CONSTITUTIONAL COURT

JUDGES

THE HON. CHIEF JUSTICE JOSEPH AZZOPARDI
THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE TONIO MALLIA

Sitting of Monday, 29th October 2018

Number: 1

Application number: 24/17 JPG

Colin John Morland

v.

The Advocate General

The Court:

<u>Preliminary</u>

1. Plaintiff Colin John Morland appealed from the judgment given by the Civil Hall First Hall (*Constitutional Jurisdiction*) on the 16th of March 2018, wherein he requested this Court:

- <u>to confirm</u> judgment insofar as it acceded to his 1st and 3rd requests;

- to revoke it insofar as it denied his 2nd request, and insofar as it ordered the Attorney General to pay €2,500 for the violation of his right to a fair trial within reasonable time;

- and instead, to order the Attorney General to pay pecuniary as well as non-pecuniary damages for all the violations suffered by him, thus upholding all his original requests.

2. For a better understanding of this appeal, the judgment of the Court of First Instance is being reproduced in its entirety:

> "Having seen the application by Colin John Morland (ID 41927A) dated 11th April 2017, vide fol 1 et seqq (Vide fol 18 et seqq), which submits;
>
> 1. *"That on the 23rd April 1995 he married Mary Ann Morland with whom he has two children.*
>
> 2. *"That on the 4th February 2002 his wife filed a legal separation lawsuit in the Civil Court First Hall in the names 'Mary Anne Morland proprio et nomine vs Colin John Morland' Application number 130/2002.*
>
> 3. "*That on the 25th April 2014 during the course of these proceedings the Court in First Instance divorced the parties and the lawsuit continued on the aspects relating to the community of acquests, maintenance and care and custody of the minors.*
>
> 4. "*That these same proceedings were decided in First Instance on the 21st November 2014.*
>
> 5. "*That both parties appealed from different parts of the judgement, which appeal and incidental appeal were decided by the Court of Appeal on the 15th December 2015.*
>
> 6. "*That as held in case **Joseph Gatt et vs Avukat Ġenerali** decided by the Constitutional Court on the 28th February 2014:*
>
> *"It is now well established, both in local jurisprudence as well as that of the European Court that, in order to determine if the length of time taken for proceedings was reasonable or not for the purposes of the Constitution and the Convention one must examine all the particular circumstances of*

> *the case and in particular the complexity of the case to be decided, how the applicant conducted himself in the proceedings complained of, how the Court proceeded in the course of these proceedings and what the applicant stood to lose as a consequence of the proceedings, besides obviously, the effective time it took to have a final decision in the case (Vide Frydlender v. France GC no. 30979/96, § 43, ECHR 2000-VII)".*

7. "That apart from this, in the case ***Azzopardi vs Malta*** *(28177/12) of the 6th November 2014 decided by the European Court of Human Rights it was held:*

> *"...... the judicial authorities remain ultimately responsible for the conduct of proceedings before them and ought to weigh up the advantages of continued adjournments against the requirement of promptness (see, mutatis mutandis, Gera de Petri Testaferrata Bonici Ghaxaq, cited above, § 43)".*

8. "It is the duty of the State to organise its legal system in such a way that the Courts are put in a position where they can guarantee evereone's right to have a final decision within a reasonable time (see for example ***Scordino v. Italy (no. 1)****, para. 183). 'The fact that the Courts have an excessive workload does not exonerate the State from responsibility (vide* ***Vocaturo v. Italy****, para 17 and* ***Cappello v. Italy****, para 17).*

9. "That in the course of these proceedings the applicant's fundamental rights were infringed, both in respect of his property (rights) and also because as a result of the delay he did not have a fair hearing within a reasonable time and as a a result of such infringments, he suffered moral and pecunary damages and this in breach of Article 6 (1) of the Convention and Article 39 (2) of the Constitution and Article 1 Protocol 1 of the Convention as will be amply proven during the course of this lawsuit.

10. "That apart from this, the applicant has a right to an effective remedy (Art 13 of the Convention) linked with the right of private life (Art 8) which rights were infringed as a result of the uncertainty pending the final outcome of the said proceedings.

11. "Consequently the applicant respectfully requests that this Honorable Court:

i. "Declares that in the aforementioned lawsuit (Rik 130/2002) his fundamental rights to have a fair hearing within a reasonnable time were infringed and because of this, apart from such rights being infringed, so also were his other rights as enshrined under Article 6 (1) of the Convention. Article 39 (2) of the Constitution and Article 1 Protocol 1 of the European Convention of Human Rights;

ii. "Declares that his rights as enshrined in Articles 8 and 13 of the Convention were infringed.

iii. "Provides an appropriate and effective remedy to redress such infringment/infringments and orders the defendant to compensate the plaintiff for damages, both pecuniary as well as non pecuniary in order to make good for such infringments.

"*With cots against the defendant who is hereby being demanded for reference to the oath.*

"Having seen that the original application documents, the order and notice of hearing have been duly notified in accordance with law.

"Having seen the reply of the Attorney General dated 28th April 2017, a fol 7 et seqq (a fol 13 et seqq), which states:

1. "*That as regards to the complaint based on* ***article 6 of the European Convention*** *and* ***article 39(2) of the Constitution*** *it should be stated from the outset that despite that the civil lawsuit overall took thirteen years to be concluded by the Civil Court (Family Section) and the Court of Appeal this does not entail an automatic unjustified delay or a delay attributable to the State. Indeed it is established and constant jurisprudence that the unreasonableness of time should not be determined in abstract or by the number of years a lawsuit kept ongoing, but should be considered in the light of the particular case at stake;*

2. "*That it is likewise accepted that there is no time limit which a Court is obliged to observe in the course of the proceedings pending before it because otherwise the interests of justice would be prejudiced due to inadvisable and excess haste;*

3. "*That without prejudice to the above in order for this Honorable Court to consider in a serious way applicant's demand under* ***article 6 of the European Convention*** *and* ***article 39(2) of the Constitution*** *it should be proved that the lawsuit was not only pending for a long time but also that the delay was capricious and intended only to put him at a disadvantage in his enjoyment of his rights according to law. Truly in the present case, the delay was not a capricious one nor unreasonable but was due owing to the nature and complexity of the procedures involved. Suffice it to state that during the civil proceedings various experts were appointed and a good number of applications were filed pendente lite;*

4. "*That in any case from the acts of the civil proceedings it does not result that the courts were in some way to blame for the delay. On the contrary the acts of the proceedings indicate that the delay was more likely to stem from applicant's own behavior: (i) who took a long time to conclude his evidence notwithstanding that the other party had concluded her evidence from the 20th November 2003; (ii) who failed to attend for a number of sittings before the Court and the before the experts, (iii) who burdened the process by a number of applications; and (iv) who did not submit his note of submissions within the given timeframe so much that he had to request the court to extend his time;*

5. "*That on the other hand when the Civil Court (Family Section) was placed in the situation to pass on judgment it delivered the judgment in a short time which did not exceed six months. Even the Court of Appeal did not take a long time to end the appeal process as it concluded the case within a year;*

6. "That indeed in the circumstances of this case applicant is slightly unjust when he criticizes the court with the delay because instead of closing his evidence or refusing to give him more time to finish his submissions before handing down the judgment, the Court chose to be patient with him and grant him further opportunity to defend his case. Therefore applicant is not correct to pretend compensation from the State for the reason that the Civil Court (Family Section) was permissive towards him at evidence and submissions stage. It follows that this first complaint cannot be deemed as justified and hence should be dismissed;

7. "That insofar as the complaint stands on the ***first article of the first protocol of the European Convention****, respondent notes that applicant does not mention which was that possession he was allegedly denied of by the State. Given the lack of indication of the possession this complaint cannot be acceded to;*

8. "That apart from this, the State at no stage of the proceedings took any property from applicant or obstructed him from enjoying his belongings. Even if there were pending separation procedures initiated by applicant's wife this does not mean that the State took control over applicant's belongings. Therefore even this complaint should be discarded;

9. "That regarding the complaint related to ***article 8 of the European Convention*** *which speaks about the right to respect for his private life, respondent feels that this remained unexplained by applicant in his constitutional application. Therefore even this complaint should be dismissed;*

10. "That notwithstanding this, respondent claims that the State under no circumstances did intervene in applicant's private life. The dispute that developed between applicant and his wife in the separation proceedings and which later on where converted into divorce proceedings cannot be deemed as part of private life because as it was stated by the Constitutional Court in the judgment ***Edmond Espedito Mugliett et vs. The Minister of Justice et*** *decided on the 5th of March 2012, "given that the controversy between them developed in a judicial action this necessarily required the intervention by the court to resolve the matter in terms of law and as such it fell outside the private sphere of the individual parties involved and turned into a matter of public nature";*

11. "That always without prejudice to all that has been said earlier, finally applicant is also not correct when he argues that he had no effective remedy under domestic law in violation of ***article 13 of the European Convention*** *to safeguard his rights.* ***Article 13 of the European Convention*** *does not require a particular procedure how a remedy should be given. What is important is that he is given an effective remedy before a national authority. This means that the constitutional remedy itself may also be deemed an effective remedy within the ambit of* ***article 13 of the European Convention****;*

12. "That ***article 13 of the European Convention*** *does not require that the remedy be within the framework of ordinary procedures as*

applicant seems to pretend. On the contrary what is important is that there should be a remedy before a national authority, irrespective of whether it is given by way of an ordinary civil lawsuit or by way of constitutional/conventional lawsuit. As for example, the European Court on Human Rights dismissed a complaint on ***article 13*** *in the judgment* ***Nazzareno Zarb vs. Malta*** *decided on the 4th of July 2006, to commensurate for the lack of remedy under ordinary law in the case of unjustified delay in the proceedings, there was the remedy under* ***Chapter 319 of the Laws of Malta*** *before the courts conferred with constitutional powers;*

13. "That indeed with the filing of these constitutional proceedings the applicant himself is recognizing that the Maltese system provides for a domestic remedy which is effective. If it had not been the case applicant would not have wasted time and money to open these proceedings;

14. "That therefore insofar as applicant is complaining about a breach of ***article 13 of the European Convention****, this is manifestly unfounded if not also frivolous due to the fact that these same proceedings and this Honorable Court as a national authority are empowered to grant an effective remedy to the applicant, provided he manages to show that he indeed was prejudiced in his fundamental rights as protected under the* ***European Convention****;*

"*Therefore for the above stated reasons the requests made by Colin John Morland should be dismissed with costs against him.*

"Having heard the witnesses on oath;

"Having seen all the documents exhibited and all the acts of the proceedings;

"Having seen the notes of submissimissions filed by the parties;

"**Deliberates:**

"**Colin Morland** testified[1] that he has suffered damages because of the undue length of the separation proceedings, including the appeal, which lasted for fourteen years for no good reason. He explained that in his view the proceedings should have only taken three years to conclude, and had that been the case, he would have stopped paying maintenance to his wife in 2004, which is why he is claiming the cited amount in damages. He stated that the judgement of the Courth of first instance reduced the maintenance payable to his wife to €200, which he had to keep paying until the appeal was decided, that is, until 2016. He testified further that he is claiming interest paid due to a garnishee order which was issued in November 2014. He stated that he made the payment which was due to his wife as half her community of acquests in two parts, with the first installment being paid in December 2014, and

[1] Fol 18E *et seqq*, including documents filed, Fol 30 *et seqq,* including documents filed and Fol 552 *et seqq*.

the second one December 2015. He went on to explain that the appellate judgement did not determine any payment dates, not even when an application for further clarification was made in this regard, which further complicated matters for the parties. He stated that the payment due could not be made immediately, as was expected by his wife, because some accounts required a ninety day notice before they could be closed, and that further more, the amount of €23,000 had to be released by his wife since it was held in joint accounts, but during negotiations, his wife issued a garnishee order which allowed an interest payment of €4,000 calculated from the date of the first instance judgement. He explained that he was also making a claim for the amount of money that he disbursed as payments to a life insurance policy made on behalf of his wife, as well as court and legal fees. Regarding the auditor's appointment during the separation proceedings, he testified that in his opinion this appointment was wholly unnecessary since it ended up as only serving to confirm the veracity of the accounts produced by him in court. He complained that he was not allowed to produce an updated financial account due to being 'out of time', when it took the Court five years to reach its decision after the audit. He claimed also that it should not have taken the Court long to determine the cause of the breakdown of the marriage, since this was an issue of irreversible incompatibility. He confirmed that the invoice filed at Fol 550 had been paid in full by him.

"**Audrey Ghigo,[2]** representing HSBC Bank Malta plc, produced a copy of the bank statements of the account held in the applicant's name for the period between the 8th of May 2001 and the 25th of January 2016, which also show all transations made by means of Standing Orders, which were always honoured.

"**Deliberates:**

"Regarding the right to a fair trial within a reasonable time

"In the present case, the applicant is claiming that he has suffered a violation of his right to a fair trial within a reasonable time, due to the excessive length of the separation proceedings. He contends that these proceedings should have lasted three years, as the dispute was not a complex or novel one. Instead, these proceedings lasted thirteen years due to his wife's behaviour and the conduct of the competent authorities. Respondant submits however that the separation proceedings were not unduly long, as the length reflected the complexity of case, and therefore cannot be blamed on the conduct of the competent authorities.

"The Court recognises that according to the jurisprudence of both the Maltese courts, as well as that of the European Court of Human Rights, in order to assess whether the case under examination was excessively

[2] Fol 119B *et seqq.*

lengthy and thus in breach of the right to a fair trial, the Court must have regard not merely to the duration of the case alone, but must rather examine four factors, that is:

“(1) The complexity of the case;
(2) The conduct of the applicant;
(3) The conduct of the competent authorities;
(4) What is at stake for the applicant.

“This has been held to be due to the fact that the time factor must not be examined in the abstract, but it must rather be examined in the light of **the particular circumstances of the case** before the Court.[3] **Furthermore, no single criterion is conclusive on its own, as the Court must instead assess the cumulative effect of the four.[4]**

“The Court further notes that regarding the reasonsable of the length of the proceedings, Maltese Courts have opined that the term ‘reasonable’ connotes a strong discretionary element, leaving it up to the Court to determine whether, considering the particular facts of the case under examination, the length of time it took for the case to be decided is such that it exceeds what is, or should normally be, acceptable in a democratic society. This therefore means that every case must be examined in light of its own special set of cicumstances.[5]

“It is the State’s duty to ensure that the judicial proceses can run its course without undue delay. The Constitutional Court has previously observed that the Maltese courts are burdened with a heavy case load which often serves as an obstacle to the speedy determination of cases. This Courts agrees with the opinion expressed many times by this Court as otherwise composed and the Constitutional Court that there exists an inherent deficiency in the justice system because the public authorities are failing their duty ensure that there are enough resources for the court to be able to perform its duties satisfactorily.[6] In this regard, the Court makes reference to the teachings of the ECHR that:

> “***…it is for the Contracting States to organise their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable***

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[3] **Anthony Camilleri et vs L-Avukat Generali et**, Constitutional Court decided 28th September 2012.
[4] See e.g. **Zakkarija Calleja vs L-Avukat Generali**, Constitutional Court decided 15th December 2015; **Sydney Ellul Sullivan vs Il-Kummissarju tal-Pulizija et**, Constitutional Court, decided 28th January 2013; **Frydlender v. France**, ECHR 30979/96 decided 27th June 2000; **Comingersoll S.A. v. Portugal**, ECHR 35382/97 decided 6th April 2000.
[5] **Emanuela Brincat vs L-Avukat Generali**, Constitutional Court decided 21st February 1996, cited with approval even in the context of civil proceedings in **Zakkarija Calleja vs L-Avukat Generali**, Constitutional Court 15th December 2015.
[6] See e.g. **Joseph Gatt et vs L-Avukat Generali**, Constitutional Court decided 28th February 2014.

***time in the determination of his civil rights and obligations.*"[7]**

"Regarding the fourth criterion, the Court notes that Respondent agrees that the nature of proceedings in question were such that they required the courts to handle the case with special diligence, and therefore in view of the parties' agreement on this matter, the Court considers that it need not examined this criterion.

"Regarding the issue of complexity, the court notes that whereas the applicant claims that the reasons for the breakdown of the marriage were simple in nature, that is, the irremediable incompatibility between the spouses, in actual fact, both spouses attributed the fault of the breakdown of the marriage to alleged mistreatment. Furthermore the applicant even made an allegation that his wife was guilty of threats, excesses and mental cruelty against their minor children. This contention by the applicant is also contradicted by the fact that during the separation proceedings, he filed an affidavit which included numerous pages of journal entries of the daily trials and tribulations of the contendents' marriage, including instances when his wife failed to prepare a salad for his lunch. Indeed the applicant filed even more journal entries further along the case, documenting every minor detail of what was happening with the children and their mother's alleged faults in their regard during the course of proceedings including some instances when the applicant found glitter in his daughter's hair.

"The Court furthermore notes that the community of acquests was comprised of a substantial amount of assets, notwithstanding the fact that the matrimonial home was the paraphernal property of the husband, as evidenced by the fact that the wife's share of the community totalled over €100,000. This was compounded by the fact that the wife made allegations that the applicant was making untoward withdrawals from accounts belonging to the community, which necessitated an investigation by the Court. While the applicant lambasts the Court for appointing an auditor for this reasons, this Court reminds the applicant that both parties to the case have a right to a fair trial which the Court must guarantee. **This includes ensuring** that it hears and duly examines any reasonable claims made by either of them. The fact that the auditor came to the conclusion that there was no wrongdoing on the part of the applicant, does not automatically mean that the Court was wrong in appointing the auditor to investigate the claims made by the applicant's wife.

"The Court notes that the case file is composed of over 2000 pages of evidence, which includes lengthy testimony by the parties on the reasons for the breakdown of the marriage which they kept insisting on attributing solely to the other party. In this respect the Court notes that it is the duty of the parties' lawyers to ensure that affidavits filed in court are restricted to facts which are relevant and material to the case, as

[7] **Frydlender v. France**, ECHR 30979/96 decided 27th June 2000.

opposed to filing whatever their client wish to share with the court, which, as can be seen from the applicant's journal entries filed in the separation proceedings, led to lengthy affidavits full of minor details which have no bearing on the case, but which the court would have had to examine. The Court notes also that three experts, namely a legal referee, an accountant and a social worker had to be appointed to aid the Court in reaching its decisions. Particularly with regards to the appointment of the social worker, and the issues which were brought up before the Court in relation to the parties' son, the Court notes that while the applicant tries to downplay these issues and attribute their examination to his wife's hysteria, it transpires from the records of the case that the parties' son was indeed a cause for concern, since he was performing very poorly at school, and had regressed to infantile behaviours such as bedwetting and thumb sucking. He was later on certified as having learning difficulties which were the result of problems with visual-motor integration, coordination skills, attention control and communication skills, as well as suffering from Aspergers.

"Regarding however the fact that there was a counter-claim, that the proceedings were converted into divorce proceedings and that the Court was asked to award a number of decrees, which according to the Respondent is further proof of the complexity of the case, the Court notes that while it is true that there was a counter-claim, the facts of the counter-claim and the legal points under examination were essentially the same as those in the original suit, and that furthermore, the conversion of the proceedings into divorce proceedings could not have had the effect of adding any element of complexity to the case. With regards to the applications *pendente lite* filed by the parties, the Court agrees with the applicant that these could not have resulted in adding to the complexity of the case, since they were decided by the Court in parallel to the gathering of evidence which was being done first by a Judicial Assistant, and then by a Legal Referee. However both would have contributed considerably to the length of the procedures.

"Therefore, the Court holds that whilst the separation case was not extraordinarily complex, certainly not enough to explain, on its own, the thirteen years that it took for the case to be finally decided, it was certainly neither straightforward nor simple - as the applicant is now trying to make it seem.

"Regarding the second and third criteria, the records of the separation/divorce proceedings, attached to this case by virtue of the decree dated the 8 May 2017, shows:

— "On the 17th August 2001, applicant's wife applied before the Second Hall of the Civil Court, to be authorized to proceed with a personal separation lawsuit against her husband, Colin John Morland (fol. 6);
— "The Second Hall of the Civil Court acceded to this request by virtue of a decree dated 31st January 2002 (fol. 7);

— "Applicant's wife instituted the personal separation proceedings against Colin John Morland on the 4th of January 2002 (fol. 1);

— "By virtue of a decree issued by the Second Hall of the Civil Court, Colin John Morland was ordered to pay monthly alimonies *pendente lite* to his wife and children ammounting to Lm 150 and Lm 210 respectively;

— "The case was appointed for first hearing on the 21st of May 2002, wherein the Court ordered that the writ of summons be translated and served upon Colin John Morland in the English language (fol 15);

— "Colin John Morland filed his statement of defence on the 25th of June 2002 together with a counter-claim (fol. 20-24);

— "Applicant's wife replied to the counter-claim on the 1st of July 2002 (fol. 27-28). On this same date, applicant's wife exhibited her own affidavit (fol. 29-64);

— "On the 4th of July 2002 Colin John Morland filed a request to extend his visitation rights (fol. 140). The said application was appointed by the Court for hearing on the 25th July 2002 for which Colin John Morland failed to attend. The application was eventually decided by the Court on the 1st August 2002;

— "Colin John Morland presented his affidavit on the 22nd August 2002 (fol. 146);

— "Until the end of year 2002, applicant's wife produced three affidavits of Emanuel Formosa (fol. 149-161), Phyllis Formosa (fol. 162-164) and Saviour Formosa (fol, 165-167), together with a medical certificate issued by Dr. S. Attard Montalto (fol. 168-169). On the 2nd December 2002, applicant's wife also produced Rita Agius to give evidence *viva voce* (fol. 168-169);

— "Three further witnesses (Catherine Fenech, Norbert Bartolo and Colin John Morland himself) gave testimony on the 21st March 2003 upon the request of applicant's wife (fol. 206-225);

— "Also on the 21st of March 2003, an application was filed by applicant's wife for the increase of the maintenance obligation to cover rent fees because Colin John Morland was living in the matrimonial home whilst his wife and children had to rent another premises (fol. 190-191). The Court acceded to this request on the 1st July 2003 and increased the maintenance obligation by Lm90 per month (fol 200). Applicants's monthly salary was Lm1500;

— "Between April and July 2002, Colin John Morland and his wife tried to settle their issues in an amicable manner and therefore sittings were being cancelled (fol. 348). No compromise however was reached;

— "Colin John Morland continued to give testimony on the request of applicant's wife on the 14th July 2003 and 3rd September 2003 (fol. 350 *et seq*);

— "Applicant's wife declared the conclusion of her evidence on the 20th November 2003 (fol. 376). From then onwards case was adjourned for the production of Colin John Morland's evidence;

— "Colin John Morland conducted the counter-examination on his wife on the 5th February 2004 (fol. 389-434), on the 18th February 2004

(fol. 435-451), on the 26th February 2004 and on the 6th April 2004 (fol. 456-467):

— "Between April and June 2004, Colin John Morland produced as wtnesses Lina Thake (fol. 473-501), Marlene Tua (fol. 502 and 514) and Lina Thake again (fol. 516-520);

— "By the end of 2004, a further affidavit was exhibited by plaintiff (fol. 523-551); Emanuel Formosa (fol. 567-587 and 654-673) and Saviour Formosa (fol. 590-653) testified again upon Colin John Morland's request;

— "On the 10th November 2004, Mary Ann Morland requested evidence from a representative of the Malta Stock Echange to correct his previous testimony. Colin John Morland filed a no objection on the 29th November 2004 and the Court acceded to such request on the 1st December 2004 (fol. 673A *et seq.*);

— "Meanwhile Mary Ann Morland filed another application on the 23rd November 2004 to present an additional affidavit (fol. 677). Although Colin John Morland was notified with this application, he never filed a reply. Court allowed the presentation of the affidavit subject to Colin John Morland's right to effect counter-examination (fol. 717);

— "The cross-examination of Colin John Morland was carried out on the 17th May 2005 (fol. 791);

— "Further applications had to be decided by the Court regarding the school of the children (fol. 719) and the travelling abroad of the children (fol. 815);

— "A legal expert was appointed on the 29th November 2005 (fol. 815);

— "Mary Ann Morland testified on the 2nd March 2006 (fol. 1317) and the 24th May 2006 (fol. 1337);

— "An application, dated 30th March 2006, was filed this time by Mary Ann Morland because Colin John Morland was not behaving properly in front of the children (fol. 818);

— "Another application was filed on the 25th April 2006, again by Mary Ann Morland, to allow her to take decisions concerning their child's health (fol. 1007). Colin John Morland objected to this application (fol. 1020). The Court, however, after hearing the witness of Dr. Simon Attard Montalto, was convinced to accede to Mary Ann Morland's demand (fol. 1036);

— "As a result a social worker was appointed on the 28th April 2006 (fol. 826). The social worker's report was presented in August 2006;

— "Another application was filed by Colin John Morland on the 4th June 2006 so that the Court appoints a family mediator;

— "Colin John Morland summoned a number of bank representatives to tender evidence on the 16th June 2006 (fol. 827). Josette Agius, Jeanette Lepre, Joe Borg Cardona and Catherine Fenech all testified on this date (fol. 1338 et seq.);

— "During the sitting of the 18th September 2006 the parties requested an adjournment to explore the possibility of reaching a compromise (fol. 1340);

— “On the 28th February 2007, upon the request of Mary Ann Morland, the Court ordered Colin John Morland to produce within three weeks, bank and financial statements regarding funds from Bradford and Bingley (fol. 835). These statements were exhibited on the 15th March 2007 (fol. 837);

— “On the 21st June 2007 Mary Ann Morland filed an application regarding the visitation rights of the children (fol. 1026). The application was decreed by the Court on the 3rd July 2007 (fol. 1030);

— “Following this decree, Colin John Morland, on the 29th October 2007, filed an application to change his visitation hours (fol. 1037). However this request was dismissed by the Court (fol. 1045);

— “Mary Ann Morland gave evidence again on the 20th November 2007 (fol. 1342);

— “The Court ordered for the closure of evidence on the 14th November 2007 (fol. 1047);

— “Colin John Morland and his wife filed a joint application on the 3rd December 2007 to revoke the nomination of the social worker. The application was accepted on the 5th December 2007 (fol. 1050);

— “The sitting of the 7th February 2008 was cancelled on behalf of Colin John Morland’s legal counsel (fol. 1052);

— “Dr. Aldo Vella testified on the 17th April 2008 (fol. 1344) whilst Colin John Morland testified on the 22nd May 2008 (fol. 1346). On this last date Colin John Morland presented an additional affidavit;

— “Mary Ann Morland and Colin John Morland testified again on the 3rd August 2008 (fol. 1346) and 29th September 2008 (fol. 1348);

— “During November 2008 parties agreed that the Court should nominate a technical referee with accounting expertise (fol. 1351). Consequently the Court nominated Accountant Mr. Lawrence Camilleri (fol. 1067);

— “Jonathan Phyall, Jeanette Lepre and Joe Borg Cardona gave evidence on the 24th November 2011 (fol. 1354) whilst Audrey Ghigo testified on the 19th of January 2009 (fol. 1356);

— “On the 17th February 2009, parties declared that they had no further evidence to produce (fol. 1357);

— “Mary Ann Morland filed an application on the 21st July 2009 to increase maintenance fee (fol. 1073). Colin John Morland objected to this increment on the 12th August 2009 (fol. 1109) but the Court on the 7th September 2009 acceded to this request and increased maintenance by €75 (fol. 1111);

— “Colin John Morland filed an application on the 23rd September 2009 to reduce the maintenance (fol. 1114) but the Court dismissed this application on the 25th September 2009 because the Court felt that nothing had changed from its previous decree of the 7th September 2009 (fol. 1122);

— “During the sitting of the 9th December 2009, the parties presented various documents for the attention of the technical referee (fol. 1358);

— “The technical referee presented his report on the 29th January 2010 (fol. 1127). On the 28th April 2010, the parties presented a list of

questions to the technical referee (fol. 1153). Following these questions the Court on the 16th June 2010 ordered the technical referee to present an additional report (fol. 1158). This additional report was filed on the 18th October 2010 (fol. 1159);

— "On the 8th November 2010, legal counsel to Colin John Morland requested the Court to adjourn cases after the 11th December 2010 (fol. 1170);

— "Technical referee Lawrence Camilleri testified on 3rd February 2011 (fol. 1176);

— "Colin John Morland presented an additional affidavit on the 9th March 2011 (fol. 1184);

— "On the 26th May 2011, the Court authorized the parties to present their written submissions before the legal referee (fol. 1206). Mary Ann Morland submitted her written submissions (fol. 1208) but Colin John Morland did not. On the 2nd November 2011, the Court allowed Colin John Morland to file his written submissions by the end of December 2011 (fol. 1238). Colin John Morland once again failed to submit his written submissions and therefore the Court on the 15th February 2012 ordered the legal referee to proceed with her report in the absence of such submissions (fol. 1243);

— "On the 18th January 2013, Colin John Morland requested the Court to allow him to present additional documents (fol. 1381). This request was accepted and Colin John Morland presented such documents (fol. 1383);

— "Another application dated 22nd February 2013 was filed by Colin John Morland to stop his son, Liam, from being examined by a psychiatrist or psychologist (fol. 1773). Mary Ann Morland objected to this request (fol. 1782). The Court on the 14th March 2013 decreed against this application (fol. 1807);

— "Legal Referee presented her report on the 14th March 2013 (fol. 1811);

— "On the 5th April 2013, Colin John Morland presented another application to present additional documents following to the legal referee's report (fol. 1828). This request was dismissed on the 13th May 2013 by the Court as the Court reasoned that Colin John Morland had ample time to present his evidence (fol. 1834);

— "A note requesting the appointment of additional referees was filed by Colin John Morland on the 24th May 2013 (fol. 1835);

— "Mary Ann Morland filed a list of questions on the 31st May 2013 to be answered by the legal referee (fol. 1836) whereas Colin John Morland presented his own list of questions on the 14th June 2013 (fol. 1840). On the 28th June 2013, the Court authorized the legal referee to reply to these questions in writing (fol. 1845). The replies by the legal referee were inserted in the acts on the 27th November 2013 (fol. 1849). Colin John Morland, on the 29th November 2013, requested the Court to allow him to make further questions (fol. 1859) and the legal referee replied to these additional questions on the 9th December 2013 (fol. 1961);

— “Mary Ann Morland filed her final written submissions on the 29th January 2014 (fol. 1861). On the other hand, Colin John Morland on the 31st January 2014, was granted two months time to present his final written submissions (fol. 1874). Colin John Morland did not manage to conclude his written submissions in time, so on the 14th March 2014 he requested for an extension. The Court accepted his request and gave him until the 15th April 2014 to file his submissions (fol. 1877). These submissions were eventually filed by Colin John Morland on the 22nd April 2014 (fol. 1878);

— “On the 23rd May 2014, Colin John Morland once more requested the Court to allow him to produce further documents. This request was accepted and following that the parties made their final oral submissions. Case was put off for judgment for the 24th October 2014 (fol. 1971);

— “The Civil Court (Family Section) did do not deliver judgment on the 24th October 2014 (fol. 1977) but handed down the judgment, nearly one month later, on the 21st November 2014 (fol. 1978);

— “Colin John Morland lodged a principal appeal from this judgment whilst his wife lodged a cross-appeal;

— “The appeal was appointed for hearing on the 6th October 2015;

— “Parties presented their oral submissions on the 10th November 2015 and judgment by the Court of Appeal was delivered on the 15th December 2015;

— “Colin John Morland filed an application before the Court of Appeal on the 10th May 2016 asking for clarifications about the judgment;

— “The application was dismissed by the Court of Appeal on the 31st May 2016 because it had nothing to add to its final judgment;

— “On the 9th of June 2016, Mary Ann Morland filed a judicial letter against Colin John Morland to settle the balance of €57,377.50 which were still due by Colin John Morland following the judgment delivered on the 15th December 2015;

— “In August 2016, Mary Ann Morland obtained a garnishee order against Colin John Morland for the amount of €57,377.50 as principal debt and for the amount of €4,212.92 as legal interests;

— “The garnishee order was withdrawn on the 19th September 2016 in view of payment effected by Colin John Morland;[8]

“The applicant argues that the Court allowed his wife to raise unnecessary and unwarranted issues and that she created a multitude of problems regarding the cross-examination of her witnesses, such that, the proceedings continued for a further eleven years. He held that the Court was to assess whether experts were needed and to monitor their efficiency, which it could not do properly because sittings before the Court were sporadic. **He argues further that he only asked for an adjournment once and that he only failed to appear for hearings where his presence was not needed** and that in fact the only sitting which records an absence of both himself and his legal counsel **was**

[8] Vide note of Attorney General’s submissions at page 556 to 561.

that of the 6th of April 2005. Respondent on the other hand argues that the delay occurred mainly due the applicant's behaviour, giving a number of examples of behaviour by the applicant which according to the Respondent caused unnecessary delay in the proceedings. Respondent argues that on the other hand the Court always decided the various *pendente lite* applications expeditiously and imposed time limits, could not close evidence because sittings were not being wasted, delivered judgement within six months, and the appeal stage was very expeditious, arguing that the applicant cannot expect compensation because the Court was patient with him.

"The Constitutional Court has already noted also that the appointment of legal referees generally means that in practice sitting are held periodically, during which only one or two witnesses testify.[9] This was in fact what happened in this case. In six years and 2 months, a total of thirty-eight sittings were held for the production of evidence by the parties, that is, a total of six sittings a year, or a sitting every two months on average. During these sittings only one or maybe two witnesses would manage to testify, while the cross-examination of the contendents and their main witnesses spanned a number of sittings. The Court furthermore notes that there were a number of length gaps between sittings, and this not including in the most part the summer recess, namely:

- "4 months between 21/03/2003 and 14/07/2003 (although this was because the parties were trying to reach an amicable compromise);
- "3 months between 03/09/2009 and 09/12/2003;
- "3 months between 06/12/2004 and 18/03/2005;
- "12 months and a week between 17/05/2005 and 24/05/2006;
- "8 ½ months between 06/03/2007 and 20/11/2007;
- "3 ½ months between 20/11/2007 and 11/03/2008

"Therefore, during the evidence gathering stage of the proceedings, there was an aggregate period of apparant inactivity of two and a half years (excluding the four months in 2003 when the parties were trying to reach an amicable compromise) which can certainly not be attributed to the applicant. The Court however notes that the inactivity is only an apparant one because evidence was still being heard and gathered by the Judicial Assistant and Legal Referee and other professionals appointed by the Court during the above mentioned period.

"The Court notes in this respect however, that although the applicant tries to blame his wife for stalling the cross-examination of her witnesses, from the minutes of the sittings, it transpires that in actual fact there was only one sitting meant for the cross-examination of one of her witnesses during which nothing happened because there was a misunderstanding regarding the notification of the said witnesses. The

[9] **Iris Cassar et vs L-Avukat Generali**, Constitutional Court decided 27th March 2015.

Court notes that while the applicant claims that he and his legal counsel only failed to attend **once** in Court, **from the minutes of the sittings held before the Judicial Assistant and the Legal Referee it transpires that the applicant wasted seven sittings, either because he or his lawyer did not appear, or because his lawyer appeared too late for the sitting to be held.** The Court notes also that the applicant cannot complain that the sittings held before the Court were too sporadic to enable the Court to exercise control of the gathering of evidence before the Judicial Assistance and the Legal Referee, and at the same argue that when he did not appear before the Court, this was only because his presence was not needed. Apart from all this, the Court noted that from the minutes of the case, it is clear that the applicant and his legal counsel failed to appear for far more than one sitting before the Court. It was the applicant's duty to ensure that he or his legal counsel appeared in Court to keep the Court informed about the state of evidence gathering and about any complaints he may have had about his wife's behaviour during these sittings. Also noted in this respect, that independently of this, the Court itself has a duty to ensure the proper supervision of the evidence gathering stage, **which the Court was clearly doing as evidenced by the notes which the Judicial Assistant periodically submitted to the attention of the Judge regarding the sittings being held.**

"Furthermore, with reference to the applicant's complaint regarding the appointment of the accountant, which according to the applicant should not have been done by the Court as this was simply a stalling technique employed by his wife, the Court notes that it transpires that **the applicant himself had submitted that he had no objection to the appointment of an accountant and that this was in the interest of both parties**,[10] and therefore he cannot now complain that this appointment was unnecessary and served to continue to unduly prolong the proceedings. The Court notes furthermore that the applicant repeatedly failed to submit his written submissions before the Legal Referee, to the extent that the Court had to eventually authorise the Legal Referee to draw up her report even in the absence of the applicant's written submission. In this regard, the applicant showed an absolute lack of interest in the case, failing to submit his written submissions before the Legal Referee, **even though he had well over a year to do this**.

"In light of all of the above, the Court therefore considers that the period of thirteen years for the conclusion of the separation proceedings in question was unneccesarily lengthy, and further concludes that **the parties share the blame for the undue length of the proceedings for the reasons outlined above.**

"With regards to the issue of compensation, the Court notes that the Constitutional Court has previously held that for violations of the right

[10] Fol 1065 of the separation proceedings.

to a fair trial within a reasonable time the Court does not award pecuniary damages allegedly suffered, but only moral damages to make good for the violation suffered.[11]

"The European Court of Human Rights has given specific indications regarding the equitable liquidation of damages suffered due to undue delay in judicial proceedings. It has been held infact that a sum of between **€1,000 and €1,500 for every year that the proceedings were still pending**, to be calculated from the day when the proceedings were filed until they were resolved by means of a final judgement as the basic figure for the relative calculation.[12]

"This basic figure is then reduced according to the number of Courts who heard the case, the applicant's conduct – in particular the number of months or years of delay that the applicant is responsible for – and also the standard of living of the country concerned.

"Accordingly, the basic figure which the applicant is entitled to as compensation for the violation suffered by him is in the amount of €13,000. This amount however has to be reduced to reflect the fact that **the case was tried by two courts**, and **the applicant is equally to blame** for the length of the proceedings and **the standard of living of the country.**

"In light of the above, the Court therefore concludes that the compensation due to the applicant is in the amount of €2,500.

"**Deliberates:**

"Regarding the right to peaceful possession of one's possessions

"Applicant bases his complaint under this heading on two arguments: firstly, that had the case taken the three years he contends it should have taken instead of the thirteen years it actually took, he would have paid €81,095.17 less in maintenance to his wife, and secondly that the prolonged separation procedure brought about a state of forced co-ownership which was not proporational to the aim sought.

"Regarding the first basis for this complaint, the Court first of all notes that with regards to the decrees which increased the maintenance that had originally been set by the Family Court, it is not completely clear whether these increases were meant to be increases to the maintenance payable for the children, or the maintenance payable as spousal support to the applicant's wife. The first request for an increase in maintenance was made by the applicant's wife in order to cover the additional expenses to rent accommodation for herself and the party's two children, after a psychologist advised her that it was better for the children, in particular her son, to live in their house, as opposed to

[11] **Said vs L-Avukat Generali**, Constitutional Court decided 11th November 2011.
[12] **Pizzatti v. Italy**, ECHR 62361/00 decided 10th November 2004.

continuing living with her mother, as this offered a more stable environmental for the children. The Court recognises that according to the law, **maintenance due for the support of one's children is meant to cover food, clothing and accommodation**. With regards to the second request, the applicant's wife requested that both her maintenance as well as that due of behalf of the children be increased due to the increased cost of living. In partially acceding to the request, the Family Court did not state clearly in its decree how much of that increase related to the wife's maintenance and how much of it related to the children's maintenance. The Court therefore considers that the applicant's calculations were made on the wrong criteria.

"The Court further notes the decision to stop the applicant's wife maintenance after two years would have elapsed from the judgement was largely based on the fact that by then their children were 18 and 17 and were therefore independent. The Court also notes that from the acts of the separation case, it results that their son needed extra care and attention, to the extent that while the case was still pending, it transpired that the child suffered from certain conditions, including Aspergers, and that his mother had to help him considerably with his school work at home, take him to weekly sessions at the Speech-Language Clinic in Zebbug and was further more directed by the professional overseeing the care of the child to carry out activities with him at home. From the acts of the proceedings of the separation case, it results that the applicant's wife carried out these duties diligently, to the extent that their son managed to obtains a few O'levels and his school leaving certificate, which considering the expert reports that this Court has examed about their son, is certainly a testament to his wife's dedication to their son's well-being and development. Considering that their son needed such special attention, it takes no stretch of the imagination to understand that it would have been rather difficult for the applicant's wife to work and maintain herself, without her husband's help, independently of the length of the separation proceedings. This Court is furthermore cognizant of the fact that while the applicant and his wife were still bringing up their children, there existed in Malta, no free child care facilities that could take care of the children after school until their mother returned home from work, and during the school holidays. It was therefore difficult, if not impossible, for a woman to work and take care of young children, especially one with special needs, without her husband's support. Therefore, had the applicant's wife been obliged to seek employment because of lack of spousal support when the children were still too young to be left to fend for themselves, applicant would still have had to help cover the costs of the child-care required. The applicant therefore would have had to pay far more than he did in spousal support to his wife, especially during the 3 monthly summer holidays during which, the children would have needed full-time care. In view of this, the Court disagrees with the applicant that had the case been concluded earlier, he would have had to pay less in maintenance, and therefore considers that this argument is unfounded.

"Regarding the second basis of applicant's argument, the Court considers that it may only enter findings of a violation on the basis of concrete situations, rather than hypothetical arguments. In fact, in **Rossi and Others v. Italy,** which was decided on the 16th of December 2008, the ECHR declared that the applications under examination were inadmissible, after considering that Article 34 of the Convention:

> "***exige qu'un individu requérant se prétende effectivement lésé par la violation qu'il allègue. Il n'institue pas au profit des particuliers une sorte d'actio popularis pour l'interprétation de la Convention…***"

"On the same vein, the ECHR stated in **Fairfield and Others v. the United Kingdom,** decided on the 8th of March 2005 that :

> "***Article 34 requires that an individual applicant should claim to have been actually affected by the violation he alleges (see Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, pp. 90-91, §§ 239-40, and Klass and Others v. Germany, judgment of 6 September 1978, Series A no. 28, pp. 17-18, § 33); it does not institute for individuals a kind of actio popularis for the interpretation of the Convention or permit individuals to complain against a law simply because they feel that it contravenes the Convention (see Norris v. Ireland, judgment of 26 October 1988, Series A no. 142, pp. 15-16, § 31, and Sanles Sanles v. Spain (dec.), no. 48335/99, ECHR 2000-XI). The same applies to events or decisions which are alleged to infringe the Convention.***"

"An exception to this requirement is however made if in the case under examination, the applicant proves that he was required to modify his conduct, as can be seen by the judgements of the ECHR handed down in the cases of **Tanase v. Moldova** decided on the 27th of April 2010, **Sejdic and Finci v. Bosnia and Herzegovina** decided on the 22 of December 2009 and **Michaud v. France** decided on the 6th of December 2012.

"In this particular case, the Court notes that applicant produced before this Court no evidence that he was impeded from acquiring anything due to continuing effects of the community of acquests or that he had to modify his behaviour because of it. The Court infact notes in this regard that the applicant never attempted to file any application before the court seized with the separation case to ask for the court's permission to make any unilateral aquisitions, in light of the length of the proceedings.

"The Court also notes that as from 2011, it had become possible for the applicant to file an application to move the court to order the cessation of the community of acquests while the separation was ongoing by virtue of Article 55 of the Civil Code, which was introduced into the law by means of Act XIV of 2011. In the Court's opinion, the fact that the applicant failed to make such a request to the Family Court, which

would have meant that the state of ‘forced co-ownership’ he is impugning would have come to an end about four years prior to the actual dissolution of the marriage, proves that applicant’s argument is merely hypothetical. Had applicant truly been impeded for acquiring anything, or modify his behaviour, due to the continued existence of the community of acquests, he would have certaintly filed such a request before the Family Court.

“Applicant’s complaint under this heading is therefore being dismissed.

“**Deliberates:**

“Regarding the right to an effective remedy

“Under this heading, the applicant complains that the separation/divorce proceedings were not an effective remedy for the applicant’s situation because it took thirteen years for them to be concluded. The Attorney General rebuts this complaint by arguing that the applicant did in fact have an effective remedy for the human rights violations complained by him before the courts of constitutional jurisdiction, as has been confirmed by the European Court of Human Rights.

“The Court observes that in his argument, the applicant conflates his rights in relation to ordinary proceedings, with this rights in relation to proceedings specifically meant to provide an effect remedy for human rights violations. Article 13 envisages precisely the latter, and therefore the length of the separation or divorce proceedings is immaterial for a complaint made under Article 13, since the effective remedy contemplated in that Article is one meant to redress a human rights violation. Therefore, the issue should rather be whether the applicant had at his disposal an effective remedy to redress the excessively lengthy separation/divorce proceedings. In this regard, the Court makes reference to the judgement of the ECHR in the case **Maria Theresa Deguara Caruana Gatto and others v. Malta** decided on the 9th of July 2013 which confirmed that there is nothing to show that constitutional redress proceedings are not effective for the purposes of Article 13 with regards to complaints regarding the length of proceedings, having found that:

> “**[i]*n so far as the complaint refers to the lack of an effective remedy in relation to their length-of-proceedings complaint, again the Court observes that a remedy was provided under Maltese law, either in the context of ordinary proceedings, by means of a referral to the constitutional jurisdictions by the court hearing the merits of the case, or alternatively through the separate institution of constitutional redress proceedings.”***

"No evidence has been produced and no arguments have been made by the applicant that could persuade this Court to depart from these reasoning. These proceedings have taken under a year and this Court is empowered by the Constitution to grant the applicant whichever remedy it deems necessary to adequately redress the violation suffered by him. This complaint is therefore manifestly unfounded and is consequently being rejected.

"**For these reasons, the Court accepts the Attorney General's pleas in respect of applicant's complaints under Article 1 of Protocol 1 and Article 8 and 13 of the European Convention on Human Rights and rejects the Attorney General's pleas relating to applicant's complaint relating to Article 6 of the European Convention on Human Rights and consequently:**

1. "**Accedes in part to the first request of the Applicant, and declares that Applicant suffered a violation of his right to a fair trial within a reasonable time in the case Mary Anne Morland pro et noe vs Colin John Morland (130/2002);**

2. "**Denies the second request of the Applicant;**

3. "**Accedes to the second request and orders the Attorney General to pay the Applicant by way of compensation the sum of two thousand and five hundred euro (€2,500) by way of compensation for the violation of the right to a fair trial within a reasonable time, with interest accruing from the date of this judgement until payment in full is made.**

"**One third of the costs of these proceedings are to be borne by the applicant, while the remaining two thirds are the borne by the respondent**".

Appeal application filed by plaintiff Colin John Morland (05.04.2018):

3. Plaintiff Colin John Morland felt aggrieved by the judgment given by the Court of First Instance, and consequently lodged this appeal in which he expressed the following FOUR (4) grounds of appeal.

(1) **FIRST** ground of appeal - *cause of delay of proceedings*

Appellant points out that notwithstanding the fact that the First Court

acknowledged at the outset that the judicial system is failing the public in that it is not ensuring that Court proceedings are concluded within a reasonable time, it placed no blame on said system for his particular delay and decided that it was him and his ex-wife who were (equally) to blame for the delay in proceedings regarding Court case **Mary Anne Morland pro et noe v. Colin John Morland** (130/2002). He insists that this is contradictory.

Furthermore he maintains that the First Court was wrong in attributing half of the blame for delay in the proceedings to him. While he concedes that he may be "slightly" to blame for the delay, he insists that he most certainly cannot be considered to have contributed to the extent as his ex-wife.

(2) **SECOND** ground of appeal– *amount of compensation awarded*

With reference to the First Court's observation that for violations of the right to a fair trial within a reasonable time compensation is awarded for moral damages and not for pecuniary damages, appellant complains that this is contrary to the very spirit of the European Convention and its teachings on just satisfaction and the provision of effective remedies for violations of fundamental human rights.

Furthermore he complains that the compensation awarded was low and unsubstantiated.

(3) **THIRD** ground of appeal– *Art. 1 of Protocol 1 of the European Convention (peaceful enjoyment of one's possessions)*

Plaintiff had argued that his right to the peaceful enjoyment of his possessions was violated because:

(a) had the case taken 3 years instead of 13 years: he would have paid around €81,000 less in maintenance to his wife; and

(b) furthermore the prolonged proceedings brought about a state of forced co-ownership, un-proportional to the aim sought.

The First Court had found his complaints unfounded.

(a) With regards to his first basis for complaint, the First Court had noted that:

1. The Family Court's decision to stop wife's maintenance after two years would have elapsed from the judgment was largely based on the fact that by then the children would be 17 and 18 and therefore independent.

Appellant however highlights the fact that his children's dependence had

nothing to do with the maintenance of his wife, because there was a separate amount determined for the maintenance of the children.

2. His son needed extra care and that since there were no free child-care facilities at the time, had his wife been obliged to seek employment because of lack of spousal support, he would still have had to help cover the costs of child-care facilities. It commented that he would have had to pay far more than he did in spousal support.

Appellant however finds difficulties with this argumentation: (i) Firstly he makes reference to the fact that the Family Court itself claimed that there was not enough evidence produced to establish whether the son's condition was severe; (ii) secondly he points out that there was a willingness on the part of his children's maternal grandmother to take care of them so the First Court wrongly assumed that child-care facilities would have been resorted to; and (iii) thirdly he insists that had the proceedings been conluded earlier he would not have paid all the maintenance he paid.

(b) With regards to his second basis for complaint the First Court noted that:

(1) It may only enter findings of a violation on the basis of concrete

situations rather than "hypothetical" arguments.

Appellant contends that his legitimate expectation to be discharged from the obligation to pay maintenance is not a "hypothetical" situation but a recognized "possession" within the autonomous definition given to the word by the ECHR.

(2) Plaintiff produced no evidence that he was impeded from acquiring anything due to continuing effects of the community of acquests or that he had to modify his behavior because of it; and furthermore after 2011 it was possible for him request a cessation of the community of acquests (state of co-ownership) while the Court case was still ongoing.

Appellant argues that it was a "state of fact" that he could not buy anything or make investments without his wife owning half of what he bought or invested in, and there was not need to prove such state of fact. Furthermore he argues that the 2011 amendments would only have brought a solution after 6 years of forced co-ownership (i.e. the period of time past the 3 years that the proceedings should have reasonably taken); and, besides, in 2011, he assumed that it would not be long until proceedings would be concluded so he did not consider it practical to avail himself of the new legislation.

(4) **FOURTH** ground of appeal– *Article 13 of the European Convention*

(the right to an effective remedy)

The First Court held that the length of the separation proceedings is immaterial for the purposes of a complaint under Article 13 since the effective remedy contemplated in such provision is one meant to redress the human rights violation. It held that the constitutional proceedings (which took under a year) afforded an effective remedy.

Applicant however complains that he was left with no remedy to recover that which he unjustly lost by the delay of the proceedings.

Reply of defendant (respondent) Advocate General to the plaintiff's appeal application (11.04.2018)

4. Respondent Advocate General explains why each of appellant's above-mentioned grounds of appeal are unfounded and unjustified, and respectfully submits that the judgment given by the First Court should be confirmed, plaintiff's appeal accordingly discarded, and expenses of this procedure borne by plaintiff (appellant).

CONSIDERATIONS OF THIS COURT

The First Ground of appeal *(regarding responsibility for lengthy proceedings)*

5. The separation proceedings (**Mary Anne Morland pro et noe v. Colin John Morland** – *130/2002*) were initiated in front of the Civil Court First Hall on the 4th of February 2002, and decided on the 21st November 2014.[13] Both parties appealed from the judgment and the Court of Appeal delivered its judgment on the 15th of December 2015. Hence thirteen years and ten months had elapsed until proceedings were definitively terminated.

6. On the 11th April 2017 Colin John Morland instituted these current constitutional proceedings, arguing that as a result of such lengthy separation proceedings his fundamental rights to have a fair hearing were infringed (as were also, allegedly, other fundamental rights of his, also enshrined in the European Convention of Human Rights).

7. The First Court in these constitutional proceedings acknowledged that it is the State's duty to ensure that the judicial process can run its course without undue delay. It acknowledged that (as has been previously observed by this Constitutional Court) Maltese Courts are in fact burdened with a heavy case load which often slows down the judicial process of cases. Following a meticulous examination of the Court acts of above-mentioned separation proceedings, it concluded that the period of thirteen years for the conclusion of said proceedings was

[13] With the parties being divorced during the course of proceedings, on the 25th April 2014.

"*unnecessarily lengthy*" and that "*the parties share the blame for the undue length of the proceedings…*". It also ordered defendant Attorney General to pay appellant the amount of €2,500 by way of compensation for moral damages to make good for the violation suffered.

8. Appellant bases his First Ground of appeal on two arguments:

(i) firstly he argues that the First Court "contradicted" itself in that although it recognized an institutional failure in the justice system it attributed the blame to the parties and no blame on the very same system for the delay in question, and

(ii) secondly he argues that he was only "slightly" to blame for the delay, and certainly not to the same extent as his ex-wife.

9. With regards to his first argument, this Court observes that although the First Court declared that both parties "*share the blame*" for the undue length of proceedings, it also attributed responsibility to the State itself, such that it ordered the defendant Attorney General to pay compensation in the amount of €2,500. Hence appellant is certainly not correct in complaining that the First Court attributed all the blame to him and his wife and none to the State.

10. With regards to his second argument, to say that appellant only contributed "slightly" to the delay, would not be entirely accurate. This Court *highlights* the following episodes:

- Between April and July 2002 both appellant and his wife tried to settle their issues (fruitlessly) and so sittings were cancelled;

- On the 20th of November 2003, appellant's wife declared her evidence concluded[14] and from then on the case was adjourned for the production of appellant's evidence;

- On the 18th of September 2006 both appellant and his wife requested an adjournment in the hope of reaching a compromise (again unsuccessfully);

- The sitting of the 7th February 2008 was cancelled on behalf of appellant's legal counsel;

- On the 17th of February 2009, both parties declared their evidence concluded;

[14] Although she declared her evidence concluded, she did produce some further evidence along the way (such as a further affidavit, a request for a witness to correct his previous testimony, a request for appellant to produce financial statements).

- On the 8th of November 2010, legal counsel to appellant requested an adjournment for after the 11th December 2010;

- On the 9th of March 2011, appellant presented an additional affidavit;

- On the 26th of May 2011 the Court authorized parties to present their written submissions before the legal referee. Appellant's wife presented her written submissions but appellant did not. On the 2nd of November 2011 Court conceded him a further period until 11th of December 2011 to present his submissions but he again failed to do so. On the 15th of February 2012 the Court authorized the legal referee to proceed with her report in the absence of such submissions.

- On the 18th of January 2013, appellant requested the Court to allow him to present additional documents. This was accepted and he submitted such documents.

- On the 5th April 2013 (following the legal referee's report of the 15th March 2013) appellant requested the Court to allow him to present additional documents. This request was denied.

- Following the presentation of the legal referee's report on the 14th

of March 2013, both appellant and his wife filed a list of questions for her on the 14th June 2013 and the 31st May 2013 respectively. On the 29th of November 2013 (two days after the legal referee's replies were inserted in the act), appellant requested the Court to allow him to make further questions and these were answered on the 9th of December 2013.

- Appellant's wife filed her final written submissions on the 29th January 2014. Appellant filed his belatedly on the 22nd April 2015.

- On the 23rd May 2014 appellant once more requested the Court to allow him to produce further documents. This was request accepted.

11. In addition to the above, throughout the duration of the proceedings both parties presented a considerable number of requests by means of applications. As the First Court rightly pointed out, although said applications would be decided concurrently with the gathering of evidence, they would have certainly contributed to the length of the proceedings.

12. In view of the above, this Court finds that the First Court was right in concluding that both parties contributed towards the undue length of proceedings; and that furthermore appellant is not at all justified in arguing that he contributed only to a "slight" extent.

13. Hence this Court regards appellant's first ground of appeal as unjustified.

The Second Ground of appeal *(regarding the amount of compensation)*

14. Appellant bases this second ground of appeal on two arguments:

(i) firstly he argues that the First Court should have awarded not only moral (non-pecuniary) damages but also pecuniary damages;

(ii) secondly he submits that the First Court was erroneous in its calculation of non-pecuniary damages in the amount of €2,500, and explains why it should have arrived at the amount of €15,309 instead.

15. With regards to his first argument, this court underlines the fact that in cases where one is alleging that one's right to a fair hearing has been violated because of unreasonably long proceedings, as a rule, the compensation awarded is compensation for moral damages, to make good for the violation of the person's right to a fair hearing, but pecuniary damages may be awarded if these have occurred to applicant.

16. This same Constitutional Court, in the case **Gasan Enterprises Ltd v. Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar** decided on the 3rd of February 2009 held that:

> "*Meta jiġi riskontrat dewmien skont l-Artikolu 6, ir-rimedju għandu jkun, bħala regola, kumpens konsistenti f' danni morali li jkunu jirrispekkjaw id-dewmien inġustifikat, u dan indipendentement min-natura tal-kawża jew il-valur tal-proprjeta` in kontestazzjoni, u bla preġudizzju għad-danni materjali ossia reali li dak id-dewmien seta' effettivament ikkawża*".

17. Also in the case **Francis Said v. L-Avukat Ġenerali** decided (also) on the 3rd of February 2009, this same Constitutional Court reiterated that:

> "*…ir-rimedju li tista' tagħti l-Prim' Awla (kif ukoll din il-Qorti) bħala rimedju għad-dewmien jista' jvarja minn sempliċi dikjarazzjoni ta' leżjoni, għal danni morali, jew, eċċezzjonalment, anke għal danni materjali*".

18. In this case, this Court does not consider that appellant really and truly suffered pecuniary damages because of the lengthy procedures. Under his third ground of appeal (i.e. his alleged violation of his right to peaceful enjoyment of his property under Article 1 of Protocol 1) he argues that because the separation proceedings were unreasonably lengthy he ended up paying over €80,000 in maintenance to his wife. Although he portrays this issue as a violation of his right to the peaceful enjoyment of his property, it is in fact more fitting to consider it as pecuniary damages "allegedly" suffered by him as a result of the lengthy procedures, and so this Court is going to consider it here, under its considerations related to his second grievance.

19. Now the First Court (in its consideration of appellant's argument under the heading of the "*right to peaceful possession of one's property"*

- Article 1 of Protocol 1, that he was deprived of more than €80,000 which he unnecessarily paid in maintenance because of lengthy procedures) concluded that applicant did not manage to prove that had the case been concluded earlier he would have had to pay less in maintenance and so deemed such argument as unfounded. The First Court gave two reasons for this conclusion.

(a) Firstly, it pointed out that with regards to the decrees which increased maintenance that had originally been set by the Family Court it was not clear whether they were meant to be increases with regards to maintenance payable to the children or as spousal support. (**Hence it was never proved that a particular portion of the maintenance paid throughout the proceedings was specifically intended as spouse maintenance *per se***). It also pointed out that in its final judgment the Family Court ordered that appellant wife's maintenance is to stop after two years from the judgment[15] and commented that this decision was largely based on the fact that by then their children were 18 and 17 and were therefore independent. (**Hence this indicates that any spousal maintenance paid to the wife throughout proceedings was in fact paid to her in consideration of her role as prime caregiver of the children**). The Family Court in fact stated the following:

> "*The Court observes that in view of the fact that plaintiff is capable of working and providing for her needs as she had done in the past, even*

[15] The Court of Appeal confirmed such position

> *though she has not worked for a number of years to take care of the family, and also in view of the fact that the parties's children are now of a certain age and have attained a high degree of independence, and that she will be receiving a hefty sum as her share of the community of acquests, defendant is to pay plaintiff maintenance for her sustenance for a limited period of two years in the sum of two hundred [€200] monthly. However, should defendant pay plaintiff the entire sum of €174,233 before the expiration of the two-year period, then on payment of the whole sum his obbligation to pay the €200 montly ceases after two months from the said payment*".

(b) Secondly the First Court pointed out that from the acts of the separation case it transpires that the son suffered from certain conditions (including Asperger's Syndrome) and that appellant's wife had to dedicate a lot of her time towards his well-being and development. Because of this fact, the First Court commented that it would have been very difficult for appellant's wife to work and maintain herself without her husband's help, and this independently of the length of the separation proceedings. **Although appellant argues that the Family Court had declared there was not enough evidence to prove that his son's condition is sufficiently severe to the point that he is incapable of working and providing for himself, this has nothing to do with the First Court's above mentioned considerations, which concern the period when the son was still being brought up.**

The First Court also commented that since throughout the proceedings the children were still being brought up, and since no free childcare facilities were available at the time, had appellant's wife been obliged to seek employment because of lack of spousal support appellant would

have had to contribute towards the costs of child-care and this would exceeded the marital support he was paying. **Although appellant points out that the children's maternal grandmother would have helped take care of the children had his wife sought employment and hence the First Court wrongly assumed that child-care facilities would have been resorted to, this Court cannot help but point out that it is rather arrogant of appellant to assume that the children's maternal grandmother would have been available to mind the children, and even more so, that such "services" given by her have no monetary value**.

20. In the light of these considerations, this Court does not find that because of the lengthy proceedings appellant suffered any pecuniary damages, more so, in the amount of €80,000 .

21. <u>Now with regards to appellant's second argument</u> (under this second grievance), this Court **does** in fact believe that the compensation in the amount of €2,500 awarded by the First Court to make good for non-pecuniary damages is in fact rather low.

22. Appellant submits that by following the "formula" which the ECHR came up with in the case **Pizzati v. Italy** (62361/00) decided on the 10th of November 2004 as a method of calculating compensation for non-

pecuniary damages as a result of lengthy proceedings, the First Court should have arrived at an amount much higher than €2,500. In fact he submits that it should have arrived at €15,309 instead.

23. In the above-mentioned case, the Strasbourg Court indeed devised a "formula"; in that it enunciated guidelines as to how courts may arrive at an appropriate liquidation of non-pecuniary damages suffered as a result of unreasonably lengthy court proceedings:

> "*26. As regards an equitable assessment of the non pecuniary damage sustained as a result of the length of proceedings, the Court considers that a sum varying between EUR 1,000 and 1,500 per year's duration of the proceedings (and not per year's delay) is a base figure for the relevant calculation. The outcome of the domestic proceedings (whether the applicant loses, wins or ultimately reaches a friendly settlement) is immaterial to the non-pecuniary damage sustained on account of the length of the proceedings.*
>
> "*The aggregate amount will be increased by EUR 2,000 if the stakes involved in the dispute are considerable, such as in cases concerning labour law, civil status and capacity, pensions, or particularly serious proceedings relating to a person's health or life.*
>
> "*The basic award will be reduced in accordance with the number of courts dealing with the case throughout the duration of the proceedings, the conduct of the applicant – particularly the number of months or years due to unjustified adjournments for which the applicant is responsible – to the stakes involved in the dispute – for example where the financial stakes are of little importance for the applicant – and on the basis of the standard of living in the country concerned. A reduction may also be envisaged where the applicant has been only briefly involved in the proceedings, having continued them in his or her capacity as heir.*
>
> "*The amount may also be reduced where the applicant has already obtained a finding of a violation in domestic proceedings and a sum of money by using a domestic remedy. Apart from the fact that the existence of a domestic remedy is in full keeping with the subsidiarity principle embodied in the Convention, such a remedy is closer and more accessible than an application to the Court, is faster, and is processed in the applicant's own language; it thus offers advantages*

that need to be taken into consideration".

24. This "formula" has in fact been followed by our courts in calculating non-pecuniary damages suffered as a result of unreasonably lengthy court proceedings. (Vide: **Victor Buttigieg et v. l-Avukat Ġenerali et**)[16]). **However it must be said that appellant fails to mention that this case (Pizzati v. Italy) was eventually decided differently by the Grand Chamber of the same Court in 2006 and the damages awarded were accordingly reduced.**

25. According to this judgment, the Court concerned, in liquidating the non-pecuniary damages, would start off with a base figure (such base figure being a sum varying between €1,000 and €1,500 for every year of the duration of the proceedings) and such base figure would be reduced according to:

- the number of courts hearing the case;
- the applicant's own contribution to the delay in the proceedings;
- the country's standard of living.

Since however the criteria mentioned were not accepted by the Grand Chamber in the same case the Court will not apply them.

[16] decided by the First Hall of the Civil Court on the 13th July 2017 and by this Constitutional Court on the 26th January 2018

The Court in this case feels that compensation should be somewhat higher than that awarded by the first Court and that the amount should be increased to **€3,500** (and not €15,309, as appellant claims).

26. Hence this Court regards appellant's second ground of appeal as **partially** justified.

The Third Ground of appeal *(regarding Article 1 Protocol 1)*

27. Appellant bases his third ground of appeal (that his right to the peaceful enjoyment of his possessions as enshrined in Article 1 Protocol 1 of the European Convention was violated by the lengthy separation proceedings) on two arguments. He contends that because separation proceedings were unreasonably lengthy:

(i) he ended up paying over €80,000 in maintenance to his wife; and

(ii) he had to endure a state of forced co-ownership which was not proportional to the aim sought.

28. Now as this Court explained in its considerations regarding appellant's second ground of appeal, this first argument of his would more appropriately be classified as "pecuniary damages" rather a violation of

his right to enjoy property under Article 1 Protocol 1, and in fact dealt with it as such. In fact, as respondent Attorney General argues in his reply to appellant's appeal, the issue of maintenance as a possessory right does not quite fall within the scope of Article 1 of Protocol 1. (In any case, as this Court found, it was not satisfactorily proven that as a result of the lengthy proceedings appellant suffered a loss of over €80,000 in maintenance paid to this wife – whether one refers to such sum as pecuniary damages or a deprivation of property).

29. With regards to appellant's second argument this Court does not agree with applicant that the state of co-ownership (i.e. the matrimonial regime of community of acquests) which continued throughout the lengthy separation proceedings can be said to amount to unjustified "control of use" within the scope of Article 1 of Protocol 1. This Court finds that the First Court was right in considering as unfounded appellant's argument that he had to endure a "forced state of co-ownership".

30. The First Court first of all declared that it could only enter findings of a violation on the basis of **concrete** situations, rather than **hypothetical** arguments, and remarked that appellant in fact produced no evidence to show that because of the state of co-ownership (i.e. the existence of the community of acquests) that subsisted throughout the separation proceedings he was impeded from acquiring anything or that

he had to modify his behavior because of it. It also noted that appellant never attempted to file any application before the Family Court to ask permission to make any unilateral acquisitions. Furthermore it noted that as from the year 2011, by virtue of Article 55 of the Civil Code (which was introduced by Act XIV oft 2011) it was possible for appellant to file an application requesting the Family Court to order the cessation of the community of acquests while the proceedings were still going on, thus bringing an end to the “forced co-ownership” he complains about.

31. This Court makes such deliberations its own and moreover makes following observation: appellant argues that by availing himself of Article 55 this would only have rectified the situation “partially” because by 2011 quite a number of years had gone by, and that furthermore, by then he could have reasonably expected a final judgment so it would not have been practical or feasible for him to make such request, and “waste further time”. This Court however notes that when the law was enacted the legal referee was still in the process of carrying out her duties, and for a couple of years later appellant himself was still making requests to the Family Court to produce additional evidence. Thus he had every opportunity to “salvage” the situation he complains about yet remained inactive. Considering such circumstances this Court finds it unfitting on his part to seek a declaration that he suffered a violation of his right to the peaceful enjoyment of his property.

32. Hence for the above-mentioned reasons, this Court finds appellant's third ground of appeal also unfounded.

The Fourth Ground of appeal *(regarding the right to an effective remedy under Article 13)*

33. The First Court concluded that applicant was afforded an effective remedy for the breach of his human rights, and this on the basis that the constitutional judgment served that purpose. Applicant complains that he was left with no remedy to recover that which he unjustly lost by the delay of the proceedings (i.e. refund of maintenance paid in excess of the amount which should have been paid had the case been decided within a reasonable time). He argues that the First Court was contradictory in its reasoning in that it earlier stated that only non-pecuniary damages (and not pecuniary damages) can be awarded.

34. As the First Court correctly pointed out however, Article 13 of the Convention envisages an "effective remedy" for the human rights violations, i.e. it is meant to address the human rights violation *per se*. It drew attention to the fact that the constitutional proceedings took under a year and that the First Court was empowered by the Constitution to grant appellant whichever remedy it deems necessary to adequately redress the violation suffered. As respondent Attorney General commented, with

the filing of these constitutional proceedings, appellant himself is acknowledging that the Maltese legal system provides for an effective domestic remedy with regards to the violation suffered.

35. Thus appellant's complaint that he was not compensated for pecuniary damages can not be made on the basis of Article 13. This apart from the fact that as discussed above (in this Court's considerations with regards to appellant's second ground), appellant failed to prove that he indeed suffered pecuniary damages.

36. For these reasons this court:

- confirms the First Court's decision that appellant suffered a violation of his fundamental human right to a fair hearing within a reasonable time as protected by Article 6 of the European Convention and suffered no violation of his other fundamental human rights as protected by Article 1 Protocol 1, Article 8[17] and Article 13 of the said Convention; and

- varies the First Court's decision in so far as it ordered the payment of €2,500 as compensation for the violation of his fundamental human right as protected under Article 6, since this Court finds that the sum of

[17] In fact appellant did not appeal from that part of the judgment whereby the First Court refuted his claims based on violation of Article 8 of the Convention

€3,500 is more appropriate.

37. Three fourths (¾) of the costs of these proceedings are to be borne by appellant (since only one of his four grounds of appeal was *partly* justified), while the remaining one fourth (¼) is to be borne by the respondent.

Joseph Azzopardi Chief Justice	Giannino Caruana Demajo Judge	Tonio Mallia Judge

Deputy Registrar
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