restrictions by applying the general principles of English Administrative Law. Cases coming up before the Constitutional Court – and beginning with the mid-70's the floodgates seemed to have opened – dealt principally with discrimination on the ground of political opinions, illegal arrest and detention, and degrading treatment while in police custody. There were some cases dealing also with expropriation, but the Constitutional Court was then very reluctant to go into, or to consider, the extent of the notion of "public interest" for purposes of expropriation. For some months the Constitutional Court itself, following the abstention of one judge, was not reconstituted by the simple expedient of the Minister of Justice not advising the President of Malta of who should be subrogated to replace the recused judge – today the Constitution provides for an automatic composition of the Constitutional Court in a similar situation, with the senior judge or judges automatically coming in from other courts to sit on the Constitutional Court. The height of all these political problems was reached in the mid-80's when the Government sought to take over church run schools and church run hospitals. Constitutional cases against the Government were instituted by the Archdiocese of Malta. The turbulent spirit of the time is perhaps best epitomised by the cases instituted by a small order of staunch and mainly Irish and English nuns, the Little Company of Mary or Blue Sisters, who fought tooth and nail Government's

attempt to take over their small hospital; and they eventually won the day in court even though they had already been unceremoniously deported from Malta after their work permit was not renewed.

The 1987 elections saw a change in the Government which had been in office since 1970. The period following, that is from 1987 to date, has been a period of economic development in a more tranquil political setting under both a Nationalist and a Labour administration. The new administration in 1987 immediately declared its intention to apply to join the European Union and, as already indicated, incorporated the European Convention into domestic law (incidentally Malta had signed up to the right of individual petition before the Strasbourg organs some months prior to the 1987 election).

Economic development over the last twenty years has brought its own type of cases before the Constitutional Court, whether as a direct or indirect result of this development. With the wider protection afforded by the European Convention and by the jurisprudence of the Strasbourg Court, the last vestiges of discrimination on the grounds of gender, particularly in the field of the acquisition of nationality, were removed by the Constitutional Court. Rent laws, dating to the immediate post-war period – which then required security of tenure for tenants in view of the lack of accommodation (because of the destruction wrought by the Second World War) – have been subjected to critical scrutiny by the courts, and in many cases the Constitutional Court has held that there was a violation of Article 1 of the First Protocol to the European Convention because, given the obtaining social situation, a landlord was being made to carry a disproportionate burden when it came to the balance between the rights of the individual and the rights of the community. The Constitutional Court has also declared that it will examine whether there was a real public interest involved in an expropriation of land by the State, or whether the public interest was being invoked merely as an excuse for something else. Immigration – not only illegal immigration but also legal immigration – has brought its own share of human rights cases. One particular case which comes to mind – the **Zakarian Case**, see copy of judgment attached – is of two Armenian kids – brother and sister of about 14 and 15 at the time of arrival in Malta – who left Moscow bound for London via Malta, with the intention of joining their aunt in London. They were refused admission into England, were sent back via the same route to Moscow, and they claimed political asylum while in Malta. The UN Commissioner for Refugees in Malta refused their application; they appealed to the Asylum Appeals Board which again refused their application, so they sought redress in court on the ground that if they were sent back to Armenia they would be subjected to inhuman and degrading treatment because of their parents' involvement in political activities. The Constitutional Court held that it was not satisfied that if they were returned to Armenia these kids would face a specific, personal and

significant risk of ill-treatment amounting to inhuman or degrading treatment, and therefore there was no obstacle to their being sent home.

To-day the Constitutional Court in Malta, like in any democracy where the rule of law prevails, is at the forefront in securing and guaranteeing fundamental human rights. With the exception of those rights which admit of no limitation or restriction – like the right not to be subjected to inhuman or degrading treatment or punishment – Constitutional Courts often have to strike a balance between the interests of an individual and those of the community at large. In doing so, social and economic considerations may be relevant. Constitutional Courts can also play a leading role in reshaping the social configuration of a particular community. In doing so, they may be accused of being too conservative or too liberal. But then that is very much the fate of any judge in a democracy. Judges, and even more so, Constitutional Court judges, often need to bring together their experience from different branches of knowledge to ensure a proper administration of justice. As David Pannick wrote in his book *Judges* (O.U.P. 1987): *"The qualities desired of a judge can be simply stated: that he be a good one and that he be thought to be so good. Such credentials are not easily acquired. The judge needs to have the strength to put an end to injustice and the faculties that are demanded of the historian and the philosopher and the prophet."*

Appendix

Judgements of the Constitutional Court delivered in the English Language

[Note: The language of the Courts in Malta is Maltese, and the vast majority of judgments – 99% – are delivered in that language. According to the Constitution, Maltese is the national language (Article 5(1)), but Maltese and English are the official languages (Article 5(2)). In accordance with the provisions of the Judicial Proceedings (Use of English Language) Act (Chapter 189 of the Laws of Malta) the English language must be used in criminal proceedings where the accused is English speaking, and in civil proceedings where both plaintiff and defendant are English speaking. In the **Eyre and Molyneaux** case and in the **Muscat** case, the constitutional proceedings began pursuant to a reference made to the Civil Court of General Jurisdiction by the Courts of Criminal Jurisdiction. The criminal proceedings were being conducted in English because Eyre, Molyneaux and Muscat were English speaking, and therefore the constitutional proceedings were continued in that language. In the **Zakarian** case, on the other hand, proceedings were conducted in the English language both before the Civil Court of General Jurisdiction and before the Constitutional Court by agreement between the parties – in effect, for the purpose of that case, the Minister of Home Affairs and the Principal Immigration Officer declared themselves to be English speaking.]

1: **The Republic of Malta v. Gregory Robert Eyre and Susan Jayne Molyneaux** – Friday 1 April 2005

2: **Luiza Merujian Zakarian and Simony Merujian Zakarian v. The Minister of Home Affairs and the Principal Immigration Officer** – Monday 19 February 2007

3: **The Police v. Lewis Muscat (Extradition Proceedings)** – Friday 9 March 2007

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CONSTITUTIONAL COURT

JUDGES

His Hon. The Chief Justice Vincent A. De Gaetano
The Hon. Mr Justice Joseph D. Camilleri
The Hon. MR Justice Joseph A. Filletti

Sitting of Friday, 1st April, 2005.

Number on list: 4

Constitutional Reference no. 14/2004

The Republic of Malta

v.

Gregory Robert Eyre and Susan Jayne Molyneaux

The Court:

Introduction

1. This is an appeal from a decision delivered by the First Hall of the Civil Court on the 12 October, 2004 pursuant to a reference made by the Criminal Court in terms of Section 46(3) of the Constitution and Section 4(3) of the European Convention Act (Cap. 319). The terms of the reference are clearly set out in the judgement of the first Court,

which is being reproduced hereunder as part of this judgement. This Court, however, is of the opinion that it is appropriate even at this stage to point out something which appears to have been ignored by the first Court, namely that in terms of the European Convention Act the substantial provision of Article 6(2) of the European Convention must be applied subject to the reservation made by Malta when signing the Convention in 1966. This stems from Section 3(3) of Cap. 319 which provides that *"The Human Rights and Fundamental Freedoms shall be enforceable subject to the Declaration and Reservations made by the Government of Malta on the signing of the Convention on the 12th day of December, 1966, which Declaration and Reservations are reproduced in the Second Schedule to this Act."* Item 1 of the "Declaration and Reservations" states: *"The Government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts."* As will be explained further on this judgement, this declaration is not really of such fundamental importance for the purpose of the question under examination in this particular case, since even without this declaration the Strasbourg case-law has in general admitted the possibility of reverse onus provisions and presumptions, subject, however, to certain overriding considerations.

2. The essence of the question under examination is whether subsection (2) of Section 26 of the Dangerous Drugs Ordinance (Cap. 101) is in violation of Section 39 of the Constitution and of Article 6 of the European Convention in so far as it is alleged that it deprives the person accused – in this case, Susan Jane Molyneaux – of the benefit of the presumption of innocence and of the general procedural requirement of "equality of arms" which is an essential requisite of a "fair trial".

The judgement of the first Court

3. The First Hall of the Civil Court, in an elaborate judgement, came to the conclusion that Section 26(2) of Cap. 101 is not in breach of Section 39 of the Constitution or of Article 6 of the Convention. The text of the entire judgement is reproduced hereunder:

> "These proceedings originated from a reference made by the Criminal Court under art. 46(3) of the Constitution of Malta ["the Constitution"] and under art. 4(3) of the European Convention Act[1] for this court to determine whether a provision of the Dangerous Drugs Ordinance[2] ["the Ordinance"] is in breach of the provisions of art. 39 of the Constitution and of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ["the Convention"] concerning the guarantees for a fair trial, in particular, the presumption of innocence and the benefit of equality of arms. The provision in question is that of art. 26(2) of the Ordinance:
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> > ***26.*** *(2) When the offence charged is that of possession of, or of selling or dealing in, a drug contrary to the provisions of this Ordinance it shall not be a defence to such charge for the accused to prove that he believed that he*

[1] Chapter 319 of the Laws of Malta.
[2] Chapter 101 of the Laws of Malta.

was in possession of, or was selling or dealing in, some thing other than the drug mentioned in the charge if the possession of, or the selling or dealing in, that other thing would have been, in the circumstances, in breach of any other provision of this Ordinance or of any other law.

"The reference by the Criminal Court was made in the following terms:

… … … the court, having seen sections 46(3) of the Constitution of Malta and 4(3) of Chapter 319, refers the issue raised in the fourth and fifth pleas of accused Susan Jayne Molyneaux, in so far as they can be construed to imply that section 26(2) of Chapter 101 of the Laws of Malta is in breach of section 39 of the Constitution of Malta and article 6 of the European Convention of Human Rights, to the Civil Court, First Hall to be determined according to law.

"The relevant facts, in brief, are as follows:

Susan Jayne Molyneaux ["the accused"] was charged, together with Gregory Robert Eyre, under Bill of Indictment number 3/2004 with being guilty of: (1) "having, with another one or more persons in Malta, and outside Malta, conspired for the purpose of committing an offence in violation of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) and the Medical and Kindred Professions Ordinance (Chapter 31), and specifically of importing and dealing in any manner in cocaine and Ecstasy Pills, and of having promoted, constituted, organised and financed such conspiracy"; (2) "meaning to bring or causing to be brought into Malta in any manner whatsoever a dangerous drug (cocaine), being a drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance, when neither was in possession of any valid and subsisting import authorisation granted in pursuance of said law"; and (3) "meaning to bring or causing to be brought into Malta in any manner whatsoever a dangerous drug (Ecstasy), being a drug restricted and controlled under the provisions of Part A, Third Schedule, of the Medical and Kindred Professions Ordinance, when neither was in possession of any valid and subsisting import authorisation granted in pursuance of said law".

The Bill of Indictment also states that the accused "did not specifically know that drugs were to be imported illegally into Malta, but merely thought and was convinced that something against the law was to be imported into Malta [such as money in order to evade tax on currency]".

"In her defence the accused raised the following pleas, *inter alia*:

… … …

4. *In view of the fact that the Attorney General in the narrative part of the first count of the Bill of Indictment excludes the accused Susan Jayne Molyneaux from any responsibility, partially since it is therein stated that she did not specifically know that the drugs were to be imported illegally into Malta, but states that she "merely thought and was convinced that something against the law was to be imported into Malta [such as money*

in order to evade tax on currency]", should the Attorney General be contending that such tantamounts to criminal liability and responsibility, any such disposition which may be quoted by the Attorney General in this regard is null and void as it runs counter to the basic principles of justice and the provisions of the Constitution of Malta and the European Convention on Human Rights.

5. *That for reasons mentioned in plea number 3 supra*[3]*, the plea mentioned in paragraph 4 supra is also applicable to the second and third counts of the Bill of Indictment.*

"The accused is complaining that the provisions of art. 26(2) of the Ordinance breach her right to a fair trial by depriving her of the benefit of the presumption of innocence and of equality of arms with the prosecution guaranteed under the Constitution and under the Convention. The relevant provisions are art. 39(1) and (5) of the Constitution:

39. *(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*

… … …

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this sub-article to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

and art. 6 of the Convention:

ARTICLE 6

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. … … …

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

"The accused claims that the provisions of art. 26(2) of the Ordinance deprive her of the right to a fair hearing because:

Such a provision, in itself, leaves the accused in a situation where, even if he is fooled or has no knowledge that he is carrying the substance he is charged of possessing, he would still be found guilty of the charge. From the wording of the law it would appear that, even if a third party had to admit on oath that he was responsible for the deception and that the person accused was totally oblivious, such evidence would not be admissible or

[3] *i.e.* "Though the second and third counts do not contain the text [referring to the accused's lack of specific knowledge about the importation of drugs] there is no doubt that the Attorney General is referring to the dangerous drugs referred to in the first count of the Bill of Indictment."

have any probative value under section 26(2) of the Ordinance. The person charged would be found guilty nonetheless.
Under this situation the accused finds himself not only in the situation that the onus probandi lies on him to exculpate himself from the offence against the Ordinance (in this case possession/selling/dealing of [sic] a drug against the Ordinance), but he is also being denied a defence which would, otherwise, if believed, lead to his acquittal.[4]

"The accused is also complaining that the above-quoted provisions of the Ordinance deprive her of "equality of arms" with the prosecution. She argues that art. 26(2) of the Ordinance "is clearly denying her the possibility of a defence which, if believed, will slightly present a different scenario which would secure her acquittal. This section of the law does not afford the accused a reasonable opportunity to present her case, including her evidence"[5].

"Finally, the accused is also claiming that, in creating an irrebuttable "presumption of guilt", the provisions of art. 26(2) of the Ordinance deprive her of the benefit of the presumption of innocence:

Accused hereby makes reference to the proviso to section 39(5) of the Constitution of Malta. This proviso makes it constitutionally legitimate for the onus probandi to be shifted onto the accused as is the case with section 26(1) of Chapter 101 of the Laws of Malta. This peculiar departure from the rule is possible as long as the shift in the onus probandi leads to a rebuttable presumption of fact and not of guilt. If it is a shift in the presumption of guilt then it will not be in conformity with the Constitution.[6]

"The question therefore is whether art. 26(2) of the Ordinance deprives the accused of the protection of the law by creating an irrebuttable presumption of guilt, thus depriving her of the presumption of innocence and giving the prosecution an unfair advantage.

"In the view of this court, art. 26(2) of the Ordinance creates the offence of being in possession of, or of selling or dealing in, a drug, knowing that one is in possession of, or selling or dealing in, an object, not being necessarily a drug, the possession or sale whereof, or the dealing in which, is prohibited by law. Therefore, it is not correct to state that the offence is one of strict liability, or one where the proof of *mens rea* is not required. Such proof is required to secure a conviction, and the burden thereof is still on the prosecution, because it is for the prosecution to prove that the accused knew that he was possessing or selling, or dealing in, an object when such possession, selling or dealing is prohibited by the law. It is true that the fact of possession or sale of, or dealing in, the prohibited object creates a presumption that the illegal act was done knowingly, but such presumption is rebuttable by the accused who is certainly not deprived of the defence of proving that, for instance, unknown persons had

4 *Fol*. 30.
5 *Fol*. 34.
6 *Foll*. 34 *et seq.*

placed the prohibited object in his pocket without his knowledge. What he cannot do is to show that, although he had guilty knowledge because he knew that he was *e.g.* in possession of a prohibited object, he did not know that the prohibited object was a drug.

"In other words, whoever knowingly possesses or sells or deals in an object knowing that that object is a prohibited object, is knowingly taking the risk that such object may be a drug, with all the consequences which that fact entails.

"Therefore, the principle established in the decided cases quoted in the accused's note of submissions before the Criminal Court[7] — namely, that "although the law does not appear to require intent for the offence of possession to take place, logical interpretation of the law requires it, as it is an essential element of a criminal offence"[8] — still stands, and it is not correct to say that "the wording of section 26(2) does away with the mental element of the offence".[9] The mental element, namely, the intention of possessing, selling or dealing in a prohibited object, is still required, and any presumption of knowledge created by the fact of possession, sale or dealing, is rebuttable.

"It may indeed be argued that proof of such intention may be construed as creating a further irrebuttable presumption of a more specific intention of possessing, selling or dealing in drugs. This argument may not be refuted by answering that art. 26(2) of the Ordinance merely defines the constituent elements of the offence, and defines the mental element as being the knowledge of possessing or selling, or dealing in, any prohibited object. In **the Salabiaku Case**[10], the European Court of Human Rights ["the European Court"], observed as follows:

> *27. As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention (Engel and Others judgment of 8 June 1976, Series A no. 22, p. 34, para. 81) and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.*
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> *… … …*
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> *28. This shift from the idea of accountability in criminal law to the notion of guilt shows the very relative nature of such a distinction. It raises a question with regard to Article 6 para. 2 (art. 6-2) of the Convention.*
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> *Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It*

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7 *Fol*. 31.

8 *Fol*. 31.

9 *Fol*. 32.

10 **Salabiaku *v.* France**, 14/1987/137/191.

does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider (paragraph 64 of the report), paragraph 2 of Article 6 (art. 6-2) merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1 (art. 6-1). Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6 (art. 6), which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law (see, inter alia, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, para. 55).

Article 6 para. 2 (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

"Essentially, therefore, the question is twofold: (i) whether a presumption of guilty knowledge based on proof of possession, *etc.* constitutes a breach of the presumption of innocence; and (ii) whether requiring knowledge of possessing or selling, or dealing in, any prohibited object rather than knowledge of possessing or selling, or dealing in, drugs constitutes a breach of the presumption of innocence. With regard to the second limb of the question, it is indifferent whether a conviction is achieved by defining the mental element as requiring a less specific knowledge or by providing that proof of a less specific knowledge creates an irrebuttable presumption of a more specific knowledge: the final result will be the same.

"The European Court, as the extract from the Salabiaku Case reproduced above makes clear, does not regard such presumptions as automatically in breach of the Convention: regard must be had to whether they are confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence". In order to determine whether art. 26(2) of the Ordinance passes this test, one must analyse and identify the nature of the presumptions and, for this purpose, reference may usefully be made to the classification adopted by the House of Lords in **the Kebeline case**[11]:

It is necessary in the first place to distinguish between the shifting from the prosecution to the accused of what Glanville Williams[12] at pp. 185-186 described as the "evidential burden", or the burden of introducing evidence in support of his case, on the one hand and the "persuasive burden", or the

[11] **R.** ***versus*** **Director of Public Prosecutions,** ***ex parte*** **Kebilene**, [1999] 3 WLR 972, 998-999. [http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd991028/kabel-1.htm]

[12] *The Proof of Guilt*, 3rd ed., 1963.

burden of persuading the jury as to his guilt or innocence, on the other. A "persuasive" burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused. An "evidential" burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.

Statutory presumptions which place an "evidential" burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence. They are not incompatible with article 6(2) of the Convention. … … ... They are a necessary part of preserving the balance of fairness between the accused and the prosecutor in matters of evidence. … … …

Statutory presumptions which transfer the "persuasive" burden to the accused require further examination. Three kinds were identified … … … First, there is the "mandatory" presumption of guilt as to an essential element of the offence. As the presumption is one which must be applied if the basis of fact on which it rests is established, it is inconsistent with the presumption of innocence. This is a matter which can be determined as a preliminary issue without reference to the facts of the case. Secondly, there is a presumption of guilt as to an essential element which is "discretionary". The tribunal of fact may or may not rely on the presumption, depending upon its view as to the cogency or weight of the evidence. If the presumption is of this kind it may be necessary for the facts of the case to be considered before a conclusion can be reached as to whether the presumption of innocence has been breached. In that event the matters cannot be resolved until after trial.

The third category of provisions which fall within the general description of reverse onus clauses consists of provisions which relate to an exemption or proviso which the accused must establish if he wishes to avoid conviction but is not an essential element of the offence.[13]

"The first presumption, namely, the presumption of guilty knowledge arising from the fact of possession, *etc.*, is rebuttable and, therefore, "discretionary", because it is up to the tribunal of fact to decide whether or not to rely upon it, depending on its view of the evidence. The question remains whether it is "persuasive", *i.e.* requiring the accused to disprove it on a balance of probabilities, or merely "evidential", in which case it would be sufficient for the accused to raise a reasonable doubt, thereby shifting back on the prosecution the burden of proving guilty knowledge beyond reasonable doubt.

"The matter was discussed in the judgment delivered by the Court of Criminal Appeal *in re* **Il-Pulizija *versus* Martin Xuereb**[14]:

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13 Opinion of Lord Hope of Craighead.

14 20 September 1996, Vol. LXXX-IV-285.

> *Għalkemm il-leġislatur, f'din id-disposizzjoni, bħalma f'diversi disposizzjonijiet oħra ta' l-Ordinanza, ma jużax il-kelma "xjentement", hu evidenti li hawn si tratta ta' reat doluż u mhux sempliċement ta' reat kolpuż. Fi kliem ieħor, il-leġislatur ma riedx jikkolpixxi lil min, per eżempju, ad insaputa tiegħu, jitqegħedlu xi droga fil-bagalja tiegħu u dan jibqa' dieħel biha Malta. Mill-banda l-oħra, u b'applikazzjoni ta' l-artikolu 26(1) ta' l-Ordinanza, persuna li tkun materjalment daħħlet droga f'Malta hi preżunta li daħħlitha xjentement, jiġifieri meta kienet taf bl-eżistanza ta' dak l-oġġett, li dak l-oġġett hu droga, u għalhekk kienet taf li qed iddaħħal id-droga, salv prova (imqar fuq bażi ta' probabilità) kuntrarja u salv il-limitazzjoni għal tali prova skond is-subartikolu (2) ta' l-imsemmi artikolu 26.*

"Since the burden on the accused is to disprove guilty knowledge on a balance of probabilities, the conclusion must be that the first presumption, albeit discretionary, is of a "persuasive" nature. Although such presumption does reverse the burden of proof, it is not necessarily in conflict with art. 39 of the Constitution or with art. 6 of the Convention; what is required is that such presumptions are confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence". Inroads into the presumption of innocence require justification, and, according to the principle of proportionality, must not be greater than is necessary. Again following the Kebeline case, the following three questions are to be considered in order to determine whether a reasonable balance between the rights of the accused and the general interest in the repression of crime has been achieved:

> *… … … in considering where the balance lies it may be useful to consider the following questions: (1) what does the prosecution have to prove in order to transfer the onus to the defence? (2) what is the burden on the accused — does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or … … … to which he readily has access? (3) what is the nature of the threat faced by society which the provision is designed to combat?*[15]

"The fact of possession must be proved by the prosecution. Once that is proved, it is up to the accused to show that he was unaware of such possession. To require the prosecution to prove knowledge would make such proof practically impossible, especially considering that drug smugglers usually seal drugs in containers, thereby enabling the person in possession of the container to say that he was unaware of the contents. It is a matter of common sense that possession of an incriminating object requires a full and satisfactory explanation, and no one is better placed than the accused to supply such an explanation. Unless the burden is shifted, it would become practically impossible to prosecute such offenders with success. Indeed, it may be said that, in such cases, the presumption may be required to redress an imbalance

[15] *Ibid.*

of arms which otherwise would shift to an unreasonable degree against the prosecution.

"The problem however arises if the accused adduces evidence which, while raising a reasonable doubt as to his guilty knowledge, is not sufficient to persuade the tribunal of fact on a balance of probabilities. In such a situation the presumption of innocence will indeed be undermined, and the guarantees under the constitution and the Convention breached, because the accused would be convicted although a reasonable doubt as to his guilt exists.

"This, however, is not a matter which can be resolved at this stage of the proceedings, because it depends upon the nature and cogency of the evidence which is still to be produced. In the words of Lord Hope, as expressed in his opinion in the Kebeline case, "it may be necessary for the facts of the case to be considered before a conclusion can be reached as to whether the presumption of innocence has been breached. In that event the matters cannot be resolved until after trial". This was also the view of the European Court of Human Rights in the Salabiaku Case when it stated that the test whether the presumption has been confined within reasonable limits which maintain the rights of the accused "depends upon the circumstances of the individual case".

"On the third question, there is no doubt that the threat posed by drugs is a serious menace to society and the legislator is fully justified in applying proportionate means which are necessary to combat the sophisticated and cunning methods employed by those who deal in dangerous drugs. This is not to say that the protection of the law should not be allowed also to those charged with such offences: indeed, the need to keep constantly in mind the requirements of the rule of law become more sensitive in such cases, as was eloquently pointed out by the South African Constitutional Court in **State *versus* Coetzee**[16]:

> *There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this*

[16] [6 March 1997] 2 LRC 593
http://www.concourt.gov.za/judgment.php?case_id=11973&PHPSESSID=2bf3fb042bdcf8a3edcb029ab7cd0133

were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption … the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.

"This is indeed a vital *caveat* to be kept constantly in mind by the tribunal of fact; however, it is not the same as saying that presumptions which encroach upon the presumption of innocence, so long as these are kept within reasonable limits which balance all legitimate interests, are *a priori* not compatible with the guarantees for a fair trial under the Constitution and the Convention.

"For these reasons, it is the view of this court that it cannot be said *a priori* that the first presumption, namely, the presumption of guilty knowledge arising from the fact of possession, *etc.*, is in breach of the provisions of the Constitution or the Convention.

"We now move on to consider the second limb of the question before this court, namely whether it is legitimate under the Constitution and the Convention for a conviction to be secured upon proof of a generic guilty knowledge, without requiring further proof of knowledge that the object possessed, sold or dealt in is, specifically, a dangerous drug proscribed under the Ordinance. We have already seen that this is a different way of saying that proof of a generic guilty knowledge raises an irrebuttable presumption of knowledge that the object possessed, *etc.*, is a dangerous drug. In this instance the presumption is mandatory, and evidence to the contrary is not allowed.

"On a first analysis, such a presumption may indeed appear to be in breach of the provisions of the Constitution and of the Convention; however, in the view of this court, other relevant factors have to be taken into consideration.

"In the first place, one must keep in mind that this presumption arises only if the accused is shown to have guilty knowledge because he is aware that he is in possession of, or selling or dealing in, a prohibited object. Moral blameworthiness already attaches to him and his position is different from that of one who unknowingly has dangerous drugs slipped into his pockets. As has been pointed out above, whoever knowingly possesses or sells or deals in an object knowing that that object is a prohibited object, is knowingly taking the risk that such object may be a drug, with all the consequences which that fact entails, and the accused, who already knows that he is handling a prohibited object, is therefore made responsible for ensuring that such object is not a prohibited drug. There is nothing objectionable or, indeed, in conflict with the provisions of the Constitution or of the Convention in putting such a burden on the accused.

"In the second place, allowing a person with guilty knowledge to escape conviction because he did not know the nature of the prohibited

object in his possession would make it ludicrously easy to circumvent the provisions of the Ordinance. Indeed, it would be easy to conceive of a scheme whereby various couriers are each given possession of sealed packages all of which, except for one, contain drugs. Each courier knows that he is participating in an illegal scheme but, like the shooter in a firing squad who does not know whether his rifle is the one loaded with the blank cartridge, the courier does not know whether his package is the one which does not contain drugs. Common sense dictates that if his package turns out to contain drugs, then he should not avoid conviction.

"In the view of this Court, therefore, the second presumption, *viz.* the one arising from art. 26(2) of the Ordinance, also is not in conflict with the provisions of the Constitution or of the Convention; indeed, not only is it justified by the need to prevent the provisions of the law from being sidestepped by crafty schemes, but is also necessary to preserve an equality of arms for the prosecution.

"The accused in the present case is complaining that, by not allowing her to prove that she did not know the nature of the objects in her possession, the law is depriving her of a defence which otherwise would have been available to her. This statement is correct, but it avoids the relevant question of whether, assuming that she know that she had a prohibited object in her possession (which, as we have seen, is a condition which must be satisfied before the prosecution may rely on art. 26(2) of the Ordinance), she should be allowed such a defence. In such circumstances, she had a duty to ensure that the prohibited object was not a drug; if she failed in such duty, she should not be allowed the defence the loss whereof she laments.

"For the above reasons, this court is of the view that the provisions of art. 26(2) of the Dangerous Drugs Ordinance are not in breach of the provisions of art. 39 of the Constitution and of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the guarantees for a fair trial, in particular, the presumption of innocence and the benefit of equality of arms.

"The records of the proceedings are to be referred back to the Criminal Court which is to continue hearing the case against the accused."

The appeal

4. Susan Jane Molyneaux appealed from this judgement by an application filed on the 22 October, 2004. Basically her grievances are two:

> **"On the one hand she respectfully submits that Section 26(2) of the Dangerous Drugs Ordinance is in violation of her right to a fair trial since it violates the right to be presumed innocent until proven guilty; while on the other hand she also complains that the same Section 26(2) is in violation of her right to a fair trial since it violates the principle inherent in such a right, that is the principle of equality of arms."** [17]

5. Before examining the relevant law and the grievances in more detail, it is pertinent to point out that appellant raised the issue of the compatibility of Section 26(2) with the provisions of the Constitution and of the European Convention in her preliminary pleas before the Criminal Court. In other words, the actual trial by jury of the said Molyneaux has not yet commenced. The "question" raised by her before the Criminal Court implies, therefore, not that the provisions of Section 39 and of Article 6 have been or are being contravened, but that they are "likely to be contravened" in relation to her[18].

The Dangerous Drugs Ordinance

6. In the Bill of Indictment preferred against her by the Attorney General, Molyneaux stands charged with (i) conspiracy to import into Malta, and to deal in any manner in, cocaine and Ecstasy pills, (ii) importation of cocaine into Malta, and (iii) importation of Ecstasy pills into Malta. Cocaine falls to be regulated under the Dangerous Drugs Ordinance already referred to, whereas Ecstasy pills fall to be regulated under the

[17] Page 105 of the record of proceedings.

Medical and Kindred Professions Ordinance (Cap. 31). Although the original reference made by the Criminal Court as well as the judgement of the first Court refer only to Section 26(2) of the Dangerous Drugs Ordinance, what has been said by the first Court and what will be said by this Court applies equally to the provision found in Cap. 31 which is identical to subsection (2) of Section 26, namely subsection (2) of Section 121A. It will however be convenient to continue to refer solely to the Dangerous Drugs Ordinance and to Section 26(2) of that Ordinance and to the offences of possession of, and of selling or dealing in, a drug contrary to Cap. 101, on the understanding that all that is said applies equally to the offences of possession of, and of selling or dealing in, a drug contrary to the provisions of Cap. 31. Under both laws, "dealing", with reference to a drug, includes "importation in such circumstances that the court is satisfied that such importation was not for the exclusive use of the offender"[19].

7. Now, there is no doubt that the offences of possession of, and of selling or dealing in, a drug contrary to the provisions of the Dangerous Drugs Ordinance, as well as the offence of conspiring "for the purposes of selling or dealing in a drug in these Islands contrary to the provisions of this Ordinance"[20] are wilful offences requiring the appropriate formal element known as "dolo". They cannot be committed "negligently", nor

[18] See Section 46(1) of the Constitution and Section 4(1) of the European Convention Act.
[19] See Section 22(1B) of Cap. 101 and Section 120A(1B) of Cap. 31.

are they offences of strict liability requiring no criminal intent. As with all other offences falling in this category, therefore, the constituent elements of the offence are the material element and the formal element. Leaving aside the offence of conspiracy – the examination of this offence would lead us into complications unnecessary for the limited purposes of this constitutional case – and limiting oneself, therefore, to the offences of possession, and physical importation into Malta, of a prohibited drug, the prosecution must in the first place prove beyond reasonable doubt the material element. The prosecution must, in other words, prove that the substance in question was in fact a prohibited drug and not something else (even if the accused thought that it was a prohibited drug, but in actual fact it turns out to be something else, the material element would not have been proved); and it must also prove that the substance was in the possession (actual or constructive) of the accused and, with regard to importation, that it was in fact brought into Malta. The present case does not raise any issues as to the material element. As to the formal element, this Court has examined the various judgements of the Court of Criminal Appeal referred to by learned counsel for the defence before the Criminal Court[21]. From these judgements it would appear that the position at law

[20] Section 22(1)(f) of Cap. 101. See the corresponding Section 120A(1)(f) of Cap. 31.
[21] See the note of submissions of the 14 May 2004, and in particular page three thereof (page 31 of the record): ***P. v. Charles Clifton*** Court of Criminal Appeal 5 July 1982; ***P. v. Martin Xuereb*** CCA 20 September 1996; ***P. v. Seifeddine Mohamed Marshan et*** CCA 21 October 1996; ***P. v. John Borg*** CCA 23 June 1997; and ***P. v. Marzouki Hachemi Beya bent Abdellatif*** CCA 16 February 1998.

with regard to this formal element has, over the years, been regarded to be the following:

(1) if a person is found to be in possession of a prohibited drug, or if a person has brought into Malta a prohibited drug, he is presumed to have been knowingly in possession of that drug and to have knowingly brought it into Malta;

(2) this presumption, rather than a mere presumption of fact[22], has been ascribed to subsection (1)[23] of Section 26 of the Dangerous Drugs Ordinance, which subsection is not in issue in this case;

(3) this presumption, therefore, is a rebuttable presumption of law;

(4) this rebuttable presumption, however, must be read in conjunction with subsection (2) of section 26, and to that extent some of the said judgements have referred to a "limitation" imposed as to what the accused can prove in order to discharge the burden resulting from the said subsection (1)[24];

(5) in view of the said "limitation", the word "knowingly" means as a minimum (i) knowledge of the existence or presence of the

[22] That is, a form of a frequently recurring variety of circumstantial evidence – evidence of relevant facts from which the existence of some fact which is in issue may be inferred – as, for example, when a person is found in possession of property so shortly after it was stolen that the court may, in the absence of a credible explanation, come to the conclusion that the person in question actually stole that property.

[23] Section 26(1): *"In any proceedings against any person for an offence against this Ordinance, it shall not be necessary to negative by evidence any licence, authority or other matter of exception or defence, and the burden of proving any such matter shall lie on the person seeking to avail himself thereof."*

substance, and (ii) if the accused believed that the substance was something other than a prohibited drug, awareness that the said substance is possessed, or has been brought into Malta, in violation of the law – in other words, "knowingly" does not necessarily mean or imply knowledge that the substance is in fact a prohibited drug or the prohibited drug that the accused was actually found to be in possession of or that he actually brought into Malta (obviously if the accused knew that the substance was a drug, it is immaterial whether he knew that possession of that substance, or its importation into Malta, was in violation of the law, ignorance of the law being no excuse).

General principles and considerations

8. There is no doubt that the presumption of innocence is a cardinal principle of criminal justice. As was stated by the then Lord Chancellor, Viscount Stankey, in ***Woolmington v. DPP*** [25]

> **"…throughout the web of English criminal law one golden thread is always to be seen, that is that it is the duty of the prosecution to prove the prisoner's guilt."**

However, it has always been accepted, both in English and in Maltese law, that there may be circumstances where it is only fair that the onus

[24] It is interesting to note that subsection (2) of Section 26 was only introduced in 1994 by Section 17 of Act VI of that year.

of proving certain facts, especially facts which lie within the particular knowledge of the accused, should rest on the accused himself: we have already seen the proviso to subsection (5) of Section 39 of the Constitution, and how this has been transposed, by way of a declaration, to the interpretation of Article 6(2) of the Convention under the European Convention Act. This Court does not believe that it is necessary to go into a detailed analysis of the distinction between the "legal burden" and the "evidential burden" as understood in English law (and to a certain extent also in Scots law)[26] – in practice Maltese courts have steered clear of the subtle distinctions that go into such a detailed analysis. The principles applied by Maltese Courts of Criminal Justice in this field are quite clear: (**i**) it is for the prosecution to prove the guilt of the accused beyond reasonable doubt; (**ii**) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (**iii**) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (**iv**) to determine whether the prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must

[25] [1935] A.C. 426 at 481.

[26] One may refer in connection with this matter to **Blackstone's Criminal Practice – 2004**, (OUP) paras. F3.1 to F3.15, pages 2033 to 2047; Sir Richard Eggleston's **Evidence, Proof and Probability**, Weidenfeld & Nicolson (London) 1978, pp. 89 to 92; David Field and Fiona Raitt **Evidence**, W. Green / Sweet & Maxwell (Edinburgh) 1996, pp. 12 to 16.

be taken of all the evidence and of all the circumstances of the case; (**v**) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence.

Further considerations

9. This court has had the benefit not only of extensive arguments by learned counsel on both sides, but also the benefit of reading several judgements of the European Court of Human Rights and of the Court of Appeal of England and Wales and of the House of Lords to which learned counsel also referred. Now there is no doubt that, apart from Malta's declaration referred to above, Article 6(2) of the Convention does not in principle prohibit presumptions of fact or of law and "reverse onus provisions". As Ben Emmerson and Andrew Ashworth observe in their book **Human Rights and Criminal Justice** [27]:

> **"The European Court of Human Rights has held that, whilst Article 6(2) does not automatically prohibit all presumptions of fact or law, neither does it regard such presumptions 'with indifference'. Rules which transfer the burden to the defence to disprove specific facts or matters must be confined 'within reasonable limits' which respect the rights of the defence, and ensure that the prosecution bear the overall burden of proving the defendant's guilt. As the Court has observed [in *Salabiaku v. France* (1991) 13 E.H.R.R. 379]: *'Presumptions of fact or of law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards the criminal***

[27] Sweet & Maxwell (London) 2001.

law…Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'. **"** [28]

10. Of particular relevance is also the general guidance given to lower courts by the Court of Appeal (Criminal Division) of England and Wales in the judgement delivered on the 29 April 2004 in the matter of ***Attorney General Reference no. 1 of 2004 and R. v. Edwards and others*** [29]. In this case the Court had this to say:

"The common law (the golden thread) and the language of Article 6(2) have the same effect. Both permit legal reverse burdens of proof or presumptions in the appropriate circumstances.

"Reverse legal burdens are probably justified if the overall burden of proof is on the prosecution i.e., the prosecution has to prove the essential ingredients of the offence, but there is a situation where there are significant reasons why it is fair and reasonable to deny the accused the 'general' protection normally guaranteed by the presumption of innocence.

"Where the exception goes no further than is reasonably necessary to achieve the objective of the reverse burden (i.e. it is proportionate), it is sufficient if the exception is reasonably necessary in all the circumstances. The assumption should be that Parliament would not have made an exception without good reason. While the judge must make his own decision as to whether there is a contravention of Article 6, the task of a judge is to 'review' Parliament's approach…

"If only an evidential burden is placed on the defendant there will be no risk of contravention of Article 6(2).

"When ascertaining whether an exception is justified, the court must construe the provision to ascertain what will be the realistic effects of the reverse burden. In doing this the court should be more concerned with substance than form. If the proper interpretation is that the statutory provision creates an offence plus

[28] *Op. cit.* p. 258, para. 9-09.
[29] The Court was composed of The Lord Chief Justice (Lord Woolf), Lord Justice Judge, and Justices Gage, Elias and Stanley Burnton.

an exception that will in itself be a strong indication that there is no contravention of Article 6(2).

"The easier it is for the accused to discharge the burden the more likely it is that the reverse burden is justified. This will be the case where the facts are within the defendant's own knowledge. How difficult it would be for the prosecution to establish the facts is also indicative of whether a reverse legal burden is justified.

"The ultimate question is: would the exception prevent a fair trial? If it would, it must either be read down if this is possible; otherwise it should be declared incompatible.

"Caution must be exercised when considering the seriousness of the offence and the power of punishment. The need for a reverse burden is not necessarily reflected by the gravity of the offence, though, from a defendant's point of view, the more serious the offence, the more important it is that there is no interference with the presumption of innocence.

"If guidance is needed as to the approach of the European Court of Human Rights, that is provided by the *Salabiaku* case at para 28 of the judgement where it is stated that: 'Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintains the rights of the defence'."

11. More recently in the House of Lords[30], in ***Attorney General's Reference no. 4 of 2002 and Sheldrake v. DPP*** [31], Lord Bingham of Cornhill, who delivered the main opinion after reviewing the case-law of the European Court of Human Rights, had this to say:

"From this body of authority certain principles may be derived. The overriding concern is that the trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or of law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to the defendant must be examined, and must

[30] Lord Bingham of Cornhill, Lord Steyn, Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry and Lord Carswell.
[31] Opinions delivered on the 14 October 2004.

be reasonable. Relevant to any judgement on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns [32] do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

12. It would at this stage be appropriate to consider the purpose and purport of subsection (2) of Section 26 of the Dangerous Drugs Ordinance. Again this Court must stress that the exercise that it is at the moment carrying out is totally unrelated to the evidence which may eventually be produced at the trial. In other words, this Court is simply considering whether it can be said *a priori* that subsection (2) of Section 26 of Cap. 101 is incompatible with Section 39 of the Constitution and Article 6 of the Convention.

13. It is clear to this Court that the general purpose of this provision is to avoid a situation, in matters concerning drug possession and drug trafficking, where a person, who deliberately refrains from enquiring about the nature of the substance that he has bought or otherwise obtained, or that he has been given, <u>but who knows or reasonably suspects (and therefore is aware) that he has bought or obtained or</u>

[32] The case involved, among other things, a reference concerning Section 11(2) of the Terrorism Act

been given something which is illegal, can avoid the rigours of the law if it turns out that that substance is in fact a prohibited drug. This is clearly borne out by the debate in committee stage in the House of Representatives when Section 26 was being amended with the introduction of subsection (2) [33]. The first Court in its judgement said that it would be "ludicrously easy to circumvent the provisions of the Ordinance" if a person were simply to refrain from enquiring about the true nature of the substance if all the circumstances indicate to him that he has, or that he has been given, something which is illegal. It would seem that for this reason subsection (2) of Section 26 places a "limitation" in the form of a "redefinition" of the formal element of the offence of possession of, or selling or dealing in, a drug contrary to the provisions of the Ordinance: rather than requiring that the accused should know that what he has in his possession or what he has brought into Malta is a prohibited drug, guilt attaches even if he is merely aware that what he has in his possession or what he has brought into Malta is something illegal – what the first Court in its judgement referred to as "generic guilty knowledge". Of course the Court before which an accused is brought may come to the conclusion, after considering all the evidence, that he was perfectly aware that he had in his possession, or that he had brought into Malta, a prohibited drug; but if it comes to the conclusion that he was merely aware that he had in his possession,

2000.

[33] See Parliamentary Debates, Sitting number 221, 25 January 1994.

or that he had brought into Malta, something which was illegal, then, as the law stands at present, the accused must be convicted. The question which this Court has now to consider is whether the combined effect of the shifting of the burden of proof together with the said "limitation" can, in realistic terms, be said to be reasonable and proportionate to the aim sought to be achieved, in such a way that the "rights of the defence" can be said to be substantially maintained[34]. After careful and lengthy deliberation this Court must give a negative answer to the question. While this Court fully appreciates the reasons behind subsection (2) of Section 26, the absolute way in which this provision is drafted not only effectively and substantially deprives an accused person of the possibility of any reasonable defence to a charge of possession of, and trafficking in, a dangerous drug but, more importantly, deprives the court of the power to assess the evidence and to tailor the punishment according to the moral blameworthiness of the accused. In fact, if an accused, indicted before the Criminal Court, proves to the satisfaction of that Court that he genuinely believed that he was importing, for instance, a pornographic film in cassette form, but the cassette turns out (unbeknown to him) to be packed with heroin, he nonetheless faces a term of imprisonment ranging from a minimum of four years to a maximum of life imprisonment (and, if a determinate sentence of imprisonment is imposed – which may be of up to thirty years – there is the addition of a fine ranging from a minimum of one thousand liri to a

[34] See ***Salabiaku v. France***, judgement of the 7 October 1988, para. 28.

maximum of fifty thousand liri). The punishment under the Customs Ordinance (Cap. 37) for the importation of such a pornographic cassette is a fine not exceeding twenty-five liri or such fine together with imprisonment not exceeding two years[35]; and the punishment for such importation under Section 208 of the Criminal Code is of imprisonment for a term not exceeding six months or a fine not exceeding two hundred liri or both such fine and imprisonment. The expressions "it shall not be a defence to such charge" and "or of any other law" in subsection (2) of Section 26 have the cumulative effect that, in the example given, the accused has to be treated by the court as if he "knowingly" imported into Malta the amount of drug found in the cassette, irrespective of what the accused actually believed to be in the cassette. This clearly places the accused at a great, indeed disproportionate, disadvantage *vis-à-vis* the prosecution, a disadvantage that he has absolutely no chance of redressing whatever the evidence he adduces with regard to the formal element of the offence. Such an imbalance strikes against the very foundations of the fairness of any criminal trial. The situation would, of course, be different if the accused knew, or reasonably suspected, that he was carrying some form of prohibited drug, even though not necessarily the drug or type of drug actually found in his possession – the presumption of knowledge in this case, even if irrebuttable, would be perfectly reasonable (this, indeed, appears to be the position in England under

[35] Section 62 of the Customs Ordinance.

Section 28(3)(a)(b) of the Misuse of Drugs Act, 1971 [36]). Although the Legislature has every right to pass the laws it thinks fit and although there is a general presumption that Parliament legislates in conformity with the provisions of the Constitution and of the European Convention, in a state governed by the Rule of Law it is ultimately always the task of the courts – in our case of this Court – to review such laws and to determine finally whether or not Parliament's approach is in conformity with the Constitution and/or the European Convention[37].

14. As has already been observed, the case against appellant Molyneaux has not yet commenced before a jury. Consequently one cannot determine with certainty how the trial judge will ultimately direct the jury as to the formal element of the offences with which she stands charged, or, indeed, how he will interpret subsection (2) of Section 26[38].

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[36] Section 28(**3**)(a): *"Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused...shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but…he shall be acquitted thereof…if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug…"*. Subsection (**2**) of this Section 28 provides: *"Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged."* In this connection it has been held that *"If the defence raises the issue sufficient to satisfy the evidential burden 'that he did not know that the bag or other container which he was carrying contained a controlled drug and believed it contained a different type of article such as a video film, this defence arises under section 28(2) and not under section 28(3)' (per Lord Hutton in* ***Lambert*** *at [181], applying* ***Salmon v. HM Advocate*** *[1998] Scot HC 12"* – **Blackstone's Criminal Practice – 2004** (OUP), para. B20-19, page 779.

[37] See ***Attorney General Reference no. 1 of 2004 and R. v. Edwards and others***, *supra*.

[38] The position was different in the case of ***Pham Hoang v. France***, decided by the European Court of Human Rights on the 25 September 1992, and to which reference was made by appellant. In that case the French Court of Appeal had already expressed its views and interpreted certain provisions of

This Court can only assume that the Criminal Court will interpret this provision as it has heretofore been interpreted by the Court of Criminal Appeal. Consequently, in the instant case, it would appear that it would be sufficient for this Court to direct the Criminal Court to ignore that part of subsection (2) of the said Section 26 which creates the imbalance referred to above.

15. For these reasons, the Court allows the appeal, revokes the judgement of the First Hall of the Civil Court of the 12 October 2004 and instead declares that, in the instant case, the fundamental right to a fair trial as guaranteed by Section 39(1) of the Constitution and by Article 6(1) of the European Convention is likely to be contravened in relation to appellant Susan Jane Molyneaux by the application of subsection (2) of Section 26 of the Dangerous Drugs Ordinance (Cap. 101) as at present in force; consequently sends back the record of the proceedings to the Criminal Court with a direction that that Court, and any other Court of Criminal Justice which may subsequently deal with the case, is to ignore the words “or of any other law” in subsection (2) of the said Section 26 if called upon to apply or interpret that subsection. In view of the novelty and difficulty of this case, each party is to bear its own costs (including those of first instance), if any. Finally the Court orders that a certified true copy of this judgement be forthwith

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French law, and applied them to the concrete facts of the case, before the matter was brought before the Strasbourg Court.

transmitted by the Registrar to the Speaker of the House of Representatives in accordance with Section 242 of the Code of Organisation and Civil Procedure (Cap. 12).

Deputy Registrar

gr

CONSTITUTIONAL COURT

JUDGES

His Hon. The Chief Justice Vincent A. De Gaetano
The Hon. Mr Justice Joseph D. Camilleri
The Hon. Mr Justice Joseph A. Filletti

Sitting of Monday 19th February, 2007.

Number

Appeal Number: 26/03JA

Luiza Merujian Zakarian and Simony Merujian Zakarian

v.

The Minister of Home Affairs and
the Principal Immigration Officer

The Court:

Preliminary

1. This is an appeal, filed by Luiza Merujian Zakarian and her brother Simony Merujian Zakarian on the 23 November 2006, from a decision of the First Hall of the Civil Court (in its Constitutional Jurisdiction) of the 13 November 2006 which had dismissed their application aimed at preventing their repatriation to Armenia. In the said application, filed

before the first court on the 21 August 2003, Luiza and Simony – Simony was then only 16 – had alleged that if they were sent back to Armenia, as the Principal Immigration Officer was planning to do after that their request for refugee status had been dismissed by the Refugee Commissioner[39] as well as by the Refugee Appeals Tribunal[40], their fundamental human rights as protected by Sections 33(1)[41], 36(1)[42], 43[43] of the Constitution, read together with Section 46[44] of the same said Constitution, would be violated. In their application of August 2003, applicants did not specify the redress sought – contrary to what is required by Rule 3(2) of the Court Practice and Procedure Rules – but it is evident from the general tenor of the application that what was being (and what is still being requested) is that the Maltese Authorities be prohibited from repatriating them, perhaps even implicitly, as the first Court suggested in its judgment, by having the decision of the Refugee Appeals Board revoked.

2. It would be appropriate at this stage to reproduce the judgment of the first Court in its entirety:

> **"The Court:**

[39] See full report at fol. 156 to 158; and abbreviated "Confidential Memo" at fol. 129.
[40] See decision of the 24 April 2003 at fol. 154.
[41] Right to life.
[42] Protection from inhuman or degrading punishment or treatment.
[43] Prohibition of deportation.
[44] In the sense that it is sufficient if a provision of the Constitution "…is <u>likely</u> to be contravened in relation…" to applicants.

"Examined the applicants' application presented on the 21st August, 2003 whereby they submitted with respect:

"That the applicants are citizens of the Republic of Armenia and are respectively aged 18 and 16;

"That after the applicants entered the Maltese jurisdiction they undertook the necessary procedures with the competent authorities with a view to procuring the issue of a refugee status in their regard;

"That such proceedings were couched in the sense that had applicants to be deported to their country of origin, namely the Republic of Armenia, they would be subjected inter alia to political persecution and oppression by the Armenian State to the extent that their personal security will likely be jeopardised and that as such political persecution would be perpetrated by the Armenian police, the Armenian State would be unable to protect applicants;

"That in fact it transpires that applicants' family were deeply involved in political activity in Armenia. During the course of such involvement in Armenian politics, applicants' aunt, Armalia Zakarian was forced to flee from Armenia together with her minor daughter after her life was threatened by the Armenian police. In fact Amalia Zakarian had been seriously injured by the Armenian police prior to her flight from that country (Dok. E). This occurred after Amalia Zakarian's husband and his mother, who were citizens of Azerbajan had been murdered during inter-communal fighting ivolving the Armenians and Azeri communities. Amalia Zakarian eventually managed to enter the jurisdiction of the United Kingdom and applied for the grant of a refugee status in that country. To date Amalia Zakarian has been resident in the UK for the last five years pending the processing of her claim to be granted a refugee status in that jurisdiction together with her minor daughter;

"That in the meantime, applicants' father Merujian Simony Zakarian, who was Amalia Zakarian's brother, remained in Armenia and continued with his involvement in Armenian politics notwithstanding that the political party of which both Amalia and Simony Zakarian were activists had lost the elections which were held in March 1998. He was also subjected to political persecution by the Armenian Police and was eventually assassinated by them in 2000 at a time when the political party against which the Zakarians had struggled, had assumed executive power in Armenia following the results of the 1998 elections, as stated supra (Dok. A and Dok. D.);

“In consequence of further political persecution subsequent to the murder of their father by the Armenian police, the personal security of the applicants was compromised to the extent that arrangements were undertaken for applicants to be in a position to flee from Armenia. On their arrival in Malta, applicants immediately applied for the grant of a refugee status (Dok. B and Dok. C.)

“That applicants’ request for the grant of a refugee status was rejected by the Refugee Commissioner and by the Refugee Appeals Board on the grounds that they did not satisfy the statutory criteria required for the grant of a refugee status although it ought to be emphasised that the said entities were not in a position to have sight of Dok. B and Dok. C as same were not available at that juncture;

“That it has already transpired that the applicants’ father was murdered by the Armenian police, whilst applicants’ aunt felt the dire necessity to flee from her country of origin in order to protect her personal security and her minor daughter’s security which were objectively threatened by the Armenian police. The same course of action was taken by the applicants in as much as they also felt that their personal security was threatened, like their father’s who had already been beaten to death by the Armenian police earlier as stated supra. It is in this context respectfully submitted that no person flees his/her country of origin, with all the attendant consequences resulting from the up-rooting of his/her existence, unless cogent reasons justify such an extreme course of action. In fact applicants, at the apex of their youth, have even forfeited their personal freedom in their quest to obtain a refugee status in this jurisdiction and to date have been detained in various detention centres for the last seven months;

“That there is no doubt that the Police are an essential pillar of the executive power of any state and that the assassination of applicants’ father at the hands of the Armenian police consequent to his involvement in political activity would evidently be tantamount to statal persecution on political grounds. Consequently, if the Armenian state was unable to afford protection to the personal security of applicants’ father and aunt, it is unlikely that the Armenian state will be willing and able to protect applicants’ personal security in the event of their deportation to Armenia, regard being had to the inexperience of the applicants, one of whom is still a minor;

“That had applicants to be deported to Armenia such a state of affairs would undoubtedly undermine their personal security and indeed, in the last analysis place their life in manifest jeopardy;

"That Section 33(1) of the Constitution provides that every person is entitled to the protection of his/her life and that no person shall be intentionally deprived of his/her life. So that in the eventuality of the deportation of applicants to Armenia, applicants lives would be placed in manifest danger notwithstanding that the said provision is entitled "Protection of Right to life". To deport applicants to Armenia would amount to exposing their lives to evident peril and indeed their father has already been murdered by the Armenian police whilst their aunt's would have been in dire peril has she remained in the Armenian jurisdiction rather than fleeing from that country;

"That the said disposition of the Constitution should be interpreted in the sense that no person should be intentionally deprived of his life and that furthermore no person's life should knowingly be exposed to the peril of its forfeiture, even if such an eventuality is merely likely to materialise, regard being had to the provisions of Section 46 of the Constitution;

"That Section 36(1) of the Constitution provides furthermore that no person shall be subjected to inhuman treatment. Undoubtedly, were applicants to be deported to Armenia such a state of affairs would be tantamount to the subjection of same to inhuman treatment in that no person's well-being and welfare and indeed his/her life should be treated recklessly especially when a strong probability subsists that such person's welfare, well-being and life will be exposed to dire peril;

"That it transpires that in the light of the rejection by the Refugee Commissioner and the Refugee Appeals Board of the claims set up by applicants, the Principal Immigration Officer is undertaking all the necessary preparations in connection with the deportation of applicants to Armenia;

"That the deportation of the applicants to Armenia will inevitably give rise to the breach of their fundamental rights as protected by the said provisions of the Constitution as such deportation would not only expose their lives to manifest danger but would amount to inhuman treatment, in accordance with the said constitutional provisions;

"That no state is entitled to expose the life of any person situate in its jurisdiction by deporting any such person to another jurisdiction were same would be likely to be politically persecuted even to the extent of endangering his/her life. Such statal behaviour woul violate the constitutional provisions embodied in Section 43 of the Constitution relative to the prohibition of deportation;

"Consequently applicants humbly pray this Honourable Court:-

"1. To order the issuance of all the required orders and to provide the remedies which might appear appropriate in the circumstances, in order that their fundamental rights, as protected by the Constitution might be rendered effectual and enforcable.

"With costs as against respondents.

"Examined respondents' reply presented on the 16th September, 2003 whereby they submitted with respect:

"That the application is unfounded in fact and in law for the following reasons:

"1. That the application has not been filed in the Maltese language as the language of the Court and it does not result that the filing of proceedings in the English language has been authorised by the Court as required by Article 21 of the Code of Organisation and Civil Procedure (Cap 12) and by the Judicial Proceedings (Use of English Language) Act (Cap 189);

"2. Without prejudice to the above, the respondents submit that the applicants' claim is unfounded on its merits and has been filed merely to delay the applicants' deportation from Malta. In this regard the respondents point out that claims such as that put forward by the applicant (i.e. that their lives 'are likely to be in manifest peril in the event of their deportation of Armenia') are investigated in terms of the Refugees Act by the Commissioner for Refugees who interviews persons who apply for refugee status and examines their claims scrupulously and at length. The decisions of the Commissioner for Refugees are moreover subject to appeal to the Refugees Appeals Board composed of two lawyers and a Chairman with vast experience in matters concerning refugees;

"That the claims of the applicants have already been dismissed as being unfounded both by the Commissioner for Refugees and by the Refugees Appeals Board who are the competent authorities in these matters and there is no evidence to substantiate the claims of the applicants as being 'prima facie' well founded before the present Court. On the contrary the fact of the dismissal of the claims as unfounded by the competent authorities in the field of refugee law militate against the acceptance of the demand for the issue of a warrant of prohibitory injunction which would effectively stultify the decision of the competent authorities without the applicants having in any way shown that the decisions of the competent authorities were defective;

"Moreover, given the procedures available under the Refugees Act it is clear that there are more than sufficient reasons for the present Court to decline the exercise of its powers under Article 46 of the Constitution and under Article 4 of the European Convention Act in view of the availability of alternative remedies for the complaint under the Refugees Act;

"For the above reasons the respondents submit that this Court should deny the demand for the issue of a warrant of prohibitory injunction;

"Examined respondents' reply by the Minister for home Affairs and the Principal Immigration Officer on the 9th October, 2003 whereby it is respectfully submitted:

"That Simony Merujian Zakarian, being a minor cannot persue this action personally since she lacks legal capacity. That the applications for refugee status by the present applicants have already been examined by the Commissioner for Refugees and by the Refugees Appeals Board who after having examined the same applications in terms of the Refugees Act and have found them to be unfounded;

"That therefore adequate means of redress for the contravention of rights alleged by the applicants have been available to them under Maltese law and that it is consequently 'desireable' in terms of the provision to subarticle (2) of Artlicle 46 of the Constitution and to Article 4 of the European Convention Act for this Court to decline to exercise its powers under the said articles;

"That the applicants have brought no proof that their aunt Amalia Zakarian is staying in the United Kingdom on the basis of refugee status;

"That the applicants have neither brought forward any proof that there are credible grounds to believe that they personally would be subjected to breaches of fundamental human rights which would result from political persecution and oppression if they were to be returned to their country of origin;

"That the defendants have indeed failed to indicate the articles of the Constitution and of the European Convention on Human Rights under which they allege to be victims;

"That the Republic of Armenia, albeit being a 'new democracy', is a State with a democratic Constitution which is a member of the Council of Europe and which has ratified the European Convention on Human Rights and therefore also assumed international obligations to respect the fundamental rights and

freedoms guaranteed by that Convention. That the fulfillment of those obligations are subject to monitoring by the Council of Europe;

"That the applicants' claims are unfounded and should be rejected;

"Took cognisance of the whole case file including the *verbal* of the 30th March, 2006 whereby the case was put off for judgment;

"Considered;

"That applicants are asking the Court to provide the remedies in order that their fundamental human rights are not infringed. In reality they are asking the Court to declare that the decision of the Refugee Appeals Board be revoked and thus they would not be deported back to their country. They are not contesting the Board's decision on the usual criteria – i.e. that the decision was flawed by non-observance of the rules of natural justice but because they are arguing that their deportation would constitute an infringement of the human rights and freedoms;

"In the text **European Human Rights Law – Text and Materials** one can find some useful comments in this regard (page 151 et sequitur);

> ""*An increasingly important and difficult question for the European Human Rights system concerns attempts by a contracting state to deport an applicant to a non contracting state where, the applicant claims, he or she will be subject to torture or inhuman or degrading treatment. The Court first considered this issue in Soering vs United Kingdom (7th July, 1989) in which the UK sought to extradite Soering to Virginia in the US to stand trial for murder. The Virginia authorities planned to seek the death penalty. Soering claimed that the circumstances surrounding the administration of death sentences in Virginia particularly the typical delay of six to eight years between imposition and execution constituted inhuman treatment or punishment;*
>
> *""The Court held that the extraditing state id have some responsibility under the convention for the potential subsequent maltreatment of extradited individuals. 'For a state to knowingly surrender a fugitive to another state where there were substantial ground for believing that there would be a danger of being subjected to torture or inhuman or degrading treatment however heinous the crime would plainly be contrary to the spirit and intendment of Article 3.';*
>
> *""As movement about the world becomes easier and crime takes on a larger international dimension it is increasingly in the*

interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely the establishment of safe havens for fugitives would not only result in danger for the state obliged to harbour the protected person but also tend to undermine the foundations of extradition. It is not normal for Convention institutions to pronounce on the existence or otherwise of potential violations of the convention. However where an applicant claims that a decision to extradite him would, if implemented be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by the Article.;

"In sum the decision by a contracting state to extradite a fugitive may give rise to an issue under Article 3 and hence engage the responsibility if that State under the convention where substantial grounds have been shown for believing that the person concerned if extradited faces a real risk of being subjected to torture or to inhuman and degrading treatment in the requesting country. The establishment of such responsibility inevitably involves an assessment of the conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless there is no question of adjudication on or establishing the responsibility of the receiving country whether under general international law, under the convention or otherwise. In so far as any liability under the convention is or may be incurred it is liability incurred by the extraditing Contracting stte by reason of its having taken action which has a direct consequence the exposure of an individual to proscribed ill-treatment.";

"The Court adopted a similar approach in Cruz Varas vs Sweden (20th March, 1991) where the applicant and his family challenged Sweden's deportation of them to Chile claiming that in Chile they faced the possibility of political persecution. The Court held that the standards set out in Soering applied to expulsion as well as to extradition but concluded that substantial grounds for believing the existence of real risk of treatment contrary to Article 3 had not been shown. It also was influenced by the fact that a considerably more liberal political atmosphere had begun to develop in Chile;

"The facts of Cruz Varas also presented questions under the 1951 Geneva Convention and 1967 protocol relating to the Status of Refugees. That convention defines refugees as those who have left their country because of a well founded fear of persecution. A reasonable threat of execution or imprisonment on prohibited grounds triggers a right of asylum under the Geneva Convention and Protocol;

"The Court is satisfied that the political and human rights situation in Armenia has improved considerably since the events mentioned by applicants. Armenia is now a member of the Council of Europe and this is sufficient guarantee that human rights are observed in that country. The facts of this case are similar to the Cruz Varas case above mentioned in that the situation now in that country is very much different to the one prevailing when the facts in question occurred. The Court is also satisfied that the evaluation of the Refugees Appeals Board was correct since applicants failed to prove otherwise;

"For these reasons the Court accepts respondents' pleas and rejects applicants' claims;

"Each party is to bear its own costs because of the particular facts of the case."

The appeal

3. Appellants Luiza and Simony Mrujian Zakarian in their appeal application are basically contending that the First Hall of the Civil Court made a wrong assessment and appreciation of the evidence produced before it. The gist of their grievance is summed up in the following two paragraph of their application:

"In conclusion applicants reiterate their claim that whilst they proved their case beyond reasonable doubt in virtue of the various sources of evidence, including documentary evidence and oral evidence, the respondents did not produce a shred of evidence which undermined the documentary evidence which was filed before the court of first instance or the oral evidence adduced before the said court.

"Applicants humbly submit in conclusion that if they are deported to Armenia they would be condemned to return to a country which is rife with human rights abuses, referred to graphically in the latest reports which appear on the US Department of State's website – abuses which have given rise to the murder of their father because [of] his political beliefs, the disappearance of other close family members, and would have placed their aunt's life and her daughter in manifest jeopardy had they not fled to the UK where they have succeeded in obtaining asylum. Such asylum would not have been

accorded to Amalia Zakarian and her daughter had their claims been vexatious and unfounded; the grant of asylum to applicants' aunt and their cousin is further proof, if any was needed, of the veracity of applicants' claims. There is no doubt that the deportation of applicants to Armenia would expose them to the inhuman and degrading treatment accorded to their aunt and even place their lives in manifest jeopardy which their father faced and which eventually led to his murder by the Armenian police."

The Court's assessment

4. It would appropriate at this stage to make some preliminary observations. First of all, Section 43 of the Constitution, invoked by applicants before the first court, is not applicable in this case. Applicants are not being "extradited" to Armenia – there is no request from the Republic of Armenia for appellants' return to that country to undergo criminal proceedings, and therefore subsections (1) and (2) of the said Section 43 are inapplicable *ratione materiae*. The same can be said, in effect, of subsection (3) since this provision prohibits only the deportation of citizens of Malta (and there is no suggestion that appellants are Maltese citizens) except as a result of extradition proceedings or under such law as is referred to in Section 44(3)(b) of the Constitution. Consequently, Section 43 of the Constitution need be considered no further.

5. Appellants, as applicants before the first Court, did not invoke any violation of any of the provisions of the European Convention on Human Rights – for reasons known only to them they invoked only some of the

human rights provisions of the Constitution, although it must also be said that respondents, in their replies, did in fact refer to the Convention. Nevertheless this Court, like the first Court, is of the view that the case-law of the European Court of Human Rights relative to Articles 2(1) and 3 of the Convention is applicable, *mutatis mutandis*, to the proper interpretation and application of Sections 33(1) and 36(1) of the Constitution.

6. The case-law of the European Court of Human Rights has, over the years, defined the parameters of the inquiry and assessment that a court must make when faced with a claim that deportation would result in a breach of Article 3 of the Convention[45]. First of all it should be made clear that the right to political asylum is not contained in either the Convention or its protocols. In the words of Karen Reid – **A Practitioner's Guide to the European Convention on Human Rights** [46] -- *"While there is no right to asylum as such guaranteed under the Convention, where an applicant faces a <u>real risk</u> of torture or ill-treatment, including extra-judicial or arbitrary execution on expulsion to a particular country, issues arise under Article 3 of the Convention…Under Article 3, the obligation of the State extends in respect of everyone within their jurisdiction to a duty not to expose them*

[45] Although most of the case-law is concerned with Article 3 of the Convention – the <u>absolute</u> prohibition of torture or inhuman and degrading treatment or punishment – there is no doubt that the same criteria are applicable when the right to life is at risk due to arbitrary execution.
[46] 2nd ed. Sweet & Maxwell (London) 2004.

to an irremediable situation of objective danger even outside their jurisdiction…The type of ill-treatment to be established is, in line with Article 3 case law, severe. Generally, a significant risk to health, physical or psychological, from deliberate ill-treatment or conditions has to be alleged. However even alleged risk to life is generally still considered in the context of Article 3. The Commission stated that Article 2 would only be in issue where the loss of life was a 'near certainty' as a consequence of the expulsion…The Court holds that, given the absolute character of the provision and the fact it enshrines one of the fundamental values of the democratic societies making up the Council of Europe, its examination of the existence of a risk of ill-treatment in breach of Article 3 must be rigorous. It will, if necessary, assess the risk in light of material obtained proprio motu. *This said, the mere possibility of ill-treatment in not enough. Thus it may not be sufficient for an applicant to point to the general unsettled situation in a country or his membership in a group which occasionally faces problems. It seems that the applicant has to establish that he faces a specific, personal risk of treatment contrary to Article 3. In* Vilvarajah v United Kingdom [47] *concerning the expulsion of five Tamil applicants to Sri Lanka, the Court did not consider that it was enough that the situation was unsettled or that some Tamils might possibly be detained or ill-treated. This threat was apparently not specific enough to these five applicants, even in light of the fact that during the Convention*

[47] 30/10/1991

proceedings three of the applicants were subjected to ill-treatment in Sri Lanka. The Court found that there was no special distinguishing feature which would have enabled the Secretary of State to foresee that they would be treated in this way." [48] (Court's emphasis). In other words, it must be shown not merely that in the country to which a person is going to be sent the political situation is unsettled, or that there is violence or even political violence to which that person, like other persons, might be subjected; what must be shown, even if at least on a balance of probabilities, is that the applicant faces a specific, personal and significant risk of such ill-treatment which would, in its severity or extent (or because of the personal circumstances of the same said applicant) amount to torture or to inhuman or degrading treatment or punishment.

7. More specifically and with reference to particular judgments, in its judgment of the 30 October 1991 in the case ***Vilvarajah and others v. United Kingdom*** (already referred to, above), the European Court of Human Rights laid down the following rules:

> **"107. In its Cruz Varas judgment of 20 March 1991 the Court noted the following principles relevant to its assessment of the risk of ill-treatment (Series A no. 201, pp. 29-31, paras. 75-76 and 83):**
>
> **"(1) In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3 (art. 3) the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu;**

[48] Paras. IIB-232/233, IIB-237.

"(2) Further, since the nature of the Contracting States' responsibility under Article 3 (art. 3) in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears;

"(3) Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum, is, in the nature of things, relative; it depends on all the circumstances of the case.

"108. The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 (art. 3) at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe (see the Soering judgment of 7 July 1989, Series A no. 161, p. 34, para. 88). It follows from the above principles that the examination of this issue in the present case must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka in the light of the general situation there in February 1988 as well as on their personal circumstances."

8. In ***Cahal v. United Kingdom***, decided on the 15 November 1996, the same Court observed:

"73. As the Court has observed in the past, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, para. 102).

"74. However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3

(art. 3) in the receiving country. In these circumstances, Article 3 (art. 3) implies the obligation not to expel the person in question to that country (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70, and the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103).”

9. And in ***H.L.R. v. France*** (29/4/1997) the Court had this to say:

“40. Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

“41. Like the Commission, the Court can but note the general situation of violence existing in the country of destination. It considers, however, that this circumstance would not in itself entail, in the event of deportation, a violation of Article 3 (art. 3).

“42. The documents from various sources produced in support of the applicant's memorial provide insight into the tense atmosphere in Colombia, but do not contain any indication of the existence of a situation comparable to his own. Although drug traffickers sometimes take revenge on informers, there is no relevant evidence to show in H.L.R.'s case that the alleged risk is real. His aunt's letters cannot by themselves suffice to show that the threat is real. Moreover, there are no documents to support the claim that the applicant's personal situation would be worse than that of other Colombians, were he to be deported. Amnesty International's reports for 1995 and 1996 do not provide any information on the type of situation in which the applicant finds himself. They describe acts of the security forces and guerrilla movements. Only in the 1995 report is there any reference, in a context which is not relevant to the present case, to criminal acts attributable to drug trafficking organisations.

“43. The Court is aware, too, of the difficulties the Colombian authorities face in containing the violence. The applicant has not shown that they are incapable of affording him appropriate protection.

“44. In the light of these considerations, the Court finds that no substantial grounds have been established for believing that the applicant, if deported, would be exposed to a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 3 (art. 3). It follows that there would be no violation of Article

3 (art. 3) if the order for the applicant's deportation were to be executed."

10. Finally, in the more recent case of ***Hilal v. United Kingdom***, decided on the 6 March 2001, the ECHR expressed itself in the following terms:

"1. The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see, for example, *Ahmed v. Austria*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2206, §§ 38-39, and *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p. 1853, §§ 73-74).

"2. In determining whether it has been shown that the applicant runs a real risk, if deported to Tanzania, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu* (see the following judgments: *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215, p. 36, § 107, and *H.L.R. v. France*, 29 April 1997, *Reports* 1997-III, p. 758, § 37). Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3, which assessment is relative, depending on all the circumstances of the case."

"3. The Court recalls that the applicant arrived in the United Kingdom from Tanzania on 9 February 1995, where he claimed asylum. In the domestic procedures concerning his asylum application, his claim was based on his membership of the CUF, an opposition party in Tanzania, and the fact that he had been detained and tortured in Zanzibar prior to his departure. He also claimed that his brother had been detained and had died due to ill-treatment and that the authorities were accusing him of tarnishing

Tanzania's good name, increasing the risk that he would be detained and ill-treated on his return.

"4. The Government have urged the Court to be cautious in taking a different view of the applicant's claims than the special adjudicator who heard him give evidence and found him lacking in credibility. The Court notes however that the special adjudicator's decision relied, *inter alia*, on a lack of substantiating evidence. Since that decision, the applicant has produced further documentation. Furthermore, while this material was looked at by the Secretary of State and by the courts in the judicial review proceedings, they did not reach any findings of fact in that regard but arrived at their decisions on a different basis – namely, that even if the allegations were true, the applicant could live safely in mainland Tanzania (the "internal flight" solution).

….

"5. The Court accepts that the applicant was arrested and detained because he was a member of the CUF opposition party and had provided them with financial support. It also finds that he was ill-treated during that detention by, *inter alia*, being suspended upside down, which caused him severe haemorrhaging through the nose. In the light of the medical record of the hospital which treated him, the apparent failure of the applicant to mention torture at his first immigration interview becomes less significant and his explanation to the special adjudicator – that he did not think he had to give all the details until the full interview a month later – becomes far less incredible. While it is correct that the medical notes and death certificate of his brother do not indicate that torture or ill-treatment was a contributory factor in his death, they did give further corroboration to the applicant's account which the special adjudicator had found so lacking in substantiation. They showed that his brother, who was also a CUF supporter, had been detained in prison and that he had been taken from the prison to hospital, where he died. This is not inconsistent with the applicant's allegation that his brother had been ill-treated in prison."

11. In the light of the abovementioned principles, this Court has examined in minute detail all the evidence adduced before the court of first instance, as well as the additional evidence adduced before it, that is on appeal, and has made an assessment of the said evidence independently of that made by the Refugee Commissioner and the

Refugee Appeals Tribunal; and after careful deliberation has come to the conclusion that there is not sufficiently strong evidence to confirm that, if applicants – who are now both of age – were to be returned to the Republic of Armenia they would face a specific, personal and significant risk of ill-treatment amounting to torture or to inhuman or degrading treatment or punishment. Much less is there any real and significant risk of their lives being placed "in manifest jeopardy". There is no doubt that applicants have had a very difficult childhood and youth, mainly due to the fact that they were suffering the consequences of their father's political involvement. They grew up in Armenia at a time of transition when this republic of the former Soviet Union was trying to get to grips with democracy and to adjust many of its institutions to achieve at least the minimum requirements to become a member of the Council of Europe. It became a member of the said Council in January 2001[49]. The late nineties and early years of this century were years of political, social and economic upheaval, and the country by all accounts still faces a number of problems which in other countries of the Council of Europe and especially in countries which are members of the European Union have by and large been relegated to history (even if only modern history). Even if the authenticity (not their correct translation, which is another thing) of certain documents – notably the documents at fol. 5, 14, 15, 125, 126 and 127 – has not been proved, this Court is prepared to accept that applicants' father (deceased) and aunt, Amalia, (who now

[49] Armenia ratified the the European Convention on Human Rights on the 26 April 2002.

resides in the UK) were politically active in Armenia in the late nineties and that as a result they were harassed and threatened by people entertaining different political ideas, probably with the connivance of certain State authorities. Amalia Zakarian's affidavit at fol. 92 is evidence of the turbulent political situation in Armenia in the mid and late nineties, which for the Zakarian family appear to have been compounded by the fact that Amalia's husband was of Azeri origin (from Baku, in Azerbaijan), by the hostility between the Armenian and Azeri communities, the loss in mysterious circumstances of Amalia's husband in the mid eighties and the loss of many more relatives in the devastating earthquake of 1988 in the Spitak region of Armenia. Because of constant police harassment and threats, in 1998 Amalia decided to leave Armenia with her eleven year old daughter (appellants' cousin) and sought political asylum in the UK after entering the country clandestinely. Up to the time of the judgment of the first court – 13 November 2006 – no evidence had been produced indicating that the said Amalia had been granted refugee status in the UK or that she had been granted political asylum. However evidence was produced – see, *inter alia*, documents at fols. 31, 33 and 34 to 40 – indicating that she stood a good chance to benefit from a Home Office "amnesty" applicable to "…families that arrived in the UK prior to 2nd October 2000, have a child who is currently below the age of 18, have not claimed asylum in more than one country and have not made multiple claims

with the UK"[50], and which would therefore enable her to remain in the UK indefinitely.

12. The circumstances surrounding the death of Amalia's brother, Merujian – applicants' father – however are not all that clear. The unauthenticated document at fol. 5, purporting to be a photocopy in Armenian of his death certificate, with an English translation printed on top, states that the cause of death was "…that he was beaten by the police and was suddenly killed". This, as the Refugee Commissioner pointed out in his report, does not tally with what appellant Luiza stated in her interview by the said Commissioner as to the circumstances surrounding her father's death (see fol. 114 and 115). There she said that her father was beaten four times because of his political beliefs. In October or November 1999 he was beaten by four or five men when he was taking her brother to school. On that occasion her brother was also stabbed with a knife in his lung. Her father remained in hospital for fifteen days and thereafter became an invalid and could not work any longer. He also left his party. Her father's health deteriorated and he was in hospital for a month before he died in May 2000, suggesting death because of some form of haematological complications. The disappearance of appellants' mother and two sisters some ten months after their father's death does not appear to be directly linked to political

[50] See the letter from Howe & Co, Solicitors dated 28/11/2003 at fol. 31.

violence at the time (2000/2001)[51] – it could have been just a case of abandonment. Likewise, appellants' decision to leave Armenia does not appear to have been really precipitated by any imminent or clear risk of ill-treatment, but rather by the fact that they were living alone with an elderly grandmother when they had an aunt living in the UK in relatively better circumstances. The mysterious Russian friend who engineered appellant's passage to Malta on their way to the UK does not add much of substance to the story.

13. It should finally be pointed out that appellants were never personally involved in political activities because they were very young, and the only type of harassment that Luiza complained of was of "being oppressed for religious reasons" (fol. 119) because of the fact that she was sometimes considered by friends as being a Muslim, when in fact she claims to be a Christian. Likewise, the fact that in 1999 when appellants' father was attacked and beaten, Simony was also stabbed with a knife in his lungs does not *per se* substantiate the allegation of a specific, personal and significant risk of degrading or inhuman treatment in 2003 or in 2007. It need hardly be added that the question of whether or not appellants ought to be granted leave to stay in Malta on humanitarian grounds or whether they ought to be allowed to join their

[51] See the interview with the Refugee Commissioner especially pages 117 and 118. The document, produced on the 7 February 2007 purporting to show that appellants' sister, Lina, has recently been granted political asylum in the United States of America, does not shed much light on the personal situation of appellants to-day. At most it goes to show that the said Lina was, after leaving home in 2001/2002, in danger because of political persecution.

aunt, on humanitarian or other grounds, in the United Kingdom, or, alternatively, given the possibilities of travelling elsewhere at their own expense, to another destination of their own choice, is an entirely different matter which falls outside the parameters of the present issue and contestation between the parties before this Court.

14. For these reasons, appellants' appeal is dismissed. Each party to bear its own costs.

Deputy Registrar

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CONSTITUTIONAL COURT

Judges

His Hon. The Chief Justice Vincent A. De Gaetano
The Hon. Mr Justice Joseph D. Camilleri
The Hon. Mr Justice Alberto J. Magri

Sitting of Friday, 9th March 2007.

Number:

Application number: 48/06 GV

In the Extradition Proceedings in the names:

The Police (Inspector Raymond Cutajar)
(Inspector Raymond Aquilina)

v.

Lewis Muscat

The Court:

Preliminary

1. This is an appeal from a judgment delivered on the 8 January 2007 by the First Hall of the Civil Court (in its Constitutional and "Conventional" Jurisdiction). The facts which gave rise to this case are briefly the following:

a. Lewis Muscat, a Maltese citizen, is sought by the judicial authorities of the State of California in the United States of America to answer to eighteen charges of “lewd act upon a child under 14 using force/violence in violation of the California Penal Code section 288(b)(1)”, one charge of possessing or controlling “obscene matter depicting person under 18 in violation of Penal Code section 311.11” and one count of distributing or exhibiting “lewd material to minor in violation of Penal Code section 288.2(a)”. On the strength of documents submitted to her, Magistrate Dr Consuelo Scerri-Herrera issued, on the 2 March 2006 a provisional arrest warrant against Muscat in terms of article 14 of the Extradition Act, Cap. 276. Lewis Muscat was arraigned before the Court of Committal on that same day (2/3/06), and the Minister’s “Authority to Proceed” in terms of article 13 of the Extradition Act was issued on the 9 March 2006. The Authority to Proceed was issued only in respect of the eighteen counts of violation of section 288(b)(1) of the Penal Code of California.

b. By decision delivered on the 4 August 2006, the Court of Committal sanctioned the extradition and ordered that Lewis Muscat be kept in custody to await his return and his extradition to the United States of America. That Court further informed Muscat that he cannot be extradited before the lapse of fifteen days from its order and that he could appeal from the decision allowing the extradition to the Court of Criminal Appeal. It also informed him that if he felt that any of the provisions of articles 10(1) and (2) of the Act have been contravened or that any provision of the Constitution of Malta or of the European Convention Act has been or is likely to be contravened in relation to his person as to justify a reversal, annulment or modification of

the Court's order of committal, he had the right to apply for redress in accordance with the provisions of article 46 of the said Constitution or of the corresponding provision of the European Convention Act, Cap. 319, as the case may be.

c. Muscat appealed to the Court of Criminal Appeal. Before that Court he pleaded, among other things, that should his extradition to the United States of America, and in particular to the State of California, be proceeded with, various provisions of the Constitution and of the European Convention on Human Rights guaranteeing his fundamental human rights would be violated.

d. The Court of Criminal Appeal, by a preliminary decision delivered on the 31 August 2006, dismissed a number of pleas of possible violation of fundamental human rights – that is with reference to Articles 6, 13 and 8 of the Convention (and of the corresponding provisions of the Constitution, where applicable, that is Article 39) – as being merely frivolous. That Court, however, for the reasons given in its decision, said that it could not dismiss as merely frivolous the question of the risk of appellant being subjected to inhuman or degrading treatment if extradited to the State of California. That Court continued as follows:

> "Some evidence has been produced and some arguments have been put forward which prevent this Court from branding the question as merely frivolous. Whether or not in effect there are "substantial grounds" for believing that Muscat will face "a real risk" of violation of Article 3 of the Convention (or of Article 36(1) of the Constitution) if extradited to the State of California is a matter into which the First Hall of the Civil Court (and possibly after it the Constitutional Court) will have to delve. The Court, therefore, having seen Articles 46(3) and 4(3) of the Constitution and of Cap. 319 respectively, as well as rule 5 of the Court Practice and Procedure Rules refers the following question to the First Hall of the Civil Court, that is to say **whether in view of all the circumstances of the case and in particular of the physical and mental state of appellant, Article 3 of the**

Convention and Article 36(1) of the Constitution are likely to be contravened in relation to the said Lewis Muscat if he is extradited to the State of California and whether therefore the extradition should proceed in the event of his appeal to this Court being dismissed on other grounds."

e. The First Hall of the Civil Court considered the question thus referred to it, and on the 8 January of this year ruled that "…it has not been established that the treatment to which the applicant (Muscat) will be exposed, and the risk of his exposure to it, is so serious as to constitute torture or inhuman or degrading treatment or punishment contrary to Article 3 of the said Convention." It further concluded, with reference to the question referred to it, that should his appeal before the Court of Criminal Appeal be dismissed on other grounds, "the extradition can proceed".

The judgment of the first Court

2. The relevant parts of the judgment of the first Court are the following:

> "The basis of applicant's complaint relates to allegations made concerning a breach in terms of Article 3 of the European Convention on Human Rights (Chapter 319 of the Laws of Malta) and Article 36(1) of the Constitution. The applicant contends that an eventual extradition to the United States would violate his rights as protected by the above mentioned provisions of the law.
>
> "In terms of Article 3 of the European Convention, no one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> "Extradition is accepted by the Convention organs as a legitimate means of enforcing criminal justice between states. There is no right not to be extradited. Usually issues arise, under the Convention, where it is alleged, as in the present case, that a breach of human rights will occur, if extradition is carried out. There is no general principle that a State cannot surrender an individual unless it is satisfied that all the conditions awaiting him in the receiving State are in full accord with each of the safeguards of the Convention. (see Soering case).
>
> "The abhorrence of torture is also recognized in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment. It states that "no State Party shall… extradite a person where there are substantial grounds for believing that he would be in danger of being subject to torture." This extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment prescribed by that Article.

"In order that an applicant succeeds in his application, he will have to advance rather strong arguments as to whether there is a real danger of such ill-treatment. The **risk** alleged must relate to a treatment which attains a certain minimum level of severity, taking into account all the circumstances, including the physical and mental effects, and where relevant the age, sex, and health of the victim (Soering Case). The risk of the ill-treatment alleged must be real and account will be taken of the assurances given by the authorities of the State requesting the extradition (2274/93 France – 20/1/1994 – case involving extradition to face murder charges in Texas).

"Respondent[52] claims that the literature exhibited by appellant does not constitutes evidence according to law and in terms of Maltese law, it is irregular and inadmissible since at best it constitutes hearsay.

"Nowadays more and more computer data is being exhibited in Court and asked to be used as any other evidence. However its probative value, like every other piece of evidence produced, has to be examined by the Court and given its proper weight. There are a number of ways how the value of such information can be established, for example, the reliability of the computer equipment, the manner in which the data was entered, the measures taken to ensure the accuracy of the date as entered, the reliability of the data itself etc.

"Therefore, documents on the contents of which a party seeks to rely, whether as evidence of their truth or as original evidence, are subject to the rules as to proof of their contents. A statement contained in a computer-produced document may be accepted as evidence provided that the maker of the statement has personal knowledge of the facts in question or the original supplier of the information contained in the document must have had, or reasonably supposed to have had personal knowledge of the matters dealt with in the document. Not all digital evidence, therefore, has to be considered as hearsay as some can be accepted after a proper evaluation of their content.

"David Busutill and Lara Bezzina gave evidence on the existence and incidence of ill-treatment, torture, cruelty and degrading treatment in the USA.

"Lara Bezzina, representing Amnesty International Malta, referred to the report – USA Amnesty International's Supplementary Briefing to the

[52] That is the Commissioner of Police.

UN Committee against Torture (Doc. LB. page 31 *et seq*). She said that this report explains various cases of torture in different US prisons, including California.

"However witness could not give the Court any information as to whether the persons who prepared this report ever visited any of the institutions mentioned in the report, nor could she say who was the source or who drew up this report, except that it contained answers to questionnaires.

"It is to be noted that in this report there are no specific prisons / institutions / correctional facilities indicated which can be traced down in California where appellant might be sent to. The report does not identify any particular institution nor are any details given about any particular case referring to California prisons. It is more of a general report.

"The Court notes that the reference made in Doc. LB on page 74 is to treatment of women in prison and their vulnerability to sexual abuse. On page 76 the case refers to a mentally disturbed youth who committed suicide, whereas on page 78 there is referenced to a case on death row which is a different matter from that being treated here.

"In this sense therefore such report cannot be the basis on which this Court can decide where in California detainees are being ill-treated. Witness had no personal knowledge of the facts she gave evidence on nor did she indicate who supplied the information contained in the document or if they had personal knowledge of the matters dealt with in the document.

"David Busutill gave evidence and exhibited the document on page 102 of the Committee against Torture dated 25th July 2006 - a report following a session in May re the USA and particularly against torture and degrading treatment.
Witness referred to point 13 of the Report: Subjects of concern and recommendations particularly as regards the absence of the federal crime of torture. Witness also referred to the fact that under California Penal Code Sec 673 – the maximum punishment for torture is for a misdemeanor.

"Again, witness could not indicate any particular prison institution, correctional facility, mental facility or half way house where the ill-treatment occurred. In fact the report does not single out any particular facility in the State of California.

"This document deals with the positive aspects and welcomes the State party's statement that all United States officials are prohibited from engaging in torture at all times and in all places, and that every act of torture within the meaning of the Convention is illegal under existing federal and/or state law, but the Committee against Torture is

still concerned that torture is still not a federal crime consistent with article 1 of the Convention.

"This concern of the Committee against Torture however does not mean that there is no rule of law in the United States or that the California Penal Code does not punish the unlawful use of any cruel, corporal or unusual punishment, even though it treats it as a misdemeanor.

"Witness David Busutill also exhibited document on page 161 published by the Los Angeles Times of the 5th October 2006 and 7th October 2006 re the situation relating to human rights within the State of California.

"Here reference is made in the document to overcrowding in the State's lockups which has reached crisis levels. Again no particular location has been indicated, and it seems that this article is basically an attack on the Governor's prison policy by his political opponents, the Democratic lawmakers, in what was called a 'political theatre'. The article also indicates that the Prison Law Office won numerous law suits challenging conditions inside state lockups. As regards the mandatory transfers referred to in the article, the proposals for such transfers have not been passed (page 162) and appellant's fears in this regard are just hypothetical and not really substantiated. As regards overcrowding, it results that this has always been a problem and not just in the last few years (page 161). Overcrowding as such, though it varies from time to time, cannot be considered as tantamount to torture, or degrading or inhuman treatment, although it should not be acceptable.

"Witness Busutill exhibited document on page 163 regarding the death of an inmate beaten to death by some inmates. This particular case concerned the first inmate slaying in two decades, out of a prison population of 172,000.

"As regards the documents referred to by appellant during the extradition proceedings (LB 1 – LB 5 page 134 et seq) the Court of Criminal Appeal had already taken cognizance of these documents and it considered that the evidence produced was not frivolous but it decided that it was up to this Court to see whether there were substantial grounds for believing that appellant would face a "real risk" of violation of article 3 of the Convention if extradited to California.

"This Court has examined these documents which deal in particular with U.S. Prisons and Offenders with Mental Illness. As it will be shown later in this judgment, appellant cannot be considered as a mental case, even though he is suffering from a mild depression in view of the present circumstances.

“Moreover the number of cases referred to in the document, do not describe the particular ways prisons are meting out their inhumane and degrading punishments. Of these prisons there are hundreds in the United States. What is presented in the document is the response to a questionnaire and there is no way one can verify the veracity of the allegations. The Court has still to be convinced who the parties are, and their accusations have still to be tested in a Court of Law.

“For the purpose of determining whether there are substantial grounds for believing that a person would be in danger of being subjected to torture or inhuman and degrading treatment this Court has to take into account all relevant considerations including, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights. This has not been the case in these proceedings.

“Appellant mentions that in view of his particular personal circumstances, together with the particular nature of the crimes he is being charged with, there exists a clear and present danger**,** that if extradited, he will be subjected to either torture or else inhuman and/or degrading treatment.

“Dr. Joseph Spiteri, Consultant psychiatrist, under whose care appellant has been since March 2006, testified that he found Lewis Muscat to be lucid, calm and cooperative. His behavior in hospital was good and he understood what was being asked of him and he came across as mildly depressed. Dr.Spiteri administered a Hamilton Depression rating scale, and Muscat scored 12, which is indicative of only mild depressive symptoms. Usually moderate depression falls within 18 and 26. Muscat is on anti depressants which is a common medication, available worldwide. From a psychiatric point of view there is nothing which prevents him from boarding a plane. He is well oriented both with time, place and person and there is no cognitive deficit whatsoever. Muscat is partially deaf in the sense that you have to raise your voice when you speak to him. As regards the brain hemorrhage which Muscat suffered from, this is not connected to his mental capabilities. In fact he has normal mental capabilities, like any ordinary man and is fit to stand trial. At present he is not actively suicidal.

“The Court examined the allegations made by appellant and the evidence of the consultant psychiatrist and feels that there is nothing which should stand in the way of having appellant extradited to the U.S. Prior to his arrest in Malta, appellant was gainfully employed as a truck driver and had no problems with his employer. Naturally, in view of the particular moment in his life, and in view of the charges that have been made against him, appellant is bound to feel the pressure health wise. It must be noted that appellant lived in the U.S.A for many years until he became a fugitive on facing criminal proceedings. The alleged crimes contravened the laws of the state where he resided and he has now to answer to the charges in the community where he lived.

"Respondent exhibited in Court Document AG drawn up by the Office of the Governor of the State of California dated 19th September 2006, containing *inter alia* a declaration by the said Governor of his obligations emanating from his being bound and having subscribed to the Eighth Amendment of the United States Constitution and Article 1, Section 17 of the Constitution of California, both of which prohibit cruel and unusual punishment of prisoners in the State of California.

"In this declaration it is stated that:

> *'If an inmate believes that he has been subjected to illegal treatment, the inmate may seek relief from both federal and state courts, either through a petition for habeas corpus or through a civil rights lawsuit.... The inmate may also apply to the courts to have a court appointed attorney. There are also several highly regarded prison advocacy groups in California that ensure that inmates' rights are safeguarded.*
>
> *'In addition, the California Office of the Inspector General is an independent watchdog agency that safeguards the integrity of the state's correctional system by rigorously investigating and auditing the California Department of Corrections and Rehabilitation to uncover criminal conduct, administrative wrongdoing, poor management practices, waste, fraud, and other abuses by staff, supervisors and management.*
>
> *'I am confident that Mr. Muscat's rights will be protected should he be found guilty of the pending charges and thereafter committed to a correctional institution in California'.*

"As regards these assurances applicant contends these do not refer to the pre-trial stage. Moreover they contradict other public declarations by California's Governor.

"A state has to take into account the assurances which are given by the authorities of the State requesting the extradition. In this case the Governor of California has given his assurance that Mr. Muscat's rights will be protected should he be found guilty of the pending charges and thereafter committed to a correctional institution in California. This assurance applies also to the pre-trial stage and in his assurance the Governor mentioned actions which are available to appellant in case his rights are not protected. Mention is made of the relief from the federal and state courts, through a petition for habeas corpus or through a civil rights lawsuit. Appellant can apply to the courts to have a court appointed attorney. There are also several prison advocacy groups that ensure that inmates' rights are safeguarded as well as there is the California Office of the Inspector General – an independent watchdog of the state's correctional system. It is true that the mere existence and enactment of laws does not necessarily guarantee their respect and enforcement but this can be said of all legal systems and of all institutions.

"The Court therefore concludes that in view of all that has been considered appellant did not prove that there exists in the State of California – where it is intended that he will be extradited – a consistent pattern of gross, flagrant, or mass violations of human rights. Neither did the appellant indicate which institutions or prisons in California ill-treat or torture detainees.

"In the documents exhibited, even though there are misgivings and subjects of concern as regards the US legal system, there is no doubt about the democratic character of the legal system which respects the rule of law and which affords procedural safeguards. The machinery of justice to which the appellant will be subjected to in the United States is not in itself arbitrary or unreasonable.

"The United States, although, not a signatory to the European Convention, is signatory to numerous international instruments which guarantee the protection afforded by the European Convention.

"Appellant did not advance any strong argument as to the existence of a real danger of ill-treatment in his regard. Appellant did not indicate any risk relating to ill-treatment which in his view attains that level of severity which is sanctioned by article 3 of the European Convention.

"Therefore the Court finds that it has not been established that the treatment to which the applicant will be exposed, and the risk of his exposure to it, is so serious as to constitute torture or inhuman or degrading treatment or punishment contrary to Article 3 of the said Convention.

"The Court therefore, with regard to the question referred to it by the Court of Criminal Appeal whether in view of all the circumstances of the case and in particular of the physical and mental state of appellant, Article 3 of the Convention and Article 36(1) of the Constitution are likely to be contravened in relation to the said Lewis Muscat if he is extradited to the State of California, decides that the extradition can proceed, in the event of his appeal to the Criminal Court of Appeal being dismissed on other grounds."

The appeal

3. Appellant Muscat, in his application of appeal, lists several grievances against the judgment of the 8 January 2007. These grievances can be summarised – not without some difficulty in view of the rather incoherent and overlapping way in which arguments are

sometimes presented in the said application – as follows: (i) the first Court "erroneously concluded that a consistent pattern of gross, flagrant or mass violations of human rights is a *sine qua non* for the appellant's claims to be successful, when this is clearly not the case under international law"; (ii) that Court also failed to take account of the other limb of the provisions under examination, namely the prohibition against other cruel, inhuman or degrading treatment or punishment; (iii) that the first Court summarily dismissed the question of overcrowding by saying that it cannot be considered as tantamount to torture or to degrading or inhuman treatment, and in this respect he makes reference to the decisions of the European Court of Human Rights in the **Dougoz**[53] and **Peers**[54] cases, both against Greece; (iv) that the first Court erred when it expected him to indicate the specific name and location of the penitentiary to which he was going or of the penitentiary where torture is practised; (v) that generally speaking the first Court did not properly evaluate the evidence presented by him, in that he contends that he has presented sufficient evidence to show that there is a clear and present danger that, if extradited, he will be subjected to either torture or else inhuman and/or degrading treatment; (vi) that Californian legislation is incompatible with international law in that it deals with torture as a mere misdemeanour rather then a felony, while no crime of torture exists at a

[53] **Dougoz v. Greece** 6 March 2001.
[54] **Peers v. Greece** 12 April 2001.

Federal level; (vii) that Governor Schwarzenegger's assurances[55] contrast sharply with his own declarations that there is a crisis in the penitentiary system of California, and that therefore those assurances are not sufficient to ensure compliance with Article 3 of the Convention; (viii) that the first Court ignored "other important precedents, case-law and international jurisprudence substantiating the appellant's grievances".

Court's assessment

4. This court has carefully examined all the documents and evidence submitted by appellant and by the Commissioner of Police. The question of the parameters of the inquiry and assessment that a court must make when faced with a claim that deportation would result in a breach of Article 3 of the Convention has recently been dealt with by this Court in its judgment of the 19 February 2007 in the case **Luiza Merujian Zakarian et v. The Minister of Home Affairs et**. Although that case dealt with deportation, the principles are equally applicable, in a general way, to extradition. In that judgment of the 19 February 2007, to which reference is being made as far as the case-law of the ECHR is concerned in order to avoid unnecessary repetition, this Court noted in particular that:

> **"… it must be shown not merely that in the country to which a person is going to be sent the political situation is unsettled, or that**

[55] See document AG1 at fol. 17 and 18.

there is violence or even political violence to which that person, like other persons, might be subjected; what must be shown, even if at least on a balance of probabilities, is that the applicant faces a specific, personal and significant risk of such ill-treatment which would, in its severity or extent (or because of the personal circumstances of the same said applicant) amount to torture or to inhuman or degrading treatment or punishment."

5. In connection with extradition in particular, it has been stated that:

"There is no right [under the Convention] not to be extradited. Principally issues arise under the Convention regarding the detention pending extradition and regarding allegations of breaches of human rights which will occur in the receiving State if the extradition is carried out. Where on proposed extradition an applicant faces a real risk of treatment contrary to Art. 3 in the receiving State, the responsibility of the expelling State is engaged and a violation arises. The principle was established in *Soering v. United Kingdom* [July 7, 1989], where conditions on death row in Virginia were found to expose the applicant, facing two charges of capital murder, to the real risk of inhuman and degrading treatment. The risk must relate to a treatment which reaches a certain minimum level of severity, taking into account all the circumstances, including the physical and mental effects and where relevant the age, sex and health of the victim…The way in which the extradition is enforced, even if involving the use of tranquillizers, has not yet been found to go beyond the inevitable trauma involved in the legitimate enforcement of an extradition decision. The Court has emphasised that the prohibition contained in Article 3 is absolute. Therefore, if there is a real risk of such prohibited treatment in the receiving State, no principle of the international enforcement of justice would justify implementing the extradition. The risk of the ill-treatment alleged must be real and account will be taken of the assurances given by the authorities of the State requesting extradition to those of the State requested." [56]

6. This Court is of the view that the First Hall of the Civil Court made a substantially correct evaluation of the evidence submitted to it. All the evidence submitted – including documents submitted before the Court of Criminal Appeal and which were also considered by the first Court –

[56] Reid, K. ***A Practitioner's Guide to the European Convention on Human Rights*** 2nd ed. Sweet & Maxwell (London) 2004, pp. 299-230, paras. IIB-147 – IIB-148, emphasis added.

even when these documents are taken at face value (that is without going into the question of how they were drawn up and whether those who drew them up had first hand knowledge of the facts recounted) does not convince this Court on a balance of probabilities, that if appellant were to be extradited to the United States he faces a specific, personal and significant risk of torture or of inhuman or degrading treatment or punishment. What the evidence discloses is that the penitentiary system of the State of California (including those penitentiaries where mentally ill patients are detained) suffers from problems which are not uncommon even on this side of the Atlantic – overcrowding, shortage of staff and the occasional aberrant or outright illegal behaviour of members of the prison staff. This is counterbalanced, at least as far as penitentiaries within the United States are concerned[57], by a highly sophisticated judicial system, at both State and Federal level, which can grant adequate remedies to prevent abuses of human rights even in prison and provide adequate redress where such abuses have occurred, as well as by numerous watch-dog organisations geared to ensuring the proper treatment of prisoners and to defending their rights. In short, the first court was perfectly correct in stating that the evidence does <u>not disclose</u> in the State of California "the existence…of a consistent pattern of gross, flagrant or mass violations of human rights". However, as appellant

[57] The position appears to be quite different with regards to Guantanamo and military prisons outside the territory of the United States – to which a substantial part of the report, Dok. LB (fol. 34), is

quite rightly points out in his first grievance, this expression – "consistent pattern of gross, flagrant or mass violations of human rights" – is unfortunately too generic an expression to be used in examining a case like appellant's. To engage the liability of a State signatory to the European Convention in terms of Article 3 (and in case of Malta also in terms of Article 36(1) of the Constitution) it is not necessary to show any pattern of behaviour in violation of Article 3 or violation on a grand or mass scale – it is sufficient if the evidence convinces this court that the circumstances (including the personal circumstances of appellant) are such that if Muscat is sent to California (or to some neighbouring State of the US for that matter) he faces a specific, personal and significant (that is substantial, real) risk of torture or of being subjected to inhuman or degrading treatment or punishment. This Court is not so convinced and this for three reasons. The first reason is that, as has already been mentioned, if extradited, appellant will be transferred to a State with a highly sophisticated and effective legal system which can under normal circumstances guarantee that his fundamental human rights will be respected, and no evidence has been adduced to suggest that the said legal system is generally ineffective. Secondly no evidence has been produced to suggest that the documented incidents of ill-treatment in Californian jails are the result of this ill-treatment being, deliberately or *de facto*, institutionalised. Thirdly, this Court, like the first Court before it, must necessarily take due account of the assurances given by the

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dedicated; see in particular fol. 34 to 66.

Governor of the State of California, in the document exhibited at fol. 17-18 of the record, and in particular of the second paragraph and the beginning of the third paragraph of that document which read as follows: *"It is my understanding that Mr Muscat has challenged his extradition back to California on the basis that serving a prison term in California would violate his human rights under European Law. As Governor of the State of California, I am bound by and subscribe to the Eighth Amendment of the United States Constitution and Article I, Section 17 of the Constitution of California, both of which prohibit cruel and unusual punishment of prisoners in the State of California. Every inmate in a California state prison is protected by the state and federal Constitutions, and by federal and state laws that not only prohibit cruel and unusual punishment, but provide for the inmates' health and welfare."* For these reasons, the second, fourth, seventh and eight grievances (summarised above, para. **3**) and, as the limited extent explained above, the first grievance, are being dismissed.

7. Even the third grievance – regarding the interpretation given by the first Court to the question of overcrowding – is unfounded. In its judgment the first Court did not say, as appellant seems to be implying, that overcrowding is not a relevant consideration when considering whether a person faces a specific, personal and significant risk of

torture or of inhuman or degrading treatment or punishment. What that Court stated was:

> **"As regards overcrowding, it results that this has always been a problem and not just in the last few years (page 161). Overcrowding as such, though it varies from time to time, cannot be considered as tantamount to torture, or to degrading or inhuman treatment, although it should not be acceptable."** (emphasis added by this court).

Now this is perfectly in line with the case law of the European Court of Human Rights, indeed even with what is stated in the judgments referred to by appellant himself, that is the **Dougoz** and **Peers** cases. Overcrowding *ut sic* does not amount to torture or inhuman or degrading treatment or punishment; if however that overcrowding is coupled with other factors, such as restrictions on movement for very long periods, inadequate ventilation or practically no ventilation at all, inability to sleep because of that overcrowding, inadequate sanitary facilities or food – than in that case overcrowding becomes a relevant factor. In the **Dougoz** case the ECHR had this to say on the question of overcrowding:

> **"46. The Court considers that conditions of detention may sometimes amount to inhuman or degrading treatment. In the "Greek case" (applications nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12) the Commission reached this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world. 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. In the present case, although the Court has not conducted an on-site visit, it notes that the applicant's allegations are corroborated by the conclusions of the CPT report of 29 November 1994 regarding the police headquarters in Alexandras Avenue. In its report the CPT stressed that the**

cellular accommodation and detention regime in that place were quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling. Although the CPT had not visited the Drapetsona detention centre at that time, the Court notes that the Government had described the conditions in Alexandras as being the same as at Drapetsona, and the applicant himself conceded that the former were slightly better with natural light, air in the cells and adequate hot water.

"47. Furthermore, the Court does not lose sight of the fact that in 1997 the CPT visited both the Alexandras police headquarters and the Drapetsona detention centre and felt it necessary to renew its visit to both places in 1999. The applicant was detained in the interim, from July 1997 to December 1998.

"48. In the light of the above, the Court considers that the conditions of detention of the applicant at the Alexandras police headquarters and the Drapetsona detention centre, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3."

And in the **Peers** case it observed:

"72. Nevertheless, the Court recalls that the applicant had to spend at least part of the evening and the entire night in his cell. Although the cell was designed for one person, the applicant had to share it with another inmate. This is one aspect in which the applicant's situation differed from the situation reviewed by the CPT in its 1994 report. Sharing the cell with another inmate meant that, for the best part of the period when the cell door was locked, the applicant was confined to his bed. Moreover, there was no ventilation in the cell, there being no opening other than a peephole in the door. The Court also notes that, during their visit to Koridallos, the delegates found that the cells in the segregation unit were exceedingly hot, although it was only June, a month when temperatures do not normally reach their peak in Greece. It is true that the delegates' visit took place in the afternoon, when the applicant would not normally be locked up in his cell. However, the Court recalls that the applicant was placed in the segregation unit during a period of the year when temperatures have the tendency to rise considerably in Greece, even in the evening and often at night. This was confirmed by Mr Papadimitriou, an inmate who shared the cell with the applicant and who testified that the latter was significantly physically affected by the heat and the lack of ventilation in the cell.

“73. The Court also recalls that in the evening and at night when the cell door was locked the applicant had to use the Asian-type toilet in his cell. The toilet was not separated from the rest of the cell by a screen and the applicant was not the cell’s only occupant.

“74. In the light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX).

“75. Indeed, in the present case, the fact remains that the competent authorities took no steps to improve the objectively unacceptable conditions of the applicant’s detention. In the Court’s view, this omission denotes lack of respect for the applicant. The Court takes into account, in particular, that, for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell-mate. The Court is not convinced by the Government’s allegation that these conditions did not affect the applicant in a manner incompatible with Article 3. On the contrary, the Court is of the opinion that the prison conditions complained of diminished the applicant’s human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considers that the conditions of the applicant’s detention in the segregation unit of the Delta wing of Koridallos Prison amounted to degrading treatment within the meaning of Article 3 of the Convention.

“There has thus been a breach of this provision.”

8. In the instant case there is nothing to suggest that, if appellant were to be extradited, there is a real or significant possibility that he will end up in situations anywhere similar to those described above. Indeed, even if one were to take the document at fol. 161 of the records – the article by Jennifer Warren of the L.A. Times – at face value, it is clear

that measures are being taken to remedy the situation, with lawyers poised to defend inmates' rights if involuntary (that is mandatory), as opposed to voluntary, transfers to other jails are effected by the authorities. This grievance is therefore also being dismissed.

9. As to the fifth grievance, this has in part been dealt with in para. 6. However in his appeal application under this grievance appellant puts in issue his "personal circumstances", notably his physical and mental problems, and the fact that, as a foreigner, the extradition is even more likely to affect him negatively. This Court must first make it clear that it is in no way convinced that Muscat suffers from any mental illness or physical disability which cannot be adequately handled in any ordinary penitentiary – in other words, it would be quite surprised if because of the depression (now under control) which assailed him as soon as he realised that he was going to be extradited, he were to be sent to a mental institution. His "personal circumstances" in this respect do not add anything substantial to the equation of whether or not there is a significant risk of his being subjected to treatment proscribed by Article 3. The fact that Muscat would be a "foreigner" in a Californian jail likewise cannot be given much weight – otherwise most extraditions would not take place. Finally there is the question of his being held in remand, or eventually, if convicted, being incarcerated in connection with child abuse offences. It is trite knowledge that persons accused or

convicted of certain offences run a higher risk of being picked upon by other inmates and of having a harder time than those accused or convicted of other offences. Again, however, this does not add much to the equation, as this court is convinced that should Muscat's extradition be proceeded with, he will not be the first, last or only person in a Californian jail charged with similar offences out of a prison population running into six figures. There is nothing in the evidence to suggest that this category of prisoners are not adequately looked after in Californian jails. This grievance, therefore, is also being dismissed.

10. Finally, the Court does not consider appellant's sixth grievance as being well founded. The fact that California considers torture a misdemeanour and not a felony, and that there is no Federal crime of torture in the US does not in any way raise the likelihood that appellant, if extradited to California, will be subjected to torture or other inhuman or degrading treatment or punishment, even in the hypothesis posited by appellant – a hypothesis which this Court is not called to rule upon – that the absence of such a Federal offence is in breach of the international obligations undertaken by the US. This grievance is actually frivolous.

Decision

11. For these reasons, the Court dismisses the appeal and confirms the judgment of the first Court. All costs, of both first and second instance, are to be borne by appellant. The Court further orders that a copy of this judgment be forthwith transmitted by the Registrar, Civil Courts and Tribunals, to the Registrar, Criminal Courts and Tribunals who is to bring it to the attention of the Court of Criminal Appeal.

Deputy Registrar
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