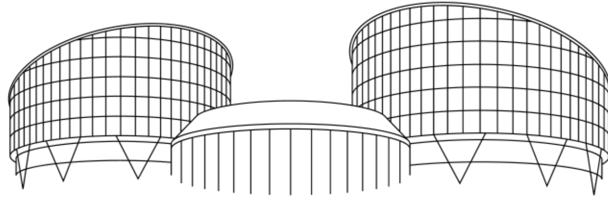

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF CAMILLERI v. MALTA

(Application no. 42931/10)

JUDGMENT

STRASBOURG

22 January 2013

FINAL

27/05/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

In the case of Camilleri v. Malta,

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

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek, *judges,*
Lawrence Quintano, ad hoc *judge,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 18 December 2012,

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

PROCEDURE

1. The case originated in an application (no. 42931/10) 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 John Camilleri ("the applicant"), on 26 July 2010.

2. The applicant was represented by Dr J. Brincat, a lawyer practising in Malta. The Maltese Government ("the Government") were represented by their Agent, Dr Peter Grech, Attorney General.

3. The applicant complained that the discretion of the public prosecutor to decide in which court an accused may be brought to trial and consequently which punishment would be applicable was contrary to the impartiality requirement of Article 6.

4. On 16 December 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mr Vincent De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28). Accordingly the President of the Chamber decided to appoint Mr Lawrence Quintano 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 1968 and lives in Malta.

A. Background of the case

7. In 2003 the applicant was charged with having, in December 2001, been in possession of illegal drugs (953 pills of Ecstasy) not for his exclusive use (Chapter 31 of the Laws of Malta).

8. On an unspecified date the prosecutor decided to try the applicant in the Criminal Court in accordance with section 120A (2) (a) (i) of the Medical and Kindred Professions Ordinance.

9. By a judgment of 16 November 2005 the Criminal Court, following a trial by jury, found the applicant guilty (by a verdict of eight to one) and sentenced him to fifteen years' imprisonment, a fine of 15,000 Maltese liras (MTL) (approximately 35,000 euros (EUR)) with twelve months' imprisonment in default, and the payment of costs and expenses. The court also ordered the confiscation of his assets.

10. On 24 April 2008 the Court of Criminal Appeal confirmed the Criminal Court's judgment.

B. Constitutional redress proceedings

11. On 18 February 2009 the applicant brought constitutional redress proceedings complaining, *inter alia*, that the discretion of the public prosecutor to decide in which court to try an accused ran counter to the impartiality requirement of Article 6 of the Convention.

12. On 14 July 2009 the Civil Court (First Hall) rejected this complaint. It referred to a previous finding by the Constitutional Court in the case of *Ellul v Attorney General*, in which it had held that the discretionary power exercised by the public prosecutor (in respect of section 22 of the Dangerous Drugs Ordinance – a provision similar to that of section 120 A under consideration in the present case) did not prevent an individual from being given a fair trial in accordance with Article 6 of the Convention, and it therefore adopted the same reasoning. The court further pointed out that unlike in the case of *Huber v. Switzerland* (23 October 1990, Series A no. 188), the Attorney General (in his role as public prosecutor) in Malta did not investigate the circumstances of the crime and did not have the power to issue detention orders.

13. On 31 July 2009 the applicant appealed to the Constitutional Court.

14. By a judgment of 12 February 2010, the Constitutional Court confirmed the Civil Court's judgment. It held that there was no doubt that the applicant had been tried before an impartial tribunal established by law and that the trial had been fair. The fact that the Attorney General (in his role as public prosecutor) could choose the forum in which to try the accused did not give him the powers of a judge in that instance. In essence the public prosecutor had no control over the finding of guilt or innocence of an individual. The situation would have been different had the public prosecutor been involved in the determination of an individual's guilt. In reference to domestic jurisprudence, it added that the means by which a case was brought before a court could not impair its independence. In so far as an individual was aware of the minimum and maximum punishments established by law at the time when the crime was committed, there could be no violation of Articles 6 or 7 of the Convention. Moreover, the applicant had not shown in what way this decision had affected him. Nevertheless, noting that the Attorney General (in his role as public prosecutor) exercised his own discretion in choosing the appropriate forum also according to the seriousness of the crime, the Constitutional Court considered that it would be desirable, for the sake of fairness and transparency, that criteria to be used by the public prosecutor should be established.

II. RELEVANT DOMESTIC LAW

15. Section 120A (2) of the Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta 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 consists in selling or dealing in a drug listed under Part A of the Third Schedule contrary to the provisions of this article, 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 three hundred and twenty-nine euros and thirty-seven cents (2,329.37) but not exceeding one hundred and sixteen thousand four hundred and sixty-eight euros 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 euros and eighty-seven cents (465.87), but not exceeding twenty-three thousand two hundred and ninety-three euros 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 consists in selling or dealing in a drug listed under Part A of the Third Schedule to this Ordinance contrary to the provisions of this article, 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 six hundred and forty-six euros 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 three hundred and twenty-nine euros 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: (...)"

In short, under that provision, the maximum punishment before the Criminal Court (for the offence with which the applicant was charged) may vary between four years and life imprisonment, whereas before the Court of Magistrates it may vary between six months and ten years.

16. Section 120A (7), in so far as relevant, reads as follows:

"(7) The provisions of Articles 21 and 28A of the Criminal Code and the provisions of the Probation Act shall not be applicable in respect of any person convicted of an offence as referred to in sub-article (2)(*a*)(i) or (*b*)(i):

Provided that where, in respect of any offence mentioned in this subarticle, after considering all the circumstances of the case including the amount and nature of the drug involved, the character of the person concerned, the number and nature of any previous convictions, including convictions in respect of which an order was made under the Probation Act, the court is of the opinion that the offender intended to consume the drug on the spot with others, the court may decide not to apply the provisions of this subarticle:

> Provided further that an offender may only benefit once from the provisions of the above proviso."

17. Article 28 A of the Criminal Code, Chapter 9 of the Laws of Malta, contains the provision for sentences of imprisonment to be suspended and Article 21 of the same code provides for the handing down of sentences below the prescribed minimum. In so far as relevant, Article 21 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 ..."

18. Article 430 of the Criminal Code provides that the Attorney General acts as the prosecutor before the Criminal Court. Section 91 (3) of the Constitution of Malta provides as follows:

> "In the exercise of his powers to institute, undertake and discontinue criminal proceedings and of any other powers conferred on him by any law in terms which authorise him to exercise that power in his individual judgment the Attorney General shall not be subject to the direction or control of any other person or authority."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 AND 7 OF THE CONVENTION

19. The applicant complained under Article 6 § 1 about the discretion of the public prosecutor to decide in which court to try an accused.

Article 6 § 1 and Article 7 of the Convention read as follows:

Article 6 § 1

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

Article 7

> "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."

20. The Government contested that argument.

A. Admissibility

21. The Court notes that the application 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

22. The applicant submitted that the discretion of the public prosecutor to decide in which court an accused could be brought to trial and consequently which punishment would be applicable was contrary to the impartiality requirement of Article 6 as the accused was effectively prejudged by a decision made by one of the parties to the trial. He noted, in particular, that the relevant law giving such discretion to an Attorney General precluded the application of Article 21 of the Criminal Code (see "Relevant Domestic Law") to the offences with which the applicant was charged. Thus, this decision was irrevocable with no right of appeal and was not subject to any judicial review. Therefore, the ability of the Attorney General (in his role as public prosecutor) and also as one of the parties in the trial to make a binding decision regarding the trial created an imbalance which could not be rectified by the courts.

23. In the present case the applicant submitted that the Constitutional Court was wrong to hold that he had not suffered any prejudice since he had been punished with a sentence of fifteen years' imprisonment and a fine of approximately EUR 35,000, while if he had appeared before the Court of Magistrates the maximum punishment for a verdict of guilt would have been ten years' imprisonment and a lower fine (with a statutory reduction for an early admission of guilt).

24. As to the case-law cited by the Government, the applicant noted that it was based on a 1990 judgment which had been delivered prior to the enactment of section 120 A (7) of the Medical and Kindred Professions Ordinance which precluded the application of Article 21 of the Criminal Code to those offences with which the applicant had been charged. He considered that any assumption to the contrary would be in contrast with the wording of the law. Indeed in the case of *The Republic of Malta v. Stanley Chircop* (decided by the Criminal Court on 11 January 2008) the court had

held that, as the law stood, it could only give effect to the recommendation of clemency made by the jury by imposing the minimum sentence established by law for the Criminal Court, but it could not impose a sentence below the minimum. The judge had gone on to question whether it had been at all wise for the Attorney General to choose to prosecute the accused before the Criminal Court rather than the Court of Magistrates.

25. Moreover, there were no guidelines to which the Attorney General had recourse. The applicant observed that there was uncertainty of the law since the discretion of the Attorney General had not been exercised on the basis of objective criteria established by law. Any criteria used by the Attorney General in arriving at his decision were, in any event, not published, and therefore such discretion was absolute. For example, the applicant made reference to a domestic case whereby two persons (M. and G.) had been charged with possession of the same quantity of drugs with intention to supply. Following the decision of the Attorney General, M. had been tried before the Court of Magistrates, where he had been sentenced to fifteen months' imprisonment. G., however, had been tried before the Criminal Court, where he had eventually been given a twenty-year prison sentence which was reduced on appeal to nine years (*The Republic of Malta v Godfrey Ellul*, decided by the Court of Criminal Appeal (Superior) on 17 March 2005). In that case the Court of Criminal Appeal had noted that "While the difference in the punishment existed, there was little to be said about it - the Court of Magistrates had considered, according to its discretion, fifteen months as a fair punishment, indeed the parameters of punishment of that court were much lower".

26. The applicant noted that even the Constitutional Court had suggested that the Attorney General should draw up criteria on which to base a decision. However, in the applicant's view, such criteria would remain subjective to each successive Attorney General. The applicant made reference to the considerations of the Court in this regard in the case of *Kafkaris v. Cyprus* ([GC], no. 21906/04, ECHR 2008). He further noted that the exercise of fair treatment could not be limited to the trial but should include the pre-trial period as in the case of *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008), and also made particular reference to *Imbrioscia v. Switzerland* (24 November 1993, § 36, Series A no. 275).

(b) The Government

27. The Government observed that the decision about which court should be used for the trial was made at the pre-trial stage, following the police investigation, at the point when the Attorney General gave his consent to prosecute and therefore before he assumed the role of prosecutor. If the decision was that the accused should be tried in the Criminal Court, the inquiry (before the Court of Criminal Inquiry) was carried out by the Executive Police, under the supervision of the Attorney General, to ensure

that all the evidence was produced. If the Court of Criminal Inquiry decided that there was sufficient evidence, the Attorney General issued a bill of indictment. At that stage, taking account of the evidence, the Attorney General could also send the case back to be tried by the Court of Magistrates instead of the Criminal Court if this appeared to be more suitable. Thus, his decision could be subject to change on the basis of the inquiry. However, once the accused had been charged, the Attorney General could only issue counter-orders to the benefit of the accused, but not to his or her prejudice. Therefore, in order for an accused to be tried before the Criminal Court, the Court of Criminal Inquiry must have issued an Article 6-compliant decision to commit for trial, in respect of which the Attorney General had no say.

28. In the Government's submission, the ensuing trial would be in no way influenced by the Attorney General's decision – as this did not constitute the determination of a criminal charge. While acknowledging that the Attorney General had links with the executive, the Government argued that he was not a member of the tribunal and could not therefore participate in any finding of guilt or innocence and therefore there could be no breach of the independence or impartiality requirement. Indeed the Attorney General did not undertake the investigation of the crime, nor did he have the power to issue a detention order (with reference to *Huber v. Switzerland*, 23 October 1990, Series A no. 188), or have any other judicial function, but exclusively performed the function of prosecutor. They contended that the Attorney General enjoyed independence from the executive in his functions as a prosecutor as laid down in the Constitution (see "Relevant Domestic Law"). The Government compared the impugned decision to that which a prosecutor made in his or her administrative capacity in respect of the offences with which the accused was to be charged. They argued that this discretion was necessary given that the circumstances which enabled the identification of more serious drug-related crimes varied considerably and could not be exhaustively listed *a priori*. Therefore, the system allowed for the examination of cases on an individual basis rather than providing for pre-established categories. This discretion served a legitimate and proportionate aim given the difference between the cost to society of ordinary drug-related crimes and more serious large-scale drug dealing.

29. The Government also made reference to domestic case-law (*Godfrey Ellul v. Attorney General*, decided by the First Hall of the Civil Court in its constitutional jurisdiction on 5 July 2005 - referring to *The Republic of Malta v. Grech,* decided by the Constitutional Court on 27 September 1990) finding that such a discretion (although in relation to section 22 of the Dangerous Drugs Ordinance – but still comparable to the one at issue) did not impair the fairness of the proceedings. They further pointed out that, according to unspecified case-law of the Civil Court in its constitutional jurisdiction and the case of *The Republic of Malta v. Mario Camilleri*

(decided on 23 January 2001 by the Criminal Court), the Criminal Court retained the power to impose sentences below the minimum established by law and to apply Article 21 of the Criminal Code (see "Relevant Domestic Law") on constitutional grounds where it found that the Attorney General had abused his power when he referred the case to the Criminal Court. This was so, despite the exclusion of the application of this Article to cases of drug trafficking under the ordinary law, particularly in view of the proviso to that exception (see "Relevant Domestic Law"). In the Government's submission, it was therefore a possibility that the minimum punishment before the Criminal Court would not be handed down. The Government further referred to the case of *Claudio Porsenna v. the Attorney General* (decided by the First Hall of the Civil Court in its constitutional jurisdiction on 6 April 2011) whereby in relation to the discretion arising from section 22 of the Dangerous Drugs Ordinance, the court held that such discretion, when exercised in a reasonable manner, would not be exercised during the pendency of the criminal proceedings and therefore fell outside the scope of the relevant provisions dealing with a fair trial. Things would be different if any discretion were exercised during the proceedings, even during the proceedings before the Court of Criminal Inquiry, in which case the exercise of that discretion would have to be scrutinised and examined from the point of view of both the Constitution and the Convention.

30. The Government submitted that the Attorney General exercised his discretion to determine in which court an accused could be charged on the basis of objective criteria, after having considered the gravity and the circumstances of the case. In particular, in deciding whether the crime constituted an ordinary drug offence (to be tried before the Court of Magistrates) or a serious drug offence (to be tried before the Criminal Court) the relevant considerations included the quantity of the illicit substance involved and other relevant circumstances. In the present case, the decision to try the applicant before the Criminal Court had been based on the large quantity of drugs seized as well as the fact that these had been discovered concealed in a quarry, and the lack of co-operation by the applicant with the police which pointed to a serious crime involving drug dealing on a large scale.

31. The Government highlighted that the Attorney General's decision based on his discretion was exercised at the pre-trial stage and therefore upon the charges being issued the applicant became aware of the punishment applicable. It followed that the applicant's complaint under Article 7 was clearly unfounded.

32. Subsequently, the Government submitted that the offence with which the applicant had been charged and of which he had eventually been found guilty and the relevant punishment were clearly defined in the law, sufficiently accessible and foreseeable from the outset. They considered that there was no uncertainty surrounding the law and the manner in which the

Attorney General's discretion was exercised had been foreseeable. They contended that the Attorney General's power under section 120A was adequately circumscribed and that an accused would be aware not only of the two ranges of punishment applicable but also to which particular range of punishment he would be subjected in view of the seriousness of the crime committed, without needing to take legal advice. Moreover, according to Convention case-law, a law would still be foreseeable even if the individual needed to take the appropriate legal advice to assess the consequences a given action might entail. Thus, according to the Government the applicant's complaint under Article 7 was unfounded.

2. *The Court's assessment*

33. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I). In this light it considers that the interests of justice would be better served if the Court examined this complaint firstly under Article 7 of the Convention.

(a) Article 7

(i). General principles

34. 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 (see *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, 22 November 1995, § 34 and § 32 respectively, Series A nos. 335-B and 335-C, and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 137, ECHR 2008). 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, what acts and omissions will make him criminally liable (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §§ 93-94, 17 September 2009).

35. 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 (see *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V, *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII, § 145, and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as

regards both the definition of an offence and the penalty the offence in question carries (see *Kafkaris*, cited above, § 140). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed for the act and/or omission committed (see, among other authorities, *Cantoni*, cited above, § 29).

36. In consequence of the principle that laws must be of general application, 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. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on 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 (see *Scoppola (no. 2)*, cited above § 100).

37. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see *Kafkaris*, cited above, § 141). Moreover, it is a firmly established part of the legal tradition of the States party to the Convention that case-law, as one of the sources of the law, necessarily contributes to the gradual development of the criminal law (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A). 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 (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II).

38. Foreseeability depends to a considerable degree on the content of the law concerned, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Achour v. France* [GC], no. 67335/01, § 54, ECHR 2006-IV and *Sud Fondi srl and Others v. Italy*, no. 75909/01, § 110, 20 January 2009).

(ii). Application to the present case

39. The issue before the Court is whether the principle that only the law can define a crime and prescribe a penalty was observed. The Court must, in

particular, ascertain whether in the present case the text of the law was sufficiently clear and satisfied the requirements of accessibility and foreseeability at the material time.

40. The Court finds that the provision in question does 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 section 120A (2) of the Medical and Kindred Professions Ordinance provided for the punishment applicable in respect of the offence with which the applicant was charged. In fact, it provided for two different possible punishments, namely a punishment of four years to life imprisonment in the event that the applicant was tried before the Criminal Court, or six months to ten years if he was tried before the Court of Magistrates. While it is clear that the punishment imposed was established by law and did not exceed the limits fixed by section 120A (2) of the above-mentioned 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 reflected on the penalty that the offence in question carried.

41. The Court observes that the law did not make it possible for the applicant to know which of the two punishment brackets would apply to him. As acknowledged by the Government (see paragraph 31 above), the applicant became aware of the punishment bracket applied to him only when he was charged, namely after the decision of the Attorney General determining the court where he was to be tried.

42. The Court considers relevant the cases of G. and M. mentioned by the applicant (see paragraph 25 above). It observes that although these cases were not totally analogous (in that G., unlike M., was a recidivist), they were based on the same facts, offences in relation to which guilt was found, and a similar quantity of drugs. However, G. was tried before the Criminal Court and eventually sentenced to nine years' imprisonment whereas M. was tried before the Court of Magistrates and sentenced to fifteen months' imprisonment. More generally, the domestic case-law presented to this Court seems to indicate that such decisions were at times unpredictable. It would therefore appear that the applicant would not have been able to know the punishment applicable to him even if he had obtained legal advice on the matter, as the decision was solely dependent on the prosecutor's discretion to determine the trial court.

43. 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 any such criteria were not 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). The Constitutional Court (see paragraph 14 above) noted that there existed no guidelines which

would aid the Attorney General in taking such a decision. 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 penalties. The Attorney General had in effect an unfettered discretion to decide which minimum 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. Neither could such a decision be seen only or mainly in terms of abuse of power, even if, as the Government suggested without however substantiating their view, this might be subject to constitutional control (see paragraph 29 above). The Court is not persuaded by the Government's argument to the effect that it was possible that the minimum punishment before the Criminal Court would not be handed down. The Court considers that the domestic courts were bound by the Attorney General's decision as to which court would have been competent to try the accused. The Court observes that Article 21 of the Criminal Code provides for the passing of sentences below the prescribed minimum on the basis of special and exceptional reasons. However, section 120A of the Medical and Kindred Professions Ordinance, which provides for the offence with which the applicant was charged, specifically states in its subsection (7) that Article 21 of the Criminal Code shall not be applicable in respect of any person convicted of the offence at issue. On an examination of the provision, the Court finds that it would not be possible to interpret the wording of that provision otherwise. Moreover, this interpretation has been confirmed by the domestic courts, the most recent decision being that of 2008 in the above-mentioned case of *The Republic of Malta v. Stanley Chircop,* in which the Criminal Court considered that the application of Article 21 to the relevant offences was excluded and therefore the court could not impose a sentence below the minimum established by law. Furthermore, the Government have not provided any examples of decisions showing that a domestic court had actually done so. Thus, a lesser sentence could not be imposed despite any concerns the judge might have had as to the use of the prosecutor's discretion (*ibid*.).

44. In the light of the above considerations, the Court concludes that the relevant legal provision failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7.

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

(b) Article 6

46. Having regard to the finding relating to Article 7 above, the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 6.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant considered that a mere declaration would not suffice to remedy the violation found, and that the State should be asked to reduce the sentence to one within the sentencing range of the Magistrate’s Court. The applicant further claimed non-pecuniary damage without specifying a particular sum.

49. The Government submitted that a declaration of a violation would be a sufficient remedy for the applicant.

50. As to the applicant’s request for his sentence to be reduced, the Court reiterates that it has no jurisdiction to alter sentences handed down by the domestic courts (see, *mutatis mutandis*, *Findlay v. the United Kingdom*, 25 February 1997, § 88, *Reports* 1997-I, and *Sannino v. Italy*, no. 30961/03, § 65, ECHR 2006-VI). Further, 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. Indeed, the present case does not concern the imposition of a heavier sentence than that which was applicable at the time of the commission of the criminal offence or the denial of the benefit of a provision prescribing a more lenient penalty which came into force after the commission of the offence (see, *inter alia*, *Alimuçaj v. Albania*, no. 20134/05, 7 February 2012; *Scoppola (no. 2)*, cited above, and *K v. Germany*, no. 61827/09, 7 June 2012) and therefore the Court does not consider it necessary to indicate any specific measure.

51. However, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

52. The applicant also claimed EUR 3,842.30 (as per the bill of costs) for the costs and expenses incurred before the domestic constitutional courts and EUR 2,500 for those incurred before the Court.

53. The Government submitted that the applicant had not provided proof that he had paid the amount of EUR 1,759.72 related to the portion of costs incurred by the Government in the constitutional proceedings. They further considered that the costs and expenses before the Court should not exceed the sum of EUR 1,000.

54. 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. 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, and also that the domestic court expenses, if still unpaid, remain due to the Government, the Court considers it reasonable to award the sum of EUR 5,000 covering costs under all heads.

C. Default interest

55. 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* unanimously the application admissible;

2. *Holds* by six votes to one that there has been a violation of Article 7 of the Convention;

3. *Holds* by five votes to two that there is no need to examine the complaint under Article 6 of the Convention;

4. *Holds* by six votes to one
   (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 5,000 (five thousand 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;

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

Done in English, and notified in writing on 22 January 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Ineta Ziemele 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) partly dissenting opinion of Judge Kalaydjieva;

(b) partly dissenting opinion of Judge Quintano.

I.Z.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE KALAYDJIEVA

I fully agree with the view of the majority that, in breach of Article 7 of the Convention, the law did not make it possible for the applicant to know which of the two punishment brackets, which were equally applicable but different in terms of their severity, would apply to his criminal activity.

According to my understanding, the applicant's complaints were not limited to the fact that the law concerning his punishment was not accessible and foreseeable to him. In fact he complained that, unlike himself, the other party to the proceedings – the Attorney General – could not only foresee, but also predetermine the decision as to the appropriate punishment brackets by choosing the court competent to examine the accusations.

Indeed, the Court agreed that "the domestic courts were bound by the Attorney General's decision as to which court would have been competent to try the accused" (see paragraph 43 of the judgment) – a situation which may be described as a privileged position of one of the parties to define the competent court in accordance with its own preference rather than with the regulations laid down by the law or with the general principle that courts should decide on their own competence. More importantly, this Court shared the national courts' view that in choosing the competent court in accordance with his own preference the Attorney General in fact had the power to limit the courts' discretion, in determining the appropriate punishment, to the brackets of varying severity indicated by the prosecution in the absence of clear criteria or guidelines. Thus – unlike this Court – the national courts were not free to act as "the masters of the characterisation to be given in law to the facts of the case" and were not competent to reclassify the impugned act as one punishable by a more lenient sentence, "despite any concerns the judge might have had as to the use of the prosecutor's discretion" (see paragraph 43), and with the result that "such decisions were at times unpredictable" (see paragraph 42).

While I agree that – like every court – this Court is "the master of the characterisation to be given in law to the facts of the case", I am not convinced that this characterisation was appropriate to the facts and the scope of the actual complaints in this case. In my view these go far beyond Article 7 and raise important issues of equality of the parties in criminal proceedings and the potential infringement of the independence and scope of the courts' competence, as a result of the statutory privilege of one of those parties, beyond the pre-trial stage of criminal proceedings, to interfere with the court's competence to determine the outcome of the proceedings. I regret the majority's view that "having regard to the finding relating to Article 7 it is not necessary to examine whether there has also been a violation of Article 6" as initially complained.

PARTLY DISSENTING OPINION OF JUDGE QUINTANO

1. I do not subscribe to either the reasoning or the conclusions of the majority as to the violation of Article 7 of the Convention in the present case, for the following reasons:

2. This case is unlike any of the previous cases which have been decided by this Court under Article 7 of the Convention. In fact, the eleven cases cited in this judgment only reflect the general criteria established by the case-law, and the respective facts are not similar to the present case in any way.

3. In paragraph 41 of the judgment the Court observes that the law did not make it possible for the applicant to know which of the two punishment brackets would apply to him. It refers to paragraph 31, according to which "[t]he Government highlighted that the Attorney General's decision based on his discretion was exercised at the pre-trial stage and *therefore upon the charges being issued the applicant became aware of the punishment applicable*." The part in italics may give the impression that a person only becomes aware of the penalty that he may face just before he is arraigned or summoned to appear in court. But this is not so at all. Just before the trial begins the Attorney General signs an order indicating which court – the Court of Magistrates or the Criminal Court – should hear the case. However, this does not mean that a person cannot foresee which court is going to deal with the charges laid against him **before** the order is issued. He can do so in four ways: (a) by considering the quantity of drugs in his possession at the time of his arrest, (b) by seeking legal advice, (c) by considering the case-law of the Court of Magistrates or that of the Criminal Court, or (d) by using all these three methods together.

4. In paragraphs 34 and 35 of the judgment the Court twice refers to the principle that the offences and penalties must be clearly defined by law. This clarity of the law must be such as to enable the individual to know from the wording of the provision of the law itself and "if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed for the act and/ or omission committed." The Court finds the wording of the law to be sufficiently clear as to its content (paragraph 40) but then considers that the law "did not make it possible for the applicant to know which of the two punishment brackets would apply to him."

5. In this case the applicant was charged in 2003 with having been in possession of 953 ecstasy pills in December 2001. By 2001 the case-law of the Court of Magistrates and that of the Criminal Court was abundant

enough for the applicant to be aware, with or without reading the law, that being caught in possession of 953 pills would mean proceedings in the Criminal Court. It was already clear that the Court of Magistrates was deciding cases involving much lesser quantities of drugs. It can definitely be said that by 2001 such a quantity of ecstasy would automatically mean the higher brackets indicated in the law. Furthermore, the applicant could have taken legal advice before being caught in possession of 953 ecstasy pills as to the penalty he was risking if he went on with the crime. Any lawyer practising in the field of drugs offences would have indicated that such a quantity of ecstasy pills would lead to a penalty of between four years and life imprisonment.

6. Drugs offences and punishments are widely reported in all the media and hence it was foreseeable to the applicant what the consequences would be, both at the time of the crime and at the time of arraignment. Two cases of the European Court of Human Rights reveal how the Court has recognised foreseeability as being possible in more difficult circumstances. In *C.R. v. the United Kingdom* (2 November 1995, § 34, Series A no. 335-C), the Court held that "judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law". And in *Achour v. France* ([GC], no. 67335/01, ECHR 2006-IV), which dealt with the extension of the period within which a convicted person could be deemed to be a recidivist, the Court found that it had been foreseeable that the applicant be regarded as a recidivist at the material time with the consequences this had for the length of his sentence.

7. In paragraph 37, the Court acknowledges that "it is a firmly established part of the legal tradition of the States party to the Convention that case-law, as one of the sources of the law, necessarily contributes to the gradual development of the criminal law." In the applicant's country the case-law is available as soon as a judgment is pronounced. And as the number of drugs cases was already substantial as far back as 2001, the applicant could easily have known about the different types of decisions of the two courts and could have foreseen what the penalty might be.

8. As to the appropriate legal advice referred to in paragraph 38, there is absolutely no doubt that this was available to the applicant.

9. In paragraph 42 of the judgment, the Court finds that "[m]ore generally, the domestic case-law presented to this Court seems to indicate that such decisions were at times unpredictable." The observations submitted to the Court cited only one reference – that of G. and M. No further examples of "unpredictability" were given. Given the scarcity of details on the cases, and with one case having been decided as far back as

1998, it is difficult to assess how "unpredictable" the decision of the Attorney General was. But even with this drawback and even if one were simply to concede that there was some form of inconsistency, one case is simply not enough to amount to consistent unpredictability[1]. Hence, I find it impossible to go along with the Court's reasoning as reflected in the last sentence of paragraph 42. No legal adviser, either before or after the commission of the crime or at the time of arraignment, would have taken the risk of assuring the applicant that with 953 ecstasy pills his case would be decided by the Court of Magistrates and thus attract the lesser penalty. Given the case-law record, this type of legal advice would have been and still is inconceivable.

10. In paragraph 43, the Court refers to that part of the decision of the Constitutional judgment of 12 February 2010 in which the Constitutional Court considered "that it would be desirable, for the sake of fairness and transparency, that criteria to be used by the public prosecutor should be established." This Court goes on to find that "the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied."

11. Given that the Court had already established that the word "law" includes the case-law of a State, it is difficult to accept the conclusion that there is no precision in the law. The case-law clearly reflects the parameters set by the Attorney General – in particular, small quantities of drugs, the circumstances in which the drugs were found, whether the facts reveal evidence of the crime of conspiracy, and the readiness of the accused to file an early guilty plea and to cooperate with the police and reveal drug sources. According to a raft of case-law, all these have a bearing on the Attorney General's final decision. The case-law reveals that only in some instances, where the quantity of drugs involved was substantial, the Attorney General ordered that the Court of Magistrates should be the competent court to try the case. In any case, a crime has to be very loosely defined before the European Court of Human Rights will find a violation of this provision (see *Kokkinakis vs Greece*, 25 May 1993, § 52, Series A no. 260-A).

12. As to the reference made to the recommendations of the Constitutional Court, it should be quite clear that suggestions made for refinements in the law do not necessarily mean a violation of Article 7. Had it been so, the Constitutional Court would have found a violation (of any

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1. In cases which appear to be similar, one has to check very carefully whether the cases are in fact "similar" or "identical" even if some of the facts apply to both cases. The quantity of drugs involved is an important element but, as a rule, other factors may be involved.

relevant Convention Article), whereas it found no violation at all. A law may need fine-tuning but it does not logically follow that an applicant's rights have been violated just because these refinements are not in place.

13. In paragraph 43, the Court further finds that (a) an insoluble problem was posed by fixing different minimum penalties, and (b) that the Attorney General had an unfettered discretion and that the decision was inevitably subjective. As to point (a) the Criminal Code itself contains provisions which lay down different maxima and minima within the same provision. Moreover, and this reflection applies to both point (a) and point (b), the discretion of the Attorney General is not as unfettered as it seems. A Constitutional Court decision of 16 March 2012 held as follows:

> "Whenever challenged to explain his decision, the Attorney General has to explain and justify the decision he has taken and then it is up to the [ordinary] court to see whether that order is in line with previous orders and that no one has been discriminated against; otherwise the decision may be held '*ultra vires*'."

14. In the same paragraph 43, the Court refers to the inapplicability of Article 21 of the Criminal Code, which allows the court to go below the minimum punishment. First of all, this Article of the Criminal Code is hardly ever used as it has been supplanted by probation orders, conditional or unconditional discharges and suspended prison sentences. Secondly, the inapplicability of this Article applies to both the Court of Magistrates and to the Criminal Court. However, in practice, the Court of Magistrates and the Criminal Court can still go below the minimum established by Chapter 31 in certain circumstances. Hence, in cases where the quantity of drugs is not too high, and the accused has filed an early guilty plea and has benefited from the reduction of the penalty by one or two degrees contemplated under Article 29 for persons who help the police to trace the sources of supply, it is possible to go below the six months' tariff. This has happened repeatedly in many cases decided by the Court of Magistrates, whether the person was a minor or not. In the case of minors, it is not the first time that the penalty was reduced to just a fine (*multa*). In my view, there is nothing to stop the Criminal Court from going below the minimum of four years if the evidence reveals circumstances identical to those which may apply before the Court of Magistrates.

15. For all the above reasons I find that the applicant's conviction is not in any way inconsistent with the provisions of Article 7 of the Convention and therefore I am of the view that there has been no violation of that Article.