QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON

Illum it-Tlieta 30 ta` Gunju 2020

Kawza Nru. 2
Rik. Nru. 92/2019 JZM

Simone Galea (K.I. 0084660M) u Dorothy Borg (K.I. 0196633M)

kontra

Avukat Generali u b` digriet tas-27 ta` Jannar 2020 l-isem "Avukat Generali" gie jaqra "Avukat tal-Istat"

u

Anthony (K.I. 0455244M) u Mary Bridget (K.I. 0281201L) konjugi Vella

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fis-6 ta` Gunju 2019 li jaqra hekk :–

i. llli zewg u missier ir-rikorrenti odjerni, Ivan Borg, kien proprjetarju tal-fond 100/6, Triq Nicolo` Isouard, Tas-Sliema li huwa ta b`kera lill-intimati konjugi Vella circa erbghin sena ilu.

ii. llli missier u zewg ir-rikorrenti Ivan Borg miet fit-8 ta`Dicembru 2017 u l-wirt tieghu ddevolva b`testment unica charta fl-atti tan-Nutar Dottor Mario Rosario Bonello datata d-9 ta` Settembru 2015 li qed jigi hawn anness u mmarkat bhala "Dokument A".

iii. llli r-rikorrenti ddikjaraw b`kuntratt causa mortis fl-atti tan-Nutar Dottor Rossella Soler datat is-27 ta` Novembru 2018 il-fond de quo lill-Kummissarju tat-Taxxi Interni u hallsu t-taxxa dovuta skont il-Ligi u dan kif jirrizulta minn "Dokument B" hawn anness.

iv. llli din il-kirja tirrisali ghas-snin tas-sebghinijiet fejn l-intimati konjugi Vella llum il-gurnata qed ihallsu kera irrizorja ta` €1,080 fis-sena, meta l-valur lokatizzju tal-fond fis-suq huwa ferm aktar gholi minn dak stabbilit bid-disposizzjonijiet tal-Kap 69 tal-Ligijiet ta` Malta, liema disposizzjonijiet gew mibdula bi ftit bl-Att X tal-2009.

v. llli l-fond de quo proprjeta` tar-rikorrenti mhux fond dekontrollat kif jirrizulta mid-"Dokument C" hawn anness, u kien soggett ghar-rekwizizzjoni kif wkoll ghall-`fair rent` a tenur tar-`Rent Restriction Dwelling Housing Ordinance 1944` u cioe` tal-Ordinanza XVI tal-1944 li flimkien mal-Kap 69 tal-Ligijiet ta` Malta li jistabbilixxu l-`fair rent` a tenur tal-Artikolu 3 u 4 tal-istess Ordinanza liema `fair rent` a tenur tal-Kap 69 tal-Ligijiet ta` Malta ma seta` qatt jeccedi dak li hemm stipulat fl-Artikolu 4 tal-istess Kap 69 tal-Ligijiet ta` Malta ossija kumpens ta` kera kif stabbilit bil-ligi jekk il-fond kien inkera f`kull zmien qabel l-4 ta` Awwissu 1914.

vi. llli ghalhekk din il-kirja kienet forzuza fuq ir-rikorrenti u mhux volontarja stante illi kieku huma krew il-fond b` kera tas-suq fl-1970 l-Bord li Jirregola l-Kera kien inaqqas il-kirja ghal dak li l-fond kien jinkera f`kull zmien qabel l-4 ta` Awwissu 1914 abbazi tal-ligijiet fuq indikati.

vii. Illi l-fond imsemmi bl-emendi tal-Att X tat-2009 illum ghandu kera ta` €1,080 fis-sena ai termini tal-Artikolu 1531C tal-Kap 16 tal-Ligijiet ta` Malta u ai termini tal-istess ligi, r-rata tal-kera ghandha tizdied kull tliet snin b`mod propozjonali ghal mod li bih ikun jizdied l-Indici ta` Inflazzjoni skont l-Artikolu XIII tal-Ordinanza li Tnehhi l-Kontroll tad-Djar bl-awment li jmiss fl-1 ta` Jannar 2022.

viii. Illi l-protezzjoni moghtija lill-inkwilini bid-dispozizzjonijiet tal-Kap 69 tal-Ligijiet ta` Malta u tal-Att X tal-2009 mhumiex gusti u ma jikkreawx bilanc ta` proporzjonalita` bejn id-drittijiet tas-sid u dawk tal-inkwilin stante li l-valur lokatizzju tal-fond huwa ferm oghla minn dak stabbilit fil-ligi u ghalhekk huma bi ksur tal-Kostituzzjoni ta` Malta u tal-Ewwel Artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropea u tal-Artikolu (14) tal-Konvenzjoni u l-antekawza tar-rikorrenti ma kellu l-ebda alternattiva biex jiehu hsieb hwejgu u biex jevita r-rekwizizzjoni.

ix. Illi l-lokazzjoni tal-fond b`kera irrizorja kienet l-unika ghazla li l-antekawza tar-rikorrenti kellu jekk huwa ried izzomm l-proprjeta` tieghu u ma jbieghx kif kellu dritt taghmel.

x. Illi l-livell baxx tal-kera, l-istat tal-incertezza tal-possibilita` tat-tehid lura tal-proprjeta`, in-nuqqas ta` salvagwardji procedurali, iz-zieda fil-livell tal-ghejxien f`Malta f`dawn l-ahhar decenni u l-interferenza sproporzjonata bejn id-drittijiet tas-sid u dawk tal-inkwilini ikkreaw piz eccessiv fuq ir-rikonenti.

xi. Illi r-rikorrenti m`ghandhomx rimedju effettiv ai termini tal-Artikolu 14 tal-Konvenzjoni Ewropea stante illi huma ma jistghux izidu il-kera b`mod ekwu u gust skont il-valur tas-suq illum stante illi dak li effettivament huma jistghu jircievu huwa dak kif limitat bl-artikolu 1531C tal-Kap, 16 tal-Ligijiet ta` Malta.

xii. Illi dan kollu gja gie determinat fil-kawzi Amato Gauci Vs Malta no. 47045/06 deciza mill-Qorti Ewropea tad-Drittijiet Fundamentali tal-Bniedem fil-15 ta` Settembru 2009 u Lindheim and others Vs Norway nru.13221/08 u 2139/10 deciza fit-12 ta` Gunju 2012 u Zammit and Attard Cassar vs Malta applikazzjonu nru. 1046/12 deciza fit-30 ta` Lulju 2015.

xii. Illi galadarba r-rikorrenti qed jsofru minn nuqqas ta` "fair balance" bejn l-interessi generali tal-komunita` u l-bzonnijiet u protezzjoni tad-drittijiet fundamentali tal-bniedem kif deciz b`Beyeler vs Italy nru.33202/96, J.A, Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd vs the United Kingdom [GC], nru. 44302/02, § 75, ECHR 2007-lll) u ghalhekk il-principju ta` proporzjonalita` kif gie deciz f`Almeida Ferreira and Melo Ferreira vs Portugal nru. 41696/07 § 27 u 44 tal-21 ta` Dicembru 2010.

xiv. Illi r-regolamenti ta` kontroll tal-kera huma interferenza mad-dritt tas-sid ghall-uzu tal-proprjeta` taghhom stante illi dawn l-iskemi ta` kontroll tal-kera u restrizzjonijiet fuq id-dritt tas-sid li jittermina l-kirja tal-inkwilin u wisq inqas ta` min qed jipprova jippresta lilu nnifsu bhala inkwilin meta mhuwiex jikkostitwixxi kontroll tal-uzu tal-proprjeta` fit-termini tat-tieni paragrafu tal-Ewwel Artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropea (vide Hutten-Czapska vs Poland [GC], nru, 35014/97, §§ 160-161, ECHR2006-Vlll, Bitto and Others vs Slovakia, nru.30255/09, § 101, 28 ta` Jannar 2014 u R&L, s.r.o, and Others §108).

xv. llli inoltre, il-ligi hija diskriminatorja bejn dak li hemm dispost fl-Artikolu 1531C tal-Kap 16 tal-Ligijiet ta` Malta u tal-Kap. 69 tal-Ligijiet ta` Malta u dak li jiddisponi l-Att XXXI tal-1995 ghal kirjiet li dahlu fis-sehh wara l-1 ta` Gunju 2005.

xvi. llli din hija wkoll diskriminatorja sia ai termini tal-Artikolu 45 tal-Kostituzzjoni ta` Malta u l-Artikolu 14 tal-Konvenzjoni Ewropea.

xvii. llli l-valur lokatizju tal-post huwa ferm oghla minn dak li l-ligi imponiet li r-rikorrenti ghandhom jircievu b` tali mod illi bid-dispozizzjonijiet tal-Artikolu 34, 37 u 45 tal-Kostituzzjoni ta` Malta u l-Artikolu 14 u l-Artikolu l tal-Ewwel Protokol tal-Konvenzjoni Ewropea il-Kap, 69 tal-Ligijiet ta` Malta kif emendat bl-Att XXXI tal-1995 u l-emendi li saru bl-Att X tal-2009 mhux biss ikkawzaw diskriminazzjoni bejn ulied il-wild u ohrajn kif stipulat fl-artikolu 1531F tal-Kap. 16 tal-Ligijiet ta` Malta imma wkoll jilledi d-drittijiet kostituzzjonali kif protetti taht l-Artikolu tal-Kostituzzjoni ta` Malta, kif ukoll tal-Artikolu 1 u 14 tal-Protocol Nru, 1 u l-Artikolu 6 tal-Konvenzjoni Ewropea u ghalhekk il-Ligi fuq imsemmija ghandha tigi ddikjarata anti-

kostituzzjonali u ghandha tigi emendata, kif del resto diga gie deciz mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kawza Amato Gauci vs. Malta - deciza fil-15 ta` Settembru 2009 u Zammit and Attard Cassar vs Malta deciza fit-30 ta`Lulju 2015 mill-Qorti Ewropea tad-Drittijiet Fundamentali tal-Bniedem.

xviii. llli l-Qorti Ewropea tad-Drittijiet tal-Bniedem diga kellha okkazjoni tikkummenta f`kazi li rrigwardjaw lil Malta li ghalkemm m`hemmx dubju li l-Istat ghandu dover u allura d-dritt li jintervjeni biex jassikura abitazzjoni decenti lil min ma jistax ikollu dan bil-mezzi tieghu stess, li ndividwu jigi privat mill-uzu liberu tal-proprjeta` ghal hafna snin u fil-frattemp jircievi kera mizera, jammonta ghall-ksur tad-dritt in kwistjoni. Fil-kawza "Ghigo vs Malta, deciza fis-26 ta` Settembru 2006, il-Qorti sabet li jezisti l-ksur tad-dritt in kwistjoni ghaliex ir-rikorrenti gie privat mill-proprjeta` tieghu tnejn u ghoxrin (22) sena qabel u kien jircievi hamsa u hamsin (55) Euro fis-sena bhala kera.

xix. Fis-sentenza "Freri Soler et vs Malta" moghtija fl-istess data, l-istess Qorti sabet li d-dritt fundamentati tar-rikorrenti gie lez u allura qalbet sentenza tal-Qorti Kostituzzjonali ta` Malta kif gara wkoll fil-kawza ta` Franco Buttigieg & Others vs Malta" deciza mir-Qorti Ewropea tad-Drittijjiet Fundamentali tal-11 ta` Dicembru 2018 u "Albert Cassar vs Malta" deciza mill-Qorti Ewropea tad-Drittijiet Fundamentali tal-Bniedem fit-30 ta` Jannar 2018.

xx. llli fil-kawza suneferita "Fleri Soler & Camilleri vs Malta" l-Qorti qalet "Not only must an interference with the right of properly pursue, on the facts as well as in principle, a "legitimate aim" in the "general interest", but there must also be `a reasonable relation of proportionality` between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of the individual`s property. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights.

xxi. llli b`sentenza deciza mill-Prim` Awla tal-Qorti Civili (Sede Kostituzzjonali), Rikors Nru. 89/18 LM fl-ismijiet Anthony Debono et vs l-Avukat Generali et, fit-8 ta` Mejju 2019, din l-Onorabbli Qorti ddecidiet illi l-Kap. 69 tal-Ligijiet ta` Malta u l-emendi tal-Att X tal-

2009 jilledu d-drittijiet kostituzzjonali tas-sidien stante li ma nzammx propozjon bejn id-drittijiet tas-sid u dawk tal-inkwilin, u li s-sidien mhux qed jircievu l-kera gusta fis-suq, biex b`hekk l-Avukat Generali gie kkundannat jhallas danni ta` €20,000 lir-rikorrenti oltre l-ispejjez kollha tal-kawza,

xxii. llli in vista tal-kazistika surreferita, sahansitra dik tal-Qorti Ewropea tad-Drittijiet tal-Bniedem, certament li ma hemm ebda dubju li din l-Onorabbli Qorti ghandha tiddeciedi l-kawza odjerna billi ssib illi r-rikorrenti nkisrilhom id-dritt fundamentali taghhom sancit bl-imsemmi Artikolu 1 tal-Ewwel Protokol tal-Konvenzjoni Ewropea u tal-Artikolu 37 tal-Kostituzzjoni ta` Malta.

Ghaldaqstant ir-rikorrrent jitolbu bir-rispett lil din l-Onorabbli Qorti prevja kwalsiasi dikjarazzjoni necessarja u opportuna u ghar-ragunijiet premessi jghidu l-intimati ghaliex m`ghandhiex:

1. Tiddikjara u Tiddeciedi illi fil-konfront tar-rikorrenti l-operazzjonijiet tal-Ordinanza li Tirregola l-Tigdid tal-Kiri tal-Bini ossija l-Kap. 69 tal-Ligijiet ta` Malta u tal-Att X tal-2009 u bl-operazzjonijiet tal-Ligijiet vigenti qeghdin jaghtu dritt ta` rilokazzjoni lill-intimati Anthony u Mary Bridget konjugi Vella tal-fond 100/6, Triq Nicolo` Isouard, Tas-Sliema, waqt li qed jigu vjolati d-drittijiet fundamentali tar-rikorrenti kif sanciti bl-Artikolu 37 tal-Kostituzzjoni ta` Malta, u l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni Ewropea (l-Ewwel Skeda tal-Kap, 319 tal-Ligijiet ta` Malta) u tal-Artikolu 14 tal-istess Konvenzjoni, u ghar-ragunijiet fuq esposti u ta` dawk li ser jirrizultaw waqt it-trattazzjoni ta` dan ir-rikors ir-rikorrenti ghandha tinghata r-rimedji kollha li din l-Onorabbli Qorti jidhrilha xierqa fis-sitwazzjoni inkuz l-izgumbrament tal-intimati Anthony u Mary Bridget konjugi Vella mill-fond de quo.

2. Tiddikjara u Tiddeciedi illi l-intimat Avukat Generali huwa responsabbli ghal kumpens u danni sofferti mir-rikorrenti b` konsegwenza tal-operazzjonijiet tal-Kap, 69 tal-Ligijiet ta` Malta u tal-Att X tal-2009 talli ma giex kreat bilanc bejn id-drittijiet tas-sid u dawk tal-inkwilin stante li ma jirriflettux is-suq u l-anqas il-valur lokatizzju tal-proprjeta` in kwistjoni wkoll ai termini tal-Ligi.

3. Tillikwida l-istess kumpens u danni kif sofferti mir-rikorrenti, ai termini tal-Ligi

4. Tikkundanna lill-intimat Avukat Generali jhallas l-istess kumpens u danni likwidati ai termini tal-Ligi.

Bl-ispejjez, komprizi dawk tal-ittra ufficjali tal-15 ta` Mejju 2019 li kopja taghha qed tigi hawn annessa u mmarkata bhala "Dokument D" u bl-ingunzjoni tal-intimati ghas-subizzjoni.

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat ir-risposta li pprezenta l-Avukat Generali fl-24 ta` Gunju 2019 li taqra hekk :-

1. Illi preliminarjament, ir-rikorrenti ghandhom igibu prova cara tat-titolu sabiex juru li huma s-sidien tal-fond in kwistjoni kif qed jallegaw fir-rikors promutur. F`dan ir-rigward ghandhom jindikaw id-data preciza ta` meta saru sidien ghaliex l-ilment kostituzzjonali u konvenzjonali taghhom jista` jigi kkunsidrat mid-data ta` meta r-rikorrenti saru proprjetarji tal-fond mertu ta` dan il-kaz.

2. Illi preliminarjament ukoll, ghandhom jigu ndikati l-artikoli mill-Kap. 69 u jew minn xi Att iehor, li skont ir-rikorrenti qed jiksrulhom id-drittijiet fundamentali taghhom ghat-tgawdija tal-proprjetà msemmija.

3. Illi fil-mertu, it-talbiet tar-rikorrenti ghandhom jigu michuda in toto peress li huma infondati fil-fatt u fid-dritt u dan ghar-ragunijiet segwenti li qed jigu hawn elenkati minghajr pregudizzju ghal xulxin :

Rigward l-Artikolu 37 tal-Kostituzzjoni u l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni :

4. Illi peress li r-rikorrenti qed jinvokaw il-protezzjoni tal-Artikolu 37 tal-Kostituzzjoni, l-esponent qed jeccepixxi l-improponibilità tal-Artikolu 37 tal-Kostituzzjoni u dan ghal zewg ragunijiet principali :

a) L-ewwel ghaliex il-kirja mertu ta` dan il-kaz hija mharsa bil-Kap. 69 tal-Ligijiet ta` Malta li hija ligi li dahlet fis-sehh fid-19 ta` Gunju 1931 u skont ma` jipprovdi l-artikolu 47(9) tal-Kostituzzjoni: "Ebda haga fl-artikolu 37 ta` din il-Kostituzzjoni ma ghandha tolqot il-hdim ta` xi ligi fis-sehh minnufih qabel it-3 ta` Marzu 1962 jew xi ligi maghmula fi jew wara dik id-data li temenda jew tissostitwixxi xi ligi fis-sehh minnufih qabel dik id-data (jew xi ligi li minn zmien ghal zmien tkun emendata jew sostitwita bil-mod deskritt f`dan is-subartikolu) …"

b) It-tieni ghaliex dan l-artikolu 37 jitkellem biss dwar tehid forzuz, jigifieri b`mod obbligatorju, u dan minghajr ma jaghmel referenza ghad-dritt tat-tgawdija tal-proprjetà – kuntrarjament ghal dak li jaghmel l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni Ewropea. Isegwi ghalhekk li l-Artikolu 37 joffri harsien lil dak li jkun unikament meta hemm tehid tal-proprjetà minhabba xi effett ta` xi att tal-Istat. Skont din id-disposizzjoni tal-Kostituzzjoni, l-istess protezzjoni mhix moghtija meta jkun hemm interferenza fid-dritt ghat-tgawdija pacifika tal-proprjetà. Skont din id-disposizzjoni tal-Kostituzzjoni, l-istess protezzjoni mhix moghtija meta jkun hemm interferenza fid-dritt ghat-tgawdija pacifika tal-proprjetà. Illi l-Qorti Kostituzzjonali fis-sentenza fl-ismijiet Nazzareno Galea et vs Giuseppe Briffa deciza fit-30 ta` Novembru 2001, osservat illi :

"Una volta din il-Qorti waslet ghall-konvinciment illi l-kaz taht ezami hu wiehed ta` privazzjoni tat-tgawdija u mhux ta` tehid tal-proprjeta` u konsegwentement ma jaqax fl-orbita` tal-Aritkolu 37, mhux il-kaz li tinvestiga oltre jekk il-kumpens mil-ligi stabbilit ghal dik il-`privazzjoni tat-tgawdija` kienx wiehed xieraq".

5. Sabiex wiehed jista` jitkellem dwar tehid forzuz jew obbligatorju, persuna trid tigi zvestita jew spussessata minn kull dritt li ghandha fuq dik il-proprjetà. Huwa evidenti li fil-kaz prezenti, tali zvestiment ma sarx u dan peress li bil-kirja r-rikorrenti ma tilfitx ghal kollox il-jeddijiet taghha fuq il-fond in kwistjoni u ghalhekk dan il-kaz ma jammontax ghal deprivazzjoni totali tal-proprjetà. Illi tajjeb li jigi nnutat li l-Istat ha mizura li tinkwadra ruhha taht kontroll ta` uzu fejn irregolarizza sitwazzjoni ta` natura socjali fl-ambitu tal-gid komuni b`dana però li jibqghu mpregudikati d-drittijet tas-sidien qua proprjetarji tal-fond. Fid-dawl ta` dan kollu, l-ilment tar-rikorrenti ma jinkwadrax ruhu fil-parametri tal-artikolu 37 tal-Kostituzzjoni u ghandu jigi michud.

6. Illi minghajr pregudizzju ghall-paragrafu precedenti, dato ma non concesso li l-artikolu 37 japplika ghal dan il-kaz, xorta wahda ma hemm ebda ksur tal-Artikolu 37 tal-Kostituzzjoni u tal-Ewwel Artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropea stante li l-fatti tal-kaz prezenti ma jikkostitwixxux tehid forzuz jew obbligatorju tal-proprjetà izda jikkostitwixxu biss kontroll ta` uzu ta` proprjetà fil-parametri tal-Kostituzzjoni u tal-Konvenzjoni Ewropea.

7. Illi safejn l-ilment tar-rikorrenti huwa msejjes fuq l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni Ewropea, l-esponenti jirrileva li skont il-proviso tal-istess artikolu, l-Istat ghandu kull jedd li jghaddi dawk il-ligijiet li jidhrulu xierqa biex jikkontrolla l-uzu tal-proprjetà skont l-interess generali. Anki skont il-gurisprudenza kostanti tal-Qorti ta` Strasburgu, l-Istat igawdi diskrezzjoni wiesgha sabiex jidentifika x`inhu mehtieg fl-interess generali u x`mizuri ghandhom jittiehdu sabiex jigu ndirizzati dawk il-htigijiet socjali. Tali diskrezzjoni tal-legislatur m`ghandhiex titbiddel sakemm din ma tkunx manifestament minghajr bazi ragonevoli – li zgur mhux il-kaz.

8. Il-ligijiet li qed jilmentaw minnhom ir-rikorrenti huma mahsuba sabiex jipprotegu persuni milli jigu mkeccija mid-dar ta` abitazzjoni taghhom f`gheluq it-terminu koncess lilhom fil-kuntratt tal-kiri. B`hekk dawn l-artikoli zgur li ma jistghux jigu kklassifikati bhala mhux legittimi jew mhux fl-interess generali u l-esponent jara li dawn l-artikoli assolutament m`ghandhomx jitqiesu li jmorru kontra d-drittijiet fundamentali tal-bniedem.

9. Illi l-Ewwel Artikolu tal-Ewwel Protokol ma jikkoncedi ebda dritt li xi hadd jircievi profitt. Allura, fil-kuntest ta` proprjetà li qed isservi ghall-finijiet ta` social housing, zgur li ma jistax jigi kkontemplat xi dritt simili.

10. Illi f`cirkostanzi bhal dawn fejn jezisti interess generali legittimu, ma tistax tpoggi fl-istess keffa l-valur tal-proprjetà fis-suq hieles ma` dak il-valur li wiehed ghandu jhallas fil-kuntest ta` social housing. L-ghan wara dawn il-ligijiet huwa li jipprovdu ghall-interess generali u cjoe li jipprovdu dar ta` abitazzjoni. Huwa risaput li l-Qorti Ewropea stess fil-gurisprudenza taghha fosthom fil-kaz ta` "Amato Gauci vs Malta" rrikonoxxiet li: "State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable." Il-Qorti Kostituzzjonali fis-sentenza

taghha ricenti fl-ismijiet Ian Peter Ellis pro et noe vs Maggur Alfred Cassar Reynaud et tas-27 ta` Jannar 2017 qalet hekk: "Huwa pacifiku li fejn tidhol il-materja ta` akkomodazzjoni socjali l-istati membri ghandhom margini wiesa` ta` apprezzament u, sakemm il-mizuri jkunu legittimi, l-ghan socjali ghandu jwassal ghal kumpens li jista` jkun ferm anqas mill-valur tal-fond jew il-valur lokatizju ta` fond fis-suq hieles."

11. Illi jekk fil-kaz odjern kien hemm tnaqqis fil-kera dovuta lir-rikorrenti meta mqabbla mal-valur lokatizju fis-suq, dan it-tnaqqis huwa kontro-bilancjat bil-margini wiesgha tal-Istat li jillegisla fil-kuntest ta` mizuri socjali fosthom fil-qasam tad-djar.

12. Ma hemm l-ebda dubju li kieku kellu jigi applikat il-prezz tal-kirjiet fis-suq ugwalment u fuq l-istess binarju ghall-binjiet kollha, kemm dawk fl-ambitu tal-qafas socjali u anke fl-ambitu ta` dawk li mhumiex, allura r-rizultat ikun li tinholoq krizi li tghabbi lil hafna familji b`pizijiet li ma jifilhux ghalihom.

13. Illi jekk ir-rikorrenti qed tilmenta li qed tigi pregudikata minhabba l-fatt li l-ammont tal-kera ma jirriflettix il-valur reali tal-fond in kwistjoni, dan ma jistax jigi rrimedjat bit-tnehhija tal-artikoli tal-Kap. 69 jew tal-artikolu 1531C; jew bl-izgumbrament tal-okkupanti. Dan qed jinghad ghaliex ma jkunx jaghmel sens li wiehed jaghraf l-iskop, il-htiega u l-legittimità tal-mizuri msemmija biex imbaghad jinnewtralizzahom billi jaghmilhom inapplikabbli bl-izgumbrament tal-okkupanti.

14. Illi l-artikolu 1531F tal-Kap. 16 jaghti tifsira ta` min hu l-inkwilin ta` fond residenzjali u meta wiehed jixtarr dan l-artikolu, jirrizulta kemm huwa nfondat l-ilment tar-rikorrenti meta tghid li m`ghandhiex speranza reali li qatt tikseb lura l-pussess effettiv tal-fond.

15. Illi s-sentenza msemmija mir-rikorrenti f`paragrafu xxi tar-rikors promotur taghhom fl-ismijiet Anthony Debono et vs l-Avukat Generali et, giet appellata mill-esponenti u ghalhekk ghadha mhix finali.

16. Xieraq jigi sottolineat li dan l-fond gie mikri bi qbil bejn ir-rikorrenti u l-inkwilini u hadd ma mpona fuq ir-rikorrenti li dan il-fond irid jinkera bil-fors. Ma jirrizulta minn imkien li kien hemm xi theddida imminenti u attwali li sfurzathom li jaghtu dan il-fond b`kiri (vide Frances Montanaro et vs Avukat Generali et, deciz nhar it-13 ta` April 2018 mill-Qorti Kostituzzjonali) u fil-fatt kien hemm diversi toroq li r-rikorrenti setghu jaghzlu dak iz-zmien, bhal ibighu l-fond jew jikru l-fond bhala fond kummercjali.

Rigward l-emendi li dahlu fis-sehh permezz tal-Att X tal-2009 :

17. Tajjeb li jinghad ukoll li l-emendi li jirrigwardaw il-kera dahlu fis-sehh wara konsultazzjoni vasta fejn giet ukoll ippubblikata l-White Paper li ggib l-isem: "Ligijiet tal-Kera: Il-htiega ta` Riforma" f`Gunju tal-2008.

18. Dan il-process ta` konsultazzjoni kien process bi tliet saffi:

(i) L-ewwel kien hemm it-tnehdija tal-White Paper li kienet komplementata minn konsultazzjoni komprensiva li nkludiet (a) diskussjoni pubblika, (b) interazzjoni ta` ittri elettronici, centru ghas-sejhat telefonici u kontribuzzjonijiet fuq website; (c) laqghat mal-Kunsill ta` Malta ghal Zvilupp Ekonomiku u Socjali u wkoll ma` korpi kostitwiti u (d) partecipazzjoni f`mezzi tat-televizjoni, tar-radju u tal-gazzetti. L-interazzjoni ta` ittri elettronici, centru ghas-sejhat telefonici u kontribuzzjonijiet fuq website wasslet ghal aktar minn 2,000 reazzjoni u 800 mistoqsija li kollha kemm huma nghataw twegiba ndividwali. It-twegibiet tqieghdu wkoll fil-website - www.rentreform.gov.mt.

(ii) It-tieni fazi tal-process ta` konsultazzjoni giet wara l-pubblikazzjoni tal-Abbozz ta` Ligi Numru 17 imsejjah `Att biex Jemenda l-Kodici Civili, Kap. 16` ippubblikat f`Novembru 2008 u d-diskussjoni sussegwenti fuq l-Abbozz fil-Kamra tar-Rapprezentanti f`Dicembru 2008 u Jannar 2009.

(iii) It-tielet fazi tal-process ta` konsultazzjoni kienet tirrigwarda d-diskussjonijiet li saru bejn il-Timijiet Teknici tal-Gvern u l-Oppozizzjoni ta` dak iz-zmien rispettivament.

19. Dan kollu qed jinghad sabiex jintwera li l-emendi ricenti dwar il-kera ma sarux b`mod superfluwu izda saru wara

konsultazzjoni serja u intensa u wara li nhass il-polz tal-poplu u tal-entitajiet kollha milquta minn dan l-istitut.

Rigward l-artikolu 14 tal-Konvenzjoni Ewropea :

20. Illi kif gie deciz f`kawzi ohra ta` din ix-xorta, ma hemm l-ebda ksur tal-artikolu 14 tal-Konvenzjoni u dan ghaliex ma hemm l-ebda diskriminazzjoni fil-konfront tar-rikorrenti. Inoltre, fir-rigward ta` dan l-artikolu, ir-rikorrenti ma ssodisfawx element importanti sabiex tiskatta l-applikabbilità tal-provvediment fl-artikolu 14 tal-Konvenzjoni Ewropea. Dan l-artikolu jissottolinea li t-tgawdija tad-drittijiet u libertajiet kontemplati fil-Konvenzjoni ghandha tigi assigurata minghajr diskriminazzjoni ghal kull raguni bhalma huma s-sess, razza, kulur, lingwa, religjon, opinjoni politika jew opinjoni ohra, origini nazzjonali jew socjali, assocjazzjoni ma` minoranza nazzjonali, proprjetà, twelid jew status iehor. Fil-kaz in dizamina ma giet allegata l-ebda diskriminazzjoni ghal xi raguni ta` status kif mitlub, sabiex ikun hemm vjolazzjoni tal-artikolu 14 tal-Konvenzjoni.

21. Illi sabiex ir-rikorrenti jistghu jallegaw li gie lez id-dritt fundamentali taghha ai termini tal-artikolu 14 tal-Konvenzjoni, iridu jippruvaw ukoll li saret diskriminazzjoni fuq bazi ta` `like with like` u dan ghaliex mhux kull agir huwa wiehed diskriminatorju;

22. Salv eccezzjonijiet ulterjuri.

Ghaldaqstant, l-esponent jitlob bir-rispett lil din l-Onorabbli Qorti joghgobha tichad il-pretensjonijiet kif dedotti fir-rikors promotur bhala infondati fil-fatt u fid-dritt stante li r-rikorrenti ma sofrew l-ebda ksur tad-drittijiet tal-bniedem u l-libertajiet fondamentali, u dan bl-ispejjez kontra l-istess rikorrenti.

Rat ir-risposta li pprezentaw l-intimati Vella fis-26 ta` Gunju 2019 li taqra hekk :-

Illi l-lanjanza tar-rikorrenti hija fis-sens illi bl-operazzjonijiet tal-`Ordinanza Li Tirregola t-Tigdid tal-Kiri ta` Bini` ossia l-Kapitolu 69 tal-Ligijiet ta` Malta u tal-Att X tal-2009, kif ukoll bl-operazzjonijiet tal-ligijiet vigenti qed jaghtu dritt ta` rilokazzjoni lill-esponenti vis-a-

vis il-fond 100/6, Triq Nicol Isouard tas-Sliema waqt li fil-konfront taghhom qed jigu miksura l-Artikolu 37 tal-Kostituzzjoni ta` Malta, l-Ewwel Artikolu tal-Ewwel Protocol tal-konvenzjoni Ewropea (l-ewwel skeda tal-kapitolu 319 tal-ligijiet ta` Malta) u tal-artikolu 14 tal-istess Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem u dan billi huma qed jigu mcahda mit-tgawdija tal-istess proprjeta` sureferita.

1. Illi in linea preliminari l-esponenti konjugi Vella ghandhom jigu liberati mill-osservanza tal-gudizziu stante illi l-ewwel u l-unika talba li tinsab dedotta fil-konfront taghhom tohrog barra mill-parametri tal-procediment Kostituzzjonali, bl-ispejjez kontra r-rikorrenti.

2. Illi ukoll in linea preliminari u minghajr pregudizzju ghas-sueccepit, huwa l-Istat biss li jista` jikkommetti vjolazzjoni tad-drittijiet fundamnetli u mhux cittadin privat, l-esponenti ma ghandhomx `locus standi judicii` stante li ma jistghux ikunu meqjusa bhala l-legittimarji kontraditturi u ghalhekk ghandhom jigu liberati mill-osservanza tat-gudizzju, bl-ispejjez kollha kontra r-rikorrenti.

3. Illi ukoll in linea preliminari u minghajr pregudizzju ghas-sueccepit, l-esponenti qeghdin biss jiprevalixxu ruhhom minn dispozizzjonijiet legislattivi validament promulgati u applikabbli fl-Istat ta` Malta qua cittadini privati u b`hekk ma jistghux ikunu misjuba li kisru drittijiet ta` terzi u di piu` jekk ir-rikorrenti soffrew xi lezjoni tad-drittijiet fundamentali taghhom din ma tista` tkun qatt akkollata fil-konfront tal-esponenti u ghalhekk ghandhom jigu liberati mill-osservanza tal-gudizzju b l-ispejjez kollha kontra r-rikorrenti.

4. Illi ukoll in linea preliminari u minghajr pregudizzju ghas-sueccepit, ir-rikorrenti naqsu milli jutilizzaw dawk ir-rimedji ordinarji u provduti taht il-Kapitolu 69 tal-Ligijiet ta` Malta liema rimedji huma mahsuba ghal sitwazzjonijiet bhal dawk ta` zieda fil-kera quddiem il-Bord kompetenti.

5. Illi ukoll in linea preliminari u minghajr pregudizzju ghas-sueccepit, ir-rikorrenti jridu igibu prova tat-titolu li fuqa qed jibbazaw l-azzjoni odjerna u mhux merament dikjarazzjoni causo morits li giet anness mar-rikors promotur immarkata bhala `Dok. B`.

6. Illi subordinarjament u minghajr pregudizzju ghas-sueccepit, l-esponenti qeghdin bil-qawwa jirrespingu l-allegazzjonijiet kollha tar-rikorrenti bhala nfondati fil-fatt u fid-dritt u dan ghar-ragunijiet segwenti :

7. Illi l-Kapitolu 69 tal-Ligijiet ta` Malta dahal fis-sehh ferm qabel mar-rikorrenti akkwistaw il-fond in kwistjoni u dan kif qed ikun vantat mill-istess rikorrenti permezz tad-dokument immarkat bl-ittra `B` anness mar-rikors promotur. Ghalhekk, ir-rikorrenti ma ghandhom l-ebda gustifikazzjoni sabiex jitolbu l-izgumbrament tal-esponenti mill-fond de quo agitur.

8. Illi ma huwiex minnu li r-rikorrenti qeghdin jigu michuda mit-tgawdija tal-proprjeta` taghhom u dan stante li fil-prezent huma jircievu l-kera ta` disghin (90) Euro fix-xahar, liema somma giet anke accettata ghax-xahar ta` Gunju 2019, fl-istess perjodu li dan ir-rikors Kostituzjonali gie prezentat, ossia s-6 ta` Gunju 2019. Ghaldaqstant din l-azzjoni hija improponibbli u intempestiva.

9. Illi di piu`, ir-rikorrenti qatt ma avvicinaw lill-esponenti bl-ebda mod bonarju jew gudizzjarju sabiex jitolbu xi awment jew zieda fil-kera.

10. Illi kieku huwa minnu li l-kirja volontarjament assunta tal-fond de quo agitur tasal biex tinibixxi r-rikorrenti mit-tgawdija tal-proprjeta` kif qed jallegaw ir-rikorrenti fir-rikors promotur, wiehed jista` jasal ghall-konkluzjoni li kull kirja ghal zmien indefinit tkun tista` tigi tterminata mis-sid u b`hekk eluf ta` nies isibu ruhhom minghajr ebda saqaf fuq rashom u dan minkejja li ma jkunu kisru ebda disposizzjoni tal-ligi vigenti.

11. Illi r-rikorrenti ma jistghux jippretendu li jkollhom kirja ferm aktar gholja minn dik stabbilita bid-disposizzjonijiet tal-Kapitolu 69 tal-Ligijiet ta` Malta. Illi r-rikorrenti ghandhom dritt li jircievu l-kirja li l-esponenti kienu ntrabtu li jhallsu ghal-fond de quo agitur u xejn aktar. Jekk kemm-il darba xtaqu li jirrevedu l-kirja sabiex tirrifletti l-valur lokatizzju tal-fond fis-suq, huma dejjem kellhom id-dritt li jipprevalu ruhhom mid-disposizzjonijiet tal-ligijiet vigenti u mhux minn procedura straordinarja bhal dan il-kaz. Id-dritt tat-tgawdija tal-proprjeta` privata jkun pjenament soddisfatt meta sid il-kera jircievi l-kera marbut mal-kirja. Ir-rikorrenti f`din l-istanza qatt

ma rrifjutaw il-kirja ghalhekk ma jistghux jippretendu li jgibu ruhhom bhala l-vittmi.

12. Illi peress li l-principju ben stabbilit mill-Qrati nostrana kif ukoll mid-Dritt Civili cioe` dak tal-pocto sunt servonda r-rikorrenti huma obbligati jirrispettaw il-kirja li kienet tikkomprendi obbligi assuni minnhom.

Ghalhekk, it-talbiet tar-rikorrenti ghandhom jitqiesu mhux gustifikati, insostenibbli, abbuzivi u kapriccjuzi, u konsegwentement ghandhom jigu michuda, bl-ispejjez kontra taghhom inkluz dawk tal-lttra Ufficjali responsiva numru : 1926/2019, intavolata nhar is-27 ta` Mejju 2019 li qed tigi hawn annessa u mmarkata bhala `Dok. R1`.

Salvi eccezzjonijiet ulterjuri.

Rat id-dokument li kien prezentat ma` din ir-risposta.

Rat id-digriet li tat fl-udjenza tal-24 ta` Settembru 2019 fejn laqghet talba tar-rikorrenti, li ma kenitx opposta mill-intimati, ghall-hatra ta` perit tekniku sabiex jistma l-valur lokatizju tal-fond 100/6, Triq Nicolo` Isouard, Sliema, b`effett mid-19 ta` Awissu 1987 u kull hames snin sal-31 ta` Dicembru 2018. Ghal dan l-iskop kien mahtur il-Perit Mario Cassar bhala perit tekniku.

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

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

Rat in-noti ta` osservazzjonijiet.

Rat l-atti l-ohra tal-kawza.

II. Provi

1. Xiehda

Ivan Borg li jigi missier ir-rikorrenti Simone Galea u r-ragel tar-rikorrenti l-ohra Dorothy Borg miet fit-8 ta` Dicembru 2017. Kien il-proprjetarju tal-fond 100/6, Triq Nocolo`Isouard, Sliema. B`testment unica charta tad-9 ta` Settembru 2015 fl-atti tan-Nutar Dottor Mario Rosario Bonello, il-wirt tieghu ddevolva favur bintu r-rikorrenti Simone Galea, soggett ghall-uzufrutt favur martu, ir-rikorrenti Dorothy Borg. Il-fond mhuwiex dekontrollat (ara c-certifikat datat 16 ta` Mejju 2019).

Simone Galea xehdet illi missierha kien kera l-fond in kwistjoni lill-intimati Vella madwar erbghin sena ilu. Fil-prezent kienet qeghda tithallas kera ta` €1,080 fis-sena. Fil-bidu tal-lokazzjoni, il-kera kienet ta` Lm 18 fix-xahar. In segwitu bdew jithallsu kera ta` €42 fix-xahar. Wara l-2009 bdew jircievu €90 kera fix-xahar u cioe` €1,080 fis-sena. Il-kera toghla kull tlett snin skont l-indici tal-inflazzjoni.

Qal li l-fond in kwistjoni huwa appartament li jifforma parti minn blokka li kienet inbniet fl-1934. Qabel inkera lill-intimati Vella l-appartament kien ir-residenza estiva ta` missierha u ta` hutu. Il-post inkera ghaliex li kieku l-fond thalla battal, kien jispicca milqut b`ordni ta` rekwizizzjoni skont kif kienu l-ligijiet fiz-zmien li saret il-kirja.

L-intimat Anthony Vella xehed illi huwa beda jghix fil-fond in kwistjoni f`Marzu 1972. Fil-bidu kienu jhallsu kera ta` Lm 18 fix-xahar. Il-kera kienet tithallas lil Av. Antoine Cachia li jigi r-ragel ta` Joyce neè Borg, li tigi oht Ivan Borg. L-appartament in kwistjoni kien wiehed minn disa` appartamenti fi blokka li kienet proprjeta` ta` Ivan Borg, Joyce Cachia u Rose Cachia ahwa Borg. F`Jannar 1995 saret il-qasma bejn l-ahwa Borg. Lil kull wiehed u wahda kienu assenjati tliet flats. L-appartament mikri lilhom sar proprjeta` ta` Ivan Borg wahdu.

Kompla jixhed illi huma dejjem hallsu l-kera inkluz meta zdiedet il-kera skont il-ligi. L-appartament jinsab fi stat ta` manutenzjoni eccellenti ghaliex dejjem ghamlu x-xogholijiet ta` manutenzjoni li kienu mehtiegu. Ghamlu wkoll bosta ameljoramenti spejjez taghhom.

Qal illi m`ghandhomx post iehor fejn imorru jabitaw. Lanqas ghandhom mezzi biex ihallsu fejn imorru band`ohra.

Stqarr li l-ahhar pagament li thallas direttament lir-rikorrenti kien dak ghax-xahar ta` Lulju 2019. Billi fil-mori ta` din il-kawza, is-sidien ghazlu li ma jaccettawx aktar il-hlas tal-kirja, huma bdew jiddepozitaw il-kera taht l-awtorita` tal-qorti.

L-intimata Mary Vella kkonfermat dak illi xehed l-intimat zewgha Anthony Vella.

2. Ir-relazzjoni tal-perit tekniku

Saru dawn il-**kostatazzjonijiet** :-

a) Illi l-fond in kwistjoni huwa appartament fil-livell tal-ewwel sular ta` blokk li ilu mibni madwar 85 sena.

b) Illi l-appartament ghandu *footprint* ta` circa 126 metri kwadri.

c) Illi jinsab fi stat ta` manutensjoni tajba hafna.

Wara li ha in konsiderazzjoni l-lokalita`, id-daqs tal-fond u l-istat tieghu, il-perit tekniku wasal ghall-konkluzjoni illi l-fond ghandu valur fis-suq ta` €403,200.

In kwantu jirrigwarda l-valur lokatizju tal-fond, il-perit tekniku stabilixxa li fl-1987, dan kien jammonta ghal €917 fis-sena, waqt illi fl-2018 tela` ghal €14,112 fis-sena.

3. Il-piz probatorju ta` relazzjoni teknika

Fis-sentenza taghha tad-19 ta` Novembru 2001 fil-kawza **"Calleja vs Mifsud"**, il-Qorti tal-Appell qalet hekk -

***Kemm il-kostatazzjonijiet tal-perit tekniku nominat mill-Qorti kif ukoll il-konsiderazzjonijiet u opinjonijiet esperti tieghu jikkostitwixxu skond il-ligi prova ta` fatt li kellhom bhala tali jigu meqjusa mill-Qorti.*** *Il-Qorti ma kenitx obbligata li taccetta r-rapport tekniku bhala prova determinanti u kellha dritt li tiskartah kif setghet tiskarta kull prova ohra. Mill-banda l-ohra pero` huwa ritenut minn dawn il-Qrati li kellu jinghata piz debitu lill-fehma teknika tal-espert nominat mill-Qorti billi l-Qorti ma kellhiex leggerment tinjora dik il-prova. Hu manifest …. illi l-mertu tal-prezenti istanza kien kollu kemm hu wiehed ta` natura teknika li ma setax jigi epurat u deciz mill-Qorti minghajr l-assistenza ta` espert in materja. B`danakollu dan ma jfissirx illi l-Qorti ma kellhiex thares b`lenti kritika lejn l-opinjoni teknika lilha sottomessa u ma kellhiex tezita li tiskarta dik l-opinjoni jekk din ma tkunx wahda sodisfacentement u adegwatament tinvesti l-mertu, jew jekk il-konkluzjoni ma kenitx sewwa tirrizolvi l-kwezit ta` natura teknika.* (enfasi u sottolinear ta` din il-qorti)

Ghalkemm qorti mhix marbuta li taccetta l-konkluzjonijiet ta` perit tekniku kontra l-konvinzjoni taghha (*dictum expertorum numquam transit in rem judicata*), fl-istess waqt dak *ma jfissirx pero` illi qorti dan tista` taghmlu b` mod legger jew kapriccjuz. Il-konvinzjoni kuntrarja taghha kellha tkun ben informata u bazata fuq ragunijiet li gravament ipoggu fid-dubju dik l-opinjoni teknika lilha sottomessa b` ragunijiet li ma ghandhomx ikunu privi mill-konsiderazzjoni tal-aspett tekniku tal-materja taht ezami* ("**Grima vs Mamo et noe" –** Qorti tal-Appell – 29 ta` Mejju 1998)**.**

Jigifieri qorti ma tistax tinjora r-relazzjoni peritali sakemm ma tkunx konvinta li l-konkluzjoni ta` tali relazzjoni ma kienetx gusta u korretta. Din il-konvinzjoni pero` kellha tkun wahda motivata minn gudizzju ben informat, anke fejn mehtieg mil-lat tekniku. ("**Cauchi vs Mercieca" –** Qorti tal-Appell – 6 ta` Ottubru 1999 **; "Saliba vs Farrugia**" – Qorti tal-Appell – 28 ta` Jannar 2000 u "**Calleja *noe* vs Mifsud**" – Qorti tal-Appell – 19 ta` Novembru 2001).

Il-*giudizio dell`arte espress mill-perit tekniku ma jistax u ma ghandux, aktar u aktar fejn il-parti nteressata ma tkunx ipprevaliet ruhha mill-fakolta` lilha moghtija ta` talba ghan-nomina ta` periti*

*addizzjonali, jigi skartat facilment, ammenokke` ma jkunx jidher sodisfacentement illi l-konkluzjonijiet peritali huma, fil-kumpless kollha tac-cirkostanzi, irragonevoli*" – ("**Bugeja *et* vs Muscat et" –** Qorti tal-Appell – 23 ta` Gunju 1967).

Fil-kaz tal-lum, jirrizulta bhala fatt li wara li kienet prezentata u mahlufa r-relazzjoni tal-perit tekniku, la ntalab li ssir eskussjoni tal-perit tekniku u lanqas tressqet ebda talba ghall-hatra ta` periti addizzjonali.

Wara li rat ir-relazzjoni, il-Qorti sejra taghmel taghha l-kostatazzjonijiet u l-konkluzjonijiet tal-perit tekniku, u sejra tqishom bhala prova ta` fatt flimkien mal-provi l-ohra.

III. L-eccezzjonijiet ta` natura preliminari

1. L-ewwel (1) eccezzjoni tal-intimat Avukat tal-Istat Il-hames (5) eccezzjoni tal-intimati Vella

Kien eccepit mill-intimati li r-rikorrenti kellhom jaghmlu l-prova tat-titolu ghall-propjeta` de qua.

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

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

> *"Illi biex wiehed ikun f`qaghda li juri li garrab ksur tal-jedd fundamentali tieghu taht l-artikolu 37 tal-Kostituzzjoni m`ghandux ghalfejn jipprova titolu assolut u lanqas wiehed originali bhallikieku l-azzjoni dwar ksur ta` jedd fundamentali kienet wahda ta` rivendika (Kost. 27.3.2015 fil-kawza fl-*

*ismijiet **Ian Peter Ellis et vs Avukat Generali et**). Huwa bizzejjed, ghall-finijiet ta` dak l-artikolu, li wiehed juri li ghandu jedd fil-haga li tkun li bih jista` jieqaf ghall-pretensjonijiet ta` haddiehor.*

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

Dan premess, il-Qorti tghid illi bhala fatt ir-rikorrenti ghamlu l-prova tat-titolu taghhom ghall-fond de quo.

Infatti jirrizulta ppruvat illi :-

a) B`testment unica charta tad-9 ta` Settembru 2015 fl-atti tan-Nutar Dottor Mario Rosario Bonello, il-wirt ta` Ivan Borg iddevolva fuq ir-rikorrenti bintu Simone Galea, soggett ghall-uzufrutt favur martu, ir-rikorrenti l-ohra Dorothy Borg, omm Simone Galea.

b) B`dikjarazzjoni causa mortis tas-27 ta` Novembru 2018 fl-atti tan-Nutar Dottor Rossella Soler, ir-rikorrenti ddikjaraw l-eredita` ta` Ivan Borg u hallsu t-taxxi relattivi inkluz fuq il-proprjeta` de qua.

Dawn il-provi ma gewx kontestati.

Inoltre l-intimati Vella kkonfermaw illi l-proprjeta` tal-appartment in kwistjoni ghaddiet ghand Ivan Borg b`qasma li saret bejn l-ahwa Borg f`Jannar 1995.

Wara li rat l-atti, il-Qorti hija sodisfatta li r-rikorrenti ghandhom titolu tajjeb ghall-proprjeta` sabiex jipproponu l-kawza odjerna.

Billi t-titolu tar-rikorrenti jirrizulta ppruvat, sejra tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel (1) eccezzjoni tal-intimat Avukat tal-Istat gia` Avukat Generali u tal-hames (5) eccezzjoni tal-intimati konjugi Vella.

2. It-tieni (2) eccezzjoni tal-intimati Vella

Qed jigi eccepit mill-intimati Vella li m`ghandhomx *locus standi* fil-kawza odjerna ghaliex mhumiex il-legittimi kontradittur tar-rikorrenti stante li huwa biss l-Istat illi jista` jikkommetti vjolazzjoni tad-drittijiet fondamentali u jaghti rimedju lir-rikorrenti.

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

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

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

> "*F`kawzi ta` natura kostituzzjonali bbazati fuq id-drittijiet fundamentali, il-legittimi kontradittur ta` dawk l-azzjonijiet jinqasmu fi tliet kategoriji. L-ewwel kategorija tikkomprendi dak li huwa allegat li huma, direttament jew indirittament, responsabbli ghall-kummissjoni jew omissjoni ta` xi fatt li jikser xi dritt fundamentali protett mil-ligi. Fit-tieni kategorija huma dawk li ghall-omissjonijiet jew kummissjonijiet talpersuni tal-ewwel kategorija jistghu jkunu responsabbli biex jaghtu jew jiffornixxu r-rimedji li s-sentenza, li takkolji llament tal-ksur ta` dritt fundamentali, tissanzjona. It-tielet kategorija mbaghad hemm dawk il-partijiet kollha li jkunu in kawza meta l-kwistjoni kostituzzjonali tinqala` fuq jew waqt xi procedura gudizzjarja.*
>
> *Dawn it-tliet kategoriji ta` persuni huma kollha legittimi kontradittur fi proceduri ta` natura kostituzzjonali, li f`dan*

ir-rigward ukoll hija specjali, ghaliex biex zgumbrament ikunu kompiti u effikaci jirrikjedu l-prezenza ta` persuni li normalment fi procedure ordinarji jithallew barra, ghaliex minghajrhom il-gudizzju xorta wahda huwa integru. F`azzjoni ta` natura kostituzzjonali wkoll, il-gudizzju jkunu integru, jekk il-persuni tat-tieni kategorija jithallew barra mill-kawza, ghalkemm jista` jkun li l-azzjoni tirrizulta ineffikaci."

L-Avukat Generali qabel, u l-Avukat tal-Istat illum, jirrapprezenta lill-Istat fi procediment tax-xorta tal-lum.

Jekk ir-rikorrenti jsehhilhom jipprovaw l-allegat ksur tad-drittijiet fondamentali taghhom, u bhala rimedju jinghata kumpens (kemm jekk pekunarju kif ukoll jekk morali) huwa l-Istat illi ghandu jaghmel tajjeb ghall-hlas tal-kumpens.

Ghalkemm il-lezjoni lamentata mir-rikorrenti mhijiex diretta fil-konfront tal-intimati Vella, madanakollu huma gew imharrka billi ghandhom interess **<u>dirett</u>** fl-esitu tal-procediment.

Proceduri tax-xorta tal-lum jinvolvu zewg aspetti :

i) ir-responsabbilita` ghall-vjolazzjoni; u
ii) l-persuna li trid twiegeb.

Dawn iz-zewg aspetti mhux necessarjament illi jkunu konnessi ghaliex waqt li l-vjolazzjoni tista` tkun twettqet minn persuna, ir-rimedju jista` jolqot persuna ohra.

Fil-kawza fl-ismijiet **<u>Raymond Cassar Torreggiani et. vs AG et</u>** li kienet deciza mill-Qorti Kostituzzjonali fit-22 ta` Frar 2013, saret din l-osservazzjoni :-

*" … **<u>biex gudizzju jkun integru jehtieg li, ghall-ahjar gudizzju tal-Qorti, jippartecipaw fih dawk kollha li huma nteressati fil-kawza</u>**. B`hekk tigi assigurata kemm jista` jkun l-effikacita` tal-gudizzju inkwantu dan jorbot biss lil dawk li jkunu partecipi fih, kif ukoll jigi rispettat il-principju tal-ekonomija tal-gudizzju sabiex ma jkunx hemm bzonn ta`*

ripetizzjoni ta` proceduri kontra l-persuni kollha interessati fid-diversi kawzi billi dawn ma jkunux hadu parti f`gudizzju wiehed. Il-gudizzju jibqa` integru mill-mument li jiehdu parti fih dawk li jkollhom id-dritt, u dawk li kontra taghhom dak l-istess dritt jikkompeti". (enfasi mizjuda)

…

Mill-premess ghandu jirrizulta car li l-intimati konjugi Tabone, bhala inkwilini tal-fond de quo, u tenut kont tal-fatt li proprju l-inkwilinat taghhom jifforma l-mertu tal-kawza odjerna, ghandhom interess guridiku u ghalhekk ikunu partecipi fil-kawza li jista` jkollha effetti legali anke fuqhom."

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

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

Fl-ewwel talba, ir-rikorrenti qeghdin jitolbu li fil-kaz ta` vjolazzjoni jkun hemm l-izgumbrament tal-intimati Vella.

L-effett ta` dak illi qieghed jintalab jolqot **direttament** lill-intimati li ghalhekk ghandhom l-interess li trid il-ligi sabiex jiddefendu l-pozizzjoni taghhom.

Tiskanta kif tinghata eccezzjoni ta` din ix-xorta fejn prattikament il-qorti qeghda tintalab minn parti sabiex thallieha barra minn kawza fejn l-effetti tad-decizjoni tal-qorti potenzjalment (mhux per mera ipotesi) jistghu jolqtu *in pieno* lil dik il-parti. Difiza ta` din ix-xorta la taghmel sens guridiku u lanqas fattwali.

Huwa ghalhekk illi l-intimati Vella ghandhom ikunu parti fil-kawza, anke jekk finalment il-legittimita` taghhom tirrizulta bhala passiva.

It-tieni (2) eccezzjoni tal-intimati Vella qeghda tigi <u>respinta.</u>

3. <u>Ir-raba` (4) eccezzjoni tal-intimati Vella</u>

L-intimati Vella qeghdin jeccepixxu li r-rikorrenti ma ezawrewx ir-rimedji ordinarji disponibbli bil-Kap 69. Qatt ma talbu awment fil-kera u baqghu jircievu l-hlas tal-kirja saz-zmien meta ntavolaw dawn il-proceduri.

L-**<u>Art 46(2) tal-Kostituzzjoni ta` Malta</u>** ("**<u>il-Kostituzzjoni</u>**") jipprovdi :-

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

L-istess principju jirrizulta fl-**Art 4(2) tal-Kap 319** fil-kaz ta` allegati vjolazzjoni tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u Libertajiet Fondamentali ("**Il-Konvenzjoni**").

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

*Illi din il-kwistjoni giet dibattuta diversi drabi fil-Qrati taghna. Il-Qorti Kostituzzjonali dahlet fil-fond taghha fis-sentenza taghha fil-kawza fl-ismijiet **"Dr Mario Vella vs Joseph Bannister nomine"** (deciza fis-7 ta` Marzu 1994) fejn, wara li elenkat numru ta` sentenzi precedenti, qalet fost affarijiet ohra illi :*

"Minn din ir-rassenja kemm tal-Prim` Awla u kemm ta` din il-Qorti jistghu jitnisslu dawn il-linji gurisprudenzjali :

a. Meta hu car li hemm mezzi ordinarji disponibbli ghar-rikorrenti biex ikollu rimedju ghad-danni li qed jilmenta, bhala principju generali dawn ghandhom jigu adoperati u r-rikors ghall-organi gudizzjarji ta` natura Kostituzzjonali ghandu jsir wara li l-ordinarji jigu ezawriti jew meta mhumiex disponibbli;

b. Din il-Qorti Kostituzzjonali sakemm ma jirrizultawlhiex ragunijiet serji gravi ta` llegalita` jew ta` gustizzja jew zball manifest ma tiddisturbax l-ezercizzju ta` diskrezzjonalita` tal-ewwel Qorti kkonferita mill-artikolu 46 (2) tal-Kostituzzjoni;

c. Kull kaz ghandu l-fattispecje partikolari tieghu;

d. Meta r-rikorrenti ma jkunx ghamel uzu minn rimedju li seta` kellu dan ma jfissirx li l-Qorti ghandha tikkonsidra li ma ghandhiex tezercita l-gurisdizzjoni taghha jekk dak il-possibbli rimedju ma kienx pero` jirrimedja hlief in parti l-lanjanzi tar-rikorrenti;

e. Meta r-rikorrenti ma jkunx ezawrixxa r-rimedju ordinarji, jekk pero` dan in-nuqqas ikun ikkontribwixxa ghalih l-operat ta` haddiehor allura ma jkunx desiderabbli illi l-Qorti tieqaf u ma tipprocedix bit-trattazzjoni tal-kaz;

f. Meta l-ewwel Qorti tezercita d-diskrezzjoni taghha u tieqaf mit-trattazzjoni minghajr ma tezamina l-materja necessarja li fuqha dik id-diskrezzjoni ghandha tigi ezercitata, il-Qorti tat-tieni grad ghandha twarrab dik id-diskrezzjoni."

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

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

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

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

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

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

…

Illi wiehed ghandu jqis li kemm l-artikolu invokat mill-intimati u kemm il-Kostituzzjoni ta` Malta ssemmi mezzi li `kienu disponibbli` u allura anke jekk kien hemm mezzi li `kienu` disponibbli ghar-rikorrent izda li minhabba t-trapass taz-

zmien ma jkunux ghadhom (disponibbli), il-Qorti tista` jekk hekk jidhrilha tiddeklina li tezercita l-gurisdizzjoni taghha.

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

"Meta huwa car li hemm mezzi ordinarji disponibbli ghar-rikorrent biex ikollu rimedju ghad-dannu li qed jillamenta, bhala principju generali dawn ghandhom jigu adoperati, u r-rikors ghall-organi gudizzjarji ta` natura kostituzzjonali ghandu jsir wara li l-ordinarji jigu ezawriti jew meta ma humhiex disponibbli." (**Dr Mario Vella vs Joseph Bannister noe** – Qorti Kostituzzjonali deciza 7 ta` Marzu 1994).

*"Hu veru li kull persuna tista` tirrikorri lill-Prim Awla ghal rimedju ta` indole Kostituzzjonali, imma l-ewwel subinciz ta` dak l-Artikolu 46 irid jigi moqri mal-proviso tat-tieni subinciz tieghu li jipprovdi li l-Qorti tista`, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skond dak l-artikolu f`kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-ksur allegat `huma jew kienu disponibbli favur dik il-persuna skond xi ligi ohra.`" (**Lawrence Cuschieri vs Onor Prim Ministru** – Qorti Kostituzzjonali deciza 6 t`April 1995.)*

"Sakemm tibqa` l-possibilita` li l-lezjoni tad-dritt fundamentali setghet kienet jew ghad tista` tigi rettifikata bil-proceduri u mezzi provduti bil-ligi, ikun generalment il-kaz li l-Qorti tiddeklina milli tezercita s-setghat kostituzzjonali taghha."* (**Stephen Falzon vs Registratur tal-Qorti et** – *Qorti Civili Prim Awla (Sede Kostitizzjonali) deciza 14 ta` Frar 2002).

*"Il-Prim Awla tal-Qorti Civili ghandha poteri diskrezzjonali wiesgha biex tiddeciedi li ma tezercitax il-poteri taghha meta r-rikorrent ma ezawriex ir-rimedji possibbli taht il-ligi ordinarja." (**Domenico Savio Spiteri vs Chairman Planning Authority et"** – Qorti Kostituzzjonali deciza 31 ta` Mejju 2000).*

Stabbiliti dawn il-parametri abbazi tal-gurisprudenza, din il-Qorti trid tqis jekk skont il-fatti tal-kaz tal-lum : (i) ir-rikorrenti kellhomx

ghad-dispozizzjoni taghhom rimedji ordinarji li kienu accessibbli, xierqa, effettivi u effikaci sabiex jindirizzaw il-lanjanzi taghhom ghaz-zmien mertu tal-ilment taghhom ; u (ii) jekk ir-rimedju ordinarju kienx ikopri ghal kollox il-lanjanzi tar-rikorrent. Fi kwalunkwe kaz, tibqa` d-diskrezzjoni tal-Qorti li taghzel *"li tezercita s-setghat taghha"* anke meta min iressaq l-ilment ikollu jew kellu mezzi ohra ta` rimedju.

Il-Qorti tghid illi bil-fatt li r-rikorrenti ma hadux passi ohra, ghajr ghall-procediment tal-lum, ma jnaqqas xejn mid-dritt taghhom ghal azzjoni tax-xorta tal-lum.

L-ghan ewlieni ta` procediment ta` natura kostituzzjonali u/jew konvenzjonali huwa li l-persuna illi tkun qed iggarrab jew tkun garrbet ksur tal-jeddijiet fondamentali taghha tinghata rimedju tajjeb, effettiv u minghajr dewmien. Hija gurisprudenza stabbilita illi, anke jekk procediment kostituzzjonali huwa ntiz biex ikun straordinarju, cittadin li jilmenta minn ksur tal-jeddijiet fondamentali tieghu m`ghandux ikun obbligat ifittex rimedju ordinarju, jekk ir-rimedju li jista` jinghata ma jkunx effettiv sabiex jindirizza l-ilment tieghu.

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

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

Fin-nota ta` sottomissjonijiet taghhom, l-intimati Vella josservaw li r-rikorrenti ghazlu li jsegwu b`din il-kawza minflok illi rrikorrew quddiem il-Bord li Jirregola l-Kera sabiex jitolbu awment fil-hlas tal-kera u li kien biss b`ittra ufficjali tal-15 ta` Mejju 2019 li pprecediet din il-kawza li r-rikorrenti avvanzaw l-ilment taghhom.

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

L-**Art 4(b) tal-Kap 69** imbaghad jistabilixxi kif ghandu jipprocedi l-Bord meta jigi biex iqis ghandux ikun hemm zieda fil-kera.

Id-disposizzjoni tghid :-

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

Lanqas ir-ripreza tal-fond ma hija prattikabbli ghaliex sabiex il-Bord ikun jista` jilqa` t-talba tas-sid jehtieg li jkunu sodisfatti numru ta` kondizzjonijiet **stringenti**.

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

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

Il-Qorti tishaq li t-tema centrali tal-istanza tar-rikorrenti hija allegat ksur tad-drittijiet fondamentali taghhom. Anke li kieku l-Bord ghandu s-setgha illi jawtorizza awment fil-kera, il-Bord m`ghandux is-setgha illi jistharreg allegat ksur ta` jeddijiet fondamentali.

Dikjarazzjoni dwar lezjoni ta` drittijiet fondamentali, kif mitlub mir-rikorrenti, tista` tinghata biss minn din il-Qorti.

Tajjeb li jinghad ukoll illi l-presentata ta` kawza wahda, dik tal-lum, minflok tnejn, it-tieni wahda tkun bil-procediment ordinarju, tirrisolvi ruhha f`ekonomija ta` gudizzju, apparti l-fatt li z-zewg procedimenti huma fis-sostanza distinti minn xulxin u jwasslu ghal ghanijiet differenti.

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

> "*Illi konsegwenza tal-istess, l-imsemmi disposizzjonijiet li huma applikabbli mill-Bord li Jirregola l-Kera jikkostitwixxu in effett ostakolu legali ghar-rikorrenti biex jirriprendu l-pussess tal-proprjeta` taghhom stante li l-intimati Farrugia ssodisfaw ir-rekwiziti tac-cittadinanza u tar-residenza ordinarja fuq indikati kif ukoll il-kondizzjonijiet tal-kirja. Certament f`tali kuntest il-Bord wiesgha kemm hi wiesgha il-kompetenza tieghu, mhuwiex fakoltizzat bil-Ligi li jizgumbra inkwilin li qed jonora l-obbligazzjonijiet tal-kirja - materja li hija ghal kollox irrilevanti ghall-ezercizzju tallum.*
>
> *Illi huwa ovvju li it-talbiet odjerni, fis-sustanza taghhom, imorru oltre konsiderazzjoni ta` allegat ksur tal-obbligi tal-kerrej. Anzi l-intimati inkwilini ghamlu enfasi fuq l-osservazzjoni rigida taghhom tal-kondizzjonijiet tal-kirja.*
>
> *Inoltre r-rikorrenti qed jitolbu kumpens ghall-ksur tad-drittijiet fondamentali li, kif gie ribadit mill-Qorti Ewropea f`Strasbourg:*
>
> *[t]o date the Court has always held that constitutional redress proceedings are effective in respect of complaints under Article 1 of Protocol No. 1, in so far as it has always been considered that there are no limits on the means of redress (including financial redress) which may be provided by the courts of constitutional jurisdiction." (Apap Bologna v. Malta, ECHR 46931/12 deciza 30 ta` Awwissu 2016)."*

Din il-Qorti tishaq illi "*l-indoli tal-azzjoni tigi dezunta mhux tant mill-kliem piu o meno ezatti tal-att istituttiv tal-gudizzju, imma mill-iskop li ghaliha huwa intiz il-gudizzju* [**Kollez. Vol.XXXIV.III.746**]."

Fil-kaz tal-lum, il-Qorti tghid illi l-azzjoni kif impostata mir-rikorrenti tista` biss tigi deciza minn qorti bhal din ta` gurisdizzjoni kostituzzjonali u/jew konvenzjonali, u ma tistax tkun trattata minn qorti jew tribunal ta` gurisdizzjoni ordinarja.

Ghalhekk qeghda tichad ir-raba` (4) eccezzjoni tal-intimati Vella.

IV. It-talbiet u l-eccezzjonijiet tal-intimati fil-mertu

1. L-ewwel talba

Qabel tqis il-mertu tal-ewwel talba, il-Qorti sejra tirreferi ghal argument li sar mir-rikorrenti fin-nota ta` osservazzjonijiet taghhom dwar l-applikazzjoni tad-disposizzjonijiet tal-Konvenzjoni ghal ligijiet li kienu fis-sehh **qabel** il-Konvenzjoni bdiet tghodd ghall-Istat Malti.

Ir-rikorrenti jirreferu ghad-decizjoni li tat l-ECtHR fis-27 ta` Frar 2018 fil-kaz ta` **Vella v. Malta.**

F`dak il-pronunzjament, il-Qorti ta` Strasbourg osservat illi :

" … *in the absence of an express limitation, the Maltese declaration of 30 April 1987 is retrospective and the Court is therefore competent to examine facts which occurred between 1967 and 1987 (see Bezzina Wettinger and Others, cited above, § 54, and the case-law cited therein).*"

L-**Art 7 tal-Kap 319** ighid :-

"*Ebda ksur tal-Artikoli 2 sa 18 (inkluzi) tal-Konvenzjoni jew tal-Artikoli 1 sa 3 (inkluzi) tal-Ewwel Protokoll li jsir qabel it-30 ta` April 1987 jew tal-Artikoli 1 sa 4 (inkluzi) tar-Raba` Protokoll, l-Artikoli 1 u 2 tas-Sitt Protokoll jew tal-Artikoli 1 sa*

5 (inkluzi) tas-Seba` Protokoll li jsir qabel l-1 ta` April 2002, ma ghandu jaghti lok ghal xi azzjoni taht l-artikolu 4."

Ir-referenza ghall-Art 7 tal-Kap 319 hija sinifikanti ghaliex ladarba l-allegata vjolazzjoni tkun avverat ruhha qabel it-30 ta` April 1987, allura l-qorti tkun trid tara jekk hijiex prekluza milli tqis jekk kienx hemm ksur tad-disposizzjonijiet tal-Konvenzjoni.

Fil-kaz in dizamina, jidher bic-car illi l-vjolazzjoni lamentata mir-rikorrenti tirrigwarda l-applikazzjoni tal-Kap 69 ghall-propjeta` in kwistjoni. Il-Kap 69 dahal fis-sehh b`effett mid-19 ta` Gunju 1931. Ir-rikorrenti jsostnu li qeghdin f`sitwazzjoni fejn minhabba l-Art 3 tal-Kap 69 huma kostretti jibqghu f`kirja minghajr prospett illi l-kera li jircievu tizdied b`mod li tkun tirrifletti l-valur lokatizju tal-fond fis-suq. Jilmentaw ukoll illi l-emendi ghall-Kap 16 li kienu ntrodotti bl-Att X tal-2009 jiddiskriminaw kontra taghhom ghaliex meta kien liberalizzat is-suq tal-kera, dan kien effettiv ghal kirjiet li bdew wara l-1 ta` Gunju 1995, izda mhux ukoll ghall-kirjiet ta` qabel.

Fil-kaz tal-lum, irrizulta li l-kirja tal-fond bdiet f`Marzu 1972. Ghadha fis-sehh sal-lum *ope legis* bis-sahha tad-disposizzjonijiet tal-Kap 69. Dan kollu jfisser li kien hemm kontinwita` fl-allegata vjolazzjoni.

Fis-sentenza li tat din il-Qorti diversament presjeduta fis-26 ta` Novembru 2009 fil-kawza fl-ismijiet **Philip Grech pro et noe vs Direttur tal-Akkomodazzjoni Socjali et** (kif riformata mill-Qorti Kostituzzjonali fis-7 ta` Dicembru 2010) inghad hekk :-

"Illi preliminarjament, l-intimat iwiegeb illi peress illi t-talbiet rikorrenti huma bbazati fuq ksur tal-Konvenzjoni Ewropeja, li saret parti mill-ligi lokali wara biss li sehh il-ksur ilmentat mir-rikorrenti, ir-rikorrenti ma ghandhomx rimedju taht l-Att dwar il-Konvenzjoni Ewropeja. L-artikolu 7 tal-Att Dwar il-Konvenzjoni Ewropeja (Kap. 319 tal-Ligijiet ta` Malta) fil-fatt jiddisponi, inter alia, illi ebda ksur tal-artikolu 1 tal-Ewwel Protokoll li jsir qabel it-30 ta` April 1987 ma ghandu jaghti lok ghal xi azzjoni taht l-istess att.

"Illi jrid jinghad pero` illi t-tfixkil fit-tgawdija tal-possediment tar-rikorrenti huwa stat ta` fatt kontinwu u li ghadu jippersisti sal-lum. Ma jistax jinghad illi r-rikorrenti ghandhom

*it-tgawdija pacifika tal-fond in kwistjoni u dan peress illi r-rikorrenti llum jinsabu fi ftehim ma` terz inkwilin konsegwenza u naxxenti mill-ordni ta` rekwizizzjoni mahruga mill-Gvern u bl-allokazzjoni tal-fond de quo mill-intimat lill-intervenut fil-kawza, u allura ir-relazzjoni li hemm bejn l-intervenut fil-kawza u r-rikorrenti li zviluppat sallum hija effett tal-istess ordni ta` rekwizizzjoni. Dan l-istat ta` fatt baqa` jippersisti sakemm l-ordni tar-rekwizizzjoni tibqa` fis-sehh u hekk ghadha il-posizzjoni sallum u ghalhekk certament l-effett tal-istess ordni hija ta` natura kontinwa ("**Nazzareno Galea et vs Giuseppe Briffa et**" (A.C. – 16 ta` April 2004). Il-kaz kien ikun differenti f`kaz li att amministrattiv kien jittratta esproprjazzjoni li giet iffinalizzata (Ara f`dan is-sens, **"Louis Manduca vs Il-Prim Ministru et"** (Q.K. - 13 ta` Jannar 1999). F`dan is-sens ukoll, irid jinghad illi l-Onorabbli Qorti Kostituzzjonali qieset esproprjazzjoni illi qatt ma giet iffinalizzata fis-sens illi qatt ma sar l-att ta` akkwist bhala ammontanti ghall-ksur kontinwu tal-possediment pacifiku ("**Pawlu Cachia vs Avukat Generali et**" (Q.K. – 28 ta` Dicembru 2001); "**Andrew Briffa vs Kummissarju tal-Art et**" – P.A. (RCP) – 27 ta` Novembru 2008. F`dan is-sens huwa ta` rilevanza, l-kaz ta` "**Loizidou vs. Turkey**" (ECHR - 15318/89 - 18 ta` Dicembru 1996) fejn il-Qorti Ewropeja qalet illi:-*

"The Court has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitation of the competence of the Convention organs. Accordingly the present case concerns alleged violations of a continuing nature if the applicant, for the purposes of Art. 1 of Protocol No. 1 and Art. 8 of the Convention can still be regarded as the legal owner of the land".

"Illi f`dan s-sens huma is-sentenzi fl-ismijiet "**Agrotexim Hallas vs Greece**" (19 ta` Frar 1992 u 10 ta` Marzu 1994) u "**Papamichaloupoulis et vs Greece**" (24 ta` Gunju 1993).

`Illi mhux hekk biss izda iktar relevanti ghall-kaz in ezami huwa dak li gie ritenut fuq dan il-punt fil-kawza fl-ismijiet **"Domenic Mintoff et vs Direttur tal-Akkomodazzjoni Socjali et"** (P.A. (GV) – 28 ta` Marzu 2008) fejn inghad li fejn allegazzjoni li l-kera wara li tkun saret rekwizizzjoni ma tkunx tirrifletti l-valur fis-suq u b`hekk ir-rikorrenti qed igorr piz sproporzjonat bhala effett ta` tali tehid f`dan il-kaz l-artikolu 7 ma japplikax billi l-effetti tar-rekwizizzjoni

jipperduraw oltre d-data li fiha harget ir-rekwizizzjoni. Dan proprju jikkombacja mal-kaz odjern, u dan iktar u iktar meta f`din il-kawza ma jidher qatt li tali ordni ta` rekwizizzjoni ghall-fond de quo qatt giet irtirata, u jidher li ghalhekk li ghadha sallum vigenti; dan apparti li l-istess rikors odjern jilmenta dwar in-nuqqas ta` kumpens gust li gie moghti lir-rikorrenti u lill avendi causa tieghu konsegwenti ghall-istess ordni ta` rekwizizzjoni. B`hekk din il-Qorti ma tikkondividiex it-tezi tal-intimat li r-rikorrenti m`ghandhomx azzjoni taht Kap. 319 ghal din ir-raguni u ghalhekk tichad din l-ewwel eccezzjoni tal-intimat ibbazata fuq l-eccezzjoni rationae temporis b`dan li din l-eccezzjoni qed tigi michuda.`

Fis-sentenza li tat din il-Qorti diversament presjeduta fil-kawza fl-ismijiet **Raymond Cassar Torreggiani et vs Avukat Generali et** (op. cit.) inghad hekk:

*"Illi l-Qorti tirrileva li l-azzjoni tar-rikorrenti hija msejsa kemm fuq id-dispozizzjonijiet tal-Kostituzzjoni u kif ukoll fuq dawk tal-Konvenzjoni. Is-silta li ssemmiet qabel tirreferi biss ghad-dispozizzjonijiet relattivi tal-Konvenzjoni. Izda hawnhekk ukoll, in-natura tal-ksur li dwaru jitqajjem l-ilment tiehu siwi ewlieni biex wiehed iqis jekk huwiex il-kaz jew le li l-ksur ikun sar qabel dawk id-dati msemmija. Dan qieghed jinghad ghaliex huwa accettat li fejn il-ksur jibqa` jsehh jew fejn il-qaghda li ggib maghha l-ksur tal-jedd fundamentali ma tkunx wahda istantaneja (Kost. 10.10.2003 fil-kawza fl-ismijiet **Francis Bezzina Wettinger et vs Kummissarju tal-Artijiet**; u Kost. 28.2.2005 fil-kawza fl-ismijiet **Attilio Ghigo vs Direttur tal-Akkommodazzjoni Socjali et** fost ohrajn), allura minkejja li l-grajja setghet sehhet qabel id-dati msemmija, l-Qorti xorta wahda tista` tqis u tistharreg il-ksur jekk il-qaghda tibqa` ttul wara (ara b`ezempju, Kost. 28.12.2001 fil-kawza fl-ismijiet **Cachia vs Avukat Generali et** (Kollez. Vol. LXXXV.i.615). Ta` min jghid hawnhekk li din il-kwestjoni tqajmet ukoll quddiem il-Qorti ta` Strasbourg f`kazijiet imressqin kontra Malta u dik il-Qorti sabet li, ladarba d-dikjarazzjoni maghmula mill-Gvern Malti f`April tal-1987 kienet b`effett retrospettiv, allura l-istharrig li dik il-Qorti tista` taghmel imur lura ghall-1967, jigifieri meta l-Konvenzjoni kienet ratifikata mill-Parlament Malti (ara b`ezempju Q.E.D.B 5.4.2011 fil-kawza fl-ismijiet **Bezzina Wettinger et vs Malta** (Applik nru. 15091/06) §54 u Rikors Kostituzzjonali Nru: 7/2017/LSO. 59 15 ta` Frar 2018*

*Q.E.D.B. 5.4.2011 fil-kawa fl-ismijiet **Gera de Petri Testaferrata Bonici Ghaxaq vs Malta** (Applik. Nru. 26771/07) §38.)*

Illi l-Qorti ma ghandha l`ebda dubju li ghalkemm il-kirja mifthema bejn l-intimat John Tabone u Cassar Estates Limited intemmet fl-1983, u bis-sahha tal-bidliet fil-ligi bl-Att XXIII tal-1979 inholqot il-kirja ex lege mal-gheluq ta` dik il-kirja konvenzjonali, l-effetti li minnhom jilmintaw ir-rikorrenti ghandhom jinhassu sallum. Minbarra f`dan, minhabba li l-intimati Tabone ghandhom jibbenefikaw mit-tibdiliet li saru fil-Ligi u baqghu izommu l-appartament, jista` jinghad li jekk hemm qaghda li gabet maghha xi ksur tal-jeddijiet fundamentali tar-rikorrenti din il-qaghda qiegha tittenna kuljum. Minhabba f`hekk, il-Qorti ma tistax ma tqisx l-ilment fid-dawl ta` dan kollu, minkejja li l-bidu tieghu jista` jmur lura qabel id-data msemmija millintimati."

Sar appell.

Il-Qorti Kostituzzjonali, fis-sentenza illi tat fid-29 ta` April 2016, waqt li kkonfermat dak fuq premess, qalet hekk :

"*27. A skans ta` ripetizzjoni, din il-Qorti taghmel referenza ghall-konsiderazzjonijiet tal-ewwel Qorti in meritu inkluz ir-referenzi taghha ghall-gurisprudenza patria u dik Ewropea, u tabbraccjahom bhala taghha. Huwa palezi illi l-allegata vjolazzjoni tal-jeddijiet tar-rikorrenti ghadha ghaddejja in kwantu l-effetti kollha emananti mill-kirja ikkreata ex lege bl-Att XXIII tal-1979 ghadhom ezistenti sal-gurnata tal-lum, u ghalhekk l-aggravju mressaq mill-konjugi Tabone ma ghandu ebda fondament fid-dritt*."

Din il-Qorti tikkondividi dawn l-insenjamenti u taghmilhom taghha. Ghalkemm il-kirja bdiet qabel it-30 ta` April 1987, l-allegata vjolazzjoni tal-Konvenzjoni baqghet ghaddejja sal-lum bil-fatt li l-kirja baqghet tiggedded *ex lege* bil-mod u manjiera determinate mil-ligi. Ghalhekk din il-Qorti ghandha setgha li tqis jekk kienx hemm ksur tad-disposizzjonijiet tal-Konvenzjoni.

a) L-Art 37 tal-Kostituzzjoni

Fir-rigward tal-mertu tal-ewwel talba, l-Avukat tal-Istat ressaq ir-raba` (4) eccezzjoni li ghandha zewg partijiet. Fil-parti (a) l-Avukat tal-Istat jikkontendi li skont l-Art 47(9) tal-Kostituzzjoni, l-Art 37 tal-Kostituzzjoni m`ghandux jimpatta fuq it-thaddim tad-disposizzjonijiet tal-Kap 69. Fil-parti (b) l-Avukat tal-Istat jikkontendi li l-Art 37 tal-Kostituzzjoni jsib applikazzjoni biss fil-kazi ta` tehid forzuz.

L-Art 47(9) tal-Kostituzzjoni jaqra hekk :

"*Ebda haga fl-artikolu 37 ta` din il-Kostituzzjoni ma ghandha tolqot il-hdim ta` xi ligi fis-sehh minnufih qabel it-3 ta` Marzu 1962 jew xi ligi maghmula fi jew wara dik id-data li temenda jew tissostitwixxi xi ligi fis-sehh minnufih qabel dik id-data (jew xi ligi li, minn zmien ghal zmien, tkun emendata jew sostitwita bil-mod deskritt f`dan is-subartikolu) u li ma –*

(a) izzidx max-xorta ta` proprjetà li jista` jittiehed pussess taghha jew id-drittijiet fuq u interess fi proprjetà li jistghu jigu miksuba;

(b) izzidx mal-finijiet li ghalihom jew cirkostanzi li fihom dik il-proprjetà jista` jittiehed pussess taghha jew tigi miksuba;

(c) taghmilx il-kondizzjonijiet li jirregolaw id-dritt ghal kumpens jew l-ammont tieghu anqas favorevoli lil xi persuna li jkollha jew li tkun interessata fil-proprjetà; jew

(d) tipprivax xi persuna minn xi dritt bhal dak li huwamsemmi fil-paragrafu (b) jew paragrafu (c) tal-artikolu 37(1) ta` din il-Kostituzzjoni."

Skont l-Avukat tal-Istat, l-ilment tar-rikorrenti bbazat fuq l-Art 37 tal-Kostituzzjoni huwa nfondat billi dik id-disposizzjoni ma tistax tigi nvokata ghall-applikazzjoni ta` ligi li kienet fis-sehh minnufih qabel it-3 ta` Marzu 1962 jew xi ligi maghmula fi jew wara dik id-data li temenda jew tissostitwixxi xi ligi fis-sehh minnufih qabel dik id-data. Fil-kaz tal-lum il-kirja favur l-intimati Vella hija regolata bil-Kap 69 li saret qabel it-3 ta` Marzu 1962 u allura kienet *saved* bl-Art 47(9) tal-Kostituzzjoni.

Ir-rikorrenti jaghmlu l-argument illi la darba l-kirja bdiet ghaddejja wara t-3 ta` Marzu 1962, l-applikazzjoni tad-dispozizzjonijiet tal-Kap 69 tista` tikkostitwixxi vjolazzjoni tal-Art 37 tal-Kostituzzjoni. Izidu jghidu li anke jekk jirrizulta li l-Kap 69 kien *saved* bl-applikazzjoni tal-Art 47(9) tal-Kostituzzjoni, f`dan il-kaz partikolari dan il-principju xorta wahda ma jistax isib applikazzjoni peress illi skont ir-rikorrenti l-emendi introdotti bl-Att X tal-2009 jinkwadraw ruhhom taht l-eccezzjonijiet kontemplati fil-paragrafi (b) u (c) tal-Art 47(9). Ghalhekk bl-applikazzjoni tad-disposizzjonijiet tal-Kap 69 u bl-emendi tal-2009 baqghet tigi mposta relazzjoni forzuza bejn is-sid u l-inkwilin bi dritt ta` rilokazzjoni *ope legis*.

Il-Qorti rat il-gurisprudenza dwar l-Art 37 u l-Art 47(9) tal-Kostituzzjoni fil-kuntest tal-Kap 88 tal-Ligijiet ta` Malta.

Fil-kawza fl-ismijiet **Lawrence Fenech Limited v. Kummissarju tal-Artijiet et** deciza mill-Qorti Kostituzzjonali fid-9 ta` Novembru 2012 tressaq aggravju fis-sens li l-Ewwel Qorti ma setghetx issib ksur tal-Art 37 tal-Kostituzzjoni minhabba l-Art 47(9). L-aggravju kien milqugh propju ghaliex il-Kap 88 sar ligi tal-pajjiz qabel it-3 ta` Marzu 1962.

Fis-sentenza ta` din il-Qorti tal-4 ta` Ottubru 2016 fil-kawza fl-ismijiet **Melina Micallef v. Il-Kummissarju tal-Artijiet** (hekk kif riformata mill-Qorti Kostituzzjonali fl-24 ta` Novembru 2017) kien riaffermat illi *d-disposizzjonijiet tal-Kap 88 kienu saved bl-Art 47(9) tal-Kostituzzjoni* u ghalhekk *ma tistax tigi nvokata vjolazzjoni tal-Art 37 tal-Kostituzzjoni.*

Similment fis-sentenza ta` din il-Qorti tat-3 ta` Ottubru 2014 fil-kawza fl-ismijiet **Francis Bezzina Wettinger et vs Kummissarju tal-Artijiet et** (konfermata mill-Qorti Kostituzzjonali fl-24 ta` April 2015) inghad hekk :-

> *"L-intimati jikkontendu li l-Art 37 tal-Kostituzzjoni mhuwiex applikabbli ghall-kaz tal-lum in vista tal-Art 47(9) tal-Kostituzzjoni.*
>
> *Il-Qorti terga` taghmel riferenza ghas-sentenza tal-Qorti Kostituzzjonali fil-kawza "**Bezzina Wettinger et vs Il-Prim` Ministru et**" (op. cit.)*

Fis-sentenza taghha, il-Qorti Kostituzzjonali kkonfermat dak li qalet l-Ewwel Qorti :-

Illi ghalhekk din il-Qorti taqbel mal-konkluzjoni tal-Ewwel Qorti illi l-Kapitolu 88 – bhala ligi li kienet fis-sehh qabel it-3 ta` Marzu 1962 – huwa salvagwardjat bl-istess Kostituzzjoni ai termini tal-Artikolu 47(9), u konsegwentement dan l-aggravju qed jigi respint.

*Illi dwar dan il-punt, din il-Qorti taghmel riferenza wkoll ghas-sentenza ta` din il-Qorti (PA/RCP) tat-22 ta` Marzu 2002 fil-kawza "**Francis Bezzina Wettinger et vs Kummissarju tal-Artijiet**" fejn inghad hekk :-*

Illi kif inghad f`**Pawlu Cachia vs Avukat Generali et** (9/4/99 Rik. Nru. 586/97/VDG), il-hdim ta` xi ligi fis-sehh minnufih qabel id-data msemmija ma tistax tkun anti-kostituzzjonali fis-sens li tippekka kontra l-artikolu 37. L-istess jinghad ghal xi amending act jew substituting act maghmula f`dik id-data jew wara dik id-data purche` li tali att li hekk jemenda jew jissostitwixxi dik il-ligi ma jkunx jaghmel xi wahda mill-affarijiet imsemmi fil-paragrafi (a) sa (d) tal-imsemmi artikolu 47(9).

Illi kif kompliet tghid dik il-Qorti, ma hemmx dubbju li l-Kap. 88 kien fis-sehh qabel it-3 ta` Marzu 1962. Ma hemmx dubju wkoll li l-imsemmija ligi giet emendata wara dik id-data, izda r-rikorrent f`ebda hin ma ndika xi emenda li b`xi mod taqa` taht xi wiehed mill-paragrafi (a) sa (d) tal-artikolu 47(9). Illi hafna mill-emendi maghmula wara t-3 ta` Marzu 1962 kienu ta` natura formali bhas-sostituzzjoni tal-Gvernatur Generali bil-President ta` Malta. Illi din il-Qorti b`hekk ezaminat jekk fir-rigward tad-dikjarazzjonijiet ta` esproprjazzjoni meritu ta` din il-kawza u fir-rigward tal-proceduri ghall-kumpens gewx imhaddma xi amending provisions li jaqghu taht l-imsemmija paragrafi (a) sa (d). Din il-Qorti ma tarax li dan huwa l-kaz, fis-sens li d-dispozizzjonijiet imhaddma fir-rigward tal-ordnijiet ta` esproprjazzjoni de quo huma kollha salvati bl-Artikolu 47(9) milli jiksru l-Artikolu 37.

Issa l-Qorti tirribadixxi li fil-kawza tal-lum, ir-rikorrenti qeghdin jilmentaw minn vjolazzjoni tal-Art 37 tal-Kostituzzjoni ghaliex il-Bord tal-Arbitragg dwar l-Artijiet

illikwida kumpens li, skond ir-rikorrenti, ma kienx xieraq u adegwat.

Il-Qorti tirrileva li l-kumpens li l-Bord kien u ghadu jillikwida jsegwi l-kriterji li huma stabbiliti fid-disposizzjonijiet tal-Kap 88. Ghalhekk billi l-Kap 88 huwa ligi li giet saved ai termini tal-Art 47(9) tal-Kostituzzjoni, din l-Qorti mhijiex sejra tqis ix-xorta ta` ilment li ghandhom ir-rikorrenti skond l-Art 37 tal-Kostituzzjoni fejn dan l-ilment jolqot it-twettieq tal-Kap 88."

Riferibbilment ghall-kaz tal-lum, ma hemmx dubju illi l-ligijiet relattivi ghall-kirja mertu tal-kawza saru qabel it-3 ta` Marzu 1962. Dawk il-ligijiet gew emendati matul is-snin.

Il-Qorti m`ghandhiex prova li xi emendi kienu jaqghu taht xi wiehed mill-eccezzjonijiet ravvizati fil-paragrafi (a) sa (d) tal-Art 47(9) tal-Kostituzzjoni. Tghid dan ghaliex bl-introduzzjoni tal-Artikolu 1531B il-legislatur ghamilha cara illi ghal kirja li kienet fis-sehh qabel l-1 ta` Gunju 1995 ghandha tibqa` tghodd il-ligi kif kienet fis-sehh qabel l-1 ta` Gunju 1995. Madanakollu bl-emendi li dahlu fis-sehh bis-sahha tal-Att X tal-2009 il-legislatur haseb illi jipprovdi ghal skaletta ta` zidiet fil-quantum tal-kirja waqt li gie ffissat ammont bhala l-anqas rata ta` kera permissibbli. Zgur ghalhekk illi bl-introduzzjoni ta` dawn l-emendi il-legislatur ma poggiex fis-sehh kondizzjonijiet li jirregolaw id-dritt ghal kumpens b`mod anqas favorevoli ghas-sidien. Ma tirrizultax ghalhekk l-eccezzjoni ravvizata taht il-paragrafu (c) tal-Art 47(9) tal-Kostituzzjoni. Lanqas ma jista` jinghad illi l-emendi ntrodotti bl-Att X tal-2009 jaqghu taht l-eccezzjoni mahsuba fil-paragrafu (b) tal-Art 47(9) tal-Kostituzzjoni ghaliexx l-Art 1531F jaghmel elenku specifiku tal-persuni li f`determinati cirkostanzi tista` tigi tramandata l-kirja favur taghhom. Ghalhekk mhux talli dawn l-emendi ma jzidux mal-finijiet jew cirkostanzi li fihom jista` jinkiseb lura l-pussess battal tal-proprjeta` talli jservu sabiex jistabilixxu *cut off date* u dererminati cirkostanzi li tahthom biss tista` tigi mgedda l-kirja favur qraba tal-inkwilin. Jekk l-inkwilin ma jkollux jghixu mieghu persuni li jissoddisfaw il-kriterji partikolari ndikati fl-Artikolu 1531F, is-sid jaf b`certezza li mal-mewt tal-inkwilin huwa sejjer jikseb lura l-pussess battal. Il-Qorti hija tal-fehma illi l-emendi introdotti bl-Att X tal-2009 ma jzidux aktar piz fuq is-sidien ma` dak li kien diga` mpost bil-Kap 69.

Fid-dawl tal-premess, il-Qorti tqis illi d-disposizzjonijiet tal-Kap 69 kienu *saved* bl-Art 47(9) tal-Kostituzzjoni. Ghalhekk ma tistax tigi avvanzata mir-rikorrenti pretensjoni ta` vjolazzjoni tal-Art 37 tal-Kostituzzjoni. Fic-cirkostanzi ma hemmx il-htiega li tistharreg il-parti (b) tal-eccezzjoni, kif ukoll l-eccezzjonijiet bin-nru hamsa (5) u sitta (6) li tressaq l-Avukat tal-Istat li huma relatati.

L-ewwel talba <u>limitatament u safejn</u> tirreferi ghal vjolazzjoni tal-Art 37 tal-Kostituzzjoni qeghda tkun r<u>espinta</u>.

b) <u>L-Art 1 Prot 1 tal-Konvenzjoni</u>

Id-disposizzjoni taqra hekk :-

Kull persuna naturali jew persuna morali ghandha d-dritt ghat-tgawdija pacifika tal-possedimenti taghha.

Hadd ma ghandu jigi pprivat mill-possedimenti tieghu hlief fl-interess pubbliku u bla hsara tal-kundizzjonijiet provduti bil-ligi u bil-principji generali tal-ligi internazzjonali.

Izda d-disposizzjonijiet ta` qabel ma ghandhom b`ebda mod inaqqsu d-dritt ta` Stat li jwettaq dawk il-ligijiet li jidhrulu xierqa biex jikkontrolla l-uzu tal-proprjeta skond l-interess generali jew biex jizgura l-hlas ta` taxxi jew kontribuzzjonijiet ohra jew pieni.

Id-disposizzjoni hija gwidata minn tliet principji :-

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

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

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

meta jintroduci legislazzjoni ntiza sabiex ittaffi problemi ta` akkomodazzjoni.

i) Gurisprudenza tal-ECtHR

L-Istat ghandu s-setgha u d-dritt li jirregola l-uzu tal-propjeta` fl-interess generali. Madanakollu l-interess tal-privat ghandu jkun tutelat ukoll ghaliex fl-ezercizzju tas-setgha tal-Istat li jikkontrolla l-uzu tal-proprjetà ghandu jkun sodisfatt ir-rekwizit tal-proporzjonalità.

Fis-sentenza **Amato Gauci vs Malta** (15 ta` Settembru 2009 : finali 15 ta` Dicembru 2009) l-ECtHR kienet qalet :-

> *56. Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see **Sporrong and Lönnroth** cited above, §§ 69-74, and **Brumărescu v. Romania** [GC], no. 28342/95, § 78, ECHR 1999-VII).*
>
> *57. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State`s interference the person concerned had to bear a disproportionate and excessive burden (see **James and Others**, cited above, § 50; **Mellacher and Others**, cited above, § 48, and **Spadea and Scalabrino v. Italy**, judgment of 28 September 1995, § 33, Series A no. 315-B).*
>
> *58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. …. Indeed, where an issue in the general interest is at stake, it is incumbent on*

*the public authorities to act in good time, and in an appropriate and consistent manner (see **Immobiliare Saffi v. Italy**, [GC], no. 22774/93, § 54, ECHR 1999-V; and Broniowski, cited above, § 151).*

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

…

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

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

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

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

(a) Whether there was an interference

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

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

46. Subsequently, in ***R & L, s.r.o. and Others*** *(cited above) the Court specifically examined whether Article 1 of Protocol No. 1 protected applicants who had purchased property in the knowledge that rent restrictions imposed on the property might contravene the Convention. In that case, when the applicants had acquired their respective properties*

their rents had been set in accordance with the rent regulations applicable at the time and the applicants could not have increased the rents above the threshold set by the State. Nor were they free to terminate the rent agreements and conclude new ones with different – higher – levels of rent. The Court did not find it decisive that one of the applicants had purchased the property before the domestic courts had taken issue with the legislation in place which had given a legitimate expectation that the status of such properties would be addressed by the national legislator in due course. The Court held that it could not be said that the applicants as landlords had implicitly waived their right to set the level of rents, as, for the Court, waiving a right necessarily presupposed that it would have been possible to exercise it. There was no waiver of a right in a situation where the person concerned had never had the option of exercising that right and thus could not waive it. It followed that the rent-control regulations had constituted an interference with the landlords` right to use their property (ibid., § 106).

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

*48. Turning to the present case, the Court also notes that the applicants had bought their property before the European Court of Human Rights took issue with the Maltese legislation applicable in cases such as **Amato Gauci** (cited above). That judgment was eventually followed in most cases in domestic case-law. However, again the Court finds this not to be decisive given the passage of time between the purchase of the property and now. In this connection the Court reiterates that what might be justified at a specific time might not be justified decades later (see **Amato Gauci**, cited above, § 60). In the present case, while it is true that the applicants knowingly entered into the rent agreement in 1988 with the relevant restrictions (specifically the inability to increase the rent or to terminate the lease), the Court considers that the applicants could not reasonably have foreseen the extent of inflation in property prices in the decades that followed (see **Zammit and Attard Cassar**, cited above, § 50). Once the discrepancy in the rent applied and that on the market became evident, they were unable to do anything more than attempt to use the available remedies, which they did in 2010, but which were to no avail in their circumstances. The decisions of the domestic courts regarding their application thus constituted interference in their respect. Furthermore, the applicants, who bought a property that was already subject to a restricted lease, did not have the possibility to set the rent themselves or to freely terminate the agreement. Clearly, they could not be said to have waived any rights in that connection (see **Zammit and Attard Cassar**, cited above, § 50).*

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

*50. The Court has previously held that rent-control schemes and restrictions on an applicant`s right to terminate a tenant`s lease constitute control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. It follows that the case should be examined under the second paragraph of Article 1 of Protocol No. 1 (see **Hutten-Czapska v. Poland** [GC], no. 35014/97, §§*

*160-61, ECHR 2006-VIII; **Bittó and Others v. Slovakia**, no. 30255/09, § 101, 28 January 2014; and **R & L, s.r.o. and Others**, cited above, § 108).*

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

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

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

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

(c) Whether the Maltese authorities struck a fair balance

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

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

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

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

*57. As to the rent payable, the Court is ready to accept that EUR 466 annually was a more or less reasonable amount of rent in 1988 - particularly given that it was an amount of rent which the applicants were aware of and in spite of which they decided to purchase the property with the relevant restrictions. Furthermore, it was an amount of rent which the applicants expected to receive for a number of years, at least until the demise of J.G. and his wife. Moreover, the Court accepts that at the relevant time the measure pursued a legitimate social-policy aim (see paragraph 53 above) which may call for payments of rent at less than the full market value (see **Amato Gauci**, § 77).*

58. The same cannot be said after the passage of decades, during which the rent had remained the same (as stated by the parties and the domestic courts, the rent is still EUR 466

*annually). The Court has previously held that there had been a rise in the standard of living in Malta over the past decades (see **Amato Gauci**, cited above, § 63, and **Anthony Aquilina**, cited above, § 65). Thus, the needs and the general interest which may have existed in 1979 must have decreased over the three decades that ensued (see **Anthony Aquilina**, cited above, § 65). It is noted that as stated by the Government in paragraph 40 above, the minimum wage in 2015 was EUR 720.46 per month, while in 1974 (the date when Malta adopted a national minimum wage) it amounted to the equivalent of less than EUR 100 per month (see **Amato Gauci**, cited above, § 60).*

*59. The Court need not identify the exact year at which the rent payable was no longer reasonable. It observes that cases against Malta concerning the same subject matter, that is to say renewal of leases by operation of law - whose rent had been set on an open market – (see **Amato Gauci, Anthony Aquilina, and Zammit and Attard Cassar**, all cited above), which have invariably lead to findings of a violation of Article 1 of Protocol No. 1, concerned periods after the year 2000. Furthermore, the Government of the respondent State have often argued that Malta suffered a boom in property prices in 2003 (see, for example, **Apap Bologna v. Malta**, no. 46931/12, § 97, 30 August 2016). Lastly, although not determinative, it was only in 2008 that the applicants refused to accept the rent, once P.G. had inherited the property. In the light of the above it suffices for the Court to consider that a rent based on the value of the property as it stood in 1962 with the relevant adjustment which amounted to EUR 466 annually in 1988 and thereafter – was certainly not reasonable for the years following 2000.*

60. In particular, even if one had to concede that the valuations submitted by the applicants are on the high side, the Court notes that the first-instance domestic court, in 2011, accepted EUR 3,000 per month (that is to say EUR 36,000 per year) as the rental market value of the property (see paragraph 18 above). Thus, the amount of rent received by the applicants, around EUR 39 a month, that is to say EUR 466 per year, for a fourteen-room house in Sliema, a highly sought-after location, is indeed "derisory" as was also found by the first-instance domestic court (see paragraph 18 above). Indeed, that amount of rent contrasts sharply with the market value of the premises in recent years, as accepted by the domestic court or as submitted by the applicant, as it

*amounted to a little more than 1% of the market value. The Court considers that State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable. Nevertheless, this may not lead to results which are manifestly unreasonable (see **Amato Gauci**, cited above, § 62).*

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

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

Kaz iehor ta` interess kien dak ta` **Zammit and Attard Cassar v Malta** li kien deciz mill-ECtHR fit-30 ta` Lulju 2015.

L-ilment tal-applikanti kien illi r-restrizzjonijiet dwar kera kienu ta` piz eccessiv. Kien allegat ghalhekk mill-applikanti li garrbu vjolazzjoni tal-jeddijiet fondamentali taghhom hekk kif tutelati bl-Art 1 Prot 1 tal-Konvenzjoni. Il-kaz kien jittratta dwar kirja ta` fond kummercjali li kienet qed tigi mgedda *ope legis* u cioe` bis-sahha tal-Kap 69. Ghalkemm tal-lum huwa kaz ta` fond residenzjali, il-kirja sfat imgedda sa ma waslet ghand l-intimati Pace bis-sahha tal-Kap 69.

L-ECtHR sabet li kien hemm lezjoni tal-Art 1 Prot 1 tal-Konvenzjoni minkejja l-emendi tal-2009.

Inghad hekk :-

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

(a) Whether there was interference

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

49. More recently, in ***R & L, s.r.o. and Others v. the Czech Republic*** *(nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09, 3 July 2014) the Court specifically examined whether Article 1 of Protocol No. 1 protected applicants who had purchased property in the knowledge that rent restrictions imposed on the property might contravene the Convention. In that case, when the applicants had acquired their respective houses their rents had been set in accordance with the rent regulations applicable at the time and the applicants could not have increased the rents above the threshold set by the State. Nor were they free to terminate the rent agreements and conclude new ones with different – higher – levels of rent. The Court held that it could not be said that the applicants as landlords had implicitly waived their right to set the level of rents, as, for the Court, waiving a right necessarily presupposed that it would have been possible to exercise it. There was no waiver of a right in a situation where the person concerned had never had the option of exercising that right and thus could not waive it. It*

followed that the rent-control regulations had constituted an interference with the landlords` right to use their property (ibid. § 106).

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

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

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

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

53. The first requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful

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

54. Furthermore, a measure aimed at controlling the use of property can only be justified if it is shown, inter alia, to be "in accordance with the general interest". Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the "general" or "public" interest. The notion of "public" or "general" interest is necessarily extensive. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has on many occasions declared that it will respect the legislature`s judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation (see, mutatis mutandis, ***Hutten-Czapska****, cited above, §§ 165-66, and* ***Fleri Soler and Camilleri v. Malta****, no. 35349/05, § 65, ECHR 2006-X).*

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

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

commercial premises, may be considered as being in the general interest.

*(c) **Whether the Maltese authorities struck a fair balance***

*57. In each case involving an alleged violation of Article 1 of Protocol No. 1, the Court must ascertain whether by reason of the State`s interference, the person concerned had to bear a disproportionate and excessive burden (see **James and Others**, cited above, § 50, and **Amato Gauci**, cited above, § 57).*

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

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

60. The Court observes that in the present case the lease was subject to renewal by operation of law and the applicants had no possibility to evict the tenant on the basis of any of

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

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

*62. The Court further notes that for the first decade of the rental contract, during which – according to the applicants – the market value of the property was EUR 7,000, the rent payable to the applicants was EUR 862 a year. Subsequently, for the year 2010 the rent amounted to EUR 990, for 2011 EUR 1,138, for 2012 EUR 1,309 and for 2013 EUR 1,505. For the years 2014 onwards it would increase by 5% a year. The Court reiterates that State control over levels of rent falls into a sphere that is subject to a wide margin of appreciation by the State, and its application may often cause significant reductions in the amount of rent chargeable. Nevertheless, this may not lead to results which are manifestly unreasonable, such as amounts of rent allowing only a minimal profit (see **Amato Gauci**, cited above, § 62). While the applicants do not have an absolute right to obtain rent at market value, the Court observes that, despite the 2009 amendments, the amount of rent is significantly lower than*

the market value of the premises as submitted by the applicants, which was not effectively contested by the Government. However, the applicants have not argued that they were unable to make any profit. Even so, this element must be balanced against the interests at play in the present case.

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

64. Lastly, the Court notes that unlike in other rent-control cases where the applicants were in a position of uncertainty as to when and if they would recover their property (see, inter alia, ***Amato Gauci****, cited above, § 61, and* ***Saliba and Others v. Malta****, no. 20287/10, § 67, 22 November 2011), in the present case, under the laws currently in force and in the absence of any further legislative interventions, the applicants` property will be free and unencumbered as of 2028. It follows that the effects of such rent regulation are circumscribed in time. However, the Court cannot ignore the fact that by that time, the restriction on the applicants` rights would have been in force for nearly three decades, and to date has been in force for over a decade.*

65. Having assessed all the elements above, and notwithstanding the margin of appreciation allowed to a State in choosing the form and deciding on the extent of control over the use of property in such cases, the Court finds that, having regard to the relatively low rental value of the premises and the lack of procedural safeguards in the application of the law, a disproportionate and excessive burden was imposed on the applicants, who have had to bear

a significant part of the social and financial costs of supporting a commercial enterprise. It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants` right to the enjoyment of their property.

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

ii) <u>Gurisprudenza tal-Qrati Maltin</u>

Fejn jidhol l-Art 1 Prot 1 tal-Konvenzjoni, diversi kienu d-decizjonijiet tal-qrati taghna li kienu jittrattaw kazi li kienu jinvolvu disposizzjonijiet tal-Kap 158 fejn kienet dikjarata vjolazzjoni tal-Art 1 Prot 1. Kienu decizjonijiet dwar fondi residenzjali.

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

Dak li nghad f`din il-gurisprudenza huwa ta` siwi ghall-kaz tal-lum.

It-thaddim tal-Art 1 Prot 1 tal-Konvenzjoni jigma` fih tliet principji : u cioe` : illi ghandu jkun hemm it-tgawdija pacifika tal-proprjeta` ; illi l-privazzjoni minn possedimenti hija soggetta ghal kondizzjonijiet ; u li l-Istat ghandu l-jedd illi jikkontrolla l-uzu tal-proprjeta` konformement mal-interess generali.

It-tliet principji ghalkemm distinti mhumiex disgunti peress illi l-ahhar tnejn jittrattaw sitwazzjonijiet partikolari ta` indhil fid-dritt ghall-godiment pacifiku tal-proprjeta` u ghalhekk iridu jinftehmu fid-dawl tal-principju generali espost fl-ewwel principju.

Kull tip ta` interferenza trid tkun kompatibbli mal-principji ta` (i) l-legalita`, (ii) ghan legittimu fl-interess generali, u (iii) bilanc gust.

Huwa mehtieg proporzjon ragjonevoli bejn il-mezzi, u l-ghan persegwit bil-mezzi li jkun ghamel uzu minnhom l-Istat, sabiex jikkontrolla l-uzu tal-proprjeta` tal-individwu.

Dan il-proporzjon issib r-*raison d`etre* tieghu fil-principju tal-"bilanc xieraq" li jrid jinzamm bejn l-esigenzi tal-interess generali, u l-htiega tal-harsien tad-drittijiet fundamentali tal-persuna.

F`kazi bhal dak ta` llum, il-Qorti tkun trid tqis il-varji interessi, u taccerta ruhha jekk bhala konsegwenza tal-indhil tal-Istat il-persuna tkujx qeghda ggarrab piz eccessiv u sproporzjonat.

iii) <u>Sfond storiku u legali</u>

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

Wara l-Ewwel Gwerra Dinija, il-kirjiet bdew joghlew b`rata mghaggla. Ghalhekk kienet mehtiega regolamentazzjoni.

L-Att I tal-1925 kien l-ewwel att legislattiv li kien intiz sabiex jirregola zidiet fil-kera tant li mpona arbitragg meta ma kienx jintlahaq ftehim dwar iz-zidiet fil-kera. Dan l-Att kellu jkollu effett temporanju sal-31 ta` Dicembru 1927.

Inhasset il-htiega ta` kontroll aktar strett.

Ghalhekk kien promulgat l-Att XXIII tal-1929, li permezz tieghu, is-sidien gew prekluzi milli jghollu l-kera jew milli jirrifjutaw li jgeddu l-kera minghajr il-permess tal-Bord li Jirregola l-Kera. Il-Bord inghata s-setgha illi jilqa` talba ghal zgumbrament biss wara li jkunu sodisfatti numru ta` kondizzjonijiet. In kwantu ghat-talbiet ghal zieda fil-kera, il-Bord seta` jawtorizza awment sa massimu ta` 40% tal-kera gusta vigenti f`Awissu 1914. Din il-mizura wkoll kellha tkun wahda temporanja sakemm is-suq jistabilizza ruhu. Infatti l-Att XXIII tal-1929 kellu jkollu effett sal-31 ta` Dicembru 1933.

L-Ordinanza XXI tal-1931 li Tirregola t-Tigdid tal-Kiri ta` Bini (illum Kap 69 tal-Ligijiet ta` Malta) li hadet post l-Att XXIII tal-1929 kienet promulgata fid-19 ta` Gunju 1931 u kienet intiza sabiex ikollha effett sal-31 ta` Dicembru 1933. Biss in segwitu saret definittiva. Saret din il-ligi l-aktar minhabba nuqqas kbir ta` djar ta` abitazzjoni wara l-herba tat-Tieni Gwerra Dinija. Kien mehtieg illi l-kera tad-djar titrazzan fi zmien ta` skarsezza. Kien frott dan l-intervent legislattiv illi hafna nies setghu jifilhu jhallsu sabiex ikollhom saqaf fuq rashom. Waqt li l-ligi serviet l-iskop originali taghha, maz-zmien gabet maghha konsegwenzi negattivi fis-sens illi bdiet tohnoq is-suq u bdew jonqsu l-postijiet disponibbli ghall-kera. Tajjeb jinghad li l-Kap 69 kien jirregola propjeta` urbana (*urban property*) u allura mhux biss fondi ntizi ghall-finijiet residenzjali izda anke ghal propjeta` kummercjali.

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

iv) <u>Konsiderazzjonijiet</u>

L-Ordinanza XXI tal-1931 kellha skop legittimu u saret fl-interess generali ghaliex kienet mahsuba sabiex tevita sitwazzjoni fejn persuni jispiccaw minghajr saqaf fuq rashom. L-istorja socjo-ekonomika ta` dawn il-Gzejjer turi li din il-ligi kienet necessarja. Il-legislatur ipprova jsib bilanc bejn interessi konfliggenti. Fl-istess waqt ghandu jinghad li t-tkattir tal-gid fil-kors tas-snin wera li dak l-intervent legislattiv, ghalkemm kellu propositi tajbin, ma kienx baqa` joffri bilanc, anzi

holoq sproporzjon u zvantagg evidenti u notevoli ta` parti fil-konfront ta` ohra.

Abbinati l-fatti tal-kaz tal-lum mal-insenjamenti gurisprudenzjali, il-Qorti tqis illi d-disposizzjonijiet dwar it-tigdid awtomatiku tal-kera kif ukoll il-kontroll fl-ammont tal-kera huma mizuri mahsuba sabiex jikkontrollaw l-uzu u t-tgawdija tal-proprjeta`. Kemm il-modalita` tat-tigdid tal-kera u kif ukoll il-kontroll fl-ammont ta` kera percepibbli jikkostitwixxu interferenza fl-uzu u t-tgawdija tal-proprjeta`.

Jirrizulta ppruvat illi l-kera li r-rikorrenti setghu jippercepixxu minhabba l-effetti tal-Kap 69 meta mqabbla mal-kera fis-suq hieles oggettivament hija bil-wisq baxxa.

Infatti meta l-intimati Vella bdew jikru l-fond minghand l-antekawza tar-rikorrenti fl-1972 kienu jhallsu Lm 18 fix-xahar. Il-kera telghet ghal €42 fix-xahar bl-introduzzjoni tal-Att X tal-2009. Illum qeghda tithallas kera ta` €90 fix-xahar ghat-total ta` €1,080 fis-sena. Meta r-rikorrenti dahlu fix-xena wara l-mewt ta` Ivan Borg, li lilu kien mess il-flat de quo wara li saret il-qasma ma` hutu, il-kirja kienet diga` fis-sehh.

L-intimati jaghmlu l-argument illi r-rikorrenti dahlu fid-drittijiet u l-obbligi tal-aventi causa taghhom u ghalhekk iridu joqghodu ghad-decizjonijiet li kienu ttiehdu mill-predecessuri taghhom fit-titolu. Dawn kien ghamlu lokazzjoni li kienet regolata bil-Kap 69. Ghalhekk ivinci l-principju : *pacta sunt servanda*.

Lil hinn mir-raguni li wasslet ghall-kirja bosta snin ilu favur l-intimati Vella jibqa` l-fatt illi jekk dak iz-zmien is-sid ried jiehu xi gwadann mill-proprjeta` tieghu ma kellux triq ohra hlief illi jottempra ruhu mal-ligijiet vigenti. Zgur illi fl-1972 ma kienx previst mill-antekawza tar-rikorrenti li kien sejjer ikun hemm bdil tant qawwi `l fuq fis-suq tal-kera li gab mieghu bidla fil-ligijiet anke minhabba l-influwenza markata tad-decizjonijiet tal-Qorti ta` Strasbourg.

Din il-Qorti hija tal-fehma illi kienu x`kienu c-cirkostanzi meta nkera l-post, anke jekk kien diga` fis-sehh il-Kap 69, b`daqshekk ma jfissirx illi bl-applikazzjoni ta` dik il-ligi fir-realtajiet tas-socjeta` nostrana, il-qaghda taghhom bhala sidien kienet ben tutelata.

Fil-kaz tar-rikorrenti, l-accettazzjoni da parti taghhom tal-kirja m`ghandhiex tiftiehem jew addirittura teskludi vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni.

L-istat ta` nuqqas ta` ghazla kienet realta` tangibbli fil-pajjiz taghna li thalla jippersisti mill-Istat sa zminijiet ricenti.

L-isvolta lejn l-ahjar giet unikament minhabba s-sentenzi tal-ECtHR u tal-Qorti Kostituzzjonali taghna.

Hemm kien dikjarat *senza se e senza ma* li bl-applikazzjoni tal-ligijiet specjali tal-kera sehh ksur tal-jeddijiet fondamentali tas-sidien.

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

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

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

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

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

Bl-emendi l-aktar ricenti gara li filwaqt li l-inkwilini nghataw protezzjoni ma garax l-istess lis-sidien li kellhom joqghodu ghal dak li kienet tipprovdi l-ligi ghaliex il-legislatur naqas milli joffrilhom rimedju adegwat skont il-ligi ordinarja sabiex joggezzjonaw b`mod effettiv ghar-restrizzjonijiet fuq il-kundizzjonijiet lokatizzji.

L-uniku triq disponibbli ghas-sidien kienet li jfittxu kenn quddiem il-qrati ta` indole kostituzzjonali jew konvenzjonali (ara s-sentenza li tat din il-Qorti diversament presjeduta fil-11 ta` Mejju 2017 fil-kawza fl-ismijiet **Josephine Azzopardi et vs L-Onorevoli Prim Ministru et**).

Tajjeb jinghad illi a tenur tal-Art 14 tal-Kap 69 is-sid illi "*irid jgholli l-kera jew ibiddel il-kondizzjonijiet tal-kiri*" kellu jsegwi l-procedura stabbilita fl-Ordinanza, u jindika l-kondizzjonijiet il-godda qabel l-iskadenza tal-kirja. L-inkwilin jibqa` bil-jedd illi jressaq l-oggezzjonijiet tieghu quddiem il-Bord li Jirregola l-Kera. Ghad illi l-legislatur haseb ghal ezenzjoni ghar-regola stabbilita fl-Art 3, fl-istess waqt holoq eccezzjoni bl-Art 4 ghaliex kienu limitati s-setghat tal-Bord billi dan ma setax jawtorizza awment fil-kera li jkun oghla minn 40% tal-valur lokatizju tal-fond kif kien fl-1914.

Anke fil-kaz li s-sid jitlob lura l-pussess tal-fond, il-legislatur haseb ghal cirkostanzi specifici fejn il-Bord jista` jilqa` t-talba tas-sid. Dan johrog mid-dispost tal-Art 9 tal-Kap 69.

L-assjem tal-premess iwassal ghall-fehma li l-uniku rimedju **tajjeb u effettiv** li kellhom ir-rikorrenti kien proprju procediment bhal dak tal-lum.

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

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

Jirrizulta ghalhekk illi l-kirja tal-fond de quo kienet imgedda *ope legis* b`mod u manjiera illi s-sid kien kostrett *a suo malgrado* li joqghod ghal dak ir-regim ta` dritt certament sfavorevoli ghalih. Anke li kieku ntalab awment fil-kera, il-ligi ma kinitx tipprovdi ghal kondizzjonijiet biex eventwali awment ikun tassew reali u gust. Ghalhekk ir-rikorrent u l-awturi taghhom ma kellhomx rimedji effettivi.

Jirrizulta li l-legislazzjoni attwali tolqot lir-rikorrenti bi sproporzjon evidenti u sfavorevoli ghalihom. Mhuwiex in diskussjoni l-jedd tal-Istat illi jikkontrolla b`legislazzjoni l-uzu tal-proprjeta` meta dan ikun fl-interess pubbliku. Fl-istess waqt l-Istat huwa obbligat juri li fl-applikazzjoni ta` dik il-legislazzjoni jkunu qeghdin jinzammu bilanc u proporzjonalita` bejn l-interess generali u ta` dak privat. Il-kwistjoni ghandha tibqa` nkwadrata madwar il-fatt illi bl-applikazzjoni tad-disposizzjonijiet tal-Kap 69 ghas-sitwazzjoni tar-rikorrenti qed ikun hemm ksur tal-Art 1 Prot 1 tal-Konvenzjoni. Fil-kaz tar-rikorrenti huwa ppruvat sproporzjon notevoli kontra taghhom fir-ritorn li jista` jkollhom li kieku t-tgawdija tal-propjeta` kellha tithalla tilhaq il-milja taghha.

Huwa evidenti li matul iz-zmien anke l-legislatur irrealizza li dak li wasslu biex jintervjeni fl-1931 kien jehtieg ripensament motivat minn bidla lejn l-ahjar fil-qaghda ekonomika u socjali tal-pajjiz. Il-Qorti tosserva illi waqt illi bl-Att XXXI tal-1995 il-legislatur intervjena favur il-liberalizzazzjoni tal-kera, ghazel illi jillimita dan ghal dawk il-kirjiet illi bdew wara l-1 ta` Gunju 1995, bil-konsegwenza illi kollox baqa` kif kien ghal dawk il-kirjiet (bhal din tal-lum) li kienu saru qabel l-1 ta` Gunju 1995.

Tajjeb jinghad illi bl-emendi li kienu ntrodotti ghall-Kap 16 bl-Att X tal-2009, ghad li kien hemm awment fil-kera, xorta wahda baqa` jirrizulta sproporzjon kontra r-rikorrenti bejn l-awment fil-kera skont l-Art 1531C tal-Kap 16 u l-valur lokatizju tal-fond fis-suq hieles. Dan

oltre ghall-fatt li s-sid baqa` kostrett joqghod ghal quantum ta` zieda dettat mil-ligi li stabbiliet mhux biss kemm ghandu jkun l-awment izda anke kull meta. Qabel id-dhul fis-sehh tal-emendi, ir-rikorrenti odjerni kienu ilhom snin twal igarrbu lezjoni tal-jedd taghhom skont l-Art 1 Prot 1 tal-Konvenzjoni.

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

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

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

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

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

B`referenza ghall-kaz tal-lum, jirrizulta ppruvat illi l-kera percepita mir-rikorrenti, abbazi tad-disposizzjonijiet tal-Kap 69, hija bil-wisq inferjuri ghall-kera fis-suq. Il-figuri li saret referenza ghalihom aktar kmieni jitkellmu wahedhom. Ghalhekk huwa ppruvat l-isproporzjon li ma jridx l-Art 1 Prot 1 tal-Konvenzjoni u li qed jingarr mis-sid.

Hija l-fehma konsiderata ta` din il-Qorti illi meqjusa l-fatti u cirkostanzi tal-kaz tal-lum kif evolvew mal-medda tas-snin sal-lum il-piz li kellu jgorr is-sid kien sproporzjonat u eccessiv

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

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

c) <u>L-Art 14 tal-Konvenzjoni</u>

Ghalkemm fil-premessi tar-rikors, ir-rikorrenti jilmentaw minn diskriminazzjoni skont l-Art 45 tal-Kostituzzjoni u l-Art 14 tal-Konvenzjoni *bejn dak li hemm dispost fl-Artikolu 1531C tal-Kap 16 tal-Ligijiet ta` Malta u tal-Kap. 69 tal-Ligijiet ta` Malta u dak li jiddisponi l-Att XXXI tal-1995 ghal kirjiet li dahlu fis-sehh wara l-1 ta` Gunju 2005*, fl-ewwel talba mbaghad jitolbu dikjarazzjoni ta` vjolazzjoni skont l-Art 14 tal-Konvenzjoni **<u>biss</u>**. Ghalhekk ghalkemm fil-premessi ssemma l-Art 45 tal-Kostituzzjoni, il-Qorti mhijiex sejra taghti konsiderazzjoni ghal din id-disposizzjoni, ladarba ma hemmx talba ghal dikjarazzjoni ta` vjolazzjoni skont dik id-disposizzjoni.

Fl-eccezzjoni nru 20, l-Avukat tal-Istat jikkontendi li r-rikorrenti ma garrbu L-ebda diskriminazzjoni.

Tajjeb jinghad illi lment skont l-Art 14 tal-Konvenzjoni jehtieg necessarjament illi jkun abbinat ma` vjolazzjoni ta` jedd iehor tutelat mill-Konvenzjoni.

Issir referenza ghas-sentenza ta` din il-Qorti kif diversament presjeduta tad-19 ta` Ottubru 2000 fl-ismijiet **<u>Victoria Cassar vs</u>**

<u>Awtorita` Marittima ta` Malta et</u>, inghad hekk dwar l-applikazzjoni tal-Art 14 tal-Konvenzjoni :-

Illi kif gie ritenut mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem fil-kaz ***Abdulaziz, Cabales and Balkandali*** *(28 ta` Mejju 1985) :*

"Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence, since it has effect solely in relation to the "enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter."

*Illi fis-sentenza "**Angelo Xuereb vs Kummissarju tal-Pulizija**" (Qorti Kost. 17 ta` Frar 1999), il-Qorti qalet li lawturi van Dijk u van Hoof, b`referenza ghal dan ilpassagg mis-sentenza <u>Abdalaziz</u>, spejgaw li:*

*"This formula makes it clear that Article 14 is not independent in the sense that there has to be at least some kind of relation with the right and freedoms of the Convention; differential treatment in a field which falls outside the scope of the Convention cannot amount to a violation of Article 14" (**Theory and Practice of the European Convention on Human Rights, Kluwer, 1990, p 536**).*

…

Illi in effetti fil-kaz appena citat, iktar komunament maghruf bhala "Abdulaziz, Cabales and Balkandali" (1973) holoq precedent u wessa sew l-applikazzjoni tal-artikolu 14, billi ghalkemm gie ritenut li l-istess artikolu mhux awtonomu, pero` jaghti tifsira iktar wiesgha lid-drittijiet fundamentali l-

ohra, bhal dak tal-artikolu 8, meta applikat flimkien mal-istess artikolu 14.

…

*Illi dan l-izvilupp certament ifisser li l-import tal-istess artikolu 14 meta abbinat mal-artikoli l-ohra tal-istess Konvenzjoni, jaghti lill-istess artikoli applikazzjoni u interpretazzjoni iktar wiesgha fid-dawl tal-principji kontra ddiskriminazzjoni enuncjati fl-artikolu 14, bil-konsegwenza li ta` indubjament interpretazzjoni aktar libera ghall-kazi li jistghu jaqaw taht l-istess artikoli, li minghajr it-test tal-artikolu 14, kienu jibqghu barra mill-ambitu ta` protezzjoni tal-istess imsemmija drittijiet fundamentali. (**European Human Rights Law - Mark Janis** - page 257).*

Ir-rikorrenti jabbinaw l-ilment taghhom ma` diskriminazzjoni specifikament fil-kwalita` taghhom ta` sidien ta` proprjeta` mikrija. Kwindi l-invokazzjoni tal-Art 14 qeghda tigi abbinata mal-Art 1 Prot 1 tal-Konvenzjoni. Ighidu r-rikorrenti li persuni li bhalhom ikunu krew postijiet qabel l-1 ta` Gunju 1995 qeghdin jigu diskriminati ghaliex qeghdin jircievu trattament divers minn dawk il-persuni li jkunu krew postijiet wara dik id-data.

Meqjusa l-fatti u c-cirkostanzi kollha tal-kaz, il-Qorti ssib illi r-rikorrenti garrbu lezjoni tad-drittijiet taghhom kif tutelati bl-Art 14 tal-Konvenzjoni.

Ghalhekk qeghda tichad l-eccezzjonijiet tal-intimat l-Avukat tal-Istat safejn dawn jolqtu dik il-parti tal-ewwel (1) talba li tirrigwarda d-dikjarazzjoni ta` ksur tal-jeddijiet fondamentali tar-rikorrenti kif protetti bl-Art 14 tal-Konvenzjoni.

Qeghda tilqa` l-ewwel (1) talba tar-rikorrenti safejn din tirrigwarda ksur tal-jeddijiet fondamentali taghhom kif tutelati bl-Art 14 tal-Konvenzjoni.

d) <u>L-izgumbrament mill-fond</u>

Fl-ambitu tal-ewwel talba, ir-rikorrenti talbu l-izgumbrament tal-intimati Vella mill-fond de quo, li min-naha taghhom laqghu ghal din it-talba bl-ewwel (1) u bis-sebgha (7) eccezzjonijiet.

Fis-sentenza li tat fis-7 ta` Dicembru 2012 fil-kawza fl-ismijiet **<u>Angela sive Gina Balzan v. L-Onorevoli Prim Ministru et</u>** il-Qorti Kostituzzjonali qalet hekk :-

> *"Dwar x`ghandu jkun ir-rimedju, l-ewwel Qorti pprovdiet billi qalet illi l-intimati Bajada ma jkunux jistghu jinqdew bl-Artikolu 12A tal-Kap. 158 biex jilqghu ghal kull azzjoni li tista` taghmel ir-rikorrenti fil-forum kompetenti biex tikseb l-izgumbrament taghhom. Din il-Qorti, wara li hasbet fit-tul fuq din il-materja, tara li dan mhux rimedju li tista` taghti.*
>
> *Il-bilanc bejn l-interessi differenti jrid joholqu l-Gvern, u hu l-Gvern li jrid ibati l-konsegwenzi jekk jonqos minn dan id-dmir tieghu. Ghan-nuqqas tal-Gvern ma ghandux ibati c-cittadin. La darba, f`dan il-kaz, il-ligi per se ma gietx meqjusa li tikser il-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem, ma tistax tigi dizapplikata ghall-kaz. Din il-Qorti gia` osservat f`kuntest iehor li meta jkun hemm ordni ta` rekwizizzjoni u l-Gvern iqieghed persuna ohra in situ b`kera li titqies baxxa, ir-rimedju mhux li tithassar dik l-ordni ta` rekwizizzjoni izda li jinghata kumpens adegwat bhala just satisfaction u dan talli ma nholoqx bilanc gust bejn l-interessi involuti. F`dawn ic-cirkostanzi, ma tkunx l-ordni ta` rekwizizzjoni nnifisha li tkun kisret id-dritt ta` proprjeta` tas-sid, izda l-mekkanizmu ta` kumpens (ara Montanaro Gauci v. Direttur Akkomodazzjoni Socjali et, deciza minn din il-Qorti fil-25 ta` Novembru 2011). Anke l-kaz meritu ta` din il-kawza m`huwhiex il-passi li ha l-Gvern fl-interess generali li huma hziena izda l-mekkanizmu li holoq biex jigi determinat l-applikazzjoni tal-ligi u l-quantum tal-kumpens. Ghalhekk, anke f`dan il-kaz, ir-rimedju ghandu jkun ta` kumpens, kif del resto jipprovdi l-Artikolu 41 ta` Konvenzjoni Ewropeja, l-uniku ligi li nstab li gie miksur.*

Din il-Qorti ma tistax taghti ordni li twassal, wisq probabbli, ghat-tkeccija tal-konjugi Bajada mill-fond inkwistjoni, meta l-protezzjoni nfisha, moghtija lilhom mill-Gvern, mhux leziva ghad-drittijiet tas-sid. Veru li jista jinghad li, f`dan il-kaz, il-konjugi Bajada ma haqqhomx jibqghu fil-post la darba ghandhom proprjeta` immobbli ohra, pero`, ghal dan ma hasibx il-Legislatur, u ma jahtux il-konjugi Bajada li jippruvaw jiehdu vantagg mil-ligi kif inhi.

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

[ara wkoll : **Dr. Cedric Mifsud et v. L-Avukat Generali et** (25/10/2013) ; **Maria Ludgarda sive Mary Borg et vs Rosario Mifsud et** (29/04/2016) ; u **Rose Borg vs Avukat Generali et** (11/07/2016)]

Fid-decizjoni li nghatat fit-22 ta` Frar 2012 dwar *just satisfaction* fil-kaz ta` **Frendo Randon and Others v. Malta**, l-ECtHR irrimarkat illi :-

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

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

Issir referenza wkoll ghal decizjoni ohra tal-ECtHR u cioe` dik tat-12 ta` Gunju 2012 fil-kaz ta` **Lindheim and Others v. Norway** fejn inghad :-

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

Bla hsara ghall-kuntest tad-dritt fejn kienet ippronunzjata l-gurisprudenza fuq riferita, din il-Qorti tafferma li din il-gurisprudenza tghodd ukoll *mutatis mutandis* ghal-legislazzjoni mertu tal-kawza odjerna.

Il-Qorti tghid ukoll illi procediment ta` x-xorta tal-lum mhuwiex il-forum appozitu sabiex tinghata decizjoni dwar jekk inkwilin ghandux jigi zgumbrat jew le. Huma t-tribunali jew qrati ordinarji li ghandhom il-kompetenza li jesprimu ruhhom dwar talba ghal zgumbrament.

Ghall-fini tal-procediment odjern, dik rilevanti hija l-konsiderazzjoni ta` jekk ligi tkunx ivvjolat il-jeddijiet fondamentali tal-persuna u allura jekk abbazi tal-fattispeci ta` kull kaz dik il-ligi ghandhiex tkun applikata bejn il-partijiet kemm-il darba l-applikazzjoni taghha tkun leziva ghad-drittijiet fundamentali tal-persuna koncernata.

Fil-kaz tal-lum jirrizulta li l-inkwilini agixxew skont il-ligijiet vigenti. Ghalhekk m`ghandhomx legalment jirrispondu ghall-kostituzzjonalita` ommeno tal-ligi kif applikata. Lanqas m`ghandhom ikunu ordnati jaghtu rimedju lir-rikorrent jew jehlu l-ispejjez tal-kawza.

L-Istat huwa responsabbli ghall-promulgazzjoni tal-ligi. Ghalhekk ghandu jkun l-Istat illi jwiegeb.

Konsegwentement dik il-parti tal-ewwel domanda tar-rikorrenti fejn intalab l-izgumbrament tal-intimati Vella qeghda tkun <u>respinta.</u>

Filwaqt illi tilqa` l-eccezzjonijiet nru wiehed (1) u dik il-parti tal-eccezzjoni nru sebgha (7) tal-intimati Vella fejn issir referenza ghall-izgumbrament mill-fond, fl-istess waqt sejra tiddikjara illi d-dispozizzjonijiet tal-Kap 69 m`ghandhomx jibqghu applikabbli, u ghalhekk l-intimati Vella ma jistghux jibqghu jistriehu fuq il-Kap 69 sabiex jibqghu jokkupaw il-fond de quo.

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

Ir-rikorrenti qeghdin jitolbu dikjarazzjoni li l-Avukat tal-Istat ikun dikjarat responsabbli ghall-hlas ta`kumpens ghall-vjolazzjoni subita tal-jeddijiet fondamentali taghhom.

Billi l-Avukat tal-Istat ghandu jaghmel tajjeb ghall-vjolazzjoni tal-jeddijiet fondamentali li accertat li r-rikorrenti garrbu kif fuq inghad, il-Qorti sejra tilqa` t-tieni talba.

3. It-tielet talba

Ir-rikorrenti talbu l-likwidazzjoni ta` kumpens u danni.

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

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

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

Decizjoni li kkunsidrat fid-dettall din il-kwistjoni hija s-sentenza li tat il-Qorti Kostituzzjonali fil-kawza **Raymond Cassar Torregiani et vs Avukat Generali et** (op. cit.)

Il-Qorti qalet hekk :-

"*Dwar il-quantum tal-kumpens dovut issir referenza ghas-sentenza ta` din il-Qorti* ***Igino Trapani Galea Feriol pro et noe et V Kummissarju tal-Artijiet et*** *deciza fil-31 ta` Ottubru 2014, fejn f` materja ta` komputazzjoni ta` kumpens ghal lezjoni ta` dritt fondamentali sancit fl-artikolu konvenzjonali fuq citat gie osservat:*

"Rigward il-quantum tal-kumpens stabbilit mill-ewwel Qorti, din il-Qorti tosserva fl-ewwel lok li kull kaz ghandu jigi trattat u deciz fuq il-fattispecie tieghu. Barra minn hekk, jekk il-Qorti Ewropeja hasset li f` certi kazijiet kellha taghti kumpens f` ammont inferjuri ghal dak li nghata lir-rikorrenti mill-ewwel Qorti, ma jfissirx li allura l-Qrati Maltin tilfu l-awtonomija

taghhom b` mod li bilfors kumpens li jinghata ikun f` ammont vicin dak li taghti l-Qorti Ewropeja. Fil-kaz odjern l-ewwel Qorti hadet in konsiderazzjoni l-fatturi kollha li jimmilitaw kemm favur kif ukoll kontra r-rikorrenti u deherilha li l-kumpens xieraq li ghandha taghti f` dan il-kaz ikun fl-ammont ta` hamsa u ghoxrin elf Euro (EUR 25,000). Hija kkonsidrat id-dewmien da parti tar-rikorrenti li jiehdu l-proceduri opportuni, il-valur tal-immobbli, iz-zmien tant twil li r-rikorrenti ilhom privati mill-godiment tal-proprjeta` taghhom minghand ma nghata ebda kumpens, l-istat tal-fond u l-ezistenza tal-fattur tal-interess pubbliku. Ma` dawn ghandu jigi senjalat il-fatt li qabel l-ispossessament tal-proprjeta` taghhom ir-rikorrenti kellhom permess mill-Bord kompetenti sabiex jizviluppaw il-fond."

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

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

Generali et) [ara wkoll ghall-istess skop : ECtHR : 30 ta` Jannar 2018 : **Cassar vs Malta** : Application 50570/13]

Il-proceduri odjerni min-natura taghhom huma diretti sabiex jindirizzaw lezjoni kostituzzjonali u/jew konvenzjonali.

Il-Qorti sabet vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni.

Ghalkemm id-diskrepanza bejn il-kera attwalment percepita u l-valur lokatizju li l-fond de quo jgib fis-suq hieles hija fattur determinanti sabiex ikun stabbilit jekk kienx vjolat il-principju tal-proporzjonalita`, fl-istess waqt hemm fatturi ohra li wkoll ghandhom rilevanza, u li flimkien ghandhom iwasslu ghall-ghoti ta` kumpens gust ghal-lezjoni subita.

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

> *"25. F`materja ta` kumpens il-gurisprudenza patria kif ukoll dik tal-Qorti Ewropeja identifikat is-segwenti principji :*
>
> *"The Court would reiterate that compensation terms under the relevant legislation may be material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate balance on applicants. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference." [ECHR 31443/96 para.176 Bronoiswki v. Poland, decided 22 June 2004].*
>
> *26. Fil-kawza Louis Apap Bologna v. Calcidon Ciantar et deciza 24 Frar 2012, din il-Qorti osservat hekk:*
>
> *"F`kazijiet bhal dawn il-kumpens xieraq ghandu jiehu in konsiderazzjoni l-ghan legittimu li mmotiva l-mizura tarrekwizizzjoni u li l-kumpens jista` jkun anqas mill-kumpens shih li altrimenti jkun dovut skond il-kriterji tas-suq. Il-Qorti Ewropea fil-kazijiet ta` Edwards v Malta u Ghigo v Malta 17 Lulju 2008] ddecidiet li :*

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

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

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

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

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

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

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

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

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

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

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

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

Illi kif inhu mizmum u mghallem "fil-kaz ta` ligi leziva tad-drittijiet konvenzjonali jew kostituzzjonali, huwa l-Istat u mhux ic-cittadin li ghandu jirrispondi. Ghax huwa principalment l-obbligu tal-Istat, u mhux tal-inkwilin, li

jassigura li d-drittijiet fundamentali tas-sid ma jinkisrux" (Kost. 24.2.2012 fil-kawza fl-ismijiet Louis Apap Bologna vs Kalcidon Ciantar et; u Kost. 6.2.2015 fil-kawza fl-ismijiet Sean Bradshaw et vs L-Avukat Generali et);

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

Fis-sentenza ta` din il-Qorti diversament ippreseduta fil-kawza fl-ismijiet **Sergio Falzon et vs Alfred Farrugia et** tat-30 ta` Jannar 2018 (konfermata mill-Qorti Kostituzzjonali b`sentenza tal-14 ta` Dicembru 2018) inghad :-

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

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

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

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

Ikkonsidrat li

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

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

"46. The Court also takes issue with the fact that in line with domestic case-law, such compensation awards are reduced on the grounds that the applicants have instituted constitutional redress proceedings several years after they started suffering the violation complained of. In this connection, the Court notes, first and foremost, that domestic law does not impose a time-limit for the institution of constitutional redress proceedings. The legislator leaves the choice of timing to the applicant. Moreover, in circumstances such as those of the present case, the violation complained of is a continuing one. The Court thus finds that such reasoning is questionable in the light of the circumstances of the case and the domestic legal framework, which appears to give great latitude to individuals seeking redress for human rights violations.")

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

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

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

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

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

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

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

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

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

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

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

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

A. <u>Damage</u>

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

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

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

Therefore, the Court considers that the valuation submitted by the applicants is on the high side, but may nonetheless provide a relevant indication and workable basis.

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

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

89. The Court reiterates that an award in respect of pecuniary damage under Article 41 of the Convention is intended to put the applicant, as far as possible, in the position he or she would have enjoyed had the breach not occurred (see, mutatis mutandis, ***Kingsley v. the United Kingdom*** *[GC], no. 35605/97, § 40, ECHR 2002-IV). It therefore considers that interest should be added to the award in order to compensate for the loss of value of the award over time (see* ***Runkee and White v. the United Kingdom****, nos. 42949/98 and 53134/99, § 52, 10 May 2007). As such, the interest rate should reflect national economic conditions such as levels of inflation and rates of*

*interest (see, for example, **Akkuş v. Turkey,** 9 July 1997, Reports of Judgments and Decisions 1997-IV, § 35; **Romanchenko v. Ukraine**, no. 5596/03, 22 November 2005, § 30, unpublished; and **Prodan v. Moldova**, no. 49806/99, § 73, ECHR 2004-III (extracts)). It notes that the applicants claimed the statutory rate of eight per cent, and the Government`s objection in that respect. The Court considers that a rate of five per cent interest is more realistic (see **Amato Gauci**, cited above, § 78, and **Ghigo v. Malta** (just satisfaction), no. 31122/05, § 20, 17 July 2008) thus a one-off payment at 5% interest should be added (see **Anthony Aquilina**, cited above, § 72, in fine).*

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

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

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

Il-fatturi li principalment jidderminaw il-quantum tal-kumpens huma :-

i) L-interess generali li jaghti legittimita` lill-intervent legislattiv.

ii) It-tul ta` zmien li s-sidien ikunu ilhom igarrbu l-effett tal-intervent legislattiv a skapitu taghhom.

iii) L-isproporzjon bejn il-kera li attwalment tithallas abbazi tal-intervent legislattiv u dik li tista` tigi percepita fis-suq hieles. Ghalkemm dan il-fattur ghandu jittiehed in konsiderazzjoni, il-prezz tas-suq ghandu jitqies bhala kriterju ndikattiv mhux assolut.

iv) Il-fond ghadda ghand ir-rikorrenti kif soggett ghal kirja li diga` kienet vigenti favur l-intimati Vella.

v) Id-daqs u s-sit fejn tinsab il-proprjeta`.

vi) L-incertezza dwar meta u jekk ir-rikorrenti jistghux jiehdu lura l-pussess battal tal-fond.

vii) Iz-zmien meta r-rikorrenti waqfu jaccettaw il-hlas tal-kera.

viii) L-inerzja tal-Istat meta baqa` passiv ghal medda rragjonevoli ta` snin sabiex jipprova jirrimedja ghall-isproporzjon b`legislazzjoni ad hoc.

ix) Il-fatt illi bl-introduzzjoni tal-Att XXXI tal-1995 u l-konsegwenti liberalizzazzjoni tal-kera ir-rikorrenti gew diskriminati.

x) In-nuqqas ta` rimedju ordinarju effettiv.

xi) Il-fatt illi bl-applikazzjoni tad-dispozizzjonijiet tal-Kap 69 ir-rikorrenti qeghdin igarrbu lezjoni tad-drittijiet fondamentali taghhom kif imharsa bil-Konvenzjoni.

Il-Qorti tishaq illi kull kaz ghandu l-isfond u l-fattispeci partikolari tieghu. Ghalhekk ma jistax ikun hemm uniformita` fil-quantum tal-kumpens li jigi likwidat mill-qrati taghna.

Il-Qorti tifhem u tapprezza illi l-intervent legislattiv kien motivat mis-sitwazzjoni socjo-ekonomika tal-pajjiz. Dan l-intervent kien motivat minn ghan legittimu, mahsub sabiex jaghti serhan lil ghadd kbir ta` nies illi kienu f`riskju reali li jispiccaw minghajr saqaf fuq rashom. Fl-istess waqt tqis ukoll illi meta saret il-kirja, l-awturi tar-rikorrenti certament li ma setghux ragjonevolement jipprevedu l-futur, fis-sens illi jara x`setghu jkunu x-xejriet socjali u ekonomici tal-pajjiz fuq firxa twila ta` snin.

Fil-kaz tal-lum, irrizulta mill-kostatazzjonijiet mhux ikkontestati tal-perit tekniku illi l-fond de quo ghandu valur lokatizju akbar mill-kera li qeghdin ihallsu l-intimati Vella.

L-izbilanc u l-isproporzjon kontra r-rikorrenti huwa lampanti.

Il-Qorti hadet kont ta` kollox.

Qieset bir-reqqa l-assjem ta` fatti u cirkostanzi tal-kaz li diga` ghamlet ampja riferenza ghalihom, inkluz id-dikjarazzjoni taghha li kien hemm vjolazzjoni.

Qieset ukoll il-komportament u l-ghazliet tar-rikorrenti, il-kostatazzjonijiet tal-perit tekniku u l-pronunzjamenti tal-qrati.

Hija tal-fehma li favur ir-rikorrenti ghandha tigi likwidata somma komplessiva ta` €20,000 in kwantu ghal €15,000 bhala danni pekunjarji u in kwantu ghal €5,000 bhala danni mhux pekunjarji.

4. Ir-raba`talba

Is-somma likwidata ghandha tithallas biss mill-Avukat tal-Istat.

V. L-Art 6 tal-Konvenzjoni

Fil-paragrafu xvii tar-rikors promotur, ir-rikorrenti jilmentaw minn vjolazzjoni tal-jeddijiet fondamentali taghhom hekk kif dawn huma mharsa bl-Art 6 tal-Konvenzjoni.

Madanakollu ma tressqet ebda talba ghal dikjarazzjoni ta` ksur fir-rigward tad-drittijiet kif imharsa taht l-Artikolu 6 tal-Konvenzjoni.

Ir-raguni ghala sar l-ilment la tirrizulta fil-provi u lanqas fit-trattazzjoni.

Ghalhekk mhijiex sejra taghti konsiderazzjoni ghall-ilment.

VI. Spejjez

L-intimati Vella m`ghamlu xejn kontra l-ligi anzi ottemperaw ruhhom. Ghalhekk m`ghandhomx ibatu spejjez gudizzjarji.

In vista tar-risultanzi, l-ispejjez gudizzjarji ghandhom jithallsu in kwantu ghal nofs mir-rikorrenti u in kwantu ghal nofs mill-Avukat tal-Istat.

<u>Decide</u>

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

Tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel (1) eccezzjoni tal-Avukat tal-Istat kif ukoll tal-hames (5) eccezzjoni tal-intimati Vella stante li r-rikorrenti ghamlu l-prova kemm tal-kirja kif ukoll tat-titolu ghall-fond ufficjalment immarkat 100/6, Triq Nicolo Isouard, Tas-Sliema.

Tastjeni milli tiehu konjizzjoni ulterjuri tat-tieni (2) eccezzjoni tal-Avukat tal-Istat billi r-rikorrenti ndikaw id-disposizzjonijiet tal-Kap 69 illi fuqhom qeghdin jibbazaw l-ilmenti taghhom.

Tilqa` l-eccezzjoni erbgha (4)(a) tal-Avukat tal-Istat billi tiddikjara li d-disposizzjonijiet tal-Kap 69 kienu *saved* bl-Art 47(9) tal-Kostituzzjoni ta` Malta.

Tastjeni milli tiehu konjizzjoni ulterjuri tal-eccezzjonijet tal-Avukat tal-Istat li jaghmlu referenza ghall-Art 37 tal-Kostituzzjoni ta` Malta.

Tichad dawk l-eccezzjonijiet tal-intimati kollha ghal dik il-parti tal-ewwel (1) domanda fejn ir-rikorrenti talbu dikjarazzjoni u decizjoni li effett tad-disposizzjonijiet tal-Kap 69

tal-Ligijiet ta` Malta garrbu vjolazzjoni ghad-dritt taghhom ta` proprjeta` ghall-fond ufficjalment immarkat 100/6, Triq Nicolo Isouard, Tas-Sliema, kif dak id-dritt huwa mhares bl-Ewwel Artikolu tal-Ewwel Protokoll.

Tichad dawk l-eccezzjonijiet tal-Avukat tal-Istat ghal dik il-parti tal-ewwel (1) talba fejn ir-rikorrenti talbu dikjarazzjoni u decizjoni li effett tad-disposizzjonijiet tal-Kap 69 tal-Ligijiet ta` Malta garrbu vjolazzjoni ghad-dritt taghhom ta` proprjeta` ghall-fond ufficjalment immarkat 100/6, Triq Nicolo Isouard, Tas-Sliema, kif dak id-dritt huwa mhares bl-Artikolu 14 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u Libertajiet Fondamentali.

Tichad il-bqija tal-eccezzjonijiet tal-Avukat tal-Istat.

Tilqa` l-eccezzjonijiet numerati wiehed (1) u tlieta (3) tal-intimati konjugi Vella.

Tilqa` limitatament dik il-parti tal-eccezzjoni numerata (7) tal-intimati konjugi Vella li tirreferi ghall-izgumbrament taghhom mill-fond de quo.

Tichad il-bqija tal-eccezzjonijiet tal-intimati konjugi Vella.

Tilqa` l-ewwel (1) talba limitatament u safejn ir-rikorrenti talbu dikjarazzjoni u decizjoni li effett tad-disposizzjonijiet tal-Kap 69 tal-Ligijiet ta` Malta huma garrbu vjolazzjoni ghad-dritt taghhom ta` proprjeta` tal-fond ufficjalment immarkat 100/6, Triq Nicolo Isouard, Tas-Sliema, kif dak id-dritt huwa mhares bl-Ewwel Artikolu tal-Ewwel Protokoll u bl-Artikolu 14 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u Libertajiet Fondamentali.

Riferibbilment ukoll ghall-ewwel talba, tiddikjara u tiddeciedi li l-intimati konjugi Vella ma jistghux jibqghu jistriehu fuq il-Kap 69 sabiex jibqghu jokkupaw il-fond de quo.

Tilqa` t-tieni (2) talba.

Tilqa` t-tielet (3) talba billi tillikwida favur ir-rikorrenti s-somma komplessiva ta` ghoxrin elf ewro (€20,000) in kwantu ghal hmistax-il elf ewro (€15,000) bhala kumpens pekunjarju, u in kwantu ghal hamest elef ewro (€5,000) bhala kumpens mhux pekunjarju ghall-vjolazzjoni li garrbu ghad-dritt taghhom ta` proprjeta` tal-fond ufficjalment immarkat 100/6, Triq Nicolo Isouard, Tas-Sliema, kif dak id-dritt huwa mhares bl-Ewwel Artikolu tal-Ewwel Protokoll u bl-Artikolu 14 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u Libertajiet Fondamentali.

Tilqa` r-raba` (4) talba billi tordna lill-intimat Avukat tal-Istat sabiex ihallas lir-rikorrenti s-somma likwidata skont it-tielet (3) talba, bl-imghax legali b`effett mil-lum.

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

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

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur