CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. JUDGE
JACQUELINE PADOVANI GRIMA LL.D. LL.M. (IMLI)

Court hearing of the 9th May 2018

Constitutional Reference No.: 79/2015 JPG
Case No.: 2

The Police

Vs

Tolga Temuge

The Court,

Having seen the reference dated 30th October 2015, of the Courts of Magistrates (Malta) precided by Magistrate Dr. Charmaine Galea LL.D.;

Having seen the decree of the court of the 5th November 2015, whereby this court order a notification to all parties concerned of the said Constitutional Reference and appointed it for hearing;

Having seen the decree of this court of the 21st January 2016, (vide fol 59 et seq);

Having seen the Explanatory Note by Tolga Temuge of the 7th March 2016, which reads as follows;

> *That, following a complaint filed by his wife Caroline Temuge Muscat, applicant was charged before the Court of Magistrates (Malta) as a court of criminal judicature with a number of offences including harassment.*
>
> *That applicant appeared before the said Court on the 26th October, 2015 and pleaded not guilty to the charges. Applicant was, out of his own free will, unassisted by a lawyer.*
>
> *That applicant refused to sign a provisional protection order. He was ordered to do so upon the insistence by Caroline Temuge Muscat's legal representatives. His refusal was deemed by the Court to be in contempt and he was this condemned to a period of ten (10) days detention. No mention to the provision of law sustaining such punishment was mentioned.*
>
> *That on the 30th October, 2015, applicant, now assisted by the undersigned lawyer, explained his refusal to sign the protection order and requested the Court to revoke or vary its decree of the 26th October, 2015 (erroneously referred as the decree of the 2nd October, 2015 in the minutes of the sitting).*
>
> *That applicant however refused to sign the protection order and his request was consequently refused. At this point he asked the Court to refer the matter to the First Hall of the Civil Court due to an alleged violation of Article 5 of the European Convention. The Court of Magistrates referred the matter notwithstanding complainant's absurd assertions that the request was frivolous and vexatious.*

That, ironically, on the 4th November, 2015, complainant's team of lawyers filed an application requesting the Court to give effect to the protection order irrespective of applicant's consent. On the 10th November, 2015 applicant replied to this request (vide fol 48 of the acts of the proceedings) and, inter alia, explained that his actions were not contemptuous but merely a consequence of complainant's behaviour. The Court acceded to the complainant's request.

That applicant's request for the matter to be referred to this Honourable Court is due to the fact that his detention for ten days is unlawful and, moreover, he was not given the chance to explain the reason for his refusal. He was simply coerced to sign an order which he did not understand and which he believed to be a manipulative act by his wife.

That section 686 of the Criminal Code states that the provisions of the Code of Organization and Civil Procedure relating to the respect due to the court, are applicable to the courts of criminal jurisdiction. It would seem that the Court of Magistrates condemned applicant to the said period of detention in terms of section 991 of the Code of Organization and Civil Procedure. There is no other provision that could warrant such a sentence without a proper trial.

That section 991 of the Code of Organization and Civil Procedure refers to "any indecent word or gesture". Applicant's refusal to sign a protection order cannot in any way be coined as an indecent word or gesture. In the absence of a provision in the Criminal Code specifically dealing with such a refusal, it is being submitted that the Court of Magistrates should have applied section 992 of the Code of Organization and Civil Procedure and afforded applicant the possibility of a trial to defend his actions. Condemning applicant to a period of ten days detention without informing

him which provision of law had been breached is in all due respect in violation of Article 5 of the European Convention.

Therefore applicant respectfully requests this Honourable Court to declare that his condemnation to a period of ten days detention is in violation of the said Article.

Having seen the Responsive Note by the Attorney General of the 17th March 2016, which reads as follows;

1. *That this note is in accordance with the decree issued by this Honourable Court during the sitting of the 21st January 2016.*

2. *That on the 26th October 2015 the Court of Magistrates (as a Court of Criminal Judicature) ordered applicant to sign a protection order, however, he refused to do so and the Court deemed his refusal to be in contempt and proceeded by condemning applicant to 10 days detention.*

3. *That applicant explained and clarified in his explanatory note the terms of the constitutional reference wherein he is claiming that the decision of the Court of Magistrates to condemn applicant to a period of ten days detention for refusing to obey a court order is unlawful and in breach of article 5 of the European Convention.*

4. *That respondent humbly submits in addition to the pleas raised in his reply dated 16th November 2015 that this Honourable Court should abstain from exercising its "special" constitutional jurisdiction in terms of Article 4(2) of Chapter 319 of the Laws of Malta since applicant blatantly did not make use of other "ordinary" remedies available to him at law to redress any perceived grievances he holds against the decision of the Court of*

Magistrates. In this sense reference is made to two judgments given by the Constitutional Court in the names Nardu Balzan Imqareb vs. Registratur tal-Qrati tal-Gustizzja 18 of May 2006: 'Rikorsi Kostituzzjonali huma, min-natura taghhom, specjali u straordinarji, u meta s-sistema ordinarja ta` ridress tipprovdi mod ta` soluzzjoni effettiva, dik is-sistema ordinarja trid tigi uzata u adoattata qabel ma` l-Gvern, jew l-amministrazzjoni taghha, jigi akkuzat bi ksur tad-drittijiet fundamentali tieghu. Ma jistax jinghad li l-Gvern ikun kiser id-drittijiet fundamentali tac-cittadin, meta lic-cittadin ikunu pprovduti u hemm disponibbli ghalih rimedji ghal-lanjanzi tieghu' and Olena Tretjak vs. Direttur tac-Cittadinanza u Expatriate Affairs 16 ta` Jannar 2006 where the Court observed: 'M`huwiex moghti lil persuna l-beneficju li l-ewwel thalli jghaddi ghalxejn iz-zmien li fih setghet tiehu r-rimedju ghall-ksur tal-jedd taghha, u mbaghad tressaq ilment kostituzzjonali jew konven zjonali dwar l-istess ksur bhallikieku l-procedura kostituzzjonali jew konvenzjonali kienet xi rimedju in extremis li wiehed jista` jirrikorri ghalih biex isewwi zball jew nuqqas li ma messux twettaq qabel'

5. *That in view of the fact that applicant is claiming that the decision of the Court of Magistrates to order his detention was unlawful, he had the ordinary remedy of redress in terms of article 409A of the Criminal Code. If applicant truly considered his detention at the prisons manifestly unfounded and illegal he could have filed an urgent application before the Court of Magistrates requesting his immediate release. Such a remedy was accessible, effective and adequate to address the grievance.*

6. *That without prejudice to the above, applicant had also another ordinary remedy found under Title XVII of Chapter 12 of the Laws of Malta.*

7. *That in view of this respondent requests this Honourable Court to exercise its discretion not to hear the case on the merits owing to the fact that applicant*

> *failed to avail himself of ordinary remedies available to him to redress his grievances.*

Court heard all the evidence proffered by the parties to the case;

Court took its decision of the 11th of October 2017;

Court took cognisance of all the acts of the proceedings;

Court heard oral submissions of the parties.

Deliberates:

Tolga Temuge testified at Fol 71 *et seq* that after he and his wife Caroline separated, his ex wife would not allow him to visit their dog, who was old and about to die, and that every time he tried to communicate with her, it was only about the dog. He continued that he was very surprised when he was ex wife reported him to the police for domestic violence and in fact decided to go to court without a lawyer because he figured that they would be able to resolve the issue amicably. He also added that this was the first criminal case brought against him by his ex wife.

Temuge testified that since he was unassisted, while his ex wife showed up with three lawyers, the Magistrate asked him whether he wanted a lawyer, and the case continued when he replied that he did not see the need for one. He continued that his ex wife's lawyer asked the Court to issue a protection order, at which point he interjected, submitting to the Court that it should hear his version of the events before accepting such a request. He explained that the Court then stated that he was in contempt in court for refusing to sign the protection order and sentenced him to detention, adding that given the choice he wouldn't have gone to jail instead of signing the order. He clarified that when the Magistrate told him he would be held in contempt he was not offered a lawyer at any

point, and his ex wife's lawyer kept interrupting him everytime he tried to speak and explain himself.

He continued that from jail he managed to contact his friends who found him a lawyer, who in turn suggested that they meet at the hearing, which was scheduled for four or five days after he was detained. He also confirmed that he never received a summons charging him with contempt of court but was instead simply sent to jail immediately after he was declared as being in contempt of court during the sitting. Finally he testified that he while was sentenced to ten days detention, he was released after then ninth day because during the sitting the Magistrate said that the protection order can be enforced whether he signed it or not so he didn't need to sign it.

WPS 223 Charlene Calleja testified at Fol 84 *et seq* that she had been present in Court during the sitting in question and confirmed that Temuge was detained for refusing to sign the protection order, because he wanted to be able to see his ex wife's dog. She explained that both the Inspector and the Magistrate tried to explain to him the consequences of not signing the protection order but he insisted that he wouldn't sign it.

Under cross-examination at Fol 86 she testified that she does not remember that Temuge did not have a lawyer during these proceedings.

Caroline Muscat testified at Fol 92 *et seq* that she and Temuge separated in August 2015, and on the 21st of that month temuge had showed up at her apartment demanding to see the dog, but that after she closed the apartment door he remained in the corridor calling her names and she had to call the police, although he had already left by the time they showed up. She continued that there were numerous other similar incidents, but he would always leave before the police turned up. She explained that she was present during the sitting in question, where Temuge was not assisted by her lawyer, and requested that a protection order be issued after she testified and gave her version of the events. She continued that at that point the Magistrate asked him to sign the protection order, but he refused and insisted on being heard, which is what led to the Court's

decision to detain him. She also explained that she had asked for a protection order to be issued because she was scared of her ex-husband.

Under cross-examination at Fol 97 *et seq* she testified agreed with the defence lawyer's suggestion that er ex-husband used to contact her only because he wanted to see the dog, and confirmed that there were even emails sent by her ex-husband asking to se the dog. She stated that in fact she had arranged for him to see the dog before he had to be put down, through third parties, and that this was after the protection order had been issued. She confirmed that the proceedings in question were the instituted after the first ever complaint that she filed against her ex-husband.

Inspector Godwin Scerri testified at Fol 102 *et seq* that around early Agust 2015 the Qawra Police Station had received a report of domestic violence from Caroline Muscat against her ex-husband Tolga Temuge. He continued that after a few days they had received a second report according to which Temuge had threatened Muscat with intimate photographs that were taken during their marriage. He explained that he got a statement from Temuge who would not reveal any personal information, and that at first the issue seemed that Muscat was not letting him see the dog. He testified that on the basis of this information the police pressed charges against Temuge for insults and threats, which are being heard before Magistrate Dr. Charmaine Galea.

He explained that during the first sitting, just before the case was adjourned, the prosecution asked for a protection order to be issued in favour of Muscat so that maybe Temuge would stop trying to contact her. He continued that when the Magistrate accepted the request, Temuge made it clear that he would not stop contacting Muscat, while the Magistrate insisted that he must obey the protection order. He also stated that Temuge was not assisted by a lawyer during these proceedings because he said that it was a small case and he thought it would be over in a day.

Under cross-examination at Fol 106 *et seq* he confirmed that nobody asked for what he had just testified about to be minuted during the proceedings before the Court of

Magistrates. Asked about the evidence that he produced in court gainst the accused, he testified that the evidence produced consisted of the photos and a letter allegedly sent to Muscat by Temuge. Asked about the reason why Temuge refused to sign the protection order, he stated that he did not remember the reason given by him.

WPS 274 Francesca Quattromani testified at Fol 118A *et seq* that Caroline Muscat had filed a report on the 25th of August 2015 that her ex-husband was ringing the bell to the front door of the block of apartments. She explained that Temuge was not there when she arrived, but added that Muscat told her that he had been constantly harassing her and that she had filed other reports about this, and therefore she issued charges against Temuge. She continued that she also spoke to Temuge about it who told her that he only went to Muscat's apartment because he wanted to see their dog who was sick.

Under cross-examination at Fol 118C *et seq* she testified that Muscat didn't tell her that Temuge had gone to her apartment to see the dog and in fact never mentioned the dog. She also testified that she was not present for the court sitting.

Deliberates;

The preliminary plea of nullity

With regards to the plea of nullity of the Constitutional Reference on the basis that the reference is vague and unclear and fails to mention precisely the terms of the question or questions which the Refering Court requires answered, this Court understands that this plea has been resolved with the filing of the explanatory note of Tolga Temuge dated 7th March 2016 and the responsive explanatory note by the Attorney General dated 17th March 2016.

The nature of contempt proceedings/findings.

Before moving on to examine the merits of the case under Articles 5 and 6 of the Convention and Article 2 of Protocol 7 of the Convention, the Court considers it imperative to first and foremost determine the nature of the contempt proceedings, that is, whether they are of a civil or criminal nature, as such a determination will necessarily affect its examination of the merits in relation of the aforementioned articles.

The seminal judgement on the classification of proceedings was delivered by the ECHR in **Engel v. The Netherlands,**[1] in which the ECHR confirmed the theory of 'autonomous concepts' that had been first coined by the Commission which noted that the Convention terms 'criminal charge' and 'civil rights and obligations'

"…cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned but related to an autonomous concept which must be interpreted independently, even though the general principles of the High Contracting Parties must necessarily be taken into consideration in any such interpretation."[2]

The development of this theory was based on the fear that:

"[i]f the Contracting Parties were able at their discretion to classify an offence as disciplinary instead of criminal…the operation of the fundamental clauses of articles 6 and 7 would be subordinated to their sovereign will."[3]

In **Engel and Others**, the Court held that the determination of whether an offence is to be considered criminal for the purposes of the Convention rests of three factors:

[1] **Engel and Others v. The Netherlands,** ECHR 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, decided on the 8th of June 1976.
[2] **Twenty One Detained Persons v. Germany**, EComHR (1968), Collection 27, at 97 – 116, par. 4.
[3] **Engel and Others,** see above note 1, par. 80 -81.

First, the classification under national law, which:-

"…provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States."[4]

Secondly, the nature of the offence, which is a criterion of far great import that the preceeding one, and thirdly:

"…the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so."[5]

The Court has seen that the Attorney General has not contested the applicability of Article 6 and of Article 2 of Protocol 7 to the Convention, and that therefore it appears that the Attorney General is not contesting the classification as criminal of the finding of contempt in question. The Court holds that in light of the aforementioned judgement of the ECHR it ought to be clear that the finding of contempt against the accused in this case is to be characterised as criminal, considering that an individual found in contempt of Court under Article 991 can risk incurring a penalty of up to two months detention. In fact, in **Il-Pulizija vs Robert Saliba,** regarding a finding of contempt under Article 991 of the **Code of Organisation and Civil Procedure (COCP),** the Court of Appeal held that contempt proceedings are always considered to be akin to criminal proceedings, and on this basis declared null *ex officio* the decree finding the appellant in contempt, after

[4] *Ibid.,* par. 82.
[5] *Idem.*

applying a provision of the Criminal Code according to which a decision of the Court is null and void if it does not cite correctly the article that it is based on.[6]

Regarding the Attorney General's argument that the accused's detention might not have necessarily been based on Article 991, the Court agrees with the accused's argument that since the detention was inflicted on him by the Court of Magistrates itself and summarily, the punishment must necessarily have its roots in article 991, since this is the only article that allows for summary punishment, as the rest of the articles relating to contempt of court (with the exclusion of Article 990) require that the Court direct the Registrar to initiate separate proceedings against the contemner.

According to this Court it is therefore clear that the finding of contempt against the accused is to be considered as criminal in nature.

Deliberates;

The Right to Liberty

The accused argues that the Court of Magistrates sentenced him to ten days detention on the basis of Article 991 of the Code of Organisation and Civil Procedure (COCP), as according to the applicant, there is no other provision that could warrant such a sentence without a proper trial. He argues that therefore his detention was illegal since Article 991 of the COCP was not applicable in his case, as his refusal to sign the Protection Order cannot amount to **'any indecent word or gesture.'**

The Court notes that judges and magistrates are empowered by law to enforce and maintain good order and decorum during court sittings.[7] The law also provides for the punishment of those whose behaviour amounts to contempt of court and creates two sets of distinct procedures. In the case of contempt of court that falls under Article 990 or

[6] **Il-Pulizija vs Robert Saliba,** Court of Appell decided on the 17th of June 2016.
[7] Article 988 COCP.

Article 991 of the COCP, the law provides for summary punishment of the contemner by the judge or magistrate presiding over the court. In all other cases, the law provides that the judge or magistrate presiding over the court is to direct the Registrar to initiate separate contempt proceedings against the contemner. Therefore, summary punishment of the contemner is possible in the case of:

utterance of words of approval or disapproval, or disturbance of the court's attention in any other manner, where the magistrate or judge presiding over the court is empowered to punish the contemner fortwith by means of a reprimand, expulsion from the court, arrest for a period of not longer than twenty-four hours within the court building itself or a fine (multa or ammenda) in terms of the Criminal Code;[8] and
a person who commits any act of contempt of court by means of indecent word or gesture, or a person who insults any other person, where the court is empowered to forthwith punish the contemner and sentence him to a fine (amenda or multa) or detention in terms of the Criminal Code;[9]

The Court therefore agrees with the accused that the Court of Magistrates must have necessarily applied against him Article 991 of the COCP, since this is the only article dealing with contempt of court that could have empowered the court to punish him summarily to detention in excess of 24 hours. The Court thus has to examine whether Article 991 of the COCP was indeed applicable to the accused.

The Attorney General argues that the accused's refusal to sign the Protection Order constitutes a challenge to the authority of the Court which, in turn, constitutes ***"eghmil mhux xieraq"*** in terms of Article 991 of the COCP and that therefore the Court was empowered to sentence him to detention forthwith. He argues that therefore, applicant's detention was based on the law and therefore not in violation of Article 5 of the Convention.

[8] Article 990 COCP.
[9] Article 991 COCP.

The accused argues on the other hand that the applicant's refusal to sign the Protection Order cannot amount to **(an indecent word or gesture)** and that therefore the Court of Magistrates could not have lawfully sentenced him to detention.

As to the scope of application of Article 991 of the COCP, the Court begins by noting that this article was already present in the first codification of the Laws of Malta. At the time it was Article 1007, and it provided for the Court's power to penalise with a fine (multa or ammenda) or detention in accordance with the Criminal Code those, who commit contempt of court **"*con parole o gesti indecenti"*** or **"*ingiuriasse qualunque altra persona".***[10] When the law was codified in the English and Maltese language, the English text faithfully followed the Italian one, with Article 991 making reference to **"*indecent words or gestures.*"** On the other hand, the Maltese version of the text makes reference to **"*kliem jew eghmil mhux xieraq"*** which connote a wider range of words, actions and conduct which may be considered inappropriate.

The Court also notes that the ambiguity of the Maltese text has led to conflicting judgements on its precise import. For instance, the finding of contempt of court that led the Contemner to institute the proceedings in the names of **Ignatius sive Nazju Busuttil vs L-Avukat Generali** was based on his attending Court without a tie, which had led the Court to decide that the applicant **'*ma kienx liebes b'mod xieraq*'** and his refusal to pay the fine imposed on him by the court for not wearing a tie, which refusal was also considered to be **'*eghmil mhux xieraq.'*** [11] In **L-Pulizija vs Meinrad Calleja** the Court held that the distiniction between Article 991 and the other articles dealing with contempt of court is that under Article 991, the law is granting the judge or magistrate the means to immediately bring to order any one who attempts to obstruct the course of justice, with

[10] Leggi di Organizzazione e Procedura Civile per l'Isola di Malta e Sue Dipendenze (Aggiuntevi le emende) (Malta: A. Aquilina, 1874), Article 1007 **"*Se alcuno con parole o gesti indecenti, nell'udienza, commettesse un atto di disprezzo dell'autorita della Corte, o ingiuriasse qualunque altra persona, potra essere dall'autorita menzionata nell'articolo 1004 condannato, sul momento, all'ammenda, alla multa, od alla detenzione indicate nelle Leggi Criminali."***

[11] **Ignatius sive Nazju Busuttil vs L-Avukat Generali,** First Hall of the Civil Court (Constitutional Jurisdiction) decided on the 20th of June 2003.

the aim of ensuring that nothing should impede the court from carrying out its functions.[12]

More recently, in **Il-Pulizija vs Tarquin Vella,** the Court held that Vella's failure to show up again in court after his case had been postponed, amounted to ***"eghmil mhux xieraq"*** and an act of contempt of court within the meaning of Article 991 of the COCP.[13] However just a few months after this judgement, in **Il-Pulizija vs Robert Saliba** the Court of Appeal annulled a decree finding the appellant guilty of contempt under Article 991, after finding that the appellant's repeated failure to attend court sittings did not amount to ***"eghmil mhux xieraq"*** in terms of this Article.[14]

As this Court has already stated, the term ***'mhux xieraq'*** is a broad term, and is used widely in the law for various reasons, such as in the case of an unfair trial, improper use of telecommunications equipment, etc. Clearly therefore while the term has a broad meaning, its meaning in a particular article is circumscribed by the particular circumstances of that article. However, this is not the first time that the use of this term has caused confusion. In fact, the use of this term in Chapter 399 created so much difficulty that it led Parliament to amend the law in order to define what was considered to be **'uzu mhux xieraq'** of telecommunications equipment, with the Office of the Attorney General informing Parliament that the term was so ambiguous that it led one

[12] **Il-Pulizija vs Meinrad Calleja,** Court of Magistrates decided on the 8th of June 1998: **"*Huwa ovvju, anke minn ezami anke superficjali tad-disposizzjonijiet applikabbli li d-distinzjoni basilari bejn l-imgieba mhux xierqa li ssir 'infaciem curiae' u dik li ma ssirx hekk hija netta….Fl-ewwel kaz, il-ligi trid taghti lill-gudikant ilmezzi biex immedjatament igib ghall-ordni lil min jittanta jfixkel il-kors tal-gustizzja u dana biex tassikura li xejn ma jimpediha milli tesercita d-doveri taghha b'intervent repentin u awtorevoli.*"**

[13] **Il-Pulizija vs Tarquin Vella,** Court of Magistrates (Malta) as a Court of Criminal Judicature, decided on the 3rd of February 2016: **"*Il-Qorti taghmilha cara li min jissejjah biex jidher quddiem il-Qorti jrid jaghmel dan. Tarquin Vella naqas meta deher fis-seduta, is-seduta kienet posposta biex ikun assistit mill-avukat talghajnuna legali, hareg mill-awla u ma rritornax meta l-kawza tieghu regghet issejhet. Din il-Qorti wara li rat l-Artikolu 991 tqis li li dak li ghamel ir-rikorrent waqt is-seduta li deher u telaq 'l hemm jammonta ghal "eghmil mhux xieraq waqt is-seduta." U fil-fehma ta' din il-Qorti dan huwa "att ta' disprezz tal-qorti."*

[14] **Il-Pulizija vs Robert Saliba,** see above note 6: **"*Fs* [*sic*]*-sentenza, izda, l-ewwel Qorti ddeskriviet l-ghemil li tieghu kienet qed issib lill-appellant hati bhala konsistenti fil-fatt li "baqa' ripetutament jonqos milli jidher ghal din il-kawza Ghalhekk, jirrizulta ictu oculi mill-atti nfushom tal-procedimenti quddiem l-ewwel Qorti li l-ghemil li dwaru l-ewwel Qorti kienet qed issib htija ma jinkwadrax fl-artikolu citat minnha."***

court to find that once a telephone has been in fact used as a telephone, it can never be said that the accused made a use of it which was ***"mhux xieraq".***[15]

The Court therefore considers it necessary to examine how the term is be interpreted, in order to ascertain whether it was actually applicable to the accused. The Court notes that there are various methods of interpretation of the law. The method of literal interpretation dictates that a word is to be given its plain, ordinary and literal meaning, while contextual interpretation dictates that a word is to be interpreted in the light of the context that it finds itself in. According to **Lord Hoffman**:

"The interpretation of a legal document involves ascertaining what meaning it would carry to a reasonable person having all the background knowledge which is reasonably available to the person or class of person to whom the document is addressed. A written contract is addressed to the parties; a public document like a statute is addressed to the public at large; a patent specification is addressed to persons skilled in the relevant art, and so on."[16]

Regarding contextual interpretation, the Court makes reference to the decision of the Supreme Court of the Australian Capital Territory, wherein, with regards to a dispute relating to the interpretation to be given to the term 'house', the Court considered that:

"As early as 1881, in Yorkshire Insurance Co v Clayton (1881) 8 QBD 421, it was recognized that separate dwelling units or flats, though one above the other could each be regarded as houses for the purpose of rating legislation (see Jessel MR at p 424-5). Grant v Langston (1900) AC 383 illustrates that the term "house" usually will denote a dwelling rather than commercial premises, for the purposes of a statute imposing an inhabited house duty. (See Earl of Halsbury L.C. at 390-392). A "public house" was not a "house" for that purpose. The effect of the comments referred to is that, by itself, the word

[15] Parliament of Malta, Meeting no. 117, of the 10th of December 2007.
[16] Homburg Houtimport BV v Agrosin Private Ltd [2004] 1 AC 715; [2003] 2 All ER 785; [2003] UKHL 12, 73.

"house" can convey a variety of meanings. **It is the context in which the word appears which enables one meaning rather than another to be selected.**"[17]

As stated by Lord Steyn, "it is a universal truth that words can only be understood in relation to the circumstances in which they are used."[18] Furthermore,

"**Language can never be understood divorced from its context**. In the words of Oliver Wendell Holmes, a word is not a transparent crystal. The true purpose is to find the contextual meaning of the language of the text, ie, what the words would convey to the reasonable person circumstanced as the parties were."[19]

Maltese Courts have, since time immemorial, accepted that the law must not be interpreted in the abstract but that rather, regard must be had to its spirit, to the context and to the intention of the Legislator. This can be seen in the judgement of **Negoziante Emanuele Scicluna vs Negoziante Giuseppe Calcedonio Borg,** where the Court of Appeal held that:

"l-interpretazione, come dice Thibant, essendo l'atto dello spirit umano, per il quale si giunge ad avere coscienza del senso che si asconde in una legge, traducendola in termini propri e piu chiari, e ricostruendone il pensiero che vi si contiene, non e soltanto necessaria nei soli casi di oscurita della legge, ma pure nella sua applicazione quando i tribunal elevano la stessa a cirterio del loro gudizi, cio che pero laconicamente dice il testo 'lex interpretation adiuvanda', o come altri disse 'lo spirito aiuta la lettera'. Infatti questa costituisce l'interpretazione che appartiene al giureconsulto ed al giudice, che dicesi dottrinale, per ciu si determina il vero senso della legge, o si supplisce nel caso che sieno mute o insufficienti le sue disposizione."***[20]***

[17] In The Estate of Kathleen Theresa Purcell, deceased Bryan Francis Purcell V. Frances Anne Purcell and Felix John Purcell S.C. No. 21 of 1990 Wills (1991) 103 FLR 271 [1991] ACTSC 126 (7 February 1991) 22.

[18] Steyn, Johan, "The Intractable Problem of The Interpretation of Legal Texts" [2003] SydLawRw 1; (2003) 25(1) Sydney Law Review 5.

[19] Solution 6 v Industrial Relations Commission (NSW) 60 NSWLR 558, 81.

[20] **Negoziante Emanuele Scicluna vs Negoziante Giuseppe Calcedonio Borg,** Court of Appeal decided on the 21st of June 1871 (Kollez. Vol. V, p. 571).

This same judgement held that when interpreting a provision the law it is necessary to link the dispositions of the law together:

"secondo la massima riconosciuta che le leggi si sostengono e si spegiano scambievolmente, e si scorgono in fatti ravicinate, confrontrando tra loro le diverse disposizione, mettendo in accordo quello che riguardano la stessa materia, conforme la riconoscuita regola di diritto che per interpretare la legge in una manera gusta e necessario conferire insieme tutti gli articoli e non decidersi dietro uno dei suoi precetti."

Furthermore, in Avukat Dr. Anthony Pullicino et vs Sir David Campbell noe it was held that:

"…… mhux ezatt il-principju espost mill-appellanti illi meta l-kelma tal-legislatur hija cara (f'dan il-kaz hija cara l-art 3 biex tkun eskluza azzjoni) ma tistax tezamina r-'ratio legis', ghaliex kif din il-Qorti rriteniet in re Ing. G. Vincenti vs Edgar Staines ne fil-25 ta' Ottubru 1940 (Appell Civili), 'il principio ubi nulla ambiguitas verborum est non est facienda voluntatis quaestio deve cedere all'altro principio d'interpretazione, che cioe` non mens verbis sed verba menti servire debent, perche` altrimenti nascerebbe conflitto tra il pensiero certo del legislatore e la parola della legge. L'interpretazione logica non ha unicamente un ufficio sussidiario all'interpretazione letterale, e l'intenzione del legislatore deve prevalere"".[21]

This line of reasoning was also confirmed in a more recent judgement, where it was held that:

"Kif saput, il-kompitu ta' l-interpretazzjoni mhux ezercizzju facli u, anzi, ta' sikwit joffri insidji li, jekk wiehed ma joqghodx attent ghalihom, spiss jinkorri fi zball. Dan jokkorri partikolarment fejn it-test ikun oskur jew elaborat izzejjed jew fejn ikun fonti ta' aktar

[21] **Avukat Dr. Anthony Pullicino et vs Sir David Campbell noe,** Court of Appeal, decided on the 23rd of Mejju 1947 (Vol. XXXIII.i.103).

minn interpretazzjoni wahda. B'danakollu, kif wisq tajjeb gie espress, "billi hi regola ta' interpretazzjoni illi ebda ligi ma ghandha titqies kontradittorja fiha nfisha, meta jkun hemm dubju fuq hekk, huwa kompitu tal-gudikant li jindaga u jinterpreta s-sens skond l-intenzjoni tal-legislatur, u b'quddiem ghajnejh ir-ragunijiet li geghlu lil-legislatur jaddotta l-ligi. Il-gudikant ghalhekk ghandu jirrikorri ghal "mens legis" biex jaghti dik l-interpretazzjoni li tikkorrispondi ghall-ispirtu nformatur tal-ligi."[22]

This reasoning is based on the teaching of jurists, who hold that the spirit of the law must never be sacrificed for the letter. As stated by **Laurent**:

"Noi respingiamo dunque cio` che si dice l'interpretazione giudaica, che sacrifica lo spirito alla lettera. L'interprete deve sempre ricercare lo spirito della legge. In questo senso, si potrebbe dire che ogni interpretazione e` logica. Per chiaro che sia il testo, bisogna animarlo, vivificarlo, ricorrendo alla storia, alla discussione, ai lavori preparatori; a piu` forte ragione, cio` e` necessario quando la legge e` oscura…. la nostra conclusione e` che bisogna sempre consultare i lavori preparatori; ma bisogna guadarsi dal vedervi un'interpretazione autentica del Codice. Si finirebbe a delle eresie giuridiche, se le si prendesse letteralmente."[23]

Following the same line of thought, **Trabucchi**, opined that:

"l'interpretazione letterale ci offre la base oggettiva; ma non basta, ed e` necessaria l'interpretazione logica che ci dara` la voluntas legis, l'elemento vitale che ha carattere decisivo"[24]

Furthermore, the Court notes that in such a case, where the words used in the law are unclear and unambiguous, it can be useful to refer to the history of the law as a guide to

[22] **It-Tabib Dottor John Cassar et vs Stanley Castillo,** Court of Appeal, decided on the 6th of October 2004.
[23] F. Laurent, *Principii di Diritto Civile*, Vol.1, 307, 309.
[24] A.Trabucchi, *Istituzioni di Diritto Civile*, (Trentesima Terza Ed., Cedam) 37 -38.

interpretation, as the state of the previous law may be relevant as part of the circumstances on which the law was passed. As stated by **Ricci**:

"si guardi bene l'interprete dallo attribuire una soverchia importanza ai siffatti elementi di interpretazione … L'interprete deve fermare la sua attenzione sui precedenti della legge e specialmente sul complesso delle sue disposizioni intesa a regolare una data materia."[25]

With regards to the present case, as stated above, the law as it was originally drafted refered to **'parole o gesti indecenti'**. When translated into Maltese this became **"*kliem jew eghmil mhux xieraq.*"** The Court understands that whenever there is a discrepancy between the English and Maltese text of the law, it is the Maltese text that is to prevail[26] as far as laws which were enacted after the declaration of Independance. With regards to Legislation that predates the Constitution of Malta, it is logical and just to give greater eminence to the Italian or English text from which the Legislation was drafted. The Court considers that in this case, the English text gives this Court insight as to the intention of the Legislator when Article 991 of the COCP was being translated into Maltese and English. The English translation followed faithfully the Italian version of law, leading this Court to conclude that the Legislator's intention was clearly to reproduce the Italian **"parole o gesti indecenti"** and that therefore, it is in this light, that Article 991 should correctly being interpreted.

Furthermore, the Court has already found that the contempt provision of Article 991 is criminal in nature, and therefore, the rules of criminal law interpretation are to apply. In the interpretation of criminal law provisions, if real ambiguities are found in the application of provision which may affect the liberty of the accused, then that provision is to be applied is such a manner as to favour the person against whom it is sought to be applied. This is in view of the fact that if one is to be deprived of one's liberty, one

[25] F. Ricci, *Diritto Civile*, Vol I, par. 13. This reasoning was accepted by the Court of Appeal in the judgement of **Avv. Dottor Vincenzo Depasquale noe vs Francesca Aquilina** decide don the 28th of October 1968.

[26] Vide Article 74 of the Constitution of Malta.

should at least know that the law provided for this deprivation in express terms, and not by implication or analogy. [27] On this matter it was also stated that:

"…if a penal provision is reasonably capable of two interpretations that interpretation which is the more favourable to the accused must be adopted .... I do not think, however, that this principle always requires a word which has two accepted meanings to be given the more restrictive meaning. Where a word used in a statute has two accepted meanings then either or both meanings may apply. The court is first required to endeavour to determine the sense in which Parliament used the word from the context in which it appears. It is only in the case of an ambiguity which still exists after the full context is considered, where it is uncertain in which sense Parliament used the word, that the above rule of statutory construction requires the interpretation which is the more favourable to the defendant to be adopted. This is merely another way of stating the principle that the conduct must be clearly brought within the proscription."[28]

In this case it is clear that the terminology used in Article 991 is ambigious: it has in fact, already led to conflicting judgements on the precise scope of its application. The Court equally understands that any gudicant may have easily understood that ***"eghmil mhux xieraq"*** (roughly translated as improper conduct) could have served as an umbrella clause to include the alleged challenging behaviour of the accused.

However the intention of the legislator, as the Court has already found above, points to a restrictive interpretation of the term **"*kliem jew eghmil mhux xieraq*"** in the sense of **"*indecent words or gestures*"**. Considering all this therefore, together with the fact that in criminal matters in case of ambiguity, the interpretation most favourable to the accused must be applied, the Court concludes that Article 991 was not applicable to the accused in the circumstances.

[27] In this regard see for instance **Marcotte v. Deputy Attorney General for Canada**, [1976] 1 S.C.R. 108, at 115, 19 C.C.C. (2d) 257, at 262, 51 D.L.R. (3d) 259, at 264 (1974).
[28] R. v. Goulis, 60 C.C.C. (2d) 349, at 351, 20 C.R. (3d) 360, at 365, 37 C.B.R. (N.S.) 290, at 294 (Ont. C.A. 1981)

Yet should any gudicant have to go to such laborious lengths to elicit the correct interpretation of the text of a particular legislation? The question of legal certainty shall be dealt with hereafter.

Regarding Article 5 of the ECHR, **Schabas** opines that:

> ***"The notion of 'lawfulness' is fundamental to article 5. The introductory portion of article 5(1) sets out the condition that any deprivation of liberty be 'in accordance with a procedure prescribed by law'. Each of the sub-paragraphs of article 5(1) employs the word 'lawful'. When it uses the words 'lawful' and 'lawfulness', the Convention is referring essentially to national law. It sets out an obligation to conform to the substantive and procedural rules of national law."***[29]

The Court has seen that the accused was sentenced to detention following a finding of the Court of Magistrates that he was in contempt for refusing to sign a Protection Order in favour of his wife. According to Article 5 (1) (a) of the Convention, the deprivation of liberty of an individual is allowed when it is done in accordance with a procedure prescribed by law for the **"*lawful detention of a person after conviction by a competent* court."** The Court notes however that according to the jurisprudence of the ECHR, when the detention of an individual is based on the wrong interpretation of a domestic law, such detention will not be considered to be in conformity with national law and will therefore constitute a breach of Article 5 of the Convention.[30]

Furthemore, the Court notes that detention must not only be lawful in terms of the domestic law of the State, as Article 5 (1) requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness, and that therefore there must also be an assessment of whether the domestic law itself is consistent with the Convention **"*including the general principles expressed***

[29] W. A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2016) 229.
[30] See for instance **Gusinsky v. Russia,** ECHR 70276/01, decided on the 19th of May 2004, par. 66 -69.

***or implied therein, notably the principle of legal certainty*.”**[31] In this regard, according to the constant jurisprudence of the ECHR that **where the deprivation of liberty is at stake it is particularly important that the general principle of legal certainty be satisfied**[32]**.** Legal certainty, according to the jurisprudence of the ECHR, means that the law governing conditions for deprivation of liberty be accessible, clearly defined, and that it application be foreseeable.[33]

The Court has already found that the provision on the basis of which the accused was sentenced to detention is ambigious, and that due to its ambiguity there are conflicting judgements of the Maltese courts as to its precise import. In view of this, **the Court finds that the law in this case does not satisfy the principle of legal certainty,** since the circumstances which may lead to the infliction of a period of detention are not clearly defined, and the ambiguity of the law has rendered the application of the provision unforeseeable. In view of this, the Court holds that the accused's detention under this Article **could have been never been lawful**, **since the State has failed in its duty to provide an accessible, clearly defined law, the application of which is foreseeable with regards to Article 991 of the COCP.**

The Court therefore finds that the accused's detention, as ordered on the 26th of October 2015, was unlawful and therefore in breach of Article 5 of the Convention.

Deliberates

The Right to a Fair Trial.

In its partial judgement of the 11th October 2017 this Court, in light of the judgement of the Constitutional Court in the names of **Il-Pulizija (Assistent Kummissarju Norbert Ciappara) vs Mario Zammit,** recharacterized this reference to also include a

[31] **Mooren v. Germany**, ECHR 11364/03, decided on the 9th of July 2009, par. 73. See also **Baranowski v. Poland,** ECHR 28358/95, par. 51–52, **Jėčius v. Lithuania**, ECHR 34578/97, par. 56, **Nasrulloyev v. Russia,** ECHR 656/06, decided on the 11th of October 2007, par.71.
[32] *Idem.*
[33] *Idem.*

determination regarding Article 6 of the Convention, that is, applicant's right to a fair trial, relative to the Court of Magistrate's decision to sentence him to a term of detention after finding him in contempt of the court. Applicant had, at the time, chosen not be assisted by a lawyer during the criminal proceedings against him, and remained so unassisted even when the Court found him guilty of contempt for refusing to sign a Protection Order in favour of his wife.

The Court notes that the right to self-representation is a universal human right, enshrined in the majority of international human rights instruments.[34] It is generally framed in terms of the right to defend oneself in person and is considered to be a minimum guarantee to which everyone shall be entitled to in full equality.

The denial of self-representation as a violation of the right to a fair trial was recognized by the Human Rights Committee (HRC) in **Michael and Brian Hill v. Spain**, which concerned a case where the former complainant was denied the right to appear pro se by the Spanish court.[35] It appears from this case that a denial by the court of a request to self-present will not automatically lead to a violation of the right to a fair trial, although if it emerges that the restriction of the right to self-representation was automatic and unjustified, such as for instance in a situation where it is, without exception, not allowed by law, such a restrictions will *ipso facto* amount to a violation of the right to a fair trial.

From a perusal of the jurisprudence of the United Nations Human Rights Commission (HRC) and the European Court of Human Rights (ECtHR), it is clear that the right to self- representation is not an absolute and unqualified right, even if the language of the text itself does not suggest the existence of qualification to the right. The ECtHR regards the statutory delimitation of the right to self-representation as being a matter which falls

[34] International Covenant on Civil and Political Rights (ICCPR), (16 December 1966), Art. 14(3)(d); European Convention on Human Rights (ECHR), Art. 6(3)(c); American Convention on Human Rights, Art. 8(2)(d).
[35] Michael and Brian Hill v. Spain, Human Rights Committee, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997).

within the margin of appreciation of the state parties.[36] In **Croissant v. Germany** it considered that although German law imposed mandatory legal assistance on all defendants charged before Regional Courts, and at all stages of proceedings, the applicant had not suffered a violation of his right to a fair trial, because, notwithstanding the fact that regard must be had to the wishes of the accused, such wishes can be overlooked **'when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.'**[37]

The jurisprudence of the EctHR shows that it is not incompatible with the right to a fair trial for legislation to provide for the imposition of legal counsel irrespective of the wishes of the accused in certain specified circumstances.[38] What is required is that an appointment running counter to the wishes of the accused is based on 'relevant and sufficient justification.'[39] In **Croissant**, the imposition of counsel against the wishes of the accused in the interests of justice was considered to be relevant and sufficient reason, thus precluding a violation of Article 6, and in **Correa de Matos** the Court concluded that such a reason '…is, in particular, a measure in the interests of the accused designed to ensure the proper defence of his interests.'

Maltese law recognises the principles outlined in the jurisprudence cited above, which are reflected in Article 205 (2) of Chapter 12 of the Laws of Malta, which provides that:

> **'[t]*he court may order the party who is not assisted by an advocate to engage one if, in the opinion of the court, such party is unable adequately to plead his case; and if such party fails to engage an advocate, the court shall appoint, for the purpose, one of the***

[36] X. v. Austria, European Commission on Human Rights (decision), Application No. 7138/75 (5 July 1977).
[37] Croissant v. Germany, ECtHR, Application No. 13611/88 (25 September 1992) par. 29. The principle of 'interests of justice' as a justification for the legitimate imposition of counsel was reiterated again by the ECtHR in Lagerblom v. Sweden, Application No.26891/95 (14 February 2003) par. 50 and 54 and Correa de Matos v. Portugal, ECtHR, Application No. 48188/99 (15 November 2001).
[38] A number of European countries in fact provide for mandatory representation in certain civil proceedings, i.e Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Poland, Portugal and Spain.
[39] *Supra* note 37

> ***official curators to be selected according to the turn on the rota****; if the party refuses to give the necessary information to the advocate so appointed, the court may dispose of the case after hearing such evidence as the court may consider necessary*.'

It appears therefore that whereas Maltese law allows a party in to self-represent, the court may restrict such right if it considers that they are unable to adequately plead their case. In this manner the court can ensure that all the elements of the party's right to a fair trial are respected, since the party's wish to exercise his right to self-representation should in no way diminish the protection of the other elements of the right to a fair trial, in particular the right to equality of arms, since all the elements are of equal importance and recognise no hierarchy.

As stated by **HRC Committee Member Eckhar Klein** in his individual opinion:

> '***…the express formulation of the different aspects of the right to a fair trial is founded on many varied good reasons, based on historical experience. The Committee should not encourage any view that some rights enshrined in article 14 of the Covenant are less important than others.***'[40]

A court faced with an accused who wishes to self-represent must therefore seek to strike a balance between the accused's wishes and the rest of the other aspects of the right to a fair trial, and it is only if the court considers that the party's right to a fair trial generally can be guaranteed, that a request to self-represent should be accepted. In particular, the court must ensure that the spirit of Article 6 is protected. As such, when faced with a self-representing accused, a court must determine whether it is in the interests of justice to order an accused to appoint counsel to represent him or to appoint a legal aid lawyer for him if he is unwilling or unable to engage counsel himself. In Maltese law such an obligation also finds a basis in Article 519 of the Criminal Code which states that:

[40] *Supra* note 35, Individual Opinion by Committee Member Eckart Klein.

> **"[i]*t shall be the duty of the courts of criminal justice to see to the adequate defence of the parties charged or accused…*"**

The Court notes that in this particular case it was clear that **the accused failed to grasp the consequences of his actions,** as he himself testified before this Court, that had he understood that he would go to prison if he kept refusing to sign the Protection Order, he would have just signed it. The Court notes further that this testimony was in no way contradicted by the Attorney General. The Court is also mindful of the fact that the accused, who does not have a legal background, and much less a background in Maltese criminal law and procedure, was up against not just one person, but four, that is, the prosecutor and the three lawyers representing his wife.

The Court also notes that the accused was not at least given time by the Court to consult the law so that he could be in a better position to defend himself. Having said that, considering the Court's finding above about the ambuigity of the law, and worse still, the **clear dissonance between the English and Maltese text,** the Court is of the opinion that since the accused, being non-Maltese speaking, could have only consulted the English text, he could not have been in a position to anticipate that Article 991 could be given such a wide interpretation due to the wording of the Maltese text, making it even less likely that he could have effectively represented himself.

The Court considers that it requires no stretch of the imagination to consider that in such a situation, it is near impossible for the accused's right to equality of arms to be adequately protected without legal representation. Of particular importance is the fact that the law does not provide a right to lodge an appeal against a detention order following a finding of contempt, which also means that the detention order would become effective immediately, which makes it all the more imperative to ensure that the accused's right to effective representation remains practical and effective.

The Court notes furthermore that when the Court of Magistrates was considering finding applicant in contempt, the applicant was not asked whether he wanted at this point to be represented by a lawyer, nor informed that he had a right to have legal aid appointed for him to represent him free of charge, since he was facing the imposition of a period of detention, the duration of which could be up to two months, effective immediately and which he would not have the opportunity to appeal.

In light of the above this Court considers therefore that when the Court of Magistrates was considering finding applicant in contempt and sentencing him to a period of detention, the interests of justice nececcesitated that the accused be ordered to engage counsel, or have a legal aid lawyer appointed for him, if he was unable or unwilling to engage counsel himself.

Deliberates;

The Right to Appeal in Criminal Proceedings.

In its partial judgement of the 11th October 2017 this Court also recharacterized this reference in terms of Article 2 of the Seventh Protocol of the Convention which guaranteed the right to appeal in criminal proceedings. According to this article:

> **"*1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.***
>
> ***2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal*."**

The Court refers to the judgement handed down by the ECHR in **Zaicevs v. Latvia**, where a finding of a violation of Article 2 of Protocol 7 was entered unanimously after it resulted that domestic law regulating contempt of court gave the court the power to impose a maximum of fifteen days of detention, which order was not amenable to appeal before a higher court. The ECHR held that:

> "…***when deciding whether an offence is of a minor character, an important criterion is the question of whether the offence is punishable by imprisonment or not*** *(see paragraph 24 above). In the instant case, Article 201-39 of the Regulatory Offences Code stipulated that the offence in question was punishable by a term of detention of up to fifteen days. Having regard to the aim of Article 2 and the nature of the guarantees for which it provides, the Court is satisfied that* ***an offence for which the law prescribes a custodial sentence as the main punishment cannot be described as "minor" within the meaning of the second paragraph of that Article.*** *As to the classification of the offence in national law, the Court has already pointed out that this has only a relative value*."[41]

This line of reasoning was confirmed in **Ashughyan** and **Galystan**, with the ECHR finding of a violation of Article 2 of Protocol 7 after considering that an offence liable to a maximum term of detention of fifteen days cannot be considered to be a minor offence, and that therefore, the lack of a possibility to appeal from such a sentence is a violation of Article 2 of Protocol 7.[42]

According to Article 1003 (1) of the COCP:

[41] **Zaicevs v. Latvia,** ECHR 65022/01 decided on the 31st of February 2007, par. 55. See also Council of Europe, 'Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms' ETS 117 (Strasbourg 1984) par. 21.

[42] **Ashughyan v. Armenia,** see above note **Error! Bookmark not defined.**, par. 108 – 110, **Galystan v. Armenia**, see above note **Error! Bookmark not defined.**, par. 124 - 127.

> **"*No appeal shall lie from any sentence passed under article 990 or 991, and any such sentence may be carried into execution forthwith*."**

Of relevance to this examination is also Article 12 (2) of the Criminal Code, according to which, when it is not otherwise stated, a period of detention can last for a maximum of two months. By application of this article, a person found in contempt of court under Article 991 of the COCP can therefore be sentence to detention for a period of up to two months. It is clear therefore, in light of the above considerations, that due to the punishment for contempt of court prescribed under Article 991 COCP cannot be considered as being of a **'minor character'**, and that therefore a right of appeal must be given to those sentence under this Article.

The Court notes that with the amendments to Article 1000 by Act XXIV of 1995 it has now become possible for the court which awarded the punishment to commute or remit the punishment. This however is not enough to render the State compliant with Article 2 of Protocol 7, principally for three reasons. First and foremost, it is the law itself that recognises, in Article 1003 (1), that there shall be no appeal from decisions of the Court under Articles 990 and 991. Secondly, the review must be conducted by a higher tribunal, and therefore Article 1000 clearly does not satisfy the obligations imposed by Article 2 of Protocol 7. Finally, appeal proceedings must comply with Article 6, meaning that, apart from other things, the appellate court must be impartial within the meaning of the Convention, and as stated in **Oberschlick v. Austria,** if the Court of Appeal comprises any judge who has previously dealt with the case in first instance, the appellate court's impartiality is open to doubt.[43] It follows that Article 1000 is not enough to satisfy the requirements of the right to appeal in cases of contempt of court. It is clear therefore, that a finding of contempt under Article 991 of the COCP is not amenable to appeal as required by Article 2 of Protocol 7 to the European Convention of Human Rights.

[43] **Oberschlick v. Austria**, ECHR 11662/85 decided on the 23rd of May 1991, par. 50.

In light of the above, the Court therefore finds that Article 1003 (1) as applied to Article 991 of the COCP violates the right to appeal as established in Article 2 of Protocol 7 to the European Convention of Human Rights.

For these reasons, the Court therefore responds to the reference of the Court of Magistrates (Malta) as a Court of Criminal Judicature by declaring that the ambiguity of Article 991 of the COCP rendered his detention unlawful in terms of Article 5 of the Convention, that the accused's lack of legal assistance before being found guilty of contempt of court and sentenced to detention was in breach of his right to a fair trial in accordance with Article 6 of the Convention, and that the impossibility of filing an appeal from a finding of contempt under Article 991 COCP, in accordance with Article 1000 COCP, is in breach of the accused's right to appeal as guaranteed under Article 2 of Protocol 7 of the Convention.

The Court orders that the acts be remitted back to the Court of Magistrates (Malta) as a Court of Criminal Judicature for the continuance of the proceedings before it in light of this decision.

Cost shall be borne by Commission of Police and the Attorney General.

Read.

Judge Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli
Deputy Registrar