

PERMANENT REPRESENTATION OF MALTA TO THE
COUNCIL OF EUROPE

N.V. No. 002/06

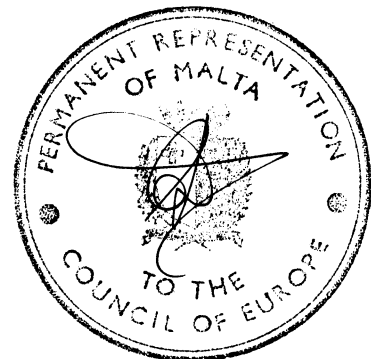
The Permanent Representation of Malta to the Council of Europe presents its compliments to the Council of Europe and has the honour to refer to the letter of the Secretary General of the Council of Europe addressed to the Hon. Mr. Michael Frendo, Maltese Minister for Foreign Affairs of Malta, dated 21 November 2005, regarding explanations requested under the authority of Article 52 of the European Convention on Human Rights.

The Permanent Representation has the honour to enclose herewith the original letter by the Hon. Mr. M. Frendo addressed to the Secretary General of the Council of Europe, a copy of which was transmitted to the office of the Secretary General on 21 February 2006.

The Permanent Representation of Malta to the Council of Europe avails itself of this opportunity to renew to the Council of Europe, the assurances of its highest consideration.

Strasbourg, 27 February 2006

The Council of Europe
STRASBOURG



MINISTERU
TA' L-AFFARIJJIET BARRANIN



MINISTRY
OF FOREIGN AFFAIRS

MALTA

Il-Ministru

The Minister

20 February 2006

Dear Secretary General,

I am writing in reply to your correspondence dated 21 November 2005 wherein, under the powers conferred to you by Article 52 of the European Convention on Human Rights, you asked the Government of Malta to furnish explanations on the effective implementation of particular provisions of the Convention in domestic law.

I am attaching a copy of the report compiled by the relevant government bodies in response to your queries.

A handwritten signature in black ink that reads 'Michael Frendo'. Below the signature is a horizontal line.

Michael Frendo

**Mr Terry Davis
Secretary General
Council of Europe
Strasbourg**

Malta Report

Officials of foreign agencies within the jurisdiction of these Islands are subject to all national laws including criminal laws. The power to make use of certain coercive methods, such as the power to arrest, is granted to specific persons by the law itself, such as police officers, customs officers and members of the Armed Forces. These powers cannot be delegated. This clearly implies that any person, including officials of a foreign agency, applying any coercive measures in places within the exclusive jurisdiction of these Islands would be guilty of a criminal offence, i.e. illegal arrest in its simple or aggravated form (sections 86 and 87 of the Criminal Code).

Our Criminal Code provides safeguards to prevent unacknowledged deprivation of liberty in various provisions. First of all, any magistrate or officer of the Executive Police who do not take action upon an allegation of unlawful detention are guilty of a criminal offence punishable by imprisonment (section 137).

Secondly the said Code provides for the *habeus corpus* remedy in a number of provisions depending on whether the person alleging unlawful detention is charged in court or not. In the latter case, i.e. where the unlawful detention is not in connection with an offence with which he is charged or accused before a court, that person may apply to the Court of Magistrates, which will treat his case with utmost urgency, and if the allegation is founded, the court will order his immediate and unconditional release (section 409A). In the case of a person in custody for an offence for which he is charged or accused before the Court of Magistrates, an identical remedy exists (section 412B). This remedy is also rendered applicable to proceedings before the Criminal Court and the Court of Criminal Appeal (section 525(2A)) thus applying to all courts of criminal jurisdiction in Malta.

Moreover, when a person charged or accused who is in custody is first brought before the Court of Magistrates, the court must, if it finds that the continued detention of the person charged or accused is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the person in custody, unconditionally release that person from custody. This means that the court must examine the lawfulness of the detention of the person brought before it even if the matter is not raised by the parties (article 574A(1)(6)).

The provisions that have been quoted are being attached.

The “European Convention Act” (Cap. 319 of the Laws of Malta) makes provision for the substantive Articles of the “European Convention for the Protection of Human Rights and Fundamental Freedoms”, to become and be, enforceable as, part of the Law of Malta.

The Inquiries Act (Cap. 273 of the Laws of Malta) provides an added safeguard in that it grants the power to an independent Board to carry out an inquiry into (a) the conduct of public officers, or of officers or servants of a statutory body, or of anyone or more of

such public officers or officers or servants; (b) the conduct or management of any department of Government or of any statutory body; (c) any matter falling within the functions or responsibility of any such department or body, or otherwise concerning or affecting a service of the Government.

In your request you asked, 'whether any public official or other person acting in an official capacity has been involved in any manner - whether by action or omission - in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such derivation of liberty may have occurred by or at the instigation of any foreign agency'. From our investigations, I am in a position to state that to our knowledge, no public official or other person acting in an official capacity, has been involved in such behaviour, whether by action or omission.

ARTICLE 86

Whosoever, without a lawful order from the competent authorities, and saving the cases where the law authorizes private individuals to apprehend offenders, arrests, detains or confines any person against the will of the same, or provides a place for carrying out such arrest, detention or confinement, shall, on conviction, be liable to imprisonment for a term from seven months to two years:

Provided that the court may, in minor cases, award imprisonment for a term from one to three months or a fine (*multa*).

ARTICLE 87

(1) The punishment for the crime referred to in the last preceding article, shall be imprisonment for a term from thirteen months to three years in each of the following cases:

- (a) if the detention or confinement continues for more than twenty days;
- (b) if the arrest is effected with the unauthorized use of a uniform, or under an assumed name, or under a warrant falsely purporting to be issued by a public authority;
- (c) if the individual arrested, detained or confined, is subjected to any bodily harm, or is threatened with death;
- (d) if the detention or confinement is continued by the offender notwithstanding his knowledge that a writ or warrant for the release or delivery of the person detained or confined has been issued by the competent authority;
- (e) if the crime is committed with the object of extorting money or effects, or of compelling any other person to agree to any transfer of property belonging to such person;
- (f) if the crime is committed for the purpose of forcing another person to do or to omit an act, which, if voluntarily done or omitted, would be a crime;
- (g) if the crime is committed as a means of compelling a person to do an act or to submit to treatment injurious to the modesty of that person's sex.

(2) Where a person who commits the crime referred to in the last preceding article threatens to kill, to injure or to continue to detain or confine the person arrested, detained or confined, with the object of compelling a state, an international governmental organisation or person to do or to abstain from doing an act he shall be liable to the punishment of imprisonment for life.

ARTICLE 137

Any magistrate who, in a matter within his powers, fails or refuses to attend to a lawful complaint touching an unlawful detention, and any officer of the Executive Police, who, on a similar complaint made to him, fails to prove that he reported the same to his superior authorities within twenty-four hours, shall, on conviction, be liable to imprisonment for a term from one to six months.

ARTICLE 409A

(1) Any person who alleges he is being unlawfully detained under the authority of the Police or of any other public authority not in connection with any offence with which he is charged or accused before a court may at any time apply to the Court of Magistrates, which shall have the same powers which that court has as a court of criminal inquiry, demanding his release from custody. Any such application shall be appointed for hearing with urgency and the application together with the date of the hearing shall be served on the same day of the application on the applicant and on the Commissioner of Police or on the public authority under whose authority the applicant is allegedly being unlawfully detained. The Commissioner of Police or public authority, as the case may be, may file a reply by not later than the day of the hearing.

(2) On the day appointed for the hearing of the application the court shall summarily hear the applicant and the respondents and any relevant evidence produced by them in support of their submissions and on the reasons and circumstances militating in favour or against the lawfulness of the continued detention of the applicant.

(3) If, having heard the evidence produced and the submissions made by the applicant and respondents, the court finds that the continued detention of the applicant is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the applicant it shall allow the application. Otherwise the court shall refuse the application.

(4) Where the court decides to allow the application the record of the proceedings including a copy of the court's decision shall be transmitted to the Attorney General by not later than the next working day and the Attorney General may, within two working days from the receipt of the record and if he is of the opinion that the arrest and continued detention of the person released from custody was founded on any provision of this Code or of any other law, apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released from custody. The record of the proceedings and the court's decision transmitted to the Attorney General under the provisions of this subarticle shall be filed together with the application by the Attorney General to the Criminal Court.

ARTICLE 412B

(1) Any person in custody for an offence for which he is charged or accused before the Court of Magistrates and who, at any stage other than that to which article 574A applies, alleges that his continued detention is not in accordance with the law may at any time apply to the court demanding his release from custody. Any such application shall be appointed for hearing with urgency and together with the date of the hearing shall be served on the same day of the application on the Commissioner of Police or, as the case may be, on the Commissioner of Police and the Attorney General, who may file a reply thereto by not later than the day of the hearing.

(2) The provisions of article 574A(2) and (3) shall *mutatis mutandis* apply to an application under this article.

(3) Where the application is filed in connection with proceedings pending before the Court of Magistrates as a court of criminal inquiry before a bill of indictment has been filed and the record of the inquiry is with the Attorney General in connection with any act of the proceedings the application shall be filed in the Criminal Court and the foregoing provisions of this article shall *mutatis mutandis* apply thereto.

(4) The provisions of article 409A(4) shall apply to a decision of the Court of Magistrates under this article.

ARTICLE 574A

(1) When the person charged or accused who is in custody is first brought before the Court of Magistrates, whether as a court of criminal judicature or as a court of criminal inquiry, the Court shall have the charges read out to the person charged or accused and, after examining the person charged as provided in article 392 as the proceedings may require, shall summarily hear the prosecuting or arraigning officer and any evidence produced by that officer on the reasons supporting the charges and on the reasons and circumstances, if any, militating against the release of the person charged or accused.

(2) After hearing the prosecuting or arraigning police officer and any evidence produced as provided in subarticle (1) the court shall inform the person charged or accused that he may be temporarily released from custody on bail by the court under conditions to be determined by it and shall ask him what he has to say with respect to his arrest and his continued detention and with respect to the reasons and the circumstances militating in favour of his release.

(3) Where any of the offences charged consists in any of the offences mentioned in article 575(2) the court shall, after hearing the person charged or accused as provided in subarticle (2) of this article, ask the prosecuting or arraigning officer whether he has any submissions to make on the question of temporary release from custody on bail of the person charged or accused and the latter shall be allowed to respond.

(4) Where none of the offences charged consists in any of the offences mentioned in article 575(2) the court shall, after hearing the person charged or accused as provided in subarticle (2) of this article, ask the prosecuting or arraigning officer whether he and the Attorney General have any submissions, in writing or otherwise, to make on the question of the temporary release from custody of the person charged or accused and the latter shall be allowed to respond.

(5) At the end of submissions as provided in the preceding subarticles of this article the court shall review the circumstances militating for or against detention.

(6) If the court finds that the continued detention of the person charged or accused is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the person in custody it shall unconditionally release that person from custody.

(7) If the court does not find cause to release unconditionally the person charged or accused under the provisions of subarticle (6) it may nevertheless, saving the provisions of article 575(1) and unless release is prohibited by any provision of law, release that person from custody on bail subject to such conditions as it may deem appropriate.

(8) If the court does not find cause to release unconditionally the person charged or accused and refuses to grant that person bail the court shall remand that person into custody and the provisions of article 575(11) shall apply.

(9) Where the court orders the release from custody of the person charged or accused, whether unconditionally or on bail subject to conditions, under any of the provisions of this article the decision of the court to that effect shall be served on the Attorney General by not later than the next working day and the Attorney General may apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released or to amend the conditions, including the amount of bail, that may have been determined by the Court of Magistrates.

Article 525(2A)

The provisions of article 412B(1) and (2) shall also apply *mutatis mutandis* to the Criminal Court with respect to a person in custody for an offence for which a bill

of indictment has been filed as well as to the Court of Criminal Appeal with respect to a person in custody who is a party to appeal proceedings before that court:

Provided that with respect to the Criminal Court the relevant decision shall in all cases be taken by the Court sitting without a jury.

The Criminal Code may be viewed at:

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf

The Inquiries Act may be viewed at:

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt273.pdf

The European Convention Act may be viewed at:

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf