FIRST HALL CIVIL COURT
(CONSTITUTIONAL JURISDICTION)
HON. MADAME JUSTICE MIRIAM HAYMAN

Constitutional Reference no. 213/2019

In the names of:

The Police (Inspector Kieth Vella)

Vs.

Omar Azumi

Today 18th of September, 2020.

The Court,

Seen the reference sent from the Magistrate'S Court as a Court of Criminal Judicature which reads:

"For these reasons, the Court accedes to the request made by the accused as per application dated 30th May 2019 and by virtue of Article 46(3) of the Constitution of Malta and Article 4(3) of Chapther 319 of the Laws of Malta referes the constitutional matter to the First Hall Civil Court for that Court to decide whether the seizure of the undeclared cash in accordance with subsidiary legislation 233.07 breaches the accused's constitutional rights on the basis of Article 1 of Protocol 1 European Convention of Human Rights".

Seen the note of submisions submitted by both parties in this regard

Considers.

The point in issue is whether the seizure of monies (which is also *ex lege* coupled with the imposition of a fine, multa) as envisaged under the regulation 3(4)(c) of S. of L. 233.07 breaches the afore mentioned Article 1 of the First Protocol to the above montioned Convention.

In short the applicant questions the constitutionalty of the punishment afforded under the said legislation due to the lack of correspondence between the crime committed and the punishement handed down with particular reference to the confiscation/seizure of proceeds in favour of the Commissioner, such to create a lack of proportionality to the pregudice of the applicant to the extent that the courts without even being granted any discretion in affording the disputed punishement will end up inflicting the automatic seizure of the undeclared sum in excess of the premitted ten thousand euros, (€10,000) additionally imposing a fine of 25% of the total sum found, therefore inclusive of the so called legal ammont allowed and returned, thus failing to strike a proper balance between the demands of the general interests of the community to curb certain crimes emanating in particular from money laundering and the fundamental property rights of the applicant.

The Court *a priori* notes that the reference is penned to the extent as quoted above to be examined **only** from the point of view of the seizure of the undeclared cash, therefore that in excess of the allowed ten thousand euros. Obviously the Court of Magistrates was itself limited to the reference made. Infact a look at the catalyst application[1] clearly indicates the limitation of this reference in that the constitutional issue raised is only limited to the actual seizure of the undeclared cash; it stops short of raising the more complex problems emmanating from the subsidiary legislation under attack in that it clearly arouses further issue in the actual non-discrteionary fine to be imposed when the undeclared sum is over a certain limit. The amount of the fine, the lack of consideration of the proveneance of the monies and the fact that the courts have no discretion in this regard have proven to be of constitutional concern.

In fact in the note of submissions submitted by both parties the issues just pointed out were duly addressed.

[1] Folio 46 of the records of the case

Parties make reference to a recent Constitutional judgement, handed down by the first Hall of the Civil Court in its Constitutional Competence in the names of **John Jason Agius vs The Attorney General**[2]. The court had this to say in the regard of the issue raised:

"Fil-kaz de quo ir-rikorrenti kien hiereg minn Malta b'ammont ta' sitta u tletin elf, tlett mija hamsa u hamsin ewro (€36,355) fi flus kontanti mhux iddikjarati. Fil-mument tal-qbid, il-Kummissarju tat-Taxxi precizament nhar is-7 ta' Settembru, 2017 irritorna is-somma ta' ghaxart elef ewro (€10,000) lir-rikorrent stante li l-ligi tippermetti li sal-valur ta' ghaxart elef euro (€10,000) m'hemmx bzonn li jigu ddikjarati. Mill-atti ma jidhirx li dan il-fatt huwa kontestat minn xi parti fil-kawza.

Il-ligi precizament l-Artikolu 3 tal-Legislazzjoni Sussidjarja 233.07 jitkellem dwar penali ta' 25% fuq l-ammont shih li jkun qieghed jingarr flimkien mal-konfiska tas-somma in eccess ta' ghaxart elef euro (€10,000). Prima facie jidher li tali ligi hija gustifikata fit-termini tal-artikolu 37 tal-Kostituzzjoni ta' Malta stante li kemm il-konfiska kif ukoll il-penali huma eccezzjonijiet kontemplati fl-istess. Tqum izda l-kwistjoni dwar il-proporzjonalita' tal-piena u l-konfiska fil-kaz odjern fejn jirrizulta li prattikament ir-rikorrent jekk misjub hati ser jitlef il-flus kollha li kellu fuqu waqt l-att inkluz l-ghaxart elef Euro (€10,000) li legalment setghu jingarru mir-rikorrent. Dan rizultat izda tal-applikazzjoni tal-persentagg ta' 25% fuq is-somma kollha misjuba fuq ir-rikorrent u l-unika relazzjoni li ghandu dan l-persentagg mas-somma tal-ghaxart elef Euro (10,000) ritornata hija li parti mill-penali tikkonsisti f'25% tas-somma ta' €10,000 cioe' s-somma ta' €2,500. Fil-bqija l-penali hija mahduma fuq is-somma misjuba in eccess ta' €10,000 liema somma wkoll tinsab maqbuda u suggett ghall-konfiska mad-decizjoni ta' htija.

Illi ghalhekk il-kwezit li trid tezamina din il-Qorti taht din it-tieni talba hu jekk effettivament hux proporzjonat li r-rikorrent jigi deprivat tista' tghid mis-somma kollha misjuba fuqu konsegwenza tal-applikazzjoni tal-ligi meta maghduda l-penali u l-konfiska flimkien. Mill-gurisprudenza tal-Qrati Ewropej kif ikkwotata aktar il-fuq m' hemmx dubju li dawn itendu a favur tar-rikorrent f'kazijiet bhal dawn fejn jidher li mhux qed jitqies li tali mizuri tant estremi huma proporzjonati mal-interess pubbliku kawtelat. Fil-kaz partikolari l-ligi in kwisjtoni filwaqt li hija ntiza li trazzan il-hasil ta' flus fl-interess pubbliku minn naha l-ohra l-att

[2] 108/2018JVC decided 23/01/2020 **appealed** Judgement by the Constitutional Court is adjourned for the 5th of October, 2020

proprju ta' nuqqas ta' dikjarazzjoni tat-trasferiment tal-flus kontanti (li huwa l-att li biha hu akkuzat bih ir-rikorrent odjern) ma jistax jitqies li ghandu xi effett tant drastiku fuq l-interess pubbliku li jista' jiggustifika l-pieni tant estremi imposti. Il-kwezit ghalhekk huwa jekk ghandux jitqies proporzjonat, fl-ambitu tad-dritt fundamentali ghat-tgawdija tal-proprjeta' li r-reat odjern (kif mehud wahdu) ghandu jgorr mieghu il-konfiska tal-flus kollha in eccess tas-somma ta' €10,000 flimkien ma' penali fuq l-ammont kollu nkluz dik il-parti konsidrata bhala legali?

Din il-Qorti wara li gharblet ferm id-decizjonijiet partikolarment dawk Ewropej dwar dan il-punt tqis is-segwenti:

1. *Illi l-applikazzjoni ta' multa ta' 25% fuq is-somma kkunsidrata bhala legali, tant li tinghata lura lill-persuna a tempo vergine, ma tistax titqies bhala wahda proporzjonata ('striking a fair balance') u certament fl-applikazzjoni taghha il-mizien ghandu jxaqleb lejn id-dritt ta' propjeta' tal-persuna kif sancit mill-artikolu 37 tal-Kostituzzjoni ta' Malta u l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni u mhux lejn l-interess pubbliku;*

2. *Illi din il-Qorti tqis ukoll illi n-nuqqas ta' diskrezzjoni da parti tal-Qorti Kriminali fil-kazijiet in kontestazzjoni li tevalwa hi ghandhiex jew le tordna l-konfiska tas-somma in eccess flimkien mal-imposizzjoni tal-multa ta' 25% fuq l-ammont maqbud in eccess (oltre l-ewwel ghaxart elef li fuqha gia esprimiet ruhha din il-Qorti aktar il' fuq), u dan wara li tkun hi li semghet il-fatti u l-provi fl-atti, wkoll jikkonsisti fi ksur tad-drittijiet fundamentali tar-rikorrent ai termini tal-artikolu 37 tal-Kostituzzjoni ta' Malta u l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni. Din il-Qorti tqis li almenu, sabiex il-principju tal-'striking a fair balance' u cioe` tal-proporzjonalita' jkun qed jigi rispettat, ghandu jinghata l-poter lill-istess Qorti kompetenti li tisma' l-kaz kriminali li hi stess tapplika l-principju ta' proporzjonalita skont il-kaz pendenti quddiemha.* ***Il-fatt li fil-ligi lanqas tezisti l-possibilita' li l-Qorti tqis il-propozjonalita' tal-konfiska u l-piena (almenu ghal dik li hija konfiska) fil-kaz partikolari certament jilledi d-drittijiet tar-rikorrent kif isostni ai termini tat-tieni talba tieghu u ghalhekk din il-Qorti ser tghaddi sabiex tilqa' l-istess fid-dawl ta' dawn l-osservazzjonijet. Dan huwa aktar accenwat u gustifikat in vista tal-emendi recenti fl-istess ligi fejn ghal certu ammonti iddahhlet il-possibilita' ta' ftehim bejn l-awtorita' u l-individwu izda f'kazijiet aktar gravi l-akkuzat ma nghatax tali dritt. Il-Qorti ma tara l-***

ebda gustifikazzjoni minn lat ta' drittijiet fundamentali ghal tali distinzjoni bejn individwu u iehor a bazi ta' ammont.[3] "

The court ones again points out that the reference in question is limited in examining a breach in so far as the law penalises the transgression also by imposing the mandatory forfeiture of the excess of the allowed ten thousand euros. The above quoted judgement goes furher in evaluating the Constitutional impact of the punishment in question. In fact as is the case in the nature of such alleged breaches, the judgement also enters in the issue of the lack of court discretion to determine whether the nature of the breach is such so as to warrant the whole penalty/seizure imposed considering the actual crime committed, that is a lack of declaration, and the impact it has on the so called general interest of society in general and on the offender in particular. Just for academic purposes it is also worth noting that the cited judgement also examined the issue from the point of view of article 39 of the Constitution and 6 of the Convention. It found no breach in this regard.

Aptly reference should be made to determining judgements of the European Court of Fundamental Human Rights in similar issues. Thus in the judgement in the names of **Affaire Grifhorst vs France**[4] it was held that:-

"100. La Cour a également eu égard à l'importance de la sanction qui a été infligée au requérant pour ce défaut de déclaration, à savoir le cumul de la confiscation de l'intégralité de la somme transportée, soit 233 056 EUR, avec une amende égale à la moitié de ce montant (116 528 EUR), soit au total 349 584 EUR. Elle relève qu'en vertu de l'article 465 du code des douanes dans sa rédaction en vigueur au moment des faits, le défaut de déclaration entraînait automatiquement la confiscation de l'intégralité de la somme, seule l'amende pouvant être modulée par les juridictions internes (de 25 à 100 % de la somme non déclarée).

101. La Cour relève que, parmi les autres Etats membres du Conseil de l'Europe, la sanction la plus fréquemment prévue est l'amende. Elle peut être cumulée avec une peine de confiscation, notamment lorsque l'origine licite des sommes transportées n'est pas établie, ou en cas de poursuites pénales à l'encontre de l'intéressé. Toutefois, lorsqu'elle est prévue, la confiscation ne concerne en général que le reliquat de la somme excédant le montant à déclarer ;

[3] Emphasis of this Courti.
[4] 283336/02: 26/2/2009 (published in French)

seul un autre Etat (la Bulgarie) prévoit le cumul d'une amende pouvant aller jusqu'au double de la somme non déclarée avec la confiscation automatique de l'intégralité de la somme.

102. La Cour rejoint l'approche de la Commission européenne qui, dans son avis motivé de juillet 2001 (paragraphe 29 ci-dessus), a souligné que la sanction devait correspondre à la gravité du manquement constaté, à savoir le manquement à l'obligation de déclaration et non pas à la gravité du manquement éventuel non constaté, à ce stade, d'un délit tel que le blanchiment d'argent ou la fraude fiscale.

103. ***La Cour relève qu'à la suite de cet avis motivé, les autorités françaises ont modifié l'article 465 précité. Dans sa rédaction entrée en vigueur le 1er octobre 2004, cet article ne prévoit plus de confiscation automatique et l'amende a été réduite au quart de la somme sur laquelle porte l'infraction. La somme non déclarée est désormais consignée pendant une durée maximum de six mois, et la confiscation peut être prononcée dans ce délai par les juridictions compétentes lorsqu'il y a des indices ou raisons plausibles de penser que l'intéressé a commis d'autres infractions au code des douanes ou y a participé. De l'avis de la Cour, un tel système permet de préserver le juste équilibre entre les exigences de l'intérêt général et la protection des droits fondamentaux de l'individu****.*

104. La Cour observe enfin que, dans la plupart des textes internationaux ou communautaires applicables en la matière, il est fait référence au caractère « proportionné » que doivent revêtir les sanctions prévues par les Etats. [5]

105. Au vu de ces éléments et dans les circonstances particulières de la présente affaire, la Cour arrive à la conclusion que la sanction imposée au requérant, cumulant la confiscation et l'amende, était disproportionnée au regard du manquement commis et que le juste équilibre n'a pas été respecté (cf. Ismayilov c. Russie, no 30352/03, § 38, 6 novembre 2008).

106. Il y a donc eu en l'espèce violation de l'article 1 du Protocole no 1 à la Convention."

The Court found that the application of the seizure and the fine applied together without a proper examination of the illicit provenance of the monies created a disproportionality against the interests and rights of the private citizen involved, sacrified for the good of the general interest of society. As evidenced in the

[5] **Emphasis of this Court**.

emphasised paragraph the European Court lauded the recent amendments of the concerned french legislation wherein no automatic seizure was any longer applicable, as also the reduction to one fourth of the monies to which the fine was to be applied. Futhermore the said amendments also provided for a judicial scrutiny regarding the monies involved and their forfieture. The amendments were infact intended for no other reason but to respect the disputed issue of proportionality.

The same questionable situation is prelevant in the punsihment laid down in the subsidiary legislation in question, that in the case of the excess undeclared ammount found, **the automatic seizure of the excess of ten thousand euros would operate** as also the fine of 25% on the **whole** amount of cash found. A punishment which is mandatory and permits no scrutiny of the courts. A punishment which in actual fact does not even consider or examine the actual provenance of these monies. Thus although the law is triggered to curtail the tranfers of monies proceeding from crime, as in money laundering, drugs, human trafficking, oil smuggling, illicit gaming proceeds etc, all intended for public good, in actual fact the monies in question have no definite established illegal provenance except for the breach of the law established in the subsidiary legislation in question, that is and merely the lack of the required declaration. Therefore their illegality stems only from the fact that they are an undeclared amount and will suffer the same siezure even if their provenance is clean, licit and legal. A similar situation was in fact examined by the Europrean Court of Human Rights in the name of **Ismayilov vs Russia[6].** The facts of the case mirror the mentioned prospect in that :-

"5. The applicant was born in 1937 and lives in Moscow.

6. On 17 November 2002 the applicant arrived in Moscow from Baku. He was carrying with him 21,348 US dollars (USD), ***representing the proceeds from the sale of his ancestral dwelling in Baku***[7]*. However, he only reported USD 48 on the customs declaration, whereas Russian law required that any amount exceeding USD 10,000 be declared to the customs. A customs inspection uncovered the remaining amount in his luggage. The applicant was charged with smuggling, a criminal offence under Article 188 § 1 of the Criminal Code, and the money was appended to the criminal case as physical evidence.*

7. On 8 May 2003 the Golovinskiy District Court of Moscow found the applicant guilty as charged and imposed a suspended sentence of six months' imprisonment conditional on six months' probation. As regards the money, it held:

[6] Application no. 30352/03) 6.04.2009
[7] Emphasis of this Court

"physical evidence- 21,348US dollars stored in the Central cash desk of the Sheremetyevo Customs Office – shall revert to the State"

The Court futher held-:

"34. The Court will next assess whether there was a reasonable relationship of proportionality between the means employed by the authorities to secure the general interest of the community and the protection of the applicant's right to the peaceful enjoyment of his possessions or, in other words, whether an individual and excessive burden was or was not imposed on the applicant.

35. The criminal offence of which the applicant was found guilty consisted of failure to declare the 21,300 US dollars in cash which he was carrying, to the customs authorities. It is important to note that the act of bringing foreign currency in cash into Russia was not illegal under Russian law. Not only was it lawful to import foreign currency as such but also the sum which could be legally transferred or, as in the present case, physically carried across the Russian customs border, was not in principle restricted (see paragraph 19 above). This element distinguishes the instant case from the cases in which the confiscation measure applied either to goods whose importation was prohibited (see AGOSI, cited above, concerning a ban on import of gold coins; Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, ECHR 2005-VI, concerning the banning of Yugoslavian aircraft falling under the sanctions regime) or vehicles used for transport of prohibited substances or trafficking in human beings (see Air Canada, cited above; C.M. v. France (dec.), cited above, and Yildirim v. Italy (dec.), no. 38602/02, ECHR 2003-IV).

36. Furthermore, the lawful origin of the confiscated cash was not contested. The applicant possessed documentary evidence, such as the will and the sale contract, showing that he had acquired the money through the sale of a Baku flat which he had inherited from his mother. On that ground the Court distinguishes the present case from the cases in which the confiscation measure extended to the assets which were the proceeds of a criminal offence (see Phillips v. the United Kingdom, no. 41087/98, §§ 9-18, ECHR 2001-VII), which were deemed to have been unlawfully acquired (see Riela and Arcuri, both cited above, and Raimondo v. Italy, judgment of 22 February 1994, Series A no. 281-A, § 29) or were intended for use in illegal activities (see Butler v. the United Kingdom (dec.), no. 41661/98, 27 June 2002)."

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It futher added that:-

"38. The Court considers that, in order to be considered proportionate, the interference should correspond to the gravity of the infringement, namely the failure to comply with the declaration requirement, rather than to the gravity of any presumed infringement which had not however been actually established, such as an offence of money laundering or tax evasion. The amount confiscated was undoubtedly substantial for the applicant, for it represented the entirety of the proceeds from the sale of his late mother's home in Baku. On the other hand, the harm that the applicant might have caused to the authorities was minor: he had not avoided customs duties or any other levies or caused any other pecuniary damage to the State. Had the amount gone undetected, the Russian authorities would have only been deprived of the information that the money had entered Russia. Thus, the confiscation measure was not intended as pecuniary compensation for damage – as the State had not suffered any loss as a result of the applicant's failure to declare the money – but was deterrent and punitive in its purpose (compare Bendenoun v. France, judgment of 24 February 1994, Series A no. 284, § 47). However, in the instant case the applicant had already been punished for the smuggling offence with a term of imprisonment conditional on a period of probation. It has not been convincingly shown or indeed argued by the Government that that sanction alone was not sufficient to achieve the desired deterrent and punitive effect and prevent violations of the declaration requirement. In these circumstances, the imposition of a confiscation measure as an additional sanction was, in the Court's assessment, disproportionate, in that it imposed an "individual and excessive burden" on the applicant.

39. There has therefore been a violation of Article 1 of Protocol No. 1".

This same principle was also reiterated in the case **Vasilevski vs the Former Yugoslav Republic of Macedonia**[8] a case which concerned the automatic confiscation of a truck used in sugar smuggling not withstanding the said vehicle was actually sold after the crime.

"49. As regards the balance between the aim pursued and the applicant's rights, the Court reiterates that, where possessions that have been used unlawfully are confiscated, such a balance depends on many factors, which include the owner's behaviour. It must therefore determine whether the domestic authorities had

[8] Application 26653/08 28/07/2016

regard to the applicant's degree of fault or care or, at least, the relationship between his conduct and the offence which had been committed. In addition, it must be ascertained whether the procedure in the domestic legal system afforded the applicant, in the light of the severity of the measure to which he was liable, an adequate opportunity to put his case to the responsible authorities, pleading, as the case might be, illegality or arbitrary and unreasonable conduct (see Yildirim v. Italy (dec.), no. 38602/02, ECHR 2003-IV). The requisite balance will not be achieved if the person concerned has had to bear an individual and excessive burden (see Waldemar Nowakowski v. Poland, no. 55167/11, § 47, 24 July 2012).

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61. Having regard to the above considerations, and in spite of the wide margin of appreciation afforded to the State in this domain, the Court finds that the enforcement of the confiscation order, which had as a resulting effect the dispossession of the lorry from the applicant, imposed an excessive burden on him.

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

In the publication issued by the European Strasbourg Court under the auspices of the European Council under the name of " **Guide on Article 1 of Protocol No.1 to the European Court on Human Rights; Protection of Property"**[9] it is said that:

"Even preventive confiscation measures, imposed in the absence of a criminal conviction, do not, as such, amount to a breach of Article 1 of Protocol No. 1. The operation of the presumption that the property of a person suspected of belonging to a criminal organisation represents the proceeds from unlawful activities, if the relevant proceedings afford the owner a reasonable opportunity of putting his or her case to the authorities, is not prohibited per se, especially if the courts are debarred from basing their decisions on mere suspicions (Arcuri and Others v. Italy (dec.))."

The same in fact cannot be said in so far as the governing legislation in this case is concerned. As it results Omar Azumi is accused of having breached Article **3** of Subsidiary Legislation 233.07 (Cash control Regulations) of the External

[9] Updated 30/04/2020.

Transaction Act Chapter 233 of the Laws of Malta. This following cited sub-pargraph, because the undeclared sum is in excess of **€20,001,** affords no discretion or any administrative arrangement with regards to the mandatory siezure of the whole undeclared sum in excess of ten thousand euros.

The disputed article reads:

"3. (1) Any person entering or leaving Malta, or transiting through Malta and carrying a sum of a value of ten thousand euro (€10,000) or more in cash shall be obliged to declare such sum to the Commissioner.

2) The obligation to declare every sum as mentioned in sub-regulation (1) shall not be fulfilled unless such person has completed the applicable form,appearing in the Schedule, and has handed in such form to the Commissioner when entering or leaving Malta, or transiting through Malta.

(3) A person who makes a false declaration for the purposes of these regulations or who does not fulfil the obligation to declare such sum in terms of sub-regulation (2), shall be guilty of an offence.

4) (a) Without prejudice to what is provided in sub-regulation (6), if the sum mentioned in sub-regulation (1) which is falsely declared or not declared is of a value of between precisely ten thousand euro(€10,000) and ten thousand and two hundred euro(€10,200), the Commissioner may enter into an agreement with the person therein mentioned, and impose a penalty of two hundred euro (€200) or equivalent in lieu of proceedings in court, so however that no forfeiture of cash may take place. The signing of this agreement, which may take place up to the delivery of a final judgement by the court, shall also mean that the person is renouncing to any claim he may have against the Commissioner or the Attorney General resulting from the case. In the absence of such agreement, the Commissioner shall seize the amount in excess of ten thousand euro (€10,000), or the whole amount when the cash is indivisible and the person shall, on conviction, be liable to a fine (multa) equivalent to twenty-five per cent (25%) of the value of all the cash being carried, the sum of ten thousand euro (€10,000), as represented in local currency on the date when the person is entering or leaving Malta or is transiting through Malta, and the court shall also order the forfeiture in favour of the Commissioner of the undeclared cash in excess of ten thousand euro (€10,000), or the whole amount when the cash is indivisible.

(b) Without prejudice to what is provided in sub-regulation (6), if the sum mentioned in sub-regulation (1) which is falsely declared or not declared is of a value of between ten thousand two hundred and one euro (€10,201) and twenty thousand euro (€20,000), the Commissioner may enter into an agreement with the person therein mentioned, and impose the forfeiture of the amount of cash in excess of ten thousand euro(€10,000), or the whole amount if the cash is indivisible, in lieu of proceedings in court. The signing of this agreement, which may take place up to the delivery of a final judgement by the court, shall also mean that the person is renouncing to any claim he may have against the Commissioner or the Attorney General resulting from the case. In the absence of such agreement, the Commissioner shall seize the sum in excess of ten thousand euro (€10,000), or the whole amount when the cash is indivisible and the person shall, on conviction, be liable to a fine (multa) equivalent to twenty-five per cent (25%) of the value of all the cash being carried, including the sum of ten thousand euro (€10,000), as represented in local currency on the date when the person is entering or leaving Malta or is transiting through Malta, and the court shall also order the forfeiture in favour of the Commissioner of the undeclared amount of cash in excess of ten thousand euro (€10,000), or the whole amount when the cash is indivisible.

(c) If the sum mentioned in sub-regulation(1) which is falsely declared or not declared is of a value of twenty thousand and one euro(€20,001) or more, the Commissioner shall seize the sum in excess of ten thousand euro (€10,000)or the whole amount when the cash is indivisible and the person shall, on conviction, be liable to a fine (multa) equivalent to twenty-five per cent(25%) of the value of all the cash being carried, including the sum of ten thousand euro (€10,000),as represented in local currency on the date when the person is entering or leaving Malta or is transiting through Malta, provided that in no case shall the fine (multa) exceed fifty thousand euro(€50,000), and the court shall also order the forfeiture in favour of the Commissioner of the undeclared amount of cash in excess of ten thousand euro (€10,000), or the whole amount when the cash is indivisible

(d) All amounts of cash collected as a result of the agreement with the person as provided for in paragraphs (a) and (b) shall belong to the Commissioner.(e) All amounts of cash confiscated by order of the court by virtue of these regulations shall become the property of the Government and shall be released in favour of the Commissioner and no application shall be required to be made to the competent court by the Commissioner to take possession thereof."

As premised the reference under examination is limited to the lack of proportionality in the punishment in so far as ALL the excess monies are subject to seizure in favour of the Commissioner. The Court is of the opinion that though public interest does necessitate the cross border control of movement of monies, especially monies emanating from criminal activities of any nature, those of dubious provenance, however lack of judicial scrutiny as to provenance of said proceeds and to the particular facts of the case, leaves much to be desired with regards to balancing the interest of the public that of curtailing the breach of the law and the individual's property rights, thus breaching proportionality and striking an unbalance *"…. between the means employed and the aim sought to be realised. In striking the fair balance thereby required between the general interest of the community and the requirements of the protection of the individual's fundamental rights,…"*[10]

Also the forfeiture in question is in stark contrast to monies emanating from money laundering crimes where the law, Chapter 373 of the Laws of Malta, in article 7 thereof provides the machinery for a convicted person whose assets have been so forfeited by a court order on conviction to challenge civilly the same forfeiture. Therefore a mechanism of judicial scrutiny is provided to separate non-compromised assets from *dirty proceeds* and have the former released. *Multo magis* therefore should a scrutiny be available when the crime in issue is the lack of declaration as per required form and just that.

Such is the challenged punishment that in actual fact besides suffering the 25% fine on the whole undeclared amount found, that of **€200,182.0** therefore the sum of €50,045.50, the subsidiary legislation in issue also imposes the seizure of the sum in excess of ten thousand euros therefore the sum of €190,182. This last sum must be added to the mentioned fine thus the sum lost and confiscated/seized by the Commissioner would be to the amount of **€240,227.50** This final last amount speaks volumes as to proportionality issue in question.

Of particular interest here and echoing the anti-constitutionality of extreme disproportinate punishments are two quotes from the **Grifhorst** case above cited. Thus in examing " *La jurisprudence de la Cour de justice des Communautés européennes"* the court opines that:-

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[10] **Theory & Practice of the European Convention on Human Rights** (4th Edit, 2006), P. Van Dijk u J.H an Hoof

*"**c) Sanctions et respect du principe de proportionnalité***

31. En ce qui concerne les infractions douanières, la CJCE considère de façon constante qu'en l'absence d'harmonisation de la législation communautaire dans ce domaine, les Etats membres sont compétents pour choisir les sanctions qui leur semblent appropriées. Ils sont toutefois tenus d'exercer cette compétence dans le respect du droit communautaire et de ses principes généraux et, par conséquent, dans le respect du principe de proportionnalité (cf. arrêts du 16 décembre 1992, Commission/Grèce, C-210/91, Rec p. I-6735, point 19, du 26 octobre 1995, Siesse, C-36/94, Rec. p. I-3573, point 21, et du 7 décembre 2000, De Andrade, C-213/99, Rec. p. I-11083, point 20).

32. La CJCE précise que les mesures administratives ou répressives ne doivent pas dépasser le cadre de ce qui est nécessaire aux objectifs poursuivis et qu'une sanction ne doit pas être si disproportionnée par rapport à la gravité de l'infraction qu'elle devienne une entrave à l'une des libertés consacrées par le traité (voir notamment arrêt Commission c. Grèce précité, point 20 et la jurisprudence citée et arrêt du 12 juillet 2001, Louloudakis, C-262/99, Rec. p. I-5547 ; voir également l'arrêt rendu par la CJCE dans l'affaire Bosphorus Airways précitée, cité au paragraphe 52 de l'arrêt)."

Lastly it is to be noted that the subsidiary legislation merits of this reference has today been amended[11] in the sense that any monies in excess of ten thousand euros are *" of a value of more than thirty thousand euro (€30,000), the Commissioner shall detain the sum in excess of ten thousand euro (€10,000), or the whole amount when he cash is indivisible and deposit it in the Depository as provided in sub-regulation (7) and the person shall, on conviction, be liable to a fine (multa) equivalent to fifty five per cent (55%) of the sum carried in excess of ten thousand euro (€10,000) together with another fine (multa) of fifty euro (€50)."*[12]

Furthermore the new amendments prospect not a mandatory seizure in favour of the commissioner but a detention on his part of the excess amount, as also an obligation to deposit the same excess amount with the appointed depository. The competent authorities[13], are then obliged to carry out an assessment of the necessity and proportionality of the detention within specified times. The law also

[11] 7th July 2020 L.N. 285/2020

[12] Regulation 5(b)

[13] Being The financial intelligence Analysis Unit, Asset Recovery Bureau, the Commissioner , Malta Security Services and Malta Financial Services Authority. Vide article 2 of the regulation as amended.

speaks of a detected criminal activity justifying the continuous detention and criminal proceedings being taken even under any other law as a result thereof.[14]

Obviously this Court is not delving any further in these amendments as, as premised, it is circumscript in its assessment by the reference received. However already a brief and cursive look at these new regulations reveal a more balanced approach towards the punishment and seizure/confiscation of excess monies, regard also be had to their actual provenance.

Back to the qustion in issue, as to the question of proportionality because of the reasons above premised, the Court thus refers to the referring Court Of Magistrates as a Court of Criminal Judicature *"that the seizure of the undeclared cash in accordance with subsidiary legislation 233.07 breaches the accused's constitutional rights on the basis of Article 1 of Protocol 1 European Convention of Human Rights".*

Hon Miriam Hayman

Judge

Victor Deguara

Dep. Reg.

[14] Regulation 9(b)(c)