CRIMINAL COURT
Hon. Madame Justice Dr. Consuelo Scerri Herrera LL.D.

Bill of Indictment Nr. 5/2020

THE REPUBLIC OF MALTA

versus

CHRISTOPH DOLL

Today the 17th November, 2020

The Court,

Having seen the bill of indictment nr. 5 of the year 2020, brought against Christoph Doll, holder of Maltese Identity Card Nr. 64913(A), wherein the Attorney General in the First Count of the said bill of indictment profferd:

That, on the twenty sixth (26th) November of the year two thousand and fifteen (2015), ***Omissis*** accompanied her twelve (12) year old daughter ***Omissis*** to the Rabat Police Station in order to lodge a police report against a certain Christoph Doll, thirty one (31) years of age, for having participated in sexual activities with the girl when she was only eleven (11) years old. The minor, ***Omissis***, reported how the accused Doll had participated in sexual activities with her on different occasions in his residence in Bahrija Valley, Rabat, Malta starting from when they got to know eachother in January of the year two thousand and fourteen (2014)

until August of the year two thousand and fifteen (2015) when the minor decided it was best to stop all contact with the accused.

That ***Omissis*** reported how she had met the accused Doll at a party to which she attended together with her family. Christoph Doll, in fact, became a very trusted friend of the minor's family and particularly of the minor who had even added him as her Facebook friend. Indeed, the accused and the girl first started communicating by means of Facebook Messenger where after a while the content of these conversations became of a sexual nature.

That, the girl reports how the sexual activities started in the year two thousand and fourteen (2014) when on one occasion, while communicating on Messenger with the accused, the latter invited the eleven (11) year old to his house in Bahrija Valley, Rabat, Malta. The victim would ask her mother's permission to go over to Christoph Doll's house and being a trusted family friend, her mother used to allow her to go to his house. On one of these occasions where the girl was at the accused's house, while she was swimming in the pool with him, the accused asked her to go and sit down on him. He then moved down his hands to her bikini area and repeatedly moved his fingers close to the eleven (11) year old's vagina. On another occasion, the accused once again invited ***Omissis*** to his house and this time he offered to give her a back massage using oil. While he was giving her a back massage, **the accused inserted his fingers in the victim's vagina and after, they had a shower together**. Later, the accused asked her to go and sit on the sofa next to him and, on the initiative of the accused, **they exchanged a French kiss** before she was accompanied home.

That, in the same period indicated hereabove, the accused once more invited ***Omissis*** to his house and while they were showering together, **the accused gave the minor oral sex**. **He also asked the minor to give him oral sex and while they were in the shower together, the girl gave him oral sex as instructed by him.**

The accused then suggested to the minor that they go and continue these sexual activities in his bedroom and while she was laying on his bed, he continued giving the girl oral sex. After the completion of these sexual activities with the minor, the accused accompanied the girl home.

That, in August of the year two thousand and fifteen (2015), ***Omissis*** stopped contact with the accused and in November of that same year, she confessed to her mother that she had been participating in sexual activities with the accused Christoph Doll from the year two thousand and fourteen (2014). Following that, a police report was lodged and on the fourteenth (14th) of June of the year two thousand and sixteen (2016), the accused was arraigned in Court charged with participating in sexual activities with ***Omissis***, a minor.

By committing the above-mentioned acts with criminal intent, the accused Christoph Doll rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, taken part in **sexual activities with a minor, *Omissis*, a vulnerable person and this in abuse of a recognized position of trust, authority or influence over such person.**

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above in this Bill of Indictment, accuses Christoph Doll of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions

of the law and committed in pursuance of the same design, **taken part in sexual activities with a minor, *Omissis*, a vulnerable person and this in abuse of a recognized position of trust, authority or influence over such person.**

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused Christoph Doll be proceeded against according to law, and that he be sentenced to the punishment of imprisonment from seven (7) years to imprisonment for life with solitary confinement as is stipulated and laid down in Articles 17, 18, 31, 204C(2)(c), 208AC(1)(b)(g), 208B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta and Articles 6(2) Protection of Minors (Registration) Act, Chapter 518 of the Laws of Malta or to any other punishment applicable according to law to the declaration of guilt of the accused.

In the Second Count of the Bill of Indictment the Attorney General proffered:
That, under the circumstances indicated in the First Count of this Bill of Indictment that is, on the twenty sixth (26th) November of the year two thousand and fifteen (2015), ***Omissis*** accompanied her twelve (12) year old daughter ***Omissis*** to the Rabat Police Station in order to lodge a police report against a certain Christoph Doll, thirty one (31) years of age, for having participated in sexual activities with the girl when she was only eleven (11) years old. The minor, ***Omissis***, reported how the accused Doll had participated in sexual activities with her on different occasions in his residence in Bahrija Valley, Rabat, Malta starting from when they got to know eachother in January of the year two thousand and fourteen (2014) until August of the year two thousand and fifteen (2015) when the minor decided to stop all contact with the accused.

That ***Omissis*** reported how she had met the accused Doll at a party to which she attended together with her family. Christoph Doll, in fact, became a very trusted friend of the minor's family and particularly of the minor who had even added

him as her Facebook friend. Indeed, the accused and the girl first started communicating by means of Facebook Messenger where after a while the content of these conversations became of a sexual nature. In these conversations, the accused aroused the sexual interest of the victim by talking about sexual activities such as oral sex and used words such as 'eat you up', 'blowjob' and 'anal'. **The minor reports how at eleven (11) years old, she did not know the meaning of these words until she would look them up on the internet.**

That the accused sent the minor nude pictures of himself and asked the victim to reciprocate. There were also occasions, as already mentioned in the previous count of this Bill of Indictment, where the accused invited over the minor to his house in Bahrija Valley, Rabat, Malta and participated in sexual activities with her. The victim would ask her mother's permission to go over to Christoph Doll's house and being a trusted family friend, her mother used to allow her to go to his house, **in this way entrusting him with the care of the minor during such time as the minor was at his place.**

That, on one occasion, the accused Doll insisted on having a shower with ***Omissis*** and while they were in the shower, he instructed her to perform oral sex on him. **The victim reports how she did not know how to perform oral sex and to never have ever engaged in sexual activities before and it was the accused who showed her what to do.** He also gave his victim oral sex. There was also another occasion where the accused asked ***Omissis*** to go and sit next to him on the sofa and he gave her a French kiss. **The eleven-year old reports to have never kissed anyone before such time as she was invited into so doing by the accused.**

That in this way, **the accused performed lewd acts directed to the indulgence of his sexual appetite on a person who had not completed the age of twelve (12),**

***Omissis*, while he was temporarily charged with the care of the minor and because of which he aroused her sexual interest.**

By committing the above-mentioned acts with criminal intent, the accused Christoph Doll rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, **by lewd acts, defiled a minor, *Omissis*, who had not completed the age of twelve (12) and while being a person charged, even though temporarily, with the care, education, instruction, control or custody of the minor.**

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above in this Bill of Indictment, accuses Christoph Doll of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, **by lewd acts, defiled a minor, *Omissis*, who had not completed the age of twelve (12) and while being a person charged, even though temporarily, with the care, education, instruction, control or custody of the minor.**

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused Christoph Doll be proceeded against according to law, and that he be sentenced to the punishment of imprisonment from four (4) years to twelve (12) years with solitary confinement as is stipulated and laid down in Articles 17, 18, 31, 203(1)(a)(c) and 533 of the Criminal Code, Chapter 9 of the Laws of Malta and Article 6(2) of the Protection of Minors (Registration) Act, Chapter 518 of the

Laws of Malta or to any other punishment applicable according to law to the declaration of guilt of the accused.

In the Third Count of the Bill of Indictment the Attorney General proffered:
That, under the circumstances indicated in the previous counts on this Bill of Indictment that is, on the twenty sixth (26th) November of the year two thousand and fifteen (2015), ***Omissis*** accompanied her twelve (12) year old daughter ***Omissis*** to the Rabat Police Station in order to lodge a police report against a certain Christoph Doll, thirty one (31) years of age, for having participated in sexual activities with the girl when she was only eleven (11) years old. The minor, ***Omissis***, reported how the accused Doll had participated in sexual activities with her on different occasions in his residence in Bahrija Valley, Rabat, Malta starting from when they got to know eachother in January of the year two thousand and fourteen (2014) until August of the year two thousand and fifteen (2015) when the minor decided it was best to stop all contact with the accused.

That ***Omissis*** reported how she had met the accused Doll at a party to which she attended together with her family. Christoph Doll, in fact, became a very trusted friend of the minor's family and particularly of the minor who had even added him as her Facebook friend. Indeed, the accused and the girl first started communicating by means of Facebook Messenger where after a while the content of these conversations became of a sexual nature. The victim and the accused used to communicate even via WhatsApp where the conversations always revolved around the topic of sex. **These conversations were then sometimes followed by an invitation on the part of the accused for the girl to go to his house where they would engage in the sexual activities that they would have spoken about using technological means.** The victim would ask her mother's permission to go over to Christoph Doll's house and being a **trusted family friend, her mother used to allow her to go to his house.**

That, the victim reports how the sexual activities started in the year two thousand and fourteen (2014) when on one occasion, while communicating electronically with the accused, the latter invited the eleven (11) year old to his house in Bahrija Valley, Rabat, Malta. On one of these occasions where the victim was at the accused's house, he offered to give her a back massage using oil and while massaging her he inserted his fingers in the girl's vagina. After that, he invited her to have a shower together and French kissed her. There was another occasion in the same period where the accused once more, while communicating electronically, invited the eleven-year-old to his house and while they were showering together, he gave ***Omissis*** oral sex. He also instructed the minor to give him oral sex and showed her how this is done. The accused then suggested to the victim that they go and continue these sexual activities in his bedroom and while the victim was laying on his bed, he once more inserted his fingers in the girl's vagina and fingered her. After the completion of these sexual activities with the minor, the accused accompanied the girl home.

By committing the above-mentioned acts with criminal intent, the accused Christoph Doll rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, **by means of information and communication technologies, proposed to meet a person under age, *Omissis*, for the purpose of participating in sexual activities with the minor, where the proposal was followed by material acts leading to such a meeting and this was done with the abuse of a recognized position of trust over the person under age.**

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above in this Bill of Indictment,

accuses Christoph Doll of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, **by means of information and communication technologies, proposed to meet a person under age, *Omissis*, for the purpose of participating in sexual activities with the minor, where the proposal was followed by material acts leading to such a meeting and this was done with the abuse of a recognized position of trust over the person under age.**

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused Christoph Doll be proceeded against according to law, and that he be sentenced to the punishment of imprisonment from three (3) to twelve (12) years with solitary confinement as is stipulated and laid down in Articles 17, 18, 31, 533, 208AA(1)(d) and 208B of the Criminal Code, Chapter 9 of the Laws of Malta and Article 6(2) of the Protection of Minors (Registration) Act, Chapter 518 of the Laws of Malta or to any other punishment applicable according to law to the declaration of guilt of the accused.

In the Fourth Count of the Bill of Indictment the Attorney General proffered:
That, under the circumstances indicated in the previous counts on this Bill of Indictment that is, on the twenty sixth (26th) November of the year two thousand and fifteen (2015), ***Omissis*** accompanied her twelve (12) year old daughter ***Omissis*** to the Rabat Police Station in order to lodge a police report against a certain Christoph Doll, thirty one (31) years of age, for having participated in sexual activities with the girl when she was only eleven (11) years old. The minor, ***Omissis***, reported how the accused Doll had participated in sexual activities with her on different occasions in his residence in Bahrija Valley, Rabat, Malta starting from when they got to know eachother in January of the year two

thousand and fourteen (2014) until August of the year two thousand and fifteen (2015) when the minor decided it was best to stop all contact with the accused.

That ***Omissis*** reported how she had met the accused Doll at a party to which she attended together with her family. Christoph Doll, in fact, became a very trusted friend of the minor's family and particularly of the minor who had even added him as her Facebook friend. Indeed, the accused and the girl first started communicating by means of Facebook Messenger where after a while the content of these conversations became of a sexual nature.

That on various occasions while communicating by technological means with the victim, the accused Doll requested the victim to send nude photographs of herself to him. The victim reported to the Police how even the accused used to send nude photographs of himself to her via WhatsApp or messenger and he also sent her photographs of other women, also naked. That this exchange of indecent material took place between the minor and the accused while the accused was in the Maltese Islands.

By committing the above-mentioned acts with criminal intent, the accused Christoph Doll rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, **as a citizen or permanent resident of Malta, whether in Malta or outside of Malta, as well as a person in Malta, made or produced or permitted to be made or produced any indecent material or produced, distributed, disseminated, imported, exported, offered, sold, supplied, transmitted, made available, procured for himself or for another or showed such indecent material, to the detriment of a person under age, *Omissis*, a person of the age of eleven (11).**

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above in this Bill of Indictment, accuses Christoph Doll of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, **as a citizen or permanent resident of Malta, whether in Malta or outside of Malta, as well as a person in Malta, made or produced or permitted to be made or produced any indecent material or produced, distributed, disseminated, imported, exported, offered, sold, supplied, transmitted, made available, procured for himself or for another or showed such indecent material, to the detriment of a person under age, *Omissis*, a person of the age of eleven (11).**

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused Christoph Doll be proceeded against according to law, and that he be sentenced to the punishment of imprisonment from thirteen (13) months to nine (9) years as is stipulated and laid down in Articles 17, 18, 23, 31, 533, 208A and 208B of the Criminal Code, Chapter 9 of the Laws of Malta and Article 6(2) of the Protection of Minors (Registration) Act, Chapter 518 of the Laws of Malta or to any other punishment applicable according to law to the declaration of guilt of the accused.

In the Fifth and Last Count of the Bill of Indictment the Attorney General proffered:

That, under the circumstances indicated in the previous counts on this Bill of Indictment that is, on the twenty sixth (26th) November of the year two thousand and fifteen (2015), ***Omissis*** accompanied her twelve (12) year old daughter ***Omissis*** to the Rabat Police Station in order to lodge a police report against a

certain Christoph Doll, thirty one (31) years of age, for having participated in sexual activities with the girl when she was only eleven (11) years old. The minor, ***Omissis***, reported how the accused Doll had participated in sexual activities with her on different occasions in his residence in Bahrija Valley, Rabat, Malta starting from when they got to know eachother in January of the year two thousand and fourteen (2014) until August of the year two thousand and fifteen (2015) when the minor decided it was best to stop all contact with the accused. The accused and the minor communicated mainly electronically through Facebook Messenger and WhatsApp.

That on various occasions while communicating by technological means with the victim, the accused Doll requested the victim to send nude photographs of herself to him. The victim reported to the Police how even the accused used to send nude photographs of himself to her via WhatsApp or messenger and he also sent her photographs of other women, also naked. That this exchange of indecent material took place between the minor and the accused while the accused was in the Maltese Islands. That, furthermore, the nude photographs of the minor were found to be in the possession of the accused, that is, stored in his mobile phone.

By committing the above-mentioned acts with criminal intent, the accused Christoph Doll rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, **acquired knowingly obtained access through information and communication technologies to, or was in possession of, any indecent material which shows, depicts, or represents a person under age, that person being *Omissis*, of eleven (11) years.**

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above in this Bill of Indictment, accuses Christoph Doll of having rendered himself guilty of having, on the Maltese Islands, on the tenth (10th) of August of the year two thousand and fifteen (2015) and in the preceeding months and years, by several acts, even if committed at different times, but constituting a violation of the same provisions of the law and committed in pursuance of the same design, **acquired knowingly obtained access through information and communication technologies to, or was in possession of, any indecent material which shows, depicts, or represents a person under age, that person being *Omissis*, of eleven (11) years.**

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused Christoph Doll be proceeded against according to law, and that he be sentenced to a term of imprisonment of five (5) years as is stipulated and laid down in Articles 17, 18, 23, 31, 533, 208A(1B) and 208B of the Criminal Code, Chapter 9 of the Laws of Malta and Article 6(2) of the Protection of Minors (Registration) Act, Chapter 518 of the Laws of Malta or to any other punishment applicable according to law to the declaration of guilt of the accused.

Having seen the acts of the proceedings, including those of the compilation of evidence before the Court of Magistrates – As a Court of Criminal Inquiry.
Having seen that the accused in terms of article 449 presented a note of preliminary pleas on the 23rd September, 2020 wherein the accused submitted:

1. The inadmissibility of the accused's statement and the inadmissibility of any reference made to his declarations in view of the fact that they were made without a lawyer being present during his investigation and interrogation and prior to him being given full disclosure;

2. The nullity of the first count of the bill of indictment in view of the fact that the provision of law creating the offence is not quoted;

3. The nullity of the first count of the bill of indictment in view of the fact that the fact stated in the indictment, namely the aggravating circumstance mentioned in article 204C(2)(c) of the Criminal Code, does not constitute, in substance, the offence stated or described in the said count;

4. The nullity of the first count of the bill of indictment in view of the fact that the fact stated in the indictment, namely the aggravating circumstance mentioned in article 208AC(1)(g) of the Criminal Code, does not constitute, in substance, the offence stated or described in the said count;

5. Without prejudice to the previous pleas, the punishment requested in the first count of the bill of indictment exceeds the maximum punishment prescribed by law;

6. The minimum punishment requested in the second count of the bill of indictment exceeds the minimum punishment prescribed by law;

7. The nullity of the third count of the bill of indictment in view of the fact that the provision of law allegedly creating the offence does not exist;

8. Without prejudice to the previous plea, the nullity of the third count of the bill of indictment in view of the fact that the aggravating circumstance mentioned in article 208AA(2)(d) is mentioned in the description of the offence in this count but is not quoted;

9. Without prejudice to the previous pleas, the nullity of the third count of the bill of indictment in view of the fact that the fact stated in the indictment, namely the aggravating circumstance mentioned in article 208AA(2)(d) of the Criminal Code, does not constitute, in substance, the offence stated or described in the said count;

10. Without prejudice to the previous pleas, the punishment requested in the third count of the bill of indictment exceeds the maximum punishment prescribed by the law;

11. The minimum punishment requested in the fourth count of the bill of indictment exceeds the minimum punishment prescribed by law;

12. The inadmissibility of the testimony and report of Veronica Ellul Federici in that they are based on opinion and the witness is not a court-appointed expert.

Having seen the minutes of the proceedings of the 20th October, 2020, wherein the parties agreed that this Court should give judgement on the first plea regarding the admissibility of the accused's statement.

Considers,

This Court will first consider this first plea raised by the accused regarding the admissibility or otherwise of his statement marked as document PC1.The accused believes that his statement released on the 15th March 2016 should be declared as inadmissible evidence since despite the accused being given his right to speak with a lawyer for a limited period of one hour prior to the commencement of the interrogation, he was not given his right to be assisted by

a lawyer of his choice during the interrogation and this in the opinion of the accused amounts to a violation to his fundamental human right to be given a fair trial throughout the criminal proceeding.

Inspector Paula Ciantar gave evidence on the 14th June, 2016[1] and presented the statement delivered by the accused and on the top part of such statement the court came across the caution that was given to the accused by her and Inspector Neville Mercieca prior to the commencement of the interrogation namely:-

"*You are not obliged to say anything unless you wish to do so and anything you say may be given in evidence. You have the right (if you so request to be allowed to consult with a lawyer or a legal procurator for a duration not exceeding one hour, either in person or by phone prior to any interview. You are being also informed that if you opt to exercise your right to consult a lawyer or legal procurator as explained above, and on being questioned by the police you fail to mention any fact existing at the moment and on which you will later use in your defence in eventual proceedings against you, the court or jury may draw an inference from the failure to mention such facts. Amounting to corroboration of any evidence of guilt. Finally, you are being notified that if there exist reasonable grounds, your right to legal advice may be delayed for not longer than 36 hours as stipulated in article 355AT and 355AU of the Criminal Code.*"

The court also took note of what Inspector Neville Mercieca stated on oath in his testimony of the 4th October 2016 in that he was present only for the first part of the statement that was being taken by Inspector Ciantar at the Police Headquarters. In fact he confirms that he was present for the caution but then had to leave because he had other duties.

This statement consists of 8 pages taken in the presence of PC 276 Gregory Attard and the accused ends by stating that "*throughout this interrogation, I am still*

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confused how I cannot have my lawyer present as in my country, this is standard procedure."

This statement is concluded by the standard caution that "*I (with reference to the accused) declare that this statement was given by myself voluntarily and was not induced by threats, fear or promises of any advantages and after I have read it myself, I choose not to sign it*." This statement although released by the accused is not signed by him.

This same statement however contains the following questions put forward to the accused by the investigating officer Inspector Paula Pace namely:

Q. *Do you understand English?*
A. Yes
Q. Do you confirm that you were given the right to consult with a lawyer and you chose to consult with Dr Giannella De Marco?
A. Yes
Q. Do you confirm that you were given a printed copy of your rights?
A. Yes

It transpires that although it appears that PS 276 was a witness to the statement released by the accused since he allegedly signed the copy presented in these acts. on the 20th September 2017 the prosecuting officer Joseph Busuttil declared that PS 276 Gregory Attard had no active role in this investigation.

It is to be noted that the accused is not asking for this Honourable court to declare his statement to be inadmissible on the basis of vulnerability but on the basis that although the accused was given the right to consult with a lawyer of his choice prior to his interrogation, he was not given the right to have his lawyer of choice present throughout the investigation more particularly during the making of his confession.

During the time when the statement was taken, the law in Malta did not provide for this right to legal assistance to be given during the entire investigation including the taking of the interrogation. In fact the accused made use of his right to consult a lawyer for a limited period of one hour prior to the making his statement .

There has been a notable devolvement with regards to the right to legal assistance during investigation at pre-trial stage, which case law was and still is rather conflicting. A judgement which had a significant impact on case law is that delivered by the European Court of Human Rights in the name **Borg v. Malta'**[1]. In this latter case, the European Court of Human Rights amongst other considerations therein mentioned considered the following:

'56. Early access to a lawyer is one of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see Salduz v. Turkey [GC], no. 36391/02, § 54, ECHR 2008).

57. The Court reiterates that in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see Salduz, cited above, § 55).

58. Denying the applicant access to a lawyer because this was provided for on a systematic basis by the relevant legal provisions already falls short of the requirements of Article 6 (ibid., § 56).

(ii) Application to the present case

59. The Court observes that the post-Salduz case-law referred to by the Government (paragraph 53 in fine) does not concern situations where the lack of legal assistance at the pre-trial stage stemmed either from a lack of legal provisions allowing for such assistance or from an explicit ban in domestic law.

60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, Salduz, cited above, § 56; Navone and Others v. Monaco, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013; Brusco v. France, no. 1466/07, § 54, 14 October 2010; and Stojkovic v. France and Belgium, no. 25303/08, §§ 51-57, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, Dayanan v. Turkey, no. 7377/03 §§ 31-33, 13 October 2009; Yeşilkaya v. Turkey, no. 59780/00, 8 December 2009; and Fazli Kaya v. Turkey, no. 24820/05, 17 September 2013).

61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see Salduz, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).

62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see Salduz, cited above, §§ 52, 55 and 56).

63. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention.'

An important judgement in relation to the importance and interpretation that is to be given to the right to legal assistance during the interrogation having a bearing on the term fair trial, though where the court considered the accused person to be a vulnerable person is 'Christopher Bartolo (KI 390981M) VS Avukat Generali Kummissarju tal-Pulizija'2[2], where the First Hall Civil Court considered that:-

'*Fin-nota ta' sottomissjonijiet taghhom, l-intimati jargumentaw illi l-ilment tar-rikorrent fil-meritu huwa nfondat peress illi huwa kien inghata d-dritt li jikkonsulta ma' avukat qabel l-interrogazzjoni, u filfatt kien ezercita dan id-dritt, u illi s- sentenza citati minnu fir-rikors promotur ma huma ta' l-ebda sostenn ghal l-ilment tar-rikorrent peress illi dawn jipprospettaw sitwazzjoni fejn l-interrogat ma thalliex ikellem avukat qabel ma ttehdulu l-istqarrija.*

Il-Qorti rat pero illi l-ilment tar-rikorrent fir-rikors promotur tieghu m'huwiex illi ma thalliex jikkonsulta ma' avukat qabel ma ttehdietlu l-istqarrija (hlief fir-rigward tat-tieni wahda), izda proprju illi l-assistant legali tieghu ma kienx prezenti ***waqt*** *it- tehid tal-istqarrija, kif jidher per ezempju minn paragrafu 8 u 13 tar-rikors promotur.* ***M'huwiex***

[2] Decided by the First Hall Civil Court (Constitutional competence)on the 23rd November, 2017 (Applicatin number: 92/2016 JPG)

ikkontestat illi r-rikorrent ma giex interrogat fil-presenza tal-avukat tieghu, anke ghaliex wara kollox, f'dak iz-zmien il-ligi stess ma kienitx tippermetti dan.

Fis-sentenza fl-ismijiet ***Panovits v. Cyprus*** *deciza mill-Qorti ta' Strasbourg fl-11 ta' Dicembru 2008 intqal illi: "...the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation.* ***The lack of legal assistance during an applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings."***

Fuq l-istess linja ta' hsieb, fis-sentenza fl-ismijiet ***Dayanan v. Turkey*** *deciza mill- Qorti ta' Strasbourg fit-13 ta' Ottubru 2009 u citata fir-rikors promour tar-rikorrent:*
"In accordance with the generally recognised international norms, which the Court accepts and which form the framework for its case- law, ***an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned*** *(for the relevant international legal materials see Salduz, cited above, §§ 37-44). Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."*

Il-fatt illi l-gurisprudenza tal-Qorti ta' Strasbourg evolviet sussegwentement ghas-sentenza ta' ***Salduz*** *b'mod illi l-interpretazzjoni tad-dritt ghal smiegh mill-Qorti bdiet tikkonsidra li huwa necessarju li l-arrestat jithalla jkollu l-assistenza ta' avukat waqt l-interogattorju hija kkonfermata bl-aktar mod car fis-sentenza fl- ismijiet* ***Brusco v. France*** *deciza fl-14 ta' Ottubru 2010, fejn il-Qorti ta' Strasbourg ibbazat il-konkluzjoni taghha mhux biss fuq l-fatt illi Brusco ma thalliex ikellem avukat qabel ma gie interrogat izda anke ghaliex ma kellux access ghal avukat waqt l-ewwel interogazzjoni tieghu u l-*

interogazzjonijiet l-ohra kollha ta' wara dik, u dan a kuntrarju ta' dak li jezigi l-Artikolu 6:

"L'avocat n'a donc été en mesure ni de l'informer sur son droit à garder le silence et de ne pas s'auto-incriminer avant son premier interrogatoire ni de l'assister lors de cette déposition et lors de celles qui suivirent, comme l'exige l'article 6 de la Convention.

Konferma terga aktar cara ta' dan, tinsab fis-sentenza fl-ismijiet ***Navone and others v. Monaco*** *deciza mill-Qorti ta' Strasbourg fl-24 ta' Ottubru 2013, fejn il- Qorti ikkonkludiet illi l-ligi ta' Monaco, li kienet tippermetti biss konsultazzjoni ma' avukat qabel l-interrogatorju, u ma kienitx tippermetti illi l-avukat ikun prezenti waqt l-interogazzjoni3,* ***kienet leziva tad-dritt ta' smiegh xieraq****:*

"Or, en l'espèce, nul ne conteste qu'à l'époque des faits, le droit monégasque ne permettait pas aux personnes gardées à vue de bénéficier d'une assistance d'un avocat pendant les interrogatoires : une telle assistance était donc automatiquement exclue en raison des dispositions légales pertinentes. La Cour relève en effet que le droit interne ne prévoyait qu'une consultation avec un avocat au début de la garde à vue ou de la prolongation de celle-ci, pendant une heure maximum, l'avocat étant en tout état de cause exclu des interrogatoires dans tous les cas.

(...)

Par conséquent, la Cour ne peut que constater que les requérants ont été automatiquement privés de l'assistance d'un conseil au sens de l'article 6 lors de leur garde à vue, la loi en vigueur à l'époque pertinente faisant obstacle à leur présence durant les interrogatories.

Thus the Court took note that even the domestic courts started already expressing themselves on their doubts as to whether the law as in place in the time that this interrogation was made was sufficient to guarantee the right to a fair trial considering that the law did not allow for the lawyer to be present during the interrogation as

reported in the judgment in the names ***Il-Pulizija (Spetur Jesmond J. Borg) vs Jason Cortis***[3] *where the court held that:*

"...jista' jkun hemm lok ghal-dibattitu dwar kemm il-provvedimenti tal-Kap 9 jirrispekkjaw d-dritt ghall-assistenza legali moghti lill- arrestat tenut kont ukoll illi dan id-dritt, kif ezistenti llum taht il-ligi taghna, huwa ristrett ghal siegha qabel l-interoggatorju u b'hekk jeskludi l-jedd tal-presenza tal-avukat waqt l-istess interrogatorju. *F'dak l-istadju l-arrestat huwa soggett ghal mistoqsijiet diretti u suggestivi bir-risposti taghhom, anke jekk jghazel li ma jwegibx, bit-traskrizzjoni tieghu tkun eventwalment esebita fil-proceduri kontrih fejn ikun meqjus innocenti sakemm pruvat mod iehor.*

Huwa car ghalhekk illi skont il-gurisprudenza kostanti tal-Qorti ta' Strasbourg, hekk kif zviluppat u evolviet sussegwentement ghas-sentenza ta' Salduz, il- garanzija u protezzjoni ta' smiegh xieraq tirikjedi illi l-arrestat jinghata l-possibilita li jkollu mieghu avukat tal-fiducja tieghu waqt, u mhux biss qabel, l-interogazzjoni. Ghalhekk jidher illi l-argument tal-intimati illi dan l-ilment tar-rikorrent huwa nfondat ghaliex kienet inghata l-possibilita li jkellem avukat qabel l-ewwel interrogatorju huwa nsostenibbli ghaliex mill-gurisprudenza appena citata, jidher car illi l-arrestat ghandu jinghata l-possibilita li jkollu avukat prezenti waqt l- interogazzjoni.

M'huwiex kontestat, illi fiz-zmien in kwistjoni ***kien hemm restrizzjoni sistematika*** *li kienet timpedixxi lill-arrestat milli jkollu avukat tal-fiducja tieghu prezenti waqt l-interrogazzjoni. M'huwiex ikkontestat ukoll illi r-rikorrent ma thalliex ikollu avukat prezenti waqt l-ewwel interogazzjoni, u illi ma inghatax access ghall-avukat tieghu qabel jew waqt it-tieni interogazzjoni. Dan il-fatt wahdu, skont il-gurisprudenza tal-Qorti ta' Strasbourg, huwa bizzejjed biex tinstab lezjoni tad-dritt ta' smiegh xieraq.*

Il-Qorti pero ma tistghax ma tirrilevax illi dan huwa kaz gravi u partikolari, fejn ir-rikorrent huwa afflitt minn marda serja u terminali, tant li fi zmien tal- interogazzjoni

[3] Delivered by the Criminal court of Appeal on the 6th October 2016

kien ikollu jaghmel sitt sieghat dialysis, fi granet alternattivi u filfatt kien gie arrestat hekk kif kien ghadu hareg minn sitt sieghat dialysis. Il-Qorti tinsab mhassba mmens illi l-pulizija ma zammew ebda record tal-kondizzjoni ta' sahha tar-rikorrent, b'mod illi ma jistghux jikkonfermaw jekk kienux taw cans lir- rikorrent jiekol u jixrob bejn sitt sieghat dialysis u l-interogazzjoni tieghu jew le, skont kif qed jallega r-rikorrent. Il-Qorti tfakkar illi sakemm ir-rikorrent kien fil- kustodja tal-pulizija, il-pulizija kienet responsabbli ghal sahhtu u ghalhekk kellha tara li jkollha informazzjoni sufficjenti dwar il-kondizzjoni medika tar-rikorrent sabiex tigi salvagwardjata sahhtu u li r-rikorrent ma jithalliex bil-guh u bil-ghatx wara sitt sieghat dialysis.

Il-Qorti hija tal-fehma illi mill-provi prodotti rrizulta l-kondizzjoni medika tar- rikorrent, li kienet tikkawzalu ugiegh kbir, ansjeta u depressjoni, dana kollu jirrendi r-rikorrent persuna vulnerabbli, specjalment ikkonsidrat illi l-ewwel interogazzjoni segwit sitt sieghat dialysis. Barra minn hekk, skont it-testimonjanza mhux kontradetta tal-psikologu Nicholas Briffa, a fol 128 – 129, ir-rikorrent huwa persuna suxxettibbli, u reza vulnerabbli minhabba l-kondizzjoni medika u d- depressjoni li minnha kien jbaghti. Di piu' l-fatt illi r-rikorrent ma kellu l-ebda esperjenza ta' interrogatorju, tirrendih aktar vulnerabbli.

Il-Qorti rat ukoll illi l-intimati ma ressqu l-ebda prova li kien hemm xi ragunijiet impellanti - "compelling reasons" - sabiex ir-rikorrent ma jithalliex ikollu avukat prezenti waqt l-interogazzjonijiet tieghu. Ghalhekk, ikkonsidrat li dak iz-zmien kien hemm restrizzjoni sistematika ghad-dritt ta' assistenza legali waqt l-interrogazzjoni, l-effetti ta' liema kienu aggravati f'dan il-kaz minhabba l-vulnerabbilita tar- rikorrent, u galadarba l-intimati ma ressqu l-ebda prova li kien hemm ragunijet serji u mpellenti li jistghu jiggustifikaw ir-restrizzjoni tad-dritt ta' assistenza legali sofferta mir-rikorrent, il-Qorti tikkonkludi illi l-ilment tar-rikorrent illi d-dritt tieghu ghal smiegh xieraq gie lez, huwa fondat.

Ghalhekk, il-Qorti tiddikjara illi r-rikorrent sofra lezjoni tad-dritt tieghu ghal smiegh xieraq minhabba restrizzjoni mhux gustifikata ghad-dritt tieghu ta' access ghal avukat.[1]

The Attorney General and the Commissioner of Police both appealed this judgement[4] and the court in its judgment amongst other considerations stated that:

"35. *Fil-kaz odjern jirrizulta car li fl-istqarrijiet tieghu r-rikorrent, minkejja li qabel ma irrilaxxja l-ewwel stqarrija, l-avukat tieghu kien tah il-parir li f'dak l-istadju ma jghid xejn lill-pulizija, huwa xorta wahda iddecieda li jirrispondi ghad-domandi waqt l-interrogazzjoni, bir-rizutlat li stqarr certu fatti inkriminanti ghalih in kwantu ammetta li kien jixtri l-blokkok tal-cannabis, kemm ghall-konsum personali tieghu kif ukoll sabiex ibiegh lil terzi. Fil-fatt stqarr li kien ibiegh minnha lill-barranin li kienu Ghawdex. B'dan il-mod huwa kien ammetta li kien jittraffika dik id-droga. L-istess ammissjoni kienet giet ripetuta fit-tieni stqarrija fejn ir-rikorrent amplifika wkoll dwar minn ghand min kien jixtri d-droga.*

36. Mill-premess jirrizulta manifest li l-istqarrijiet rilaxxjati mir-rikorrent ser ikollhom kif fil-fatt gja` kellhom quddiem il-Qorti Kriminali impatt fil- proceduri kriminali, mhux in kwantu ghall-ammissjonijiet, izda in kwantu l- kontenut taghhom kien ittiehed in konsiderazzjoni fil-quantum tal-piena imposta fuqu mill-Qorti Kriminali, u issa huwa car li anke l-Qorti tal-Appell Kriminali ser tiehu konsiderazzjoni tal-kontenut tal-istqarrijiet f'dan ir- rigward. Ghalhekk, ghalkemm il-proceduri kriminali ghadhom pendenti u ghalhekk ma jistax f'dan l-istadju jigi determinat jekk kienx hemm lezjoni ta' smigh xieraq f'dawk il-proceduri, jekk l-istqarrijiet jithallew fil-process tal- proceduri kriminali, dawn wisq probabbilment ser isir uzu minnhom mill- Qorti tal-Appell Kriminali bi pregudizzju jew vantagg ghall-akkuzat fil- kwantifikazzjoni tal-piena, kemm dik karcerarja kif ukoll ghal dak li tirrigwarda l-multa li tista' tigi imposta.

37. Fid-dawl tal-premess it-tehid tal-istqarrijiet zgur li ser ikollhom impatt fuq l-ezitu tal-process kriminali u, ladarba dan isir, x'aktarx ser isir ksur tad- dritt tal-rikorrent ghal

[4] 'Christopher Bartolo v. (1) Avukat Generali; u (2) Kummissarju tal-Pulizija' decided by the Constitutional Court on the October, 2018 (Application Number 92/16 JPG)

smigh xieraq tenut kont tal-fatt li dawn gew rilaxxjati mir-rikorrent fl-assenza ta' avukat li jassistih. Ghalhekk huwa xieraq li, filwaqt li f'dan l-istadju ma jistax jinghad jekk kienx hemm lezjoni ta' dan id- dritt fundamentali tar-rikorrent peress li l-proceduri kriminali ghadhom pendenti, dawn ma jithallewx jibqghu fl-inkartament tal-process kriminali'

The Constitutional Court upheld the appeal of the Attorney General and Commissioner of Police and revoked the judgement delivered by the First Hall Civil Court and upheld the plea of the respondents appellants in so far that the current procedures were premature *'intempestivi'* and ordered that there should be no use of the two statements released by the accused during the criminal proceedings to safeguard the right of the accused not to have a infringement to his human rights.

In '**Il-Pulizija (Spettur Malcolm Bondin) kontra Aldo Pistella**'[5] amongst other considerations the court held that:

"Riferibbilment ghall-kaz in ezami, jirrizulta illi Aldo Pistella nghata dritt li jkellem lill-avukat ta` ghazla tieghu qabel irrilaxxja l-istqarrija lill-Ispettur Malcolm Bondin. L-ispettur koncernat ikkonferma li hekk kien il-kaz, kemm meta xehed fil-kors ta` dan il-procediment, kif ukoll meta xehed fil-kawza kriminali. In partikolari, fis-seduta tal-kawza kriminali tal-20 ta` Ottubru 2014 stqarr illi :-

"Minn hemm hekk komplejna bl-investigazzjonijiet mas-sur Aldo Pistella fejn jien tajtu d-drittijiet tieghu u fejn tajtu d-dritt tal-parir legali fejn xtaq li jkellem avukat u fil-fatt kien tkellem ma` l-avukat tieghu Dr Sarah Sultana personalment, kien tkellem l-ghada filghodu fejn kienet giet tkellmu gewwa l-kwartieri tal-Pulizija. Wara li ha l- parir legali kont komplejt bl-investigazzjonijiet mieghu...." (ara fol 19 u 20 tal-process kriminali).

[5] Decided by the First Hall Civil Court (Constitutional Competence) on the 27th June, 2017 (Application number: 104/16 JZM).

Mill-istqarrija rrizulta wkoll illi Pistella kkonferma li fehem it-twissija moghtija lilu mill-pulizija u li kien kellem lil avukat tieghu qabel ma rrilaxxja l- istqarrija. Insibu a fol 29 :

"M: Fhimtha t-twissija li ghadni kif tajtek?

T: Iva.

M: Tikkonferma li kellimt lil avukat tieghek Dr Sara Sultana u gejt moghti dokument bid-drittijiet kollha tieghek bil-lingwa taljana?

T: Iva."

Madanakollu rrizulta wkoll illi Pistella ma kienx assistit mill-avukat ta` ghazla tieghu waqt it-tehid tal-istqarrija. Gara hekk ghaliex fiz-zmien meta Pistella kien qed jigi nvestigat, ma kienx hemm dritt li min kien qed jigi nvestigat jitlob li jkun assistit minn konsulent legali waqt it-tehid ta` l- istqarrija.

Din hija propju l-kwistjoni mertu tar-referenza kostituzzjonali odjerna, ossija jekk il-kaz ta` persuna li ma jkollhiex assistenza legali fl-istadju meta tkun giet arrestata u interrogata jikkostitwix ksur tal-jedd ghal smigh xieraq kif tutelat bl-Art 6 tal-Konvenzjoni.

Il-Qorti hadet nota tal-fatt li Aldo Pistella ddikjara li talab l-assistenza ta` avukat izda dak l-avukat ma kienx prezenti waqt l-interrogatorju.

Irrizulta wkoll mix-xiehda tal-Ispettur Bondin fil-proceduri kriminali illi waqt li kien qed jaghti l-istqarrija, Pistella kkopera izda kellu problema bejn li ried jikxef il-persuni involuti u bejn li ma riedx ; ghalhekk kien rega` nsista li jkellem lill-konsulent legali izda din it-talba kienet michuda.

L-ispettur xehed hekk a fol 25 :-

"Is-sinjur ikkopera maghna bis-shih. Il-problema li kellu s-sinjur qisu bejn jixtieq jikkopera mal-pulizija u jghid verament min huma nvoluti n-nies u minn ghand min kien qed jixtri u jassistina f`dawk l- affarijiet u bejn qed jibza` minn dawn l-affarijiet. Ghax f`hin minnhom xtaq li jghinna u f`hin minnhom rega` talab biex jitkellem fil-fatt ma` l-avukat, ghidtlu li ma jistax."

*Ghal din il-Qorti, il-fatt li persuna ma kinitx assistita minn avukat waqt l-interrogazzjoni jwassal ghal sitwazzjoni fejn l-**uzu ta` l-istqarrija** mehuda minghajr l-assistenza legali tammonta ghal lezjoni tad-dritt ghal smigh xieraq tal-imputat skont l-Art 6 tal-Konvenzjoni.*

Din il-Qorti tqis li ghall-kaz odjern ghandha tapplika l- gurisprudenza l-aktar ricenti tal-ECHR u tal-qrati taghna fejn inghad kjarament li d-dritt ta` l-applikant jigi rrimedjabbilment ippregudikat meta hu jirrilaxxa stqarrijiet waqt l-interrogazzjoni meta ma kienx assistit minn avukat u in segwitu dawk l-istqarrijiet jintuzaw kontra tieghu. '

The same court considered that:-

"'*Fil-fehma ta` din il-Qorti, il-fatt li persuna ma kinitx assistita minn avukat waqt l-interrogazzjoni u waqt l-istess interrogazzjoni talbet li terga` tkellem lill-avukat u tali talba giet michuda, iwassal ghal sitwazzjoni fejn id- dritt ta` dik il-persuna, fil-kaz tal-lum Aldo Pistella, kien irrimedjabbilment ippregudikat stante illi huwa rrilaxxja stqarrijiet waqt l-interrogazzjoni meta ma kienx assistit minn avukat u in segwitu dawk l-istqarrijiet jintuzaw kontra tieghu.*

Issa rrizulta wkoll illi l-kawza kriminali ghadha pendenti.

Ghalkemm il-qorti ta` gurisdizzjoni kriminali eventwalment taghti decizjoni fil-mertu wara li jkun inghalaq il-gbir tal-provi, tenut kont tal-konsiderazzjonijiet kollha premessi, m`ghandux ikun illi l-kawza kriminali

titkompla bl-istqarrija ta` Aldo Pistella lill-Ispettur Malcolm Bondin tkun taghmel prova ladarba rrizulta li waqt it-tehid tal- istqarrija ma kienx prezenti l-avukat ta` Aldo Pistella.

Del resto l-Avukat Generali u l-Kummissarju tal-Pulizija t-tnejn sostnew illi l-kaz tal-pulizija kontra Aldo Pistella mhuwiex fondat biss fuq l-istqarrija ta` l-akkuzat izda fuq provi ohra wkoll.

Ghalkemm jibqa` l-principju li procediment gudizzjarju ghandu jitqies fit-totalita` tieghu sabiex jigi determinat kienx hemm ksur tal- jedd ghal smigh xieraq, tibqa` l-konsiderazzjoni li m`ghandu jsir ebda uzu mill-istqarrija ta` Aldo Pistella fil-process kriminali sabiex meta jintemm il-process kriminali, ma jkunx mittiefes b`irregolaritajiet.'

The Consitutional Court[6] confirmed the judgement of the first court wherein amongst other consdierations in regard to the appeal of the attorney General and Comissioner of Police it considered that:

'*Għalkemm, bħall-ewwel qorti, taqbel mal-appellanti illi f'dan l- istadju għadu ma seħħ l-ebda ksur tal-jedd għal smigħ xieraq, madankollu, kif osservat fil-kaz ta' Malcolm Said*[7]*, il-qorti xorta hija tal-fehma li ma jkunx għaqli li l-proċess kriminali jitħalla jitkompla bil-produzzjoni tal-istqarrija tal-akkuzat Pistella ladarba din, għallinqas f'parti minnha, ittieħdet mingħajr ma Pistella kellu l-għajnuna ta' avukat. Għalhekk, għalkemm għadu ma seħħ ebda ksur tal-jedd għal smigħ xieraq, fiċ-ċirkostanzi huwa għaqli illi, kif qalet l-ewwel qorti, ma jsir ebda uzu mill-istqarrija fil- proċess kriminali sabiex, meta l-proċess kriminali jintemm, ma jkunx tniggeż b'irregolarità – dik li jkun sar uzu minn stqarrija li ttieħdet mingħajr ma l-interrogat kellu l-għajnuna ta' avukat – li tista' twassal għal konsegwenzi bħal tħassir tal-proċess kollu.*

[6] 'Il-Pulizija (Spettur Malcolm Bondin) v. Aldo Pistella' decided on the -14th December, 2018 (Application number 104/2016/1 JZM

[7] 24 th June 2016.

15. Il-fatt li, kif josservaw l-appellanti, hemm xiehda oħra fil-proċess barra l-istqarrija li tista' ssaħħaħ il-każ tal-prosekuzjoni ma huwiex argument kontra din il-konkluzjoni. Ifisser biss li l-każ tal- prosekuzzjoni ma jiddgħajjifx bit-tneħħija tal-istqarrija waqt li jista' jingieb fix-xejn jekk l-istqarrija titħalla fil-proċess u dan possibilment iwassal għal sejbien, eventwalment, ta' ksur tal-jedd għal smigħ xieraq.'

The court also makes referene to the case **'Ir-Repubblika ta' Malta v. Martino Aiello'**[8] where it was held that:

'Ghandu jinghad li t-trattazzjoni tal-partijiet marret oltre l- meritu tas-sentenzi hawn fuq imsemmija li jirrigwardaw li fis-sistema taghna qabel l-ghaxra ta' Frar, 2010 il-persuna ndagata jew akkuzata ma kellha ebda dritt li tkellem lill-avukat ta' l- ghazla taghha. Dan ghaliex l-istqarrija li giet rilaxxata minn Martino Aiello ggib id-data tad- 19 ta' Ottubru, 2014 u dak in-nhar Martino Aiello rrifjuta li jkellem avukat ta' fiducja tieghu.

Illi l-avukati tar-rikorrenti qajmu l-punt li Martino Aiello ma kellhux avukat prezenti mieghu meta hu rrilaxxa l-istqarrija tieghu fid-19 ta' Ottubru, 2014. It-tratazzjoni tal-partijiet kien dwar dan il-punt.

Illi dan il-punt gie finalment deciz mill-legislatur bil-promulgazzjoni ta' l-Att numru LI ta' l- 2016. Dan l-att gie operattiv fit-28 ta' Novembru, 2016 permezz ta' l-A.L. 401 ta' l-2016.
Illi l-artikolu li hu rilevanti ghall-ezercizzju in ezami hu l-artikolu 355AUA li jaghti id-dritt ta' access ghal avukat fi proceduri kriminali.

Illi t-tezi tar-rikorrenti hi semplici u lineari. Meta giet rilaxxata l-istqarrija dik il-persuna ma kellhiex id-dritt tal-prezenza ta' l-avukat. Il-konkluzjoni allura hi li tali stqarrija ghandha tkun inammissibli.

[8] Preliminary judgmenet givenby the Crminal Court on the 9th May, 2017 (Bill of Indictment Number 13/2015)

Illi t-tezi tal-Avukat Generali hi daqstant lineari. Ir-rikorrenti gie moghti d-dritt li jikkonsulta avukat ta' fiducja tieghu. Hu rrifjuta tali dritt, ma kkonsulta lil hadd u liberament u volontarjament irrilaxxa l-istqarrija hawn fuq imsemmija.
Illi din il-Qorti josserva li s-sentenza Borg v. Malta (hawn fuq citata) ma kinitx biss jitkellem fuq id-dritt li wiehed ikollu l-jedd li jikkonsulta ma avukat qabel tigi rilaxxat stqarrija. Dik is-sdentenza tghid illi f'kull stadju ta' l-investigazzjoni l-persuna susspettata jew akkuzata jrid ikollha d-dritt ta' l-avukat. Kien ghalhekk li gie promulgat l-Att numru LI ta' l-2016.

Illi fil-fehma ta' din il-Qorti l-istess principji li gew applikati fis-sentnezi hawn fuq imsemmija ghandhom japplikaw f'dan il-kaz ukoll. Dan ifisser li anki jekk r-rikorrenti rrifjuta d-dritt li jikkonsulta avukat ma jfissirx li hu kien ser jirrifjuta l-prezenza ta' avukat fl- istess kamra ta' l-interrogatorju, tenut kont tal-fatt li l-artikolu fuq citat isemmi li l-avukat prezenti ghall-interrogatorju "...jippartecipa b'mod effettiv fl-interrogazzjoni...". Kif wiehed jista' japprezza din hi sitwazzjoni kompletament differenti. Logikament, ma tistax tipenalizza persuna li ghamel ghazla fuq parametri kompletament differenti minn dawk li huma in vigore llum.

Ghaldaqstant, ghal dawn ir-ragunijiet din il-Qorti tilqa l-eccezzjoni tar-rikorrenti. Tiddikjara l-istqarrija tad-19 ta' Ottubru, 2014 rilaxxat mir-rikorrenti bhala nammissibbli. Tali stqarrija ma tistax tigi prodotta waqt il-guri jew kopja taghha moghtija lill-gurati.'

This judgement was appealed and the Criminal Court of Appeal.[9] Did not confirm the judgment delivered by the first court and stated that:-

'19. Illi gjaldarba l-kwistjoni imqanqla la hija wahda frivola u lanqas vessatorja, din il-Qorti, wara li rat l-artikolu 46(3) tal-Kostituzzjoni u l-artikolu 4(3) tal- Kapitolu 319 tal-Ligijiet ta' Malta, qed tibghat lil-Prim'Awla tal-Qorti Civili, l- kwistjoni dwar ***jekk bl-***

[9] Decided on the 9th April, 2018 (Bill of Indictment number 13/2015)

uzu fil-guri kontra l-akkuzat appellat Martino Aiello tal- istqarrija rilaxxjata minnu lill-pulizija fid-19 ta' Ottubru 2014 jigix lez id-dritt tal-istess Martino Aiello ghal smigh xieraq sancit bl-artikolu 39(1)(3) tal-Kostituzzjoni u l-artikolu 6(1)(3) tal-Konvenzjoni għall-Protezzjoni tad- Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali.

20. Tiddiferixxi dan l-appell sine die sakemm tigi deciza definittivament il- kwistjoni fuq riferita.'

The First Hall Civil Court decided the Consitutional reference and declared that in the circumstances there can be no violation to the fundamental human rights of the accused Martino Aiello to his right to a fair trial as guaranteed by Article 39 of the Constitutin of Malta and Article 6 of the European Convention of Human Rights if during the celebration of the Jury use is made of the statement released by the accsued on the 19th ' Ottuber 2014 and after other considerations held that:-

'*Applikati dawn il-prinċipji għall-kawża li għandha quddiemha llum, din il-Qorti hija tal-fehma li ma ġiex muri li bl-użu tal-istqarrija tiegħu fil-ġuri kontra l-akkużat ser jiġi mittiefes id-dritt tiegħu għal smigħ xieraq.*

Qabel xejn, din il-Qorti tgħid illi ma jirriżultax li kien hemm raġunijiet tajbin li jżommu lill-akkużat milli jkollu avukat preżenti waqt l-interrogazzjoni u waqt li kien qiegħed jagħti l-istqarrija. L-uniku raġuni li Martino Aiello ma setax ikun mgħejjun minn avukat kienet li, dak iż-żmien, il-liġi ma kienitx tippermetti li l-akkużat ikun hekk mgħejjun f'dak l-istadju imma seta' jikkonsulta ma' avukat biss qabel l-interrogazzjoni, xi ħaġa li mhux kontestat li Martino Aiello rrifjuta li jagħmel.

Madanakollu, il-posizzjoni ġurisprudenzjali kurrenti turi li m'għadux il-każ li l-fatt waħdu li l-liġi ma kienitx tippermetti l-assistenza ta' avukat qabel jew waqt l-interrogazzjoni, awtomatikament iwassal sabiex jinstab li kien hemm ksur tad-dritt għal

smigħ xieraq, kif qiegħed jippretendi l-akkużat, imma din il-Qorti għandha tqis diversi fatturi qabel tasal għall-konklużjoni tagħha.

Kif diġà ntqal, dan il-każ huwa kemmxejn differenti mill-każ ta' Aldo Pistella in kwantu li Martino Aiello kien fil-fatt irrinunzja għad-dritt tiegħu li jikkonsulta ma' avukat qabel ma ġie interrogat mill-Pulizija u assolutament ma ġiex muri li huwa xtaq li jkollu avukat preżenti waqt l-interogazzjoni jew waqt li kien qiegħed jirrilaxxja l-istqarrija.

Proprju dwar ir-rinunzja, fil-każ ta' Paskal vs Ukraine, tal-15 ta' Settembru 2011, il-Qorti Ewropea qalet hekk:

> *"neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial, as long as a waiver of the right is given in an unequivocal manner and was attended by the minimum safeguards commensurate to its importance."*

L-akkużat naqas milli juri wkoll li huwa għandu jitqies bħala persuna vulnerabbli. Fil-fatt, meta xehed quddiem din il-Qorti, tista' tgħid li ma semma xejn dwar iċ-ċirkostanzi tal-arrest tiegħu flimkien ma' martu mal wasla tagħhom hawn Malta. Martino Aiello la kien minorenni u lanqas kien ibati minn xi forma oħra ta' vulnerabilità fiż-żmien in kwistjoni. Lanqas jirriżulta xi prova fis-sens li ċ-ċirkostanzi li fihom ittieħdet l-istqarrija kienu għalih intimidanti. L-istqarrija ngħatat volontarjament, mingħajr theddid, wegħdi jew promessi ta' vantaġġi u wara li ngħata d-debita twissija skont il-liġi, u ċioè li ma kienx obbligat jitkellem sakemm ma kienx hekk jixtieq, iżda li dak li kien ser jgħid seta' jinġieb bħala prova kontrih. Lanqas ma ġie muri li l-akkużat ma kienx qiegħed jifhem l-import taċ-ċirkostanzi li kien jinsab fihom. Il-Qorti tinnota wkoll illi Martino Aiello ma qajjem l-ebda lment dwar l-istqarrija li kien irrilaxxja qabel ma ġie deċiż il-każ ta' Borg vs Malta imma huwa talab lill-Qorti

Kriminali sabiex ikun jista' jressaq eċċezzjoni dwar l-inammissibilità tal-istqarrija biss minħabba dak deċiż mill-Qorti Ewropea fl-imsemmija każ. Imma kif rajna, din il-ġurisprudenza m'għadhiex applikabbli inkondizzjonatament safejn l-akkużat qiegħed jippretendi li l-istqarrija tiegħu mhijiex ammissibbli bħala prova abbażi tal-fatt waħdu li dak iż-żmien ma setax ikun assistit minn avukat waqt l-interrogazzjoni u waqt li kien qiegħed jirrilaxxja l-istqarrija. Anzi, għandhom jittieħdu in konsiderazzjoni diversi fatturi li flimkien jagħmlu ċ-ċirkostanzi tal-każ.

Martino Aiello fl-ebda stadju ma kkontesta l-awtenticità tal-prova li ġabet il-Prosekuzzjoni kontrih, liema prova mhijiex limitata għall-istqarrija in kwistjoni. Lanqas ma oppona għall-preżentata ta' dik l-evidenza. L-assjem tal-provi ser ikun evalwat minn Imħallef u għalhekk, minn persuna b'għarfien għoli tal-proċedura legali u l-liġi Maltija.
Finalment, il-Qorti tqis illi huwa indubbjament fl-interess pubbliku li jiġi investigat u imressaq sabiex jiġi ġudikat mill-Qrati ta' ġurisdizzjoni kriminali l-akkużat li nqabad in flagrante jittraffika d-droga f'Malta.

Għaldaqstant, il-Qorti ssib li l-akkużat Martino Aiello ma rnexxilux juri li tassew ser iġarrab ksur tad-dritt tiegħu għal smigħ xieraq bl-użu fil-ġuri kontra tiegħu tal-istqarrija li rrilaxxja fid-19 ta' Ottubru 2014.'

The Constitutional Court in the case '**Ir-Repubblika ta' Malta v. Martino Aiello**'[10] rejected the appeal and held amongst other consdierations that:-

"24. L-istqarrija ma ttieħditx bi ksur ta' xi dispozizzjoni ta' liġi u kien ċertament fl-interess pubbliku li każ dwar traffikar ta' drogi f'Malta, ikun investigat u jittieħdu proċeduri kriminali dwaru.

[10] Decided by the Constitutional Court on the 27th March, 2020 (Application number 38/18 AF)

25. M'hemm l-ebda indizju li l-appellant gie mgiegħel jagħmel dik l-istqarrija. Fl-ebda stadju m'allega xi theddid jew wegħda biex għamilha.

26. Fir-rigward ta' paragrafu (g) m'hemmx dubju li l-prosekuzzjoni trid li dik l-istqarrija tintuża bħala prova importanti tal-ġuri li għad irid isir, u dan b'riferenza għal dak li ġara f'Mejju u Ġunju, 2014 peress li fl-istqarrija Aiello ammetta li kien hemm darbtejn oħra f'dawk ix-xhur meta kien diġà` importa droga f'Malta. Fatt li saret riferenza espressa għalih fl-att tal-akkuża. Għalkemm il-ġuri għadu ma sarx, hu evidenti li dik l-ammissjoni fl-istqarrija għandha importanza fil-proċess kriminali tant li saret riferenza għaliha fl-att tal-akkuża.

27. Inoltre, dwar dan il-każ għad irid isir il-ġuri. Għalhekk huma l-ġurati li ser jiddeċiedu jekk l-appellant huwiex ħati tal-akkużi li hemm kontrih. Madankollu, ser ikun l-imħallef li fl-indirizz li jrid jagħmel lill-ġurati ser jigbor ix-xiehda tax- xhieda u l-provi li jkunu marbutin magħhom, kif ukoll ifisser ix-xorta u l-elementi tar-reati rilevanti għall-każ. Hu l-imħallef li jagħmel ".... kull osservazzjoni oħra li tiswa biex triegi u turi lill-ġuri kif għandu jaqdi sewwa d-dmirijiet tiegħu" (Artikolu 465 tal-Kap. 9).

28. Li hu żgur hu li f'dan il-każ l-appellant ingħata l-opportunita' li jitkellem ma' avukat, bit-telefon jew wiċċ imb'wiċċ, iżda irrifjuta. B'dak il-mod l-appellant ċaħħad lilu nnifsu mill-opportunita' li jkollu parir ta' avukat sabiex jipprepara ruħu għall-interrogazzjoni u sabiex jingħata tagħrif dwar il-vantaġġi u żvantaġġi li jitkellem jew jagħżel is-silenzju waqt l-interrogazzjoni. Dan meta kien jaf li waqt l-interrogazzjoni ma kienx ser ikollu l-assitenza ta' avukat preżenti. Dan apparti li kien infurmat b'mod ċar bil-jedd li jibqa' sieket u ma jwegibx iżda xorta agħżel li jwieġeb liberament. Madankollu xorta agħżel li jwieġeb għad-domandi li sarulu.."

Recently there was yet another substantial development pronounced by the Grand Chambers of the European Court of Human rights which is of major

importance in regard to the exercise of this right namely **'Bueze vs Belgium'**[11] . In this case the Court held that emphasis must be given to all the facts of the proceedings as a whole in order to decide whether there has been a violation to the right to a fair hearing. It considered:-

'150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see Ibrahim and Others, cited above, § 274, and Simeonovi, cited above, § 120):

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

[11] Decided by the Grand Chamber of the ECtHR on the 9th ' November, 2018 (Applcation number: 71409/10)

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice.' Gie kkunsidrat li:

'193. In conclusion, re-emphasising the very strict scrutiny that must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court finds that the criminal proceedings brought against the applicant, when considered as a whole, did not cure the procedural defects occurring at the pre-trial stage, among which the following can be regarded as particularly significant:

(a) The restrictions on the applicant's right of access to a lawyer were particularly extensive. He was questioned while in police custody without having been able to consult with a lawyer beforehand or to secure the presence of a lawyer, and in the course of the subsequent judicial investigation no lawyer attended his interviews or other investigative acts.

(b) In those circumstances, and without having received sufficiently clear prior information as to his right to remain silent, the applicant gave detailed statements while in police custody. He subsequently presented different versions of the facts and made statements which, even though they were not self-incriminating stricto sensu,

substantially affected his position as regards, in particular, the charge of the attempted murder of C.L.

(c) All of the statements in question were admitted in evidence by the Assize Court without conducting an appropriate examination of the circumstances in which the statements had been given, or of the impact of the absence of a lawyer.

(d) While the Court of Cassation examined the admissibility of the prosecution case, also seeking to ascertain whether the right to a fair trial had been respected, it focused on the absence of a lawyer during the period in police custody without assessing the consequences for the applicant's defence rights of the lawyer's absence during his police interviews, examinations by the investigating judge and other acts performed in the course of the subsequent judicial investigation.

(e) The statements given by the applicant played an important role in the indictment and, as regards the count of the attempted murder of C.L., constituted an integral part of the evidence on which the applicant's conviction was based.

(f) In the trial before the Assize Court, the jurors did not receive any directions or guidance as to how the applicant's statements and their evidential value should be assessed.

194. The Court finds it important to emphasise, as it has done in other cases under Article 6 § 1 of the Convention in which an assessment of the overall fairness of the proceedings was at issue, that it is not for the Court to act as a court of fourth instance (see Schatschaschwili, cited above, § 124). In carrying out such an assessment, as required by Article 6 § 1, it must nevertheless carefully look at how the domestic proceedings were conducted, and very strict scrutiny is called for where the restriction on the right of access to a lawyer is not based on any compelling reasons. In the present case, it is the combination of the various above-mentioned factors, and not each one taken separately, which rendered the proceedings unfair as a whole.

(iv) General conclusion

195. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.'

Thus according to this judgment the restriction to access a lawyer during interogation does not automatically mean that there has been a violation of the right to a fair *hearing* but that the Court has to evaluate the l-'*overall fairness*' of the proceedings to be able to determine if there is violation or not. In this regard the Court of Crminal Appeal in the case '**Il-Pulizija Vs Maximilian Ciantar**'[12] whilstmaking reference to the case '**Philippe Bueze vs Belgium**'[13] considered that: -

'*Illi ghalkemm illum kif inghad il-ligi regghet giet emendata u dan sabiex jigi fis-sehh fil-ligi domestika d-dritt komunitarju fir-rigward u sabiex ukoll ir-restrizzjoni sistematika dwar id-dritt ghall-avukat jigi regolat, madanakollu fiz-zmien meta giet rilaxxjata l-istqarrija tal-appellant kien hemm dritt, ghalkemm wiehed iktar ristrett, tal-persuna suspettata biex tikkonferixxi mal-avukat tal-fiducja taghha fil-hin precedenti l-interrogatorju mill-pulizija. Illi allura din il-Qorti fid-dawl tal- pronunzjament surriferit tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem ma tistax a priori tiskarta stqarrija ta' persuna li tkun inghatat l-jedd tikkonsulta ma' avukat qabel ma tigi interrogata, izda fejn l-avukat taghha ma kienx prezenti filwaqt tal- interogazzjoni, u dan ghaliex allegatament jista' jkun hemm lezjoni tad-dritt taghha ghal smigh xieraq, billi kif mistqarr f'dan il-pronunzjament kull kaz irid jitqies ghalih u cioe' allura billi jigi mistharreg f'kull kaz individwalment jekk bil-fatt illi l-persuna akkuzata ma kellhiex l-avukat prezenti waqt it-tehid tal-istqarrija dan setax impinga fuq is-smigh xieraq iktar 'il quddiem tul il-proceduri penali istitwiti kontra taghha.*

[12] Decided by the Court of Crminal appeal on the 27th Febraury, 2019 (Appeal application number: 514/2017

[13] Decided by the Grand Chamber on the 9 th November, 2018 (Numru: 71409/10)

Din il-Qorti ma ghandhiex funzjonijiet kostituzzjonali u allura ma ghandhiex il-poter tistharreg jekk ikunx sehh lezjoni tad-dritt ta' smigh xieraq jew jekk potenzjalment dan jistax isehh u dan f'kaz fejn xi forma ta' assistenza legali tkun giet moghtija. Ma tistax il-Qorti ta' kompetenza penali tiddeciedi a priori illi bil-fatt wahdu illi fiz-zmien li l-persuna akkuzata tkun giet interrogata ma kellhiex il-jedd ikollha l-avukat prezenti maghha dan awtomatikament kien vjolattiv tal-jedd taghha ghal smigh xieraq meta l-Qorti Ewropeja issa qed tidderigi il-qrati domestici jindagaw jekk il- proceduri fl-intier taghhom kenux gusti fil-konfront tal-akkuzat bit-test allura li irid jigi segwiet fuq zewg binarji u cioe':

1. *the existence of compelling reasons for the right to be withheld*
2. *the overall fairness of the proceedings.*

Jinghad biss f'dan il-kaz illi l-appellant kien abbilment assistit tul dawn il-proceduri kriminali istitwiti kontra tieghu. Fl-ebda mument tul il-proceduri ma jqanqal il-kwistjoni dwar il-valur probatorju tal-istqarrija minnu rilaxxjata biex b'hekk il-Qorti ghandha quddiemha prova li qatt ma giet ikkontestata. Illi maghdud dan madanakollu l-Qorti tosserva li l-appellant kien ikkonsulta mal-avukat tal-fiducja tieghu qabel ma gie interrogat. F'dak iz-zmien huwa kellu sitta u ghoxrin sena u diga` kellu irregistrati kontra tieghu hdax-il kundanna biex b'hekk ma jistax jitqies li kien bniedem vulnerabbli. L-appellant qatt ma jikkontendi illi hu jew l-avukat tieghu ma gewx mgharrfa mill-pulizija dwar in-natura tal-akkuzi migjuba fil-konfront tieghu jew tal-provi li l-pulizija kellhom f'idejhom. Fuq kollox dak mistqarr mill- appellant fl-istqarrija minnu rilaxxjata huwa biss korroborazzjoni ta' dak li jikkontendu l-vittmi billi dawn kienu x-xhieda ewlenija f'dan il-kaz meta jistqarru li gharfu lill-appellant bhala wiehed mill-hallelin.

Illi finalment ghalkemm il-ligi f'dak iz-zmien ma kenitx tippermetti lill-avukat li jkun prezenti waqt it-tehid tal-istqarrija, madanakollu ghandu jinghad illi l-ligi kif inhi illum ma tantx toffri dik l-assistenza effettiva bil-fatt illi l-avukat ikun prezenti mal- persuna

suspettata waqt li din tkun qed tigi interrogata bil-proviso ghall-artikolu 355AUA (8)(c) tal-Kodici Kriminali jiddisponi hekk:

"Id-dritt tal-avukat li jippartecipa b'mod effettiv ma għandux jinftiehem bħala dritt tal-avukat li jostakola l-interrogazzjoni jew li jissuġġerixxi twegibiet jew reazzjonijiet oħra għall-interrogazzjoni u kull mistoqsija jew rimarka oħra mill-avukat għandha, ħlief f'ċirkostanzi eċċezzjonali, issir wara li l-Pulizija Eżekuttiva jew awtorità oħra investigattiva jew awtorità ġudizzjarja jkunu ddikjaraw li ma għandhomx aktar mistoqsijiet.

Fil-fatt minn qari tad-Direttiva tal-Unjoni Ewropeja dwar id-Dritt tal-assistenza legali, ghalkemm din giet tramandata kwazi kelma b'kelma fil-ligi taghna, madanakollu dana l-proviso ma jirriaffigura imkien fl-artikolu 3 tad-Direttiva, li gie trasportat fl-artikolu 355AUA tal-Kodici Kriminali.

Maghmula dawn il-konsiderazzjonijiet ghalhekk din il-Qorti ma issib l-ebda mottiv li jista' igieghlha titbieghed mill-fehma milhuqa mill-Ewwel Qorti li strahet fuq ix- xiehda tal-vittmi f'dan il-kaz abbinata mal-istqarrija rilaxxjata mill-appellant u dan sabiex sejset is-sejbien ta' htija fil-konfront tieghu.'

This Court feels it should also make reference to the Joint concurring opinion of Judges Yudkivska, Vučinić, Turković u Hüseynov in the case **'Beuze v. Belgium[14]'** wherein they considered that :-

'*22. In sum, we believe that it is vital to make a distinction between the systematic defects and the particular defects which are found in individual cases as a result of targeted and context-specific restrictions (e.g. in terrorism cases) or as a result of mistakes and shortcomings in individual cases. It is not correct for the Court to consider the overall fairness of an individual applicant's case when a systematic ban exists, affecting every*

[14] Decided by the -Grand Chamberof the ECtHR on the -9 th November, 2018 (App. no: 71409/10)

other individual in the applicant's position and in the absence of any assessment by the relevant national authorities.

23. The formulation of the exception is extremely clear: any derogation must be justified by compelling reasons pertaining to an urgent need to avert danger for the life or physical integrity of one or more people. In addition, any derogation must comply with the principle of proportionality, which implies that the competent authority must always choose the alternative that least restricts the right of access to a lawyer and must limit the duration of the restriction as much as possible. In accordance with the Court's case-law, no derogation may be based exclusively on the type or seriousness of the offence and any decision to derogate requires a case-by-case assessment by the competent authority. Finally, derogations may only be authorised by a reasoned decision of a judicial authority.

24. The Court must apply a strict approach to a blanket prohibition on the right to legal assistance; otherwise we will end up in conflict with the overall direction of both the case-law of the Court and EU law.'

In the case **'Paul Anthony Caruana v. Avukat Ġenerali, Kummissarju tal-Pulizija, Reġistratur tal-Qrati u Tribunali Kriminali'**[15] the Constitutional Court made reference to the case **'Beuze VS Belgium'** and considered that :

'*18. Din hija interpretazzjoni li hija eqreb mal-posizzjoni li kienet ħadet din il-qorti qabel is-sentenza ta' Borg milli mal-interpretazzjoni mogħtija mir-Raba' Sezzjoni f'Borg u effettivament tfisser li kellha raġuni il-Qorti Kostituzzjonali ta' Malta fil-posizzjoni li kienet ħadet fil-każ ta' Muscat u fis-sentenzi li segwew, qabel ma kienet kostretta tbiddel dik l-inter- pretazzjoni fid-dawl ta' Borg.*

19. Uħud mill-imħallfin membri tal-qorti li tat is-sentenza ta' Beuze, f'opinjoni għalihom, ikkritikaw is-sentenza fejn qalet illi, f'kull każ, trid tqis il-proċess fit-totalità tiegħu u mhux biss in-nuqqas ta' għajnuna ta' avukat, għax dehrilhom illi, iżjed milli

[15] Decided by the Constitutional Court on the 31 st May, 2019 (App. No. 64/2014 JRM

preċiżazzjoni tal-interpretazzjoni ta' Salduz fid-dawl ta' Ibrahim, is-sentenza ta' Beuze hija kapo- volgiment ta' dik il-ġurisprudenza. Hu x'inhu, hijiex preċiżazzjoni, elaborazzjoni, evoluzzjoni jew kapovolgiment, din hija sa issa l-aħħar kelma, u tagħti raġun lill-Qorti Kostituzzjonali ta' Malta fil-ġuris- prudenza li segwiet is-sentenza ta' Muscat.

20. Fid-dawl ta' dawn il-konsiderazzjoniiet, l-aggravju tal-attur – safejn igħid illi "l-fatt waħdu illi persuna li tkun instabet ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil- liġi maltija, awtomatikament ikun ifisser illi saret vjolazzjoni tad-dritt fundamentali tas-smigħ xieraq ta' dik l-istess persuna taħt l-artikolu 6 tal-Konvenzjoni Ewropea" – huwa ħażin u huwa miċħud.[1]

In this same judgment the court considered that there was a good reason why the applicant should not have spoken with a lawyer prior to the making of a controlled delivery to a third party who used to provide him with the drugs. It held that there was no allegation that the statement was made not according to article 658 of the Crminal Code although at this stage the applicant is claiming to have been drunk when he made his statement It also took into consideration the fact that the applicant was found guilty not on the basis of his statement but on his plea of admission of guilty. This admission was registered in the presence of his lawyer and before the Magistarte who informed him of the cosnequences of such admissionand also gave himthe opportunity to retract it the court thus confiremed that there was no breach to a fair hrearing.

Reference is also made to the judgment in the names **'Stephen Pirotta v. L-Avukat Ġenerali u l-Kummissarju tal-Pulizija'**[16] where the court took ntoe of the consdierations given by the Grand Chamber of the ECtHR in that:-

[16] Decided by the Constitutional Court on the 27th ' September , 2019 (App. No : 13/2016 JRM)

'*Effettivament, dan ifisser illi – kontra dak li qalet l-ewwel qorti fis-silta migjuba fuq – il-fatt waħdu li ma tkunx tħalliet tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni, ukoll jekk ma kienx hemm raġunijiet impellenti għal dan in-nuqqas, u dik l-istqarrija ntużat fil-proċess, ma huwiex bizżejjed biex, ipso facto, jinsab ksur tal-jedd għal smigħ xieraq: trid tqis il-proċess fit-totalità tiegħu ("having regard to the development of the proceedings as a whole").*'

The Court noted that no violation was encountered according to Article 39 of the Consitution of Malta and Article 6 of the European Convention cpnsidered that:-

'*Fil-każ tallum ma jista' jkun hemm ebda dell ta' dubju li l-attur kien ħati tal-imputazzjonijiet imressqa kontra tiegħu, kif wara kollox għarfet l- ewwel qorti stess. L-ewwel qorti għarfet ukoll illi l-qrati ta' ġurisdizzjoni kriminali waslu għall-konkluzjoni tal-ħtija tal-attur bis-saħħa ta' xiehda oħra barra l-istqarrija tiegħu. Meqjus il-proċess kriminali fl-intier tiegħu, ma jistax jingħad illi l-attur ma ngħatax smigħ xieraq: kellu għarfien tal- provi kollha mressqa kontrih u ma ntweriex li nżamm mistur xi tagħrif li kellha l-pulizija; kellu għajnuna ta' avukat waqt il-proċess quddiem il- qorti; kellu fakoltà jressaq xhieda u jagħmel konto-eżami tax-xhieda tal-prosekuzzjoni; instab ħati bis-saħħa ta' xiehda oġġettiva li, ukoll jekk ma tqisx l-ammissjoni tiegħu, rabtitu mal-inċident u ma setgħetx tħalli dubju dwar il-ħtija tiegħu.*'

In the recent case delivered by the European Court of Human Rights in the names **'<u>Farrugia vs. Malta</u>[17]',** gie kkunsidrat li:

'*98. Prior to the recent Beuze judgment, in a number of cases, the Court found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention (see, in particular, Dayanan v. Turkey, no. 7377/03, § 33, 13 October 2009 and Boz v. Turkey, no. 2039/04, § 35, 9 February 2010). That same approach was*

[17] Decided by the ECtHR on the 4th June , 2019 and rendered res judicata on the 7 th ' October 2019 (App. No 63041/13)

followed by the Court in relation to the Maltese context in Borg (no.37537/13, 12 January 2016).

99. Subsequently, being confronted with a certain divergence in the approach to be followed in cases dealing with the right of access to a lawyer, the Court had occasion to further examine the matter in Ibrahim and Others, Simeonovi and more recently in Beuze, all cited above, where the Court departed from the principle set out in the preceding paragraph. In Beuze, the most recent authority on the matter, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them, as explained below.

(i) Concept of compelling reasons

100. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see Beuze, cited above, §§ 142-143).

(ii) The fairness of the proceedings as a whole and the relationship between the two stages of the test

101. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see Beuze, cited above, § 145).

102. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 146).

103. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3 (c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case (ibid., § 149).

(ii) Relevant factors for the overall fairness assessment

104. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account:

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice (ibid., § 150).'

Consideration was also given to:-

'118. However, the nature of the statements and their use is of particular relevance in the present case. The Court notes that they did not contain any confessions nor was their content self-incriminating. However, the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see, for example, Schmid-Laffer v.Switzerland, no. 41269/08, § 37, 16 June 2015). Indeed, the statements given by the applicant, at pre-trial stage in the absence of a lawyer, were relied on by the Court of Criminal Appeal in connection with the applicant's credibility. In particular, in its judgment the Court of Criminal Appeal had noted certain inconsistencies in his statements of 1 and 2 February 2002 (see paragraph 22 above) and it had considered that he was not reliable as the applicant had replied in an evasive and hesitant way to police questions concerning his business, profitability, rent, and profits of the previous year (see paragraph 26 above). Nevertheless, the Court cannot but note that the Court of Criminal Appeal had found that A.F.'s statements had been enough to determine the applicant's guilt. In consequence its assessment of the applicant's credibility on the basis of his pre-trial statements can be considered as having been made ex abundanti cautela (out of an abundance of caution). In the light of the Court of Criminal Appeal's finding concerning the sufficiency of A.F.'s statements, the Court considers that the use it made of the applicant's statements to assess his credibility cannot be considered as having substantially affected his position.

(ii) Conclusion

119. In conclusion, while very strict scrutiny must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court, in the specific circumstances of the case, finds that having taken into account the combination of the various above-mentioned factors, despite the lack of procedural safeguards relevant to the instant case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.

120. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.'

The *joint dissenting opinion* of Judges Serghides u Pinto de Albuquerque is also interesting wherein amongst other considerations they considered:

'*10. In any event, we are of the view that the right to a lawyer at the pre- trial stage does not hinge, in any way or form, on the state of vulnerability of the defendant. Nothing in the Convention makes the Article 6 § 3 (c) right dependent on such vulnerability. Such an abusive and restrictive interpretation of that right contradicts its essence. Every defendant, vulnerable or not, has a right, at the pre-trial stage, to a lawyer who will advise him or her on the defence strategy to be followed.*

11. Secondly, the majority state that "The applicant did not allege, either before the domestic courts or before [the Court], that the Police had exerted any pressure on him, nor that the evidence obtained had been in violation of another Convention provision[18]*"*

12. We disagree with this argument. The fact that a defendant has not been pressured by the police does not limit his or her right to a lawyer. Legal assistance in a criminal procedure is indispensable not only to counter pressure by the police or any other evidence obtained in violation of the Convention, but to define a strategy for the defence and adapt it to every incident throughout the entire proceedings. The police are expected to act lawfully, regardless of the manner in which a defendant presents his or her defence, with or without the benefit of legal assistance. The one has simply nothing to do with the other. Lawful conduct by the police is not a valuable argument on which to restrict the exercise of a Convention right by the defence. Ultimately, this argument by the majority reflects a very restrictive conception of the role of the lawyer in criminal procedure.

13. Thirdly, the majority state that "in the present case, the applicant was informed repeatedly in a sufficiently explicit manner of his right to remain silent and the privilege against self-incrimination"[19]*.*

[18] § 111 of the present judgment.

14. Again, we cannot accept this argument. The right to remain silent is not interchangeable with the right to a lawyer. These are two very different rights. Legal assistance at the pre-trial stage of a criminal procedure is essential to inform the defendant of the advantages and disadvantages, from the perspective of the defence strategy, of speaking out or remaining silent. In other words, the right to a lawyer is instrumental in effective protection of the right to remain silent (and of the privilege against self-incrimination).

13. In short, the fact that the applicant was informed of his right to remain silent if he so desired and the fact that the applicant did not claim that any pressure was exerted on him have nothing to do with his procedural right under Article 6 § 3 (c) of the Convention to have access to a lawyer. Those facts are irrelevant for the purpose of curing the breach of this right. In our view, it is a fundamental mistake at stage two not to take seriously into account the finding of stage one, especially when the test applied should be a very strict scrutiny23. Otherwise, what is the point of having two stages!?'

Considers further that:

The development in the interpretation to the right to a fair hearing given by the European Court on Human Rights through the above mentioned case law '**Beuze vs Belgium'** delivered by the Grand Chamber and the judgement delivered by the European Court of Human Rights **'Farrugia vs. Malta'** is already reflected in the position taken by the Consitutional Court when considering whether there has been a violation to a fair trial. It appears that there is a development in the sense that the fact that a statement is taken in the absence of a a lawyer dos not automatically mean that according to these judgements there is a violaltion to the right to a fair trial but reference has to be made to the totality of the proceedings to see whether there has been a violation or not.

[19] § 112 of the present judgment.

In this case the court is faced with a case which is going to be heard and decided by a number of jurors and thus the situation is different from when there is a case which is going to be decided by the Constitutional Court or First Hall Civil Court or where the case is already a *res judicata* wherein the courts are asked to oversee whether there has been a violation to a fair trial due to the fact that the statement being released in the absence of the right to a lawyer beign present during the interrogation. In this cae the Court has to carry out an exercise regarding the way the procedure was conducted inr elation to 'overall fairness' to establish if there was a violation to the right to a fiar trial.

This case subsequent to the compilation of evidence will be heard by a Jury and the court is being asked to determine the preliminary plea as to whether the statement of the accused released in the absence of his lawyer is admissible or not. The accused bases his plea on the premise that there has been an infringement to his right to a fair trial because he was not given his right to be assisted by a lawyer of his choice throughout the interrogation. In this case it results that the accused had spoken with a lawyer namely Dr Giannella De Marco prior to his interrogation but not during his interrogation since the law at that time did not allow for this to happen. This court will not consider whether there has been a violation to his right to a fair trial as out lined by Dr Stephen Tonna Lowell in his oral submissions but will decide on whether the statement of the accused has any probative value.

The Court feels at this stage that it should refer to the case **'Graziella Attard v. Avukat Ġenerali'**[20] which though did not deal solely with the absence of the right to be assisted by a lawyer but also with the absence of the right to speak with a lawyer prior to the onset of the interrogation, the Constitutional court held that: -

'*10. Madankollu, billi ċ-ċirkostanzi fejn il-persuna interrogata tista' ma titħalliex tkellem avukat huma l-eċċezzjoni aktar milli r-regola, u din il- qorti għandha s-setgħa li tagħti*

[20] Decided by the Constitutional Court on the 27 th September, 2019 (App. No 83/2016 LSO)

rimedju fejn issib li disposizzjoni li tħares dritt fondamentali mhux biss "qiegħda tiġi" iżda wkoll meta "tkun x'aktarx sejra tiġi miksura", din il-qorti hija tal-fehma, kif osservat fis-sentenza mogħtija fl-24 ta' Ġunju 2016 fl-ismijiet ***Malcolm Said v. Avukat Ġenerali***[21]*, illi ma jkunx għaqli – partikolarment fid-dawl ta' inkonsistenzi fis-sentenzi tal-Qorti Ewropea li joħloq element ta' imprevedibilità, kif jixhdu l-posizzjonijiet konfliġġenti li ħadet fil-każ ta' Borg u f'dak ta' Beuze – illi l-proċess kriminali jitħalla jitkompla bil- produzzjoni tal-istqarrija mogħtija mill-attriċi lill-pulizija għaliex tqis illi, fiċ-ċirkostanzi, in-nuqqas ta' għajnuna ta' avukat ma kienx nuqqas li ma jista' jkollu ebda konsegwenza ta' preġudizzju għall-attriċi, aktar u aktar meta fl-istqarrija ammettiet sehma fir-reat.*

11. Għaldaqstant tipprovdi dwar dan l-aggravju tal-avukat Ġenerali billi tgħid illi, għalkemm ma seħħ ebda ksur tal-jedd tal-attriċi għal smigħ xieraq meta tteħditilha stqarrija, madankollu dik l-istqarrija ma għand- hiex tibqa' fl-inkartament tal-kawża kontriha.'

The Court held that:-

'*18. Il-qorti tqis illi l-ordni li l-istqarrija titneħħa mill-inkartament, aktar milli rimedju għal ksur li, wara kollox, għadu ma seħħx, huwa garanzija tal- integrità tal-proċess u wkoll fl-interess pubbliku, biex ma jiġrix l- proċess kontra l-attriċi jkollu jitħassar wara li jintemm, b'ħela ta' ħin u riżorsi, li tkun forma oħra ta' inġustizzja għax il-liġijiet għandhom iħarsu mhux biss lil min hu mixli b'reat iżda wkoll lil min jista' jkun vittma ta' reat.*

19. Il-qorti għalhekk tergà' ttenni li ma jkunx għaqli li jsir użu mill-istqarrija waqt il-proċess kriminali, u għal din ir-raġuni tiċħad ukoll dan l-aħħar aggravju.'

Malta has now faced a number of changes with regard to the right to legal assistance after the Tranposition of the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and

[21] Rik. kost. 74/2014 op cit

in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty in particular Article 3 of the Diretive which states the following :

> *1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.*
>
> *2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:*
>
> *(a)before they are questioned by the police or by another law enforcement or judicial authority;*
>
> *(b)upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;*
>
> *(c) without undue delay after deprivation of liberty;*
>
> *(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.*
>
> *3. The right of access to a lawyer shall entail the following:*
>
> *(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;*

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

4. Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.

Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.

5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

Currently sub articles (1) and (2) of Article 355AUA of chapter 9 of the laws of Malta provide:

(1) The suspect or the accused person shall have the right of access to a lawyer in such time and in such a manner so as to allow him to exercise his rights of defence practically and effectively.

(2) The suspect or the accused person shall have access to a lawyer without undue delay.

In any event, the suspect or the accused person shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) beforre they are questioned by the Executive Police or by another law enforcement or judicial authority in respect of the commission of a criminal offence;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidencegathering act in accordance with sub-article (8)(e);

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

Whereas sub section (8) to Article 355AUA provides:-

The right of access to a lawyer shall entail the following:

(a) the suspect or the accused person, if he has elected to exercise his right to legal assistance, and his lawyer, shall be informed of the alleged offence about which the suspect or the accused person is to be questioned. Such information shall be provided to the suspect or the accused person prior to the commencement of questioning, which time shall not be less than one hour before questioning starts;

(b) the suspect or the accused person shall have the right to meet in private and communicate with the lawyer representing him, including prior to questioning by the police or by another law enforcement or judicial authority;

(c) ***the suspect or the accused person shall have the right for his lawyer to be present and participate effectively when questioned. Such participation may be regulated in accordance with procedures which the Minister responsible for justice may by regulations establish, provided that such procedures shall not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using where possible audiovisual means in terms of paragraph (d):***

Provided that the right of the lawyer to participate effectively shall not be

interpreted as including a right of the lawyer to hinder the questioning or to suggest replies or other reactions to the questioning and any questions or other remarks by the lawyer shall, except in exceptional circumstances, be made after the Executive Police or other investigating or judicial authority shall have declared that it has no further questions;

(d) questioning, all answers given thereto and all the proceedings related to the questioning of the suspect or accused person, shall where possible be recorded by audio-visual means and in such case a copy of the recording shall be handed over to the suspect or the accused person following the conclusion of the questioning. Any such recording shall be admissible in evidence, unless the suspect or the accused person alleges and proves that the recording is not the original recording and that it has been tampered with. No transcription need be made of the recording when used in proceedings before any court of justice of criminal jurisdiction, nor need the suspect or the accused person sign any written statement made following the conclusion of the questioning once all the questions and answers, if any, are recorded on audio-visual means;

(e) the suspect or the accused person shall have the right for his lawyer to attend the following investigative or evidencegathering acts if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a offence.

This Court thus declares that it is in no way stating that the taking of a statement *per se* in the absence of being assisted by a lawyer thougout its making equates to a breach of one's fundamental human rights. However, it feels that it is not correct and safe to leave the statement released on the 1st October 2015 in the absence of a lawyer in the proceedings since these current proceedings are still on going and are not a *res judicata*. Also on the premise that these proceedigns are going to be heard before a Jury and therefore such statement could have a bearing on the decision to be taken by the jurors since there is a potential risk that at a later stage this statement is consisered to have no probabtive value (by a Constitutional Court) and thus could lead to the retrial of the entire case and this

to the prejudice of all parties. This is also being said in view of what the dissenting opinions held by the Judges who did not agree with the decisions taken both by the European Court and by the Grand Chamber. Thus, the court safely concludes by stating that the position with regards to the taking of statements in the absence of lawyer being present throughout has been crystalized in Malta.

This court is of the opinion that notwithstanding the development registered in the domestic case law, it is indicative that in order for the court to decide whether there is a breach to a fair trial it has to take regard to the proceedings as a whole, and thus the isolated fact that the statement was taken in the absence of a lawyer being present, today is being interpreted that such a state of affairs should not equate to an automatic infringement to the right to a fair hearing. Due to the fact that in this case the Jury is yet to be appointed, the court is of the opinion to safeguard the integrity of the proceedings and in the sense of justice that is should order the withdrawal of the statement released by the accused on the 1st October 2015 from the proceedings forthwith.

Thus this court is upholding the first plea raised by the defence with regard to the inadmissibility of the statement of the accused released on the 1st October 2015 marked as document PC 1 which is found at fol 26 to33 of the acts of the proceedings and declares it to be inadmissible in terms of law and consequently orders its withdfrawal from the proceedings and also orders that no reference is to be made to his statement (Dok PC 1) at any stage of the proceedings that are to follow.

(ft) Consuelo Scerri Herrera
Judge
VERA KOPJA

Franklin Calleja

Deputy Registrar