QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON

Illum il-Hamis 30 ta` Mejju 2019

Kawza Nru. 2
Rikors Nru. 62/2016 JZM

Nadia Vella [detentrici tal-karta ta` l-identità bin-numru : 17276 (G)]

u

Christopher Craven [detentur tal-karta ta` l-identità bin-numru : 108178 (A)]

kontra

L-Avukat Generali

u

Joseph Camilleri [detentur tal-karta ta` l-identità bin-numru : 458091 (M)],

dan ta` l-ahhar ghal kull interess illi jista` jkollu

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors li kien prezentat fl-<u>20 ta` Gunju 2016</u> u li jaqra hekk :–

1. <u>Introduzzjoni</u>

1.1. L-esponenti ser jibdew billi jispjegaw il-fatti illi wasslu ghall-prezentata ta` dan ir-rikors;

1.2. L-esponenti Nadia Vella u l-intimat Joseph Camilleri kienu mizzewgin u miz-zwieg taghhom kellhom tifel wiehed, il-minuri Eric Camilleri, li twieled nhar il-5 ta` Marzu, 2006;

1.3. L-esponenti Nadia Vella u l-intimat Joseph Camilleri isseparaw personalment permezz ta` kuntratt ta` separazzjoni personali ippubblikat min-Nutar Dottor Paul George Pisani nhar l-14 ta` Jannar, 2008, kopja ta` liema qeghda tigi hawn annessa u mmarkata bhala "<u>Dokument NV1</u>". Fost affarijiet ohra, f`dan il-kuntratt ta` separazzjoni personali l-esponenti Nadia Vella u l-intimat Joseph Camilleri ftehmu illi kull wiehed u wahda minnhom huma awtorizzati jghixu hajjithom indipendentament u li l-ebda wahda mill-partijiet ma jkollha xi setgha tindahal lill-parti l-ohra fil-hajja privata

taghha. Gie miftiehem illi r-residenza tal-minuri Eric Camilleri ghandha tkun ma` l-esponenti Nadia Vella u li l-intimat Joseph Camilleri ghandu jkollu access ghall-imsemmi minuri. Dak iz-zmien l-esponenti Nadia Vella u l-intimat Joseph Camilleri kienu jghixu Ghawdex;

*1.4. Sussegwentament, l-esponenti Nadia Vella talbet lill-Qorti tal-Magistrati (Ghawdex) Gurisdizzjoni Superjuri Sezzjoni tal-Familja illi hija tigi awtorizzata tghix Malta u tirregistra lill-minuri Eric Camilleri fi skola gewwa Malta u dik il-Qorti b`digriet moghti minnha nhar it-23 ta` Lulju, 2009 laqghet it-talbiet ta` l-esponenti Nadia Vella u ipprovdiet bl-mod li jirrizulta minn dak id-digriet. Kopja ta` l-atti relattivi qeghda tigi hawn annessa u mmarkata bhala "<u>Dokument NV2</u>". L-intimat Joseph Camilleri minn hemm beda battalja legali qalila kontra l-esponenti inkluz bi proceduri mibdija minnu quddiem il-Qorti Civili (Sezzjoni Familja) bir-rikors mahluf bin-numru: 302/2012/AL fl-ismijiet **Joseph Camilleri v. Nadia Vella** li bhalissa ghadhom pendenti;*

1.5. Nel frattemp, l-intimat Joseph Camilleri beda relazzjoni intima ma` certa Melissa Grima li ilu maghha ghal madwar dawn l-ahhar hames (5) snin u minnha l-intimat Joseph Camilleri ghandu tifel li ghandu madwar sena u nofs. Melissa Grima gjà ghandha tifla minn terzi li ghandha madwar disa` (9) snin. Min-naha taghha, l-esponenti Nadia Vella ghandha relazzjoni mar-rikorrenti l-iehor Christopher Craven, bhalissa qeghda tistenna tarbija minghandu u huma behsiebhom jizzewgu. L-intimat Joseph Camilleri mhuwiex jaccetta l-fatt illi l-esponenti Nadia Vella u Christopher Craven ghandhom il-hajja privata taghhom li jixtiequ jghixu fil-paci. B`rikors ipprezentat minnu fl-atti tal-kawza imsemmija fil-paragrafu precedenti nhar l-24 ta` Lulju, 2015 talab, fost affarijiet ohra, illi l-minuri Eric Camilleri jibda jghix mieghu u jittiehed minghand l-esponenti Nadia Vella bl-ghajnuna tal-marixxalli u tal-pulizija ezekuttiva, filwaqt li allega sensiela shiha ta` menzonji fil-konfront ta` l-esponenti. B`digriet moghti mill-Qorti Civili (Sezzjoni tal-Familja) fl-atti tar-rikors mahluf bin-numru: 302/2012/AL fl-ismijiet **Joseph Camilleri v. Nadia Vella** nhar l-1 ta` Ottubru, 2015 dik il-Qorti ordnat, fost affarijiet ohra, dan illi gej: Tordna illi Nadia Vella ma tesponix aktar lill-minuri ghal partner taghha u dan <u>b`effett immedjat</u>. Kopja tar-rikors u d-digriet relattiv qeghdin

jigu hawn annessi u mmarkati bhala "<u>Dokument NV3</u>". Kif jidher mill-istess digriet li ghalih qeghda issir referenza, kien gjà gieipprezentat rapport ta` l-Avukat tat-Tfal, li huwa issiggilat b`ordni tal-Qorti Civili (Sezzjoni tal-Familja) u li ghalih la l-esponenti Nadia Vella u lanqas l-intimat Joseph Camilleri ma ghandhom access u inhatret ukoll il-Psikologa Carmen Sammut illi halfet ir-relazzjoni taghha nhar il-25 ta` Novembru, 2015, kopja ta` liema qeghda tigi hawn annessa u mmarkata bhala "<u>Dokument NV4</u>". Filwaqt illi ma irrizulta xejn hazin jew ta` perikolu ghall-minuri Eric Camilleri ghal dak illi huwa kuntatt u relazzjoni li l-minuri lahaq stabbilixxa ma` l-esponenti Christopher Craven, anzi irrizulta illi l-minuri xtaq illi jara lill-esponenti Christopher Craven, il-Qorti Civili (Sezzjoni tal-Famlja) ma irrevokatx id-digriet taghha precedentament moghti minnha li bih ordnat lill-esponenti Nadia Vella ma tesponix lill-minuri Eric Camilleri ghall-partner taghha. L-esponenti Nadia Vella talbet lill-Qorti Civili (Sezzjoni tal-Familja) tirrevoka l-ordni li biha hija giet ordnata li ma tesponix lil binha Eric Camilleri ghall-esponenti Christopher Craven izda l-intimat Joseph Camilleri oggezzjona u dik il-Qorti cahdet it-talba ta` l-esponenti Nadia Vella minghajr ma tat ragunijiet specifici ghaliex l-esponenti ma jistghux ikunu fil-prezenza ta` xulxin meta l-esponenti Nadia Vella jkollha lil binha Eric Camilleri maghha filwaqt illi l-intimat Joseph Camilleri jista` jesponi lill-imsemmi minuri ghal prezenza tas-siehba tieghu. L-effett ta` din l-ordni moghtija mill-Qorti Civili (Sezzjoni tal-Familja) mhuwiex negligibbli ghaliex, kif ser jirrizulta ampjament matul it-trattazzjoni ta` dan ir-rikors, wassal sabiex l-esponenti u l-minuri Eric Camilleri sahansitra jitilfu vaganza li kienu gjà ibbukkjaw. Inoltre, ghalkemm l-esponenti Nadia Vella talbet illi l-Qorti Civili (Sezzjoni tal-Famlja) tisma` lill-esponenti Christopher Craven kif ukoll illi tigi ezaminata r-relazzjoni li huwa bena mal-minuri Eric Camilleri, dik il-Qorti cahdet it-talba ta` l-esponenti Nadia Vella u dan ghal darb`ohra ghall-ebda raguni specifika. Ir-rikorsi u t-talbiet kollha ta` l-esponenti Nadia Vella gew degretati minghajr smiegh. Dan kollu qieghed jaffettwa negattivament ir-relazzjoni ta` l-esponenti u l-qaghda ta` l-esponenti Nadia Vella li hija tqila u ghandha kull dritt illi jkollha l-assistenza ta` missier it-tarbija li qeghda tistenna matul it-tqala taghha aktar u aktar meta ma tezisti l-ebda raguni – hlief il-pika da parti ta` l-intimat Joseph Camilleri – ghaliex hija ghandha tghix b`mod separat minn mas-sieheb taghha l-esponenti Christopher Craven;

2. L-ilment konvenzjonali ta` l-esponenti

2.1. Spjegati l-fatti illi wasslu ghall-prezentata ta` dan ir-rikors, l-esponenti ser jghaddu sabiex jispjegaw l-ilmenti taghhom mil-lenti tad-drittijiet fundamentali;

2.2. Fl-ewwel lok, l-esponenti jsostnu illi d-digriet moghti mill-Qorti Civili (Sezzjoni tal-Familja) li permezz tieghu l-esponenti Nadia Vella giet ordnata li ma tesponix lill-minuri Eric Camilleri ghall-partner taghha, l-effetti ta` dak id-digriet u d-digrieti kollha illi bihom dik il-Qorti cahdet it-talbiet ta` l-esponenti Nadia Vella sabiex il-parti relattiva tad-digriet imsemmi tigi varjata u jew revokata jikkostitwixxu lezjoni ta` l-artikolu 8 tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali inkorporata fil-Ligijiet ta` Malta bis-sahha tal-Kap. 319 tal-Ligijiet ta` Malta in kwantu, fic-cirkostanzi tal-kaz odjern, jikkostitwixxu ksur, certament mhux gustifikat, tad-dritt ghar-rispett tal-hajja privata u/jew tal-familja ta` l-esponenti. L-esponenti ma jistghux jghixu hajjithom flimkien bhal kull koppja ohra minhabba l-imsemmi digriet moghti mill-Qorti Civili (Sezzjoni tal-Familja). Il-lezjoni hija aktar serja fil-kaz odjern ghaliex l-esponenti qeghdin f`relazzjoni serja, qeghdin jistennew tarbija u l-esponenti Christopher Craven kien lahaq bena relazzjoni mal-minuri Eric Camilleri wkoll. L-esponenti mhux biss ma jistghux jghixu flimkien izda la jistghu isiefru flimkien u lanqas jistghu ikunu fil-prezenza ta` xulxin meta l-minuri Eric Camilleri jkun ma` l-esponenti Nadia Vella. L-esponenti Nadia Vella ghandha bzonn illi missier it-tarbija li qeghda tistenna, l-esponenti Christopher Craven, ikun prezenti l-hin kollu maghha u joffrilha kull assistenza li jista` matul it-tqala taghha meta evidentament ma jistax jaghmel dan sakemm id-digriet moghti mill-Qorti Civili (Sezzjoni tal-Familja) jibqa` fis-sehh. F`socjetà moderna u demokratika huwa accettat u accettabbli illi persuna li qabel kienet mizzewga ghandha dritt illi terga` tibni hajjitha mill-gdid ma` terza persuna minghajr indhil jew interferenza li tkun verament gustifikabbli;

2.3. Fit-tieni lok, l-esponenti jsostnu illi l-process quddiem il-Qorti Civili (Sezzjoni tal-Familja) fl-atti tar-rikors mahluf bin-numru: 302/2012/AL fl-ismijiet ***Joseph Camilleri v. Nadia Vella****, inkluzi izda*

mhux limitati, id-digriet moghti mill-Qorti Civili (Sezzjoni tal-Familja) li permezz tieghu l-esponenti Nadia Vella giet ordnata li ma tesponix lill-minuri Eric Camilleri ghall-partner taghha, l-effetti ta` dak id-digriet u d-digrieti kollha illi bihom cahdet it-talbiet ta` l-esponenti Nadia Vella sabiex il-parti relattiva tad-digriet imsemmi tigi varjata u jew revokata u inkluz ukoll id-digriet li bih giet michuda t-talba ta` l-esponenti Nadia Vella sabiex tinghata udjenza fejn jinstema` l-esponenti Christopher Craven u tigi mahtura esperta psikologa sabiex tigi ezaminata r-relazzjoni li huwa bena mal-minuri Eric Camilleri jikkostitwixxu lezjoni ta` l-artikolu 6 tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali inkorporata fil-Ligijiet ta` Malta bis-sahha tal-Kap. 319 tal-Ligijiet ta` Malta u dana ghas-segwenti ragunijiet :-

(i) in kwantu ghall-esponenti Christopher Craven huwa umilment sottomess illi d-dritt fundamentali tieghu taht l-artikolu 6 tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali inkorporata fil-Ligijiet ta` Malta bis-sahha tal-Kap. 319 tal-Ligijiet ta` Malta gie lez b`mod partikolari billi huwa gie mcahhad mid-dritt tieghu ta` access ghall-Qorti u dana peress illi l-Qorti Civili (Sezzjoni tal-Familja) ghaddiet gudizzju dwaru u cjoè li ma jistax ikun fil-prezenza tal-minuri Eric Camilleri, minghajr ma huwa parti f`dawk il-proceduri, minghajr ma inghata smiegh u jew saru l-accertamenti mehtiega u dan minkejja l-fatt illi l-esponenti Nadia Vella talbet udjenza u li jsir dan kollu;

(ii) in kwantu ghall-esponenti Nadia Vella u ghall-esponenti Christopher Craven, jew min minnhom, huwa umilment sottomess illi d-dritt fundamentali taghhom taht l-artikolu 6 tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali inkorporata fil-Ligijiet ta` Malta bis-sahha tal-Kap. 319 tal-Ligijiet ta` Malta gie lez in kwantu r-rapport ta` l-Avukat tat-Tfal ipprezentat nhar id-29 ta` Settembru, 2015 illi presumibbilment wassal sabiex il-Qorti Civili (Sezzjoni tal-Familja) tordna lill-esponenti Nadia Vella sabiex ma tesponix lill-minuri Eric Camilleri ghall-esponenti Christopher Craven huwa issigillat b`ordni ta` dik il-Qorti stess u mhuwiex accessibbli ghall-partijiet meta almenu l-partijiet fil-kawza ghandhom kull dritt li

jaraw kull prova, dokument, rapport jew relazzjoni li tkun parti mill-process civili fejn jigu determinati d-drittijiet u l-obbligi taghhom;

(iii) in kwantu ghall-esponenti Nadia Vella huwa umilment sottomess illi d-dritt fundamentali taghha taht l-artikolu 6 tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali inkorporata fil-Ligijiet ta` Malta bis-sahha tal-Kap. 319 tal-Ligijiet ta` Malta gie lez ghaliex decizjonijiet importanti hafna li qeghdin jaffettwaw il-hajja taghha inghataw minghajr ma l-Qorti Civili (Sezzjoni tal-Familja) tat oral hearing. Fis-sentenza moghtija mill-Qorti Ewropea dwar id-Drittijiet u l-Libertajiet Fundamentali tal-Bniedem nhar il-21 ta` Settembru, 2006 fl-ismijiet* ***Moser v. Austria*** *gie ritenut illi According to the Court`s case-law, the right to a public hearing under Article 6 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, Stallinger and Kuso v. Austria, judgment of 23 April 1997, Reports 1997-II, pp. 679-80, § 51, and Allan Jacobsson v. Sweden (no. 2), judgment of 19 February 1998, Reports 1998-I, p. 168, § 46). 92. In the present case, there were no such circumstances. Neither did the proceedings concern highly technical issues or purely legal questions (see, as regards these criteria, Schuler-Zgraggen v. Switzerland, judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58, and Varela Assalino v. Portugal (dec.), no. 64336/01, 25 April 2002). Thus, the first applicant was entitled to a hearing. Fis-sentenza moghtija mill-"Grand Chamber" tal-Qorti Ewropea dwar id-Drittijiet u l-Libertajiet Fundamentali tal-Bniedem nhar il-15 ta` Ottubru, 2009 fl-ismijiet ***Micallef v. Malta*** *ir-regoli tal-fair and public trial gew applikati ghal provvedimenti provvizorji kontemplati mil-ligi taghna: issa jekk interim measure fuq proprjetà iggib maghha l-obbligu tal-garanziji kollha tal-fair and public trial, kemm dan ghandu japplika aktar ghall-mizuri li jolqtu l-hajja privata u tal-familja ta` l-esponenti ?*

(iv) in kwantu ghall-esponenti Nadia Vella huwa umilment sottomess illi d-dritt fundamentali taghha taht l-artikolu 6 tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali inkorporata fil-Ligijiet ta` Malta bis-sahha tal-Kap. 319 tal-Ligijiet ta` Malta gie lez in kwantu hija ma ghandha l-

ebda rimedju effettiv u l-ebda access veru u proprju ghall-Qorti in kwantu hija tixtieq timpunja d-digrieti moghtija mill-Qorti Civili (Sezzjoni tal-Familja) li permezz taghhom hija giet ordnata li ma tesponix lill-minuri Eric Camilleri ghall-partner taghha u d-digrieti kollha illi bihom cahdet it-talbiet ta` l-esponenti Nadia Vella sabiex il-parti relattiva tad-digriet imsemmi tigi varjata u jew revokata izda l-uniku mezz ta` kontestazzjoni li jezisti huwa li l-esponenti Nadia Vella taghmel rikors lill-istess Qorti presjeduta mill-istess gudikant fejn titlob lill-istess gudikant li jdawwar il-fehma tieghu precedentament espressa meta huwa altru milli evidenti li f`dan il-kaz partikolari l-esponenti Nadia Vella ma hijiex qeghda tinghata widen ghal dawn it-talbiet taghha u ma hija ser qatt tinghata widen sakemm dan ikun l-uniku mezz ta` kontestazzjoni. Inoltre issostni li l-mod imsemmi hawn fuq li bih jinghataw id-digrieti fejn il-gudikant sedenti lanqas biss taghti raguni jew raguni specifika huwa leziv ta` l-istess jedd fundamentali hawn invokat kif ser jirrizulta ahjar matul it-trattazzjoni ta` dan ir-rikors;

3. <u>Konkluzjoni</u>

3.1. Ghal dawn ir-ragunijiet kollha, l-esponenti umilment jitolbu illi dina l-Onorabbli Qorti jghogobha :

(i) fl-ewwel lok, tiddikjara u tiddeciedi illi l-fatti suesposti jaghtu lok ghal u jikkostitwixxu ksur tad-drittijiet fundamentali ta` l-esponenti senjatament l-artikolu 8 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali inkorporata fil-Ligijiet ta` Malta bis-sahha tal-Kap. 319 tal-Ligijiet ta` Malta;

(ii) fit-tieni lok, tiddikjara u tiddeciedi illi l-fatti suesposti jaghtu lok ghal u jikkostitwixxu ksur tad-drittijiet fundamentali ta` l-esponenti senjatament l-artikolu 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali inkorporata fil-Ligijiet ta` Malta bis-sahha tal-Kap. 319 tal-Ligijiet ta` Malta;

(iii) konsegwentament taghti dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex twettaq, jew tizgura t-twettiq tad-drittijiet fundamentali ta` l-esponenti hekk kif garantiti taht il-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali u dana billi, fost affarijiet ohra, thassar u tannulla d-digriet moghti mill-Qorti Civili (Sezzjoni tal-Familja) nhar l-1 ta` Ottubru, 2015 fl-atti tar-rikors mahluf bin-numru : 302/2012/AL fl-ismijiet ***Joseph Camilleri v. Nadia Vella*** *in kwantu l-esponenti Nadia Vella giet ordnata ma tesponix lill-minuri Eric Camilleri ghall-partner taghha b`effett immedjat;*

(iv) tikkundanna lill-intimati, jew min minnhom, ihallsu d-danni sofferti mill-esponenti minhabba tali vjolazzjonijiet.

Bl-ispejjez kontra l-intimati.

Rat ir-risposta li pprezenta l-Avukat Generali fit-<u>2 ta` Novembru 2016</u> li taqra hekk :-

(I) *Illi in linea preliminari, jidher li l-azzjoni odjerna hi intempestiva stante li r-rikorrenti ma esawrewx ir-rimedji ordinarji disponibbli ghalihom skont il-ligi u ghalhekk din l-Onorabbli Qorti ghandha tiddeklina milli tiehu konjizzjoni ulterjuri tar-Rikors Promotur odjern u dan ai termini tal-Artikolu 4(2) tal-Konvenzjoni Ewropeja;*

(II) *Illi subordinatament u minghajr pregudizzju ghas-suespost, l-esponent jirribatti li fic-cirkostanzi odjerni mhux minnu li kien hemm vjolazzjoni tal-Artikoli 6 u 8 tal-Konvenzjoni Ewropea fil-konfront tar-rikorrenti u dan ghar-ragunijiet segwenti li qed jigu elenkati minghajr pregudizzju ghal xulxin :-*

(i) Illi t-talbiet kif dedotti fir-Rikors Promotur huma insostenibbli stante li dato ma non concesso li l-allegazzjonijiet tar-rikorrenti huma fondati, xorta wahda ma jsegwix li dawn jaghtu lok ghan-nuqqas ta` smigh xieraq. Kif tghallimna l-Gurisprudenza nostrana, id-dritt ghas-smigh xieraq jiggarantixxi l-aderenza ma certi principji procedurali li huma konducenti ghall-amministrazzjoni tajba tal-gustizzja. Fil-fatt, din l-Onorabbli Qorti fil-mansjoni Kostituzzjonali taghha hija kompetenti biss biex tiddeciedi jekk gewx lezi xi drittijiet fondamentali kif protetti bil-Kostituzzjoni u bil-Konvenzjoni Ewropeja u mhux li tirrevedi d-digrieti tal-Qrati l-ohra sabiex tiddeciedi jekk dawn gewx decizi korrettament o meno[1];

(ii) Illi inoltrè, l-azzjoni odjerna hija infondata fil-fatt u fid-dritt stante li fic-cirkostanzi odjerni, il-Qorti koncernata iddecidiet skont il-ligi wara li ezercitat id-diskrezzjoni taghha b`mod ragjonevoli fl-ambitu tal-gustizzja. Ghandu jinghad li, il-fatt uniku li t-talbiet tal-intimat Joseph Camilleri iltaqghu ma jikkostitwix ksur awtomatiku tad-drittijiet fundamentali tar-rikorrenti odjerni;

***(III)** Illi dejjem minghajr pregudizzju ghas-suespost u ghar-ragunijiet fuq esposti, l-ebda rimedju u/jew danni m`hu dovut lir-rikorrenti stante li c-cirkostanzi tal-kaz ma jirraprezentaw l-ebda ksur tad-drittijiet fundamentali tar-rikorrenti kif protetti mill-Artikoli 6 u 8 tal-Konvenzjoni Ewropeja u dan in kwantu jidher mill-atti processwali in kwistjoni, li l-Qorti koncernata mexxiet l-imsemmija proceduri b`mod ragjonevoli u skont id-dettami tal-gustizzja f`cirkostanzi litigjuzi ferm kombattuti bejn il-partijiet koncernati;*

***(IV)** Illi finalment, dato ma non concesso li din l-Onorabbli Qorti jidhrilha li gew lezi xi drittijiet tar-rikorrenti, fl-umli fehma tal-esponent fic-cirkostanzi odjerni, dikjarazzjoni ta` ksur ghandha tkun sufficjenti;*

***(V)** Salv eccezzjonijiet ulterjuri; jekk ikun il-kaz.*

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[1] QK *J.E.M. Investments Limited v. Avukat Generali et* [30.09.2011]

Ghaldaqstant l-esponent, jitlob bir-rispett lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrenti kif dedotti fir-Rikors Promotur bhala infondati fil-fatt u fi-dritt stante li c-cirkostanzi tal-kaz ma jirraprezentaw l-ebda ksur tad-drittijiet fundamentali tar-rikorrenti ai termini tal-Artikoli 6 u 8 tal-Konvenzjoni Ewropeja; bl-ispejjez kontra taghhom.

Rat ir-risposta li pprezenta Joseph Camilleri fit-<u>3 ta` Novembru</u> <u>2016</u> u li taqra hekk :-

<u>Preliminari</u>

1. Illi preliminarjament jinghad illi l-esponent m`huwiex il-legittimu kontradittur u dana stante li huwa qatt ma jista` jirrispondi u/jew jinsab responsabbli ghal-lezjoni tad-dritt tar-rikorrenti;

2. Illi minghajr pregudizzju ghas-suespost u dwar il-mertu jinghad illi t-talbiet tar-rikorrenti mhumiex fondati fil-fatt u fid-dritt u dana kif ser jirrizulta mis-smiegh u trattazzjoni tal-kawza;

3. Illi r-rikorrenti qeghdin sfaccatament jittantaw jabbuzaw minn dawn il-proceduri straordinarji u solenni u juzaw l-istess bhala forma t`appell minn diversi digrieti li inghataw mill-Qorti tal-Familja li kienet propju hi li kellha l-opportunita` tevalwa l-provi prodotti, il-komportament tal-partijiet u x-xhieda taghhom meta ddeponew quddiemha, u ghexet l-iter tal-process fil-vari fazijiet kollha tieghu;

4. Illi, minghajr pregudizzju ghas-suespost, jinghad illi r-rikorrenti lanqas qed ikunu sinciera fid-dikjarazzjonijiet tal-fatti li ssottomettew quddiem din l-Onorabbli Qorti u fil-fatt ghazlu li ma jaghtux id-dettalji kollha pertinenti ghall-kaz odjern;

Dwar l-Vjolazzjoni tal-Artikolu 8 tal-Konvenzjoni

5. Effettivament huwa minnu li l-esponent ilu f`relazzjoni stabbli mal-partner tieghu ghal iktar minn sitt snin u ghandu anke wild mill-istess partner; madanakollu ghalkemm illum Nadia Vella qed tikkwota l-kuntratt ta` separazzjoni tal-kontendenti u cioe` li l-partijiet m`ghandhomx jindahlu f`hajjet xulxin; jinghad li ghal zmien twil matul il-proceduri pendenti quddiem il-Qorti Civili (Sezzjoni Familja) fil-kawza fl-ismijiet Joseph Camilleri v Nadia Vella hija kienet toggezzjona ghall-partner tal-esponent, u dan ghaliex fi kliemha l-minuri ma riedx li din tkun prezenti; tant li fil-bidu tal-proceduri kien hemm anke diversi digrieti f`liema l-esponent kien ordnat ma jesponix lill-minuri ghall-istess partner anke jekk dawn kienu jikkonvivu. L-esponent dejjem ottempera ruhu mal-ordnijiet kollha tal-Qorti u fil-fatt, meta huwa kien ikollu l-access ghall-ibnu, dak iz-zmien, il-partner tieghu kienet anke tmur torqod ghand ommha. Ovvjament l-ghaliex illum inqalbet il-folja u hija hi li ma tistax tesponi lill-minuri ghall-partner taghha, hija ghazlet li tintavola l-proceduri odjerni;

6. Illi jinghad illi d-digriet moghti mill-Qorti Civili (Sezzjoni Familja) inghata wara li Christopher Craven, li sa dak iz-zmien kien jabita ma` Nadia Vella, nhar it-18 ta` Lulju 2015, ghall-habta tas-2.30 ta` filghodu ghazel li jmur wara l-bieb tal-esponent, jheddu li kien ser joqtollu lill-ibnu u jistiednu ghall-glied u fil-fatt huwa anke gara xi pots tal-komun, versu persunt l-esponent. L-esponent anke kellu footage tal-imsemmi Craven jahrab minn fuq il-post wara l-imsemmi incident. Tali fatt gie anke ammess mir-rikorrenti Nadia Vella f`xi atti li hija intavolat quddiem il-Qorti Civili (Sezzjoni Familja), fejn hija anke ammettiet li l-esponent iddefenda ruhu;

7. Illi di piu jinghad illi l-imsemmi digriet tal-1 t`Ottubru 2015, fejn Nadia Vella giet ordnata biex ma tesponix lill-minuri ghall-partner taghha, ir-rikorrent Christopher Craven, inghata wara li l-Avukat tat-Tfal Dr Tanya Sammut Catania, ghat-tielet darba konsekuttiva regghet tkellmet mal-minuri Eric Camilleri fit-tul, u ghamlet ir-rakkomandazzjonijiet taghha;

8. Illi ghalhekk b`referenza ghal-lanjanza tar-rikorrenti li b`xi mod qed jinkisrulhom id-drittijiet fundamentali taghhom, b`tali digriet, l-esponent jaghmel referenza ghall-kawza fl-ismijiet, ***Lanouar Bounab pro et noe vs Avukat Generali et*** *dik l-Onorabbli Qorti kienet iddikjarat illi :-*

"Id-divjet impost mill-Qorti fis-sens li Lanouar Bounab ma jarax lil ibnu, certament jammonta ghall-indhil fil-hajja tal-familja tieghu. Dak li jrid jigi ezaminat pero` hu jekk tali indhil hux gustifikat fit-termini tas-subartikolu (2) ta` l-artikolu 8 in disamina (Konvenzjoni). *<u>Ma hemmx dubbju li f`certi kazijiet fejn ikun hemm kunflitt ta` interess bejn id-drittijiet tal-genituri u l-interessi tat-tfal, l-interessi ta` dawn tal-ahhar ghandhom jipprevalu."</u>*

9. B`zieda mas-suespost, fil-kawza fl-ismijiet* ***Carmelo Mizzi v Mary sive Moira Mizzi*** *deciza mill-Onorabbli Qorti tal-Familja, nhar it-30 ta` Gunju 2015, gie mtenni illi "Rilevanti dak li ntqal mill-Qorti tal-Appell Ingliz f`sentenza fl-ismijiet "Newham London Borough vs AG li kienet qed titratta l-ligi bl-isem The Children Act 1988: "Of course, the words of the statute must be considered, but I do not believe that Parliament intended them to be unduly restrictive when the evidence clearly indicates that a certain course should be taken in order to protect the child[2]."

10. Illi l-gurisprudenza nostrana hija cara u kostanti f`dak li jirrigwarda l-ahjar interess tal-minuri. Effettivament anke fil-kawza fl-ismijiet,* ***L-Avukat Dottor Stephen Thake nomine et vs Joseph Portelli*** *deciza mill-Onorabbli Qorti ta` l-Appell fl-4 ta` Novembru, 1994 intqal illi f`certa kazijiet il-Qorti tista` anke tohrog barra mit-termini li jimpurtawlha l-partijiet fl-att tac-citazzjoni u fit-talbiet taghhom jekk l-interessi tal-minuri hekk jehtiegu. F`sentenza aktar recenti tal-Qorti tal-Appell fl-ismijiet ***Maria Rosaria Micallef vs Alfred Micallef*** *moghtija fit-18 ta` Gunju 2007 intqal hekk: "Principju iehor ben not fil-ligi tal-familja huwa li l-genituri huma obbligati li jagixxu dejjem fl-ahjar interess ta` wliedhom. Huwa dejjem obbligu*

[2] *[1993] 1 FLR 281 at 289, CA.*

tal-Qorti li fil-provvedimenti li taghti tipprova tikseb ghall-ulied dak li jkun ta` l-aqwa utilita` u ta` vantagg ghall-istess ulied. L-Artikolu 47 u 56 ta` l-istess Kodici jaccennaw ghal dan l-obbligu tal-Qorti - sija pure fil-kuncett tal-kura u kustodja - li l-konsiderazzjoni ewlenija tal-Qorti ghandha tkun il-gid ta` l-ulied."

11. Illi fi kwalunkwe kaz, u minghajr pregudizzju ghas-suespost, jinghad illi sfortunatament il-kawza odjerna hija biss mis en scene u dan galadarba bhala stat ta` fatt iz-zewg rikorrenti qed jabitaw flimkien u dan del resto jista` jigi kkonfermat mhux biss mill-esponent, izda anke mill-Marixxalli tal-Qorti u l-Pulizija li anke marru fir-residenza ta` Nadia Vella gewwa San Gwann biex jezegwixxu d-digriet moghti mill-Qorti tal-Familja nhar it-23 t`Awwissu 2016 billi jiehdu lill-minuri Eric ghall-access tal-esponent wara li r-rikorrenti hatfet lill-minuri minn wara l-bieb tad-dar tal-esponent. F`dik l-istanza wkoll, ir-rikorrent Craven kien prezenti u fil-prezenza tal-minuri Eric Camilleri;

<u>Dwar l-Vjolazzjoni tal-Artikolu 6 tal-Konvenzjoni</u>

12. Illi b`zieda u minghajr pregudizzju ghas-suespost, jinghad illi mhux kontestat illi t-talbiet kollha mressqa minn Nadia Vella fir-rigward tar-rikorrent Christopher Craven gew michuda mill-Qorti Civili (Sezzjoni Familja);

13. Illi b`zieda mas-suespost jinghad ukoll ghalkemm illum ir-rikorrenti qed jipprovaw ipengu stampa taghhom infushom bhala xi vittmi tas-sistema, ghandu jigi ribadit illi tali provvediment inghata wara incident serju li bir-rispett kollu lejn ir-rikorrent Christopher Craven, holoq esklussivament u unikament l-istess Craven. Fil-fatt, qabel l-imsemmi rikorrent mara wara l-bieb tar-residenza tal-esponent fis-2.30am, fis-sakra u hedded lilu u lill-ibnu, l-esponent qatt ma kien oggezzjona ghalih;

14. Illi minghajr pregudizzju ghas-suespost jinghad ukoll illi fil-proceduri quddiem il-Qorti Civili (Sezzjoni Familja) li fetah l-esponent principalment biex jirregola l-access tieghu lejn ibnu, m`ghandhomx jindahlu terzi u effettivament l-imsemmi Craven ma kellu l-ebda dritt jew setgha li jitlob li jigi mismugh f`dawk il-proceduri li jolqtu biss lir-rikorrenti Nadia Vella u lill-esponent bhala genituri tal-minuri Eric Camilleri;

15. Illi di piu` u minghajr pregudizzju ghas-suespost, jinghad ukoll illi bir-rispett kollu dovut lejn l-imsemmija rikorrenti, it-talba impustata minn Nadia Vella fl-atti tal-kawza tal-Familja, biex jinstema` l-partner taghha Christopher Craven, saret fi stadju ta` provi attrici u ghalhekk anke proceduralment, ma setghet qatt tintlaqa` stante li f`dak l-istadju kien ghadu qed iressaq il-provi tieghu r-rikorrent;

16. Illi f`dan ir-rigward u minghjar pregudizzju ghas-suespost jinghad ukoll illi effettivament l-esponent ghalaq il-provi tieghu nhar is-6 ta` Lulju 2016. Nadia Vella setghet tressaq lill-partner taghha Christopher Craven bhala xhud taghha ghas-seduta li kien hemm iffissata quddiem l-Perit Legali Dr Gabrielle Buttigieg ghas-7 ta` Settembru 2016 li kienet intiza ghall-provi taghha; madanakollu hija naqqset milli taghmel. Dan kollu juri li l-animu tar-rikorrenti li minkejja li kellhom kull opportunita` quddiem il-Qorti Civili (Sezzjoni Familja) biex isemmghu lehinhom huma ghazlu illi ma jaghmlux dan u dan anke jekk kellhom rimedju facli u disponibbli ferm qabel tigi deciza din il-kawza;

17. Illi di piu` u minghajr pregudizzju ghas-suespost, fir-rigward tal-allegazzjoni li r-rikorrenti soffrew xi pregudizzju rrimedjabbli u nuqqas ta` smiegh xieraq l-ghaliex ir-rapport tal-Avukat tat-Tfal Dr Tanya Sammut Catania huwa ssiggillat; l-esponent iwiegeb illi ghalkemm il-probabbilita` hi li l-imsemmi rapport kellu piz fuq l-eventwali decizjoni tal-Qorti Civili (Sezzjoni Familja) tal-1 t`Ottubru 2015, dan certament illi ma ttiehidx b`mod esklussiv u fil-fatt kien hemm assjem ta` provi, inkluz ritratti, footage, u anki rapporti tal-pulizija;

18. Illi jinghad illi effettivament kif inhu ormai ben risaput, il-prassi hija li biex jigu kkawtelati l-minuri, il-Qorti Civili (Sezzjoni Familja) dejjem tissiggilla r-rapport tal-Avukat tat-Tfal u dan biex il-minuri jkunu dejjem ikkawtelati u jhossuhom komdi jitkellmu liberament minghajr il-bizgha li dak li ser jghidu jista` jkollhom riperkussjonijiet fuqhom `il quddiem;

19. Illi f`dan ir-rigward issir referenza ghall-kawza fl-ismijiet* ***Carmelo Mizzi v Mary sive Moira Mizzi*** *deciza mill-Onorabbli Qorti tal-Familja, nhar it-30 ta` Gunju 2015, fejn il-Qorti tenniet hekk: "Fi proceduri gudizzjarji li jincidu fuq id-drittijiet ta` minuri, il-Qrati taghna ghandhom setghat pjuttost wiesgha u flessibbli sabiex iharsu bl-ahjar mezz possibbli d-drittijiet tal-persuni taht l-eta` magguri. Dan naturalment in omagg ghall-principju kardinali illi l-persuni l-aktar vulnerabbli fis-socjeta` ghandhom jircevu l-akbar protezzjoni possibbli mill-organi kollha tal-istat." F`dik l-istanza il-Qorti kompliet hekk: "Meta si tratta ta` drittijiet tal-minuri vis-à-vis d-drittijiet tal-genituri l-Qorti hija fid-dover li tqis dejjem dak li hu fl-ahjar interess tal-minuri u dan peress li fil-maggor parti tal-kazijiet li jitressqu ghad-decizzjonijiet tal-Qorti tal-Familja, kull decizzjoni immankabilment thalli effett duratur fuq il-hajja tal-minuri u fuq il-hajja ta` dawk ta` madwar il-minuri."

20. Illi fl-imsemmija sentenza ssir referenza wkoll ghall-Artikolu 149 tal-Kap. 16 tal-Ligijiet ta` Malta, li jtenn "B`dak kollu li jinsab f`kull disposizzjoni ohra ta` dan il-Kodici, il-qorti tista`, jekk tigi murija raguni tajba, taghti dawk l-ordnijiet dwar il-persuna jew il-proprjeta ta` persuna li tkun taht l-eta kif jidhrilha xieraq fl-ahjar interessi tat-tifel." L-imsemmi artikolu huwa simili ghall-Artikolu 3 tal-Konvenzjoni tan-Nazzjonijiet Uniti dwar id-Drittijiet tat-Tfal;

21. Illi ghalhekk u tenut kont tac-cirkostanzi partikolari tal-kaz odjern, l-esponent jopponi ghat-talbiet kollha mressqa mir-rikorrenti;

22. Illi finalment l-esponent jopponi ghall-ispejjez tal-proceduri odjerni;

Salv eccezzjonijiet ulterjuri.

Bl-ispejjez kontra r-rikorrenti.

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

Rat in-noti ta` osservazzjonijiet li pprezentaw l-intimati.

Semghet is-sottomissjonijiet tal-ahhar bil-fomm li saru mid-difensuri tal-partijiet kollha.

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

Rat l-atti l-ohra tal-kawza.

II. Provi

Nadia Vella xehdet illi kienet mizzewga mal-intimat u minn dan z-zwieg kellhom tifel wiehed jismu Eric li twieled fil-5 ta` Marzu 2006. Huma kienu sseparaw permezz ta` kuntratt ta` separazzjoni fl-atti tan-Nutar Paul George Pisani tal-14 ta` Jannar 2008. F`dan l-kuntratt kien miftiehem illi kull parti setghet tghix il-hajja taghha indipendentement mill-parti l-ohra, u li l-ebda parti ma kellha tindahal fil-hajja privata tal-parti l-ohra. Kien miftiehem ukoll illi l-minuri kellu joqghod mar-rikorrenti bl-intimat ikollu access. Dak iz-zmien il-konjugi Vella kienu joqghodu Ghawdex. Iz-zwieg taghhom kien annullat ukoll mit-Tribunal Ekklezjastiku.

Kompliet tixhed illi wara ftit zmien ghamlet talba fil-Qorti ta` Ghawdex sabiex tkun awtorizzata tghix Malta u tirregistra lit-tifel fi skola go Malta. B`digriet tat-23 ta` Lulju 2009, il-Qorti awtorizzatha taghmel hekk. In segwitu, l-intimat Camilleri beda proceduri fil-konfront taghha bin-numru 302/2012 fl-ismijiet **Joseph Camilleri vs Nadia Vella**.

Stqarr illi wara l-intimat beda relazzjoni ma` mara ohra u minn din ir-relazzjoni twieled tifel. Min-naha taghha, hija ghandha relazzjoni mar-rikorrent l-iehor Christopher Craven u minn din ir-relazzjoni twieldet tifla. Il-hsieb taghhom huwa li jizzewgu.

Qalet illi fl-24 ta` Lulju 2015, l-intimat ipprezenta rikors fl-atti tal-kawza Nru. 302/2012 fejn talab sabiex binhom Eric jibda jghix mieghu. B`digriet tal-1 ta` Ottubru 2015, il-Qorti *inter alia* ordnatilha sabiex *"ma tesponix aktar lill-minuri ghal partner taghha u dan b`effett immedjat."* Hija ghamlet talba sabiex dik l-ordni tkun revokata izda Camilleri oggezzjona u l-Qorti cahdet t-talba taghha minghajr raguni. Min-naha l-ohra ma nghatat l-ebda ordni sabiex Camilleri ma jesponix lil Eric ghall-partner tieghu.

Fissret illi fit-12 ta` Gunju 2015 hija kienet ipprezentat rikors fejn kienet talbet permess mill-Qorti sabiex issiefer b`Eric maghha flimkien mal-partner taghha (u cioe` r-rikorrent Camilleri). Meta wiegeb, Camilleri kien allega l-partner taghha kien agixxa bi vjolenza fil-konfront tieghu. Wara skambju ta` atti, il-Qorti cahdet it-talba taghha fl-20 ta` Awissu 2015 u tat provvediment fis-sens illi riedet tezamina r-rapport li kien se jigi pprezentat mill-Avukat tat-Tfal. Minhabba dan kellhom ihassru l-mawra barra. Fl-20 ta` Awissu 2015, ipprezentat nota fejn oltre spjegazzjoni dettaljata pprezentat ritratti li kienu juru l-maqlub ta` dak li kien allega Camilleri u cioe` illi kien Craven il-vittma ta` vjolenza. In vista ta` dan kollu, hija pprezentat rikorsi ohra fejn talbet lill-Qorti sabiex tisma` lil Craven u li jkun ezaminat minn psikologu. Anke din it-talba kienet michuda.

Kompliet tixhed illi wara d-digriet fejn kien projbit illi Eric ikun espost ghall-partner taghha, dan tal-ahhar kellu johrog mid-dar taghha u mar joqghod go garage fejn jahdem. Fissret illi Craven kien jghinha l-hin kollu b`Eric : jigbru mill-iskola, jiehdu l-football u joqghod jistennih sakemm jispicca. Wara dak id-digriet kellha taghmel kollox hi wahedha. Minbarra dan, billi kien gie miftiehem li Camilleri kellu jigbor lil Eric minn hdejn l-Love Monument li hemm San Giljan fl-10.00

a.m.u u hi dak il-hin kienet tkun xoghol, minhabba l-partner taghha ma setax jersaq hdejn binha, kien ikollha tinzel ommha minn Ghawdex sabiex tkun tista` twassal t-tifel fil-post fejn kellu jingabar minn missieru.

Stqarret illi wara li hija kellha t-tifla minn Craven, id-digriet dwar Eric kien qed jippregudika l-hajja privata u familjari taghha u ta` l-partner taghha, u ma kienx jaghmilx sens. Tghid illi ma tistax tghix ma` Craven anke jekk kellhom it-tifla flimkien.

Qalet illi bil-kawza odjerna huma qeghdin jilmentaw minn ksur tal-jedd ghal smigh xieraq ghaliex Craven kien imcahhad mid-dritt ta` access ghal qorti, meta ghalkemm il-qorti tat provvediment dwaru ma thalliex ighid tieghu billi ma nghatax smigh. Apparti dan, ir-rapport tal-Avukat tat-Tfal, li jidher illi wassal lill-qorti biex tiddeciedi kif fuq inghad, huwa dokument sigillat u mhux accessibbli ghall-partijiet. Inoltre l-qorti ppronunzjat ruhha dwar il-hajja privata taghhom bla ma tathom dritt jitkellmu. Ighidu wkoll li l-jedd ghal smigh xieraq kien ivvjolat ghaliex ghalkemm tixtieq timpunja d-digrieti li nghataw, kull talba li ghamlet kienet respinta, apparti li l-Imhallef sedenti mhijiex qeghda widen ghall-ilmenti taghha.

__Fil-kontroezami__, xehdet illi l-inkwiet wara li kien iffirmat il-kuntratt ta` separazzjoni beda meta kienet ipprezentat rikors sabiex hi tigi tghix Malta ghaliex kienet sabet xoghol Malta. Camilleri ma riedx jaccetta dan. Baqa` jinsisti (u beda jaghmel rapporti) dwar l-access li skont il-kuntratt originali u cioe` kull nhar ta` Tlieta u nhar ta` Hamis. In segwitu il-hin inbidel b`digriet tal-qorti biex sar mill-Gimgha sas-Sibt. Eric kien ghamel sajf shih ighid li ma riedx imur ghand missieru.

Qalet illi dak iz-zmien tal-2009, Eric kellu tliet snin u nofs. Dik is-sena, Camilleri ma kienx imcahhad mill-access ghat-tifel ghaliex Eric dejjem mar mill-Gimgha sas-Sibt.

Mistoqsija anke minn din il-Qorti kif seta` tifel ta` tlett snin u nofs jirrifjuta li jmur ghand missieru, wiegbet illi la hi, u lanqas is-surgent ma setghu jikkonvincu lit-tifel biex imur. Kien jibki u li kien xeba` jmur ghaliex il-partner ta` missieru Melissa u t-tifla Yanika kienu qishom *"r-regina u l-principessa".*

Mistoqsija mill-Qorti jekk fl-2015 it-tifel riedx ikollu relazzjoni maz-zewg ġenituri, stqarret li hija dejjem imbottat lil Eric sabiex imur ghand missieru.

Stqarret illi sahansitra llum li Eric qabez l-ghaxar snin fl-eta` meta jasal il-Hamis filghaxija jibda jilmenta li ma jridx imur fejn missieru Ghawdex.

Qalet illi f`Lulju 2017, Camilleri inqabad bid-droga fuqu. Ghalkemm hija pprezentat rikors sabiex l-access tal-missier ikun supervizjonat, ir-rikors kien michud.

Christopher Craven xehed illi huwa kien gie Malta fi Frar 2013 ghal *diving holiday*. Ghogbu l-pajjiz, iddecieda li jibqa` Malta u beda jfittex impjieg. Fil-fatt sab ix-xoghol u baqa` jghix Malta. F`Dicembru 2013 huwa ltaqa` ma` Nadia Vella u bdew johorgu flimkien. Qaltlu li kienet mizzewga ma` Joseph Camilleri u li kellhom tifel Eric. Sa dak il-mument, ma kienx ghadu ltaqa ma` Camilleri u mat-tifel. Ir-rikorrenti qaltlu li kellha problemi ma` Camilleri dwar Eric u li kienu l-qorti. Huwa seta` japprezza dak li kienet ghaddejja minnu r-rikorrenti ghaliex hu stess, meta kien zzewweg ghat-tieni darba l-Ingilterra, kien ha hsieb ta` zewg tfajliet li missierhom kien alkolizzat u drogat.

Xehed illi r-relazzjoni tieghu ma` r-rikorrenti saret stabbli u bdew ighixu flimkien. Ma` Eric iltaqa` f`Jannar 2014, meta t-tifel kellu tmien snin. L-ewwel impressjoni tieghu ta` Eric kienet li kien tifel intelligenti u sensittiv. Mill-ewwel kellu relazzjoni tajba mieghu. Fehem l-inkwiet ta` Eric dwar il-genituri tieghu. Hu u Eric kellhom l-istess passjoni ghall-football u ghall-muzika. Eric kien jafda mieghu u kien ighidlu kif missieru kien qed igib ruhu mieghu. Fix-xhur ta` wara, ghalkemm ipprova li ma jghaddi l-ebda gudizzju dwar Camilleri, induna li r-relazzjoni li l-missier kellu mat-tifel kienet aktar sabiex il-missier "juza" lit-tifel milli sabiex ikollu relazzjoni ma` ibnu. Camilleri kien indifferenti ghal dak li ried Eric u ghall-bzonnijiet tieghu. Fil-fatt minghajr ma hasibha darbtejn, beda jiehu responsabilita` ghal Eric u jiehdu l-iskola kuljum u kien jattendi ghall-attivitajiet tal-iskola u dawk ta` barra l-curriculum tal-iskola. Qatt ma ried jiehu post missieru, izda fl-istess waqt ried joffri lit-tifel figura paterna.

Stqarr illi Nadia Vella kienet ghamlet kuntatt ma` Camilleri ghaliex kellha bzonn tibdel il-hin tal-access ghaliex Eric kellu party

ghand habib tieghu li xtaq imur. Ipprovat issib kompromess. Camilleri ma kellimhiex sa siegha qabel il-party. L-attitudni ta` Camilleri kompliet turi ruhha f`okkazjonijiet fejn il-missier kien jiehu lit-tifel ghal avvenimenti fejn tifel ta` eta` zghira mhux biss m`ghandux ikun jaf li jezistu izda li lanqas ma` ghandu jkun involut fihom. Dan holoq hafna tensjoni. Camilleri beda jirrapporta lil Nadia Vella li kienet qeghda tfixkek l-access ghat-tifel. Ghalkemm l-omm u t-tifel kienu joqghodu San Gwann, l-access ta` Camilleri kien isir Ghawdex ; ghalhekk kull darba Nadia Vella riedet tmur Ghawdex bit-tifel u trid terga` tmur ghalih meta l-access ta` Camilleri jispicca.

Xehed illi r-relazzjoni li ghandu ma` r-rikorrenti u ma` Eric hija mportanti hafna ghalih. Ir-rikorrenti u hu kellhom tifla li twieldet fil-4 ta` Novembru 2016. Kienu se jizzewgu wkoll.

Stqarr illi sa mill-bidu nett Camilleri kellu problema bil-presenza tieghu. Ipprova jfixkel r-relazzjoni tajba li ghandu mar-rikorrenti. L-ewwel darba li ltaqa` mieghu kien lejn nofs Jannar 2014 fil-ground tal-Infetti, Birkirkara, fejn Eric kellu tournament tal-football. Imbaghad ltaqa` mieghu l-Hadd ta` wara, meta Camilleri wassal lit-tifel tard id-dar taghha x-Xewkija. Sa mill-ewwel darba li ltaqghu, Camilleri kien offensiv bi kliemu fil-konfront tieghu. Kien hemm drabi wkoll meta Camilleri b`Eric mieghu fil-karozza pprova jidhol go fih.

Spjega illi Eric kellu habib tifel iehor jismu Nikos Konidaris. Il-hbiberija ta` bejn it-tfal estendiet ghar-rikorrenti u ghall-genituri tat-tifel l-iehor. Il-genituri ta` Nikos stiednu lir-rikorrenti u lil Eric ghal btala fil-villa li n-nannu ta` Konidaris ghandu go Sardegna. Eric kien eccitat hafna ghal din il-btala. Ghalhekk kemm r-rikorrenti kif ukoll l-genituri ta` Nikos riedu sabiex jippjanaw btala specjali ghat-tfal billi jabbinaw dan l-vjagg ma` visita kulturali Ruma u Venezja. Ir-rikorrenti avzat minn qabel lil Camilleri b`dan kollu izda dan irrifjuta li Eric imur ghal din il-btala. Ir-rikorrenti kellha tirrikorri ghall-qorti. Fit-12 ta` Gunju 2015, ipprezentat rikors li kien notifikat lil Camilleri. Dan talab aktar informazzjoni. B`digriet tal-25 ta` Lulju 2015, ir-rikorrenti kienet ordnata taghti aktar dettalji dwar l-vjagg. Fit-30 ta` Lulju 2015, ir-rikorrent ipprezentat nota bid-dettalji kollha. Fl-10 ta` Awissu 2015, il-Qorti irrimarkat li r-rikorrenti ma kenitx indikat ma` min kien se jorqod Eric. Ir-rikorrenti pprezentat nota ohra. Fis-17 ta` Awissu 2015, l-Qorti ordnat in-notifika lil Camilleri b`jumejn zmien biex iwiegeb. Fid-19 ta` Awissu 2015, Camilleri pprezenta risposta fejn oggezzjona ghall-vjagg ghaliex allega li hu kien vjolenti mieghu. Fl-20 ta` Awissu 2015, il-Qorti tat digriet fejn cahdet it-talba ta` Nadia Vella

abbazi tar-raguni moghtija minn Camilleri u abbazi tal-fatt illi riedet tara r-rapport li kellu jigi prezentat mill-Avukat tat-Tfal. B`hekk ir-rikorrenti u binha ma thallewx isiefru ghal btala li kienet diga` organizzata. Id-digriet wasal jumejn biss qabel kellhom isiefru.

Kompla jixhed illi matul s-snin hu kellu joqghod ghall-abbuz fiziku u verbali ta` Camilleri. Kieku dan l-abbuz kien dirett lejh biss forsi ma kienx jaghti kaz, izda billi kien abbuz dirett ukoll ir-rikorrenti u binha dak kien ta` thassib ghalih. Kien hemm tal-inqas tliet okkazjonijiet fejn Camilleri habat ghal ibnu. Jaf b`dan ghaliex Eric kien qallu b`dan anke fil-presenza ta` ommu. Fl-ahhar incident Eric kellu anke sinjali fuq il-persuna tieghu, li baqghu hemm, anke wara erbgha u ghoxrin siegha. Tliet ijiem wara marru tieg ta` kugina tar-rikorrenti. Waqt it-tieg, il-hbieb u l-kugini ta` Eric kienu qed jilaghbu l-hin kollhu. Eric qaghad appartat jibki ghaliex billi kien wegga`. Hu u Nadia Vella kienu nkwetati ferm l-aktar minhabba l-influwenza negattiva ta` missieru kien qed ikollha fuq l-aspetti kollha ta` hajtu.

Stqarr illi huwa ha decizjoni mpulsiva li jmur ikellem lil Camilleri. Ghall-ewwel kien kalm hafna meta wasal fl-appartament tieghu, izda l-affarijiet ma grawx kif xtaq ghax beda jigi molestat, mhedded u attakkat verbalment mit-tieqa. Imbaghad Camilleri waddablu madwar seba` qsari tat-terracotta u ntilef minn sensih. Meta stejqer mar l-Ghassa tal-Pulizja, fejn sab lil P.S. Sean Tabone. Dan cempel ghall-ambulanza. Dak il-hin minhabba l-inkwiet li kien hemm bejn ir-rikorrenti u Camilleri dwar l-access ghal Eric, ha decizjoni li ma jaghmilx rapport kontra Camilleri. Meta wasal id-dar, kien infurmat li kellu jsir rapport minhabba n-natura gravi u permanenti tal-attakk li kien sar fuqu. Mar lura l-Ghassa, u baqa` sorpriz u konfuz illi Camilleri, minghajr l-icken prova jew sinjali fuq il-persuna tieghu, u bil-hwejjeg nodfa, mar ghamel rapport li kien hu li attakkah mhux il-maqlub. Huwa jaccetta li ma messux mar id-dar ta` Camilleri izda stqarr ukoll li ma setax ikompli ma jaghtix kaz tal-abbuz li kienu qeghdin igarrbu l-partner tieghu u binha.

Kompla stqarr illi b`rikors tal-24 ta` Lulju 2015, Camilleri talab lill-Qorti sabiex Eric jibda jirrisjedi mieghu, u sabiex t-tifel jittiehed mid-dar tal-omm anke permezz ta` l-marixxali tal-qorti u tal-pulizija. Ir-rikors kien fih gideb u allegazzjonijiet. Permezz ta` digriet tal-1 ta` Ottubru 2015, il-Qorti ordnat lil Nadia Vela sabiex ma tesponix aktar lil Eric ghall-presenza tieghu. Il-konsegwenza ghalih kienet serja ghaliex kellu jitlaq mid-dar, gie separat mill-familja tieghu, u kien injorat id-dritt ghall-hajja familjari li ghandhom hu u r-rikorrenti. Kellu jsib post

fejn ighix, distakkat mill-familja tieghu. Il-provvediment tal-Qorti ma kienx gust mieghu ghaliex kienet evalwata naha wahda biss waqt li hu kien skartat.

Xehed illi l-psikologa Carmen Sammut ipprezentat rapport fil-25 ta` Novembru 2015. Minn dan r-rapport mhux biss hareg illi r-relazzjoni tieghu ma` Eric hija tajba, izda li Eric esprima x-xewqa li jerga` jibda jarah. Minkejja r-rapport, il-posizzjoni tal-Qorti baqghet li kienet. Huwa qatt ma ntalab jixhed jew inghata l-opportunita` jfisser il-posizzjoni tieghu. Gara li huwa safa` mkecci mill-familja tieghu, filwaqt li Camilleri baqa` jesponi lil Eric ghall-partner tieghu. Minkejja r-rikors kollha li pprezentat Nadia Vella, il-Qorti cahdithom kollha.

Stqarr illi fit-22 ta` Awissu 2016, inqala` ncident fejn Camilleri kellu l-access u r-rikorrenti kellha ssuq lil Eric minn San Gwann ghal Ghawdex. Kien jaf li kienet qeghda thossha ntimidata haliex kien hemm varji okkazjonijiet fejn Camilleri kien jaghti bis-sieq il-karozza taghha. Ghalhekk kienu ftehmu li kienet se thalli lil Eric mal-ġenituri taghha Ghawdex biex hekk ma tkunx wahedha meta tiltaqa` ma` Camilleri ; dak iz-zmien kienet tqila. Nadia Vella kellha tigi lura Malta izda minhabba l-fatt li kien hemm queue twil ghall-vapur baghtitlu messagg li kienet tippreferi li jitla` Ghawdex hu biex imbaghad joqghodu fid-dar li hi kellha hemm. Dak il-lejl meta kienu qeghdin id-dar ix-Xewkija semghu l-bieb u meta fethu raw lil Eric mimli hmieg. Dak z-zmien Eric kellhu biss ghaxar snin u nofs. Qalilhom li kien harab minn missieru, u li kien inheba fl-eghlieqi sakemm irnexxielu jasal sa ghandhom.

Stqarr illi ghalkemm Nadia Vella kienet tqila bit-tarbija taghhom ma setax ikun maghha ghall-appuntamenti tal-isptar u tat-tabib ghaliex Eric kien ikun maghha.

Xehed illi kien hemm bdil fis-sitwazzjoni taghhom biss fil-kors ta` din il-kawza kostituzzjonali meta fit-3 ta` Novembru 2015, gurnata qabel ma twieldet binthom Jade, il-Qorti awtorizzathom jergghu jibdew jghixu flimkien bhala familja. Din kienet koncessjoni li biddlet hajjithom u mill-gurnata li twieldet Jade regghu bdew jghixu bhala familja.

<u>Joseph Camilleri</u> xehed illi Eric twieled miz-zwieg tieghu ma` Nadia Vella. Hu u r-rikorrenti kellhom separazzjoni bonarja. Fl-2008

meta sar il-kuntratt tas-separazzjoni bonarja, Nadia Vella u t-tifel kienu jghixu Ghawdex u kellu access tajjeb ghat-tifel. Wara xi zmien r-rikorrenti riedet tmur tghix Malta, imma hu kien oggezzjona minhabba l-access ghat-tifel. Ir-rikorrenti pprezentat rikors fit-23 ta` Lulju 2009. Il-Qorti pprovdiet fis-sens li tat permess sabiex Eric ikun registrat St. Edward`s College, Malta. Nadia Vella kienet sejra tibda tahdem hemm. Inghatat permess biex tghix Malta bit-tifel matul il-gimgha. L-access ghal Eric inbidel u ma kien gie deciz xejn dwar dak li jigri fil-Milied, fil-Ghid u fil-vaganzi tas-sajf. Ir-rikorrenti hadet il-linja li l-access li kien inghata mill-Qorti kellu japplika dejjem li ghalih kien ifisser hafna drabi li ma jkunx jista` jara t-tifel. Ghalhekk kellu jibda proceduri Malta fil-Qorti Civili (Sezzjoni tal-Familja).

Stqarr illi r-rikorrenti kienet topponi t-talbiet kollha tieghu minhabba l-partner tieghu Melissa, ghalkemm kien ilu snin maghha u kienu jghixu flimkien. Minhabba l-opposizzjoni taghha, fil-bidu meta kellu l-access, dan ma setax issir fil-presenza ta` Melissa ; ghalhekk kien ikollha titlaq mid-dar matul il-weekend. Imbaghad bdiet ittellfu l-access ghal Eric. Kien hemm sajf shih meta ma setax jara t-tifel. Ghalhekk ipprezenta rikors dwar din il-kwistjoni. Waqt l-udjenza tas-smigh tar-rikors, ir-rikorrenti ma kenitx dehret u l-Qorti hadet decizjoni illi hu jibda jiehu t-tifel direttament mill-Iskola bil-pulizija u l-marixxalli. Minn hemm bdew il-problemi, ghaliex kull darba li kien imur biex jigbor lil Eric mill-iskola, flimkien mal-pulizija u l-marixxali, ir-rikorrenti kienet tiggranfa mat-tifel, li kien ikun qed jibki, u ma tkunx trid thallih, biex kull darba Eric kien jghaddi minn trawma.

Xehed illi Nadia Vella bdiet tghid li t-tifel ma riedx imur ghandu u bdiet topponi ghal kull talba li kien jaghmel bhal li jsiefer mat-tifel, jew li jiehdu xi attivita tal-familja, jew li jiehdu ghall-funeral ta` missieru. Fl-2013 wara li kien awtorizzat mill-qorti biex isiefer ma` Melissa u Eric biex imorru Disneyland, ir-rikorrenti kienet ipprezentat tliert rikorsi bl-opposizzjoni taghha. Aktar ma beda jghaddi z-zmien, aktar r-rikorrenti kienet tipprova titfa t-tajn fuqu, u kienet tisfida d-digrieti tal-Qorti dwar l-access. B`hekk il-Qorti kienet kull darba izzid l-access tieghu tas-Sajf. Aktar ma kien jizdied l-access, aktar ir-rikorrenti bdiet tivvinta stejjer fuqu, bhal li sawwat lit-tifel.

Stqarr li maz-zmien, hu kellu tifel ma` Melissa waqt li z-zewg rikorrenti bdew relazzjoni flimkien. Ghalkemm haseb li Nadia Vella kienet ser tikkalma, l-affarijiet marru ghal aghar. Kollox skala meta Craven mar id-dar tieghu fit-18 ta` Lulju 2015, ghal habta tas-2.30 a.m., xurban u beda jheddu. Craven hebb ghalih u kisser xi qsari. Hu

ddefenda ruhu u Craven harab. Huwa kellu jipprezenta rikors u l-Qorti ordnat li jsir rapport mill-Avukat tat-Tfal u li Nadia Vella ma tesponix lil Eric ghal Craven. Minkejja d-divjet, ir-rikorrenti baqghet tlaqqa` lil Eric ma` Craven, li baqa` jghix maghha. Fil-fatt meta kienet twassal lil Eric ghall-access, Craven kien ikun bil-karozza warajha.

__Fil-kontroezami__, stqarr illi kien hemm perijodu ta` madwar xahar jew xahar u nofs, meta ma setax ikun hem mil-presenza ta` Eric meta jkun ma` Melissa. Mistoqsi jekk kienx baqa` midrub fl-incident ma` Craven, stqarr illi huwa ma kienx wegga`. Kull ma kellu kienet daqqa zghira fuq rasu, mentri Craven kien indarab. Ikkonferma li wara dak l-incident, il-Qorti kienet iddecidiet li Eric ma jiltaqax ma` Crave. Is-sitwazzjoni inbidlet biss fil-kors tal-kawza odjerna. Huwa kien talab l-intervent tal-Qorti meta ra li Craven kien aggressiv mat-tifel. Mistoqsi jekk kienx ghadu jahsibha l-istess, wiegeb li xorta ma kien jafdah. Mistoqsi jekk kienx hemm xi darba meta t-tifel kien ilmenta mieghu dwar Craven, stqarr li huwa staqsa xejn lil Eric dwar dan. It-tifel qatt ma qallu xejn u qatt ma lmenta dwar agressivita` da parti ta` Craven.

__L-Ispetter Nicolai Said__ ipprezenta l-fedina penali tar-rikorrent Craven u rapport li sar kontra tieghu.

III. __Sottomissjonijiet__

1. __Bil-miktub__

a) __L-Avukat Generali__

Dwar l-ewwel eccezzjoni tieghu, l-Avukat Generali jirrileva li bhala fatt ir-rikorrenti kellhom rimedji ordinarji - tajba u effettivi. Li kieku r-rikorrenti riedu r-revoka tad-digriet li tat il-Qorti Civili (Sezzjoni tal-Familja) tal-1 ta` Ottubru 2015 huma setghu jew i) jitolbu revoka taht l-Artu 564(4) tal-Kap 16 jew l-Art 230 tal-Kap 12 ; jew ii) jitolbu li jsir appell minn dak d-digriet taht skont l-Art 229(3) tal-Artikolu 229(3) tal-Kap 12 (ara : QK - **__Teddy sive Jude Taddeo Refalo et vs Avukat Generali__** - 21 ta` Marzu 2007 - inkella iii) jaghmlu kawza *ad hoc* biex iwaqqghu d-digriet (ara : QK - 27 ta` April 2012 - **__Stacey Spiteri et vs Direttur tar-Registru Pubbliku__** ; QK - **__Claudine Desira et vs Direttur tar-Registru Pubbliku__** - 9 ta` Novembru

2012 u PAK : **David Anthony Pollina vs L-Avukat Generali et** : 1 ta` Dicembru 2015). Ma tirrizulta ebda prova li r-rikorrenti ghamlu xi wahda minn dawn il-proceduri ordinarji.

L-Avukat Generali jkompli josserva li r-rikors ta` Nadia Vella tad-9 ta` Ottubru 2015, ma kienx intiz li jkun talba ghar-revoka *contrario imperio* tad-digriet. Ir-rikorrenti ghadhom sal-lum bic-cans li jitolbu lil dik il-Qorti li titbieghed mid-digriet taghha tal-1 ta` Ottobru 2015.

Ikompli jinghad illi ma jirrizultax li Nadia Vella nfurmat lill-Qorti tal-Familja li kienet qed tistenna tarbija, u li llum ghandha fil-fatt tarbija, minn Craven, fatti dawn li jikkostitwixxu bdil tac-cirkostanzi, fejn allura r-rikorrenti ghad ghandha anke sal-lum l-opportunita` li titlob intervent mill-Qorti tal-Familja.

L-Avukat Generali jissottometti qrati bil-kompetenza bhal din tal-lum ghazlu li ma jezercitawx s-setghat kostituzzjonali taghhom (ara : QK : **Anthony Xuereb vs Helen Milligan et** : 6 ta` Settembru 2010 ; PAK : **Michael Baldacchino pro et noe vs L-Avukat Generali** : 30 ta` Gunju 2015). Jaghmel il-punt illi r-rikorrenti ma jistghux jippretendu li jitolbu rimedju minn din il-qorti meta huwa car li huma ghazlu li ma juzawx r-rimedji ordinarji li taghtihom l-ligi (ara : PAK : **Nardu Balzan Imqareb vs Registratur tal-Qrati tal-Gustizzja** : 18 ta` Mejju 2006)

B`referenza ghall-ilment tar-rikorrenti dwar ksur tal-Art 8 tal-Konvenzjoni, l-Avukat Generali osserva li fid-dritt ghal familja hemm inkluz id-dritt li genitur u wild jithallew igawdu l-kumpannija ta` xulxin (ara : ECtHR : **Gluhakovic vs Croatia** : 12 ta` April 2011). Meta l-generituri ikunu mifrudin jew ma jghixux flimkien, il-genituri ghandhom d-dritt li jinghaqdu ma` uliedhom u l-Istat ghandu jiffacilita dan (ara : ECtHR : **Shaw vs Hungary** : 26 ta` Lulju 2011). Fil-kaz tal-lum, tirrizulta relazzjoni ta` omm u iben bejn Nadia Vella u Eric ; ghalhekk l-Art 8 huwa applikabbli. Pero` ma rrizultax li dik ir-relazzjoni kienet vjolata bid-digriet tal-1 ta` Ottubru 2015. Fil-kaz tar-rikorrent Craven, mhuwiex il-genitur naturali ta` Eric u ghalhekk m`ghandux dritt ta` familja fil-konfront tieghu. Fil-kawza odjerna, ma jidhirx illi l-mertu huwa centrat fuq r-relazzjoni li z-zewg rikorrenti ghandhom mal-minuri, izda aktar huwa ffukat fuq r-relazzjoni li z-zewg rikorrenti ghandhom bejniethom. Ladarba l-minuri jghix ma` ommu, u Craven ma setax javvicina lil Eric bid-digriet tal-1 ta` Ottubru 2015, allura d-dritt tar-rikorrenti li jghixu bhala familja gie vvjolat.

Mhux qed ikun kontestat il-kuncett ta` familja kif mifhum bl-Art 8. Id-disposizzjoni ma tapplikax biss ghal koppji mizzewgin izda tghodd ukoll fil-kaz ta` koppji li mhumiex mizzewgin, basta li jigi ppruvat li hemm rabta solida u kostanti (ara : ECtHR : **Kruskovic vs Croatia** : 21 ta` Gunju 2011 ; u ECtHR : **Kroon and others vs The Netherlands** : 27 ta` Novembru 1994). Sabiex ikun determinat jekk relazzjoni ghandhiex titqies bhala dik ta` hajja familjari, iridu jirrizultaw numru ta` fatturi fosthom jekk il-koppja tghix flimkien, it-tul tal-relazzjoni u jekk urewx impenn lejn xulxin (ara ECtHR : **Van der Heijden vs The Netherlands** : 3 ta` April 2012).

L-Avukat Generali jissottometti li huwa jemmen li fil-kaz tal-lum kien ippruvat li bejn r-rikorrenti hemm relazzjoni serja li tinkwadra ruhha bhala familja ai termini tal-Art 8 tal-Kovenzjoni. Ighid illi ma jistax jichad li d-digriet tal-1 ta` Ottubru 2015, b`mod indirett, indahhal fil-hajja familjari tar-rikorrenti, ghaliex r-rikorrenti Craven u l-minuri ma setghux ikunu fil-presenza ta` xulxin. Fl-istess waqt, u minkejja li d-digriet holoq indhil fil-hajja familjari tar-rikorrenti, ma jfissirx li dak l-indhil kien imur kontra l-Art 8 ghaliex ma jkunx hemm vjolazzjoni jekk l-indhil ikun : i) skont il-ligi ; u ii) mehtieg f`socjeta demokratika biex jitharsu wiehed jew aktar mill-skopijiet li ghalihom l-Konvenzjoni tippermetti li jkun hemm indhil. Fost dawn l-iskopjijet hemm il-harsien tad-drittijiet ta` haddiehor jew tas-sahha jew tal-integrita` morali ta` ohrajn. Fil-kaz tal-lum, mhuwiex kontestat li d-digriet in kwistjoni kien
skont il-ligi ghaliex il-qorti ghandha s-setgha li taghti dawk l-ordnijiet necessarji fl-ahjar interess tal-minuri. Jekk huwa mehtieg li fl-interess tal-minuri, genitur ma jinghatax access, allura l-interess tal-minuri ghandu jipprevali fuq l-interess tal-genitur (ara : **V vs Malta** deciz mill-Kummissjoni : Qorti ta` Strasbourg : 9 ta` April 1992). Bl-istess mod fl-interess tal-minuri, genitur jista` ma jithalliex li jesponi lill-minuri ghal ghal terza persuna, meta din tista tkun ta` hsara ghall-minuri. Dan jghodd anke meta it-terz ikun is-sieheb tal-genitur, bhal ma hu l-kaz odjern (ara : ECtHR : **Hoppe vs Germany** : 5 ta` Dicembru 2002). Il-Qorti Civili (Sezzjoni tal-Familja) kellha kull dmir li tordna li l-minuri ma jkunx espost ghar-rikorrent Craven, meta kien hemm allegazzjoni u rapport lill-pulizija li Craven kien hedded li joqtol lill-minuri. Il-Qorti ma setghetx tibqa` passiva. Ghalhekk fic-cirkostanzi tal-kaz, l-intervent tal-Qorti bid-digriet tal-1 ta` Ottubru 2015 kien gustifikat fil-kuntest tal-Art 8.

Dwar l-ilment tar-rikorrenti li bil-mod kif inghataw id-digrieti tal-1 ta` Ottubru 2015 u tat-28 ta` Ottubru 2015, kien hemm vjolazzjoni tad-dritt taghhom ghal smigh xieraq, l-Avukat Generali josserva illi

ghalkemm huwa veru li z-zewg digrieti setghu nghataw f`cirkostanzi ahjar, dak ma jfissirx li kien ippregudikat id-dritt tar-rikorrenti ghal smigh xieraq. Fil-kaz ta` Craven, l-ilment ma jistax iregi billi la kien parti fiz-zewg digrieti u lanqas fil-kawza. Ghalhekk fil-kaz ta` Craven ma kienx hemm determinazzjoni ta` drittijiet jew obbligi civili. Anke jekk kien is-suggett taz-zewg digrieti, ma kienu decizi l-ebda drittijiet jew obbligi civili tieghu. Fil-kaz ta` Nadia Vella, lanqas ma jista` jinghad li kien hem mil-ksur lamentat ghaliex iz-zewg digrieti in kwistjoni m`ghalqux b`mod finali l-kwistjoni. Huma digrieti *pendente lite* li jistghu jinbidlu. Fil-kaz ta` ilment dwar smigh xieraq, wiehed ma ghandux jieqaf fuq episodju wiehed jew aktar izda irid jara l-process kollhu kemm hu (ara : QK : **Gregorio sive Godwin Scicluna vs Avukat Generali et** : 15 ta` Ottubru 2003 ; u ECtHR : **Martin Dimech vs Malta** : 2 ta` April 2015).

L-Avukat Generali jirrileva illi f`gurisprudenza ricenti, il-Qorti Kostituzzjonali cahdet ilment simili appuntu ghaliex l-process kriminali kien ghadu pendenti (ara r-Referenza : **The Police vs Austin Uche et** li kienet deciza fil-5 ta` Ottubru 2018). Vera li hemm cirkostanzi partikolari fejn sentenzi jew digrieti jistghu jigu evalwati fl-isfond tal-Art 6, izda dan jigri biss sakemm il-parti li tilmenta turi li l-episodju jew cirkostanza hija ta` serjeta` jew gravita` tant kbira li tiggustifika l- ilment (ara : PAK : **Perit Daniel Micallef et nomine vs L-Avukat Generali et** : 13 ta` April 2016) Ghalhekk hija l-eccezzjoni mhux ir-regola. Li sehh fil-kaz tal-lum ma jikkwalifikax bhala cirkostanza eccezzjonali. Huwa veru li l-Qorti ma semghetx lil Craven qabel tat id-digriet u lanqas semghet sottomissjonijiet bil-fomm pero` dak ma jfissirx li fil-kors tal-kawza Nadia Vella hija prekluza milli tipproduci lil Craven bhala xhud taghha.

Dwar il-fatt li Nadia Vella qeghda titlob li tara r-rapport tal-Avukat tat-Tfal, l-Avukat Generali jissottometti li r-rikorrenti tista` titlob lill-Qorti sabiex tordna li r-rapport jifforma parti mill-atti tal-kawza. Danm mhux prekluz mil-ligi.

Dwar il-kontenut tad-digriet, l-Avukat Generali jirrikonoxxi li kien ikun ahjar li kieku l-Qorti elaborat ftit aktar d-digriet taghha, izda b`daqshekk ma jfissirx li kien nieqes minn motivazzjoni. Il-Qorti, tajjeb jew hazin, qalet li kienet qed tichad r-rikors ta` Vella ghaliex kienet accettat uhud mir-risposti tal-intimat Camilleri. Ir-rikorrenti jistghu ma jaqblux ma` dawn r-ragunijiet, izda ma jistghux jghidu li l-Qorti ma spjegatx ghaliex kienet qed tichad r-rikors (ara : Qorti tal-Appell : **Diane Schembri et vs Alfred Schembri** :27 ta` Frar 2015).

b) Joseph Camilleri

Camilleri jirreferi ghax-xiehda tal-Ufficjal tal-Qorti Eunice Fiorini, li kkonfermat li r-rikorrenti Nadia Vella la appellat u lanqas talbu permess sabiex tappella mid-digriet fejn kienet prekluza milli tesponi lill-minuri Eric ghall-partner taghha Craven.

Dwar l-ilment li kien hemm vjolazzjoni tal-Art 8 tal-Konvenzjoni, Camilleri jissottometti li l-gurisprudenza tal-qrati taghna hija cara u kostanti ghal dak li jirrigwarda l-ahjar interess tal-minuri (ara : QCF : **Carmelo Mizzi vs Mary sive Moira Mizzi** : 30 ta` Gunju 2015 ; Appell : **L-Avukat Stephen Thake nomine et vs Joseph Portelli** : 4 ta` Novembru 1994 ; u QCF : **Maria Rosaria Micallef vs Alfred Micallef** : 18 ta` Gunju 2007).

Dwar l-ilment li kien hemm vjolazzjoni tal-Art 6, Camilleri jissottometti li t-talbiet kollha ta` Nadia Vella dwar il-presenza ta` Craven kienu michuda kollha. Id-digriet li nghata fil-1 ta` Ottubru 2015 gie wara incident serju li nholoq minn Craven wahdu. Inoltre fil-proceduri pendenti quddiem il-Qorti Civili (Sezzjoni tal-Familja) Craven mhux parti u ghalhekk ma kellu l-ebda jippretendi li jinghata smigh. It-talba ta` Nadia Vella sabiex Craven jinghata smigh saret meta l-kawza kienet fl-istadju tal-provi taghha. Eppure Vella naqset lil tressaq lil Craven bhala xhud.

Dwar ir-rapport tal-Avukat tat-Tfal, Camilleri jirrileva li ghalkemm huwa probabbli li l-kontenut tar-rapport incida fuq l-esitu tal-provvediment, fl-istess waqt quddiem il-qorti kien hemm ukoll provi ohra li certament kienu kkunsidrati. Li r-rapport ikun sigillat hija prassi li tinthaddem sabiex ikun tutelat l-interess tal-minuri (QCF : **Carmelo Mizzi vs Mary sive Moira Mizzi** : 30 ta` Gunju 2015).

Skont Camilleri, it-talbiet ghandhom ikunu respinti.

2. Bil-fomm

a) Ir-rikorrenti

L-ilmenti taghhom kienu il-konsegwenza ta` incidenti li graw fil-kors tal-kawza quddiem il-Qorti Civili (Sezzjoni tal-Familja). Wara l-incident ta` bejn Craven u Camilleri, dan tal-ahhar ipprezenta rikors li kien dekretat fl-1 ta` Ottubru 2015. Fost affarijiet ohra, il-Qorti kienet ordnat sabiex Nadia Vella ma tesponix lil Eric ghall-partner taghha. Hija kienet f`relazzjoni ma` Craven u kellha l-kura u l-kustodja ta` Eric. Ippruvat tikseb revoka tad-digriet izda t-talba kienet michuda. Talbet lill-Qorti biex tisma` lil Craven izda t-talba kienet michuda wkoll. Mir-relazzjoni taghhom, Vella u Carven kellhom tarbija pero` minhabba d-digriet ma setghux ighixu flimkien bhala familja u cioe` Vella, Craven, Eric u t-tarbija.

Dwar l-eccezzjoni tal-Avukat Generali illi ma kienux ezawriti r-rimedji ordinarji, ir-rikorrenti rrilevaw illi fil-kaz ta` Craven ma setax jattakka d-digriet u allura ma kellux rimedju ordinarju. Dwar Vella, irrizulta li ppruvat tikseb revoka *contrario imperio*, ghal aktar minn darba, imma kull darba kien michud. Minn dawk id-digrieti ma hemmx appell ghaliex huma digrieti *pendente lite* li ghalihom ma japplikax l-Art 229 tal-Kap 12.

Dwar l-ilment tieghu li kien hemm vjolazzjoni tal-Art 8 tal-Konvenzjoni, kienu citati l-Guidelines tal-ECtHR fejn *inter alia* jinghad - *"In order to determine whether a particular infringement upon Article 8 is necessary in a democratic society the Court balances the interests of the member state against the rights of the applicant. In an early and leading Article 8 case the Court clarified that "necessary" in this context does not have the flexibility of such expressions as useful, reasonable or desireable, but implies the existence of a pressing social need for the interference in question"*. Ghalhekk il-kriterju prevalenti huwa *"a pressing social need"* li l-minuri u r-rikorrenti Craven ma jkunux ma` xulxin.Fil-kaz tal-lum ma kienx hemm dan il-*pressing social need* (ara : EctHR : **Dudgeon vs The United Kingdom** ; **Piechowicz vs Poland** ; u **Paradiso and Campanelli vs Italy**)

Dwar l-element li jissemma fl-Art 8 illi jista` jkun hemm limitazzjoni jekk l-interferenza tkun skont il-ligi, ir-rikorrenti jirreferu ghad-decizjoni tal-EctHR fil-kaz ta` **Silver and others vs The United Kingdom**. Fil-kaz tal-lum ma kenitx mehtiega l-interferenza ghaliex kien hemm dan il-*pressing social need.*

Dwar l-ilment ta` Craven li kien hemm vjolazzjoni tal-Art 6, ir-rikorrenti jissottomettu li fil-mument li l-Qorti tat id-digriet, hija

effettwat u ddeterminat is-sitwazzjoni ta` Craven bla ma dan seta` jiddefendi ruhu. Ghalhekk kien digriet li ddetermina d-drittijiet u l-obbligi civili ta` Craven.

Dwar ir-rapport tal-Avukat tat-Tfal, ir-rikorrenti jirrilevaw illi huwa tajjeb li r-rapport jinzamm ghand l-Imhallef u ma jkunx disponibbli ghal kulhadd, izda l-partijiet ghandhom dritt li jkollhom access ghal dan r-rapport. Ghalkemm ma hemm xejn fil-ligi li jghid li hadd ma jista` jkollu access ghal dan ir-rapport, fil-kaz tal-lum il-linja li hadet il-Qorti kienet stretta hafna.

Dwar il-vjolazzjoni tal-Art 6, kien osservat illi l-Qorti kien messha tat smigh ladarba kienet sejra taghti provvediment daqstant serju u gravi. Ghalhekk kien hemm lezjoni.

Ir-rikorrenti hallew fl-ahjar gudizzju ta` din il-Qorti dwar l-ghamla ta` rimedju li jinghataw fil-kaz li tinstab il-vjolazzjoni.

Dwar s-sottomissjoni tal-Avukat Generali li sabiex ikun hemm lezjoni tal-Art 6, wiehed ghandu jistenna l-ezitu tal-proceduri kollha, ir-rikorrenti osservaw li fil-kaz tal-lum dan ma kienx possibbli ghaliex sehh ksur istantanju li baqa` jissussisti. Billi Craven ma huwiex parti fil-proceduri quddiem il-Qorti tal-Familja, ma setghux jinstennew li tkun deciza finalment il-kawza qabel jistitwixxu din il-kawza.

b) <u>L-Avukat Generali</u>

<u>B`zieda ma` dak li diga` ssottometta bil-kitba</u>, l-Avukat Generali jikkontesta l-procedura adoperata mir-rikorrenti, ghaliex minflok li proceduri kostituzzjonali jintuzaw bhala ghodda ghall-ahjar amministrazzjoni tal-gustizzja, intuzaw mir-rikorrenti sabiex jipparalizzaw kawza civili pendenti quddiem qorti ordinarja li ghandha kompetenza sabiex tisma` dik il-kawza. Meta jkun hemm ilment dwar smigh xieraq, u ndhil fil-hajja privata, u l-kawza tkun ghadha pendenti, ghandha tkun il-qorti ordinarja li tiddeciedi l-kwistjonijiet. Fis-sentenza finali tal-kaz in kwistjoni tkun deciza l-kwistjoni tal-access u ghalhekk jispicca d-digriet li kien inghata *pendente lite*.

L-Avukat Generali jikkontesta kemm kien opportun li r-rikorrenti jmorru ghal dan il-procediment fejn fis-sostanza dak li qed jitolbu huwa t-thassir ta` digrieti li nghataw mill-qorti ordinarja. Dan ghaliex l-Art 56(4) tal-Kap 16 jaghti lill-qorti l-fakolta` li tirrevoka kull ordni li tkun tat. Fil-kaz tal-lum ma rrizultax illi minkejja c-cirkostanzi kienu nbidlu waqt il-kawza bit-twelid ta` tarbija mir-relazzjoni ta` bejn ir-rikorrenti sar rikors iehor fejn dan il-fatt gdid jingieb ghall-konjizzjoni tal-Qorti tal-Familja sabiex tiddeciedi l-kwistjoni hi. Lanqas ir-rikorrenti ma talbu sabiex id-digriet jigi revokat *contrario imperio.* L-uniku rikors iehor li sar kienet talba sabiex jinhatru esperti biex jezaminaw lil Craven u lil Camilleri.lir-rikorrent Craven u l-intimat Camilleri. L-Avukat Generali jsostni l-validita` tas-sottomissjonijiet tieghu anke fuq l-iskorta tas-sentenza tal-Qorti Kostituzzjonali fil-kawza fl-ismijiet **Anthony Xuereb vs Helen Milligan et** (op. cit.)

IV. Konsiderazzjonijiet

1. Fatti

Il-konjugi Nadia ("**Vella**") u Joseph Camilleri ("**Camilleri**") ghamlu kuntratt ta` separazzjoni konsenswali. Fid-data tal-kuntratt, it-tnejn kienu joqghodu Ghawdex.

In segwitu, sabet impieg St Edwards College, Malta, riedet tirrisjedi Malta mat-tifel Eric, li kien se jattendi l-Kullegg fejn kienet ser tkun impjegata ommu. Camilleri oggezzjona.

Vella pprezentat rikors quddiem il-Qorti Civili (Sezzjoni tal-Familja) fejn gabet dawn il-fatti ghall-attenzjoni tal-qorti. B`digriet taghha tat-23 ta` Lulju 2009, Vella kienet awtorizzata toqghod Malta, b`Eric maghha, b`dan illi l-access ta` Camilleri ghal ibnu skont il-kuntratt ta` separazzjoni kellu jinbidel sabiex isir mis-7.00 p.m. tal-Gimgha sas-7.00 p.m. tas-Sibt, u fl-ahhar ta` kull xahar il-granet isiru mis-Sibt ghall-Hadd bl-istess hinijiet. Skont id-digriet, Vella kellha twassal lil Eric Ghawdex u tigbru hi.

Fit-3 ta` Gunju 2014, quddiem il-Qorti Civili (Sezzjoni tal-Familja) kien miftiehem li l-access ta` Camilleri kellu jkun bejn is-6.00 p.m. tal-Gimgha sas-6.00 p.m. tal-Hadd. Vella kellha twassal lil Eric

Ghawdex u jerga` jinzel maghha Malta. Camilleri kellu jigbor it-tifel mid-dar li Vella ghandha fix-Xewkija.

Fit-12 ta` Gunu 2015, Vella pprezentat rikors sabiex tkun awtorizzata ssiefer bit-tifel mill-24 ta` Awissu sal-5 ta` Settembru ta` dik is-sena. Camilleri pprezenta risposta fl-20 ta` Lulju 2015. Ghalkemm ma oggezzjonax, talab aktar informazzjoni dwar il-vjagg u jigi kkumpensat ghall-access li kien se jitlef minhabba s-safra. Vella wiegbet fit-30 ta` Lulju 2015. B`digriet tal-10 ta` Awissu 2015, il-Qorti rrilevat li Vella kienet naqset milli tindika ma` min kien se jorqod it-tifel. Fit-12 ta` Awissu 2015, tat id-dettalji. Il-Qorti ordnat in-notifika lil Camilleri bi zmien jumejn bi iwiegeb. Fir-risposta tieghu tad-19 ta` Awissu 2015, Camilleri oggezzjona li t-tifel isiefer mal-partner ta` Vella u cioe` Craven. Fl-20 ta` Awissu 2015, Vella pprezentat nota fejn cahdet dak li allega Camilleri. Ipprezentat ricevuti li kienu juru li matul s-safra, Craven kien se jorqod go kamra singola meta qabel kienet ibbukkjat kamra trippla. Fl-20 ta` Awissu 2015, il-Qorti tat digriet fejn cahdet t-talba tas-safar *"ghar-ragunijiet kollha imsemmija mill-kontro-parti"* kif ukoll ghaliex riedet tezamina bir-reqqa r-rapport tal-Avukat tat-Tfal.

Intant fl-24 ta` Lulju 2015, Camilleri pprezenta rikors fejn, prevja d-dispensa tan-notifika lil Vella, talab illi t-tifel jibda jghix mieghu b`access supervizjonat ghal ommu, kif ukoll illi t-tifel ma jkunx espost ghal Craven stante li dan *"huwa bniedem perikoluz u li hedded lit-tifel bil-mewt"*. Vella wiegbet fit-3 ta` Awissu 2015. Fl-<u>1 ta` Ottubru 2015</u>, il-Qorti, wara li rat ir-rapport tal-Avukat tat-Tfal, hatret lil psikologa Carmen Sammut sabiex, wara li tara lit-tifel, taghmel ir-rakkomandazzjonijeit taghha. Ordnat ukoll sabiex Vella ma tesponiex lit-tifel lil Craven.

Fid-9 ta` Ottobru 2015, Vella pprezentat rikors fejn talbet lill-Qorti sabiex tvarja d-digriet li tat fl-1 ta` Ottubru 2015, u sabiex tisma` lil Craven. Wara li kien notifikat bir-rikors, Camilleri pprezenta risposta fis-27 ta` Ottubru 2015. Fit-<u>28 ta` Ottubru 2015</u>, il-Qorti tat digriet fejn cahdet it-talbiet *"ghal uhud mir-ragunijiet imsemmija fir-risposta."*

Fir-rapport tal-psikologa tal-25 ta` Novembru 2015, *inter alia,* jinghad :-

" … li z-zewg genituri huma mportanti ghalih u li jixtieq jikkuntenthom it-tnejn."

" Hu jitkellem dwar is-sieheb tal-omm Chris b`mod pozittiv hafna, u b`mod mhux daqshekk pozittiv dwar is-siehba ta` missier u t-tifla taghha."

" … jidher li Chris … kien jaghtih hafna attenzjoni, u jaghmel mieghu affarijiet li jhobb, filwaqt li ghand missieru, fejn hu rrefera ghas-siehba tal-missier u t-tifla taghha bhala l-`queen` u l-`principessa` jidher li l-attenzjoni ma kienitx kollha fuqu naturalment, u li kellhu iktar kompetizzjoni ghall-attenzjoni tal-missier …"

"Mindu ma jistax jara lil Chris, hu beda jsemmi, kemm meta gabitu ommu, kif ukoll meta gabu missieru, li jimmissjah, u esprima x-xewqa li jixtieq jarah ghall-festi tal-Milied."

Il-psikologa tikkonkludi li t-tifel irid relazzjoni maz-zewg genituri.

2. <u>L-ewwel eccezzjoni tal-intimat Avukat Generali</u>

Il-Qorti taghmel referenza ghas-sentenza li tat il-Qorti Kostituzzjonali fis-27 ta` April 2012 fil-kawza **<u>Stacey Spiteri et vs Direttur tar-Registru Pubbliku</u>**, fejn kienu delineati l-principji li ghandhom jirregolaw eccezzjoni ta` din ix-xorta. Inghad hekk :-

10. Il-principji applikabbli meta l-Qorti tigi biex tiddeciedi jekk ir-rikorrenti ghandhomx jew kellhomx ghad-dispozizzjoni taghhom rimedju ordinarju alternattiv u effettiv gew delineati minn din il-Qorti f`diversi sentenzi taghha u li anke l-Ewwel Qorti ghamlet referenza ghalihom. Dan l-insenjament gie migbur b`mod komprensiv fis-sentenza ta` din il-Qorti diversament preseduta tas-16 ta` Jannar 2006 fl-ismijiet ***Olena Tetyak v. Direttur tac-Cittadinanza u Expatriate Affairs.***

11. Fost ohrajn insibu dawn :

L-ezistenza tar-rimedju l-iehor ghandha tirrizulta bhala stat ta` fatt attwali u objettiv ;

Ir-rimedju jrid ikun accessibbli, xieraq, effettiv u adegwat biex jindirizza l-ksur lamentat ;

Biex ir-rimedju jitqies effettiv m`hemmx ghalfejn li jintwera li r-rimedju se jaghti lir-rikorrent success garantit, imma jkun bizzejjed li jkun wiehed li jista` jigi segwit b`mod prattiku, effettiv u effikaci ;

Id-diskrezzjoni li ghandha l-Qorti f`dan ir-rigward trid titwettaq b`mod korrett u fl-ahjar interess tal- amministrazzjoni tal-gustizzja sabiex min-naha wahda, il- Qrati ta` indoli kostituzzjonali ma jkunux rinfaccjati b`kawzi li messhom jew setghu tressqu quddiem Qrati ohrajn kompetenti jew li dwarhom messhom jew setghu jfittxu rimedji ohrajn effettivi, u min-naha l-ohra sabiex persuna ma tkunx imcahhda mir-rimedji li ghandha jedd tfittex taht il-Kostituzzjoni jew taht il-Konvenzjoni ;

In-nuqqas wahdu ta` tehid ta` mezzi ordinarji mir-rikorrent mhuwiex raguni bizzejjed biex Qorti ta` xejra kostituzzjonali tiddeciedi li ma tuzax is-setghat taghha li tisma` l-ilment, jekk jintwera li l-imsemmija mezzi ma kinux tajbin biex jaghtu rimedju shih lir-rikorrent

Izda meta jidher car li jezistu mezzi ordinarji disponibbli biex jikseb rimedju ghall-ilment tieghu, ir-rikorrent ghandu jirrikorri ghal dawk il-mezzi, qabel ma jirrikorri ghar- rimedju kostituzzjonali.

Din il-Qorti taghmel taghha dawn l-insenjamenti.

Ir-rikorrenti qeghdin jilmentaw minn ksur tal-Art 6 u tal-Art 8 tal-Konvenzjoni ghar-ragunijiet indikati aktar kmieni. Fil-kaz tas-sejbien ta` vjolazzjoni skont l-ewwel u t-tieni talbiet, ir-rikorrenti qeghdin jitolbu t-thassir tad-digriet tal-1 ta` Ottubru 2015 moghti mill-Qorti Civili (Sezzjoni tal-Familja) skont it-tielet talba, kif ukoll il-hlas

ta` danni ghall-vjolazzjonijiet skont ir-raba` talba.

Mill-provi li tressqu fil-kors ta` din il-kawza, il-Qorti hija sodisfatta li r-rikorrenti Vella rrikorriet ghal proceduri quddiem il-qorti ordinarja sabiex taqleb is-sitwazzjoni taghha. Iddur fejn iddur mal-alternattivi ndikati mill-Avukat Generali, jibqa` l-fatt illi kull rikors li pprezentat ir-rikorrenti sabiex issib tarf tal-kwistjoni kien rigettat mill-qorti ordinarja. Bhala fatt id-digriet tal-1 ta` Ottobru 2015 ma kienx ghamla ta` digriet li minnu seta` jintalab permess lill-qorti ordinarja sabiex ikun interpost appell minnu.

Dan premess, tajjeb li jkun riaffermat, anke minn din il-Qorti, illi taghha tibqa` d-diskrezzjoni tesercitax (inkella le) is-setghat kostituzzjonali u/jew konvenzjonali taghha jekk jirrizulta li l-mezzi ordinarji ma kienux bizzejjed sabiex jaghtu rimedju **<u>tajjeb u effettiv</u>** lir-rikorrenti. Din il-Qorti ma ssibx li kien hemm rimedju b`dawn il-karatteristici, wara li qieset il-volazzjonijiet lamentati mir-rikorrenti, il-fatti u c-cirkostanzi tal-kaz, kif ukoll il-provi li gabu l-partijiet. Lanqas m`ghandu dawn l-elementi r-rimedju l-iehor indikat mill-Avukat Generali ta` kawza ad hoc biex jaqa` d-digriet.

Ghalhekk sejra tezercita d-diskrezzjoni taghha illi tiddeciedi l-kawza hi.

L-ewwel eccezzjoni tal-intimat Avukat Generali qeghda tkun <u>respinta</u>.

3. <u>L-ewwel eccezzjoni tal-intimat Joseph Camilleri</u>

Dwar eccezzjoni ta` din ix-xorta, din il-Qorti diversament presjeduta fis-sentenza li tat fil-kawza **<u>Marilyn Tanti vs L-Avukat Generali et</u>** fis-6 ta` Marzu 2018, irrimarkat hekk :-

"Illi l-Qorti tqis li l-kwestjoni ta` min ghandu jwieġeb ghal xilja ta` ksur ta` jedd fondamentali tintrabat kemm mal-ghamla tal-ksur li

jkun u wkoll mar-rimedju xieraq li jista` jinghata ghal dak il-ksur. Illum hu stabilit li l-Qrati taghna gharfu din ir-rejalta`, u ghalhekk sawru d-distinzjonijiet mehtieġa applikabbli ghall-biċċa l-kbira mill-każijiet. Illum il-ġurnata jingharfu kategoriji differenti ta` persuni li jistghu jitqiesu bhala leġittimi kuntraditturi f`azzjonijiet kostituzzjonali. Dawn jinqasmu fi tliet kategoriji, jiġifieri (a) dawk li jridu jwieġbu direttament jew indirettament ghall-ghemil li jikser id-dritt fundamentali ta` persuna, (b) dawk li jridu jaghmlu tajjeb (billi jipprovdu r- rimedju xieraq) ghan-nuqqasijiet jew l-eghmejjel li bihom haddiehor jikser xi jedd fundamentali ta` xi hadd, u (ċ) dawk il-partijiet kollha li jkunu f`kawża meta kwestjoni ta` xejra kostituzzjonali jew konvenzjonali tqum waqt is-smigh ta` xi kawża f`qorti (Kost. 7.12.1990 fil-kawża fl-ismijiet ***Abela vs Onor. Prim Ministru et****). Ma` dawn, u dejjem jekk ikollhom interess fil-kawża, jistghu jiddahhlu persuni ohrajn bil-ghan li jaghmlu shih il-ġudizzju u jaghmluh rappreżentattiv ta` kull interess involut fil-kwestjoni. Ghaldaqstant, meta l- allegazzjoni ta` ksur ta` wiehed mid-drittijiet fundamentali tal-bniedem tqum minn jew fuq proceduri li jkunu pendenti bejn il-partijiet, dawk il-partijiet ghandhom jifformaw parti mill-istess ġudizzju, kemm ghaliex dawn ghandhom ċertament interess fl-istess proċeduri u wkoll ghall-integrita` tal-ġudizzju* ***(P.A. Kost. RCP 10.1.2003 fil-kawża fl-ismijiet Kenneth Brincat et vs Avukat Ġenerali et)****"*

Fil-kawza tal-lum, ghal ragunijiet ta` allegat ksur tal-jeddijiet fondamentali taghhom hekk kif tutelati bl-Art 6 u bl-Art 8 tal-Konvenzjoni, ir-rikorrenti qeghdin jitolbu t-thassir ta` digriet moghti mill-Qorti Civili (Sezzjoni Familja) f`kawza fejn Camilleri huwa l-attur. M`ghandux ghalfejn ikun hemm l-icken dubju, mhux biss ghall-fini ta` integrita` ta` gudizzju, izda fuq kollox minhabba l-interess dirett li ghandu fl-esitu ta` dan il-procediment, inkluz li jikkontesta fil-mertu l-fondatezza tal-lanzjanzi tar-rikorrenti, illi Camilleri ghandu jkun parti fil-kawza odjerna.

L-ewwel ccezzjoni tal-intimat Camilleri qeghda tkun michuda.

4. L-ewwel talba

L-Art 8 tal-Konvenzjoni jghid :-

(1) Kulhadd ghandu d-dritt ghar-rispett tal-hajja privata tieghu u tal-familja tieghu, ta` daru u tal-korrispondenza tieghu.

(2) Ma ghandux ikun hemm indhil minn awtorita` pubblika dwar l-eżerċizzju ta` dan id-dritt hlief dak li jkun skont il-liġi u li jkun mehtieġ f `soċjeta` demokratika fl-interessi tas-sigurta` nazzjonali, sigurta` pubblika jew il-ġid ekonomiku tal-pajjiż, biex jiġi evitat id-diżordni jew l-eghmil ta` delitti, ghall-protezzjoni tas-sahha jew tal-morali, jew ghall-protezzjoni tad-drittijiet u l-libertajiet ta` haddiehor.

Ir-rikorrenti qeghdin jallegaw li effett tad-digriet tal-1 ta` Ottubru 2015 li tat il-Qorti Civili (Sezzjoni tal-Familja) kien hemm vjolazzjoni tal-Art 8 stante li ma setghux jghixu flimkien bhala koppja u bhala familja.

Fis-sentenza li tat din il-Qorti diversament presjeduta fl-20 ta` Ottubru 2015 fil-kawza **Rosalie Darmanin vs Il-Prim Ministru et** (mhux appellata) inghad hekk :-

Illi tajjeb li jinghad li "hajja privata" fl-artikolu 8 tal-Konvenzjoni ghandha tifsira wiesgha li tghodd fiha l-aspetti tal-hajja fiżika u soċjali tal-persuna. Minbarra dan, ladarba l-istess artikolu hu mahsub li jhares il-jedd ghall- hajja tal-familja, hu mistenni li tintwera l-eżistenza tal-familja fiċ-ċirkostanzi li jqajmu l-ilment u li din iċ-ċirkostanza hija wahda ta` fatt. Madankollu, ghall-finijiet tal-istess artikolu, b``familja` wiehed ma jifhimx biss familja mnissla b`rabta ta` żwieġ, imma wkoll familji ta` fatt li jghixu flimkien barra ż-żwieġ u wkoll fejn ir-relazzjoni tkun bejn persuni tal-istess ġeneru, jew fejn ir-relazzjoni sahansitra ma tkunx wahda ta` koabitazzjoni. Jinghad ukoll li l-firxa tal-artikolu 8 tal-Konvenzjoni tghodd ukoll dwar relazzjonijiet jew rabtiet ta` `familja` li ghad iridu jew potenzjalment jistghu jiżviluppaw bejn il-persuni involuti (ġeneralment rabtiet bejn ulied u ġenituri) ;

Illi b`żieda ma` dan kollu, ghall-finijiet tal-Konvenzjoni, `hajja tal-familja` ma tahsibx biss f`rabtiet soċjali, morali u kulturali, imma tghodd fiha interessi ta` xehta materjali jew partimonjali bhalma huma kwestjonijiet ta` manteniment jew qsim tal-ġid miġmugh ukoll jekk dan isir mal-mewt ta` wahda mill-partijiet. Ghaliex ghalkemm

kwestjonijiet bhal dawn "are not normally exercised until the estate-owner`s death, that is at time when family life undergoes a change or even comes to an end, this does not mean that no issue concerning such rights may arise before the death: the distribution of the estate may be settled, and in practice fairly often is settled, by the making of a will or of a gift on account of a future inheritance; it therefore represents a feature of family life that cannot be disregarded";

…

Illi biex indhil bhal dak ikun "skond il-ligi", jehtieg mhux biss li jsir taht is-sahha ta` xi ligi li tkun fis-sehh, imma wkoll li t-twettiq ta` kull ghamil ma jkunx jiddependi minn diskrezzjoni bla razan jew uzata b`mod li hadd ma jista` jobsru. Fuq kollox, biex mizura ta` ndhil tkun titqies bhala wahda "mehtiega f`socjeta` demokratika", jrid jintwera li kienet wahda mnissla minn htiega urgenti socjali li tkun proporzjonali mal-ghan mixtieq u prevedibbli fit-thaddim taghha biex taghti c-"certezza" tad-dritt. F`dan il-waqt ta` min isemmi li l-artikolu 8 tal-Konvenzjoni jitkellem dwar ir- "rispett" li l-Istat ghandu juri ghall-jeddijiet imsemmija f`dak l-artikolu. Dan tfisser bhala obbligazzjoni passiva fuq l-istat biex ma jindahalx bla bzonn jew b`mod eccessiv f`dawk il-jeddijiet, bil-konsegwenza li mhux kull indhil huwa projbit sakemm ikun joqghod mal-ghanijiet mahsuba fl- artikolu 8(2) tal-Konvenzjoni u jkun indhil maghmul b`mod proporzjonat ma` dawk l-ghanijiet. Kif inghad "In determining whether the interference was "necessary in a democratic society", the Court refers to the principles established in its case-law. It has to consider whether, in the light of the case as a whole, the reasons adduced to justify that interference were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, inter alia, T.P. and K.M. v. the United Kingdom [GC], no.28945/9,§ 70, ECHR 2001-V, and Sommerfeld v. Germany [GC], no.31871/96, § 62, ECHR 2003-VIII." ;

Illi huwa stabilit li, fejn jidhol l-aspett tal-proporzjonalita` 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."

In vista tal-mertu ta` din il-kawza, u **l-principju tal-ahjar interess tal-minuri**, il-Qorti sejra tirreferi wkoll ghal konvenzjonijiet internazzjonali dwar id-drittijiet tat-tfal.

Fil-"**<u>United Nations Convention on the Rights of the Child</u>**", il-*preamble* jghid :-

"The States Parties to the present Convention,

...

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

...

Have agreed as follows :

...

<u>Article 18</u>

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Il-principju tal-ahjar interess tat-tfal jirrizulta wkoll fit-tieni principju tad-"**Declaration on the Rights of the Child**" li kienet adottata mill-Gnus Maghquda fl-20 ta` Novembru 1959 :-

"The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

Fil-"**Convention on the Rights of the Child**", Artikolu 3 § 1, jinghad :-

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Fil-"**Guidelines on Determining the Best Interests of the Child**" li kienu ppublikati mill-UNHCR jinghad :-

"The term `best interests` broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child`s environment and experiences."

Fl-Art 24 tac-"**Charter of Fundamental Rights**" tal-UE insibu illi :-

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child`s best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Premess dan kollu, l-effett li kellu d-digriet in kwistjoni kien illi r-rikorrenti ma setghux ighixu flimkien bhala familja flimkiern ma` iben ir-rikorrenti. Irrizulta bhala fatt illi r-relazzjoni li kellhom ir-rikorrenti kienet stabbli, kellhom tarbija flimkien, u kienu fil-process li minn stat ta` koabitazzjoni jghaddu ghal zwieg.

Tajjeb li jkun riaffermat illi l-Art 8 tal-Konvenzjoni ma jaghtix tutela biss ghall-familji ta` persuni mizzewgin izda ghal familji *di fatto.*

Kif qalet ukoll l-ECtHR fid-decizjoni taghha fil-kaz ta` **<u>Elsholz vs Germany</u>** (App. No. 25735/94) :-

" … the notion of family under this provision is not confined to marriage-based relationships and may encompass other de facto family ties where the parties are living together out of wedlock."

M`ghandux ikun kontestat illi d-dritt protett bl-Art 8 huwa soggett ghal limitazzjoni fejn l-intervent tal-Istat ikun gustifikat.

Sabiex l-interferenza tal-Istat tkun gustifikata, ghandhom jissussistu tliet elementi :-

i) trid tkun skont il-ligi ;

ii) jrid ikollha skop legittimu ; u

iii) tkun necessarja f`socjeta` demokratika.

Inoltre l-indhil mill-Istat irid ikun necessarju, anke prevedibbli, minhabba htiega urgenti socjali. Din trid tkun proporzjonata mal-iskop li jrid jintlahaq.

Riferibbilment ghall-kaz tal-lum, jirrizulta li r-rikorrenti huma familja *di fatto.* Hekk jidher li huma Camilleri u s-siehba tieghu wkoll. Fil-kaz taghhom it-tnejn, iz-zewg familji *di fatto* wasslu ghat-twelid ta`

tarbija kull naha, apparti Eric li twieled minn dak li kien iz-zwieg ta` Vella u Camilleri.

Ir-rikorrenti jikkostitwixxu "familja" ghall-fini tal-Art 8 u ghalhekk ghandhom protezzjoni.

Id-decizjoni li trid taghmel din il-Qorti huwa li tghid jekk id-digriet tal-1 ta` Ottubru 2015 kienx jikkostitwixxi vjolazzjoni tal-Art 8.

Id-digriet kien ighid hekk :-

"Regghet rat r-rikors ta` l-attur tal-24 ta` Lulju 2015, u l-atti sussegwenti.

Rat r-rapport tal-Avukat tat-Tfal tad-29 ta` Settembru 2015.

Tahtar lil Carmen Sammut bhala espert psikologu illi wara li tikkomunika ma` Dr. Tanya Sammut Catania, taghmel assessment tat-tfal minuri u taghti rakkomandazzjonijiet kollha mehtiega dwar il-minuri.

Tordna illi Nadia Vella ma tesponix aktar lill-minuri ghal partner taghha u dan b`effett immedjat."

Fir-rikors tal-24 ta` Lulju 2015, Camilleri talab sabiex Eric immedjatament imur jabita mieghu, u sabiex l-omm ikollha biss access supervizjonat.

Ir-rikors kien prezentat wara l-incident ta` bejn Camilleri u Craven.

Ir-rikors kien precedut minn iehor prezentat fis-17 ta` Lulju 2015 fejn Vella talbet li Camilleri ma jkollux aktar access ghal Eric minhabba l-incident ta` bejn Camilleri u Eric (*supra*).

Ir-rapport tal-Avukat tat-Tfal issemma fid-digriet. Ghalkemm ma kienx prodott bhala prova fil-kors ta` din il-kawza, din il-Qorti ghandha f`idejha bhala prova r-rapport tal-psikologa Carmen Sammut.

Mir-rapport ta` Dr Carmen Sammut jirrizulta li r-relazzjoni bejn il-minuri u Craven kienet tajba (ara l-estratt mir-rapport citat aktar kmieni).

Fuq l-iskorta tal-kumpless tal-provi akkwiziti, din il-Qorti mhijiex issib u tara gustifikazzjoni ghall-indhil.

Ir-rapporti kollha li saru lill-Pulizija kienu jittrattaw il-hinijiet tal-access. Dwar l-allegat incident tat-18 ta` Lulju 2015, Craven jaghti verzjoni ta` l-fatti diversa minn dik ta` Camilleri. Li certament hareg **<u>oggettivament</u>** minn dan l-incident kien illi Craven safa` ferut waqt li Camilleri ma gralu xejn. Minbarra dan l-allegat incident ma kien hemm xejn aktar li seta` jiggustifika il-mizura li hadet il-qorti.

Din il-Qorti ma tistax ma tirrimarkax il-hasra ta` tant rikorsi u rapporti li saru minn Vella u Camilleri li fihom Eric spicca jaghqad intortament. L-ironija hija li Vella u Camilleri spiccaw il-qorti (u hemm ghadhom sal-lum) dwar l-access ta` Eric meta l-procedura tal-firda konsenswali ta` bejniethom kienet ghaddiet harir.

Huwa principju universali illi l-ahjar interess tal-minuri jigi l-ewwel u qabel kull konsiderazzjoni ohra. Fil-kaz tal-lum, is-sitwazzjoni sfortunata ghall-ahhar li ghadda minnha Eric bdiet minn meta kien ghadu ckejken, tul it-tfulija tieghu, sa issa li sar guvnott.

Din il-Qorti tistqarr minghajr tlaqlieq illi Eric ma kienx jimmerita t-trattament konflittwali u egosita tal-genituri tieghu.

Din il-Qorti ma tqisx li d-digriet in kwistjoni kien fl-ahjar interess tal-minuri.

Billi l-ahjar interess tal-minuri, anke meta nkwadrat fl-ambitu ta` familja, jimmerita harsien anke bl-Art 8 tal-Konvenzjoni, il-Qorti jidhrilha li d-digriet tal-1 ta` Ottubru 2015 kien lesiv ghad-drittijiet tar-rikorrenti kif ittutelati bl-istess disposizzjoni.

5. <u>It-tieni talba</u>

<u>L-Art 6(1) tal-Konvenzjoni</u> jghid :

Fid-decizjoni tad-drittijiet civili u tal-obbligi tieghu jew ta` xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b`ligi. Is-sentenza ghandha tinghata pubblikament izda l-istampa u l-pubbliku jista` jigi eskluz mill-proceduri kollha jew minn parti minnhom fl-interess tal-morali, tal-ordni pubbliku jew tas-sigurtà nazzjonali f`socjetà demokratika, meta l-interessi tal-minuri jew il-protezzjoni tal-hajja privata tal-partijiet hekk tehtieg, jew safejn ikun rigorozament mehtieg fil-fehma tal-qorti f`cirkostanzi specjali meta l-pubblicità tista` tippregudika l-interessi tal-gustizzja.

Ir-rikorrenti jilmentaw li kontra taghhom sehh ksur tal-Art 6 tal-Konvenzjoni billi : i) fil-kaz ta` Craven, kien imcahhad mid-dritt ta` access ghall-qorti, meta l-Qorti Civili (Sezzjoni Familja) ghaddiet provvediment dwaru minghajr ma kien parti tal-proceduri u minghajr ma nghata smigh ; ii) ma kellhomx access ghar-rapport li sar mill-Avukat tat-Tfal, anke jekk Vella hija parti fil-kawza ; iii) decizjonijiet li ghandhom effett determinanti fuq il-familja taghhom ittiehdu minghajr smigh ; u iv) Vella m`ghandha l-ebda rimedju effettiv u access ghal qorti stante li l-uniku mod kif setghet timpunja d-digriet de quo kien li tirrikorri ghand l-istess qorti li ppronunzjat ruhha kontra l-interess taghha u tal-familja taghha.

Fil-kaz ta` **<u>Saliba vs Malta</u>** li kien trattat quddiem l-ECtHR l-applikant kien qed jilmenta dwar l-mod kif il-qrati kienu qiesu l-provi li kellhom quddiemhom, kif ukoll dwar il-validita, il-kredibilita u r-rilevanza taghhom.

Fis-sentenza li tat f`dak il-kaz fid-29 ta` Novembru 2016 l-ECtHR qalet hekk :-

63. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see, for example, García Ruiz v. Spain [GC], no. 30544/96, § 28, ECHR 1999-I, and Perić v. Croatia, no. 34499/06, § 17, 27 March 2008).

64. On the other hand, whilst acknowledging the domestic judicial authorities` prerogative to assess the evidence and decide what is relevant and admissible, the Court reiterates that Article 6 § 1 places the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (see Khamidov, cited above, § 173) without prejudice to its assessment of whether they are relevant to its decision (see Van de Hurk v. the Netherlands, 19 April 1994, § 59, Series A no. 288, and Dulaurans v. France, no. 34553/97, § 33, 21 March 2000). An error of law or fact by the national court which is so evident as to be characterised as a "manifest error" – that is to say, an error that no reasonable court could ever have made – may be such as to disturb the fairness of the proceedings (see Bochan, § 62, cited above).

65. The Court reiterates further that, in view of the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see Cudak v. Lithuania [GC], no. 15869/02, § 58, ECHR 2010), the right to a fair trial cannot be seen as effective unless the requests and observations of the parties are truly "heard", that is to say, properly examined by the tribunal (see Dulaurans, cited above, § 33; Donadze v. Georgia, no. 74644/01, §§ 32 and 35, 7 March 2006; and Dima v. Romania, no. 58472/00, § 34, 16 November 2006).

66. Also, according to the Court`s established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see García Ruiz, cited above, § 26, ECHR 1999-I, with further references, and Ajdarić v. Croatia, no. 20883/09, § 34, 13 December 2011).

67. The requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law, the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases (see, for example, Dombo Beheer B.V., cited above, §§ 32-33 and Jokela v. Finland, no. 28856/95, § 68, ECHR 2002-IV). However, the Court considers it necessary, when examining proceedings that fall within the civil-law aspect of Article 6, to draw inspiration from its approach to criminal-law matters (see Dilipak and Karakaya v. Turkey, nos. 7942/05 and 24838/05, § 80, 4 March 2014).

(b) Application to the present case

68. While the Court does not usually interfere with a domestic court`s assessment of evidence, it nevertheless has taken issue with certain cases. In Dulaurans the Court found a violation of the right to a fair trial because the sole reason why the French Court of Cassation had arrived at its contested decision rejecting the applicant`s appeal on points of law as inadmissible was the result of "a manifest error of assessment" (see Dulaurans, cited above, § 25). In Khamidov, the unreasonableness of the domestic courts` conclusion as to the facts was "so striking and palpable on the face of it" that the Court held that the proceedings complained of had to be regarded as "grossly arbitrary" (see Khamidov, cited above, § 174). In Anđelković, the Court found that the arbitrariness of the domestic court`s decision, which principally had had no legal basis in domestic law and had not contained any connection between the established facts, the applicable law and the outcome of the proceedings, amounted to a "denial of justice" (see Anđelković, cited above, § 27). In Bochan, the Supreme Court had made assertions which were palpably incorrect and which the Court construed as being "grossly arbitrary" or as entailing a "denial of justice". Thus, the nature and the implications of the defect in the Supreme Court`s decision were such that that the impugned proceedings fell short of the requirement of a "fair trial" under Article 6 § 1 of the Convention (see Bochan, cited above, § 65).

69. Turning to the circumstances of the present case, the Court notes with perplexity the first-instance court`s conclusions based on Mr Z.`s inconsistent testimony (see paragraph 16 above concerning the domestic court`s description of such testimony) where it seems not to have taken account of all the other witness statements which raised doubts as to the veracity of his attestations (see paragraph 15 above). That judgment highlighted the various inconsistencies of Mr Z.`s testimony and noted the repetitive, far-fetched and banal arguments raised by Mr. Z which, in the same first-instance court`s view, weakened his version (see paragraph 16 above). Nevertheless, the first-instance court`s judgment makes absolutely no reference whatsoever to any other witness testimony heard during the proceedings, despite the fact that some of that evidence contradicted the statements of Mr Z. (see paragraph 15 above). The first-instance judgment, inter alia, makes no mention of the applicant`s statements to the effect that he was not involved and that Mr Z. was only acting in retaliation. Nor does the judgment refer to the evidence of the applicant`s wife and siblings which in many ways contradicted that of Mr Z. Neither did the first-instance judgment make any reference to any one of the other witnesses who had submitted an affidavit or testified at the bar and/or in cross-examination. Indeed that judgment relied solely on Mr Z.`s testimony, which the court chose to believe, irrespective of any other evidence brought before it.

70. Drawing inspiration from its approach to criminal-law matters (see paragraph 67 above), the Court considers that even had the first-instance court considered that other evidence to be incoherent, unreliable or immaterial, a comment or explanation to that effect would have been warranted. The Court reiterates that, in a criminal context, "inconsistencies between a witness`s own statements given at various times, as well as serious inconsistencies between different types of evidence ..., give rise to a serious ground for challenging the credibility of the witness and the probative value of his or her testimony; as such, this type of challenge constitutes an objection capable of influencing the assessment of the factual circumstances of the case based on that evidence and, ultimately, the outcome of the trial" (see Huseyn and Others v. Azerbaijan, nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 206, 26 July 2011).

71. While it is true that the current proceedings were civil in nature, it cannot be ignored that the case in question concerned the responsibility for damage resulting from participation in a robbery.

Thus the assessment of evidence is somewhat similar despite a different burden of proof being applicable. Indeed it is striking that the first-instance court while highlighting the inconsistencies of Mr Z.`s testimony, gave no reasons as to why it considered that Mr Z.`s statements remained credible and reliable. Nor did it justify those inconsistencies in any way (unlike the Court of Appeal). Such consideration was all the more necessary given that the applicant had originally not been able to identify the assailant back in 1995. The Court notes that the applicant`s name and that of his brother had been mentioned in the investigation only with regard to persons who had had access to the house and could have been familiar with it, but no identification of the brothers or the applicant as robbers had been made at the time. Given the delay in identification, which occurred only, suddenly, five years after the robbery and the fact that the identification was the main evidence on which the first-instance court relied, this evidence required a thorough examination. Nevertheless, the first-instance court in its judgment made no consideration and gave no explanations in respect of the sudden change of heart of Mr Z. which occurred in 2000 only after the applicant had lodged civil proceedings against him, despite the applicant`s highlighting of the matter repeatedly.

72. Furthermore, while the domestic court accepted the identification of the applicant, on the basis that identification could be based on mannerisms, movements and his silhouette, it did not give any consideration to the fact that the evidence produced indicated that Mr Z. was not even able to distinguish between the applicant and his brother – or at least no mention of such was made in the judgment. It is indeed disconcerting to imagine that the only objective evidence before the domestic court, namely that the applicant had had access to the victims` house (together with other people, including his brother), fulfilled the required balance of probabilities.

73. A proper examination of the submissions, arguments and evidence adduced by the parties and adequately stating the reasons on which decisions are based are relevant aspects under the civil limb of Article 6 § 1 (see the case law references at paragraph 64 above). The Court considers that this applies equally, if not more, when imputing civil responsibility for damage arising out of criminal acts due to the harsh consequences which may ensue from such findings. The Court notes that, in certain circumstances, such proceedings may also attract some of the guarantees applicable in criminal cases such as, for example, those of Article 6 § 2 (see, for example, Vella v. Malta, no. 69122/10, § 47, 11 February 2014) and that the requirements of a

fair hearing are the most strict in the sphere of criminal law (see Jussila v. Finland [GC], no. 73053/01, § 43, ECHR 2006-XIV). The Court has previously held that, notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma (ibid.). In the same vein the Court considers that, while civil in nature, cases such as the one in the present case can also carry such stigma. Thus, while all civil cases deserve the protection of Article 6 § 1, there is no doubt that in this type of case it is imperative that the domestic decisions are based on a thorough assessment of the evidence presented and that they contain adequate reasons (see general principles at paragraph 64-66 above). The present case leaves much to be desired in that connection.

74. The Court also notes that the Court of Appeal chose not to interfere with the lower court`s assessment of evidence, relying entirely on the opinion of the first-instance court. While, it did give some explanation of its own motion as to the inconsistencies in Mr Z.`s statements, no justification was put forward in relation to the testimonies of other individuals who put in doubt Z.`s credibility and his ability to recognise the applicant.

75. In its examination of such cases, it is the Court`s role to determine that the proceedings as a whole were fair as required by Article 6 § 1. Apart from the above considerations the Court considers it relevant to make the following further considerations in connection with the applicant`s specific complaints (see paragraphs 53-54 above). It reiterates that in its assessment of compliance of the procedure in question with the principle of equality of arms, which is a feature of the wider concept of a fair trial, significant importance is attached to appearances and to the increased sensitivity of the public to the fair administration of justice (see Borgers v. Belgium, 30 October 1991, Series A no. 214-B, § 24, and Perić, cited above, §§ 24-25).

76. The applicant complained about his inability to cross-examine one of the witnesses, namely Ms Z. The Court notes that although the applicant failed to raise the matter before the Court of Appeal, the courts at two levels of constitutional jurisdiction assessed the matter on the merits. The Court notes that the civil court at first-instance gave no specific reasons in reply to the applicant`s request to

expunge Ms Z.`s statement from the record and therefore its decision to accept the testimony despite the applicant not having the opportunity to cross-examine the witness. The courts at two levels of constitutional jurisdiction assumed these reasons, concluding that the judge had acted within his discretion and that no prejudice had been caused to the applicant. The Court considers that even though Ms Z. did not identify the applicant in her testimony, she had been the only other witness present on the day of the robbery. Since her testimony was accepted, the applicant had a real interest in cross-examining her or of having her statement removed from evidence.

77. Similarly, the Court observes that the Court of Appeal left unanswered the applicant`s request to produce a witness (his brother) during the appeal proceedings and never gave a decision on the matter. While the Government argued, in line with the Constitutional Court`s finding (see paragraph 33 above), that the applicant had failed to make such an application in the proper way, the Court of Appeal made no finding to that effect, and did not state that the applicant had failed adequately to bring to their attention his intention to call his brother as a witness (compare, mutatis mutandis, Tamminen, cited above, § 39). It has not been disputed that the appeal application contained such a request including an explanation as to the relevance of the witness (ibid.). Furthermore, while the Government highlighted the exceptional nature of hearing evidence from a witness in appeal proceedings, the Court`s attention has not been brought to any specific procedural impediment which prevented the court from taking cognisance of such a request, and the Court notes that Article 208 of the Code of Organisation and Civil Procedure (see paragraph 42 above) only refers to witnesses which had not previously testified (and thus did not apply in the present case since F. had already testified during the first-instance proceedings). Moreover, the intention of the applicant was not to hear the evidence but to juxtapose the witnesses so that the appeal court could see them, allowing it to examine, in its role of appeal court, whether there were compelling reasons which would have made it appropriate to alter the first-instance decision. Nevertheless, no attention was given to this matter by the Court of Appeal.

…

79. The Court considers that the various failures mentioned above, might not individually suffice to find that the applicant had an unfair trial. Nevertheless, the Court cannot ignore the various shortcomings in the proceedings in the present case, particularly the

failure to give reasons in respect of the conflicting evidence (see paragraphs 69-74 above) and in respect of the applicant`s requests which were shot down with little or no motivation whatsoever (see paragraphs 76 and 77 above).

80. The foregoing considerations are sufficient to enable the Court to conclude that there had been a violation of Article 6 § 1 of the Convention.

Dwar l-ilment illi ma kienx hemm access ghar-rapport tal-Avukat tat-Tfal, fil-kaz ta` **Yonchev vs Bulgaria** li kien deciz fis-7 ta` Dicembru 2017 l-ECtHR qalet hekk :-

45. The concept of "private life" under Article 8 is a broad term. It covers physical and psychological integrity and can therefore embrace multiple aspects of a person`s physical and social identity. Information about the person`s health is an important element of private life. Article 8 protects in addition a right to personal development and the right to establish and develop relationships with other human beings and the outside world (see S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008).

…

(b) Access to information in the Court`s case law under Article 8 of the Convention

48. The Court has held that, in addition to the primarily negative undertakings in Article 8, there may be positive obligations inherent in effective respect for private life (see Roche v. the United Kingdom [GC], no. 32555/96, § 157, ECHR 2005-X).

49. With regard to access to personal data held by the public authorities, with the exception of information related to national security considerations (see Leander v. Sweden, 26 March 1987, § 51, Series A no. 116), the Court has recognised a vital interest, protected by Article 8 of the Convention, of persons wishing to receive information necessary to know and to understand their childhood and

early development (see Gaskin, cited above, § 49) or to trace their origins, in particular the identity of their natural parents (see Odièvre v. France [GC], no. 42326/98, § 41-47, ECHR 2003-III), information concerning health risks to which interested persons had been exposed (see Roche, cited above, § 161; McGinley and Egan v. the United Kingdom, 9 June 1998, § 99, Reports of Judgments and Decisions 1998-III; Guerra and Others v. Italy, 19 February 1998, § 60, Reports 1998-I), or information about a person`s records created by the secret services during the period of a totalitarian regime (see Haralambie v. Romania, no. 21737/03, §§ 87-89, 27 October 2009, and Joanna Szulc v. Poland, no. 43932/08, § 87, 13 November 2012).

50. In these contexts, the Court held that the respondent State`s positive obligation under Article 8 of the Convention required it to provide an effective and accessible procedure enabling the applicants to have access to all relevant and appropriate information necessary for the specific purposes described above (see Roche, § 162, Haralambie, § 86, Joanna Szulc, §§ 86 and 94, all cited above)."

Fl-isfond tal-premess, tajjeb jinghad illi fl-ambitu tal-harsien li huwa ntiz li jaghti l-Art 6, ghandu jkun hemm osservanza ta` dawn il-principji :-

i) Kull qorti ghandha l-obbligu u d-dmir li taghrbel u tqis bir-reqqa l-evidenza u s-sottomissjonijiet tal-partijiet.

ii) Id-dritt ghal smigh xieraq huwa effettiv biss meta l-osservazzjonijiet u l-argumenti tal-partijiet huma "truly heard".

iii) Meta jinghataw decizjonijiet, u anke digrieti, li jaffettwaw il-partijiet, b`mod daqstant drastiku, dawk il-pronunzjamenti ghandhom ikunu motivati u spjegati.

Ghalkemm kull procediment civili jaqa` taht il-harsien tal-Art 6, m`ghandux ikun hemm l-icken dubju illi f`dawk il-proceduri fejn ikun hemm involuti persuni vulnerabbli, bhal minuri, huwa vitali u mperattiv li pronunzjament ta` qorti ghandu jkun spjegat bl-ahjar mod, u jkun ir-rizultat ta` analizi akkurata tal-provi.

Il-Qorti sejra tghaddi ghall-konsiderazzjoni tal-ilmenti tar-rikorrenti dwar allegata vjolazzjoni tal-Art 6 (*supra*).

Jirrizulta li wara d-digriet tal-1 ta` Ottubru 2015, Vella pprezentat rikors fid-9 ta` Ottubru 2015, fejn irreferiet ghal *character references* dwar Craven, u talbet sabiex l-inkariku tal-psikologa Sammut ikun estiz sabiex tevalwa wkoll il-karattru ta` Craven, u r-relazzjoni tieghu ma` l-minuri. Talbet ukoll lill-Qorti sabiex tisma` lil Craven innifsu. Wara li r-rikors kien notifikat lil Camilleri dan ipprezenta risposta fis-27 ta` Ottobru 2015. L-ghada l-Qorti tat d-digriet taghha fejn cahdet *t-talbiet kollha ukoll ghal uhud mir-ragunijiet imsemmija fir-risposta.* Tajjeb jigi rilevat illi r-risposta ta` Camilleri kien kwazi ripetizzjoni tar-rikors li kien ipprezenta fl-24 ta` Lulju 2015.

Id-dritt ghal smigh xieraq ikun effettiv meta t-talbiet li jsiru mill-partijiet jigu trattati verbalment mill-qorti lit kun sejra tippronunzja ruhha dwarhom. Fl-ambitu ta` procediment civili, id-dritt ghal smigh xieraq skont l-Art 6 ikun imhares jekk isir ezami akkurat tal-provi, sottomissjonijiet u argumenti li jkunu ngiebu quddiem il-qrati. Fattur din li ssir essenzjali f`kazi ta` access u b`mod aktar wiesgha l-interess tal-minuri.

Fil-kaz tal-lum, il-Qorti Civili (Sezzjoni tal-Familja) kienet sejra taghti provvediment li kien ser jeffettwa mhux biss il-futur prossimu u l-*well being* tal-minuri f`kawza fejn l-akkaniment tal-genituri ha s-sopravvent, izda kien seer ikollu effett ukoll fuq partijiet ohra interessati, u cioe` l-genituri tal-minuri, il-*partners* tal-genituri tal-minuri u sahansitra l-ulied li twieldu mir-relazzjoni ta` bejn il-genituri u l-*partners* taghhom. Ladarba l-qorti kien hsiebha li zzomm lil Craven boghod minn Eric, l-inqas li kellha taghmel kien li tappunta r-rikors ghas-smigh sabiex tisma` lill-kontendenti izda tisma` wkoll lil Craven li diga` gie accertat li kien ifforma familja ma` Vella, ladarba Craven kien ser jintlaqat direttament bil-provvediment taghha. Ir-relazzjoni li Craven kellu ma` Vella kienet mibnija fuq affetti u ntimita` ta` zewg persuni li ghazlu li jghixu flimkien ghat-tul. Mill-provi jirrizulta li bejn l-minuri u Craven kienet nbniet relazzjoni tajba u li Craven kien sar parti mill-hajja ta` kuljum tal-minuri. Billi l-minuri kien diga` ghaddej minn zmien difficli u ta` tensjoni minhabba l-kuntrasti emottivi u gudizzjarji tal-genituri tieghu, il-Qorti Civili (Sezzjoni tal-Familja) kellha tevalwa b`mod wiesgha s-sitwazzjoni li kellha quddiemha u tisma` lil kull min kien ser jintlaqat mill-provvediment taghha, inkluz

Craven. Ghalhekk kien hemm vjolazzjoni tal-jedd ghal smigh xieraq.

Ir-rikorrenti jilmentaw illi ma kellhomx access ghar-rapport li sar mill-Avukat tat-Tfal u li fuqu jidher li l-qorti sejset il-provvediment taghha.

L-Avukat tat-Tfal Dr. Tanya Sammut Catania kienet appuntata fit-3 ta` Awissu 2015, wara rikors li pprezenta Camilleri fl-24 ta` Lulju 2015. Fir-rikors Camilleri allega : i) illi l-minuri kien jibza` minn ommu r-rikorrenti ; ii) li r-rapport li sar mill-minuri kien falz ; u iii) li Craven ghandu problemi psikologici. Ghalhekk talab illi l-minuri jibda jirrisjedi mieghu, b`access supervizjonat ta` ommu, u mhux fil-presenza ta` Craven. L-Avukat tat-Tfal kellha tisma` lill-minuri u tirrelata dwar t-talbiet ta` Camilleri. Jidher illi r-rapport kien prezentat fid-29 ta` Settembru 2015 u fl-1 ta` Ottobru 2015, il-Qorti tat id-digriet taghha.

Il-funzjonijiet tal-Avukat tat-Tfal huma delineati fl-**<u>Art 25 tal-Kap 569</u>** li jghid :-

(1) Bla hsara ghall-funzjonijiet tal-Avukat tat-Tfal li johorgu minn xi ligi ohra, l-Avukat tat-Tfal ghandu :

(a) jaghti parir legali u assistenza lit-tifel;

(b) jistabilixxi u jipprezenta l-fehmiet tat-tifel quddiem xi qorti jew xi awtorità amministrattiva;

(c) jaghti spjegazzjonijiet lit-tifel dwar il-konsegwenzi li jkunu possibbli f`kaz ta` konformità mal-fehmiet tieghu jew taghha; u

(d) jaghti lit-tifel kull informazzjoni rilevanti:

Izda l-Avukat tat-Tfal ghandu jaghti lit-tifel l-ispjegazzjonijiet u l-informazzjoni rilevanti kollha kif imsemmi fil-paragrafi (b) u (c) biss meta t-tifel ikun meqjus li ghandu ftehim bizzejjed.

(2) L-Avukat tat-Tfal ghandu jircievi dak it-tahrig rilevanti li minn zmien ghal zmien jista` jigi preskritt b`regolamenti maghmulin mill-Ministru responsabbli ghall-Gustizzja sabiex ikunu effettivament rapprezentati u accertati l-fehmiet u x-xewqat tat-tifel.

Fil-kummenti li kienu saru mill-Gudikatura wara li hareg it-tieni dokument ghall-Konsultazzjoni Pubblika dwar r-Riforma Holistika fil-Qasam tal-Gustizzja f`Settembru 2013 kien inghad *inter alia* :-

53. Il-parental alienation hija realtà qawwija u tragika fost hafna familji li huma ghaddejjin minn firda u jenhtieg li ikun hemm tahrig opportun ghal kull persuna involuta fil-Qorti tal-Familja, inkluzi avukati u gudikanti, dwar x`tip ta` azzjoni tista` tittiehed biex tigi rimedjata minghajr ma wiehed ikompli jkisser mhux biss il-familja, imma, b`mod partikolari, lill-minuri involut. Hija xi ftit dubbjuza l-prassi adottata s`issa illi l-Avukati tat-Tfal jipprezentaw rapport lill-qorti wara li jkunu intervistaw lit-tfal li jippatrocinaw. Dan qed jinghad ghaliex proprjament il-funzjoni ta` avukat ma hiex li jipprezenta rapport lill-qorti izda li jressaq sottomissjonijiet sew orali sew bil-kitba.

Din il-Qorti hija tal-fehma li r-rapport tal-Avukat tat-Tfal m`ghandux jibqa` naccessibbli ghall-partijiet. Qed tishaq fuq dan partikolarment fil-kaz tal-lum ghaliex jirrizulta li parti mir-raguni ghaliex il-qorti pprovdiet illi Eric ma kellux ikun espost ghal Craven kien minhabba dak li hareg mir-rapport tal-Avukat tat-Tfal. Tkompli tinsisti fuq dan ghaliex mill-provi li kellha quddiemha ma hareg xejn konklussiv li kellu jwassal lill-Qorti tal-Familja li tipprovdi kif dehrilha bla ma semghet lill-partijiet u lanqas lil Craven innifsu. Taghmel dawn ir-rilievi ghaliex wara li qrat r-rapport ta` Dr. Carmen Sammut ma rrizulta xejn li kellu jzomm lill-minuri boghod minn Craven li kien ifforma familja ma` omm il-minuri. Anke f`dan il-kaz kien hemm lezjoni.

Ir-rikorrenti lmentaw ukoll illi bla ma semghethom il-Qorti tal-Familja affettwat il-hajja familjari taghhom.

Jirrizulta mill-provi illi d-digrieti in kwistjoni nghataw minghajr smiegh ghaliex il-qorti llimitat ruhha ghall-kitba.

Anke fuq l-iskorta ta` dak deciz mill-ECtHR f`**<u>Saliba vs Malta</u>**, is-smigh kien mehtieg tenut kont tas-sensittivita` tal-kaz. Mill-provi rrizulta li r-rikorrenti ma nghatatx l-opportunita li jkollha smigh kemm kemm dwar ir-rikors fejn kienet qed titlob sabiex ssiefer ma` binha u kemm fir-rikors fejn l-intimat ried ibiddel l-access li kien hemm ghal minuri. Il-vjolazzjoni tirrizulta wkoll.

L-ilmenti l-iehor kien illi Vella m`ghandhiex rimedju effettiv ghaliex kull rikors li hija ghamlet jew li tista` taghmel sabiex tipprova tvarja d-digrieti precedenti tal-Qorti Civili (Sezzjoni tal-Familja), jinstema` mill-istess imhallef li jkun diga` ta provvediment dwar l-istess materja.

L-Avukat Generali jirreferi ghall-**<u>Art 37 tal-Kap 16</u>**.

Id-disposizzjoni tghid hekk :-

(1) Il-kawzi kollha ghal separazzjoni personali ghandhom jingiebu quddiem is-sezzjoni xierqa tal-Qorti Civili kif jigi stabbilit b`regolamenti maghmulin mill-Ministru responsabbli ghall-gustizzja :

Izda qabel jinbdew il-procedimenti, tista` ssir talba sabiex jigi stabbilit l-ammont tas-somma ghall-manteniment fil-waqt li l-procedimenti jkunu pendenti u ghall-ghoti ta` digriet li jordna l-hlas ta` dik is-somma jew talba lill-qorti biex b`digriet tistabbilixxi liema wahda mill-partijiet fiz-zwieg, jekk ikun il-kaz, ghandha matul il-procedimenti tibqa` tghix fid-dar matrimonjali.

(2) Ir-rikors li jkun fih it-talba msemmija fil-proviso ghas-subartikolu (1) ghandha tkun debitament appuntata ghas-smigh mill-qorti u ghandha tigi notifikata lill-konvenut flimkien mal-avviz ta` dik is-seduta :

Izda meta jkun hemm involuta l-vjolenza domestika, ir-rikors imsemmi ghandu jigi appuntat fi zmien erbat ijiem u l-qorti tista`, b`inizjattiva taghha stess qabel ma tisma` lill-partijiet jew wara, tohrog ordni ta` protezzjoni taht l-artikolu 412C tal-Kodici Kriminali u, jew ordni ta` trattament taht l-artikolu 412D tal-istess Kodici, u d-dispozizzjonijiet ta` dawk l-artikoli ghandhom japplikaw mutatis mutandis ghal ordni mahruga taht dan l-artikolu bhallikieku din kienet ordni mahruga taht l-artikolu korrispondenti ta` dak il-Kodici:

Izda wkoll ghall-finijiet ta` dan l-artikolu u tal-artikolu 39, "vjolenza domestika" ghandu jkollha l-istess tifsira moghtija lilha bl-artikolu 2 tal-Att dwar il-Vjolenza Abbazi ta` Generu u Vjolenza Domestika.

(3) Il-qorti ghandha tisma` lir-rikorrent u lill-intimat sommarjament u mbaghad ghandha, b`digriet, tiddeciedi fuq ir-rikors :

Izda l-qorti tista` tiddeciedi fuq it-talba meta r-rikorrent jew l-intimat jew kemm ir-rikorrent kif ukoll l-intimat jonqsu li jidhru fil-jum tas-smigh.

(4) Id-digriet imsemmi fis-subartikolu (3) ikun titolu ezekuttiv meqjus bhala inkluz fost id-digrieti msemmija fl-artikolu 253(a) tal-Kodici ta` Organizazzjoni u Procedura Civili u jkun ezegwibbli bl-istess mod u taht l-istess kondizzjonijiet kif jigu ezegwiti atti bhal dan.

(5) Id-digriet imsemmi fis-subartikolu (3) ma jibqax ezegwibbli jekk l-azzjoni ghas-separazzjoni li ghaliha jinghata permess ma tinbedix fi zmien xahrejn mid-data tad-digriet jew f`dak iz-zmien itwal li tista` taghti l-qorti fl-istess digriet jew f`digriet iehor wara.

(6) Id-dispozizzjonijiet tal-artikolu 381 tal-Kodici ta` Organizzazzjoni u Procedura Civili li bis-sahha taghhom il-qorti ta` gurisdizzjoni kontenzjuza tista` taghmel il-mandat hemm specifikat ghandhom japplikaw, mutatis mutandis, daqslikieku r-riferenza ghall-qorti f`dak is-subartikolu, kienet riferenza ghas-sezzjoni xierqa tal-Qorti Civili li quddiemha tkun saret it-talba msemmija fil-proviso ghas-subartikolu (1).

(7) Id-digriet u l-ordni msemmija f`dan l-artikolu jistghu biss jigu riveduti, mibdula jew revokati fuq rikors maghmul mill-parti li titlob dik ir-revizjoni, dak it-tibdil jew dik ir-revoka.

(8) Bla hsara ghad-dispozizzjonijiet tal-artikolu 39 tal-Kostituzzjoni, regolamenti maghmulin taht dan l-artikolu jistghu jipprovdu ghas-smigh ta` kawzi bil-maghluq.

(9) Id-dispozizzjonijiet ta` dan l-artikolu ghandhom japplikaw ukoll f`kawzi li jirrigwardaw il-manteniment, l-access, u, jew, il-kura u l-kustodja tat-tfal, ukoll meta l-genituri ma jkunux mizzewgin.

Skont din id-disposizzjoni, meta si tratta ta` kwistjonijiet ta` access ghall-minuri, ir-rikors ghandu jigi appuntat ghas-smigh biex il-Qorti tisma` lill-partijiet sommarjament u taghti d-digriet. Dak id-digriet ikun titolu ezekuttiv.

Fis-sentenza li tat din il-Qorti diversament presjeduta fid-9 ta` Settembru 2002 fir-Referenza **<u>Spettur Paul Camilleri vs Joseph Bone et</u>** inghad hekk :-

"L-Artikolu 6(1) tal-Konvenzjoni Ewropea - kif ukoll l-Artikolu 39(1) tal-Kostituzzjoni - jiggarantixxi lil kull min ikun akkuzat b`reat kriminali smigh xieraq ("fair hearing") billi jezigi li l-kaz jigi mismugh minn "tribunal indipendenti u imparzjali mwaqqaf b`ligi".

Li gudikant ikun imparzjali jfisser li huwa jkun hieles minn pregudizzju jew minn "bias" fil-mod kif jaffronta l-kaz li jkollu quddiemu.

L-ezistenza ta` imparzjalita` ghall-finijiet tal-Artikolu 6(1) ghandha tigi determinata skond test soggettiv, jigifieri fuq il-bazi tal-konvinciment personali ta` gudikant partikolari f`kaz partikolari, kif ukoll skond test oggettiv, jigifieri jekk il-gudikant joffrix garanziji sufficjenti sabiex jeskludi kwalsijasi dubju legittimu f`dan is-sens.

Ghal dak li jirrigwarda t-test soggettiv, fis-sens jekk li l-gudikant ikunx fil-fatt u fir-realta` pregudikat, ir-regola hi li l-gudikant hu presunt imparzjali sakemm ma jigix ippruvat il-pregudizzju li huwa ghandu jew kellu fir-rigward ta` xi kaz partikolari.

Is-semplici fatt li gudikant jigi msejjah sabiex jiddeciedi seriatim diversi kawzi li jinvolvu l-istess partijiet, liema kawzi jkunu pero` naxxenti minn "fatti" differenti, ma jfissirx li kif appena jiddeciedi l-ewwel wahda favur parti jew ohra allura huwa jkun "pregudikat" fil-konfront tal-parti sokkombenti fir-rigward tal-kawzi li jkun ghad baqghalu jiddeciedi. Il-gudikant serju u kompetenti jaffronta kull kaz b`oggettivita` u jaghmel sforz konxju biex jiddeciedi biss fuq dak li jkun irrisultalu bhala fatt u skond il-ligi, u fid-dawl tal-argumenti mressqa mid-difensuri tal-partijiet, indipendentement minn dak li jkun iddecieda f`kawzi precedenti li jinvolvu lil xi parti li terga` tigi quddiemu.

L-applikazzjoni tat-test oggettiv, id-domanda fondamentali hija jekk dubju legittimu jistax jigi gustifikat oggettivament. Trid issir indagini jekk il-qorti toffrix garanziji sufficjenti sabiex teskludi dubju bhal dan, jew jekk hemmx fatti accertabbli li jistghu iqajmu dubji dwar

l-imparzjalita` tal-qorti. Fil-valutazzjoni tal-imparzjalita` ta` qorti anki l-apparenzi jistghu ikunu importanti. Meta jkun hemm dubju legittimu dwar l-imparzjalita` ta` imhallef, dan ghandu jastjeni milli jiehu konjizzjoni tal-kaz.

Fir-rigward ta` dan it-test oggettiv, ghalkemm dak li jahseb l-akkuzat (jew il-parti li tqajjem l-ilment) dwar l-imparzjalita` tal-qorti huwa importanti, dan fih innifsu ma hux fattur decisiv. Dak li hu decisiv hu jekk hemmx cirkostanzi, oggettivament riskontrabbli, li jnisslu dubbju legittimu f`mohh l-akkuzat jew f`mohh il-pubbliku dwar l-imparzjalita` tal-qorti. S`intendi, anke cirkostanza wahda f`dan is-sens tista` tkun bizzejjed.

…

Biex jidhol fix-xena l-Artikolu 6(1) tal-Konvenzjoni, mhux bizzejjed li jkun hemm "link" bejn kawza u ohra, bhal, per ezempju il-"link" li l-partijiet (imputat u vittma) jkunu l-istess, jew li l-fatti, ghalkemm differenti, ikunu naxxenti minn glied kontinwu bejn l-istess partijiet. Biex wiehed jista` jitkellem dwar "pre-gudizzju" irid ikun hemm decizjoni fuq xi fatt li jkun ukoll "in issue" fit-tieni kawza, b`mod li l-gudikant fit-tieni kawza ikun diga ippronunzja ruhhu fuq il-fatt in kontestazzjoni.

Fil-kawza **<u>Patrick Spiteri vs Avukat Generali et</u>** deciza minn din il-Qorti diversament presjeduta fis-17 ta` Mejju 2012 inghad :-

Din il-Qorti sejra tqis fil-qosor the right to a fair trial b`mod generali.

*L-awturi Harris, O`Boyle & Warbrick tal-ktieb **"<u>Law of the European Convention on Human Rights</u>"** - Second Edition – 2009 – Oxford - ighidu hekk - fil-pagna 201 :*

The Court (b`riferenza ghall-Qorti ta` Strasbourg) has stressed that "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively" (Perez v France – 2004-I ; 40 EHRR 909 para 64 GC).

Ikomplu hekk fil-pagna 202 –

The Court also allows States a wide margin of appreciation as to the manner in which national courts operate ... A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of results as of conduct, with national courts being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial.

Izjed fil-pagna 204 –

In some contexts a breach of Article 6 will only be found to have occurred upon proof of "actual prejudice" to the applicant. *(enfasi ta` din il-Qorti)*

Fil-pagna 224 jinghad –

Article 6 does not control the content of a state`s national law ; it is only a procedural guarantee of a right to a fair hearing in the determination of whatever legal rights and obligations a state chooses to provide in its law.

*L-awturi Van Dijk, Van Hoof, Van Rijn, Leo Zwaak fil-ktieb **"<u>Theory and Practice of the European Convention on Human Rights</u>"** - Fourth Edition – Intersentia – 2006 jaghmlu din l-analizi fil-pagna 578 –*

When is a hearing fair? In the Kraska case (sentenza tad-19 ta` April 1993) the Court took as a starting-point that the purpose of Article 6 is inter alia "to place the tribunal under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessments of whether they are relevant to its decision.

*Riferibbilment ghall-kwistjoni partikolari li biha din il-Qorti hija rinfaccjata fil-kawza tal-lum u cioe` "il-permess specjali biex isir appell minn digriet interlokutorju", **l- awturi Harris, O`Boyle & Warbrick** (op. cit.) ighidu hekk fil-pag.234 –*

Whereas Article 6 applies to the execution of final judgements, it does not govern interlocutory court proceedings. *These include a challenge to the composition of a court, a request for interim relief, **an application for leave to appeal** or an application to re-open a civil case ...*

The Court`s generally negative approach in respect of interlocutory proceedings is based on the view that a person`s rights

and obligations are only being determined in the sense of Article 6(1) when they are being ruled upon on the merits. While this is a tenable interpretation, it is not a necessary one and does not recognize the importance that decisions taken in interlocutory proceedings may have for the outcome of the case on the merits. An interpretation that included interlocutory proceedings would be more in accordance with a right of effective access to a court and with a purposive, human rights reading of the Convention. (sottolinear u enfasi ta` l-qorti)

Il-Qorti diga` ttrattat ir-rikorsi li pprezentat Vella fit-12 ta` Gunju 2015 u fid-9 ta` Ottubru 2015 quddiem il-Qorti Civili (Sezzjoni Familja) fil-kawza ta` bejn Camilleri u Vella fuq citata.

Anke fil-kaz ta` dawn iz-zewg rikorsi ma kienet appuntata l-ebda udjenza ghas-smigh. Il-provvedimenti nghataw fuq l-iskorta tal-atti. Ma jidhirx ghalhekk li kienu osservati d-dettami tal-Art 37 tal-Kap 16.

Jista` jsir l-argument li Vella setghet talbet permess mill-qorti sabiex tappella mid-digriet skont l-Art 229(3) tal-Kap 12. L-argument pero` ma jregix ghaliex kif fissret il-Qorti ta` l-Appell fil-kawza **<u>Mary sive Mariella Cassar vs Edward Cassar</u>** deciza fil-27 ta` Mejju 2016, ma jistax isir appell minn digrieti ta` dak it-tip :-

Fl-ewwel lok din il-Qorti tissenjala li jirrizulta car li d-digriet appellat m`huwiex wiehed minn dawk indikati fis-sub-incizi 1 u 2 tal-Artikolu 229 u ghalhekk dak li ghandu jigi ezaminat huwa jekk jinkwadrax fid-dispost tas-sub-inciz 3 tal-istess artikolu. Dan is-sub-inciz huwa ta` natura residwali u japplika ghal kull "digriet interlokutorju iehor" li jinghata fil-kors tal-proceduri u li ma jaqax taht is-sub-incizi 1 u 2.

*9. Dwar il-materja li titratta l-appellabbilita` ta` digrieti moghtija fil-kors ta` proceduri hija relevanti s-segwenti osservazzjoni maghmula minn din il-Qorti fil-**kawza Paul Tanti et v. Sammy Mifsud** :*

"Ezami akkurat ta` l-artikolu 229 ghandu juri illi l-legislatur b`din iddisposizzjoni ried li jirregolarizza u jirrazjonalizza meta u kif seta` jsir appell minn digrieti moghtija mill-Qorti mahsuba biex

jiffavorixxu landament korrett tal-proceduri quddiemha. Infatti l-artikolu jipprovdi ghal digrieti kamerali u interlokutorji ta` kull xorta u jiddetermina jekk setax jew le jsir appell minnhom qabel l-ghoti tas-sentenza definittiva u f`dawk il-kazijiet fejn digriet interlokutorju seta` jigi appellat qabel issentenza definittiva, id-disposizzjoni timponi procedura li kellha tigi segwita. Id-dispozizzjoni pero` taghmilha cara illi dawk il-provvedimenti kienu japplikaw biss ghad-digrieti msemmija fis-subincizi (1) u (2) ta` l- istess artikolu u ghal kull appell "minn kull digriet interlokutorju iehor li mhuwiex inkluz fis-subartikolu (1) u (2) ta` dan l-artikolu". Dan ifisser illi jekk id-digriet ma jkunx wiehed interlokutorju (naturalment ukoll jekk jkun kamerali) – u dana kif qed jigi definit li hu id-digriet taht ezami – lartikolu 229 tal-Kap 12 ma kienx applikabbli ghalih. Infatti l-incizi sussegwenti (4), (5) u (6) huma lkoll marbutin mad-dispozizzjoni precedenti. Kienu allura biss japplikaw ghal dawk ix-xorta ta` digrieti imsemmija fl-incizi (1) u (2).

10. Fil-kaz odjern, ghalkemm id-digriet provvizorju appellat jista` jitqies bhala ancillari ghall-gudizzju, ma jistax jitqies bhala wiehed interlokutorju peress li m`huwiex intiz sabiex jirregola l-andament tal-proceduri; wisq anqas jista` jigi meqjus bhala digriet definittiv peress li minnu nnifsu hu ta` natura provvizorja intiz sabiex jirregola temporanjament is-sitwazzjoni fil-meritu bejn il-partijiet sakemm tinghata s-sentenza finali. Ghaldaqstant ma jistax jitqies bhala li jinkwadra fl- imsemmi sub-inciz 3.

Rigward d-digriet li nghata fil-1 ta` Ottubru 2015, u li huwa l-mertu tal-kawza odjerna, dan ma jistax jitqies li kien interlokutorju jew definittiv, ghaliex kien intiz biss sabiex jirregola s-sitwazzjoni temporanjament sakemm tinghata s-sentenza finali. Ghalhekk ma setax jintalab permess biex isir appell.

Tqis illi Vella ma kellhiex smigh xieraq tenut kont illi l-qorti kellha l-obbligu li taghti smigh, anke ai termini tal-Artikolu 37 tal-Kap 16.

6. <u>It-tielet talba</u>

In vista tal-premess, din il-Qorti tqis illi r-rimedju l-aktar opportun ghandu jkun dak li qed jintalab mir-rikorrenti fit-tielet talba. Ghalhekk sejra thassar id-digriet tal-1 ta` Ottubru 2015.

7. <u>Ir-raba` talba</u>

Ghalkemm kif impostata, din it-talba mhix alternattiva ghat-tielet talba, huwa bil-wisq evidenti li r-rimedju li riedu r-rikorrenti kien l-akkoljiment tat-tielet talba. Tant hu hekk li fis-sottomissjonijiet taghhom, ir-rikorrenti accennaw biss ghal din it-talba meta kienu ssikkati sabiex jesprimu ruhhom minn din il-Qorti stess (ara t-traskrizzjoni tas-sottomissjonijiet tal-ahhar bil-fomm). Ir-rikorrenti prattikament irrimettew ruhhom ghall-gudizzju tal-qorti.

Apparti li ma rrizultax jekk kif impostata t-talba kinitx mirata lejn danni pekunjarji jew morali jew it-tnejn, hija l-fehma konsiderata ta` din il-Qorti li bl-akkoljiment tal-ewwel, tat-tieni u tat-tielet talbiet, ir-rikorrenti ghandhom iqisu lilhom innfsuhom pjenament sodisfatti, tenut kont tan-natura, fattispeci, u cirkostanzi tal-kaz.

Ghalhekk mhijiex sejra tilqa` r-raba` talba.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet tar-rikorrenti u dwar l-eccezzjonijiet taz-zewg intimate billi taqta` u tiddeciedi hekk :-

Tilqa` l-ewwel talba.

Tilqa` t-tieni talba.

Riferibbilment ghat-tielet talba, thassar u tannulla d-digriet moghti fl-1 ta` Ottubru 2015 mill-Qorti Civili (Sezzjoni tal-Familja) fil-kawza fl-ismijiet "Joseph Camilleri vs Nadia Vella" (Rik. Gur. Nru. 302/2012/AL).

Tichad ir-raba` talba.

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

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur