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

FOURTH SECTION

CASE OF ZARB ADAMI v. MALTA

(Application no. 17209/02)

JUDGMENT

STRASBOURG

20 June 2006

FINAL

20/09/2006

In the case of Zarb Adami v. Malta,

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

Nicolas Bratza, *President*,
Josep Casadevall,
Kristaq Traja,
Lech Garlicki,
Javier Borrego Borrego,
Ljiljana Mijović, *judges*,
Joseph Filletti, ad hoc *judge*,
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 24 May 2005 and 30 May 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 17209/02) 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 Maurice Zarb Adami ("the applicant"), on 22 April 2002.

2. The applicant was represented by Mr I. Refalo and Mrs T. Comodini Cachia, lawyers practising in Valletta, Malta. The Maltese Government ("the Government") were represented by their Agent, Mr S. Camilleri, Attorney General, and Mr P. Grech, Deputy Attorney General.

3. The applicant alleged that he had been discriminated against on the ground of sex in performing the social duty of jury service (Article 14 of the Convention taken in conjunction with Articles 4 § 3 and 6).

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Giovanni Bonello, the judge elected in respect of Malta, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Joseph Filletti to sit as an *ad hoc* judge.

5. By a decision of 24 May 2005, following a hearing on admissibility and the merits (Rule 54 § 3), the Chamber declared the application admissible.

6. The applicant, but not the Government, filed further observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a Maltese national and lives in Attard, Malta.

8. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The background of the case

9. The applicant is a pharmacist in Malta. From 1971 he was placed on the lists of jurors and remained on them until 2005.

10. Between 1971 and 1997, the applicant was called to serve as a juror in three different sets of criminal proceedings. On these occasions, he was called to serve both as a juror and as a foreman of the jury.

11. In 1997 the applicant was again called to appear before the Criminal Court to serve as a juror. This time he failed to attend on the requested date and on 14 April 1997 he was fined 100 Maltese liri ((MTL) – approximately 240 euros (EUR)).

2. The constitutional proceedings

12. As the applicant failed to pay the fine, on 11 June 1997 the Registrar of the Courts of Malta submitted an application to the Criminal Court. It asked that court to summon the applicant before it and/or to convert the fine imposed into a term of imprisonment.

13. At the sitting of 26 June 1997 before the Criminal Court, the applicant raised the plea that the fine imposed on him was unconstitutional and constituted a breach of his fundamental rights. He alleged, in particular, that the sanction was discriminatory in terms of Article 45 of the Constitution and Article 14 of the Convention taken in conjunction with Article 4 § 3 (d), because it subjected him to burdens and duties to which other persons in the same position were not subjected. Moreover, the law and/or the domestic practice exempted persons of the female sex from jury service whereas, *de facto*, men were not offered this exemption.

14. Considering that the applicant's plea was not merely frivolous and/or vexatious, on 29 September 1997 the Criminal Court referred it to the First Hall of the Civil Court.

15. Before the Civil Court, the applicant alleged that the Maltese system penalised men and favoured women, as statistical information showed that during the preceding five years only 3.05% of jurors had been women whereas 96.95% had been men. Moreover, the burden of jury service was not equitably distributed but was placed on a very small proportion of the population: in 1997 the lists of jurors represented only 3.4% of the list of

voters. In practice, those who had on one occasion been placed on the lists of jurors would remain on them until they were disqualified, while others who also satisfied all the requirements were *de facto* exempted from such civic obligation.

16. In a judgment of 5 February 1999, the Civil Court rejected the applicant's claims. It held that in stating that every Maltese citizen who had attained the age of 21 qualified to serve as a juror the law did not make any distinction between citizens. More specifically, there was no distinction between men and women. As to the practice criticised by the applicant, the latter had not substantiated his allegation that there were other persons eligible to serve as jurors who managed to avoid performing their duties. Moreover, the applicant had failed to seek exemption from jury service in accordance with domestic law.

17. The Civil Court also observed that the applicant had not proved that he was being treated differently to such an extent that the burdens and obligations imposed on him were greater than those imposed on another person. In particular, it had not been established that people who had been on the lists of jurors as long as the applicant had been removed without a valid reason, or that persons who were in a situation comparable to that of the applicant were left off the lists. The applicant had also failed to submit any evidence showing that the discrepancies between women and men called to serve as jurors were specifically attributable to an intention to discriminate between the sexes or were aimed at giving an unjust advantage to women in relation to men.

18. The applicant appealed against the judgment of 5 February 1999 to the Constitutional Court. He observed, in particular, that the existence of discrimination was clearly shown by the statistics he had produced. Given this factual background, it was unnecessary to prove an intention to discriminate on the part of the authorities.

19. In his submissions, the applicant pointed out that jury service was a burden as it required the person concerned to abandon his or her work in order to attend court hearings regularly; moreover, it imposed a moral burden to judge the innocence or guilt of a person. According to the Constitution of Malta and the Convention, social burdens should be shared by all in an equitable manner. However, statistics showed that lists of foremen were composed of 0.74% of women and 99.26% of men, and that the lists of jurors represented only 3.4% of the list of voters.

20. In a judgment of 2 November 2001, the Constitutional Court dismissed the applicant's appeal and confirmed the judgment of the Civil Court.

21. The Constitutional Court reiterated that neither the law nor the administrative rules in relation to the compilation of the lists of jurors were in any way discriminatory. In fact, the statistics showed that the number of women on the lists of jurors was 145 in 1996 (almost double the number of

the previous year), and that this number increased to 2,490 in 1997. Therefore, an irreversible administrative process had been set in motion in order to bring the number of women on the lists into line with that of men.

22. The Constitutional Court acknowledged, however, that the number of women actually called to serve as jurors was very low: only five per year in the years 1995, 1996 and 1997. This was clearly the result of the jury selection procedure, in which the reasons militating for and against the choice of a certain person as juror were evaluated. The results were dependant on many factors, such as the element of luck, challenges brought by the defence and exemptions granted by the courts. It was true that women were exempted from jury service for social, family and cultural reasons; however, this was perfectly legitimate and lawful when it was as a consequence of a claim by the defence, the prosecutors or the presiding judge.

23. The Constitutional Court also agreed that it appeared that the manner in which the lists of jurors were compiled favoured a situation in which when a person was placed on the lists he remained on them until the age restriction was reached. Therefore the applicant's grievance that this system seemed to punish those persons who were on the lists could be justified. Thus, the Constitutional Court suggested that the system be amended and that the lists be periodically changed in order to exclude those persons who had already been called for jury service.

24. As concerned the applicability of Article 14 of the Convention, the Constitutional Court noted that jury service should be considered "a normal civic obligation" within the meaning of Article 4 of the Convention, and therefore Article 14 came into play. The Constitutional Court considered, however, that the applicant had not been subjected to burdensome treatment simply because he had had to serve as a juror on three occasions over a span of seventeen years. In any case, this circumstance did not entitle him to take the law into his own hands and decide to ignore the court summons. Instead, he should have made use of the ordinary remedies available to him, such as filing a request for exemption from jury service with the competent court. Had this request been refused, he could have appealed.

25. The Constitutional Court also rejected the applicant's submission that the fine imposed on him was discriminatory. It observed that anyone who had been fined by the competent court was obliged by law to pay the fine and that anyone who disobeyed an order of a court was liable to be sanctioned.

3. The applicant's requests for exemption from jury service

26. On an unspecified date in 2003, the applicant petitioned the Registrar of the Criminal Court. He observed that, according to the Government Gazette of 28 August 2003, his name had been registered on the List of Jurors and on the List of Special Jurors. However, as he was a

lecturer at the University of Malta, he sought exemption from jury service in accordance with Article 604(1) of the Criminal Code (hereinafter "the CC").

27. By a decision of 23 October 2003, the Registrar of the Criminal Court rejected the applicant's petition.

28. Having been summoned once again to serve as a juror in another trial, in 2004 the applicant requested to be exempted from jury service under Article 607 of the CC. This application was rejected by the competent domestic court.

29. On 18 April 2005 the applicant requested once again to be exempted from serving as a juror. He relied on Article 604(1) of the CC, providing an exemption for full-time lecturers at the University. On 25 April 2005 his request was accepted.

II. RELEVANT DOMESTIC LAW

30. According to Article 603(1) of the CC,

> "Every person of the age of twenty-one years or upwards, residing in Malta and being a citizen of Malta, shall be qualified to serve as a juror provided such person has an adequate knowledge of the Maltese language, is of good character and is competent to serve as a juror."

31. The compilation of the lists of jurors is regulated by Article 605 of the CC. The lists are drawn up by the Commissioner of Police together with two magistrates and the Registrar of the Courts. They are published in the Government Gazette in the month of August each year. Within fifteen days from the publication any person who, not possessing the qualifications required by law to serve as a juror, desires to be struck off the lists may file an application before the Criminal Court. The court shall proceed summarily on the application and the registrar shall note on the lists any correction which the court may order. Subsequently, the names of the jurors are written down on separate ballots of paper and every month ballots are drawn.

32. Article 604 of the CC provides:

> "(1) The following persons are exempted from serving as jurors:
>
> Members of the House of Representatives, judges, clergymen, members of the Armed Forces of Malta, persons holding the office of Head of a Government Department and their deputies, the magistrates, the Registrar of Courts, officers of the Executive Police, professors of the University, teachers of the Government secondary, primary and technical schools, District Medical Officers, health inspectors, the Principal Probation Officer and Probation Officers.
>
> (2) Moreover the court may, on an application to that effect, exempt from serving as a juror any apothecary of a village and any physician, surgeon or obstetrician actually practising his profession, and, in general, any person who has completed the

sixtieth year of his age, unless, in some particular case, the court deems otherwise for the ends of justice.

(3) A person who has the care of a family or of a person who suffers from any physical or mental infirmity shall also be exempt from serving as a juror."

33. Article 607 of the CC provides that any person who is not qualified or liable to serve as a juror, or who may have special reasons for asking to be exempted from serving as a juror, may bring the matter before the court, by means of an application to be filed within four days after the service of a writ of summons. The court may, "if it deems the reasons alleged to be good, ... order the registrar to cancel the name of such person".

34. According to Article 609 of the CC, if a summoned person (that is, a person called to serve as a juror) fails to appear before the court at the time stated in the writ, he will be sentenced by the court to a fine and may be compelled to serve as a juror by means of a warrant of escort or arrest. The court may, on an application to that effect, remit the fine if it is satisfied that there was good cause for the non-appearance.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 4 § 3 (d)

35. The applicant considered that the way in which jury service had been imposed on him was discriminatory in nature. He relied on Article 14 of the Convention taken in conjunction with Article 4 § 3 (d).

The relevant parts of the latter provision read as follows:

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:

...

(d) any work or service which forms part of normal civic obligations."

36. Article 14 of the Convention states:

"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."

A. Applicability of Article 14 of the Convention taken in conjunction with Article 4 § 3 (d)

1. The parties' submissions

(a) The Government

37. The Government considered that Article 14 of the Convention taken in conjunction with Article 4 § 3 (d) was not applicable to the facts of the present case.

38. They submitted that jury service was undoubtedly a "normal civic obligation" based on social solidarity, which was imposed on citizens in order to ensure the democratisation of the process of the administration of criminal justice and that a person was judged by his or her peers. This had not been contested by the applicant. Therefore, service as a juror could not amount to "forced or compulsory labour" within the meaning of Article 4 § 2 of the Convention. The applicability of that provision was excluded by virtue of paragraph 3 (d).

39. The Government further noted that the applicant, who had only been called to serve three times as a juror over a period of seventeen years, had complained only about the procedures which led to the drawing up of the lists of those who were eligible to serve as jurors, and not about the subsequent process of selection of the persons who eventually performed jury service. However, the drawing up of the lists did not amount to "forced labour", as no service was necessarily implied by the mere fact that a person's name appeared on them. In fact, an exemption could be granted, the person could be challenged or it might happen that his or her name would never be selected. Therefore, the facts underlying the applicant's complaint fell outside the ambit of Article 4 of the Convention, and Article 14 was not applicable.

(b) The applicant

40. The applicant pointed out that the Constitutional Court had categorically accepted that jury service was a "normal civic obligation". This opinion was confirmed by the principles laid down by the Court in *Karlheinz Schmidt v. Germany* (18 July 1994, Series A no. 291-B) and *Van der Mussele v. Belgium* (23 November 1983, Series A no. 70). In the latter judgment, the Court held that the concept of "normal civic obligation" referred "to all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". The applicant emphasised that he had not offered himself voluntarily for jury service. On the contrary, this service had been exacted from him on pain of a fine, which could be converted into a term of imprisonment. The applicant made reference to judgments in which the

United States Supreme Court dealt with issues related to jury service and discrimination in the selection of jurors (*Smith v. State of Texas*, 25 November 1940, 311 US 128 (1941); *Thiel v. Southern Pac. Co.*, 20 May 1946, 328 US 217 (1946); and *Brown v. Allen*, 9 February 1953, 344 US 443 (1953)). It held that jury service was a civic obligation and that the jury system played a political function in the administration of the law and was fundamental in a democratic system of justice.

41. In the applicant's view, as jury service was covered by paragraph 3 (d) of Article 4, the only logical conclusion was that the facts of the case fell within the scope of Article 4. As a consequence, Article 14 – a provision which did not require a violation of the substantive provision of the Convention, but only a link with it – was also applicable.

2. The Court's assessment

42. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts in issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports of Judgments and Decisions* 1997-I, and *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II).

43. The Court reiterates that paragraph 2 of Article 4, which prohibits "forced or compulsory labour", enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Siliadin v. France*, no. 73316/01, § 112, ECHR 2005-VII). However, paragraph 3 of this provision indicates that the term "forced or compulsory labour" shall not include, *inter alia*, "any work or service which forms part of normal civic obligations".

44. In the case of *Karlheinz Schmidt*, in which only men were obliged to serve in the fire brigade or to pay a financial contribution in lieu of such service (cited above, § 22), the Court found that Article 14 was applicable and stated that:

> " ... paragraph 3 of Article 4 is not intended to 'limit' the exercise of the right guaranteed by paragraph 2, but to 'delimit' the very content of that right, for it forms a whole with paragraph 2 and indicates what 'the term "forced or compulsory labour" shall not include' (*ce qui 'n'est pas considéré comme* "*travail forcé ou obligatoire*" '). This being so, paragraph 3 serves as an aid to the interpretation of paragraph 2. The four sub-paragraphs of paragraph 3, notwithstanding their diversity, are grounded on

> the governing ideas of the general interest, social solidarity and what is normal in the ordinary course of affairs ..."

45. The Court has also emphasised that "[t]he criteria which serve to delimit the concept of compulsory labour include the notion of what is in the normal course of affairs ... Work or labour that is in itself normal may in fact be rendered abnormal if the choice of the groups or individuals bound to perform it is governed by discriminatory factors, which was precisely what the applicant contended had occurred in the present circumstances" (see *Van der Mussele*, cited above, § 43).

46. In the present case, the Court does not see any reason to depart from its findings in the two judgments cited above. Therefore, the fact that a situation corresponds to the notion of a normal civic obligation within the meaning of paragraph 3 is not an obstacle to the applicability of Article 4 of the Convention taken in conjunction with Article 14.

47. Like the parties to the proceedings, the Court considers that compulsory jury service such as exists in Malta is one of the "normal civic obligations" envisaged in Article 4 § 3 (d). It observes further that the applicant did not offer himself voluntarily for jury service and that his failure to appear led to the imposition of a fine, which could be converted into a term of imprisonment. On account of its close links with the obligation to serve, the obligation to pay the fine also falls within the scope of Article 4 § 3 (d) (see, *mutatis mutandis*, *Karlheinz Schmidt*, cited above, § 23).

48. It is true, as pointed out by the Government (see paragraph 39 above), that in his submissions the applicant mainly criticised the procedures leading to the drawing up of the lists of jurors. However, this does not imply that his complaint is not directed against the result of these procedures, namely the fact that he was required to perform the civic obligation of jury service.

49. It follows that the facts in issue fall within the ambit of Article 4. Article 14 of the Convention is accordingly applicable.

B. Compliance with Article 14 of the Convention taken in conjunction with Article 4 § 3 (d)

1. The parties' submissions

(a) The Government

50. The Government observed that the applicant accepted that the relevant domestic provisions did not discriminate between men and women. His complaints seemed therefore directed against the administrative practices relating to the choice of persons for jury service.

51. However, Article 14 of the Convention could not come into play in connection with the applicant's claim that a person put on the lists was not removed before he died or became exempted because of age. That alleged practice in fact applied equally to both men and women. The applicant's complaints should therefore be interpreted in the sense that as a result of various factors he, as a man, was more likely to be called for jury service than a woman.

52. The Government noted that originally all women had been precluded from jury service. The law had then been modified, and women could apply to have their names placed on the lists of jurors. Nowadays, both women and men were equally liable to be called to serve as jurors or to be exempted from that social duty. Therefore, the lists of jurors had started as all-male lists, and it was only gradually that women had been added and continued to be added to them.

53. As to the statistics produced by the applicant, the Government observed that between 1996 and 1997 the number of male jurors had increased by less than 74% (from 4,298 to 7,503), while the number of female jurors had increased by 1,596% (from 147 to 2,494). In any case, it had to be borne in mind that most jurors were chosen from the part of the population which was active in the economy and professional life. Such people were in fact less likely to have family or other reasons for seeking an exemption.

54. The Government pointed out that, as the Constitutional Court had correctly stated, "an irreversible administrative process had been set in motion in order to bring the number of women on the lists into line with that of men". Since 1997, when the lists of jurors were revised on a yearly basis, the Commissioner of Police had tended to substitute women in the place of men who were disqualified from service, and the objective of securing a more even distribution of jurors between the two genders was kept in mind when putting additional jurors on the lists. One of the measures that had been taken was to add government or bank employees to the lists of jurors, amongst which groups women were well-represented. University graduates had also been added to the lists on the basis that there was an equal number of men and women. The Government noted that as a result of this ongoing process, in the lists of jurors published in the Gazette of 15 November 2004, there were 6,344 women and 10,195 men. They also clarified that while there was no maximum numerical limit to the number of people included on the lists of jurors, the number actually enrolled depended on checks made by the Commissioner of Police, and on the practice of putting on the lists only qualified individuals (men or women) who were less likely to be entitled to an exemption.

55. It should also be noted that according to Article 604(3) of the CC (see paragraph 32 above), an exemption might be granted when a juror was a person who cared for a family or a person suffering from physical or

mental infirmity. As more women than men were looking after their families, a higher number of women were disqualified on that ground. However, this was the result of socio-cultural factors rather than of the operation of the law.

56. The Government emphasised furthermore that the prosecution and the defence had the right to challenge a number of jurors. For cultural reasons, defence lawyers might have had a tendency to challenge female jurors, but this was discrimination against and not in favour of women.

57. In the light of the above, the Government concluded that the practice of selection and exemption from jury service was justifiable under Article 4 § 3 of the Convention taken alone or in conjunction with Article 14.

(b) The applicant

58. The applicant complained of a two-fold discriminatory treatment. In the first place he alleged that he had been treated differently from women who, though satisfying the legal requirements, were called on to fulfil jury service in a minimal manner when compared to men.

59. Thus, the burden of jury service was placed predominantly on men, while women were *de facto* exempted from this social duty. The applicant referred, on this point, to the statistics he had produced in the domestic proceedings. He noted that in 1996 140,975 women and 135,527 men were enrolled on the electoral register; however, only 147 women (among whom 5 actually served as jurors) were placed on the lists of jurors, as opposed to 4,298 men (174 of whom actually served as jurors).

60. This discrimination was caused by the way in which the lists of jurors were compiled and could not be excused by social or cultural reasons or by the choice made at the beginning of the trial by the prosecutor or the defence. The crux of the matter was in fact not the number of women who actually had to serve as jurors, but the low number enrolled on the lists of jurors.

61. The applicant considered that after 1994, when women became liable to serve as jurors on the same footing as men, there was no reason in law for the continued discrepancy between the two genders. Both men and women were in theory equally liable to serve as jurors and to be exempted. However, as the overwhelming majority of people enrolled on the lists were men, the only explanation was that there had been a discriminatory administrative practice.

62. The applicant was unable to explain the increasing number of women registered as jurors from 1996 to 1997, but pointed out that the increase had only occurred three years after the 1994 amendments. The fact that the number of women selected as jurors was constantly growing might also be explained by the judgment given in his case by the Constitutional Court, in which a revision of the system of compiling the lists had been recommended. In any case, the discrimination complained of had lasted for

at least twenty-six years, including the year when the applicant had lodged his complaint before the national courts.

63. As to the Government's argument that the predominant number of men was a result of there being fewer women active in public and professional life, the applicant noted that the law did not require a person to be active in such fields in order to qualify as a juror. The Government's argument might even be considered discriminatory against people who chose to study at university or to become housewives. The applicant also alleged that the socio-cultural factors indicated by the Government could not justify a difference in treatment especially when the law itself was amended in order to eliminate its discriminatory wording.

64. The applicant considered that the differences in treatment complained of lacked any objective and reasonable justification. Men did not have any specific abilities which might render them more fit for jury service than women. The aim of the jury system should be to ensure that the accused was tried by a sample of society. A jury predominantly composed of men would create an unbalanced system of criminal justice in relation to trials in which women were defendants, victims or witnesses.

65. The applicant further considered that he had also been discriminated against *vis-à-vis* other men who, though eligible for jury service, had never been summoned to serve as jurors.

66. He alleged that the way in which the laws establishing jury service were applied had led to a situation in which only a small percentage of the population was summoned to serve as jurors. Of the hundreds of thousands of persons eligible for jury service, only a few hundred were actually called for service. The lists of jurors were not compiled every year and the same names were retained on the lists. Even if the law clearly required new lists to be compiled, the practice was, as substantially admitted by the Government, to make a simple annual check of those who had become disqualified or had died during the previous twelve months.

67. In that respect, the applicant noted that the number of persons enrolled on the electoral register in 1996 and 1997 was, respectively, 276,502 and 279,487, while the number of persons placed on the lists of jurors in the same years was 4,445 and 9,997. It followed that the burden of jury service was limited, in 1996, to 1.6% of those eligible and in 1997 to 3.57%. Moreover, in 1997 the number of male registered voters was 137,090; however, only 392 men were called to serve as foremen and 7,111 were called to serve as jurors. While accepting that only a small percentage of persons were needed every year to serve as jurors, the applicant emphasised that the burden of such service had been imposed on the same people, representing a small minority of the population, for a large number of years. In this connection, he pointed out that he had been placed on the lists for the first time in 1971 and that his name had not been removed since.

68. In the applicant's view, the situation was still unsatisfactory. Even after the 2002 amendments, the lists were not drawn up *de novo*. The authorities confined themselves to replacing people who had become disqualified. As a result, only 6% of the population were on the lists (3.5% of men and 2.5% of women).

69. The applicant noted that no justification had been put forward by the Government to explain the difference in treatment that he suffered *vis-à-vis* other men.

70. In the applicant's view, a civic obligation is normal if it is enforced and administered in a just and equitable manner and it is shared by the qualified members of the society. A fair cross section of society is imperative for a just and fair jury system. On the contrary, when, as in his case, such an obligation imposes an excessive and disproportionate burden on a single individual, discrimination contrary to the Convention occurs. The applicant referred to the above-mentioned judgments in which the United States Supreme Court criticised the practices of placing the burden of jury service upon only a section of the population and of excluding an ethnic or racial group from jury service. Moreover, the case of *Taylor v. Louisiana* (419 US 522 (1975)) concerned a situation whereby women could not be selected for jury service unless they had previously declared in writing that they wished to serve as jurors. The Supreme Court had held that "if it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed". The applicant submitted that the situation in Malta was similar to that in the State of Louisiana at the time of the *Taylor* case.

2. The Court's assessment

(a) General principles

71. The Court's case-law establishes that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). However, not every difference in treatment will amount to a violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory (see *Ünal Tekeli v. Turkey*, no. 29865/96, § 49, ECHR 2004-X).

72. A difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim: Article 14 will also be violated when it is clearly established

that there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, for example, *Petrovic*, cited above, § 30, and *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 177, Series A no. 102).

73. In other words, the notion of discrimination includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94). Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention (see, among other authorities, *G.M.B. and K.M. v. Switzerland* (dec.), no. 36797/97, 27 September 2001).

74. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports* 1996-IV). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background (see *Rasmussen v. Denmark*, 28 November 1984, § 40, Series A no. 87, and *Inze v. Austria*, 28 October 1987, § 41, Series A no. 126), but the final decision as to observance of the Convention's requirements rests with the Court. Since the Convention is first and foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Ünal Tekeli*, cited above, § 54, and, *mutatis mutandis*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV).

(b) Whether there has been a difference in treatment between persons in similar situations

75. The Court observes that it is accepted by the applicant that the difference in treatment complained of does not depend on the wording of the domestic provisions. As in force at the relevant time, Maltese law did not make any distinction between the sexes, both men and women being equally eligible for jury service (see Article 603(1) of the CC, paragraph 30 above). The discrimination in issue was on the contrary based on what the applicant described as a well-established practice, characterised by a number of factors, such as the manner in which the lists of jurors were compiled and the criteria for exemption from jury service. As a result, only a negligible percentage of women were called to serve as jurors.

76. The Court has held in previous cases that statistics are not in themselves sufficient to disclose a practice which could be classified as

discriminatory (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001). At the same time, the Court considers that a discrimination potentially contrary to the Convention may result not only from a legislative measure (see, in the ambit of social duties, *Karlheinz Schmidt*, cited above, §§ 24-29), but also from a *de facto* situation.

77. The Court notes that it is apparent from the statistics produced by the parties (see paragraphs 53 and 59 above) that in 1997 – the year in which the applicant was called to serve as a juror and failed to attend the court – the number of men (7,503) enrolled on the lists of jurors was three times that of women (2,494). In the previous year this difference was even more significant, as only 147 women were placed on the lists of jurors, as opposed to 4,298 men. The Court is also struck by the fact that in 1996, 5 women and 174 men served as jurors.

78. The Court considers that these figures show that the civic obligation of jury service has been placed predominantly on men. Therefore, there has been a difference in treatment between two groups – men and women – which, with respect to this duty, were in a similar situation.

79. It is true that, as the Government pointed out, since 1997 an administrative process had been set in motion in order to bring the number of women registered as jurors into line with that of men. As a result, in 2004 6,344 women and 10,195 men were enrolled on the lists of jurors, thus showing a significant increase in the number of women actually eligible for jury service. However, this does not undermine the finding that at the relevant time – when the applicant was called to serve as a juror and failed to appear – only a negligible percentage of women were enrolled on the lists of jurors and were actually requested to perform jury service.

(c) Whether there is objective and reasonable justification

80. The Court observes that, if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group (see *McShane v. the United Kingdom*, no. 43290/98, § 135, 28 May 2002). Moreover, very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention (see *Willis*, cited above, § 39, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A no. 263).

81. In the instant case, the Government argued that the difference in treatment depended on a number of factors. In the first place, jurors were chosen from the part of the population which was active in the economy and professional life. Moreover, according to Article 604(3) of the CC, an exemption from jury service might be granted to persons who had to take care of their family. More women than men could successfully rely on such

a provision. Finally, "for cultural reasons", defence lawyers might have had a tendency to challenge female jurors (see paragraphs 53, 55 and 56 above).

82. The Court has doubts as to whether the factors indicated by the Government are sufficient to explain the significant discrepancy in the distribution of jury service. It notes furthermore that the second and third factors relate only to the number of women who actually performed jury service and do not explain the very low number of women enrolled on the lists of jurors. In any event, the factors highlighted by the Government only constitute explanations of the mechanisms which led to the difference in treatment complained of. No valid argument has been put before the Court in order to provide a proper justification for it. In particular, it has not been shown that the difference in treatment pursued a legitimate aim and that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

83. In the light of the foregoing, the Court finds that there has been a violation of Article 14 taken in conjunction with Article 4 § 3 (d) of the Convention.

84. This conclusion dispenses the Court from examining whether the applicant has also been discriminated against *vis-à-vis* other men who, though eligible for jury service, have never been summoned to serve as jurors.

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

85. The applicant alleged that in relation to a civic obligation that had been imposed on him he had had to face criminal proceedings, had been ordered to pay a fine and had been threatened with imprisonment in default. He relied on Article 14 of the Convention taken in conjunction with Article 6. The relevant part of the latter provision reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ..."

A. The parties' submissions

1. The Government

86. The Government observed that the applicant had become liable to the payment of a fine because he had chosen to ignore his summons for jury service. He had not complained of an unfair trial or of a lack of independence or impartiality of the domestic tribunal. Nor had he complained that the situation would have been different if he had been a

woman. Therefore, no discrimination on the ground of sex could be disclosed.

87. In the Government's view, the applicant's complaint might be understood in the sense that, as there were more male jurors, it was more likely that a male juror would become liable to a fine if he ignored his duties. To accept that argument would be tantamount to holding that laws on prostitution were in breach of Article 14 taken in conjunction with Article 6 simply because there were more female than male prostitutes. In any case, the applicant had alleged that others could be victims of the alleged violation, but not that he himself was a victim.

88. The Government were of the opinion that the complaint under Article 6 relied on the same facts as those alleged in connection with Articles 14 and 4 § 3 (d). In fact, there was a necessary link between the criminal proceedings against the applicant and the fine that had been imposed on him for ignoring the court summons calling him for jury service.

2. The applicant

89. The applicant considered that the proceedings in which the Criminal Court had been asked to convert the fine into a term of imprisonment fell within the ambit of Article 6 of the Convention. He alleged furthermore that a violation of the latter provision taken in conjunction with Article 14 of the Convention, "necessarily [arose] as a consequence of the complaint raised under Articles 14 and 4 § 3 (d)". In that respect, the applicant submitted that there was a strong link between jury service and the proceedings that had been brought against him. The compilation of the lists of jurors, the summons served on the applicant, the fine imposed on him and the proceedings for its conversion were events that were mutually dependent and entirely interrelated.

B. The Court's assessment

90. The Court observes that the applicant did not allege that the proceedings directed against him were in any way unfair or that any of the rights guaranteed by Article 6 had been violated. In any case, it notes that the criminal proceedings were a mere consequence of the existence of the discriminatory civic obligation. Having regard to its finding that there has been a violation of Article 14 taken in conjunction with Article 4 § 3 (d) (see paragraph 84 above), the Court does not consider it necessary to examine whether there has also been a violation of Article 14 taken in conjunction with Article 6 (see, *mutatis mutandis*, *Karlheinz Schmidt*, cited above, § 30).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

91. 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

92. The applicant observed that his service as a juror caused him to be absent from his employment for a number of days. However, as the financial loss was difficult to quantify, he did not present any claim in this respect. The applicant also had to pay a fine of 100 Maltese liri (MTL) (approximately 240 euros (EUR)), which was the direct effect of the discrimination complained of. He requested the reimbursement of this sum. As to non-pecuniary damage, the applicant left the matter to the discretion of the Court. He pointed out that his name had been kept on the lists of jurors and jury foremen published in 2005.

93. The Government did not comment on the applicant's claims.

94. In so far as the repayment of the EUR 240 fine is concerned, the Court notes that this fine was imposed for non-attendance before the Criminal Court; it has not been shown that it was directly linked with the practice found to be in breach of the Convention. It further considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

B. Costs and expenses

95. The applicant claimed MTL 723.33 (approximately EUR 1,736) for the costs incurred at the domestic level. He produced a tax-inclusive bill in this respect, issued by the Registrar of the Courts. He further claimed a total sum of MTL 2,353.04 (approximately EUR 5,648), to which EUR 368 should be added, for the proceedings before the Court, these sums covering both his lawyers' fees and the costs of their attendance at the oral hearing of 24 May 2005. The total sum claimed for costs and expenses was thus EUR 7,752.

96. The Government did not comment on the applicant's claims.

97. According to the Court's established case-law, an award can be made in respect of costs and expenses incurred by the applicant only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see, *inter alia*, *Belziuk v. Poland*, 25 March 1998, § 49, *Reports* 1998-II, and *Craxi v. Italy*, no. 34896/97, § 115, 5 December 2002).

98. In the present case, the Court considers the total amount claimed to be reasonable. It therefore awards the applicant EUR 7,752, plus any tax that may be chargeable on this sum.

C. Default interest

99. The Court considers it appropriate that the default interest 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. *Holds* by six votes to one that Article 14 of the Convention taken in conjunction with Article 4 § 3 (d) is applicable in the present case;

2. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention taken in conjunction with Article 4 § 3 (d);

3. *Holds* unanimously that it is not necessary to examine whether there has been a violation of Article 14 of the Convention taken in conjunction with Article 6;

4. *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 amounts, to be converted into Maltese liri at the rate applicable at the date of settlement:
      (i) EUR 7,752 (seven thousand seven hundred and fifty-two euros) in respect of costs and expenses;
      (ii) any tax that may be chargeable on the above amount;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President

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

(a) concurring opinion of Judge Bratza;
(b) concurring opinion of Judge Garlicki;
(c) dissenting opinion of Judge Casadevall.

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE BRATZA

1. It is with some hesitation that I have voted with the majority of the Chamber in favour of finding a violation of Article 14 of the Convention taken in conjunction with Article 4. My hesitations relate less to the question whether, if applicable, Article 14 of the Convention was violated than to the more fundamental question whether the facts complained of fall within the ambit of Article 4 and thus whether Article 14 has any application at all.

2. As the judgment makes clear, this is not the first occasion on which the Court has been required to examine whether a complaint of discriminatory treatment in the performance of a "civic obligation" fell within the ambit of Article 4 § 3 (d) of the Convention.

In *Van der Mussele v. Belgium* (23 November 1983, Series A no. 70), the Court was required to determine whether the obligation imposed on the applicant, as a pupil advocate, to represent a defendant without remuneration and without being reimbursed his expenses was in violation of Article 4 of the Convention taken alone or in conjunction with Article 14. In assessing whether the work the applicant was obliged to perform amounted to "forced or compulsory labour" within the meaning of Article 4 § 2, the Court held that the structure of Article 4 was informative on this point:

> "Paragraph 3 is not intended to 'limit' the exercise of the right guaranteed by paragraph 2, but to 'delimit' the very content of this right, for it forms a whole with paragraph 2 and indicates what 'the term "forced or compulsory labour" shall not include' (*ce qui* '*n'est pas considéré comme 'travail forcé ou obligatoire"* '). This being so, paragraph 3 serves as an aid to the interpretation of paragraph 2.
>
> The four sub-paragraphs of paragraph 3, notwithstanding their diversity, are grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs. The final sub-paragraph, namely sub-paragraph (d) which excludes 'any work which forms part of normal civil obligations' from the scope of forced or compulsory labour, is of especial significance in the context of the present case." (§ 38)

Having examined the nature and extent of the burden imposed on the applicant, as well as the compensatory factors and the standards generally obtaining in Belgium and other democratic societies, the Court concluded that there was no compulsory labour for the purposes of Article 4 § 2 of the Convention. In view of this conclusion, the Court did not find it necessary to determine:

> "... whether the work in question was in any event justified under Article 4 § 3 (d) as such and, in particular, whether the notion of 'normal civic obligations' extends to obligations incumbent on a specific category of citizens by reason of the position they occupy, or the functions they are called upon to perform, in the community." (§ 41)

Turning to the issue under Article 14 of the Convention, the Court first addressed the question whether, since it had already found that there was no forced or compulsory labour for the purposes of Article 4,

> "... the facts in issue fall completely outside the ambit of that Article and, hence, of Article 14. However, such reasoning would be met by one major objection. The criteria which serve to delimit the concept of compulsory labour include the notion of what is in the normal course of affairs ... Work or labour that is in itself normal may in fact be rendered abnormal if the choice of the groups or individuals bound to perform it is governed by discriminatory factors, which was precisely what the applicant contended had occurred in the present circumstances.
>
> Consequently, this is not a case where Article 14 should be held inapplicable; the Government, moreover, did not contest the point." (§ 43)

Having concluded that Article 14 was not inapplicable, the Court found on the facts that the applicant had not been subjected to discriminatory treatment.

3. In the case of *Karlheinz Schmidt v. Germany* (18 July 1994, Series A no. 291-B), the applicant complained that he was obliged to pay a fire service levy under an Act which made it compulsory for men, but not for women, to serve in the fire brigade or pay a financial contribution in lieu of such service. He claimed to be the victim of discrimination on grounds of sex in breach of Article 14 "taken in conjunction with Article 4 § 3 (d) of the Convention".

The Court, after reiterating that there could be no room for the application of Article 14 unless the facts fell within the ambit of one or more of the substantive provisions of the Convention, went on to quote from paragraph 38 of *Van der Mussele* to the effect, *inter alia*, that paragraph 3 of Article 4 was not intended to "limit" the exercise of the right guaranteed by paragraph 2 but rather to "delimit" the very content of that right and that the paragraph accordingly served as an aid to the interpretation of paragraph 2. The Court continued:

> "Like the participants in the proceedings, the Court considers that compulsory fire service such as exists in Baden-Württemberg is one of the 'normal civic obligations' envisaged in Article 4 § 3 (d). It observes further that the financial contribution which is payable – in lieu of service – is, according to the Federal Constitutional Court ..., a 'compensatory charge'. The Court therefore concludes that, on account of its close links with the obligation to serve, the obligation to pay also falls within the scope of Article 4 § 3 (d).
>
> It follows that Article 14 read in conjunction with Article 4 § 3 (d) applies." (§ 23)

In this case the Court concluded that the difference in treatment was not objectively justified and that there had accordingly been a violation of Article 14 of the Convention "taken in conjunction with Article 4 § 3 (d)".

4. I do not find the reasoning in either judgment for holding Article 14 to be applicable to be entirely convincing or satisfactory.

The drafting of Article 4 of the Convention is unusual. The rights guaranteed by the Article are set out in paragraph 1 ("No one shall be held in slavery or servitude") and paragraph 2 ("No one shall be required to perform forced or compulsory labour"). Like Article 3 of the Convention, the prohibitions contained in the two paragraphs are cast in absolute terms, there being no stated exceptions and, in the case of the first paragraph, no derogation being permitted under Article 15. Paragraph 3 of the Article does not confer any rights. In particular, it does not confer a right not to be compelled to perform work or services of the kind set out in sub-paragraphs (a)-(d). Nor, unlike paragraph 2 of Articles 8-11 of the Convention, does paragraph 3 provide for permitted restrictions on the enjoyment of rights guaranteed by Article 4. Nor, again, unlike paragraph 2 of Article 2 of the Convention, does paragraph 3 lay down specific circumstances in which acts which would otherwise offend against the absolute prohibition in the Article might be justified. Paragraph 3 instead defines the scope of the prohibition in paragraph 2 by spelling out what is not included within the words "forced or compulsory labour": as the Court expressed the point, paragraph 3 does not "limit" the exercise of the right guaranteed by paragraph 2 but "delimits" the very content of that right.

5. This being so, the question arises as to how compulsion to perform work or services forming part of "normal civic obligations", which are expressly excluded from the protection afforded by Article 4, can at the same time be said to fall "within the ambit" of that provision so as to render Article 14 applicable.

In *Van der Mussele*, the Court sought to circumvent the problem by holding that the work or labour in question was "abnormal" if the choice of the groups or individuals bound to perform it were "governed by discriminatory factors", which was what the applicant contended had occurred in that case. However, this reasoning is not without its difficulties. In the first place, the Court expressly found that the services the applicant had been required to perform, even if "abnormal", did not amount to "forced or compulsory labour" for the purposes of paragraph 2 of Article 4 and were thus not within the scope of the right guaranteed by that paragraph. Secondly, discriminatory treatment only gives rise to an issue under Article 14 of the Convention if it relates to facts falling within the ambit of a substantive provision; if the facts do not otherwise fall within such ambit they cannot be made to do so because discrimination is alleged.

In *Karlheinz Schmidt*, the Court did not suggest that the obligation imposed on the applicant was abnormal but, on the contrary, found that it was a normal civic obligation which fell squarely within the terms of paragraph 3 (d). It would appear to follow from the Court's earlier reasoning that the obligation in question thus fell outside the scope of the right guaranteed by Article 4. However, as Judge Mifsud Bonnici pointed out in his dissenting opinion in that case, the Court in fact reached precisely

the opposite conclusion, appearing to treat paragraph 3 (d) not as "delimiting" the scope of the right guaranteed by paragraph 2 of Article 4 but as if it conferred an independent right.

6. Despite my doubts as to the Court's reasoning in its earlier judgments, since I see no ground on which to distinguish them from the present case, I would follow them in holding Article 14 to be applicable. This result would also seem to accord better with the principle that the Convention should be interpreted and applied in a manner which renders the rights practical and effective, not theoretical and illusory. It would seem scarcely compatible with this principle to interpret Article 4 as entitling a State to oblige one particular group or category of individuals to perform civic obligations, without the necessity to justify the discriminatory treatment. However, I consider that the reasons for holding Article 14 to be applicable in such circumstances require further clarification. Here, my approach to the question is not dissimilar to that of Judge Garlicki, whose concurring opinion I have had the benefit of reading.

7. The central question which arises is what constitutes "the ambit" of one of the substantive Articles, in this case Article 4. It has been argued that "even the most tenuous links with another provision in the Convention will suffice" for Article 14 to be engaged (see Grosz, Beatson and Duffy, Human Rights: The 1998 Act and the European Convention, 1st edition, Sweet & Maxwell, 2000, § C14-10). Even if this may be seen as going too far, it is indisputable that a wide interpretation has consistently been given by the Court to the term "within the ambit". Thus, according to the constant case-law of the Court, the application of Article 14 not only does not presuppose the violation of one of the substantive Convention rights or a direct interference with the exercise of such right, but it does not even require that the discriminatory treatment of which complaint is made falls within the four corners of the individual rights guaranteed by the Article. This is best illustrated by the fact that Article 14 has been held to cover not only the enjoyment of the rights that States are obliged to safeguard under the Convention but also those rights and freedoms that a State has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention (see, for example, *Case* "*relating to certain aspects of laws on the use of languages in education in Belgium*" (merits), 23 July 1968, Series A no. 6, pp. 33-34, § 9, and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 71, Series A no. 94). This would indicate in my view that the "ambit" of an Article for this purpose must be given a significantly wider meaning than the "scope" of the particular rights defined in the Article itself. Thus, in the specific context of Article 4 of the Convention, the fact that work or service falling within the definition of "normal civic obligations" in paragraph 3 are expressly excluded from the scope of the right guaranteed by paragraph 2 of that Article in no sense

means that they are also excluded from the ambit of the Article seen as a whole.

8. What then is to be regarded as being "within the ambit" of Article 4? In my view valuable guidance is to be found in the International Labour Organisation Convention no. 29 on which, as pointed out by the Court in *Van der Mussele* (cited above, § 32), the authors of the European Convention based themselves in drafting Article 4 and to which the Article "bears a striking resemblance". Paragraph 1 of the ILO Convention provides that for the purposes of that Convention "forced or compulsory labour" shall mean "all work or service which is exacted from any person under the menace of a penalty and for which the person has not offered himself voluntarily". It is this definition which the Court noted could "provide a starting-point for interpretation of Article 4 ... of the European Convention", without sight being lost of the Convention's special features or of the fact that the Convention was a living instrument, to be read in the light of the notions currently prevailing in democratic States. It is beyond dispute that compulsory jury service in Malta was and is a service which is exacted "under the menace of a penalty" (in the case of the applicant, a fine for non-attendance for jury service was in fact imposed). It is also beyond dispute that the applicant did not offer himself voluntarily for jury service, which would in principle therefore fall within the ordinary meaning of what constitutes "forced or compulsory labour". This is indeed confirmed by paragraph 3 itself which, by excluding from the prohibition in paragraph 2 "normal civic obligations", shows the wide scope of what would otherwise be treated as "forced or compulsory labour". While paragraph 3 must indeed be regarded as "delimiting" the scope of the right guaranteed in paragraph 2 as the Court stated in *Van der Mussele* (with the consequence that a State which imposes normal civic obligations does not violate the Article), it does not exclude such obligations from the ambit of the Article (with the consequence that such obligations may only be imposed in a non-discriminatory manner).

9. For the above reasons, I consider that Article 14 is applicable and I share the view of the majority of the Court that in the present case it was violated. However, unlike the majority and unlike the Court in *Karlheinz Schmidt*, I would find a violation of Article 14 "taken in conjunction with Article 4" and not "taken in conjunction with Article 4 § 3 (d)".

CONCURRING OPINION OF JUDGE GARLICKI

I am prepared to accept the finding that Article 14 of the Convention taken in conjunction with Article 4 (and, in particular, paragraph 3 (d) thereof) is applicable in the present case. I also agree that there has been a violation of that Article.

However, I am not sure whether the "traditional" approach to the interpretation of Article 4, as expressed in *Van der Mussele v. Belgium* (23 November 1983, Series A no. 70) and *Karlheinz Schmidt v. Germany* (18 July 1994, Series A no. 291-B), represents the most convincing way of arriving at those conclusions.

In analysing the relationship between paragraphs 2 and 3 of Article 4, the Court indicated that the latter paragraph was "not intended to 'limit' the exercise of the right guaranteed by paragraph 2, but to 'delimit' the very content of that right" (see *Karlheinz Schmidt*, cited above, § 22). Thus, the Court adopted an "exception to exception" approach. But such an approach may lead to a narrow reading of Article 4: the compulsory work and services enumerated in paragraph 3 remain entirely outside the scope of that Article. In consequence, their regulation bears no direct relation to "the enjoyment of rights and freedoms" necessary to trigger the equal protection guarantees. It is true that, in *Karlheinz Schmidt*, the Court did find a violation of Article 14, but it did not show how and why the civic duty in question was linked to the right not to be required to perform compulsory labour.

In my opinion, as long as we remain within this traditional approach, it will be very difficult to establish such a link and to apply Article 14 to situations enumerated in paragraph 3 (and, from that perspective, the dissenting opinion of Judge Casadevall seems quite logical).

However, I believe that it is possible to read Article 4, taken as a whole, in a broader way, not only as prohibiting any forms of forced or compulsory labour but also as regulating State prerogatives in establishing different forms of compulsory work and services. In other words, Article 4 may also be read as setting a general framework of duties which may be imposed on an individual. Article 4 empowers the State to establish such duties and services, but – by the very fact of their enumeration – Article 4 also absorbs (includes) them into the realm of the Convention. One of the consequences of such inclusion is that those duties and services must be formulated in a manner compatible with the Convention, Article 14 included. It should not be forgotten that Article 4 is drafted in a particular manner: no other substantive provision of the Convention contains enumerations of such kind. This may suggest that the drafters of the Convention envisaged that Article 4 might be interpreted in a particular way.

Several arguments may warrant this broad reading of Article 4. First of all, it would reflect the particular rank of Article 4 as "one of the

fundamental values of democratic societies". Secondly, it would correspond better to the concept of positive duties of the State: the State is not only prohibited from introducing any form of forced or compulsory labour, but is also required to regulate the scope and manner of what remains imposable on individual citizens. Finally, it would respond to the developing trends of modern societies: whilst it is now very difficult to find situations of "classic" forced labour or servitude (the 2005 *Siliadin v. France* case being the only recent example (no. 73316/01, ECHR 2005-VII)), there may be more controversies surrounding obligations enumerated in paragraph 3 of Article 4.

DISSENTING OPINION OF JUDGE CASADEVALL

(Translation)

1. For the reasons set out below, I voted in favour of finding that Article 14 of the Convention taken in conjunction with Article 4 § 3 (d) is not applicable and that consequently there has been no violation of those provisions.

2. Like the dissenting judges in *Karlheinz Schmidt* (18 July 1994, Series A no. 291-B, a judgment that is now twelve years old), I fail to see how Article 14, which is dependent for its existence on a recognised right (see paragraph 42 of the present judgment), can be linked to sub-paragraph (d) of Article 4 § 3 for the following reasons:

(a) sub-paragraph (d) actually constitutes an exception to the general rule prohibiting forced or compulsory labour;

(b) the expression "forced or compulsory labour" in Article 4 does not include "any work or service which forms part of normal civic obligations" (see paragraph 43 of the judgment); and

(c) it is accepted that the obligation to serve as a juror in Malta forms part of the "normal civic obligations" (see paragraph 47 of the judgment).

3. It is quite clear that Mr Zarb Adami has not been required to perform forced or compulsory labour within the meaning of Article 4 § 2 and that the service he was asked to perform constituted a civic obligation, such as serving the administration of criminal justice. Since the applicant is unable to assert a substantive right protected by the Convention (Article 4 does not prohibit civic obligations of this type) Article 14 cannot come into play.

4. Furthermore, I consider that the facts of the present case enable it to be distinguished from the case of *Karlheinz Schmidt* without difficulty. In the latter case (as the Court notes in paragraph 28), the discrimination complained of by the applicant went beyond the obligation for men to perform compulsory service in the fire brigade, since "the obligation to perform such service is exclusively one of law and theory. ... The financial contribution has – not in law but in fact – lost its compensatory character and has become the only effective duty" and the issue therefore became one of a difference in treatment on grounds of sex in view of the obligation imposed on certain inhabitants of the German town concerned to pay the contribution because they belonged to the male sex. In the present case, the applicant was forced to pay a fine for failing to comply with the summons requiring him to perform jury service, a penalty to which anyone, whether male or female, who failed to comply with those statutory provisions was liable. The penalty was not in itself discriminatory and, in my view, does not possess the link with Article 4 that is ascribed to it in the judgment (see paragraph 47).

5. As to the merits, even assuming that Article 14 taken in conjunction with Article 4 was applicable, I would also have voted against finding a violation. I would classify this complaint as frivolous and fail to see any discrimination that would entitle the applicant to protection under the Convention. He was required to perform jury service on three occasions over a seventeen-year period, which is not unreasonable (Mr Van der Mussele was required to act as a court-assigned lawyer approximately fifty times in three years (!) under an obligation which "... was founded on a conception of social solidarity and cannot be regarded as unreasonable" and in respect of which "the burden imposed on the applicant was not disproportionate" (see *Van der Mussele v. Belgium*, 23 November 1983, § 39, Series A no. 70).

6. Article 14 safeguards individuals, placed in analogous situations, from discrimination (see *Marckx v. Belgium*, 13 June 1979, § 32, Series A no. 31). In the present case, I see no analogy between the applicant's situation and, for example, that of a housewife and mother. It was on receipt of a fourth summons that the applicant decided to run the risk of ignoring the summons and not attending court, rather than to apply for an exemption. It is accepted that neither the legislation nor the rules on how the lists of jurors are to be compiled are discriminatory. However, for historical, family, social and cultural reasons which are also to be found in other spheres (such as compulsory military service), for many years the number of women included on the lists of jurors was low (perhaps it was they who had cause to complain of discrimination). However, the practice has been corrected in recent years and some balance has now been established. Finally, in April 2005, the applicant's application for exemption from jury service was accepted by the competent authority.