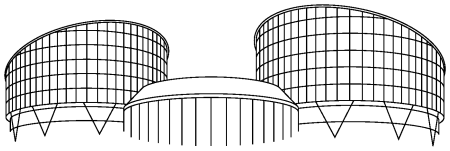

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SEYCHELL v. MALTA

(Application no. 43328/14)

JUDGMENT

STRASBOURG

28 August 2018

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

In the case of Seychell v. Malta,

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

Ganna Yudkivska, *President,*
Faris Vehabović,
Egidijus Kūris,
Iulia Motoc,
Carlo Ranzoni,
Marko Bošnjak, *judges,*
Geoffrey Valenzia, *ad hoc judge,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 19 June 2018,

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

PROCEDURE

1. The case originated in an application (no. 43328/14) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Maltese national, Mr Anthony Seychell ("the applicant"), on 2 June 2014.

2. The applicant was represented by Dr T. Azzopardi, a lawyer practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged that the discretion of the Attorney General to decide in which court to try an accused, with the consequent effects this had on punishment, was in breach of Article 7.

4. On 2 March 2016 the complaint concerning Article 7 was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Mr Vincent A. De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28). Accordingly, the President decided to appoint Mr Geoffrey Valenzia to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1961 and is detained at the Corradino Correctional Facility, Paola.

A. Background to the case

7. On 25 June 2004 the police searched the applicant's residence and found a quantity of cannabis plants, a canopy, foil and two electric lamps on the roof.

8. The police informed the applicant that he was being charged by the Attorney General, before the Criminal Court, with (i) cultivation and (ii) aggravated possession (not for his exclusive use) of cannabis.

9. A court-appointed expert found that the weight of the dried cannabis leaves found amounted to 3,416.20 grams, from which 6,832 cannabis 'reefers' could be made or 11,382 'sticks of cannabis'.

10. During the trial by jury the applicant, who suffered from chronic depression and severe back pain, admitted the first charge.

11. By a judgment of 5 March 2008 the applicant was found guilty of both charges (the verdict was unanimous in relation to the first charge, and seven votes to two in relation to the second charge) and was sentenced to a term of twelve years' imprisonment and a fine of 25,000 euros (EUR) by the Criminal Court. The fine was to be converted into a further eighteen months' imprisonment if it remained unpaid. In determining the punishment, the Criminal Court noted that, according to the law, if, having considered the age of an accused, his previous conduct, the quantity and quality of the drug in question, as well as all other circumstances, or if the jury's verdict was not unanimous, it considered that the punishment of life imprisonment would not be adequate, it could sentence the accused to a term of imprisonment of between four and thirty years and a fine of between approximately EUR 3,330 and EUR 116,500. In the present case, it considered the conduct of the applicant, the fact that there was agreement that the second charge would be absorbed by the first charge for the purposes of punishment, and the punishments handed down in similar cases.

12. By a judgment of 12 March 2009 the Court of Criminal Appeal confirmed the first-instance judgment.

B. Constitutional redress proceedings

13. On 9 November 2010, the applicant instituted constitutional redress proceedings, complaining under Article 6 § 1 about, *inter alia*, the discretion of the Attorney General as public prosecutor to decide in which court to try an accused.

14. On 10 October 2012 the case was adjourned for judgment. On 11 February 2013 (following the judgment of the Court in *Camilleri v. Malta*, no. 42931/10, 22 January 2013) the applicant asked to add a complaint under Article 7 in connection with the discretion of the Attorney General.

15. By a decree of 12 February 2013 the Civil Court (First Hall), in its constitutional competence, rejected the request to suspend the determination of the case and to allow the applicant to add a complaint under Article 7 of the Convention, given that the stage of collection of evidence and pleadings (*dibattiment*) had come to an end.

16. By a judgment of 21 March 2013, the Civil Court (First Hall), in its constitutional competence, rejected the applicant's claims. Having rejected all other complaints by the applicant, it considered that it was not necessary to determine the complaint concerning the discretion of the Attorney General (under Article 6).

17. By a judgment of 9 December 2013 the Constitutional Court rejected an appeal by the applicant and confirmed the first-instance judgment. As to the complaint about the Attorney General's discretion, the Constitutional Court considered that the Court had found a violation of Article 7 in that connection (giving no remedy), but had not determined the matter under Article 6. In the Constitutional Court's view, such a finding which related to the lack of foreseeability of the law could not cast doubt on the fairness of the proceedings in general which would paralyse the entire judicial system. Furthermore, local case-law had previously established that such a discretion did not breach an applicant's fair trial rights. The Constitutional Court also noted that there was no reason to alter the first-instance court's discretion regarding not allowing the addition of the complaint under Article 7, at a time when the collection of evidence had closed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The relevant law

18. In Malta, at the relevant time, in cases such as the present one, it was the Attorney General as public prosecutor who decided before which court an accused could be tried, and consequently which punishment would be applicable.

19. At the time of the applicant's trial, Article 22 of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, provided that the maximum punishment before the Criminal Court (for the offences with which the applicant was charged) might vary between four years and life imprisonment, whereas before the Court of Magistrates it might vary between six months and ten years. The provision, in so far as relevant, reads as follows:

> "(2) Every person charged with an offence against this Ordinance shall be tried in the Criminal Court or before the Court of Magistrates (Malta) or the Court of Magistrates (Gozo), as the Attorney General may direct, and if he is found guilty shall, in respect of each offence, be liable -
>
> (a) on conviction by the Criminal Court -

(i) where the offence is one under article 4 or under article 8(c) or consists in selling or dealing in a drug contrary to the provisions of this Ordinance or in an offence under subarticle (1)(f), or of the offence of possession of a drug, contrary to the provisions of this Ordinance, under such circumstances that the court is satisfied that such possession was not for the exclusive use of the offender, or of the offences mentioned in subarticles (1C) or (1D) or (1E), to imprisonment for life:

Provided that:

(aa) where the court is of the opinion that, when it takes into account the age of the offender, the previous conduct of the offender, the quantity of the drug and the nature and quantity of the equipment or materials, if any, involved in the offence and all other circumstances of the offence, the punishment of imprisonment for life would not be appropriate; or

(bb) where the verdict of the jury is not unanimous, then the Court may sentence the person convicted to the punishment of imprisonment for a term of not less than four years but not exceeding thirty years and to a fine (*multa*) of not less than two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) but not exceeding one hundred and sixteen thousand and four hundred and sixty-eight euro and sixty-seven cents (116,468.67); and

(ii) for any other offence to imprisonment for a term of not less than twelve months but not exceeding ten years and to a fine (*multa*) of not less than four hundred and sixty-five euro and eighty-seven cents (465.87) but not exceeding twenty-three thousand and two hundred and ninety-three euro and seventy-three cents (23,293.73); or

(b) on conviction by the Court of Magistrates (Malta) or the Court of Magistrates (Gozo) -

(i) where the offence is one under article 4 or under article 8(c) or consists in selling or dealing in a drug contrary to the provisions of this Ordinance or in an offence under subarticle (1)(f), or of the offence of possession of a drug, contrary to the provisions of this Ordinance, under such circumstances that the court is satisfied that such possession was not for the exclusive use of the offender, or of the offences mentioned in subarticles (1C) or (1D) or (1E), to imprisonment for a term of not less than six months but not exceeding ten years and to a fine (*multa*) of not less than four hundred and sixty-five euro and eighty-seven cents (465.87) but not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87); and

(ii) for any other offence to imprisonment for a term of not less than three months but not exceeding twelve months or to a fine (*multa*) of not less than four hundred and sixty-five euro and eighty-seven cents (465.87) but not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) or to both such imprisonment and fine, and in every case of conviction for an offence against this Ordinance, all articles in respect of which the offence was committed shall be forfeited to the Government, and any such forfeited article shall, if the court so orders, be destroyed or otherwise disposed of as may be provided in the order:"

20. Article 22 of the Dangerous Drugs Ordinance also enlists a number of circumstances where Article 21 of the Criminal Code does not apply. In so far as relevant, Article 21 of the Criminal Code, concerning the handing down of sentences below the prescribed minimum, reads as follows:

> "... the court may, for special and exceptional reasons to be expressly stated in detail in the decision, apply in its discretion any lesser punishment which it deems adequate, notwithstanding that a minimum punishment is prescribed in the article contemplating the particular offence ..."

21. Article 175 of the Code of Organisation and Civil Procedure, prior to amendments in 2016, read as follows:

> "(1) The court may, at any stage of the proceedings, at the request of any of the parties, until judgment is delivered after hearing where necessary the parties, order the substitution of any act or permit any written pleading to be amended, either by adding or striking out the name of any party and substituting another name therefor or by correcting any mistake in the name or in the character of the parties, or by correcting any other mistake or by causing other submission of fact or of law to be added even by separate note, provided that no such substitution or amendment shall affect the substance either of the action or of the defence on the merits of the case.
>
> (2) Any court of appellate jurisdiction may also order or permit, at any time until judgment is delivered, the correction of any mistake in the application by which the appeal is entered or in the answer, including any mistake in the indication of the court which delivered the decision appealed from, in the name or character of the parties, or in the date of the judgment appealed from:
>
> (3) Any judicial or administrative omission or mistake in a judicial act may until the court shall have delivered judgment and disposed of the case be remedied by a court of its own motion."

B. Domestic case-law

22. In the case of P.B., whose house in Żejtun was also searched on the same day as the applicant's, 693.12 grams of the cannabis plant (in its entirety, i.e. including leaves) were found. According to a court-appointed expert, this could be made into between 693 and 1,386 'reefers' or approximately 2,310 'cannabis sticks'. P.B. was tried by the Criminal Court, which on 29 November 2011, following a guilty plea and plea bargaining, sentenced P.B. to seven and a half years' imprisonment and a fine of EUR 17,400.

23. The Government referred to the following case-law examples decided by the Criminal Court:

- *Republic of Malta vs Fedele Bartolo*, of 15 July 1998, concerning the cultivation of cannabis, an offence committed in 1988, where the punishment handed down was a suspended sentence and a fine.

- *Republic of Malta vs Jolade Martins* of 29 August 1991, concerning 275.8 grams of heroin, an offence committed in 1989-90, where the punishment handed down was six years and six months' imprisonment and a fine.

- *Republic of Malta vs Godfrey Ellul*, 5 April 1995, concerning conspiracy and the trafficking of cocaine in 1990, an offence where the

punishment handed down was a fine (overturned on appeal on 4 July 2002, which cleared the applicant of all charges).

- *Republic of Malta vs Ruzarju Tonna* of 26 April 1993 concerning the trafficking of heroin in 1991, where the punishment handed down was ten years' imprisonment and a fine (confirmed on appeal on 10 May 1994).

- *Republic of Malta vs George Mifsud* of 19 June 1996 concerning the trafficking of heroin in 1988, where the accused was acquitted.

- *Republic of Malta vs Emmanuela Brincat* of 28 March and 6 April 1995 concerning the trafficking of heroin in 1993, where the punishment handed down was eight years' imprisonment and a fine (confirmed on appeal on 27 October 1997).

- *Republic of Malta vs Christopher Borg, Mario Joseph Rodenas and Allison Micallef* of 7 July 2000, concerning the trafficking of cocaine and cannabis in 1997, where the punishment handed down to the accused was four years' imprisonment and a fine, three years and three months' imprisonment and a fine, and a three-year suspended sentence and a fine, respectively. On appeal by Allison Micallef on 5 July 2002, her suspended sentence was reduced to two years.

- *Republic of Malta vs Ali Ben Mohammed Hechmi Bettaieb* of 28 October 1999 concerning the trafficking of heroin in 1997, where the punishment handed down was fifteen years' imprisonment and a fine (confirmed on appeal on 2 June 2005).

- *Republic of Malta vs Abojila Ali Ashor Tunsi* of 9 July 1999 concerning the trafficking of cannabis in 1998, where the punishment handed down was six years' imprisonment.

- *Republic of Malta vs Perry Ingomar Toornstra* of 12 June 2001 concerning 5,000 ecstasy pills and LSD in 2000, where the punishment handed down was twenty years' imprisonment and a fine.

- *Republic of Malta vs Ezedeen Mohammed Zelmati* of 14 July 2000 concerning the importation of cannabis in 1998, where the punishment handed down was fifteen years' imprisonment and a fine.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

24. The applicant complained about the discretion of the Attorney General to decide in which court to try an accused and the consequent effects this had on punishment. He relied on Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international

law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. Admissibility

1. The Government's objection of non-exhaustion of domestic remedies

(a) The parties' submissions

25. The Government submitted that the complaint under Article 7 had not been brought before the constitutional jurisdictions, as the complaint before such courts had been raised solely under Article 6 of the Convention. They noted that, while it was true that the applicant had tried to amend his application before the constitutional jurisdictions, he had done so too late, at a point when the case had been adjourned for judgment. Referring to Article 175 of the Code of Organisation and Civil Procedure, they noted that putting forward pleadings under Article 7 would have substantially affected the defence on the merits, which had been based on Article 6. The Government contested the applicant's allegation that they had opposed his request, and noted that no right of reply to the applicant's request had been granted to the respondent. Given the above, it had thus been for the applicant to lodge a fresh set of constitutional redress proceedings. Lastly, the Government noted that the Court's power to decide a complaint *ex officio* under a different Article from the one relied on by the applicant did not override the need to exhaust domestic remedies.

26. The applicant submitted that he had brought the substance of his complaints before the domestic courts, specifically, the discretion of the Attorney General to choose in which court to try an accused, albeit under Article 6. Furthermore, a few days after the Court had delivered its judgment in *Camilleri v. Malta* (no. 42931/10, 22 January 2013) he had asked the domestic court to add a complaint under Article 7, but following the Government's objection, his request had been rejected. He noted that the rules of court allowed for additions to an on-going constitutional case, provided that the respondent was given the opportunity to rebut the fresh legal grounds. Thus, the State had had an opportunity to examine the complaint within the domestic framework, but it had failed to do so. Moreover, his complaint under Article 6 had not even been examined by the domestic court. The applicant also relied on the Court's case-law whereby it had reclassified a complaint *ex officio*.

(b) The Court's assessment

27. The Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V; and *Gatt v. Malta*, no. 28221/08, § 22, ECHR 2010).

28. The rule on exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time, it requires, in principle, that the complaints intended to be made subsequently at international level should have been aired before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014; and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, §§ 84-87, 9 July 2015).

29. It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance" (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 39, ECHR 1999-I; and *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III). If the applicant has not relied on the provisions of the Convention, he or she must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged breach in the first place (see *Gäfgen v. Germany* [GC], no. 22978/05, § 142, ECHR 2010, and *Karapanagiotou and Others v. Greece*, no. 1571/08, § 29, 28 October 2010).

30. The Court notes that the complaint in the present case concerns the discretion of the Attorney General in Malta (in drug-related cases) to decide in which court to try an accused, and therefore the applicable punishment bracket. The case thus raises the same legal issue as that in *Camilleri* (cited above). The applicant in that case had raised the issue before both the domestic courts and this Court under Article 6 § 1. However, the Court decided *ex officio* to communicate the complaint under Article 7 as well, and eventually found a violation of Article 7 and decided that it was not necessary to examine the complaint under Article 6 § 1. That judgment was made public in January 2013, and just after that judgment the applicant in the present case (who had lodged constitutional redress proceedings in 2010, relying on Article 6, as in *Camilleri*, cited above) attempted to amend his claim before the domestic constitutional jurisdictions to also include Article 7. His request was rejected; however, his claim about the same matter falling under Article 6 of the Convention was maintained and rejected summarily. The Court need not comment on the domestic courts' decision to reject the applicant's request, as in any event it considers that, in the present case, the complaint, whether under Article 6 or Article 7, arises

out of the same facts and is based on the same arguments related to the risk of arbitrariness in the Attorney General's decision (see, *mutatis mutandis*, *Gatt*, cited above, § 24). It follows that the applicant provided the national authorities with the opportunity which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, namely that of putting right the violations alleged against them (ibid.; and, *mutatis mutandis*, *Aldeguer Tomás v. Spain*, no. 35214/09, § 61, 14 June 2016, and *Portu Juanenea and Sarasola Yarzabal v. Spain*, no. 1653/13, § 63, 13 February 2018).

31. The Government's objection concerning a failure to exhaust domestic remedies must therefore be dismissed.

2. Conclusion

32. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

33. The applicant submitted that the Attorney General's choice of trial court and consequently the punishment applicable for the offences in issue, without adequate legal safeguards, had violated Article 7. He relied on the *Camilleri* judgment (cited above). He noted that, despite acknowledging that judgment and being obliged to change the law, which they had done, the Government had failed to take any action in respect of him, when he had been in the same situation.

34. The applicant relied on the case of P.B. (see paragraph 22 above), who he claimed had been tried by the Court of Magistrates, and submitted that the Attorney General had not dealt with the two nearly identical cases in the same manner.

(b) The Government

35. The Government noted the Court's findings in the case of *Camilleri* (cited above) that there had been a violation of Article 7, but they also noted that, in that case, the Court had found that the relevant law had clearly spelt out the offence and the punishment. In their view, the latter consideration also applied to this case in relation to Article 22 of the Dangerous Drugs Ordinance.

36. Moreover, the Government submitted that the applicant could reasonably have foreseen, if necessary with the assistance of informed legal advice, that he would certainly be tried before the Criminal Court for the acts he had committed. This was particularly so in view of the quantity of drugs found and the circumstances in which they had been found (various stages of cultivation, as well as leaves which had been left to dry), and the domestic case-law in drug cases, which was given wide media coverage. The Government referred to a number of cases decided before the applicant had committed the offence at issue (see paragraph 23 above). In the Government's view, the case-law clearly reflected the parameters which had had a bearing on the Attorney General's decision, that is: the quantity of the drugs found, the circumstances in which they had been found, whether the facts had revealed conspiracy, and the level of cooperation of the accused.

37. The Government submitted that any lawyer would have been capable of telling the applicant that he would be tried before the Criminal Court in such circumstances. Moreover, the applicant had previously been charged with drug-related offences. The Government relied on *C.R. v. the United Kingdom* (22 November 1995, Series A no. 335-C) and *Achour v. France* ([GC], no. 67335/01, ECHR 2006-IV).

38. The Government submitted that the Attorney General's discretion was not unfettered in so far as, according to a Constitutional Court judgment of 2012, such discretion was subject to judicial review. Lastly, they noted that Article 21 of the Criminal Code did not apply in the present case, irrespective of whether proceedings were being held before the Court of Magistrates or the Criminal Court.

39. The Government further submitted that the case of P.B. was totally unrelated, and the only similarity was the illicit substance (cannabis) and the locality, in so far as both accused resided in Żejtun. In particular, the amount of dried cannabis leaves had been much smaller in P.B's case, but more importantly, he had been tried by the Criminal Court anyway, and thus had been exposed to the same punishment bracket, contrary to what the applicant had submitted. The Government further noted that the applicant had not provided any example to show that persons charged with similar offences in respect of a similar amount of drugs had been charged before the Court of Magistrates.

40. Lastly, the Government noted that they had executed the *Camilleri* judgment (cited above), and the case had been closed by the Committee of Ministers in 2014.

2. The Court's assessment

(a) General principles

41. The guarantee enshrined in Article 7 should be construed and applied, as follows from its object and purpose, in such a way as to provide

effective safeguards against arbitrary prosecution, conviction and punishment. Article 7 § 1 of the Convention sets forth the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable (see *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 50, ECHR 2015, and the cases cited therein).

42. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (ibid.).

43. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. Consequently, in any system of law, however clearly drafted a legal provision may be, including a criminal law provision, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances ibid.).

44. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain. The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (ibid.).

(b) Application to the present case

45. The Court notes that while the *Camilleri* case (cited above) was based on an examination of the provisions of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta, the present case is based on the provisions of the Dangerous Drugs Ordinance, which are

however analogous to the former provisions and thus raise the same issue under Article 7. It is thus for the Court to ascertain whether the text of the law was also sufficiently clear in the present case and satisfied the requirements of accessibility and foreseeability at the material time.

46. The Court notes that it is not disputed that the impugned provision did not give rise to any ambiguity or lack of clarity as to its content in respect of what actions were criminal and constituted the relevant offence. The Court further notes that there is no doubt that it provided for the punishment applicable in respect of the offences with which the applicant was charged. In fact, it provided for two different possible punishments, namely four years to life imprisonment in the event that the applicant was tried before the Criminal Court, or six months to ten years' imprisonment if he was tried before the Court of Magistrates.

47. While it is clear that the punishment imposed was established by law and did not exceed the limits fixed by Article 22 of the Dangerous Drugs Ordinance, it remains to be determined whether the Ordinance's qualitative requirements, particularly that of foreseeability, were satisfied, regard being had to the manner of choice of jurisdiction, as this affected the penalty that the offence in question carried.

48. As in the *Camilleri* case (cited above), the Court observes that the law did not make it possible for the applicant to know, at the time of the commission of the offence, which of the two punishment brackets would apply to him. However, the Government argued that it would have been possible for the applicant to know such punishment, if necessary with the assistance of informed legal advice, in view of the domestic case-law which clearly reflected the parameters which had a bearing on the Attorney General's decision (see paragraph 36 above). In this connection, the Court notes that the Government referred to a number of cases with an extremely brief description of each (see paragraph 23 above), but failed to submit the relevant judgments. Nor did the Government indicate the specific charges or which law was at issue in those cases, or any other detail concerning the circumstances leading to those judgments. Further, even assuming that the little information provided is correct, the Court notes that only three of those cases referred to charges solely related to cannabis (as in the case of the applicant), and in none of those cases did the Government refer to the quantity of cannabis at issue. In the light of the above, the Court considers that it has not been shown to its satisfaction that the applicant could have known, even with appropriate legal advice, which court he would be tried in, and therefore the consequences which his actions could entail.

49. At the same time, unlike in the case of *Camilleri* (cited above), the applicant has failed to prove that similar circumstances were tried by different courts. Indeed, in the present case, the only case brought to the Court's attention with a similar factual background, despite a smaller amount of drugs being involved, was also tried by the Criminal Court and

was thus subject to the same punishment bracket. It is true that in the *Camilleri* judgment (cited above) the Court gave weight to the example put forward by the applicant. However, the Court considers that the absence of such an example is not determinative, particularly in the light of the paucity of the examples put forward by the Government. In the Court's view, the case-law put forward by both parties does not suffice to dispel the concerns related to the applicable legal framework whereby the applicable punishment was solely dependent on the Attorney General's discretion to determine the trial court.

50. While it may well be true that the Attorney General gave weight to a number of criteria before taking his decision, it is also true that no such criteria were specified in any legislative text or made the subject of judicial clarification over the years. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one (based on enumerated factors and criteria) (see, *mutatis mutandis*, *Camilleri*, cited above, § 43). Thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. An insoluble problem was posed by fixing different minimum (and maximum) penalties. The Attorney General had in effect an unfettered discretion to decide which minimum (and maximum) penalty would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards. Such a decision could not be seen only or mainly in terms of abuse of power, even if – as the Government suggested, without substantiating their view – it might be subject to judicial review (see paragraph 38 above).

51. Moreover, the domestic courts were bound by the Attorney General's decision as to which court would be competent to try the accused. The Government acknowledged that Article 21 of the Criminal Code – which provided for the passing of sentences below the prescribed minimum on the basis of special and exceptional reasons – was not applicable to the present case (see paragraph 38 above). Thus, at the relevant time, a lesser sentence could not be imposed, despite any concerns the judge might have had as to the use of the Attorney General's discretion (ibid.).

52. In the light of the above considerations, the Court concludes that the relevant legal provision at the material time (prior to recent amendments in the light of the *Camilleri* judgment, cited above) failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided for in Article 7.

53. It follows that there has been a violation of Article 7 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

55. The applicant claimed 45,000 euros (EUR) in respect of pecuniary damage, an amount representing his loss of income for the extra years he had spent in prison (in his view, at least five), and EUR 40,000 in respect of non-pecuniary damage.

56. The Government submitted that the claim in respect of pecuniary damage should not be awarded, in so far as the applicant's punishment had been in line with the law and his argument that he had been imprisoned for an extra five or six years bore no cause and effect relationship with the alleged violation. In any event, no compensation in respect of pecuniary damage was due in their view, as a finding of a violation would constitute sufficient just satisfaction. They also considered that an award in respect of non-pecuniary damage should not exceed EUR 1,000, as awarded in the *Camilleri* case.

57. The Court cannot speculate as to the tribunal to which the applicant would have been committed for trial had the law satisfied the requirement of foreseeability (see *Camilleri*, cited above, § 50). Therefore it cannot speculate on the length of the sentence which would have been imposed on the applicant had the violation not occurred. Thus, it rejects the claim for the pecuniary damage alleged. On the other hand, making its assessment on an equitable basis, it awards the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

58. The applicant also claimed EUR 434.36 for costs and expenses incurred before the domestic courts, as evidenced by receipts, and EUR 2,950 for costs and expenses incurred before the Court, as evidenced by a taxed invoice, which he requested be paid directly into his representative's account, as to date he had been unable to pay the latter.

59. The Government did not consider that any costs were due in relation to the domestic proceedings, which did not concern Article 7. As to the costs before this Court, they considered that the amount should not exceed EUR 1,000.

60. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that the applicant brought the substance of his

complaint before the constitutional jurisdictions, an action which was necessary to comply with the exhaustion requirement. In consequence, there is no reason to reject such a claim, which is hereby awarded in full. Thus, in the present case, regard being had to the documents in its possession and the above criteria, and noting particularly that the applicant did not submit a breakdown of costs or any details as to the number of hours worked and the rate charged per hour, the Court considers it reasonable to award the sum of EUR 1,700, covering costs under all heads.

C. Default interest

61. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 7 of the Convention;

3. *Holds*, by five votes to two,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,700 (one thousand seven hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 28 August 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Ganna Yudkivska
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Judge Bošnjak;

(b) dissenting opinion of Judge Valenzia.

G.Y.
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DISSENTING OPINION OF JUDGE BOŠNJAK

1. To my regret, I cannot agree with the majority that the application in the present case should be declared admissible, as I believe that the Government are right in their objection of non-exhaustion of domestic remedies.

2. While it is true that the applicant instituted constitutional redress proceedings complaining, *inter alia*, about the discretion of the Attorney General as public prosecutor to decide in which court to try an accused, he failed to make this complaint expressly under Article 7 of the Convention, claiming a violation of Article 6 § 1 of the Convention instead. Subsequently, following the judgment of the Court in *Camilleri v. Malta* (no. 42931/10, 22 January 2013), the applicant asked the courts to add a complaint under Article 7, claiming a lack of foreseeability. The national courts rejected the request to allow this additional complaint. This rejection was apparently based on Article 175 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta), according to which the power of a court to permit amendments to pleadings is limited to situations where such amendments do not affect the substance either of the action or of the defence on the merits of the case.

3. In my opinion, this legal framework in general and the rulings of the national courts in the applicant's case in particular cannot be considered as manifestly unreasonable or overly formalistic. In order to ensure the rational and fair conduct of proceedings, any reasonable legal system limits the possibilities of parties to modify or amend their claims. What is more, some legal systems expect claimants to specify the legal characterisation of their claims at the beginning of the proceedings, with the courts being bound by that legal characterisation. In itself, such an expectation is not incompatible with any Convention requirement. One should not forget that the facts of a case can never be entirely separated from the law and, *vice versa*, the law cannot be fully separated from the facts. When legally assessing a certain course of events over time, one has to identify the relevant facts in the light of the legal provisions. On the other hand, it is necessary to ascertain which legal provisions from the entire legal order might form the normative constituent elements of the case. In some instances this may prove to be a complicated operation, requiring gradual reflection on an event in the light of the legal provisions and *vice versa*. The normative constituent elements of the case and the relevant facts respectively form the *premissa maior* and *premissa minor* of the legal syllogism, allowing for a conclusion as to their correspondence.

4. Turning to the circumstances of the present case, it is apparent that the applicant complained before the national courts about the discretion of the Attorney General, but he did so from the perspective of the fairness of (criminal) proceedings. Only later, when all the pleadings of the parties had

been concluded, did he seek leave to add a complaint alleging a lack of foreseeability. It is not unreasonable to consider this complaint to be a separate and new one, and therefore no longer permitted at such a late stage of the proceedings. On this point, it might be necessary to add that the applicant never complained that this particular refusal by the national courts violated any of his Convention rights. Furthermore, I do not believe that the national courts could be expected to address the issue of foreseeability in the Attorney General's discretion of their own motion, in the absence of the lack of a timely complaint by the applicant to that effect. In this connection, I would like to refer to a recent decision of our Court in the case of *Caruana v. Malta* (no. 56396/12, 15 May 2018). Since the applicant in that case had failed to submit that the legal provision in question was not precise or foreseeable, the Court held that there was no reason for it to delve further into the matter. If the Court, which frequently reiterates that it is master of the legal characterisation of the facts of a case, does not examine a particular issue from the point of view of foreseeability in the absence of a timely complaint by an applicant to that effect, I believe that no more should be expected from the national courts when examining the claims before them.

5. Additionally, the Government argued that the applicant could have lodged a fresh set of constitutional redress proceedings relying on the Court's findings in *Camilleri*. The applicant failed to explain why he did not decide to seize that additional opportunity or to argue that the legal avenue in question would not be an effective legal remedy in his case. In conclusion, I find it impossible to reject the Government's objection of non-exhaustion of domestic remedies.

6. Had the applicant exhausted domestic legal remedies, I would have had no problem in joining the majority in finding a violation of Article 7 of the Convention on the merits. Since, however, it seems to be the established practice of this Court that a judge who considers an application to be inadmissible for non-exhaustion of legal remedies is not supposed to find for the applicant on the merits, I also voted for finding no violation in the present case under the operative part.

DISSENTING OPINION OF JUDGE VALENZIA

The majority conclude that the relevant legal provision at the material time (prior to recent amendments in the light of the *Camilleri* judgment) failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided for in Article 7 and that there has therefore been a violation of Article 7 of the Convention.

A. Non-exhaustion of domestic remedies

It is to be pointed out that in this case the Constitutional Court in Malta never decided, on the merits, whether there had been a breach of Article 7 *per se* even though, in substance, the question of the Attorney General's discretion was raised under Article 6.

The majority dismissed the submission by the Government that the applicant could have lodged a fresh application for constitutional redress proceedings in Malta before referring the matter to the Strasbourg Court.

The Government insisted that the Court's power to decide a complaint of its own motion under a different Article from the one relied on by the applicant did not override the need to exhaust domestic remedies (see the *Bezzina Wettinger* case).

The Government's contention is that the applicant did not exhaust domestic remedies because the matter could still have been decided by the Constitutional Court in Malta before he applied to the Strasbourg Court.

The applicant already had a Strasbourg Court decision in his favour and so he did not need to apply to this Court again for reaffirmation of a principle which had already been established. Nothing prevented him from applying in Malta, not even the statutory time-limit, which in Malta does not run in human-rights cases. Just as the applicant relied on the *Camilleri* judgment in Strasbourg, he could easily have relied on it in the Maltese courts. So, in my view the applicant did not exhaust domestic remedies which were readily available.

B. Merits

The Court asserts that it is not disputed that the impugned provision of the law did not give rise to any ambiguity or lack of clarity as to its content in respect of what actions were criminal and constituted the relevant offence (see paragraph 46). The law also provided for the punishment applicable in respect of the offences with which the applicant was charged.

However, the judgment states that the law did not make it possible for the applicant to know, at the time of the commission of the offence, which of the two punishment brackets would apply to him.

I cannot agree with the Court's conclusion that it has not been shown to its satisfaction that the applicant could have known, even with appropriate legal advice, which court he would be tried in, and therefore the consequences which his actions could entail.

For those who are familiar with Maltese law and case-law (and – besides ignorance of the law being no excuse – the applicant was no stranger to the drugs law), one does not need rocket science to know that cultivating cannabis on an industrial scale (which is why he was charged with aggravated possession, the substance not being for his own exclusive use) would entail trial by jury before the Criminal Court and not being summarily tried before the Magistrate's Court. In this case the applicant could not have had any doubt that he would be tried by jury. Article 7 has to be applied to the concrete and particular circumstances of the case and not in a general way. Such cases of industrial-scale cultivation of drugs could even be considered as *res ipsa loquitur* cases, just like the crime of murder which is never tried summarily. Moreover, the applicant did not provide any examples to show that persons charged with a similar amount of drugs had been tried before the Magistrate's Court.

The basis of the applicant's allegation of a breach of Article 7 is not a general one as to principle, but how the discretion was applied in his particular case when compared to the Peter Joseph Bonnici case. The applicant stated in page 6 of his submissions that the problem was the choice of jurisdiction, which gave rise to a disparity in punishment in this case. The applicant wrongly indicated that Mr Bonnici was tried before a Magistrate's Court, whereas in fact he was tried before the Criminal Court, and from that mistaken premise he deduced and claimed (under the heading "Just Satisfaction") that he had spent four years and six months longer in detention than Mr Bonnici, who was sentenced to imprisonment for a period of seven years and six months, and accordingly claimed 85,000 euros. The applicant therefore alleged that it was the jurisdiction of the court which made the difference and wrongful use of the Attorney General's discretion. However, it is clear that both were judged by the Criminal Court and the difference concerned the quantity of the illegal substance and the fact that Mr Bonnici admitted the charges in the initial stages of the proceedings and not because of arbitrary use of the Attorney General's discretion. So it cannot be said, on the basis of the mistaken premise made by applicant, that there was a breach of Article 7.

The applicant's complaint that the Attorney General used his discretion incorrectly was based on his receiving a harsher punishment than Mr Bonnici under similar circumstances, not because he did not know what kind of punishment his offence would bring. The question of use of discretion does not arise in this case, as both were tried by the Criminal Court.