QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON

Illum il-Hamis 30 ta` Mejju 2019

Kawza Nru. 4
Rikors Nru. 79/2017 JZM

Emanuel
[K.I. numru 316065(M)]

u

Dorothy
[K.I. numru 340369(M)]

mizzewgin Bezzina

kontra

1. Avukat Generali

2. Madelaine Bezzina
[K.I. numru 08775151(M)]

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors tat-<u>12 ta` Ottubru 2017</u> li jaqra hekk :–

1. Illi l-esponenti huma l-proprjetarji tal-Blokk ta` appartamenti numru hamsa u erbghin (45), bl-isem Broadway Flats, li jinsabu gewwa Triq il-Fuxa, San Gwann;

2. Illi r-rikorrenti huma ghalhekk il-proprjetarji tal-appartament numru wiehed (1) li jifforma parti mill-Blokk ta` Appartament numru hamsa u erbghin (45), `Broadway Flats`, Triq il-Fuxa, San Gwann, kif jidher mill-kuntratt ta` akkwist in atti Nutar Marco Burlo` datat 2 ta` Marzu 2004, hawn anness u mmarkat bhala Dok B, u mmarkat bil-kulur ahmar fuq ir-ritratti hawn annessi u mmarkati bhala Dok C;

3. Illi l-flat numru wiehed (1) li jifforma parti mill-Blokk ta` Appartament numru 45, `Broadway Flats`, Triq il-Fuxa, San Gwann, jinkera lill-intimata Madelaine Bezzina ghal numru ta snin, sa minn qabel l-istess rikorrenti akkwistaw l-istess fond;

4. Illi din hija kera li tiggedded minn sena ghal sena u ghalhekk ir-rikorrenti ma ghandhom ebda certezza jew prospettiva reali li jiehdu lura l-pussess tal-fond proprjeta` taghhom. Illi di piu` ir-rikorrenti ma ghandhom ebda dritt li jwaqqfu tali kera jew li jirrifjutaw li jgeddu l-kirja tal-intimata;

5. Illi r-rikorrenti qed jigu mcahhda mit-tgawdija tal-proprjeta` taghhom u dan minghajr ma jottjenu ebda forma ta` kumpens xieraq. Illi in fatti l-intimata Madeleine Bezzina, tikri l-istess fond b`rata ta` kera ta` € 70.00 fix-xahar, li hija ferm inferjuri ghall-valur lokatizju reali ta` dan l-appartament;

6. Illi ghalhekk ir-rikorrenti qed jigu privati mill-proprjeta` taghhom minghajr ebda raguni valida jew kumpens xieraq u b`hekk qed jigu lezi id-drittijiet fondamentali taghhom hekk kif protetti mill-Kostituzzjoni ta` Malta u l-Konvenzjoni Ewropea Dwar id-Drittijiet tal-Bniedem;

7. Illi tali sitwazzjoni tikser d-drittijet tar-rikorrenti protetti partikolarment izda mhux esklussivament taht l-artikolu 37 tal-Kostituzzjoni ta` Malta u l-Artikolu 1 Protokol 1, tal-Konvenzjoni Ewropea Dwar id-Drittijiet tal-Bniedem.

Ghaldaqstant, wara li jsiru d-dikjarazzjonijiet necessarji u li jinghataw il-provvedimenti opportuni, tghid l-intimata ghaliex m`Ghandhiex Din l-Onorabbli Qorti Tilqa` it-talbiet tar-rikorrenti li qieghdin hawn jitolbu li Din l-Onorabbli Qorti Joghgobha :

1. Tiddikjara u tiddeciedi illi l-kirja vigenti tal-appartament numru wiehed (1) li jifforma parti mill-Blokk ta` Appartament numru hamsa u erbghin (45), `Broadway Flats`, Triq il-Fuxa, San Gwann lill-intimata Madeleine Bezzina, qed tinibixxi lir-rikorrenti mit-tgawdija tal-proprjeta` taghhom u tikser d-drittijiet fondamentali tar-rikorrenti protetti taht l-artikolu 37 tal-Kostituzzjoni ta` Malta u l-Artikolu 1 Protokol 1, tal-Konvenzjoni Ewropea Dwar id-Drittijiet tal-Bniedem.

2. Tiddeciedi dwar rimedju li jixraq lil din is-sitwazzjoni u ghalhekk tiddikjara xolta l-kirja bejn ir-rikorrenti u l-intimata fir-rigward tal-appartament numru wiehed (1) li jifforma parti mill-Blokk ta` Appartament numru hamsa u erbghin 45, `Broadway Flats`, Triq il-Fuxa, San Gwann u Tordna l-izgumbrament tal-istess intimata Madeleine Bezzina mill-fond de quo.

3. Tiddeciedi alternattivament illi l-intimata ma ghandha l-ebda dritt legali illi issostni il-pozizzjoni taghha taht il-Kapitolu 69 tal-Ligijiet ta` Malta jew taht xi ligi ohra biex tkompli tokkupa l-istess fond.

4. Tiddikjara u Tiddeciedi illi l-intimati huma responsabli ghal kumpens u danni sofferti mir-rikorrenti b`konsegwenza tal-operazzjonijiet tal-Kapitolu 69 tal-Ligijiet ta` Malta li ma kreatx bilanc gust bejn d-drittijiet tas-sid u d-drittijiet tal-inkwilin u dan ai termini tal-artikolu 41 tal-Konvenzjoni Ewropea Dwar id-Drittijiet tal-Bniedem.

5. Tillikwida l-istess kumpens u danni kif sofferti mir-rikorrenti u dan ai termini tal-artikolu 41 tal-Konvenzjoni Ewropea Dwar id-Drittijiet tal-Bniedem.

6. Tordna li l-intimati jhallsu l-istess kumpens u danni likwidati ai termini tal-artikolu 41 tal-Konvenzjoni Ewropea Dwar id-Drittijiet tal-Bniedem.

7. Taghti kull rimedju li jkun Jidhrilha xieraq u opportun.

Bl-ispejjez inkluz inkluzi dawk tal-ittra legali tad-9 ta` Gunju 2017 (Dok D) kontra l-intimati li jibqghu minn issa ingunti ghas-subizzjoni

Rat il-lista tad-dokumenti li kienu prezentati mar-rikors promotur.

Rat ir-risposta tal-intimat Avukat Generali prezentata fl-1 ta` Novembru 2017 li taqra hekk :–

1. Illi in linea preliminari, mill-premessi fir-rikors in risposta, jidher li r-rikorrenti naqsu milli jaghmlu uzu mir-rimedji ordinarji provduti taht il-Kapitolu 69 tal-Ligijiet ta` Malta mahsuba ghal sitwazzjonijiet bhal kaz de quo.

2. Illi in linea preliminari wkoll u minghajr pregudizzju ghas-suespost, huwa xieraq u opportun li jigi pprezentat il-kuntratt tal-kera fuq

l-appartament numru 1 li jifforma parti mill-blokk ta` appartament numru 45, Broadway Flats, Triq il-Fuxa, San Gwann.

3. Illi subordinament u minghajr pregudizzju ghal premess u fil-mertu, l-esponent jopponi l-allegazzjonijiet avvanzati mir-rikorrenti bhala nfondati fil-fatt u fid-dritt u jirrileva illi ma sehh l-ebda ksur da parte tieghu tad-drittijiet fundamentali tal-bniedem fil-konfront taghhom ai termini tal-Artikolu 1 tal-Ewwel Protokol, kif ukoll tal-Artikolu 37 tal-Kostituzzjoni u dan ghas-segwenti motivi li qeghdin jigu avvanzati minghajr pregudizzju ghal xulxin.

4. Illi l-esponenti jecepixxi l-improponibilità tat-talba abbazi tal-Artikolu 41 tal-Konvenzjoni u dan stante li dan l-artikolu japplika biss ghall-organi gudizzjarji tal-Kunsill tal-Ewropa u mhux ghall-Qrati Maltin. Kemm hu hekk dan l-artikolu tat-Trattat ma jifformax parti mil-ligi Maltija ghaliex m`huwiex inkluz fit-tifsira ta` `Drittijiet tal-Bniedem u Libertajiet Fondamentali` kif riprodotta fl-Artikolu 2 tal-Kap 319 tal-Ligijiet ta` Malta u lanqas ma gie traspost fil-ligi domestika skont l-Artikolu 3 (3) tal-Kap 304 tal-Ligijiet ta` Malta.

5. Illi subordinatament u minghajr pregudizzju ghas-suespost, l-allegazzjonijiet tas-sidien huma infondanti fil-fatt u fid-dritt in kwantu li l-fond in kwistjoni jidher li huwa okkupat minn Madelaine Bezzina fuq bazi legali. Kif mistqarr mir-rikorrenti stess fir-rikors konvenzjonali taghhom, ir-relazzjoni taghhom mal-intimat hija regolata b`kuntratt ta` kera. Ifisser dan li hawnhekk m`ghandniex kaz ta` tehid jew deprivazzjoni ta` proprjetà min-naha tal-Istat kif imsemmi fl-ewwel parti tal-ewwel protokoll tal-Konvenzjoni Ewropea billi r-relazzjoni ta` kera kienet imnissla mir-rieda hielsa tal-partijiet jew l-awturi taghhom.

6. Illi l-Kap. 69 tal-Ligijiet ta` Malta (Ordinanza li Tirregola t-Tigdid tal-Kiri ta` Bini) li pemezz tieghu l-intimata Bezzina ghadha qed tokkupa l-fond in kwistjoni dahlet fis-sehh ferm qabel li r-rikorrenti xtraw il-fond de quo.

7. Illi r-rikorrenti kienu konsapevoli tal-fatt li huma kienu qeghdin jixtru l-fond `kif mikri lil terzi`[1] u dan kif muri fil-kuntratt ta` xiri tat-2 ta` Marzu 2004 u wkoll fit-tielet premessa tar-rikors promotur[2]. Ir-rikorrenti dahlu ghal kuntratt ta` xiri b`mod volontarju bil-konsapevolezza tar-regim legali li kien jiggverna dak il-kuntratt (inkluz ghalhekk il-ftehim tal-awturi taghhom mal-intimata Bezzina), bhal ma` l-awtur tar-rikorrenti dahlu b`mod volontarju ghal ftehim lokatizzju mal-intimata Bezzina. B`dan ifisser ghalhekk li r-rikorrenti dahlu fiz-zarbun tal-awtur taghhom u huma accettaw li jkunu marbutin b`dak li ghamel hu daqslikieku kien sar minnhom, inkluz ghalhekk il-kwantum tal-kera li kellu jithallas ghall-kiri ta` dan il-fond.

8. Illi barra minn hekk, jidher ukoll li r-rikorrenti lanqas biss talbu zieda ghal kera quddiem il-Bord li Jirregola l-Kera skont id-disposizzjonijit tal-Kap. 69 tal-Ligijet ta` Malta. Ifisser dan kollu ghal esponent li sad-data li r-rikorrenti fethu dawn il-proceduri huma ma kinux imdejqin bl-ammont tal-kera tal-fond jew inkellha akkwiexxew ghal din is-sitwazzjoni.

9. Illi minghajr pregudizzju ghal premess, safejn l-ilment tar-rikorrenti jinsab dirett kontra d-dispozizzjonijiet tal-Kap 69 tal-Ligijiet ta` Malta, tajjeb li jinghad li skont il-proviso tal-ewwel artikolu tal-ewwel protokoll tal-Konvenzjoni Ewropea, l-Istat ghandu kull jedd li jwettaq dawk il-ligijiet li jidhirlu xieraq biex jikkontrolla l-uzu ta` proprjetà skont l-interess generali. F`dan is-sens huwa maghruf fil-gurisprudenza li l-Istat igawdi minn diskrezzjoni wiesgha sabiex jiddentifika x`inhu mehtieg fl-interess generali u sabiex jistabilixxi liema huma dawk il-mizuri mehtiega ghal harsien tal-interess generali.

10. Illi f`dan il-kaz l-indhil tal-Istat fl-uzu tal-proprjetà mikrija mir-rikorrenti taqa` fl-ambitu tal-ewwel artikolu tal-ewwel protokoll tal-Konvenzjoni Ewropea peress li meta l-iskop pubbliku jkun wiehed socjali, il-valur li jigi pretiz minn sid il-fond bhala kumpens ta` l-uzu li qed isir mill-fond ma jistghax jitkejjel mal-valur li l-fond igib fis-suq, diment li l-ammont, zghir kemm hu zghir `pursues a purpose of general interest

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[1] *Tieni pagna, ir-raba` linja ta` Dok B anness mar-rikors promotur.*

[2] *`[...] jinkera lill-intimata Madelaine Bezzina ghal numru ta` snin, sa minn qabel l-istess rikorrenti akkwistaw l-istess fond`.*

*which was not manifestly without foundation,` dan huwa gustifikat u legalment accettat (**Mellacher and Other v. Austira**, 1989). L-aggustament fil-kera jilhaq il-bilanc bejn l-interess generali u dak tal-privat, ghaldaqstant mhux il-kaz li wiehed jitkellem fuq kumpens mhux xieraq.*

11. Illi l-Kap. 69 tal-Ligijiet ta` Malta bl-ebda mod ma jikkostitwixxu tehid forzuz tal-proprjetà jew tehid obbligatorju izda kontroll ta` uzu ta` proprjetà fil-parametri tal-Kostituzzjoni u tal-Konvenzjoni Ewropea.

12. Illi sabiex jinghad li kien hemm tehid forzuz jew obbligatorju, jehtieg li persuna tigi zvestita minn kull dritt li ghandha fuq il-proprjetà, meta fil-kaz odjern l-Istat sempliciemnt irregolarizza sitwazzjoni socjali fl-ambitu tal-gid komuni, minghajr pero ma gew ippregudikati d-drittijiet tas-sidien tal-fond de quo u dan stante li s-sidien qatt ma gew totalment zvestiti mid-drittijiet taghhom fuq il-propjeta mertu ta` din il-kawza.

13. Illi ai termini tal-proviso tal-Artikolu 37 (1) tal-Kostituzzjoni, il-legislatur jista` jistabilixxi l-kriterji li ghandhom jitharsu, tenut kont tal-fatturi u c-cirkostanzi kollha, sabiex jigi ffissat il-kumpens li ghandu jithallas fuq il-proprjetà.

14. Illi l-provvedimenti tal-Kap 69 huma immirati lejn cirkostanzi specjali fil-pajjiz li jinkwadraw ruhhom f`dawk ic-cirkostanzi u kazijiet specjali li skont l-imsemmi proviso jiggustifikaw lil-legislatur sabiex fl-interess nazzjonali jkun hu li b`ligi jistabilixxi l-kumpens.

*15. Illi l-hsieb ta` min fassal il-Kostutzzjoni jorbot ma` dak li nghad mill-Kummissjoni fi Strasbourg fil-kaz **Connie Zammit and other v. Malta** deciza fit-12 ta` Jannar 1991 li stqarret li :*

The Commission recalls the case-law of the Commission and Court which recognizes that state intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to a legislature in

implementing social and economic policies is necessarily a wide one both with regards to a problem of public concern warranting measures of control and as to the choice of the rules for the implementation of such measures.[3]

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

17. Illi dejjem minghajr pregudizzju ghas-suespost, bl-emendi li sehhew fil-ligi bl-Att X tal-2009 u b`referenza specifika ghall-Artikolu 1531C tal-Kap. 16 tal-Ligijiet ta` Malta gie stabbilit mekkanizmu ghall-awment perjodiku tal-kera. Ghaldaqstant minn dan jirrizulta wkoll illi bl-emendi introdotti bl-Att X tal-2009 il-pozizzjoni tar-rikorrenti giet miljorata minn dak inhar li saret il-kirja u ghaldaqstant ir-rikorrenti ma jistghu jallegaw ebda ksur tad-drittijiet fundamentali taghhom.

18. Illi dato ma non concesso, li din l-Onorabbli Qorti jidhrilha li kien hemm xi ksur tad-drittijiet fundamentali tar-rikorrenti, fatt li qed jigi kontestat, l-esponent jirrileva li fic-cirkostanzi tal-kaz dikjarazzjoni ta` ksur hija sufficjenti u ma hemm lok ghal ebda rimedji ohra mitluba mir-rikorrenti.

Salv eccezzjonijiet ulterjuri.

Fid-dawl tas-suespost, l-esponent jitlob bir-rispett li din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrenti, bl-ispejjez kontra taghhom.

Rat ir-risposta li l-intimata Madelaine Bezzina pprezentat fis-7 ta` Novembru 2017 u li taqra hekk :-

[3] *Ara wkoll* ***Amato Gauci vs. Malta****, App Nru 47045/06 deciza fil-15 ta` Settembru 2009.*

1. Illi preliminarjament, stante li huwa l-Istat biss li jista` jikkommetti vjolazzjoni tad-drittijiet fondamentali u mhux l-individwu privat, l-esponenti m`ghandhiex `locus standi judicii` u m`hijiex legittimu kontradittur, u ghalhekk ghandha tigi liberata mill-osservanza tal-gudizzju, bl-ispejjez kontra r-rikorrenti.

2. Illi preliminarjament, stante li l-esponenti ma tista` tipprovdi l-ebda rimedju fl-eventwalita` remota illi jigi deciz li r-rikorrenti sofrew lezjoni, ghal din ir-raguni wkoll, l-esponenti m`ghandhiex `locus standi judicii` u mhijiex legittimu kontradittur u ghandha tinheles mill-osservanza tal-gudizzju, dejjem a spejjez tar-rikorrenti.

3. Illi preliminarjament, ir-rikorrenti naqsu milli jaghmlu uzu mir-rimedji ordinarji provduti taht il-Kap 69 tal-Ligijiet ta` Malta mahsuba ghal sitwazzjonijiet bhal kaz prezenti. Ir-rikorrenti lanqas biss talbu zieda fil-kera quddiem il-Bord kompetenti.

4. Illi preliminarjament, l-azzjoni hija improponibbli stante li l-artikolu 41 tal-Konvenzjoni japplika biss ghall-organi gudizzjarji tal-Kunsill tal-Ewropa u mhux ghall-Qrati tal-Gustizzja Maltin. Difatti, dan l-artikolu 41 mhuwiex inkluz fit-tifsira ta` `Drittijiet tal-Bniedem u Libertajiet Fondamentali` kif riprodotta fl-artikolu 2 tal-Kap 319 tal-Ligijiet ta` Malta.

5. Illi l-Kap 69 dahal fis-sehh zmien twil qabel ma r-rikorrenti akkwistaw il-proprjeta` in kwistjoni. Ir-rikorrenti kienu jafu illi l-appartament kien soggett ghal kirja li giet moghtija lill-esponenti mill-mejjet Giuseppe Debono, liema sitwazzjoni giet accettata liberament mir-rikorrent Emanuel Bezzina. Ghalhekk, ir-rikorrent m`ghandu l-ebda gustifikazzjoni biex issa jilmenta li l-kirja tikser xi dritt fondamentali tieghu.

6. Illi r-rikorrent huwa liberu li jizviluppa l-proprjeta` tieghu kif jidhirlu, sakemm jirrispetta l-kirja li kienet pre-ezistenti u li kien jaf biha fil-mument meta xtara u akkwista l-proprjeta` Broadway Flats, Fuxa Street, San Gwann.

7. Illi mhux minnu li r-rikorrenti qeghdin jigu mcahhdin mit-tgawdija tal-proprjeta` taghhom. Huma intitolati ghal ammont ta` kera li fil-prezent huwa EUR 70 fix-xahar, liema somma qieghda tigi ddepozitata l-Qorti stante li huma qeghdin jirrifjutawha. Barra minn hekk, ir-rikorrenti qatt ma talbu lill-Bord ghal xi zieda fil-kera. Il-kera li huma intitolati li jippercepixxu u li qeghdin jirrifjutaw tissodisfa r-rekwizit tad-dritt ghat-tgawdija pacifika tal-proprjeta`. Il-fatt li r-rikorrent jippretendi xi haga ikbar minn hekk ma jfissirx li dan id-dritt tieghu qieghed jigi lez, izda jfisser biss illi l-aptit tieghu qed jeccedi d-dhul li jista` jippercepixxi mill-kiri tal-appartament.

8. Illi d-dispozizzjonijiet li jiggarantixxu d-drittijiet fondamentali m`ghandhomx jittiehdu b`leggerezza kif qed jippretendu r-rikorrenti, u s-semplici aptit ghal gwadann ikbar ma jistax iwassal ghal lezjoni ta` dak id-dritt fondamentali.

9. Illi kieku kien minnu li kirja volontarjament assunta ta` appartament tasal biex "tinibixxi lir-rikorrenti mit-tgawdija tal-proprjeta` taghhom" kif qeghdin jallegaw ir-rikorrenti, kull kirja ghal zmien indefinit tkun tista` tigi terminata mis-sid u b`hekk eluf ta` persuni kienu jsibu ruhhom minghajr ebda saqaf fuq rashom.

10. Illi peress illi hu principju ben stabbilit fid-Dritt Civili illi "pacta sunt servanda", ir-rikorrenti huma obbligati jirrispettaw il-kirja li kienet kompriza fl-obbligi assunti minnhom meta giet akkwistata din il-proprjeta` mir-rikorrenti Emanuel u Dorothy mizzewgin Bezzina.

11. Illi dment li l-esponenti thallas il-kera pattwita puntwalment, hija m`ghandha l-ebda obbligu jew raguni biex thallas xi danni jew kumpens lir-rikorrenti, li ghandhom dritt biss li jircievu l-kera. Izda dawn qeghdin jaghzlu li jirrifjutaw il-kera kapriccjozament, liema ammont ta` kera qieghed jigi ddepozitat il-Qorti puntwalment.

12. Illi r-rikorrenti ma jistghux jippretendu "bilanc gust" ghajr li jircievu l-kera marbut mal-kirja ta` dan l-appartament. Id-dritt ghat-

tgawdija tal-proprjeta` privata jkun pjenament soddisfatt meta sid il-kera jircievi l-kera marbut mal-kirja. Ir-rikorrenti qeghdin jirrifjutaw il-kera u ghalhekk ma jistghux jippretendu gharfien ta` status ta` vittma, stante li d-disagju taghhom qeghdin igibuh b`idejhom stess.

13. Ghalhekk, lanqas l-Istat m`ghandu jigi ritenut responsabbli ghal xi vjolazzjoni. Fil-fatt, l-Istat ghandu dritt jezercita kontroll fuq l-uzu tal-proprjeta` sabiex jipprovi akkomodazzjoni socjali. Il-gvernijiet tal-pajjizi kollha jkollhom jezercitaw kontroll fuq l-uzu tal-proprjeta`, u jaghmlu hekk ghal skop socjali. Din hija limitazzjoni li l-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem inkorporata fil-Kap 319 tal-Ligijiet ta` Malta, tirrikonoxxi. L-istess limitazzjoni tinsab accettata wkoll fil-gurisprudenza antika u moderna tal-Qorti Ewropeja ghad-Drittijiet tal-Bniedem. Skont il-gurisprudenza tal-Qorti Ewropeja ghad-Drittijiet tal-Bniedem, l-Istat igawdi "margin of appreciation" biex jilhaq dan il-ghan li jrid iwettaq, u dan ghall-harsien tal-interess generali.

14. Illi l-Kap 69 tal-Ligijiet ta` Malta bl-ebda mod ma jikkostitwixxi tehid forzuz tal-proprjeta` izda kontroll tal-proprjeta` fil-limiti ta` dak li hu ragonevoli. Il-Kap 69 huwa immirat biex jilqa` ghac-cirkostanzi specjali fil-pajjiz biex kulhadd ikollu fejn joqghod.

15. Illi l-posizzjoni legali tar-rikorrenti giet imtejba bl-emendi introdotti fl-2009, li r-rikorrenti jippruvaw jinjoraw.

Ghalhekk, it-talbiet tar-rikorrenti ghandhom jitqiesu mhux gustifikati, insostenibbli, abbusivi u kapriccjuzi, u konsegwentement ghandhom jigu michuda, bl-ispejjez kontra taghhom.

Salvi eccezzjonijiet ohra.

Rat id-digriet li tat fl-udjenza tat-23 ta` Jannar 2018 fejn innominat lill-Perit Mario Cassar bhala perit tekniku sabiex, wara li jistabilixxi l-valur tal-appartament numru wiehed (1) li jifforma parti mill-blokk ta` appartamenti numru hamsa u erbghin (45), Broadway Flats, Triq il-Fuxa,

San Gwann, jistma l-valur lokatizju tal-fond, imqassam fuq firxa ta` perijodi ta` hames snin sal-lum, billi jqis il-fatturi kollha relevanti, inkluz id-data tal-kirja u l-ammont tal-kera li tithallas.

Rat il-verbal tal-udjenza tal-5 ta` April 2018, fejn il-perit tekniku kien dirett sabiex ghall-fini tal-kalkolu tal-valur lokatizju, il-perijodi ndikati fid-digriet tal-hatra ghandhom jiskattaw mill-1992 sal-lum.

Rat ir-relazzjoni li pprezenta l-perit tekniku, u li kkonferma bil-gurament il-kontenut taghha fl-udjenza tal-4 ta` Gunju 2018.

Semghet lill-perit tekniku jwiegeb ghal domandi in eskussjoni fl-istess udjenza u fl-udjenza tal-11 ta` Ottubru 2018.

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

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

Rat in-noti ta` osservazzjonijiet tal-partijiet.

Rat l-atti l-ohra tal-kawza.

II. <u>Provi</u>

Permezz ta' kuntatt ta' bejgh tas-26 ta' Frar 1990, fl-atti tan-Nutar Dr Clyde La Rosa, ir-rikorrenti xtraw u akkwistaw minghand Giuseppe Debono *l-appartament internament markat bin-numru tnejn (2) sovrappost ghal erba` garages, formanti parti minn korp ta` bini li jikkonsisti li jikkonsisti f`sitt garages u hanut fil-pjan terran u zewg appartamenti fl-ewwel sular (first floor) minghajr numru ufficjali fi Triq il-Fuxa, San Gwann, gebel u saqaf, bid-drittijiet u pertinenzi tieghu kollha*

nkluza l-washroom ta` fuq il-bejt u l-arja sovrastanti l-istess appartament, konfinanti mil-lvant mat-triq u mit-tramuntana u nofsinhar ma` beni tal-venditur, bhala soggett ghar-rata tieghu ta` cens annwu u perpetwu ta` hames liri Maltin (Lm 5) u bil-"vacant possession" [4].

Permezz ta' kuntratt ta' bejgh tat-2 ta' Marzu 2004 fl-atti tan-Nutar Dr Marco Burlo`[5], ir-rikorrenti xtraw u akkwistaw minghand Catherine Cutajar u ohrajn *il-flat internament markat bin-numru wiehed (1) jinsab fil-first floor level, jigi l-flat tan-naha tax-xellug meta wiehed ihares lejn il-blokk li minnu jifforma parti minn Triq il-Fuxa, formanti parti minn blokk li jgib in-numru hamsa u erbghin (45) fi Triq il-Fuxa, San Gwann, bl-arja libera tieghu fis-sens li l-bejt li jigi direttament sovrappost ghal flat mibjugh huwa nkluz fil-bejgh, bil-komunjoni mal-flat l-iehor fl-istess blokk, tal-entratura principali, entrata, tarag u tromba tat-tarag, pjanijiet, shafts u dawk il-partijiet kollha ntizi ghall-uzu komuni, soggett ghac-cens annwu u perpetwu u mhux revedibbli ta` lira maltija (Lm 1) mill-bqija liberu u frank u hieles minn kwalunkwe drittijiet u/jew servitu reali u/jew personali favur terzi, bid-drittijiet, giustijiet u pertinenzi kollha tieghu, u hekk kif mikri lil terzi.*

Il-frazi tal-kuntratt *hekk kif mikri lil terzi* tirreferi ghall-kirja tal-intimata Bezzina, li tigi oht ir-rikorrent. Fil-fatt l-intimata thallas kera ta` €70 fix-xahar.

Skont ma xehed ir-rikorrent[6] jidher illi matul is-snin kienu nqalghu problemi ma` ohtu l-intimata dwar l-uzu tal-appartament u drittijiet illi kienet qeghda tivvanta.

Jirrizulta li r-rikorrenti kisbu permess ghall-izvilupp tal-arja u sabiex jaghmlu xogholijiet ohra fil-blokk. L-intimata ttentat twaqqaf dan l-izvilupp u ghamlet kawza fejn il-kontenzjoni ewlenija hija l-proprjeta tal-kamra tal-bejt. Dwar dan kien hemm decizjoni ta` din il-Qorti kif diversament presjeduta tas-6 ta' Mejju 2016 fil-kawza fl-ismijiet

[4] Ara din il-kuntratt li gie anness flimkien mar-rikor promotur u mmarkat bhala Dok. A a fol. 5 *et seq.* tal-process.
[5] Ara din il-kuntratt li gie anness flimkien mar-rikor promotur u mmarkat bhala Dok. B a fol. 9 *et seq.* tal-process.
[6] Ara l-affidavit ta' Emanuel Bezzina mmarkat bhala Dok. X1 a fol. 40 sa 41 tal-process.

Madelaine Bezzina vs Emanuel Bezzina u martu Dorothy Bezzina[7] fejn kien dikjarat illi Madelaine Bezzina ma sehhilix tipprova illi l-kirja tal-appartament taghha kienet testendi wkoll ghall-kamra tal-bejt. Inghad ukoll illi x-xogholijiet proposti kienu ser ikunu meljoramenti u ghalhekk l-attrici ma kienet serja ssofri ebda pregudizzju. It-talbiet attrici kienu michuda, billi x-xogholijiet kienu ser isiru fil-partijiet komuni tal-blokk illi jappartjenu lill-intimati (ir-rikorrenti odjerni) ghalkemm kien dikjarat illi l-intimati ma setghux jezegwixxu xogholijiet ta' kostruzzjoni fil-gallerija tal-appartament ta' Madelaine Bezzina. Sar appell minn din id-decizjoni, liema appell ghadu pendenti.

Ir-rikorrenti xehdu illi huma jinsabu deprivati mit-tgawdija tal-proprjeta' taghhom. Kien ghalhekk illi ghamlu din il-kawza billi jikkotendu li l-kera li qeghdin jircievu ghall-flat in kwistjoni hija baxxa wisq.

Fil-kors tal-**kontroezami**, ir-rikorrent stqarr illi ghalkemm kien jaf li l-appartament kien diga mikri lil ohtu l-intimata, huwa xorta wahda xtara l-flat[8]. Il-kirja lill-intimata bdiet ghall-habta tal-1992.

Emanuel Bezzina xehed illi ghalkemm huwa minnu illi jistghu jbieghu il-fond, jibqa' l-fatt illi ma jistghux jigbru l-valur reali tieghu tenut kont li hemm inkwilin joqghod fih. Bhala sidien huma jinsabu fil-ghama dwar meta ser ikunu jistghu jiksbu lura l-proprjeta' nonostante zviluppi legislattivi. Lanqas ma jistghu jikru l-post bil-prezzijiet attwali tas-suq.

Jirrizulta illi b'ittra legali tad-9 ta' Gunju 2017 l-intimata Bezzina kienet interpellata mir-rikorrenti sabiex tizgombra mill-fond *de quo*[9].

Fil-kors tal-**kontroezami**, Emanuel Bezzina kkonferma illi hu qatt ma beda proceduri quddiem il-Bord li Jirregola l-Kera sabiex jitlob awment fil-kera li kien qed jithallas.

[7] Kopja ta' din is-sentenza giet esebita bhala Dok. L a fol. 108 *et seq.* tal-process.
[8] Ara x-xhieda in kontro-ezami ta' Emanuel Bezzina a fol. 126-127 tal-process.
[9] Kopja ta' din l-ittra giet annessa mar-rikors promotur u mmarkata bhala Dok. D - fol. 13 tal-process.

L-intimata Madelaine Bezzina[10] xehdet illi l-appartament mertu ta' din il-vertenza bdiet tikrih minghand Giuseppe Debono fi Frar tal-1993 ghal kera ta` Lm 30 fix-xahar. Meta miet Giuseppe Debono, il-kera bdiet thallasha lil martu Giuseppa Debono. In segwitu l-kera bdiet tithallas lill-ulied. Kien biss fl-2004 illi r-rikorrenti xtraw l-flat li hija kienet kriet minn hdax-il sena qabel. Ikkonfermat id-disgwid li ghandha mar-rikorrent kif ukoll illi l-kera qeghda tkun depozitata l-qorti.

Perit Jonathan Fenech ikkonferma bil-gurament ir-rapport tieghu datat 25 ta` Mejju 2017 skont inkariku li nghata mir-rikorrenti[11]. Xehed illi huwa qatt ma dahal fl-appartament u ghamel il-kalkoli tieghu in bazi tal-pjanti li abbazi taghhom inbena l-post. Stqarr illi l-fond de quo huwa appartament fl-ewwel sular, sovrastanti proprjeta' ta' terzi, u jinsab fiz-zona ta' zvilupp ta' San Gwann. Ghandu daqs ta` 84.7 mk. Ghandu karma tas-sodda wahda, *open plan area* u kamra tal-banju.

Perit Fenech stqarr illi l-bazi tal-valutazzjoni tieghu tirrizulta minn studju komparattiv li jiehu in konsiderazzjoni kemm ghandu zmien il-post, jekk hemmx permessi ta' bini, iz-zona fejn jinsab, il-kondizzjoni esterjuri tieghu, u kif ukoll fatturi esterjuri partikolarment l-ekonomija fiz-zmien relattiv, ir-rata tal-inflazzjoni, u kif ukoll il-valur tal-ispejjez tal-kostruzzjoni. Abbazi ta` dawn il-konsiderazzjonijiet, wasal ghall-konkluzjoni fl-2017 illi l-valur tal-fond fuq is-suq kien jammonta ghal bejn €135,000 u €150,000 waqt illi l-valur lokatizju tieghu kien ta' €400 kull xahar.

Mir-relazzjoni tal-perit tekniku, Perit Mario Cassar johorgu dawn il-fatti :-

Sar access fuq il-post fis-16 ta' Marzu 2018.

Mill-qisien li ttiehdu, jirrizulta illi l-arja interna tal-appartament hija ta' 79 mk.

[10] Ara l-affidavit ta' Madelaine Bezzina a fol. 130 sa 132 tal-process.

Skont il-pjan lokali ta' l-izvilupp, u cioe` n-*North Harbour Local Plan* ippubblikat mill-MEPA f`Lulju 2006, u DC 2015, l-gholi ta' zvilupp peremss fiz-zona fejn jinsab l-appartament huwa ta' 17.5 m.

Dan ifisser illi skont il-*policies* vigenti, jistghu jinbnew b`kollox hames sular mil-livell tat-triq.

Ha in konsiderazzjoni l-*percentage growth* tal-valur tal-propjeta` mmobbli f`Malta. Bejn l-1992 u l-2016, il-valur tal-propjeta` mmobbli zdied b`rata ta` 6.1% fis-sena.

Tenut kont tal-valur ta' proprjetajiet ohra fl-istess zona, jirrizulta li appartament fi stat ta' *finished* qieghed jinbiegh bil-prezz ta' €2730 ghal kull metru kwadru.

Wara illi qies it-tip ta' proprjeta, id-daqs, il-lokalita`, l-istat attwali, kif ukoll illi l-appartament huwa liberu u frank, il-perit tekniku wasal ghall-konkluzjoni illi l-appartament in kwistjoni ghandu valur ta' €1911 kull metru kwadru u ghalhekk ghandu valur totali fis-suq ta' €151,000.

In kwantu ghall-valur lokatizzju, il-perit tekniku stabilixxa illi fl-1992 dan kien jammonta ghal €1029 fis-sena waqt illi fl-2018 dan kien tela` ghal €4,963 fis-sena.

Il-perit tekniku wiegeb ghal domandi in eskussjoni.

Huwa xehed illi l-valuri li ndika kienu limitati ghall-appartament u allura kienu jeskludu l-valur lokatizzju tal-kamra tal-bejt, billi kien hemm kontestazzjoni bejn il-partijiet jekk dik il-kamra tal-bejt kenitx mikrija lill-intimata.

Stqarr illi l-prezz li ndika bhala dak ta` appartament *finished* kien jirreferi ghall-prezz ta' apparatament gdid. Fil-kaz tal-lum, l-appartament

ma kienx gdid. Fil-fatt kellu finituri qodma. Kien ghalhekk illi ghamel tnaqqis ta' 30% fil-prezz li jgib fis-suq appartament gdid.

III. L-ewwel (1) eccezzjoni tal-intimat Avukat Generali u t-tielet (3) eccezzjoni tal-intimata Bezzina

Fl-ewwel (1) eccezzjoni, l-Avukat Generali qieghed jeccepixxi li r-rikorrent ma ezawrewx ir-rimedji ordinarji disponibbli bil-Kap 69.

Lanqas qatt talbu awment fil-kera.

It-tielet (3) eccezzjoni tal-intimata Bezzina hija fuq l-istess linja.

Jibda biex jinghad illi fin-nota ta' sottomissjonijiet taghhom ir-rikorrenti ma ndirizzawx dawn l-eccezzjonijiet partikolari.

Fin-nota ta' sottomissjonijiet tieghu, l-Avukat Generali kompla jespandi l-eccezzjoni tieghu.

L-**Art 46 (2) tal-Kostituzzjoni** jipprovdi :-

> *Il-Prim`Awla tal-Qorti Civili ghandu jkollha gurisdizzjoni originali li tisma` u tiddecidi kull talba maghmula minn xi persuna skont is-subartikolu (1) ta` dan l-artikolu, u tista` taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex twettaq, jew tizgura t-twettiq ta` kull wahda middisposizzjonijiet tal-imsemmija artikoli 33 sa 45 (maghdudin) li ghall-protezzjoni taghhom tkun intitolata dik il-persuna :*
>
> *Izda l-Qorti tista`, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skont dan is-subartikolu f`kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-*

> *ksur allegat huma jew kienudisponibbli favur dik il-persuna skont xi ligi ohra.*

L-istess principju jinstab fl-**Art 4(2) tal-Kap 319**.

Kif inghad minn din il-Qorti diversament preseduta fil-kawza **John Grech et vs Onor. Prim Ministru et deciza** deciza fid-29 ta` April 2013 (u konfermata mill-Qorti Kostituzzjonali fil-31 ta` Jannar 2014) :-

> *Illi din il-kwistjoni giet dibattuta diversi drabi fil-Qrati taghna. Il-Qorti Kostituzzjonali dahlet fil-fond taghha fis-sentenza taghha fil-kawza fl-ismijiet **"Dr Mario Vella vs Joseph Bannister nomine"** (deciza fis-7 ta` Marzu 1994) fejn, wara li elenkat numru ta` sentenzi precedenti, qalet fost affarijiet ohra illi :*
>
> *"Minn din ir-rassenja kemm tal-Prim` Awla u kemm ta` din il-Qorti jistghu jitnisslu dawn il-linji gurisprudenzjali :*
>
> *a. Meta hu car li hemm mezzi ordinarji disponibbli ghar-rikorrenti biex ikollu rimedju ghad-danni li qed jilmenta, bhala principju generali dawn ghandhom jigu adoperati u r-rikors ghall-organi gudizzjarji ta` natura Kostituzzjonali ghandu jsir wara li l-ordinarji jigu ezawriti jew meta mhumiex disponibbli;*
>
> *b. Din il-Qorti Kostituzzjonali sakemm ma jirrizultawlhiex ragunijiet serji gravi ta` llegalita` jew ta` gustizzja jew zball manifest ma tiddisturbax l-ezercizzju ta` diskrezzjonalita` tal-ewwel Qorti kkonferita mill-artikolu 46 (2) tal-Kostituzzjoni;*
>
> *c. Kull kaz ghandu l-fattispecje partikolari tieghu;*
>
> *d. Meta r-rikorrenti ma jkunx ghamel uzu minn rimedju li seta` kellu dan ma jfissirx li l-Qorti ghandha tikkonsidra li ma ghandhiex tezercita l-gurisdizzjoni taghha jekk dak il-possibbli rimedju ma kienx pero` jirrimedja hlief in parti l-lanjanzi tar-rikorrenti;*
>
> *e. Meta r-rikorrenti ma jkunx ezawrixxa r-rimedju ordinarji, jekk pero` dan in-nuqqas ikun ikkontribwixxa ghalih l-operat ta` haddiehor allura ma jkunx desiderabbli illi l-Qorti tieqaf u ma tipprocedix bit-trattazzjoni tal-kaz;*
>
> *f. Meta l-ewwel Qorti tezercita d-diskrezzjoni taghha u tieqaf mit-trattazzjoni minghajr ma tezamina l-materja necessarja li fuqha dik id-diskrezzjoni ghandha tigi ezercitata, il-Qorti tat-tieni grad ghandha twarrab dik id-diskrezzjoni."*

*Illi l-istess Qorti fil-kawza fl-ismijiet "**Philip Spiteri vs Sammy Meilaq**" (deciza fit-8 ta` Marzu 1995) qalet ukoll li:*

"Meta l-oggett tal-kawza jkun ta` natura komplessa – u jkollu kwistjonijiet li ghandhom rimedju f` xi ligi ohra, u ohrajn li ma ghandhomx, rimedju hlief Kostituzzjonali – allura ghandha tipprevali din l-ahhar azzjoni". F`din is-sentenza l-Qorti osservat li jkun sewwa li mal-kelma `komplessa` jizdied il-kliem `jew inkella mhallta`.

*Fil-kawza fl-ismijiet "**Maria sive Marthese Attard et vs Policy Manager tal-Malta Shipyards et**" (deciza mill-Prim` Awla, Sede Kostituzzjonali, fit-30 ta` Settembru 2010) gie dikjarat illi :*

"L-ezistenza ta` rimedju iehor trid titqies fil-kuntest tal-allegat ksur tad-dritt fundamentali. Ghandu jkun rimedju accessibbli, xieraq, effettiv u adegwat biex jindirizza dan il-ksur. Fl-istess waqt ma hemmx ghalfejn li biex jitqies effettiv ikun jirrizulta li r-rimedju sejjer jaghti lir-rikorrenti success garanti. Huwa bizzejjed li jintwera li jkun wiehed li jista` jigi segwit b`mod prattiku, effettiv u effikaci.

Meta jidher li jezistu mezzi ordinarji disponibbli biex jikseb rimedju ghall-ilment tieghu r-rikorrent ghandu jirrikorri ghal dawk il-mezzi, qabel ma jirrikorri ghar-rimedju Kostituzzjonali u huwa biss wara li jkun fittex dawk il-mezzi jew wara li jidher li dawk il-mezzi ma jkunux effettivament disponibbli li ghandu jintuza r-rimedju Kostituzzjonali."

*Illi f`dan is-sens wiehed jista` jsib ukoll l-insenjament fir-rigward fis-sentenza tal-Qorti tal-Appell fl-ismijiet "**Joseph Fenech vs Awtorita` tal-Ippjanar et"** deciza fid-9 ta` Novembru 2012*

…

Illi wiehed ghandu jqis li kemm l-artikolu invokat mill-intimati u kemm il-Kostituzzjoni ta` Malta ssemmi mezzi li `kienu disponibbli` u allura anke jekk kien hemm mezzi li `kienu` disponibbli ghar-rikorrent izda li minhabba t-trapass taz-zmien ma jkunux ghadhom (disponibbli), il-Qorti tista` jekk hekk jidhrilha tiddeklina li tezercita l-gurisdizzjoni taghha.

Fid-decizjoni li tat fis-27 ta` Frar 2006 fil-kawza **Sonia Zammit et vs Ministru tal-Politika Socjali et** din il-Qorti diversament presjeduta rreferiet ghal aktar gurisprudenza :-

> *"Meta huwa car li hemm mezzi ordinarji disponibbli ghar-rikorrent biex ikollu rimedju ghad-dannu li qed jillamenta, bhala principju generali dawn ghandhom jigu adoperati, u r-rikors ghall-organi gudizzjarji ta` natura kostituzzjonali ghandu jsir wara li l-ordinarji jigu ezawriti jew meta ma humhiex disponibbli." (**Dr Mario Vella vs Joseph Bannister noe** – Qorti Kostituzzjonali deciza 7 ta` Marzu 1994).*
>
> *"Hu veru li kull persuna tista` tirrikorri lill-Prim Awla ghal rimedju ta` indole Kostituzzjonali, imma l-ewwel subinciz ta` dak l-Artikolu 46 irid jigi moqri mal-proviso tat-tieni subinciz tieghu li jipprovdi li l-Qorti tista`, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skond dak l-artikolu f`kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-ksur allegat `huma jew kienu disponibbli favur dik il-persuna skond xi ligi ohra.`" (**Lawrence Cuschieri vs Onor Prim Ministru** – Qorti Kostituzzjonali deciza 6 t`April 1995.)*
>
> *"Sakemm tibqa` l-possibilita` li l-lezjoni tad-dritt fundamentali setghet kienet jew ghad tista` tigi rettifikata bil-proceduri u mezzi provduti bil-ligi, ikun generalment il-kaz li l-Qorti tiddeklina milli tezercita s-setghat kostituzzjonali taghha."* (**Stephen Falzon vs Registratur tal-Qorti et** – *Qorti Civili Prim Awla (Sede Kostitizzjonali) deciza 14 ta` Frar 2002).*
>
> *"Il-Prim Awla tal-Qorti Civili ghandha poteri diskrezzjonali wiesgha biex tiddeciedi li ma tezercitax il-poteri taghha meta r-rikorrent ma ezawriex ir-rimedji possibbli taht il-ligi ordinarja." (**Domenico Savio Spiteri vs Chairman Planning Authority et"** – Qorti Kostituzzjonali deciza 31 ta` Mejju 2000).*

Stabbiliti dawn il-parametri, li johorgu mill-gurisprudenza, din il-Qorti trid tqis jekk skont il-fatti tal-kaz tal-lum : (i) ir-rikorrenti kellhomx ghad-dispozizzjoni taghhom rimedji ordinarji li kienu accessibbli, xierqa, effettivi u effikaci sabiex jindirizzaw il-lanjanzi taghhom ; u (ii) jekk ir-rimedju ordinarju kienx ikopri ghal kollox il-lanjanzi tar-rikorrenti. Fi kwalunkwe kaz, tibqa` d-diskrezzjoni ta` din il-Qorti li taghzel "li tezercita

s-setghat taghha" anke meta min iressaq l-ilment ikollu jew kellu mezzi ohra ta` rimedju.

Il-Qorti tqis illi l-fatt li r-rikorrenti ma hadux passi ohra, ghajr ghall-procediment tal-lum, ma jnaqqas xejn mid-dritt tal-azzjoni taghhom. L-ghan ewlieni ta` procediment ta' natura kostituzzjonali u/jew konvenzjonali huwa li l-persuna illi tkun qed iggarrab ksur tal-jeddijiet fondamentali taghha tinghata rimedju effettiv u minghajr dewmien. Hija gurisprudenza stabbilita illi, anke jekk procediment kostituzzjonali huwa ntiz biex ikun straordinarju, cittadin li jilmenta minn ksur tal-jeddijiet fondamentali tieghu m`ghandux ikun obbligat ifittex rimedju ordinarju, jekk ir-rimedju li jista` jinghata ma jkunx effettiv sabiex jindirizza l-ilment tieghu.

Fis-sentenza li tat fis-27 ta` Marzu 2015 fil-kawza fl-ismijiet **Ian Peter Ellis et vs Avukat Generali et** il-Qorti Kostituzzjonali ghamlet l-osservazzjoni illi :-

> *Dwar il-materja ta` awment fil-kera u n-nuqqas tal-applikanti li jirrikorru quddiem il-Bord li Jirregola l-Kera, il-Qorti Ewropeja fil-kawza **Ghigo v. Malta** [Appl. 31122/05 –para.66] osservat :*
>
> *"It is true that the Government reproached the applicant for his failure to institute proceedings before the Rent Regulation Board to fix a fair rent for the premises.... However it has not been shown by any concrete examples from domestic law and practice that this remedy would have been an effective one."*

L-intimata Bezzina ssostni li jekk ir-rikorrenti riedu zieda fil-kera, kellhom jagixxu skont il-Kap 69. Bhala fatt qatt ma talbuha zieda fil-kera. U lanqas hadu azzjoni ghal dak il-ghan. Infatti fl-ittra legali datata 9 ta' Gunju 2017, ir-rikorrenti intimawha sabiex tizgombra mill-fond de quo fuq il-pretest illi "*l-kirja ta' dan il-fond tilledi d-drittijiet fondamentali tal-mittenti* ".

L-**Art 3 tal-Kap 69** jipprekludi awment fil-kera jew bdil fil-kondizzjonijiet tal-kirja, jekk mhux bil-permess tal-Bord li Jirregola l-Kera.

L-**Art 4(b) tal-Kap 69** imbaghad jistabilixxi kif ghandu jkun gwidat il-Bord meta jigi biex iqis ghandux ikun hemm zieda fil-kera. Jinghad :-

> *"jekk il-kera gdid ma jkunx izjed minn 40% mill-kera gust (stabbilit, meta mehtieg, bi stima) li bih il-fond kien mikri jew seta' jinkera f'kull zmien qabel l-4 ta' Awissu tal-1914: il-Bord jista' jistabbilixxi dan il-kera gust."*

Barra dan hekk, ma jistax ikun hemm ripreza tal-fond ghaliex jehtieg li jkunu sodisfatti numru ta' kondizzjonijiet stringenti qabel ma' l-Bord ikun jista' jilqa' t-talba tas-sid.

Isegwi ghalhekk illi peress illi l-kirja tal-intimata Bezzina hija regolata bil-Kap 69, ir-rikorrenti ma jistghu jaghmlu xejn biex itejjbu l-pozizzjoni taghhom. Anke li kieku r-rikorrenti pprezentaw talba ghall-awment fil-kera quddiem il-Bord, jibqa' l-fatt illi l-ammont illi l-Bord jista' jiffissa bil-ligi huwa baxx hafna meta kkomparat mal-kera li fond bhal dak mikri lill-intimata jista' jinkiseb fis-suq hieles. Ma hemm l-ebda paragun bejn il-valur tal-proprjeta` lura fl-1914 u dak tal-lum.

Il-Qorti tosserva wkoll li l-emendi ghall-Kap 16 li saru bl-Att X tal-2009 ma jistghux jitqiesu bhala li jaghtu rimedju effettiv ghal-lanjanzi tar-rikorrenti ghaliex anke b`dawk l-emendi jirrizulta sproporzjon kontra r-rikorrenti bejn l-awment fil-kera skont l-Art 1531C tal-Kap 16 u l-valur lokatizju tal-fond fis-suq hieles.

Huwa opportun illi jigi osservat li t-talba tar-rikorrenti hija ccentrata fuq ksur tad-drittijiet fondamentali taghhom. Anke jekk il-Bord ghandu s-setgha illi jawtorizza awment fil-kera, il-Bord m'ghandux is-setgha illi jistharreg allegat ksur. Dikjarazzjoni dwar lezjoni ta' drittijiet fondamentali, kif mitlub mir-rikorrenti, tista' tinghata biss minn din il-Qorti. Tajjeb jinghad ukoll illi l-presentata ta` kawza wahda kif odjerna,

minflok tnejn b`dik ordinarja bil-wisq mhux effettiva, tissarraf f`ekonomija ta` gudizzju. Din il-Qorti kif adita hija munita b'firxa akbar ta' setghat, u ghalhekk ir-rimedju li jinghata jolqot l-ilment fl-aspetti kollha tieghu.

Kif osservat din il-Qorti diversament presjeduta fis-sentenza li tat fit-30 ta` Jannar 2018 fil-kawza fl-ismijiet **Sergio Falzon et vs Avukat Generali et** :-

> *"Illi konsegwenza tal-istess, l-imsemmi disposizzjonijiet li huma applikabbli mill-Bord li Jirregola l-Kera jikkostitwixxu in effett ostakolu legali ghar-rikorrenti biex jirriprendu l-pussess tal-proprjeta` taghhom stante li l-intimati Farrugia ssodisfaw ir-rekwiziti tac-cittadinanza u tar-residenza ordinarja fuq indikati kif ukoll il-kondizzjonijiet tal-kirja. Certament f'tali kuntest il-Bord wiesgha kemm hi wiesgha il-kompetenza tieghu, mhuwiex fakoltizzat bil-Ligi li jizgumbra inkwilin li qed jonora l-obbligazzjonijiet tal-kirja - materja li hija ghal kollox irrilevanti ghall-ezercizzju tallum.*
>
> *Illi huwa ovvju li it-talbiet odjerni, fis-sustanza taghhom, imorru oltre konsiderazzjoni ta' allegat ksur tal-obbligi tal-kerrej. Anzi l-intimati inkwilini ghamlu enfasi fuq l-osservazzjoni rigida taghhom tal-kondizzjonijiet tal-kirja.*
>
> *Inoltre r-rikorrenti qed jitolbu kumpens ghall-ksur tad-drittijiet fondamentali li, kif gie ribadit mill-Qorti Ewropea f'Strasbourg:*
>
> *[t]o date the Court has always held that constitutional redress proceedings are effective in respect of complaints under Article 1 of Protocol No. 1, in so far as it has always been considered that there are no limits on the means of redress (including financial redress) which may be provided by the courts of constitutional jurisdiction." (Apap*

Bologna v. Malta, ECHR 46931/12 deciza 30 ta` Awwissu 2016)."

Din il-Qorti tishaq illi "*l-indoli tal-azzjoni tigi dezunta mhux tant mill-kliem piu o meno ezatti ta` l-att istituttiv tal-gudizzju, imma mill-iskop li ghaliha huwa intiz il-gudizzju* [**Kollez. Vol.XXXIV.III.746**]." Fil-kaz tal-lum, din il-Qorti tghid illi l-azzjoni kif impostata mir-rikorrenti tista` biss tigi deciza minn qorti bhal din ta` gurisdizzjoni kostituzzjonali u/jew konvenzjonali, u ma tistax tkun trattata minn qorti jew tribunal ta` gurisdizzjoni ordinarja.

Ghalhekk, filwaqt illi tiddikjara li sejra tezercita s-setghat taghha kif previst bl-Art 46(2) tal-Kostituzzjoni u bl-Art 4(2) tal-Kap 319, qeghda tichad l-ewwel (1) eccezzjoni tal-intimat Avukat Generali u t-tielet (3) eccezzjoni tal-intimata Bezzina.

IV. L-ewwel (1) u t-tieni (2) eccezzjonijiet tal-intimata Bezzina

L-intimata qeghda teccepixxi li :-

i) m'ghandhiex *locus standi* u li mhijiex legittimu kontradittur fil-kawza odjerna billi huwa biss l-Istat illi jista' jikkommetti vjolazzjoni tad-drittijiet fondamentali ;

ii) b'rabta mal-ewwel eccezzjoni, izzid fit-tieni eccezzjoni illi m'ghandhiex *locus standi* u li mhijiex legittimu kontradittur sabiex taghti xi rimedju kostituzzjonali.

Il-Qorti sejra tittratta dawn iz-zewg eccezzjonijiet flimkien.

Huwa accettat mill-gurisprudenza taghna illi f`kawzi ta' indole kostituzzjonali u/jew konvenzjonali huwa l-Istat illi ghandu jwiegeb ghall-vjolazzjoni ta` drittijiet fondamentali billi huwa l-Istat illi ghandu l-obbligu illi jassigura illi l-ligijiet ma joholqux zbilanc ngust bejn id-drittijiet tac-cittadin privat u l-obbligi tal-Istat.

Fil-kawza tal-lum, ir-rikorrenti qeghdin jilmentaw mill-fatt illi d-disposizzjonijiet tal-Kap 69 qeghdin johloqu relazzjoni forzuza ghad-detriment taghhom vis-à-vis l-intimata Bezzina bhala inkwilina taghhom. Ghalhekk qeghdin jitolbu dikjarazzjoni illi dak li johrog mill-Kap 69 jikser il-jeddijiet fondamentali taghhom skont l-Art 37 tal-Kostituzzjoni u l-Art 1 Prot 1 tal-Konvenzjoni.

Fis-sentenza li tat fis-7 ta` Dicembru 1990 fil-kawza fl-ismijiet **Joseph Abela v. Onor. Prim' Ministru et**, il-Qorti Kostituzzjonali qalet hekk :-

> "*F`kawzi ta' natura kostituzzjonali bbazati fuq id-drittijiet fundamentali, il-legittimi kontradittur ta' dawk l-azzjonijiet jinqasmu fi tliet kategoriji. L-ewwel kategorija tikkomprendi dak li huwa allegat li huma, direttament jew indirittament, responsabbli ghall-kummissjoni jew omissjoni ta' xi fatt li jikser xi dritt fundamentali protett mil-ligi. Fit-tieni kategorija huma dawk li ghall-omissjonijiet jew kummissjonijiet talpersuni tal-ewwel kategorija jistghu jkunu responsabbli biex jaghtu jew jiffornixxu r-rimedji li s-sentenza, li takkolji llament tal-ksur ta' dritt fundamentali, tissanzjona. It-tielet kategorija mbaghad hemm dawk il-partijiet kollha li jkunu in kawza meta l-kwistjoni kostituzzjonali tinqala' fuq jew waqt xi procedura gudizzjarja.*
>
> *Dawn it-tliet kategoriji ta' persuni huma kollha legittimi kontradittur fi proceduri ta' natura kostituzzjonali, li f'dan ir-rigward ukoll hija specjali, ghaliex biex zgumbrament ikunu kompiti u effikaci jirrikjedu l-prezenza ta' persuni li normalment fi procedure ordinarji jithallew barra, ghaliex minghajrhom il-gudizzju xorta wahda huwa integru. F'azzjoni ta' natura kostituzzjonali wkoll, il-gudizzju jkunu integru, jekk il-persuni tat-tieni kategorija jithallew barra mill-kawza, ghalkemm jista' jkun li l-azzjoni tirrizulta ineffikaci*."

L-Avukat Generali jinkwadra bhala r-rapprezentant tal-Istat billi jekk ir-rikorrenti jsehhilhom jipprovaw l-allegat ksur tad-drittijiet fondamentali taghhom, u bhala rimedju jinghata kumpens (kemm jekk pekunarju kif ukoll jekk morali) huwa l-Istat illi ghandu jaghmel tajjeb ghall-hlas tal-kumpens. Fil-kaz tal-intimata, il-lezjoni lamentata mir-rikorrenti fil-kawza odjerna mhijiex diretta kontra taghha izda kienet imharrka billi ghandha interess fl-esitu tal-procediment. Proceduri tax-xorta tal-lum jinvolvu zewg aspetti : i) ir-responsabbilita' ghall-vjolazzjoni u ii) l-persuna li trid twiegeb. Dawn iz-zewg aspetti mhux necessarjament illi jkunu konnessi b'tant illi waqt li l-vjolazzjoni tkun giet imwettqa minn persuna, ir-rimedju jista' jolqot persuna ohra.

Fil-kawza fl-ismijiet **Raymond Cassar Torreggiani et. vs AG et**, deciza mill-Qorti Kostituzzjonali fit-22 ta' Frar 2013, il-Qorti ghamlet din l-osservazzjoni :-

> *" … **biex gudizzju jkun integru jehtieg li, ghall-ahjar gudizzju tal-Qorti, jippartecipaw fih dawk kollha li huma nteressati fil-kawza**. B'hekk tigi assigurata kemm jista' jkun l-effikacita` tal-gudizzju inkwantu dan jorbot biss lil dawk li jkunu partecipi fih, kif ukoll jigi rispettat il-principju tal-ekonomija tal-gudizzju sabiex ma jkunx hemm bzonn ta' ripetizzjoni ta' proceduri kontra l-persuni kollha interessati fid-diversi kawzi billi dawn ma jkunux hadu parti f'gudizzju wiehed. Il-gudizzju jibqa' integru mill-mument li jiehdu parti fih dawk li jkollhom id-dritt, u dawk li kontra taghhom dak l-istess dritt jikkompeti". (enfasi mizjuda)*
>
> *…*
>
> *Mill-premess ghandu jirrizulta car li l-intimati konjugi Tabone, bhala inkwilini tal-fond de quo, u tenut kont tal-fatt li proprju l-inkwilinat taghhom jifforma l-mertu tal-kawza odjerna, ghandhom interess guridiku u ghalhekk ikunu partecipi fil-kawza li jista' jkollha effetti legali anke fuqhom."*

Il-Qorti taghmel referenza wkoll ghal dak illi nghad fis-sentenza li tat il-Qorti Kostituzzjonali fis-6 ta` Frar 2015 fil-kawza fl-ismijiet **Sam Bradshaw et vs l-Avukat Generali et** :-

> *"20. Din il-Qorti tosserva li, ghalkemm taqbel mat-tezi li, ladarba l-kazin agixxa skont il-ligi, allura m'ghandux legalment jirrispondi ghall-inkostituzzjonalita` tal-ligi applikata minnu jew jehel spejjez tal-kawza, izda mill-banda l-ohra, il-proceduri odjerni necessarjament jaffettwaw lill-kazin stante li dan hu parti fir-rapport guridiku li huwa regolat b'ligi li l-kostituzzjonalita` taghha qed tigi attakkata. Ghaldaqstant il-prezenza tieghu f'dawn il-proceduri hija necessarja ghall-finijiet tal-integreta` tal-gudizzju. Il-kazin bhala inkwilin tal-fond ghandu interess guridiku f'din il-kawza peress li l-meritu jikkoncerna lilu direttament. Ghal din ir-raguni huwa ghandu jkun partecipi fil-gudizzju u ghalhekk huma legittimi kuntradituri. Ghaldaqstant lewwel Qorti kienet korretta meta laqghet it-talba ghas-sejha fil-kawza tal-kazin intimat."*

Ir-rikorrenti qeghdin jitolbu l-izgumbrament tal-intimata Bezzina. Peress illi anke ghalhekk l-effett li dak li qed jintalab mir-rikorrenti jolqot lill-intimata direttament hija ghandha l-interess lit rid il-ligi sabiex tiddefendi l-pozizzjoni taghha. Ghalhekk ghandha tkun parti fil-kawza, anke jekk finalment il-legittimita` taghha tkun tirrizulta bhala passiva.

L-ewwel (1) u t-tieni (2) eccezzjonijiet tal-intimata Bezzina qeghdin jigu <u>respinti.</u>

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

Bl-ewwel talba, ir-rikorrenti qeghdin jitolbu mill-qorti dikjarazzjoni li bl-applikazzjoni tad-disposizzjoni tal-Kap 69 ghall-kirja vigenti mhux qed jithallew igawdu l-fond in kwistjoni, propjeta` taghhom, bi ksur tal-

jeddjiet fondamentali taghhom hekk kif imharsa bl-Art 37 tal-Kostituzzjoni u bl-Art 1 Prot 1 tal-Konvenzjoni.

1. L-Art 37 tal-Kostituzzjoni

L-Avukat Generali qieghed jeccepixxi li r-rikorrenti ma jistghux jipproponu t-talba abbazi tal-Art 37 tal-Kostituzzjoni, billi d-disposizzjoni tghodd biss fil-kaz ta` tehid forzuz tal-proprjeta`li mhuwiex il-kaz tal-lum. Sabiex wiehed ikun jista` jitkellem dwar tehid forzuz jew obbligatorju, persuna trid tkun zvestita minn kull dritt li ghandha fuq dik il-proprjeta`. Fil-kaz odjern, skont l-Avukat Generali, ma sar ebda zvestiment ghaliex bit-thaddim tal-ligi in kwistjoni ir-rikorrenti ma tilfux id-drittijiet taghhom fuq il-fond in kwistjoni.

Ghall-kaz tal-lum il-parti rilevanti tal-Art 37 hija s-subartikolu (1) li tghid :-

> *Ebda proprjetà ta` kull xorta li tkun ma ghandu jittiehed pussess taghha b`mod obbligatorju, u ebda nteress fi jew dritt fuq proprjetà ta` kull xorta li tkun ma ghandu jigi miksub b`mod obbligatorju, hlief meta hemm disposizzjoni ta` ligi applikabbli ghal dak it-tehid ta` pussess jew akkwist –*
>
> *(a) ghall-hlas ta` kumpens xieraq ;*
>
> *(b) li tizgura lil kull persuna li tippretendi dak il-kumpens dritt ta` access lil Qorti jew tribunal indipendenti u imparzjali mwaqqaf b`ligi sabiex jigi deciz l-interess taghha fi jew dritt fuq il-proprjetà u l-ammont ta` kull kumpens li ghalih tista` tkun intitolata, u sabiex tikseb hlas ta` dak il-kumpens ; u*
>
> *(c) li tizgura lil kull parti fi proceduri f`dik il-Qorti jew tribunal dwar pretensjoni bhal dik dritt ta` appell mid-decizjoni taghha lill-Qorti tal-Appell f`Malta :*
>
> *Izda f`kazijiet specjali l-Parlament jista`, jekk hekk jidhirlu xieraq li jaghmel fl-interess nazzjonali, b`ligi jistabbilixxi l-kriterji li ghandhom*

> *jitharsu, maghduda l-fatturi u c-cirkostanzi l-ohra li ghandhom jitqiesu, biex jigi stabbilit il-kumpens li ghandu jithallas dwar proprjetà li jittiehed pussess taghha jew li tigi akkwistata b`mod obbligatorju; u f`kull kaz bhal dak il-kumpens ghandu jigi iffissat u ghandu jithallas skont hekk.*

Fis-sentenza li tat il-Qorti Kostituzzjonali fil-25 ta` Frar 2011 fil-kawza **Lay Lay Co Ltd vs L-Awtorita ta` Malta Dwar l-Ambjent u l-Ippjanar et** inghad illi l-Art 37 tal-Kostituzzjoni japplika biss meta jkun hemm tehid forzjuz ta` proprjeta, mhux meta l-ilment ikun jirrigwarda l-kontroll jew limitazzjoni ta` l-uzu ta` proprjeta.

Fis-sentenza ta` din il-Qorti diversament presjeduta tat-3 ta` Ottubru 2008 fil-kawza : **Josephine Bugeja vs Avukat Generali et** : kien diga` affermat dan il-principju. Fil-fatt kien inghad hekk :-

> *"Dan qed jinghad peress li biex japplika l-principju ta` tehid forzuz wiehed irid jara jekk ittehditx proprjeta` b`mod li ssid originali jigi zvestit minn kull dritt li ghandu fuq il-proprjeta`. F`dan il-kaz, il-fond kien u ghadu proprjeta` tar-rikorrenti, li tista` taljena jew tittrasferixxi l-fond lill-terzi, ghalkemm il-valur tal-fond certament qieghed affettwat mic-cirkostanzi msemmija .... Fil-fatt, kif qalet l-Onorabbli Qorti Kostituzzjonali fil-kawza "**Galea et vs Briffa et"**, deciza fit-30 ta` Novembru, 2001, li kienet titratta mid-dritt ta` enfitewta, li kien igawdi minn koncessjoni ta` anqas minn tletin sena, li fit-tmien l-enfitewsi jikkonverti t-titolu tieghu f`wiehed ta` kera, bl-okkupazzjoni tkun protetta bil-ligi, biex ikun hemm ksur tal-Kostituzzjoni, jrid ikun hemm tehid tal-proprjeta`, u mhux biss regolamenti li jikkontrollaw l-uzu tal-istess proprjeta`.*
>
> *Dik l-Onorabbli Qorti ghamlet is-segwenti osservazzjonijiet fil-kuntest tat-tgawdija ta` fond.*
>
> *"Jibqa` pero` l-problema jekk din il-limitazzjoni statutorja fir-rigward tat-tgawdija tal-proprjeta` setghetx tigi ekwiparata mat-tehid ta` pussess taghha b`mod obbligatarju ghaliex hi din l-ahhar figura guridika illi tattira l-protezzjoni minn privazzjoni ta` proprjeta` bla kumpens ai termini*

tal-artikolu 37 tal-Kostituzzjoni … Il-Kostituzzjoni titkellem minn tehid ta` pussess forzat b`mod obbligatorju. Dicitura li, wehidha, minghajr riferenza ghad-dritt ta` tgawdija pacifika fih innifsu donnu timplika li biex tigi estiza l-protezzjoni tal-Kostituzzjoni jehtieg li jkun hemm privazzjoni ta` proprjeta` u li din tkun effett dirett ta` xi att tal-Istat u mhux bizzejjed li jkun hemm privazzjoni tad-dritt tat-tgawdija pacifika bhala rifless ta` tali att …

Il-Kostituzzjoni ta` Malta ghandha approcc divers ghad-dritt tal-proprjeta`. Fl-artikolu 32 hi telenka fost id-drittijiet u l-libertajiet fondamentali tal-individwu "it-tgawdija ta` proprjeta`". Dan id-dritt fondamentali li l-individwi kollha b`mod indiskriminat ghandhom igawdu l-protezzjoni tal-Kostituzzjoni, pero`, hu soggett "ghar-rispett tad-drittijiet u l-libertajiet tal-ohrajn u tal-interess pubbliku". Dan l-artikolu hu pero` wiehed dikjaratorju u jidher li t-twettieq tieghu fir-rigward tad-dritt ta` proprjeta` hu limitat ghall-applikazzjoni tal-artikolu 37 fuq citat li l-vjolazzjoni tieghu taghti lok ghar-rimedju kostituzzjonali. Jidher ghalhekk li kontrarjament ghad-dikjarazzjoni tal-principju, fl-ewwel sentenza tal-ewwel artikolu tal-Ewwel Protokol Tal-Konvenzjoni Ewropeja, (Every natural or legal person is entitled to the peaceful enjoyment of his possessions), l-artikolu 32 li jiddikjara d-dritt ghall-proprjeta` b`mod generali ma hux "ut sic" enforzabbli f`xi Qorti. Infatti s-subinciz 1 tal-artikolu 46 jipprovdi illi jaghti biss lok gharrikors quddiem il-Qorti Kostituzzjonali u jista` biss jintalab rimedju ghalihom il-kazijiet ta` vjolazzjonijiet taht l-artikoli 33 sa 45.

Dan ifisser illi biex ir-rikorrenti jkollhom success fis-sottomissjonijiet taghhom fir-rigward tal-artikolu 37 tal-Kostituzzjoni, huma jridu sodisfacentement jippruvaw illi l-fatti kif provati … jinkwadraw ruhhom fl-estremi tas-subinciz 1 tal-artikolu 37 ….".

Jista` allura b`logika jigi arguwit illi l-artikolu 37 jitkellem car u tond fuq cahda tal-proprjeta` jew id-dritt fuqha minghajr kumpens xieraq. Ifisser

> *dan li ghandek vjolazzjoni jekk ghandek privazzjoni totali tal-proprjeta jew xi jedd fuqha minghajr l-ebda kumpens jew ahjar minghajr kumpens li ma jkunx xieraq. Din il-konkluzjoni hi wkoll suffragata mill-kumplament tal-artikolu 37 li proprju jipprovdi li dan il-kumpens kellu jigi stabbilit mil-ligi u li l-kwantifikazzjoni tieghu kellha tkun soggetta ghall-iskrutinju ta` Qorti b`kompetenza li tinvesti tali mertu biex tassigura l-gustizzja tal-kumpens. Hi allura l-fehma ta` din il-Qorti illi fil-kaz taht ezami ma jokkorrux l-estremi tal-ewwel paragrafu tal-artikolu 37 in kwantu kif fuq elaborat hawn non si tratta ta` tehid ta` proprjeta` jew ta` jedd fuqha taht xi forma jew ohra izda ta` limitazzjoni tal-uzu tal-istess proprjeta`".*

Il-pronunzjament tal-Qorti dwar l-Art 37 tal-Kostituzzjoni kien ikkonfermat b`sentenza tal-Qorti Kostituzzjonali tas-7 ta` Dicembru 2009.

Ghalkemm fil-kaz tal-lum, ir-rikorrenti jilmentaw minn ksur ta` din id-disposizzjoni tal-Kostituzzjoni, din il-Qorti hija tal-fehma konsiderata illi d-disposizzjonijiet mertu ta` din il-kawza ma jwasslux ghal tehid forzuz tal-propjeta` izda ghal kontroll fl-uzu taghha.

Ghalhekk l-ewwel (1) talba <u>safejn din tirrigwarda ksur tal-Art 37 tal-Kostituzzjoni</u> qeghda tkun michuda.

2. <u>L-Art 1 Prot 1 tal-Konvenzjoni</u>

Id-disposizzjoni tipprovdi illi :-

> *"Kull persuna naturali jew persuna morali ghandha d-dritt ghat-tgawdija pacifika tal-possedimenti taghha.*
>
> *Hadd ma ghandu jigi pprivat mill-possedimenti tieghu hlief fl-interess pubbliku u bla hsara tal-*

> *kundizzjonijiet provduti bil-ligi u bil-principji generali tal-ligi internazzjonali.*
>
> *Izda d-disposizzjonijiet ta` qabel ma ghandhom b`ebda mod inaqqsu d-dritt ta` Stat li jwettaq dawk il-ligijiet li jidhrulu xierqa biex jikkontrolla l-uzu tal-proprjeta skond l-interess generali jew biex jizgura l-hlas ta` taxxi jew kontribuzzjonijiet ohra jew pieni.".*

Id-disposizzjoni hija gwidata minn tliet principji :-

a) Illi kull persuna, sew dik naturali kif ukoll dik morali, ghandha dritt ghat-tgawdija tal-proprjeta' b'mod pacifiku ;

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

c) Illi jibqa` d-dritt tal-Istat illi jghaddi ligijiet sabiex *inter alia* b`mod xieraq jikkontrolla l-uzu tal-gid fl-interess pubbliku, bhal meta jintroduci legislazzjoni ntiza sabiex ittaffi problemi ta` akkomodazzjoni.

a) <u>Gurisprudenza tal-ECHR</u>

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

> *"The second paragraph reserves to States the right to enact such laws as they deem necessary to control the use of property in accordance with the general interest.*
>
> *…*
>
> *Such laws are especially common in the field of housing, which in our modern societies, is a central concern of social and economic policies.*

…

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

…

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

…

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

…

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

Il-Qorti taghmel referenza ghad-decizjoni li tat l-ECtHR fil-5 ta` Jannar 2000 fil-kaz **Beyeler vs Italy** fejn inghad hekk :-

"98. As the Court has stated on a number of occasions, Article 1 of Protocol No. 1 comprises three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use

> *of property in accordance with the general interest ... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, among other authorities, the* ***James and Others v. the United Kingdom*** *judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, which reproduces in part the analysis given by the Court in its* ***Sporrong and Lönnroth v. Sweden*** *judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also the* ***Holy Monasteries v. Greece*** *judgment of 9 December 1994, Series A no. 301-A, p. 31, § 56, and* ***Iatridis v. Greece*** *[GC], no. 31107/96, § 55, ECHR 1999-II)."*

Fis-sentenza **Amato Gauci vs Malta** (li nghatat fil-15 ta` Settembru 2009 u saret finali 15 ta` Dicembru 2009) l-ECtHR irrimarkat illi :-

> *56. Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see* ***Sporrong and Lönnroth*** *cited above, §§ 69-74, and* ***Brumărescu v. Romania*** *[GC], no. 28342/95, § 78, ECHR 1999-VII).*
>
> *57. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore*

*ascertain whether by reason of the State`s interference the person concerned had to bear a disproportionate and excessive burden (see **James and Others**, cited above, § 50; **Mellacher and Others**, cited above, § 48, and **Spadea and Scalabrino v. Italy**, judgment of 28 September 1995, § 33, Series A no. 315-B).*

*58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. …. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner (see **Immobiliare Saffi v. Italy**, [GC], no. 22774/93, § 54, ECHR 1999-V; and Broniowski, cited above, § 151).*

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

…

"In the present case, having regard to the low rental value which could be fixed by the Rent Regulation Board, the applicant`s state of uncertainty as to

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

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

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

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

Il-kaz ta` **Zammit & Attard Cassar vs Malta**, li kien deciz mill-ECtHR fit-30 ta` Lulju 2015, kien jittratta dwar kirja ta` fond kummercjali li kienet qed tigi mgedda b`mod awtomatiku skont il-Kap 69. Anke ghal dak il-kaz, l-ECtHR irriaffermat il-principji li kienu enunzjati fis-sentenzi taghha ta` qabel dwar il-kontroll ta` kiri ta` djar. Il-Qorti sabet illi kien hemm lezjoni tal-Art 1 Prot 1 tal-Konvenzjoni minkejja li kienu dahlu bl-Att X tal-2009.

Il-Qorti qalet hekk :-

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

(a) Whether there was interference

48. In previous cases concerning restrictions on lease agreements, the Court considered that there had been interference (as a result of the domestic courts` refusals of the applicants` demands) despite the applicants` knowledge of the applicable restrictions at the time when they entered into the lease agreement, a matter which however carried weight in the assessment of the proportionality of the measure (see ***Almeida Ferreira and Melo Ferreira v. Portugal****, no. 41696/07, §§ 27 and 34, 21 December 2010).*

49. More recently, in ***R & L, s.r.o. and Others v. the Czech Republic*** *(nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09, 3 July 2014) the Court specifically examined whether Article 1 of Protocol No. 1 protected applicants who had purchased property in the knowledge that rent restrictions imposed on the property might contravene the Convention. In that case, when the applicants had acquired their respective houses their rents had been set in accordance with the rent regulations applicable at the time and the applicants could not have increased the rents above the*

threshold set by the State. Nor were they free to terminate the rent agreements and conclude new ones with different – higher – levels of rent. The Court held that it could not be said that the applicants as landlords had implicitly waived their right to set the level of rents, as, for the Court, waiving a right necessarily presupposed that it would have been possible to exercise it. There was no waiver of a right in a situation where the person concerned had never had the option of exercising that right and thus could not waive it. It followed that the rent-control regulations had constituted an interference with the landlords` right to use their property (ibid. § 106).

50. In the present case the Court observes that the applicants` predecessor in title knowingly entered into the rent agreement in 1971. It is the Court`s considered opinion that, at the time, the applicants` predecessor in title could not reasonably have had a clear idea of the extent of inflation in property prices in the decades to come. Moreover, the Court observes that when the applicants inherited the property in question they had been unable to do anything more than attempt to use the available remedies, which were to no avail in their circumstances. The decisions of the domestic courts regarding their request thus constitute interference in their respect. Furthermore, as in ***R & L, s.r.o. and Others*** *(cited above), the applicants in the present case, who inherited a property that was already subject to a lease, did not have the possibility to set the rent themselves (or to freely terminate the agreement). It follows that they could not be said to have waived any right in that respect.*

51. Accordingly, the Court considers that the rent-control regulations and their application in the present case constituted an interference with the applicants` right (as landlords) to use their property.

*52. The Court has previously held that rent-control schemes and restrictions on an applicant`s right to terminate a tenant`s lease constitute control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. It follows that the case should be examined under the second paragraph of Article 1 of Protocol No. 1 (see **Hutten-Czapska v. Poland** [GC], no. 35014/97, §§ 160-161, ECHR 2006-VIII, **Bittó and Others v. Slovakia**, no.30255/09, § 101, 28 January 2014; and **R & L, s.r.o. and Others**, cited above, § 108).*

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

*53. The first requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions be lawful. In particular, the second paragraph of Article 1, while recognising that States have the right to control the use of property, subjects their right to the condition that it be exercised by enforcing "laws". Moreover, the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see, mutatis mutandis, **Broniowski v. Poland** [GC], no. 31443/96, § 147, ECHR 2004-V, and **Amato Gauci,** cited above, § 53).*

54. Furthermore, a measure aimed at controlling the use of property can only be justified if it is shown, inter alia, to be "in accordance with the general interest". Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the "general" or "public" interest. The notion of "public" or "general" interest is necessarily extensive. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic

policies should be a wide one, the Court has on many occasions declared that it will respect the legislature`s judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation (see, mutatis mutandis, ***Hutten-Czapska****, cited above, §§ 165-66, and* ***Fleri Soler and Camilleri v. Malta****, no. 35349/05, § 65, ECHR 2006-X).*

55. The Court finds that the restriction was imposed by the Reletting of Urban Property (Regulation) Ordinance and was "lawful" within the meaning of Article 1 of Protocol No. 1. This was not disputed by the parties.

56. As to the legitimate aim pursued, the Government submitted that the measure, as applied to commercial premises, aimed to protect the stability of businesses and the public services such businesses provided. The measure was also aimed at protecting the employment of those persons who depended on the activity of those businesses and safeguarded against property owners taking advantage of the economic activity of a tenant. The Court observes that the Commission has previously accepted that rent regulation to preserve the economic viability of commercial enterprises in the interest of both those enterprises and the consumer, was in the general interest (see ***G v. Austria*** *no. 12484/86, Com. Dec., 7 June 1990). Similarly, the Court can accept that, in principle, the overall measure, which also applied to commercial premises, may be considered as being in the general interest.*

(c) Whether the Maltese authorities struck a fair balance

57. In each case involving an alleged violation of Article 1 of Protocol No. 1, the Court must ascertain whether by reason of the State`s interference, the person concerned had to bear a disproportionate and

*excessive burden (see **James and Others**, cited above, § 50, and **Amato Gauci**, cited above, § 57).*

58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the conditions of the rent received by individual landlords and the extent of the State`s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord`s property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State`s conduct (see Immobiliare Saffi v. Italy, [GC], no. 22774/93, § 54, ECHR 1999-V, and Broniowski, cited above, § 151).

59. The Court notes, in the first place, that the Government`s final argument (submitted at an advanced stage in the proceedings, see paragraph 46 above) is misconceived in so far as the property they were referring to was not the property at issue in the present case. From the documents and submissions provided to the Court it transpires that the property is in use and thus the applicants were not entitled, on the grounds established by law (Article 12 of Ordinance, paragraph 26 above), to evict the tenant.

60. The Court observes that in the present case the lease was subject to renewal by operation of law and the applicants had no possibility to evict the tenant on the basis of any of the limited grounds provided for by law. Indeed, any such request before the RRB, in the circumstances obtaining in their case,

would have been unsuccessful, despite the fact that the tenant was a commercial enterprise that possessed other property (a matter which has not been disputed), as the latter fact was not a relevant consideration for the application of the law. Furthermore, the applicants were unable to fix the rent – or rather to increase the rent previously established by their predecessor in title. The Court notes that, generally, increases in rent could be done through the RRB. They were, however, subject to capping, in that any increase could not go beyond 40% of the fair rent at which the premises were or could have been leased before August 1914. Indeed, in the applicants` case no increase was possible at all, because the rent originally fixed in 1971 was already beyond the capping threshold.

61. Whereas the RRB could have constituted a relevant procedural safeguard by overseeing the operation of the system, in the present case it was devoid of any useful effect, given the limitations imposed by the law (see, mutatis mutandis, see ***Amato Gauci****, cited above, § 62 and* ***Anthony Aquilina v. Malta****, no. 3851/12, § 66, 11 December 2014). Consequently, the application of the law itself lacked adequate procedural safeguards aimed at achieving a balance between the interests of the tenants and those of the owners (ibid and, mutatis mutandis,* ***Statileo v. Croatia****, no. 12027/10, § 128, 10 July 2014).*

62. The Court further notes that for the first decade of the rental contract, during which – according to the applicants – the market value of the property was EUR 7,000, the rent payable to the applicants was EUR 862 a year. Subsequently, for the year 2010 the rent amounted to EUR 990, for 2011 EUR 1,138, for 2012 EUR 1,309 and for 2013 EUR 1,505. For the years 2014 onwards it would increase by 5% a year. The Court reiterates that State control over levels of rent falls into a sphere that is subject

*to a wide margin of appreciation by the State, and its application may often cause significant reductions in the amount of rent chargeable. Nevertheless, this may not lead to results which are manifestly unreasonable, such as amounts of rent allowing only a minimal profit (see **Amato Gauci**, cited above, § 62). While the applicants do not have an absolute right to obtain rent at market value, the Court observes that, despite the 2009 amendments, the amount of rent is significantly lower than the market value of the premises as submitted by the applicants, which was not effectively contested by the Government. However, the applicants have not argued that they were unable to make any profit. Even so, this element must be balanced against the interests at play in the present case.*

63. While the Court has accepted above that the overall measure was, in principle, in the general interest, the fact that there also exists an underlying private interest of a commercial nature cannot be disregarded. The Government have not argued that in the present case the viability of the tenant`s commercial enterprise was in any way dependent on the favourable conditions of the lease on the premises used for storage – a matter which was irrelevant in the application of the law to the premises. In such circumstances, both States and the Court in its supervisory role must be vigilant to ensure that measures such as the one at issue, applied automatically, do not give rise to an imbalance that imposes an excessive burden on landlords while allowing tenants of commercial property to make inflated profits. It is also in such contexts that effective procedural safeguards become indispensable.

*64. Lastly, the Court notes that unlike in other rent-control cases where the applicants were in a position of uncertainty as to when and if they would recover their property (see, inter alia, **Amato Gauci**,*

*cited above, § 61, and **Saliba and Others v. Malta**, no. 20287/10, § 67, 22 November 2011), in the present case, under the laws currently in force and in the absence of any further legislative interventions, the applicants` property will be free and unencumbered as of 2028. It follows that the effects of such rent regulation are circumscribed in time. However, the Court cannot ignore the fact that by that time, the restriction on the applicants` rights would have been in force for nearly three decades, and to date has been in force for over a decade.*

65. Having assessed all the elements above, and notwithstanding the margin of appreciation allowed to a State in choosing the form and deciding on the extent of control over the use of property in such cases, the Court finds that, having regard to the relatively low rental value of the premises and the lack of procedural safeguards in the application of the law, a disproportionate and excessive burden was imposed on the applicants, who have had to bear a significant part of the social and financial costs of supporting a commercial enterprise. It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants` right to the enjoyment of their property.

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

Ta` rilevanza huwa wkoll il-pronunzjament tal-ECtHR fil-kaz ta` **Cassar vs Malta** deciz fit-30 ta` Jannar 2018 fejn inghad :-

43. The Court reiterates that in order for an interference to be compatible with Article 1 of Protocol No. 1 it must be lawful, be in the general interest and be proportionate, that is to say it must strike a "fair balance" between the demands of the general interest of the community and the

requirements of the protection of the individual`s fundamental rights (see, among many other authorities, ***Beyeler v. Italy*** *[GC], no. 33202/96, § 107, ECHR 2000-I, and* ***J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom*** *[GC], no. 44302/02, § 75, ECHR 2007-III). The Court will examine these requirements in turn.*

(a) Whether there was an interference

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

45. More specifically in the context of restrictions on lease agreements (in particular the prohibition on bringing a tenant`s lease to an end), the Court has found that there was an interference as a result of the domestic courts` refusals of the applicants` demands, despite the applicants` knowledge of the applicable restrictions when they had entered into the lease agreement, a matter which however carried decisive weight in the assessment of the proportionality of the measure (see ***Almeida***

Ferreira and Melo Ferreira v. Portugal*, no. 41696/07, §§ 27 and 34, 21 December 2010).*

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

47. In the more recent ***Zammit and Attard Cassar*** *(cited above, § 50) case, in a situation where the applicants` predecessor in title had knowingly entered into a rent agreement in 1971 with relevant restrictions (specifically the inability to increase rent or to terminate the lease), the Court held that, at the time, the applicants` predecessor in title could not*

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

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

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

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

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

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

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

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

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

(c) Whether the Maltese authorities struck a fair balance

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

55. The Court will consider the impact that the application of the 1979 Act had on the applicants` property. It notes that the applicants could not exercise their right of use in terms of physical

possession as the house was occupied by tenants and they could not terminate the lease. Thus, while the applicants remained the owners of the property they were subjected to a forced landlord-tenant relationship for an indefinite period of time.

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

57. As to the rent payable, the Court is ready to accept that EUR 466 annually was a more or less reasonable amount of rent in 1988 - particularly given that it was an amount of rent which the applicants were aware of and in spite of which they decided to purchase the property with the relevant restrictions. Furthermore, it was an amount of rent

*which the applicants expected to receive for a number of years, at least until the demise of J.G. and his wife. Moreover, the Court accepts that at the relevant time the measure pursued a legitimate social-policy aim (see paragraph 53 above) which may call for payments of rent at less than the full market value (see **Amato Gauci**, § 77).*

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

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

the applicants refused to accept the rent, once P.G. had inherited the property. In the light of the above it suffices for the Court to consider that a rent based on the value of the property as it stood in 1962 with the relevant adjustment which amounted to EUR 466 annually in 1988 and thereafter – was certainly not reasonable for the years following 2000.

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

61. In the present case, having regard to the low rental payments to which the applicants have been entitled in recent years, the applicants` state of uncertainty as to whether they would ever recover their property, which has already been subject to this regime for nearly three decades, the rise in the standard of living in Malta over the past decades, and the lack of procedural safeguards in the application of

> *the law, which is particularly conspicuous in the present case given the situation of the current tenant as well as the size of the property and the needs of the applicants, the Court finds that a disproportionate and excessive burden was imposed on the applicants. It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants` right of property.*
>
> *62. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.*

L-istess linja gurisprudenzjali kienet ikkonfermata fid-decizjoni li tat l-ECtHR fil-kaz ta` **<u>Buttigieg and others vs Malta</u>** li nghatat fil-11 ta` Dicembru 2018 fejn inghad :-

> "*41. The Court notes that it has found in plurality of cases against Malta concerning the same subject matter that, despite the considerable discretion of the State in choosing the form and deciding on the extent of control over the use of property in such cases, having regard to the low rental value which could have or was received by the applicants, their state of uncertainty as to whether they would ever recover the property (despite more recent amendments), the lack of procedural safeguards in the application of the law and the rise in the standard of living in Malta over the past decades, a disproportionate and excessive burden was imposed on the applicants who were made to bear most of the social and financial costs of supplying housing accommodation (see Amato Gauci, cited above, § 63; Anthony Aquilina v. Malta, no. 3851/12, § 67, 11 December 2014; and Cassar v. Malta, no. 50570/13, § 61, 30 January 2018). In those cases the Court found that the Maltese State had failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant's right of property and that there had thus*

been a violation of Article 1 of Protocol No.1 to the Convention.

42. Having regard to the facts of the case and the parties' observations, the same considerations apply in the present case. There has accordingly been a violation of Article 1 of Protocol No.1 to the Convention."

b) <u>Gurisprudenza ta` l-Qrati Maltin</u>

Fejn jidhol l-Art 1 Prot 1 tal-Konvenzjoni, diversi kienu d-decizjonijiet tal-Qrati taghna fejn kienet dikjarata vjolazzjoni. Din il-Qorti tosserva illi l-bicca l-kbira tad-decizjonijiet kienu jolqtu l-applikazzjoni tal-Kap 158. Tghid fl-istess waqt illi ghalkemm il-kaz tal-lum jittratta l-applikazzjoni tal-Kap 69, ighoddu ghalih dawk il-principji li hargu minn dawk is-sentenzi ghaliex il-punt komuni fiz-zewg sitwazzjonijiet huwa l-kontroll tal-uzu u tgawdija tal-proprejta' u l-limiti tieghu.

Taghmel referenza *inter alia* ghas-sentenzi : **<u>Dr. Cedric Mifsud et vs l-Avukat Generali et</u>** deciza mill-QK fil-25 ta` Ottubru 2013 ; **<u>Angela sive` Gina Balzan vs L-Onorevoli Prim Ministru et</u>** deciza mill-QK fis-7 ta` Dicembru 2012 ; **<u>AIC Joseph Barbara et vs L-Onor Prim Ministru et</u>** deciza 31 ta` Jannar 2014 ; **<u>Maria Ludgarda Borg et vs Rosario Mifsud et</u>** deciza mill-QK fid-29 ta` April 2016 ; **<u>Concetta sive` Connie Cini vs Eleonora Galea et</u>** deciza mill-QK fil-31 ta` Jannar 2014 ; **<u>Robert Galea vs Avukat Generali et</u>** deciza mill-PA/GK fis-7 ta` Frar 2017 ; **<u>Rose Borg vs Avukat Generali et</u>** deciza mill-QK fil-11 ta` Lulju 2016 ; id-diversi kawzi bl-*occhio* **<u>Josephine Azzopardi et vs L-Onor Prim Ministru et</u>** li kienu decizi fil-25 ta` April 2018 ; u **<u>Sergio Falzon et vs Alfred Farrugia et</u>** deciza fit-30 ta` Jannar 2018.

L-Art 1 Prot 1 jigma` fih tliet principji : illi ghandu jkun hemm it-tgawdija pacifika tal-proprjeta` ; illi l-privazzjoni minn possedimenti hija soggetta ghal kondizzjonijiet ; u li l-Istat ghandu l-jedd illi jikkontrolla l-uzu tal-proprjeta` konformement mal-interess generali. It-tlieta, ghalkemm distinti, mhumiex disgunti, peress illi l-ahhar tnejn jittrattaw

sitwazzjonijiet partikolari ta` indhil fid-dritt ghall-godiment pacifiku tal-proprjeta` u ghalhekk iridu jinftehmu fid-dawl tal-principju generali espost fl-ewwel principju.

Kwalsiasi interferenza trid tkun kompatibbli mal-principji (i) tal-legalita`, (ii) tal-ghan legittimu fl-interess generali, u (iii) tal-bilanc gust. Irid jinzamm proporzjon ragjonevoli bejn il-mezzi uzati u l-ghan persegwit mill-Istat sabiex jikkontrolla l-uzu tal-proprjeta` tal-individwu. Dan il-proporzjon isib il-qofol tieghu fil-principju tal-"bilanc xieraq" li ghandu jinzamm bejn l-esigenzi tal-interess generali tal-komunita` u l-htiega tal-harsien tad-drittijiet fundamentali tal-individwu. Il-Qorti tkun trid taghmel analizi komprensiva tal-varji interessi, u taccerta ruhha jekk bhala konsegwenza tal-indhil mill-Istat l-persuna kellhiex iggarrab piz eccessiv u sproporzjonat.

c) <u>Risultanzi</u>

Meta sar il-Kap 16 fl-1868, is-suq tal-kera kien totalment hieles b`mod u manjiera illi meta taghlaq is-sid kellu l-jedd jgholli l-kera jew ma jgeddidhiex. Meta la s-sid u lanqas l-inkwilin ma kienu jitolbu tibdil fil-kondizzjonijiet tal-kirja, il-kirja kienet tiggedded *ope legis.*

Wara l-Ewwel Gwerra Dinija, il-kirjiet bdew joghlew b'rata mghaggla. Ghalhekk kienet mehtiega regolamentazzjoni. L-Att I tal-1925 kien l-ewwel att legislattiv li kien intiz sabiex jirregola zidiet fil-kera tant li mpona arbitragg meta ma kienx jintlahaq ftehim dwar iz-zidiet fil-kera. Dan l-Att kellu jkollu effett temporanju biss sal-31 ta' Dicembru 1927.

Inhasset il-htiega ta` kontroll aktar strett. Ghalhekk kien promulgat l-Att XXIII tal-1929, li permezz tieghu, is-sidien gew prekluzi milli jghollu l-kera jew milli jirrifjutaw li jgeddu l-kera minghajr il-permess tal-Bord li Jirregola l-Kera. Il-Bord inghata s-setgha illi jilqa' talba ghal zgumbrament biss wara li jkunu sodisfatti numru ta' kondizzjonijiet. In kwantu ghat-talbiet ghal zieda fil-kera, il-Bord seta` jawtorizza awment sa massimu ta' 40% tal-kera gusta f`Awissu 1914. Din il-mizura wkoll

kellha tkun wahda temporanja sakemm is-suq jistabilizza ruhu. L-Att XXIII tal-1929 kellu jkollu effett sal-31 ta' Dicembru 1933.

L-Ordinanza XXI tal-1931 li Tirregola t-Tigdid tal-Kiri ta' Bini (illum Kap 69 tal-Ligijiet ta' Malta) li hadet post l-Att XXIII tal-1929 kienet promulgata fid-19 ta' Gunju 1931 u kienet intiza sabiex ikollha effett sal-31 ta' Dicembru 1933. Biss in segwitu saret definittiva. Il-ligi kienet necessitata minhabba nuqqas kbir ta' djar ta` abitazzjoni wara l-herba tat-Tieni Gwerra Dinija. Kien mehtieg illi l-kera tad-djar titrazzan fi zmien ta' skarsezza u li l-valur lokatizju kellu jkun gust. Kien frott dan l-intervent legislattiv illi hafna nies setghu jifilhu jhallsu sabiex ikollhom saqaf fuq rashom. Waqt li l-ligi serviet l-iskop originali taghha, maz-zmien gabet maghha konsegwenzi negattivi fis-sens illi bdiet tohnoq is-suq u bdew jonqsu l-postijiet disponibbli ghall-kera.

Kien biss bl-Att XXXI tal-1995 illi l-legislatur addotta posizzjoni differenti sabiex jaghti nifs lis-suq tal-kera. B'dan l-Att il-kirijiet il-godda u cioe` dawk li jsiru wara l-1 ta' Gunju 1995 ma baqghux soggetti ghal-ligijiet specjali tal-kera. Ghall-kirijiet li saru qabel l-1 ta' Gunju 1995 baqghu jghoddu l-ligijiet ta' qabel. Ghalkemm saru diversi emendi, ftit li xejn ittaffa l-piz fuq is-sidien.

L-introduzzjoni tal-Ordinanza XXI tal-1931 kellha skop legittimu u sar fl-interess generali ghaliex kien intiz sabiex jiskansa li nies jispiccaw barra t-triq, u assikurat li persuni jkollhom fejn joqghodu. L-istorja socjali u ekonomika tal-pajjiz tixhed li l-legislazzjoni saret ghal skop tajjeb u kienet necessarja. Il-legislatur ipprova jsib bilanc bejn interessi konfliggenti. It-tkattir tal-gid fil-kors tas-snin wera pero` li dak l-intervent legislattiv ghalkemm kellu propositi tajba ma kienx baqa` joffri bilanc anzi holoq sproporzjon u zvantagg evidenti u notevoli ta` parti fil-konfront ta` ohra. Il-kera li r-rikorrenti setghu jippercepixxu bl-effett tal-Kap 69 meta mqabbla mal-kera fis-suq hieles <u>oggettivament</u> hija bil-wisq baxxa.

Abbinati l-fatti tal-kaz tal-lum mal-insenjamenti gurisprudenzjali, il-Qorti tqis illi d-disposizzjonijiet dwar it-tigdid awtomatiku tal-kera u kif ukoll il-kontroll fl-ammont tal-kera huma mizuri mahsuba sabiex

jikkontrollaw l-uzu u t-tgawdija tal-proprjeta'. Kemm il-modalita' tat-tigdid tal-kera u kif ukoll il-kontroll fl-ammont ta' kera percepibbli jikkostitwixxu forma ta' interferenza fl-uzu u t-tgawdija tal-proprjeta`. Fil-kaz tal-lum jirrizulta illi l-kirja tal-appartament bdiet fi Frar 1993 meta l-intimata bdiet tikri minghand Guzeppi Debono versu hlas ta' Lm 30 fix-xahar. Fit-2 ta' Marzu 2004 b`kuntratt fl-atti tan-Nutar Dr Marco Burlo', ir-rikorrenti xtraw l-appartament l-iehor fl-istess korp ta' bini u ghalhekk saru s-sidien tal-flat mikri lill-intimata. Dan l-akkwist kien soggett ghall-kirja ezistenti. Ir-rikorrenti akkwistaw l-appartament nru 1 meta l-kirja favur l-intimata Bezzina kienet diga` ilha fis-sehh ghal 11 –il sena.

L-Avukat Generali jaghmel l-argument illi r-rikorrenti kienu jafu bil-kirja u volontarjament accettaw illi xorta wahda jixtru l-proprjeta` in kwistjoni kif soggetta ghal dik il-kirja, u ghalhekk ma jistghux jghidu illi kienu sorprizi bl-effett tal-Kap 69. Lanqas ma jistghu, fil-fehma tal-Avukat Generali, jilmentaw mill-fatt illi bl-applikazzjoni tal-Kap 69, ir-rikorrenti gew b'xi mod imfixkla fid-drittijiet fondamentali taghhom.

Dan premess, huwa minnu illi r-rikorrenti xtraw l-appartment *de quo* u accettaw illi dan kien diga` mikri lill-intimata skont kirja li tiggedded *ope legis* ghal zmien indefinit bi hlas ta` €70 fix-xahar. Mhux maghruf bil-preciz ghal kemm snin ir-rikorrenti baqghu jaccettaw il-hlas tal-kera biss jidher li fi zminijiet aktar ricenti ma baqghux jaghmlu dan, tant illi mhux kontestat li l-intimata qeghda tiddepozita l-hlas tal-kera taht l-awtorita' tal-qorti.

Ghalkemm huwa evidenti li r-rikorrenti ma riedux jibqghu marbuta bil-kirja, ir-rikorrenti u l-awturi taghhom la qatt baghtu ittra ufficjali sabiex ikun hemm awment fil-kera, u lanqas qatt ma talbu awment fil-kera quddiem il-Bord li Jirregola l-Kera. Jirrizulta biss illi r-rikorrenti baghtu lill-intimata ittra legali fid-9 ta' Gunju 2017 fejn interpellawha sabiex tizgumbra mill-fond in kwistjoni. Min-naha taghha l-intimata baqghet ferma fil-pozizzjoni taghha.

X`wassal lill-awtur tar-rikorrenti sabiex jikri lill-intimata mhuwiex maghruf. Biss kienet x'kienet ir-raguni jibqa` fatt illi jekk dak iz-zmien is-sid ried jiehu xi gwadann mill-proprjeta` tieghu kien ta` bilfors kostrett

jottempra ruhu mal-ligi vigenti fiz-zmien ghar-rigward il-kera. Zgur illi fl-1993 ma setax ikun prevedibbli bdil fis-suq jew fil-ligi. Din il-Qorti tghid illi kienu x`kienu c-cirkostanzi tal-kaz meta s-sidien krew il-post u ghad li kienu jafu l-kirja kienet sejra tispicca regolata bil-Kap 69 b`daqshekk ma jfissirx illi bl-applikazzjoni ta` dik il-ligi fir-realtajiet tas-socjeta` Maltija il-qaghda taghhom bhala sidien kienet ben tutelata. Fil-kaz tar-rikorrenti, l-accettazzjoni da parti taghhom tal-fatt tal-kirja m'ghandhiex tiftiehem jew testendi sabiex tfisser illi ma kienx hemm vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni. L-istat ta` nuqqas ta` ghazla kienet realta' fil-pajjiz li baq` jippersisti anke sa zminijiet ricenti. L-isvolta giet mis-sentenzi tal-Qorti Kostituzzjoni u tal-ECtHR fejn kien dikjarat illi l-applikazzjoni tal-ligijiet specjali tal-kera jiksru l-jeddijiet fondamentali tas-sidien.

Fid-decizjoni tal-ECtHR fil-kaz ta` **Zammit and Attard Cassar v Malta** (op. cit.) kien rimarkat illi :-

"at the time, the applicants` predecessor in title could not reasonably have had a clear idea of the extent of inflation in property prices in the decades to come ..." (para 50).

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

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

> *Protokoll tal-Konvenzjoni, ghalkemm ikkunsidrat dan `il fatt meta llikwidat id-danni."*

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

Bl-emendi ricenti fiz-zmien gara li filwaqt li l-inkwilini nghataw protezzjoni ma garax l-istess lis-sidien li kellhom joqghodu ghal dak li kienet tipprovdi l-ligi ghaliex il-legislatur naqas milli joffrilhom rimedju adegwat skont il-ligi ordinarja sabiex joggezzjonaw b`mod effettiv ghar-restrizzjonijiet fuq il-kundizzjonijiet lokatizzji. L-uniku triq li kellhom kienet li jfittxu kenn quddiem il-qrati ta` indole kostituzzjonali jew konvenzjonali. (ara s-sentenza li tat din il-Qorti diversament presjeduta fil-11 ta` Mejju 2017 fil-kawza fl-ismijiet **Josephine Azzopardi et vs L-Onorevoli Prim Ministru et**)

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

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

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

Jirrizulta ghalhekk illi l-kirja tal-fond de quo kienet imgedda *ope legis* b`mod u manjiera illi s-sid kien kostrett *a suo malgrado* li joqghod ghal dak ir-regim ta` dritt certament sfavorevoli ghalih. Anke li kieku

ntalab awment fil-kera, il-ligi ma kinitx tipprovdi ghal kondizzjonijiet biex eventwali awment ikun tassew reali u gust. Ghalhekk ir-rikorrent u l-awturi taghhom ma kellhomx rimedji effettivi.

Fil-kaz tal-lum, ir-rikorrenti mhux jikkontestaw il-legalita' tal-legislazzjoni. Lanqas ma qeghdin jikkontestaw il-legittimita' tal-iskop ghaliex saret. Il-pern tal-ilment taghhom huwa li bl-applikazzjoni tad-disposizzjonijiet tal-Kap 69 ghas-sitwazzjoni taghhom qed ikun hemm ksur tal-Art 1 Prot 1 tal-Konvenzjoni ghaliex jirrizulta ppruvat sproporzjon qawwi kontra taghhom fir-ritorn li jista` jkollhom li kieku t-tgawdija tal-propjeta` kellha tithalla tilhaq il-milja taghha.

Mhuwiex in diskussjoni l-jedd tal-Istat illi jikkontrolla b`legislazzjoni l-uzu tal-proprjeta' meta dan ikun fl-interess pubbliku. Fl-istess waqt l-Istat huwa obbligat juri li fl-applikazzjoni ta` dik il-legislazzjoni jkunu qeghdin jinzammu bilanc u proporzjonalita' bejn l-interess generali u ta` dak privat. Huwa evidenti li matul iz-zmien anke l-legislatur irrealizza li dak li wasslu biex jintervjeni fl-1931 kien jehtieg ripensament motivat minn bidla lejn l-ahjar fil-qaghda ekonomika u socjali tal-pajjiz.

Din il-Qorti tqis illi bl-emendi tal-2009 u tal-2010 ghall-Kap 16, il-kera kellha tizdied kull tlett snin. Cio` nonostante xorta wahda baqghet karenti l-proporzjonalita` li jrid l-Art 1 Prot 1 tal-Konvenzjoni, ghaliex ghalkemm bl-emendi tal-2009 kien hemm miljorament ghas-sid meta mqabbel ma` s-sitwazzjoni precedenti, baqa` kostrett joqghod ghal quantum ta` zieda dettat mil-ligi li stabbiliet mhux biss kemm ghandu jkun l-awment izda anke kull meta. Qabel id-dhul fis-sehh ta' l-emendi, ir-rikorrenti odjerni kienu ilhom snin twal igarrbu lezjoni tal-jedd taghhom skont l-Art 1 Prot 1 tal-Konvenzjoni, ghaliex sa mill-1993 kienu kostretti jippercepixxu kera kif dettata mill-Kap 69; imbaghad wara l-1995, bil-liberalizzazzjoni tal-kera, il-qaghda tar-rikorrenti, a paragun ma` sidien ohra, li ma kinux vinkolati bil-Kap 69, tgharrqet aktar.

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

Fil-kaz ta` **Zammit and Attard Cassar v Malta** (op. cit.) l-ECtHR irrimarkat :-

> "*While the applicants do not have an absolute right to obtain rent at market value, the Court observes that, despite the 2009 amendments, the amount of rent is significantly lower than the market value of the premises as submitted by the applicants, which was not effectively contested by the Government. …While the Court has accepted above that the overall measure was, in principle, in the general interest, the fact that there also exists an underlying private interest of a commercial nature cannot be disregarded.*"

Fil-kaz ta' **Ian Peter Ellis et vs Avukat Generali et**, (op cit) il-Qorti Kostituzzjonali stabbiliet illi :-

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

Fil-kaz tal-lum, jirrizulta ppruvat illi l-kera li qeghda tithallas mill-intimata Bezzina, abbazi tad-disposizzjonijiet tal-Kap 69, hija bil-wisq inferjuri ghall-kera fis-suq kif din zdiedet bejn l-1993 u llum. Il-figuri li saret referenza ghalihom aktar kmieni jitkellmu wahedhom. Ghalhekk huwa ppruvat l-isproporzjon li ma jridx Art 1 Prot 1 tal-Konvenzjoni u li qed jingarr mis-sid.

Il-Qorti hija tal-fehma konsiderata illi tenut kont tal-fatti u cirkostanzi tal-kaz tal-lum kif evolvew mal-medda tas-snin sal-lum il-piz li

kellu jgorr is-sid kien sproporzjonat u eccessiv. Ir-rikorrent kien imcahhad mit-tgawdija tal-proprjeta` tieghu bla ma nghata kumpens xieraq ghat-tehid tal-pussess ta` l-fond li garrab.

Ghalhekk qeghda tichad l-eccezzjonijiet kollha taz-zewg intimati safejn dawn jolqtu dik il-parti ta` l-ewwel (1) talba li tirrigwarda d-dikjarazzjoni ta` ksur tal-jeddijiet fondamentali tar-rikorrenti kif protetti bl-Art 1 Prot 1 tal-Konvenzjoni.

Konsegwentement qeghda tilqa` l-ewwel (1) talba tar-rikorrenti limitatament u safejn din tirrigwarda ksur tal-jeddijiet fondamentali taghhom kif tutelati bl-Art 1 Prot 1 tal-Konvenzjoni.

VI. <u>It-tieni (2) u t-tielet (3) talbiet</u>

Il-Qorti taghmel riferenza ghas-sentenza li tat il-Qorti tal-Appell fl-24 ta` April 2015 fil-kawza : **<u>Michael Angelo Briffa et vs Nadia Merten</u>** : fejn inghad illi :-

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

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

> *13. It-tieni aggravju jolqot ir-rimedju li tat l-ewwel qorti meta qalet illi l-konvenuti Azzopardi ma jistghux jinqdew bl-art. 12(2) biex izommu l-proprjetà tal-atturi b`kiri. …*
>
> *14. Huwa minnu illi l-Avukat Generali bhala rapprezentant tal-gvern ghandu interess generali fit-twettiq tal-politika ta` social housing. Madankollu, ghall-ghanijiet ta` proceduri gudizzjarji interess generali bhal dak jista` ma jkunx bizejjed jekk il-parti interessata ma tkunx se tiehu vantagg fil-kaz partikolari.*
>
> *15. Fil-kaz tal-lum il-konvenuti Azzopardi ma appellawx mis-sentenza li ghalhekk, ghalihom, hija res iudicata. L-istess konvenuti Azzopardi ghalhekk huma marbuta bid-decizjoni tal-ewwel qorti illi "ma jistghux jinvokaw dan il-provvediment [tal-art. 12(2) tal-Kap. 158] biex jibqghu jabitaw fil-fond oggett ta` dawn il-proceduri". Huwa ovvju ghalhekk illi, ghall-ghanijiet tal-kawza tallum, l-Avukat Generali ma jista` jikseb ebda vantagg minn dan l-aggravju.*
>
> *16. Ghal din ir-raguni l-qorti ma tqisx aktar dan l-aggravju.*

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

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

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

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

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

> *jitfittex quddiem it-tribunal xieraq li lilu l-ligi taghti l-kompetenza specjali biex iqis kwestjonijiet bhal dawn. Dan jinghad ukoll minkejja li din il-Qorti tgawdi setghat wesghin ta` rimedju li tista` taghti f`kaz li ssib ksur ta` xi jedd fundamentali tal-parti attrici;*
>
> *Illi, kif inghad aktar qabel, ladarba fil-kaz tallum hemm kirja li ghadha fis-sehh fiz-zmien "konvenzjonali" taghha, il-kwestjoni tat-tnehhija mill-post tal-intimati Ganado tkun tfisser li b`dak il-kuntratt u minghajru, il-jeddijiet pattwiti taghhom ikunu ngabu fix-xejn. Jixraq li l-kwestjoni tas-siwi u z-zamma fis-sehh ta` dak il-kuntratt jitqiesu ghalhekk mit-tribunal xieraq f`azzjoni apposta;*
>
> *Illi ghalhekk, ghall-finijiet tal-istess tieni talba tar-rikorrenti, il-Qorti sejra tordna li l-intimati Ganado ma jistghux jistriehu izjed fuq id-dispozizzjonijiet tal-artikolu 12 tal-kapitolu 158 tal-Ligijiet ta` Malta biex jiggustifikaw iz-zamma taghhom tal-post tar-rikorrent."*

(ara wkoll : **Angela sive Gina Balzan v. L-Onorevoli Prim Ministru et** : op. cit; **Catherine Cauchi et vs Avukat Generali et** : op cit ; **Cassar Torreggiani vs Avukat Generali et** : op. cit. : u **Victor Portanier et vs Avukat Generali et** deciza mill-Qorti Kostituzzjonali fid-29 ta` April 2016 - fost ohrajn).

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

> *16. As the Court has held on a number of occasions, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as*

> *to restore as far as possible the situation existing before the breach (see Iatridis v. Greece (just satisfaction) [GC}, no. 31107/96 §32, ECHR 2000- XI, and Guiso- Gallissay v. Italy Just satisfaction) [GC], no. 58858/00, § 90, 22 December 2009). The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the violation allows of restitutio in integrum it is the duty of the State held liable to effect it, the Court having neither the power nor the practical possibility of doing so itself. If; however, national law does not allow - or allows only partial reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate."*

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

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

> *one hand, and the general interests of the community on the other hand, in accordance with the principles of protection of property rights under the Convention."*

In kwantu jirrigwarda t-tieni talba, din il-Qorti tirriafferma l-principju illi l-proceduri kostituzzjonali mhumiex il-forum addattat sabiex jigi deciz jekk kirja ghandhiex tkun dikjarata xjolta jew jekk inkwilin ghandux jigi zgumbrat jew le.

Billi tqis illi t-tieni (2) talba tar-rikorrenti kif dedotta tohrog barra mill-parametri ta` procediment kostituzzjonali, qeghda tilqa` l-eccezzjonijiet tal-intimati diretti lejn din it-talba, u ghalhekk qeghda <u>tichad</u> din l-istess talba.

In kwantu jirrigwarda t-tielet (3) talba, din il-Qorti taccetta li l-konsiderazzjoni rilevanti ghandha tkun illi fil-kaz li jirrizulta illi ligi tikser jeddijiet fondamentali ta` parti, dik il-ligi m`ghandhiex tibqa` tinghata effett bejn il-partijiet dment illi l-applikazzjoni taghha tkun leziva ghad-drittijiet fundamentali ta` dik il-parti. Din il-konsiderazzjoni tghodd ghall-kaz tal-lum.

Ghalhekk qeghda tipprovdi dwar it-tielet (3) talba billi tiddikjara li l-intimata Bezzina ma tistax tistrieh aktar fuq id-dispozizzjonijiet tal-Kap 69 sabiex tibqa` tokkupa b`jedd il-fond de quo.

VII. <u>Ir-raba' (4) talba</u>

a) <u>Ir-raba` eccezzjoni tal-intimat Avukat Generali u r-raba` eccezzjoni tal-intimata Bezzina</u>

Il-Qorti sejra tqis din it-talba fl-isfond tar-raba' eccezzjoni tal-intimat l-Avukat Generali u r-raba' eccezzjoni tal-intimata Bezzina.

Hemm in sostanza qed jinghad illi l-Art 41 tal-Konvenzjoni japplika biss ghall-organi gudizzjarji tal-Kunsill tal-Ewropa u mhux ukoll ghall-Qrati Maltin. Jinghad ukoll illi l-Art 41 mhux parti mil-ligijiet nostrani peress illi mhuwiex inkluz fit-tifsira ta' 'Drittijiet tal-Bniedem u Libertajiet Fondamentali' skont l-Art 2 tal-Kap 319. Lanqas ma kien traspost fil-ligi taghna skont l-Art 3(3) tal-Kap 304.

L-Art 41 tal-Konvenzjoni jghid hekk :-

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

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

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

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

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

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

Dan premess, din il-Qorti tghid illi hija twila l-lista ta` sentenzi moghtija mill-Qorti Kostituzzjonali fejn kull meta kienet riskontrata vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni bl-applikazzjoni tad-dispozizzjonijiet tal-Kap 158 u tal-Kap 69, ir-rimedju li nghata ghall-vjolazzjoni kien l-ghoti ta' kumpens. Sar hekk ghaliex il-qorti kostituzzjonali ghandha diskrezzjoni fejn jidhol ir-rimedju.

L-eccezzjonijiet in kwistjoni qeghdin jigu <u>respinti</u>.

b) <u>It-tlettax (13) –il eccezzjoni tal-intimata Bezzina</u>

L-intimata Bezzina teccepixxi li l-Istat m'ghandux jinzamm responsabbli ghal xi vjolazzjoni ghaliex l-Istat *ghandu* dritt jezercita kontroll fuq l-uzu tal-proprjeta'.

Ghalkemm huwa minnu li l-Istat ghandu kull dritt jaghmel ligijiet dwar il-kontroll tal-proprjeta fl-interess generali, l-Istat ghandu wkoll obbligu impellenti illi jassikura li jkun hemm bilanc bejn l-interess generali u l-interess tas-sidien tal-propjeta`.

Fil-fehma ta` din il-Qorti il-fatt tal-kaz tal-lum juru li ma nzammx dan il-bilanc.

L-eccezzjoni qeghda tkun <u>michuda</u>.

c) <u>L-eccezzjoni tmintax (18) tal-intimat Avukat Generali</u>

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

> *"Id-decizjoni li d-dikjarazzjoni ta' vjolazzjoni wahedha tkun bizzejjed hija l-eccezzjoni u*

> *ghandha tkun riservata ghal kazijiet fejn hemm rimedju jew konsegwenzi huma zghar. Fil-kazijiet l-ohra fejn il-lezjoni hija aktar serja l-Qorti ghandha taghti kumpens pekunjarju ghal dik il-vjolazzjoni.*"

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

L-eccezzjoni qeghda tkun <u>rigettata</u>.

Ir-raba` (4) talba qeghda tkun milqugha.

VIII. <u>Il-hames (5) talba</u>

Dwar il-likwidazzjoni ta` kumpens u/jew danni favur ir-rikorrenti, il-Qorti taghmel dawn l-osservazzjonijiet :-

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

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

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

Decizjoni li kkunsidrat fid-dettall din il-kwistjoni hija s-sentenza li tat il-Qorti Kostituzzjonali fil-kawza **Raymond Cassar Torregiani et vs Avukat Generali et** deciza fid-29 ta` April 2016.

Il-Qorti qalet hekk :-

> "*Dwar il-quantum tal-kumpens dovut issir referenza ghas-sentenza ta` din il-Qorti* ***Igino Trapani Galea Feriol pro et noe et V Kummissarju tal-Artijiet et*** *deciza fil-31 ta` Ottubru 2014, fejn f` materja ta` komputazzjoni ta` kumpens ghal lezjoni ta` dritt fondamentali sancit fl-artikolu konvenzjonali fuq citat gie osservat:*
>
> *"Rigward il-quantum tal-kumpens stabbilit mill-ewwel Qorti, din il-Qorti tosserva fl-ewwel lok li kull kaz ghandu jigi trattat u deciz fuq il-fattispecie tieghu. Barra minn hekk, jekk il-Qorti Ewropeja hasset li f` certi kazijiet kellha taghti kumpens f` ammont inferjuri ghal dak li nghata lir-rikorrenti mill-ewwel Qorti, ma jfissirx li allura l-Qrati Maltin tilfu l-awtonomija taghhom b` mod li bilfors kumpens li jinghata ikun f` ammont vicin dak li taghti l-Qorti Ewropeja. Fil-kaz odjern l-ewwel Qorti hadet in konsiderazzjoni l-fatturi kollha li jimmilitaw kemm favur kif ukoll kontra r-rikorrenti u deherilha li l-kumpens xieraq li ghandha taghti f` dan il-kaz ikun fl-ammont ta` hamsa u ghoxrin elf Euro (EUR 25,000). Hija kkonsidrat id-dewmien da parti tar-rikorrenti li jiehdu l-proceduri opportuni, il-valur tal-immobbli, iz-zmien tant twil li r-rikorrenti ilhom privati mill-godiment tal-proprjeta` taghhom minghand ma nghata ebda kumpens, l-istat tal-fond u l-ezistenza tal-fattur tal-interess pubbliku. Ma` dawn ghandu jigi senjalat il-fatt li qabel l-ispossessament tal-proprjeta` taghhom ir-rikorrenti kellhom permess mill-Bord kompetenti sabiex jizviluppaw il-fond."*
>
> *Issa ghalkemm, huwa minnu illi l-valur tal-kumpens akkordat mill-Qorti wara sejba ta` lezjoni tad-drittijiet fondamentali ma jekwiparax necessarjament ma` likwidazzjoni ta` danni civili attwali sofferti, ma jfissirx li d-danni materjali*

ghandhom jigu injorati ghall-finijiet tal-ezercizzju odjern. Il-Qorti trid tqis il-fatturi kollha rilevanti ghall-kaz odjern sabiex tasal ghad-determinazzjoni tal-quantum. Dawn huma (1) it-tul ta` zmien li ilha ssehh il-vjolazzjoni konsidrat ukoll fid-dawl tat-tul taz-zmien li r-rikorrenti damu sabiex resqu l-proceduri odjerni biex jirrivendikaw id-drittijiet kostituzzjonali taghhom ; (2) il-grad ta` sproporzjoni relatat mal-introjtu li qed jigi percepit ma` dak li jista` jigi percepit fis-suq hieles, konsidrat ukoll l-ghan socjali tal-mizura; (3) id-danni materjali sofferti mir-rikorrenti konsidrat ukoll l-ispejjez sostanzjali li ghamlu l-intimati Tabone ssabiex jirrendu l-fond abitabbli u (4) l-ordni li ser taghti din il-Qorti dwar l-ezenzjoni f` da nil-kaz mill-effetti legali tal-Artikolu 5 tal-Kap 158."

Meta jinghata kumpens fi procediment ta` din ix-xorta, ghandu jinghata konsiderazzjoni l-ghan li jkun immotiva l-mizura u cioe` l-interess pubbliku. Ghall-fini ta` quantum ta` kumpens u relattiva motivazzjoni, ara dawn id-decizjonijiet li jirreferu wkoll ghall-pronunzjamenti tal-ECHR :- QK : **Angela sive Gina Balzan v. L-Onorevoli Prim Ministru** : op. cit. ; **Dr. Cedric Mifsud et vs l-Avukat Generali et** : op. cit. ; **Concetta sive Connie Cini vs Eleonora Galea et** : op. cit. ; **Robert Galea vs Avukat Generali et** : PA/GK : op cit ; **Sergio Falzon et vs Alfred Farrugia et** : PA/GK : op. cit. ; PA/GK : 15 ta` Frar 2018 : **Alessandra Radmilli vs Joseph Ellul et** ; PA/GK : 2 ta` Marzu 2018 : **Thomas Cauchi et vs Avukat Generali et**) [ara wkoll ghall-istess skop : ECtHR : 30 ta` Jannar 2018 : **Cassar vs Malta** : Application 50570/13]

Tqis illi l-proceduri odjerni min-natura taghhom huma diretti sabiex jindirizzaw lezjoni kostituzzjonali u/jew konvenzjonali. Il-Qorti sabet vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni. Ghalkemm id-diskrepanza bejn il-kera attwalment percepita u l-valur lokatizju li l-fond de quo jgib fis-suq hieles hija fattur determinanti sabiex ikun stabbilit jekk kienx vjolat il-principju tal-proporzjonalita`, fl-istess waqt tajjeb jinghad illi fil-komputazzjoni tal-kumpens hemm fatturi ohra li wkoll ghandhom rilevanza, u li flimkien ghandhom iwasslu ghall-ghoti ta` kumpens gust ghal-lezjoni subita.

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

> *"25. F`materja ta` kumpens il-gurisprudenza patria kif ukoll dik tal-Qorti Ewropeja identifikat is-segwenti principji :*
>
> *"The Court would reiterate that compensation terms under the relevant legislation may be material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate balance on applicants. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference." [ECHR 31443/96 para.176 Bronoiswki v. Poland, decided 22 June 2004].*
>
> *26. Fil-kawza Louis Apap Bologna v. Calcidon Ciantar et deciza 24 Frar 2012, din il-Qorti osservat hekk:*
>
> *"F`kazijiet bhal dawn il-kumpens xieraq ghandu jiehu in konsiderazzjoni l-ghan legittimu li mmotiva l-mizura tarrekwizizzjoni u li l-kumpens jista` jkun anqas mill-kumpens shih li altrimenti jkun dovut skond il-kriterji tas-suq. Il-Qorti Ewropea fil-kazijiet ta` Edwards v Malta u Ghigo v Malta 17 Lulju 2008] ddecidiet li :*
>
> *"Para.76. As the Court has already stated on may occasions, in spheres such as housing of the population, States necessarily enjoy a wide margin of appreciation not only in regard to the existence of the problem of general concern warranting measures for control of individual property, but also to the choice of the measures and their implementation. The State control over levels of rent is one such measure and its*

application may often cause significant reductions in the amount of rent chargeable (….Mellacher and Others v Austria para.45].”

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

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

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

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

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

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

32. Din il-Qorti tikkondividi l-hsieb tal-ewwel Qorti li l-ammont ta` cens dovut ex lege lill-intimati huwa baxx sal-punt li ma jistax jinghad li ghat-tfixkil sostanzjali fit-tgawdija tal-proprjeta` taghhom huma nghataw kumpens adegwat, kemm ghax fiz-zminijiet tal-lum il-quantum tac-cens annwu dovut ex lege jitqies bhala wiehed baxx meta jigi relatat mal-valur tal-fond, kif ukoll tenut kont tal-konsiderazzjoni li lir-rikorrenti, okkupanti tal-fond b`titolu ta` uzufrutt biss, qed tinghatalha dritt gdid li tibqa` tokkupa l-fond b`titolu ta` enfitewsi perpetwa, bil-possibilita` tarripreza tal-pussess fiziku tal-fond da parti tas-sidien tkun wahda remota hafna. Huwa

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

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

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

tal-ligi attakkata. Minn kif wiehed jista` jara, dawn il-kriterji huma firxa shiha li trid titqies f`kull kaz ghalih u jiddependu hafna mic-cirkostanzi partikolari ta` kull kaz;

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

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

> *Illi meta wiehed iqis ic-cirkostanzi kollha li johorgu mill-provi mressqa u jhaddem dwarhom ir-regoli li dawn il-qrati minn zmien ghal zmien inqdew bihom f`kazijiet li jixxiebhu (Kost. 29.4.2016 fil-kawza fl-ismijiet Raymond Cassar Torregiani et vs Avukat Generali et), il-Qorti ssib li jkun xieraq li jithallas kumpens lir-rikorrent fis-somma ta` sebat elf euro (€ 7,000). Din is-somma qieghda tqis ukoll iz-zmien li r-rikorrent ha biex ressaq l-ilment tieghu quddiem il-Qorti (Ara Kost 25.5.2012 fil-kawza fl-ismijiet Josephine Mary Vella vs Direttur tal-Akkomodazzjoni Socjali et).”*

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

> *Ghal dak li jirrigwarda kumpens bhala rimedju ghad-danni non-pekunjarji ghas-sejbien ta` lezjoni tad-dritt fundamentali tar-rikorrenti kawza tal-applikazzjoni f`dan il-kaz tal-Artikolu 12(2) tal-Kap. 158, ir-rikorrenti ghandhom jedd ghalih meta tqis li ilhom mis-sena 1985 (izjed minn tletin sena) ma jiehdu kumpens gust ghall-fond taghom, u dan minkejja l-liberalizzazzjoni tas-suq fis-sena 1995 u li l-iskop legittimu sfuma mat-trapass taz-zmien. Tali jedd ghandu jigi kkalkulat mid-data tat-terminazzjoni tal-koncessjoni subenfitewtika, cioe`, mis-sena 1985.*
>
> *Skont il-prospett tal-perit Tekniku il-rendita` mill-valur lokatizju fuq is-suq kellu jammonta ghal €93,217 ghas-snin 1985 sa 2016. Il-kera attwalment imhallsa kienet tammonta ghall-€16,765.50 (Tabella 4.0) (17%) Madanakollu hu assodat li r-rimedju kostituzzjonali ma jfissirx necessarjament ir-rimbors tal-valur shih fuq is-suq lis-sid. (Ara ad ez. ECtHR Kaz**<u>Ghigo vs. Malta</u>** 17 ta` Lulju 2008, #18; Kaz**<u>Edwards vs. Malta</u>**, 17 ta` Lulju 2008; #21; u l-QK fil-kaz*

Borg vs Mifsud *sucitata) Specjalment meta bhal fil-kaz odjern, il-proprjeta` ma ittiehditx mill-Istat imma ghandha eventwalment tigi liberata favur is-sid minhabba r-rimedju li ser taghti din il-Qorti apparti l-kumpens.*

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

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

Ikkonsidrat li

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

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

> *"46. The Court also takes issue with the fact that in line with domestic case-law, such compensation awards are reduced on the grounds that the applicants have instituted constitutional redress proceedings several years after they started suffering the violation complained of. In this connection, the Court notes, first and foremost, that domestic law does not impose a time-limit for the institution of constitutional redress proceedings. The legislator leaves the choice of timing to the applicant. Moreover, in circumstances such as those of the present case, the violation complained of is a continuing one. The Court thus finds that such reasoning is questionable in the light of the circumstances of the case and the domestic legal framework, which appears to give great latitude to individuals seeking redress for human rights violations.")*
>
> *Ghaldaqstant wara li qieset bir-reqqa l-provi u s-sottomissjonijiet kollha, din il-Qorti qed tillikwida l-kumpens fl-ammont ta` hmistax-il elf ewro (€15,000) tenut kont il-valur tal-proprjeta` bhala liberu u vakanti (€145,000) u li l-izbilanc bejn il-kera imhallsa u l-valur lokatizju qed ikompli jizdied kull ma jghaddi z-zmien anke bl-applikazzjoni tal-emendi tal-2010. Dan il-kumpens ghandu jithallas mill-Intimat Avukat Generali flimkien mal-imghaxijiet bir-rata ta` hamsa fil-mija (5%) sad data tal-pagament effettiv."*

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

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

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

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

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

☐ *il-fatt li, meqjus l-interess pubbliku u l-ghan socjali tal-ligi attakkata, il-kumpens misthoqq lis-sidien mhux bilfors ikun daqs il-kumpens shih li seta` kien dovut kieku wiehed kellu jistrieh fuq l-indikaturi tas-suq hieles;*

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

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

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

20. Meqjusin dawn il-fatturi, din il-qorti hija tal-fehma illi kumpens ta` ghaxart elef euro (€10,000) jkun wiehed xieraq fic-cirkostanzi. Dan il-kumpens jinghata mhux taht l-art. 41 tal-Konvenzjoni, kif talbu l-atturi, ghax, kif sewwa

osserva l-Avukat Generali, dak l-artikolu ma huwiex parti mil-ligi domestika; il-kumpens jinghata taht is-setgha ta` din il-qorti li taghhti rimedju ghall-ksur ta` drittijiet fondamentali. Dan il-kumpens jithallas mill-Avukat Generali, mhux mill-konvenuta Borg, billi din kull ma ghamlet kien li nqdiet b`jedd li kienet taghtiha l-ligi."

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

A. Damage

84. The applicants claimed 1,260,996 euros (EUR) in respect of pecuniary damage. That sum reflected (i) the rent due to them from 1998 to 2015 amounting to EUR 730,330 calculated on the basis of the valuation of an estate agent at EUR 3,500 per month, (EUR 42,000 annually) in 2015, projected backwards to the year 1998 based on two indices for property prices published by the Central Bank of Malta – by means of example, such projections show the rents for the respective years as follows: EUR 6,857 annually in 1988, EUR 18,476 in 1998 and EUR 41,649 in 2008; (ii) EUR 502,006 in simple interest at 8% (capped so as not to exceed the rent of a particular year); and (iii) EUR 28,660 (supported by an architect`s report) in repairs needed to the property since the tenant had failed to take adequate care of the property. In this connection the applicants noted that as things stand, they will remain suffering the effects of the violation even after the Court judgment, for an unspecified amount of years to come. In this light they also considered that their claim of EUR 54,000 in respect of non-pecuniary damage already suffered, representing EUR 2,000 annually since 1988, should be upheld in full.

85. The Government submitted that if a violation were to be found a declaration to that effect would suffice. In any event, they considered that the valuations were exorbitant, speculative and not based on an architect`s report. They noted that the property had been purchased in 1988 at EUR 25,600 it had therefore hardly been imaginable that it could now have a rental value of EUR 42,000 annually. Indeed if it had to be divided over the years, their claim in rent amounted to around EUR 27,000 annually which would surely not reflect the rental value in the eighties and nineties. They further considered that since the applicants had accepted rent until 2008, their claim should only refer to the subsequent years. Moreover, the tenant had deposited rent for the period between 2009-15 amounting to EUR 2,796 which had to be deducted from the award of compensation. As to interest the Government noted that under domestic law, interest was due only on amount liquidated, which was not the case here. Moreover a rate of 8% was far beyond any commercial rate of interest currently available in the banking sector in respect of deposits. As to the structural works the Government considered this clam unproven and hypothetical. Lastly, the Government considered that an award under this head should not exceed EUR 10,000, which would be EUR 2,123.66 annually over six years, and an award for pecuniary damage should not exceed EUR 4,000.

86. The Court notes that the applicants are entitled to compensation in respect of the loss of control, use, and enjoyment of their property from around 2000 to date. The Court notes on the one hand that the rent suggested by the Government is not based on any valuation or other criteria, and appears to be a simple division of an aleatory sum they proposed. On the other hand, while the applicant`s valuation is based on an estate agent,

and was not accompanied by an architect`s report, the domestic court found that EUR 3,000 as opposed to the EUR 3,500 alleged by the applicants appeared reasonable. However, the Court also notes that the comparators used by the estate agent refer to renovated buildings with high quality finishing and furnishing. While no information has been submitted as to the quality of the interior of the applicants` property the Court observes that the applicants claim that their property needs repairs as it has not been well taken care of (see paragraph 84 above). Thus, the latter cannot be considered to be in the same condition and at the same rental value as the former. Therefore, the Court considers that the valuation submitted by the applicants is on the high side, but may nonetheless provide a relevant indication and workable basis.

87. In assessing the pecuniary damage sustained by the applicants, the Court has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It further notes that from 2008 onwards, the Court found the legitimacy of the aim pursued highly questionable (see paragraph 53 above) and thus does not justify a reduction compared with the free market rental value (compare, ***Zammit and Attard Cassar****, § 75; and* ***Amato Gauci****, § 77, both cited above). It further takes note of the sums already received by the applicants and those, following 2008, which were deposited in court and therefore remain retrievable, which are being deducted from the award.*

88. In the present case the Court must, however, also take note of the fact that the applicants bought the property when it was already subject to such restrictions, and therefore

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

89. The Court reiterates that an award in respect of pecuniary damage under Article 41 of the Convention is intended to put the applicant, as far as possible, in the position he or she would have enjoyed had the breach not occurred (see, mutatis mutandis, ***Kingsley v. the United Kingdom*** *[GC], no. 35605/97, § 40, ECHR 2002-IV). It therefore considers that interest should be added to the award in order to compensate for the loss of value of the award over time (see* ***Runkee and White v. the United Kingdom****, nos. 42949/98 and 53134/99, § 52, 10 May 2007). As such, the interest rate should reflect national economic conditions such as levels of inflation and rates of interest (see, for example,* ***Akkuş v. Turkey,*** *9 July 1997, Reports of Judgments and Decisions 1997-IV, § 35;* ***Romanchenko v. Ukraine****, no. 5596/03, 22 November 2005, § 30, unpublished; and* ***Prodan v. Moldova****, no. 49806/99, § 73, ECHR 2004-III (extracts)). It notes that the applicants claimed the statutory rate of eight per cent, and the Government`s objection in that respect. The Court considers that a rate of five per cent interest is more realistic (see* ***Amato Gauci****, cited above, § 78, and* ***Ghigo v. Malta*** *(just satisfaction), no. 31122/05, § 20,*

> *17 July 2008) thus a one-off payment at 5% interest should be added (see **Anthony Aquilina**, cited above, § 72, in fine).*
>
> *90. Lastly, it is not for the Court to award the claim concerning renovation work which was not entered into by this Court.*
>
> *91. The Court, thus, awards the applicants the sum of EUR 170,000 jointly.*
>
> *92. The Court further considers that the applicants must have sustained feelings of anxiety and stress, having regard to the nature of the breach. It therefore awards EUR 3,000 jointly in respect of non-pecuniary damage.*

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

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

i) L-interess generali li jillegittimizza l-intervent legislattiv.

ii) L-isproporzjon bejn il-kera attwalment percepita mir-rikorrenti u dik li setghu jippercepixxu fis-suq hieles li kieku ma kinux applikati d-disposizzjonijit tal-Kap 69. Ghalkemm dan il-fattur sejjer jittiehed in konsiderazzjoni, l-istima tal-prezz tas-suq ghandu jitqies bhala kriterju ndikattiv mhux assolut.

iii) L-appartament inxtara mir-rikorrenti kif soggett ghal kirja li diga` kienet vigenti favur l-intimata Bezzina.

iv) Il-fatt li l-appartament jaghmel parti minn blokk ta` zewg appartamenti u ghandu access ghall-bejt. Mid-deskrizzjoni peritali

jirrizulta illi l-appartament jinsab fil-kantuniera u qieghed fiz-zona ta' zvilupp ta' San Gwann.

v) L-incertezza dwar meta r-rikorrenti jkunu jistghu jiehdu lura l-pussess battal tal-fond minghand l-intimata Bezzina, anke jekk fil-kaz tal-lum il-Qorti mhijiex se tqieghed dan il-fattur fuq quddiem tal-konsiderazzjonijiet taghha.

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

vii) Il-fatt li r-rikorrenti baqghu jaccettaw il-hlas tal-kera ghal numru twil ta' snin.

viii) Iz-zmien kollu li baqghu passivi bla ma jiehdu azzjoni. Kien biss fl-2017 illi baghtu l-ewwel ittra legali. Qatt qabel ma jirrizulta illi r-rikorrenti vvantaw lezjoni ta` xi dritt fondamentali fil-konfront tal-intimata Bezzina. Ghaddew 13 –il sena qabel ma r-rikorrenti intavolaw dan il-procediment tenut kont illi xtraw l-appartament fl-2004 u l-kawza kienet prezentata fl-2017.

ix) L-ispejjez gudizzjarji u dawk extra-gudizzjarji, senjatament il-hatra ta` perit *ex parte*, li kellhom jinkorru r-rikorrenti, sabiex imexxu bl-azzjoni ;

x) L-inerzja tal-Istat meta baqa` passiv ghal snin shah sabiex jipprova jirrimedja b`legislazzjoni ad hoc sabiex isib tarf tal-kwistjoni.

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

Issa fil-kaz tal-lum, skont il-provi ta` natura teknika, jirrizulta li l-appartament de quo ghandu valur ta' circa €151,000. Fis-sostanza, il-periti jaqblu wkoll dwar il-valur lokatizju tal-appartament. Il-perit *ex parte* tar-rikorrenti ndika valur lokatizju ta' €400 fix-xahar, waqt li l-perit tekniku ndika valur lokatizju fl-ammont ta' €4963 fis-sena. Ir-rikorrenti qeghdin jippercepixxu kera fl-ammont ta' €840 fis-sena. Dan ifisser li f`sena r-rikorrenti idahhlu mill-fond dak li skont il-periti kienu jdahhlu

f`xaghrejn li kieku l-flat kellu jkun mikri fis-suq hieles. L-izbilanc u l-isproporzjon huma evidenti.

Minkejja d-diskrepanza, din il-Qorti tirriafferma li l-kumpens bhala rimedju kostituzzjonali mhuwiex ekwivalenti ta` bilfors ghal rimbors favur is-sid tal-valur shih fis-suq hieles.

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

Meqjusa l-fatti u cirkostanzi tal-kaz, senjatament il-valur lokatizju tal-fond kif svolgja matul iz-zmien, id-dikjarazzjoni li kien hemm vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni, il-fatt illi l-post kien akkwistat mir-rikorrenti b`kerrej go fih li kien protett mid-disposizzjonijiet tal-Kap 69, iz-zmien li hadu r-rikorrenti sabiex jintavolaw il-procediment odjern, kif ukoll il-linja ta` gurisprudenza traccjata mill-qrati taghna u mill-ECtHR, din il-Qorti hija ta` l-fehma li filwaqt li ma tarax li hemm lok illi favur ir-rikorrenti jigu likwidati danni morali, fl-istess waqt tghid li favur ir-rikorrenti ghandha tigi likwidata is-somma ta` hmistax -il elf Ewro (€15,000) bhala danni pekunjarji ghall-vjolazzjoni subita tal-Art 1 Prot 1 tal-Konvenzjoni.

IX. Is-sitt (6) talba

L-ammont likwidat ta` <u>EUR 15,000</u> ghandu jithallas <u>biss</u> mill-Avukat Generali li jirrapprezenta l-Istat.

L-intimata Bezzina m`ghandha thallas ebda kumpens lir-rikorrenti ghaliex hija ottemperat ruhha mal-ligijiet vigenti, u m`ghamlet xejn sabiex tikser il-jeddijiet fondamentali tar-rikorrenti.

Lanqas m`ghandha thallas spejjez gudizzjarji.

X. <u>Is-seba` (7) talba</u>

Billi ma jidhrilhiex li hemm rimedji ohra x`jinghataw, qeghda tastjeni milli tiehu konjizzjoni ulterjuri ta` din it-talba.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet tar-rikorrenti, wara li tat konsiderazzjoni lill-eccezzjonijiet tal-intimati, billi qeghda taqta`u tiddeciedi hekk :-

Tipprovdi dwar l-ewwel (1) talba billi, filwaqt illi tiddikjara u tiddeciedi illi r-rikorrenti garrbu vjolazzjoni tad-dritt taghhom ta` propjeta` ta` l-appartament numru wiehed (1) li jifforma parti mill-blokk ta` appartramenti numru hamsa u erbghin (45) 'Broadway Flats', Triq il-Fuxa, San Gwann, kif imhares bl-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali, tiddikjara illi r-rikorrenti ma garrbu l-ebda vjolazzjoni tad-dritt taghhom ta` propjeta`, kif imhares bl-Art 37 ta` l-Kostituzzjoni ta` Malta.

Tichad it-tieni (2) talba fl-intier taghha kif dedotta.

Tipprovdi dwar it-tielet (3) talba, billi tiddikjara u tiddeciedi wkoll illi l-intimata Madelaine Bezzina ma tistax tistrieh izjed fuq id-dispozizzjonijiet tal-Kap 69 tal-Ligijiet ta` Malta sabiex tibqa` jokkupa u toqghod fl-appartament fuq riferit.

Riferibbilment ghar-raba` (4) talba, tiddikjara u tiddeciedi illi l-intimat Avukat Generali wahdu huwa responsabbli sabiex ihallas kumpens lir-rikorrenti ghall-vjolazzjoni tal-jedd fondamentali taghhom kif fuq inghad.

Riferibbilment ghall-hames (5) talba, tillikwida favur ir-rikorrenti in linea ta` danni pekunjarji s-somma ta` hmistax-il elf Ewro (EUR 15,000) ghall-vjolazzjoni subita tad-dritt taghhom ghall-propjeta` kif imhares bl-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali.

Riferibbilment ghas-sitt (6) talba, tordna lill-intimat Avukat Generali sabiex ihallas lir-rikorrenti s-somma hekk kif fuq likwidata.

Tastjeni milli tiehu konjizzjoni ulterjuri tas-seba` (7) talba.

Tordna lir-rikorrenti u lill-Avukat Generali sabiex ihallsu nofs kull wiehed tal-ispejjez kollha ta` din il-kawza.

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

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur