MALTA

QORTI CIVILI
PRIM'AWLA

ONOR. IMHALLEF
SILVIO MELI

LL.D.; Dip. Stud. Rel.; Dip. Can. Matr. Jur. & Proc.;
Cert. Jur. & H.R. (Strasbourg);
P.G. Dip. European Competition Law (King's College, London),
P.G. Dip. European Law (King's College, London).

Illum id-9 ta' Novembru, 2016.

Prim'Awla tal-Qorti Civili
(Sede Kostituzzjonali)

Rikors Numru 61/2014 SM

Carmen Magro (I.D. 0703943 M),
Nazzarena *sive* Leslie Baldacchino
(I.D. 0325565 M), Alexander Magro
(I.D. 0502568 M) u Andrew Magro
(I.D. 0288673 M)

vs.

L-Onorevoli Prim Ministru ta' Malta
u l-Avukat Generali in rapprezentanza
tal-Gvern ta' Malta

Il-Qorti,

1.0. Rat ir-rikors datat is-26 t'Awwissu, 2014, li permezz tieghu r-rikorrenti sintetikament esponew s-segwenti: (ara foll 1)

1.1. Illi r-rikorrenti huma werrieta ta' Fedele Magro li flimkien ma' huh Alfred kien akkwista b'titolu ta' subenfitewsi fit-2 ta' Settembru, 1959, l-art in dizamina, (ara foll 4);

1.2. Illi sussegwentement l-ahwa Magro indikati fil-paragrafu precedenti kienu bnew blokk ta' tmien (8) appartamenti, (ara foll 10), fuq l-istess art;

1.3. Illi fis-7 ta' Jannar, 1966, ikkoncedew l-istess blokka, *"Verdala Flats"*, fi triq gdida f'Paceville Avenue, (illum Triq Salvu Privitera), Paceville, San Giljan, lill-Kaptan Joseph Wismayer, b'subenfitewsi temporanja ghal sbatax- il sena;

1.4. Illi fis-27 ta' Settembru, 1976, l-istess ahwa Magro fuq indikati qasmu l-istess blokk t'appartamenti, biex il-fond meritu tal-procedura odjerna, senjatament l-appartament bin-numru 1 gie assenjat lil Fedele Magro, (ara foll 16);

1.5. Illi rizultat tal-istess assenjazzjoni dan l-appartament hu illum proprjeta` esklussiva tar-rikorrenti;

1.6. Illi meta fis-6 ta' Jannar, 1983, spiccat il-koncessjoni subenfitewtika temporanja favur il-Kaptan Wismayer, il-familja Magro giet ghall-ewwel darba a konjizzjoni tal-fatt li matul l-istess koncessjoni l-appartament in dizamina kien gie mikri lil Alfred McElhatton, cittadin ta' Malta, u l-appartament *de quo* hu r-residenza ordinarja tieghu;

1.7. Illi fil-mori tal-imsemmija koncessjoni subenfitewtika temporanja, gie introdott l-artiklu 12(3) tal-Ordinanza li Tnehhi l-Kontroll tad-Djar, illum Kap 158 tal-Ligijiet ta' Malta, li ta' d-dritt lill-imsemmi McElhatton li jibqa' jokkupa d-dar *de quo* taht kirja gdida bl-istess kera u kondizzjonijiet biex il-koncessjoni enfitewtika tigi konvertita f'kirja;

1.8. Illi ghalhekk l-imsemmi artiklu 12(3) fuq riferit cahhad lil Fedele Magro bhala sid is-subenfitewsi perpetwa *de quo*, mid-dritt li jirriprendi l-pussess u t-tgawdija tal-fond *de quo* fi tmiem is-subenfitewsi temporanja moghtija lill-Kaptan Wismayer;

1.9. Illi l-holqien ta' kirja gdida minghajr il-kunsens tas-sid iccahhad lir-rikorrenti mill-pussess u mit-tgawdija tad-drittijiet taghhom fuq il-proprjeta` taghhom stess;

1.10. Illi ghalkemm it-tehid ta' pussess sar b'mod obligatorju, ma jammontax ghal esproprijazzjoni esplicta, izda xorta tammonta ghal "tehid forzuz" tal-proprjeta` taghhom;

1.11. Illi l-kera attwali percepita ghall-appartament *de quo*, anke wara r-revizjoni statutorja, tammonta ghal (€350.12), (ara foll 2);

1.12. Illi xorta wahda d-drittijiet tar-rikorrenti gew miksura *stante* li tali kera mhix wahda realistika meta paragunata mal-valur lokatizju fis-suq liberu;

1.13. Illi ghalhekk ir-rikorrenti mhux qed jircievu kumpens gust ghat-tehid forzuz jew indhil li qed isofru fl-amministrazzjoni ta' hwejjighom;

1.14. Illi l-ilment kostituzzjonali jirrigwarda s-segwenti:

1.14.1. L-artiklu 12(3) tal-Kap 158 tal-Ligijiet fuq riferiti;

1.14.2. L-artiklu 37 tal-Kostituzzjoni ta' Malta, (minn issa 'l quddiem imsejha l-Kostituzzjoni);

1.14.3. L-Ewwel Protokoll ta' l-Ewwel Skeda tal-Kap 319 tal-istess Ligijiet fuq riferiti;

1.15. Illi skont il-Qorti Ewropeja tad-Drittijiet tal-Bniedem, (minn issa l-Qorti ta' Strasburgu), fid-decizjoni taghha fl-ismijiet ***Amato Gauci vs. Malta*** datata l-***15 ta' Settembru, 2009***, stabbiliet sintetikament is-segwenti:

1.15.1. Il-Gvern ghandu dritt jirregola l-uzu tal-proprjeta` fl-interess pubbliku;

1.15.2. Izda l-applikant kien jisthoqqlu kumpens adegwat ghat-"tehid forzuz" tal-proprjeta` tieghu, bir-rata ta' 5% interessi mis-sena li fiha gie effettwat it-*"tehid forzuz"*;

1.16. Illi ghaldaqstant aderew din il-qorti biex l-intimati jkollhom l-opportunita` jghidu ghaliex din il-qorti m'ghandiex:

1.16.1. Tiddikjara li *ai termini* tal-Kap 158 fuq riferit, kif emendat fl-1979, giet kostitwita kirja gdida *ope legis* favur terzi fuq l-appartament numru 1, *"Verdala Flats"*, Triq Salvu Privitera, Paceville, proprjeta` tar-rikorrenti, li maghhom dawn tal-ahhar qatt ma kellhom relazzjoni guridika, u li allura *stante* li m'hemmx il-kunsens tar-rikorrenti fir-rigward, tammonta ghal "tehid forzuz";

1.16.2. Tiddikjara li r-rata tal-kera *ope legis* mhix ekwivalenti ghall-kumpens gust favur ir-rikorrenti, u ghalhekk gew lezi d-drittijiet umani taghhom bi ksur tal-artiklu 37 tal-Kostituzzjoni u l-ewwel artiklu tal-Ewwel Protokoll tal-Ewwel skeda tal-Kap 319 tal-ligijiet fuq riferiti;

1.16.3. Tiddikjara li r-rikorrenti huma intitolati ghall-kumpens mill-Gvern ta' Malta kif rapprezentat mill-intimati;

1.16.4. Tillikwida l-hlas ta' tali kumpens favur ir-rikorrenti;

1.16.5. Tikkundanna lill-istess Gvern biex ihallas dan il-kumpens hekk deciz lir-rikorrenti, li ghandu jirrifletti d-differenza bejn il-kera stabbilita *ope legis* u l-valur lokatizju reali matul is-snin li fihom sehh dan il-ksur u sakemm jieqaf dan il-ksur, bl-imghax skont il-ligi;

1.16.6. Taghti kull ordni iehor li jidhrilha xieraq;

1.16.7. Bl-ispejjes u bl-imghaxijiet kontra l-intimati;

2. Rat ir-risposta datata t-12 ta' Settembru, 2014, (ara foll 41);

3. Illi fir-rigward tar-risposta in dizamina jinghad li din il-qorti gia` kellha l-okkazzjoni tiddeciedi l-punt preliminari sollevat mill-intimati permezz tas-sentenza taghha datata s-16 t'April, 2015, (ara foll 74);

4. Illi għalhekk id-deċiżjoni odjerna hi limitata għall-epurazzjoni tal-meritu kostituzzjonali u konvenzjonali sollevat mir-rikorrenti, fejn biex jiġi evitat dilungar inutili qed tagħmel referenza għall-istess sentenza preliminari fejn ir-risposti in meritu tal-intimati gia` gew sintetikament elenkati u għalhekk m'għandhomx għalfejn jiġu hawn riprodotti mill-ġdid, (ara paragrafi numru tnejn punt tnejn, (2.2.), sa tnejn punt sbatax, (2.17.), fl-istess sentenza preliminari indikata fil-paragrafu precedenti (foll 78 u 79));

5. Rat id-digriet tagħha datat it-2 ta' Marzu, 2016, li permezz tiegħu u wara talba oppozita tal-abbli rapprezentanti legali tal-partijiet, awtorizzat lill-istess biex jittrattaw il-kaz bil-modalita` u fit-termini hemm indikati, (ara foll 224);

6. Rat in-nota ta' sottomissjonijiet tar-rikorrenti datata id-29 t'April, 2016, (ara foll 230), flimkien man-nota ta' sottomissjonijiet tal-intimati datata t-30 ta' Mejju, 2016, (ara foll 237);

7. Rat in-nota tar-rikorrenti datata d-9 ta' Gunju, 2016, li permezz tagħha r-rikorrenti kollha cedew l-atti kollha tal-kawza odjerna fil-konfront tal-Prim Ministru, izda mhux fil-konfront tal-Avukat Generali, (ara foll 243);

8. Rat il-verbal tal-abbli rapprezentanti legali tal-partijiet datat id-9 ta' Gunju, 2016, li permezz teighu infurmaw lill-qorti li kienu qed jistriehu fuq in-noti ta' sottomissjonijiet minnhom ipprezentati, (ara foll 244);

9. Semghet ix-xhieda prodotta;

10. Ezaminat id-dokumenti prodotti inkluzi l-valutazzjonijiet tal-periti *ex parte*, (ara rispettivament foll 117 *et sequitur* u 225 *et sequitur*;

Ikkunsidrat:

11.0. Illi l-fatti li taw lok ghall-procedura odjerna jistghu jigu sintetikament elenkati bil-mod segwenti:

11.1. Illi l-ahwa Fedele u Alfred Magro kienu akkwistaw porzjon art b’titolu ta’ subenfitewsi perpetwa permezz ta’ kuntratt datat it-2 ta’ Settembru, 1959, (ara foll 4);

11.2. Illi dan il-porzjon art gie sussegwentement zviluppat u nbena blokk ta’ tmin (8) appartamenti bl-isem *“Verdala Flats”*, illum Triq Salvu Privitera, Paceville, (ara foll 1);

11.3. Illi fis-7 ta’ Jannar, 1966, l-istess ahwa Magro ikkoncedew l-istess blokk t’appartamenti lill-Kaptan Joseph Wismayer, (ara foll 10), b’titolu ta’ subenfitewsi temporanja ghal sbatax- (17) il sena;

11.4. Illi l-ahwa Magro qasmu l-propjreta` li kellhom in komuni, (ara foll 16), u l-appartament in meritu, dak numru 1, gie assenjat lil Fedele – l-awtur tar-rikorrenti werrieta tieghu;

11.5. Illi waqt il-koncessjoni subenfitewtika fuq riferita l-artiklu 12 tal-Kap 158 fuq riferit ta d-dritt lill-okkupant in enfitewsi li jkun cittadin Malti, (f’dan il-kaz lil Wismayer), li meta l-koncessjoni enfitewtika tiskadi dan ikompli jokkupa r-residenza *de quo* din id-darba taht kirja gdida minghand il-padrun dirett u ghal-kirja gdida riveduta skont l-indici tal-gholi tal-hajja;

11.6. Illi fil-kaz odjern il-koncessjoni subenfitewtika temporanja favur il-Wismayer skadiet fl-1983;

11.7. Illi r-rikorrenti saru jafu pero` li l-Wismayer kien assenja u kera l-appartament *de quo* lil Alfred McElhatton, cittadin Malti, li kien qed juza l-istess bhala r-residenza ordinarja tieghu;

11.8. Illi rizultat tal-emendi tal-1979 fuq riferiti r-rikorrenti ma jistghux jirriprendu l-pussess tal-fond in dizamina *stante* li rizultat t’hekk l-okkupant issa nghata dritt ta’ kera u ghalhekk ghandu dritt ikompli jokkupa l-appartament in dizamina taht kirja gdida minghand id-direttarju – fil-kaz odjern, minghand is-subdirettarju;

11.9. Illi *stante* li l-kirja issa rizultanti ma tammontax ghall-kumpens xieraq u gust. Ir-rikorrenti jsosstnu li soffrew is-segwenti lezjoni:

11.9.1. Dawk naxxenti mid-drittijiet kostituzzjonali taghhom kif sanciti bl-artiklu 37 tal-Kostituzzjoni; u

11.9.2. Dawk naxxenti mid-drittijiet Konvenzjonali taghhom kif sanciti mill-ewwel artiklu tal-Ewwel Protokoll tal-Ewwel Skeda tal-Kap 319;

11.10. Illi in vista tal-istess intervent statutorju in dizamina r-rikorrenti jsosstnu lkoll:

11.10.1. Illi tilfu d-dritt li jirriprendu l-appartament *de quo*;

11.10.2. Illi tilfu d-dritt li jistabbilixxu kera adegwat ghall-valur lokatizju reali skont is-suq attwali fil-proprjeta`;

Ikkunsidrat:

12. Illi jigi sottolineat illi kif jirrizulta mill-verbal tar-rikorrenti datat id-9 ta' Gunju, 2016, ir-rikorrenti irrinunzjaw ghall-procedura odjerna fil-konfront tal-Prim Ministru, u li allura, l-vertenza odjerna hi limitata ghall-intimat Avukat Generali biss, (ara foll 243);

Ikkunsidrat:

13. Illi jigi osservat li fil-materja in dizamina kien hemm zvilupp konsiderevoli fil-gurisprudenza naxxenti mill-Qorti ta' Strasburgu, specjalment dak naxxenti mill-kawza fl-ismijiet ***Amato Gauci vs. Malta***, datata l-***15 ta' Settembru, 2009***, - liema fatti hemm analizzati huma analogi ghal dawk in dizamina f'din il-procedura;

14. Illi fil-kaz indikat fil-paragrafu precedenti l-qorti hemm riferita ikkonkludiet li Malta kienet kissret id-drittijiet fundamentali tar-rikorrenti hemm indikat *stante* li:

"... the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant's right of property" (paragrafi 63 u 64);

15. Illi *di piu`*, fir-rapport taghha fil-kawza ***Zammit and Others vs. Malta No. 16756/90,*** datat it-***12 ta' Jannar, 1991,*** il-***Kummissjoni*** qalet hekk dwar l-Att XXIII tal-1979 in dizamina:

> "1. The Court notes that the Government made reference to the Commission's decision in ***Zammit and Others vs. Malta***. Indeed, in analogous circumstances the Commission found that the said interference had been justified in view of the wide margin of appreciation of States in this sphere. However, the Court recalls that this margin is still subject to European supervision and what might have been justified eighteen years ago, the Commission decision having been delivered in 1991, will not necessarily be justified today. As stated by the Government, Act XXIII of 1979 had as its aim to prevent large-scale evictions in the 1950s and 1960s. Thus, in its balancing exercise the Court will have to determine whether such a degree of tenant protection, to the detriment of owners, is still justified fifty years later ...";

Ikkunsidrat:

16. Illi ghal dak li jirrigwarda l-mertu in dizamina l-Qorti ta' Strasburgu stabbiliet li r-restrizzjoni fuq is-sid tal-proprjeta` li jittermina kirja hi ekwivalenti ghall-kontroll tal-uzu tal-proprjeta` u konsegwentment, timmerita referenza diretta kopjuza fir-rigward *stante* li zviluppat din il-protezzjoni b'mod innovattiv;

17. Illi fil-kawza fuq imsemmija ***Amato Gauci vs. Malta*** (ara paragrafu numru tlettax, (13.), aktar qabel), l-istess qorti qalet hekk fir-rigward:

> "52. The Court has previously held that a restriction on an applicant's right to terminate a tenant's lease constitutes control of the use of property within the

meaning of the second paragraph of Article 1. It follows that the case should be examined under the second paragraph of Article 1 of Protocol No. 1 (see ***Velosa Barreto vs. Portugal 21st November, 1995***, para. 35, Series A no. 334)"

18. Illi fil-paragrafu 56 tal-istess sentenza citata fil-paragrafu precedenti l-istess qorti kompliet bil-mod segwenti:

"Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see ***Sporrong and Lonnroth para. 74 and Brumarescu [GC],*** no. 28342/95, para. 78, ECHR 1999 – VII)";

19. Illi fil-paragrafu numru 57 l-istess sentenza tkompli:

"The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State's interference the person concerned had to bear a disproportionate and excessive burden, (see ***James and Others, para. 50; Mellacher and others, para. 48, and Spadea and Scalabrino vs. Italy, judgement of 28 September, 1995, para. 33, Series A no. 315 – B***)";

20. Illi fil-paragrafu 61 tal-istess irriteniet is-segwenti:

"The Court will consider the impact that the application of the 1979 Act had on the applicant's property. It notes that the applicant could not exercise his right of use in terms of physical possession as the house was occupied by the tenants and he could not terminate the lease. Thus, while the applicant remained the owner of the

property he was subjected to a forced landlord-tenant relationship for an indefinite period of time. It has already been established that the applicant did not have an effective remedy enabling him to evict the tenants, (see *a contrario*, ***Velosa Barreto...***), either on the basis of his own need or that of his relatives or on the basis that Mr and Mrs P. were not deserving of such protection, as they owned alternative accommodation. Consequently, the application of the law itself lacked adequate procedural safeguards aimed at achieving a balance between the interests of tenants and those of the owners. The Court further considers that the possibility of the tenant leaving the premises voluntarily was remote, especially since the tenancy could be inherited. The Government's contention that transfer of the tenancy by inheritance was improbable was not substantiated and remains to be considered as pure speculation. It follows that these circumstances inevitably left the applicant in uncertainty as to whether he would ever be able to recover his property".

21. Illi finalment l-istess qorti tkompli tissottolinea fil-paragrafu 62:

"Moreover, both the amount of rent received by the applicant, namely 210 euros per year and the maximum amount of rent the applicant could obtain, namely 420 euros, were as confirmed by the Constitutional Court, 'certainly low'. Indeed the amount of rent contrasts starkly with the market value of the premises as submitted by the applicant. The Court considers that State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable. (see, in particular ***Mellacher and others, ... para. 45***). Nevertheless, this may not lead to results which are manifestly unreasonable, such as amounts of rent allowing only a minimal profit";

Ikkunsidrat:

22. Illi l-intimati sintetikament isosstnu li fl-isfond ta' interess generali legittimu, il-qorti m'ghandiex issib lezjoni tal-artiklu Konvenzjonali fuq indikat, senjatament l-Artiklu 1 tal-Ewwel Protokoll tal-Konvenzjoni;

Ikkunsidrat:

23. Illi fir-rigward tal-paragrafi numru 5 sa 10 tar-risposta tal-intimati, (ara foll 42), issir referenza ghas-sentenza tal-***Qorti Kostituzzjonali*** fl-ismijiet ***Christopher Hall vs. Awtorita` tad-Djar***, datata d-***29 ta' Novembru, 2013***, li tghid:

> "...hu principju abbraccjat minn din il-qorti u mill-Qorti Ewropea li, anke jekk il-mizura li jkun ha l-Istat tkun legittima u tkun fl-interess pubbliku, xorta wahda tista' twassal ghal lezjoni konvenzjonali jekk ma jinzammx bilanc gust bejn l-interess tas-socjeta` generali u l-protezzjoni tad-dritt fundamentali sancit fl-Artiklu 1 tal-Ewwel Protokoll tal-Konvenzjoni, b'mod li l-mizura, allura legittima, tkun titfa' fuq l-individwu 'a disproportionate and excessive burden';"

Ikkunsidrat:

24. Illi f'dan ir-rigward, il-Qorti ta' Strasburgu osservat is-segwenti fil-kaz ***Hutten-Czapska vs. Poland Applikazzjoni Numru 35014/97 paragrafu 167***:

> "Not only must an interference with the rights of property pursue on the facts as well as in principle, a "legitimate aim" in the "general interest", but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures designed to control the use of the individual's property. The requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the

requirements of the protection of the individual's fundamental rights";

25. Illi ssir ukoll referenza ghas-sentenza tal-***Qorti Kostituzzjonali*** fl-ismijiet ***Josephine mart Carmel Bugeja vs. Avukat General et***, datata s-***7 ta' Dicembru, 2009***, ***paragrafu 55***, li tghid:

> "Kjarament, ghalhekk, il-principju issa applikat mill-Qorti Ewropea, principju li din il-qorti tikkondividi mhux ghax qalitu dik il-qorti izda ghax jaghmel sens u huwa konducenti ghall-gustizzja sostantiva, hu li ghalkemm il-Konvenzjoni Ewropea taht l-Artikolu 1 tal-Ewwel Protokoll ma tipprovdix b'mod espress ghall-kumpens fejn ikun hemm interferenza tal-istat fit-tgawdija tal-proprjeta` tal-privat, dan id-dritt huwa insitu fil-protezzjoni moghtija mill-istess Konvenzjoni, u huwa wkoll rikonoxxut in bazi ghall-principju ta' 'the requirement of proportionality between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights' ";

26. Illi fil-paragrafu 57 tal-istess decizjoni tal-Qorti Kostituzzjonali indikata fil-paragrafu precedenti tkompli billi tghid li:

> "L-import ta' din id-decizjoni huwa wiehed car u ma jhalli ebda spazju ghad-dubju. Ghalkemm il-mertu ta' dawk il-proceduri kien jittratta dwar l-applikazzjoni tal-artiklu 12(1) u (2) tal-Kap 158 tal-Ligijiet ta' Malta ... fil-fehma ta' din il-qorti l-osservazzjonijiet tal-Qorti ta' Strasbourg u l-principji guridici minnha enuncjati fl-imsemmija sentenza japplikaw *mutatis mutandis* ghall-artiklu 12(4), (5) u (6) tal-Kap 158 tal-Ligijiet ta' Malta u konsegwentement ghall-kaz in dizamina..."

Ikkunsidrat:

27. Illi in vista tal-insenjamenti gurisprudenzjali fuq esposti ghandu allura jkun pacifiku li r-risposti numru hamsa (5) sa tmienja (8) tal-intimati, (ara foll 42), ghandhom jigu respinti;

Ikkunsidrat:

28.0. Illi fir-rigward tar-risposti numru ghaxra (10) sa hmistax (15) tal-intimati jinghad sintetikament is-segwenti:

28.1. Illi effettivament l-istima ipprezentata mill-periti mqabbda mill-kontendenti – senjatament dik tal-perit tar-rikorrenti datata l-25 t'Ottubru, 2014, (ara foll 208), u dik tal-perit tal-intimati datata t-12 ta' Novembru, 2015, (ara foll 229) – mhumiex daqshekk distanti minn xulxin;

28.2. Illi din il-qorti, *stante* li m'ghandiex ghalfejn tiddubita mill-ezattezza taz-zewg stimi *in atti* ghalkemm differenti minn xulxin, qed tiddikjara li qed tistrieh fuqhom ghall-fini tal-paragun tal-istess stima tar-rata ta' kera fis-suq liberu meta paragunat mal-kera attwalment percepita fuq l-istess fond mir-rikorrenti, (ara foll 2), fejn id-distakk bejn l-istess stimi hawn riferiti u dak attwalment percepit jirrizulta enormi;

29. Illi ghalhekk, anke jekk fl-ahjar ipotesi tiehu bhala bazi l-istima tal-perit tal-intimati, ghandu jkun pacifiku li l-kumpens attwalment hekk percepit mir-rikorrenti ma jirriflettix ir-realta` ekonomika llum rizultanti fis-suq u li konsegwentement, tali kumpens ma jirriflettix il-principju tal-proporzjonalita` rikjest mill-ligi u l-gurisprudenza fuq citata bejn id-dritt tas-sid u l-interess socjali tal-komunita`;

30. Illi konsegwenza tas-suespost, jirrizulta palezement li d-differenza bejn il-kera attwament percepita mir-rikorrenti ghall-istess fond ammontanti ghal ghal €350.12 fis-sena (ara foll 2), hi ferm differenti mill-istima – anke dik l-aktar konservattiva – tal-perit tal-intimati ta' €4,900.00 fis-sena, (ara foll 229);

31. Illi ghalhekk hu pacifiku li l-kera attwalment percipita mir-rikorrenti hi in vjolazzjoni tal-Artiklu 1 tal-Ewwel Protokoll tal-Konvenzjoni;

Ikkunsidrat:

32.0. Illi rigward l-artiklu 37 tal-Kostituzzjoni jinghad sintetikament is-segwenti:

32.1. Illi dan l-artiklu partikolari jipprotegi lill-lanjant mill-privazzjoni tal-proprjeta` tieghu minghajr kumpens;

32.2. Illi partikolarment dan l-artiklu mhux biss jipprotegi lill-lanjant mit-tehid tal-proprjeta` shiha fejn b'hekk is-sid jigi zvestit minn kull dritt li kellu fuq l-istess izda jhares ukoll kwalunkwe dritt jew interess li l-lanjant jista' jkollu mit-tehid tal-istess minghajr kumpens pront, xieraq u adegwat;

32.3. Illi fil-kawza fl-ismijiet ***Mary Anne Busuttil vs. Tabib John Cassar et***, datata t-***31 t'Ottubru, 2014***, il-***Qorti Kostituzzjonali*** irriteniet fir-rigward is-segwenti:

> "L-artiklu 37 tal-Kostituzzjoni jhares mhux biss kontra t-tehid tal-jusproprjeta` shiha minghajr kumpens xieraq, b'mod li tinholoq sitwazzjoni fejn is-sid originali gie zvestit u mnezza minn kull dritt li ghandu fuq dik il-proprjeta`, izda jrid ukoll illi ebda interess fi jew dritt fuq proprjeta` ta' kull xorta li tkun ma jittiehed minghajr kumpens xieraq";

32.4. Illi jigi sottolineat li bl-emendi fir-rigward in dizamina introdotti fl-1979 ghandu jirrizulta ampjament pacifiku li d-drittijiet tar-rikorrenti kif rikonoxxuti taht l-artiklu 37 tal-Kostituzzjoni gew certament kolpiti ghad-detriment tal-istess rikorrenti;

32.5. Illi tenut kont:

32.5.1. Tal-fatt li hemm divarju pjuttost serju bejn il-valur lokatizju tal-istess fond fis-suq liberu tal-proprjeta` u l-kera effettivament percepita mir-rikorrenti skont il-ligi in dizamina; u

32.5.2. Tal-fatt li r-rikorrenti, bhala sidien tal-fond in dizamina, ma jistghux aktar, minhabba l-imsemmi intervent statutorju, jiddeterminaw l-uzu tal-proprjeta` taghhom;

ghandu jirrizulta pacifiku li fir-rigward tal-istess proprjeta` in dizamina, r-rikorrenti qeghdin igorru piz eccessiv li l-Kostituzzjoni u l-Konvenzjoni ma jittolerawx;

32.6. Illi ghalhekk ghandu jirrizulta pacifiku wkoll li ghar-ragunijiet esposti gew allura lezi d-drittijiet tar-rikorrenti kif sanciti fl-artiklu 37 tal-Kostituzzjoni;

Ikkunsidrat:

33. Illi jigi osservat li fin-nota ta' sottomissjonijiet taghhom, (ara paragrafu 14 a foll 239), l-intimati jissottomettu li r-rikorrenti kienu taw ic-cens tal-fond *de quo* "*di buona volonta`"...* u hadd ma mpona fuqhom li jghatu dan il-fond b'cens";

34.0. Illi f'dan ir-rigward jinghad sintetikament is-segwenti:

34.1. Illi meta effettivament inghata c-cens lill-Kaptan Wismayer fis-7 ta' Jannar, 1966, (ara foll 10), l-Att XXIII tal-1979 ma kienx promulgat;

34.2. Illi ghalhekk l-awtur tar-rikorrenti qatt ma seta' jipprevedi dak li sehh tlettax- (13) il sena wara;

34.3. Illi f'dan ir-rigward il-***Qorti ta' Strasburgu*** osservat is-segwenti fil-kawza fl-ismijiet ***Zammit and Attard Cassar vs. Malta***, datata t-***30 ta' Lulju, 2015***, ***para. 49***:

> "The Court held that it could not be said that applicants, as landlords, have implicitly waived their right to set the level of rents, as, for the Court, waiving a right necessarily presupposed that it would have been possible to exercise it. There was no waiver of a right in a situation where the person concerned had never had the option of exercising that right and thus could not waive it ..."

34.4. Illi fil-paragrafu 50 tal-istess il-qorti *de quo* tkompli hekk:

> "In the present case the Court observes that the applicant's predecessor in the title knowingly entered into the rent agreement in 1971. It is the Court's considered opinion that, at that time, the

applicants's predecessor in title could not reasonably have had a clear idea of the extent of inflation in property prices in the decades to come. Moreover, the Court observes that when the applicants inherited the property in question they had been unable to do anything more than attempt to use the available remedies, which were to no avail in the circumstances...";

34.5. Illi in konsegwenza tal-istess argumentazzjoni kurjali fuq riprodotta u applikata ghall-kaz in dizamina, ghandu jkun pacifiku li l-awtur tar-rikorrenti ma jistax jinghad li kellu ghazla libera fir-rigward;

34.6. Illi ghalhekk qed jigi ritenut li l-lamentata vjolazzjoni Kostituzzjonali u Konvenzjonali giet debitament stabbilita mir-rikorrenti odjerni;

Ikkunsidrat:

35.0. Illi fir-rigward tal-kumpens rikjamat mir-rikorrenti bhala rimedju ghall-ksur tad-drittijiet taghhom jinghad sintetikament is-segwenti:

35.1. Illi minn analizi tas-sitwazzjoni legali *de quo* jirrizulta li l-piz finanzjarju naxxenti mill-emendi tal-Att XXIII tal-1979 fir-rigward, ghadu sal-lum mixhut kollu kemm hu fuq is-sidien privati li huma milquta mid-disposizzjoni tal-ligi in kwistjoni li hi l-mertu tal-kawza odjerna;

35.2. Illi f'dan ir-rigward qed issir referenza ghall-paragrafu sbatax (17) tar-risposta tal-intimati, (ara foll 43), fejn dawn jissottolinejaw li peress li l-konversjoni tal-enfitewsi in dizamina f'lokazzjoni giet konkretizzata fis-6 ta' Jannar, 1983, (ara foll 1 paragrafu 4), u r-rikorrenti jirrizulta li intavolaw il-procedura odjerna fit-28 t'Awwissu, 2014, (ara foll 1), allura hemm involut perjodu ta' wiehed u tletin, (31) sena qabel mar-rikorrenti ghazlu li jezercitaw din l-azzjoni kostituzzjonali taghhom;

35.3. Illi f'dan ir-rigward taz-zmien mehud mir-rikorrenti biex jindirizzaw l-ilment kostituzzjonali taghhom, issir

referenza ghas-sentenza tal-***Qorti Kostituzzjonali*** fl-ismijiet ***Louis Apap Bologna vs. Calcidon Ciantar et***, datata l-***24 ta' Frar, 2012***, li rriteniet is-segwenti:

> "42. Din il-qorti, wara li ezaminat l-atti kollha tal-kawza, hi tal-fehma li l-ilment ghandu certu mertu. Mill-atti jirrizulta li r-rikorrenti accetta u thallas il-kera mill-Awtorita` sal-2003 u minn dak iz-zmien sal-2009 ghalkemm beda jirrifjuta l-kera u jikkorrispondi mal-Awtorita`, baqa' ma ipprocediex bil-qorti, lanqas ma fetah proceduri ordinarji biex jattakka l-ordni ta' rekwizizzjoni. Hu fetah il-kawza kostituzzjonali fl-2009 u cioe`, aktar minn ghoxrin (20) sena minn meta l-proprjeta` giet f'idejh;
>
> "43. Kif qalet din il-qorti fis-sentenza ***Dr. David Tonna et vs. Kummissarju tal-Artijiet*** deciza fit-***3 ta' Marzu, 2011***, fil-kaz fejn persuna tiddilunga milli tadixxi fil-qrati ghalkemm kellha rimedji ordinarji, mhux eskluz li l-qorti tikkunsidra li tirriduci l-ammont tal-kumpens, (ara wkoll ***Paul Fenech et vs. Kummissarju tal-Artijiet et***, ***Qorti Kostituzzjonali***, datata l-***20 ta' Frar, 2009***, u ***Paola Farrugia vs. Kummissarju tal-Artijiet Qorti Kostituzzjonali*** datata t-***30 t'Arpil, 2009***);

Ikkunsidrat:

36. Illi ghandu jkun pacifiku li l-konsiderazzjonijiet riferiti f'dan ir-rigward fil-paragrafu precedenti ghandhom ukoll rilevanza attwali fil-kaz odjern;

37. Illi ghandu jinghad li ghalkemm ir-rikorrenti ma jirrizultax li kellhom rimedji fir-rigward taht il-ligi ordinarja, pero` jirrizulta assodat li xorta wahda ma kien hemm xejn x'jimpedihom jintavolaw il-prezenti procedura hafna snin qabel ma fil-fatt iddecidew li jintavolawha;

38. Illi fl-istess hin pero` taghmel referenza ghall-lament tal-***Qorti Kostituzzjonali*** fil-kawza ***Joseph Borg et vs. L-Onorevoli Prim Ministru ta' Malta et*** datata id-***29 t'April, 2016***, li f'dan il-kuntest irriteniet li:

> **"... l-inerzja tal-awtoritajiet illi, minkejja diversi sentenzi li affermaw l-illegittimita` kostituzzjonali tad-disposizzjonijiet tal-ligi meritu tal-kawza tal-lum f'cirkostanzi kongruwi, baqghu ma ghamlu xejn biex b'intervent legislattiv jirrimedjaw ghas-sitwazzjoni b'mod sostanzjali u mhux biss kosmetiku", (emfasizzar ta' din il-qorti);**

Ikkunsidrat:

39.0. Illi fir-rigward tal-paragrafi numru 9 s'14 tar-risposta tal-intimati, (ara foll 42 u 43), jinghad sintetikament is-segwenti:

39.1. Illi l-funzjoni tal-qorti odjerna kolpita kif inhi b'vertenza t'indole Kostituzzjonali u Konvenzjonali, m'ghandiex l-oneru li tillikwida d-danni civili li jistghu jigu riskontrati, izda hi esklussivament kolpita minflok bl-allegat ksur ta' drittijiet fundamentali tal-bniedem kif espressament sanciti fl-istess Kostituzzjoni u Konvenzjoni;

39.2. Illi ghalhekk il-limitu tar-rimedju riskontrat qed jigi ddikjarat espressament li hu limitat ghall-allegat ksur tad-dritt fundamentali tar-rikorrenti kif fuq indirizzat;

DECIDE:

40.0. Illi in vista tal-premess din il-qorti tqis li r-rikorrenti pprovaw il-kaz taghhom skont il-ligi *stante* li l-artiklu 12 tal-Kap 158 jikser il-Kostituzzjoni u l-Konvenzjoni Ewropea kif fuq espost, u konsegwentement:

40.1. Tiddikjara preliminarjament li in vista tan-nota ta' cessjoni tar-rikorrenti datata d-9 ta' Gunju, 2016, fil-konfront tal-Onorevoli Prim Ministru, (ara foll 243), tillibera lill-istess mill-osservanza tal-gudizzju;

40.2. Takkolji t-talbiet kollha tar-rikorrenti fil-konfront tal-intimat Avukat Generali;

40.3. Tirrespingi r-risposti kollha tal-istess intimat indikat fil-paragrafu precedenti;

40.4. Tiddikjara li *ai termini* tal-Kap 158 fuq riferit, kif emendat bl-Att XXIII tal-1979, giet kostitwita kirja gdida *ope legis* favur terzi fuq l-appartament numru 1, *“Verdala Flats”*, Triq Salvu Privitera, Paceville, proprjeta` tar-rikorrenti, li maghhom dawn tal-ahhar qatt ma kellhom relazzjoni guridika, u li allura, *stante* li m’hemmx il-kunsens tar-rikorrenti fir-rigward, tammonta ghal “tehid forzuz”;

40.5. Tiddikjara li r-rata tal-kera *ope legis* mhix ekwivalenti ghall-kumpens gust favur ir-rikorrenti, u ghalhekk gew lezi d-drittijiet fundamentali taghhom bi ksur tal-artiklu 37 tal-Kostituzzjoni u l-Artiklu 1 tal-Ewwel Protokoll tal-Ewwel Skeda tal-Kap 319 tal-Ligijiet ta’ Malta li introduca l-Konvenzjoni Ewropea tad-Drittijiet Fundamentali tal-Bniedem direttament fl-ordinament guridiku Malti;

40.6. Tiddikjara li r-rikorrenti huma intitolati ghall-kumpens mill-Gvern ta’ Malta kif rapprezentat mill-intimat hawn fuq riferit;

40.7. Tillikwida il-kumpens relattiv fir-rigward fl-ammont ta’ ghaxart elef euro, (€10,000.00);

40.8. Tikkundanna lill-intimat Avukat Generali biex ihallas il-kumpens hekk likwidat fil-paragrafu precedenti lir-rikorrenti;

40.9. Bl-ispejjez u bl-imghaxijiet kontra l-intimat mid-data tas-sentenza odjerna.

____

Onor. Imhallef Silvio Meli

DECIZJONI FINALI