QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 30 ta` Marzu 2017

Kawza Nru. 1
Rikors Nru. 65/16 JZM

Avukat Dr Peter Fenech bhala mandatarju specjali tal-assenti Jovica Kolakovic

u

b`nota tal-15 ta` Novembru 2016, Jovica Kolakovic assuma l-atti f`ismu bhala rikorrent

kontra

Avukat Generali

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fit-22 ta` Gunju 2016 li jaqra hekk :–

Kronologija tal-fatti

Illi fl-10 ta` Settembru 2009, ir-rikorrent tressaq quddiem l-Onorabbli Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja flimkien mal-koakkuzat Thomas Mikalauskas [Kaz numru 935/2009; Magistrat Dr. Miriam Hayman, illum presjedut mill-Magistrat Dr. Neville Camilleri.]sabiex jirrinfaccja akkuzi relatati, inter alia, mal-assocjazzjoni ma` xi persuna jew persuni bl-iskop li tinbigh jew tigi traffikata l-kannabis u l-pussess tal-kannabis f`cirkostanzi li jindikaw li ma kinitx ghall-uzu personali. Kopja tal-att tal-akkuza huwa anness u mmarkat ***Dok. A****;*

Illi fit-22 ta` Settembru 2009, l-Onorabbli Qorti, fuq talba tal-prosekuzzjoni, hatret lill-espert Martin Bajada sabiex janalizza u jirkupra kull telefonata incoming u outgoing kif ukoll messaggi fuq telefoni cellulari u SIM cards ezebiti mill-iSpettur Pierre Grech, kif ukoll fuq Vodafone starter pack vojt, fil-perjodu ta` bejn l-20 ta` Awwissu u l-10 ta` Settembru 2009. Il-Qorti ordnat kull service provider sabiex jipprovdi l-informazzjoni mitluba lill-espert mahtur mill-Qorti. Kopja tad-digriet relattiv hija annessa u mmarkata ***Dok B****;*

Illi fit-2 ta` Lulju 2010, xehed Martin Bajada, kopja ta` liema xhieda hija annessa u mmarkata ***Dok. C****, li spjega li:*

"The examination concerned a number of mobile phones and SIM cards which had calls to foreign or received calls from foreign numbers and the call profile obtained was again on the resulting mobile phones which did include phones made to and received from foreign numbers. But if there are foreign SIM cards, we did not obtain call information from the respective service providers.";

"... the phone did contain messages which originated or were sent to foreign numbers and they are listed in the report. For example some of them are in foreign language and have been sent to foreign numbers.";

"... including messages coming in from foreign numbers ... There are exchanges with foreign numbers. The content of the mobile. It is not an exhaustive list. ***Only the service provider of the foreign numbers would hold that."*** *[Xhieda ta` Martin Bajada, 2 ta` Lulju 2010, fol. 468 u 469 tal-process.];*

Illi ftit jiem wara fis-6 ta` Lulju 2010, ir-rikorrent, b`riferenza ghax-xhieda ta` Martin Bajada, talab lill-Onorabbli Qorti tordna li l-informazzjoni relattiva ghal SIM card partikolari, inkluz SMS logs u l-elenku tan-numri kuntattati gewwa Malta, tingab b`urgenza mis-service providers tar-Renju Unit stante li din tista` tintilef sa Settembru 2010. Kopja tar-rikors relattiv hija annessa u mmarkata ***Dok. D****;*

Illi fl-14 ta` Lulju 2010, l-Avukat Generali pprezenta nota, kopja ta` liema hija annessa u mmarkata ***Dok. E****, permezz ta` liema rrileva, inter alia, li:*

"... applicant was notified with a generic request regarding SIM cards of service providers in the United Kingdom made by the defendant";

"... this does not tantamount (sic) to ***a letter of request which needs to be transmitted to a foreign authority in terms of Article 399 of the Criminal Code****."[399. (1) Meta l-qorti tiddeciedi li l-ezami ta` xi xhud jew li xi process iehor fl-inkjesta minn xi awtorita` barra minn Malta jkun mehtieg b`mod indispensabbli, l-ittra rogatorja ghal ghajnuna legali u d-decizjoni tal-qorti ghandhom, fi zmien tlett ijiem ta` xoghol, jigu notifikati lill-Avukat Generali li mbaghad jista`, fi zmien hamest ijiem ta` xoghol, jaghmel kull sottomissjoni bil-miktub skont ma hu jkun jidhirlu mehtieg;*

(2) L-imputat jista`, mhux aktar tard minn erbat ijiem ta` xoghol minn dik id-decizjoni, jissottometti talba addizzjonali ghall-ezami ta` xhud jew ta` xi process iehor tal-inkjesta, u jahtar persuna ohra li tidher ghalih fl-ezami jew fil-process. Dan iz-zmien jista`, ghal raguni tajba, jigi mgedded: Izda dak iz-zmien hekk imgedded ma jisax jeccedi tletin gurnata mid-data tad-decizjoni.

(3) Il-qorti ghandha tordna t-trasmissjoni tat-talba ghal ghajnuna legali lill-awtorita` barra minn Malta fi zmien tlett ijiem ta` xoghol minn meta jiskadi l-perjodu msemmi fis-subartikolu (2);

(4) Il-Qorti Kriminali tkun kompetenti li tordna t-trasmissjoni tat-talba ghal ghajnuna legali lill-awtorita` barranija wara li jsir rikors mill-Avukat Generali jew mill-imputat meta jiskadi l-perjodu ta` zmien imsemmi fis-subartikolu (3);

(5) Id-dispozizzjonijiet tal-artikolu 622B tal-Kodici ta` Kap. 12. Organizzazzjoni u Procedura Civili li jipprovdu ghall-irrekordjar ta` xhieda fuq tejp jew fuq video jew b`mezzi ohra ghandhom japplikaw ghal talba ghall-ezami ta` xi xhud taht dan l-artikolu;

(6) Id-dispozizzjonijiet tal-artikoli 618 u 619 tal-Kodici ta` Kap. 12 Organizzazzjoni u Procedura Civili ghandhom japplikaw ghall-finjiet ta` dan l-artikolu: Izda fejn ikun jezisti xi trattat, konvenzjoni, patt jew ftehim, bejn Malta u pajjiz iehor jew li jkun japplika ghaz-zewg pajjizi jew li fih iz-zewg pajjizi jkunu parti, it-talba ghandha ssir u tigi trasmessa skont l-imsemmi trattat, konvenzjoni, patt jew ftehim;

(7) Ghall-finijiet ta` dan l-artikolu, l-ittra rogatorja li biha ssir it-talba ghandu jkollha dan li gej: (a) l-ghan ta` jew ir-raguni ghal dik it-talba; (b) id-dettalji tal-persuna jew persuni msemmija fit-talba inkluz, fejn possibbli, l-indirizz, id-data tat-twelid u n-nazzjonalita`; (c) deskrizzjoni tar-reati li l-persuna qed tigi akkuzata bihom u l-piena li tista` tehel ghal dak ir-reat; (d) rapport fil-qasir tal-fatti li wasslu ghat-talba; u (e) kopja tal-legizlazzjoni rilevanti li tikkriminalizza l-imgiba attribwita lill-imputat u li taghti informazzjoni dwar ir-reat, il-piena u d-drittijiet li persuna tista` tkun moghtija;

Illi permezz tad-digriet tad-19 ta` Lulju 2010, l-Onorabbli Qorti ordnat lir-rikorrent sabiex jaderixxi ruhu mill-procedura indikata mill-Avukat Generali jekk xtaq jipprocedi bit-talba tieghu, sabiex il-Qorti tkun tista` taghti decizjoni fuq l-istess talba. Kopja tad-digriet relattiv hija annessa u mmarkata ***Dok. F****;*

Illi permezz ta` rikors ipprezentat fis-16 ta` Awwissu 2010, ir-rikorrent spjega li huwa kien ipprezenta talba li kienet giet michuda a bazi ta` konsiderazzjonijiet legali zbaljati, stante li t-talba tieghu kienet giet ikkunsidrata bhala wahda ghal ittri rogatorji, mentri fil-verita` t-talba tieghu kienet ghal ordni tal-Qorti jew mandat lill-Pulizija li kellu jigi trazmess bhala ordni tal-Qorti jew mandat lill-Pulizija tar-Renju Unit a bazi tal-kooperazzjoni tramite l-Eurojust, filwaqt li rega` accenna ghall-urgenza tat-talba tieghu stante li skont il-ligi tar-Renju Unit, dawn l-SMS u call logs kienu jigu ritenuti mis-service providers ghal perjodu ta` sena, wara liema perjodu kienu jinqerdu. Filwaqt li indika n-numri tat-telefoni cellulari, iz-zmien rilevanti flimkien mas-service providers tar-Renju Unit minn liema kellha tingab l-informazzjoni relattiva, ir-rikorrent talab ukoll sabiex tinzamm udjenza bl-urgenza jekk ikun hemm il-htiega, kif ukoll li l-Avukat Generali jinghata zmien qasir sabiex jirrispondi ghat-talba tieghu. Kopja tar-rikors relattiv hija annessa u mmarkata ***Dok. G****;*

Illi fir-risposta tieghu pprezentata fis-17 ta` Awwissu 2010, l-Avukat Generali rega` ghamel riferenza ghall-Artikolu 399 tal-Kodici Kriminali suriferit filwaqt li qal li "... if defence counsel deems that evidence of a witness abroad or other evidence in the inquiry is indispensable (sic) necessary, then

the only manner catered for in procedural penal law wherein this can be obtained is through the drawing up of letters of request." Kopja tan-nota relattiva hija annessa u mmarkata ***Dok. H****;*

Fl-udjenza tad-19 ta` Awwissu 2010, l-Onorabbli Qorti semghet lill-partijiet filwaqt li l-Avukat Generali intrabat li jipprezenta fir-Registru tal-Qorti d-dokumenti relattivi kollha, inkluz abbozzi ta` ittri rogatorji passati li kellhom jigu notifikati lill-avukat tar-rikorrent sabiex jissottometti l-proposti tieghu, kif jidher mill-kopja annessa tad-digriet immarkata ***Dok. I****;*

Illi fl-20 ta` Awwissu 2010, ir-rikorrent ipprezenta nota, kopja ta` liema hija annessa u mmarkata ***Dok. J****, permezz ta` liema rega` ghamel accenn ghall-fatt li:*

"There are in place two organs of cooperation in criminal matters in the EU ... Eurojust and the other is Europol ..."

...

"It is common public knowledge that the Police have obtained very easily from Italy information similar to the one being requested by a telephone call from the local police to their counterpart in Italy. A copy of an affidavit of Dr. Donatella Frendo Dimech is being attached. It speaks for itself how cooperation functions.";

In vista ta` dan, ir-rikorrent rega` talab lill-Onorabbli Qorti tordna lill-Pulizija u lill-Avukat Generali sabiex indipendentement jew flimkien, tramite Europol jew Eurojust, jiksbu mir-Renju Unit l-informazzjoni necessarja;

*Illi fl-24 ta` Awwissu 2010, l-Onorabbli Qorti ddekretat li* ***t-talba tar-rikorrent kienet taqa` taht id-dispozizzjonijiet tal-Artikolu 405(5) tal-Kodici Kriminali*** *[405. (5) Id-disposizzjonijiet tas-subartikoli ta` qabel ta` dan l-artikolu jghoddu wkoll meta l-imputat ikun irid jisma` jew jerga` jisma` xi xhieda. F`dan il-kaz, it-talba ghandha tigi kkomunikata lill-Avukat Generali illi, mhux aktar tard mill-jum ta` wara, ghandu jibghat lill-qorti l-atti tal-kompilazzjoni. Imbaghad il-qorti ghandha tordna li l-Kummissarju tal-Pulizija jigi notifikat bil-gurnata li fiha ghandhom jinstemghu x-xhieda, sabiex hu jew ufficjal iehor tal-Pulizija jkun jista`, jekk irid, jidher u jaghmel kontro-ezami lix-xhieda.] u in vista ta` dan, ordnat lill-Avukat Generali sabiex jiehu kull azzjoni necessarja taht din id-dispozizzjoni. Kopja tad-digriet relattiv hija annessa u mmarkata* ***Dok. K****;*

Illi fit-3 ta` Settembru 2010, l-Avukat Generali, filwaqt li ghamel riferenza ghad-digriet tal-Onorabbli Qorti tal-24 ta` Awwissu 2010, talab li tinstema` x-xhieda ta` numru ta` persuni,* ***izda ma ghamel l-ebda riferenza ghall-ordni tal-Qorti taht l-Artikolu 405(5) tal-Kodici Kriminali****, skont liema l-Avukat Generali kellu jibghat l-atti tal-kumpilazzjoni lill-Qorti sa mhux aktar tard mill-jum ta` wara, ossia l-25 ta` Awwissu 2010, sabiex il-Qorti tordna li l-Kummissarju tal-Pulizija jkun notifikat bil-gurnata li fiha kellhom jinstemghu x-xhieda ndikati mill-imputat. Kopja tad-dokument relattiv hija annessa u mmarkata ***Dok. L****;*

Illi fl-udjenza tas-6 ta` Settembru 2010, filwaqt li giet moqrija n-nota tal-Avukat Generali, l-avukat tar-rikorrent ghamel is-sottomissjonijiet tieghu rigward l-istess u nstemghu numru ta` xhieda, ***ma nghatat l-ebda ordni ulterjuri mill-Qorti in segwitu ghad-digriet taghha tal-24 ta` Awwissu 2010 b`riferenza ghat-talba tar-rikorrent ghas-sejbien u preservazzjoni tal-informazzjoni mitluba.*** *Kopja tal-verbal relattiv hija annessa u mmarkata* ***Dok. M****;*

Illi permezz ta` zewg noti pprezentati fis-7 u fl-14 ta` Settembru 2010 rispettivament, li kopji taghhom huma annessi u rispettivament immarkati ***Dok. N*** *u* ***O****, ir-rikorrent ghamel riferenza ghas-setgha tal-Qorti li tordna l-produzzjoni tad-dokumenti taht l-Artikolu 397 tal-Kodici Kriminali,[397. (1) Il-qorti tista` tordna t-tahrika ta` xhieda u l-produzzjoni ta` provi li jkun jidhrilha mehtiega, kif ukoll il-hrug ta` citazzjonijiet jew mandati ta` arrest kontra kull awtur iehor jew komplici li hija tikxef. Il-qorti tista` tordna wkoll accessi, perkwizizzjonijiet, esperimenti, it-tehid ta` xi kampjun u kull mizura jew haga ohra li tinhtieg biex il-gabra tal-provi tal-kawza tkun kompluta minn kollox.] liema setgha, a bazi tat-trattati u konvenzjonijiet rilevanti, senjatament il-Konvenzjoni Ewropea dwar Assistenza Reciproka f`Materja Kriminali,[Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union (OJ C 197) (test bil-Malti mhux disponibbli).] jistghu jigu trazmessi fl-esteru ghall-ezekuzzjoni taghhom permezz ta` ordni mill-istess Qorti, bl-istess mod kif mandat ta` arrest mahrug gewwa Malta jista` jigi ezegwit kullimkien gewwa l-Unjoni Ewropea, tramite l-Europol u/jew Eurojust;*

Illi fis-smigh tas-27 ta` Settembru 2010, ir-rikorrent filwaqt li ghamel riferenza ghall-Artikoli 399 u 405(5) tal-Kodici Kriminali, talab sabiex l-Onorabbli Qorti tawtorizza li jintbaghtu ittri rogatorji lill-awtoritajiet gudizzjarji tar-Renju Unit, liema talba intlaqghet mill-Qorti. Kopja tal-verbal relattiv hija annessa u mmarkata ***Dok. P****;*

Illi sussegwentement fis-smigh tat-30 ta` Settembru 2010, l-avukat tar-rikorrent gie awtorizzat mill-Onorabbli Qorti sabiex jemenda d-dati sottomessi fit-talba tieghu, kopja ta` liema verbal hija annessa u mmarkata ***Dok. Q****. Mid-dokument anness u mmarkat* ***Dok. R*** *jirrizulta li d-dati korretti gew sottomessi mill-avukat tar-rikorrent fl-1 ta` Ottubru 2010;*

Illi fit-12 ta` Ottubru 2010, l-Ufficjal Prosekutur ordna li l-ittri rogatorji jigu trazmessi mill-awtoritajiet kompetenti Maltin ghal dawk tar-Renju Unit. Kopja tal-verbal relattiv hija annessa u mmarkata ***Dok. S****;*

Illi fl-10 ta` Dicembru 2010, l-Avukat Generali fil-vesti tieghu ta` Awtorita` Centrali ta` Malta, baghat talba ghal assistenza legali lill-Awtorita` Centrali tar-Renju Unit bl-ittri torgatorji annessi, kopja ta` liema hija annessa u mmarkata ***Dok. T****;*

Illi fid-29 ta` Dicembru 2010, l-Awtorita` Centrali tar-Renju Unit infurmat lill-Avukat Generali qua Awtorita` Centrali ta` Malta li ***t-talba kif mibghuta ma setghetx tigi processata minhabba numru ta` nuqqasijiet fit-talba, inkluz sommarju tal-fatti rilevanti rigward l-akkuzi, informazzjoni rigward l-allegat involviment tar-rikorrent fit-traffikar tas-sustanzi perikoluzi, kif ukoll ness dirett bejn il-fatti tal-kaz u l-evidenza mitluba****. Kopja tar-risposta hija annessa u mmarkata* ***Dok. U****, flimkien ma` kopja tal-verbal tas-smigh tat-18 ta` Jannar 2011 immarkat* ***Dok. V*** *meta kemm ir-rikorrent kif ukoll l-Avukat Generali gew notifikati bir-risposta in kwistjoni;*

Illi fl-udjenza tat-18 ta` Frar 2011, l-avukat tar-rikorrent talab lill-Qorti sabiex tordna lill-Avukat Generali jiddetermina mal-Awtorita` Centrali tar-Renju Unit jekk is-service providers in kwistjoni kinux ghadhom qieghdin izommu l-informazzjoni rikjesta ghall-perjodu rilevanti identifikat fl-ittri rogatorji. Kopja tal-verbal relattiv hija hawn annessa u mmarkata ***Dok. W****;*

Illi fis-smigh tat-3 ta` Marzu 2011, ir-rikorrent ipprezenta ittri rogatorji godda sabiex dawn jigu trazmessi lill-Awtorita` Centrali in segwitu ghar-risposta ta` din tal-ahhar ghall-ewwel ittri rogatorji trazmessi, filwaqt li l-Qorti ordnat lill-Avukat Generali sabiex dawn jigu trazmessi lill-Awtorita` Centrali tar-Renju Unit. Kopja tad-digriet relattiv hija annessa u mmarkata ***Dok. X****;*

*Illi fis-6 ta` Gunju 2011, l-Awtorita` Centrali tar-Renju Unit infurmat lill-Avukat Generali in segwitu ghall-ahhar ittri rogatorji mibghuta fis-17 ta` Marzu 2011 li* ***s-service provider T-Mobile kien izomm data rigward numri ta` telefoni cellulari ghal perjodu ta` sena biss u ghalhekk ma setax jipprovdi informazzjoni rigward telefonati li saru qabel is-26 ta` April 2010****. Ikkonfermaw li n-numru registrat ma` T-Mobile kien wiehed unregistered pay as you go mobile u li l-ebda SMS, MMS, GPS, roaming jew voice call data ma kien irrizulta bejn is-26 ta` April u l-10 ta` Settembru 2010. Kopja tar-risposta hija annessa u mmarkata* ***Dok. Y****;*

*Illi fis-27 ta` Settembru 2011, l-Awtorita` Centrali tar-Renju Unit infurmat lill-Avukat Generali in segwitu ghall-ahhar ittri rogatorji mibghuta fis-17 ta` Marzu 2011 li s-service provider 02 ma sab l-ebda tracca tan-numru indikat fuq is-sistemi taghhom u ghalhekk ma setax jipprovdi dettalji dwar is-subscriber, call data jew jikkonferma jekk in-numru kienx ghadu qieghed jintuza jew le, filwaqt li kkonferma li* ***02 kien izomm data rigward numri ta` telefoni cellulari ghal perjodu ta` sena biss u ghalhekk, anke li kieku dan in-numru kien ghadu qieghed jigi uzat, il-call data mitluba ghall-2009 ma kinitx tkun disponibbli ghaliex kienet barra r-retention period****;*

Illi mill-fatti suesposti, jirrizulta carament li ***la l-Prosekuzzjoni, la l-Avukat Generali u lanqas il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja fil-kaz odjern ma qdew il-funzjonijiet rispettivi taghhom b`mod imparzjali u indipendenti*** *kif tenut jaghmlu skont id-dispozizzjonijiet rispettivament applikabbli ghalihom, ossia fil-kaz tal-Prosekuzzjoni l-Artikolu 346 tal-Kodici Kriminali, Kap. 9 tal-Ligijiet ta` Malta,[346. (1) Huwa dmir tal-Pulizija li ... tigbor il-provi, sew kontra sew favur il-persuna suspettata li tkun ghamlet dak ir-reat ...] fil-kaz tal-Avukat Generali l-Artikolu 91(3) tal-Kostituzzjoni ta` Malta,[ 91. (3) Fl-ezercizzju tas-setghat tieghu biex jistitwixxi, jaghmel u jwaqqaf proceduri kriminali u ta` kull setghat ohra moghtija lilu b`xi ligi f`termini li jawtorizzawh li jezercita dik is-setgha fil- gudizzju individwali tieghu l-Avukat Generali ma jkunx suggett ghad-direzzjoni jew kontroll ta` ebda persuna jew awtorita` ohra.] u fil-kaz tal-Qorti Istruttorja d-dispozizzjonijiet misjuba fit-Tieni Sub-titolu tat-Tieni Titolu tal-Ewwel Taqsima tal-Kap. 9, tant li minflok ma ghamlu dak kollu li setghu u li kienu obbligati jaghmlu fil-parametri tal-poteri rispettivi taghhom sabiex ir-rikorrent ikun jista` jikseb l-informazzjoni necessarja ghall-bini tad-difiza tieghu minn service providers esteri,* ***xekklu lir-rikorrent u ppregudikawh serjament tant li din l-informazzjoni llum intilfet irrimedjabilment u r-rikorrent illum jinsab sprovvist minn evidenza essenzjali u necessarja sabiex jipprova l-innocenza tieghu****, minkejja li l-Prosekuzzjoni, l-Avukat Generali u l-Qorti Istruttorja kienu kollha ben konoxxenti tal-htiega ta` din l-evidenza*

u l-urgenza tat-talba tar-rikorrent in vista tat-terminu li fih l-informazzjoni necessarja tigi mizmuma mis-service providers esteri, liema fatt ir-rikorrent kien iddikjara sa mill-ewwel talba tieghu maghmula fis-6 ta` Lulju 2010 (Dok H anness mar-rikors odjern);

Illi l-fatti suriferiti wasslu, jew jistghu jwasslu ghal:

A. ***Ksur tad-dritt tar-rikorrent ta` smigh xieraq li jipprezupponi fih il-principju tal-gustizzja naturali ta` audi alteram partem jew equality of arms kif sancit, inter alia, mill-Artikolu 39 tal-Kostituzzjoni ta` Malta, kif ukoll mill-Artikolu 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem****;*

Illi fir-rigward tal-Avukat Generali, jigi umilment ritenut li fis-sistema procedurali penali Maltija, ir-rwol tal-Avukat Generali jhaddan fih diversi funzjonijiet u dmirijiet. Il-funzjonijiet tal-Avukat Generali qua prosekutur b`mod generali jibdew minn meta jircievi l-atti tal-kompilazzjoni maghmula mill-Qorti tal-Magistrati, kif jistabilixxi l-Artikolu 431(1) tal-Kodici Kriminali. [*431 (1) *Kemm-il darba mhux provdut xort`ohra f`dan il-Kodici jew f`xi ligi ohra, il-funzjonijiet tal-Avukat Generali jibdew minn dak in-nhar li jircievi l-atti tal-kompilazzjoni maghmula mill-Qorti tal-Magistrati.] Quddiem il-Qorti tal-Magistrati bhala Qorti Istruttorja, l-Avukat Generali ma jkunx meqjus bhala parti fil-proceduri, stante li l-prosekuzzjoni tal-kaz tkun immexxija mill-Pulizija Ezekuttiva. Di fatti, fis-sentenza fl-ismijiet ***Il-Pulizija vs. Edward Cassar et****, l-Onorabbli Qorti tal-Appell Kriminali (Inferjuri) spjegat li:*

"... F`dan l-istadju [meta tinghalaq il-kumpilazzjoni] jibda jiffunzjona l-Avukat Generali tar-Repubblika. Infatti bl-artikolu 443(1) tal-Kap. 12 "il-funzjonijiet tal-Avukat Generali jibdew minn dakinhar li jircievi l-attijiet tal-kumpilazzjoni maghmula mill-Qorti tal-Pulizija Gudizzjarja";

***Illi fl-ezercizzju ta` dawn il-funzjonijiet l-Avukat Generali ghandu poteri diskrezzjonali importanti u f`certi kazi u f`certu sens jagixxi f`vesti ta` gudikant. Inghad f`certu sens ghax in realta` certi decizjonijiet li jista` jiehu l-Avukat Generali jittiehdu mhux ghax strettament ghandu funzjoni li jiggudika lill-imputat izda in forza u bhala konsegwenza fil-fatt li f`idejh u f`idejh biss hi fdata d-decizjoni jekk imexxix quddiem il-Qorti Kriminali permezz tal-att ta` akkuza jew jekk johrogx "nulle prosequi".*** *L-Avukat Generali m`ghandu qatt il-poter li jiddeciedi l-htija izda ghandu l-awtorita` li jiddeciedi li l-kaz ma jimxix aktar `il quddiem jew li ma jigix deciz mill-Qorti tal-Magistrati izda*

mill-Qorti Kriminali/guri. Hu veru li f`din il-funzjoni l-Avukat Generali ma jiehu l-ordni ta` hadd u d-decizjoni tieghu mhix sindakabbli;

L-Avukat Generali meta jircievi l-atti tal-kumpilazzjoni ghandu wkoll funzjoni ohra importanti u cioe` dik li jipprovdi ghaliha l-artikolu 417 tal-Kodici Kriminali. Skont dan l-artikolu l-Avukat Generali jista` bil-miktub jitlob lill-Qorti Istruttorja tisma` xhieda godda jew taghmel mistoqsijiet ohra lix-xhieda li jkunu gia` nstemghu*. Ghal dan il-fini l-Avukat Generali ghandu jibghat lil dik il-Qorti l-attijiet tal-kumpilazzjoni flimkien mat-talba tieghu bil-miktub, u fiha ghandu jfisser fuqhiex ghandu jsir l-ezami jew l-ezami mill-gdid tax-xhieda.* ***Din il-procedura tista` tirrepeti ruhha ghal aktar minn darba sakemm l-atti tal-kumpilazzjoni jkunu istruwiti a sodisfazzjon tal-istess Avukat Generali****;*

1. ***Minn meta jircievi l-attijiet tal-kumpilazzjoni jibda jiffunzjona l-Avukat Generali li primarjament ghandu l-kompitu li jirredigi u jipprezenta l-att tal-akkuza. Dana ghax l-Avukat Generali huwa l-prosekutur quddiem il-Qorti Kriminali****.[* Volum 70 (1986), il-Hames Parti, it-Tieni Sezzjoni, pagna 689*];*

Illi mis-suespost jirrizulta li qabel ma jircievi l-atti tal-kumpilazzjoni, l-Avukat Generali la huwa parti fil-proceduri quddiem il-Qorti Istruttorja u lanqas ghalhekk ma jista` jinghad li l-funzjoni tieghu hija ta` prosekutur, stante li dan ir-rwol jiskatta biss meta jircievi l-atti tal-kumpilazzjoni. Jirrizulta ghalhekk li ***qabel dan l-istadju, quddiem il-Qorti Istruttorja, l-Avukat Generali ghandu l-kompitu li jkun imparzjali u indipendenti miz-zewg partijiet u li jassikura li l-evidenza kollha mehtiega tingabar sabiex l-attijiet ikunu kompleti u integri, sabiex meta jaslu ghandu, ikun f`pozizzjoni li jiehu decizjoni dwar jekk jinharigx l-att ta` akkuza fil-konfront tal-akkuzat****;*

Illi barra minn hekk, quddiem il-Qorti Istruttorja, l-Avukat Generali gieli jkollu jippartecipa fil-proceduri fil-funzjoni tieghu ta` Awtorita` Centrali ta` Malta, bhal meta, taht l-Artikolu 399 tal-Kodici Kriminali suriferit, ikun mehtieg l-ezami ta` xi xhud jew xi process iehor fl-inkjesta minn xi awtorita` barra minn Malta. F`dan ir-rwol, indubitament, l-Avukat Generali jrid ikun imparzjali u indipendenti mill-partijiet;

Illi b`rizultat ta` dan, quddiem il-Qorti Istruttorja, l-Avukat Generali ghandu obbligu li jkun indipendenti u imparzjali fil-konfront tal-partijiet u li

fl-agir tieghu, ***ma jhaddanx rwoli u/jew atitudnijiet ta` prosekutur jew b`xi mod ixekkel lill-akkuzat fil-bini tad-difiza tieghu****;*

Illi dawn ir-rwoli differenti min-natura separata u distinta taghhom jaghtu lok ghal kunflitt ta` interess fl-ezercizzju taghhom mill-Avukat Generali. Fis-sentenza fl-ismijiet ***Alan Mifsud et vs. L-Avukat Generali et****, il-Qorti Kostituzzjonali rrimarkat li:*

"Issa taht l-ebda aspett ma jista` jigi kkonsidrat illi l-Avukat Generali jista` qatt ikun il-gudikant inkwantu fl-ordinament guridiku Malti, huwa l-prosekutur pubbliku per eccellenza – parti essenzjali f`kull kawza penali, u ghaldaqstant, in kwantu huwa parti, ***ma jistax ikun fl-istess hin imparzjali – ghaliex din timplika kontradizzjoni profonda fit-termini, mhux biss lingwistici imma wkoll guridici****." [*Volum 74 (1990), L-Ewwel Parti, pagna 227*];*

Illi l-Qorti Ewropea dwar id-Drittijiet tal-Bniedem ippronunzjat ruhha fuq il-principju ta` audi alteram partem jew equality of arms f`bosta mis-sentenzi taghha, fosthom ***Kress v France*** *fejn stabbiliet li dan il-principju "... requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent." [*Applikazzjoni numru 39594/98, sentenza datata 7 ta` Gunju 2001*.] Applikazzjoni interessanti ta` dan il-principju jinstab fis-sentenza tal-Qorti Ewropea fl-ismijiet* ***Borgers v Belgium****, fejn il-Qorti analizzat is-sistema procedurali Belgjana u r-rwol tal-avocat général fl-istess sistema u stabbiliet li:*

"No one questions the objectivity with which the procureur général`s department at the Court of Cassation discharges its functions. This is shown by the consensus which has existed in Belgium in relation to it since its inception and by its approval by Parliament on various occasions.";

"Nevertheless the opinion of the procureur général`s department cannot be regarded as neutral from the point of view of the parties to the cassation proceedings. By recommending that an accused`s appeal be allowed or dismissed, the official of the procureur général`s department becomes objectively speaking his ally or his opponent. In the latter event, Article 6 para. 1 (art. 6-1) requires that the rights of the defence and the principle of equality of arms be respected.";

"In the present case the hearing on 18 June 1985 before the Court of Cassation concluded with the avocat général`s submissions to the effect that Mr Borger`s appeal should not be allowed (see paragraph 15 above). At no time could the latter reply to those submissions: before hearing them, he was

unaware of their contents because they had not been communicated to him in advance; thereafter he was prevented from doing so by statute. Article 1107 of the Judicial Code prohibits even the lodging of written notes following the intervention of the member of the procureur général`s department (see paragraph 17 above);

"The Court cannot see the justification for such restrictions on the rights of the defence. Once the avocat général had made submissions unfavourable to the applicant, the latter had a clear interest in being able to submit his observations on them before argument was closed. The fact that the Court of Cassation`s jurisdiction is confined to questions of law makes no difference in this respect.";

"Further and above all, the inequality was increased even more by the avocat général`s participation, in an advisory capacity, in the Court`s deliberations. Assistance of this nature, given with total objectivity, may be of some use in drafting judgments, although this task falls in the first place to the Court of Cassation itself. It is however hard to see how such assistance can remain limited to stylistic considerations, which are in any case often indissociable from substantive matters, if it is in addition intended, as the Government also affirmed, to contribute towards maintaining the consistency of the case-law. Even if such assistance was so limited in the present case, it could reasonably be thought that the deliberations afforded the avocat général an additional opportunity to promote, without fear of contradiction by the applicant, his submissions to the effect that the appeal should be dismissed." *[*Applikazzjoni numru 12005/86, sentenza datata 30 ta` Ottubru 1991.*];*

Inoltre fis-sentenza fl-ismijiet ***De Haes and Gijsels v Belgium****, il-Qorti Ewropea tenniet li:*

"... ***the principle of equality of arms – a component of the broader concept of a fair trial – requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-a`-vis his opponent*** *(see, among other authorities, the Ankerl v. Switzerland judgment of 23 October 1996, Reports 1996-V, pp. 1565-66, para. 38).";*

...

"At all events, the proceedings brought against the applicants by the judges and the Advocate-General did not relate to the merits of the judgment in the X case but solely to the question whether in the circumstances the

applicants had been entitled to express themselves as they had. It was not necessary in order to answer that question to produce the whole file of the proceedings concerning Mr X but only ***documents which were likely to prove or disprove the truth of the applicants` allegations****.";*

"It was in those terms that Mr De Haes and Mr Gijsels made their application. ***They asked the Brussels tribunal de premie`re instance and Court of Appeal at least to study the opinion of the three professors whose examinations had prompted the applicants to write their articles*** *(see paragraph 10 above).* ***The outright rejection of their application put the journalists at a substantial disadvantage vis-a`-vis the plaintiffs. There was therefore a breach of the principle of equality of arms****.";*

"That finding alone constitutes a breach of Article 6 para. 1 (art. 6-1)." *[*Applikazzjoni numru 19983/92, sentenza datata 24 ta` Frar 1997*.];*

Illi filwaqt li l-kazijiet fuq citati jirrigwardaw sistemi procedurali li b`xi mod jew iehor mhumiex rispekkjati kompletament f`dik Maltija, il-principji li addottat il-Qorti Ewropea jistiednu skrutinju fid-dettall tal-poteri u funzjonijiet rispettivi tal-Prosekuzzjoni u tal-Avukat Generali fl-isfond tal-principju ta` audi alteram partem. Huwa umilment ritenut li l-kontradizzjonijiet emanenti mir-rwoli u responsabilijiet suesposti wasslu jew jistghu jwasslu ghal lezjoni tad-dritt ta` smigh xieraq tar-rikorrent u tal-principju ta` audi alteram partem;

B. ***Ksur tad-dritt tar-rikorrent li jkollu zmien u facilitajiet xierqa ghall-preparazzjoni tad-difiza tieghu kif sancit, inter alia, mill-Artikolu 39(6)(b) tal-Kostituzzjoni ta` Malta, kif ukoll mill-Artikolu 6(3)(b) tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem***

Illi mill-fatti suesposti, jirrizulta carament li ***meta l-Avukat Generali, fil-perjodu ta` bejn is-6 ta` Lulju 2010*** *(meta saret l-ewwel talba mir-rikorrent ghall-gbir tal-informazzjoni relattiva ghal SIM card partikolari, inkluz SMS logs u l-elenku tan-numri kuntattati gewwa Malta, mis-service providers tar-Renju Unit stante li din setghet tintilef sa Settembru 2010, Dok D anness mar-rikors odjern)* ***u l-1 ta` Ottubru 2010*** *(meta l-ewwel ittri rogatorji gew sottomessi mir-rikorrent,* ***Dok R*** *anness mar-rikors odjern),* ***ma pprovdiex l-assistenza kollha necessarja sabiex, in vista tal-urgenza tat-talba tar-rikorrent, l-informazzjoni mitluba ma tintilifx izda tigi kkonservata mill-entitajiet esteri in kwistjoni, naqas mid-dmirijiet u obbligi tieghu bir-rizultat li l-informazzjoni intilfet irrimedjabilment,***

ir-rikorrent ma setax jikseb l-evidenza necessarja sabiex isostni l-innocenza tieghu u jibni d-difiza tieghu u ghalhekk gie lez jew jista` jigi lez id-dritt fondamentali tieghu ta` smigh xieraq*;*

*Illi l-Avukat Generali kien fl-ahjar ipotezi negligenti meta ma ottemprax ruhhu mad-digriet tal-Qorti tal-24 ta` Awwissu 2010 (**Dok K** ezebit ma` dan ir-rikors) permezz ta` liema l-Onorabbli Qorti Kriminali ddekretat "... that this application be once again notified to the Attorney General for him to take the necessary action in terms of said Section 405(5) of the Criminal Code." L-inosservanza da parti tal-Avukat Generali tohrog cara mill-fatt li fit-3 ta` Settembru 2010, l-Avukat Generali talab, proprju taht l-Artikolu 405 tal-Kodici Kriminali u b`riferenza diretta ghad-digriet tal-Qorti tal-24 ta` Awwissu, li jisma` numru ta` xhieda, **filwaqt li ma ha l-ebda azzjoni ohra sabiex jikseb u/jew jikkonserva l-informazzjoni mehtiega mis-service providers Inglizi**!;*

*Illi r-risposta tal-Avukat Generali tal-14 ta` Lulju 2010 ghall-ewwel talba maghmula mir-rikorrent fis-6 ta` Lulju fejn talab b`urgenza li tingab l-informazzjoni mis-service providers Inglizi, fejn l-Avukat Generali, minflok ma ghamel dak li seta` fil-parametri tal-poteri tieghu sabiex jikseb u jippreserva l-evidenza mitluba, iddikjara biss li t-talba tar-rikorrent ma kinitx skont il-procedura misjuba fl-Artikolu 399 tal-Kap. 9, kienet mhux biss (dejjem fl-ahjar ipotezi) negligenti izda wkoll fattwalment skorretta, stante li **huwa fatt maghruf li l-procedura tal-ittri rogatorji hija wahda li tiehu hafna zmien u li f`kazijiet urgenti bhal dan in kwistjoni, hija procedura stabbilita li l-Avukat Generali fil-vesti tieghu ta` Awtorita` Centrali ta` Malta jiehu dawk l-azzjonijiet u rimedji necessarji tramite l-Eurojust u Europol li jippermettu azzjoni ferm aktar veloci u f`waqtha**!;*

*Illi wara li fit-12 ta` Ottubru 2010 l-Ufficjal Prosekutur ordna li l-ittri rogatorji jigu trazmessi mill-awtoritajiet kompetenti Maltin ghal dawk tar-Renju Unit (**Dok. S** anness mar-rikors odjern), **kien biss fl-10 ta` Dicembru 2010, ossia kwazi xahrejn wara, li effettivament intbaghtu l-ewwel ittri rogatorji (Dok. T** anness mar-rikors odjern), **liema dewmien kien kemm inspjegabbli kif ukoll negligenti da parti tal-Avukat Generali**, issa fil-vesti tieghu ta` Awtorita` Centrali ta` Malta responsabbli ghat-trazmissjoni ta` ittri rogatorji lill-awtoritajiet centrali ta` pajjizi ohra, **tenut kont l-urgenza fit-trazmissjoni sabiex tinkiseb l-informazzjoni necessarja qabel ma din tinqered ghal dejjem**;*

Illi r-risposta tad-29 ta` Dicembru 2010 tal-Awtorita` Centrali tar-Renju Unit kixfet ezempju car iehor tan-negligenza tal-Avukat Generali qua Awtorita` Centrali ta` Malta meta infurmatha li ***minhabba numru ta` nuqqasijiet fit-talba maghmula (Dok. U*** *anness mar-rikors odjern),* ***it-talba ma setghetx tigi processata****. Ma jinftihemx kif bhala l-awtorita` responsabbli ghal kwistjonijiet ta` din ix-xorta, l-Avukat Generali f`dan il-kaz partikolari ma rnexxilux, qua l-Awtorita` Centrali ta` Malta li ghandu d-dmir u r-responsabilita` f`dan il-qasam, jipprovdi bizzejjed informazzjoni u informazzjoni adekwata sabiex it-talba ghall-informazzjoni tirnexxi,* ***u dan wara li precedentement, kien l-Avukat Generali stess li, fir-risposti ghat-talbiet numeruzi tar-rikorrent ghall-ippreservar tal-informazzjoni, tkellmet fuq il-procedura tal-ittri rogatorji bhala wahda li hija "... adopted frequently before our Courts."*** *[****Dok H*** *anness mar-rikors odjern.] Sussegwentement, minkejja l-accenn tar-rikorrent ghall-urgenza tal-kwistjoni (****Dok. W*** *anness mar-rikors odjern), kien biss fis-17 ta` Marzu 2011 li ittri rogatorji godda gew mibghuta mill-Avukat Generali lill-Awtorita` Centrali tar-Renju Unit, sa liema zmien izda* ***kien evidentement tard wisq biex l-informazzjoni necessarja ghad-difiza tkun ghadha qieghda tigi mizmuma u ritenuta fis-sistemi tas-service providers****.;*

Illi r-responsabilita` ghall-abbozzar tal-ittri rogatorji taqa` pjenament fil-kompiti u obbligi tal-Avukat Generali qua Awtorita` Centrali ta` Malta, kif stabbilit carament mid-dispozizzjonijiet tal-Artikoli 3(1) [The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it ***by the judicial authorities of the requesting Party*** *for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.] u 15(1) [Letters rogatory referred to in Articles 3, 4 and 5 as well as the applications referred to in Article 11* ***shall be addressed by the Ministry of Justice of the requesting Party*** *to the Ministry of Justice of the requested Party and shall be returned through the same channels.] u (2) [****In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party****. They shall be returned together with the relevant documents through the channels stipulated in paragraph 1 of this article.] tal-Konvenzjoni Ewropea dwar Assistenza Reciproka f`Materja Kriminali suriferita. [Konvenzjoni Ewropea dwar Assistenza Reciproka f`Materja Kriminali (riferenza numru 6).] Ir-rikorrent ma kellu l-ebda mod kif seta` jirkupra l-informazzjoni necessarja wahdu, minghajr ma jkollu bzonn l-assistenza u ghajnuna tal-Avukat Generali;*

Illi anke li kieku kellu jigi koncess li kien hemm xi ftit nuqqas ta` kjarezza fil-bidu da parti tar-rikorrent dwar taht liema dispozizzjoni kellha

ssir it-talba tieghu, ***xorta jibqa` l-fatt li t-talbiet ta` natura generali maghmula mir-rikorrent fis-16 u l-20 ta` Awwissu 2010 sabiex l-Avukat Generali jottjeni l-informazzjoni necessarja mir-Renju Unit b`accenn partikolari ghall-urgenza tal-kwistjoni kellhom igibu fis-sehh l-obbligu tal-Onorabbli Qorti Istruttorja u tal-Avukat Generali li jassikuraw il-preservazzjoni tal-evidenza u jagixxu b`mod imparzjali u fir-rigward tal-Avukat Generali bhala Awtorita` Centrali ta` Malta, u jiehdu dawk il-passi kollha necessarji sabiex l-informazzjoni tingabar. Li kieku l-Avukat Generali u l-Qorti Istruttorja agixxew b`dan il-mod fil-mument opportun, ossia f`Lulju 2010 meta r-rikorrent ghamel l-ewwel talba tieghu, l-informazzjoni kienet tkun ghadha ma gietx meqruda u d-drittijiet tar-rikorrent ma kinux ikunu mittiefsa****!*** *Jinghad li* ***l-esponent kien tempestiv fit-talba tieghu ghall-preservazzjoni tal-evidenza****, stante li sa mill-ewwel talba tieghu lill-Onorabbli Qorti tas-6 ta` Lulju 2010, informa lill-Qorti li din l-informazzjoni kienet ser tintilef sa Settembru tal-istess sena u ghalhekk kellha tingab b`urgenza!;*

Illi s-suespost japplika wkoll ghall-Onorabbli Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja, li ghal tul ta` zmien naqset milli tagixxi b`mod effettiv sabiex tassigura l-preservazzjoni u kisbien tal-informazzjoni mehtiega mir-rikorrent sabiex jipprova l-innocenza tieghu *u* ***meta, fl-24 ta` Awwissu 2010, finalment ordnat lill-Avukat Generali sabiex jiehu kull azzjoni necessarja*** *taht l-Artikolu 405(5) tal-Kap. 9, b`riferenza ghat-talba tar-rikorrent,* ***ir-riferenza ghall-Artikolu 405(5) kienet wahda ineffettiva, stante li ma setghetx u fil-fatt ma gabitx l-effett mixtieq, mitlub u mehtieg mir-rikorrent****. Barra minn hekk, meta sussegwentement l-Avukat Generali ma ha l-ebda azzjoni in segwitu ghad-digriet taghha sabiex jikseb u jippreserva l-informazzjoni rikjesta mir-rikorrent,* ***ma hadet l-ebda azzjoni ulterjuri sabiex tirraddrizza l-pregudizzju li kien inholoq fil-konfront tar-rikorrent****;*

Illi ***l-informazzjoni li kien qieghed jitlob ir-rikorrent permezz tat-talbiet numeruzi tieghu kienet evidenza ta` natura fondamentali u necessarja sabiex issostni l-innocenza tieghu u ghall-bini tad-difiza tieghu****, stante li kienet tikkonsisti fil-call u SMS logs ta` zewg numri ta` telefoni cellulari – wiehed li kien misjub fuq ir-rikorrent filwaqt li l-iehor li kien misjub fuq il-koakkuzat Thomas Mikalauskas. Permezz ta` dawn il-logs, ir-rikorrent seta` jibni l-evidenza necessarja sabiex juri n-nuqqas ta` involviment tieghu u l-innocenza tieghu fil-kaz odjern;*

Minghajr din id-data essenzjali izda, ***illum il-gurnata r-rikorrent huwa sprovvist minn kull prova sabiex isostni t-tezi tieghu, filwaqt li l-koakkuzat Mikalauskas, fl-assenza ta` din id-data, ma kellu xejn xi jwaqqfu milli jallega li r-rikorrent kien involut fl-istorja daqsu, jekk mhux aktar minnu****;*

Illi jinghad ukoll li l-informazzjoni, evidenza u dokumentazzjoni li talab li tinkiseb ir-rikorrent ***ma setghetx tinkiseb minnu minghajr l-assistenza u l-intervent tal-Onorabbli Qorti Istruttorja u tal-Avukat Generali bil-mezzi moghtija lilu****;*

Illi jirrizulta ghalhekk li minkejja l-fatt li ghadu ma nharigx att tal-akkuza fil-konfront tar-rikorrent, id-drittijiet fondamentali tar-rikorrent gia` gew lezi in kwantu ma giex ipprovdut bil-facilitajiet adekwati u mehtiega sabiex jipprepara d-difiza tieghu, liema lezjoni gia` poggietu fi pregudizzju rrimedjabbli fl-eventwalita` ta` guri, u dan minhabba li l-bazi tad-difiza tieghu, ossia l-informazzjoni rikjesta mis-service providers Inglizi, hija mitlufa ghal dejjem;

Illi fir-rigward tal-Artikolu 6(3)(b) tal-Konvenzjoni Ewropea, fis-sentenza fl-ismijiet ***Iglin v Ukraine*** *il- Qorti stabbiliet li:*

"The Court notes that Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise ***everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the opportunity to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings*** *(see Can v. Austria, no. 9300/81, Commission`s report of 12 July 1984, Series A no. 96, § 53; Connolly v. the United Kingdom (dec.), no. 27245/95, 26 June 1996; and Mayzit v. Russia, no. 63378/00, § 78, 20 January 2005). Furthermore, the facilities available to everyone charged with a criminal offence should include* ***the opportunity to acquaint himself with the results of investigations carried out throughout the proceedings for the purpose of preparing his defence*** *(see C.G.P. v. the Netherlands, (dec.), no. 29835/96, 15 January 1997, and Foucher v. France, 18 March 1997, §§ 26-38, Reports 1997-II).* ***The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case*** *(see Kornev and Karpenko v. Ukraine, no. 17444/04, § 67, 21 October 2010)." [*Applikazzjoni numru 39908/05, sentenza datata 12 ta` Jannar 2012.*];*

Illi s-suespost isib sostenn fil-gurisprudenza tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem, senjatament fis-sentenza fl-ismijiet ***Jespers v Belgium****, fejn il-Kummissjoni tal-Qorti esprimiet l-opinjoni li d-difiza ghandu jinghatalha minn dawk li jkunu qieghdin jinvestigaw il-kaz access ghal medda wiesgha ta` informazzjoni, inkluz informazzjoni "... in their possession, or which they could gain access to which may assist the accused in exonerating himself." [Jespers v Belgium* (1981) 27 DR 61 (ECtHR Com)*.];*

Illi fis-sentenza fl-ismijiet ***Krčmář and Others v The Czech Republic****, il-Qorti Ewropea stabbiliet li:*

"The Court considers that, ***in itself, the gathering of additional evidence by a court****, as in the present case by the Constitutional Court,* ***is not incompatible with the requirements of a fair hearing****. In the present case, only the fact that the documentary evidence collected by the Constitutional Court on its own initiative from the Rakovník District Records Office, the Prague District Records Office, the Prague Central Records Office, the Ministry of Employment and Social Affairs and the Ministry of Finance was not communicated to the applicants raises a problem.";*

"The principle of equality of arms, which is one of the elements of the broader concept of a fair hearing, requires each party to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-a`-vis its opponent *(see the Ankerl v. Switzerland judgment of 23 October 1996, Reports 1996-V, pp. 1567-68, § 38, and the Helle v. Finland judgment of 19 December 1997, Reports 1997-VIII, p. 2928, § 53). In the present case the documentary evidence in issue was not communicated to either of the parties to the dispute before the Constitutional Court. Accordingly, no infringement of equality of arms has been established.";*

***"However, the concept of a fair hearing also implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court`s decision****"(see the Nideröst-Huber v. Switzerland judgment of 18 February 1997, Reports 1997-I, p. 108, § 24, and the Mantovanelli v. France judgment of 18 March 1997,Reports 1997-II, p. 436, § 33). [*Applikazzjoni numru 35376/97, sentenza datata 3 ta` Marzu 2000*.];*

Fis-sentenza fl-ismijiet ***Natuten v Finland****, il-Qorti Ewropea stabbiliet is-segwenti principji rigward l-Artikoli 6(1) u (3) tal-Konvenzjoni:*

"Failure to disclose to the defence material evidence, which contains such particulars which could enable the accused to exonerate himself or have his sentence reduced would constitute a refusal of facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in Article 6 § 3 (b) of the Convention *(seeC.G.P., cited above).* ***The accused may, however, be expected to give specific reasons for his request*** *(see Bendenoun v. France, 24 February 1994, § 52, Series A no. 284)* ***and the domestic courts are entitled to examine the validity of these reasons*** *(see C.G.P., cited above).";*

Jinghad f`dan ir-rigward li ***r-rikorrent odjern kien spjega adekwatament ir-rilevanza tal-evidenza in kwistjoni fil-kaz odjern, tant li la l-prosekuzzjoni u lanqas il-Qorti qatt ma kkontestaw ir-rilevanza taghha****. Il-Qorti Ewropea kompliet li:*

"Turning to the present case, the Court observes that the number of the destroyed recordings, or the contents thereof, cannot be verified from the material submitted. The Government have not, however, contested the applicant`s submission that the amount of such recordings was of some significance. Nor have they been able to provide any specific information about their contents.";

"As to the Government`s contention that the applicant had only pleaded the relevance of the destroyed recordings after having submitted his letter of appeal to the Court of Appeal, the Court notes that under domestic law the Court of Appeal was empowered to consider questions of both fact and law, and it was still open to the applicant to request new evidence to be produced at that stage. Moreover, the Government have not argued that the requested recordings would, in fact, have been available in the District Court proceedings, any more than in the proceedings before the Court of Appeal. The Court notes in this connection that, although the actual time of destruction of the recordings in question remains unclear, it had presumably taken place in the course of the pre-trial investigation. In this respect the Court refers to the relevant provision of the Coercive Measures Act in force at the relevant time (see paragraph 21 above). As to the Government`s argument that the applicant could have described the contents of the destroyed recordings, the Court considers that the applicant could not have been expected to announce his alleged involvement in a different offence, punishable by law, prior to any charges having been brought against him.";

"The Court reiterates that the requirements of Article 6 presuppose that having given specific reasons for the request for disclosure of certain evidence which could enable the accused to

exonerate himself, he should be entitled to have the validity of those reasons examined by a court. Although the applicant, in this case, must have known the contents of the destroyed recordings, as far as they involved him, and even if he had been able to put questions during the trial concerning all of the conversations with the other defendants, the Court points out that the national courts did not find the defendants` allegations about the purchase of illegal weapons credible, for lack of other supporting evidence" *(see paragraphs 12 and 17 above). "Furthermore, the Court of Appeal did not refuse to order the disclosure of the requested recordings on the ground that the applicant had not given specific and acceptable reasons for his request.* ***Instead, it declined to render a decision in that respect, as the recordings had been destroyed and could thus not have been disclosed to the defence or produced to the court"*** *(see paragraphs 15 and 16 above);*

"Even though the police and the prosecutor were obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the investigating authority itself, even when co-operating with the prosecution, attempts to assess what may or may not be relevant to the case, cannot comply with the requirements of Article 6 § 1. Moreover, it is not clear to what extent the prosecutor was, in fact, involved in the decision to destroy those recordings which were not included in the case file. ***In this case, the destruction of certain material obtained through telephone surveillance made it impossible for the defence to verify its assumptions as to its relevance and to prove their correctness before the trial courts****." [*Applikazzjoni numru 21022/04, sentenza datata 30 ta` Gunju 2009*];*

Illi mis-suespost jirrizulta car li d-dritt fondamentali tar-rikorrent li jinghata facilitajiet adekwati sabiex jipprepara u jibni d-difiza tieghu gie lez b`rizultat dirett tan-negligenza, inazzjoni u inosservanza tal-obbligi rispettivi tal-Prosekuzzjoni, tal-Avukat Generali kif ukoll tal-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja. Dan gia` sarraf u ser ikompli jsarraf fi pregudizzju rrimedjabbli u serju tad-drittijiet fondamentali tar-rikorrent, li llum huwa sprovvist ghal dejjem minn evidenza inkontrovertibbli li kienet ser issostni l-innocenza tieghu.

Ghaldaqstant ghar-ragunijiet fuq premessi, ir-rikorrent umilment jitlob lil din l-Onorabbli Qorti joghgobha :–

(a) Tiddikjara li r-rikorrent inkisirlu jew x`aktarx ser jinkisirlu d-dritt fondamentali tieghu ghal smigh xieraq li jinkorpora fih il-principju tal-gustizzja naturali ta` equality of arms sancit, inter alia, mill-Artikolu 39

tal-Kostituzzjoni ta` Malta, kif ukoll mill-Artikolu 6(1) tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.

(b) Tiddikjara li r-rikorrent inkisirlu jew x`aktarx ser jinkisirlu d-dritt fondamentali tieghu qua persuna akkuzata b`reat kriminali li jkollu zmien u facilitajiet xierqa ghall-preparazzjoni tad-difiza tieghu kif sancit, inter alia, mill-Artikolu 39(6)(b) tal-Kostituzzjoni ta` Malta, kif ukoll mill-Artikolu 6(3)(b) tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.

(c) Tordna, in vista tal-ksur tad-drittijiet tar-rikorrent b`rizultat ta` liema intilfet irrimedjabilment evidenza essenzjali fil-konfront tar-rikorrent fil-proceduri odjerni, il-waqfien tal-proceduri fil-konfront tar-rikorrent u l-liberazzjoni tar-rikorrent.

(d) Taghti dawk ir-rimedji ohra li jidhrilha xierqa u opportuni fic-cirkostanzi tal-kaz sabiex tigi zgurata l-amministrazzjoni korretta tal-gustizzja.

Bl-ispejjez.

Rat id-dokumenti li kienu annessi mar-rikors promotur.

Rat id-digriet li tat din il-Qorti <u>diversament presjeduta</u> fl-24 ta` Gunju 2016 fejn appuntat ir-rikors ghas-smigh u fejn ordnat in-notifika tar-rikors lill-intimat b`terminu ghar-risposta.

Rat ir-risposta tal-Avukat Generali pprezentata fit-<u>8 ta` Lulju 2016</u> li taqra hekk :–

*1. Illi qabel xejn l-esponent jara li hemm raguni tajba ta` rikuza jew astensjoni tal-Imhallef sedenti skont l-**Artikolu 734(e)** tal-**Kap. 12 tal-Ligijiet ta` Malta**. Dan minhabba li parti mill-ilment kostituzzjonali tar-rikorrent jolqot l-imgieba tal-Imhallef sedenti fiz-zmien ta` meta hija kienet taqdi bhala Magistrat quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja fil-proceduri kriminali miexja kontra l-istess rikorrent;*

*2. Illi preliminarjament ukoll l-esponent jemmen li l-azzjoni tar-rikorrent hija ghal kollox bikrija peress li s`issa ghadu mhux maghruf kif u taht liema cirkostanzi r-rikorrent sejjer jigi zvantaggjat waqt is-smigh tieghu. Tassew f`dan l-istadju tal-proceduri mhuwiex indikattiv li l-ilmenti tar-rikorrent jigu diskussi u trattati in vacuo. F`dan il-kuntest huwa stabbilit anke f`gurisprudenza konsistenti, li biex tinsab lezjoni tas-smigh xieraq kif imhares taht l-**artikolu 6 tal-Konvenzjoni Ewropea u l-artikolu 39 tal-Kostituzzjoni**, huwa mehtieg li l-process gudizzjarju jigi ezaminat fil-kumpless kollu tieghu. Bhala regola, meta wiehed japprezza jekk proceduri humiex xierqa jew le, wiehed m`ghandux ihares biss lejn xi nuqqasijiet procedurali li jigru imma lejn jekk fl-assjem taghhom, il-proceduri kinux jew le kondotti b`gustizzja fis-sostanza u fl-apparenza;*

Mhux biss f`dan il-kaz il-provi tal-partijiet ghadhom qed jingabru u ghalhekk ir-rikorrenti ghadu fiz-zmien li jressaq il-provi kollha li jrid, imma ghal dak li jiswa jista` jaghti l-kaz li l-Qorti Kriminali u/jew il-Qorti tal-Appell Kriminali tiddeciedi li tiddikjara li r-rikorrent mhux hati tal-akkuzi migjuba kontra tieghu. Jekk dan jigri l-ilmenti kostituzzjonali/konvenzjonali mqajma minnu f`dawn il-proceduri jaqghu fix-xejn;

3. Illi marbut ma` dan, l-ilment tar-rikorrent safejn mibni fuq allegazzjoni ta` vjolazzjoni ta` smigh xieraq (audi alterem u ugwaljanza ta` opportunita`) dan jista` jigi trattat u indirizzat mill-Qrati Kriminali. Wara kollox mhumiex il-Qrati Kostituzzjonali biss li huma kompetenti biex jiddeciedu jekk il-principji tal-gustizzja naturali gewx imharsa jew le. Kif jinsab ritenut, l-invokazzjoni tas-smigh xieraq jaghti certament, "poter residwali lil kull Qorti li tirrimedja ghal sitwazzjonijiet ta` vjolazzjoni tad-dritt fundamentali ghal smigh xieraq" ("**Busy Bee Ltd. Vs Joseph M. Said**", Appell Sede Inferjuri, 21 ta` Marzu 1997);

*Dan jghodd b`aktar qawwa ghall-kaz tal-lum peress li r-rikorrent qieghed jallega li huwa gie pregudikat fid-difiza tieghu u garrab ingustizzja fis-smigh tieghu minhabba li skont hu ma gewx imharsa kif imiss certu dispozizzjonijiet tal-**Kap. 9 tal-Ligijiet ta` Malta** fejn jikkoncerna l-prova bil-mezz tal-ittri rogatorji u l-irwol tal-Avukat Generali fil-kumpilazzjoni. Bilkemm hemm bzonn jinghad kwistjoni bhal din tista` tigi indirizzata mill-Qrati Kriminali. Wiehed ukoll ma jridx jinsa li jekk ir-rikorrent irid jikkontesta s-siwi u l-ammissibilita` tal-provi li fuqhom il-prosekuzzjoni qed tibni l-akkuzi taghha, huwa dejjem jista` jekk irid iressaq eccezzjoni f`dan is-sens quddiem il-Qorti Kriminali kif hekk jinsab dispost fl-**Artikolu 438(2) tal-Kap. 9 tal-Ligijiet ta` Malta** u dan meta tinhariglu l-att tal-akkuza;*

Kif inghad f`bosta sentenzi kostituzzjonali, fil-process gudizzjarju penali huwa l-gudikant fil-Qrati Kriminali li fl-ahhar mill-ahhar huwa

l-moderatur tal-proceduri li jizgura mhux biss li jinzamm bilanc bejn il-kontendenti u l-mezzi disponibbli ghalihom biex jiddefendu r-rispettivi pozizzjonijiet taghhom, imma huwa wkoll moghti mil-ligi s-setghat u l-mezzi l-ohrajn kollha biex ikun jista` jizgura process gust u xieraq (ara **Emmanuel sive Leli Camilleri vs Il-Kummissarju tal-Pulizija et** moghtija mill-Qorti Kostituzzjonali fl-20 ta` Dicembru 2000);

*Ghalhekk galadarba l-ilmenti tar-rikorrent jistghu jigu mistharrga mill-Qrati Kriminali u jekk ikun il-kaz anke mill-Qorti tal-Appell Kriminali, ma jinhassx li hemm il-htiega biex ghalissa din l-Onorabbli Qorti tinqeda bis-setghat kostituzzjonali taghha fid-dawl tal-**Artikolu 46(2) tal-Kostituzzjoni** u tal-proviso tal-**Artikolu 4(2) tal-Kap. 319 tal-Ligijiet ta` Malta**. Huwa aktar ghaqli li l-process kriminali jithalla miexi minghajr xkiel;*

4. Illi bla hsara ghall-premess, l-esponent ma jistax ma jikkummentax li l-fatti ewlenija msemmija mir-rikorrent fir-rikors kostituzzjonali tieghu jmorru lura ghal grajjiet li sehhew diversi snin ilu. F`din il-qaghda, ma hemmx dubju li l-moghdija taz-zmien iddghajjef mhux ftit is-serjeta` u s-siwi tal-ilmenti tar-rikorrent. Mhux hekk biss, l-esponent ihares lejn dan ir-rikors kostituzzjonali b`certu perplessita` u suspett ghaliex jistaghgeb x`wassal lir-rikorrent biex jiehu dawn il-passi gudizzjarji wara tant zmien. Hu stramb ukoll il-fatt li r-rikorrent qatt ma qajjem dan il-punt qabel quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja;

5. Illi irrispettivament minn dan, l-Avukat Generali jishaq li huwa dejjem wettaq xoghlu sew u skont il-ligi. Ghalhekk safejn ir-rikorrent qed jallega li l-Avukat Generali m`ghamilx xoghlu sew jew li kien negligenti fil-qadi ta` dmirijietu, tali allegazzjonijiet qed jigu respinti bl-aktar mod qawwi u kategoriku. Tabilhaqq l-Avukat Generali m`ghamel xejn biex ixekkel lir-rikorrent mid-difiza tieghu. L-istess jghodd fejn ir-rikorrent jakkuza lill-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja li ma ghamlitx xoghlha tajjeb;

*6. Illi fis-sewwa kien ir-rikorrent li l-ewwel dam biex ikkonvinca ruhu li biex tingieb il-prova minn barra kellha ssir l-ittra rogatorja. Ir-rikorrent ikkonvinca ruhu biss li kellu jimxi bl-ittra rogatorja meta fis-seduta tal-15 ta` Settembru 2010 giet ipprezentata e-mail mill-esperti tal-EUROJUST (ara **Dok. AG1**). Imbaghad kien ir-rikorrent li dam biex hejja din l-ittra rogatorja u meta fl-ahhar ghamilha, kien ir-rikorrent li ma abbozzahiex kif kellha tkun. Kif jidher minn **Dok. AG 2** appuntu fuq il-kwistjoni tal-phone numbers, l-awtoritajiet Inglizi rrimarkaw li, " these phone numbers are not referred to in the background of the case" u talbu,*

"please clarify how these numbers are linked to the case and why it is believed that the information requested will assist with this investigation:;

Ghalhekk jekk kien hemm nuqqas f`din il-vicenda processwali dan ma kienx gej min-naha tal-Avukat Generali jew mill-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja li ma kinux jafu ghaliex ir-rikorrenti kien qed jitlob din l-informazzjoni izda dan kien gej mir-rikorrent stess, fl-ewwel lok minhabba l-perseveranza zbaljata tieghu li ma jaghmilx l-ittra rogatorja mill-bidunett u fit-tieni lok minhabba li meta ddecieda li jaghmilha huwa ma mmotivax il-htiega wara l-prova li ried igib minn barra;

*7. Illi f`dan il-kuntest ir-rikorrent m`ghandux ragun meta jipprova jaghti x`jifhem li l-Avukat Generali ma mexiex b`mod indipendenti u imparzjali fil-kwistjoni tal-ittra rogatorja. Apparti li bhala stat fattwali dan mhux minnu ghaliex l-Avukat Generali ghamel l-almu tieghu biex jiffacilita` l-process tal-ittri rogatorji, jizdied jinghad li fi kwalunkwe` kaz il-kuncetti ta` indipendenza u imparzjalita` skont il-**Kostituzzjoni ta` Malta u l-Konvenzjoni Ewropea** jghoddu biss ghall-qrati u t-tribunali – haga li l-Avukat Generali mhuwiex;*

*8. Illi terga` u tghid, lil hinn mill-kwistjoni dwar min kien jahti ghad-dewmien fil-kunsinna tal-ittra rogatorja, il-prova li r-rikorrent xtaq li tingieb fl-atti kriminali permezz ta` din l-ittra rogatorja xorta qatt ma setghet tigi prezentata. Dan minhabba li skont **Dok. Y** imressaq mir-rikorrent stess, jidher in-numru tar-rikorrent qatt ma kien registrat mal-fornitur barranin. Ghalhekk dan il-fornitur qatt ma seta` jibghat taghrif marbut mar-rikorrent. Jigi b`hekk li r-rikorrent ma garrab l-ebda hsara ghaliex l-ittra rogatorja ma waslitx fil-hin ghand l-awtoritajiet barranin;*

9. Illi f`kull kaz u dejjem minghajr pregudizzju ghal dak fuq imsemmi r-rikorrent ma jistax jilmenta mill-fatt li huwa mhux ha jinghata l-opportunita` li jinstema` fil-proceduri kriminali tieghu, meta wiehed iqis li sa issa ghad lanqas inharget l-att tal-akkuza kontra r-rikorrent u allura ghadu ma giex appuntat il-guri. Waqt il-guri r-rikorrent se jkollu tabilhaqq kull opportunita` li jressaq il-provi u s-sottomissjonijiet kollha li jidhrulu xierqa u opportuni, b`dana li huwa ma jistax isostni li mhux ha jkollu c-cans tieghu biex juri l-innocenza tieghu;

10. Illi ghalkemm it-telefonati u l-messaggi li saru barra (jekk dawn tassew saru) ma jistghux jitressqu bhala prova fil-guri tieghu, dan ma jfissirx li r-rikorrent ma jistax jixhed dwarhom jew li ma jistax itella` provi ohra biex jikkonferma dak li seta` ntqal f`tali konversazzjonijiet;

11. Illi dan biex ma jinghadx ukoll li r-rikorrent ma jfissirx fir-rikors tieghu kif dan it-taghrif seta` jkun ta` beneficcju ghalih fid-difiza tieghu jew kif in-nuqqas ta` dan it-taghrif seta` jkun ta` pregudizzju ghalih. L-esponent sincerament jemmen li dan it-taghrif jekk tassew jezisti ma jincidi xejn fuq il-fattispecji tal-kaz – dan meta wiehed iqis li l-akkuza kontra r-rikorrent tikkoncerna sejba ta` madwar 15-il kilo droga fil-kamra ta` fejn kien qieghed jallogga r-rikorrent waqt is-soggorn tieghu f`Malta. Tassew f`dawn ic-cirkostanzi t-telefonati li setghu saru barra minn Malta ma jaffettwax id-difiza tar-rikorrent fil-proceduri kriminali tieghu. Ghalhekk huwa evidenti f`ghajnejn l-esponent li qed jinqeda b`din l-iskuza tal-ittra rogatorja biex jipprova jxekkel il-kontinwazzjoni tal-kawza;

12. Illi fuq l-ilment tal-equality of arms, dan jezigi li x-xhieda titressaq fil-prezenza tal-akkuzat sabiex dan ikun jaf fuq hiex huma mibnija l-akkuzi migjuba kontrieh, halli b`hekk ikun jista` jwaqqa` din ix-xhieda billi jressaq ix-xhieda tieghu, u sabiex ikun jista` jaghmel kontro-ezami tax-xhieda. Fil-guri r-rikorrent ha jkollu d-dritt li jikkonfronta lil kull min ikun qed jakkuzah, jew lil kull min ikun qed jistabilixxi xi fatt li jista` jittiehed bhala prova kontra tieghu. Ghalhekk mhux il-kaz li r-rikorrent ha jigi zvantaggjat meta mqabbel mal-prosekuzzjoni. Dan japplika wkoll fir-rigward tal-koakkuzat Mikalauskas, fis-sens li r-rikorrent ghandu kull opportunita` li jwaqqa` t-testimonjanza tieghu billi jew jesponih ghall-kontro-ezami jew billi jixhed huwa stess kontrih jew inkella billi jressaq xhieda ohra li hija disponibbli;

13. Illi multo magis fil-kawza kriminali kontra r-rikorrent, il-prosekuzzjoni ma kisbet l-ebda vantagg la zghir u lanqas sostanzjali fuq ir-rikorrent ghaliex ma tressaqx it-taghrif tal-fornitur esteru. Jekk intilef dan it-taghrif dan intilef kemm ghall-prosekuzzjoni u kemm ghad-difiza. B`zieda ma` dan il-prosekuzzjoni xorta jehtigielha tipprova l-kaz taghha lil hinn kull dubju ragonevoli u r-rikorrenti xorta jibqa` jgawdi mill-beneficcju tal-principju in dubio pro reo;

14. Illi r-rikorrent ghad ghandu l-istess opportunita` daqs il-prosekuzzjoni sabiex jipprezenta l-kaz tieghu u ghadu jista` jikkontrolla x-xhieda tal-prosekuzzjoni kif ukoll li jtella` x-xhieda tieghu. Ukoll kemm il-prosekuzzjoni u kemm id-difiza ghandhom access ghall-istess informazzjoni;

15. Illi safejn ir-rikorrent qed jallega li huwa ma kellux zmien u facilitajiet bizzejjed biex ihejji d-difiza tieghu, dan huwa manifestament

fieragh ghaliex il-guri tieghu ghadu ma giex appuntat u ghalhekk huwa ghadu fiz-zmien li jipprepara ghall-kaz tieghu;

16. Illi fl-ahharnett dejjem bla pregudizzju, inkwantu r-rikorrent qieghed jippretendi li jigu mhassra l-proceduri kriminali mibdija kontra tieghu, dan huwa ghal kollox inkoncepibbli. Taht dan il-profil l-esponent jaghmel riferenza ghal dak imtenni mill-Qorti Kostituzzjonali fis-sentenza ***Charles Steven Muscat vs Avukat Generali*** *tat-8 ta` Ottubru 2012, li l-jedd li jaghtu l-Kostituzzjoni u l-Konvenzjoni huwa dak ghal smigh xieraq. Ma hemm ebda jedd li kull min hu akkuzat b`reat kriminali jigi liberat minn dik l-akkuza, jew li l-akkuzat jinghata l-mezzi biex, hati jew mhux, jinheles mill-akkuza, jew li, minhabba xi irregolarita`, tkun xi tkun, min fuq il-fatti ghandu jinstab hati ghandu jithalla jahrab il-konsegwenzi ta` ghemilu;*

17. Ghaldaqstant fid-dawl ta` dan kollu l-esponent umilment jitlob lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrenti bl-ispejjez kontra tieghu.

Rat id-dokumenti li kienu esebiti mar-risposta.

Rat il-provvediment li tat din il-Qorti diversament presjeduta fis-26 ta` Settembru 2016 fejn wara li laqghet l-ewwel eccezzjoni baghtet l-atti lir-Registratur tal-Qorti sabiex jigu assenjati skont il-ligi.

Rat l-ordni tal-Onor Prim` Imhallef tas-17 ta` Ottubru 2016 fejn il-kawza giet assenjata lil din il-Qorti kif presjeduta.

Rat id-digriet taghha ta` l-20 ta` Ottubru 2016 fejn appuntat ir-rikors ghas-smigh quddiemha ghall-udjenza tal-15 ta` Novembru 2016 fid-9.00 a.m.

Rat id-digriet li tat fl-udjenza tal-15 ta` Novembru 2016 fejn laqghet it-talbiet tal-partijiet sabiex qabel tghaddi ghall-konsiderazzjoni tal-mertu taghti decizjoni dwar it-tieni u t-tielet eccezzjonijiet preliminari.

Rat illi in kwantu jirrigwarda provi dwar it-tieni u t-tielet eccezzjonijiet il-partijiet qaghdu fuq l-atti.

Rat in-noti ta` osservazzjonijiet.

Rat l-atti l-ohra.

II. <u>It-tieni eccezzjoni</u>

Permezz tat-tieni eccezzjoni, l-Avukat Generali laqa` ghall-azzjoni tar-rikorrent billi eccepixxa li kienet ghal kollox bikrija peress li sal-lum ghadu mhux maghruf kif u taht liema cirkostanzi r-rikorrent kien ser ikun zvantaggjat waqt is-smigh. Sabiex ikun hemm lezjoni tal-jedd ta` smigh xieraq kif imhares bl-Art 6 tal-Konvenzjoni u bl-Art 39 tal-Kostituzzjoni, ghandu jsir ezami tal-process gudizzjarju fl-asjem tieghu. Bhala regola, l-ezami tal-proceduri gudizzjarji m`ghandux ikun cirkoskritt ghal ezami ta` nuqqasijiet procedurali, imma ghandu jkun ezami ta` jekk il-proceduri kinux jew le kondotti b`gustizzja fis-sostanza u fl-apparenza taghhom.

Riferibbilment ghall-kaz tal-lum, l-Avukat Generali sahaq li mhux biss il-provi tal-partijiet ghadhom qed jingabru u ghalhekk ir-rikorrent ghadu fiz-zmien li jressaq il-provi kollha li jrid, imma ghal dak li jiswa jista` jaghti l-kaz li l-Qorti Kriminali u/jew il-Qorti tal-Appell Kriminali tiddeciedi li tiddikjara li r-rikorrent mhux hati tal-akkuzi migjuba kontra tieghu. Jekk dan jigri l-ilmenti kostituzzjonali u konvenzjonali tar-rikorrent jaqghu fix-xejn.

1. <u>Gurisprudenza</u>

Fis-sentenza li tat fil-25 ta` Marzu 2011 fil-kawza "**<u>David sive David Norbert Schembri vs Avukat Generali</u>**" il-Qorti Kostituzzjonali ghamlet riferenza ghad-decizjoni tal-Ewwel Qorti :-

"kellha tqis il-process kollu, u mhux episodju wiehed mehud wahdu. Ghalkemm dwar id-decizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza ma hemmx rimedju ordinarju iehor, ghax dik id-decizjoni hija finali, dwar id-decizjoni fuq l-akkuza nfisha il-process ordinarju ghadu ghaddej, u ghalhekk ir-rikorrent ghadu jista` jinqeda bir-rimedji li taghtih il-ligi ordinarja. Dan huwa relevanti ghax il-jedd

imhares taht l-Artikolu 6 huwa dwar id-decizjoni fuq l-akkuza kriminali, u mhux dwar iddecizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza. Fil-kaz tal-lum id-decizjoni illi l-kawza kriminali kontra r-rikorrent ghandha titmexxa `l quddiem, fiha nfisha u wehedha, ma tolqot ebda jedd fondamentali mhares taht l-artikolu tal-Konvenzjoni li fuqu qieghed jistrieh ir-rikorrent".

Dwar id-decizjoni tal-Ewwel Qorti ir-rikorrent kien ghamel l-argument illi :-

" … l-ghoti ta` rimedju jista` jigi anticipat jekk ikun se jinkiser dritt. Fis-sentenza tal-Qorti ta` Strasbourg fil-kaz fl-ismijiet ***Imbroscia v. Switzerland*** *jinghad li :*

'The manner in which article 6(1) and 3(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case.'

*Kif tikteb Karen Reid fil-ktieb "****A Practitioner`s Guide to the European Convention on Human Rights****", 3rd Edition page 70*

'While the conformity of a trial with the requirements of Article 6 must be assessed on the basis of the trial as a whole, a particular incident may assume such importance as to constitute a decisive factor in the general appraisal of the trial overall'.

Madanakollu l-Qorti Kostituzzjonali kkonfermat id-decizjoni tal-Ewwel Qorti u cahdet l-aggravju.

Fil-kaz "**Repubblika ta` Malta v Carmel Camilleri**" li kien deciz mill-Qorti Kostituzzjonali fit-22 ta` Frar 2013, inghad illi ma kienx necessarjament il-kaz illi l-Ewwel Qorti kellha tistenna sakemm jintemm il-process kriminali qabel ma tqisl- ilment dwar ksur tal-jedd ghal smigh xieraq sabiex dak il- edd jigi "*evalwat fir-rigward tat-totalità tal-procedura".* Kien rilevat illi :-

"Tassew illi l-gurisprudenza generalment hija kif ighid l-Avukat Generali. Ukoll fil-kaz ta`* ***Imbrioscia v. l-Isvizzera (****Q.E.D.B. 24 ta` Novembru 1993, rikors 13972/88.4), li wkoll kien dwar id-dritt ghall-ghajnuna ta` avukat waqt l-interrogazzjoni, il-Qorti Ewropeja qalet illi kellha taghmel "a scrutiny of the proceedings as a whole". Dan huwa principju

generali li japplika ghall-jedd ghal smigh xieraq u ma jidhirx li hemm xi raguni ghala filkuntest tal-jedd ghall-ghajnuna ta` avukat ghandu jkun differenti.

Madankollu, kif qalet din il-qorti fil-kaz ta` **Il-Pulizija v. Alvin Privitera (**Q. Kost. 11 ta` April 2011) , jista` jigri illi episodju wiehed ikun determinanti ghall-ezitu tal-process kollu u ghalhekk ma jkunx il-kaz illi l-qorti tistenna sakemm jintemm il-kaz. Dan jista` facilment jigri fil-kaz ta` ammissjoni ta` htija. Huwa minnu illi, jekk ikollha raguni ghax tahseb illi dik lammissjoni ma jkollhiex mis-sewwa, il-qorti tista` ma toqghodx fuqha. Ma jistax ma jinghadx, izda, illi stqarrija ta` htija aktar iva milli le tkun determinanti.

Din il-qorti ghalhekk ma tarax illi hemm ragunijiet bizzejjed biex tiddisturba din il-konkluzjoni li waslet ghaliha l-Ewwel Qorti, u li wasslitha biex taghti decizjoni qabel ma jkun intemm il-process penali.

Barra minn hekk, dan il-kaz inbeda b`referenza mill-Qorti Kriminali, li waqqfet is-smigh quddiemha sakemm ikollha t-twegiba ghal dik ir-referenza. Ma setghetx ghalhekk l-Ewwel Qorti ma twegibx ghar-referenza billi tistenna sakemm jinghalaq il-process kriminali.

Safejn irid illi l-qorti tqis it-"totalità tal-procedura" qabel ma twiegeb ghar-referenza, l-aggravju huwa ghalhekk michud."

Fir-riferenza kostituzzjonali fl-ismijiet "**Il-Pulizija vs Dr Melvyn Mifsud**" deciza mill-Qorti Kostituzzjonali fis-26 ta` April 2013 kien rilevat illi hija gurisprudenza kostanti li l-ezami ta` jekk hemmx vjolazzjoni tad-dritt ghal smigh xieraq irid isir billi jittiehed qis tal-procedimenti kollha fl-assjem taghhom u li ghalhekk dan l-ezercizzju, fil-principju, huwa indikat li jsir biss fi tmiem il-procedimenti u mhux qabel.

Il-Qorti kompliet tghid li :-

"Dan hu ugwalment applikabbli meta din il-Qorti jkollha tikkunsidra jekk x`aktarx tkunx ser issehh tali vjolazzjoni. Huwa minnu li kemm din il-Qorti kif ukoll l-organi ta` Strasburgu kkoncedew li in linea eccezzjonali xi fattur partikolari tal-proceduri jista` jkun tant determinanti ghad-dritt ghal smigh xieraq li ma jkunx mehtieg li l-Qorti tistenna sa tmiem il-proceduri sabiex tiddeciedi jkunx hemm vjolazzjoni tad-dritt in kwistjoni (Ara inter alia Repubblika ta` Malta v. Carmel Camilleri, ibid) izda dan ma hux il-kaz li ghandha l-Qorti quddiemha llum.

Fil-kaz tal-lum anki kieku kien minnu li naqsu xi notamenti bil-miktub li kienu xi darba jifformaw parti mill-atti - haga li, kif inghad, ma tirrizultax pruvata f`dawn il-proceduri mill-appellant fil-grad li trid il-ligi - il-Qorti ta` kompetenza kriminali tkun ghad trid tevalwa r-relevanza ta` dik il-kitba allegatament nieqsa tenut kont tal-fatt li l-appellant jallega li jehtieg dik il-prova sabiex isostni l-eccezzjoni tieghu tal-preskrizzjoni filwaqt li l-prosekuzzjoni ssostni li r-reat li bih huwa akkuzat l-appellant huwa wiehed ta` natura permanenti u li bhala konsegwenza jgib mieghu il-fatt li t-terminu preskrittiv anqas biss jibda jiddekorri sakemm jibqa` jissusisti l-fatt projbit mil-ligi u cioe` fil-kaz de quo n-nuqqas tal-pagament tal-ammonti allegatament dovuti lill-avukat Dr. Carmelo Grima; il-Qorti riferenti jista` jehtigilha tipprovdi jekk ghandhiex tammetti xi prova sekondarja in sostituzzjoni ta` xi prova primarja u tkun ghad trid tiddetermina jekk il-prosekuzzjoni intentax l-azzjoni penali fiz-zmien previst mil-ligi u jekk tkunx ippruvat il-htija talakkuzat sal-grad previst mil-ligi penali u cioe` oltre ddubbju ragjonevoli; u eventwalment, fid-dawl ta` dan kollu, tkun trid tiddeciedi dwar il-htija o meno tal-appellant.

Ikunx hemm vjolazzjoni tad-dritt ghal smigh xieraq, ghalhekk, jiddependi minn kif il-Qorti riferenti tittratta u tiddisponi mid-diversi kwistjonijiet u tappi processwali appena elenkati, fost ohrajn, li jistghu jitqieghdu quddiemha fil-kors tal-process u ghalhekk certament il-fatt wahdu previst mill-appellant sabiex fuqu jsostni t-talba tieghu ghal riferenza lil din il-Qorti ma hux wahdu determinanti tal-kwistjoni minnu sollevata li ghalhekk hi ghal kollox intempestiva u prematura u daqstant intempestiva u prematura hi r-referenza tal-Qorti referenti."

Fil-kaz ta` "**Morgan Ehi Egbomon vs Avukat Generali**" deciz mill-Qorti Kostituzzjonali fis-16 ta` Marzu 2011, il-qorti accettat il-posizzjoni tal-ewwel qorti illi sabiex il-qorti tkun tista` tiddeciedi dwar allegazzjoni ta` nuqqas ta` smigh xieraq kien hemm bzonn illi jsir apprezzament tal-process kriminali kollu. Ladarba s-smigh ma kienx mitmum, kien ghadu mhux maghruf kif u taht liema cirkostanzi jistghu joperaw ir-regoli illi l-appellant kien qieghed jilmenta dwarhom.

Inghad :-

"Ghalhekk, sewwa qalet l-ewwel qorti illi, qabel ma jkun sar u ntemm il-process penali, ikun prematur illi jsir minn din il-qorti l-ezercizzju li jrid l-Appellant, kemm ghax l-Appellant ghad ghandu ghad-dispozizzjoni tieghu r-rimedji u l-mezzi ta` harsien kollha li jaghtih il-process penali – u ghalhekk ghad ghandu rimedji taht il-ligi ordinarja – u kif ukoll ghax din il-qorti ghadha ma tistax tqis il-process penali kollu kemm hu – ghax ghadu ma sarx – biex tkun tista` tghid kienx hemm ksur tal-jeddijiet fondamentali, mhux

f`episodju izolat, izda fil-kuntest tal-process meqjus kollu kemm hu u bl-applikazzjoni in concreto tad-dispozizzjoniiet tal-ligi attakkati."

Fil-pag 140-141 tal-ktieb "**A Commentary on the Constitution of Malta**" l-awtur Av. Tonio Borg ighid hekk :-

*The trial or proceedngs had to be seen as a whole and one incident or irregularity does not necessarily vitiate the entire proceedings. (See **Anthony Zarb et vs Minister for Justice** (CC) (16 October 2002) (729/99): "For the question to be decided whether a fair hearing took place or not, according to the previously mentioned articles of the Constitution, one cannot and should not simply focus one`s attention on a part only of the proceedings before a court and if one finds any shortcoming, whatever it may be, one comes to the inexorable conclusion that the entire proceedings are therefore vitiated. On the other hand, for one to arrive at the conclusion whether there was a breach of the fundamental right of a fair hearing, it is necessary that the entire iter of the judicial proceedings be analysed. The assessment has to be based on the entirety of all the elements which form the judicial proceedings since it is only through such a comprehensive assessment that one can reasonably decide whether there was any violation of the said fundamental right" (see also **Dr L Pullicino vs Prime Minister et** (CC) (18 August 1998) (kollezzjoni Vol LXXII.1.159) where though some irregularities in the jury trial had occurred, the trial as a whole had been fair; see also **Josephine Calleja vs Attorney General et** (465/94) and **Gregorio Scicluna vs Attorney General et** (463/94) (both decided by the (CC) on 15 October 2003). See also **Victor Lanzon et noe vs Commissioner of Police** (CC) (29 November 2004) (15/02) where the interview by Police of a minor in absence of lawyer was not by itself deemed to be in breach of Article 6. See also **Police vs Carmelo Ellul Sullivan et** (CC) (25 September 2015) (29/10) where the fact that a new magistrate had been appointed who had not heard the witnesses viva voce was not per se considered to be in breach of Article 6 because the trial had not yet been concluded, and the defence would have the right to cross-examine the witnesses before the new magistrate, and the trial had to be seen as a whole; and **George Pace v Attorney General et** (CC) (31 October 2014) (56/11): "The right to a fair hearing is granted so that after a hearing within a reasonable time, a person who is innocent is not given a guilty verdict, and such person is given all the necessary means for such purpose; and also so that guilty persons do not evade the consequences of their actions."*

Fil-kawza "**Malcolm Said vs Avukat Generali et**" deciza fl-24 ta` Gunju 2016, il-Qorti Kostituzzjonali kellha quddiemha aggravju fejn inghad b`insistenza illi d-dritt ta` smigh xieraq kellu jkun evalwat fir-rigward tat-totalità tal-procedura fl-intier taghha u mhux fir-rigward ta` mumenti minnha, bhal ma kien qed jipprova jaghmel l-appellat.

Il-Qorti Kostituzzjonali qalet hekk :-

"Madankollu, ghalkemm il-Qorti Ewropea hija marbuta bir-regola tal-esawriment tar-rimedji domestici, li kienet ir-raguni ghala sabet li l-ilment ta` Dimech kien intempestiv, din il-qorti ghandha s-setgha li taghti rimedju fejn issib li disposizzjoni li thares dritt fondamentali mhux biss "qieghda tigi" izda wkoll meta "tkun x`aktarx sejra tigi miksura". Jekk, meta jsir uzu minn stqarrija li tkun ittiehdet minghajr ma min jaghmilha jkollu l-ghajnuna ta` avukat, dan ikun bi ksur tal-jedd ghal smigh xieraq, mela "x`aktarx" illi d-dritt ghal smigh xieraq jinkiser jekk jithalla li jsir uzu mill-istqarrija, u l-intervent ta` din il-qorti jkun mehtieg minn issa sabiex ma thallix li dan isir.

Dan it-tieni aggravju huwa ghalhekk michud."

Fid-decizjoni li tat fis-7 ta` April 2003 fil-kawza "**Glenn Bedidngfield vs Kummissarju tal-Pulizija et**" inghatat tifsira tal-frazi "*x` aktarx ser jigi miksur".*

Inghad hekk :-

"Kwantu ghat-tieni aggravju, huwa veru li s-subartikolu (1) ta` l-Artikolu 4 tal-Kap. 319 jitkellem dwar allegazzjoni ta` dak li jkun li xi dritt fondamentali tieghu "x`aktarx ser jigi miksur", izda din l-espressjoni qatt ma giet interpretata, sia fil-kuntest ta` l-imsemmi Artikolu 4 u sia fil-kuntest taddisposizzjoni analoga fil-Kostituzzjoni, li l-Prim Awla (fil-gurisdizzjoni kostituzzjonali taghha) jew din il-Qorti ghandhom jiddeciedu kwistjonijiet jew fl-astratt jew flipotesi li tavvera ruhha xi kontingenza partikolari. Biex wiehed jista` jallega li "x`aktarx ser jigi miksur" xi dritt fondamentali il-fatti jridu jkunu tali li jistghu jwasslu ragjonevolment ghal stat ta` fatt determinat, liema stat ta` fatt ikun jikkozza ma xi wiehed jew aktar mid-drittijiet fondamentali tal-bniedem."

Ta` l-istess portata kienet is-sentenza tat-30 ta` Mejju 2003 fil-kawza "**Joseph Hili maghruf bhala Nadia Hili vs Avukat Generali et**".

Fid-decizjoni moghtija fit-12 ta` Frar 2016 fil-kawza "**General Workers` Union v. L-Avukat Generali**" il-Qorti Kostituzzjonali qalet illi :-

"*Dwar jekk l-azzjoni hijiex intempestiva L-Avukat Generali jilmenta li l-ewwel Qorti kienet zbaljata meta ma kkonsidratx li f`kuntest ta` allegata lezjoni tad-dritt ghal smigh xieraq l-azzjoni ttentata mill-union hija wahda intempestiva peress li l-proceduri li minnhom qed tilmenta l-istess Union*

*(**GWU v. l-Enemalta Corporation** – fuq tilwima tax-xoghol dwar allegazzjoni ta` ksur ta` ftehim li kien iffirmat bejn il-partijiet fis-sena 2002 fir-rigward ta` Stephen Leonardi, membru tal-union,) ghadhom pendenti.*

L-Avukat Generali jargumenta li stharrig dwar allegazzjoni ta` ksur tad-dritt tas-smigh xieraq jitlob li l-evalwazzjoni tal-procedura li minnha jkun qed isir lament titqies fit-totalita` taghha. Jghid li huwa inkoncepibbli li f`dan l-istadju ssir l-evalwazzjoni necessarja tal-garanziji kostituzzjonali u konvenzjonali peress li tali evalwazzjoni tista` ssir biss meta l-process ikun mitmum ladarba l-evalwazzjoni trid issir b`riferenza ghall-process fl-intier tieghu…….Waqt illi taht il-Konvenzjoni l-Qorti Ewropea tad-Drittijiet tal-Bniedem ma ghandhiex is-setgha illi tqis allegazzjoni dwar ksur ta` drittijiet fondamentali qabel ma min iressaq l-ilment ikun inqeda bir-rimedji domestici kollha, taht il-Kostituzzjoni u taht l-Att dwar il-Konvenzjoni Ewropea il-Prim`Awla tal-Qorti Civili "tista`, jekk tqis li jkun desderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha ... f`kull kaz meta tkun sodifatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienu disponibbli ... skont xi ligi ohra".

Huwa ghalhekk imholli fid-diskrezzjon`i tal-Prim`Awla – dejjem fil-parametri stabbiliti fil-gurisprudenza – li taghzel "li tezercita s-setghat taghha" wkoll meta min iressaq l-ilment ikollu jew kellu mezzi ohra ta` rimedju, u meta l-Prim`Awla taghzel li tinqeda bis-setghat kostituzzjonali taghha l-Qorti Kostituzzjonali bhala regola ma tiddisturbax dik l-ghazla hlief meta tkun manifestament hazina jew meta hekk ikun mehtieg biex il-proceduri kostituzzjonali ma jigux trivalizzati.

Din il-Qorti tapprezza illi jkun ta` ostakolu ghall-efficjenza tal-gustizzja u tal-amministrazzjoni pubblika jekk, malli titressaq kawza b`allegazzjoni li lprocess quddiem tribunal jew korp imwaqqaf b`ligi huwa bi ksur tal-jedd ghal smigh xieraq, dak it-tribunal jew korp ma jkunx jista` jibda jwettaq id-dmirijiet tieghu qabel tinqata` dik il-kawza jekk il-Prim`Awla wisq facilment taghzel li tinqeda bis-setghat kostituzzjonali taghha flok tistenna li jintemmu l-proceduri quddiem dak it-tribunal jew korp biex tqis il-process fl-intier tieghu.

Madankollu, il-Qorti tifhem ukoll illi fic-cirkostanzi tal-kaz tal-lum ikun aktar xieraq illi l-aggravju dwar rimedju ordinarju ma jintlaqax, u illi l-appell jinstema` wkoll fil-meritu, partikolarment billi d-difett allegat fl-istruttura tatTribunal jibqa` jipperdura jkun xi jkun l-ezitu tal-proceduri quddiem it-Tribunal u wkoll ghax ma jkunx ghaqli illi jitkompla process meta hemm sentenza ta` qorti ta` gurisdizzjoni kostituzzjonali li tghid illi dak il-process huwa bi ksur ta` jeddijiet fondamentali. Dan l-aggravju huwa ghalhekk michud."

Fil-kawza fl-ismijiet "**Charles Steven Muscat vs Avukat Generali**" li kienet deciza minn din il-Qorti (**PA/GC**) fl-10 ta` Ottubru 2011 sar l-argument illi sabiex tkun tista` tigi deciza kwistjoni ta` nuqqas ta` smigh xieraq kien mehtieg apprezzament tal-process kriminali fl-interezza tieghu u allura ladarba l-proceduri kriminali kienu ghadhom ma bdewx jinstemghu, u wisq anqas gew konkluzi, u dan meta l-apprezzament ta` allegazzjoni ta` nuqqas ta` smigh xieraq kienet tirrikjedi evalwazjoni tal-process penali fl-intier tieghu, l-azzjoni kienet intempestiva.

Il-Qorti rrilevat illi :-

Fl-opinjoni ta` din il-Qorti hawnhekk mhux qed jigi deciz jekk ir-rikorrenti huwiex hati jew le tal-akkuzi migjuba kontra tieghu. Dan mhux il-kompitu ta` din il-Qorti, li, in effett, trid tiddeciedi jekk sehhitx lezjoni tad-drittijiet fondamentali tar-rikorrenti meta huwa rrilaxxja stqarrija waqt l-investigazzjonijiet minnhajr ma seta, qabel, jikkonsulta ma avukat.

*Fis-sentenza fl-ismijiet **"Il-Pulizija vs Alvin Privitera"** l-Qorti Kostituzzjonali (11 ta` April 2011) gie ritenut li "meta di gia jkun hemm ragunijiet bizzejjed li fuqhom il-Qorti tkun tista ssib li hemm lezjoni, il-Qorti m`ghandhiex toqghod tistenna sakhemm jintemm il-kaz jew li jigi attwalment miksur id-dritt pretiz biex tiddeciedi jekk hemmx lezjoni jew le. Jista jaghti l-kaz li jkun tard wisq. ..... Fil-fehma ta` din il-Qorti n-nuqqas ta` assistenza ta avukat fl-istadju ta` investigazzjoni hu wiehed minn dawn ic-cirkostanzi li jistghu jippregudikaw id-dritt ta` persuna akkuzata irrimedjabilment."*

Fil-kaz deciz mill-ECHR "**Dimech vs Malta**" tat-2 ta` April 2015, il-Gvern Malti sostna li l-ilment tar-rikorrent kien prematur :-

The Government submitted that the applicant`s complaint was premature as the trial by jury had not yet taken place. It was thus possible that the applicant would not be found guilty, in which case he could not be considered a victim in terms of the Convention (they referred to Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010). The Government contended that examining the applicant`s complaint at this stage would not enable the Court to assess the basis of the applicant`s "conviction", which had not yet taken place. The Government further noted that the constitutional jurisdictions had not "opted" to take cognisance of the case, but simply could not decline the exercise of jurisdiction given that the applicant`s referral request had been accepted by the Criminal Court.

Il-Qorti Ewropeja accettat l-argument u qalet :-

The Court accepts the Government`s argument that the constitutional jurisdictions had no choice but to take cognisance of the case according to the functioning of the domestic system. However, the Court notes that those jurisdictions did not take cognisance of the case only to find later that the claim was inadmissible. In fact, the constitutional jurisdictions did not reject the case as being premature despite the fact that the proceedings were still pending. Nor did they reject it for non-exhaustion of ordinary remedies on the ground that the applicant had not asked for a lawyer (admittedly, as established in domestic case-law (see paragraph 31 above), there would have been little point in so doing given the inexistence of such a right in Maltese law at the time). On the contrary, the constitutional jurisdictions took cognisance of the case, opting to examine it on the merits and give judgment accordingly.

The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, ***X. v. Norway****, Commission decision of 4 July 1978, Decisions and Reports (DR) 14, p. 228;* ***Bricmont v. Belgium****, 7 July 1989, Series A no. 158; Papadopoulos v. Greece, (dec.), no. 52848/99, 29 November 2001;* ***Arrigo and Vella v. Malta*** *(dec.), no. 6569/04, 10 May 2005 and* ***Pace v. Malta*** *(dec.), no. 30651/03, 8 December 2005). At the same time, the Convention organs have also consistently held that such an issue can only be determined by examining the proceedings as a whole, save where an event or particular aspect may have been so significant or important that it amounts to a decisive factor for the overall assessment of the proceedings as a whole – pointing out, however, that even in those cases it is on the basis of the proceedings as a whole that a ruling should be made as to whether there has been a fair hearing of the case (see, inter alia,* ***X v. Switzerland,*** *no. 9000/80, Commission decision of 11 March 1982, DR 28, p. 127;* ***B v. Belgium****, Commission decision of 3 October 1990, DR 66, p. 105;* ***Cervero Carillo v. Spain****, (dec.), no. 55788/00, 17 May 2001;* ***Mitterrand v. France*** *(dec.) no. 39344/04, 7 November 2006 and more recently,* ***De Villepin v. France*** *(dec.), no. 63249/09, 21 September 2010).*

The Court observes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, ***Salduz****, cited above, § 56;* ***Navone and Others v. Monaco****, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013;* ***Brusco v. France****, no. 1466/07, § 54, 14 October 2010; and* ***Stojkovic v. France and Belgium,*** *no. 25303/08, §§ 51-57, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a*

*violation of Article 6 (see, for example, **Dayanan v. Turkey**, no. 7377/03 §§ 31-33, 13 October 2009; **Yeşilkaya v. Turkey**, no. 59780/00, 8 December 2009; and **Fazli Kaya v. Turkey**, no. 24820/05, 17 September 2013). The same situation appears to obtain in the present case. 45. Nevertheless, unlike in the above mentioned examples, the criminal proceedings in the present case have not come to an end. Thus, despite the peculiar interpretation of the Court`s case-law by the Constitutional Court, and although it may be unlikely, it cannot be entirely excluded that the courts of criminal jurisdiction, before which the case is heard, hear the case in the same circumstances that would have existed had the right to legalassistance during pre-trial stage not been disregarded, namely by expunging from the records the relevant statements. The Court notes that, if, because of the limitations of the applicable criminal procedural law, it is not possible given the stage reached in the pending proceedings, to expunge from the records the relevant statements (whether at the request of the applicant or by the courts of criminal jurisdiction of their own motion), it cannot be excluded that the legislature take action to ensure that a procedure is made available at the earliest opportunity for this purpose.*

Furthermore, even assuming that the above scenario would not come to be, the Court considers that it cannot be excluded that the applicant be eventually acquitted or that proceedings be discontinued.

*The Court observes that applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, **Kesik v. Turkey,** (dec.), no. 18376/09, 24 August 2010 and **Simons v. Belgium** (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see **Bouglame v. Belgium** (dec.), no. 16147/08, 2 March 2010).*

The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicant`s possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicant are currently pending before the domestic courts, the Court finds this complaint to be premature. Consequently, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies.

Fil-kaz ta` "**Tyrone Fenech et vs Malta"** deciza fil-5 ta` Jannar 2016, l-ECHR qalet hekk :-

The Government submitted that the applicants` complaint was premature as their criminal proceedings were still pending. It was thus possible that the applicants would not be found guilty in which case they could

not be considered victims in terms of the Convention (they referred to ***Bouglame v. Belgium*** *(dec.), no. 16147/08, 2 March 2010). The Government contended that examining the applicants` complaint at this stage would not enable the Court to assess the basis of the applicants` "conviction", which had not yet taken place.*

The applicants` observations were submitted outside the time-limit set by the Court and no explanation was submitted as to why they had remained outstanding. The President of the relevant Section, thus decided that they should not be included in the case-file for consideration by the Court.

The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, Papadopoulos v. Greece (dec.), no. 52848/99, 29 November 2001; Arrigo and Vella v. Malta (dec.), no. 6569/04, 10 May 2005 and Pace v. Malta (dec.), no. 30651/03, 8 December 2005). At the same time, the Convention organs have also consistently held that such an issue can only be determined by examining the proceedings as a whole, save where an event or particular aspect may have been so significant or important that it amounts to a decisive factor for the overall assessment of the proceedings as a whole – pointing out, however, that even in those cases it is on the basis of the proceedings as a whole that a ruling should be made as to whether there has been a fair hearing of the case (see, inter alia, Mitterrand v. France (dec.) no. 39344/04, 7 November 2006 and more recently, De Villepin v. France (dec.), no. 63249/09, 21 September 2010).

In the present case the criminal proceedings concerning the applicants have not come to an end. Thus, although the constitutional jurisdictions have already decided the matter, the Court considers that it cannot be excluded that, inter alia, the applicants be eventually acquitted or that proceedings be discontinued (compare, Dimech, cited above, § 46).

The Court observes that applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, Dimech, cited above, § 48, Kesik v. Turkey, (dec.), no. 18376/09, 24 August 2010 and Simonsv. Belgium (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010).

The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicants` possibility of bringing new proceedings

before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicants are currently pending before the domestic courts, the Court finds this complaint to be premature.

Consequently, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies."

Dan premess, il-principju li jemergi minn din il-gurisprudenza huwa li meta l-proceduri jkunu ghadhom ma ntemmewx u ma jkunx ghadu maghruf kif ir-rikorrent ser jigi allegatament zvantaggjat, il-proceduri kostituzzjonali jkunu ntempestivi. Ilment waqt li l-proceduri jkunu ghadhom pendenti jkun jista` jitqies, meta d-dritt lamentat ikun x` aktarx ser jigi miksur izda l-ksur ravvizat irid ikun wiehed reali u imminenti.

2. <u>Risultanzi</u>

Fil-kaz tal-lum, ir-rikorrent qieghed jitlob dikjarazzjoni li n-nuqqas ta` ksib ta` taghrif dwar SIM card ta` forniturі tas-servizz li qeghdin fir-Renju Unit holoq jew x`aktarx ser johloq ksur tad-dritt tieghu ghal smigh xieraq.

Jidher illi r-rikorrent jinsab fis-sitwazzjoni fejn il-guri tieghu ghadu mhux appuntat, u allura wisq anqas instemghu provi jew saret trattazzjoni.

Ghalhekk huwa bil-wisq bikri sabiex il-Qorti tifhem x`piz ha jkollu l-fatt li ma nkisbix it-taghrif indikat mir-rikorrent mill-forniturі esteri.

Ir-rikorrent se jkun hieles illi jixhed dwar l-allegati telefonati li setghu saru barra minn Malta mis-SIM card partikolari jew li jressaq provi dwar l-istess.

Fin-nota ta` sottomissjonijiet tieghu, ir-rikorrent irrileva illi l-posizzjoni tieghu diga` tinsab ippregudikata rrimedjabilment bil-fatt – skont hu – illi ma jistax jibni difiza adegwata ghall-akkuzi dedotti kontra tieghu.

Igib l-argument illi l-prova kienet tikkonsisti fil-*call* u *sms logs* ta' zewg numri ta' telefoni cellulari – wiehed li nstab fuqu, u l-iehor li kien instab fuq il-ko-akkuzat Thomas Mikalauskas.

Skont ir-rikorrent, permezz ta` dawk il-*logs,* huwa seta` jibni l-evidenza necessarja biex juri n-nuqqas ta` involvement tieghu u l-innocenza tieghu.

Allega li minghajr dik il-prova, huwa kien ser ikun sprovvist minn kull forma ta` evidenza li tista` turi l-estranejita` tieghu.

Ir-rikorrent jafferma illi dak it-telf - irrimedjabbli – ta` provi effettivament jissarraf go vantagg ghal Thomas Mikalauskas.

Fin-nuqqas ta` dawk il-provi, il-ko-akkuzat kellu cans jimplika u jitfa' kull dell ta' responsabilita' fuqu sabiex inaqqas l-involviment tieghu minghajr hu u cioe` r-rikorrent ma jkun jista' jirribatti ghal kull ma se jkun rinfaccjat bih in kwantu provi u decizjoni nkluz eventwali piena.

Dan premess, il-Qorti ma tarax li r-rikorrent fisser kif it-taghrif li ried seta` jkun ta` beneficcju ghalih fid-difiza tieghu. Il-Qorti kienet tistenna illi tinghata spjegazzjoni dettaljata dwar kif t-telefonati li seta` saru minn barra minn Malta setghu jaffettwaw id-difiza tieghu. Dan baqa` ma sarx a sodisfazzjon ta` l-Qorti.

Lanqas ma huwa korrett da parti tar-rikorrent meta jallega illi diga` kien sehh lezjoni tad-dritt tieghu ghal smigh xieraq tieghu.

Kif taraha din il-Qorti, ghadu bil-wisq kmieni illi jigi stabbilit jekk in-nuqqas ta` otteniment ta` taghrif huwiex ser ikollu impatt leziv fir-rigward tad-dritt ghal smigh xieraq.

Ghalhekk il-Qorti qeghda tilqa` t-tieni eccezzjoni, tiddikjara ntempestiva l-azzjoni tar-rikorrent fl-istadju attwali tal-procediment kontra r-rikorrent, b`riserva ghar-rikorrent illi jintraprendi azzjoni ohra `il quddiem jekk ikun il-kaz.

III. <u>It-tielet eccezzjoni</u>

Bit-tielet eccezzjoni, qed ikun eccepit illi l-Qorti Kostituzzjonali mhijiex l-unika qorti kompetenti biex tiddeciedi jekk il-principji tal-gustizzja naturali gewx imharsa jew le.

L-Avukat Generali jiddefendi ruhu fis-sens illi fil-kaz tal-lum ir-rikorrent qieghed jallega li kien ippregudikat fid-difiza tieghu u garrab ingustizzja fis-smigh tal-kaz tieghu billi ma kinux imharsa d-dispozizzjonijiet tal-Kap 9 fejn si tratta ta` prova bil-mezz ta` l-ittri rogatorji u r-rwol tal-Avukat Generali fil-kumpilazzjoni.

Inghad illi dan kollu seta` jingieb ghall-konjizzjoni tal-Qorti Kriminali.

1. <u>Gurisprudenza</u>

Fis-sostanza l-eccezzjoni tittratta l-in-ezawriment tar-rimedji ordinarji li hija materja li tirrizulta kemm fil-Kostituzzjoni kif ukoll fil-Konvenzjoni.

Il-Qorti tirreferi ghad-decizjoni li tat il-Qorti Kostituzzjonali fl-14 ta` Mejju 2004 fil-kawza "**<u>David Axiaq vs L-Awtorita` tat-Trasport Pubbliku</u>**" fejn inghad kjarament illi sabiex tkun milqugha dik l-eccezzjoni, il-qorti trid tkun konvinta li l-persuna kellha mezz xieraq ta` rimedju skont xi ligi ohra.

Fl-istess sens kienet id-decizjoni li tat il-Qorti Kostituzzjonali fil-kawza "**<u>Mediterranean Film Studios Limited vs Il-Korporazzjoni ghall-Izvilupp ta` Malta et</u>**" tal-31 ta` Ottubru 2003.

Daqstant iehor inghad mill-Qorti Kostituzzjoni fis-sentenza li tat fis-27 ta` Frar 2003 fil-kaz ta` "**<u>John Sammut vs Awtorita` ta` l-Ippjanar</u>**".

Fid-decizjoni li tat fis-27 ta` Frar 2009 fil-kawza "**<u>Joseph Bellizzi et vs L-Awtorita` Marittima ta` Malta et</u>**" il-Qorti Kostituzzjonali qalet :-

"Illi l-principji li jirregolaw l-eccezzjoni ta` ezawriment ta` rimedji huma ben stabbiliti fil-gurisprudenza nostrali b`dan li inghad li:-

"(a) Meta jidher car li jezistu mezzi ordinarji disponibbli ghar-rikorrent biex jikseb rimedju ghall-ilment tieghu, ir-rikorrent ghandu jirrikorri ghal tali mezzi qabel ma jirrikorri ghar-rimedju kostituzzjonali, u huwa biss wara li jkun fittex dawk il-mezzi jew wara li jidher li dawk il-mezzi ma jkunux effettivament disponibbli li ghandu jintuza r-rimedju kostituzzjonali;

"(b) Li d-diskrezzjoni li tuza l-Qorti biex tqis jekk ghandhiex twettaq is-setghat taghha li tisma` kawza ta` natura kostituzzjonali ghandha torbot, sakemm ma tingiebx xi raguni serja u gravi ta` illegalita`, ingustizzja jew zball manifest fl-uzu taghha;

"(c) M`hemm l-ebda kriterju stabbilit minn qabel dwar l-uzu tal-imsemmija diskrezzjoni, billi kull kaz jehtieg jigi mistharreg fuq ic-cirkostanzi tieghu;

"(d) Fil-fatt in-nuqqas wahdu ta` tehid ta` mezzi ordinarji mir-rikorrent m`huwiex raguni bizzejjed biex Qorti ta` xejra kostituzzjonali taqtaghha li ma tuzax is-setghat taghha li tisma` l-ilment, jekk jintwera li l-imsemmija mezzi ma kienux tajbin biex jaghtu rimedju shih lir-rikorrent ghall-ilment tieghu;

"(e) In-nuqqas ta` tehid ta` rimedju ordinarju – ukoll jekk seta` kien ghal kollox effettiv biex jindirizza l-ilment tarrikorrent – minhabba l-imgieba ta` haddiehor m`ghandux ikun raguni biex il-Qorti twarrab is-setghat taghha li tisma` l-ilment kostituzzjonali tar-rikorrent (P.A. (K) (VDG) ***"Victor Bonavia vs. L-Awtorita` ta` l-Ippjanar et"*** *- 9 ta` Frar 2000);*

"(f) L-ezercizzju minn Qorti (tal-ewwel grad) taddiskrezzjoni taghha bla tistharreg il-materja necessarja li fuqha tali diskrezzjoni ghandha titwettaq, jaghti lil Qorti tattieni grad is-setgha li twarrab dik id-diskrezzjoni (Q.K. ***"Vella vs. Bannister et"*** *– 7 ta` Marzu 1994 - Kollez Vol. LXXXVIII.i.48) u (Q.K.* ***"Visual & Sound Communications Ltd v. Il-Kummissarju tal-Pulizija"*** *– 12 ta` Dicembru 2002);*

*"(g) Meta r-rimedju jaqa` fil-kompetenza ta` organu iehor jew meta s-smigh tal-ilment tar-rikorrent se jwassal biex l-indagni gudizzjarja u l-process l-iehor tas-smigh tar-rimedju ordinarju jkunu duplikazzjoni ta` xulxin, il-Qorti Kostituzzjonali ghandha ttendi lejn ir-rifjut li tuza s-setghat taghha kostituzzjonali, sakemm l-indagni gudizzjarja tal-kaz ma tkunx, min-natura taghha, ixxaqqleb izjed lejn kwistjoni kostituzzjonali (P. A. (K)* ***"Maria Gaffarena v. Kummissarju tal-Pulizija"*** *– 29 ta` Marzu 1993); (Q.K****. "David Axiaq v. Awtorita` Dwar it-Trasport Pubbliku"*** *– 15 ta` April 2004).*

"(h) Irid dejjem jitqies li din id-diskrezzjoni ghandha dejjem tigi uzata fl-ahjar amministrazzjoni tal-gustizzja u tohloq bilanc biex, mill-banda

l-wahda, twaqqaf lil min jipprova jabbuza mill-process kostituzzjonali, u mill-banda l-ohra zzomm milli jigi mahluq xkiel bla bzonn lil min genwinament ifittex rimedju kostituzzjonali (Q.K. ***Mediterranean Film Studios Limited v. Korporazzjoni ghall-Izvilupp ta` Malta et"*** *– 31 ta` Ottubru 2003).*

"Illi ghalhekk dan il-proviso mhux xi wiehed li jista` jittiehed b`mod laxk jew kapriccuz u zgur li mhux intiz biex il-Qorti tahrab mir-responsabbilta` li tiehu konjizzjoni ta` lamentela kostituzzjonali dwar allegat ksur ta` dritt fundamentali izda tfisser biss li l-Qorti ghandha l-obbligu li f`certu cirkostanzi tirrifjuta li tezercita` s-setghat taghha f`kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienu disponibbli favur dik il-persuna skond xi ligi ohra, ghaliex altrimenti tkun qeghda tagixxi ta` Qorti tat-tielet istanza – haga li tmur kontra l-ligi b`dan ghalhekk li ilment ta` natura kostituzzjoni ghandu jsir biss wara li rrimedji ordinarji jigu ezawriti jew meta ma humiex disponibbli. Meta r-rikorrent ma jkunx ghamel uzu minn rimedju li setgha kellu, l-Qorti m`ghandhiex tikkunsidra li tezercita l-gurisdizzjoni sakemm ma jirrizultax li dak il-possibli rimedju ma kienx pero` se jirrimedja hlief in parti l-lanjanzi tar-rikorrent. ***"Anton Scicluna pro et noe vs Prim Ministru"*** *(PA – 21 ta` April 1995)*

Abbazi ta` din il-gurisprudenza, johrog car illi sabiex l-eccezzjoni tkun milqugha, il-Qorti trid tkun sodisfatta li (i) mezzi xierqa ta` rimedju effettiv ghall-ksur allegat huma jew kienu disponibbli favur ir-rikorrenti ; u li (ii) l-mezz xieraq ta` rimedju ikun wiehed effettiv – cioe` wiehed li jista`, jew seta` kieku gie utilizzat, adegwatament jikkompensa lill-vittma tal-ksur ghal dak il-ksur, jew li altrimenti jaghmel tajjeb ghal dak il-ksur, per ezempju billi l-att leziv jigi dikjarat null ghall-finijiet u effetti kollha tal-ligi b`mod li l-vittma jitqieghed f`pozizzjoni non-diskriminattiva fil-konfront ta` ohrajn f` sitwazzjoni simili.

2. <u>Risultanzi</u>

Jirrizulta li fil-kaz odjern, ir-rikorrent ghandu r-rimedju ordinarju previst fl-Art 438(2) tal-Kap 9 fejn, permezz ta` nota pprezentata fir-registru tal-qorti mhux iktar tard minn hmistax-il jum tax-xoghol mid-data tan-notifika ta` l-att ta` l-akkuza -

(i) jaghti avviz dwar l-eccezzjonijiet imsemmija fl-artikolu 449 u kull eccezzjoni dwar l-ammissibbilità tal-provi li jkollu l-hsieb li jaghti, u

(ii) jindika x-xhieda u jipproduci d-dokumenti u oggetti ohra li jkollu l-hsieb li juza fil-kawza,u kopja ufficjali ta` dik in-nota ghandha tigi notifikata lill- Avukat Generali.

Ir-rikorrent ghandu wkoll l-opportunita` quddiem il-Qorti ta` l-Appell Kriminali li jressaq l-ilment tieghu fil-kaz illi l-Qorti Kriminali ma tilqax l-eccezzjoni tieghu.

L-istess ilmenti jistghu jingiebu `l quddiem waqt il-guri u wara dan quddiem il-Qorti ta` l-Appell Kriminali wara verdett ta` htija – jekk ikun il-kaz.

Ir-rikorrenti jgib l-argument illi huwa kien imqieghed fis-sitwazzjoni fejn thalla huwa sprovvist minn xhieda u dokumenti sabiex anke fuqhom ikun jista' jibni d-difiza tieghu.

Sostna li r-rimedji li tatu l-ligi ordinarja mhux effettivi u ma jistghux jissarrfu f`rimedji reali peress li l-mertu huwa wiehed purament legali li jpoggi piz sproporzjonat fuq il-gurati u johloq ksur iehor tal-jeddijiet fondamentali tieghu.

Din il-Qorti tibqa` tal-ferma konvinzjoni li t-talba tar-rikorrent saret fi stadju wisq bikri sabiex tkun tista` tigi ezaminata minnha kemm fl-isfond tal-fatt li hija intempestiva peress li l-proceduri kontra r-rikorrent ghadhom lanqas inbdew kif ukoll minhabba l-fatt li din il-Qorti ma tarax li huwa desiderabbli f`dan l-istadju tezercita s-setghat taghha ladarba ghad hemm mezzi xierqa ta` rimedju ghall-allegat ksur lamentat mir-rikorrent u disponibbli ghalih.

Ghalhekk qeghda tilqa` anke t-tielet eccezzjoni.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi billi :-

Tilqa` t-tieni u t-tielet eccezzjonijiet tal-intimat, bil-konsegwenza li qeghda tichad it-talbiet kollha tar-rikorrent.

Tordna lir-rikorrent sabiex ihallas l-ispejjez kollha ta` din il-kawza.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur