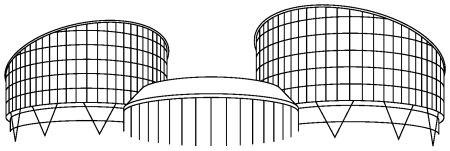

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BORG v. MALTA

(Application no. 37537/13)

JUDGMENT

STRASBOURG

12 January 2016

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 Borg v. Malta,

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

András Sajó, *President,*
Boštjan M. Zupančič,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris, *judges,*
Anna Felice, ad hoc *judge,*

and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 24 November 2015, delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37537/13) 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 Mario Borg ("the applicant"), on 28 May 2013.

2. The applicant was represented by Dr D. Camilleri, Dr M. Camilleri and Dr J. Gatt, lawyers practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged that he did not have legal assistance during the pre-trial investigation in his case in violation of Article 6 § 3 in conjunction with Article 6 § 1, and that he had suffered a violation of Article 6 § 1 as a result of conflicting constitutional pronouncements.

4. On 22 October 2013 various aspects of the application were communicated to the Government.

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 Mrs Anna Felice to sit as an ad hoc judge (Rule 29 § 1(b)).

6. The applicant requested that an oral hearing be held in the case. On 24 November 2015, the Court considered this request. It decided that having regard to the material before it an oral hearing was not necessary.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1976 and is currently detained at the Corradino Correctional Facility in Paola.

A. Background to the case

8. By Act III of 2002 the Maltese Parliament introduced the right to legal assistance at the pre-trial stage. However, the law only came into force in 2010 by means of Legal Notice 35 of 2010. Prior to this Legal Notice Maltese law did not provide for legal assistance during pre-trial investigations and specifically during questioning, whether by the police or by a magistrate in his investigative role. Before questioning, however, suspects would be cautioned, that is, informed of their right to remain silent and that anything they said could be taken down and produced as evidence. At the time, no inferences could be drawn by the trial courts from the silence of the accused at this stage.

B. Criminal proceedings

9. The applicant, at the time twenty-seven years of age, was arrested on 15 April 2003 on suspicion of importation and trafficking of drugs (heroin) in relation to two episodes in March and April 2003. On 17 April 2003 while under arrest and precisely during questioning, after being duly cautioned about his right to remain silent, the applicant, in the absence of a lawyer, gave a statement to the police, which however he refused to sign.

10. In his statement he said that he regularly drove a white Ford Escort and that he was married to a Thai national. In reply to questioning, he stated that he did not remember his whereabouts on 3 March 2003 and that he did not know a certain N. and M. and three other Turkish nationals (K., R., and M.I.). Neither had he ever paid or received money from the aforementioned persons. He further stated that he had never made or received calls to and from Turkey. He denied having, on 4 March 2003, made contact with any foreigner in Paceville, or having received anything from M. or ever having made a phone call to two specific numbers shown to him by the police. He further denied having gone to Paceville with his wife in his car and making contact with M. on 5 March 2003; he also denied that on that day M. had given him heroin capsules in the presence of his wife. He claimed however to have gone to Paceville at 10 a.m. to look for a person who had stolen his car stereo. The applicant availed himself of the right to remain silent in respect of questions as to whether he had a drug problem, whether he had

ever used heroin, and when was the last time he had done so. On being asked whether he had written the two names found on a piece of paper in his car and what was their purpose, he replied that he had himself written the two names but that he did not know the people and that he was unaware of the purpose of the paper, which had been in his car for a very long time.

11. On the same day (17 April 2003) the applicant was arraigned before the Court of Magistrates as a Court of Criminal Inquiry (committal proceedings) and his above-mentioned statement exhibited as evidence against him. The prosecution also produced another two statements implicating the applicant, given by two prosecution witnesses (N. and M., two Turkish female drug couriers, mentioned above) who had also been arrested and investigated in connection with the same crimes, and who had also not been legally assisted during the police investigation into their case.

12. In the meantime, on 15 April 2003 the duty magistrate (C.) had been informed that the applicant had been arrested, that a search had been carried out at his place of residence, and that certain items had been seized. Instead of proceeding herself to the spot to conduct the inquest for the purpose of the *in genere* inquiry (*inkjesta*), she appointed the police investigating officer to hold an on-site inquiry, and at the same time appointed a number of experts to assist him (see Articles 546 - 548 of the Criminal Code, relevant domestic law, paragraph 31 below). In their document of appointment, however, the experts were required to report their findings to her within three days. The following day she acceded to the Commissioner of Police's request that she order the relevant telephone companies to give all the information requested in connection with the mobile phones seized in the course of the investigation. In the *procès-verbal* of 23 April 2003 no findings were reported by her, given that on 21 April 2013 the Commissioner of Police had requested the said magistrate to close the inquest since committal proceedings (*kumpilazzjoni*) had already started in respect of the applicant (see paragraph 9 above). All the relevant documents were attached to the *procès-verbal* and the record of the *in genere* inquiry sent to the Attorney General.

13. The same magistrate (C.) was assigned (by lot) the case in the Court of Magistrates sitting as a Court of Criminal Inquiry. She eventually decided that there was enough evidence to put the applicant under a bill of indictment. The resulting bill of indictment was filed by the Attorney General on 14 June 2006.

14. In consequence the applicant was tried by a jury and by a judgment of the Criminal Court of 16 January 2008 he was found guilty of importing, causing to be imported, or taking steps preparatory to the importation, of heroin between February and 15 April 2003; that between February and April 2003 he conspired with other persons to import, sell or traffic heroin, or promoted, constituted, organised or financed such a conspiracy; and that in the same period he had in his possession the drug heroin in circumstances

which indicated that it was not for his exclusive use. The Criminal Court sentenced him to twenty-one years' imprisonment and a fine of 70,000 euros (EUR). During these proceedings the applicant had objected to the statements made by N. and M. on various grounds, however these objections were withdrawn on 30 October 2006, apart from one objection concerning the inadmissibility of the results of the identification parade.

15. The applicant appealed, claiming an incorrect application of the law (unrelated to legal assistance), a wrong assessment of the facts, and a disproportionate punishment.

16. During the appeal proceedings the applicant requested the Court of Criminal Appeal to refer the case to the constitutional courts on constitutional grounds (different from those raised below). On 20 November 2008 the Court of Criminal Appeal found his claims to be frivolous and vexatious and rejected his request.

17. By a judgment of the Court of Criminal Appeal of 19 May 2011 the applicant's appeal was dismissed and the first-instance judgment confirmed (apart from a slight change in respect of the timing of the third charge).

18. In so far as is relevant, the Court noted that the jury had had the advantage of seeing and hearing all the witnesses, and that the jurors had arrived at the conclusion that they should not rely on the version of events given by the applicant in his statement. The first issue which the jury had to decide was whether the two couriers (N. and M.) had made contact with the applicant in March 2003. In his statement to the police the applicant denied knowing the two women and other people mentioned by them, and also denied that he had made and received calls to and from Turkey. However, the two women identified the applicant as being the person they made contact with in March 2003, namely as the person who had given N. food, gloves, disinfectant and a laxative, and to whom M. had given the capsules they had carried in their stomachs. A number of factors gave credibility to the women's identification of the applicant: (i) the circumstances of the meetings they had with him at which time he was using a white four-door car and was in the company of an Asian woman; (ii) the applicant's statement that he habitually made use of a white four-door Ford Escort and that he was married to a Thai woman; (iii) the fact that when arrested N. and M. had separately identified the applicant in photographs; (iv) moreover, the two women had separately identified the applicant in identification parades supervised by a duty magistrate; and they did the same without hesitation when they testified, both during the committal stage and before the jury. In the light of all those factors the jurors could reasonably conclude that the person N. and M. had met in March 2003 and to whom they had delivered the capsules was the applicant.

19. This having been established, the jury had to determine what the capsules delivered to the applicant contained and whether the applicant was connected to the delivery of April 2003 intercepted by the police. The

experts had stated that the capsules contained heroin. The court rejected the applicant's argument that the delivery of March 2003 concerned cannabis, given that studies showed that drug couriers were used in connection with heroin and cocaine and sometimes ecstasy, and that Turkey was considered a key transit route to Europe for heroin.

20. It appeared from the evidence given by the two women that they had imported heroin in April 2003, which was the second time they had come to Malta. They had been forced to return in April since, in March, M. had lost most of the capsules she was carrying when vomiting on board the flight. The court considered that a recipient would expect to receive the full delivery, and that therefore it was logical for the supplier to force the courier to deliver what had been missing because of her fault. It followed that, from their testimony, it was reasonable for the jury to conclude that what N. and M. had carried in March 2003 was also heroin. The court considered that this was the only possible conclusion to be arrived at. Neither was it conjecture to conclude that the drug being carried in April was destined for the applicant. Indeed during the trial by jury M. had indicated the applicant as the recipient. The court rejected the applicant's argument that he could not be the recipient because the women had referred to someone whose father had passed away, which was not the case for the applicant. It considered the relevant part of the statement by the women as hearsay evidence and in any event it was a statement which referred to a third person and not the applicant.

21. The court further noted that on 15 April 2003, when the delivery was meant to take place, the police had seen the applicant drive around the area (at least three times) in his white Ford Escort, a short time before M. was arrested. Indeed the jurors had not believed the applicant's version that he had gone to Paceville to look for someone who had stolen his car stereo. Moreover, the jurors could not have ignored that in his statement the applicant had denied any connection with Turkey, despite the fact that he could not explain the Turkish names written on a piece of paper which was found in his car and which he admitted he had written himself, and that N. had testified that the applicant had spoken to a Turkish person on the telephone.

22. The Court of Appeal decided that in the light of the above considerations and all the evidence produced, the jurors could legally and reasonably conclude that the applicant was guilty of the first and second charge, but only partly as to the third charge, since he had never received the delivery of April 2003.

C. Constitutional redress proceedings

23. The applicant instituted constitutional redress proceedings, claiming a breach of his right to a fair trial (Article 6 § 3 (c)) on account of the lack

of legal assistance during the investigation and interrogation, both in his respect and in respect of the witnesses who had also been under investigation, their statements having repercussions on his trial. He further complained that the same magistrate who had conducted the *in genere* inquiry was also the magistrate who had conducted the compilation of evidence in the committal proceedings. He requested a remedy including, but not limited to, a declaration that the criminal proceedings be cancelled and compensation paid.

24. By a judgment of 4 June 2012 the Civil Court (First Hall) in its constitutional competence rejected the applicant's claim.

25. In respect of the statement made by the applicant on 17 April 2003 the court noted as follows: (i) the applicant had not raised the issue before his criminal proceedings came to an end, and the judgment was now *res judicata*; (ii) neither had he raised the issue in his referral request pending the criminal proceedings before the Court of Criminal Appeal; (iii) the applicant's statement was not determinant to finding him guilty: in his statement he had not admitted to trafficking in drugs or that he knew N. and M., and he had chosen to remain silent when questioned about drug use; (iv) while it was true that the Court of Criminal Appeal had referred to extracts from his statement, this was not the basis of his conviction, which was based on the evidence given in court by M. and N. and on the results of the previous identification parades – indeed he had said nothing relevant in his statement.

26. The court concluded that the proceedings having ended it had to look at the entirety of the proceedings, and it was not for it to substitute the findings of the jury. During the trial the applicant was represented by a lawyer and had ample opportunity to submit evidence and contest any evidence brought against him, and the fact that he did not have legal assistance during questioning did not have an irreparable effect on his right to defend himself.

27. The court rejected the second complaint in relation to legal assistance for the witnesses, in so far as the applicant had no standing in that respect. Moreover, their statements had remained unchanged; the applicant could have challenged them during the trial but had opted not to do so.

28. Lastly, in relation to the third complaint it held that the magistrate conducting the *in genere* inquiry was independent of the police, did not act as a prosecutor, and in the present case did not express an opinion as to whether there was sufficient evidence for the police to institute proceedings in respect of the applicant. The applicant's case was also tried by a jury and then reviewed by the Court of Criminal Appeal. Furthermore, the applicant had not raised the issue in the committal proceedings in 2003 - indeed a comment somewhat related to the issue had been explicitly withdrawn on 30 October 2006 before the Criminal Court - and he should not therefore be allowed to benefit from his own passivity.

29. By a judgment of 25 January 2013 the Constitutional Court dismissed the applicant's appeal and confirmed the first-instance judgment, with costs against the applicant. It noted that a correct interpretation of *Salduz v. Turkey* [GC] (no. 36391/02, ECHR 2008) had to be made in view of the circumstances of that case, where indeed Mr Salduz had been in a vulnerable position when he had made his statement. The rationale of the right was precisely that, and not to allow guilty persons to be let off scot-free because of a formality which had no real or serious consequences. In the present case the applicant did not claim that he was forced to make the statement, or that he was in any other way vulnerable when he made his statement. The right to a lawyer was aimed at avoiding abuses, which in fact did not happen in the applicant's case. Thus, while there was no procedural obstacle for the applicant to complain at this stage, namely before the constitutional jurisdictions, despite the fact that he had not raised the issue in the criminal proceedings, the element of vulnerability was missing in the applicant's case, and thus there could be no violation of his rights. The Constitutional Court held that even if the statement had been determinant for the finding of guilt, that finding was not necessarily tainted unless the statement had been obtained under duress, which was not so in the present case. Nevertheless, in the instant case the statement was of no relevance whatsoever, as the applicant had not admitted to anything and the Court of Criminal Appeal had only referred to the statement in saying that the jury had not believed the applicant's version. It had been other evidence that had led to his finding of guilt. Lastly, the Constitutional Court noted that it could not agree to a general view that the moment a statement was made without legal assistance it became *ipso facto* invalid and brought about a breach of Article 6.

30. As to the complaint related to the witnesses, the court did not rule out the applicant's *locus standi*, which could come into play if their statements had been made under duress. However, it was not so in the present case, where the witnesses had reiterated their statements even before the trial courts. It followed that those statements were also admissible. Lastly it confirmed the reasoning of the first-instance court relating to the impartiality of the magistrate, finding the applicant's argument opportunistic.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The "in genere" inquiry (*inkjesta*) and the inquest

31. The articles of the Criminal Code, Chapter 9 of the Laws of Malta, in so far as relevant, read as follows:

Article 546

"(1) Saving the provisions of the next following subarticles, upon the receipt of any report, information or complaint in regard to any offence liable to the punishment of imprisonment exceeding three years, and if the subject-matter of the offence still exists, the state thereof, with each and every particular, shall be described, and the instrument, as well as the manner in which such instrument may have produced the effect, shall be indicated. For the purpose of any such investigation, an inquest on the spot shall be held: ..."

Article 547

"(1) The inquest shall be held by a magistrate. ..."

Article 548

"The necessary experts shall be employed for the purposes of the inquest, and a *procès-verbal* thereof shall be drawn up: ..."

Article 549

"(1) The *procès-verbal* shall be signed by the magistrate or officer holding the inquest.

(2) If the experts employed shall express their opinion in a written report duly confirmed on oath, such report shall be annexed to the *procès-verbal* and shall be deemed to form part thereof.

(3) The depositions of witnesses examined at the inquest shall also be annexed to the *procès-verbal*.

(4) Such depositions shall be taken in the manner provided for the examination of witnesses by the court of criminal inquiry, and shall have the like effect."

Article 550 (as amended in 2006)

"(1) The *procès-verbal*, if regularly drawn up, shall be received as evidence in the trial of the cause, and the witnesses, experts or other persons who took part in the inquest shall not be produced to give evidence in the inquiry before the Court of Magistrates as court of criminal inquiry.

(2) Nevertheless it shall be lawful for the Police to produce any of the persons mentioned in subarticle (1) to give evidence in the inquiry before the Court of Magistrates as court of criminal inquiry on specific issues and for the Attorney General to produce any of the said persons in accordance with the provisions of article 405. It shall also be lawful for the person charged to produce any of the said persons for the purpose of cross-examination.

(3) The court shall also, for the like effect, have power to order the production of any expert or other witness who shall appear from the *procès-verbal* to have been examined at the inquest; and for such purpose any such expert or witness shall, in all cases within the jurisdiction of the Criminal Court, be included in the list of the witnesses of the Attorney General, to be, if necessary, examined.

(4) All documents, however, and any other material object, in respect of which a *procès-verbal* has been drawn up, and which can be preserved and conveniently exhibited, shall always be produced at the trial, together with the *procès-verbal*.

(5) The *procès-verbal* shall be deemed to have been regularly drawn up if it contains a short summary of the report, information or complaint, a list of the witnesses heard and evidence collected, and a final paragraph containing the findings of the inquiring magistrate."

Article 554

"(1) It shall be lawful for the magistrate to order the arrest of any person whom, at any inquest, he discovers to be guilty, or against whom there is sufficient circumstantial evidence, as well as to order the seizure of any papers, effects, and other objects generally, which he may think necessary for the discovery of the truth. It shall also be lawful for the magistrate to order any search into any house, building or enclosure, although belonging to any other person, if he shall have collected evidence leading him to believe that any of the above objects may be found therein.

(2) It shall also be lawful for the magistrate to order that any suspect be photographed or measured or that his fingerprints be taken or that any part of his body or clothing be examined by experts appointed by him for the purpose:

Provided that where the magistrate is of the opinion that such photographs (negatives and prints), fingerprint impressions, records of measurements and any other thing obtained from the body or clothing as aforesaid are no longer required for the purpose of the inquiry relating to the "*in genere*", he shall order their destruction or shall order that they be handed over to the person to whom they refer.

(3) In any proceedings under this Title the magistrate shall have the same powers and privileges of a magistrate presiding the Court of Magistrates as court of criminal inquiry."

B. The inquiry - committal proceedings (*kumpilazzjoni*)

32. The articles of the Criminal Code, Chapter 9 of the Laws of Malta, in so far as relevant, read as follows:

Article 389

"In respect of offences liable to a punishment exceeding the jurisdiction of the Court of Magistrates as court of criminal judicature, the Court of Magistrates shall proceed to the necessary inquiry."

Article 390

"(1) The court shall hear the report of the Police officer on oath, shall examine, without oath, the party accused, and shall hear the evidence in support of the report. Everything shall be reduced to writing."

Article 401

"...(2) On the conclusion of the inquiry, the court shall decide whether there are or not sufficient grounds for committing the accused for trial on indictment. In the first case, the court shall commit the accused for trial by the Criminal Court, and, in the second case, it shall order his discharge. ..."

C. Legal assistance during pre-trial investigation

33. Legal Notice 35 of 2010 provided for the commencement notice of the Criminal Code (Amendment) Act 2002 (Act III of 2002), which enshrined the right to legal assistance. It read as follows:

> "BY VIRTUE of the powers granted by subarticle (2) of article 1 of the Criminal Code (Amendment) Act, 2002, the Minister of Justice and Home Affairs has established the 10th February, 2010 as the date when the provisions of articles 355AT, 355AU, paragraphs (b) and (c) of subarticle (2) and subarticles (3) and (4) of article 355AX, and article 355AZ which are found in article 74 of the Act above mentioned shall come into force."

34. Pursuant to the above notice, Article 355AT of the Criminal Code, in so far as relevant, now reads as follows:

> "(1) Subject to the provisions of subarticle (3), a person arrested and held in police custody at a police station or other authorised place of detention shall, if he so requests, be allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person or by telephone, for a period not exceeding one hour. As early as practical before being questioned the person in custody shall be informed by the Police of his rights under this subarticle. ..."

D. Domestic case-law

1. Cases decided in 2011

35. In the wake of the new law, a number of accused persons instituted constitutional redress proceedings during the criminal proceedings against them, or requested the relevant criminal courts to make a referral to the constitutional jurisdictions. In 2011 three cases were decided by the Constitutional Court (in similar yet never identical formations of three judges), namely *The Police vs Alvin Privitera* of 11 April 2011, *The Police vs Esron Pullicino* of 12 April 2011, and *The Police vs Mark Lombardi*, also of 12 April 2011. In the three cases the Constitutional Court held that the claimants had suffered a breach of their right to a fair trial under Article 6 of the Convention in so far as they had not been legally assisted. The relevant details are as follows:

The Police vs Alvin Privitera, Constitutional Court judgment of 11 April 2011, upholding a first-instance judgment following a referral by the Court of Magistrates as a Court of Criminal Judicature.

36. The case concerned the fact that the accused, at the time eighteen years of age, had been questioned in the absence of a lawyer. During questioning he had denied selling heroin to X (who died of an overdose) but had admitted to selling cannabis to him. Subsequently the accused alleged that he had been forced by the investigating official to admit to the accusations. This was the sole evidence which the prosecution had in hand

in order to institute proceedings against the applicant for possession and trafficking of drugs.

37. The Constitutional Court confirmed that it should apply the Grand Chamber judgment in *Salduz v. Turkey* and the subsequent line of case-law. In particular it noted that, in order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 § 1 required that, as a rule, access to a lawyer should be provided as from the first questioning of a suspect by the police. Even where compelling reasons might exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence would in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer were used for a conviction. Given that the absence of a lawyer at the investigation stage could irretrievably prejudice the accused's right, the court considered that where there existed sufficient reasons indicating a violation, it should not wait for the end of the criminal proceedings in order to examine the merits of the case.

38. The Constitutional Court rejected the Government's plea that the applicant had not raised the issue until the prosecution had finished submitting evidence, noting that in the domestic legal system there was no deadline for raising constitutional claims. It found the Government's argument that the accused had not been forced to give a statement, and that he had been informed of his right to remain silent, to be irrelevant given the established case-law of the European Court of Human Rights and in particular the *Salduz* judgment.

39. The right to legal assistance was linked to the right not to incriminate oneself; it allowed a balance to be reached between the rights of the accused and those of the prosecution. The argument that it would otherwise be difficult for the prosecution to reach a conviction could not be taken into consideration for the purposes of this balance. The Constitutional Court further noted that Mr Salduz's young age had not been the decisive factor for the finding in that case, but merely a further argument. Moreover, it was not necessary in the case at hand to examine whether there existed any compelling reasons to justify the absence of a lawyer during questioning or whether such restrictions prejudiced the case, in so far as at the relevant time Maltese law had not provided for the right to legal assistance at that stage of the investigation and therefore there had been no need for the accused to request it. There had therefore been a systemic restriction on access to a lawyer under the relevant legal provision in force at the time. It followed that there had been a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1.

40. The Constitutional Court further noted that in its view the right to be assisted by a lawyer must be granted from the very start of the investigation

and before the person being investigated gave a statement, but it did not require that an accused be assisted during questioning.

41. The Constitutional Court did not order the statements to be expunged from the record of the proceedings, but it ordered that the Court of Criminal Judicature be informed of the said judgment so that it could decide accordingly on the validity and admissibility of the statement made.

The Police vs Esron Pullicino, judgment of 12 April 2011 upholding a first-instance judgment following a referral by the Court of Magistrates as a Court of Criminal Judicature.

42. The circumstances of the case were similar to the case above in so far as the accused had given a statement while in police custody in the absence of a lawyer and this statement was the sole evidence for the prosecution. The accused was, moreover, a minor. The Constitutional Court reiterated the same reasoning applied in the case of *Alvin Privitera*, cited above, stopping short, however, of reiterating the court's opinion in relation to assistance during the actual questioning (see paragraph 40 above).

The Police v Mark Lombardi, judgment of 12 April 2011 upholding a first-instance judgment following a referral by the Court of Magistrates as a Court of Criminal Judicature.

43. In this case the accused had made two statements in the absence of a lawyer, in the first denying any connection with possession or trafficking of drugs, and in the second admitting to having taken ecstasy pills (which amounts to possession according to the domestic case-law) but denying trafficking, although he had mentioned facts which connected him to other persons involved in trafficking.

44. The Constitutional Court reiterated the same reasoning applied in the cases of *Alvin Privitera* and *Esron Pullicino*, cited above. It further noted case-law subsequent to *Salduz* in which the Court had found a violation despite the fact that the applicant had remained silent while in police custody (*Dayanan v. Turkey*, no. 7377/03, 13 October 2009) and despite there being no admission of guilt in the statements given by the applicants (*Yeşilkaya v. Turkey*, no. 59780/00, 8 December 2009). In *Boz v. Turkey* (no. 2039/04, 9 February 2010) the Court had stressed that the systemic restriction of access to a lawyer pursuant to the relevant legal provisions breached Article 6. The Constitutional Court further referred to the finding in *Cadder v. Her Majesty's Advocate* [2010] UKSC 43, which concerned the same situation in the Scottish legal system and where that court had agreed to follow *Salduz* to the letter.

45. The Constitutional Court added that *Salduz* should not apply retroactively to cases which had become *res judicata.*

2. Subsequent cases

46. Following the above-mentioned judgments of 2011, the Constitutional Court started to consider *Salduz* as an exceptional case and to interpret it to the effect that a number of factors had to be taken into consideration when assessing whether a breach of Article 6 had occurred (see, for example, *Charles Stephen Muscat vs The Attorney General*, 8 October 2012; *Joseph Bugeja vs The Attorney General*, 14 January 2013; *The Police vs Tyron Fenech*, 22 February 2013; and *The Police vs Amanda Agius*, also of 22 February 2013, and the Constitutional Court's reasoning in the applicant's case). As a result, a number of cases where the accused had not been assisted by a lawyer – because the matter was not regulated in Maltese law – were found not to violate the Convention and the Constitution. Nevertheless, in *The Republic of Malta vs Alfred Camilleri* of 12 November 2012 the Constitutional Court, in the particular circumstances of the case, found a violation of the accused's fair trial rights, in particular because he had not even been cautioned by the police. However, following a request for retrial which was upheld by a judgment of the Constitutional Court of 31 January 2014, no violation was found in that case because the accused, who had given a statement in the absence of a lawyer, had not been forced to reply to the questions put to him by the police, nor was he particularly vulnerable to the extent that he would have required the assistance of a lawyer. The accused was fifty-five years old and therefore mature. While he had never been to prison or been questioned, he had already been found guilty of minor charges and therefore was acquainted with the law. Lastly, his statement had not been the only evidence, as some police officers had been eyewitnesses to his handling of the drugs in issue.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 OF THE CONVENTION

47. The applicant complained under Article 6 § 3 in conjunction with Article 6 § 1 about the lack of legal assistance while in police custody in his case, contrary to the findings in the judgment of *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008). Moreover, he complained that the lack of legal assistance to third persons who were called as witnesses against him also affected the fairness of his trial. He further complained under Article 6 § 1 about a lack of objective impartiality resulting from the system in place in Malta, in so far as the magistrate performing investigating functions, namely conducting the *in genere* inquiry, who collected the evidence was the same one who sat in the Court of Magistrates as a Court of Criminal

Inquiry, and who decided in the present case that the applicant should be committed to trial.

The provisions, in so far as relevant, read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

48. The Government contested those arguments.

A. Lack of legal assistance to the applicant

1. Admissibility

49. 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.

2. Merits

(a) The parties' submissions

50. The applicant submitted that he had not been legally assisted when he was in police custody and during the interrogation because of a systemic restriction of access to a lawyer in the legal system. Despite amendments to the law in 2002, the law had not come into force.

51. The applicant noted that the line taken by the courts and the Government in his case was that of this Court in the early nineties, particularly in the case of *Imbrioscia v. Switzerland* (24 November 1993, Series A no. 275), and they failed to take into consideration the Court's jurisprudential developments. He referred to the case of *John Murray v. the United Kingdom*, (8 February 1996, *Reports of Judgments and Decisions* 1996-I), and *Magee v. the United Kingdom* (no. 28135/95, ECHR 2000-VI) and subsequently to the case of *Salduz* [GC], cited above, particularly its paragraph 55. In the applicant's view the latter judgment was continuously misinterpreted by the domestic courts, despite its principles being reiterated by the Court in other cases, such as in *Pishchalnikov v. Russia* (no. 7025/04, 24 September 2009), where the Court found a violation despite the fact that the statement had not been the sole evidence. The applicant further referred to *Dayanan v. Turkey* (no. 7377/03, 13 October 2009) where the Court had found a violation on the basis that there was a systemic restriction on access to a lawyer (as in Malta), despite the fact that the applicant had remained silent during questioning. The

applicant further referred to *Yeşilkaya v. Turkey* (no. 59780/00, 8 December 2009), *Boz v. Turkey* (no. 2039/04, 9 February 2010), *Nechiporuk and Yonkalo v. Ukraine* (no. 42310/04, 21 April 2011) and *Huseyn and Others v. Azerbaijan* (nos. 35485/05, 45553/05, 35680/05 and 36085/05, 26 July 2011), all of which confirmed the approach taken in *Salduz* (cited above).

52. The applicant submitted that in the light of the current case-law, given the systemic restriction on access to a lawyer, all the arguments set out by the Government were irrelevant.

53. The Government considered that the right to see (*sic*) a lawyer in the early stages of a police investigation was not absolute and could be subject to restrictions. They referred to the cases of *Imbrioscia*, cited above; *John Murray*, cited above; and *Ahmet Mete v. Turkey* (no. 77649/01, 25 April 2006), as well as *Salduz* (cited above). The Government, recapitulating the facts and findings in the case of *Salduz*, considered that in reaching its conclusion the Grand Chamber gave particular weight to the applicant's age. The Government reiterated that the faithful interpretation of *Salduz* was that "a violation can only be found if the conviction of an accused person is solely based on incriminating statements that an accused made while being questioned, where the accused person was not given access to legal assistance". In their view any other interpretation thwarted the logic around the judgment. The Government further referred to the facts and findings in *Płonka v. Poland* (no. 20310/02, 31 March 2009); *Aleksandr Zaichenko v. Russia* (no. 39660/02, 18 February 2010); *Nechiporuk and Yonkalo* (cited above); and *Huseyn and Others* (also cited above) and noted that in those cases the applicants were convicted solely on the basis of their statements in which the applicants had admitted wrongdoing.

54. They submitted that in the present case the applicant was twenty-seven years old, and the amount of drugs involved was 816 grams of heroin which was 47% pure, which had been transported to Malta by two couriers who had already been used by the applicant for this purpose. Other objects associated with drug importation and trafficking had been seized by the police from the applicant's residence, such as telephones and a piece of paper with foreign names written on it. Other evidence besides his statement was collected and brought to the attention of the trial courts. Although the applicant chose not to sign the statement, he had voluntarily answered the questions put to him during questioning, he had been cautioned about his right to remain silent, and at no point was he threatened or coerced into giving a statement. Moreover, he answered some questions and refused to answer others, and categorically denied involvement in the drug transaction. Furthermore, the applicant was not a first offender, as according to his conviction sheet he had been arraigned on one previous occasion (concerning driving a modified car without a seatbelt).

55. They were of the view that the Court found violations in cases where applicants were convicted on the sole basis of statements within which they

admitted wrongdoing. This was not so in the present case. Similarly, the Court gave weight to the age of the victim to determine his vulnerability, and again in the present case the applicant was a mature person and was not intimidated by police officers. He understood what was being said and the consequences of his statements, enough to be able to choose which questions to answer; this showed he had understood the caution and its importance. Moreover, it was of particular relevance that, at the time of the present case, no inferences could be made from the applicant's silence, and therefore in choosing not to reply the applicant was not in any way incriminating himself. Thus, the applicant had not illustrated what prejudice he had suffered, given that his conviction had been based on the totality of the evidence collected and was not solely based on his statement. The Government therefore considered that given the proceedings as a whole, there had been no violation of the applicant's rights.

(b) The Court's assessment

(i) General principles

56. Early access to a lawyer is one of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see *Salduz v. Turkey* [GC], no. 36391/02, § 54, ECHR 2008).

57. The Court reiterates that in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see *Salduz*, cited above, § 55).

58. Denying the applicant access to a lawyer because this was provided for on a systematic basis by the relevant legal provisions already falls short of the requirements of Article 6 (ibid., § 56).

(ii) Application to the present case

59. The Court observes that the post-Salduz case-law referred to by the Government (paragraph 53 *in fine*) does not concern situations where the lack of legal assistance at the pre-trial stage stemmed either from a lack of

legal provisions allowing for such assistance or from an explicit ban in domestic law.

60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, *Salduz*, cited above, § 56; *Navone and Others v. Monaco*, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013; *Brusco v. France*, no. 1466/07, § 54, 14 October 2010; and *Stojkovic v. France and Belgium*, no. 25303/08, §§ 51-57, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, *Dayanan v. Turkey*, no. 7377/03 §§ 31-33, 13 October 2009; *Yeşilkaya v. Turkey*, no. 59780/00, 8 December 2009; and *Fazli Kaya v. Turkey*, no. 24820/05, 17 September 2013).

61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see *Salduz*, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).

62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see *Salduz*, cited above, §§ 52, 55 and 56).

63. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention.

B. Lack of legal assistance to third persons who were called as witnesses against the applicant in his criminal proceedings

1. The parties' submissions

64. The applicant submitted that the lack of legal assistance to third persons who were called as witnesses against him had also affected the fairness of his trial.

65. The applicant considered that the fact that he did not object to the witnesses during the criminal proceedings did not mean that he was renouncing his rights under Article 6. He referred to *Damir Sibgatullin v. Russia* (no. 1413/05, § 48, 24 April 2012), where the Court reiterated

"that as a matter of principle the waiver of the right must be a knowing, voluntary and intelligent act, done with sufficient awareness of the relevant circumstances. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Talat Tunç v. Turkey*, no. 32432/96, 27 March 2007, § 59, and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003)."

66. The applicant noted that as in *Jalloh v. Germany* [GC] (no. 54810/00, ECHR 2006-IX), in the present case the evidence used against him (the statement from the two witnesses) was obtained by a measure which breached one of the core rights guaranteed by the Convention. The applicant submitted that just as much as a statement of the accused given without legal assistance should not be used as evidence against him, similarly statements made by third persons in such circumstances should also be excluded, as the accused had no guarantee that those statements were delivered freely, without promise of reward and according to the law.

67. The Government noted that N. and M. had been caught red-handed, with drugs in their possession just before the drugs "were handed over to the applicant" (*sic*). While it was true that they had not been assisted by a lawyer when they gave their statements, they had not contested the admissibility of their statements, nor claimed a breach of their rights, thus the applicant could not raise such a complaint.

68. The Government submitted that Article 6 did not lay down rules for the admissibility of evidence, which was a matter for regulation under national law, and it was thus not for the Court to determine whether a particular type of evidence was admissible, or whether an applicant was guilty or not. The Court had to determine whether the proceedings as a whole were fair and whether the rights of the defence were respected. They referred to *Schenk v. Switzerland* (12 July 1988, Series A no. 140).

69. The Government further submitted that in the present case the statements by N. and M. (of which the applicant was complaining) were taken in accordance with the provisions of the Criminal Code. In his statement of defence of 13 July 2006 the applicant had objected to the admissibility of these statements, an objection which was, however, withdrawn by the applicant on 30 October 2006. The two Turkish nationals gave evidence in the trial by jury and the applicant cross-examined both witnesses. The Government also noted that there was other evidence besides these statements, such as the testimony of a police sergeant concerning the whereabouts of the applicant, the piece of paper found in his car, and the data collected from the mobile phones seized in the applicant's residence.

70. The Government distinguished the present case from *Jalloh v. Germany* [GC] (cited above), where the use as evidence of drugs obtained by forcible administration of emetics to that applicant had rendered his trial

as a whole unfair. In the present case the applicant's statements as well as those of M. and N. had been given voluntarily (as also shown by the fact that their statements were confirmed on oath before the magistrate conducting the inquiry), the applicant had been able to, and actually did, cross-examine M. and N. Further, the finding of guilt had been the result of an assessment of various pieces of evidence which corroborated the impugned statement, as also confirmed by the Court of Appeal, thus the impugned measure had not proved decisive to obtaining a conviction. It followed that the applicant had had a fair hearing.

2. The Court's assessment

71. For the purposes of the present case the Court accepts that the applicant has victim status. It also considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor does it appear inadmissible on any other grounds. It must therefore be declared admissible.

72. However, having regard to the findings in paragraph 63 above, the Court does not consider it necessary to examine the merits of this complaint.

C. Impartiality

1. The parties' submissions

73. The applicant submitted that in the Maltese legal system the magistrate sitting in the Court of Magistrates as a Court of Criminal Inquiry effectively decides on the criminal charge, in so far as it is that magistrate who decides whether there is sufficient evidence to indict the defendant or drop the case.

74. He claimed that in his case there had been a lack of objective impartiality resulting from the system in place in Malta, in so far as the magistrate performing investigating functions, namely conducting the *in genere* inquiry (who collected the evidence) was the same one who sat in the Court of Magistrates as a Court of Criminal Inquiry, and who thus, in the present case, also decided that the applicant should be charged and committed for trial. The applicant submitted that the issue remained relevant in his case even though the magistrate performing investigating functions had not in fact completed the *in genere* inquiry in his case.

75. The Government noted that the plea concerning this complaint made during the criminal proceedings was eventually withdrawn by the applicant.

76. They explained that the Court of Magistrates may act as a Court of Criminal Judicature when it has full competence to decide the merits of a charge. However, when this was not the case, as in the present case, it would function as a Court of Criminal Inquiry hearing the committal proceedings in respect of such charges. The domestic system also provided

for a magistrate who conducts an inquest (for the purpose of the *in genere* inquiry) (see paragraph 31 above): when acting in that function the magistrate is not part of the Police (unlike other jurisdictions) – the use of such a magistrate is provided for by law in cases where it is appropriate that an investigation is not carried out solely by the Police. The Government highlighted that the exercise of the criminal action lay with the police, that acted as prosecutors before the Court of Magistrates (both as court of criminal judicature and criminal inquiry). Thus, the magistrate conducting the inquest is independent of the Police and the Public Prosecutor.

77. The Government explained that during the inquest the scenario was not adversarial and there was no accused – the magistrate's role was limited to investigating, collecting, and preserving the evidence, and drawing up a *procès-verbal* which is admissible as evidence in the subsequent criminal proceedings. The *procès-verbal* is intended to establish whether in fact an offence was committed, and if so whether the evidence collected pointed towards a particular person. Moreover, when, pending this investigative stage, an accused is charged in court (as happened in the present case), the investigative role of the magistrate comes to an end and the magistrate will only produce the evidence gathered without submitting his or her conclusions in a *procès-verbal* – therefore in this case the magistrate had not even expressed an opinion on the investigation. Thus, in both cases the magistrate was not responsible for any finding of guilt.

78. As to the inquiry (committal proceedings), at this stage there is already an accused and the relevant charges, and its purpose is for the magistrate to hear evidence relative to the person arraigned and to determine whether there is a basis on which to indict the accused. During this committal stage, all evidence is presented in adversarial proceedings in which the accused is entitled to assistance by legal counsel and allowed to cross-examine witnesses. If it turns out that there is sufficient prima facie evidence against the accused, the magistrate will refer to the Attorney General for indictment. If there is not sufficient evidence, the accused is discharged. It follows that at this stage the Court of Magistrates also does not determine the "guilt" of the accused.

79. The Government submitted that an issue would arise only if the investigating magistrate in the *in genere* inquiry was the same magistrate who sat on the Court of Magistrates as a Court of Criminal Judicature and whose role is in fact to determine the criminal charge, because this would mean that the person conducting the investigation would also determine the accused's guilt or innocence.

80. In any event, the Government also submitted that there was clearly no subjective partiality in the applicant's case.

2. The Court's assessment

81. According to the Court's case-law concerning the criminal limb of Article 6, the impartiality and independence guarantees arising from Article 6 § 1 apply only to organs determining the merits of a criminal charge (see *Previti v Italy*, (dec.), no. 45291/06, 18 December 2009, and *Priebke v. Italy* (dec.), no. 48799/99). Nonetheless, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings (see *Imbrioscia*, cited above, § 37).

82. Although investigating judges do not determine a "*criminal charge*", the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial. Accordingly, Article 6 § 1 may be held to be applicable to the investigation procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6 § 1 might not apply (see *Vera Fernández-Huidobro v. Spain*, (no. 74181/01, § 110, 6 January 2010). The Court highlights the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (ibid., § 111).

83. Concerning the substance of the complaint, the Court notes that the question of lack of judicial impartiality in the present case is functional in nature: namely, where the judge's personal conduct is not in any way impugned, but where, for instance, the exercise of different functions within the judicial process by the same person objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 121, ECHR 2005-XIII; and *Morice v. France* [GC], no. 29369/10, §§ 73-78, 23 April 2015).

84. The Court observes that such functional complaints generally arise in connection with the judge actually deciding on the applicant's guilt. In that context the Court has previously held that the mere fact that a judge has also made pre-trial decisions in the case cannot be taken as in itself justifying fears as to his impartiality (see *Hauschildt v. Denmark*, § 50, 24 May 1989, Series A no. 154). What matters is the extent and nature of the pre-trial measures taken by the judge (see *Fey v. Austria*, 24 February 1993, § 30, Series A no. 255-A). On the one hand, the presence on the bench of a member of the judiciary who had conducted the preliminary investigation with extensive investigation and questioning, provided grounds for some legitimate misgivings leading to a violation of Article 6 (see *De Cubber v. Belgium*, 26 October 1984, § 30, Series A no. 86, and *Pfeifer and Plankl v. Austria*, 25 February 1992, § 36, Series A no. 227). On the other hand, less onerous steps such as a marginal interrogation role

where it was not for the impugned person on the bench to assess the merits of the accusations at the earlier investigation stage, did not lead to the same conclusion (see *Fey*, cited above, §§ 31-36). One of the relevant factors was whether the judge at issue could have had a pre-formed opinion (on the applicant's guilt) which was liable to weigh heavily in the balance at the moment of the decision (see *De Cubber*, cited above, § 29, and *Fey*, cited above, § 34).

85. The Court notes that the complaint in the present case concerns the objective (functional) impartiality of the magistrate sitting in a Court of Magistrates as a Court of Criminal Inquiry, who committed the applicant for trial, given that she had also been the magistrate conducting the *in genere* inquiry, namely the investigation and collection of the evidence.

86. The function of this magistrate in committal proceedings was to hear the report of the police officer on oath, examine the accused, hear all the evidence in relation to the accused (in adversarial proceedings) and to finally determine whether there were sufficient grounds to commit the accused for trial, and if not to discharge him. Furthermore, the magistrate had the power to order the applicant's arrest if he had not already been remanded in custody, and to hear any bail requests. In the present case the magistrate concluded that there were sufficient grounds for the applicant to be indicted. The Court notes that in *Vera Fernández-Huidobro* it concluded that, in the specific context of the Spanish system – namely, where Spanish law required the investigating judge to be impartial, since his decisions could affect fundamental rights (adopting provisional measures in the proceedings, for instance as in that case the fact that the investigating judge placed the applicant in pre-trial detention) – and the specific context of that case, namely, where the applicant was judged at only one level of jurisdiction, the investigating judge had to be impartial. Given the similarities of the situation, despite them not being identical, the Court finds no reason not to apply its considerations in *Vera Fernández-Huidobro* also to the present circumstances. It therefore considers that the provision is applicable to the proceedings before the Court of Magistrates as a Court of Criminal Inquiry.

87. In view of its findings in the subsequent paragraphs it is not necessary to address the Government's argument concerning the applicant's withdrawal of his objection during the criminal proceedings in relation to this complaint.

88. The Court observes that the procedure in the applicant's case was in conformity with the norms of domestic law. Nevertheless, such a procedure may result in an accused being faced at committal stage with the same magistrate who had already made an assessment of the evidence and, thus, who may have a preconceived idea as to the applicant's guilt. Thus, the Court does not exclude, in the light of the case-law cited above, that an issue

may arise as to the objective (functional) impartiality of a magistrate in that position.

89. However, on the specific facts of the present case, the Court notes that, the duty magistrate conducting the *in genere* inquiry had not gone herself to the spot to conduct the inquest, she had merely appointed the police investigating officer to hold an on-site inquiry, and had appointed a number of experts to assist him. She had also acceded to the Commissioner of Police's request to order the collection of the relevant telephone data. While it was true that the police and the experts had to report their findings to her, given that on 21 April 2013 the Commissioner of Police requested the magistrate to close the inquest, she did not make any final findings (nor did she express herself as to the applicant's guilt) because the committal proceedings had commenced before the closing of the inquest. In consequence, in these circumstances, the Court considers that it cannot be said that the magistrate had already had a preconceived idea of the applicant's guilt. Neither did the magistrate take any other decision which had an impact on the trial, nor was she ever part of the prosecution.

90. In conclusion, in the light of the limited investigative steps taken by magistrate C. prior to the committal proceedings, the Court does not find that such fears as the applicant may have had as to her impartiality can be held to have been objectively justified.

91. It follows that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

92. The applicant also complained about the conflicting domestic judgments concerning the application of the *Salduz* case-law, which were delivered by the supreme court of the land, namely, the Constitutional Court, which ran counter to the principle of legal certainty as upheld in *Beian v. Romania* ((no. 1), no. 30658/05, ECHR 2007-V (extracts)).

93. The Government contested that argument.

A. Admissibility

94. The Government submitted that the applicant had failed to exhaust domestic remedies on account of this complaint concerning the conflicting case-law of the Constitutional Court, which was never brought before the domestic courts. They further noted that the applicant could still lodge such a complaint in a fresh set of constitutional proceedings, which under domestic rules are not subject to a time-limit. They considered that such proceedings would not be particularly lengthy – they gave examples of two Article 6 length cases which were decided within one year and two years and two months respectively.

95. The applicant noted that his complaint arose from the Constitutional Court judgment and thus could not have been included in that application. Subsequently he could not have been expected to institute a new set of constitutional redress proceedings, given the length of such proceedings, as often remarked upon also by this Court. He referred to the cases of *Suso Musa v. Malta* (no. 42337/12, 23 July 2013), and *Aden Ahmed v. Malta* (no. 55352/12, 23 July 2013). Moreover, the applicant had been one of the first to be subject to the impugned application of the law.

96. The Court notes that it has already established, in the context of Maltese cases before it, that even though Maltese domestic law provides for a remedy against a final judgment of the Constitutional Court, the length of the proceedings detracts from the effectiveness of that remedy and that, in view of the specific situation of the Constitutional Court in the domestic legal order, in certain circumstances it is not a remedy which is required to be exhausted (see *Saliba and Others v. Malta*, no. 20287/10, § 78, 22 November 2011; *Bellizzi v. Malta*, no. 46575/09, § 44, 21 June 2011; and *Dimech*, cited above, § 53).

97. In the present case the criminal proceedings against the applicant started in 2003 and ended in 2011, and were followed by another two years of constitutional redress proceedings. Moreover, given the nature of the complaint and the above-mentioned specific situation of the Constitutional Court in the domestic legal order, the Court sees no reason to find otherwise in the circumstances of the present case.

98. Accordingly, the Government's objection that domestic remedies have not been exhausted is dismissed.

99. 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

100. The applicant submitted that the Constitutional Court changed its interpretation of the *Salduz* judgment in 2012 and 2013 (see relevant domestic law) and different conclusions were then arrived at. He noted that these conflicting judgments ran counter to the principle of legal certainty. It was the Constitutional Court's role to create certainty; however, concerning the subject matter it had done just the opposite. The applicant relied on the case of *Beian*, cited above. He noted that in *The Police vs Alvin Privitera* of 11 April 2011, *The Police vs Esron Pullicino* of 12 April 2011, and *The Police v Mark Lombardi*, also of 12 April 2011, the Constitutional Court

held that the claimants had suffered a breach of their right to a fair trial under Article 6 of the Convention in so far as they had not been legally assisted. This interpretation was reversed in the judgment in the names of *Joseph Bugeja vs The Attorney General*, 14 January 2013; *The Police vs Tyron Fenech*, 22 February 2013; and *The Police vs Amanda Agius*, also of 22 February 2013, as well as in his own case. The interpretation was again reversed in *The Republic of Malta vs Alfred Camilleri* of 12 November 2012, albeit that decision was once again overturned.

101. The applicant considered that contrary to the Government's submission no distinction could be drawn between judgments concerning criminal cases which had been concluded and those concerning criminal cases still pending, since the legal issue to be determined was the same.

(b) The Government

102. The Government submitted that the case did not concern an uncertainty in the interpretation of the law, but an alleged uncertainty following a judgment delivered by the Court. In their view the applicant disagreed with the findings in his case and was attempting to fabricate a complaint based on the judicial interpretation of that judgment.

103. The Government submitted that the Court's judgments had to be interpreted by domestic courts with reference to specific circumstances of each case before them. They noted that the facts of the cases decided in 2011 had been different to those decided subsequently.

104. Moreover, the Government submitted that it was a natural consequence of a judicial system based on various strata of jurisdiction for judgments to vary over the years (see *Santos Pinto v. Portugal*, no. 39005/04, 20 May 2008). The Government noted that in *Albu and Others v. Romania* (nos. 34796/09 and others, 10 May 2012) the Court reiterated the general principles applicable in cases concerning conflicting court decisions. It emphasised that it was not the Court's function to deal with errors of fact or law allegedly committed by a national court, unless they had infringed rights and freedoms protected by the Convention. Furthermore, in that judgment the Court reiterated that the possibility of conflicting court decisions was an inherent trait of any judicial system and that it was important to establish whether 'profound and long-standing differences' existed in the case-law of the domestic courts, whether the domestic law provided for machinery for overcoming those inconsistencies, whether that machinery had been applied, and if appropriate to what effect. A key consideration in assessing the above was whether certain stability in legal situations had been ensured, as legal certainty contributed to public confidence in the courts. However, the requirements of legal certainty did not create a right of consistency of case-law, given that case-law development was not, in itself, contrary to the proper administration of justice. Achieving consistency of the law might take time, and periods of

conflicting case-law might therefore be tolerated without undermining legal certainty.

105. The Government submitted that a distinction had to be made between those cases which concerned criminal proceedings which had come to an end and those which concerned criminal proceedings which were still ongoing. The applicant's criminal case had come to an end when constitutional proceedings were undertaken, unlike those cited by him which were delivered in 2011, thus, his case had to be compared like with like, namely the following: *Gregory Robert Eyre vs Attorney General*, decided by the Civil Court (First Hall) in its constitutional jurisdiction on 27 June 2012; *Simon Xuereb vs Attorney General*, decided by the Constitutional Court on 28 June 2012; *Joseph Bugeja vs Attorney General*, decided by the Constitutional Court on 14 January 2013; *Matthew Lanzon vs Commissioner of Police*, decided by the Constitutional Court on 25 February 2013; *Carmel Joseph Farrugia vs Attorney General*, decided by the Constitutional Court on 5 April 2013; *John Attard vs the Honourable Prime Minister and the Attorney General*, decided by the Constitutional Court on 31 May 2013; and *Geoffrey Galea vs Attorney General* decided by the Constitutional Court on 28 June 2013. In all these cases the courts had found no violation of the provision at issue. Thus, there existed no judgment finding such a violation in respect of criminal cases that had been concluded. Furthermore, it had to be noted that the 2011 cases cited by the applicant concerned vulnerable people due to their age, and that statements made without legal assistance constituted the sole evidence brought against them.

106. In the Government's view, contrary to the applicant's assertion, the Constitutional Court managed to create legal certainty by establishing a pattern in the manner in which cases concerning the subject matter at issue were being dealt with. From an analysis of the judgments it was clear that the Constitutional Court attributed importance to the vulnerability of the individual in those cases where the only evidence that the prosecution had was an admission in a statement. The Constitutional Court has also established that each and every case is considered on its own merits and if it transpires that the person is not a vulnerable person or there is other evidence besides an admission in a statement, the Constitutional Court did not find an Article 6 violation. Thus, there were no divergences in the case-law of the Constitutional Court.

2. The Court's assessment

(a) General principles

107. One of the fundamental aspects of the rule of law is the principle of legal certainty (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII), which, *inter alia*, guarantees a certain stability in legal

situations and contributes to public confidence in the courts (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 57, 20 October 2011). The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Vinčić and Others v. Serbia*, nos. 44698/06 and others, § 56, 1 December 2009). However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see *Unédic v. France*, no. 20153/04, § 74, 18 December 2008), and case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Atanasovski v. the former Yugoslav Republic of Macedonia*, no. 36815/03, § 38, 14 January 2010).

108. The Court has been called upon a number of times to examine cases concerning conflicting court decisions and has thus had an opportunity to pronounce judgment on the conditions in which conflicting decisions of domestic supreme courts were in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention (see *Paduraru v. Romania*, no. 63252/00, ECHR 2005-XII (extracts); *Beian*, cited above; *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, 2 July 2009; *Pérez Arias v. Spain*, no. 32978/03, 28 June 2007; *Ştefan and Ştef v. Romania*, nos. 24428/03 and 26977/03, 27 January 2009; *Taussik v. the Czech Republic* (dec.), no. 42162/02, 2 December 2008; and *Tudor Tudor v. Romania*, no. 21911/03, 24 March 2009). In so doing it has explained the criteria that guided its assessment, which consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied, and if appropriate to what effect (see *Iordan Iordanov and Others*, cited above, §§ 49-50).

(b) Application to the present case

109. In reply to the Government's arguments (paragraph 105 above), the Court notes that the Constitutional Court's findings in the applicant's case were not dependent on the fact that his proceedings had ended. Indeed, irrespective of the statements made by the first-instance constitutional jurisdiction concerning the applicant's case being *res judicata*, the Constitutional Court went on to examine and determine the merits of the applicant's complaint in detail and in the light of the relevant case-law. Thus, the Court finds no reason to distinguish the examination of this complaint from that made in the case of *Dimech*, cited above.

110. Having analysed the judgments brought to the Court's attention the Court observes that the difference the applicant complains of resides not in the factual situations examined by the domestic courts (see, conversely, *Erol Uçar v. Turkey* (dec.), no. 12960/05, 29 September 2009) – in so far as all the claimants were subject to the blanket provision – but in the application of the law (based on case-law, namely the case-law of this Court). It also appears that the Constitutional Court originally followed the *Salduz* judgment strictly. However, at some point, notably from 2012 onwards, the Constitutional Court "restricted" its interpretation of the *Salduz* judgment, with the consequence that a number of persons who were subject to the systemic ban in Malta, and who therefore were not assisted by a lawyer when they made their statements, did not have the benefit of favourable judgments remedying their situation. This interpretation appears to have remained the practice thereafter, in so far as the only example brought by the applicant to demonstrate a further inconsistency was the case of *The Republic of Malta vs Alfred Camilleri* of 12 November 2012, which was however overturned by the Constitutional Court pending proceedings before this Court.

111. Thus, as was the case in the recent *Dimech* judgment (cited above), in the Court's view, unlike in *Beian* (cited above), the present case does not deal with divergent approaches by the supreme court – in the present case the Constitutional Court, which is the highest court in Malta – which could create jurisprudential uncertainty, depriving the applicant of the benefits arising from the law. The situation in the present case constituted a reversal of case-law. In this connection the Court reiterates that, as held in *S.S. Balıklıçeşme Beldesi Tarım Kalkınma Kooperatifi and Others v. Turkey* (nos. 3573/05, 3617/05, 9667/05, 9884/05, 9891/05, 10167/05, 10228/05, 17258/05, 17260/05, 17262/05, 17275/05, 17290/05 and 17293/05, 30 November 2010), in the absence of arbitrariness, a reversal of case-law falls within the discretionary powers of the domestic courts, notably in countries which have a system of written law (as in Malta) and which are not, in theory, bound by precedent (see also *Torri and Others v. Italy*, (dec.), nos. 11838/07 and 12302/07, § 42, 24 January 2012, and *Yiğit v Turkey*, (dec.) no. 39529/10, §§ 21-22, 14 April 2014).

112. In *Dimech*, having examined the circumstances, which also pertain to this case, the Court held that no issue arose in respect of Article 6 § 1 as regards the notion of legal certainty and accordingly there was no violation of that provision (§ 69).

113. The Court finds no reason to hold otherwise in the present case. There has therefore not been a violation of Article 6 § 1.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 6.

114. The applicant further complained that he had been treated differently from others in his situation as evidenced by the conflicting constitutional judgments, without an objective and reasonable justification, contrary to Article 14 of the Convention, which reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

115. The Government contested that argument.

A. The parties' submissions

116. The applicant considered that despite his being in an identical, analogous or relevantly similar situation to other persons who had not been assisted by a lawyer, the Constitutional Court had not found in his favour. That decision had been subjective and not based on any objective justification, and therefore was discriminatory. He noted discrimination needed not be based on one specific ground, although in the present case, according to the Government, it appeared that the discrimination was on the basis of age.

117. The Government submitted that the applicant had failed to exhaust domestic remedies in respect of his complaint, which had never been brought before the domestic courts. They further noted that the applicant could still lodge such a complaint in a fresh set of constitutional proceedings, which under domestic rules were not subject to a time-limit.

118. The Government submitted that if the Court found no violation of the substantive provision it could not find a violation of Article 14. Moreover, the applicant had not provided evidence linking the alleged discrimination with any of the grounds provided for by Article 14. Lastly, the Government submitted that the applicant had not proved that he had been treated differently from others in the same situation, namely mature persons who had given a statement during the investigation stage but had not admitted the offence, and whose proceedings contained other evidence in connection with the offence. In fact the applicant was treated the same as others in that position, and therefore had not suffered any discrimination.

B. The Court's assessment

119. The Court refers to the considerations it set out above (see paragraphs 96-98 above) and therefore holds that the Government's objection that domestic remedies have not been exhausted must be rejected.

120. The Court reiterates that although the application of Article 14 does not presuppose a breach of the other substantive provisions of the Convention and its Protocols – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see *Mintoff v. Malta*, (dec.), no. 4566/07, 26 June 2007, and *Zammit Maempel v. Malta*, no. 24202/10, §§ 81-82, 22 November 2011).

121. In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or relevantly similar situations (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007, and *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008). Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010). The Court also points out that the grounds on which those differences of treatment are based are relevant in the context of Article 14. Only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *O'Donoghue and Others v. the United Kingdom*, no. 34848/07, § 101, ECHR 2010 (extracts)).

122. The Court notes that, as Article 6 applies in the present case, it follows that Article 14, in conjunction with the latter provision, is also applicable.

123. The Court observes that the applicant, like others in his situation, has been affected by a general ban. There is therefore a common denominator, and the applicant can, to an extent, be considered as being in an analogous situation. However, it is also true that the domestic judgments he refers to as a means of comparison concerned individuals whose situation was different from his; in particular, they concerned mostly young persons who had given statements at the investigation stage and whose proceedings, which had not come to an end, contained no other evidence in connection with the offence. Thus, despite the fact that the applicant claims that he was discriminated against possibly on the basis of age, the Court considers that this is not the sole criterion on which the domestic courts based their differentiation of the cases (see also, *Dimech*, cited above, § 79).

124. Moreover, while the Court has already held that the applicant has suffered a violation of his Article 6 rights (6 § 3 (c) taken in conjunction with Article 6 § 1, see paragraph 63 above) as a result of his not having been assisted by a lawyer, the Court did not find that an issue arose under the Convention as a result of the reversal of the case-law by the domestic courts. Following that reversal it appears that all cases of the same kind were examined on the basis of the same legal principles and criteria of

judicial assessment (see *Dimech*, cited above, § 80), namely the new interpretation given to this Court's case-law. It also appears that those cases that were similar to the applicant's case were rejected.

125. It follows that any difference in treatment was objectively and reasonably justified on the basis of the new interpretation given by the domestic courts concerning the relevant safeguard, which (however questionable it may be on the merits) must be considered as falling within the margin of appreciation of a State and therefore not contrary to Article 14 (see *Pérez Arias*, cited above, § 28 and *Dimech*, cited above, § 81). Furthermore, it does not appear from the case file that there was any discrimination against the applicant on any other grounds (see, in similar circumstances, ibid., and *David and Others v. Romania*, (dec.), no. 54577/07, 9 April 2013).

126. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

127. Lastly, the applicant complained in a confused manner under Article 13 of the Convention. Arguing as though his case was still pending before the criminal courts, he considered that the only effective remedy for a breach of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 would be a trial without the use of the impugned evidence. He noted that in *Salduz* when the Court had found a violation it had considered a retrial as the appropriate remedy ensuring that any used statements were those obtained with legal assistance.

128. The Court notes primarily that in the applicant's case criminal proceedings had come to an end when he brought constitutional redress proceedings, thus his arguments in connection with pending criminal proceedings are out of place. Secondly, his arguments concerning the type of redress which should be meted out by the constitutional jurisdictions are misconceived in so far as they would only be of relevance had the constitutional jurisdictions found in the applicant's favour. This was not so in the present case and the complaint is therefore of little pertinence in connection with the facts of the instant case, where the Constitutional Court found against the applicant (see *Dimech*, § 84).

129. Further, it has not been argued under Article 13 that the constitutional proceedings undertaken by the applicant had no prospects of success. The Court observes that while it is true that recent case-law had been in the applicant's disfavour, and was, to the Court's knowledge, consistently applied, it has not been argued that the domestic courts would undoubtedly have dismissed his complaint. The Court further notes that nothing seems to indicate that, had the constitutional jurisdictions found in favour of the applicant they would not have awarded the relevant redress,

including if necessary, a retrial (compare, *mutatis mutandis*, Constitutional Court judgment no. 281/2004/1 of 18 March 2005).

130. Nevertheless, what is relevant to the circumstances pertaining to the present case, namely, where the domestic courts rejected the applicant's claim, is that according to the Court's case-law the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see *Sürmeli v. Germany* [GC], no. 75529/01, § 98, ECHR 2006-VII) and the mere fact that an applicant's claim fails is not in itself sufficient to render the remedy ineffective (see *Amann v. Switzerland*, [GC], no. 27798/95, §§ 88-89, ECHR 2002-II).

131. Thus, in the current scenario, the fact that the Constitutional Court rejected the applicant's claim does not render such a remedy ineffective; the complaint must therefore be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

132. 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

133. The applicant claimed "non-pecuniary damage as well as pecuniary damage in the amount of expenses made in the local courts".

134. The Government noted that the applicant's claim for non-pecuniary damage had not been quantified. They considered that a finding of a violation was sufficient just satisfaction, and that, in any event, such an award should not exceed EUR 1,000.

135. Ruling on an equitable basis, the Court awards the applicant EUR 2,500 in non-pecuniary damage.

B. Costs and expenses

136. The applicant claimed EUR 2,185 for the costs and expenses incurred before the domestic courts in respect of the constitutional redress proceedings.

137. The Government submitted that the applicant had failed to prove that the costs amounting to EUR 1,076 representing Government costs during the constitutional proceedings had been paid by the applicant.

138. 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 that the sum mentioned by the Government remains payable domestically, the Court considers it reasonable to award the sum of EUR 2,185 covering costs and expenses in the domestic proceedings.

C. Default interest

139. 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 complaint under Article 6 § 3 in conjunction with Article 6 § 1 about the lack of legal assistance to the applicant, that under Article 6 § 1 about the lack of legal assistance to third parties who were called as witnesses against the applicant in his criminal proceedings and that under Article 6 § 1 in respect of the constitutional proceedings admissible and the complaints under Article 6 § 1 in respect of the impartiality requirement, and Articles 13 and 14 in conjunction with Article 6 inadmissible;

2. *Holds*, unanimously, that there has been a violation of Article 6 § 3 in conjunction with Article 6 § 1 of the Convention;

3. *Holds*, unanimously, that there is no need to examine the merits of the complaint under Article 6 § 1 about the lack of legal assistance to third parties who were called as witnesses against the applicant in his criminal proceedings;

4. *Holds*, by six votes to one that there has been no violation of Article 6 § 1 of the Convention in respect of legal certainty concerning the constitutional proceedings;

5. *Holds*, unanimously,
   (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 amount
      (i) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in non-pecuniary damage;

(ii) EUR 2,185 (two thousand one hundred and eighty-five 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

Done in English, and notified in writing on 12 January 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	András Sajó
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment.

A.S.
F.E.P.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. The core issue of *Borg* is the question of legal certainty in the Maltese Constitutional Court's case-law after *Salduz*[1]. Having applied the *Salduz* judgment literally in three consecutive cases, the Constitutional Court changed its case-law, reading into the Grand Chamber case a significant caveat, in the sense that *Salduz* was only applicable in "exceptional" cases and to "vulnerable" persons. The crucial questions that inevitably come to mind are the following: what prompted this reversal of the case-law? Was this reversal of the case-law compatible with the legal expectations of citizens, lawyers and defendants? Was it within the margin of appreciation of the respondent State? Was it compatible with the letter, the spirit and the legal force of *Salduz*?

2. The case is further complicated in view of the fact that these intimately linked questions have been decided by the European Court of Human Rights (the Court) in *Dimech v. Malta* and other similar complaints have subsequently been rejected by means of the Single Judge formation, on the basis of *Dimech*[2]. In the present case, the Chamber confirms and reiterates *Dimech*, in so far as the reversal of the Constitutional Court's case-law concerning the interpretation of the Convention and, more specifically, the above-mentioned Grand Chamber judgment did not call into question the principle of legal certainty. In *Dimech*, the Chamber stated clearly that:

> "In the present case the Constitutional Court of Malta departed from the principles established by the Court, a course of action which it was, in theory, free to undertake – although it removes any opportunity for the domestic authorities to make matters right in the domestic system and forces an applicant to bring proceedings before the Court under Article 34 of the Convention. Nevertheless, the Court considers that the way that domestic courts apply relevant case-law of this Court to domestic proceedings cannot by itself raise an issue of legal certainty at the domestic level. Importantly, the Court notes that there is no indication that in the national court's application of their interpretation of this Court's case-law in the applicants' case, there was any arbitrariness capable of raising an issue under the Convention. Indeed, it appears that within their autonomous interpretation of the case-law, the domestic courts were coherent and respected the criteria of judicial assessment."

In these circumstances the Court considered that no issue arose in respect of Article 6 § 1 of the European Convention on Human Rights (the Convention) as regards the notion of legal certainty in those proceedings. There had accordingly been no violation of that provision, according to the Chamber's unanimous judgment. The same conclusion was reached by the

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[1] *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.
[2] *Dimech v. Malta*, no. 34373/13, 2 April 2015.

majority in the present case, on the basis of the *Dimech* reasoning, to which this Chamber explicitly refers in paragraph 112 of the judgment.

3. I dissent in *Borg*, because I am of the view that *Dimech* seriously undermines the Convention system of human rights protection and should therefore be overruled. As I wrote in *Herrmann*, overruling a case in which the Court has reached a particular conclusion is a "very serious matter", which places a special burden on judges to demonstrate not only that the finding in question is incorrect, but that it would be appropriate to take the additional step of overruling it[3]. I will try to meet that burden in the following pages.

The application of *Salduz* in Malta

4. The *Salduz v. Turkey* judgment established that in order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 § 1 of the Convention requires that, as a rule, access to a lawyer should be provided as from the first questioning of a suspect by the police. This case-law was subsequently confirmed with regard to other Contracting Parties to the Convention, such as France[4], Belgium[5] and Monaco[6], and further developed in *Dayanan*[7], which found a violation despite the fact that the applicant had remained silent while in police custody, and *Yesilkaya*[8], which went so far as finding a violation despite there being no admission of guilt in the statements given by the applicant.

5. By Act III of 2002 the Maltese Parliament introduced the right to legal assistance at the pre-trial stage. However, the law only came into force in 2010 by means of Legal Notice 35 of 2010. The relevant provision of Article 355AT of the Criminal Code was couched in broad terms, referring to "a person arrested and held in police custody at a police station or other authorised place of detention".

6. In *Alvin Privitera*[9], which was a case against an eighteen year old, the Constitutional Court clearly stated that Mr Salduz's young age had not been the decisive factor for the finding in that case, but merely a further argument[10]. This position of the Constitutional Court was reiterated in *Esron Pullicino*[11]. In *Mark Lombardi*[12], which was not a case against a

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[3] *Herrmann v. Germany* [GC], no. 9300/07, 26 June 2012.
[4] *Brusco v. France*, no. 1466/07, § 54, 14 October 2010.
[5] *Stojkovic v. France and Belgium*, no. 25303/08, §§ 51-57, 27 October 2011.
[6] *Navone and Others v. Monaco*, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013
[7] *Dayanan v. Turkey*, no. 7377/03, 13 October 2009.
[8] *Yeşilkaya v. Turkey*, no. 59780/00, 8 December 2009.
[9] *Police vs Alvin Privitera*, Constitutional Court judgment of 11 April 2011.
[10] See paragraph 39 of the present judgment.
[11] *Police vs Esron Pullicino*, Constitutional Court judgment of 12 April 2011.

minor or vulnerable person, the Constitutional Court quite rightly noted the evolution of the Court's case-law, citing *Dayanan* and *Yesilkaya*, and *Cadder v. Her Majesty's Advocate*, which concerned the same situation in the Scottish legal system and in which the United Kingdom Supreme Court had agreed to follow *Salduz* to the letter[13].

7. After its laudable judgments of 2011, the Constitutional Court started to consider *Salduz* as an "exceptional" case and to apply it only when the defendant was a "vulnerable" person, for example due to his young age[14]. Suddenly, out of the blue, without any change in this Court's case-law, the Maltese Constitutional Court changed the domestic case-law in a direction that was contrary to *Salduz*, depriving the defendants of their right to a lawyer during police arrest or pre-trial custody or detention. In spite of the crystal-clear course taken by the Court towards reinforcing the right to legal assistance for defendants from the very beginning of the investigation and particularly when in police custody or during police questioning, the Constitutional Court of Malta chose to contradict the letter and the spirit of the Grand Chamber's judgment, introducing a broadly formulated caveat to its applicability: the vulnerability of the defendant. No plausible grounds were given for this radical change from the same Constitutional Court's prior case-law, which had specifically denied the "decisive" role of the age or vulnerability factor in the determination of the *Salduz* right to legal assistance. Worse still, no specifics were provided as to the relevant characteristics of vulnerable persons. On this fragile legal basis, the impact of the Grand Chamber case-law was, in practical terms, limited to "exceptional" cases.

8. In the light of this restrictive understanding of *Salduz*, the Government argued that the Constitutional Court had attached weight to the defendant's vulnerability in those cases where it found a violation of the defendant's right to legal assistance, which was not the case with the applicant. The Government argued that it could not be claimed that the applicant felt intimidated by the presence of police officers, since he was not a first-time offender and had been convicted previously. The Government further added that the applicant chose not to reply to certain questions and categorically denied any connection with the drug found on the two couriers, evidence, in their view, that the applicant understood what had been said and the consequences of what he was saying. The

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[12] *Police v Mark Lombardi*, Constitutional Court judgment of 12 April 2011.

[13] *Cadder v. Her Majesty's Advocate* [2010] UKSC 4. The Supreme Court held that Mr Cadder's rights under Article 6(1) of the ECHR had been breached because he had been denied access to a solicitor before he was interviewed by the Scottish police.

[14] See, for example, *Charles Stephen Muscat vs The Attorney General*, 8 October 2012; *Joseph Bugeja vs The Attorney General*, 14 January 2013; *The Police vs Tyron Fenech*, 22 February 2013; and *The Police vs Amanda Agius*, also of 22 February 2013.

Government also submitted that at the time of the police interview the law did not provide for the possibility of drawing negative inferences from the questioned person's silence. Finally, the Government indicated that the Constitutional Court found a violation in cases where defendants were convicted on the sole basis of the statement in which they had admitted to the offence, while in the present applicant's case he had denied any involvement in the offence.

In the Government's view, all these factors distinguished the present case from previous cases in which the Constitutional Court had found a violation of the defendant's right to legal assistance[15]. This line of argumentation is unfounded, since all these allegations, even if proven, are irrelevant in view of *Yesilkaya*, which acknowledges the right to legal assistance also when the defendant denies any involvement in the offence. Moreover, the *Salduz* principle does not hinge on the age or vulnerability of the defendant, as the Constitutional Court explicitly admitted in *Alvin Privitera*, nor on the defendant's previous criminal record, nor on the possible inferences drawn from his or her silence.

Ultimately, the Government's essential point is that the Court's judgments "have to be interpreted with reference to the particular facts of the case which the national courts are analysing. Such [a] case-by-case approach does not run counter to the principle of judicial certainty, as diametrically opposed judgments presuppose that these were given in different cases."[16] In other words, the Government is claiming that *Salduz* did not posit a principle of law and therefore national courts may depart from it when the facts of a case are not exactly the same as those in *Salduz*. This view not only downgrades *Salduz* to the rank of a strictly fact-sensitive understatement by the Grand Chamber, but, worse still, reflects a wrong and worrying methodological perspective on the Court's role and the legal force of its judgments[17].

The consequences of the domestic departure from *Salduz*

9. As a matter of fact, *Dimech* quite rightly noted the Constitutional Court's departure from *Salduz*[18]. But without further ado it went on to admit

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[15] See page 11 of the Government's observations.
[16] See page 20 of the Government's observations.
[17] In the Government's further observations, it is stressed that "the Court has always delved into the particular facts of the case and circumstances of the case in order to assess whether a violation occurred". The Government is defending a casuistic methodological reading of the motivation of the Court's judgments, which I have already criticised in my separate opinion in *Valentin Campeanu v. Romania* [GC].
[18] Paragraph 68 of *Dimech*, cited above: "In the present case the Constitutional Court departed from the principles established by the Court".

that the Contracting Parties to the Convention are "free" to depart from the Court's case-law[19] and even that it "falls within their margin of appreciation" to do so in the case of a Grand Chamber case like *Salduz*[20].

10. Were this to be true, the Convention system of human rights protection would be a mere illusion. Should the domestic authorities' "autonomous" interpretation of the Convention go so far that they could disregard the letter and the spirit of the Court's judgments, the Court would be deprived of its jurisdictional power. Were the margin of appreciation to allow for such arbitrary restriction of the legal effect of the Court's judgments, the intention of the founding fathers of the Convention to create a system of "collective enforcement of certain of the rights stated in the Universal Declaration" on the basis of a "common heritage of political traditions, ideals, freedom and the rule of law" would be thwarted. Should the Contracting Parties be free to follow the Court's case-law if, when and so far as this pleased the respective Governments or local courts, the "achievement of greater unity" between these Parties would be an illusory goal, each of the Parties choosing at any given historical moment the extent to which they wished to take part in the "common understating and observance of ... human rights" which is at the heart of the European human rights protection system. Were the principle of the subsidiarity of the Court's review to be amenable to such discretionary manipulation of the Court's case-law, the Court would be downgraded to the position of a mere commission tasked with recommending to the Contracting Parties to the Convention the steps they could possibly take for the protection of human rights and fundamental freedoms, the States remaining free to take into consideration convenient judgments and to ignore inconvenient judgments delivered by this Court. To paraphrase *Loizidou*, such a system, which would enable States to qualify the binding nature of the Court's judgments, would not only seriously weaken the role of the Court in the discharge of its functions, but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)[21].

11. Having found under Article 6 that there existed no objective and reasonable justification for the different treatment of defendants on the basis of the Constitutional Court's new interpretation, I do not consider that a new, different issue arose under Article 14. Hence, I voted for the

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[19] Paragraph 68 of *Dimech*, cited above: "a course of action which it was, in theory, free to undertake".

[20] Paragraph 81 of *Dimech*, cited above, repeated in paragraph 127 of the present judgment: "which (however questionable it may be on the merits) must be considered as falling within the margin of appreciation of a State and therefore not contrary to Article 14 (see *Pérez Arias*, cited above, § 28 and *Dimech*, cited above, § 81)."

[21] *Loizidou v. Turkey (preliminary objections)* [GC], no. 15318/89, § 75, 23 March 1995. On the role of the Court as the European Constitutional Court, see my separate opinion in *Fabris v. France* [GC], no. 16574/08, 7 February 2013.

inadmissibility of the Article 14 complaint, on the assumption that the finding of a violation of Article 6 due to the breach of the principle of legality suffices for the purpose of the protection of human rights in the present case.

The insufficiency of the national remedies

12. In *Dimech*, the Chamber concluded that the new Constitutional Court case-law "removes any opportunity for the domestic authorities to make matters right in the domestic system and forces" applicants to come to Strasbourg[22]. In other words, the constitutional remedy was useless. Yet in paragraph 131 of the present judgment the Chamber takes the opposite position, accepting that an appeal to the Constitutional Court could be effective in order to remedy the violation of *Salduz*. It seems to me that paragraph 68 of *Dimech* clearly contradicts paragraph 131 of *Borg*. The optimistic approach in *Borg* is not backed up by the pessimistic assessment in *Dimech*. Although the majority in the present judgment carefully avoided the problematic statements made in paragraph 68 of *Dimech*, the inconsistency between the two judgments remains.

13. I voted for the conclusion that the Article 13 complaint was inadmissible for two reasons: firstly, because the applicant's complaint was confused, in that he argued as though his case was still pending before the domestic courts and, secondly, because his complaint was not even communicated to the Government[23]. Had it been clearly argued that the constitutional proceedings undertaken by the applicant were useless and had this complaint been communicated, I would have found the corresponding violation.

The lack of impartiality of the magistrate sitting in a Court of Magistrates as a Court of Criminal Inquiry

14. The applicant claimed that the magistrate conducting the *in genere* inquiry was the same individual who sat in the Court of Magistrates as a Court of Criminal Inquiry and decided that the applicant should be indicted and committed to trial. Affirming that an issue may arise as to the

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[22] Paragraph 68 of *Dimech*, cited above.

[23] In *Hidir Durmaz v. Turkey*, no. 26291/05, 12 September 2011, I explained when a separate opinion may be joined with regard to inadmissibility issues dealt with in judgments. The 115th plenary administrative session of 21 October 2013 voted a "Recommendation" which "invites judges to avoid as far as possible addressing in their separate opinions complaints that have been declared inadmissible". This is evidently not binding (Article 45 of the Convention).

magistrate's objective impartiality in this scenario[24], the Chamber nonetheless rejected the complaint as inadmissible on "the specific facts of the case", arguing that the investigating magistrate merely appointed a police investigating officer to hold an on-site inquiry and a number of experts to assist him, and also ordered the collection of the relevant telephone data, but did not "make any final findings (nor did she express herself as to the applicant's guilt)"[25].

15. I disagree with the Chamber's approach[26]. In my view, no issue of impartiality arises and the Court did not need to decide the complaint on the specific facts of this case, for the simple reason that the magistrate sitting on the Court of Magistrates as a Court of Criminal Inquiry does not determine the guilt of the defendant. The determination of the criminal charge, which is the task of the magistrate sitting on the Court of Magistrates as a Court of Criminal Inquiry, should not be confused with the determination of the guilt of the defendant, which is the task of the magistrate sitting on the Court of Magistrates as a Court of Criminal Judicature. The former assessment is reached on the basis of sufficient grounds for indictment and the latter is based on evidence beyond reasonable doubt.

16. Thus, the degree of involvement of the magistrate sitting on the Court of Magistrates as a Court of Criminal Inquiry in the investigation itself is irrelevant. It is immaterial for the purpose of assessing this magistrate's objective impartiality what kind of investigative steps he or she undertook or ordered to be undertaken during the inquest, or whether he or she took any other decision which had or would have had an impact on the trial. It is also not decisive that the committal proceedings had commenced before the closing of the inquest.

17. To put it in theoretical terms, the objective impartiality test is failed when the defendant committed by the magistrate sitting on the Court of Magistrates as a Court of Criminal Inquiry faces the same person as trial judge. Had the magistrate conducting the committal proceedings been the same magistrate who presided over the Court of Magistrates as a Court of Criminal Judicature, serious doubt could be raised about his or her objective impartiality.

18. Differently, if the same person acts as investigating magistrate in the *in genere* inquiry, but does not deliver the decision of committal for trial, and subsequently comes into play as a trial judge in the Court of Magistrates as a Court of Criminal Judicature, the objective impartiality of the

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[24] See paragraph 89 of the judgment.

[25] See paragraph 90 of the judgment.

[26] I do not even consider here the separate question of the applicant's victim status with regard to this specific complaint, which is very doubtful, since he withdrew the plea of lack of impartiality during the criminal proceedings, as is clear from the criminal court's record of 13 July 2006.

magistrate is not necessarily subject to doubt. In this scenario, the objective impartiality test will hinge on the type of decisions taken by the investigating magistrate, which might raise a plausible suspicion as to his or her preconceived mindset. For example, an investigating magistrate who has ordered the arrest of a person whom he or she considered to be guilty or against whom there was sufficient circumstantial evidence (Article 554 of the Criminal Code) should not intervene in the trial, since that previous order would instil serious doubts in the mind of the accused and gravely undermine the trial judge's objective impartiality.

19. Lastly, the *Vera Férnandez-Huidoro* case is of no importance whatsoever for the present case[27]. In that case, the Court examined whether the post held by a central investigating judge within the Ministry of the Interior could have raised an issue as to his objective impartiality once he had returned to his post as a judge and taken over the investigation of the pending criminal case. After leaving political office to resume the investigation, the investigating judge did not satisfy the impartiality requirement of Article 6. Nevertheless, the Supreme Court and, in particular, the investigating judge appointed from that court's Criminal Division, had corrected the defect in question by conducting a fresh investigation from the outset. During that process, most of the investigative steps had been carried out anew and many further measures had been taken, and the parties had had the opportunity, both before the designated investigating judge and at the trial in the Supreme Court, to confirm or contradict the statements previously taken from them, in a procedure offering all the necessary guarantees. Hence, the allegations of lack of impartiality for political reasons in the trial of a Minister of State for Security at the Ministry of the Interior convicted of misappropriation of public funds and false imprisonment, although grounded, did not suffice to find a violation of Article 6 of the Convention. The Court concluded, by four votes to three, that there had been no violation of Article 6 § 1. In the present case, no political suspicion lingered over the magistrate sitting in the Court of Magistrates as a Court of Criminal Inquiry, nor had she any previous ministerial tasks which could raise a doubt about her objective impartiality.

The lack of legal assistance to third persons called as witnesses against the applicant

20. The applicant claimed that he had no guarantee that statements made by witnesses without legal assistance were delivered freely. The Chamber

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[27] *Vera Férnandez-Huidoro v. Spain*, no. 74181/01, 6 January 2010, cited in paragraphs 83 and 87 of the present judgment.

did not wish to address the merits of this complaint, finding it unnecessary to do so, having regard to the findings on the lack of legal assistance to the applicant. In my opinion, the question is much simpler: the applicant had not had victim status since his withdrawal of the related plea on 30 October 2006[28]. In any case, the complaint is unfounded, in view of the fact that the witnesses' statements were confirmed under oath before the magistrate conducting the inquiry and repeated during trial, where the witnesses were cross-examined. That is why I also could vote with the majority on this point.

Conclusion

21. To sum up, the interpretation of *Salduz* by the Constitutional Court of Malta is in breach of the "constitutional instrument of European public order"[29] and its "peremptory character"[30]. The present judgment reiterates *Dimech*, which is wrong and should be reversed. If *Dimech* opened the door to legal uncertainty, the present judgment keeps it wide open. The Chamber had an opportunity to correct a wrong which seriously harms the Court's authority, but unfortunately it has not seized the occasion. Be that as it may, in the light of the repetitive findings of violations of Article 6 § 3 (c) of the Convention by this Court, the Maltese Constitutional Court should correct its trajectory and return to its initial Convention-friendly interpretation of *Salduz*. For the purposes of this case, it should be reiterated that a retrial is the most appropriate remedy, as the Court determined both in *Salduz* and *Yesilkaya.*

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[28] See paragraph 14 of the judgment.
[29] *Loizidou v. Turkey (preliminary objections)* [GC], cited above, § 75.
[30] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, no. 45036/98, § 154, 30 June 2005.