QORTI KOSTITUZZJONALI

IMĦALLFIN

S.T.O. PRIM IMĦALLEF JOSEPH AZZOPARDI
ONOR. IMĦALLEF JOSEPH R MICALLEF
ONOR. IMĦALLEF TONIO MALLIA

Seduta ta' nhar il-Ġimgħa, 12 ta' Lulju, 2019.

Numru 1

Rikors numru 40/17JZM

Raphael Aloisio, Malcolm Booker, Steve Cachia, Edward Camilleri, Andrew Manduca, Paul Mercieca u Stephen Paris personalment u fil-kapaċità tagħhom ta' *partners* tad-Ditta *Deloitte*

vs

Avukat Ġenerali

Il-Qorti:

1. Dan huwa appell imressaq mir-rikorrenti minn sentenza mogħtija mill-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) fis-27 ta' Settembru, 2018, (minn issa 'l hemm imsejħa "is-sentenza appellata") li biha u għar-raġunijiet hemm imfissra, dik il-Qorti ċaħdet l-eċċezzjoni preliminari tal-

intimat dwar il-ġudikat, iżda laqgħet l-eċċezzjonijiet tiegħu fil-mertu u ċaħdet it-talbiet kollha tar-rikorrenti;

2. Fir-rikors promotur tagħhom, ir-rikorrenti (minn issa 'l hemm imsejħin "l-appellanti") kienu talbu lill-ewwel Qorti: "*1. Twettaq u tizgura t-twettiq tad-drittijiet fundamentali tar-rikorrenti, 2. Tiddikjara li r-rikorrenti sofrew lezjoni ta` l-imsemmija drittijiet garantiti mill-Artikolu 13 u 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet Fundamentali tal-Bniedem, 3. Tordna li l-appell preliminari fuq imsemmi fil-kawza "Valle Del Miele Limited vs. Raphael Aloiso et" jerga' jitqieghed fuq il-lista tal-Qorti tal-Appell sabiex jinstema` u jigi deciz minnha, u 4. Tordna l-hlas ta` kumpens xieraq.*";

3. Il-każ kollu li dwaru l-appellanti kienu fetħu l-kawża quddiem l-ewwel Qorti joħroġ minn appell imressaq mill-appellanti minn sentenza preliminari dwar eċċezzjoni preliminari mogħtija mill-Prim'Awla tal-Qorti Ċivili f'kawża fl-ismijiet "*Valle Del Miele Limited vs Raphael Aloisio et*" (Ċitazz. Nru. 1902/2001) (minn issa 'l hemm imsejħa "il-kawża prinċipali"), liema appell il-Qorti tal-Appell kienet sabet li kien irritu u null għaliex qalet li kien tressaq wara ż-żmien. Minħabba dik is-sentenza, l-appellanti kienu fetħu kawża għal ksur ta' jedd fundamentali quddiem il-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) li kienet sabet li huma kienu ġarrbu ksur tal-jedd tagħhom għal smigħ xieraq minħabba s-

sentenza mogħtija mill-Qorti tal-Appell. Minn dik is-sentenza l-Avukat Ġenerali kien appella. Din il-Qorti, b'sentenza tat-2 ta' Marzu, 2007, kienet ħassret is-sentenza appellata tal-ewwel Qorti u sabet li r-rikorrenti ma kinux ġarrbu ksur tal-jedd tagħhom għal smigħ xieraq la taħt il-Kostituzzjoni u lanqas taħt il-Konvenzjoni;

4. L-appellanti kienu fetħu kawża quddiem il-Qorti Ewropeja tad-Drittijiet tal-Bniedem[1] (minn issa 'l hemm imsejħa "Q.E.D.B.") li, b'sentenza tal-14 ta' Ġunju, 2011, sabet li huma kienu ġarrbu ksur tal-jedd tagħhom għal smigħ xieraq u ordnat il-ħlas tas-somma ta' sitt elef euro (€ 6,000) bħala "*just satisfaction*". Wara li ngħatat l-imsemmija sentenza, l-appellanti kienu talbu lil din il-Qorti għall-finijiet tal-artikolu 6 tal-Kapitolu 319 tal-Liġijiet ta' Malta biex tordna li, b'esekuzzjoni tas-sentenza mogħtija mill-Q.E.D.B., il-jedd li jappellaw mis-sentenza preliminari fil-kawża prinċipali jerġa' jingħatalhom u li l-Qorti tal-Appell terġa' tqiegħed l-appell tagħhom għas-smigħ. Din il-Qorti diversament komposta, ċaħdet it-talba tagħhom bi provvediment mogħti fit-28 ta' Settembru, 2012[2], għaliex qalet li ma kien hem xejn aktar x'jiġi esegwit mis-sentenza ladarba l-kumpens iffissat mill-Q.E.D.B. kien tħallas kif ordnat. L-appellanti reġgħu ressqu talba oħra quddiem din il-Qorti diversament komposta biex tħassar '*contrario imperio*' l-provvediment tat-28 ta' Settembru, 2012. Bi provvediment mogħti fil-25 ta' Novembru,

[1] Q.E.D.B. fil-kawża fl-ismijiet ***Mercieca et vs Malta*** (Applik. Nru. 21947/07)
[2] Rik. Nru. 173/12

2016[3], u għar-raġunijiet hemm imsemmija, din il-Qorti ċaħdet it-talba tagħhom. Kien wara li ngħata dak il-provvediment li l-appellanti fis-26 ta' Marzu, 2017, fetħu din il-kawża. Sadattant, fis-16 ta' Diċembru, 2013, il-Prim'Awla tal-Qorti Ċivili kienet tat is-sentenza fil-mertu fil-kawża prinċipali. L-appellanti ressqu appell minn dik is-sentenza, quddiem il-Qorti tal-Appell, liema appell għad irid jinstema';

5. Fis-sentenza appellata f'din il-kawża saru l-konsiderazzjonijiet li ġejjin:

> "*Fil-kawza tal-lum, qed jinghad mir-rikorrenti illi d-decizjoni tal-ECHR fuq riferita, ghalkemm finali bhala decizjoni, baqghet ma gietx ezegwita mill-Istat Malti, kif kien obbligu tieghu. Skont ir-rikorrenti, il-Kumitat tal-Ministri fi hdan il-Kunsill ta` l-Ewropa ma kienx infurmat li r-rikorrenti kienu qed jiehdu l-proceduri opportuni skont il-ligi sabiex tigi enforzata s-sentenza tal-ECHR, billi l-appell taghhom jerga` jitqieghed fuq il-lista halli jinstema` u jigi deciz.*
>
> *"Min-naha tieghu, l-intimat isostni li d-decizjoni tal-ECHR mhux biss kienet finali izda kienet ukoll ezegwita wkoll skont l-obbligi ta` l-istat Malti. L-intimat jishaq illi Malta hija obbligata li fi zmien sitt xhur wara li tinghata sentenza mill-ECHR tikkomunika lill-Kumitat tal-Ministri l-mod kif giet ezegwita s-sentenza. Fil-kaz tal-lum, hekk sar.*
>
> - *Omissis* -
>
> *"IV.* ***Dottrina u Gurisprudenza***
>
> *"Dwar just satisfaction u r-rimedji li jinghataw mill-ECHR, jirrizulta fis-sit elettroniku : https://www.echr.coe.int/.../PD_satisfaction_claims_ENG.pdf : illi skont ir-****Rules of Court – Practice Directions*** *li hargu fid-19 ta` Settembru 2016 : jinghad hekk :-*
>
>> *"1. The award of just satisfaction is not an automatic consequence of a finding by the European Courtof Human Rights that there has been a violation of a right guaranteed*

[3] Rik. Nru. 73/13

by the European Convention on Human Rights or its Protocols. The wording of Article 41, which provides that the Court shall award just satisfaction only if domestic law does not allow complete reparation to be made, and even then only "if necessary" (s`il y a lieu in the French text), makes this clear.

"2. Furthermore, the Court will only award such satisfaction as is considered to be "just" (équitable in the French text) in the circumstances. Consequently, regard will be had to the particular features of each case. The Court may decide that for some heads of alleged prejudice the finding of violation constitutes in itself sufficient just satisfaction, without there being any call to afford financial compensation. It may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even not to make any award at all. This may be the case, for example, if the situation complained of, the amount of damage or the level of the costs is due to the applicant`s own fault. In setting the amount of an award, the Court may also consider the respective positions of the applicant as the party injured by a violation and the Contracting Party as responsible for the public interest. Finally, the Court will normally take into account the local economic circumstances.

"3. When it makes an award under Article 41, the Court may decide to take guidance from domestic standards. It is, however, never bound by them.

"4. Claimants are warned that compliance with the formal and substantive requirements deriving from the Convention and the Rules of Court is a condition for the award of just satisfaction.

….

"7. Just satisfaction may be afforded under Article 41 of the Convention in respect of :
- *(a) pecuniary damage;*
- *(b) non-pecuniary damage; and*
- *(c) costs and expenses.*

"2. Pecuniary damage

…

"10. The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place, in other words, restitutio in integrum. This can involve compensation for both loss actually suffered (damnum emergens) and loss, or

diminished gain, to be expected in the future (lucrum cessans).
“11. It is for the applicant to show that pecuniary damage has resulted from the violation or violations alleged. The applicant should submit relevant documents to prove, as far as possible, not only the existence but also the amount or value of the damage.

“12. Normally, the Court`s award will reflect the full calculated amount of the damage. However, if the actual damage cannot be precisely calculated, the Court will make an estimate based on the facts at its disposal. As pointed out in paragraph 2 above, it is also possible that the Court may find reasons in equity to award less than the full amount of the loss.

“3. Non-pecuniary damage

“13. The Court`s award in respect of non-pecuniary damage is intended to provide financial compensation for non-material harm, for example mental or physical suffering.

“14. It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. If the existence of such damage is established, and if the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law.

“15. Applicants who wish to be compensated for non-pecuniary damage are invited to specify a sum which in their view would be equitable. Applicants who consider themselves victims of more than one violation may claim either a single lump sum covering all alleged violations or a separate sum in respect of each alleged violation.

“4. Costs and expenses

“16. The Court can order the reimbursement to the applicant of costs and expenses which he or she has incurred – first at the domestic level, and subsequently in the proceedings before the Court itself– in trying to prevent the violation from occurring, or in trying to obtain redress therefor. Such costs and expenses will typically include the cost of legal assistance, court registration fees and suchlike. They may also include travel and subsistence expenses, in particular if these have been incurred by attendance at a hearing of the Court.

“17. The Court will uphold claims for costs and expenses only in so far as they are referable to the violations it has found. It will reject them in so far as they relate to complaints that have not led to the finding of a violation, or to complaints declared inadmissible. This being so, applicants may wish to link separate claim items to particular complaints.

> *"18. Costs and expenses must have been actually incurred. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation. Any sums paid or payable by domestic authorities or by the Council of Europe by way of legal aid will be deducted.*
>
> *"19. Costs and expenses must have been necessarily incurred. That is, they must have become unavoidable in order to prevent the violation or obtain redress therefor.*
>
> *"20. They must be reasonable as to quantum. If the Court finds them to be excessive, it will award a sum which, on its own estimate, is reasonable.*
>
> *"21. The Court requires evidence, such as itemised bills and invoices. These must be sufficiently detailed to enable the Court to determine to what extent the above requirements have been met."*

*"Fil-kitba bl-isem : "**The competence of the European Court of Human Rights to order restitutio in integrum and specific orders as remedial measures in the case 46221/99A** : l-awturi **Mera Martinot, Martina Siegfried u Jacco Snoeijer** ghamlu analizi ta` x`ghandu jikkostitwixxi restitutio in integrum :*

> *"It is a well-established principle of international law that a breach of an international obligation entails the duty to make adequate reparation. This reparation may take different forms. This report will focus on two kinds of reparation only: restitutio in integrum and specific orders.*
>
> *"Restitutio in integrum (or: restitution in kind) is the form of redress, which requires the removal of consequences of the breach and the re-establishment of the situation, which would in all probability have existed if the wrongful act had not been committed. Specific orders compel the wrongdoing state to act in a particular way. The orders can take the form of a negative injunction or the requirement of specific performance. The former type of specific order demands the wrongdoing state to refrain from causing damage or breaching an obligation in the future, while the latter demands the implementation of a certain treaty or contractual obligation, or the adoption of certain preventive conduct.*
>
> *"Restitutio in integrum and specific orders are not the only forms of redress. Compensation or damages (dommages-intérêts) is frequently granted when restitution in kind is impossible or undesirable. The injured party receives a sum that equals the value of the loss of the status quo ante and may even receive additional compensation, making up for any extra costs resulting from the temporary interruption of the situation before the breach. If it is difficult to express the*

damage resulting from the breach in monetary terms, or if the injured party deems pecuniary compensation undesirable, satisfaction may be the appropriate remedy. Examples of satisfaction are apologies expressed by the wrongdoing state, or assurances as to the future.

"Another form of reparation may be a declaratory judgement. The mere recognition by an international forum that a breach has actually occurred is then thought of as adequate redress.

"1.2 Restitutio in integrum as general principle of law

"According to the International Law Commission (ILC) in its Commentary on the Draft Articles as adopted by the Commission on First Reading in 1996 `restitution in kind is the first of methods of reparation available to a state injured by an international wrongful act`.

"The general principle that a State responsible for a wrongful act is under an obligation to`wipe out` all the consequences of a breach, is most closely conformed to by restitution in kind. Logically therefore, thus the International Law Commission, restitution in kind comes before any other form of reparation.

"This legal logic is also recognised by others. Chen (Bin Cheng, ***General Principles of Law as Applied by International Courts and Tribunals****, Cambridge: Grotius Press, 1987, p. 389) asserts:*

"The judicial essence of responsibility is that it imposes an obligation upon every subject of law who commits an unlawful act to wipe out all the consequences of that act and to re-establish the situation which would, in all probability, have existed if that act had not been committed. It is a logical consequence flowing from the very nature of law and is an integral part of every legal order".

"Apart from the logical primacy of restitution in kind there is another argument to be made to award this kind of reparation its principal place. Remedies in general, in the absence of acollective sanctioning or enforcement authority, uphold the public interest or legal order bypunishing or deterring wrongdoing. (Dinah Shelton, ***Remedies in International Human Rights Law****, Oxford: Oxford University Press, 1999, p. 49)*

"Restitution in kind, more specifically, fulfils the same function. More so, would the consequences of an international wrongful act remain unredressed, or would it be possible to simply `buy off` the consequences of such act, then the norm breached would be devoid of any meaning. Restitution in kind therefore has a regulating effect. (R.A Lawson, `Internationale rechtspraak in de Nederlandse

rechtsorde`, in Handelingen Nederlandse JuristenVerenigingen, 129e jaargang (1999-I), pp.1-133, p. 80).

…

"1.4 State practice

"The primacy of restitution in kind is substantiated by state practice. The restitution in kind rule was most clearly confirmed by the Permanent Court of International Justice (PCIJ) in the 1928 Chórzow Factory case.(Case of Chorzów Factory (Claim for Indemnity), 1928 PCIJ Series A, No. 17.)

"According to the Court:

"The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that the reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."

"Later, in the Temple of Preah Vihear case the International Court of Justice (ICJ) again ruledin favour of restitutio in integrum (Temple of Preah Vihear (Cambodia v. Thailand), 1962 ICJ 6), The Court found that Thailand had to leave theunlawfully occupied temple area and restore any religious objects, which it had removed.

"Subsequent case law seems to be rare. Critics argue that this lack of case law undermines the primacy of the restitution in kind rule, or denies its very existence. However, this is not the case. There are quite a number of cases in which parties have chosen other forms of reparation only after the constat, that restitution in kind could not be effected. More importantly, the primacy of restitution in kind is confirmed by the attitudes of the parties concerned. States have often insisted upon claiming restitution, regardless of the improbabilities or difficulties of such a claim.

"All in all, there is no contradiction in acknowledging the fact that other forms of reparation occur more frequently than restitution in kind, while at the same time recognising that restitution in kind is the very first remedy to be sought."

"Il-kitba tkompli tittratta dwar ir-rimedji li toffri l-Konvenzjoni, u x` tista` tordna jew tiddikjara l-ECHR fid-decizjonijiet taghha.

"Tkompli tghid :-

"The Court is competent to award `just satisfaction`, whatever that may be at this point, when there`s a

breach of the Convention (`a decision or a measure […] completely or partially in conflict with the obligations arising from the present Convention`); some sort of damage has occurred; and a causal link exists between the breach and the damage (`[…] reparation to be made for the consequences of this decision or measure`).

"Another stipulation is that the consequences of the violation cannot be fully repaired according to the internal law of the state concerned, i.e. when a state`s municipal law `allows only partial reparation`. This phrase at first sight seems to delimit the competence of the Court quite strictly. But what if a state allows for partial reparation, but refuses to grant it? What if a state does not allow for reparation at all?

"The Court has some latitude in deciding to award `just satisfaction` due to the inclusion if the phrase `if necessary`. This enables the Court to take into consideration the special circumstances of the particular case at hand. (Peter van Dijk and G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, Den Haag: Kluwer Law International, 1998 (3rd ed.), p. 178)….In sum, the Court has found that it is competent to award `just satisfaction` in the following instances. In cases where the Court has found a breach in regard of which full reparation in the form of restitution in kind is impossible due to the very nature of the injury the Court is competent to award `just satisfaction`, regardless whether the state in breach is willing or ableto allow reparation (Vagrancy-ruling). In cases where restitutio in integrum is indeed possible, but where the liable state is unable (travaux préparatoires and literal reading Article 41) or unwilling (Ringeisen-case) to grant reparation the Court also has the powers to apply Article 41. Only in cases where full reparation is possible and where the state concerned is able and willing to do so, should the Court refrain from adjudicating on just satisfaction claims.

"..The question that arises next is whether the content of `just satisfaction`could be extended to include the indication by the Court, through recommendations or otherwise, to the liable state to award the injured party restitutio in integrum or to order specific performance or negative injunctions.

"The drafting history of Article 50 (old) reveals that the idea of a Court capable of issuing orders or recommendations was initially preferred by some. At

the 1948 Congress of Europe, where the idea of a European human rights system emerged, the Congress delegates expressed their desire for a Court of Justice with `adequate sanctions` for the implementation of a European human rights Charter. But the idea of a powerful Court competent to prescribe not only monetary compensation, but also able to require penal or administrative action by the state concerned, was clearly not universally accepted. The Committee of Experts on Human Rights therefore suggested to the Committee of Ministers of the Council of Europe the adoption of what later became Article 50 of the European Convention on Human Rights.

"The reliance on arbitration instruments was induced by the expectation that adjudication before the Court was primarily inter-state in nature, rather than based on individual communications.

"However, taken into account the subsequent development of the European human rights regime, notably the scarcity of inter-state complaints and the plethora of individual communications, turning to the travaux préparatoires for evidence as to what exact measures `just satisfaction` may contain seems to be rather irrelevant. This is confirmed by the fact that as far the question of determining the competence of the Court to award just satisfaction is concerned, the travaux were only taken as a starting point from which the Court progressively departed. In several cases the Court has explicitly recognised and affirmed the principle of restitutio in integrum. In the Piersack case (Piersack case, 23 October 1984, A 85, par. 12) it ruled: "[…] the Court will proceed from the principle that the applicant should as far as possible be put in the position he would have been in had the requirements of Article 6 (Article 6) not been disregarded."

"Moreover, in the case of Papamichalopoulos and others vs. Greece and more recently in the case of Akdivar vs. Turkey the Court found that the principle of restitutio in integrum was binding on states (Papamichalopoulos and others vs. Greece, 25 October 1995, A 330, par. 34 en Akdivar vs. Turkey, 1 April 1998, file no. 99/1995/605/693, par. 47):

"The Court recalls that a judgement in which it finds a breach imposes on the respondent State a legal obligation to put an end to such breach and make reparation for its consequences in such a way as to

restore as far as possible the situation existing before the breach (restitutio in integrum)."

“One thing is evident though: any other forms of redress other than pecuniary compensation or a declaratory judgement, notably restitutio in integrum and specific orders, have so far not been ruled by the Court. This peculiarity of affirming the principle of restitution in kind, while at the same time refusing to actually grant it, can be explained by the inherent impossibility of most cases: the sheer impossibility of restoring the status quo ante because of the nature of the breach. Examples of this kind of inherent impossibility are cases that concern rights of an abstract content, such as the freedom of expression, which are difficult to remedy in the full sense. Another example is a case in which somebody is unlawfully arrested, but released before the Court is able to decide the case. With regard to such cases nothing else can be done but to affirm the breach and to award financial compensation. However, and this is very important, the inherent impossibility to award restitutio in integrum in some, perhaps even in most cases, cannot in itself preclude the Court from imposing or recommending restitutio in integrum in other cases where the liable state is unwilling or unable to restore the original situation.

…

“Time and again the Court has refused to direct a liable state to take certain measures. The Court has even been very reluctant to merely recommend states what to do. Its line of argument is that is has no competence to do so and that it is up to the state in question to choose the means to live up to its international obligations. This view must be rejected however.

“Because domestic and international legal systems are distinct and neither system has supremacy over the other, a state cannot call upon its own law as a justification for not living up to its international obligations. The Permanent Court of Arbitration, the Permanent Court of International Justice, and the International Court of Justice have produced a consistent jurisprudence in this respect. No act of legislation, or any other source of internal rules and decision-making can prevail over or limit the scope of international responsibility. Domestic concerns, consequently, no matter how grave, cannot alter the fact that restitution in kind is the principal means of

reparation in international law…..Therefore, in situations where restitutio in integrum is possible there is no international de jure obstacle for the Court to indicate what the necessary measures for restitutio in integrum would be, regardless of the municipal legal order of the state concerned. Any problems arising at the domestic level, should be seen as mere de facto problems, incapable of derogating from the international legal obligations."

*"Fil-**Harvard Human Rights Journal** (Vol 23) dehret kitba bl-isem : **The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief : A Critical Appraisal from a Right to Health Perspective** : ta` **Ingrid Nifosi-Sutton** (Adjunct Professor of Law, American University Washington College of Law) fejn inghad hekk dwar just satisfaction :-*

"Interpreting this provision (b`riferenza ghal Art 41 of the Convention previously numbered Article 50), the Court has outlined its own authority to decide whether or not to order just satisfaction after having evaluated the circumstances of each case and the alleged violations.

"In the famous Vagrancy cases, the Court spelled out three pre-conditions to exercise its power to order reparations under Article 41. First, the Court must find the conduct of a contracting state to be in violation of the rights and obligations set forth in the ECHR. Second, there must be an injury, that is to say moral or material damage, to the plaintiff. Third, the Court must deem it necessary to afford just satisfaction. The third pre-condition hints at the discretionary nature of the exercise of the remedial power conferredby Article 41, a discretionary nature that the Court has further acknowledged in subsequent cases.

"Generally, just satisfaction afforded by the Court in application of Article 41 of the Convention is provided in two forms : either a declaratory judgment establishing one or more violations of the ECHR, or a financial award considial role of the Court in the sense that it leaves to the respondent state the freedom to decide the actual redress to be provided to victims, limiting the Court only to establishing the occurrence of violations. Such a narrow remedial power of the Court conforms to the principle of subsidiarity, which dictates that states themselves should secure Convention rights and remedy their own breaches. Thus, the first of the two avenues of redress (declaratory judgment) taken by the Court limits the scope of the Court`s remedial competence.

"Although states have some discretion in redressing violations of the ECHR, the Court`s declaratory judgments have included remedial obligations.The Court has derived these obligations from Article 46(1), which requires states to

abide by the final judgments of the Court in any case to which they are parties. The Court has explained that, following a ruling in which it finds one or more breaches of Convention rights, Article 46(1) requires contracting states to effectively put an end to the violations established by the Court and fulfill restitutio in integrum.
"Restitutio in integrum is the primary form of reparation that states parties to the ECHR must provide.

"Its purpose is to re-establish as far as possible the situation existing before the breaches and to "take something from the wrongdoer to which the victim is entitled and restore it to the victim." When practicable, restitutio in integrum is the preferred form of reparation: it ends continuing violations and, more importantly, "corresponds to the needs and desires of victims."

"Insofar as the nature of the violation at stake makes it impossible to bring about restitutio in integrum, Article 46(1) establishes a provision for alternative forms of reparation. States enjoy wide discretion in choosing alternative reparations, which may consist of individual measures specified…..it is when full reparation (restitutio in integrum) cannot be attained at the national level that the Court is authorized under Article 41to award financial just satisfaction in the form of pecuniary or non-pecuniary damages.

"As the Court`s practice has shown, damages may be ordered when the Court has found a violation of the ECHR and the applicant has successfully proven a causal link between the harm suffered and the violation at stake.

"The sum to be awarded to the victim is assessed on an "equitable basis," a formula "which appears to be something akin to a mantra waved by the Court, in that it expresses the conclusion of the Court, but does not explain the basis of an award." Due to the difficulty of proving that the violation of Convention rights has caused pecuniary harm, awards of pecuniary damages are less frequent than awards of moral damages. Moral damages are typically afforded to compensate victims for non-pecuniary injuries such as harm to reputation, psychological harm, distress, frustration, humiliation, and sense of injustice. Other factors that are decisive in the award of damages are the seriousness of the violation, the conduct of the state and applicant, and the accuracy of the claim.

"States` obligations under Article 46(1) in instances in which the Court has ordered damages is to pay the sum awarded to the applicant within three months of the issuance of the Court`s judgment. In addition, states are requested to adopt "general and/or, if appropriate, individual measures . . . to put an end to the violation found by the Court and to redress so far as possible the effects." (Scozzari and Giunta v. Italy, App. Nos. 39221/98 and 41963/98, 35 Eur. H.R. Rep. 12,

249(2000). Moreover, states` payment of financial just satisfaction and the adoption of all the remedial measures required by Article46(1), including the provision of restitutio in integrum, are monitored by the Committee of Ministers of the Council of Europe (hereinafter "the Committee of Ministers") through an essentially diplomatic and political process.

"The Court`s practice under Article 41 shows a tendency to provide declaratory relief to redress violations of the ECHR and inconsistencies in the award of financial just satisfaction that are at variance with the principle of subsidiarity. In several cases, the Court has awarded damages without giving due consideration to required reparations at the national level, or has refrained from ordering damages irrespective of whether redress was available domestically. More importantly, the Court has taken the view that Article 41 does not confer a power to order restitutio in integrum or other specific non-monetary measures to remedy violations of the ECHR.

"Moreover, the Court does not view the provision as providing an individual right to reparation.

"Commentators have been critical of the Court`s remedial practice.

"Tomuschat has stressed the "intellectual weakness" of such an approach and its inadequacy in providing practical and effective relief to individuals who are victims of the most flagrant violations of the ECHR, such as wrongful convictions. Others, such as Shelton, argue that the Court`s "stringent" interpretation of Article 41 has "hampered the evolution of remedies in the European system."

"The Court has shown a willingness to change its restrictive approach to redress of violations of the ECHR by ordering specific non-monetary reparations, including restitutio in integrum, in five cases decided between 1995 and 2004.

…

"Papamichalopoulos and others v. Greece (Papamichalopoulos and Others v. Greece (Article 50), App. No. 14556/89, 21 Eur. H.R. Rep.439 (1995)) and Brumarescu v. Romania (Brumarescu v. Romania, App. No. 28342/95, 33 Eur. H.R. Rep. 36 (2001) were the first two cases in which the ECtHR requested states to provide restitution in integrum. Both cases concerned a state`s expropriation of private property.

"The Court ordered the respondent governments to return the land at stake, a measure that was intended to "put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a

breach of Article 1 of Protocol No. 1 [on the right to property].”

“Three years after Brumarescu, the Court took a bold stand vis-`a-vis restitutio in integrum in two cases. The Court ordered the respondent states to release applicants imprisoned unlawfully under domestic law and Article 5 of the ECHR (setting forth the right to liberty and security). In Assanidze vs. Georgia (Assanidze v. Georgia, App. No. 71503/01, 39 Eur. H.R. Rep. 32 (2004) the applicant alleged that his continued detention constituted an Article 5 violation; he continued to be imprisoned despite having received a presidential pardon in 1999 and having been acquitted by the Supreme Court of Georgia in 2001. The Grand Chamber concluded that this violated the relevant provision and, after noting that “by its very nature, the violation found in the instant case [did] not leave any real choice as to the measures required to remedy it,”the Court ordered Georgia to“secure the applicant`s release at the earliest possible date.”

“The Court came to similar conclusions in Ilascu and Others v. Moldova and Russia (Ilascu and Others v. Moldova and Russia, App. No. 48787/99, 40 Eur. H.R. Rep. 46 (2004). The case concerned three Moldovan nationals convicted by the Supreme Court of the Moldavian Republic of Transdniestria (“MRT”), a region of Moldova that proclaimed its independence in 1991 but has not been recognized by the international community. The Court, sitting as a Grand Chamber, found a violation of Article 5, maintaining that “none of the applicants was convicted by a `court,` and that a sentence of imprisonment passed by a judicial body such as the `Supreme Court of the MRT`. . .[could not] be regarded as `lawful detention` ordered `in accordance with a procedure prescribed by law.`” It went on to request that the respondent states “take every measure to put an end to the arbitrary detention of the applicants . . and to secure their immediate release.”

“In yet another 2004 case, Broniowski v. Poland, the Court specified the type of redress the respondent state should provide, not only for the claimant, but also for similarly situated people (Broniowski v. Poland, App. No. 31443/96, 40 Eur. H.R. Rep. 21 (2004). The Grand Chamber found that Poland had violated Article 1 of Protocol No. 1 by failing to compensate the applicant for property that he had lost as a consequence of the redrawing of Poland`s Eastern border along the Bug River at the end of World War II. The Court noted that “the violation of the applicant`s right guaranteed by Article 1 of Protocol No. 1 originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which . . . affected and remain[ed] capable of affecting a large number of persons.” As a matter of fact, 80,000 people were in a similar situation, and 167 related applications were pending before

the Court, threatening "the future effectiveness of the [European] Convention machinery."

"In order to ensure that Poland fulfilled its Article 46(1) obligations, the Court held that Poland should perform one of two actions: it should either adopt appropriate legal measures and administrative practices to secure the remaining Bug River claimants` property rights under Article 1 of Protocol No. 1, or provide them with equivalent redress. In 2005, Poland enacted a new law setting the ceiling for compensation for Bug River property at 20% of its original value. By doing so, Poland institutionalized the innovative relief ordered by the Court and avoided court proceedings for similar violations of the right to property. The ECtHR found that the law met the requirements set in the Broniowski judgment. The Broniowski judgment is regarded as the first "pilot judgment" adopted by the ECtHR: it is a ruling in which the Court ordered specific remedial measures aimed at affording relief not only to the applicants in the case at stake but to "a wider class of victims without each having to bring a separate complaint to Strasbourg."

"The above cases are illustrative of a new trend in the Court`s practice that encourages states that have violated the ECHR to adopt specific reparations other than monetary compensation. The request to provide restitutio in integrum represents a major shift in the Court`s traditional remedial approach: it suggests that the Court has revisited its interpretation of Article 41 and come to the conclusion that it is in fact authorized to afford this form of reparation. This breakthrough may be ascribed to the actual possibility of attaining restitutio in integrum when continuing violations are at stake, and, as far as the Ilascu case is concerned, the willingness to put an end to flagrant violations of the right to liberty and security that had originated from the unusual situation of the creation of a state not recognized by the international community.

"The Court has further broadened its remedial jurisdiction by ordering specific remedial measures of a general character. The Broniowski case suggests that the Court has reinterpreted Article 46(1) as providing the Court with the power to order general measures to tackle systemic problems that may give rise, or are giving rise, to numerous and identical breaches of theECHR by the same state. By virtue of their capability to fulfill deterrent functions, general measures can be regarded as guarantees of non-repetition.

"Dwar dak li ghandu jsir wara li tinghata sentenza mill-ECHR, il-Qorti tirreferi ghal kitba bl-isem : ***A Comparative View on the Execution of judgments of the European Court of Human Rights*** *ta`* ***Tom Barhuysen u Michiel L van Emmerick****.*

"L-ewwel awtur kien Associate Professor of Public Law, Leiden University, Netherlands. It-tieni awtur kien Legal Adviser at the Constitutional and Legislative Affairs Division, Ministry of the Interior, Netherlands.

*"Il-kitba hija bazata fuq zewg lectures illi l-awturi kienu ghamlu fil-Konferenza tal-British Institute of International and Comparative Law (BIICL) bl-isem **"European Court of Human Rights : Remedies and Execution of Judgements"** li saret Londra fit-28 ta` Ottubru 2003.*

"Il-"papers" li kienu prezentati fil-konferenza wara kienu ppubblikati fi ktieb bl-istess isem tal-konferenza f`April 2005 li l-edituri tieghu kienu Theodora Christou (mill-Queen Mary University of London) u Juan Pablo Raymond (Research Fellow tal-BIICL).

"Inghad hekk :-

> *"Decisions of the ECtHR are declaratory in nature: the ECtHR establishes whether or not a State has violated the Convention in the case at hand.*
>
> *Pursuant to Article 46 ECHR, judgments are only binding to the parties in that particular case. From this same article of the Convention the following obligations arise: (a) to terminate the violation with regards to the applicant, (b) to provide the applicant with restitutio in integrum (that is restoring the situation prior to the violation), and (c) to take measures to prevent future violations (also with regard to other individuals similarly affected by the violation, for instance by changing the law)."*
>
> *"However, the Court is not competent to quash national legislation or decisions which are contrary to the ECHR, nor does it have the power to revise final decisions of national courts. Neither does the ECtHR consider itself to be in a position to issue certain orders to the State party to the Convention. The Court does not even consider it competent to make recommendations to the condemned State as to which steps it should take to remedy the consequences of the treaty violation. According to constant case law of the Court, the condemned State is, pursuant to Article 46 ECHR, free to choose the means by which to comply with the Court`s judgment and to offer restitutio in integrum. For instance, in the case Pelladoah v The Netherlands the ECtHR rejected the applicant`s request to order the State to reopen the national criminal proceedings. This freedom as to the choice of means is, however, not unlimited, as the Vermeire case has made clear. In this case the Court, briefly stated, deemed it necessary for the national court to act when the legislator would take too long in implementing a Strasbourg decision.*

“After having established that a Convention violation has taken place, the ECtHR has the power to award the victim `just satisfaction`, where appropriate, on the basis of Article 41 ECHR.. This alternative, consisting of compensation, only applies if the domestic legal system does not allow for full restitutio in integrum. The Court gives priority to restitutio in integrum, which in practice, however, will often be impossible, either because the damage caused is irreversible or because the ECtHR lacks the power to quash national decisions or to issue certain orders.

…

“According to the wording of Article 41, a condition for the award of just satisfaction is that the national law of the State party to the Convention does not allow for full reparation of the consequences of the treaty violation. The Court has, however, interpreted its competence on the basis of Article 41 very broadly and considers it free to award damages whenever these are claimed by the applicant, irrespective of the national means for reparation. The ECtHR awards damages on grounds of equity and has used this power numerous times. The Court awards financial compensation for both material and non-material damage. The award of a sum of money is the most frequently used form of compensation in the Court`s practice. This sum may also include compensation for costs incurred by the applicant, both in the national procedure and in Strasbourg. However, research into the Court`s practice pursuant to Article 41 ECHR shows that the Court often does not award any damages at all.

“In fact, the Court often only states, without giving reasons and without regard to the national possibilities for reparation that the mere finding of a violation of the Convention constitutes sufficient satisfaction in cases where damage is of a non-pecuniary nature. Besides, claims for compensation of non-pecuniary damage are often rejected with the consideration that the Court cannot enter into speculation as to whether the national procedure would have ended differently if the conditions imposed by the Convention had been complied with.

“It follows from this that many applicants who `win` their case in Strasbourg will nevertheless feel that they have been left empty-handed by the Court.

“To date, the insufficiently guaranteed and hardly consistent Strasbourg practice of offering remedies and awarding damages renders acute the demand for proper national possibilities for redress.

“Therefore, let us now look at the remedies that could be offered in individual cases at the national level after the finding of a violation by the ECtHR.

“A study of the various legal systems of the Council of Europe shows that in theory one can think of a relatively wide range of possible remedies to be offered in national law in order to achieve restitutio in integrum or to provide compensation after a condemning judgment by the Strasbourg Court. Four main remedies can be distinguished.

“The first remedy is that national administrative orders found to be violating the Convention are revised or revoked. The authorities in most of the Council of Europe Member States in principle have this power. However, if third party interests are involved, the authorities must in principle refrain from using this power. The protection of legal certainty with regards to these third parties must prevail in such a case. This means that the remedy of revising or revoking orders is most useful in cases in which no third parties are directly involved, such as immigration cases or tax cases. An example of the use of this remedy could be the revocation of an expulsion order after the Strasbourg Court has ruled that this expulsion is contrary to eg Article 3 ECHR because of the real risk of inhuman or degrading treatment in the home country.

“In criminal cases a remedy could be the pardoning of a convicted person leading to his/her acquittal, for instance, after the ECtHR has found a violation of Article 6 of the Convention because of the use of improper evidence.

“Sentence reduction can also be used in response to a Strasbourg judgment.

…

“As research shows, a considerable number of Council of Europe Member States nowadays provide for the possibility of reopening proceedings that have been closed with a decision having res judicata power. This with a view to revising the decision concerned, with due regard for the judgment of the ECtHR., both in respect of material and procedural matters following from it. In the case of Van Mechelen v The Netherlands, mentioned earlier, this remedy would have meant that the criminal proceedings would have been reopened, but then without the use of anonymous witnesses (as its use was found to be contrary to Article 6 ECHR). …As in many cases it seems to be an ideal means for the execution of Strasbourg judgments. However, problems could arise in cases where third party interests are involved.

“A fourth remedy is the instigation of tort proceedings against the State. The State could be obliged to pay damages because of wrongful judicial acts or because of other wrongful acts of State authorities.

"One of the possible remedies just described, the reopening of closed proceedings, deserves special attention as the Committee of Ministers has recommended Member States to implement this possibility in their national legal systems. According to the Committee of Ministers this possibility is in some cases the most efficient, if not the only, means of achieving restitution in integrum.

"In this context it should be stressed that the Convention does not oblige States to act upon this recommendation (the recommendations of the Committee of Ministers are not binding). There is only a legal obligation to remedy the violation found, but the Convention does not prescribe the means by which this should be achieved. Nevertheless, in our opinion, the reopening of proceedings seems in many cases the ideal means to fulfil the restitutio in integrum obligation unless third party interests were prejudiced by the reopening of the case.

"However, some important questions have to be discussed when introducing a reopening procedure. Such as :

"• in which field or fields of law should reopening be possible?
"• how to deal with third party interests?
"• with regard to what type of violation of the ECHR (procedural rights only or also material rights) should reopening be possible?
"• time limits?
"• who can ask for reopening?
"• which authority should decide on a reopening request?
"• what to do with similar cases that have not been brought to Strasbourg?; etc.

"Research by the Council of Europe (1999) and, more recently by van Kempen (2003), shows that State practice with regard to the reopening possibility and its various features is by no means uniform. Some countries do not have any reopening possibility at all. Several countries – a majority of the Council of Europe Member States – have provisions that can be used in the field of criminal law. Provisions in the field of civil and administrative law are less common, which to a certain extent can be explained by the involvement of non-State third parties in many cases in these fields of law for whom legal certainty needs to be protected. In countries where such a reopening is a possibility, it can be based on a provision specially focussing on ECtHR judgments, or on a general provision that also covers other grounds for reopening proceedings such as new facts that are decisive for the outcome of the case (nova). Some countries have one special provision, covering criminal, civil, and administrative law (like Switzerland and Malta). In Norway, a case can be reopened (on the basis of a general provision) in reaction to a-formally non-binding-finding of the Human Rights Committee that monitors the Covenant on

> *Civil and Political Rights. With regard to some other countries the situation is unclear as these countries do not have reopening provisions specially focussing on ECtHR judgments, but have instead general reopening provisions and it is unclear whether these can be used in reaction to a Strasbourg judgment.*

"Dwar il-procedura applikabbli wara li tinghata s-sentenza, ikompli jinghad fl-istess kitba :-

> *"Under Article 46 ECHR the Committee of Ministers supervises the execution of the Court`s judgments. This supervision takes the form of monitoring whether the State has executed the judgment in the individual case by restitutio in integrum and/or payment of damages on the basis of Article 41 ECHR. The Committee also monitors whether the necessary legislative or administrative reforms have been instituted in order to prevent future violations.*
>
> *"The Committee does not regard its supervising role with regard to a certain case as finished until it has satisfied itself – on the basis of information supplied by the State – that the State has fulfilled its obligations arising from the judgment. The conclusion that a judgment has been properly implemented will be formalized by the adoption of a resolution by the Committee in which the information supplied by the State is also mentioned. This resolution is made public and can be a good source for research with regard to the execution of judgments. If a State fails to execute a judgment, the Committee may decide on the measures to be taken against this State (for instance: a political condemnation, suspension of the right to vote at the Committee of Ministers, or expulsion from the Council of Europe).*
>
> *"The record of States in executing the Court`s judgments can be regarded as relatively good. Although some States need a lot of time to implement appropriate measures, in the end the Committee can conclude in most cases that the judgment has been properly executed. This shows that the judgments of the Court have acquired a highly persuasive status in the various Member States. On the other hand, it has to be said that more and more States are becoming increasingly reluctant to execute judgments against them and try to find ways to minimize the possible impact of these judgments.*
>
> *"It is also because of this development that the Parliamentary Assembly of the Council of Europe is trying to gain more control over the execution of judgments. The Assembly is now informed on a regular basis on the execution records of the Member States and tries to use its (political) influence whenever problems arise.*

> *"However, the individual concerned (the applicant who has won his or her case) has no formal role in the supervision procedure, although they could try to draw the attention of the Committee of Ministers to a judgment that has not been properly executed. The Olsson II v Sweden case shows that so far the ECtHR has not been prepared to deal separately with the complaint that a previous Court judgment has not been (properly) executed. The applicants in this case asked the Court to condemn Sweden for a violation of Article 46, which the Court refused. From this case it can also be deduced that so far, the Court is not willing to override a decision of the Committee of Ministers that a certain judgment has been properly executed, although scholars have argued that it is the Court and not the Committee that should have the last word in this respect. The Court has confirmed this reluctant position in its admissibility decision in the case Lyons v United Kingdom. In this case, the Court found the complaint of the applicants – that by refusing to reopen a closed national procedure and to take into account the condemnation by the Court in an earlier judgment (19 September 2000, IjL, GMR and AKP v United Kingdom), there was a `new` breach of Article 6 § 1 and a breach of Article 13 ECHR – inadmissible. The Court stresses the exclusive role of the Committee of Ministers with regard to the execution of judgments and is of the opinion that there is no new breach of the Convention. In this respect the Court states that the Convention does not give it jurisdiction to direct a State to open a new trial or to quash a conviction."*

"V. <u>Konsiderazzjonijiet ta` din il-Qorti</u>

*"Ir-rikorrenti jirreferu ghad-decizjoni tal-ECHR tad-9 ta` Jannar 2013 fil-kaz ta` **<u>Volkov v. Ukraine</u>** (Appl. No. 21722/11.*

"Il-Qorti rat din id-decizjoni.

"Fiha jirrizulta riassunt ta` insenjamenti u principji fejn ghalkemm l-ECHR taghti decizjonijiet dikjaratorji, ikun hemm kazi eccezzjonali fejn anke taghti ordnijiet dwar x` rimedji ghandhom jinghataw minn Stat Membru.

*"Fil-kaz ta` **<u>Volkov v. Ukraine</u>**, mhux bhal ma sar fil-kaz ta` **<u>Mercieca</u> <u>and Others v. Malta</u>**, l-ECHR specifikat ukoll x` rimedji ohra ghandhom jinghataw in linea mal-prinicipju ta` restitutio in integrum.*

"Inghad hekk :-

> *"IV. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION*
>
> *"191. Article 41 of the Convention provides:*

“If the Court finds that there has been a violation of the Convention or the Protocolsthereto, and if the internal law of the High Contracting Party concerned allows onlypartial reparation to be made, the Court shall, if necessary, afford just satisfaction tothe injured party.”

“192. Article 46 of the Convention provides:

“1. The High Contracting Parties undertake to abide by the final judgment of theCourt in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee ofMinisters, which shall supervise its execution. ...”

“A. Indication of general and individual measures

“1. General principles

“193. In the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which the Court finds a breachof the Convention imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, 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. It follows, inter alia, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see Maestri v. Italy [GC],no. 39748/98, § 47, ECHR 2004-I; Assanidze v. Georgia [GC],no. 71503/01, § 198, ECHR 2004-II; and Ilaşcu et v. Moldova & Russia [GC], no. 48787/99, § 487, ECHR 2004-VII).

“194. The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court`s judgment (see, among other authorities, Öcalan v. Turkey [GC], no. 46221/99, § 210, ECHR 2005-

IV;Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 249,ECHR 2000-VIII; and Brumărescu v. Romania (just satisfaction) [GC],no. 28342/95, § 20, ECHR 2001-I). 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 to secure the rights and freedoms guaranteed under the Convention (Article 1) (see Papamichalopoulos and Others v. Greece (Article 50), 31 October 1995,§ 34, Series A no. 330-B).

"195. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned (see, for example, Broniowski v. Poland [GC], no. 31443/96, § 194, ECHR 2004-V). In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate a specific measure (see, for example, Assanidze, cited above, §§ 202 and 203;Aleksanyan v. Russia, no. 46468/06, § 240, 22 December 2008; and Fatullayev v. Azerbaijan, no. 40984/07, §§ 176 and 177, 22 April 2010).

- *Omissis –*
-

"(ii) <u>The Court`s assessment</u>

"199. The Court notes that the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary. In particular, the violations found in the case suggest that the system of judicial discipline in Ukraine has not been organised in a proper way, as it does not ensure the sufficient separation of the judiciary from other branches of State power.

"Moreover, it does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence, the latter being one of the most important values underpinning the effective functioning of democracies.

"200. The Court considers that the nature of the violations found suggests that for the proper execution of the present judgment the respondent State would be required to take a number of general measures aimed at reforming the system of judicial discipline. These measures should include legislative reform involving the restructuring of the institutional basis of the system.

"Furthermore, these measures should entail the development of appropriate forms and principles of coherent application of domestic law in this field.

"201. As regards the Government`s contentions that they had already put in place certain safeguards in the area, the Court notes that the legislative amendments of 7 July 2010 did not have immediate effect and the recomposition of the HCJ will have to take place gradually in the future. In any event, the Court has noted that these amendments do not in fact resolve the specific issue of the composition of the HCJ (see paragraph 112 above).

"As to the other legislative amendments outlined by the Government, the Court does not consider that they substantially address the whole range of the problems identified by the Court in the context of this case. There are many issues, as discussed in the reasoning part of this judgment, indicating defects in the domestic legislation and practice in this area. In sum, the legislative steps mentioned by the Government do not resolve the problems of systemic dysfunctions in the legal system disclosed by the present case.

"202. Therefore, the Court considers it necessary to stress that Ukraine must urgently put in place the general reforms in its legal system outlined above. In so doing, the Ukrainian authorities should have due regard to this judgment, the Court`s relevant case-law and the Committee of Ministers` relevant recommendations, resolutions and decisions.

"(b) Individual measures

- omissis -

"(ii) The Court`s assessment

"205. The Court has established that the applicant was dismissed inviolation of the fundamental principles of procedural fairness enshrined in Article 6 of the Convention, such as the principles of an independent and impartial tribunal, legal certainty and the right to be heard by a tribunal established by law. The applicant`s dismissal has been also found to be incompatible with the requirements of lawfulness under Article 8 of the Convention. The dismissal of the applicant, a judge of the Supreme Court, in manifest disregard of the above principles of the Convention, could be viewed as a threat to the independence of the judiciary as a whole.

"206. The question therefore arises as to what individual measures would be the most appropriate to put an end to the violations found in the present case. In many cases where the domestic proceedings were found to be in breach of the Convention, the Court has held that the most appropriate form of reparation for the violations found could be reopening of the domestic proceedings (see, for example,

Huseyn and Others v. Azerbaijan,nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 262, 26 July 2011, withfurther references). In so doing, the Court has specified this measure in the operative part of the judgment (see, for example, Lungoci v. Romania,no. 62710/00, 26 January 2006, and Aj ć v. Croatia, no. 20883/09,13 December 2011).

"207. Having regard to the above conclusions as to the necessity of introducing general measures for reforming the system of judicial discipline, the Court does not consider that the reopening of the domestic proceedings would constitute an appropriate form of redress for the violations of the applicant`s rights. There are no grounds to assume that the applicant`s case would be retried in accordance with the principles of the Convention in the near future. In these circumstances, the Court sees no point in indicating such a measure.

"208. Having said that, the Court cannot accept that the applicant should be left in a state of uncertainty as regards the way in which his rights should be restored. The Court considers that by its very nature, the situation found to exist in the instant case does not leave any real choice as to the individual measures required to remedy the violations of the applicant`s Convention rights. Having regard to the very exceptional circumstances of the case and the urgent need to put an end to the violations of Articles 6 and 8 of the Convention, the Court holds that the respondent State shall secure the applicant`s reinstatement in the post of judge of the Supreme Court at the earliest possible date.

- *Omissis –*
-

"2. Non-pecuniary damage

"212. The applicant claimed that as a result of his unfair dismissal, he had suffered considerable distress and frustration which could not be sufficiently redressed by the findings of violations. He sought an award of just satisfaction for non-pecuniary damage in the amount of EUR 20,000.

"213. The Government contended that the claim in respect ofnon-pecuniary damage had been unsubstantiated.

"214. The Court considers that the applicant must have suffered distress and anxiety on account of the violations found. Ruling on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 6,000 in respect of non-pecuniary damage.

"C. Costs and expenses

"215. The applicant also claimed 14,945.81 pounds sterling (GBP) forcosts and expenses incurred before the Court between 23 March and20 April 2012. The claim

> *consisted of legal fees for the applicant`s representatives in London (Mr Philip Leach and Ms Jane Gordon), who had spent 82 hours and 40 minutes working on the case in that period; a fee for the EHRAC support officer; administrative expenses; and translation costs.*
>
> *"216. In his additional submissions on this topic, the applicant claimed GBP 11,154.95 for costs and expenses incurred in connection with the hearing of 12 June 2012. The claim included legal fees for the applicant`s representatives, who had spent 69 hours and 30 minutes working on the case; a fee for the EHRAC support officer; administrative disbursements; and translation costs.*
>
> *"217. The applicant asked that any award under this head be paid directly to the bank account of the EHRAC.*
>
> *"218. The Government argued that the applicant had failed to show that the costs and expenses had been necessarily incurred. Moreover, they had not been properly substantiated.*
>
> *"219. According to the Court`s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 12,000 covering costs under all heads. The amount shall be paid directly into the bank account of the applicant`s representatives.*

"F`dan il-kaz, l-ECHR specifikat ir-rimedji li kellhom jigu addottati mill-iStat Membru. L-applikant kien talab li jinghata rimedji fosthom li jerga`jinghata l-pozizzjoni ta` Imhallef. Kien ghalhekk illi l-ECHR ghamlet ezami ta` dak ir-rimedju li kien mitlub bil-konsegwenza li accettat li fid-decizjoni taghha tghid specifikament li dak ir-rimedju kellu jinghata lill-applikant.

"Kaz iehor citat mir-rikorrenti kien dak deciz mill-ECHR ffid-29 ta` Novembru 1991 fl-ismijiet ***Vermeire v. Belgium.***

"L-ECHR irrimarkat hekk :-

> *"26. An overall revision of the legislation, with the aim of carrying out a thorough going and consistent amendment of the whole of the law on affiliation and inheritance on intestacy, was not necessary at all as an essential preliminary to compliance with the Convention as interpreted by the Court in the Marckx case. The freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 (art. 53) cannot allow it to suspend the application of the Convention while waiting for such a reform*

to be completed, to the extent of compelling the Court to reject in 1991, with respect to a succession which took effect on 22 July 1980, complaints identical to those which itupheld on 13 June 1979.

"Fil-kaz ta`* ***Vermiere*** *(u kuntrarjament ghal dak li ntalab fil-kaz ta` ***Mercieca and Others)*** *l-applikanti kienet talbet bhala rimedju li tinghata kumpens ekwivalenti ghas-sehem mill-wirt li kien imcahhda minnu. Il-Qorti rriservat li taghti decizjoni skont dak li kien l-Art 50 u tat zmien sabiex jigu komunikati lilha sottomissjonijiet mill-kontendenti :-*

"Under Article 50 (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

"Mrs Vermeire claimed in the first place 40,175,787 Belgian francs (BEF) as compensation, this being equivalent to her share in the two estates in question, after deducting inheritance tax and adding interest payable since the two deaths. She also claimed BEF 2,486,399 in respect of her costs and expenses before the domestic courts and the Strasbourg institutions.

"30. In the Government`s opinion, were the Court to find that there had been a breach of the Convention, the judgment would in itself constitute just satisfaction. The figures put forward by the applicant could in any event not be relied on, as they were based solely on the declarations of inheritance, which were unilateral and incomplete.

"31. The Court agrees with the Commission that the applicant suffered pecuniary damage, the amount of which is equivalent to the share of her grandfather`s estate which she would have obtained had she been his "legitimate" granddaughter. Inheritance taxes and interest due must be taken into account in calculating the compensation.

"32. However, as the Government dispute the information supplied by Mrs Vermeire and as some of the costs claimed appear liable to revision on the basis of this judgment, the question of the application of Article 50 (art. 50) is not ready for decision. It should therefore be reserved.

"FOR THESE REASONS, THE COURT

"1. Holds by eight votes to one that the Belgian State was under no obligation to reopen the succession to the estate of Irma Vermeire née Van den Berghe;

"2. Holds unanimously that the applicant`s exclusion from the estate of Camiel Vermeire violated Article 14 in conjunction with Article 8 (art. 14+8) of the Convention;

"3. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision; accordingly, (a) reserves it in whole; (b) invites the Government and the applicant to submit to it in writing within the next three months their observations on the question and in particular to communicate to it any agreement which they may reach; (c) reserves the subsequent procedure and delegates to the President of the Court power to fix the same if need be."

"Ir-rikorrenti jirreferu ghad-decizjoni li tat il-Qorti Kostituzzjonali fit-30 ta` Ottubru 2015 fil-kawza fl-ismijiet **Malta Playing Fields Association v. Il-Kummissarju tal-Artijiet et** li kien appell minn sentenza ta` din il-Qorti kif presjeduta, u fejn is-sentenza taghha kienet ikkonfermata.

"Il-Qorti Kostituzzjonali qalet hekk :-

"31. Rigward ir-rimedju, il-Qorti tirribadixxi li –

"Dwar just satisfaction, ir-regola hi li meta l-Qorti ssib li hemm vjolazzjoni, sa fejn hu possibbli, l-Istat ghandu jipprovdi restitutio in integrum. Meta dan ma jkunx possibbli jew inkella jkun biss parzjalment possibbli l-Qorti ghandha taghti just satisfaction. Id-decizjoni li ddikjarazzjoni ta` vjolazzjoni wahedha tkun bizzejjed hija l-eccezzjoni u ghandha tkun rizervata ghal kazijiet fejn hemm rimedju jew konsegwenzi huma zghar." [Q.Kos.55/2009 **Victor Gatt v. Avukat Generali et**, deciza 5 ta` Lulju 2001].

"32. Fil-kaz in kwistjoni jirrizulta mix-xhieda tar-rapprezentant tal-Klabb intimat li fuq l-art de quo hemm "erbat ikmamar, tnejn huma garages, wiehed ufficcju u classroom". Dan ix-xhud qal ukoll li fil-post hemm kostruwiti slipways.

"33. Fic-cirkostanzi tal-kaz din il-Qorti ma tarax li hemm raguni valida ghaliex ir-rimedju moghti mill-ewwel Qorti m`ghandux jitqies bhala wiehed idoneju. Ma jirrizultax li l-bini ezistenti huwa ta` xi entita` kbira jew li huwa okkupat minn diversi nies, bhal fil-kaz ta` appartamenti, li ser jigu effettwati negattivament jekk jinghata r-rimedju moghti mill-ewwel Qorti. Il-kwistjoni hija limitata ghar-relazzjoni bejn l-Assocjazzjoni, il-Gvern u l-Klabb li l-ghan taghhom dejjem kien l-istess, u cioe` li fuq l-art de quo tinbena skola tal-ibburdjar u catering facilities li fil-fatt inbnew.

> *"Ghalhekk din il-Qorti taqbel mal-ewwel Qorti li r-rimedju ghandu jkun l-annullament tal-ordni ta` esproprijazzjoni stante li kienet vjolattiva tad-drittijiet fundamentali tal-Assocjazzjoni kif protetti bl-Artikolu 37 tal-Kostituzzjoni, l-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni."*

*"L-istess bhalma gara fil-kazi ta` **Volkov** u **Vermier** u fil-kawza ta` l-**Malta Playing Fields Association** ghad-differenza ta` dak li gara fil-kaz ta` **Mercieca and Others vs Malta**, ir-rikorrenti talbet rimedji **specifici** li l-Qorti akkordat.*

"Tishaq ghal darb`ohra illi fil-kaz ta` Mercieca and Others v. Malta mhux hekk gara.

*"Infatti hemm ir-rikorrenti kienu ressqu **zewg talbiet** skont l-Art 41 tal-Konvenzjoni : talba ghal damages u talba ghal costs and expenses.*

*"L-ECHR **cahdet** it-talba ghal damages billi qalet hekk :-*

> *"53. The applicants claimed 1,150 euros (EUR), supported by a taxed bill of costs, representing the sum incurred by the applicants in connection with the rejected appeal, in respect of pecuniary damage.*
>
> *"54. The Government submitted that these claims were not a direct consequence of the violation complained of.*
>
> *"55. The Court does not discern any causal link between the violation found and the pecuniary damage alleged, as it cannot speculate on what the outcome would have been had had the Court of Appeal declared the applicants` appeal admissible and proceeded to hear it. Accordingly, the Court rejects this claim."*

"Dwar it-talba ghal costs and expenses, l-ECHR qalet hekk :-

> *"56. The applicants also claimed EUR 6,169.54, vouched by an attached bill of costs, for costs and expenses incurred before the domestic courts and EUR 14,320 (EUR 7,190 + EUR 7,130) in lawters` fees incurred before the Court.*
>
> *"57. The Government submitted that the costs of the domestic proceedings claimed by the applicants included the costs of the Attorney General (EUR 2,261) which had not been claimed by the latter and would not be claimed by the latter in the event that the Court were to find a violation in the present case. As to the claims for proceedings before this Court, the Government submitted that they were grossly exaggerated and that there was no justification for doubling the fees on account of the fact that two lawyers were consulted about the proceedings. In their view, it was appropriate to award EUR 2,000.*

"58. According to the Court`s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court considers the amounts claimed for legal fees to be excessive. Regard being had to the documents in its possession and the above criteria, notably the absence of details as to the number of hours worked and the rate charged per hour, and noting that the costs of the Attorney General in the domestic proceedings will not be claimed and are therefore to de deducted from this award, the Court considers it reasonable to award the sum of EUR 6,000 covering costs under all heads.

"C. <u>Default interest</u>

"59. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points."

*"Id-**<u>decide</u>** tas-sentenza ta` **<u>Mercieca and Others</u>** ighid hekk :-*

"1. Declares the application admissible;

"2. Holds that there has been a violation of Article 6(1) of the Convention;

"3. Holds

"(a) that the respondent State is to pay the applicants, within three months from the date on which the judgement becomes final in accordance with Article 44 (2) of the Convention, EUR 6,000 (six-thousand Euros) plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

"4. Dismisses the remainder of the applicants` claim for just satisfaction.

*"**Meta tqis id-decizjoni tal-ECHR, din il-Qorti tirrileva illi fil-kors tal-procediment imkien ma r-rikorrenti talbu illi fil-kaz ta` esitu favorevoli ghalihom, kellhom jinghata lilhom il-jedd li jinstema` l-appell taghhom mill-eccezzjonijiet preliminari.***

"Tosserva wkoll illi l-ECHR qieset it-talbiet li tressqu ghall-konsiderazzjoni taghha u tat id-decizjoni taghha dwarhom billi akkordat dak li kellu x`jaqsam ma` costs and expenses.

"Ghalhekk il-Qorti qeghda tifhem li l-ECHR kienet ezawrjenti fid-decizjoni taghha fis-sens li qieset li dikjarazzjoni li sehhet vjolazzjoni tal-Artikolu 6 tal-Kovenzjoni kienet bizzejjed.

"Li kieku kellha din il-Qorti tadotta l-interpretazzjoni li taw uhud mill-awturi citati mir-rikorrenti fin-nota ta` sottomissjonijiet taghhom, ma tarax li hemm lok li tidhol fi kwistjoni dwar jekk din id-decizjoni kenitx implimentata u jekk kienx osservat il-principju ta` restitutio in integrum.

"Il-procedura dwar l-infurzar ta` decizjonijiet tal-ECHR tispetta lill-Kumitat tal-Ministri tal-Kunsill ta` l-Ewropa. Il-Kumitat jigi nfurmat mill-awtorita' responsabbli ta` Malta (u del resto ta` pajjizi membri ohra) dwar x`sar sabiex tkun sanata l-pozizzjoni ta` Malta wara decizjoni tal-ECHR.

*"Mill-**Execution of Judgements of the European Court of Human Rights Action Report : Mercieca and Others vs Malta : Appl. No. 21974/07 : Judgement of 14/06/2011, final on 14/09/2011** jirrizulta li Malta nfurmat lill-Kumitat tal-Ministri fis-27 ta` Mejju 2013 (fol 26 u 27) illi :-*

*"**Individual measures***

"The appliants` domestic proceedings, referred to in the judgement, have now reached the final stages prior to the first instance decision. Following the delivery of the judgement by the court of first instance, the applicants will have the opportunity to file an appeal against both the partial judgement as well as an appeal against the final judgement should they wish to do so

….

"The authorities are of the opinion that the judgement does not require the adoption of any further individual measures.

….

*"**State of execution of judgement***

"The Government considers that all necessary individual and general measures have been taken to execute the judgement and that the case should be closed.

"Bit-taghrif li rcieva l-Kumitat tal-Ministri kien sodisfatt li s-sentenza kienet giet ezegwita.

"Infatti b`rizoluzzjoni tal-10 ta` Lulju 2013, il-Kumitat tal-Ministri kkonferma li fil-fatt is-sentenza tal-14 ta` Gunju 2011 fl-ismijiet ***Mercieca and Others vs Malta*** *kienet giet adottata u ezegwita mill-Gvern Malti (fol 34).*

"Testwalment jinghad hekk :-

> *"Having satisfied itself that all measures required by Article 46, paragraph 1, have been adopted,*
>
> *DECLARES that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case and*
>
> *DECIDES to close the examination thereof."*

*"**Ir-rikorrenti jissottomettu li meta l-awtorita` Maltija responsabbli kkomunikat mal-Kumitat tal-Ministri, naqset li tinforma lill-Kumitat li fis-7 ta` Mejju 2012, ir-rikorrenti kienu qed jitolbu lill-Qorti Kostituzzjonali biex tissana l-pozizzjoni wara d-decizjoni li kienet tat l-ECHR.***

*"**Madanakollu dan il-fatt ma jaghti l-ebda setgha li din il-Qorti tmur oltre s-setghat li ghandu l-Kumitat tal-Ministri sabiex tkun hi li taccerta ruhhha jekk is-sentenza tal-ECHR kenitx imwettqa bil-mod u manjiera pretizi mir-rikorrenti fil-procediment tal-lum.***

"Il-Qorti sejra tirreferi ghad-decizjoni tal-Grand Chamber tal-ECHR tal-5 ta` Frar 2015 fil-kaz ta` ***Bochan v. Ukraine*** *(Appl. No. 22251/08).*

"Il-Qorti sejra taghmel sunt tal-kwistjoni :-

> *"The European Court of Human Rights held, unanimously, that there had been a violation of Article 6 § 1 (right to a fair hearing) of the European Convention of Human Rights.*
>
> *"The case concerned the proceedings relating to Ms Bochan`s "appeal in the light of exceptional circumstances" based on the European Court of Human Rights` judgment in her previous case about the unfairness of property proceedings (judgment of 3 May 2007).*
>
> *"The Court found that because the Supreme Court had made a distorted presentation of its findings in the 2007 judgment, Ms Bochan had not been able to have her property claim examined in the light of these findings, in the framework of the cassation-type procedure provided for under Ukrainian law.*

“The Court considered that it was competent to examine the new issue raised in Ms Bochan`s second case without encroaching on the prerogatives of Ukraine and the Committee of Ministers under Article 46 (Binding force and implementation of judgments). It also reiterated that, while it was for the Member States to decide how best to implement its judgments, the availability of procedures allowing a case to be revisited when a violation of Article 6 had been found was the best way to achieve restoration to the applicant`s original situation.

“Principal facts

“The applicant, Mariya Ivanivna Bochan, is a Ukrainian national who was born in 1917 and lives in Ternopil (Ukraine).

“Since 1997 Ms Bochan has claimed, so far unsuccessfully, title to part of a house, owned by Mr M. at the relevant time, and to the land on which it stands. Her property claim was considered on numerous occasions by the domestic courts. Her case was eventually reassigned by the Supreme Court to lower courts with different territorial jurisdiction, and it was ultimately decided that Mr M. was the lawful owner of that part of the house and had the right to use the land on which it had been constructed.

“On 17 July 2001 Ms Bochan lodged an application with the European Court of Human Rights, complaining in particular of unfairness in the domestic proceedings concerning her claim. In its judgment of 3 May 2007, the Court found that there had been a violation of Article 6 § 1 (right to a fair trial), having regard to the circumstances in which Ms Bochan`s case had been reassigned by the Supreme Court and to the lack of sufficient reasoning in the domestic decisions, these issues being taken together and cumulatively. The Court further decided that it was not necessary to rule on the applicant`s complaint based on Article 1 of Protocol No. 1 (protection of property), as it raised no distinct issue. Ms Bochan`s other complaints, including about the length of the proceedings, were dismissed by the Court as unsubstantiated. The applicant was awarded 2,000 euros in respect of non-pecuniary damage. To date, the Committee of Ministers of the Council of Europe has not yet concluded the supervision of the execution of the judgment.

“On 14 June 2007 Ms Bochan lodged an “appeal in the light of exceptional circumstances” as provided for under Ukrainian law. Relying on the European Court`s judgment of 3 May 2007, she asked the Supreme Court to quash the decisions in her case and to adopt a new judgment allowing her claims in full. Her appeal was dismissed on 14 March 2008, the Supreme Court holding that the domestic decisions had been correct and well-founded. Her second appeal was declared inadmissible on 5 June 2008 on the

grounds that there had been no arguments calling for reconsideration of the case.

"Relying on Articles 6 § 1 (right to a fair hearing) and 1 of Protocol No. 1 (protection of property), the applicant complained of the proceedings concerning her "appeal in the light of exceptional circumstances" ("exceptional appeal"), in particular that the Supreme Court had failed to take into account the European Court`s findings in its judgment of 3 May 2007 and that its reasoning relating to the outcome of her previous application had contradicted the Court`s findings in the judgment of 3 May 2007.

"The application was lodged with the European Court of Human Rights on 7 April 2008. On 19 November 2013 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.

"Judgment was given by the Grand Chamber of 17 judges

"The Court considered that some of Ms Bochan`s pleadings in the present case could be understood as complaining about an alleged lack of proper execution of its judgment of 3 May 2007. However, complaints of a failure either to execute the Court`s judgments or to redress a violation already found by the Court fell outside the Court`s competence. Accordingly, the Court declared Ms Bochan`s complaints concerning the failure to remedy the original violation of Article 6 § 1 in her previous case inadmissible.

"However, a new complaint was raised by Ms Bochan in her second application concerning the conduct and fairness of the proceedings decided in March 2008 - it did not concern their outcome as such or the effectiveness of the national courts` implementation of the Court`s judgment of 3 May 2007. The Court was therefore competent to examine this new issue without encroaching on the prerogatives of Ukraine and the Committee of Ministers under Article 46 of the Convention.

"The Court found, in the light both of the relevant provisions of the Ukrainian legislation and of the nature and scope of the exceptional appeal proceedings, that this cassation-type procedure had been decisive for the determination of Ms Bochan`s civil rights and obligations. Consequently, Article 6 § 1 had been applicable to these proceedings.

"The Court reiterated that it was for the Member States to decide how best to implement its judgments and that there was no uniform approach among them as to the possibility of seeking reopening of terminated civil proceedings following a finding of a violation by the Court or as to the modalities of implementation of existing reopening mechanisms. However, the availability of procedures allowing a case to be revisited when a violation of Article 6 had been found demonstrated a

Member State`s commitment to the Convention as well as to the Court`s case-lawand was the best way to achieve restoration to the applicant`s original situation (restitutio in integrum).

"The Court reiterated that it was not its role to act as a fourth instance and to question under Article 6 § 1 the judgments of the national courts, unless their findings had been arbitrary or manifestly unreasonable. However in Ms Bochan`s case, the Supreme Court, in its decision of 14 March 2008, had grossly misrepresented the Court`s findings in its judgment of 3 May 2007. Indeed, the Supreme Court had found that Ukrainian courts` decisions in Ms Bochan`s case had been lawful and well-founded and that she had been awarded just satisfaction for the violation of the "reasonable-time" guarantee, when the Court had in fact found a violation of the Convention on account of the unfairness of the original domestic proceedings.

"The Court observed that the Supreme Court`s reasoning could not be considered as a different reading of a legal text but rather as being "grossly arbitrary" or as entailing a "denial of justice", as the distorted presentation of the Court`s 2007 judgment in the first Bochan case had defeated Ms Bochan`s attempt to have her property claim examined in the framework of the cassation-type procedure provided for under Ukrainian law in the light of the Court`s judgment in her previous case.

"As a consequence, there had been a violation of Article 6 § 1 on account of the unfairness of the proceedings culminating in the decision of the Supreme Court of 14 March 2008.

"Having regard to its finding under Article 6 § 1 of the Convention, the Court found that it was not necessary to examine whether, in this case, there had been a violation of Article 1 of Protocol No. 1.

"The Court held that Ukraine was to pay the applicant 10,000 euro in respect of non-pecuniary damage.

*"**Tajjeb jinghad illi lanqas ma jirrizulta li l-ECHR ghandha setgha li tmur oltre dawk is-setghat li ghandu l-Kumitat tal-Ministri.***

"Fil-kaz ta` ***Bochan v. Ukraine*** *(op. cit.) inghad hekk :-*

"33. The question of compliance by the High Contracting Parties with the Court`s judgments falls outside its jurisdiction if it is not raised in the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5 of the Convention (see The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2), nos. 41561/07 and 20972/08, § 56, 18 October 2011). Under Article 46 § 2,

the Committee of Ministers is vested with the powers to supervise the execution of the Court`s judgments and evaluate the measures taken by respondent States. However, the Committee of Ministers` role in the sphere of execution of the Court`s judgments does not prevent the Court from examining a fresh application concerning measures taken by a respondent State in execution of a judgment if that application contains relevant new information relating to issues undecided by the initial judgment (see Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC], no. 32772/02, §§ 61-63, ECHR 2009).

"34. The relevant general principles were summarised in Egmez v. Cyprus ((dec.), no. 12214/07, §§ 48-56, 18 September 2012), as follows:

"48. The Court reiterates that findings of a violation in its judgments are in principle declaratory (see Krčmář and Others v. the Czech Republic (dec.), no. 69190/01, 30 March 2004; Lyons and Others v. the United Kingdom (dec.), no. 15227/03, ECHR 2003-IX; and Marckx v. Belgium, 13 June 1979, § 58, Series A no. 31) and that, by Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers (see, mutatis mutandis, Papamichalopoulos and Others v. Greece (Article 50), 31 October 1995, § 34, Series A no. 330-B). It follows, inter alia, that a judgment in which the Court finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see Pisano v. Italy (striking out) [GC], no. 36732/97, § 43, 24 October 2002 and Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII). Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court`s judgment (see the above-cited Scozzari and Giunta judgment, § 249). For its part, the Court cannot assume any role in this dialogue (Lyons and Others, cited above).

"49. Although the Court can in certain situations indicate the specific remedy or other measure to be taken by the respondent State (see, for instance, Assanidze v. Georgia [GC], no. 71503/01, point 14 of the operative part, ECHR 2004-II; Gençel v. Turkey, no. 53431/99, § 27, 23 October 2003), it still falls to the Committee of Ministers to evaluate

the implementation of such measures under Article 46 § 2 of the Convention (see Greens and M.T. v. the United Kingdom, nos. 60041/08 and60054/08, § 107, 23 November 2010; Suljagić v. Bosnia and Herzegovina, no. 27912/02, § 61, 3 November 2009; Hutten Czapska v. Poland (friendly settlement) [GC], no. 35014/97, § 42, 28 April 2008; Hutten Czapska v. Poland [GC], no. 35014/97, §§ 231-239 and the operative part, ECHR 2006-VIII); Broniowski v. Poland (friendly settlement) [GC], no. 31443/96, § 42, ECHR 2005-IX; and Broniowski v. Poland [GC], no. 31443/96, §§ 189-194 and the operative part, ECHR 2004-V).

"50. Consequently, the Court has consistently emphasised that it does not have jurisdiction to verify whether a Contracting Party has complied with the obligations imposed on it by one of the Court`s judgments. It has therefore refused to examine complaints concerning the failure by States to execute its judgments, declaring such complaints inadmissible ratione materiae (see Moldovan and Others v. Moldova (dec.), no. 8229/04, 15 February 2011; Dowsett v. the United Kingdom (no. 2) (dec.), no. 8559/08, 4 January 2011; Öcalan v. Turkey (dec.), no. 5980/07, 6 July 2010; Haase v. Germany, no. 11057/02, ECHR 2004 III; Komanický v. Slovakia (dec.), no. 13677/03, 1 March 2005; Lyons and Others, cited above; Krčmář and Others, cited above; and [Fischer] v. Austria (dec.), no. 27569/02, ECHR 2003 VI).

"51. However, the Committee of Ministers` role in this sphere does not mean that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment (see Verein gegen Tierfabriken Schweiz (VgT), cited above, § 62; Hakkar v. France (dec.), no. 43580/04, 7 April 2009; Haase, cited above; Mehemi [v. France (no. 2), no. 53470/99, § 43, ECHR 2003-IV]; Rongoni v. Italy, no. 44531/98, § 13, 25 October 2001; Rando v. Italy, no. 38498/97, § 17, 15 February 2000; Leterme v. France, 29 April 1998, Reports 1998-III; Pailot v. France, 22 April 1998, § 57, Reports 1998-II; and Olsson v. Sweden (no. 2), 27 November 1992, Series A no. 250) and, as such, form the subject of a new application that may be dealt with by the Court.

"52. On that basis, the Court has found that it had the competence to entertain complaints in a number of follow-up cases for example where the domestic authorities have carried out a fresh domestic examination of the case by way of implementation of one of the Court`s judgments whether by reopening of the proceedings (see Emre v. Switzerland (no. 2), no. 5056/10, 11 October 2011, and Hertel [v. Switzerland (dec.), no. 53440/99, ECHR 2002-I]) or by the initiation of [an] entire new set of domestic proceedings (see The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2), nos. 41561/07 and 20972/08, 18

October 2011 and Liu v. Russia (no. 2), no. 29157/09, 26 July 2011).

“53. Moreover, in the specific context of a continuing violation of a Convention right following adoption of a judgment in which the Court has found a violation of that right during a certain period of time, it is not unusual for the Court to examine a second application concerning a violation of that right in the subsequent period (see, amongst others Ivanţoc and Others v. Moldova and Russia, no. 23687/05, §§ 93-96, 15 November 2011 regarding continuing detention; Wasserman v. Russia (no. 2), no. 21071/05, §§ 36-37, 10 April 2008 as to the non-enforcement of a domestic judgment; and Rongoni v. Italy, cited above, § 13, concerning length of proceedings).

“In such cases the `new issue` results from the continuation of the violation that formed the basis of the Court`s initial decision. The examination by the Court, however, is confined to the new periods concerned and any new complaints invoked in this respect (see for example, Ivanţoc and Others, cited above).

“54. It is clear from the Court`s case-law that the determination of the existence of a `new issue` very much depends on the specific circumstances of a given case and that distinctions between cases are not always clear-cut. So, for instance, in the Verein gegen Tierfabriken Schweiz (VgT) case (cited above), the Court found that it was competent to examine a complaint that the domestic court in question had dismissed an application to reopen proceedings following the Court`s judgment.

“The Court relied mainly on the fact that the grounds for dismissing the application were new and therefore constituted relevant new information capable of giving rise to a fresh violation of the Convention (see Verein gegen Tierfabriken Schweiz (VgT), cited above, § 65). It further took into account the fact that the Committee of Ministers had ended its supervision of the execution of the Court`s judgment without taking into account the reopening refusal as it had not been informed of that decision. The Court considered that, from that standpoint also, the refusal in issue constituted a new fact (ibid, § 67). Similarly, in its recent judgment in the case of Emre (cited above) the Court found that a new domestic judgment given following the reopening of the case, and in which the domestic court had proceeded to carry out a new balancing of interests, constituted a new fact. It also observed in this respect that the execution procedure before the Committee of Ministers had not yet commenced. Comparable complaints were, however, dismissed in the cases of Schelling v. Austria (no. 2) (dec.), no. 46128/07, 16 September 2010 and Steck-Risch and Others v. Liechtenstein(dec.) no. 629061//08, 11 May 2010), as the Court considered, that on the facts,

thedecisions of the domestic courts refusing the applications for reopening were notbased on or connected with relevant new grounds capable of giving rise to a fresh violation of the Convention. Further, in Steck-Risch the Court observed that theCommittee of Ministers had ended its supervision of the execution of the Court`sprevious judgment prior to the domestic court`s refusal to reopen the proceedings andwithout relying on the fact that a reopening request could be made. There was norelevant new information in this respect either.

"55. Reference should also be made in this context to the criteria established in thecase-law concerning Article 35 § 2 (b), by which an application is to be declaredinadmissible if it `is substantially the same as a matter that has already been examinedby the Court ... and contains no relevant new information`: (i) an application isconsidered as being `substantially the same` where the parties, the complaints and thefacts are identical (see Verein Gegen Tierfabriken Schweiz (VgT) cited above, § 63 and Pauger v. Austria (dec.), nos. 16717/90 and 24872/94, Commission decisions of9 January 1995); (ii) the concept of complaint is characterised by the facts alleged in itand not merely by the legal grounds or arguments relied on (see Guerra and Othersv. Italy, 19 February 1998, § 44, Reports 1998-I and Powell and Rayner v. the UnitedKingdom, 21 February 1990, § 29, Series A no. 172); and (iii) where the applicantsubmits new information, the application will not be essentially the same as a previous application (see Patera v. the Czech Republic (dec.), no. 25326/03), Commissiondecision of 10 January 1996 and Chappex v. Switzerland (dec.), no. 20338/92,Commission decision of 12 October 1994).

"56. Accordingly, the powers assigned to the Committee of Ministers by Article 46to supervise the execution of the Court`s judgments and evaluate the implementationof the measures taken by the States under this Article will not be encroached on wherethe Court has to deal with relevant new information in the context of a freshapplication (see Verein Gegen Tierfabriken Schweiz (VgT) cited above, § 67)."

"Fil-kaz tal-lum, jista` jkun illi l-Kumitat tal-Ministri ma kienx infurmat bil-proceduri pendenti sabiex l-appell jerga` jitqieghed fuq il-listi sabiex jinstema`, izda din il-Qorti hija tal-fehma li, fic-cirkostanzi ta` dan il-kaz, ma tistax tippermetti li tkun uzata sabiex tkun hi li tirrimedja <u>ghan-nuqqasijiet bil-wisq evidenti tar-rikorrenti</u> meta quddiem l-ECHR m`ghamlu l-ebda talba specifika ghal rimedju sabiex l-appell taghhom quddiem il-Qorti tal-Appell jerga` jitqieghed fuq il-lista.

"Tajjeb jinghad illi fil-kaz tal-lum kien sar appell.

> *"L-appell kien ikopri kemm il-mertu kif ukoll il-kwistjoni li kienet deciza bis-sentenza parzjali tal-Ewwel Qorti tal-1 ta` Dicembru 2003.*
>
> *"Kif svolgew il-fatti, il-Qorti ta` l-Appell fil-waqt opportun sejra tisma` u tiddeciedi l-kaz **kollu**.*
>
> ***"Wara li qieset l-assjem ta` fatti u cirkostanzi, il-Qorti ma ssibx li sehhet jew li sejra ssehh lezjoni tad-drittijiet sanciti bl-Art 13 u 6 tal-Kovenzjoni.***
>
> ***"Fehmet u qieset il-pozizzjoni li hadet l-ECHR.***
>
> ***"Dan premess, din il-Qorti hija ferma fil-fehma illi kieku l-ECHR kienet tal-fehma li kellu jinghata rimedju kif prospettat mir-rikorrenti allura fatt daqstant rilevanti u importanti kien ikun rilevat fid-decizjoni tal-ECHR.***";

6. L-appellanti appellew mill-imsemmija sentenza b'Rikors imressaq fis-16 ta' Ottubru, 2018, li bih u għar-raġunijiet hemm imfissra talbu li din il-Qorti tirrevoka u tħassar is-sentenza appellata u tilqa' t-talbiet tar-rikorrenti, bl-ispejjeż taż-żewġ istanzi kontra l-appellat;

7. B'Risposta mressqa fis-26 ta' Ottubru, 2018, l-intimat appellat laqa' għall-imsemmi appell billi, għar-raġunijiet hemm imfissra, qal li din il-Qorti għandha tiċħad l-appell u tikkonferma s-sentenza appellata bl-ispejjeż taż-żewġ istanzi kontra l-appellanti;

8. Waqt is-smigħ tal-4 ta' Frar, 2019[4], l-avukati tal-appellanti talbu li tnejn mill-imħallfin komponenti din il-Qorti jikkunsidraw jekk kellhomx jastjenu milli jkomplu jagħmlu parti mill-Qorti ladarba kienu jiffurmaw parti minnha meta tat il-provvediment tal-25 ta' Novembru, 2016;

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[4] Paġ., 120 tal-proċess

9. Bi provvediment mogħti fl-4 ta' Marzu, 2019[5], l-imsemija mħallfin astjenew milli jkomplu jisimgħu l-appell;

10. Bis-surroga tal-5 ta' Marzu, 2019, din il-Qorti ġiet kostitwita kif issa komposta;

11. Semgħet it-trattazzjoni tal-appell fid-9 ta' April, 2019;

12. Rat l-atti kollha tal-kawża;

13. Rat li l-appell tħalla għal-lum għas-sentenza;

Ikkunsidrat:

14. Illi l-**aggravji** li fuqhom l-appellanti jsejsu l-appell tagħhom jistgħu, fil-qosor, jinġabru f'dan: (1) li l-ewwel Qorti għamlet apprezzament żbaljat dwar il-materja li kellha quddiemha; (2) li hemm indikazzjonijiet ċari u inekwivoċi illi l-ewwel Qorti ma afferratx sewwa l-materja li nġiebet quddiemha; (3) li s-sentenza appellata injorat dak li ġie ritenut li hemm stipulat fl-artikolu 46 tal-Konvenzjoni; u (4) li l-ewwel Qorti żbaljat ukoll meta qieset li l-Q.E.D.B. mkien ma ordnat li bħala rimedju l-appellanti

[5] Paġġ. 122 – 3 tal-proċess

kellu jerġa' jingħatalhom il-jedd li l-appell tagħhom mis-sentenza preliminari jerġa' jitqiegħed għas-smigħ;

15. Illi, billi l-intimat appellat qal li s-sentenza appellata hija tajba u jistħoqq li tkun konfermata, din il-Qorti qiegħda tifhem li huwa joqgħod għal dik il-parti fejn l-ewwel Qorti ċaħditlu l-eċċezzjoni preliminari tiegħu tal-ġudikat. B'dan il-mod, dik il-parti tas-sentenza appellata torbot liż-żewġ partijiet li, b'hekk, jaċċettaw li ż-żewġ provvedimenti mogħtijin minn din il-Qorti (diversament komposta) fit-28 ta' Settembru 2012 u fil-25 ta' Novembru 2016 kienu digrieti u mhux sentenzi;

16. Illi bl-**ewwel aggravju** tagħhom l-appellanti jilmentaw li l-ewwel Qorti naqset li tħaddem kif jixraq ir-rimedju effettiv li huma kien jixirqilhom jingħataw wara s-sentenza mogħtija mill-Q.E.D.B. fil-każ tagħhom. Jisħqu li, għall-finijiet tal-artikolu 46 tal-Konvenzjoni, biex tassew li dik is-sentenza tkun eżegwita kif imiss, il-Qrati Maltin messhom reġgħu qegħdu għas-smigħ l-appell tagħhom mis-sentenza preliminari li kienet ingħatat fil-kawża prinċipali. Jgħidu li billi tħallsu s-somma imsemmija fis-sentenza tal-Q.E.D.B. il-ksur li ġarrbu dwar il-jedd tagħhom għal smigħ xieraq xorta waħda baqa' ma ssewwiex: biex jissewwa, kellha titħaddem ir-regola tar-*restitutio in integrum.* Iżidu jgħidu li r-raġunijiet ewlenin għaliex it-trattazzjoni tal-appell preliminari jmissu jerġa' jingħatalhom huma: (a) li l-Q.E.D.B. ma setgħet qatt tieħu

b'tagħha s-setgħat tal-Qrati tal-Istat Membru u twaqqaf il-ksur jew li tipprovdi rimedju li kellhom jipprovduh il-Qrati nazzjonali; (b) li r-rimedju ta' kumpens mogħti mill-Q.E.D.B. fis-sentenza tagħha ma kienx jinkludi rimedju talli l-appell preliminari tagħhom kien ġie mwarrab inġustament; (ċ) li t-tqegħid lura tas-smigħ tal-appell preliminari kien u għadu r-rimedju wieħed xieraq biex jitneħħa l-ksur li stab li huma ġarrbu biċ-ċaħda tiegħu; (d) li bil-fatt li s-smigħ tal-kawża prinċipali baqa' sejjer (u issa ngħatat ukoll sentenza fil-mertu) il-ħsara mġarrba minnhom fil-jedd għal smigħ xieraq aktar kibret; u (e) filwaqt li, f'kawżi oħrajn, il-partijiet f'kawża għandhom "żewġ opportunitajiet biex jappellaw", huma tħallew b'opportunità waħda biss u bl-inċertezzi kollha li dan iġib miegħu;

17. Illi għal dan l-aggravju l-appellat Avukat Ġenerali jirribatti billi jgħid li ladarba l-kawża li l-appellanti kienu fetħu quddiem il-Q.E.D.B. kienet ġiet eżegwita, l-ilmenti kollha tagħhom jaqgħu u l-pretensjonijiet tagħhom ta' rimedji oħrajn – b'mod partikolari li l-appell tagħhom mill-eċċezzjoni preliminari jerġa' jitqiegħed għas-smigħ – ma huma bl-ebda mod mistħoqqa. Huwa jgħid li b'qari tas-sentenza mogħtija mill-Q.E.D.B. joħroġ mill-ewwel daqqa t'għajn lir-rimedju mogħti lill-appellanti minn dik il-Qorti kien wieħed ta' kumpens u li tali kumpens tħallas żmien qabel ma l-appellanti fetħu din il-kawża. Iżid jgħid li l-eżekuzzjoni ta' dik is-sentenza ġiet konfermata wkoll mill-Kumitat tal-Ministri tal-Kunsill tal-

Ewropa u għalhekk ma fadal l-ebda rimedju ieħor x'jingħata lill-appellanti minn jew bis-saħħa ta' dik is-sentenza;

18. Illi biex il-Qorti tqis dan l-aggravju jixraq li wieħed jirreferi għall-verbal li sar mill-avukati tal-partijiet waqt is-smigħ tad-19 ta' Ottubru, 2017[6] quddiem l-ewwel Qorti fejn, fost l-oħrajn, huma iddikjaraw li "l-kwestjoni li dwarha trid tiddeċiedi din il-Qorti hija jekk id-deċiżjoni mogħtija minn ECtHR fil-każ ta' Mercieca & Other vs Malta kinitx finali għall-fini ta' eżekuzzjoni inkella le";

19. Illi l-appellanti jqisu li l-ewwel Qorti naqset li tagħraf li s-sentenza mogħtija fil-każ tagħhom mill-Q.E.D.B. kienet sabet ksur tal-jedd tagħhom għal smigħ xieraq u, għalkemm kienet ordnat il-ħlas ta' kumpens, dan ma kienx jindirizza għal kollox ir-rimedju mistenni. Jgħidu wkoll li d-dikjarazzjoni tal-Kumitat tal-Ministri tal-Kunsill tal-Ewropa li s-sentenza tal-Q.E.D.B. kienet ġiet eżegwita ittieħdet minn wara dahar l-istess appellanti u fuq it-tagħrif biss li għoġbu jagħti l-intimat appellat bħala Aġent tal-Istat Malti quddiem dak il-Kumitat. Fuq kollox, huma jilmintaw li l-provvedimenti mogħtijin minn din il-Qorti (fl-2012 u fl-2016) fuq it-talba tagħhom li l-appell preliminari jerġa' jitqiegħed għas-smigħ kienu jissarrfu fin-nuqqas ta' ħarsien tas-sentenza tal-Q.E.D.B. billi din il-Qorti "ma tatniex dik il-parti li mhix spelluta fid-deċiżjoni"[7];

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[6] Paġ. 20 tal-proċess
[7] Sottomissjonijiet tal-avukat tal-appellanti quddiem l-ewwel Qorti f'paġ. 60 tal-proċess

20. Illi din il-Qorti jidhrilha li l-ewwel Qorti żammet għal kollox mal-parametri tal-kwestjoni kif verbalizzata mill-partijiet infushom. Jidher ukoll li kienet iffokata fuq x'ingħad fl-imsemmi verbal għaliex iċ-ċitazzjonijiet estensivi meħuda minn awturi u minn sentenzi oħrajn tal-Q.E.D.B. innifisha ma jħallu l-ebda dubju li l-ewwel Qorti riedet tindirizza l-ilment tal-appellanti sewwasew fuq dak li ngħad. Fil-fehma ta' din il-Qorti, l-ewwel Qorti seħħilha tagħmel dan. Il-fehma li waslet għaliha l-ewwel Qorti ma kinitx dik li stennew l-appellanti. Dan la jfisser li l-ewwel Qorti "ma afferratx il-kwestjoni li kellha quddiemha" u lanqas li ma sabitx tajjeb;

21. Illi din il-Qorti, fid-dawl tal-episodji ġudizzjarji li seħħew f'din il-kawża sa minn meta l-ewwel darba l-appellanti ressqu l-ilmenti tagħhom ta' ksur ta' jeddijiet fundamentali, tqis li l-kwestjoni dwar l-episodju taċ-ċaħda tal-appell preliminari ngħalqet b'mod definittiv hekk kif il-Q.E.D.B. tat is-sentenza tagħha f'Ġunju tal-2011. L-eżekuzzjoni ta' dik is-sentenza ngħalqet hekk kif l-Istat Malti wera li qagħad għal dik is-sentenza u wettaq il-ħlas tal-kumpens lill-appellanti, ġrajja li huma ma jiċħdux li saret. Kull pretensjoni oħra li huma jippretendu f'din il-kawża taħt il-kawżali tar-'*restitutio in integrum*' tmur lil hinn mill-kwestjoni dwar jekk is-sentenza mogħtija mill-Q.E.D.B. kinitx tabilħaqq eżegwita. Din il-Qorti, bħall-ewwel Qorti qabilha, ma tarax li s-sentenza tal-Q.E.D.B.

kienet ħalliet mhux magħluqa u wisq ordnat li l-appell preliminari li kien twarrab kellu jerġa' jitqiegħed għad-smigħ. Waqt is-sottomissjonijiet ulterjuri tal-kawża quddiem l-ewwel Qorti[8], l-għaref difensur tal-appellanti nnifsu qal li l-Q.E.D.B ma kellhiex is-setgħa li tinċidi fuq is-sovranità tal-Qrati nazzjonali u tiddettalhom x'imisshom jew x'ma jmisshomx jagħmlu wara li tkun tat sentenza b'riferenza għal dak l-Istat[9];

22. Illi dan ifisser li lanqas jista' jkun allura li, kif jilmentaw l-appellanti, kien hemm xi direttiva implikata tal-Q.E.D.B. lill-Istat Malti jew lill-Qrati tiegħu li, biex jingħata rimedju, l-appell preliminari tagħhom li kien twarrab kellu jerġa' jitqiegħed għas-smigħ. Dan il-fatt qisitu din il-Qorti diversament komposta fid-digrieti tagħha ta' Settembru 2012 u ta' Novembru 2016. Lil hinn minn hekk, jidher li l-argument tad-difensur tal-appellanti lanqas ma huwa minnu għaliex l-ewwel Qorti iċċitat siltiet minn sentenzi fejn il-Q.E.D.B. nnifisha ordnat b'mod speċifiku, f'każijiet oħrajn kontra Stati oħrajn, rimedji speċifiċi taħt il-kawżali tar-'*restitutio in integrum*'. Jekk dan huwa minnu, il-Q.E.D.B. għandha allura s-setgħa li tordna tali rimedji. F'dan il-każ ma sarx ordni f'dan is-sens, kif sewwa sabet l-ewwel Qorti li kien il-każ. Jekk l-appellanti kinux talbu espressament dan ir-rimedju jew le meta ressqu l-każ tagħhom quddiem il-Q.E.D.B. ma jirriżultax mill-atti, imma l-fatt hu li l-Q.E.D.B. tat ir-rimedju li tat u dak ir-rimedju twettaq mill-Istat Malti;

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[8] *Ibid.* f'paġ. 58 tal-proċess
[9] Dan tennewh f'§§ 1.5, 2.4 u 3.2 tar-Rikors tal-Appell tagħhom f'paġġ. 104, 107 u 108 tal-proċess

23. Illi għal dawn ir-raġunijiet, l-ewwel aggravju ma jirriżultax mistħoqq u mhux sejjer jintlaqa';

24. Illi bit-**tieni aggravju** l-appellanti jgħidu li l-ewwel Qorti ma afferratx sewwa l-materja li kellha quddiemha. Huma jagħtu lista ta' ċirkostanzi fejn jaraw li dan seħħ matul is-sentenza appellata. Iqisu li bosta mill-kunsiderazzjonijiet u riferenzi li saru mill-ewwel Qorti jixhdu li hija ma kinitx fehmet sewwa x'kienu issottomettewlha jew x'jinvolvu l-prinċipji li fuqhom sejsu l-każ tagħhom. Itennu li ma hemm xejn x'iżomm milli l-appell preliminari tagħhom jerġa' jitqiegħed għas-smigħ biex tassew ikunu ngħataw rimedju sħiħ u effettiv għall-ksur tal-jedd fundamentali mġarrab minnhom. Iqisu li kull problema naxxenti fil-livell domestiku li qiegħda toħloq dan it-tfixkil biex jingħata lura l-appell imwarrab imissha titqies bħala xejn iżjed minn problema *de facto*;

25. Illi din il-Qorti tara li dan l-aggravju jixxiebah ma' dak ta' qablu u jerġa' jqanqal kwestjonijiet bħalu. Is-siltiet mis-sentenza appellata li l-appellanti jsemmu biex isostnu l-aggravju tagħhom ma jqisux il-fatt li l-ewwel Qorti nqdiet b'siltiet oħrajn wisq aktar rilevanti li jindirizzaw il-kwestjoni li kellha quddiemha. Minbarra dan, l-ewwel Qorti għamlet ukoll raġunament proprju dwar dak li kienu qegħdin jitolbuha l-appellanti u kemm kien mistħoqq. Lanqas ma jista' jkun traskurat il-fatt li, meta l-

appellanti fetħu din il-kawża, il-kawża prinċipali kien ilha maqtugħa fil-mertu mill-ewwel istanza minn tal-anqas tliet snin u nofs u kemm l-appellanti f'din il-kawża u kif ukoll il-parti l-oħra appellaw minnha. Għalhekk, sakemm l-appellanti ma jridux jgħidu li l-ewwel Qorti messha ordnat it-tħassir tas-sentenza mogħtija fil-kawża prinċipali wkoll, il-kwestjoni dwar jekk is-sentenza mogħtija mill-Q.E.D.B kinitx ġiet esegwita jew le trid titqies ukoll fil-qafas ta' din ir-rejaltà proċedurali fattwali;

26. Illi, mill-bqija, il-kunsiderazzjonijiet li għamlet din il-Qorti dwar l-ewwel aggravju ttennihom f'dan ukoll u b'hekk tqis li lanqas dan it-tieni aggravju ma huwa tajjeb u sejra tiċħdu;

27. Illi fit-**tielet aggravju** l-appellanti jgħidu li l-ewwel Qorti ma qieset xejn x'jgħid l-artikolu 46 tal-Konvenzjoni, u jerġgħu jsemmu siltiet mis-sentenza appellata fejn, fil-fehma tagħhom, seħħ dan in-nuqqas.

28. Illi l-artikolu 46 tal-Konvenzjoni jgħid hekk:

> "*(1) Il-Partijiet Għolja Kontraenti jimpenjaw ruħhom jirrispettaw is-sentenza finali tal-Qorti fi kwalunkwe każ li jkunu parti fih.*
> "*(2) Is-sentenza finali tal-Qorti għandha tiġi trasmessa lill-Kumitat tal-Ministri, li għandu jissorvelja l-eżekuzzjoni tagħha.*
> "*(3) Jekk il-Kumitat tal-Ministri jikkonsidra li s-superviżjoni ta' sentenza finali qed jiġi mxekkel b'xi problema ta' interpretazzjoni tas-sentenza, jista' jirreferi l-kwistjoni lill-Qorti sabiex tieħu deċiżjoni fuq tali interpretazzjoni. Deċiżjoni ta' riferenza teħtieġ*

vot ta' maġġoranza ta' żewġ terzi tar-rappreżentanti titolari tal-kumitat.
"(4) Jekk il-Kumitat tal-Ministri jikkonsidra li xi Parti Għolja Kontraenti tirrifjuta li tirrispetta s-sentenza finali f'każ li tkun parti fih, dan il-Kumitat, wara li jibgħat notifika formali lil dik il-parti u permezz ta' deċiżjoni adottata b'vot ta' maġġoranza ta' żewġ terzi tar-rappreżentanti titolari tal-kumitat, jista' jirreferi lill-Qorti l-mistoqsija jekk din il-Parti naqsitx milli twettaq l-obbligi tagħha taħt il-paragrafu 1.
"*(5) Jekk il-Qorti ssib ksur tal-paragrafu 1, hi għandha tirreferi l-każ lill-Kumitat tal-Ministrisabiex jikkonsidra liema miżuri għandhom jittieħdu. Jekk il-Qorti ma ssib l-ebda ksur tal-paragrafu 1, hi għandha tirreferi l-każ lill-Kumitat tal-Ministri sabiex jagħlaq l-eżami tiegħu tal-każ.*"[10];

29. Illi din il-Qorti tibda biex tgħid li l-argument tal-appellanti dwar dan l-aggravju ma jreġix u anqas jissaħħaħ sempliċement billi jisiltu bran ċkejken minn silta wisq itwal u jaqilgħuh mill-kuntest li fih ingħad. Fit-tieni lok, il-fatt li l-Q.E.D.B. ma ordnatx li l-appell preliminari jerġa' jitqiegħed għas-smigħ ma kien bl-ebda mod ifisser li dan ħalla miftuħa l-kwestjoni tal-imsemmi artikolu 46 u ħalla bħala mhix esegwita s-sentenza mogħtija minn dik il-Qorti. Għar-raġunijiet li ssemmew qabel f'din is-sentenza[11], din il-Qorti ma taqbilx mas-sottomissjoni tal-appellanti f'dan ir-rigward. Fit-tielet lok, f'xi wħud mis-siltiet magħżula mill-ewwel Qorti, ingħata ħjiel ta' x'inhuma l-limiti tar-regola mħaddna fil-artikolu msemmi u aktar u aktar fir-regola tar-'*restitutio in integrum*' meta ċ-ċirkostanzi jkunu tali li jżommu milli tali rimedju jingħata. Dan ifisser li mhuwiex minnu, kif jargumentaw l-appellanti, li r-regola tar-restituzzjoni sħiħa titħaddem dejjem u tabilfors bla ebda kwalifika. Fir-raba' lok, l-ewwel Qorti fissret ukoll il-kwestjoni tal-eżekuzzjoni tas-sentenza

[10] Pubblikazzjoni tal-Kunsill tal-Ewropa (verżjoni fl-ilsien Malti)
[11] §§ 21 – 2 *supra*

mogħtija mill-Q.E.D.B. fil-każ tal-appellanti billi semmiet ir-Riżoluzzjoni mgħoddija mill-Kumitat tal-Ministri f'Mejju tal-2013 u l-għeluq tal-eżami dwar dik l-eżekuzzjoni. Fir-rapport imressaq mill-Istat Malti (u li jinsab mehmuż mal-imsemmija Riżoluzzjoni), jingħad bla ebda ħjiel ta' dubju li ma kienx ingħata s-smigħ mill-ġdid tal-appell imwarrab u ngħad ukoll li l-appellanti ma ntmessilhomx il-jedd li jistgħu jressqu l-appell wara l-għoti tas-sentenza aħħarija fil-kawża prinċipali. Fi kliem ieħor, għall-finijiet tal-artikolu 46 tal-Konvenzjoni, ir-Riżoluzzjoni sabet li s-sentenza tal-Q.E.B.D. kienet eżegwita minkejja li lill-appellanti ma kienx ingħatalhom li l-appell preliminari tagħhom jerġa' jitqiegħed fuq il-lista tas-smigħ mill-ġdid. Dan kien dak li ntalbet tiddetermina l-ewwel Qorti fis-sentenza appellata u dan kien dak li sabet li sar. Dan kollu jixhed li dik il-Qorti qieset sewwa t-tħaddim tal-artikolu msemmi;

30. Illi għal dawn ir-raġunijiet, il-Qorti tasal għall-fehma lilanqas dan it-tielet aggravju ma huwa mistħoqq u mhix se tilqgħu;

31. Illi fir-**raba' aggravju** l-appellanti jgħidu li bil-mod kif din il-Qorti (fid-digrieti li bihom ċaħdet it-talba tagħhom li terġa' tqiegħed l-appell preliminari mill-ġdid għas-smigħ) u l-ewwel Qorti fis-sentenza appellata huma ċċaħħdu minn benefiċċju li kull parti oħra f'kull kawża jingħatalha – dak li jkollha rimedju fiż-żewġ istanzi. Iżidu jgħidu li l-kwestjoni tal-kompetenza ħarbitilha għal kollox lill-ewwel Qorti;

32. Illi din il-Qorti hija tal-fehma li dan l-aggravju huma msejjes fuq premessa ħażina. Ma huwiex minnu li, fis-smigħ ta' kull kawża li titmexxa quddiem il-Qrati Maltin fil-kompetenza ċivili tagħhom, li jeżisti xi jedd ta' żewġ appelli fuq l-istess ħaġa, fl-ewwel u fit-tieni istanza. Bil-fatt li, tajjeb jew ħażin, l-appell preliminari tagħhom twarrab għaliex ingħad li tressaq wara ż-żmien, l-appellanti baqalhom bla mittiefes il-jedd li jqajmu l-aggravju issa li l-kawża prinċipali nqatgħet fuq il-mertu wkoll. Din il-Qorti għandha għaliex tifhem li l-appellanti nqdew minn dan il-jedd meta ressqu l-appell tagħhom mis-sentenza tal-ewwel istanza fil-kawża prinċipali. Min-naħa l-oħra, li kieku l-appell preliminari tagħhom ingħata smigħ u ngħatat is-sentenza dwaru, ma kien ikun hemm l-ebda jedd għall-appellanti li jistgħu jerġgħu jqajmu l-istess aggravju fit-tieni istanza wkoll. Għalhekk lanqas ma huwa tajjeb l-argument tal-appellanti li tqiegħdu f'sitwazzjoni ta' preġudizzju fil-konfront ta' ħaddieħor minħabba f'dak li ġara;

33. Illi ladarba l-kawża prinċipali tinsab fl-istadju li hi, ma jista' jibdel xejn mill-fatt li l-appellanti għaddew mill-proċess kollu tal-kawża prinċipali u ta' dan il-Q.E.D.B. tathom il-kumpens li dehrilha li kien jixraq. Huwa f'dan id-dawl li toħroġ it-tifsira xierqa tal-paragrafu ħamsin (50) tas-sentenza mogħtija fil-każ tagħhom minn dik il-Qorti. Kull tifsira oħra

li l-appellanti jittantaw jisiltu minn dak il-paragrafu, fil-fehma tal-Qorti, huwa argument li lanqas kien fil-ħsieb ta' dik il-Qorti;

34. Illi minħabba f'hekk ukoll, lanqas dan l-aggravju ma jistħoqqlu jintlaqa' u l-Qorti qiegħda twarrbu;

Decide:

35. Għal dawn ir-raġunijiet il-Qorti qiegħda taqta' u tiddeċiedi billi:

Tiċħad l-appell u tikkonferma għal kollox is-sentenza mogħtija mill-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) fis-27 ta' Settembru, 2018, fil-kawża fl-ismijiet premessi, **bl-ispejjeż** ta' din l-istanza kontra l-appellanti, filwaqt l-ispejjeż tal-ewwel istanza jibqgħu kif deċiżi fis-sentenza appellata.

Joseph Azzopardi
Prim Imħallef

Joseph R Micallef
Imħallef

Tonio Mallia
Imħallef

Deputat Reġistratur
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