QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 29 ta` Novembru 2018

Kawza Nru. 1
Rikors Nru. 6/18 JZM

Mary Fatima Vassallo ID. 285150(M) u ghal kull interess zewgha John Vassallo ID. 390646(M)

kontra

Joseph u Agnes konjugi Scicluna detenturi rispettivament tal-karti ta` l-identita` numri 5146(M) u 910944(M)

u

L-Avukat Generali

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors li kien prezentat fl-10 ta` Lulju 2017 fejn kien premess :-

1. Illi l-attrici hija l-propjetarja tal-fond 115 Flat 1 Triq il-Kullegg l-Antik, Sliema;

2. Illi l-genituri ta` l-attrici Mary Fatima Vassallo li huma Dottor Carmelo Caruana u Pauline Caruana xebba Zammit llum jinsabu mejtin u mietu fil-5 ta` Frar 1992 u fil-26 ta` Novembru 1987 rispettivament, u dan kif jirrizulta mic-certifikati tal-mewt hawn annessi bhala ***dok MFV 1 u MFV 2****;*

3. Illi l-attrici Mary Fatima Vassallo akkwistat din il-propjeta` in toto permezz ta` wirt minghand ommha Pauline mart Dottor Carmelo Caruana u dan kif jirrizulta mir-ricerki testamentarji u mit-testment (tal-11 ta` Novembru 1987 fl-atti tan-Nutar Dr George Cassar ) li kopja taghhom qieghdin jigu hawn annessi bhala* ***dok MFV 3 sa MFV 8 inkluzi.*** *Illi `inter alia` din il-propjeta` `giet debitament denunzjata mal-Awtorijiatjiet kompetenti tat-Taxxi Interni permess ta` denunzja numru 1038/1988 u t-taxxa relattiva giet imhallsa skond il-ligi;

4. Illi Pauline Caruana kienet dahlet f`kuntratt ta` subcens temporanju ta` sbatax il-sena datat l-ghaxra (10) ta` Marzu tas-sena 1973 fl-atti tan-Nutar Joseph Vella Galea, fejn gie koncess il-fond bin-numru 115 Flat 2 [korrezzjoni awtorizzata b`digriet 15/03/2018] Triq il-Kullegg l-Antik Sliema, fuq titolu ta` enfitewsi temporanju , dekorribbli mill-1 ta` Jannar 1973, u fejn jithallas canone/cens ta Lm 90 fis-sena, sena bil-quddiem, liema kuntratt qieghed jigi hawn anness u mmarkat bhala ***Dok MFV 9****;*

5. Illi wara li sar il-kuntratt ta` l-ghaxra (10) ta` Marzu 1973 fl-atti tan-Nutar Joseph Vella Galea, l-legislatur ta` dak iz-zmien introduca permezz ta` Att XXIII tas-sena 1979, ligijiet li `inter alia` llum jinsabu ai termini tal-Artikolu 12 tal-Kap 158, fejn min kien qieghed jokkupa fond bhala ` habitual residence` u l-inkwilin huwa cittadin Malti, (bhal ma hu l-kaz ta` l-intimat Joseph Scicluna), gie awtomatikament intitolat li jibqa` jokkupa l-fond wara z-zmien tal-koncessjoni enfitewtika, b` titolu ta` kera, u dan skond l-artikolu 12 tal-Kap 158, flimkien ma` martu;

6. Illi l-intimati baqghu jghixu fil-fond kif jidher mill-kopji tar-Registri Elettorali tul is-snin kif u mal-eghluq tal-koncessjoni enfitwetika sallum, u dan kif jidher mill-kopji tar-Registri Elettorali varji (ta` diversi snin) markati u annessi bhala ***dokumenti X 1 sa X 8 inkluzi****;*

7. Illi l-kirja lokatizja prezenti skond kif ghandha tigi kalkolata skond il-ligi taht l-artikolu 12 tal-Kap 158 u wkoll taht l-Att X tas-sena 2009, hija ta` Euros 867. 76, fis-sena zieda u/jew somma verjuri ghal din ic-cifra. Illi r-rikorrenti waqfu li jircievu aktar l-kera mill-intimat billi din is-sitwazzjoni hija sproporzjonata u ingusta ghall-ahhar, kif ser jigi muri iktar il-quddiem f`dan ir-rikors u fil-mori tal-kawza.

8. Illi minn mindu r-rikorrenti waqfu jaccettaw il-kirja tal-fond mill-intimat Scicluna, l-intimat Scicluna qieghed jghaddi sabiex jiddepoizta fir-Registru tal-Qorti pemezz ta` cedoli, sommom ta` flus li jammontaw ghal circa Euros 420 fis-sena u/jew sommom verjuri;

9. Illi meta saret il-koncessjoni enfitewtika mill-aventi kawza tal-attrici Mary Fatima Vassallo, l-atturi qatt ma setghu jkunu jafu bil-ligijiet u bl-implikazzjonijiet ta` l-Att XXIII tas-sena 1979, billi l-ligi dahlet mhux biss b`mod prospettiv imma anki kellha effetti retroattivi, fejn bhal f`dan il-kaz de quo, l-atturi gew effettwati u pregudikati serjament bil-bdil tal-ligi ;

10. Illi r-rikorrenti talbu lill-intimat Joseph Scicliuna sabiex hu flimkien ma` martu Agnes u l-familja tieghu jivvakaw il-fond 115 Flat 2 [korrezzjoni awtorizzata b`digriet 15/03/2018] Triq il-Kullegg l-Antik Sliema, permezz ta` zewg ittri ufficjali bin-numru 1565/2014 tat-22 ta` Mejju 2014 u tal-20 ta` Settembru 2016 bin-numru 3093/2016, hawn annessi u mmarkata bhala ***Dok MFV 10A u MFV 10B****, liema zewg ittri gew debitament notifikati lill-intimati;*

11. Illi nonostante dawn l-interpellanzi, l-intimat Joseph Scicluna ghadu sallum jabita fil-fond imsemmi tar-rikorrenti, u dan in vjolazzjoni tad-drittijiet tar-rikorrenti, liema atturi jinsabu ferm pregudikati mit-tgawdija tal-propjeta` taghhom, stante li dan id-dewmien b`kirja baxxa u minghajr ebda tama li l-propjeta` tigi liberata u vakata entro terminu qasir u definit, qieghed jikkostitwixxi ksur ta` drittijiet ta` propjeta` ghall-istess rikorrenti, liema rikorrenti ma jistghux aktar jissaportu is-sitwazzjoni incerta li tezisti u ghadha tezisti sallum.

12. Illi inoltre l-mod kif inhi miktuba l-ligi mart l-istess Joseph Scicluna, u cjoe` Agnes Scicluna wkoll hija protetta fil-ligi, u ghalhekk is-sitwazzjoni hija aktar incerta ghall-istess rikorrenti li ma jistghux igawdu mill-propjeta` taghhom;

13. Illi l-ilment tar-atturi huwa li qieghdin jigu imcahhda mit-tgawdija tal-fond propjeta` taghhom, u illi l-kundizzjonijiet imposti mil-ligi huma sproporzjonati ghall-ghanijiet li ghandha l-ligi stess, fejn effettivament ir-rikorrenti qieghdin jigu mcahhda b`mod sproporzjonat mit-tgawdija tal-propjeta` taghhom, meta tqies illi l-kirja li hija offruta lilhom huwa ta` Euros 419.29 u/jew somma verjuri kull sena, liema kirja hija mizera u rrizorja, u ma tirriflettix is-suq kummercjali tal-kera tal-fond (market value lease) mertu tal-kaz de quo.

14. Illi anki jekk u ghal grazzja tal-argument huma jiehdu s-somma skond il-ligi kontemplata u specifikata taht l-Att XXIII tas-sena 1979 u kif ukoll tal-Att X tas-sena 2009, xorta wahda l-kirja offruta bil-ligi hija ferma aktar baxxa minn dik il-kirja li l-atturi jistghu jakkwistaw fuq is-suq hieles;

15. Illi l-hlas ta` din il-kera, ma tirriflettix il-valur tal-propjeta` lokatizja fuq s-suq. Illi hekk kif jidher mill-istima tal-Perit Godwin Abela r - rikorrenti huma pregudikati milli jaghmlu dhul xieraq mill-propjeta` taghhom billi l-kirja lokatizja tal-fond (illum taht il-ligijiet vigenti) huwa ta` circa Euros 867.76 kull sena, u/jew somma verjuri, mentri fis-suq miftuh il-kirja huwa ta` Euros 7,600 fis-sena u/jew somma verjuri, kif jirrizulta mir-rapport maghmul mill-Perit Godwin Abela datat il-31 ta` Marzu 2017 li kopja tieghu jinsab anness bhala ***dok MFV 11;***

16. Illi dan l-istat ta` fatt jaghti lok ghall-ksur tal-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni Ewropeja skond il-Kap 319.

*17. Illi sitwazzjoni bhal din tal-kaz odjern diga` giet trattata kemm mil-Qorti Ewropeja (European Court of Human Rights) fil-Kaz* ***Amato Gauci vs Malta (App Numru 47045/06) deciz fil-15 ta` Settembru 2009****, fejn il-Qorti ikkonkludiet li hemm ksur tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropeja. Illi l-Qorti qalet li jehtieg ikun hemm element ta` proporzjonalita`, "the requisite balance will not be struck where the person concerned bears an individual and excessive burden";*

18. Illi l-kera li l-intimati huma disposti joffru kull sena hija ferm aktar baxxa milli dik li kieku tithallas fuq is-suq hieles. Il-Qorti fil-kawza hawn fuq citata ta` Amato Gauci vs Malta, tenniet illi ghalkemm il-Gvern igawdi minn margini ta` apprezzament wiesgha fil-kontroll ta` kera, "nevertheless, this may not lead to results which are manifestly unreasonable, such as amounts of rents allowing only a minimum profit";

19. Illi meqjus il-kera baxxa, l-incertezza jekk ir-rikorrenti qattx humiex ser jirkuprawil-propjeta` taghhom, l-fatt illi l-possibilita` li l-intimat jitlaq mill-

fond minn jeddu hija remota, il-fatt li ghandu martu residenti fil-post ukoll, u n-nuqqas ta` garanziji procedurali sabiex is-sid ikun jista` jiehu lura l-pussess ta` hwejgu, r-rikorrenti kellhom jifthu din il-kawza;

20. Illi l-Qorti ghandha tapprezza wkoll illi l-intimat u mart l-intimat ghadhom jghixu u jokkupaw il-fond ta` l-attrici, u dan ghax jghidu li huma protetti taht il-ligi, liema sitwazzjoni taghmilha infelici ghall-istess atturi;

21. Illi ghalkemm r-rikorrenti ghadhom sidien tal-fond, giet imposta fuqhom relazzjoni gdida mal-intimat ghal-perjodu indefinit meta l-atturi ma setghu qatt jaraw dan l-istat ta` fatt gej fuqhom meta dahlu fi ftehim tal-10 ta` Marzu 1973 fl-atti tan-Nutar Joe Vella Galea, u meta qatt ma ffirmaw sabiex jidhlu fi ftehim ta` kera, wara li skada il-ftehim originali;

22. Inoltre ma hemm ebda rimedju effettiv sabiex l-intimati jiehdu lura l-pussess tal-fond taghhom u ghalhekk kellhom jintavolaw din il-kawza quddiem il-Prim`Awla Tal-Qorti Civili (Sede Kostituzzjonali);

23. Illi oltre hekk, l-intimati Scicluna qieghdin jintavolaw il-kera kif jahsbu li huwa dovut ghall-intimati, fir-Registru tal-Qorti kif jidher mill-anness cedoli bin-numri 1106/15, 1107/15, 2363/15, 2444/16 u 2380/17, markati ***dok Y 1 sa dok Y 5 inkluzi****;*

24. Illi lanqas ma jezistu salvagwardji procedurali xierqa mmirata sabiex jinkiseb bilanc bejn l-interess tal-kerrej u dawk tas-sidien, u dan nonostante l-emendi li dahlu permezz tal-Att X tas-sena 2009;

25. Illi l-Qorti Kostituzzjonali uzat l-istess principji fil-kazijiet ***Maria Ludgarda Borg et vs Rosario Mifsud et*** *. deciza mill-Qorti Kostituzzjonali fid-29 ta` April 2016 (rik nru. 72/2014) u* ***Maria Stella sive Estelle u John Azzopardi Vella vs Avukat Generali et.*** *tat-30 ta` Settembru 2016 (rik nru. 15/2014) , fejn il-Qorti enfasizzat li mill-gurisprudenza tal-Qorti Ewropea johrog li l-kontroll tal-uzu tal-propjeta` mhuwiex dritt assolut u hemm bzonn li ssir analizi biex jigi stabbilit li hemm bilanc bejn id-drittijiet tal-individwu u d-dritt tal-Istat. Pero` dawn iz-zewg kawzi, bhal il-kaz in dizamina, taghmilha wkoll cara li l-isproporzjonalita` fid-drittijiet ta` l-Istat ma jistghux ikunu tali li sid il-fond jissussidja indefinittivament l-inkwilin b`mod sproporzjonat u b`mod li sid il-fond lanqas jaf kif u meta l-pussess vakanti tal-propjeta` sejra tirriverti lura ghandu;*

26. Illi l-Qorti Kostituzzjonali fil-kawzi fl-ismijiet ***Dr Cedric Mifsud nomine et vs Avukat Generali et****, bion-numru tar-rikors 33/2010 u 34/2010 decizi fil-25 ta` Ottubru 2013 u fil-31 ta` Jannar 2014 risepttivament, bl-istess mod ukoll iddikjaraw illi l-Artikolu 12 tal-Ordinanza li Tnehhi l-Kontroll tad-Djar (Kap. 158 tal-Ligijiet ta` Malta) huwa inkonsistenti mad-dritt fundamentali tar-rikorent taht l-Artikolu 1 tal-Protokoll numru 1, u ghaldaqstant l-intimati ma jistghux jinvokaw dan il-provvediment biex jibqghu jabitaw fil-fond;*

Rat it-talbiet tar-rikorrenti li jghidu hekk :-

1. Tiddikjara li l-artikolu 12(2) u 12(3) tal-Kap 158 jiksru u jivvjolaw id-dritt tar-rikorrenti ghat-tgawdija tal-propjeta taghhom bl-indirizz 115 Flat 1 Triq il-Kullegg l-Antik, Sliema, u dan bi ksur tal-Artikolu ta` l-Ewwel Artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropea, liema Konvenzjoni giet ratifikata u saret parti integrali tal-ligijiet domestici fil-Kap 319, u dan prevja u jekk hemm bzonn li tappunta periti nominandi;

2. Tiffissa kumpens xieraq ghal tali vjolazzjoni stante l-fatt li r-rikorrenti baqghu dawn is-snin kollha (mill-31 ta` Dicembru 1989 [korrezzjoni awtorizzata] sal-lum) minghajr il-pussess battal tal-fond 115 Flat 2 [korrezzjoni atorizzata b`digriet 15/03/2018] Triq il-Kullegg l-Antik, Sliema, u t-tgawdija tal-propjeta` taghhom.

3. Minghajr pregudizzju, ghat-talba precedenti, taghti lir-rikorrenti dawk ir-rimedji li jidhrilha li huma xierqa fis-sitwazzjoni, inkluz li jergghu jiehdu lura l-pussess battal tal-fond propjeta` taghhom 115 Flat 2 [korrezzjoni atorizzata b`digriet 15/03/2018] Triq il-Kullegg l-Antik, Sliema, entro terminu qasir u perentorju li l-Qorti tistipula fic-cirkostanzi.

Bl-ispejjez kollha inkluz taz-zewg ittri uficcjali bin-numri 1565/2014 tat-22 ta` Mejju 2014 u tal-20 ta` Settembru 2016 bin-numru 3093/2016, u bl-imghax legali mid-data tal-likwidazzjoni tal-kumpens sal-pagament effettiv;

L-intimati huma minn issa ngunti in subizzjoni.

Rat il-lista ta` x-xhieda u tad-dokumenti.

Rat ir-risposta li pprezenta l-Avukat Generali fid-19 ta` Frar 2018 li taqra hekk :-

1. Illi in linea preliminari, huwa xieraq u opportun li r-rikorrenti jipprovaw it-titolu taghhom ta` sid fuq il-proprjetà 115, Flat 1, Triq il-Kullegg, Sliema.

2. Illi in linea preliminari wkoll, ir-rikorrenti ma jistghux jinvokaw l-anti-konvenzjonalità tal-Artikolu 12 tal-Kap 158 tal-Ligijiet ta` Malta u dan stante li l-awturi tal-koncessjoni enfitwtika matul hajjithom qatt ma oggezzjonaw ghall-konverzjoni f`kera favur l-intimat Joseph u Agnes konjugi Scicluna u ghall-kuntrarju jidher li dawn hallew ghaddejja l-kirja favur il-konvenut l-iehor minghajr xkiel ghaliex dejjem accettaw il-kera. F`tali cirkostanzi, ir-rikorrenti Mary Fatima Vassallo bhala successur tal-aventi kawza taghhom hija marbuta bid-decizjonijiet li ttiehdu mill-predecessuri taghha, b`dana li r-rikorrenti hija prekluza milli tannulla dak li ma ridux jaghmlu l-awturi taghha.

3. Illi fil-mertu u minghajr pregudizzju ghas-suespost, l-esponent jopponi l-allegazzjonijiet avvanzati mir-rikorrenti bhala nfondati fil-fatt u fid-dritt u jirrileva illi ma sehh l-ebda ksur da parte tieghu tad-drittijiet fundamentali tal-bniedem fil-konfront tar-rikorrent ai termini tal-Artikolu 1 tal-Ewwel Protokol tal-Konvenzjoni stante li l-fond in kwistjoni jidher li huwa okkupat fuq bazi legali ai termini tal-Kap 158 tal-Ligijiet ta` Malta.

4. Illi l-Artikolu 12 tal-Kap 158 bl-ebda mod ma jikkostitwixxi tehid forzuz tal-proprjetà jew tehid obbligatorju izda kontroll ta` uzu ta` proprjetà fil-parametri tal-Kostituzzjoni u tal-Konvenzjoni Ewropea u ghalhekk l-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni m`huwiex applikabbli.

5. Illi sabiex jinghad li kien hemm tehid forzuz jew obbligatorju, jehtieg li persuna tigi zvestita minn kull dritt li ghandha fuq il-proprjetà, meta fil-kaz odjern l-istat sempliciment irregolarizza sitwazzjoni socjali fl-ambitu tal-gid komuni, minghajr pero` ma gew ippregudikati d-drittijiet tar-rikorrenti u dan stante li r-rikorrenti u l-awturi taghha qatt ma gew totalment zvestiti mill-allegat drittijiet taghhom fuq il-propjetà mertu ta` din il-kawza.

6. Illi ai termini tal-proviso tal-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni, l-Istat ghandu kull jedd li jghaddi dawk il-ligijiet li jidhirlu xierqa biex jikkontrolla l-uzu tal-proprjetà skont l-interess generali. Illi hija gurisprudenza kostanti tal-Qorti ta` Strasburgu li l-Istat igawdi minn diskrezzjoni wiesgha sabiex jidentifika x`inhu mehtieg fl-interess generali u sabiex jistabilixxi liema huma dawk il-mizuri mehtiega ghall-harsien tal-interess generali.

7. Illi l-provvedimenti tal-Kap 158 huma immirati lejn cirkostanzi specjali fil-pajjiz li jinkwadraw ruhhom f`dawk ic-cirkostanzi u kazijiet specjali li skond l-imsemmi proviso jiggustifikaw lil-legislatur sabiex fl-interess nazzjonali jkun hu li b`ligi jistabilixxi l-kumpens.

8. Illi huwa fatt maghruf li l-ghan wara din il-ligi hu li kulhadd ikollu fejn joqghod u li l-uzu tal-proprjetà anke privata jghin biex dan isehh. Illi certament dan jikkwalifika bhala interess generali ghall-fini ta` dawn l-artikoli.

*9. Illi l-Qorti Ewropea stess fil-gurisprudenza taghha fosthom fil-kaz ta` **Amato Gauci vs Malta**[1]rrikonoxxiet li "State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable.".*

10. Illi nonostante li t-tieni talba ma tindikax taht liema artikolu tal-Konvenzjoni qieghda tigi proposta, l-esponent jassumi li din qed isir ai termini tal-Artikolu 41 tal-Konvenzoni. Illi f`dan ir-rigward l-esponent jeccepixxi l-improponibilita tat-talba stante li l-Artikolu 41 tal-Konvenzjoni japplika biss ghall-organi gudizzjarji tal-Kunsill tal-Ewropa u mhux ghall-Qrati Maltin. Kemm hu hekk dan l-artikolu tat-Trattat ma jifformax parti mil-ligi Maltija ghaliex m`huwiex inkluz fit-tifsira ta` `Drittijiet tal-Bniedem u Libertajiet Fondamentali` kif riprodotta fl-Artikolu 2 tal-Kap 319 tal-Ligijiet ta` Malta u lanqas ma gie traspost fil-ligi domestika skont l-Artikolu 3 (3) tal-Kap 304 tal-Ligijiet ta` Malta.

11. Illi l-Artikoli 12 (1) u l-Artikoli 12 (2) tal-Kap 158 tal-Ligijiet ta` Malta ghandhom ghanijiet legittimi u huma fl-interess generali, b`dana li ma hemm xejn hazin taht il-Konvenzjoni Ewropea, li l-ligi Maltija tiddisponi li f`gheluq tal-enfitewzi jew sub-enfitewzi l-okkupant li jkun qed juza` dik id-dar bhala r-residenza tieghu ghandu jithalla fid-dar taht titolu ta` kera, allura safejn ir-rikorrenti qieghda titlob dikjarazzjoni gudizzjali li l-ligi tikser il-Konvenzjoni Ewropea u li l-kirja favur is-Sinjuri Scicluna ghandha tigi mwaqqfa, tali talba m`hijiex misthoqqa. Tabilhaqq anke jekk ir-rikorrenti qed isostnu li huma qeghdin iggorru piz sproporzjonat minhabba li l-ammont ta` kera li qed jircievi ma jirriflettix il-valur reali tal-fond inkwistjoni, dan ma jistghax jigi imsewwi bit-tnehhija tal-ligi jew bl-izgumbrament tal-konjugi Scicluna. Dan qed jinghad ghaliex wiehed ma jistghax fl-istess nifs jaghraf l-iskop, il-htiega u l-legittimità tal-mizura msemmija fl-Artikolu 12 biex imbaghad jinnewtralizzaha billi jaghmilha inapplikabbli bl-izgumbrament tal-okkupant.

---

[1]*App Nru 47045/06 deciz 15/09/2009.*

12. Illi ghalhekk anke jekk fil-kaz odjern jirrizulta li l-kera dovuta lir-rikorrent hija inferjuri ghall-valur lokatizju fis-suq, dan it-tnaqqis huwa kontro-bilancjat bil-margini wiesgha tal-Istat li jillegisla fil-kuntest ta` mizuri socjali.

13. Illi jsegwi ghalhekk, fl-umli fehma tal-esponent, li fil-kaz odjern din l-Onorabbli Qorti m`ghandhiex tevalwa din il-ligi fil-kuntest principalment ta` spekulazzjoni tal-proprjetà imma ghandha tiskrutinja u tapplika l-ligi fil-qafas aktar wiesgha u cioe` l-aspett tal-proporzjonalità fid-dawl tar-realtà ekonomika u socjali tal-pajjiz in generali.

*14. Illi ghandu jinghad li meta l-iskop pubbliku jkun wiehed socjali, il-valur li jigi pretiz minn sid il-fond bhala kumpens ta` l-uzu li qed isir mill-fond ma jistghax jitkejjel mal-valur li l-fond igib fis-suq, diment li l-ammont, zghir kemm hu zghir `pursues a purpose of general interest which was not manifestly without foundation,` dan huwa gustifikat u legalment accettat (**Mellacher and Other v. Austira**, 1989). L-aggustament fil-kera jilhaq il-bilanc bejn l-interess generali u dak tal-privat, ghaldaqstant mhux il-kaz li wiehed jitkellem fuq kumpens mhux xieraq.*

15. Illi dato ma non concesso, li din l-Onorabbli Qorti jidhrilha li kien hemm xi ksur tad-drittijiet fundamentali tar-rikorrenti, fatt li qed jigi kontestat, l-esponent jirrileva li fic-cirkostanzi tal-kaz dikjarazzjoni ta` ksur hija sufficjenti.

16. Salv eccezzjonijiet ulterjuri

Ghaldaqstant, l-esponent jitlob bir-rispett li din l-Onorabbli Qorti joghgobha tichad it-talbiet kif dedotti fir-rikors promotur bhala infondati fil-fatt u fid-dritt stante li ma hemm ebda ksur tad-drittijiet fundamentali tar-rikorrenti ai termini tal-Artikolu 1 tal-Ewwel Protokol tal-Konvenzjoni Ewropea b`konsegwenza ghalhekk l-ebda kumpens m`huwa misthoqqa, bl-ispejjez kontra ir-rikorrenti.

Rat ir-risposta li pprezentaw Joseph u Agnes konjugi Scicluna fit-<u>8 ta` Marzu 2018</u> li tghid hekk :-

Fir-rikors taghhom ir-Rikorrenti qeghdin jallegaw ksur tal-Ewwel Artikolu ta` l-Ewwel Protokoll tal-Konvenzjoni Ewropea (l-Ewwel Skeda tal-Kap.

319) u dan billi skont huma l-Artikolu 12 (2) u 12 (3) tal-Kap 158 jiksru d-dritt tar-Rikorrenti ghat-tgawdija tal-propjeta` taghhom.

*1. Illi in linea preliminari, r-Rikorrenti bi zball iddikjaraw li huma s-sidien tal-fond 115, Flat 1, Triq il-Kullegg l-Antik, Sliema mentri l-Esponenti konjugi Scicluna ghandhom l-unika u ordinarja residenza taghhom fil-fond numru 115, **Flat 2**, Triq il-Kullegg l-Antik, Sliema.*

2. Illi preliminarjament u minghajr pregudizzju ghas-suespost, ir-rikorrenti ghandhom igibu prova li huma ghandhom titolu validu ta` propjeta` fuq il-fond mertu ta` din l-istanza;

3. Illi fit-tielet lok u fil-mertu, l-Esponenti bhala l-koncessjonarji kellhom id-dritt li "...meta tiskadi l-enfitewsi prezentati ghar-renova ta` sbatax – il sena ohra bil-kundizzjonijiet stipulati f`dan l-att". [ara l-klawzola 5 tal-kuntratt ta` enfitewsi temporanja fl-atti tan-Nutar Dr. Joseph Vella Galea tal-10 ta` Marzu 1973 – Dok. MFV 9 in atti]. Minn dan johrog li l-intenzjoni tad-direttarju kienet li l-koncessjoni terga` tiggedded bl-istess kundizzjonijiet miftiehma fl-imsemmi att originali minghajr ziedet fic-cens. Bl-operat tal-Artikolu 12 tal-Kap. 158 ir-Rikorrenti marru ahjar stante li l-kera zdiedet minn zmien ghal zmien skont il-ligi.

4. Illi l-Esponenti dejjem imxew mal-Ligi u hallsu c-cens u mbaghad il-kera puntwalment li kienet tigi accettata mir-Rikorrenti u, peress li dan l-ahhar, ma baqghetx tigi accettata bdiet tigi depozitata fir-Registru tal-Qorti.

*5. Illi wkoll fil-mertu ma jistax jinghad illi d-drittijiet gew b`xi mod lezi stante illi r-rikorrenti fl-ebda standju ma gew spossessati mill-propjeta` taghhom hlief li huma ghandhom biss godiment limitat tal-istess u dejjem, jekk iridu, **jistghu** jittrasferixxu lil terzi persuni l-propjeta` mertu ta` din l-istanza.*

6. Illi salv is-suespost, b`referenza ghar-risposta tal-Avukat Generali , l-Esponenti qeghdin jassoccjaw ruhhom ma` tali risposta u jaghmlu taghhom eccezzjonijiet sollevati mill-Avukat Generali.

7. Salv eccezzjonijiet ulterjuri.

Ghaldaqstant l-Esponenti intimati umilment jitolbu lil din l-Onorabbli Qorti joghgobha tichad it-talbiet maghmula permezz tar-rikors tar-Rikorrenti, bl-ispejjez kollha kontra r-Rikorrenti.

Rat id-digriet li tat fl-udjenza tal-15 ta` Marzu 2018 fejn laqghet it-talba tar-rikorrenti sabiex, in vista tal-ewwel eccezzjoni tal-intimati konjugi Scicluna, ikun hemm korrezzjoni fir-rikors promotur fis-sens illi kull referenza ghall-fond in kwistjoni ma tibqax ghall-flat 1 izda ghall-flat 2, u b`hekk l-indirizz korrett tal-fond isir 115, Flat 2, Triq il-Kullegg l-Antik, Sliema.

Rat illi wara dan id-digriet, l-intimati konjugi Scicluna rtiraw l-ewwel eccezzjoni taghhom.

Semghet ix-xhieda.

Rat id-dokumenti li tressqu bhala prova.

Rat illi l-kawza thalliet ghas-sentenza ghal-lum bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti li pprezentaw ir-rikorrenti u l-Avukat Generali.

Rat l-atti l-ohra tal-kawza.

II. <u>Provi</u>

<u>Ir-rikorrent John Vassallo</u> xehed dwar il-provenjenza tat-titolu li ghandha l-mara tieghu, ir-rikorrenti Mary Fatima Vassallo, ghall-fond mertu ta` din il-kawza.

Spjega illi meta zzewweg lil martu, huma xtaqu jmorru joqghodu Tas-Sliema pero` l-genituri ta` martu ma setghux jitolbu lill-inkwilini jivvakaw il-post ghaliex kienu protetti bil-ligi.

Kompla jghid illi hu u martu jinsabu deprivati mit-tgawdija tal-proprjeta` u ilhom hekk deprivati sa mill-1990 meta ghalaq ic-cens.

Stqarr illi ghalkemm huwa minnu illi jistghu Jbieghu il-fond jibqa` l-fatt illi ma jistghux jigbru l-valur reali tieghu tenut kont li hemm inkwilini residenti fih. Bhala sidien huma jinsabu fil-ghama dwar meta ser ikunu jistghu jiksbu lura l-proprjeta` nonostante zviluppi legislattivi. Lanqas ma jistghu jikru l-post bil-prezzijiet attwali tas-suq.

Dwar il-klawsola 5 tal-kuntratt li kien sar mal-intimati Scicluna, xehed illi mhux minnu li l-intenzjoni tad-direttarji kienet illi l-kuntratt jerga` jiggedded, anzi bil-maqlub. L-intenzjoni kienet biss dik illi l-enfitewsi temporanja tiggedded ghal zmien ta` 17-il sena ohra u cioè sal-ahhar ta` Dicembru 1989 u mhux aktar minn hekk jew addirittura ghal zmien indefinit. Ghalkemm kien hem mil-klawsola 5, fil-fatt Scicluna baqghu ma estendewx ic-cens skont il-kuntratt ghaliex meta ghalaq ic-cens originali ma ghamlu xejn.

Stqarr illi biz-zieda fil-kera li saret skont il-ligi, huma ma marrux ahjar.

Qal ukoll li mhux minnu li Scicluna qaghadu mal-ligi. Ipprezenta skeda li hejja huwa stess bil-kalkolu tal-kera li kellha tithallas skont l-Att XXIII tal-1979 u skont l-Att X tal-2009. Abbazi ta` din l-iskeda jirrizulta li Scicluna qeghdin ihallsu huwa ferm inqas minn dak dovut minnhom skont il-ligijiet esistenti.

Xehed ukoll illi meta Pauline Caruana ffirmat il-kuntratt tal-1973 qatt ma setghet tobsor li kien ser ikun hemm bidliet tali fil-ligijiet tal-pajjiz li bihom kienu ser jigu effettwati hazin u drastikament il-jeddijiet taghha.

Sostna li l-applikazzjoni tal-Art 12(2) u (3) tal-Kap 158 jiksru l-jeddijiet fondamentali taghhom.

Qal ukoll illi b`ittra ufficjali tat-22 ta` Mejju 2014 u ohra tal-20 ta` Settembru 2016 l-intimati Scicluna kienu nterpellati biex jizgumbraw mill-fond *de quo.*

Perit Godwin Abela pprezenta r-rapport datat 31 ta` Marzu 2017 li hejja fuq inkariku *ex parte* tar-rikorrenti dwar il-valur fis-suq tal-fond *de quo* u l-valur lokatizju tal-istess fond.

Xehed illi l-fond huwa appartament fl-ewwel sular inkluz l-ajra sovrastanti. Jaghmel parti minn blokk ta` zewg flats li jinsab fil-qalba taz-zona residenzjali tas-Sliema. Ghandu daqs ta` 80 mk inkluza bitha nterna. Taccedi ghall-post minn bieb u tarag komuni.

Fisser illi l-fond ghandu entrata b`tieqa li taghti ghal fuq bitha interna, b`kamra kbira fuq quddiem u b`gallerija maghluqa li taghti fuq it-triq. L-entrata taghti ghall-kamra tal-pranzu, kamra tal-banju, kcina u kamra fuq wara. I-tarag komuni jaghti ghal kamra fil-livell tal-bejt kif ukoll ghal terazzin, wiehed fuq quddiem u iehor fuq wara tal-istess kamra.

Spjega li l-post li nbena circa tmenin sena ilu. Jinsab f`kondizzjoni tajba u jirrikjedi biss meljorament minimu tas-servizzi sabiex jirriflettu l-livelli tal-lum.

Stqarr illi l-bazi tal-valutazzjoni tieghu hija studju komparattiv li jiehu in konsiderazzjoni l-valur ta` proprjetajiet komparabbli fiz-zona, tenut ukoll kont ta` kemm ghandu zmien il-post, il-kondizzjoni prezenti, u kif ukoll xogholijiet mehtiega ghat-titjib tal-istess. Il-valur lokatizzju kien stmat fuq *initial yield* ta` 4% fis-sena. Abbazi ta` dawn il-konsiderazzjonijiet, huwa kkonkluda illi l-valur korrenti tal-fond fuq is-suq jammonta ghal €190,000 waqt illi l-valur lokatizju tieghu huwa ta` €7,600 fis-sena. Il-valur fuq is-suq tal-fond fl-1 ta` Jannar 1973 kien ta` €6,500 waqt li l-valur lokatizzju fl-istess data kien ta` €227.50 fis-sena. Il-valur fuq is-suq tal-fond fl-1 ta` Jannar 2007 kien ta` €85,000 waqt li l-valur lokatizju ghall-istess data kien ta` €2,975 fis-sena.

L-intimat Joseph Scicluna xehed li hu u martu jirrisjedu fil-fond 115/2, Triq il-Kullegg l-Antik, Sliema. Il-fond huwa l-unika residenza taghhom.

Spjega li kienu akkwistaw il-fond b`cens temporanju minghand il-genituri tar-rikorrenti Mary Fatima Vassallo b`kuntratt tal-10 ta` Marz 1973 fl-atti tan-Nutar Dottor Joseph Vella Galea. Kienu jhallsu c-cens lid-direttarji Caruana, u

kellhom is-serhan tal-mohh li l-kuntratt kien ser jerga` jiggedded peress li kellhom miktub illi : "… *meta tiskadi l-enfitewsi prezenti ghar-renova ta` sbatax il-sena ohra bil-kondizzjonijiet stipulati f`dan l-att.*"

Qal li fiz-zmien tal-kuntratt Dr Carmelo Caruana kien membru tal-Parlament u x`aktarx kien jaf sew x`kienu ser ikunu l-konsegwenzi meta ghaddiet il-ligi tal-1979. Ghalhekk seta` kellimhom qabel skada z-zmien sabiex jibdlu l-kuntratt.

Zied jghid illi meta r-rikorrenti Vassallo wirtet il-post, ma talbithomx biex isir kuntratt gdid. Anzi meta ghalaq il-kuntratt u t-titolu qaleb ghal kera hija accettat il-kera li kienet tammonta ghal aktar milli kien ic-cens originali. Huma dejjem hallsu c-cens imbaghad il-kera fil-pront u l-hlas kien dejjem accettat. Kien biss fl-ahhar zminijiet illi l-kera bdiet tigi depozitata l-qorti ghaliex bdiet tkun rifjutata.

Xehed illi kemm kienu ilhom fil-fond, dejjem hadu hsieb jaghmlu x-xogholijiet kollha mehtiega u ta` dan qatt ma talbu kumpens.

Stqarr illi hu u martu m`ghandhomx mezzi biex jixtru jew jikru proprjeta` ohra. Ighixu bil-pensjoni. U m`ghandhomx dhul iehor. Huma anzjani u ghalhekk ebda bank mhu ser jislifhom flus biex jixtru band`ohra.

Ippreciza li dan l-ahhar kienu avvicinati mir-rikorrenti sabiex jidhlu "… *f`kuntratt gdid ta` kera izda l-kundizzjonijiet li riedet timponi fuqna ma kinux ragjonevoli u l-kera li pproponiet kienet taqbez sew il-mezzi finanzjarji taghna.*" (fol. 100)

Spjega illi martu kienet ilha ghomorha tghix tas-Sliema u ilhom jghixu fil-post minn mindu zzewgu.

Zied jghid illi jekk issa jigu ordnati jivvakaw il-post dan kien ser jaffettwahom "*hazin hafna psikologikament. Sahhet marti m`hijiex tajba ghax ghandha storja ta` kancer u qieghda tiehu trattament.*" (fol. 100)

Fil-**kontroezami** xehed illi meta dahlet fis-sehh il-ligi tal-1979 huwa ha parir legali fis-sens illi mal-gheluq tac-cens seta` jzomm il-post b`titolu ta` kera. Meta ghalaq ic-cens m`ghamel xejn sabiex ibiddel it-titolu minn cens ghal kera ghax ma nghatax il-parir sabiex jaghmel dan.

Perit Paul Buhagiar xehed illi huwa nghata inkariku *ex parte* mill-Avukat Generali sabiex jaghmel spezzjoni tal-fond 115 Flat 2, Triq il-Kullegg l-Antik, Sliema, u jipprezenta relazzjoni.

Xehed illi fis-6 ta` April 2018 acceda fil-post, ghamel spezzjoni u ha l-qisien.

Spjega li l-fond jinsab fil-livell tal-ewwel sular b`kamra tal-bejt u bejt li huwa tal-istess appartament. Il-bini fit-triq ghandu mill-inqas tmenin sena. Kien inbena qabel l-1939. Il-post jinsab fi triq stabbilita fil-qalba tas-Sliema u huwa facilment milhuq minn servizzi essenzjali bhal hwienet.

Ipprezenta *site plans* bi skali differenti fosthom *orthophoto plan*. Dawn id-dokumenti huma estratti mill-*geo portal* tal-Awtorita` tal-Ippjanar u jirreferu ghal ritratti ricenti mehuda mill-ajra fl-2016.

Il-post kien moghti fl-1973 b`cens ghal 17 il-sena.

Il-komun ghandu access dirett mil-livell tat-triq. Il-fond fih intrata mdaqqsa, tromba tat-tarag tal-gebel tar-ragg li jibqa` tiela` sal-bejt. Il-komun huwa maqsum bejn zewg appartamenti li t-tnejn jinsabu fl-ewwel sular. Il-bieb tal-appartament jaghti ghal go salott li jiehu dawl u ventilazzjoni mill-bitha nterna. Mis-salott wiehed jaccedi ghal kamra tas-sodda principali li tinsab fuq il-faccata u ghandha gallerija maghluqa tal-injam. Mis-salott taccedi wkoll ghall-bqija tal-appartament u cioè kamra li tintuza bhala studju, kamra tal-ikel u kamra tal-banju, kif ukoll kcina u kamra tas-sodda ohra zghira. Dawn il-kmamar jaghtu fuq il-bitha ta` wara. Fuq il-bejt hemm kamra ohra li taqsam il-bejt fi tnejn : parti quddiem u ohra wara.

Xehed illi l-appartament huwa akkoljenti u qed jinzamm fi stat tajjeb hafna. Il-post jista` jitqies bhala nternament abitabbli. L-inkwilini ghamlu benefikati konsistenti mill-ghamara tal-appartament kollu, modernizzar tal-kamra tal-banju, kcina u sistema ta` dawl u ilma. Il-post huwa msaqqaf b`xorok tal-gebel mserha fuq travi tal-hadid li huma f`kundizzjoni tajba. Il-wicc tal-bejt inkesa bil-*membrane* pero` xorta hemm sinjali ta` perkolazzjoni ta` ilma mis-saqaf tal-kcina.

Il-post ghandu arja msaqqfa ta` 133.13 m.k.

Skont il-Perit Buhagiar, il-valur korrenti ghal kull metru kwadru hija ta` €1401.63 li jfisser li l-fond de quo, liberu u frank, jiswa €186,500. Il-valur lokatizju huwa ta` €5,130 fis-sena.

III. <u>It-tieni (2) eccezzjoni tal-intimati Scicluna u l-ewwel (1) eccezzjoni tal-Avukat Generali</u>

Il-gurisprudenza tal-qrati taghna hija fis-sens illi fil-kawza ta` ndole kostituzzjonali mhuwiex indispensabbli illi r-rikorrent jipprova t-titolu tieghu ghall-propjeta` *de qua* ghaliex kawzi bhal din tal-lum mhumiex kawzi ta` rivendika fejn il-prova tat-titolu hija *sine qua non*t sabiex tirnexxi l-azzjoni.

Fis-sentenza li tat fis-7 ta` Frar 2017 fil-kawza **<u>Robert Galea vs Avukat Generali et</u>** din il-Qorti diversament presjeduta qalet hekk :-

> *"Illi biex wiehed ikun f`qaghda li juri li garrab ksur tal-jedd fundamentali tieghu taht l-artikolu 37 tal-Kostituzzjoni m`ghandux ghalfejn jipprova titolu assolut u lanqas wiehed originali bhallikieku l-azzjoni dwar ksur ta` jedd fundamentali kienet wahda ta` rivendika (Kost. 27.3.2015 fil-kawza fl-ismijiet **<u>Ian Peter Ellis et vs Avukat Generali et</u>**). Huwa bizzejjed, ghall-finijiet ta` dak l-artikolu, li wiehed juri li ghandu jedd fil-haga li tkun li bih jista` jieqaf ghall-pretensjonijiet ta` haddiehor.*

Imbaghad, ghall-finijiet tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, huwa bizzejjed li l-persuna turi li kellha l-pussess tal-haga li tkun."

Dan premess, il-Qorti tosserva illi r-rikorrenti ghamlu l-prova tat-titolu.

Infatti jirrizulta ppruvat illi :-

a) B`kuntratt tal-20 ta` Frar 1935 fl-atti Nutar Emmanuele Pio DeBono, Alfredo Zammit, li jigi n-nannu tar-rikorrenti Mary Fatima Vassallo, xtara u akkwista tlett proprjetajiet bl-isem : `Saint Philip`, `Saint Mary` u `Saint Rita` fi Triq il-Kullegg l-Antik, Sliema, soggetti ghall-hlas annwu u perpetwu ta` 17-il lira sterlina ;

b) Illum dawn it-tliet propjetajiet ghandhom in-numri ufficjali 114, 115 Flat 1 u Flat 2, u 116. It-tabelli bl-ismijiet originali ghandhom *in situ*. Il-fond okkupat mill-konjugi Scicluna huwa St Mary, 115 Flat 2.

c) Is-successjoni ta` Alfredo Zammit kienet regolata b`testment *unica charta* ma` martu tal-4 ta` Marzu 1944. L-eredi universali kienet Pauline Caruana née Zammit, li tigi omm ir-rikorrenti Mary Fatima Vassallo.

d) B`kuntratt tal-10 ta` Marzu 1973 fl-atti tan-Nutar Dottor Joseph Vella Galea, l-imsemmija Pauline Caruana tat lill-intimat Scicluna l-fond 115/2, Triq il-Kullegg l-Antik, Sliema, b`titolu ta` enfitewsi temporanja ghal 17-il sena il sena, dekorribbli mill-1 ta` Jannar 1973 versu hlas ta` cens ta` Lm90 fis-sena pagabbli bil-quddiem.

e) B`testment tal-11 ta` Novembru 1987 fl-atti tan-Nutar Dottor George Cassar, l-Avukat Dottor Carmelo Caruana u martu Pauline Caruana hatru lill-unika binthom ir-rikorrent Mary Fatima Vassallo bhala unika eredi universali u padruna assoluta tal-gid taghhom kollu presenti u futuri, mobbli u mmobbli.

Dawn il-provi ma gewx kontestati.

Anzi l-intimat Scicluna meta xehed ikkonferma li Mary Fatima Vassallo kienet wirtet il-post minghand il-genituri taghha. Kien ihallas ic-cens u wara anke l-kera. Meta saru c-cedoli ta` depositu, dawn saru kontra r-rikorrenti.

Il-Qorti tasal ghall-fehma li r-rikorrenti Mary Fatima Vassallo ghandha titolu tajjeb ghall-post. Dan jaghti l-jedd li tippretendi li tgawdi flimkien ma` zewgha l-jeddijiet taghha fuqu u li titlob il-harsien tal-istess jeddijiet fil-kaz ta` cahda taghhom.

Ghalhekk it-tieni (2) eccezzjoni tal-intimati Scicluna u l-ewwel (1) eccezzjoni tal-Avukat Generali qeghdin jigu respinti.

IV. <u>It-tieni (2) eccezzjoni tal-Avukat Generali</u>

Jirrizulta li meta ghalaq ic-cens temporanju originali fl-10 ta` Marzu 1990, l-intimati konjugi Scicluna baqghu jirrisjedu fil-fond b`titolu ta` kera. Il-bdil fit-titolu sar bis-sahha tal-**<u>Art 12(2) u (3) tal-Kap 158</u>**. Id-disposizzjonijiet dahlu fl-Att XXIII ta` l-1979 u gew fis-sehh b`effett mill-15 ta` Gunju 1979.

Is-sidien accettaw il-konverzjoni fit-titolu tant illi accettaw il-kera. Kien biss b`effett mill-2014 li r-rikorrenti bdew jirrifjutaw il-hlas tal-kera u b`hekk l-intimati bdew jiddepozitaw il-hlas tal-kera fil-qorti u hekk baqa` jsir sal-lum.

Huwa evidenti li r-rikorrenti ma riedux jibqghu marbuta bil-kirja u ghalhekk pprezentaw l-ittri ufficjali tat-22 ta` Mejju 2014 u tal-20 ta` Settembru 2016 fejn interpellaw lill-intimati Scicluna biex jizgumbraw mill-fond in kwistjoni. Min-naha taghhom l-intimati baqghu fermi fil-pozizzjoni taghhom.

Fil-fehma tal-Qorti, dan kollu ma jnissilx ir-rinunzja tar-rikorrenti tad-drittijiet taghhom.

Il-konsegwenzi legali tal-emendi ghall-Kap 158 kienu maghrufa lis-sidien fid-data tal-gheluq tal-koncessjoni enfitewtika originali fl-10 ta` Marzu 1990, ben hdax-il sena wara d-dhul fis-sehh tal-emendi. Jibqa` pero` l-fatt li s-sidien ma kellhomx ghazla libera ta` x`setghu jaghmlu bil-proprjeta`. L-aventi kawza kienu vinkolati b`dak li kienet tghid il-ligi, u ghalhekk qaghdu ghal li kienet tipprovdi. Din is-sitwazzjoni ta` nuqqas ta` ghazla kienet realta` fil-pajjiz li baqghet tippersisti anke sa zminijiet ricenti. Kien biss wara li nghataw sentenzi mill-Qorti Kostituzzjoni u mill-ECtHR fejn l-Art 12(2) tal-Kap 12 kien dikjarat li jmur kontra l-jeddijiet tas-sidien skont l-Art 1 Prot 1 tal-Konvenzjoni li r-relazzjoni ta` bejn is-sidien u l-inkwilini (li qabel kienu censwalisti) nbidlet b`mod radikali.

Fis-sentenza li tat il-Qorti Kostituzzjonali fid-29 ta` April 2016 fil-kawza fl-ismijiet **<u>Maria Ludgarda sive Mary Borg vs Rosario Mifsud et</u>** deciza inghad hekk :-

> *"kien biss fl-ahhar snin illi ghall-ewwel darba gie dikjarat li l-Artikolu 12(2) jilledi d-dritt fundamentali protett taht l-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropea (sentenza tal-Qorti Ewropea fil-kaz Amato Gauci vs Malta, 15 ta` Dicembru 2009). .... Dan m`huwiex kaz ta` ksur ta` dritt fundamentali li jsehh ta` darba, izda vjolazzjoni kontinwata tal-Artikolu 1 tal-Ewwel Protokoll. Fic-cirkostanzi dan l-argument hu nfondat. Issir ukoll riferenza ghas-sentenza tal-Qorti Ewropea fil-kaz Anthony Aquilina v Malta Applikazzjoni 3851/12) tal-11 ta` Dicembru 2014, li kienet titratta wkoll kaz ta` controlled rent. Minkejja li s-sid kien baqa` jircievi l-kera l-qorti xorta ddikjarat ksur tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, ghalkemm ikkunsidrat dan `il fatt meta llikwidat id-danni."*

(ara wkoll : **<u>Rose Borg vs Avukat Generali et</u>** deciza mill-Qorti Kostituzzjonali fil-11 ta` Lulju 2016 ; u **<u>Rebecca Hyzler et vs Avukat Generali et</u>** deciza minn din il-Qorti diversament presjeduta fid-9 ta` Mejju 2018)

Bl-emendi gara li filwaqt li l-inkwilini nghataw protezzjoni ma garax l-istess fil-kaz tas-sidien li kellhom joqghodu ghal dak li kienet tipprovdi l-ligi

ghaliex il-legislatur naqas milli joffrilhom rimedju adegwat skont il-ligi ordinarja sabiex joggezzjonaw b`mod effettiv ghall-konverzjoni. L-uniku triq li kellhom kienet li jfittxu kenn quddiem il-qrati ta` indole kostituzzjonali jew konvenzjonali.

(ara s-sentenza li tat din il-Qorti diversament presjeduta fil-11 ta` Mejju 2017 fil-kawza fl-ismijiet **<u>Josephine Azzopardi et vs L-Onorevoli Prim Ministru et</u>**)

Hekk ghamlu r-rikorrenti fil-kaz tal-lum.

Kif inghad minn din il-Qorti diversament presjeduta fis-sentenza li tat fit-30 ta` Mejju 2018 fil-kawza fl-ismijiet **<u>David Pullicino et vs Avukat Generali et</u>** :

> *"Il-fatt wahdu li sid jipprova jikseb l-akbar gid minn sitwazzjoni legali li tikkundizzjonah, ma jfissirx b`daqshekk li jkun qabel ma` dik il-qaghda u warrab kull ilment li jista` ghandu dwar ic-cahda jew l-indhil fit-tgawdija ta` hwejgu minhabba f`ligi bhal dik jew illi rrinunzja ghall-jedd li jitlob rimedju (ara* ***Robert Galea vs Avukat Generali et****, 07/02/2017)"*

Il-Qorti hija tal-fehma illi l-eccezzjoni tal-Avukat Generali hija nsostenibbli u ghalhekk sejra tkun michuda.

V. <u>L-ewwel (1) talba tar-rikorrenti</u>

Fl-ewwel talba, ir-rikorrenti qeghdin jitolbu mill-qorti dikjarazzjoni li kien hemm vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni fil-konfront taghha bl-applikazzjoni tal-Art 12(2) u (3) tal-Kap 158 fil-kaz tal-fond in kwistjoni.

Diversi kienu d-drabi fejn il-qrati taghna ttrattaw fid-dettall jekk limitazzjoni fit-tgawdija ta` proprjeta` tistax tigi ekwiparata ma` tehid forzuz kif kontemplat bl-Art 37 tal-Kostituzzjoni. Ghalkemm fil-kaz tal-lum, ir-rikorrenti mhux qeghdin jilmentaw minn ksur ta` din id-

disposizzjoni tal-Kostituzzjoni, din il-Qorti xorta wahda tghid illi d-disposizzjonijiet mertu ta` din il-kawza ma jwasslux ghal tehid forzuz tal-propjeta` izda ghal kontroll fl-uzu taghha.

(ara s-sentenzi : QK - **Josephine Bugeja vs Avukat Generali et** – 7 ta` Dicembru 2009 ; QK - **Angela sive Gina Balzan v. L-Onorevoli Prim Ministru et** – 7 ta` Dicembru 2012 ; PA/K - **Rose Borg vs Avukat Generali et** - 25 ta` Frar 2016 ; QK - : **Mary Anne Busuttil vs Tabib John Cassar et** – 31 ta` Ottubru 2014 ; QAS - **Michael Angelo Briffa et v. Nadia Merten** – 24 ta` April 2015 ; PA/K - **Robert Galea vs Avukat Generali et** - 7 ta` Frar 2017 ; PA/K – Catherine Cauchi et vs Avukat Generali et - 2 ta` Mejju 2017 ; PA/K - **Anthony Aquilina vs Avukat Generali** - 9 ta` Ottubru 2017)

Ghalkemm jista` jinqalghu sitwazzjonijiet fejn skont xi disposizzjonijiet tal-Kap 158 il-konverzjoni *ope legis* tkun tammonta ghal forma ohra ta` tehid obbligatorju, mhuwiex dan il-kaz tal-lum ghaliex ir-rikorrenti dejjem baqghu sidien tal-proprjeta` taghhom u effett tal-bidliet legislattivi l-propjeta` baqghet taghhom. Li gara kien biss kontroll fit-tgawdija u tal-uzu taghha. Tishaq fuq dan anke ghaliex il-kaz tal-lum ma kienx wiehed ta` konverzjoni ta` enfitewsi temporanja ghal wahda perpetwa izda ta` bdil fit-titolu minn enfitewsi temporanja ghal lokazzjoni.

L-Avukat Generali jikkontendi li l-mod kif sar il-kontroll tat-tgawdija u tal-uzu tal-fond de quo effett tal-Art 12 tal-Kap 158 ma kienx jikser l-Art 1 Prot 1 tal-Konvenzjoni.

Id-dispozizzjoni taqra hekk :-

> *Kull persuna naturali jew persuna morali ghandha d-dritt ghat-tgawdija pacifika tal-possedimenti taghha.*
>
> *Hadd ma ghandu jigi pprivat mill-possedimenti tieghu hlief fl-interess pubbliku u bla hsara tal-kundizzjonijiet provduti bil-ligi u bil-principji generali tal-ligi internazzjonali.*
>
> *Izda d-disposizzjonijiet ta` qabel ma ghandhom b`ebda mod inaqqsu d-dritt ta` Stat li jwettaq dawk il-ligijiet li jidhrulu xierqa biex jikkontrolla l-uzu tal-proprjeta*

skond l-interess generali jew biex jizgura l-hlas ta` taxxi jew kontribuzzjonijiet ohra jew pieni.

Id-disposizzjoni hija gwidata minn tliet principji :-

a) Kull persuna, sew dik naturali kif ukoll dik moral, ghandha dritt ghat-tgawdija tal-proprjeta` b`mod pacifiku ;

b) Tnaqqis fit-tgawdija tal-proprjeta` jista` jkun biss gustifikat jekk jintwera li jkun sar fl-interess pubbliku. Ghalhekk id-dritt mhuwiex assolut u huwa soggett ghall-kundizzjonijiet mahsuba fil-ligi u ghall-principji tad-dritt internazzjonali. Min ikun imcahhad, huwa ntitolat ghal kumpens xieraq ;

c) Jibqa` d-dritt tal-Istat illi jghaddi ligijiet sabiex *inter alia* b`mod xieraq jikkontrolla l-uzu tal-gid fl-interess pubbliku.

Il-Qorti taghmel referenza ghad-decizjoni li tat l-ECtHR fil-5 ta` Jannar 200 fil-kaz **<u>Beyeler vs Italy</u>** fejn inghad hekk :-

*"98. As the Court has stated on a number of occasions, Article 1 of Protocol No. 1 comprises three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, `distinct` in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, among other authorities, the **<u>James and Others v. the United Kingdom</u>** judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, which reproduces in*

part the analysis given by the Court in its ***Sporrong and Lönnroth v. Sweden*** *judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also the* ***Holy Monasteries v. Greece*** *judgment of 9 December 1994, Series A no. 301-A, p. 31, § 56, and* ***Iatridis v. Greece*** *[GC], no. 31107/96, § 55, ECHR 1999-II)."*

Fil-kaz tal-lum, ma hemmx dubju illi dak previst bl-introduzzjoni tal-Art 12(2) tal-Kap 158 kien certament kontroll ta` uzu tal-proprjeta`.

Huwa pacifiku ormai li l-Istat ghandu margini ta` apprezzament wesghin meta jigi biex jintroduci legislazzjoni sabiex itaffi problemi socjali ta` akkomodazzjoni. Madanakollu, pero`, kwalsiasi interferenza mill-Istat trid tkun kompatibbli mal-principji ta` (i) legalita` (ii) ghan legittimu fl-interess generali, u (iii) bilanc gust.

Jehtieg li jinzamm proporzjon ragjonevoli bejn il-mezzi uzati u l-ghan persegwit mill-Istat sabiex jikkontrolla l-uzu tal-proprjeta`. Ir-*raison d`etre* tal-proporzjonalita` huwa l-"bilanc xieraq" li ghandu jinzamm bejn l-esigenzi tal-interess generali u l-htiega tal-harsien tad-drittijiet fundamentali tal-persuna.

Il-qrati huma msejha sabiex jaghmlu analizi komprensiva tal-interessi kollha tal-partijiet sabiex taccerta ruhha jekk bhala konsegwenza tal-indhil mill-Istat, il-persuna tghabbietx b`piz eccessiv u sproporzjonat.

1. Gurisprudenza tal-ECtHR

Fil-kaz ta` **Spadea and Scalabino vs Italy** deciz fit-28 ta` Settembru 1995 kien osservat :-

"The second paragraph reserves to States the right to enact such laws as they deem necessary to control the use of property in accordance with the general interest.

…

Such laws are especially common in the field of housing, which in our modern societies, is a central concern of social and economic policies.

…

In order to implement such policies, the legislature must have a wide margin of appreciation.

…

The Court will respect the legislature`s judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation.

…

an interference must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights.

…

There must be a reasonable relationship of proportionality between the means employed and the aim pursued."

Ghalkemm huwa rikonoxxjut id-dritt tal-Istat li jikkontrolla l-uzu tal-proprjeta`, fl-ezercizzju ta` dan il-jedd, l-Istat irid ihares il-proporzjonalita`, ghaliex l-interess tal-privat ghandu jigi mhares u garantit.

Infatti fil-kaz ta` **Amato Gauci vs Malta** li kien deciz fil-15 ta` Settembru 2009, l-ECtHR qalet :-

"56. Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the

individual`s fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see ***Sporrong and Lönnroth*** *cited above, §§ 69-74, and* ***Brumărescu v. Romania*** *[GC], no. 28342/95, § 78, ECHR 1999-VII).*

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

58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions of the rent received by individual landlords and the extent of the State`s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord`s property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State`s conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner (see ***Immobiliare***

***Saffi v. Italy**, [GC], no. 22774/93, § 54, ECHR 1999-V; and Broniowski, cited above, § 151).*

*59. Moreover, in situations where the operation of the rent-control legislation involves wide-reaching consequences for numerous individuals and has economic and social consequences for the country as a whole, the authorities must have considerable discretion not only in choosing the form and decidingon the extent of control over the use of property but also in deciding on the appropriate timing for the enforcement of the relevant laws. Nevertheless, that discretion, however considerable, is not unlimited and its exercise cannot entail consequences at variance with the Convention standards (see, mutatis mutandis, **Hutten-Czapska**, cited above, § 223)."*

…

*"In the present case, having regard to the low rental value which could be fixed by the Rent Regulation Board, the applicant`s state of uncertainty as towhether he would ever recover his property, which has already been subject to this regime for nine years, the lack of procedural safeguards in the application of the law and the rise in the standard of living in Malta over the past decades, the Court finds that a disproportionate and excessive burden was imposed on the applicant. The latter was requested to bear most of the social and financial costs of supplying housing accommodation to Mr and Mrs P. (see, mutatis mutandis, **Hutten-Czapska**, cited above, § 225). It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant`s right of property.".*

Il-konkluzjoni kienet li kien hemm vjolazzjoni ta` Art 1 Prot 1 tal-Konvenzjoni.

Relevanti wkoll huwa dak li qalet l-ECtHR fid-decizjoni taghha tat-22 ta` Novembru 2011 fil-kaz ta`**<u> Saliba et vs Malta</u>** :-

> *" ... the rise in the standard of living in Malta over these decades and the diminished need to secure social housing compared to the post-war era........it is clear that what might have been justified years ago, will not necessarily be justified today (see **<u>Amato Gauci</u>**, cited above, 60)."*

Fil-kaz ta` **<u>Zammit & Attard Cassar vs Malta</u>** li kien deciz fit-30 ta` Lulju 2015, il-Qorti rriaffermat il-principji li kienu enuncjati fis-sentenzi taghha ta` qabel dwar il-kontroll ta` kiri ta` djar billi rriteniet :

> *"57. In each case involving an alleged violation of Article 1 of Protocol No. 1, the Court must ascertain whether by reason of the State`s interference, the person concerned had to bear a disproportionate and excessive burden (see 9 App.No.1046/12) -EctHR 25 ta` Frar 2016. **<u>James and Others</u>**, cited above, § 50, and **<u>Amato Gauci</u>**, cited above, § 57).*
>
> *58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the conditions of the rent received by individual landlords and the extent of the State`s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord`s property rights are neither arbitrary nor unforeseeable.*
>
> *Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State`s conduct (see **<u>Immobiliare Saffi v. Italy</u>**, [GC], no. 22774/93, §*

54, ECHR 1999-V, and Broniowski, cited above, § 151).”

Ta` rilevanza huwa dak li qalet l-ECtRH fil-kaz **Cassar vs Malta** li kien deciz fit-30 ta` Jannar 2018 :-

*43. The Court reiterates that in order for an interference to be compatible with Article 1 of Protocol No. 1 it must be lawful, be in the general interest and be proportionate, that is to say it must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights (see, among many other authorities, **Beyeler v. Italy** [GC], no. 33202/96, § 107, ECHR 2000-I, and **J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom** [GC], no. 44302/02, § 75, ECHR 2007-III). The Court will examine these requirements in turn.*

(a) Whether there was an interference

*44. In connection with the development of property, the Court has previously found that having been aware of the fact that their property had been encumbered with restrictions when they had bought it (for example, its designation in a local development plan), the applicants could not hold that circumstance against the authorities (see **Lacz v. Poland**, (dec.) no. 22665/02, 23 June, 2009; and the case-law cited therein), specially when a complaint has not been made that they had a legitimate reason to believe that the restrictions encumbering their property would be removed after they bought the property. However, the Court has not excluded that there might be particular cases where an applicant who bought a property in full knowledge that it was encumbered with restrictions may subsequently complain of an interference with his or her property rights, for example, where the said restrictions are alleged to be unlawful (ibid.).*

*45. More specifically in the context of restrictions on lease agreements (in particular the prohibition on bringing a tenant`s lease to an end), the Court has found that there was an interference as a result of the domestic courts` refusals of the applicants` demands, despite the applicants` knowledge of the applicable restrictions when they had entered into the lease agreement, a matter which however carried decisive weight in the assessment of the proportionality of the measure (see **Almeida Ferreira and Melo Ferreira v. Portugal**, no. 41696/07, §§ 27 and 34, 21 December 2010).*

*46. Subsequently, in **R & L, s.r.o. and Others** (cited above) the Court specifically examined whether Article 1 of Protocol No. 1 protected applicants who had purchased property in the knowledge that rent restrictions imposed on the property might contravene the Convention. In that case, when the applicants had acquired their respective properties their rents had been set in accordance with the rent regulations applicable at the time and the applicants could not have increased the rents above the threshold set by the State. Nor were they free to terminate the rent agreements and conclude new ones with different – higher – levels of rent. The Court did not find it decisive that one of the applicants had purchased the property before the domestic courts had taken issue with the legislation in place which had given a legitimate expectation that the status of such properties would be addressed by the national legislator in due course. The Court held that it could not be said that the applicants as landlords had implicitly waived their right to set the level of rents, as, for the Court, waiving a right necessarily presupposed that it would have been possible to exercise it. There was no waiver of a right in a situation where the person concerned had never had the option of exercising that right and thus could not waive it. It followed that the rent-control regulations had constituted an interference with the landlords` right to use their property (ibid., § 106).*

*47. In the more recent **Zammit and Attard Cassar** (cited above, § 50) case, in a situation where the applicants` predecessor in title had knowingly entered into a rent agreement in 1971 with relevant restrictions (specifically the inability to increase rent or to terminate the lease), the Court held that, at the time, the applicants` predecessor in title could not reasonably have had a clear idea of the extent of inflation in property prices in the decades to follow. Moreover, the Court observed that when the applicants had inherited the property in question they had been unable to do anything more than attempt to use the available remedies, which had been to no avail in their circumstances. The decisions of the domestic courts regarding their request had thus constituted interference in their respect. Furthermore, as in **R & L, s.r.o. and Others**, in **Zammit and Attard Cassar** (both cited above) the applicants, who had inherited a property that had already been subject to a lease, had not had the possibility to set the rent themselves (or to freely terminate the agreement). It followed that they could not be said to have waived any rights in that respect. Accordingly, the Court found that the rent-control regulations and their application in that case had constituted an interference with the applicants` right (as landlords) to use their property (**Zammit and Attard Cassar**, cited above, § 51).*

*48. Turning to the present case, the Court also notes that the applicants had bought their property before the European Court of Human Rights took issue with the Maltese legislation applicable in cases such as **Amato Gauci** (cited above). That judgment was eventually followed in most cases in domestic case-law. However, again the Court finds this not to be decisive given the passage of time between the purchase of the property and now. In this connection the Court reiterates that what might be justified at a specific time might not be justified decades later (see **Amato Gauci**, cited above, § 60). In the present case, while it is true that the applicants knowingly entered into the rent agreement in 1988 with the relevant restrictions (specifically the*

*inability to increase the rent or to terminate the lease), the Court considers that the applicants could not reasonably have foreseen the extent of inflation in property prices in the decades that followed (see **Zammit and Attard Cassar**, cited above, § 50). Once the discrepancy in the rent applied and that on the market became evident, they were unable to do anything more than attempt to use the available remedies, which they did in 2010, but which were to no avail in their circumstances. The decisions of the domestic courts regarding their application thus constituted interference in their respect. Furthermore, the applicants, who bought a property that was already subject to a restricted lease, did not have the possibility to set the rent themselves or to freely terminate the agreement. Clearly, they could not be said to have waived any rights in that connection (see **Zammit and Attard Cassar**, cited above, § 50).*

*49. Accordingly, the Court finds that the rent-control regulations and their application in the present case constituted an interference with the applicants` right (as landlords) to use their property (see **Zammit and Attard Cassar**, cited above, § 51). Nevertheless, in circumstances such as those of the present case a number of considerations need to be made in connection with the proportionality of the interference.*

*50. The Court has previously held that rent-control schemes and restrictions on an applicant`s right to terminate a tenant`s lease constitute control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. It follows that the case should be examined under the second paragraph of Article 1 of Protocol No. 1 (see **Hutten-Czapska v. Poland** [GC], no. 35014/97, §§ 160-61, ECHR 2006-VIII; **Bittó and Others v.Slovakia**, no. 30255/09, § 101, 28 January 2014; and **R & L, s.r.o. and Others**, cited above, § 108).*

(b) Whether the Maltese authorities observed the principle of lawfulness and pursued a "legitimate aim in the general interest"

51. The Court refers to its general principles on the matter as set out in Amato Gauci (cited above, § 53-54).

52. That the interference was lawful has not been disputed by the parties. The Court finds that the restriction arising from the 1979 amendments was imposed by Act XXIII of 1979 and was therefore "lawful" within the meaning of Article 1 of Protocol No. 1.

*53. In the present case the Court can accept that the applicable legislation in the present case pursued a legitimate social-policy aim, specifically the social protection of tenants (see **Amato Gauci**, cited above, § 55, and Anthony Aquilina, cited above, § 57). It is, however, also true that the relevance of that general interest may have decreased over time, particularly after 2008 (see Anthony Aquilina, cited above, § 57), even more so given that following that date, the only person benefiting from the impugned measures was P.G., whose financial situation as shown before the domestic courts and which is not being contested before this Court, leaves little doubt as to P.G`s necessity for such a property, and at a regulated rent. This Court will therefore revert to this matter in its assessment as to the proportionality of the impugned measure.*

(c) Whether the Maltese authorities struck a fair balance

54. The Court refers to its general principles on the matter as set out in Amato Gauci (cited above, § 56-59).

55. The Court will consider the impact that the application of the 1979 Act had on the applicants` property. It notes that the applicants could not exercise their right of use in terms of physical possession as the house was occupied by tenants and they could not

terminate the lease. Thus, while the applicants remained the owners of the property they were subjected to a forced landlord-tenant relationship for an indefinite period of time.

*56. Despite any reference to unidentified procedural safeguards by the Government (see paragraph 41 above) the Court has on various occasions found that applicants in such a situation did not have an effective remedy enabling them to evict the tenants either on the basis of their own needs or those of their relatives, or on the basis that the tenants were not deserving of such protection (see **Amato Gauci**, cited above, § 60, and **Anthony Aquilina**, cited above, § 66). Indeed, when their need arose (some years after they had purchased it) and later despite the little need of it by the tenant – who was not in any particular need of housing (at least after 2008) – the applicants were unable to recover the property. Consequently, the application of the law itself lacked adequate procedural safeguards aimed at achieving a balance between the interests of the tenants and those of the owners (see **Anthony Aquilina**, cited above, § 66, and mutatis mutandis, **Zammit and Attard Cassar**, cited above, § 61). The Court further considers that the possibility of the tenant leaving the premises voluntarily was remote, especially since the tenancy could be inherited – as in fact happened in the present case. It is clear that these circumstances inevitably left the applicants in uncertainty as to whether they would ever be able to recover their property.*

57. As to the rent payable, the Court is ready to accept that EUR 466 annually was a more or less reasonable amount of rent in 1988 - particularly given that it was an amount of rent which the applicants were aware of and in spite of which they decided to purchase the property with the relevant restrictions. Furthermore, it was an amount of rent which the applicants expected to receive for a number of years, at least until the demise of J.G. and his wife. Moreover, the Court accepts that at the relevant time the measure

*pursued a legitimate social-policy aim (see paragraph 53 above) which may call for payments of rent at less than the full market value (see **Amato Gauci**, § 77).*

*58. The same cannot be said after the passage of decades, during which the rent had remained the same (as stated by the parties and the domestic courts, the rent is still EUR 466 annually). The Court has previously held that there had been a rise in the standard of living in Malta over the past decades (see **Amato Gauci**, cited above, § 63, and **Anthony Aquilina**, cited above, § 65). Thus, the needs and the general interest which may have existed in 1979 must have decreased over the three decades that ensued (see **Anthony Aquilina**, cited above, § 65). It is noted that as stated by the Government in paragraph 40 above, the minimum wage in 2015 was EUR 720.46 per month, while in 1974 (the date when Malta adopted a national minimum wage) it amounted to the equivalent of less than EUR 100 per month (see **Amato Gauci**, cited above, § 60).*

*59. The Court need not identify the exact year at which the rent payable was no longer reasonable. It observes that cases against Malta concerning the same subject matter, that is to say renewal of leases by operation of law - whose rent had been set on an open market – (see **Amato Gauci, Anthony Aquilina, and Zammit and Attard Cassar**, all cited above), which have invariably lead to findings of a violation of Article 1 of Protocol No. 1, concerned periods after the year 2000. Furthermore, the Government of the respondent State have often argued that Malta suffered a boom in property prices in 2003 (see, for example, **Apap Bologna v. Malta**, no. 46931/12, § 97, 30 August 2016). Lastly, although not determinative, it was only in 2008 that the applicants refused to accept the rent, once P.G. had inherited the property. In the light of the above it suffices for the Court to consider that a rent based on the value of the property as it stood in 1962 with the relevant adjustment which amounted to EUR*

466 annually in 1988 and thereafter – was certainly not reasonable for the years following 2000.

*60. In particular, even if one had to concede that the valuations submitted by the applicants are on the high side, the Court notes that the first-instance domestic court, in 2011, accepted EUR 3,000 per month (that is to say EUR 36,000 per year) as the rental market value of the property (see paragraph 18 above). Thus, the amount of rent received by the applicants, around EUR 39 a month, that is to say EUR 466 per year, for a fourteen-room house in Sliema, a highly sought-after location, is indeed "derisory" as was also found by the first-instance domestic court (see paragraph 18 above). Indeed, that amount of rent contrasts sharply with the market value of the premises in recent years, as accepted by the domestic court or as submitted by the applicant, as it amounted to a little more than 1% of the market value. The Court considers that State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable. Nevertheless, this may not lead to results which are manifestly unreasonable (see **Amato Gauci**, cited above, § 62).*

61. In the present case, having regard to the low rental payments to which the applicants have been entitled in recent years, the applicants` state of uncertainty as to whether they would ever recover their property, which has already been subject to this regime for nearly three decades, the rise in the standard of living in Malta over the past decades, and the lack of procedural safeguards in the application of the law, which is particularly conspicuous in the present case given the situation of the current tenant as well as the size of the property and the needs of the applicants, the Court finds that a disproportionate and excessive burden was imposed on the applicants. It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants` right of property.

62. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention. »

2. Gurisprudenza ta` dawn il-Qrati

Il-Qorti sejra tghaddi ghal analizi ta` whud mis-sentenzi tal-qrati taghna.

i) Dr. Cedric Mifsud et vs l-Avukat Generali et
(Rik Nru 33/2010 AE)

Fl-ewwel istanza, il-kawza kienet deciza fit-18 ta` Settembru 2012. Mill-Qorti Kostituzzjonali kienet deciza fil-25 ta` Ottubru 2013.

a) L-ewwel istanza

L-Ewwel Qorti sabet illi l-Art 12(2) tal-Kap 158 kien imur kontra l-Art 1 Prot 1 tal-Konvenzjoni.

Kien osservat illi l-Art 12(2) kien baqa` l-istess kif kien meta kien introdott fl-1979.

Kien altru milli evidenti li l-piz finanzjarju kien ghadu mixhut fuq is-sidien privati.

Ghalhekk kien dikjarat illi l-Art 12(2) huwa bla effett fir-rigward tal-proprjeta` mertu tal-kawza, u kien dikjarat li l-inkwilini ma setghux jinvokaw id-disposizzjoni sabiex jibqghu jabitaw fil-fond.

L-Avukat Generali kien ordnat ihallas lir-rikorrenti s-somma ta` €30,000.

Il-Qorti qalet hekk :

Sitwazzjoni bhal dik tal-kaz odjern diga` giet trattata mill-Qorti Ewropeja fil-kaz ***Amato Gauci vs Malta***

(App.Numru 47045/06) deciz fil-15 ta` Settembru 2009, fejn bazikament il-Qorti qalet:-

i. Restrizzjoni ghas-sid li jittermina kirja tissarraf f`kontroll tal-uzu tal-proprjeta. Ghalhekk il-kaz ghandu jigi ezaminat taht it-tieni paragrafu tal-Artikolu 1.

ii. L-Att XXIII tal-1979 kien legali in kwantu lghan tieghu kien "a legitimate social policy". Il-Qorti osservat:

"Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in 6 f`dan il-kaz the `general` or `public` interest. The notion of `public` or `general` interest is necessarily extensive. In particular, spheres such a housing of the population, which modern societies consider a prime social neeed and which plays a central role in the welfare and economic policies of Contracting states, may often call for some form of regulation by the State.".

*iii. Irid jigi sodisfatt l-element ta` proporzjonalita; "As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see **Sporrong and Lönnroth** cited above, §§ 69-74, and **Brumărescu v. Romania** [GC], no. 28342/95, § 78,ECHR 1999-VII)." (Ara wkoll **C.M. v Franza** deciza fis-26 ta` Gunju 2011).*

iv. Il-kera li r-rikorrent kien qieghed jircievi kull sena, mija u ghoxrin lira Maltija (Lm120), gie ddikjarat li hu baxx.

L-istess inghad fir-rigward tal-massimu li seta` jircievi skond il-ligi (Lm420). Kera li tikkontrasta sew ma` dik li tithallas fis-suq hieles. Ghalkemm il-Qorti rrikonoxxiet li l-Gvern kien igawdi minn margni ta` apprezzament wiesgha fir-rigward ta` kontroll ta` kera, "Nevertheless, this may not lead to results which are manifestly unreasonable, such as amounts of rent

allowing only a minimum profit.". Fil-kaz taghna b`applikazzjoni tal-Artikolu 12(1) is-sid kien ikollu jedd ghall- kera ta` Lm99 minn meta ghalaq ic-cens fl-1991, u 15 il-sena wara kien ikollu jedd ghal Lm1488 …

v. Meqjus il-kera baxxa, l-incertezza jekk is-sid qattx kien ser jirkupra l-proprjeta tieghu, il-possibilta` remota li l-inkwilina jitlaq mill-fond minn jeddu specjalment mehud in konsiderazzjoni li l-kirja setghtet tintiret, nuqqas ta` salvagwardji procedurali fl-applikazzjoni tal-ligi, u z-zieda tal-istandard of living f`Malta matul is-snin, il-Qorti kkonkludiet li piz zejjed gie mqieghed fuq is-sid; "It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant`s right of property.". Il-Qorti osservat li c-cirkostanzi fuq imsemmija "...inevitably left the applicant in uncertainty as to whether he would ever be able to recover his property.". Ghalhekk ikkonkludiet li hemm ksur tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni.

vi. Il-Qorti tat kumpens lir-rikorrent wara li osservat li hu " … entitled to compensation in respect of the loss of control, use, and enjoyment of his property from 2000 to date. In assessing the pecuniary damage sustained by the applicant, the Court, has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It has further considered the legitimate purpose of the restriction imposed, reiterating that legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less reimbursement of the full market value."

vii. Il-Qorti osservat ukoll li wara l-emendi ntrodotti fl- 1995, l-effetti ta` din il-ligi thassru ghall-kuntratti li saru wara l-1995; "..... a decision which fell within the State`s margin of appreciation, can be deemed reasonably and objectively justified to protect owners from restrictions impinging on their rights."

L-emendi li saru fl-1995 wasslu biex ma tinghatax iktar protezzjoni ghal min jaghmel kuntratt ta` enfitewsi fl-1 ta` Gunju 1995 u wara. B`dan il-provvediment, u ohrajn li lliberalizzaw is-suq tal-kirjiet

f`Malta, jidher li l-Gvern ta` Malta kien qieghed jirrikonoxxi li l-qaghda socjali tal-pajjiz ma kinetx titlob li tinghata iktar protezzjoni. Madankollu ma saret l-ebda revizjoni ta` dawk li bhal rikorrenti sabu ruhhom imcahhdin mill-proprjeta taghhom bi dritt li jircievu kumpens mizeru. Japplika wkoll f`dan il-kaz il-konkluzjoni li ghamlet il-Qorti Ewropea fil-kaz ***Lindheim and Others v Norway*** *deciz fit-12 ta` Gunju 2012 :-*

"Whilst in reaching the above conclusion the Court has focused on the particular circumstances of the applicants` individual complaints, it adds by way of a general observation that the problem underlying the violation of Article 1 of Protocol No. 1 concerns the legislation itself and that its findings extend beyond the sole interests of the applicants in the instant case. This is a case where the Court considers that the respondent State should take appropriate legislative and/or other general measures to secure in its domestic legal order a mechanism which will ensure a fair balance between the interests of lessors on the one hand, and the general interests of the community on the other hand, in accordance with the principles of protection of property rights under the Convention.".

Ovvjament m`huwiex id-dmir tal-Qorti biex tghid kif ghandu jsehh bilanc bejn l-interessi tal-privat u l-interessi l-ohra.

Il-Qorti Ewropea diga` kellha l-opportunita li tezamina l-Artikolu 12(2) tal-Kap. 158 fil-kaz ta` Amato Gauci u tesprimi l-fehma taghha. Ghalkemm strettament il-gurisprudenza ta` dik il-Qorti ma torbotx lill-qrati lokali, il-Gvern ma ressaq l-ebda raguni valida ghalfejn din il-Qorti m`ghandix issegwi l-insenjament car li johrog minn dik is-sentenza.

Wara li l-Qorti qieset l-istima tal-valur lokatizju paragunat mal-hlas li r-rikorrenti huma intitolati li jircievu skond il-ligi, ic-cirkostanzi l-ohra li semmiet il-Qorti Ewropeja fil-kaz ta` Amato Gauci, u wkoll il-fatt li s-sid ghandu dritt ghall-awment fil-kera kull 15-il sena, zmien li din il-Qorti tqies li ma jirriflettix ir-realta` ekonomika taz-zmenijiet tal-lum, il-konkluzjoni hi li hemm ksur tal-Artikolu 1 tal-Ewwel Protokoll. Il-mizuri li setghu kienu mehtiega matul is-seklu dsatax ma jfissirx li baqghu bzonnjuzi ghaz-zmenijiet tal-lum.

…

Gialadarba l-Artikolu 12(2) tal-Kap. 158 jipprovdi :-

i. Ghall-hlas ta` kera baxxa hafna li ma tirriflettix il-valur tal-proprjeta fuq is-suq. Jekk wiehed kellu joqghod fuq l-istima tal-perit Abela u l-iktar kera li r-rikorrenti huma llum intitolati ghaliha (€465.87 is-sena), ifisser dhul ta` 0.13% tal-valur tal-proprjeta`. Dan il-provvediment ma jissalvagwardjax l-interessi tas-sid, inkluz dak li jaghmlu l-qliegh mill-proprjeta taghhom.

ii. Ghall-awment ta` kera kull hmistax-il sena biss.

iii. Ghal mod kif jigi kkalkolat awment fil-kera, cioe` bazat biss fuq l-indici ta` inflazzjoni u ma jistax jaqbez id-doppju tal-kera li kien jithallas, minghajr ma wiehed jikkunsidra l-valur tal-proprjeta bhala fattur rilevanti.

iv. Ghal fatt li jekk il-partijiet ma jaqblux dwar il-kondizzjonijiet tal-kirja, eskluz dawk li huma regolati mil-ligi, allura l-uniku rimedju li ghandu s-sid hu li jirreferi l-kaz quddiem il-Bord Li Jirregola l-Kera.

v. Ghal stat ta` incertezza ghar-rigward ta` meta s-sid ser ikollu dritt jiehu lura l-pussess ta` hwejgu. Ghaddew diga` iktar minn ghoxrin (20) sena minn meta skadiet l-enfitewsi. Incertezza li tezisti minkejja li t-tifsira ta` inkwilina giet ristretta wara l-emendi li saru bl-Att X tal-2009.

vi. Ghal nuqqas ta` garanziji procedurali sabiex is-sid ikun jista` jiehu lura l-pussess ta` hwejgu f`kazijiet fejn ikollu bzonn il-proprjeta per ezempju ghall-uzu personali tieghu jew ta` membri tal-familja, jew fejn ic-censwalist ma jimmeritax li jinghata protezzjoni;

Il-Qorti ser tiddikjara li dan il-provvediment imur kontra d-dritt fundamentali tar-rikorrenti kif protett fl-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropea. Dan hu provvediment li ghadu kif kien meta gie ntrodott fl-1979, u hu altru milli evidenti li l-piz finanzjarju ghadu sal-lum mixhut kollu fuq dawk is-sidien privati li huma milquta minn dan il-provvediment."

b) <u>It-tieni istanza</u>

Fid-decizjoni taghha, il-Qorti Kostituzzjonali kkonfermat is-sentenza tal-Ewwel Qorti fil-mertu izda naqqset il-kumpens ghall-vjolazzjoni ghal €15,000.

ii) <u>Angela sive` Gina Balzan vs L-Onorevoli Prim Ministru et Qorti Kostituzzjonali – 7 ta` Dicembru 2012 (op. cit.)</u>

Fid-decizjoni taghha, il-Qorti Kostituzzjonali qalet hekk :-

> *"Ezaminata din il-kwistjoni, din il-Qorti rat li l-posizzjoni li din il-Qorti u l-Qorti Ewropeja tad-Drittijiet Fundamentali tal-Bniedem hadu fil-kuntest tal-emendi fil-ligi tal-kera li dahlu fis-sehh fl-1979, ma kienx li tiddikjara l-emendi antikostituzzjonali, peress li hu fis-setgha tal-Gvern li jikkontrolla l-uzu ta` proprjeta` fl-interess generali, u allura li tipprovdi, per ezempju, ghall-konverzjoni ta` titolu ta` emfitewsi temporanju fuq fond okkupat bhala residenza ghal titolu ta` emfitewsi perpetwa jew titolu ta` kera, jaqa` f`din is-setgha tal-Gvern biex jassigura postijiet bizzejjed ghall-abitazzjoni tan-nies; il-legislazzjoni ut sic ma tistax, allura, titqies li tivvjola d-drittijiet fundamentali ta` sidien dawk il-fondi.*
>
> *L-Istat ghandu f`kazijiet bhal dawn margini wiesgha ta` diskrezzjoni billi hu ghandu taghrif dirett tas-socjeta` u l-bzonnijiet taghha, u ghalhekk bhala principju hu f`posizzjoni ahjar biex jiddetermina x`inhu fl-interess pubbliku u x`mezzi jadopera biex jassigura li kulhadd ikollu ghejxien u akkomodazzjoni xierqa. Fis-sentenza **<u>Ghigo v. Malta</u>**, deciza mill-Qorti Ewropeja tad-Drittijiet Fundamentali tal-Bniedem fis-26 ta` Settembru, 2006, ikkonfermat l-iskop socjali f`legislazzjonijiet li jolqtu materja ta` housing. Hi qalet hekk:*
>
> *"In the present case, the Court can accept the Government`s argument that the requisition and the rent control were aimed at ensuring the just distribution and use of housing resources in a country where land available for construction could not meet the demand. These measures, implemented with a view to securing the social protection of tenants were also*

aimed at preventing homelessness, as well as at protecting the dignity of poorly-off tenants."

Il-Gvern irid jara, pero`, li din il-legislazzjoni fl-interess generali tac-cittadin ma tohloqx piz zejjed fuq sid partikolari ghax dan, bhala s-sid tal-proprjeta`, ghandu dritt ghall-kumpens gust ghall-uzu socjali li l-Gvern irid jaghmel mill-proprjeta` tieghu. Hu obbligu tal-Gvern li johloq bilanc gust bejn l-interess tac-cittadin li jkollu fejn jghammar, u l-interess tas-sid li jiehu gwadan gust mill-proprjeta` tieghu. Jekk il-Gvern sejjer hu jimponi residenza go fond, irid johloq mekkanizmu biex jara` li l-interess tas-sid ma jkunx ippregjudikat.

Dan hu s-sens tad-decizjoni fil-kaz ***Amato Gauci v. Malta****, deciza mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem fil-15 ta` Settembru, 2009, meta osservat li fejn l-istat johloq sistema ta` "forced landlord – tenant relationship for an indefinate time", irid jigi assigurat li lis-sid jinghata kumpens li mhux "manifestly unreasonable", kumpens li mhux necessarjament ikun daqs dak li joffri s-suq, imma lanqas ma ghandu jwassal li jaghti lis-sid "only a minimal profit".*

F`dan il-kaz, il-mekkanizmu li holoq il-Gvern iwassal ghall-kumpens li hu ferm `il boghod mill-kumpens li tkun intitolata ghalih ir-rikorrenti kieku thalliet tpoggi l-appartament taghha ghall- kera fis-suq. Kwindi, il-mekkanizmu li holoq il-Gvern, f`dan il-kaz, falla u ma tax rizultat li jirrispekja d-dritt ta` proprjeta` tar-rikorrenti.

Hekk kif il-Gvern ghandu dritt jespropria art fl-interess pubbliku, basta joffri kumpens gust ghal dak it-tehid, hekk ukoll jekk, fl-interess nazzjonali, ihoss li jrid jintervjeni fl-uzu li jsir minn proprjeta` ta` terzi, irid jara li c-cittadin privat ma jigix ippregjudikat, u li jinghata kumpens xieraq ghall-uzu impost. L-aspett socjali ta` ligi trid tigi evalwata mill-Gvern, u sta ghall-Gvern jara li ligi, applikabbli ergo omnes, twassal ghal-konsegwenzi mixtieqa, pero`, fejn se jigu aggevolati klassi ta` persuni f`sitwazzjoni partikolari, il-Gvern irid jara Ii ma tbatix klassi ohra ta` cittadin, u hawn il-htiega ta` bilanc gust.

Jinkombi fuq il-Gvern li johloq mekkanizmu li f`kull kaz iwassal ghal bilanc gust, u ghall-fini ta` dan il-kaz,

din il-Qorti tara li l-Gvern ma provdix ghas-sitwazzjoni fejn il-kumpens ikun baxx wisq, u lanqas ghas-sitwazzjoni fejn l-okkupant, li jrid jipprevalixxi ruhu mil-ligi, ikun hu sid ta` proprjeta` ohra. F`dan il-kaz, it-thaddim tal-mekkanizmu ta` vantagg lill-konjugi Bajada u dan bid-dritt (i) li jibqghu fl-appartament b`mod indefinit; (ii) li jhallsu kera ta` kwazi €500 fis-sena, meta l-valur lokatizzju tal-fond gie stmat mill-perit inkarigat mill-attrici li hu €7,000 fis-sena; u (iii) meta ghandhom proprjeta` ohra zgur fi Triq Ellul Mercer, Sliema (Mezzanin numru 24 u fond numru 17) u fi Triq Villambrosa, Hamrun (terran) maghruf bl-isem "Dar il-Ferh"). Fil-mekkanizmu li holoq il-Gvern ma hemm ebda "safeguard" kontra dawn l-ingustizzji, u jhalli lil sid il-fond ibati l-konsegwenzi ta` dawn ir-rizultanzi.

Dan mhux gust, u jwassal lir-rikorrenti ssofri lezjoni fid-dritt taghha ta` proprjeta` kif protett fl-ewwel artikolu tal-ewwel Protokoll tal-Konvenzjoni Ewropeja."

iii) **<u>Maria Ludgarda Borg et vs Rosario Mifsud et</u>**
(Rik Nru 72/14 AE)

Fl-ewwel istanza l-kawza kienet deciza fit-30 ta` Ottubru 2015. Id-decizjoni tal-Qorti Kostituzzjonali nghatat fid-29 ta` April 2016.

a) **<u>L-Ewwel Qorti</u>**

Kien deciz fl-ewwel istanza li minkejja l-emendi bl-Att X tal-2010 fejn il-kera saret rivedibbli kull tliet snin u mhux iktar kull hmistax-il sena, xorta wahda ma kien hemmx bilanc xieraq bejn l-interess generali u dak privat tas-sid.

Inghad :

"Hu evidenti li f`dan il-kaz il-ligi qeghda tippermetti lir-rikorrenti li tircievi biss a minimal profit (ara sentenza tal-Qorti Ewropea fil-kaz* ***<u>Amato Gauci v. Malta</u>*** *47045/2006 tal-15 ta` Dicembru 2009). Dan m`huwiex bizzejjed biex ikun hemm bilanc xieraq. ....`Il fatt li l-kera hi rivedibbli kull tliet snin m`hijiex mizura li tat lok biex jinholoq il-bilanc xieraq li ssemma hawn

fuq. Dan iktar u iktar meta hu fatt maghruf li hu s-suq li jirregola l-kera u mhux l-indici ta` inflazzjoni li hemm fl-Iskeda tal-Kap. 158. Ligi li ghal finijiet ta` kera ma taghti l-ebda konsiderazzjoni per ezempju ghal-lokalita fejn jinsab il-fond, id-daqs tal-fond u l-kundizzjoni tieghu.

Apparti l-kera hemm fatturi ohra li juru li ma nzammx il-bilanc xieraq. Hekk per ezempju sid il-kera jista` jirrifjuta li jgedded il-kera biss fil-kazijiet limitati kontemplati fl-Artikolu 5(3) tal-Kap. 158. Tezisti wkoll incertezza meta sid il-kera ser ikun jista` jiehu l-fond taht il-kontroll tieghu. Il-probabilta` hi li fl-istat attwali tal-affarijiet hu remot hafna li l-konjugi Mifsud jitilqu minn jeddhom mid-dar oggett ta` dawn il-proceduri.

F`dan ir-rigward hemm stat ta` incertezza totali gialadarba l-ligi ma tiffissax terminu massimu li fih il-proprjeta ghandha tibqa` titgawda b`kirja. Sallum diga` ghaddew sbatax-il sena minn meta tterminat il-koncessjoni enfitewtika, u r-rikorrenti m`ghandha l-ebda hjiel meta ser tiehu lura hwejjigha. Inoltre d-definizzjoni ta` kerrej tinkludi wkoll ulied u hut il-kerrej mhux mizzewwgin li jkunu jghixu mieghu fiz-zmien tal-mewt tieghu (ara Artikolu 2). Fil-kaz in ezami l-konjugi Mifsud ghandhom tifla li tghix maghhom. Claudia Mifsud xehedet li ricentement xtrat appartament gewwa s-Swatar bhala investiment (102).

B`daqshekk ma jfissirx li fil-kaz in ezami m`hemmx il-possibilta li tibqa` tghix maghhom u tgawdi mill-protezzjoni li toffri l-ligi. Mela l-ligi ma toffrix biss protezzjoni lill-inkwilin izda wkoll lil terzi. ….

Hekk ukoll fis-sentenza ***<u>Albert Cassar et vs Onor`Prim`Ministru et</u>****, il-Qorti Kostituzzjonali qalet:*

"[36] Din il-Qorti tosserva li l-Att XXIII tas-sena 1979 li jipprovdi ghall-konverzjoni tac-cens temporanju ghal wiehed ta` lokazzjoni jikkostitwixxi ndhil fid-dritt konvenzjonali tar-rikorrenti ghat-tgawdija tal-proprjeta` taghhom, stante li permezz tieghu nholqot "forced landlord-tenant relationship" ghal zmien indefenit, b`mod li r-rikorrenti qeghdin isofru deprivazzjoni tal-proprjeta` taghhom, stante li ma jistghux juzawha biex jabitaw fiha, kif ukoll qed isofru telf finanzjarju sostanzjali bil-kera baxx fissat mil-ligi".

…

Hu fatt li mill-provi rrizulta li l-mezzi finanzjarji tal-intimati jiddependu mill-pensjoni li jircievi l-intimat Rosario Mifsud. Ma rrizultax li ghandhom xi ntrojtu iehor. Li tnejn min-nies ighixu bil-pensjoni tar-ragel li jircievi minghand il-Gvern ma tippermettix hajja ta` lussu…. M`hemmx dubju li l-Gvern ghandu dmir li jipprovdi ghal nies fil-bzonn, izda zgur mhux billi jitfa` l-piz kollu fuq sid il-kera. Ir-realta` tal-lum m`hijiex dik li kienet tezisti fl-1979 meta dahal fis-sehh l-Att XXIII li kien l-Att li holoq a forced landlord-tenant relationship. Dan apparti li l-Gvern lanqas ma pprezenta statistika bhala prova li fic-cirkostanzi tal-lum ghad hemm il-htiega tal-mizura li ttiehdet bl-introduzzjoni tal-Att XXIII tal-1979.

…

Waqt is-smigh tal-kawza ssemma wkoll li :-

i. sid il-kera ghandha iktar gid li wirtet minghand il-genituri. B`daqshekk ma jbiddel xejn minn dak li diga` ntqal.

ii. l-intimati Mifsud ghamlu miljoramenti fil-fond … Pero` hi l-ligi stess li tipprovdi li meta jiskadi t-terminu tal-koncessjoni, il-padrun dirett jiehu lura l-fond bil-miljoramenti (Artikolu 1521 tal-Kodici Civili).

15. Gialadarba l-ilment tar-rikorrenti hu gustifikat taht l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni, m`hemmx il-htiega li l-Qorti titratta l-ilment taghhom fir-rigward tal-Artikolu 37 tal-Kostituzzjoni."

b) <u>Il-Qorti Kostituzzjonali</u>

Fis-sentenza taghha, il-Qorti Kostituzzjonali qalet :-

25. L-ewwel Qorti sabet lezjoni tad-drittijiet tal-intimati taht l-Artikolu 1 tal-Ewwel Protokoll tal-Kap.319…Kemm l-Avukat Generali, kif ukoll l-intimati konjugi Mifsud jissottomettu illi tenut kont tal-interess generali legittimu wara l-mizura legislattiva in

dizamina, il-Qorti ma ghandhiex issib sproporzjon tali li jimmerita sejbien ta` lezjoni tal-artikolu protokolari.

…

*28. Fir-rigward hija opportuna l-osservazzjoni maghmula minn din il-Qorti fis-sentenza taghha tad-29ta` Novembru 2013 fl-ismijiet **Christopher Hall v. Awtorita` tad-Djar et** li :*

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

Jigi osservat li, ghad li l-istat ghandu margini wiesgha ta` diskrezzjoni f`materja ta` akkomodazzjoni socjali huwa ghandu l-obbligu li jassigura wkoll li bejn il-mezzi adoperati u l-iskop li jrid jilhaq, ikun hemm bilanc gust bejn il-piz li qed ibati s-sid ta` proprjeta` fit-tgawdija pacifika tad-dritt fundamentali tieghu minhabba kirja protetta, u l-interessi tas-socjeta` in generali. L-istat ghandu ghalhekk l-obbligu illi jassigura li ebda parti ma tkun assoggettata ghal piz sproporzjonat u eccessiv.

…

32. L-ewwel Qorti sabet li f`dan il-kaz, ghal numru ta` ragunijiet, ma nholoqx bilanc gust bejn l-interess tal-komunita` u l-interessi privati tar-rikorrenti bhala sidien… Din il-Qorti tikkondividi dawn il-konsiderazzjonijiet maghmula mill-ewwel Qorti li wassluha sabiex f`dan il-kaz issib ksur tal-artikolu konvenzjonali fuq citat rizultat ta` fatturi li holqu zbilanc bejn l-ghan tal-mizura u l-piz sproporzjonat u eccessiv li qed isofru r-rikorrenti.

…

34. Tosserva wkoll li huwiex minnu illi l-Qorti ma qiesitx il-fatt illi uzu ta` proprjeta` fl-interess generali fil-kuntest ta` akkomodazzjoni socjali jista` jimporta riduzzjoni konsiderevoli fl-ammont tal-kera pagabbli.

Hija ikkonsidrat l-ammont tal-kera fil-kuntest ta` bilanc xieraq, u waslet ghall-konkluzjoni li l-hlas ta` 18% tal-kera li jimmerita` l-fond in kwistjoni fis-suq hieles, ma huwiex bizzejjed biex jintlahaq dan il-bilanc.

Dan id-distakk fil-valur lokatizju johloq sproporzjon u jitfa` piz eccessiv u sproporzjonat fuq ir-rikorrenti bi pregudizzju ghad-dritt fundamentali taghhom sancit bl-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni."

iv) <u>Robert Galea vs Avukat Generali et</u>
<u>(Rik Nru 50/15 JRM)</u>

Fis-sentenza ta` din il-Qorti diversament presjeduta tas-7 ta` Frar 2017 (**<u>mhux appellata</u>**) inghad hekk :-

Illi huwa stabbilit li biex indhil fit-tgawdija tal-gid ta` persuna jkun gustifikat fl-interess generali, irid jintwera li hemm utilita` konkreta ghal dak l-indhil, u mhux semplici ipotesi ta` bzonn jew aspirazzjoni.

*Minbarra dan, l-interess generali jew pubbliku ghandu jibqa` jsehh ghaz-zmien kollu tal-indhil fit-tgawdija tal-gid tal-persuna (Kost. 10.10.2003 fil-kawza fl-ismijiet **<u>Francis Bezzina Wettinger et vs Kummissarju tal-Artijiet</u>**).*

Illi huwa mghallem li, ghall-finijiet ta` l-artikolu 1, "there will be deprivation of property only where all the legal rights of the owner are extinguished by operation of law or by the exercise of a legal power to the same effect. ... In the absence of a formal extinction of the owner`s right, the Court has been very cautious about accepting that a de facto deprivation of property qualifies as a `deprivation` for the purposes of Article 1/2. De facto takings are generally understood to occur when the authorities interfere substantially with the enjoyment of possessions without formally divesting the owner of his title."

*Ghalhekk, b`tehid ta` gid minghand is-sid ghall-finijiet ta` dan l-artikolu, jidher li wiehed ifisser il-kaz fejn il-jeddijiet proprjetarji jingiebu fix-xejn (Ara, per ezempju, Kost. 1.2.2008 fil-kawza fl-ismijiet **Vincent Curmi noe et vs L-Onor. Prim Ministru et**);*

*Illi minbarra dan, kif inghad aktar qabel, huwa accettat li s-setgha tal-Istat li jindahal biex b`ligi jikkontrolla l-uzu tal-gid taht l-artikolu 1 tal-Ewwel Protokoll hija setgha wiesgha u diskrezzjonali. Dejjem tibqa` l-htiega li jintwera (mill-istess Stat) l-interess generali u l-bilanc xieraq bejn l-interessi tal-individwu u dak tal-komunita` (Kost. 8.1.2007 fil-kawza flismijiet **Gera de` Petri Testaferrata Bonici Ghaxaq vs L-Avukat Generali et**);*

Illi, min-naha l-ohra, ghal dak li jirrigwarda l-indhil fl-uzu tal-gid min-naha tal-Istat, jidher li dan l-indhil jista` jiehu s-sura ta` kull ghamla ta` kontroll (bla ma jcahhad lis-sid mit-titolu), sakemm dan isir billi jithares il-bilanc bejn il-htiega ta` interess pubbliku jew generali u l-jeddijiet tas-sid fuq dak il-gid;

*Illi filwaqt li huwa d-dmir tal-Istat li juri li t-tehid jew l-indhil sehh tassew fl-interess pubbliku jew generali (Kost. 24.5.2004 fil-kawza fl-ismijiet **Raymond Vella et vs Il-Kummissarju tal-Artijiet**), hemm qbil li, fejn jidhol dak li jitqies bhala "interess pubbliku", l-Istat igawdi firxa wiesgha ta` diskrezzjoni (Q.E.D.B. 23.11.2000 fil-kawza fl-ismijiet **The former King of Greece et vs Grecja** (Applik. Nru. 25701/94) § 87).*

*Madankollu, il-mod kif titwettaq dik id-diskrezzjoni jrid jghaddi mill-gharbiel tal-bilanc mistenni bejn l-interessi tas-socjeta` u dawk tal-individwu mgarrab bit-twettiq taghha, u dan kemm jekk l-eghmil ikun ta` tehid ta` proprjeta` u kif ukoll jekk ikun "semplicement" dwar indhil fl-uzu taghha (K. Reid **A Practitioner`s Guide to the European Convention on Human Rights** (3rd. Edit, 2007) pag. 501);*

Illi huwa accettat ukoll li s-setgha moghtija lill-Istat li jikkontrolla l-uzu tal-gid ukoll ghal ghanijiet socjali jew fl-interess pubbliku trid titwettaq b`mod proporzjonali mal-interessi tas-sid privat fit-tgawdija ta` hwejgu. Din il-proporzjonalita` tinkiseb fis-sura ta` hlas ta` kumpens xieraq u ghalhekk jekk il-kumpens

mahsub mil-ligi ma jkunx xieraq, jonqos l-element tal-proporzjonalita`.

Jekk jonqos dan l-element, ikun hemm ksur tal-jedd fundamentali ghat-tgawdija pacifika tal-gid kif imhares bl-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni;

*Illi huwa stabilit li, fejn jidhol l-aspett talproporzjonalita` taht il-Konvenzjoni "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights". This balancing approach known under the term of principle of proportionality has acquired the status of general principle in the Convention system." (Van Dijk, van Hoof, van Rijn, Zwaak **Theory and Practice of the European Convention on Human Rights** (4th Edit, 2006), § 17.4.2, f`pagg. 882 – 3) Dan l-element tal-proporzjonalita` kien kunsidrat b`reqqa mill-oghla Qorti f`Malta f`ghadd ta` kazijiet u l-Qorti tqis li ghandha taccenna ghalihom bla ma tidhol f`dettal ta` tismija mill-gdid (Ara Kost. 27.4.2012 fil-kawza fl-ismijiet **Michael Xerri et vs Avukat Michelle Tabone noe et** , fost bosta ohrajn);*

Illi ma hemmx dubju li, fil-kaz li l-Qorti ghandha quddiemha, l-indhil li minnu jilminta r-rikorrent sehh bis-sahha ta` ligi (l-Att XXIII tal-1979). B`dik il-ligi, fir-rigward ta` postijiet li qabel kienu dekontrollati, fi tmiem ta` enfitewsi li taghlaq ta` post bhal dak, is-sid (i) ma setax aktar jippretendi li l-utilista johrog mill-post, imma l-ligi kienet tat lil dak l-utilista l-jedd li jibqa` joqghod fih bhala kerrej. Illi (ii) l-kirja kienet imgedda ghal zminijiet ta` hmistax-il (15) sena kull wahda, bil-hlas tal-kera regolat. Illi (iii) s-sid ma setax aktar jirrifjuta li jgedded il-kirja hlief fic-cirkostanzi imsemmija fl-istess dispozizzjonijiet, u (iv) ma setax jimponi kundizzjonijiet ohrajn hlief dawk ukoll stabiliti espressament.

Ghar-rigward tat-tehid lura tal-post minghand il-kerrej, is-sid irid juri lill-Bord li Jirregola l-Kera li l-kerrej ikun kiser il-kundizzjonijiet tal-kirja dwar hlas f`waqtu tal-kera, iz-zamma f`kundizzjoni tajba tal-post mikri u l-harsien tal-kundizzjonijiet miftehma, fosthom li ma jkunx inqeda mill-post b`uzu iehor minn dak

miftiehem li l-post kien inkera ghalih. Dwar il-kundizzjonijiet li s-sid jista` jimponi, il-kera ma baqax minghajr kontroll u seta` jizdied biss kull hmistax-il sena skond l-indici tal-inflazzjoni u ma jaqbizx id-doppju tal-ammont tal-perjodu ta` qabel. Ghal dak li jirrigwarda t-tiswijiet u z-zamma f`kundizzjoni tajba tal-post, sid il-kera ma setax jehles mir-rabta li jidhol ghall-ispejjez mehtiega jekk mhux qabel iressaq quddiem l-imsemmi Bord li Jirregola l-Kera certifikat minn perit arkitett u accettat mill-kerrej, li juri li l-post kien fi stat tajjeb ta` tiswija62. Qabel ma dahlu dawn id-dispozizzjonijiet, sid ta` post dekontrollat ma kienx marbut b`dawn il-kundizzjonijiet f`kaz li jikri l-post;

Illi fil-kaz tal-kirja li nhalqet favur l-intimati Ganado, dawn gew igawdu mill-bidliet li ddahhlu fil-ligi bl-Att XXIII tal-1979 kemm ghaliex il-post kien koncess lilhom b`enfitewsi temporanju bhala d-dar fejn joqoghdu u jghixu regolarment u kif ukoll ghaliex huma kienu cittadini Maltin. Tajjeb jerga` jinghad li meta l-intimati Ganado kisbu l-koncessjoni enfitewtika tal-post minghand ir-rikorrent, huma kienu ghamlu dan bil-weghda li johorgu mill-post malli jaghlaq iz-zmien miftiehem u sakemm ikunu ghadhom ma xtrawx post taghhom fejn kien fi hsiebhom imorru joqoghdu;

Illi l-Qorti hija tal-fehma wkoll li wiehed ma jistax jittraskura aspett ewlieni li johrog min-natura tal-kuntratt tal-enfitewsi. Jidher li dan l-aspett mhux kulhadd jaghraf is-siwi tieghu u jaghti `l wiehed x`jifhem li sahansitra quddiem il-Qorti ta` Strasbourg dan il-kuncett tal-kuntratt mhuwiex apprezzat kemm jisthoqqlu. Il-Qorti qieghda tirreferi ghall-fatt li l-kuntratt ta` enfitewsi jista` jixxiebah ma` bejgh, fejn l-utilista jinghata jeddijiet wesghin fuq il-gid moghti lilu b`enfitewsi u fejn id-direttarju jxidd (ghat-tul tal-koncessjoni) kwazi l-kontroll kollu fuq il-haga li jkun ta` b`enfitewsi, hlief ghall-gharfien tad-dirett dominju tieghu bil-hlas tal-"canone". Dan ifisser li l-"canone" jew cens li kien ikun impost f`koncessjoni enfitewtika ma kienx tabilfors jitkejjel mas-siwi intrinsiku jew skond is-suq tal-gid li jkun qieghed jinghata b`enfitewsi, izda kien ikun hlas nominali bhala turija biss tal-ezistenza tal-jeddijiet tal-padrun dirett. Fil-bicca l-kbira tal-kazijiet, din kienet tkun ghazla konxja u hielsa tal-koncedent direttarju;

Illi meta, ghalhekk, l-artikolu 12 tal-Kapitolu 158 rabat il-kejl tal-hlas tal-kera l-gdida ex lege ma` kemm kien l-ammont tal-"canone" li jithallas matul il-koncessjoni enfitewtika, kienet qieghda tinhalaq sitwazzjoni li tabilfors iddarras lill-padrun dirett fl-gheluq tal-imsemmija koncessjoni. Kemm hu hekk, it-taqbil li llum isir dwar il-valur lokatizju ta` fond li seta` kien inghata b`enfitewsi li taghlaq, iwassal ghar-rizultati kontrastanti mal-kejl tal-kera dovuta marbuta mal-ammont ta` "canone" li kien iffissat liberament bejn il-kontraenti, kif jidher li kien il-kaz fil-koncessjoni enfitewtika originali bejn ir-rikorrent u l-intimat Ganado. Dan il-fattur issa jidher li huwa wkoll rizultat li johrog f`bosta kazijiet fejn wiehed jigi biex iqis l-aspett tal-proporzjonalita` tal-mizura fil-konfront tat-tgawdija tal-jedd tas-sid fuq hwejgu;

Illi minhabba f`hekk, jibqa` fatt mhux kontestat li t-tigrib li jsib ma` wiccu l-padrun dirett meta taghlaq koncessjoni (sub-) enfitewtika mhuwiex daqstant minhabba r-riperkussjonijiet tal-ghazla tieghu li jimponi "canone" mhux kalibrat mal-valur fis-suq tal-immobbli,daqskemm minhabba l-fatt li, fl-gheluq tal-imsemmija koncessjoni, sejra tinhalaq kirja mkejla fuq u b`rabta` mal-imsemmi "canone" u liema kirja zzomm milli l-immobbli bil-benefikati mtellghin fuqu jerga` lura ghand sidu. Kif sewwa inghad f`dan ir-rigward "il-fatt illi l-ligi taghti lis-sid il-jedd biss illi l-kera jzomm il-valur monetarju tieghu bla konsiderazzjoni ghall-fatt illi s-sid gie mcahhad mill-possibilita` li jiehu l-fond lura jew li jikrih b`kundizzjonijiet aktar vantagguzi, u l-fatt ukoll illi l-ligi ma tahseb ghal ebda mekkanizmu biex tkun valutata tassew il-htiega socjali tal-kerrej ghal kirja protetta, u ma tahsibx ghall-possibilita` li dik il-htiega tigi mqabbla mal-htiega, li tista` tkun xejn anaqas socjali, tas-sid, jaghmlu l-ligi nieqsa minn dawk l-elementi li joholqu bilanc u proporzjon bejn il-htiega genwina ghall-akkomodazzjoni socjali u li ccahhad lis-sid mit-tgawdija ta` hwejgu" (Kost 30.9.2016 fil-kawza fl-ismijiet ***Maria Stella Azzopardi Vella et vs Avukat Generali et*** *§20);*

Illi fis-sottomissjonijiet tieghu, ir-rikorrent jghid li bil-bidliet li saru fil-ligi matul iz-zmien li kienet ghadha miexja l-koncessjoni enfitewtika originali, huwa garrab hsara kemm f`dak li jirrigwarda l-ammont ta` dhul li seta` jippretendi bi dritt minghand l-utilista u kif ukoll

bil-fatt li lanqas seta` aktar jiehu l-post lura f`idejh mal-gheluq tal-istess koncessjoni, minkejja li jghid li wliedu kellhom bzonnu biex jghixu fih huma.

Ghalhekk, jghid li huwa qieghed illum bla htija tieghu jgorr il-piz ta` rabta legali li ma kienet bl-ebda mod mahsuba meta dahal fis-sehh l-Att XXIII tal-1979.

Ikompli jargumenta li l-fatt li hu accetta ghal numru ta` snin il-kera minghand l-intimati Ganado wkoll wara li kien ghalaq iz-zmien konvenzjonali ma jnaqqas xejn mill-fatt li jezisti zbilanc bejn l-interessi tieghu dak milhuq mill-interess pubbliku. Jishaq li l-kera li jdahhal illum minghand l-intimati Ganado – elfejn disa` mija u hdax-il euro u tlieta u ghoxrin centezmi (€ 2911.23) kull sena – jgibu mqar sbatax fil-mija (17%) tal-valur lokatizju xieraq li l-post kien stmat mill-perit tekniku mqabbad mill-Qorti li jista` jgib f`kera fiz-zmien li nfethet din il-kawza. Jghid ukoll li tassew ghandu bzonn il-post kemm ghalih u ghal martu u bil-ligi kif inhi ma jistghux johduh f`idejhom, filwaqt li wliedhom kellhom ifittxu post ghalihom biex jikruh bi hlas ta` kera gholi. Huwa jishaq li fid-dawl tal-ksur tal-jedd li huwa qieghed igarrab, ir-rimedju xieraq ghandu jkun il-hlas ta` kumpens ghat-telf ta` kera minn dak inhar li l-koncessjoni enfitewtika ntemmet u nhalqet il-kirja sallum, imqabbla ma kemm kien inkera l-post li kieku kien hieles biex jinkera fuq is-suq; u kif ukoll li l-post jintraddlu lura battal mill-kerrej, ghaliex anqas minn hekk, il-hsara li qieghed igarrab tibqa` ma tissewwiex;

Illi, min-naha taghhom l-intimati Ganado jishqu hafna fuq il-fatt li r-rabta kuntrattwali li nhalqet bil-ftehim tal-2009 ma tistax tissarraf fi ksur tal-jeddijiet tar-rikorrent. Huma jghidu li nqdew b`jedd li taghtihom il-ligi u ma jistghux iwiegbu ghall-ilment ta` ksur ta` jedd fundamentali li ma halquhx huma.

Itennu li lanqas ma tista` tintlaqa` t-talba tar-rikorrent biex din il-Qorti tordnalhom johorgu mill-post u li lanqas ma huwa xieraq li huma jkunu kundannati jhallsuh kumpens, imma jekk tassew hemm ksur taljeddijiet tar-rikorrenti, hu l-Istat li ghandu jhallas kumpens bhal dak;

Illi l-intimat Avukat Generali jargumenta li l-Konvenzjoni taghti lill-Istat setgha wiesgha biex

jindahal fil-jedd ta` tgawdija tal-possedimenti tal-privat ghal interess pubbliku. Izid jghid li r-rikorrent minn rajh biddel il-binarji ta` din il-kawza hekk kif qataghha li jidhol f`kuntratt ta` kirja gdid mal-intimati Ganado li ma baqghetx aktar marbuta mad-dispozizzjonijiet tal-Kapitolu 158 tal-Ligijiet ta` Malta.

Izid jghid li wkoll kieku l-Qorti kellha ssib li d-dispozizzjonijiet tal-artikolu 12 tal-Kapitolu 158 kienu jiksru l-jedd fundamentali tar-rikorrent, b`daqshekk ma jgibx ukoll il-hall tal-ftehim ta` kirja li sar fl-2009 bejnu u l-intimati Ganado u li fadallu sa Novembru tal-2023 biex jaghlaq u b`harsien tar-regola li l-kuntratti jorbtu lil min jidhol fihom – pacta sunt servanda – u jridu jitwettqu b`bona fidi. L-intimat jghid li ma hemm l-ebda dubju li meta ghaddiet il-ligi fl-1979, l-Istat kien qieghed jaghmel dan b`ghan legittimu fejn l-indhil kien jinvolvi t-thaddim ta` politika socjali u ekonomika f`qafas ta` interess pubbliku u ta` gustizzja socjali. Jghid li dik il-ligi kienet taqa` fil-parametri tat-tieni paragrafu tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni u zzomm bilanc gust bejn l-ghan socjali mahsub wara dik il-ligi u r-rispett u l-harsien tal-jeddijiet fundamentali tas-sidien dwar it-tgawdija ta` hwejjighom. L-ghan socjali wara l-bidliet fil-ligi bl-Att XXIII tal-1979 – dak li fl-interess pubbliku ikun assigurat li jkun hemm provvista ta` djar fejn wiehed jghix ghal min ikun nieqes minn tali akkomodazzjoni minhabba ragunijiet finanzjarji u socjali – kien maghruf ukoll mill-Qorti ta` Strasbourg f`bosta sentenzi li tressqu quddiemha minn applikanti minn Malta. Itemm jghid li llum il-gurnata l-ligi regghet inbidlet u saret izjed favorevoli ghas-sidien u jolqtu lir-rikorrenti wkoll;

Illi din il-Qorti tqis li, fic-cirkostanzi tal-kaz, ma jistax jinghad li r-rikorrent gie "privat" jew imcahhad minn hwejgu ghall-finijiet tat-tifsira moghtija fl-ewwel paragrafu tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni.

Madankollu, ma hemm l-ebda dubju li, bis-sahha tal-Att XXIII tal-1979, sehh indhil sostanzjali fit-tgawdija ta` hwejgu b`mod li l-ilment tieghu jaqa` biex jitqies taht it-tieni paragrafu tal-istess artikolu. Kif inghad qabel, filwaqt li dak l-indhil huwa legali (ghaliex huwa sewwasew l-effett ta` ligi mghoddija mill-Parlament), u

filwaqt li ma hemm l-ebda dubju li l-ghan li ghalih kienet ghaddiet il-ligi kien dak li jipprovdi akkomodazzjoni mharsa lil ghadd ta` persuni, wiehed irid jara jekk dak l-indhil kienx wiehed meqjus jew proporzjonali jew jekk, minhabba fih, is-sid tal-gid (f`dan il-kaz partikolari r-rikorrent) intalabx jerfa` piz zejjed u sproporzjonat fit-tgawdija tal-jedd tieghu meta mqabbel mal-ghanijiet li ghalihom dik il-ligi ddahhlet fis-sehh;

Illi l-Qorti jidhrilha li jixraq tqis li, qabel ma ddahhlu fis-sehh id-dispozizzjonijiet tal-artikolu 12 tal-Kap 158, fil-ligi kien diga` ilu s-snin li ddahhlu dispozizzjonijiet li jharsu lill-kerrejja ta` postijiet urbani. Kemm hu hekk, id-dispozizzjonijiet tal-Kap 158 kienu jirrapprezentaw eccezzjoni ghal dawk id-dispozizzjonijiet u l-kelma "dekontrollat" kienet tirreferi sewwasew ghat-tnehhija ta` certi fondi "godda" mill-morsa tad-dispozizzjonijiet tal-ligijiet il-qodma, jekk ikunu mharsa certi kundizzjonijiet hemm preskritti.

Dan ifisser li l-Kap 158, sal-1979, kien eccezzjoni ghar-regola ta` x`jigri minn post urban moghti b`koncessjoni enfitewtika meta tintemm il-koncessjoni miftehma.

Mela, meta ddahhlu fis-sehh id-dispozizzjonijiet tal-ligi bl-Att XXIII tal-1979, il-legislatur kien qieghed jerga` johloq eccezzjoni fl-eccezzjoni u jikkontrolla x`setghat kien ikollu s-sid ta` post iddekontrollat fl-eghluq ta` koncessjoni enfitewtika u x`jeddijiet kien ikollu l-okkupant tal-istess post fi tmiem koncessjoni bhal dik;
Illi l-Qorti thoss li din il-precizazzjoni hija mehtiega fil-kaz li ghandha quddiemha llum – b`mod partikolari f`dak li jirrigwarda l-kriterju tal-proporzjonalita` – ghaliex biha johrog car li d-dispozizzjonijiet tal-Att XXIII tal-1979 kienu ndhil legislattiv meta fl-ordinament guridiku Malti kienu jezistu diga` ligijiet ohrajn li jipprovdu ghall-harsien tal-akkomodazzjoni socjali kemm f`dak li jirrigwarda s-setghat tal-Istat li jiehu b`rekwizizzjoni gid immobbli privat biex jaghtih b`kiri lil min kien jehtiegu, u kif ukoll f`dak li jirrigwarda l-kiri ta` postijiet qodma f`dak li jirrigwarda r-relazzjonijiet u d-drittijiet privati bejn sidien u kerrejja;

Illi, minbarra dan, il-bidliet li ddahhlu fil-ligi bl-Att XXIII tal-1979 inghatalhom effett retrospettiv, jigifieri saru jghoddu wkoll ghal koncessjonijiet enfitewtici ta`

postijiet dekontrollati moghtija qabel ma gie fis-sehh l-imsemmi Att. Dan ifisser li, fi tmiem koncessjoni bhal dik, tnisslu effetti u konsegwenzi legali li l-partijiet kontraenti ma kellhomx f`mohhhom meta ntrabtu bil-ftehim tal-istess koncessjoni enfitewtika ta` post bhal dak. Dawn l-effetti u konsegwenzi ghabbew aktar lis-sidien u iffavorew lill-utilisti li mbaghad, b`daqqa ta` pinna, saru kerrejja. Dawn l-effetti u konsegwenzi ma baqghux jghoddu fil-kaz fejn kirjiet ta` postijiet dekontrollati saru fl-1 ta` Gunju, 1995 jew wara dakinhar. Minhabba f`hekk, il-kirja mertu tal-kaz tal-lum ma setghetx tiehu beneficcju minn din il-liberalizzazzjoni;

*Illi b`zieda ma` dan kollu, kien biss wara bosta snin minn mindu r-rikorrent sab ruhu milqut minn dawn il-bidliet legislattivi li minnhom tant jilminta li fetah din il-kawza fl-2015. Dan ma jfissirx li b`daqshekk tilef l-istatus tieghu ta` "vittma" tal-ligi li minnha jilminta, izda din ic-cirkostanza taf thalli tabilfors impatt fuq il-kwalita` tal-ilment imressaq (Kost. 25.10.2013 fil-kawza fl-ismijiet **<u>Dr Cedric Mifsud et vs L-Avukat Generali et</u>**) u wkoll fuq ir-rimedju moghti (Kost. 3.3.2011 fil-kawza fl-ismijiet **<u>Dr David Tonna et vs Kummissarju tal-Artijiet et</u>**).*

*Ghalkemm f`dan ir-rigward irid jinghad ukoll li l-fatt li l-ligi ma timponix fuq sid zmien sa meta jmissu jiftah proceduri dwar ilment ta` ksur ta` jedd fundamentali tqies mill-Qorti fi Strasbourg bhala "questionable" li l-Qorti domestika tiehu qies tad-dewmien fit-tnedija tal-proceduri bhala wiehed mill-kriterji li fuqu jitkejjel il-kumpens (Ara Q.E.D.B. 30.8.2016 fil-kawza fl-ismijiet **<u>Montanaro Gauci et vs Malta</u>** (Applik. Nru. 31454/12) §45);*

Illi meta l-Qorti tigi biex tqis jekk l-indhil li r-rikorrent garrab huwiex wiehed li joqghod ghall-htigijiet tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, trid taghmel "an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are `practical and effective`. It must look behind appearances and investigate the realities of the situation complained of.

In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions of the rent received by individual

landlords and the extent of the State`s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord`s property rights are neither arbitrary nor unforeseeable" (Q.E.D.B. 11.12.2014 fil-kawza fl-ismijiet ***Anthony Aquilina vs Malta*** *(Applik. Nru. 3851/12) §60);*

Illi meta wiehed iqis il-fatturi u c-cirkostanzi kollha marbuta mal-kaz, wiehed isib li l-piz finanzjarju ghadu mitfugh kollu fuq ir-rikorrent sallum. Dan johrog l-izjed meta wiehed iqis il-valur li l-post kien meqjus li jista` jinkera kemm fiz-zmien meta ghalqet il-koncessjoni enfitewtika u kif ukoll kemm kien jinkera llum li kieku ma kinetx fis-sehh il-ligi kif inhi b`effett tal-Att XXIII tal-1979. Il-perit tekniku sab li fis-sena meta ghalqet il-koncessjoni enfitewtika maghmula lill-intimati Ganado (jigifieri f`Dicembru tal-1993) il-valur li bih il-post kien jista` jinkera kien ta` erbat elef disa` mija u sitta u hamsin euro (€ 4,956) fis-sena filwaqt li llum l-istess appartament kien jista` jinkera ghal sbatax-il elf u seba` mitt (€17,700) fis-sena. Meta l-koncessjoni enfitewtika ntemmet u nhalqet il-kirja ope legis (fl-1993) l-oghla kera li seta` jintalab minghand l-intimati Ganado kien ta` elfejn u tnejn u ghoxrin euro (€2,022) fis-sena, filwaqt li ghat-tieni tigdida tal-kirja ghal hmistax-il (15) sena sat-30 ta` Novembru, 2023, il-kera li l-intimati Ganado huma tenuti jhallsu hu ta` elfejn disa` mija u hdax-il euro u tnejn u ghoxrin centezmi (€ 2,911.22) fis-sena;

Illi dan ifisser li filwaqt li meta nhalqet il-kirja l-kera li seta` jintalab minghand l-intimati Ganado kien jitla` ghal madwar wiehed u erbghin fil-mija (41%) tal-valur lokatizju xieraq tal-post, issa l-kera dovut bilkemm ilahhaq is-sbatax fil-mija (17%) tal-valur lokatizju xieraq tal-istess post illum. Jigifieri aktar ma qieghed jghaddi z-zmien jirrizulta li aktar qieghed jikber id-distakk bejn dak li jithallas b`kera u dak li jixraq jithallas. Meta wiehed iqabbel il-kera dovuta mal-kera li l-post jista` jinkera bih li kieku ma kienx maqbud taht l-effetti tal-Att XXIII, wiehed isib li hemm disproporzjon qawwi bejn qaghda u ohra u li dan id-disproporzjon qieghed igarrbu r-rikorrent wahdu, minkejja l-ghanijiet legittimi u socjali li l-ligi qieghda tilhaq fir-rigward tal-intimati Ganado;

Illi ghalhekk, il-Qorti tasal ghall-fehma li fil-qaghda li jinsab fiha r-rikorrent illum u ladarba l-bidliet li regghu saru fil-ligi baqghu ma indirizzawx ghal kollox qaghda bhal dik li jinsab fiha r-rikorrent, u kif ukoll fid-dawl tat-tifsira li nghataw id-dispozizzjonijiet rilevanti tal-Kap 158 kif mibdula bl-Att XXIII tal-1979, kemm mill-qrati ta` kompetenza kostituzzjonali Maltin (Kost. 29.4.2016 fil-kawza fl-ismijiet* ***__Maria Ludgarda Borg et vs Rosario Mifsud et__****) u kemm tal-Qorti ta` Strasbourg (Q.E.D.B. 15.9.2009 fil-kawza fl-ismijiet ***__Amato Gauci vs Malta__*** *(Applik. Nru. 47045/06) §§51 –2; u Q.E.D.B. 11.12.2014 fil-kawza fl-ismijiet* ***__Anthony Aquilina vs Malta__*** *(Applik. Nru. 3851/12) §66 – 7 fost ohrajn), jirrizulta li r-rikorrent garrab u qieghed igarrab ksur tal-jedd tieghu ghat-tgawdija pacifika ta` hwejgu kif imhares bl-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni u dan minhabba li d-dispozizzjonijiet tal-artikolu 12(2) u (3) imsemmi Kap 158 iqieghed fuqu piz sproporzjonat meta mqabbel mal-ghan li ghalih iddahhlu fis-sehh l-istess dispozizzjonijiet;*

Illi, madankollu, safejn l-ewwel talba tar-rikorrent, kif imfassla, torbot il-ksur imgarrab minnu mal-fatt li d-dispozizzjonijiet tal-artikolu 12 tal-Kap 158 "jirrenduha impossibbli lir-rikorrenti li jirriprendi lpussess tal-proprjeta` tieghu" din il-Qorti diga` qalet aktar qabel li dan ma jidhirx li huwa l-kaz. Huwa tabilhaqq izjed iebes u difficli li r-rikorrent isehhlu jnehhi lill-intimati Ganado mill-post – l-aktar minhabba l-ftehim tal-kirja li ghadu ghaddej – izda l-ligi ma taghlaqx il-bieb lilu biex jinghata dak ir-rimedju u l-procedura u l-access ghal tribunal indipendenti u imparzjali biex jilhaq dak il-ghan huwa disponibbli lilu bhalma huwa disponibbli ghal kull sid iehor ta` post mikri bhala residenza protetta jew `kontrollata`. Dan il-punt jinghad b`aktar qawwa fid-dawl tal-effetti li din il-Qorti tqis li jinhalaq bis-sejbien tal-ksur tal-artikolu 1 tal-Ewwel Protokoll meta meqjus l-artikolu 12 tal-Ordinanza. Ghalhekk, il-Qorti ma ssibx li tassew jezisti ksur tal-jedd fundamentali tarrikorrent taht l-ewwel talba tieghu ghar-raguni li huwa jaghti f`dik it-talba;

Illi b`daqshekk ma jfissirx li l-Qorti ma tistax issib ksur tal-jedd taht it-tieni talba tar-rikorrenti. Ghalkemm fid-dehra taghha din it-tieni talba tista` tkun konsegwenzjali ghall-ewwel talba, huwa car ghal

din il-Qorti li r-rikorrenti tassew qieghed igarrab ksur tal-jedd tieghu kif imhares bl-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni ghar-ragunijiet imsemmijin aktar `il fuq u li ma hemmx ghalfejn jergghu jissemmew. B`mod partikolari, ma jistax jinghad li, minn dak li hareg mill-fatti u mill-konsiderazzjonijiet li saru aktar qabel, it-tieni talba ma tistax triegi fuq is-sahha taghha, safejn imsejsa fuq ksur tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni. Dan qieghed jinghad ghaliex din il-Qorti waslet ghall-fehma li r-rikorrenti qieghed igarrab ksur tal-jedd tieghu taht l-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni minhabba li l-piz li l-ligi qieghda ggeghelu jgorru huwa wiehed sproporzjonat meta mqabbel mal-ghan li ghalih l-indhil kien mahsub li jirregola favur l-intimati.

Ghalhekk, it-tieni talba hija tajba u sejra tintlaqa` u dan safejn titlob is-sejbien ta` ksur ta` jedd fundamentali taht il-Konvenzjoni."

3. Risultanzi

Fil-kaz tal-lum, ic-cens favur l-intimati Scicluna kien temporanju ghal 17-il sena u beda fl-1973. Fl-gheluq is-17 –il sena, l-enfitewti kellhom id-dritt li jidhlu ghal cens iehor bl-istess kondizzjonijiet kif jirrizulta mill-klawsola 5 tal-kuntratt. Waqt li kienet ghaddejja l-koncessjoni originali, dahlu fis-sehh l-emendi ghall-Kap 158 bis-sahha tal-Att XXIII tal-1979. Bl-Art 12(2) u (3) tal-Kap 158, fl-gheluq tas-17-il sena, ic-cens seta` jigi konvertit ghal kera *ope legis.* L-ammont tal-kera ma thalliex ghall-kontrattazzjoni libera ta` bejn is-sid u l-inkwilin (gia` censwalist) izda kien determinat mil-ligi stess.

Ghalkemm xejn ma kien izomm li jsir cens gdid, huwa evidenti li l-konverzjoni ghal kera kienet nettament tiffavorixxi lill-inkwilin ghaliex it-titolu ta` dan issa gie protett *ope legis* u mhux aktar determinat minn pattijiet mas-sid li mhux bilfors kien jikkondividi. Bis-sahha ta` l-Artikolu 12(2)(b)(i) tal-Kap 158, ir-rikorrenti kienu kostretti *ope legis* illi jidhlu ghal lokazzjoni ma` l-intimati Scicluna ghal zmien indefinit.

Bil-konverzjoni ghal kera, is-sid tilef il-jedd ghall-kontrattazzjoni libera u fuq kollox kontroll fuq kemm ghandu jircievi kera ghaliex dak kien stabbilit mil-

legislatur b`formola pre-determinata marbuta bil-fattur taz-zmien u tal-indici tal-inflazzjoni, kriterju dan tal-ahhar li l-prova taz-zmien uriet li ma kienx jirrifletti dak li kien jiddetta s-suq liberu.

Tajjeb jinghad illi l-introduzzjoni tal-Att XXIII tal-1979 kellu skop legittimu u sar fl-interess generali ghaliex kien intiz sabiex jiskansa li nies jispiccaw barra t-triq, u li nies ikollhom fejn joqghodu. L-istorja socjali u ekonomika tal-pajjiz turi li legislazzjoni kienet necessarja. Il-hsieb warajha kien tajjeb. Il-legislatur ipprova jfittex bilanc bejn interessi konfliggenti. It-tkattir tal-gid fil-kors tas-snin wera pero` li dak l-intervent legislattiv ghalkemm kellu propositi tajba ma kienx baqa` joffri bilanc anzi holoq sproporzjon u zvantagg notevoli ta` parti fil-konfront ta` ohra. Ir-rata ta` kera li r-rikorrenti setghu jippercepixxu bl-effett tal-Art 12(2) meta mqabbla mal-kera fis-suq hieles oggettivament hija bil-wisq baxxa. B`zieda ma` din il-kostatazzjoni, il-qaghda ekonomika tal-pajjiz fuq kull livell illum hija fil-wisgha ahjar minn dik li kienet fl-1979, meta l-legislatur hass il-htiega – din il-Qorti tghid – impellenti – li jghaddi l-emendi ghall-Kap 158.

Fil-kaz tal-lum, ir-rikorrenti mhux jikkontestaw il-legalita` tal-legislazzjoni. Lanqas ma qeghdin jikkontestaw il-legittimita` tal-iskop ghaliex saret. Il-pern tal-ilment taghhom huwa l-fatt illi fil-fehma taghhom l-applikazzjoni tad-disposizzjonijiet ghas-sitwazzjoni taghhom jikkostitwixxu ksur tal-Art 1 Prot 1 tal-Konvenzjoni ghaliex jirrizulta sproporzjon qawwi kontra taghhom fir-ritorn li jista` jkollhom li kieku t-tgawdija tal-propjeta` kellha tithalla tilhaq il-milja taghha.

Mhuwiex in diskussjoni l-jedd tal-Istat illi jikkontrolla b`legislazzjoni l-uzu tal-proprjeta` meta dan ikun fl-interess pubbliku. Fl-istess waqt l-Istat huwa obbligat juri li fl-applikazzjoni ta` dik il-legislazzjoni jkunu qeghdin jinzammu bilanc u proporzjonalita` bejn l-interess generali u ta` dak privat. Huwa evidenti li matul iz-zmien anke l-legislatur irrealizza li dak li wasslu biex jintervjeni fl-1979 kien jehtieg ripensament motivat minn bidla lejn l-ahjar fil-qaghda ekonomika u socjali tal-pajjiz. Fil-fatt effett tal-Att XXXI tal-1995, bl-Art 16(3) tal-Kap 158 inghad illi d-dispozizzjonijiet ta` l-Art 12 m`ghandhomx aktar japplikaw ghal kuntratti ta` enfitewsi temporanja li jsiru fl-1 ta` Gunju 1995 jew wara.

Din il-Qorti tqis illi bl-emendi tal-2009 u tal-2010 ghall-Kap 16, il-kera kellha tizdied kull tlett snin (mhux kull 15-il sena kif kien l-istat tad-dritt bl-

emendi tal-1979). Cio` nonostante xorta wahda baqghet karenti l-proporzjonalita` li jrid l-Art 1 Prot 1 tal-Konvenzjoni, ghaliex ghalkemm bl-emendi tal-2009 kien hemm miljorament ghas-sid meta mqabbel ma` s-sitwazzjoni precedenti, baqa` kostrett joqghod ghal quantum ta` zieda dettat mil-ligi li stabbiliet mhux biss kemm ghandu jkun l-awment izda anke kull meta. Qabel id-dhul fis-sehh ta` l-emendi, ir-rikorrenti kienu ilhom snin twal igarrbu lezjoni tal-jedd taghhom skont l-Art 1 Prot 1 tal-Konvenzjoni, ghaliex sa mill-1990 kienu kostretti jippercepixxu kera kif dettata mill-Kap 158 ; imbaghad wara l-1995, bil-liberalizzazzjoni tal-kera, il-qaghda tar-rikorrenti, a paragun ma` sidien ohra, li ma kellhomx il-vinkoli tal-Kap 158, tgharrqet aktar.

Fid-decizjoni taghha tal-11 ta` Dicembru 2014 fil-kaz ta` **<u>Anthony Aquilina vs Malta</u>** l-ECtHR irrimarkat illi : *"the 2009 and 2010 amendments (only) slightly improved a landlord`s position"*.

Fis-sentenza tas-27 ta` Marzu 2015 fil-kawza "**<u>Ian Peter Ellis et vs Avukat Generali et</u>**, il-Qorti Kostituzzjonali stabbiliet illi :-

"Lanqas l-emendi ghall-Kodici Civili li sehhew bl-Att tas-sena 2009 ma jistghu jitqiesu bhala li jaghtu rimedju effettiv ghall-lanjanzi tar-rikorrenti, kemm ghax tezisti diskrepanza enormi bejn l-awment fil-kera kontemplat fl-artikolu 1531C u l-valur lokatizju tal-fond fis-suq hieles, kif ukoll ghax id-disposizzjonijiet tal-artikolu 1531F, fic-cirkostanzi tal-kaz, jaghmlu remota l-possibilita` li dawn jipprendu l-pussess tal-fond taghhom."

Il-Qorti tosserva wkoll illi fil-mori ta` din il-kawza, dahal fis-sehh l-Att XXVII tal-2018 li kien intiz sabiex ikompli jemenda l-Kap 158.

Il-Qorti fliet bir-reqqa d-disposizzjonijiet ta` l-Att XXVII tal-2018.

Tirrileva li b`dawn l-emendi, l-Art 12B tal-Kap 158. Din id-disposizzjoni taghti lis-sid il-possibilita` illi jmur quddiem il-Bord li Jirregola l-Kera sabiex jitlob revizjoni tal-kera f` ammont li ma jkunx jeccedi 2% tal-valur tal-fond liberu u frank fis-suq miftuh. Taghti wkoll ic-cans lis-sid illi jitlob bdil fil-kondizzjonijiet tal-kirja.

Fin-nota ta` osservazzjonijiet taghhom, ir-rikorrenti iqanqlu l-punt illi dawn l-emendi ma jistghux japplikaw ghall-kaz taghhom billi l-kawza tal-lum thalliet ghad-decizjoni, qabel dahlu fis-sehh l-emendi. Inoltre tirrileva illi bl-applikazzjoni tal-emendi ghall-kaz odjern ikompli jgarrbu vjolazzjoni tal-jeddijiet taghha ghaliex jixxejjen il-process gudizzjarju.

Il-Qorti hija tal-fehma li l-emendi ta` din is-sena m`ghandhomx jincidu fuq il-proceduri odjerni, ghaliex dawn tal-lum huma proceduri li ghandhom il-binarji specjali taghhom ghad-differenza ta` proceduri ordinarji. Ghax din il-kawza hija ta` ndole konvenzjonali, il-Qorti kif addita trid twettaq esami attent u mirqum sabiex tistabilixxi abbazi tal-provi akkwiziti jekk kienx hemm ksur tal-Art 1 Prot tal-Konvenzjoni. Jekk issib vjolazzjoni, tkompli minn hemm. Dak li jahsbu ghalih l-emendi johrog barra mill-parametri tal-procediment odjern. Tajjeb li jkun rimarkat ukoll mhux biss li l-emendi dahlu fis-sehh wara li kienet istitwita din il-kawza, mhux biss id-dottrina tal-*jus superveniens* ma tapplikax ghall-kaz tal-lum, izda fi kwalunkwe kaz fil-procediment ordinarju r-rikorrenti ma jistghux jitolbu awmenti fil-kera ghaz-zmien precedenti d-data tad-dhul fis-sehh tal-emendi.

Abbazi tal-provi li ngabru fil-kaz tal-lum, ma hemmx l-icken dubju li l-kera li qeghdin ihallsu l-intimati Scicluna abbazi tad-disposizzjonijiet tal-Kap 158 huwa bil-wisq inqas mill-kera fis-suq kif din zdiedet matul iz-zmien mill-1990 sal-lum. Il-figuri li saret referenza ghalihom aktar kmieni jitkellmu wahedhom u ghalhekk huwa pprivat l-isproporzjon li ma jridx Art 1 Prot 1 tal-Konvenzjoni u li qed jingarr mis-sid.

Ghalhekk filwaqt li qeghda tilqa` l-ewwel talba tar-rikorrenti, qeghda tichad l-eccezzjonijiet tal-intimati kull fejn kien eccepit minnhom li l-fattispeci tal-kaz tal-lum ma jwasslux ghal vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni.

VIII. It-tieni (2) talba tar-rikorrenti

1. L-ghaxar (10) eccezzjoni tal-Avukat Generali

Fl-ghaxar (10) eccezzjoni, l-Avukat Generali jikkontendi li minkejja li r-rikorrenti ma ndikawx fuq liema disposizzjoni kienu qeghdin jitolbu kumpens, tkun korretta l-assunzjoni li t-talba hija bbazata fuq l-Art 41 tal-Konvenzjoni.

Jeccepixxi li l-Art 41 tal-Konvenzjoni japplika biss ghall-organi gudizzjarji tal-Kunsill tal-Ewropa u mhux ukoll ghall-Qrati Maltin. Isostni li l-Art 41 mhux parti mil-ligijiet nostrani peress illi mhuwiex inkluz fit-tifsira ta` `Drittijiet tal-Bniedem u Libertajiet Fondamentali` skont l-Art 2 tal-Kap 319. Inoltre ma kienx traspost fil-ligi taghna skont l-Art 3(3) tal-Kap 304 tal-Ligijiet ta` Malta.

L-**<u>Art 41 tal-Konvenzjoni</u>** jghid hekk :-

> *"Jekk il-Qorti ssib li kien hemm ksur tal-Konvenzjoni jew tal- Protokolli taghha, u jekk il-ligi interna tal-Parti Gholja Kontraenti kkoncernata tippermetti biss riparazzjoni parzjali, il-Qorti ghandha taghti s-soddisfazzjon xierqa lil-parti leza jekk ikun necessarju."*

Il-Qorti taghmel referenza ghas-sentenza ta` din il-Qorti diversament presjeduta tas-7 ta` Frar 2017 fil-kawza **<u>Robert Galea vs Avukat Generali et</u>**, (op. cit.) fejn inghad hekk :

> *"Illi ghal dak li jirrigwarda t-talba tal-kumpens il-Qorti tqis li din it-talba hija l-effett naturali tas-sejbien tal-ksur tal-jedd invokat. Huwa mizmum li, ladarba Qorti ssib li r-rikorrent garrab ksur tal-jedd tieghu kif imhares bl-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, ma huwiex bizzejjed li tieqaf b`semplici dikjarazzjoni bhal dik. Ghalkemm ir-rimedju xieraq mhuwiex lanqas u tabilfors il-kundanna ta` hlas ta` kumpens bhallikieku l-haga li dwarha sehh il-ksur kienet inbieghet, xi ghamla ta` kumpens huwa misthoqq u doveruz. Hawn ukoll, il-Qorti qieghda zzomm quddiem ghajnejha li l-ksur imgarrab mir-rikorrent jikkonsisti f`indhil dwar u mhux f`tehid tal-gid tieghu;*
>
> *Illi b`zieda ma` dan, ir-rikorrent jitlob ukoll il-hlas tad-danni "ai termini tal-artikolu 41 tal-Konvenzjoni Ewropeja";*
>
> *Illi l-Qorti tibda biex tghid li l-kumpens misthoqq lill-persuna wara li jkun instab li din garrbet ksur ta` xi jedd fundamentali taghha ma huwiex l-istess bhal-*

likwidazzjoni u hlas ta` danni mgarrba. Minbarra dan, ir-rikorrent ma jistax jistrieh fuq l-ghoti ta` kumpens taht l-artikolu minnu msemmi tal-Konvenzjoni. Fl-ewwel lok, il-Konvenzjoni taghmel mil-ligijiet ta` Malta safejn id-dispozizzjonijiet taghha kienu inkorporati fil-Kapitolu 319 tal-Ligijiet ta` Malta. L-imsemmi artikolu ma kienx hekk inkorporat. Fit-tieni lok, huwa maqbul li d-dispozizzjonijiet ta` dak l-artikolu jghoddu ghall-Qorti ta` Strasbourg u mhux ghall-qrati domestici tal-Pajjizi Membri tal-Kunsill tal-Ewropa (Ara Kost. 30.9.2016 fil-kawza fl-ismijiet Maria Stella Azzopardi Vella et vs Avukat Generali et);

Illi b`daqshekk ma jfissirx li t-talbiet tar-rikorrent dwar l-ghoti ta` rimedju mhumiex sejrin jintlaqghu. Jekk ma jistghux jintlaqghu talbiet ghal-likwidazzjoni ta` kumpens u danni bis-sahha tal-imsemmi artikolu 41 tal-Konvenzjoni, jista` u sejjer jinghata rimedju taht il-kriterji tal-ghoti ta` rimedju bhal dan minn din il-Qorti fis-setghat u kompetenza attwali taghha (Kost. 17.12.2010 fil-kawza fl-ismijiet Philip Grech pro et noe vs Direttur tal-Akkomodazzjoni Socjali et). Ghalhekk, il-Qorti tasal ghall-fehma li t-tieni rimedju mitlub mir-rikorrenti fit-tielet, ir-raba` u l-hames talbiet tieghu ma jisthoqqlux jintlaqa`, imma sejjer jinghata kumpens taht it-tieni talba tieghu"

Huwa fatt li l-Art 41 tal-Konvenzjoni ma kienx traspost fil-ligi taghna. Il-Konvenzjoni u l-Protokolli taghha jitqiesu illi jifformaw parti mil-ligi taghna safejn dawn gew inkorporati fil-Kap 319. L-Art 41 kien intiz sabiex jigi applikat mill-ECtHR, wara talba ghal dan l-iskop, fil-kazi fejn il-qrati tal-pajjizi firmatarji tal-Konvenzjoni ma jkunux taw kumpens ghall-vjolazzjoni accertata. Hemm l-ECtHR tkun tista` taghti kumpens.

Dan premess, hija biss assunzjoni dik tal-Avukat Generali illi t-talba tar-rikorrenti ghall-kumpens hija fondata fuq l-Art 41. Twila hija l-lista ta` decizjonijiet li tat il-Qorti Kostituzzjonali illi kull fejn sehh ksur tal-Art 1 Prot 1 tal-Konvenzjoni bl-applikazzjoni tal-Art 12 tal-Kap 158, ir-rimedju ghall-vjolazzjoni huwa l-ghoti ta` kumpens u dan peress illi fiul-gurisdizzjoni taghha l-qorti ghandha diskrezzjoni x`tip ta` rimedju taghti.

Barra minn hekk tajjeb jinghad ukoll li mkien ma jirrizulta li ghall-proponibilita` tal-azzjoni, ir-rikorrenti huwa obbligat jindika d-disposizzjoni li abbazi taghha qed jitlob il-hlas ta` kumpens konsegwenzjali ghas-sejbien ta` vjolazzjoni tad-dritt fondamentali.

L-eccezzjoni hija michuda.

2. <u>Il-kumpens</u>

Il-kumpens li jista` jinghata fi procediment ta` din ix-xorta mhuwiex ekwivalenti ghal danni civili li jigu likwidati mill-qrati ordinarji (ara : QK : **<u>Philip Grech pro et noe vs Direttur tal-Akkomodazzjoni Socjali et</u>** deciza fis-17 ta` Dicembru 2010 ; **<u>Victor Gatt et vs Avukat Generali et</u>** deciza fil-5 ta` Lulju 2011 ; u **<u>Ian Peter Ellis et vs Avukat Generali et</u>** deciza fl-24 ta` Gunju 2016).

Fid-decizjoni ta` **<u>Maria Stella sive Estelle Azzopardi et vs Avukat Generali et</u>** deciza fit-30 ta` Settembru 2016, il-Qorti Kostituzzjonali kompliet tippreciza illi r-*"rimedju li taghti din il-Qorti huwa kumpens ghall-ksur tad-dritt fondamentali u mhux danni civili ghal opportunita` mitlufa."*

Dan premess, huma diversi l-konsiderazzjonijiet li l-Qorti ghandha taghmel sabiex tistabilixxi l-*quantum* tal-kumpens.

Fost il-konsiderazzjonijiet hemm dik li r-rikorrenti ma gewx zvestiti mill-proprjeta` taghhom u liu l-kwistjoni fil-kaz tal-lum tibqa` dik li bl-intervent legislattiv li ghamel l-Istat ghall-fini ta` l-uzu tal-propjeta` sehh sproporzjon u zbilanc kontra r-rikorrenti bil-konsegwenza li garrbu ksur tal-jedd fondamentali taghhom kif tutelat bl-Art 1 Prot 1 tal-Konvenzjoni.

Fis-sentenza li tat fid-29 ta` April 2016 fil-kawza fl-ismijiet **<u>Raymond Cassar Torregiani et vs Avukat Generali et</u>**, il-Qorti Kostituzzjonali qalet hekk :

> *"Dwar il-quantum tal-kumpens dovut issir referenza ghas-sentenza ta` din il-Qorti Igino Trapani Galea*

Feriol pro et noe et V Kummissarju tal-Artijiet et deciza fil-31 ta` Ottubru 2014, fejn f` materja ta` komputazzjoni ta` kumpens ghal lezjoni ta` dritt fondamentali sancit fl-artikolu konvenzjonali fuq citat gie osservat:

"Rigward il-quantum tal-kumpens stabbilit mill-ewwel Qorti, din il-Qorti tosserva fl-ewwel lok li kull kaz ghandu jigi trattat u deciz fuq il-fattispecie tieghu. Barra minn hekk, jekk il-Qorti Ewropeja hasset li f` certi kazijiet kellha taghti kumpens f` ammont inferjuri ghal dak li nghata lir-rikorrenti mill-ewwel Qorti, ma jfissirx li allura l-Qrati Maltin tilfu l-awtonomija taghhom b` mod li bilfors kumpens li jinghata ikun f` ammont vicin dak li taghti l-Qorti Ewropeja. Fil-kaz odjern l-ewwel Qorti hadet in konsiderazzjoni l-fatturi kollha li jimmilitaw kemm favur kif ukoll kontra r-rikorrenti u deherilha li l-kumpens xieraq li ghandha taghti f` dan il-kaz ikun fl-ammont ta` hamsa u ghoxrin elf Euro (EUR 25,000). Hija kkonsidrat id-dewmien da parti tar-rikorrenti li jiehdu l-proceduri opportuni, il-valur tal-immobbli, iz-zmien tant twil li r-rikorrenti ilhom privati mill-godiment tal-proprjeta` taghhom minghajr ma nghata ebda kumpens, l-istat tal-fond u l-ezistenza tal-fattur tal-interess pubbliku. Ma` dawn ghandu jigi senjalat il-fatt li qabel l-ispossessament tal-proprjeta` taghhom ir-rikorrenti kellhom permess mill-Bord kompetenti sabiex jizviluppaw il-fond."

Issa ghalkemm, huwa minnu illi l-valur tal-kumpens akkordat mill-Qorti wara sejba ta` lezjoni tad-drittijiet fondamentali ma jekwiparax necessarjament ma` likwidazzjoni ta` danni civili attwali sofferti, ma jfissirx li d-danni materjali ghandhom jigu injorati ghall-finijiet tal-ezercizzju odjern. Il-Qorti trid tqis il-fatturi kollha rilevanti ghall-kaz odjern sabiex tasal ghad-determinazzjoni tal-quantum. Dawn huma (1) it-tul ta` zmien li ilha ssehh il-vjolazzjoni konsidrat ukoll fid-dawl tat-tul taz-zmien li r-rikorrenti damu sabiex resqu l-proceduri odjerni biex jirrivendikaw id-drittijiet kostituzzjonali taghhom; (2) il-grad ta` sproporzjoni

relatat mal-introjtu li qed jigi percepit ma` dak li jista` jigi percepit fis-suq hieles, konsidrat ukoll l-ghan socjali tal-mizura; (3) id-danni materjali sofferti mir-rikorrenti konsidrat ukoll l-ispejjez sostanzjali li ghamlu l-intimati Tabone ssabiex jirrendu l-fond abitabbli u (4) l-ordni li ser taghti din il-Qorti dwar l-ezenzjoni f` da nil-kaz mill-effetti legali tal-Artikolu 5 tal-Kap 158."

Fis-sentenza li tat fis-sentenza li tat fit-12 ta` Lulju 2011 fil-kawza fl-ismijiet **Carmen Cassar vs Direttur ghall-Akkomodazzjoni Socjali et** il-Qorti Kostituzzjonali osservat illi meta fi proceduri bhal dawk odjerni jinghata kumpens, il-qorti ghandha tqis l-interess pubbliku li wassal l-Istat biex jintervjeni. Ghalhekk il-kumpens likwidat ghandu jkun ragjonevoli.

Fis-sentenza li tat fil-31 ta` Jannar 2014 fil-kawza fl-ismijiet **Concetta sive Connie Cini vs Eleonora Galea et** il-Qorti Kostituzzjoni rrilevat :

"25. F`materja ta` kumpens il-gurisprudenza patria kif ukoll dik tal-Qorti Ewropeja identifikat is-segwenti principji :

"The Court would reiterate that compensation terms under the relevant legislation may be material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate balance on applicants. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference." [ECHR 31443/96 para.176 Bronoiswki v. Poland, decided 22 June 2004].

26. Fil-kawza Louis Apap Bologna v. Calcidon Ciantar et deciza 24 Frar 2012, din il-Qorti osservat hekk:

"F`kazijiet bhal dawn il-kumpens xieraq ghandu jiehu in konsiderazzjoni l-ghan legittimu li mmotiva l-mizura tarrekwizizzjoni u li l-kumpens jista` jkun anqas mill-kumpens shih li altrimenti jkun dovut

skond il-kriterji tas-suq. Il-Qorti Ewropea fil-kazijiet ta` Edwards v Malta u Ghigo v Malta 17 Lulju 2008] ddecidiet li :

"Para.76. As the Court has already stated on may occasions, in spheres such as housing of the population, States necessarily enjoy a wide margin of appreciation not only in regard to the existence of the problem of general concern warranting measures for control of individual property, but also to the choice of the measures and their implementation. The State control over levels of rent is one such measure and its application may often cause significant reductions in the amount of rent chargeable (….Mellacher and Others v Austria para.45]."

27. Inoltre, "In the absence of a formal expropriation that is to say a transfer of ownership, the Court considers that it must look behind the appearances to investigate the realities of the situation complained of!.. Since the Convention is intended to guarantee rights that are practical and effective it has to be ascertained whether that situation amounted to a de facto expropriation [Sporrong & Lonnroth v. Sweden 18/12/1994; ara ukoll kawza Perit Duminku Mintoff, supra]".

28. Fil-kaz in dizamina, l-ewwel Qorti waslet ghall-konkluzjoni li l-kumpens dovut ex lege lill-intimati bis-sahha tal-artikolu precitat huwa wiehed irizorju meta komparat mal-valur tal-fond fis-suq. L-Avukat Generali jhossu aggravat bil-fatt li fid-determinazzjoni tal-fattur tal-proporzjonalita` tal-mizura relattivament ghall-kumpens dovut, l-ewwel Qorti ma kellhiex timxi fuq l-istima tal-valur tal-fond fl-ammont ta` mija, hamsa u tletin elf Euro (€135,000) moghti ex parte mill-Perit inkarigat mill-intimati, izda se mai kellha timxi fuq l-istima ta` disghin elf Euro (€90,000) tal-Perit inkarigat mir-rikorrenti, stante li l- Konvenzjoni "ma tikkoncedi ebda dritt li xi hadd jircievi profitt, aktar u aktar fil-kuntest ta` proprjeta` li qed isservi ghall-finijiet ta` social housing."

29. Fir-rigward din il-Qorti tosserva li dan l-ilment tal- Avukat Generali huwa fondat. Inkwantu huwa konformi mal-principju, illum assodat kemm fil-gurisprudenza patrija kif ukoll f`dik tal-Qorti Ewropeja, li f`kaz ta` legislazzjoni li ghandha ghan socjali l-kumpens offrut jista` ma jkunx jekwivali ghall-valur tal-fond fis-suq.

30. Kif osservat il-Qorti Ewropeja fil-kaz Amato Gauci v. Malta, [Appl.47045/06, deciz 15 Dicembru 2009]:

"... [the Court] reiterating that legitimate objectives in the `public interest`, such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less that reimbursement of the full market value [see James and Others, cited above, para.54 and Jahn and Others v Germany [GC] nos.46720/99, 72203/01 and 72552/01, para.94..]

31. Illi jirrizulta pacifiku li fiz-zmien meta nghatat il-koncessjoni sub-enfitewtika, fil-11 ta` Jannar 1960 ic-cens annwu kien gie stabbilit fl-ammont ta` £35, illum wiehed u tmenin Euro, tlieta u hamsin centezmi (€81.53), li bl-applikazzjoni tal-Artikolu 12 jizdied ghal erba; mija, disgha u tmenin Euro u tmintax-il centezmi (€489.18)3. Inoltre, l-utilista, allura perpetwa tista` tifdi c-cens versu l-prezz ta` disat elef u tmien mitt Euro (€9,800) li minnu ghandu jitnaqqas il-capital gains tax ta` 12%.

32. Din il-Qorti tikkondividi l-hsieb tal-ewwel Qorti li l-ammont ta` cens dovut ex lege lill-intimati huwa baxx sal-punt li ma jistax jinghad li ghat-tfixkil sostanzjali fit-tgawdija tal-proprjeta` taghhom huma nghataw kumpens adegwat, kemm ghax fiz-zminijiet tal-lum il-quantum tac-cens annwu dovut ex lege jitqies bhala wiehed baxx meta jigi relatat mal-valur tal-fond, kif ukoll tenut kont tal-konsiderazzjoni li lir-rikorrenti, okkupanti tal-fond b`titolu ta` uzufrutt biss, qed

tinghatalha dritt gdid li tibqa` tokkupa l-fond b`titolu ta` enfitewsi perpetwa, bil-possibilita` tarripreza tal-pussess fiziku tal-fond da parti tas-sidien tkun wahda remota hafna. Huwa principalment dan il-fattur li, fil-fehema ta` din il-Qorti, jitfa` `a disproportionate and excessive burden` fuq is-siden.

33. Kif gja` osservat minn din il-Qorti fil-kawza Josephine Bugeja v. Avukat Generali, deciza 7 Dicembru 2009, ghad-determinazzjoni tal-fattur tal-proporzjonalita` ghandu jittiehed kont tal-effetti legali u prattici li l-applikazzjoni tal-artikolu ser iggib mieghu. Dan l-ezami ghandu jsir mhux in vacuo, izda skont il-fattispecje tal-kaz. "Huwa l-ezercizju ta` dak id-dritt fil-prattika u b`mod konkret, u mhux l-ezistenza tieghu fl-astratt, li jista` bhal fil-kaz in ezami, talvolta jammonta ghal-lezjoni ta` dritt fundamentali" [para.45]. Jigi ribadit li l-Qorti ghandha thares lejn l-effett prattiku tas-sitwazzjoni, peress li, kif sostnut mill-Qorti Ewropeja, il-konvenzjoni tiggarantixxi drittijiet li huma "practical and effective" biex jigi stabbilit jekk is-sitwazzjoni fil-fatt tammontax ghal esproprijazzjoni de facto."

Fis-sentenza ta` din il-Qorti diversament presjeduta tas-7 ta` Frar 2017 fil-kawza fl-ismijiet **Robert Galea vs Avukat Generali et**, (op. cit.) inghad :-

Illi huwa llum stabilit li r-rimedju li tista` taghti din il-Qorti huwa kumpens ghall-ksur tad-dritt fundamentali u mhux danni civili ghal opportunita` mitlufa (Kost. 22.2.2013 fil-kawza fl-ismijiet Albert Cassar et vs Onor. Prim Ministru et). Biex tasal ghal dan, il-Qorti jehtigilha tqis ghadd ta` fatturi, fosthom it-telf effettiv li jkun garrab is-sid, l-ghan socjali mahsub mil-ligi, il-grad ta` sproporzjon fit-tqabbil bejn id-dhul attwali li qieghed jircievi r-rikorrent mad-dhul li jista` jinkiseb fis-suq hieles, id-danni materjali li l-parti rikorrenti tista` tipprova li garrbet u wkoll l-effetti tal-ordni li l-Qorti tista` taghti dwar jekk l-okkupant jistax jibqa` jistrieh aktar fuq it-thaddim tal-ligi attakkata. Minn kif wiehed jista` jara, dawn il-kriterji

huma firxa shiha li trid titqies f`kull kaz ghalih u jiddependu hafna mic-cirkostanzi partikolari ta` kull kaz;

Illi dwar il-kumpens dovut lir-rikorrent, madankollu, tqum konsiderazzjoni ohra. Ghalkemm ir-rikorrent harrek ukoll lill-intimati Ganado, izda dan ma jfissirx li huma l-istess intimati Ganado li jridu jhallsu lir-rikorrent il-kumpens li sejjer jinghata jew li jaghmlu tajjeb ghal ghazla li kienet taghtihom il-ligi. Kumpens bhal dak ghandu jbatih biss l-Istat minhabba li l-ksur li qed igarrab ir-rikorrent huwa l-effett dirett tal-ligi li ddahhlet bl-Att XXIII tal-1979. L-intimati Ganado nqdew b`ligi li tathom jeddijiet godda li ma kellhomx fiz-zmien meta nghatat il-koncessjoni enfitewtika, izda ma ghamlu xejn biex jiksbu dan il-jedd b`mod illegali. Fid-dawl tal-massima qui suo jure utitur neminem laedere videtur, l-Qorti ma tistax issib li l-intimati Ganado jridu jaghmlu tajjeb huma wkoll ghall-hlas tal-kumpens lir-rikorrent minhabba s-sejbien ta` ksur tal-jedd fundamentali tieghu. Din il-fehma tinbena wkoll fuq il-fatt li l-ilment tar-rikorrent jirrigwarda ligi li jaghmilha l-Istat u mhux ic-cittadin li, min-naha tieghu, ghandu jedd jinqeda biha fil-parametri taghha u safejn din ma titqiesx li qieghda tikser il-jedd fundamentali tas-sid;

Illi kif inhu mizmum u mghallem "fil-kaz ta` ligi leziva tad-drittijiet konvenzjonali jew kostituzzjonali, huwa l-Istat u mhux ic-cittadin li ghandu jirrispondi. Ghax huwa principalment l-obbligu tal-Istat, u mhux tal-inkwilin, li jassigura li d-drittijiet fundamentali tas-sid ma jinkisrux" (Kost. 24.2.2012 fil-kawza fl-ismijiet Louis Apap Bologna vs Kalcidon Ciantar et; u Kost. 6.2.2015 fil-kawza fl-ismijiet Sean Bradshaw et vs L-Avukat Generali et);

Illi meta wiehed iqis ic-cirkostanzi kollha li johorgu mill-provi mressqa u jhaddem dwarhom ir-regoli li dawn il-qrati minn zmien ghal zmien inqdew bihom f`kazijiet li jixxiebhu (Kost. 29.4.2016 fil-kawza fl-ismijiet Raymond Cassar Torregiani et vs Avukat

Generali et), il-Qorti ssib li jkun xieraq li jithallas kumpens lir-rikorrent fis-somma ta` sebat elf euro (€ 7,000). Din is-somma qieghda tqis ukoll iz-zmien li r-rikorrent ha biex ressaq l-ilment tieghu quddiem il-Qorti (Ara Kost 25.5.2012 fil-kawza fl-ismijiet Josephine Mary Vella vs Direttur tal-Akkomodazzjoni Socjali et)."

Fis-sentenza ta` din il-Qorti diversament ippreseduta fil-kawza fl-ismijiet **Sergio Falzon et vs Alfred Farrugia et** tat-30 ta` Jannar 2018 (li minnha sar appell) inghad :-

Ghal dak li jirrigwarda kumpens bhala rimedju ghad-danni non-pekunjarji ghas-sejbien ta` lezjoni tad-dritt fundamentali tar-rikorrenti kawza tal-applikazzjoni f`dan il-kaz tal-Artikolu 12(2) tal-Kap. 158, ir-rikorrenti ghandhom jedd ghalih meta tqis li ilhom mis-sena 1985 (izjed minn tletin sena) ma jiehdu kumpens gust ghall-fond taghom, u dan minkejja l-liberalizzazzjoni tas-suq fis-sena 1995 u li l-iskop legittimu sfuma mat-trapass taz-zmien. Tali jedd ghandu jigi kkalkulat mid-data tat-terminazzjoni tal-koncessjoni subenfitewtika, cioe`, mis-sena 1985.

*Skont il-prospett tal-perit Tekniku il-rendita` mill-valur lokatizju fuq is-suq kellu jammonta ghal €93,217 ghas-snin 1985 sa 2016. Il-kera attwalment imhallsa kienet tammonta ghall-€16,765.50 (Tabella 4.0) (17%) Madanakollu hu assodat li r-rimedju kostituzzjonali ma jfissirx necessarjament ir-rimbors tal-valur shih fuq is-suq lis-sid. (Ara ad ez. ECtHR Kaz**Ghigo vs. Malta** 17 ta` Lulju 2008, #18; Kaz**Edwards vs. Malta**, 17 ta` Lulju 2008; #21; u l-QK fil-kaz **Borg vs Mifsud** sucitata) Specjalment meta bhal fil-kaz odjern, il-proprjeta` ma ittiehditx mill-Istat imma ghandha eventwalment tigi liberata favur is-sid minhabba r-rimedju li ser taghti din il-Qorti apparti l-kumpens.*

*Il-Qorti Kostituzzjonali f`**Borg vs Mifsud** citat supra, wara li qieset li:*

"l-ghan principali tal-proceduri odjerni u ta` dak mitlub mir-rikorrenti, li huwa dak li jigi determinat jekk ir-rikorrenti sofrewx lezjoni tad-dritt fundamentali taghhom, u fil-kaz affermattiv, "… tiffissa kumpens xieraq ghal tali vjolazzjoni stante li r-rikorrenti baqghu dawn is-snin kollha [mill-1 ta` Dicembru 1998 sal-lum] minghajr il-pussess u t-tgawdija tal-proprjeta` taghhom" u taghti dawk ir-rimedji li l-Qorti jidhrilha xierqa inkluz li jiehdu lura l-pussess tal-fond proprjeta` taghhom…".

Ikkonsidrat li

"Din id-diskrepanza ta` 18% bejn il-kera fis-suq hieles u l-kera attwalment percepita mir-rikorrenti, timmilita favur ir-rikorrenti fil-komputazzjoni tal-kumpens ghax hija fattur relevanti hafna fil-komputazzjoni tal-estent tal-vjolazzjoni."

Izda dik il-Qorti kkonsidrat ukoll il-fattur li r-rikorrenti damu milli jipprevalu ruhhom mir-rimedju kostituzzjonali kif ukoll kkonsidrat ir-rimedju li kien ser jinghata b`dak il-gudizzju, li permezz tieghu l-intimati ma jistghux ikomplu aktar jistriehu fuq l-Att XXIII.1997 biex jibqghu jokkupaw il-fond de quo. Din il-Qorti ma taqbilx li ghandu jkun hemm tnaqqis dwar id-dewmien. (Dwar id-dewmien vide contra s-sentenza tal-Qorti Ewropea fil-kaz fl-ismijiet "Apap Bologna vs Malta" deciza r fit-30 ta` Novembru 2016 fejn irrimarkat:-

"46. The Court also takes issue with the fact that in line with domestic case-law, such compensation awards are reduced on the grounds that the applicants have instituted constitutional redress proceedings several years after they started suffering the violation complained of. In this connection, the Court notes, first and foremost, that domestic law does not impose a time-limit for the institution of constitutional redress proceedings. The legislator leaves the choice of timing to the applicant. Moreover, in circumstances such as those of the present case, the violation complained of is a

continuing one. The Court thus finds that such reasoning is questionable in the light of the circumstances of the case and the domestic legal framework, which appears to give great latitude to individuals seeking redress for human rights violations.")

Ghaldaqstant wara li qieset bir-reqqa l-provi u s-sottomissjonijiet kollha, din il-Qorti qed tillikwida l-kumpens fl-ammont ta` hmistax-il elf ewro (€15,000) tenut kont il-valur tal-proprjeta` bhala liberu u vakanti (€145,000) u li l-izbilanc bejn il-kera imhallsa u l-valur lokatizju qed ikompli jizdied kull ma jghaddi z-zmien anke bl-applikazzjoni tal-emendi tal-2010. Dan il-kumpens ghandu jithallas mill-Intimat Avukat Generali flimkien mal-imghaxijiet bir-rata ta` hamsa fil-mija (5%) sad data tal-pagament effettiv."

Fis-sentenza li tat fit-2 ta` Marzu 2018 fil-kawza fil-kawza fl-ismijiet **Thomas Cauchi et vs Avukat Generali et** il-Qorti Kostituzzjonali ghamlet dawn ir-rilievi :-

"Nghaddu ghalhekk ghal-likwidazzjoni tal-kumpens ghall-ksur tad-dritt tal-atturi ghat-tgawdija ta`hwejjighom. Fost il-fatturi relevanti ghal-likwidazzjoni hemm dawn:

* *id-diskrepanza bejn il-kera li l-atturi kellhom jedd ghalih taht il-Kap. 158 u l-kera li l-fond seta`gab fuq is-suq hieles;*

* *iz-zmien minn meta beda jinhass dan in-nuqqas ta` pro-porzjonalità;*

* *il-fatt li l-valuri moghtija mill-perit huma biss indikazzjoni tat-telf ekonomiku li setghu garrbu l-atturi u mhux prova ta` telf reali;*

* *il-fatt li, meqjus l-interess pubbliku u l-ghan socjali tal-ligi attakkata, il-kumpens misthoqq lis-sidien mhux bilfors ikun daqs il-kumpens shih li seta` kien dovut*

kieku wiehed kellu jistrieh fuq l-indikaturi tas-suq hieles;

 l-incertezza tal-atturi dwar meta jistghu, jew jekk jistghux qatt matul hajjithom, jiehdu hwejjighom lura, fin-nuqqas ta` mekkanizmu biex is-sidien jiehdu hwejjighom lura jew biex isir tqabbil bejn il-htigijiet tas-sidien u l-htigijiet tal-kerrejja, izda wkoll ir-rimedji li jistghu jaghtu lill-atturi s-setgha li jiehdu lura l-fond bis-sahha tad-dikjarazzjoni li l-konvenuta ma tistax tistrieh fuq il-ligi attakkata biex fuqha ssejjes titolu biex tibqa`zzomm il-fond;

 il-quantum ta` kumpens moghti mill-qrati f`kawzi ohra fejn ic-cirkostanzi kienu bejn wiehed u iehor jixxiebhu;

 il-fatt li ghandu jinghata kumpens kemm morali u kemm materjali ghall-ksur tad-dritt fondamentali.

20. Meqjusin dawn il-fatturi, din il-qorti hija tal-fehma illi kumpens ta` ghaxart elef euro (€10,000) jkun wiehed xieraq fic-cirkostanzi. Dan il-kumpens jinghata mhux taht l-art. 41 tal-Konvenzjoni, kif talbu l-atturi, ghax, kif sewwa osserva l-Avukat Generali, dak l-artikolu ma huwiex parti mil-ligi domestika; il-kumpens jinghata taht is-setgha ta` din il-qorti li taghhti rimedju ghall-ksur ta` drittijiet fondamentali. Dan il-kumpens jithallas mill-Avukat Generali, mhux mill-konvenuta Borg, billi din kull ma ghamlet kien li nqdiet b`jedd li kienet taghtiha l-ligi."

Fid-decizjoni **Cassar vs Malta** tat-30 ta` Jannar 2018 (App. 50570/13) l-ECtHR ghamlet dawn l-osservazzjonijiet :-

A. Damage

84. The applicants claimed 1,260,996 euros (EUR) in respect of pecuniary damage. That sum reflected (i) the rent due to them from 1998 to 2015 amounting to EUR 730,330 calculated on the basis of the valuation of

an estate agent at EUR 3,500 per month, (EUR 42,000 annually) in 2015, projected backwards to the year 1998 based on two indices for property prices published by the Central Bank of Malta – by means of example, such projections show the rents for the respective years as follows: EUR 6,857 annually in 1988, EUR 18,476 in 1998 and EUR 41,649 in 2008; (ii) EUR 502,006 in simple interest at 8% (capped so as not to exceed the rent of a particular year); and (iii) EUR 28,660 (supported by an architect`s report) in repairs needed to the property since the tenant had failed to take adequate care of the property. In this connection the applicants noted that as things stand, they will remain suffering the effects of the violation even after the Court judgment, for an unspecified amount of years to come. In this light they also considered that their claim of EUR 54,000 in respect of non-pecuniary damage already suffered, representing EUR 2,000 annually since 1988, should be upheld in full.

85. The Government submitted that if a violation were to be found a declaration to that effect would suffice. In any event, they considered that the valuations were exorbitant, speculative and not based on an architect`s report. They noted that the property had been purchased in 1988 at EUR 25,600 it had therefore hardly been imaginable that it could now have a rental value of EUR 42,000 annually. Indeed if it had to be divided over the years, their claim in rent amounted to around EUR 27,000 annually which would surely not reflect the rental value in the eighties and nineties. They further considered that since the applicants had accepted rent until 2008, their claim should only refer to the subsequent years. Moreover, the tenant had deposited rent for the period between 2009-15 amounting to EUR 2,796 which had to be deducted from the award of compensation. As to interest the Government noted that under domestic law, interest was due only on amount liquidated, which was not the case here. Moreover a rate of 8% was far beyond any commercial rate of interest currently available in the banking sector in respect of deposits. As to the

structural works the Government considered this clam unproven and hypothetical. Lastly, the Government considered that an award under this head should not exceed EUR 10,000, which would be EUR 2,123.66 annually over six years, and an award for pecuniary damage should not exceed EUR 4,000.

86. The Court notes that the applicants are entitled to compensation in respect of the loss of control, use, and enjoyment of their property from around 2000 to date. The Court notes on the one hand that the rent suggested by the Government is not based on any valuation or other criteria, and appears to be a simple division of an aleatory sum they proposed. On the other hand, while the applicant`s valuation is based on an estate agent, and was not accompanied by an architect`s report, the domestic court found that EUR 3,000 as opposed to the EUR 3,500 alleged by the applicants appeared reasonable. However, the Court also notes that the comparators used by the estate agent refer to renovated buildings with high quality finishing and furnishing. While no information has been submitted as to the quality of the interior of the applicants` property the Court observes that the applicants claim that their property needs repairs as it has not been well taken care of (see paragraph 84 above). Thus, the latter cannot be considered to be in the same condition and at the same rental value as the former. Therefore, the Court considers that the valuation submitted by the applicants is on the high side, but may nonetheless provide a relevant indication and workable basis.

87. In assessing the pecuniary damage sustained by the applicants, the Court has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It further notes that from 2008 onwards, the Court found the legitimacy of the aim pursued highly questionable (see paragraph 53 above) and thus does not justify a reduction compared with the free market rental value

*(compare, **Zammit and Attard Cassar**, § 75; and **Amato Gauci**, § 77, both cited above). It further takes note of the sums already received by the applicants and those, following 2008, which were deposited in court and therefore remain retrievable, which are being deducted from the award.*

88. In the present case the Court must, however, also take note of the fact that the applicants bought the property when it was already subject to such restrictions, and therefore it considers that the purchase price at the time reflected such restrictions. While the applicants consider that the Government`s claim to that effect was unsubstantiated (see paragraphs 37 and 38 above), the Court notes that according to the evaluations submitted by the applicants, the property in 1988, date when they purchased it, had a rental market value of EUR 6,857 annually. The Court observes that such a sum in rent would not be appropriate for a property purchased in the same year at EUR 25,600, if that were its real sale value. In consequence it must be accepted that the limitations on the property affected the purchase price.

*89. The Court reiterates that an award in respect of pecuniary damage under Article 41 of the Convention is intended to put the applicant, as far as possible, in the position he or she would have enjoyed had the breach not occurred (see, mutatis mutandis, **Kingsley v. the United Kingdom** [GC], no. 35605/97, § 40, ECHR 2002-IV). It therefore considers that interest should be added to the award in order to compensate for the loss of value of the award over time (see **Runkee and White v. the United Kingdom**, nos. 42949/98 and 53134/99, § 52, 10 May 2007). As such, the interest rate should reflect national economic conditions such as levels of inflation and rates of interest (see, for example, **Akkuş v. Turkey**, 9 July 1997, Reports of Judgments and Decisions 1997-IV, § 35; **Romanchenko v. Ukraine**, no. 5596/03, 22 November 2005, § 30, unpublished; and **Prodan v. Moldova**, no. 49806/99, § 73, ECHR 2004-III (extracts)). It notes that the*

*applicants claimed the statutory rate of eight per cent, and the Government`s objection in that respect. The Court considers that a rate of five per cent interest is more realistic (see **Amato Gauci**, cited above, § 78, and **Ghigo v. Malta** (just satisfaction), no. 31122/05, § 20, 17 July 2008) thus a one-off payment at 5% interest should be added (see **Anthony Aquilina**, cited above, § 72, in fine).*

90. Lastly, it is not for the Court to award the claim concerning renovation work which was not entered into by this Court.

91. The Court, thus, awards the applicants the sum of EUR 170,000 jointly.

92. The Court further considers that the applicants must have sustained feelings of anxiety and stress, having regard to the nature of the breach. It therefore awards EUR 3,000 jointly in respect of non-pecuniary damage.

Premessa din il-gurisprudenza, meta tigi biex tillikwida l-kumpens (ghad-differenza ta` r-raguni ghall-vjolazzjoni) il-Qorti m`ghandhiex toqghod biss fuq id-diskrepanza bejn il-kera attwalment percepita mir-rikorrenti u l-valur lokatizju ta` l-fond fis-suq hieles. Ghalkemm huwa fattur ewlieni, mhuwiex l-uniku ghaliex hemm fatturi ohra li ghandhom effett mitiganti fuq il-quantum tal-kumpens.

Il-fatturi li jidderminaw l-entita` tal-kumpens huma :-

i) L-interess generali li jaghti legittimazzjoni ghall-intervent legislattiv ;

ii) L-isproporzjon bejn il-kera attwalment percepita mir-rikorrenti u dik li setghet tippercepixxi fis-suq hieles li kieku ma kienx applikat l-Art 12 tal-Kap 158. Ghalkemm dan il-fattur sejjer jittiehed in konsiderazzjoni, l-istima tal-prezz tas-suq ghandu jitqies bhala kriterju ndikattiv mhux assolut.

iii) Il-fatt li l-flat jaghmel parti minn blokk ta` zewg appartamenti u ghandu l-bejt ghalih. Mid-deskrizzjoni li taw il-periti, u mill-mod kif kienet certifikata l-qaghda tal-fond, jirrizulta t-tqassim tal-post huwa komdu, inkluz is-servizzi, kien mizmum tajjeb mill-intimati Scicluna, u jinsab fil-qalba residenzjali ta` Tas-Sliema ;

iv) L-incertezza dwar meta r-rikorrenti jkunu jistghu jiehdu lura l-pussess battal tal-fond minghand l-intimati Scicluna, anke jekk fil-kaz tal-lum il-Qorti mhijiex se tqieghed dan il-fattur fuq quddiem tal-konsiderazzjonijiet taghha ghar-raguni li l-intimati Scicluna huma persuni ta` eta` avvanzata ;

v) Iz-zmien li r-rikorrenti damu jgarrbu l-istat ta` sproporzjon ;

vi) Il-fatt li r-rikorrenti baqghu jaccettaw il-hlas tal-kera li kienu jhallsu l-intimati konjugi Scicluna sas-sena 2013, u allura ghal 13-il sena wara li kien ghalaq ic-cens u saret il-konverzjoni tat-titolu ghal kera *ope legis.*

vii) Iz-zmien kollu li baqghu passivi bla ma jiehdu azzjoni. Kien biss fl-2014 illi baghtu l-ewwel ittra ufficjali. Qatt qabel ma jirrizulta illi r-rikorrenti vvantaw xi dritt fil-konfront tal-intimati Scicluna. Hadu 18 –il sena li hadu r-rikorrenti biex intavolaw dan il-procediment tenut kont tal-fatt li c-cens temporanju originali ghalaq fl-1990 u l-kawza kienet prezentata fl-2018 ;

viii) L-ispejjez gudizzjarji u dawk extra-gudizzjarji, senjatament il-hatra ta` perit *ex parte*, li kellhom jinkorru r-rikorrenti, sabiex ikollhom *le carte in regola* biex imexxu bl-azzjoni ;

ix) L-inerzja tal-Istat illi nonostante l-ghadd notevoli ta` decizjonijiet li tat il-Qorti Kostituzzjonali u l-ECtHR dwar il-mertu tal-istanza odjerna baqa` passiv ghal snin shah sabiex jirrimedja b`legislazzjoni effettiva u effikaci li ssib tarf darba ghal dejjem tal-kwistjoni.

ix) Fl-1973 meta sar il-kuntratt tac-cens originali, l-aventi causa tar-rikorrenti ma setghetx kienet taf li fl-1979 kien ser issir ligi li ddghajjef il-jeddijiet taghha bhala sid tal-fond de quo.

Mir-rapporti tal-periti li xehdu fil-kawza tal-lum, jirrizulta li ghalkemm kien hemm diskrepanza fl-istimi tal-valur lokatizju, fis-sens illi l-perit tar-rikorrenti ghamel valutazzjoni ta` €7,600 fis-sena waqt li l-perit tal-Avukat Generali ghamel stimas ta` €5,130 fis-sena, jibqa` l-fatt li r-rikorrenti kienet qeghda tippercepixxi kera fl-ammont ta` €419.29 fis-sena. Dan ifisser li r-

rikorrenti idahhlu mill-fond f`sena dak illi skont il-Perit Paul Buhagiar irendi fis-suq liberu f`xahar. Il-Qorti qed tirreferi ghall-konteggi tal-Perit Buhagiar ghaliex huma aktar konservattivi minn dawk tal-Perit Abela. Eppure thares mnejn thares l-izbilanc u l-isproporzjon huma sostanzjali ferm.

Ghall-fini ta` kalkolu ta` kumpens il-Qorti ma tqisx li l-benefikati li saru mill-intimati Scicluna ghandhom jinghataw konsiderazzjoni ghaliex jekk saru meta kien fis-sehh ic-cens dawk il-benefikati kienu a kariku taghhom bhala censwalisti anke jekk temporanji, u jekk saru meta t-titolu kien konvertit ghal kera, kien messhom ikkunsidraw li ma kienx sejrin ikunu rifuzi ghalihom.

Propju ghaliex kull kaz ghandu l-isfond u l-fattispeci partikolari tieghu, huwa evidenti li ma hemmx uniformita` fil-quantum tal-kumpens li jigi likwidat mill-qrati taghna.

Fl-istess waqt zammet bhala gwida ghall-fini ta` quantum numru ta` decizjonijiet li tat il-Qorti Kostituzzjonali fmatul dawn l-ahhar sentejn fosthom : **<u>Maria Ludgarda sive Mary Borg et vs Rosario Mifsud et</u>** deciza fid-29 ta` April 2016 ; **<u>Raymond Cassar Torregiani et vs Avukat Generali et</u>** deciza fid-29 ta` April 2016 ; **<u>Vincent Curmi noe vs Avukat Generali et</u>** deciza fl-24 ta` Gunju 2016 ; **<u>Rose Borg vs Avukat Generali et</u>** deciza fil-11 ta` Lulju 2016 ; **<u>Ian Peter Ellis et vs Avukat Generali et</u>** deciza fl-24 ta` Gunju 2016 ; **<u>Maria Stella sive Estelle Azzopardi et vs Avukat Generali</u>** deciza fid-29 ta` Settembru 2016 ; **<u>Jesmond Portelli et vs Avukat Generali et</u>** deciza fil-25 ta` Novembru 2016 ; **<u>Catherine Cauchi et vs Avukat Generali et</u>** deciza fis-26 ta` Jannar 2018 ; **<u>Thomas Cauchi et vs Avukat Generali et</u>** deciza fit-2 ta` Marzu 2018 ; is-sittax (16) –il kawza fl-ismijiet **<u>Josephine Azzopardi et vs L-Onor Prim Ministru et</u>** li kienu decizi kollha fil-25 ta` April 2018.

Tenut kont ta` kollox, u wara li hasbet fit-tul, il-Qorti hija ta` l-fehma li favur ir-rikorrenti ghandha tigi likwidata somma globali ta` <u>EUR 20,000</u> in kwantu ghal EUR 15,000 bhala danni pekunarji u in kwantu ghal EUR 5,000 bhala danni morali.

Din is-somma ghandha tithallas biss mill-Avukat Generali li jirrapprezenta l-Istat. L-intimati konjugi Scicluna m`ghandhom ihallsu ebda lir-rikorrenti ghaliex l-imgieba taghhom kienet sorretta mil-ligi vigenti. M`ghamlu xejn biex imorru kontra dik il-ligi. Ghalhekk m`ghandhom ihallsu xejn lanqas spejjez gudizzjarji.

IX. It-tielet (3) talba tar-rikorrenti

Il-Qorti sejra tqis din it-talba fl-isfond tal-hdax-il eccezzjoni tal-Avukat Generali.

Il-Qorti taghmel riferenza ghas-sentenza li tat il-Qorti tal-Appell fl-24 ta` April 2015 fil-kawza : **Michael Angelo Briffa et vs Nadia Merten** : op. cit. : fejn inghad hekk :-

> *16. Lanqas ma huwa relevanti l-fatt illi r-rimedju moghti mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kaz ta` Amato Gauci kien il-kundanna tal-gvern li jhallas id-danni u mhux il-kundanna tal-kerrej ghal zgumbrament. Qabel xejn kawzi quddiem il-Qorti Ewropea jsiru kontra l-istat u mhux kontra cittadini privati: il-kerrej, li ma kienx parti fil-kawza, ma setax jigi kundannat li jizgombra. Barra minn hekk, ir-rimedju li tista` taghti dik il-qorti huwa biss kontra l-istat: ma ghandha ebda setgha tordna zgumbrament ta` cittadini privati. Ukoll, dik il-qorti tista` biss tghid illi irravvizat ksur ta` xi disposizzjoni tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali izda ma ghandha ebda setgha li tghid illi l-ligi domestika "tkun bla effett".*

Fis-sentenza taghha fil-kawza : **Angela sive Gina Balzan v. L-Onorevoli Prim Ministru et** : : op. cit. : l-Ewwel Qorti qalet hekk :-

> *" … fost ir-rimedji li qieghda titolob l-attrici ghal dan il-ksur hemm dak tal-izgumbrament tal-konvenuti Bajada mill-fond. Din il-qorti ma tarax illi huwa kompitu taghha fil-kompetenza kostituzzjonali li taghti ordni ta` zgumbrament, ukoll ghax ma giex, u ma setax jigi, dibattut quddiemha jekk il-konvenuti Bajada ghandhomx xi titolu iehor biex izommu l-fond. Jidher ukoll illi hemm kawza ohra pendenti bejn l-attrici u l-kerrejja (rikors mahluf numru 288/2007) fejn tigi dibattuta l-kwistjoni talizgumbrament. Ghall-ghanijiet ta` din il-kawza tal-lum huwa bizzejjed li jinghad illi l-konvenuti Bajada ma jistghux jinqdew bl-art. 12A tal-*

Kap. 158 biex jilqghu ghal kull azzjoni li ghamlet jew tista` taghmel l-attrici fil-forum kompetenti biex tikseb l-izgumbrament taghhom."

Fis-sentenza taghha l-Qorti Kostituzzjonali kkonfermat din il-posizzjoni billi qalet hekk :-

"Dwar x`ghandu jkun ir-rimedju, l-Ewwel Qorti pprovdiet billi qalet illi l-intimati Bajada ma jkunux jistghu jinqdew bl-Artikolu 12A tal-Kap. 158 biex jilqghu ghal kull azzjoni li tista` taghmel ir-rikorrenti fil-forum kompetenti biex tikseb l-izgumbrament taghhom. Din il-Qorti, wara li hasbet fit-tul fuq din il-materja, tara li dan mhux rimedju li tista` taghti.

Il-bilanc bejn l-interessi differenti jrid joholqu l-Gvern, u hu l-Gvern li jrid ibati l-konsegwenzi jekk jonqos minn dan id-dmir tieghu. Ghan-nuqqas tal-Gvern ma ghandux ibati ccittadin. La darba, f`dan il-kaz, il-ligi per se ma gietx meqjusa li tikser il-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem, ma tistax tigi dizapplikata ghall-kaz. Din il-Qorti gia` osservat f`kuntest iehor li meta jkun hemm ordni ta` rekwizizzjoni u l-Gvern iqieghed persuna ohra in situ b`kera li titqies baxxa, ir-rimedju mhux li tithassar dik l-ordni ta` rekwizizzjoni izda li jinghata kumpens adegwat bhala just satisfaction u dan talli ma nholoqx bilanc gust bejn l-interessi involuti. F`dawn ic-cirkostanzi, ma tkunx l-ordni ta` rekwizizzjoni nnifisha li tkun kisret id-dritt ta` proprjeta` tas-sid, izda l-mekkanizmu ta` kumpens (ara Montanaro Gauci v. Direttur Akkomodazzjoni Socjali et, deciza minn din il-Qorti fil-25 ta` Novembru 2011). Anke l-kaz meritu ta` din il-kawza m`huwhiex il-passi li ha l-Gvern fl-interess generali li huma hziena izda l-mekkanizmu li holoq biex jigi determinat l-applikazzjoni tal-ligi u l-quantum tal-kumpens. Ghalhekk, anke f`dan il-kaz, ir-rimedju ghandu jkun ta` kumpens, kif del resto jipprovdi l-Artikolu 41 ta` Konvenzjoni Ewropeja, l-uniku ligi li nstab li gie miksur.

Din il-Qorti ma tistax taghti ordni li twassal, wisq probabbli, ghat-tkeccija tal-konjugi Bajada mill-fond inkwistjoni, meta l-protezzjoni infisha, moghtija lilhom mill-Gvern, mhux leziva ghad-drittijiet tas-sid. Veru li jista jinghad li, f`dan il-kaz, il-konjugi Bajada ma

haqqhomx jibqghu fil-post la darba ghandhom proprjeta` immobbli ohra, pero`, ghal dan ma hasibx il-Legislatur, u ma jahtux il-konjugi Bajada li jippruvaw jiehdu vantagg mil-ligi kif inhi.

Kif osservat il-Qorti Ewropeja tal-Gustizzja fil-kaz ta` Amato Gauci, aktar qabel imsemmi, meta l-ligi ma tipprovdix li s-sid ikun jista` jikkontesta d-dritt tal-enfitewta li juzufriwixxi ruhu bil-beneficcji li taghtih il-ligi "on the basis that they were not deserving of such protection, as they owned alternative accomodation", ir-rizultat ikun li "the application of the law itself lacked adequate procedural safeguards aimed at achieving a balance between the interests of the tenants and those of the owners". Kwindi, il-ligi ghandha titqies applikabbli ghall-kaz, izda peress li fl-istess ligi jezistu nuqqasijiet procedurali biex jinholoq bilanc gust, irid jinghata kumpens adegwat lis-sid halli "jinholoq" dan il-bilanc."

Fis-sentenza li tat il-Qorti Kostituzzjonali fil-kawza : **<u>Dr. Cedric Mifsud et vs. L-Avukat Generali et</u>** : op cit : inghad hekk :-

13. It-tieni aggravju jolqot ir-rimedju li tat l-ewwel qorti meta qalet illi l-konvenuti Azzopardi ma jistghux jinqdew bl-art. 12(2) biex izommu l-proprjetà tal-atturi b`kiri. ...

14. Huwa minnu illi l-Avukat Generali bhala rapprezentant tal-gvern ghandu interess generali fit-twettiq tal-politika ta` social housing. Madankollu, ghall-ghanijiet ta` proceduri gudizzjarji interess generali bhal dak jista` ma jkunx bizejjed jekk il-parti interessata ma tkunx se tiehu vantagg fil-kaz partikolari.

15. Fil-kaz tal-lum il-konvenuti Azzopardi ma appellawx mis-sentenza li ghalhekk, ghalihom, hija res iudicata. L-istess konvenuti Azzopardi ghalhekk huma marbuta bid-decizjoni tal-ewwel qorti illi "ma jistghux jinvokaw dan il-provvediment [tal-art. 12(2) tal-Kap. 158] biex jibqghu jabitaw fil-fond oggett ta` dawn il-proceduri". Huwa ovvju ghalhekk illi, ghall-ghanijiet tal-kawza tallum, l-Avukat Generali ma jista` jikseb ebda vantagg minn dan l-aggravju.

16. Ghal din ir-raguni l-qorti ma tqisx aktar dan l-aggravju.

Fis-sentenza : **Robert Galea vs Avukat Generali et** : op cit : inghad hekk :-

"Illi ghal dak li jirrigwarda r-rimedju l-iehor mitlub mir-rikorrent, il-Qorti taghraf li saret talba specifika fir-rikors promotur innifsu biex hija tikkunsidra l-izgumbrament tal-intimati Ganado mill-post;

Illi l-Qorti tifhem li kulma jmur, ir-rikorrent fil-qaghda attwali qieghed igarrab ksur tal-jedd tieghu dwar hwejgu. Kif sewwa jghid, jekk il-Qorti kellha tieqaf biss bl-ghoti ta` kumpens, ma tkunx qieghda teqred l-ghajn tal-vjolazzjoni li qieghed igarrab u kull kumpens f`kull kaz ikun rimedju parzjali li jieqaf malli tinqata` l-kawza billi l-Qorti ma tistax f`kawza bhal din taghti kumpens ghall-gejjieni li mhux maghruf kemm jista` jtul (Ara Amato Gauci vs Malta §80);

Illi, min-naha l-ohra, sejbien ta` ksur ta` jedd fundamentali jitlob l-ghoti ta` rimedju effettiv, kemm fil-prattika u kif ukoll fil-ligi, b`mod li l-ghoti wahdu ta` kumpens jista` ma jitqiesx bhala rimedju tajjeb bizzejjed. F`kazijiet ta` dawn l-ahhar zmien, il-Qorti fi Strasbourg qieset li r-rimedju tat-tnehhija tal-okkupant minn post kien ir-rimedju effettiv li messu nghata, u li ghat-tbatija li ggarrab il-parti mnehhija jrid jaghmel tajjeb l-Istat Malti (Ara Q.E.D.B. 30.8.2016 fil-kawza fl-ismijiet Apap Bologna vs Malta (Applik. Nru. 46931/12) §§ 76 sa 91 (kaz li jirrigwarda Ordni ta` Rekwizizzjoni);

Illi f`dan ir-rigward u wara li hasbet fit-tul, il-Qorti taghzel li taghmel taghha l-principji imwettqa mill-Qorti Kostituzzjonali f`cirkostanza bhal din (Ara Kost. 31.1.2014 fil-kawza fl-ismijiet Dr. Cedric Mifsud et vs L-Avukat Generali et §§ 32 – 36) u tghid li l-intimati Ganado ma jistghux jibqghu jinqdew bid-dispozizzjonijiet tal-artikolu 12 tal-kapitolu 158 tal-Ligijiet ta` Malta ladarba b`dak il-mod ir-rikorrent ikun qieghed igarrab ksur tal-jedd tieghu taht l-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni. Min-naha l-ohra, huwa wkoll stabbilit li mhuwiex il-kompitu ta` Qorti mitluba tistharreg ilment ta` ksur ta` jedd fundamentali dwar it-tgawdija bil-kwiet tal-gid u

l-ghoti ta` kumpens xieraq biex tordna t-tnehhija mill-post tal-okkupant li jkun. F`kaz bhal dak, ir-rimedju jrid jitfittex quddiem it-tribunal xieraq li lilu l-ligi taghti l-kompetenza specjali biex iqis kwestjonijiet bhal dawn. Dan jinghad ukoll minkejja li din il-Qorti tgawdi setghat wesghin ta` rimedju li tista` taghti f`kaz li ssib ksur ta` xi jedd fundamentali tal-parti attrici;

Illi, kif inghad aktar qabel, ladarba fil-kaz tallum hemm kirja li ghadha fis-sehh fiz-zmien "konvenzjonali" taghha, il-kwestjoni tat-tnehhija mill-post tal-intimati Ganado tkun tfisser li b`dak il-kuntratt u minghajru, il-jeddijiet pattwiti taghhom ikunu ngabu fix-xejn. Jixraq li l-kwestjoni tas-siwi u z-zamma fis-sehh ta` dak il-kuntratt jitqiesu ghalhekk mit-tribunal xieraq f`azzjoni apposta;

Illi ghalhekk, ghall-finijiet tal-istess tieni talba tar-rikorrenti, il-Qorti sejra tordna li l-intimati Ganado ma jistghux jistriehu izjed fuq id-dispozizzjonijiet tal-artikolu 12 tal-kapitolu 158 tal-Ligijiet ta` Malta biex jiggustifikaw iz-zamma taghhom tal-post tar-rikorrent."

(ara wkoll : **Catherine Cauchi et vs Avukat Generali et** : op cit ; **Cassar Torreggiani vs Avukat Generali et** : op. cit. : u **Victor Portanier et vs Avukat Generali et** deciza mill-Qorti Kostituzzjonali fid-29 ta` April 2016 - fost ohrajn).

Fid-decizjoni illi tat l-ECHR fil-kaz ta` **Frendo Randon and Others v. Malta** tat-22 ta` Frar 2012 inghad illi :-

16. As the Court has held on a number of occasions, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see Iatridis v. Greece (just satisfaction) [GC}, no. 31107/96 §32, ECHR 2000- XI, and Guiso- Gallissay v. Italy Just satisfaction) [GC], no. 58858/00, § 90, 22 December 2009). The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of

execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the violation allows of restitutio in integrum it is the duty of the State held liable to effect it, the Court having neither the power nor the practical possibility of doing so itself. If; however, national law does not allow - or allows only partial reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate."

Tghodd ukoll il-konkluzjoni li waslet ghaliha l-ECHR fil-kaz ta` **Lindheim and Others vs Norway** tat-12 ta` Gunju 2012 :-

"Whilst in reaching the above conclusion the Court has focused on the particular circumstances of the applicants` individual complaints, it adds by way of a general observation that the problem underlying the violation of Article 1 of Protocol No. 1 concerns the legislation itself and that its findings extend beyond the sole interests of the applicants in the instant case. This is a case where the Court considers that the respondent State should take appropriate legislative and/or other general measures to secure in its domestic legal order a mechanism which will ensure a fair balance between the interests of lessors on the one hand, and the general interests of the community on the other hand, in accordance with the principles of protection of property rights under the Convention."

Fil-fehma ta` din il-Qorti, il-proceduri kostituzzjonali mhumiex il-forum addattat sabiex jigi deciz jekk inkwilin ghandux jigi zgumbrat jew le.

Dak li huwa rilevanti hija l-konsiderazzjoni li, fil-kaz li jirrizulta illi ligi tikser jeddijiet fondamentali ta` parti, dik il-ligi m`ghandhiex tibqa` tinghata effett bejn il-partijiet dment illi l-applikazzjoni taghha tkun leziva ghad-drittijiet fundamentali ta` dik il-parti.

Din il-Qorti tghid illi t-talba ghall-izgumbrament inserita fit-tielet talba tohrog barra mill-parametri ta` procediment ta` din ix-xorta.

Ghalhekk mhijiex sejra tordna l-izgumbrament tal-intimati Scicluna mill-fond de quo.

Daqstant dwar it-talba ghall-izgumbrament tal-intimati konjugi Scicluna, mill-fond de quo.

Fl-ambitu tat-tielet talba tar-rikorrenti, il-Qorti sejra tiddikjara illi l-Art 12 tal-Kap 158 m`ghandux jibqa` applikabbli. Ghalhekk l-intimati l-intimati konjugi Scicluna m`ghandhomx jibqghu jinvokaw din id-disposizzjoni sabiex f`sede ohra mhux din ighidu li ghandhom jibqghu jokkupaw il-fond de quo.

X. <u>L-cccezzjoni numerata 15 tal-Avukat Generali</u>

Dwar din l-eccezzjoni, il-Qorti tikkondividi d-decizjoni li tat il-Qorti Kostituzzjonali fil-5 ta` Lulju 2011 fil-kawza fl-ismijiet **<u>Victor Gatt et vs Avukat Generali et</u>** fejn inghad hekk:

> *"Id-decizjoni li d-dikjarazzjoni ta` vjolazzjoni wahedha tkun bizzejjed hija l-eccezzjoni u ghandha tkun riservata ghal kazijiet fejn hemm rimedju jew konsegwenzi huma zghar. Fil-kazijiet l-ohra fejn il-lezjoni hija aktar serja l-Qorti ghandha taghti kumpens pekunjarju ghal dik il-vjolazzjoni."*

Hija l-fehma ta` din il-Qorti illi fil-kaz prezenti, ma jistax ikun hemm *restitutio in integrum.* Min-naha l-ohra, semplici dikjarazzjoni ta` vjolazzjoni ma tkunx bizzejjed wahedha sabiex tikkumpensa lir-rikorrenti ghall-piz sproporzjonat u eccessiv illi garrbu minhabba l-applikazzjoni tad-disposizzjonijiet tal-ligi li qeghdin jigu mpunjati.

L-eccezzjoni qeghda tkun rigettata.

Decide

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

Tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel (1) eccezzjoni tal-intimati konjugi Scicluna billi din kienet irtirata fil-mori tal-kawza.

Tichad it-tieni (2), t-tielet (3) u l-hames (5) eccezzjoni tal-intimati konjugi Scicluna.

Tastjeni milli tiehu konjizzjoni ulterjuri tal-eccezzjonijiet l-ohra tal-intimati konjugi Scicluna.

Tipprovdi dwar ir-raba` (4) u l-hames (5) eccezzjonijiet tal-Avukat Generali billi tiddikjara li bl-applikazzjoni tad-disposizzjonijiet tal-ligi in kwistjoni, ma kienx hemm da parti tal-Istat tehid forzuz jew obbligatorju tal-propjeta` tar-rikorrenti, izda kontroll fl-uzu ta` dik il-propjeta`.

Tipprovdi dwar il-hdax (11) l-eccezzjoni tal-intimat Avukat Generali billi tiddikjara illi l-intimati konjugi Scicluna m`ghandhomx jigu zgumbrati mill-fond 115/2, Triq il-Kullegg l-Antik, Sliema.

Tichad il-bqija ta` l-eccezzjonijiet tal-intimat Avukat Generali.

Riferibbilment ghall-ewwel (1) talba tar-rikorrenti, tiddikjara li bl-applikazzjoni tal-Art 12(2) u (3) tal-Kap 158 tal-Ligijiet ta` Malta, saret lezjoni tal-jedd tar-rikorrenti ghat-tgawdija tal-fond 115/2, Triq il-Kullegg l-Antik, Sliema, propjeta` tar-rikorrenti Mary Fatima Vassallo, bi ksur tal-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali,

Riferibbilment ghat-tieni (2) talba, tillikwida favur ir-rikorrenti s-somma globali ta` ghoxrin elf Ewro (EUR 20,000) in kwantu ghal hmistax-il elf Ewro (EUR 15,000) bhala danni pekunjarji, u in kwantu ghal hamest elef Ewro (EUR 5,000) bhala danni morali ghall-vjolazzjoni subita tad-drittijiet taghhom skont l-ewwel talba.

Tiddikjara u tiddeciedi illi l-intimat Avukat Generali wahdu huwa responsabbli sabiex ihallas il-kumpens likwidat favur ir-rikorrenti.

Riferibbilment ghat-tielet (3) talba, filwaqt li qeghda tichad it-talba tar-rikorrenti ghall-izgumbrament tal-intimati konjugi Scicluna mill-fond in kwistjoni, fl-istess waqt qeghda tiddikjara u tiddeciedi wkoll illi l-intimati konjugi Scicluna ma jistghux jistriehu izjed fuq id-dispozizzjonijiet tal-Art. 12 tal-Kap. 158 tal-Ligijiet ta` Malta sabiex jibqghu jokkupaw u joqghodu fil-fond fuq riferit.

Tordna li l-ispejjez kollha ta` din il-kawza ghandhom jithallsu in kwantu ghal nofs mir-rikorrenti u in kwantu ghal nofs mill-intimat Avukat Generali.

Tordna lir-Registratur tal-Qorti sabiex kif appena din is-sentenza tghaddi in gudikat jibghat kopja taghha lill-Ispeaker tal-Kamra tad-Deputati kif irid l-Artikolu 242 tal-Kapitolu 12 tal-Ligijiet ta` Malta.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur