QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum it-Tlieta 30 ta` Ottubru 2018

Kawza Nru. 1
Rikors Nru. 98/2013 JZM

Connie Decelis (737248M) u Jason Decelis (216295M), u b`digriet tal-4 ta` April 2017 l-atti f`isem Jason Decelis gew trasfuzi f`isem ir-rikorrenti l-ohra Connie Decelis, stante l-mewt tieghu.

kontra

Avukat Generali

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fid-9 ta` Dicembru 2013 li jaqra hekk :

1. Illi fis-sena 2006 l-esponenti Connie Decelis u binha Jason Decelis, flimkien ma` Carmel Decelis, kienu qeghdin jistennew li jghaddu guri bl-akkuza ta` omicidju volontarju wara l-hrug ta` l-Att tal-Akkuza numru 7/2006 kontra taghhom it-tlieta.

L-ewwel raguni – dritt ghall-assistenza legali

2. Illi fit-30 ta` Mejju 2006 inghata digriet mill-Qorti Kriminali li bih wara li rat ir-Risposta tad-Direttur tal-Qrati u Tribunali Kriminali hatret bhala Avukat tal-Ghajnuna Legali lil Dr. Martin Fenech LL.D. biex jippatrocina lill-akkuzat Jason Decelis.

3. Illi fl-1 ta` Gunju 2006 l-Avukat Martin Fenech ipprezenta rikors li bih, wara li ppremetta li malli sar jaf bil-hatra tieghu huwa kien pront u gabar l-inkartament u sab inkartament voluminuz; illi huwa jehtieg zmien biex isir jaf lil Jason Decelis halli jibni relazzjoni ta` fiducja ma` l-akkuzat; illi l-kawza giet appuntata ghal nhar it-Tnejn 5 ta` Gunju 2006 u li jhoss illi z-zmien moghti lilu "huwa ferm u ferm qasir u mhux ser ikun f`posizzjoni jistudja l-kaz u jipprepara ruhu sew"; ghalhekk, "tenut kont tac-cirkostanzi li mhumiex fil-kontroll tieghu" talab biex il-guri jigi differit ghal gurnata ohra "sabiex tippermettilu jipprepara u jistudja l-kaz aktar fil-profond halli jkun jista` jaghti l-ahjar u jkun preparat mill-ahjar".

4. Illi b`digriet moghti dakinhar stess il-Qorti Kriminali cahdet it-talba tal-avukat difensur.

5. Illi l-Avukat Martin Fenech iltaqa` ghall-ewwel darba ma` l-esponent Jason Decelis u ma` ommu nhar il-Gimgha, 2 ta` Gunju 2006. B`hekk ma kienx hemm `Equality of arms` stante li l-prosekuzzjoni kienet ilha tipprepara ghall-kaz filwaqt li hu kellu inqas minn hamest ijiem biex jipprepara mal-klijent.

6. Illi l-Guri beda nhar it-Tnejn, 5 ta` Gunju 2006, u b`hekk l-avukat difensur ma kellux zmien bizzejjed biex jipprepara ruhu sew ghall-Guri, b`mod partikolari minhabba z-zmien qasir hafna, kif ukoll minhabba l-inkartament voluminuz.

It-tieni raguni – dritt ta` kontestazzjoni u kontroezami tax-xhieda

7. Illi fit-tieni jum tal-Guri, il-Qorti Kriminali awtorizzat lill-prosekuzzjoni taqra d-deposizzjonijiet moghtija minn Hayet Attard u Hamidi Abdel fil-kumpilazzjoni u dan peress li dawn x`aktarx kienu telqu minn Malta.

8. Illi l-avukati difensuri minnufih irregistraw l-oppozizzjoni taghhom billi f`dan il-kaz ma kienx jista` jsir il-kontroezami taz-zewg xhieda.

9. Illi l-prosekutur irrileva li l-kontroezami seta` jsir fl-istadju tal-kumpilazzjoni, kif fil-fatt sar f`dan il-kaz.

10. Illi l-Qorti Kriminali laqghet talba mid-difiza biex, ghall-fini ta` kontroll, jinqraw l-istqarrijiet maghmula mix-xhieda Hayat Attard u Hamidi Abdel lill-Pulizija "u li sussegwentement giet ikkonfermata quddiem il-Magistrat Inkwirenti." B`danakollu, ma kienx possibbli li dawn iz-zewg xhieda jigu kontroezaminati peress li kienu assenti.

<u>It-tielet raguni – dritt ta` kontestazzjoni u kontroezami tal-koakkuzat</u>

11. Illi fis-seduta tas-7 ta` Gunju 2006, "l-akkuzat Carmel Decelis offra d-depozizzjoni tieghu minn jeddu bil-gurament" u l-prosekutur ghamel kontroezami lix-xhud. Fix-xiehda tieghu, Carmel Decelis tefa` l-htija fuq ir-rikorrenti permezz ta` xiehda li m`ghandhiex mis-sewwa, u dan bil-ghan li jiskolpa ruhu kompletament. Carmel Decelis sahansitra wasal biex ighid li ibnu ma kienx tajjeb biex ikun fis-socjeta`.

12. Illi l-Artikolu 661 tal-Kodici Kriminali jippostula sitwazzjoni fejn meta zewg persuni jew aktar jigu processati flimkien, kull dikjarazzjoni maghmula minn wiehed mhix ta` pregudizzju kontra l-iehor, billi jipprovdi:

"Konfessjoni ma taghmilx prova hlief kontra min jaghmilha, u mhix ta` pregudizzju ghal ebda persuna ohra."

Izda, l-Artikolu 639(3) jipprovdi illi –

"Meta l-uniku xhud kontra l-akkuzat dwar xi reat fi process li jinstema` quddiem il-gurati tkun persuna komplici, il-Qorti ghandha taghti direttiva lill-gurati biex jiznu x-xiehda li dak ix-xhud jaghti b`kawtela qabel ma jserrhu fuqha u jaslu biex isibu hati lill-akkuzat."

*13. Illi dawn iz-zewg dispozizzjonijiet tal-ligi huma konfliggenti u kontradittorji peress li l-**Artikolu 661** jghid li tali dikjarazzjoni mhix ta` pregudizzju ghal koakkuzat jew ebda persuna ohra u taghmel prova biss kontra min jaghmilha, filwaqt li l-**Artikolu 639(3)** jghid li f`kaz illi l-komplici jkun instema` quddiem il-gurati bhala l-uniku xhud kontra l-akkuzat, ghandha tinghata direttiva ta` twiddiba lill-gurati biex jiznu x-xiehda moghtija minnu b`kawtela qabel ma **jserrhu fuqha** u jaslu biex isibu hati lill-akkuzat.*

14. Illi minhabba f`din l-anomalija u inkongruwenza legali, la l-avukat difensur tar-rikorrenti Connie Decelis u lanqas l-avukat difensur tar-rikorrent Jason Decelis ma kienu f`posizzjoni li jaghmlu l-kontroezami lix-xhud Carmel Decelis.

15. Illi skont l-insenjament tal-Professur Sir Anthony Mamo (Lecture Notes in Criminal Procedure) –

*"It would indeed be dangerous to act upon it [the evidence of a tainted witness] if the accused denies the charge on oath, and is unshaken by **cross-examination**, but if the accused leaves the accomplice`s evidence unchallenged, is it necessary to regard conviction as dangerous? (A.C.L. Morrison, The Protection of the Accused in `The Journal of Criminal Science` (Vol. 1, p. 148-149).*

Dan juri li l-kontroezami huwa ammissibbli fejn il-koakkuzat / komplici jkun ta x-xiehda tieghu quddiem il-gurati.

16. Illi l-fatt li l-akkuzata Connie Decelis xehdet minn jeddha bil-gurament ma jservix l-istess ghan u ma kienx bizzejjed biex jaghmel tajjeb ghax-xiehda inveritjiera moghtija mill-akkuzat Carmel Decelis. Izda, lill-koakkuzat Carmel Decelis ma setax isirlu l-kontroezami mill-avukati difensuri taz-zewg akkuzati l-ohra minkejja li huwa tefa` l-htija fuqhom.

<u>Ir-raba` raguni – dritt tal-akkuzat li jsegwi l-proceduri fil-guri tieghu</u>

17. Illi meta l-avukat sottofirmat tkellem mal-Avukat Martin Fenech dwar il-Guri, l-Avukat Fenech infurmah illi mhux biss ma kellux zmien sufficjenti biex ihejji sewwa ghall-Guri u biex isir jaf lil Jason Decelis u jibni relazzjoni ta` fiducja mieghu, izda wkoll matul il-Guri tieghu Jason Decelis ma kienx f`pozizzjoni li jinvolvi ruhu fih peress li, minhabba l-uzu abitwali ta` medicini u Valium mehuda dakinhar stess, Jason Decelis kien il-hin kollu joghnos u ma jistax izomm rasu soda `l fuq, u b`hekk ma kienx f`qaghda li jsegwi l-proceduri kontra tieghu. B`danakollu, l-avukat tieghu ma azzardax jitlob lill-

Qorti twaqqaf il-Guri minhabba li l-isforzi u tentattivi li kienu saru minnu biex jikseb posponiment tal-Guri kienu gew michuda.

18. Illi dak iz-zmien Jason Decelis kien `drug addict` kif juru l-fatti tal-kaz u l-prosekutur qal diversi quddiem il-gurati illi Jason Decelis kien beda jittraffika d-drogi meta kien fuq plegg, li hija haga assolutament inveritjiera.

<u>Il-hames raguni – dritt tal-akkuzat li ma jinstabx hati fuq il-bazi ta` reati li ma jezistux fil-ligijiet ta` Malta</u>

19. Illi l-akkuza migjuba kontra r-rikorrenti, l-verdett tal-gurija u s-sentenzi tal-Qorti Kriminali u tal-Qorti tal-Appell Kriminali, li ssanzjonaw ir-rizultat ta` Omicidju volontarju b`omissjoni, imorru kontra r-realta` guridika illi fil-ligijiet ta` Malta ma jezistix ir-reat ta` rifjut ta` ghoti ta` ghajnuna (`omissione di soccorso`), kif lanqas ma jezisti l-kuncett ta` `duty of care` li jifforma parti mill-common law Ingliza izda ma jiffurmax parti mil-Ligi ta` Malta. Ghalhekk, is-sejbien ta` htija ta` omicidju volontarju b`omissjoni ma tistax treggi, kif lanqas ma jistghu jreggu konsiderazzjonijiet bazati fuq `duty of care` u rifjut ta` ghoti ta` ghajnuna (`omissione di soccorso`).

20. Illi ghar-ragunijiet hawn fuq imfissra u ohrajn li jigu spjegati ahjar matul il-kors ta` dawn il-proceduri, ir-rikorrenti ma kellhomx smiegh xieraq.

21. Illi r-rikorrenti qeghdin ukoll jimpunjaw id-dispozizzjonijiet ta` l-Artikoli 661 u 639(3) tal-Kodici Kriminali bhala konfliggenti u kontradittorji, u ghalhekk, meta jigu applikati flimkien tinholoq sitwazzjoni li tikser id-dritt fondamentali ta` l-akkuzat ghal smiegh xieraq, u konsegwentement l-Artikolu 639(3) tal-Kodici Kriminali huwa antikostituzzjonali.

Illi fil-konfront ta` David Gatt, l-Avukat Generali ma bqax jinsisti li l-akkuza li taghmel ghall-kaz hija dik ta` omicidju volontarju b`omissjoni – akkuza li r-rikorrenti dejjem sostnew li hija inezistenti fil-Kodici Kriminali ta` pajjizna.

Illi b`rizultat ta` dina c-change of heart ghalkemm il-ligi ma nbidlitx, David Gatt la gie ssentenzjat ghal 15 –il sena habs bhall-esponenti, u lanqas ghal 25 sena habs bhall-kompjant binha Jason Decelis, izda gie ssentenzjat ghal 4 snin biss habs.

Illi dan sehh wara li l-Avukat Generali ghazel li ma jghaddix guri lil David Gatt izda li jippatteggja ma` l-avukati ta` David Gatt, u warrab dak li tant kien jemmen fih b`tant hegga meta kien qed jittratta l-kaz taz-zewg rikorrenti.

Illi dan irrizulta fi pregudizzju serju ghar-rikorrent u ghal binha, kemm f`dik li hija l-akkuza xierqa, kif ukoll f`dik li hija l-kundanna xierqa. Ghalhekk ukoll, ir-rikorrenti ma kellhomx smigh xieraq u b`hekk l-Artikolu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem gie lez.

Ghaldaqstant, ir-rikorrenti jitolbu bir-rispett illi din l-Onorabbli Qorti –

(1) joghgobha tiddikjara illi, ghar-ragunijiet hawn fuq imfissra, huma ma kellhomx smiegh xieraq kif garantit mill-Artikolu 6 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem (Kapitolu 319) u konsegwentement tordna t-thassir tal-verdett u s-sentenza kontra taghhom;

(2) joghgobha tiddikjara li kien hemm ksur tal-Artikolu 7 tal-Konvenzjoni (Kapitolu 319) in kwantu fid-Dritt Malti la jezisti r-reat ta` nuqqas li persuna taghti l-ghajnuna u lanqas ma jezisti `duty of care`, li jifforma parti mill-Common Law;

(3) joghgobha tiddikjara u tiddeciedi illi t-thaddim tal-artikolu 661 u tal-artikolu 639(3) tal-Kodici Kriminali, mehudin flimkien, fil-guri "Ir-Repubblika ta` Malta vs. Carmel Decelis, Concetta sive Connie Decelis u Jason Lee Decelis" ivvjola d-drittijiet fondamentali taz-zewg rikorrenti in kwantu kien jikser is-salvagward kostituzzjonali ta` smiegh xieraq billi huma ma kellhomx l-opportunita` li jaghmlu kontroezami lil Carmel Decelis, lil Hayet Attard u Hamidi Abdel;

(4) tordna l-iskarcerazzjoni immedjata tar-rikorrenti; u

(5) tordna l-hlas ta` kumpens xieraq ghall-vjolazzjonijiet tad-drittijiet fondamentali taghhom, inkluz iz-zmien ta` kemm damu fil-facilita` korrettiva.

Rat ir-risposta li pprezenta l-intimat fit-30 ta` Jannar 2014 li taqra hekk :

1. Illi fl-ewwel lok u in linea preliminari, il-hames lanjanza tar-rikorrenti dwar l-allegat "dritt tal-akkuzat li ma jinstabx hati fuq il-bazi ta` reati li ma jezistux fil-ligijiet ta` Malta" huwa res judicata ;

*Illi l-esponent jaghmel referenza ghall-proceduri kostituzzjonali fl-ismijiet "**Concetta Decelis u Jason Decelis vs. il-Ministru tal-Gustizzja u l-Kummissarju tal-Pulizija**" (Rikors Kostituzzjonali Numru 3/2009) li permezz taghhom ir-rikorrenti odjerni allegaw u talbu dikjarazzjoni ta` ksur ta` **l-artikolu 39(8) tal-Kostituzzjoni u tal-artikolu 7(1) tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem** stante li fil-kawza fl-ismijiet "Ir-Repubblika ta` Malta vs Carmel Decelis, Concetta Decelis u Jason Louis Paul Decelis" moghtija mill-Onorabbli Qorti tal-Appell Kriminali fil-25 ta` Settembru 2008, saret referenza b`analogija ghal-Ligi Penali Ingliza, u gurisprudenza Ingliza, u waslet allegatament ghall-introduzzjoni ta` disposizzjoni jew regoli godda fil-Ligi Penali Maltija, b`mod li skond ir-rikorrenti nholoq reat gdid li qabel ma kienx jezisti fil-ligi Maltija... allegatament kien hemm interpretazzjoni mill-Ligi Ngliza b`mod wiesgha hafna... u allegatament il-principji enuncjati mill-gurisprudenza Ingliza...gew applikati ex post facto u retrospettivament". Permezz tal-istess proceduri l-istess rikorrenti allegaw ukoll ksur tal-**artikolu 39(1) tal-Kostituzzjoni u tal-artikolu 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem** peress li skont huma "l-bidla radikali fil-qaghda legali mid-data meta sehh dan il-kaz fit-13 ta` Mejju 2001 sad-data meta inghatat is-sentenza riferita mill-Onorabbli Qorti tal-Magistrati...". B`decizjoni tal-Onorabbli Qorti Civili Prim` Awla datata 9 ta` Dicembru 2010 it-talbiet tar-rikorrenti Decelis gew michuda bhala infondati fil-fatt u fid-dritt. Din id-decizjoni giet ukoll ikkonfermata mill-Onorabbli Qorti Kostituzzjonali fit-2 ta` Mejju, 2011;*

2. Illi in linea preliminari u minghajr pregudizzju ghas-suespost, in kwantu r-rikorrenti qeghdin ghat-tieni darba jittentaw juzaw din il-procedura kostituzzjonali bhala mezz biex jappellaw minn decizjoni ta` l-Onorabbli Qorti tal-Appelli Kriminali u li llum hija res judicata billi qeghdin jipprovaw ilibbsuha b`libsa kostituzzjonali, din il-procedura hija frivola u vessatorja u tabbuza minn din il-procedura straordinarja;

3. Illi dejjem in linea preliminari u minghajr pregudizzju ghas-suespost, in kwantu l-allegazzjonijiet vantati mir-rikorrenti setghu tqajjmu matul il-proceduri kriminali "ordinarji", hija l-umli fehema tal-esponent li din l-Onorabbli Qorti ghandha tastjeni milli tisma` dan il-kaz ai termini tal-artikolu 46(2) tal-Kostituzzjoni u l-artikolu 4 tal-Kap 319;

4. Illi fil-mertu u minghajr pregudizzju ghas-suespost, l-allegazzjonijiet kollha tar-rikorrenti huma nfondati fil-fatt u fid-dritt u kull talba mressqa minnhom hija insostenibbli ghas-segwenti ragunijiet li qed jigu hawn elenkati minghajr pregudizzju ghal xulxin;

*5. Illi l-**Artikolu 6 tal-Konvenzjoni Ewropea** jipprovdi li fid-decizjoni tad-drittijiet civili u tal-obbligi tieghu jew ta` xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b`ligi. Xejn fl-imsemmija proceduri kriminali kontra r-rikorrenti ma vvjola dan id-dritt u kull allegazzjoni tar-rikorrenti li kien hemm xi ksur f`dan is-sens hija fattwalment u legalment infondata;*

6. Illi matul l-andament kollu tal-proceduri kriminali kontra taghhom, ir-rikorrenti dejjem kellhom zmien u facilitajiet xierqa ghall-preparazzjoni tad-difiza taghhom u kull allegazzjoni li l-avukat difensur ta` Jason Decelis ma kellux zmien bizzejjed biex jipprepara ruhu sew ghall-guri hija infondata;

7. Illi t-tieni lment tar-rikorrenti jirreferi ghad-"dritt ta` kontestazzjoni u kontro-ezami tax-xhieda" in kwantu fil-guri inqrat ix-xhieda moghtija minn Hyat Attard u Hamdi Adel tat-8 ta` Gunju 2001 moghtija fl-istadju tal-kumpilazzjoni peress li meta nstema l-guri dawn ix-xhieda kienu telqu minn Malta. Jigi sottolineat li din ix-xhieda nqrat fit-totalita` taghha inkluz il-parti fejn sar il-kontro-ezami mid-difiza. L-esponent jirreleva li la darba d-difiza inghatat opportunita` adegwata u sodisfacenti sabiex taghmel il-kontro-ezamijiet ta` l-imsemmija Hyat Attard u Hamdi Adel fl-istadju tal-kumpilazzjoni, irrispettivament mill-fatt jekk d-difiza ipprevalietx ruhha o meno minn dan id-dritt, l-allegata vjolazzjoni tal-artikolu 6 tal-Konvenzjoni Ewropea hija ghal kollox infondata;

8. Illi minghajr pregudizzju, l-Onorabbli Qorti Kriminali laqghet it-talba tal-avukat difensur ta` Carmel Decelis, sabiex ghal fini ta` kontroll jinqraw u jitqassmu kopja tal-istqarrijiet guramentati tal-imsemmija Hyat Attard u Hamdi Adel;

9. Illi permezz tat-tielet ilment taghhom ir-rikorrenti qeghdin jallegaw li hemm kunflitt u kontradizzjoni bejn l-artikolu 661 u l-artikolu 639(3) tal-Kodici Kriminali u allegatament "minhabba f`din l-anomalija u inkongruwenza legali, la d-difensur tar-rikorrenti Connie Decelis u lanqas l-avukat difensur tar-rikorrent Jason Decelis ma kienu f`pozizzjoni li jaghmlu l-kontroezami lix-xhud Carmel Decelis". Bir-rispett kollu, ma hemm l-ebda kunflitt jew kontradizzjoni bejn dawn iz-zewg artikoli tal-Kodici Kriminali. Minghajr pregudizzju, l-allegazzjonijiet tar-rikorrenti fis-sens illi "t-thaddim tal-artikolu 661 u tal-artikolu 639(3) tal-Kodici Kriminali, mehudin flimkien, fil-guri "Ir-Repubblika ta` Malta vs. Carmel Decelis, Concetta sive Connie mDecelis u Jason Lee Decelis" ma jwasslu ghall-ebda ksur ta` drittijiet fondamentali taghhom ghal smiegh kif allegat minnhom;

10. Illi l-artikolu 661 u l-artikolu 639(3) tal-Kodici Kriminali mhumiex "antikostituzzjonali" kif allegat mir-rikorrenti;

11. Illi di piu` u minghajr pregudizzju, b`referenza ghal-dak li jipprovdi l-artikolu 639(3) tal-Kap 9. tal-Ligijiet ta` Malta, Carmel Decelis certament li ma kienx "l-uniku xhud kontra l-akkuzat" fil-kaz de quo;

12. Illi dejjem minghajr pregudizzju u f`kull kaz, ir-rikors tal-appell ta` Concetta Decelis u Jason Louis Paul Decelis gie michud mill-Onorabbli Qorti tal-Appell Kriminali li inter alia kkonfermat, b`referenza d-dikjarazzjonijiet ta` Concetta Decelis u Jason Decelis <u>stess</u> u ghax-xhieda ta` David Gatt, Dr. Michael Sammut u Andrew Caruana, li kien hemm provi processwali bizzejjed biex il-gurija setghet ragonevolment issib htija fil-konfront taghhom;

13. Illi dwar id-dritt tal-akkuzat Jason Decelis li jsegwi l-proceduri fil-guri tieghu, mill-atti tal-proceduri ma jirrizultax li huwa gie mcahhad minn dan id-dritt u kull allegazzjoni f`dan is-sens hija infondata;

14. Illi minghajr pregudizzju ghal dan, l-avukat difensur ta` Jason Decelis qatt ma kien ivverbalizza xi allegazzjoni f`dan is-sens matul is-smiegh tal-guri kull allegazzjoni li "Jason Decelis ma kienx f`pozizzjoni li jinvolvi ruhu fih peress li, minhabba l-uzu abitwali ta` medicini u Valium mehuda dakinhar stess, Jason Decelis kien il-hin kollu jonghos u ma jistax izomm rasu soda `l fuq" qed titqajjem ghall-ewwel darba fir-rikors in risposta u cioe` aktar minn seba` snin wara l-imsemmi guri;

15. Illi jigi mtenni li l-fatt li r-rikorrenti ma qablux mas-sentenza moghtija mill-Qorti tal-Appell Kriminali ma jwassalx fih innifsu ghal ksur tad-dritt fundamentali taghhom ghal smiegh xieraq kif donnhom qeghdin jippretendu r-rikorrenti permezz tal-allegazzjonijiet u t-talbiet mressqa minnhom fir-rikors in risposta;

16. Illi minghajr pregudizzju ghall-eccezzjonijiet preliminari tal-esponent, rigward l-allegazzjoni ta` ksur tal-Artikolu 7 tal-Konvenzjoni Ewropea, l-esponent jissottometti li m`hemm l-ebda ksur ta` dan l-artikolu;

17. Illi r-rikorrenti nstabu hatja a tenur tal-artikolu 211 tal-Kodici Kriminali li ilu jezisti fil-ligi taghna minn ferm qabel Mejju tal-2001 meta graw ic-cirkostanzi mertu tal-proceduri kriminali surriferiti;

18. Illi minghajr pregudizzju ghal dan, l-Artikolu 7(2) tal-imsemmija Konvenzjoni jipprovdi jistghu jigu applikati wkoll il-principji generali tal-ligi rikonoxxuti min-nazzjonijiet civilizzati u ghalhekk it-tieni talba tar-rikorrenti hija f`kull kaz insostenibbli;

19. Illi dejjem minghajr pregudizzju, l-esponent jissottometti li f`kull kaz l-gurisprudenza Maltija tghallem x`inhuma l-elementi kostituttivi ta` reat ta` omicidju volontarju u certament dan il-kaz kien jissodisfa l-elementi kollha tal-artikolu 211 tal-Kap. 9 tal-Ligijiet ta` Malta;

20. Illi in vista tas-suespost, hija l-umli fehema tal-esponent li l-allegazzjonijiet tar-rikorrenti huma kollha infondati fil-fatt u fid-dritt b`dan illi t-talbiet taghhom lil din l-Onorabbli Qorti huma insostenibbli u ghandhom jigu michuda;

21. Illi dejjem minghajr pregudizzju ghas-suespost, dwar ir-rimedji mitluba, dato ma non concesso li din l-Onorabbli ssib ksur tad-drittijiet fundamentali tar-rikorrenti, m`hemm l-ebda lok li jithassar il-verdett u s-sentenza taghhom kif mitlub mir-rikorrenti u lanqas ma hemm lok li din l-Onorabbli Qorti "tordna l-iskarcerazzjoni immedjata tar-rikorrenti", kif ukoll, ma hemm lok li r-rikorrenti jinghataw xi kumpens kif pretiz minnhom, b`dan illi f`umli fehema tal-esponent kull talba f`dan is-sens hija insostenibbli u ghandha tigi michuda;

Salv eccezzjonijiet ulterjuri.

Ghaldaqstant u in vista tas-suespost, l-esponent bir-rispett jitlob lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrenti, bl-ispejjez kontra taghhom.

Semghet ix-xhieda u rat il-provi l-ohra li tressqu fil-kors tal-kawza.

Rat in-noti ta` osservazzjonijiet li pprezentaw il-partijiet.

Semghet is-sottomissjonijiet tal-ahhar li ghamlu d-difensuri fl-udjenza tat-18 ta` Gunju 2018.

Rat illi l-kawza thalliet ghas-sentenza ghal-lum.

Rat l-atti l-ohra.

II. Fatti

Qabel tirreferi ghall-provi li huma attinenti ghall-mertu tal-istanza tar-rikorrenti, u qabel taghmel il-konsiderazzjonijiet taghha, ikun opportun jekk tirreferi **fil-qosor** ghall-fatti li jikkostitwixxu l-isfond tal-vertenza odjerna.

Fit-13 ta` Mejju 2001 u fil-lejl ta` qabel, Rachel Bowdler hadet kwantita` ta` droga bil-konsegwenza u spiccat fi stat ta` *overdose* fir-residenza tar-rikorrenti Connie Decelis. Dan gara wara li Rachel Bowdler u r-rikorrent l-iehor Jason Decelis (li miet fil-mori tal-kawza u li jigi iben Connie Decelis) iltaqghu barra l-fond ta` Connie Decelis u dahlu flimkien gewwa fejn kellhom relazzjoni intima. In segwitu Rachel Bowdler bdiet thossha hazin sakemm spiccat kompletament mitlufha minn sensiha. Connie Decelis u Jason Decelis, minkejja li setghu jikkonstataw li Rachel Bowdler kienet fi stat ta` overdose, ma talbux assistenza medika. Wara ammont sostanzjali ta` sieghat, Rachel Bowdler mietet. Connie Decelis u r-ragel taghha Carmel Decelis iddisponew mill-katavru ta` Rachel Bowdler billi qeghduh go ghalqa mwarrba fil-limiti tal-Mgarr, Malta.

Connie Decelis, Carmel Decelis u Jason Decelis kienu mixlija bl-omicidju volontarju ta` Rachel Bowdler. Wara li ntemmet il-kumpilazzjoni, ghaddew guri, instabu hatja u kienu kkundannati b`sentenza tal-Qorti Kriminali tat-13 ta` Gunju 2006 fejn kienu kkundannati : Connie Decelis ghal prigunerija ta` 15-il sena ; Jason Decelis ghal prigunerija ta` 25 sena ; u Carmel Decelis ghal prigunerija ta` sena u sitt xhur. Is-sentenza tal-Qorti Kriminali kienet ikkonfermata b`sentenza tal-Qorti tal-Appell Kriminali tal-25 ta` Settemkbru 2008.

Fil-15 ta` Jannar 2009, Connie Decelis u Jason Decelis ipprezenta ir-rikors kostituzzjonali Nru. 3/09 RCP kontra Il-Ministru tal-Gustizzja u l-Intern, l-Avukat Generali, id-Direttur Generali Qrati tal-Gustizzja u l-Kummissarju tal-Pulizija fejn allegaw illi kienu garrbu ksur tal-jedd fondamentali ghal smigh xieraq fil-kors tal-proceduri kriminali fuq riferiti li kienu istitwiti kontra taghhom.

B`sentenza li tat din il-Qorti diversament presjeduta fid-9 ta` Dicembru 2010, it-talbiet tar-rikorrenti kienu michuda. Is-senetenza kienert ikkonfermata mill-Qorti Kostituzzjonali fit-2 ta` Mejju 2011.

III. Xiehda

Av. Dr Malcolm Mifsud xehed illi huwa kien assista lil Connie Decelis waqt il-guri. Fix-xhur ta` qabel beda l-guri, kien nominat sabiex jassisiti sia lil Connie Decelis kif ukoll lil binha Jason Decelis pero fil-kors tat-thejjija ghall-guri huwa dehrlu li ma kienx ghaqli li jkompli jiddefendi lit-tnejn. Ghalkemm l-akkuzati ma kinux qeghdin iwahhlu f`xulxin ghall-akkadut, xorta wahda kien tal-fehma li seta` jkun hemm konflitt fid-difiza taghhom it-tnejn.

Dwar il-kundizzjoni ta` Jason Decelis matul il-guri, Dr Mifsud stqarr illi kien jidher li Jason Decelis ma kienx iffokat fuq il-guri. Jaf li Jason Decelis kellu dipendenza kbira fuq id-droga u waqt il-guri huwa kellu l-okkazjoni jinnota lil Jason Decelis b`rasu `l isfel u kien ikun qieghed jonghos. Dan kien ta` thassib ghalih bejn ghaliex l-akkuzat ma kienx qieghed isegwi l-guri u anki minhabba d-dehra li kien qed jaghti tieghu nnifsu lill-gurati. F`okkazjoni minnhom huwa anke gibed l-attenzjoni ta` Connie Decelis sabiex tqajjem lil binha pero` huwa ma attirax l-attenzjoni tal-Imhallef sedenti ghal dak il-fatt.

Mistoqsi jekk kellux xi preokkupazzjoni legali dwar l-akkuza kif giet ifformolata ta` *wilful homicide by omission*, u eventwalment dwar il-verdett fuq l-istess, Dr Mifsud tenna illi "*preokkupazzjoni legali ma kellniex*" ghaliex kien ovvju fejn riedet tasal il-Prosekuzzjoni u cioe li Connie Decelis m`ghamlet assolutament xejn sabiex issalva lil Rachel Bowdler. Fisser li fid-difiza tieghu huwa kien enfasizza l-punt illi fil-ligijiet taghna, hlief fil-kazi eccezzjonali, ma kienx hemm obbligu li wiehed jippresta assistenza.

Dwar il-kontro-ezami ta` Carmel Decelis, stqarr illi Connie Decelis ghazlet illi tixhed. L-istess ghamel Carmel Decelis li xehet il-htija fuqha. Billi Carmel Decelis kien ko-akkuzat, huwa kien prekluz illi ghal Connie Decelis jaghmillu kontro-ezami. Irrimarka illi "*sakemm apprezzaw il-gurati li ko-akkuzat jista` ma*

jistax jinfluwixxi fuq ko-akkuzat issa dik hija open to speculation kemm fehmuha l-gurati." (fol 34)

Dwar il-kontro-ezami ta` Hayet Attard u Hamidi Abdel, spjega illi dawn iz-zewg xhieda ma kinux prezenti waqt il-guri. Ghalhekk inqrat id-depozizzjoni li kienu taw waqt il-kumpilazzjoni. Dwar dan huwa ma kellu l-ebda problema. Mistoqsi mill-Qorti jekk ivverbalizzax talba illi ried jaghmel kontro-ezami lil dawn iz-zewg xhieda, huwa stqarr : "*Le ghax fil-ligi hja cara jekk ma jinstabx jew huwa indispost b`xi mod jew iehor tinqara allura le ma nahsibx li ghamilt* ***ma niftakarx li ghamilt xi verbal f`dan is-sens it doesn`t make sense***." (fol. 38) (enfasi tal-Qorti)

Av. Dr. Martin Fenech xehed illi huwa assista bhala Avukat tal-Ghajnuna Legali lil Jason Decelis waqt il-guri.

Fisser illi kien il-jum ta` l-Gimgha li rcieva telefonata mill-Qorti fejn intalab jibgor *file* ghaliex kellu guri li kien ser jibda it-Tnejn. Xtaq li kellu ftit aktar zmien sabiex jistudja l-kaz sewwa u sabiex ukoll jibni relazzjoni mal-klijent tieghu Jason Decelis. Ghalhekk ipprezenta rikors f`dan is-sens izda t-talba tieghu kienet respinta. L-Imhallef illi kien ser jippresjedi l-guri stiednu bil-fomm sabiex jaghmel il-weekend gewwa jistudja l-kaz. Tenna li : "*kelli naghmel weekend gewwa nistudjah mill-ahjar ovvjament li nista` jiena, u* ***nghid ghamilt l-almu tieghi****, u l-guri beda t-Tnejn igifieri*." (fol. 44) (enfasi tal-Qorti). Meta wasal il-hin tal-guri ma hassx illi kien sprovvist mit-thejjija. (fol. 57)

Dwar il-kundizzjoni ta` Jason Decelis tul il-guri, xehed hekk : "*Il-kundizzjoni kienet, jekk nista nuza l-kelma hazina, fis-sens illi kien three fourths of the time rasu baxxa kwazi kwazi qisu rieqed il-hin kollu, u jekk forsi nghidha kienet wahda mir-ragunijiet li forsi lanqas jiena ma ridt ntellghu bhala xhud, ghax qisu fil-guri ma kienx qed jifhem jew ma kienx qed isegwi sewwa x` kien qed jigri*." (fol. 46-47). Qal illi Jason Decelis waqt il-guri kien *over fatigued*. Dwar dan pero, huwa ma attirax l-attenzjoni tal-Imhallef sedenti ghaliex : "*Hu kien qed jarah … kien quddiemu ezatt*" (fol. 47) u "*…it was in my opinion quite an obvious state jigifieri*." (fol. 52). Huwa kellu d-dubji tieghu dwar kemm Jason Decelis kien qieghed isegwi l-guri pero` zied jghid illi meta kien ikellmu wara l-guri Decelis kien ikun "*alert*" (fol. 47-48). Ippreciza illi fil-fatt Jason Decelis ma kellux "*full cognisance of what`s happening*" (fol. 53) pero` meta kkumparat ma

kif kien ikun fl-awla waqt il-guri, barra l-awla kien jidher illi kien ikun ftit ahjar (fol. 53).

Xehed illi matul il-guri, waqt illi Jason Decelis kien ikun bilqieghda fl-awla huwa kien "*ikun qisu rieqed*" (fol. 58). Imbaghad waqt il-break kien "*iqum u qisu jistenbah*". Huwa kien jispjega lil Decelis l-andament tal-guri u jitkellem mieghu u sahansitra jiehu informazzjoni minghandu (fol. 58-59). Sahaq illi waqt il-guri Jason Decelis "*kien prezenti pero, he was not cognisant ta` x`kien qrd jigri*" (fol. 61).

Xehed illi huwa ma ghamel ebda kontro-ezami lil Carmel Decelis gharraguni li billi dan kien ko-akkuzat il-ligi ma kinitx tippermetti li bhala difensur ta` ko-akkuzat jaghmel kontroezami lill-istess Decelis.

Dwar Hayet Attard u Hamidi Abdel, stqarr illi ma setax jaghmel kontro-ezami taghhom ghaliex waqt il-guri kienu telqu minn Malta. Min-naha tieghu ma rregistra xejn fl-atti tal-guri dwar din il-kwistjoni.

Dwar l-akkuza kif dedotta, xehed illi ghall-Prosekuzzjoni dak kien kaz ta` *murder by omission*. Id-difiza tieghu ccentrat fuq il-fatt illi ma kienx Jason Decelis li qatel lil Rachel Bowdler. Lanqas ghen fil-mewt taghha ghaliex dakinhar li mietet Rachel Bowdler, Jason Decelis stess kien fi stat hazin taht l-effett tad-droga.

Dwar il-posizzjoni ta` David Gatt, stqarr illi jiftakar illi waqt il-guri huwa kien accenna ghall-fatt illi ma kienx Jason Decelis illi forna d-droga lil Rachel Bowdler. Huwa qies il-kwistjoni ta min forna d-droga bhala : "*it was third party, a third case mbaghad jigifieri*." (fol. 55)

P.C. 1511 Kevin Tabone xehed illi waqt il-guri huwa kien ghal darba jew darbtejn skorta ma` Jason Decelis. Huwa kien ikun bilqieghda wara Jason Decelis u kien mohhu fih ghaliex kien "*beda qisu tmur ghajnejh bih, jinzel hekk **qisu jonghos** hekk bhal speci, bdejt nigbidlu kull darba l-attenzjoni, minn wara qum, u mmissu nghajjatlu minn taht l-ilsien hekk, Jason Jason qum oqghod dritt, oqghod dritt*." (fol. 76)

<u>Assistent Kummissarju tal-Pulizija Neil Harrison</u> xehed illi huwa nvestiga l-kaz tal-mewt ta` Rachel Bowdler u kien l-ufficjal prosekutur. Dwar Hayet Attard u Hamidi Abdel**,** stqarr illi dawn kienu nterrogati u wara xehdu fil-kumpilazzjoni. Meta sari l-guri, dawn iz-zewg persuni ma kienux ghadhom Malta u ma setghux jigu rintraccjati barra minn Malta. Ma kienx il-kaz li dawn it-tnejn jinzammu Malta.

<u>Claudia Calleja</u> xehdet illi tahdem bhala gurnalista ma` The Times of Malta. Irrappurtat il-guri tar-rikorrenti. Dwar il-kondizzjoni ta` Jason Decelis tul il-guri, saritilha referenza ghal kitba taghha li dehret fil-gurnal fis-6 ta` Gunju 2006 fejn inghad : "*During yesterday`s sititng Jason Decelis barely kept his eyes open and sat crouched in his seat, eyes closed seemingly oblivious to everything around him. His mother by his side as well as a police officer behind him, tried often to pull him to a sitting posture, but it did not last long*." (fol. 115) u kienet domandata jekk dak li l-kitba kienet qeghda tirreferi ghal "*yesterday`s sitting*" kienx sehh ukoll fi granet ohra. Wiegbet illi ma tiftakarx pero` qalet ukoll : "*nimmagina kieku rega sar hekk kont nerga` nosservah. Jista jkun ma niftakarx imma dakinhar zgur*." (fol. 116)

<u>Ir-rikorrenti Connie Decelis</u> xehdet kif sehhet il-mewt ta` Rachel Bowdler.

Xehdet ukoll dwar il-mod kif hi, binha Jason u zewgha Carmel helsu mill-katavru taghha.

Dwar Hayet Attard u Hamidi Abdel, xehdet illi dawn kienu joqghodu fl-istess blokk ta` flats taghha, precizament fil-flat ta` taht taghha. Hayet kienet rat lil Rachel Bowdler dakinhar li marret fl-flat ta` binha Jason. Rat lilhom anke hergin b`Rachel Bowdler. Hayet ghamlet rapport. Kemm Hayet kif ukoll huha Abdel xehdu fil-kumpilazzjoni. Hayet u Abdel telqu minn Malta sakemm sar il-guri.

Stqarret illi kien il-Gimgha, qabel kellu jibda l-guri t-Tnejn, li rceviet telefonata fejn qalulha li kien instab Avukat tal-Ghajuna Legali sabiex jidher ghal Jason. Hi u Jason iltaqghu mal-avukat koncernat illi kien Dr Martin Fenech ghal tlett kwarti biss.

Kompliet tixhed illi waqt il-guri, binha Jason beda "*jinnoddja*" jigifieri "*bhal meta jibda nofsu rieqed*" (fol. 205). Il-pulizija li kien skorta mieghu beda jipprova jqajjmu l-hin kollu. Anke l-Imhallef sedenti gibed l-attenzjoni ghal dan il-fatt. Meta hija stess ippruvat tqajjmu, l-Imhallef qalilha biex tersaq minn hdejh.

Spjegat illi waqt il-*break* kienu jidhlu gewwa u ghalkemm Jason kien jiehu kafé xorta wahda kien jibqa` "*drowsy*" pero` dan mhux ghax kien taht l-effett tad-droga (fol. 206).

Hija fissret li dan kien l-effett ta` eccess ta` pilloli tat-tip Valium, Methadone, kalmanti u pilloli ohra illi kien jinghata mid-Detox u l-effett ta` pilloli ohra illi kien inghata l-habs. Mistoqsija jekk gibditx l-attenzjoni tal-awtoritajiet, inkluz dawk tal-habs, dwar l-ammont ta` pilloli illi kienu qeghdin jigu somministrati lil Jason, hija wiegbet illi ma tkellmet ma hadd dwar dan.

Ziedet tghid li l-Imhallef sedenti beda javza lill-pulizija sabiex izommu lil Jason kemm jista` jkun imqajjem.

Sahqet illi Jason "*ma kienx mitluf minn sensih … imma once li jpoggi bilqieghda xorta jinnoddja l-hin kollu*" (fol. 217). Meta mbaghad kien jiehu kafé qawwi kien ikellimha ghalkemm il-kliem ma kienx ikun car ghax kien ikollu lsienu tqil (fol. 218)

<u>Antoine Gera</u> xehed illi huwa kien impjegat bhala *usher* il-Qorti u kien assenjat mal-Qorti Kriminali. Fl-2006 kien addett mal-Imhallef Joseph Galea Debono.

Dwar il-kundizzjoni ta` Jason Decelis tul il-guri, stqarr illi dan kien ikun "*kwazi l-hin kollu rieqed qisu jonghos hekk qisu ma jafx x`qed jigri*." (fol. 511). Mistoqsi kienx gibed l-attenzjoni ta` xi hadd dwar dan, fisser illi "*ma nahsibx li kelli ghalfejn nigbed l-attenzjoni ghax kulhadd kien jarah dan rieqed. Anke l-gurati bdew jindunaw li dan il-hin kollu rieqed*." (fol. 511)

Ippreciza : "*kull min ihares lejh dan qisek qed tarah rieqed. Il-hin kollu, kien hemm il-hin kollu I mean jekk il-guri f`gurnata konna naghmlu ghall-argument ghaxar sieghat fih il-guri, nahseb li disa` sieghat minnhom kien jaghmilhom rieqed hekk b`rasu baxxuta issa jkunx imqajjem u qieghed hekk, imma kull darba li nhares lejh, hafna drabi.*" (fol. 512)

Ikkonferma li waqt il-guri, Jason Decelis kien assistit minn avukat.

IV. L-azzjoni

Ir-rikorrenti mexxew bl-azzjoni tal-lum abbazi tal-Art 6(3)(b)(c) u (d) u tal-Art 7 tal-Konvenzjoni Ewropeja ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali ("**il-Konvenzjoni"**).

V. Dritt

L-Art 6(3) tal-Konvenzjoni jaqra hekk :-

Kull min ikun akkuzat b`reat kriminali ghandu d-drittijiet minimi li gejjin

(a) li jkun infurmat minnufih, b`lingwa li jifhem u bid-dettal, dwar in-natura u rraguni tal-akkuza kontra tieghu;

(b) li jkollu zmien u facilitajiet xierqa ghall-preparazzjoni tad-difiza tieghu;

(c) li jiddefendi ruhu persunalment jew permezz ta` assistenza legali maghzula minnu stess jew, jekk ma jkollux mezzi bizzejjed li jhallas l-assistenza legali, din ghandha tinghata lilu b`xejn meta linteressi tal-gustizzja jehtiegu hekk;

(d) li jezamina jew li jara li jigu ezaminati xhieda kontra tieghu u li jottjeni l-attendenza u lezami ta` xhieda favur tieghu taht l-istess kundizzjonijiet bhax-xhieda kontra tieghu;

(e) li jkollu assistenza b`xejn ta` interpretu jekk ma jkunx jifhem jew jitkellem il-lingwa uzata fil-qorti.

L-Art 7 ighid :-

(1) Hadd ma ghandu jitqies li jkun hati ta` reat kriminali minhabba f`xi att jew ommissjoni li ma kinux jikkostitwixxu reat kriminali skond ligi nazzjonali jew internazzjonali fil-hin meta jkun sar. Lanqas ma ghandha tinghata piena akbar minn dik li kienet applikabbli fiz-zmien meta r-reat kriminali jkun sar.

(2) Dan l-Artikolu ma ghandux jippregudika l-proceduri l-applikazzjoni tal-piena ta` xi persuna ghal xi att jew ommissjoni li, fiz-zmien meta jkun sar, kien kriminali skond il-principji generali tal-ligi rikonoxxuti min-nazzjonijiet civilizzati.

VI. Dottrina u Gurisprudenza

In vista tal-fatt illi fejn jirrigwarda l-allegat ksur tal-Art 7 l-intimat ta l-eccezzjoni tar-*res judicata*, materja li ser tkun trattata `l quddiem, il-Qorti sejra tillimita ruhha ghad-dottrina u ghall-gurisprudenza li tirrigwarda d-disposizzjonijiet indikati tal-Art 6.

Fil-**Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (criminal limb)** ippubblikat mill-Qorti Ewropea dwar Drittijiet tal-Bniedem ("**ECHR**") fl-2014 jinghad hekk :-

> *229. The requirements of Article 6 § 3 concerning the rights of the defence are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention (**Sakhnovskiy v. Russia** [GC], § 94; **Gäfgen v. Germany** [GC], § 169). 230. The specific guarantees laid down in Article 6 § 3 exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or to contribute to ensuring, the fairness of the criminal proceedings as a whole. The guarantees enshrined in Article 6 § 3 are therefore not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings*

*(Mayzit v. Russia, § 77; **Can v. Austria**, Commission report, § 48).*

Il-pubblikazzjoni tal-ECHR tittratta d-disposizzjonijiet li fuqhom tistrieh l-azzjoni odjerna :-

L-Art 6(3)(b)
(Il-preparazzjoni tad-difiza)

a. General considerations

*255. Article 6 § 3 (b) of the Convention concerns two elements of a proper defence, namely the question of facilities and that of time. This provision implies that the substantive defence activity on the accused`s behalf may comprise everything which is "necessary" to prepare the trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (**Can v. Austria**, Commission report, § 53; **Gregačević v. Croatia**, § 51).*

*256. The issue of adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case (**Iglin v. Ukraine**, § 65; **Galstyan v. Armenia**, § 84).*

b. Adequate time

…

*258. When assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and the stage of the proceedings (**Gregačević v. Croatia**, § 51). Account must be taken also of the usual workload of legal counsel; however, it is not unreasonable to require a defence lawyer to arrange for at least some shift in the*

*emphasis of his work if this is necessary in view of the special urgency of a particular case (**Mattick v. Germany** (dec.)).*

259. Article 6 § 3 (b) of the Convention does not require the preparation of a trial lasting over a certain period of time to be completed before the first hearing. The course of trials cannot be fully charted in advance and may reveal elements which have not hitherto come to light and which require further preparation by the parties (ibid.).

*260. The defence must be given additional time after certain occurrences in the proceedings in order to adjust its position, prepare a request, lodge an appeal, etc. (**Miminoshvili v. Russia**, § 141). Such "occurrences" may include changes in the indictment (**Pélissier and Sassi v. France** [GC], § 62), introduction of new evidence by the prosecution (**G.B. v. France**, §§ 60-62), or a sudden and drastic change in the opinion of an expert during the trial (ibid., §§ 69-70). 261. An accused is expected to seek an adjournment or postponement of a hearing if there is a perceived problem with the time allowed (**Campbell and Fell v. the United Kingdom**, § 98; **Bäckström and Andersson v. Sweden** (dec.); **Craxi v. Italy** (no. 1), § 72), save in exceptional circumstances (**Goddi v. Italy**, § 31) or where there is no basis for such a right in domestic law and practice (**Galstyan v. Armenia**, § 85). 262. In certain circumstances a court may be required to adjourn a hearing of its own motion in order to give the defence sufficient time (**Sadak and Others v. Turkey** (no. 1), § 57; **Sakhnovskiy v. Russia** [GC], §§ 103 and 106).*

…

c. Adequate facilities

ii. Consultation with a lawyer

*273. "Facilities" provided to an accused include consultation with his lawyer (**Campbell and Fell v. the United Kingdom**, § 99; **Goddi v. Italy**, § 31). The*

*opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence (**Bonzi v. Switzerland**, Commission decision; Can v. Austria, Commission report, § 52).*

*274. Article 6 § 3 (b) overlaps with a right to legal assistance in Article 6 § 3 (c) of the Convention (**Lanz v. Austria**, §§ 50-53; **Öcalan v. Turkey** [GC], § 148; **Trepashkin v. Russia** (no. 2), §§ 159-168).*

L-Art 6(3)(c)
(Dritt ghall-assistenza legali)

*275. Article 6 § 3 (c) encompasses particular aspects of the right to a fair trial within the meaning of Article 6 § 1 (**Correia de Matos v. Portugal** (dec.); **Foucher v. France**, § 30). This sub-paragraph guarantees that the proceedings against an accused person will not take place without adequate representation of the case for the defence (**Pakelli v. Germany**, Commission report, § 84). It comprises three separate rights: to defend oneself in person, to defend oneself through legal assistance of one`s own choosing and, subject to certain conditions, to be given legal assistance free (ibid., § 31).*

…

a. Scope of application

*276. Any person subject to a criminal charge must be protected by Article 6 § 3 (c) at every stage of the proceedings (**Imbrioscia v. Switzerland**, § 37). This protection may thus become relevant even before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions of Article 6 (ibid., § 36; **Öcalan v. Turkey** [GC], § 131; **Magee v. the United Kingdom**, § 41).*

277. While Article 6 § 3 (b) is tied to considerations relating to the preparation of the trial, Article 6 § 3 (c) gives the accused a more general right to assistance and

*support by a lawyer throughout the whole proceedings (**Can v. Austria**, Commission report, § 54).*

…

b. Legal assistance

*283. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (**Salduz v. Turkey** [GC], § 51). As a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or pretrial detention (**Dayanan v. Turkey**, § 31). The right of an accused to participate effectively in a criminal trial includes, in general, not only the right to be present, but also the right to receive legal assistance, if necessary (**Lagerblom v. Sweden**, § 49; **Galstyan v. Armenia**, § 89). By the same token, the mere presence of the applicant`s lawyer cannot compensate for the absence of the accused (**Zana v. Turkey** [GC], § 72).*

*284. The right to legal representation is not dependent upon the accused`s presence (**Van Geyseghem v. Belgium** [GC], § 34; **Campbell and Fell v. the United Kingdom**, § 99; **Poitrimol v. France**, § 34). The fact that the defendant, despite having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right to be defended by counsel (**Van Geyseghem v. Belgium** [GC], § 34; **Pelladoah v. the Netherlands**, § 40; **Krombach v. France**, § 89; **Galstyan v. Armenia**, § 89).*

…

286. For the right to legal assistance to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending

*the accused in his absence, is given the opportunity to do so (**Van Geyseghem v. Belgium [GC], § 33; Pelladoah v. the Netherlands**, § 41).*

…

e. Practical and effective legal assistance

*295. Article 6 § 3 (c) enshrines the right to "practical and effective" legal assistance Bluntly, the mere appointment of a legal-aid lawyer does not ensure effective assistance since the lawyer appointed may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties (**Artico v. Italy**, § 33).*

296. The right to effective legal assistance includes, inter alia, the accused`s right to communicate with his lawyer in private.

L-Art 6(3)(d)(3)
(Ezami tax-xhieda)

a. Autonomous meaning of the term "witness"

*298. The term "witness" has an autonomous meaning in the Convention system, regardless of classifications under national law (Damir Sibgatullin v. Russia, § 45; **S.N. v. Sweden**, § 45) Where a deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (**Kaste and Mathisen v. Norway**, § 53; **Lucà v. Italy**, § 41).*

*299. The term includes a co-accused (**Trofimov v. Russia**, § 37), victims (**Vladimir Romanov v. Russia**, § 97) and expert witnesses (**Doorson v. the Netherlands**, §§ 81-82).*
*300. Article 6 § 3 (d) may also be applied to documentary evidence (**Mirilashvili v. Russia**, §§ 158-159).*

b. Right to examine or have examined witnesses

i. General principles

*301. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a ater stage of proceedings (**Hümmer v. Germany**, § 38; **Lucà v. Italy**, § 39; **Solakov v. the former Yugoslav Republic of Macedonia**, § 57).*

*302. There are two requirements which follow from the above general principle. First, there must be a good reason for the non-attendance of a witness. Second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule") (**Al-Khawaja and Tahery v. the United Kingdom** [GC], § 119).*

*303. Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied (**Van Mechelen and Others v. the Netherlands**, § 58).*

*304. The possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial (**Tarău v. Romania**, § 74; **Graviano v. Italy**, § 38). ii. Duty to make a reasonable effort in securing attendance of a witness*

*305. The requirement that there be a good reason for the non-attendance of a witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. When witnesses do not attend to give live evidence, there is a duty to enquire whether their absence is justified (**Al-Khawaja and Tahery v. the United Kingdom** [GC], § 120; **Gabrielyan v. Armenia**, §§ 78, 81-84).*

*306. Article 6 § 1 taken together with § 3 requires the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him (**Trofimov v. Russia**, § 33; **Sadak and Others v. Turkey** (no. 1), § 67).*

*307. In the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence (**Karpenko v. Russia**, § 62; **Damir Sibgatullin v. Russia**, § 51; **Pello v. Estonia**, § 35; **Bonev v. Bulgaria**, § 43). 308. However, impossibilium nulla est obligatio; provided that the authorities cannot be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question, the witnesses` unavailability as such does not make it necessary to discontinue the prosecution (**Gossa v. Poland**, § 55; **Haas v. Germany** (dec.); **Calabrò v. Italy and Germany** (dec.); **Ubach Mortes v. Andorra** (dec.)).*

…

iv. Reliance on witness testimony not adduced in court

*310. It may prove necessary in certain circumstances to refer to depositions made during the investigative stage (**Lucà v. Italy**, § 40), for example, when a witness has died (**Mika v. Sweden** (dec.), § 37; **Ferrantelli and Santangelo v. Italy**, § 52) or has exercised the*

*right to remain silent (**Vidgen v. the Netherlands**, § 47; **Sofri and Others v. I**taly (dec.); **Craxi v. Italy** (no. 1), § 86), or when reasonable efforts by the authorities to secure the attendance of a witness have failed (**Mirilashvili v. Russia**, § 217).*

*311. Given the extent to which the absence of a witness adversely affects the rights of the defence, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort (**Al-Khawaja and Tahery v. the United Kingdom** [GC], § 125).*

*312. Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care (**S.N. v. Sweden**, § 53; **Doorson v. the Netherlands**, § 76).*

*313. If a witness was unavailable for adversarial examination for good reason, it is open to a domestic court to have regard to the statements made by the witness at the pre-trial stage, if these statements are corroborated by other evidence (**Mirilashvili v. Russia**, § 217; **Scheper v. the Netherlands** (dec.); **Calabrò v. Italy and Germany** (dec.); **Ferrantelli and Santangelo v. Italy**, § 52).*

*314. Article 6 § 3 (d) only requires the possibility of cross-examining witnesses whose testimony was not adduced before the trial court in situations where this testimony played a main or decisive role in securing the conviction (**Kok v. the Netherlands** (dec.); **Krasniki v. the Czech Republic**, § 79)*

315. Even where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. However, the fact that a conviction is based solely or to a decisive extent on the statement of an absent witness would constitute a very important factor

*to weigh in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (**Al-Khawaja and Tahery v. the United Kingdom** [GC], § 147).*

ix. Right to call witnesses for the defence

*329. As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3(d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It does not require the attendance and examination of every witness on the accused`s behalf; its essential aim, as is indicated by the words "under the same conditions", is full "equality of arms" in the matter (**Perna v. Italy** [GC], § 29; **Solakov v. the former Yugoslav Republic of Macedonia**, § 57).*

*330. It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth and the rights of the defence (**Perna v. Italy** [GC], § 29; **Băcanu and SC « R » S.A. v. Romania**, § 75).*

331. When a request by a defendant to examine witnesses is not vexatious, is sufficiently reasoned, is relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or even led to his acquittal, the domestic authorities must provide relevant reasons for dismissing

*such a request (**Topić v. Croatia**, § 42; **Polyakov v. Russia**, §§ 34-35).*

*332. Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to examine a witness (**S.N. v. Sweden**, § 44; **Accardi and Others v. Italy** (dec.)).*

Dwar l-***equality of arms*** l-awturi **Dovydas Vitkauskas u Grigoriy Dikov** ighidu hekk fil-ktieb "**Protecting the right to a fair trial under the European Convention on Human Rights**" (Council of Europe - Human Rights Handbooks - 2012) :-

*"Equality of arms" requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis-à-vis another party (**Brandstetter**).*

*While "equality of arms" essentially denotes equal procedural ability to state the case, it usually overlaps with the "adversarial" requirement – the latter in accordance with the rather narrow understanding of the Court concerning the access to and knowledge of evidence – and it is not clear on the basis of the Court`s consistent case-law whether these principles in fact have independent existence from each other (but see **Yvon v. France**, §§29-40). It can safely be said that issues with non-disclosure of evidence to the defence may be analysed both from the standpoint of the requirement of adversarial character of the proceedings (ability to know and test the evidence before the judge) and the "equality of arms" guarantee (ability to know and test evidence on equal conditions with the other party).*

*In some civil cases it would not appear inappropriate to also look at the question of the ability to access and contest evidence as part of the general requirement of "access to a court" (**McGinley and Egan v. the United Kingdom**). In **Varnima Corporation International S.A. v. Greece** (§§28-35), for instance, the domestic*

courts applied two different limitation periods to the respective claims of each party (the applicant company and the state), disallowing the applicant`s claim while admitting the one filed by the authorities).

*A minor inequality which does not affect fairness of the proceedings as a whole will not infringe Article 6 (**Verdú Verdú v. Spain**, §§23-29). At the same time, as a general rule, it is for the parties alone to decide whether observations filed by another participant in the proceedings call for comment, no matter what actual effect the note might have had on the judges (**Ferreira Alves (No. 3) v. Portugal**, §§35-43).*

*While there is no exhaustive definition as to what are the minimum requirements of "equality of arms", there must be adequate procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties. These may include opportunities to: a) adduce evidence, b) challenge hostile evidence, and c) present arguments on the matters at issue (**H. v. Belgium**, §§49-55).*

*The opposing party must not be given additional privileges to promote its view, such as the right to be present before a court while the other party is absent (**Borgers v. Belgium**, §§24-29).*

*The presence of a prosecutor in civil proceedings opposing two private parties can be justified if the dispute affects also the public interest or if one of the parties belongs to a vulnerable group in need of special protection (**Batsanina v. Russia**, §§20- 28).*

The requirement of "equality of arms" enjoys a significant autonomy but is not fully autonomous from the domestic law since Article 6 takes into account the inherent differences of accusatorial systems – for instance, to the extent that it is for the parties to decide in that system which evidence to present or witnesses to call at trial – and inquisitorial systems, where the court decides what type and how much of the evidence is to be

presented at trial. An applicant in an inquisitorial system, for instance, cannot rely on the principle of the "equality of arms" or Article 6 §3d in order to call any witness of his choosing to testify at trial (Vidal).

Fis-sentenza li tat din il-Qorti kif presjeduta fid-29 ta` April, 2014 fil-kawza fl-ismijiet **Edgar Publio Bonnici Cachia vs Avukat Generali** (li kienet ikkonfermata mill-Qorti Kostituzzjonali b`sentenza tal-5 ta` Dicembru 2014) inghad hekk :

*Minn Pag 81 sa Pag 267 tar-Raba` Edizzjoni (2011) ta` **A Practitioner`s Guide to the European Convention on Human Rights** (Sweet & Maxwell), il-gurista Karen Reid tittratta dak li hija ssejjah il-"problem areas" tal-"fair trial guarantees".*
Il-Qorti sejra tislet brani minn din il-kitba li fil-fehma taghha huma rilevanti ghall-mertu tal-kawza tal-lum:

Pag 81:

The key principle governing Art 6 is fairness … of the proceedings as a whole …

Pag 82:

As to fairness, it is perhaps simpler to say what it does not mean.

The Commission frequently stated, and the Court continues to emphasise, that the Convention organs are not courts of appeal from domestic courts and cannot examine complaints that a court has made errors of fact or law or reached the wrong decision or that a person was, for example, wrongly convicted. They will not enter into the merits of decisions. For this reason, complaints concernming miscarriages of justice are unlikely to succeed before them.

Domestic courts are in the best position to assess the evidence before them, to decide what is relevant or admissible. Matters of appreciation of domestic law and

the categorisation of claims in domestic law are also primarily for the appreciation of domestic courts …

Pag 83:

From the Convention point of view it is not so much the result that is in question but the process of "hearing" …

Equality of arms between the parties, or "a fair balance" must be achieved. This means that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions which do not place him at a substantial disadvantage vis-à- vis his opponent …

Pag 84:
The accused, and in civil proceedings the parties, must be able to participate effectively in proceedings …

Pag 85:

Measures taken in the conduct of a criminal trial must be reconcilable with an adequate and effective exercise of the rights of the defence. The importance of securing defence rights in criminal proceedings has been identified as a principle of democratic society and, in this respect, Art 6 must be interpreted to render them practical and effective rather than theoretical and illusory …

The proceedings are looked at as a whole and one restriction on the defence may be insufficient to render the proceedings as a whole unfair …

Pag 156:

The Commission did not exclude that the refusal by a court to order an expert, hear a witness or to accept other types of evidence might in certain circumstances render the proceedings unfair. Since, however, it was for the national courts to decide what was necessary or

essential to decide a case, it commented that only in exceptional circumstances would it conclude that a decision of a national court in such a matter violated the right to a fair hearing. It gave the example of where an applicant adduced some evidence which the court rejected outright, refusing to allow verification of it and without giving sufficient reasons for its refusal …

*Where in "**Accardi v. Italy**" (30598/02 – Dec. January 20. 2005 – ECHR 2005-II) the decision of a domestic court not to order a pychologist`s report or to call the expert requested by the defence was based on logical and pertinent arguments and the conclusion that such evidential measures were of no relevance to the proceedings, there was no infringement of the rights of the defence or the fairness principle*
…

Fis-sentenza taghha tas-26 ta` Lulju 2011 fil-kawza "**Huseyn and Others vs Azerbaijan**" il-Qorti ta` Strasbourg qalet hekk:

*175. More specifically, all of the applicants consistently claimed that neither they nor their counsel had been given sufficient access to the prosecution evidence after the pre-trial investigation had been completed and before the trial commenced, nor had they enjoyed such access after the trial had commenced, despite their repeated complaints to that effect. The Court reiterates that the right to an adversarial trial under Article 6 § 1 of the Convention means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment on them (see **Brandstetter v. Austria**, 28 August 1991, §§ 66-67, Series A no. 211). Article 6 § 3 (b) guarantees the accused "adequate time*

and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility of putting all relevant defence arguments before the trial court and thus of influencing the outcome of the proceedings (see ***Can v. Austria****, no. 9300/81, Commission report of 12 July 1984, § 53, Series A no. 96;* ***Connolly v. the United Kingdom****, no. 27245/95, Commission decision of 26 June 1996; and* ***Mayzit v. Russia****, no. 63378/00, § 78, 20 January 2005). The facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings (see* ***C.G.P. v. the Netherlands****, no. 29835/96, Commission decision of 15 January 1997, and* ***Foucher v. France****, 18 March 1997, §§ 31-38, Reports 1997-II). The issue of the adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case. …*

188. The Court reiterates that the principle of equality of arms, as one of the fundamental elements of the broader concept of a fair trial, requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent (see ***Nideröst-Huber v. Switzerland****, 18 February 1997, § 23, Reports 1997-I). That right means, inter alia, the opportunity for the parties to a trial to present their own legal assessment of the case and to comment on the observations made by the other party, with a view to influencing the court`s decision (see, mutatis mutandis,* ***Lobo Machado v. Portugal****, 20 February 1996, § 31, Reports 1996-I, with further references). The requirement of equality of arms, in the sense of a "fair balance" between the parties, applies in principle to both criminal and civil cases ; in criminal cases a lesser degree of latitude is allowed for any deviations from that*

*requirement (see **Dombo Beheer B.V. v. the Netherlands**, 27 October 1993, §§ 32-33, Series A no. 274).*

…

*196. At the outset, the Court notes that the prosecution`s case was based to a large degree on numerous witnesses whose pre-trial statements were produced in court. However, it appears that all of these witnesses were called to testify at the trial and that, in principle, the applicants were given an opportunity to question them. As to the defence witnesses, it is true that the Assize Court allowed the examination of only some of the witnesses requested by the defence, but refused to call all of the persons whom the defence sought to examine. While Article 6 § 3 (d) of the Convention is aimed at ensuring equality in criminal proceedings between the defence and the prosecution as regards the calling and examination of witnesses, it does not give an accused person an unlimited right to obtain the attendance of witnesses in court. The domestic law may thus lay down conditions for the admission and examination of witnesses provided that such conditions are identical for witnesses on both sides. Similarly, the domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence, for instance on the ground that the court considers their evidence unlikely to assist in ascertaining the truth (see **X v. Austria**, no. 4428/70, Commission decision of 1 June 1972). Having regard to the available material, the Court finds that it has not been clearly shown how any of the witnesses whom the Assize Court refused to examine would have been able to assist the applicants` defence against the specific accusations put forward against them.*

…

200. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be

examined in particular whether the applicants were given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see Khan, cited above, §§ 35 and 37, and Allan, cited above, § 43). Where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance (see Allan, cited above, § 47, and ***Bykov v. Russia*** *[GC], no. 4378/02, § 95, ECHR 2009-...)*

*Fil-kawza "****Klimentyev vs Russia****" li kienet deciza mill-Qorti ta` Strasbourg fis-16 ta` Novembru 2006 l-ilment tal-applikant kien illi huwa sofra vjolazzjoni tad-dritt tieghu ghal smigh xieraq ghaliex ma kienx inghata l-opportunita` li jezamina r-rapporti tal-esperti tal-qorti. F`dik il-kawza il-Qorti Ewropea ma kenitx sabet vjolazzjoni ghaliex il-ligi domestika kienet taghti l-opportunita` lill-akkuzat li jezamina dawk irrapporti u ghalhekk kien nuqqas tal-applikant li ma hax dik l-opportunita`. Il-Qorti qalet hekk :*

`95. The Court recalls that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see e.g. ***Jespers v. Belgium****, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61;* ***Foucher v. France****, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, § 34;* ***Bulut v. Austria****, judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, p. 380-381, § 47).*

96. On the facts, the Court observes that the case for the prosecution rested, inter alia, on a number of expert reports (technical, medical, graphological and other) ordered by the prosecution during the pre-trial stage of

proceedings in 1995 and 1996. Four out of more than sixteen decisions ordering such reports were served on the applicant with delays ranging from two to three and a half months, whilst the remaining twelve decisions were served within a month from the respective dates of their delivery (see paragraphs 34-37 in the summary of facts). The applicant principally argued that the late notification of these decisions had effectively deprived him of the possibility to participate in the rendering of the expert examinations and that the subsequent admission of the respective expert examinations had been in breach of Article 6.

97. Having regard to the circumstances of the case, the relevant domestic law and the parties` submissions, the Court cannot subscribe to the applicant`s argument. To begin with, the Court observes that at the time of service of these sixteen decisions both the applicant and his counsel were officially informed about the procedural rights of the accused, including the right to challenge an expert, seek the appointment of a particular person as an expert, adduce further questions, be present during the expert examination in person and make any comments and be informed of expert conclusions (see paragraph 37 above). The applicant and his counsel had an unrestricted opportunity to make related requests and motions in writing and, indeed, there is no indication in the case-file that any of the requests of the defence were turned down as belated or otherwise inadmissible. On the contrary, the authorities granted and implemented all of the applicant`s requests in this respect. Moreover, there is nothing in the case-file to suggest, and indeed the applicant has not alleged that he was unable, personally or with the assistance of his defence counsel, to study the impugned expert examinations beforehand, contest them throughout the trial and appeal proceedings or avail himself of his rights under Sections 89 and 290 of the Criminal Procedure Code by requesting the trial court to order additional or repetitive expert examinations.`

…

*Fis-sentenza taghha tat-30 ta` Settembru 2011 fil-kawza "**J.E.M Investments Ltd v. Avukat Generali et**" il-Qorti Kostituzzjonali qalet hekk –*

`id-dritt ghas-smigh xieraq ma jiggarantix il-korrettezza tas-sentenzi fil-meritu izda jiggarantixxi biss l-aderenza ma` certi principji procedurali (indipendenza u imparzjalita` tal-Qorti u tal-gudikant, audi alteram partem u smigh u pronuncjament tas-sentenza fil-pubbliku) li huma konducenti ghall-amministrazzjoni tajba tal-gustizzja.

Il-funzjoni tal-Qorti, fil-gurisdizzjoni Kostituzzjonali taghha, m`hijiex illi tirrevedi s-sentenzi ta` Qrati ohra biex tghid jekk dawn gewx decizi `sewwa` jew le, izda hija limitata ghall-funzjoni li tara jekk dawk is-sentenzi kisrux il-Kostituzzjoni jew il-Konvenzjoni Ewropea.`

Ighidu Harris, O`Boyle & Warbrick fil-ktieb "**Law of the European Convention on Human Rights**" (Tieni Edizzjoni – 2009 - OUP) illi in linea ta` principju the Court (u cioe` l-ECHR) allows States a wide margin of appreciation as to the manner in which national courts operate … A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of results as of conduct, with national courts being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial. (enfasi ta` din il-Qorti) [ara pag 202]. U jkomplu li in some contexts a breach of Article 6 will only be found to have occurred upon proof of "actual prejudice" to the applicant … [ara pag 204]

Fil-Pag 251 tal-ktieb "**Law of the European Convention on Human Rights**" (2nd Edition - 2009 - OUP), l-awturi **Harris, O`Boyle & Warbrick** josservaw illi :-

"The right to a fair hearing supposes compliance with the principle of equality of arms. This principle, which applies to civil as well as criminal proceedings requires

each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis- à-vis his opponent. In general terms, the principle incorporates the idea of a fair balance between the parties."

VI. Konsiderazzjonijiet ta` din il-Qorti

1. L-ewwel (1) ilment : Id-dritt ghall-assistenza legali

a) Ir-rikorrenti Connie Decelis de proprio

Minn esami tar-rikors promotur, l-ilment jirreferi **specifikament** ghad-dritt ghall-assistenza legali ta` Jason Decelis (**mhux** ta` Connie Decelis) fis-sens illi l-avukat tieghu nghata zmien qasir sabiex jipprepara d-difiza tieghu fil-guri.

Dan premess, il-Qorti tosserva illi fin-nota ta` sottomissjonijiet tar-rikorrenti, harget barra mill-ilment kif delineat fir-rikors promotur, u affermat illi hija ma kelliex assistenza ta` avukat waqt l-interrogatorju. Din il-lanjanza minn imkien ma tirrizulta fir-rikors promotur. Lanqas ma saret xi talba fil-kors tal-kawza sabiex tizdied talba ohra. Tajjeb irrileva l-intimat fin-nota ta` sottomissjonijiet tieghu illi r-risoluzzjoni tal-vertenza ghandha tibqa` nkwadrata u allura deciza fil-parmetri li stabbilew ir-rikorrenti stess bil-kawzali u bit-talbiet li ressqu fir-rikors promotur. Il-gurisprudenza tal-qrati taghna hija cara meta kategorikament teskludi li l-qrati jippronunzjaw ruhhom dwar materji li johorgu barra mill-kontestazzjoni ta` bejn il-partijiet.

Fis-sentenza li tat din il-Qorti diversament presjeduta fil-31 ta` Jannar 2003 fil-kawza fl-ismijiet "**Godwin Azzopardi vs Paul Azzopardi**" kien deciz hekk :-

"*… il-Qorti ghandha toqghod biss fuq il-kawzali u t-talba dedotta, u xejn izjed" (Vol. XXXIX P I p 243). Li jfisser li l-Qorti ghandha fl-ghoti tas-sentenza taghha toqghod rigorosament fil-limiti tal-kontestazzjoni, u entro it-termini tac-citazzjoni u ta` l-eccezzjonijiet*."

Fis-sentenza li tat il-Qorti tal-Appell Inferjuri fid-19 ta` Mejju 2004 fil-kawza fl-ismijiet "**Veronique Amato Gauci et vs Marco Zammit**" inghad hekk :-

> *"llli ghal dak illi jirrigwarda l-azzjonijiet civili, l-procedura tillimita hafna l-inizjattivi li l-Qorti tista tiehu minn rajha. Fost dawn, per ezempju, hemm il-gurisdizzjoni, fejn jekk jirrizultalha illi m`ghandhiex kompetenza jew gurisdizzjoni biex tisma` kawza, l-Qorti tista` "ex-officcio" tqajjem din il-kwistjoni peress illi hi ta` ordni pubbliku. L-istess fil-kaz ta` Mandat in Factum fejn il-Qorti tista` "ex-officcio" tezamina r-ragunijiet ghall-hrug ta` dan il-Mandat (ara **Xuereb vs Xuereb** Appell 27 ta` Marzu, 2003)*
>
> *....*
>
> *1. "Huwa principju maghruf illi l-Imhallef civili ghandu, fl-ghoti tas-sentenza f`kawza, joqghod rigorozament fil-limiti tal-kontestazzjoni b`mod illi waqt li hu obbligat jokkupa ruhu mill-kwestjonijiet kollha dedotti fil-gudizzju mill-partijiet, minn naha l-ohra ma jistax jitratta u jirrizolvi kwestjonijiet li l-partijiet ma ssollevawx u ma ssottomettewx ghad-decizjoni tieghu, ammenokke non si tratta minn kwestjonijiet ta` ordni pubbliku li l-Imhallef hu obbligat jirrileva "ex officio" – "**Joseph Gatt –vs- Joseph Galea**", Appell Civili, 12 ta` Lulju 1965; "**Regina mart Francis Cacciottolo –vs- Francis Cacciottolo**", Appell Civili, 30 ta` Gunju 1976*
>
> *2. "Il-Qorti m`ghandhiex tissolleva eccezzjonijiet li m`hiex awtorizzata espressament mill-Kodici ta` Organizazzjoni u Procedura Civili jew minn konsiderazzjonijiet ta` ordni pubbliku, altrimenti kwalunkwe kwestjoni legali tkun tista` tigi sollevata mill-Qorti, prattika din mhiex rakkomandabbli li tista` twassal ghal sitwazzjoni fejn il-Qorti tiddeciedi fuq l-eccezzjoni taghha stess" – "**Anthony Hammett noe –vs- Vincent Genovese pro et noe**", Appell Kummercjali, 31 ta` Jannar 1991 ;*

> *"Fis-sistema gudizzjarja taghna l-Qorti m`ghandhiex tissolleva eccezzjonijiet li m`hijiex awtorizzata espressament mill-Kodici ta` Organizazzjoni u Procedura Civili jew minn xi konsiderazzjoni serja ta` ordni pubbliku. Dana billi, bhala norma, il-gudikant ghandu jiddeciedi l-kawza billi joqghod fuq il-binarju tal-kontestazzjoni li jressqulu l-partijiet. Huwa r-rwol tad-difensur tal-parti u mhux tal-gudikant li jiskogita difizi u eccezzjonijiet dwar kwestjonijiet legali. Diversament il-Qorti tkun qeghda tesponi ruha ghal certi riskji ovvji meta tiddeciedi kawza fuq eccezzjoni li tissolleva hi stess, meta m`hijiex awtorizzata espressament li taghmel hekk" – "**Edwin Grech –vs- Antida Saglimbene et**", Qorti tal-Kummerc, 9 ta` April 1992.*

(ara wkoll: Qorti ta` l-Appell Inferjuri : 10 ta` Ottubru 2005 : fl-ismijiet **Grobett Holdings Ltd. vs Steve Abela** pro et noe ; Qorti ta` l-Appell Inferjuri : 20 ta` Ottubru 2003 fl-ismijiet **Borg vs Halmann Limited**; Prim`Awla: 2 ta` Frar 1990 fl-ismijiet **Gatt vs Debono et**).

Fis-sentenza li tat fit-28 ta` Settembru 2012 fil-kawza fl-ismijiet "**Edwin Cilia vs Carmela Cilia**" il-Qorti tal-Appell irrimarkat illi:

> *"mhux lecitu allura, li l-Qorti tmur lil hinn mit-talba, ghax is-sentenza trid tirrispekkja biss dak li gie mitlub."*

(ara wkoll : Qorti tal-Appell : 21 ta` Gunju 2011 : **Joseph Mary Farrell vs Kummissarju tat-Taxxa Fuq il-Valur Mizjud**)

Ghalhekk din il-Qorti mhijiex sejra tippronunzja ruhha dwar il-kwistjoni sollevata minn Connie Decelis fin-nota ta` osservazzjonijiet taghha meta allegat illi ma kellhiex assistenza legali waqt l-interrogatorju, u allura allegat li garrbet lezjoni tal-jedd taghha ghal smigh xieraq.

Tishaq illi l-qrati superjuri (<u>inkluz</u> dawk ta` gurisdizzjoni kostituzzjonali u konvenzjonali) jridu jimxu a bazi tal-kawzali li jressaq ir-rikorrent u tat-talba li ssegwi minn dik il-kawzali. Hija obbligata toqghod fuq il-kawzali u t-talba dedotta u <u>xejn izjed</u>.

b) <u>Jason Decelis</u>

Dan ir-rikorrent ilmenta li ma nghatax difiza xierqa ghaliex l-Av. Martin Fenech li kien inkarikat tard biex jiehu hsieb id-difiza tieghu, u ghalhekk ma kienx adegwatament ippreparat biex jaqdi l-inkariku.

Fil-Pag 291-292 ta` **<u>Jacobs, White & Ovay</u>** : **<u>The European Convention on Human Rights</u>** : Seventh Edition : OUP : jinghad hekk :-

The concept of "equality of arms" …requires a fair balance between the parties and applies to both civil and criminal cases.

…

What matters is that parties are afforded a reasonable opportunity to present their case – including their evidence – under conditions that do not ploace them at a substantial disadvantage vis-à-vis the other side.

(ara wkoll : Pag 251 et seq : **<u>Harris, O`Boyle & Warbrick</u>** : **<u>Law of the European Convention on Human Rights</u>** : Second Edition : OUP)

Fil-kaz tal-lum, jirrizulta mir-rikors a fol 225 illi Dr Fenech kien infurmat fit-30 ta` Mejju 2006 illi kien mahtur bhala Avukat tal-Ghajnuna Legali sabiex jassisti lil Jason Decelis. Fir-rikors Dr Fenech ighid illi huwa kien pront ha konjizzjoni tal-inkartament kollu li kien voluminuz. Jumejn wara li kien infurmat Dr Fenech ipprezenta r-rikors fejn talab aktar zmien sabiex ikun jista` jipprepara ruhu ahjar ghall-guri illi kien ser jibda fil-5 ta` Gunju 2006. Ir-rikors kien dekretat dakinhar stess tal-presentata u t-talba kienet michuda. Connie Decelis tistqarr illi kien biss fil-jum tal-Gimgha, u allura fil-jum tat-2 ta` Gunju 2006, illi iltaqghu ma` Dr. Fenech. Premessi dawn ic-cirkostanzi, ma jirrizultax illi bejn id-data meta ha konjizzjoni tal-process u d-data meta ltaqa` mal-assistit tieghu, Dr Fenech ma kienx diga` beda jahdem fuq id-difiza ta` Jason Decelis.

Fix-xiehda tieghu, Dr. Fenech ighid li hassu ppressat bil-hin biex ihejji d-difiza pero` **mkien** ma stqarr illi minhabba l-pressjoni taz-zmien ma kienx ippreparat.

Wara l-mewt ta` Jason Decelis l-atti tieghu b hala rikorrent kienu trasfuzi fil-persuna ta` Connie Decelis. Fin-nota ta` sottomossjonijiet taghha, Connie Decelis tishaq illi "*Dr Martin Fenech kellu inqas minn kemm tghodd granet fuq is-swaba ta` id wahda*" sabiex jipprepara ghall-guri (fol. 520). Minkejja din l-istqarrija, effettivament irrizulta li kien hemm sitt ijiem. Il-Qorti mhijiex sejra tghid kellux Dr Fenech jinghata aktar zmien mill-Qorti Kriminali biex ihejji d-difiza meta tinsab rinfaccjata bix-xiehda ta` Dr Fenech illi ghalkell xtaq li kieku kellu aktar zmien biex ihejji ruhu xorta wahda ghamel l-almu tieghu biex Jason Decelis ikollu difiza adegwata. Dr Fenech xehed illi ghamel weekend gewwa jistudja u hass illi kien preparat tajjeb sabiex jiddefendi lill-klijient tieghu u allura sabiex jaghmel ezamijiet u kontro-ezamijiet skont il-kaz.

Fin-nota ta sottomissjonijiet tieghu, l-intimat jirrimarka illi ghalkemm ir-rikorrenti tafferma li binha Jason Decelis ma kellux smigh xieraq, tonqos milli tindika bil-preciz x`kienu n-nuqqasijiet tad-difensur tieghu, u allura ma tippruvax fejn précis binha kien sprovvist minn difiza tajba.

Il-Qorti tirrimarka illi dak li tghid ir-rikorrenti fin-nota ta` sottomissjonijiet dwar l-opera ta` Dr Fenech u cioe` : illi "*minn ezami tal-proceduri tal-Guri, mix-xihdiet in kontroezami, minn kull aspett, jidher car illi l-avukat difensur ma kienx – u qatt ma seta ikun – adegwatament ippreparat biex jaghmel Guri dwar akkuza ta` Omicidju Volontarju.*" (fol. 520) jirrasenta n-nuqqas ta` etika u disrispett lejn il-prestazzjonijiet ta` Dr Fenech, kumment dan li messu qatt ma sar ghaliex huwa ghal kollox soggettiv, frott ta` spekulazzjoni u ghalhekk ingust. Ghalkemm ir-rikorrenti u d-difensur attwali taghha jistghu ma jaqblux ma` l-mod kif thejjiet id-difiza u mal-kondotta ta` Dr Fenech, dik il-fehma ma taghtihom l-ebda jedd li jittrasformaw fehma ghal go fatt ippruvat kif lanqas ma jaghtihom jedd jippresumu illi kien hemm xi lezjoni tal-jedd ghall-assistenza legali ta` Jason Decelis . Mill-arringa ta` l-Av. Fenech (kopja ta liema tinsab ezebita in atti) johrog kjarament illi Dr Fenech kien jaf il-kaz tajjeb, hejja ruhu tajjeb u ddefenda lill-assistit tieghu bl-ahjar mod illi seta`.

Jidher bil-wisq evidenti illi r-rikorrenti qed torbot il-lanjanza taghha merament fuq ir-rikors li ntavola l-Av. Fenech qabel il-guri (*supra*). Dan wahdu **<u>ma jistax</u>** iwassal dikjarazzjoni minn din il-qorti illi kien hemm nuqqas ta` *equality of arms* jew li b`xi mod seta` kien hemm lezjoni tal-jedd ghal smigh xieraq ta` Jason Decelis.

Fejn ikun allegat ksur ta` jeddijiet fondamentali, b`mod partikolari fil-kaz ta` allegata lezjoni tal-jedd ghal smigh xieraq, il-qorti ghandha tqis l-ilment fuq l-assjem tal-procediment, mhux toqghod biss fuq aspett izolat. Trid taccerta jekk fit-totalita` tieghu, kienx jirrizulta li l-persuna tkun garrbet pregudizzju tali li jwassal ghal lezjoni.

Issa l-Art 6(3)(b) tal-Konvenzjoni jitlob illi l-persuna akkuzata tinghata l-opportunita illi thejji d-difiza taghha b`mod u manjiera illi tkun tista` ggib `il quddiem quddiem il-Qorti dawk l-argumenti kollha illi jistghu jinfluwixxu fuq id-decizjoni finali.

Dak illi mbaghad jahseb ghalih l-Art 6(3)(c) huwa li l-akkuzat jircievi assistenza legali.

Dan premess, fil-kaz tal-lum, l-assjem tal-provi jnissel fl-animu ta` din il-Qorti c-certezza morali illi Jason Decelis tassew kellu assistenza legali adegwata matul il-guri kollu. Kellu wkoll kull opportunita` illi jitkellem mad-difensur tieghu dwar kull aspett tad-difiza tieghu waqt il-guri.

<u>Minn imkien</u> ma jirrizulta illi Jason Decelis jew id-difensur tieghu ressqu xi ilment ta` natura kostituzzjonali jew konvenzjonali ta` xi xorta waqt xi stadju tal-procediment kriminali.

<u>L-ewwel lanjanza tar-rikorrenti hija infondata u ghalhekk qeghda tkun respinta</u>.

2. <u>It-tieni (2) ilment :</u>
<u>Id-dritt ghall-kontestazzjoni u ghall-kontroezami tax-xhieda</u>

Il-lanjanza tar-rikorrenti tinsorgi specifikament fir-rigward tax-xiehda ta` Hayet Attard u Adel Hamidi.

Jirrizulta li dawn iz-zewg persuni xehdu waqt il-kumpilazzjoni izda ma kienux Malta meta sar il-guri peress illi ma setghux jigu rintraccjati. Ghalhekk ma setax isir il-kontroezami taghhom.

Ir-regola generali hija li persuna ghandha tixhed *viva voce* salv ghal cirkostanzi eccezzjonali li ghalihom tipprovdi specifikament il-ligi.

Fil-kaz ta` persuni illi jkunu xehdu fil-kumpilazzjoni izda illi ma jkunux prezenti fi stadju ulterjuri tal-process, il-ligi taghna bl-**Art. 646(2) tal-Kap 9** tipprovdi illi :

> *Ix-xiehda tax-xhieda, sew kontra kemm favur l-imputat jew akkuzat, kemm-il darba tkun ittiehdet bil-gurament matul il-kompilazzjoni, skont il-ligi, tista` tingieb bhala prova :*
>
> *Basta li x-xhud jingieb ukoll fil-qorti biex jigi ezaminat viva voce kif provdut fis-subartikolu (1) hlief jekk, meta jitqiesu c-cirkostanzi tal-kaz, huwa evidenti lill-Qorti li xhieda viva voce tista` tikkawza hsara psikologika lix-xhud u jekk ix-xhud ikun mejjet, ikun barra minn Malta jew ma jkunx jista` jinsab u bla hsara ghad-dispozizzjonijiet tas-subartikolu (8)*

Meta javveraw ruhhom ic-cirkostanzi li tahseb ghalihom id-disposizzjoni appena citata, jiskatta mbaghad l-**Art 646(11) tal-Kap 9** li jghid :-

> *Meta jinghad li xi xhud miet, siefer jew ma jkunx jista` jinstab, il-qorti tista` tqis l-allegazzjoni ppruvata bir-rapport mahluf tal-marixxall jew ufficjal esekutur iehor illi bih iwettaq li huwa sar jaf zgur li dak ix-xhud hu mejjet jew imsiefer, jew li huwa ghamel it-tfittxija li tinhtieg u ma rnexxilux isibu.*"

Il-Qorti rat b`reqqa l-inkartament tal-guri li kien prezentat bhala prova ghall-fini tal-procediment tal-lum.

Tirreferi ghall-verbal tal-udjenza tas-6 ta` Gunju 2006 quddiem il-Qorti Kriminali fejn jinghad hekk b`riferenza ghax-xiehda tal-persuni fuq menzjonati :-

> *Xehdet bil-gurament il-Marixall Carmen Pisani fuq ix-xhieda Hayet Attard u Hamidi Abdel.*
>
> *Qed naccerta lill-Qorti illi minkejja l-isforzi li ghamilna biex ninnotifikaw lil Hayet Attard u huha Abdel Hamidi ma rnexxilniex u meta hallejna karta fl-indirizz tal-flatt ta` Bugibba fejn kienu joqghodu meta xehdu quddiem il-Qorti tal-Magistrati bhala Qorti Istruttorja, sid il-post li sabet din il-karta infurmatna illi dawn x`aktarx illi kienu telqu minn Malta ghax anki lilha kellhom jaghtuha xi flus.*
>
> *Il-Qorti la darba dawn ma setghux jigu ntraccati, tawtorizza lill-prosekuzzjoni taqra d-deposizzjoni taghhom fil-kumpilazzjoni. Id-difiza tat-tlett akkuzati tosserva li f`dan il-kaz mhux ser tkun possibbli li taghmel konto-ezami.*
>
> *Dr Barbara ghall-prosekuzzjoni jirrileva pero` li l-kontro-ezami seta` jsir fl-istadju tal-kumpilazzjoni kif fil-fatt sar f`dan il-kaz.*
>
> *Dr Barbara jitlob li tinghata kopja tax-xhieda traskritta ta` dawn ix-xheda lill-gurati.*
>
> *Il-Qorti tilqa` t-talba.*
>
> *Dr Chris Cardona ghall-akkuzat Carmel Decelis jitlob li tinqara l-istqarrija ghal fini ta` kontroll li kienu ghamlu x-xhieda Hayat Attard u Hamidi Abdel lill-Pulizija u li sussegwentement giet ikkonfermata quddiem il-Magistrat Inkwirenti.*

Il-Qorti tilqa` t-talba u tordna wkoll li titqassam kopja ta` dawn l-istqarrijiet taz-zewg xhieda lill-gurati." (fol. 236)

Dan il-verbal ma jhalli ebda dubju illi l-procedura prevista bl-Art 646 (2) u (11) tal-Kap 9 kienet osservata.

Ma jistax ghalhekk jinghad illi kien hemm xi skorrettezza procedurali.

Ghalhekk mhuwiex sewwa li r-rikorrenti fin-nota ta` sottomissjonijiet taghha tallega illi la l-Pulizija, la l-Prosekuzzjoni u lanqas il-Qorti m`ghamlu xejn sabiex jissalvagwardjaw id-dritt tal-kontro-ezami.

Il-Qorti tqis ukoll illi ghalkemm id-difiza tal-akkuzati kollha fil-guri irregistraw il-punt illi kontro-ezami ta` dawk iz-zewg persuni ma setax isir, effettivament hadd ma ressaq kontestazzjoni dwar dan, propju ghaliex id-difensuri taghhom kienu edotti mill-osservanza tad-disposizzjonijiet appena citati.

Dak illi jitlob l-Art 6(3)(d) tal-Konvenzjoni huwa illi l-akkuzat ikollu dritt illi jezamina u jikkontesta kull evidenza illi titressaq kontra tieghu fi proceduri kriminali. Dan allura jfisser illi l-akkuzat ghandu dritt jaghmel ezami u kontro-ezami tax-xhieda li jitressqu mill-Prosekuzzjoni. Fl-istess waqt tajjeb jinghad illi dan id-dritt mhuwiex assolut u huwa soggett ghal restrizzjonijiet li ma jilledux id-dritt tal-akkuzat kif tutelat bl-Art 6(3)(d) dment illi jkunu gew addottati mizuri prekawzjonali.

Riferibbilment ghall-kaz meta xhieda ma jkunux ser jixhdu *viva voce,* irid jirrizulta illi kien hemm raguni valida ghaliex dawn ma telghux jixhdu, u jrid jintwera wkoll illi da parti tal-Awtoritajiet ikun sar kull tentattiv possibbli sabiex dawn ix-xhieda jigu rintraccjati halli jingiebu jixhdu. Fil-kaz in ezami jidher illi l-Awtoritajiet ghamlu li setghu sabiex isibu dawn il-persuni u ma sabuhomx ghaliex lahqu telqu mill-pajjiz. L-Ass. Kumm. Neil Harrison spjega wkoll illi ma kienx il-kaz illi dawk il-persuni jinzammu Malta kontra r-rieda taghhom fl-eventwalita` illi forsi jkunu mehtiega jixhdu fi stadju ulterjuri.

L-Art 6(3)(d) jirrekjedi illi s-sejbien ta` htija ma jkunx jistrih biss fuq id-depozizzjoni tax-xhieda li jkunu assenti.

Fil-kaz in ezami, ghalkemm jidher illi ix-xiehda ta` dawn iz-zewg persuni kienet ta` importanza ghall-prosekuzzjoni, **ma jirrizultax** minghajr ombra illi l-kaz ta` l-prosekuzzjoni kien kollu kemm hu mibni fuq ix-xiehda ta` dawn iz-zewg persuni. Fil-fatt, ghalkemm irrileva illi ma setax isir il-kontro-ezami taghhom, ir-rikorrenti fl-ebda mument ma tilmenta illi s-sejbien tal-htija taghha jew ta` binha Jason Decelis kien ibbazat unikament fuq ix-xiehda taghhom.

Din il-Qorti tirrimarka illi ghalkemm dan tal-lum kien it-tieni rikors kostituzzjonali li ressqu Connie Decelis u Jason Decelis, din il-lanjanza tqanqlet ghall-ewwel darba illum. Il-kwesit johrog wahdu : jekk din il-kwistjoni partikolari kienet tant vitali ghar-rikorrenti ghax lesiva ghal jedd taghhom ghal smigh xieraq, ghala l-kwistjoni ma kenitx sollevata fil-kors tal-ewwel procediment kostituzzjonali ? Twegiba minnaha tar-rikorrenti ma hemmx.

It-tieni lanjanza tar-rikorrenti qeghda tkun respinta.

3. It-tielet (3) ilment :
Il-kontestazzjoni u kontro-ezami ta` Carmel Decelis

Carmel Decelis kien ko-akkuzat ma` martu Connie Decelis u ma` ibnu Jason Decelis fil-guri. Kull wiehed mit-tliet ko-akkuzati kellu d-dritt jaghzel illi jixhed jew li jibqa` sieket. Carmel Decelis u Connie Decelis ghazlu illi jixhdu. Ix-xiehda taghhom tikkostitwixxi prova fil-konfront taghhom biss izda mhux fil-konfront ta` l-ko-akkuzati l-ohra.

Saret referenza ghall-**Art 661 tal-Kap 9**.

L-Art 661 ighid :-

Konfessjoni ma taghmilx prova hlief kontra min jaghmilha, u mhix ta` pregudizzju ghal ebda persuna ohra.

Saret referenza wkoll ghall-**Art 693(3)** li jghid :-

Meta l-uniku xhud kontra l-akkuzat dwar xi reat fi process li jinstema` quddiem il-gurati tkun persuna komplici, il-Qorti ghandha taghti direttiva lill-gurati biex jiznu x-xiehda li dak ix-xhud jaghti b`kawtela qabel ma jserrhu fuqha u jaslu biex isibu hati lill-akkuzat.

Fin-nota ta` sottomissjonijiet taghha, ir-rikorrenti taghmel l-argument illi dawn iz-zewg dispozizzjonijiet "*huma konfliggenti u kontradittorji*".

Ir-rikorrenti taghmel l-argument illi x-xiehda ta` ko-akkuzat jew ma tghodd xejn kontra l-akkuzat l-iehor jew inkella tghodd pero` trid tittiehed b`kawtela.

Ir-rikorrenti tissottometti wkoll illi minhabba din l-inkongruwenza, lanqas seta` jsir il-kontro-ezami ta` Carmel Decelis.

Il-Qorti tosserva illi ghalkemm ir-rikorrenti taghmel dan l-argument sabiex tipprova tattakka l-fatt illi ma sarx kontro-ezami ta` Carmel Decelis, hija tonqos milli tirreferi ghall-fatt illi anke hi xehdet fil-guri.

Bl-istess argument lanqas tar-rikorrenti ma` seta jsir il-kontro-ezami.

Ir-rikorrenti ma tilmentax mill-fatt illi x-xiehda taghha wkoll setghet holqot pregudizzju lill-ko-akkuzati l-ohra, inkluz lill-binha Jason Decelis.

Il-Qorti tosserva illi fl-atti ta` din il-kawza **ma hemmx** : a) ix-xiehda ta` Carmel Decelis waqt il-guri b) l-indirizz tal-Imhallef li ppresjeda l-guri c) is-sentenza tal-Qorti Kriminali d) is-sentenza tal-Qorti tal-Appell Kriminali.

Ir-rikorrenti naqset milli tindika bil-preciz kif kienet ta` pregudizzju ghaliha x-xiehda ta` Carmel Decelis.

Naqset milli tghid jekk l-Imhallef li ppresjeda l-guri osservax id-dettami tal-Art 693(3) tal-Kap 9.

Il-lanjanza tar-rikorrenti *forsi* kienet tiehu xejra diversa li kieku l-Imhallef naqas f`dak l-obbligu tieghu bil-konsegwenza li jkun halla lill-gurati, nies inesperti fil-ligi, jassumu illi x-xiehda ta` Carmel Decelis setghet tghodd ukoll fil-konfront ta` Connie Decelis u Jason Decelis.

Dan premess, il-Qorti tirrileva illi skont il-linji gwida tal-ECHR, l-uzu tal-kelma *xhieda* fl-Art 6(3)(d) tinkludi wkoll ko-akkuzati.

Id-disposizzjoni hija mirata sabiex tassikura a) illi d-dritt tal-akkuzat illi jezamina u jimpunja kull evidenza illi titressaq kontra tieghu fi proceduri kriminali, u b) illi li s-sejbien ta` htija ma jkunx jistrih unikament fuq depozizzjoni li taghha ma setax isir kontro-ezami.ma setghetx tigi kontro-ezaminata.

Ir-regoli generali dwar l-applikazzjoni tal-Art 6(3)(d) jistghu ikunu soggetti ghal restrizzjonijiet li ma jammontawx ghal-lezjoni. Dan ighodd kemm il-darba fil-ligijiet tal-Istat Membru tal-Kunsill tal-Ewropa ikunu jinkludu salvagwardji ntizi sabiex filwaqt illi minn naha wahda tkun kwalifikata l-applikazzjoni tal-Art 6(3)(d), dan fl-istess waqt ma tohloq ebda lezjoni.

Din il-Qorti m`ghandhiex dubju illi dan il-bilanc inzamm fil-kaz tal-lum.

Tghid dan ghaliex ghalkemm huwa minnu illi x-xiehda ta` ko-akkuzat ma tistax tigi soggetta ghall-kontro-ezami ta` ko-akkuzat iehor, huwa minnu wkoll illi l-ligi penali nostrana tipprovdi salvagwardja li tinsab riposta fl-Art 639(3) tal-Kap 9.

Ghalkemm ir-rikorrenti avvanzat il-fatt illi ma setax isir il-kontro-ezami ta` Carmel Decelis, fl-ebda waqt ma attakkat il-fatt illi l-Imhallef li ppresjeda l-guri naqas milli joqghod mal-Art 639 (3). Kwindi ma jirrizultax ippruvat illi r-rikorrenti garrbu pregudizzju jew lezjoni skont l-Art 6(3)(d) tal-Konvenzjoni.

Il-Qorti terga` tishaq – bhal ma ghamlet aktar kmieni – illi minkejja li dan tal-lum kien it-tieni rikors kostituzzjonali li ghamlu r-rikorrenti, din il-lanjanza qatt ma tressqet qabel.

Ghalhekk anke t-tielet ilment qed ikun rigettat.

4. <u>Ir-raba` (4) ilment</u> :
Id-dritt tal-akkuzat li jsegwi l-proceduri istitwiti tieghu

Fil-Pag 296 ta` **<u>Jacobs, White & Ovey : The European Convention on Human Rights</u>** (op. cit.) jinghad hekk :-

It is not, however, sufficient that the criminal defendant or civil party is present in court. He or she must, in addition, be able effectively to participate in the proceedings. In one criminal case, the applicant was slightly deaf and had not been able to hear some o0f the evidence at trial. The Strasbourg Court did not, however, find a violation of Article 6(1) in view of the fact that the applicants`s counsel, who could hear all that was said and was able to take his client`s instructions at all times, chose for tactical reasons not to request that the accused be seated closer to the witness.

Fil-Pag 215 ta` **<u>A Practitioner`s Guide to the European Convention on Human Rights</u>** (Fourth Edition – Sweet & Mexwell) **<u>Karen Reid</u>** tghid hekk

… where an adult has difficulties in following court proceedings, this has not always infringed the fairness of the proceedings. In Stanford v UK, where the applicant complained of poor acoustics in the court room, it was sufficient that the applicant`s lawyer was able to inform him what was being said. Where an applicant was on anti-depressent medication, the court noted that the trial judge had verified that he was fit to plead and that he was reporesented by a lawyer …

Fl-ambitu tal-Art 6(3)(c) tal-Konvenzjoni hemm inkluz id-dritt illi kull min ikun mixli b`akkuzi kriminali, ikollu assistenza legali. Matul dawn l-ahhar snin, din il-kwistjoni kienet tittratta estensivament fil-gurisprudenza tal-qrati taghna u tal-ECHR. Illum id-dritt ghall-assistenza legali jitqies bhala aspett ewlieni fit-tutela tal-jedd aktar wiesgha ghal smigh xieraq.

Fi process kriminali, fil-parametri stabbiliti mil-ligi, l-akkuzat mhuwiex meqjus bhala figura passiva ; il-prova tal-akkuzi dedotti kontra tieghu trid tissoddisfa grad li jmur `l hinn minn kull dubju dettat mir-raguni ; inoltre ghandu l-jedd tal-ghazla jixhedx inkella le fil-procediment. Il-harsien tal-jeddijiet tal-akkuzat mhux limitat biss ghall-fatt li jkun prezenti waqt il-procediment izda jinkludi wkoll id-dritt illi jircievi assistenza legali fil-kors tal-process. B`avukat mahtur biex jidher ghalih akkuzat ikun jista` jressaq xhieda u provi ohra, jaghmel kontro-ezamijiet, u jittratta.

Fil-kaz tal-lum, jirrizulta li ghal Jason Decelis kien mahtur Avukat tal-Ghajnuna Legali sabiex imexxi d-difiza tieghu fil-guri. Jirrizulta illi l-avukat koncernat Dr Martin Fenech ghamel kull ma kien mistenni minnu.

Diversi xehdu fil-kors tal-kawza tal-lum sabiex ighidu illi waqt il-guri Jason Decelis kien izomm rasu baxxuta u addirittura li kien ikun qed jonghos. Skont Connie Decelis, kien ikun hekk effett ta` pilloli li kien jiehu b`rabta mal-vizzju tad-droga li kellu. Minkejja li kien jidher hekk, xejn ma kien formalment issenjalat. Lanqas l-avukat *d`ufficio* ta` Jason Decelis ma dehrlu li kellu ghalfejn jattira formalment l-attenzjoni tal-Imhallef li ppresjeda l-guri jew ghamel xi talba biex l-assistit tieghu jkun invistat minn tabib sabiex jiccertifika b`gurament setax l-istess Decelis isegwi l-guri u jekk le jitlob li jitwaqqaf il-guri. Fil-fatt il-guri baqa` ghaddej mill-bidu sal-ahhar bla interruzzjoni.

Fid-deposizzjoni tieghu, Dr Fenech xehed illi ghalkemm Jason Decelis kien ikun rasu baxxuta fl-awla, qisu rieqed, fl-istadju ta` *break* kien iqum, johrog mill-awla bla assistenza u kien ikun f`postu. Connie Decelis ikkonfermat dan u ziedet illi meta kien jinghata l-kafe` kien jigi f`tieghu. Dr Fenech stqarr illi kien jikkomunika ma` Jason Decelis, kien ifissirlu x`ikun ghaddej, u kien sodisfatt li kien qed jifhem xhinu ghaddej. Dr Fenech sahaq illi huwa hejja d-difiza flimkien mal-istess Decelis li tah il-verzjoni tieghu ta` li gara. Dr Fenech isostni li ma kienx sprovvist minn informazzjoni da parti ta` Jason Decelis minhabba dak li seta` kellu.

Din il-Qorti hija tal-fehma li l-preponderanza tal-provi turi li Jason Decelis ma garrab ebda lezjoni. Jekk ghal xi raguni jew ohra Jason Decelis ma kienx qed jippresta attenzjoni *al cento per cento* ma jfissirx li garrab lezjoni tal-jedd ghal smigh xieraq. Kien assistit minn avukat mill-bidu sal-ahhar li ghamel dak li dehrlu l-ahjar fic-cirkostanzi u fl-ahjar interess tal-assistit tieghu.

Din il-Qorti tirrespingi bhala nsostenibbli l-argument illi jkun hemm lezjoni tal-jedd ghal smigh xieraq jekk akkuzat ghad li jkun assistit minn avukat ma jsegwix l-andament tal-procediment.

Din il-Qorti hija sodisfatta illi Jason Decelis segwa dak li kellu jsegwi mill-procediment kontra tieghu b`mod illi l-procediment kontra tieghu baqa` mill-bidu sal-ahhar hieles minn kull ombra ta` rregolarita`.

Di piu` ma hemmx <u>prova medika oggettiva</u> li turi li Jason Decelis kien medikament prekluz milli jsegwi l-guri.

Din il-Qorti hija perswaza illi kieku din il-prova kienet tissussisti kienet tingieb ghall-attenzjoni tal-Qorti u jsir verbal fl-atti tal-kawza.

Minn dan kollu ma sar xejn.

Tirrileva wkoll illi anke din il-lanjanza tqanqlet <u>ghall-ewwel darba</u> fil-proceduri odjerni.

Ir-raba` lment qed ikun michud ukoll.

5. <u>Il-hames (5) ilment</u> :
Sejbien ta` htija ghal reat li ma jezistix fil-ligi ta` Malta

Dan l-ilment sar in vista tal-Art 7 tal-Konvenzjoni.

B`risposta ghal dan l-ilment partikolari, l-Avukat Generali eccepixxa r-*res judicata* billi rrefera ghall-mertu tal-kawza fl-ismijiet "Concetta Decelis u Jason Decelis vs Il-Ministru tal-Gustizzja u l-Intern, l-Avukat Generali u d-Direttur Generali Qrati tal-Gustizzja u l-Kummissarju tal-Pulizija" (Rik. Nru. 3/09 RCP) li kienet deciza mill-Qorti Kostituzzjonali fit-2 ta` Novembru 2011.

In vista tal-eccezzjoni, il-Qorti sejra tqis kif topera d-difiza tar-*res judicata* skont il-gurisprudenza.

a) *res judicata*

Sabiex tirnexxi l-eccezzjoni ta` *res judicata*, jehtieg li jikkonkorru tliet elementi :

a) *eadem res* ;
b) *eadem causa petendi* ; u
c) *eadem personae.*

Dwar in-natura guridika tal-eccezzjoni, il-Qorti taghmel riferenza ghas-sentenza li tat il-Qorti tal-Appell fl-10 ta` Ottubru 2003 fil-kawza "**Crocefissa Sammut et vs Joseph Spiteri**".

Analizi ta` **l-element *eadem res*** saret fis-sentenza ta` din il-Qorti (**PA/RCP**) tad-9 ta` Jannar 2002 fil-kawza "**Rabat Construction Ltd vs Cutajar Construction Company Ltd**".

Hemm inghad illi dan l-element jirrigwarda l-fatt li l-oggett mertu tat-talba l-gdida jkun identiku ghat-talba precedenti li tkun giet determinata b`sentenza li tkun ghaddiet in gudikat. Ghalhekk sentenza li tikkostitwixxi gudikat ma tistax timpedixxi talba gdida milli tigi proposta quddiem qorti, jekk din hi ntiza sabiex tottjeni xi haga **differenti** ghal dak li kien intalab b`talba precedenti li giet determinata b`sentenza ta` qabel.

Minn dan isegwi li anke jekk l-oggett ta` t-talba l-gdida hu **simili** ghal dak ta` decizjoni precedenti, **izda mhux identiku**, is-similarita` mhijiex ostakolu ghat-talba gdida ghaliex l-effetti ta` sentenza li tkun ghaddiet in gudikat huma limitati ghal dak li jkunu ressqu l-partijiet u ddecidew il-qrati.

Mill-interpretazzjoni li jaghtu d-diversi awturi ta` kif ghandha tigi determinata l-identita` ta` l-oggett jidher illi l-ahjar metodu hu li l-qorti tezamina jekk il-kwistjoni li titressaq fit-talbiet attrici tkunx giet jew le deciza fis-sentenza li tkun ghaddiet in gudikat. Ghalhekk, wiehed irid jara jekk il-punt imqajjem f`dawn it-talbiet kienx determinat fis-sentenza l-ohra jew jekk baqax mhux deciz. Jekk il-kwistjoni tkun giet trattata u deciza, allura jkun hemm l-identita` ta` l-oggett.

L-element *eadem causa petendi* jirrikjedi li *"the cause of the claim"* fit-talba l-gdida tkun l-istess bhat-talba precedenti li tkun giet deciza b`sentenza li tkun ghaddiet in gudikat. Il-*causa petendi* hi "*the title on which the demand is based".* Sabiex jirrizulta l-element, irid jigi ppruvat li l-kawzali tat-talba l-gdida tkun fondata fuq l-istess fatt guridiku li kien jifforma l-bazi tat-talba li kienet giet determinata b`sentenza li ghaddiet in gudikat. Il-gudikat ma jigix nieqes minhabba id-diversita` ta` motivi tal-*causa petendi.*

L-element *eadem personae* kien trattat fis-sentenza li tat din il-Qorti diversament presjeduta fil-kawza fl-ismijiet "**Charles Cortis v. Francis X. Aquilina et**" fejn inghad :-

L-element tal-identita` tal-persuni, huwa wkoll fondamentali u ta` siwi daqs iz-zewg elementi l-ohrajn. In-nuqqas tieghu huwa bizzejjed biex jeskludi l-gudikat ghaliex min ma kienx prezenti fil-gudizzju, u lanqas kien fih rappresentat legittimament, ma jistax jitqies marbut b`sentenza moghtija u li ghaddiet in gudikat, ukoll jekk l-ezitu ta` dik is-sentenza ikun jiffavorih.

It-tlett elementi huma kumulattivi mhux alternattivi. Ghalhekk nieqes imqar wiehed minnhom, taqa` l-eccezzjoni.

Inghad ukoll illi *res judicata* ghandha applikazzjoni restrittiva.

Fis-sentenza ta` din il-Qorti diversament presjeduta tat-28 ta` Marzu 2003 fil-kawza fl-ismijiet "**Anthony Borg et v. Anthony Francis Willoughby**" kien rilevat illi :-

Il-fundament ta` l-"action" u ta` l-"exceptio judicati" hija preskrizzjoni legali, u ghalhekk hija `strictissimae interpretationis`.Li jfisser li l-atturi ma

jkunux jistghu permezz ta` kawza ohra jifthu t-trattazzjoni ta` l-istess punti fl-istess kwistjoni li gja gew diskussi f`kawza deciza b`sentenza li gja ghaddiet f`gudikat.

Sakemm ma jkunx hemm ebda decizjoni fuq il-vera kwistjoni kontroversa, u dik il-kwistjoni ma tkunx giet prekluza minn ebda decizjoni definittiva moghtija fil-gudizzju, l-istess kwistjoni tibqa` mhux deciza, u ma jistax mill-parti l-ohra jinghad li ghad-decizjoni josta l-gudikat.

L-eccezzjoni tal-gudikat ghandha tigi ammessa b`cirkospezzjoni kbira; u dan aktar u aktar meta dik l-eccezzjoni jkollha l-effett li teskludi xi dritt, bhal meta si tratta minn incident processwali li jqum fil-kors tal-gudizzju, fejn ma jistax ikun hemm dak li jissejjah gudikat implicitu. Biex ikun hemm lok ghall-eccezzjoni tal-gudikat, hemm bzonn li l-kwistjoni tkun giet `effettivament` deciza bis-sentenza ta` qabel … Fid-dubju l-Imhallef m`ghandux jippropendi favur l-eccezzjoni tal-gudikat."

Huwa pacifiku illi *"fejn dispositttiv ta` sentenza jkun sempliciment jikkonsisti f` liberazzjoni ab observantia ma jistax jinghad li kien hemm gudikat vinkolanti bejn il-partijiet u allura l-kwestjoni tista` tigi riproposta`ex novo."* (Qorti tal-Appell : 10 ta` Marzu 2004 : "**Joseph Aquilina et noe v. Charles Camilleri**) ghaliex kif kien ritenut fis-sentenza li tat il-Qorti tal-Kummerc fl-4 ta` Dicembru 1884 fil-kawza "**Negte. Nicola Mifsud ed altri v. Comte. Paolo Albanese**" *"e` positivo che la sentenza liberatoria dell`osservanza del giudizio non sia definitiva in merito e nulla osta perche` le stesse domande siano riproposte.*"

Fis-sentenza li tat fil-5 ta` Marzu 1958 fil-kawza "**Caterina Gerada vs Avukat Dr. Antonio Caruana**" il-Qorti tal-Appell irriteniet illi :

> *"L-eccezzjoni tal-gudikat ghandha tigi ammessa b`cirkospezzjoni kbira; u dan aktar u aktar meta dik l-eccezzjoni jkollha l-effett li teskludi xi dritt bhla meta si tratta minn incident processwali li jqum fil-kors tal-gudizzju, fejn ma jistghax ikun hemm lok ghall-eccezzjoni tal-gudikat, hemm bzonn li l-kwistjoni tkun giet "effettivament" deciza bis-sentenza ta` qabel u mhux biss li "setghet tigi deciza."*
>
> *Huwa veru li l-motivazzjonijiet fis-sentenza jiswew biex jiddeteminaw il-vera portata tal-punt deciz, b`mod li ghalkemm l-awtorita` tal-gudikat tkun dejjem u eskluzivamnet fid-dispozittiv is-sens ezatt u gust tad-*

dispozittiv u l-estensjoni legittima tieghu jkunu determinati u spjegati fil-mottivazzjonijiet, anzi xi drabi jigri illi d-decizjoni ma tkunx interament fil-parti dispozittiva tas-sentenza imma tkun anki fil-parti razzjonali taghha meta fil-motivazzjoni tigi definita u rizoluta xi kwistjoni b`mod li dik il-parti tkun il-premessa logika u necessarja tad-dispozittiv u allura dik il-parti tifforma haga wahda maddizpozittiv li kollha flimkien kien jiffurmaw il-gudikat

…

Dan kollu pero` mhux applikabbli meta f`sentenza li minnha hu allegat li johrog il-gudikat, la fil-motivazzjonijiet u lanqas fid-dispozittiv u lanqas fit-tnejn kombinati flimkien, ma tkun giet verament "deciza" l-identika kwistjoni li l-parti kuntrarja tallega li hija perenta bil-gudikat anzi meta dik il-kwstjoni mhux talli ma tkunx giet verament deciza imma anzi tkun giet espressament riservata.

Huwa pacifiku illi "*fejn dispositiv ta` sentenza jkun sempliciment jikkonsisti f` liberazzjoni ab observantia ma jistax jinghad li kien hemm gudikat vinkolanti bejn il-partijiet u allura l-kwestjoni tista` tigi riproposta`ex novo.*" (Qorti tal-Appell : 10 ta` Marzu 2004 : "**Joseph Aquilina et noe v. Charles Camilleri**") ghaliex kif kien ritenut fis-sentenza li tat il-Qorti tal-Kummerc fl-4 ta` Dicembru 1884 fil-kawza "**Negte. Nicola Mifsud ed altri v. Comte. Paolo Albanese**" *"e` positivo che la sentenza liberatoria dall`osservanza del giudizio non sia definitiva in merito e nulla osta perche` le stesse domande siano riproposte."*

Kien ukoll stabbilit illi biex *res judicata* tigi eccepita b`success jehtieg li c-cirkostanzi tal-kaz jibqghu l-istess bhal dawk tal-kaz ta` qabel. Jekk ikun hemm bdil fic-cirkostanzi jigi li s-sentenza ta` qabel ma titqiesx ta` ostakolu ghar-riproposizzjoni tat-talba [ara : Qorti ta` l-Appeal (Inferjuri) tas-6 ta` April 2005 : "**Joseph Difesa v. L-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar**"] kif ukoll : Prim`Awla tal-Qorti Civili : 20 ta` Jannar 2016 – "**Vella Estates Limited v. Raymond Azzopardi et**"; u "**David Theuma et vs Giuseppi Spiteri** – 2 ta` Marzu 2015 u l-gurisprudenza estensiva citata fiz-zewg decizjonijiet).

b) <u>Risultanzi</u>

L-Avukat Generali qed isostni l-eccezzjoni abbazi tad-decizjoni li tat il-Qorti Kostituzzjonali fit-2 ta` Novembru 2011 fil-kawza Nru 3/09 RCP fl-ismijiet "Concetta Decelis et vs Il-Ministru tal-Gustizzja u l-Intern et".

It-talbiet tar-rikorrenti kienu dawn :-

> *1. Tiddikjara u tiddeciedi li r-referenza b`analogija ghall-Ligi Penali Ingliza, medjanti l-gurisprudenza Ingliza, permezz tal-imsemmija sentenza moghtija mill-Onorabbli Qorti tal-Appell Kriminali fil-25 ta` Settembru 2008 fil-kawza fl-ismijiet "Ir-Repubblika ta` Malta vs Carmel Decelis,Concetta Decelis u Jason Louis Paul Decelis", wasslet ghall-introduzzjoni ta` disposizzjoni jew regola tal-Ligi gdida fil-Ligi Penali Maltija li permezz taghha giet kostitwita responsabbilta` jew addebitu penali li ma kinitx kontemplata mil-Ligi Penali Maltija u dan bi pregudizzju gravi ghall-esponenti billi l-agir taghhom seta` jigi u fil-fatt gie karatterizzat penalment bhala doluz b`mod li setghu jikkonkorru u in effetti kkonkorrew l-elementi kollha rikjesti mil-Ligi biex l-esponenti setghu jinstabu u effettivament instabu hatja ta` omicidju volontarju u dan bi ksur tal-principju ta` "Nullum crimen sine lege, nulla pena sine lege" u ghalhekk bi ksur ta` dak li jinghad fl-artikolu 39 (8) tal-Kostituzzoni u tal-artikolu 7 (1) tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem ;*
>
> *2. F`kaz li dak li nghad fl-ewwel domanda tal-presenti mhux legalment fondat, tiddikjara u tiddeciedi illi anke jekk ir-referenza b`analogija ghal-Ligi Penali Ingliza medjanti l-kazistika Inliza, permezz tal-imsemmija sentenza, moghtija mill-Onorabbli Qorti tal-Appell Kriminali fil-25 ta` Settembru 2008 fil-kawza fl-ismijiet "Ir-Repubblika ta` Malta vs Carmel Decelis,*

Concetta Decelis u Jason Louis Paul Decelis", kienet guridikament fondata, il-principji legali li jirrizultaw minn tali referenza gew interpretati b`mod estremament wiesgha li tiddipartixxi mill-ittra u mill-ispirtu ta` tali principji legali esteri stante illi giet kostitwita responsabbilta` kriminali li mhix mahsuba minn din il-gurisprudenza barranija u bazata, tali gurisprudenza estera fuq il-kuncett legali Ingliz tal-manslaughter ekwivalenti ghal kuncett legali Malti ta` omicidju involontarju u dan bi ksur tal-principju ta` `Nullum crimen sine lege, nulla pena sine lege` u konsegwentament bi ksur tal-artikolu 39(8) tal-Kostituzzjoni u tal-artikolu 7 (1) tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem ;

3. F`kaz li dak li jinghad fit-tieni domanda mhux legalment fondat u li s-sentenza moghtija mill-Onorabbli Qorti tal-Appell Kriminali kienet legalment fondata bil-mod u maniera li interpretat il-principji tal-Ligi Penali Ingliza medjanti l-gurisprudenza minnha citata, in kwantu applikabbli ghal dan il-kaz, tiddikjara u tiddeciedi li l-principji enuncjati mill-gurisprudenza Ingliza, kif interpretati mill-Onorabbli Qorti tal-Appell Kriminali permezz tal-imsemmija sentenza, moghtija fil-25 ta` Settembru 2008 fil-kawza fl-ismijiet "Ir-Repubblika ta` Malta vs Carmel Decelis, Concetta Decelis u Jason Louis Paul Decelis", gew applikati ex post facto u retrospettivament billi tali principji allura formanti parti mil-Ligi Penali Maltija, konsegwenti ghas-sentenza riferita ma kinux effettivi meta sehh il-kaz li kien jinvolvi lir-rikorrenti fl-2001 meta allura l-agir taghhom ma kienx jammonta ghal reat billi ma kienx doluz u ghalhekk ma setax iwassal biex huma jinstabu hatja ta` omicidju volontarju u dan bi ksur tal-principju ta` `Nullum crimen sine lege,nulla pena sine lege` u konsegwentement bi ksur tal-artikolu 39 (8) tal-Kostituzzjoni u tal-artikolu 7 (1) tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem ;

4. Tiddikjara u tiddeciedi li in konsegwenza ta` bidla radikali fil-qaghda legali mid-data meta sehh dan il-kaz fit-13 ta` Mejju 2001 sad-data meta inghatat is-sentenza riferita mill-Onorabbli Qorti tal-Appell Kriminali fil-25 ta` Settembru 2008 fil-kawza fl-ismijiet "Ir-Repubblika ta` Malta vs Carmel Decelis, Concetta Decelis u Jason Louis Paul Decelis", billi l-agir tal-esponenti, li fit-13 ta` Mejju 2001 ma kienx doluz stante li huma ma kellhom ebda duty of care fil-konfront tal-mejta, impost fuqhom mil-Ligi Kriminali, in forza tas-sentenza riferita l-esponenti gew meqjusa li kellhom tali duty of care fil-konfront tal-mejta bil-konsegwenza li l-agir taghhom gie karatterizzat bhala illecitu penali u konsegwentement doluz b`mod li huma setghu jinstabu hatja u effettivament instabu hatja ta` omicidju volontarju billi setghu jikkonkorru u in effetti kkonkorrew l-elementi kollha rikjesti mil-Ligi biex huma setghu jinstabu u fil-fatt instabu hatja ta` omicidju volontarju b`mod li r-rikorrenti gew pregudikati gravement bi ksur tad-dritt fondamentali taghhom ta` smigh xieraq billi huma gew gudikati inter alia skont regola tal-ligi li giet introdotta fil-Ligi Penali Maltija permezz tal-imsemmija sentenza meta din ir-regola tal-ligi ma kinitx fis-sehh fit-13 ta` Mejju 2001 u dan in vjolazzjoni tal-artikolu 39 (1) tal-Kostituzzjoni u tal-artikolu 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem ;

5. F`kaz li tigi milqugha wahda jew aktar mit-talbiet tar-rikorrenti, tannulla, thassar u tirrevoka s-sentenza moghtija mill-Onorabbli Qorti tal-Appell Kriminali fil-25 ta` Settembru 2008 fil-kawza fl-ismijiet "Ir-Repubblika ta` Malta vs Carmel Decelis, Concetta Decelis u Jason Louis Paul Decelis" u tirrinvija l-atti processwali, relattivament ghall-istess kawza lill-Onorabbli Qorti tal- Appell Kriminali ghad-definizzjoni ulterjuri taghha jekk ikun il-kaz ;

6. Tordna l-liberazzjoni tar-rikorrenti mic-Centru Korrezzjonali ta` Kordin wara li huma jkunu skontaw

kwalsiasi periodu ta` prigunerija talvolta mposta fuqhom minn Qorti kompetenti jekk ikun il-kaz u f`kaz li ma tezisti ebda raguni kontemplata mil-Ligi ghad-detenzjoni ulterjuri taghhom, tenut kont li anke fl-ipotesi li r-rikorrenti jinstabu hatja tal-ksur ta` xi dispozizzjoni ohra tal-Ligi Kriminali, konsegwenti ghar-rinviju tal-atti processwali relattivament ghall-kawza fl-ismijiet "Ir-Repubblika ta` Malta vs Carmel Decelis, Concetta Decelis u Jason Louis Paul Decelis" lill-Onorabbli Qorti tal-Appell Kriminali u konsegwenti ghad-definizzjoni ulterjuri tal-istess kaz, inkluz li huma jinstabu hatja ta` omicidju involontarju, ir-rikorrenti jkunu gia` skontaw il-piena talvolta kontemplata mil-Ligi Kriminali in materja ta` tali reat in vista tad-detenzjoni taghhom aktar qabel fl-istess Centru Korrezzjonali ta` Kordin b`mod li jkun hemm lok ghal-liberazzjoni mmedjata taghhom.

Daqstant ghat-talbiet.

Riferibbilment ghall-aggravju tal-appellanti illi ma kellhiex tinstab htija ghal reati li ma jezistux Malta, fis-sentenza taghha, il-Qorti Kostituzzjonali ghamlet dawn l-osservazzjonijiet :-

"Il-Qorti ta` Strasbourg fil-kaz ta` KOKKINAKIS v. GREECE (Application no. 14307/88) – 25 ta` Mejju 1993 spjegat dan l-artikolu hekk :

"The Court points out that Article 7 para. 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused`s disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused`s detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts` interpretation of it,

what acts and omissions will make him liable". (para 52).(sottolinerar ta`din il-Qorti)

<u>Reat gdid</u>

L-ilment ewlieni tal-appellanti fir-rigward ta` dan l-artikolu huwa li fil-kaz in ezami inholoq reat gdid li qabel ma kienx jezisti fis-sistema legali Maltija cioe` r-reat tal-omicidju volontarju b`ommissjoni.

L-appellanti jsostnu li r-reat ta` omicidju bl-ommissjoni ma jezistix. Jghidu li l-aktar li huma setghu nstabu responsabbli f`dan il-kaz kien biss ta` omissione di soccorso u dan jammonta ghal negligenza, cioe` ghal omicidju involontarju u mhux ghal omicidju volontarju. Ghalhekk meta huma nstabu hatja mill-Qorti Kriminali ta` dan ir-reat, u l-istess sentenza giet ikkonfermata mill-Qorti tal-Appell Kriminali, inkiser id-dritt taghhom taht l-Artikolu 7 ta` Konvenzjoni billi ma setghux jinstabu hatja ta` reat li ma jezistix fil-ligi.

Illi pero` fil-verita` l-principju ta` omicidju volontarju b`ommissjoni jezisti. Il-principju legali huwa li kull offiza kriminali tista` ssir jew permezz ta` att jew permezz ta` ommissjoni. Kif jghallem il-Profs. A. Mamo 2 :

"The act which destroys life may be an act of commission or any act of omission."

Il-Qorti Kriminali sabet li l-appellanti kienu hatja skont iddisposizzjonijiet tal-Artikolu 211 tal-Kap. 9 ta` omicidju volontarju per via di ommissjoni taht it-tieni forma hemm kontemplata u cioe` bl-intenzjoni maghrufa bhala ***intenzjoni pozittiva indiretta****.*

Il-Qorti Kriminali ddecidiet hekk fuq dan il-punt :

"Hu minnu li mhux allegat li l-krizi inizjali fl-istat tas-sahha ta` Rachel Bowdler kkagunawha huma, pero` huma biss flimkien jew f` hinijiet differenti setghu w kienu fi grad li jsejjhu l-assistenza medika opportuna, li

skond l-espert setghet salvat lill-vittma. Bl-ommissjoni persistenti taghhom li jaghmlu dan fuq firxa ta` madwar tnax il-siegha fil-kaz ta` Jason Decelis, u ta` madwar tmin sieghat fil-kaz ta` Concetta Decelis, huma kkagunaw jew accelleraw ilmewt tat-tfajla, li dak il-hin kienet tiddependi kompletament u esklussivament fuqhom u minnhom".

Din is-sentenza giet ikkonfermata mill-Qorti tal-Appell Kriminali.

Kif isemmu l-awturi van Dijk, van Hoof, van Rijn, Zwaak fil-ktieb Theory and Practice of the European Convention on Human Rights, 4th Ed. Page 656 :

"In principle the national legislature is free to decide what act or omission is to be qualified as an offence and has to be penalised. Article 7 is not an issue there. The European review in that case is confined to the question whether or not any of the other provisions of the Convention have been violated by that legislation".

Tal-istess hsieb huma l-awturi Harris, O`Boyle & Warbrick fejn ighidu fil-ktieb taghhom Law of the European Convention on Human Rights, it-tieni edizzjoni, li :

"Given that Article 7 requires that national courts act on the basis of their national law and that they interpret and apply that law in accordance with Article 7, the Strasbourg Court may find itself reviewing the interpretation and application of national law by national courts. In accordance with the Court`s general approach whereby it does not question the interpretation and application of national law by national courts, this supervisory function is undertaken with caution, with the Court only exceptionally finding the interpretation and application of national law by the national courts to be in breach of Article 7. Article 7 (1) refers to criminal offences that have a basis in `law`."

Ghalhekk mhux il-kompitu ta` din il-Qorti li tara jekk il-Qorti Kriminali kif ukoll il-Qorti tal-Appell Kriminali ddecidew sew jew le, izda biss li tara jekk is-sentenza kif inhi, tiksirx iddrittijiet fundamentali tal-appellanti. Lanqas ma hija lfunzjoni ta` din il-Qorti li sservi ta` Qorti ta` revizjoni ta` dawn il-Qrati.

Hi fehma ta` din il-Qorti li la l-Qorti Kriminali u lanqas ilQorti tal-Appell Kriminali ma qalu xi spropozitu meta ddecidew li bl-ommissjoni persistenti u voluta talappellanti fuq firxa ta` hafna sieghat huma kkagunaw jew accelleraw il-mewt ta` Rachel Bowdler. L-appellanti ma sejhux ghall-ghajnuna medika billi l-appellant Jason Decelis xi granet qabel kien instab hati ta` reat iehor millQrati u ghalhekk huma ghazlu li ma jsejhux ghal ghajnuna medika biex Jason Decelis ma jispiccax mill-gdid involut mal-pulizija. Minflok ma gabu l-ghajnuna appozita huma ghazlu li jsalvaw gildhom. Huma kienu jafu li bin-nuqqas ta` assistenza kienu qeghdin ipoggu l-hajja ta` Rachel Bowdler b`perikolu car imma ghalkemm kienu qed jipprevedu l-possibbilita` jew probabbilita` tal-mewt ta` Rachel Bowdler baqghu indifferenti ghall-konsegwenzi li fil-fatt sehhew.

Skont il-Qorti Kriminali, u anke il-Qorti tal-Appell Kriminali, l-intenzjoni specifika tal-appellanti li jpoggu l-hajja ta` Rachel Bowdler f`perikolu manifest kienet tohrog cara millprovi. Din il-Qorti ma tidholx fil-valutazzjoni u apprezzament mill-gdid ta` dawk il-provi billi l-funzjoni taghha huwa limitat kif gia` nghad biex tara jekk inkisrux id-drittijiet kostituzzjonali tal-appellanti, li pero` fil-fehma ta` din il-Qorti ma nksirux billi ma nholoq ebda reat gdid imma l-Qorti interpretat il-ligi kif inhi ghal fattispecie tal-kaz li kellha quddiemha. Il-Qorti Kriminali ma sabithomx hatja ta` xi reat li ma kienx gia` jezisti meta twettaq il-fatt u ghalhekk ma kienx hemm ksur tal-Artikolu 7 tal-Konvenzjoni.

Dan l-aggravju qed jigi michud.

Duty of care

Skont l-appellanti l-Qorti tal-Appell Kriminali f`dan il-kaz applikat il-kuncett ta` duty of care meta fil-fatt dan ilkuncett huwa estraneju ghad-dritt Malti.

Illi minn ezami tal-atti processwali ma jirrizultax pero` li l-Qorti Kriminali jew il-Qorti tal-Appell Kriminali fil-fatt iddecidew li skont il-Kodici Kriminali l-appellanti kellhom a legal duty of care lejn Rachel Bowdler. Il-principju legali huwa li persuna ma tistax tinsab hatja kriminalment ghallatti ta` ommissjoni, imma tista` tkun hekk responsabbili meta jkun hemm `a duty of care`. Meta l-Qorti Kriminali ezaminat il-fatti tal-kaz u l-ligi li fuqha l-appellanti gew akkuzati hi sabet li ghalkemm l-appellanti ma kellhomx a legal duty of care huma minn rajhom assumew dak lobbligu u ghalhekk la darba huma assumew dak id-duty of care, allura l-agir taghhom kien suggett ghal-ligi kriminali. L-istess haga ddecidiet il-Qorti tal-Appell Kriminali. Ma kienx kaz li l-ligi obbligat lill-appellanti li jiehdu hsieb Rachel Bowdler, imma kienu huma stess li assumew dak l-obbligu. F`dak il-lejl Rachel Bowdler kienet taht il-kontroll taghhom u kienet tiddependi kompletament u esklussivament fuqhom. Izda minhabba l-interessi taghhom l-appellanti hallewha bla assistenza medika apposita sakemm mietet. Dan ma kienx kaz ta` ommissione di soccorso, lanqas ma kien kaz ta` zball jew ta` negligenza imma ta` decizjoni konxja ta` dak li riedu jaghmlu u cioe` li ma jsejhux ghall-assistenza medika biex ma jigux involuti mill-gdid mal-pulizija.

Ghalhekk fil-fehma ta` din il-Qorti l-Qorti tal-Appell Kriminali ma dahhlet ebda kuncett estraneu ta` duty of care fil-ligi taghna.

L-appellanti inoltre jikkontendu illi anke kieku dan ilkuncett ta` duty of care kien applikabbili u legalment fondat, l-interpretazzjoni tal-Qorti tal-Appell Kriminali estendiet l-applikazzjoni ta` dan il-kuncett, mill-kamp ta` manslaughter ossija omicidju involontarju ghall-

kamp talomicidju volontarju u dan ki kien jammonta ghal interpretazzjoni estensiva u wiesa.

Kif gia` nghad, f`dan il-kaz il-Qorti tal-Appell Kriminali ma holqot ebda reat gdid ta` omicidju volontarju a bazi ta` nuqqas t`osservanza tad-duty of care. Lanqas ma introduciet b`analogija mil-Ligi Ingliza l-kuncett li wassal ghal manslaughter taht il-Ligi Maltija. Illi meta l-Qorti kkunsidrat li l-appellanti assumew id-duty of care ma jfissirx li dan l-obbligu jaqa` biss fl-isfera tal-involontarju, billi d-duty of care li assumew jigi nieqes kemm fejn ikun hemm negligenza, u aktar u aktar fejn ikun hemm `recklessness` jew `indifferenza` ghal konsegwenzi u dan billi din l-indifferenza hija appuntu l-oppost tad-duty of care. Ghalhekk wiehed ma jibqax jitkellem dwar kulpa imma dwar dolo3 kif spjegat fit-tieni forma tal-Artikolu 211 tal-Kap. 9.

Izda anke kieku, din il-Qorti tirrileva li kif gie deciz millQorti ta` Strasbourg fil-kazijiet S.W. vs U.K u C.R. vs U.K. (1995) :

"Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen … ".

Fil-kaz in ezami l-interpretazzjoni li tat il-Qorti tal-Appell Kriminali kif ukoll il-Qorti Kriminali kienet konformi mal-ligi u ma l-intepretazzjoni li dejjem inghatat tal-Artikolu 211 tal-Kap. 9 partikolarment fit-tieni forma tieghu.

…

<u>L-Artikolu 6 tal-Konvenzjoni</u>

Fir-rigward tal-Artikolu 6 tal-Konvenzjoni u l-Artikolu 39(1) tal-Kostituzzjoni ta` Malta l-appellanti

jissottomettu li gie vjolat dan l-artikolu billi m`ghandhiex ir-reat ta` omissione di soccorso u m`ghandhiex il-kuncett ta` duty to care, mentri fil-proceduri penali dawn gew imsemmija u applikati quddiem il-gurija. Inoltre fl-istess proceduri intuzat gurisprudenza Ingliza u Skocciza dwar reati kolpuzi u cioe` manslaughter u culpable homicide, u giet erronjament applikata ghar-reat ta` omicidju volontarju taht il-Kodici Kriminali meta il-gurisprudenza Ingliza tittratta dduty of care fl-ambitu tal-omicidju involontarju.

Illi f`dan ir-rigward il-lezjoni taht l-Artikolu 6 giet sollevata a bazi ta` dak li suppost gie lez taht l-Artikolu 7. L-aggravji fir-rigward tal-Artikolu 7 tal-Konvenzjoni gew ripetuti firrigward tal-Artikolu 6 ukoll. Stante li din il-Qorti diga` sabet li ma hemm ebda lezjoni taht l-Artikolu 7, ghallistess ragunijiet ma jistax jinghad li l-appellanti ma nghatawx smigh xieraq a bazi ta` dawk l-aggravji. Ma hemm xejn gdid li jista` jigi kkunsidrat taht l-Artikolu 6 li ma giex ikkonsidrat taht l-Artikolu 7.

Ghalhekk dan l-aggravju qed jigi michud.

<u>Decide</u>

Ghal dawn il-motivi tiddeciedi billi tichad l-appell u tikkonferma s-sentenza appellata, bl-ispejjez ghall-appellanti."

Wara li qieset bir-reqqa li tixraq id-decizjoni li fuqha qieghed joqghod l-Avukat Generali in sostenn tal-eccezzjoni tieghu sabiex tara jekk jirrizultawx sodisfatti r-rekwiziti tar-*res judicata,* din il-Qorti taghmel dawn l-osservazzjonijiet :-

a) <u>*eadem res*</u> :

Din il-Qorti hija tal-fehma illi **dan ir-rekwizit huwa soddisfatt** billi l-kwistjoni li l-hames lanjanza qeghda tolqot fil-kawza tal-lum jirrizulta li hija identika ghal dik li kienet deciza fil-kawza precedenti.

b) ***eadem personae*** **:**

Din il-Qorti hija tal-fehma li **anke dan ir-rekwizit huwa sodisfatt** billi l-kontendenti fl-istanza odjerna u dawk fil-kawza precedent l-istess hlief illi fil-kawza l-ohra kienu ndikati ntimati ohra. Dan l-ahhar fatt ma jbiddel xejn mis-sussistenza tar-rekwizit.

c) ***eadem causa petendi*** **:**

Din il-Qorti hija tal-fehma illi l-kawzali tat-talba li saret fil-kawza tal-lum hija bbazata fuq l-istess fatt guridiku illi kien jifforma l-bazi tat-talbiet li kienu ntavolati fil-kawza precedenti li ghaddiet in gudikat. **Ghalhekk anke dan l-ahhar element huwa sodisfatt.**

L-eccezzjoni tar-*res judicata* kif dedotta qeghda tkun milqugha.

Ghalhekk il-hames ilment qed ikun rigettat.

6. Is-sitt (6) ilment :
Bdil fl-akkuza fil-kawza kontra David Gatt

Ir-rikorrenti tilmenta illi l-bdil fl-akkuza fil-kawza kontra David Gatt u l-piena li nghata David Gatt holqu pregudizzju serju ghaliha u ghal binha Jason Decelis.

Skont ir-rikorrenti, minhabba dan il-fatt, garrbu lezjoni tal-jedd ghal smigh xieraq.

Il-Qorti ma tarax kif dak li sar fil-kaz ta` David Gatt kiser id-dritt tar-rikorrenti ghal smigh xieraq.

Il-kaz ta` David Gatt dejjem kien trattat separatament minn dak ta` r-rikorrenti. David Gatt kien mixli b`akkuzi differenti minn dawk tar-rikorrenti. Ghaliex kien hemm bdil fl-akkuza kontra David Gatt mhux kwistjoni li ghandha tolqot il-mertu tal-procediment tal-lum u ghalhekk il-Qorti mhux ser tidhol fil-materja. Kull kaz ghandu l-grajja tieghu u ghalhekk il-Qorti mhijiex sejra tissindaka dak li sar fir-rigward ta` David Gatt. Ma hemmx prova tal-lezjoni lamentata mir-rikorrenti.

Ghalhekk qeghda tichad is-sitt ilment.

<u>Decide</u>

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

Tilqa` l-eccezzjonijiet kollha tal-intimat Avukat Generali.

Tichad it-talbiet kollha tar-rikorrenti Connie Decelis, kemm dawk li jirrigwardaw lilha personalment, kif ukoll dawk li kienu jirrigwardaw lill-mejjet Jason Decelis li l-atti tieghu bhala rikorrent kienu trasfuzi f`isem l-istess Connie Decelis, wara li Jason Decelis miet fil-mori tal-kawza.

Tordna lir-rikorrenti sabiex thallas l-ispejjez kollha ta` din il-kawza.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur