QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON

Illum it-Tlieta 28 ta` Jannar 2021

Kawza Nru. 4
Rikors Nru. 14/2020 JZM

Anthony Muscat, detentur tal-kata tal-identita` nru. 534459(M), f`ismu personali u bhala mandatarju ta` Giovanna sive Joan Mifsud, detentrici tal-passaport Awstraljan nru. Z6630530 u Marie Scicluna, detentrici tal-kata tal-identita nru. 546057 (M)

kontra

Elizabeth Farrugia

u

L-Avukat tal-Istat

Il-Qorti :

I. **Preliminari**

Rat ir-rikors prezentat fil-21 ta` Jannar 2020 li jaqra hekk :–

1. Ir-rikorrenti huma sidien tal-proprjeta` bin-numru 23, Triq Hal Tarxien, Paola.

2. Huma jikru dan il-fond lill-intimata Elzabeth Farrugia, li zzomm il-fond b`kirja protetta taht il-Kapitolu 69 tal-Ligijiet ta` Malta, li bl-operat tal-Att X tal-2009 u tal-Artikolu 1531C tal-Kapitolu 16 tal-Ligijiet ta` Malta, tintitola lis-sidien rikorrenti jircievu kera fis-somma ta` €232.94, liema rata tizdied biss kull tliet snin u limitatament skont l-indici tal-inflazzjoni provduti mill-Kapitolu 158 tal-Ligijiet ta` Malta.

3. Il-protezzjoni li tgawdi l-inkwilina jinkludu provedimenti fil-ligi li jcahhdu lis-sidien rikorrenti milli jiehdu l-pussess lura tal-proprjeti` b`dana li huma sfurzati jibqghu jaccettaw rilokazzjoni wara rilokazzjoni tal-kirja – b`mod perpetwu - u b`massimu ta` kera li tizdied biss limitatament kif ipprovdut mill-Artikolu 1531C tal-Kapitolu 16 tal-Ligijiet ta` Malta. Il-kera percepita llum, u anke qabel l-introduzzjoni tal-Att X tal-2009, hija baxxa ferm u `l boghod minn dawk li r-rikorrenti setghu u jistghu jiksbu fis-suq miftugh, kieku ma hemmx l-ligi li tipprevjeni dan.

4. Il-protezzjon moghtija lill-inkwilina bid-dispozizzjonijiet tal-Kapitolu 69 tal-Ligijiet ta` Malta, tal-artikolu 1531 C tal-Kapitolu 16 tal-Ligijiet ta`Malta, u tal-Att X tal-2009, jikkreaw zbilanc qawwi u nuqqas ta` proporzjonalita` bejn id-drittijiet tas-sidien (ir-rikorrenti) u dawk tal-inkwilina (l-intimata Eltzabeth Farrugia), stante li l-valur lokatizju tal-fond huwa ferm oghla minn dak stabbilit fit-ligi u ghalhekk tali zbilanc jilledi l-jeddijiet tar-rikorrenti kemm taht l-Artikolu 1 tal-Protokol nru. 1 tal-Konvenzjoni Ewropea, kif ukoll l-Artikolu 14 tal-istess Konvenzjoni, u kif ukoll l-artikolu 37 u 45 tal-Kostituzzjoni ta` Malta. Dan l-istat ta` fatt kien fis-sehh kemm qabel l-introduzzjoni tal-Att X tal-2009, u kif ukoll wara, u ghadu fis-sehh sal-lum.

5. Il-livell baxx ta` kera, l-istat tal-incertezza tal-possibilita` tat-tehid lura ta` proprjeta`, in-nuqqas ta` salvagwardja procedurali, iz-zieda fil-livell tal-ghejxien f` Malta f`dawk l-ahhar decimi u l-

interferenza sproporzjonata bejn id-drittijiet tas-sid u dawk tal-inkwilin ikkreaw piz eccessiv fuq ir-rikorrenti.

6. Ir-rikorrenti ma ghandhomx rimedju effettiv ai termini tal-htigijiet tal-Konvenzjoni Ewropea, stante l-fatt li huma ma jistghux izidu l-kera b`mod ekwu u gust skont il-valur tas-suq illum u anke minhabba li effettivament jistghu biss jircievu dak l-ammont kif limitat bl-artikolu 1531C tal-Kapitolu 16 tal-Ligijiet ta` Malta.

7. Dawn id-dispozizzjonijiet ta` kontroll tal-kirja huma interferenza mhux gustifikata fit-termini tat-tieni paragrafu tal-Ewwel Artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem, u b`hekk jilledu l-jeddijiet tr-rikorrenti kif sanciti mill-Artikolu 1 tal-Protokoi Nru. 1 tal-Konvenzjoni Ewropea, kif ukoll l-Artikolu 37 u 45 tal-Kostituzzjoni.

8. Din il-Qorti kif ukoll il-Qorti Kostituzzjonali u l-Qorti Ewropea pronunzjaw ruhhom dwar din il-materja diversi drabi. F`din il-kawza l-esponenti qeghdin jaghmlu s-solita talba ghall-kumpens biex jigu rimedjati l-lezjonijiet passati. Qieghda ssir ukoll talba ghall-izgumbrament biex tramite din l-Onorabbli Qorti, l-esponenti jinghataw rimedju minn hawn `il quddiem u cioe` billi jottjenu l-izgumbrament tal-intimata malli din tinstab illi qieghda tokkupa l-fond taht kirja leziva u allura b`hekk invalida u minghajr effett. Issir riferenza ghal dak li ntqal fil-kaz tal-Qorti Ewropea fl-ismijiet ta`Portanier vs Malta (App No. 55747/16), li idderigiet il-qrati Maltin jaghtu rimedju verament effettiv, bla ma s-sidien ikollhom ghalfejn jaghmlu proceduri dupplici biex jottjenu solljev ghal-jeddijiet taghhom. Dan, anke fid-dawl tal-fatt li fl-istess kaz intqal illi hlas ta` kumpens jista` ma jkunx bizzejjed biex jindirizza vjolazzjon taht il-Konvenzjoni. Huwa ghalhekk illi r-rikorrenti qeghdin jitolbu r-rimedju ta` zgombrament, natutalment appatti l-kumpens.

Ghaldaqstant, jghidu l-intimati `l ghaliex ma ghandhiex din l-Onorabbli Qorti joghgobha, salv kull dikjarazzjoni jew ordni ohra mehtiega :

1. Tiddikjara illi l-intimata Ebzabeth Farrugia qed izzomm il-fond riferut hawn fuq b`kirja taht il-Kapitolu 69 tal-Ligijiet ta` Malta, bl-operat tal-Att X tal-2009 u tal-Attikolu 1531C tal-Kapitolu 16 tal-Ligijiet ta`Malta.

2. Tiddikjara illi ghar-ragunijiet fuq spjegati, u ghal dawk li se jirrizultaw fil-provi, il-Kapitolu 69 tal-Ligijiet ta` Malta, l-emendi tal-Att X tal-2009, u senjatament l-artikolu 1531C tal-Kapitolu 16, jivvjolaw id-drittijiet fondamentali tar-rikorrenti kif sanciti fl-Artikolu 1 tal-Protokoll nru. 1 tal-Konvenzjoni Ewropea, kif ukoll fl-Artikolu 14 tal-istess Konvenzjoni, u kif ukoll fl-artikoli 37 a 45 tal-Kostituzzjoni ta` Malta;

3. Tiddikjara konsegwentement illi l-Kapitolu 69 tal-Ligijiet ta` Malta, l-emendi tal-Att X tal-2009, u senjatament l-artikolu 1531C tal-Kapitolu 16 huma nulli u bla effett, erga omnes, jew inkella fil-konfront tal-kirja ta` bejn il-partijiet Muscat u Farrugia.

4. Taghti dawk ir-rimedji kollha meqjusa xierqa.

5. Tiddikjara illi b`konsegwenza tat-talbiet precedenti, l-intimata Elizabeth Farrugia m`ghandha l-ebda titolu validu fil-ligi li jtiha l-jedd tkompli tokkupa l-proprjeta`: proprjeta` bin-numru 23, Triq Hal Tarxien, Paola.

6. Tordna b`hekk lill-intimata Elizabeth Farrugia sabiex tizgombra mill-proprjeta` indikata, u dana billi tivvakaha u taghti lura l-pussess shih taghha lir-rikorrenti, u taghti terminu qasir perentorju ghal dan il-ghan.

7. Tiddikjara illi l-intimati jew min minnhom huma/huwa responsabbli ghad-danni sofferti mir-rikorrenti minhabba t-telf ta` kontroll, uzu u t-tgawdija tal-proprjeta` de quo, u l-kumpens dovut lilhom, u tillikwida l-kumpens/ d-danni li ghandhom jithallsu lir-rikorrenti, u tordna lill-intimati jew min minnhom ihallsu dik is-somma hekk likwidata;

8. Taghti kull rimedju u/jew provvediment iehor mehtieg.

Bl-imghax legali fejn applikabbli, bl-ispejjez kontra l-intimati, inkluz tal-ittra gudizzjarja tas-seba` (7) ta`Novembru tas-sena elfejn u dsatax (2019) [4343/2019].

Rat id-dokumenti li kienu prezentati mar-rikors promotur.

Rat ir-risposta li pprezenta l-Avukat tal-Istat fit-13 ta` Frar 2020 li taqra hekk :-

1. Illi preliminarjament ir-rikorrenti ghandhom igibu prova tal-allegata kirja sabiex jigi stabbilit minn meta bdiet tinkera din il-proprjeta`, u s-somma li kienet qieghda tithallas ghall-istess kirja mill-inkwilina.

2. flli preliminarjament ukoll u minghajr pregudizzju ghas-suespost, ir-rikorrenti ghandhom jindikaw ezattament l-artikoli mill-Kapitolu 69 tal-Ligijiet ta` Malta u mill-Att X tal-2009, li skont huma jiksrulhom id-drittijiet fundamentali taghhom ghat-tgawdija tal-proprjeta` msemmija, tant li ghandhom jigu ddikjarati nulli u bla effett ergo omnes jew inter partes.

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

4. Illi rigward l-Artikolu 37 tal-Kostituzzjoni u l-Ewwel Artikolu tal-Ewwel Protokoll tai-Konvenzjoni, ghandu fl-ewwel lok jigi rilevat illi Artikolu 37 tal-Kostituzzjoni mhux applikabbli fil-kawza odjerna minhabba li l-kirja mertu ta` dan il-kaz hija allegatament mharsa bid-dispozizzjonijiet tal-Kapitolu 69 tal-Ligijiet ta` Malta, liema ligi dahlet fis-sehh fid-19 ta` Gunju 1931 u skont ma jipprovdi l-Artikolu 47(9) tal-Kostituzzjoni, "Ebda haga fl-artikolu 37 ta` din il-Kostituzzjoni ma ghandha tolqot il-hdim ta` xi ligi fis-sehh minnufih qabel it-3 ta` Marzu 1962 jew xi ligi maghmula fi jew wara dik id-data li temenda jew tissostitwixxi xi ligi fis-sehh minnufih qabel dik id-data (jew xi ligi li minn zmien 8 ghal zmien tkun emendata jew sostitwita bil-mod deskitt f`dan is-subartikolu)...".

5. Illi barra minn hekk, Artikolu 37 tal-Kostituzzjoni huwa mproponibbli wkoll ghaliex dan l-artikolu japplika biss f`kaz ta` tehid forzuz tal-proprjeta` Sabiex wiehed jista` jitkellem dwar tehid forzuz jew obbligatorju, persuna trid tigi zvestita jew spussessata minn kull dritt li ghandha fuq dik il-proprjeta`. Huwa evidenti li fil-kaz prezenti, tali zvestiment ma sarx u dan peress li bil-kirja r-rikorrenti ma tilfux

ghal kollox il-jeddijiet taghhom fuq il-fond in kwistjoni u ghalhekk dan il-kaz ma jammontax ghal deprivazzjoni totali tal-proprjeta`.

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

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

8. Illi l-Ewwel Artikolu tal-Ewwel Protokol ma jikkoncedi ebda dritt li xi hadd jircievi profitt. Allura, fil-kuntest ta` proprjeta` li qed isservi ghall-finijiet ta` social housing, zgur li ma jistax jigi kkontemplat xi dritt simili. F`dawn cirkostanzi fejn jezisti interess generali legittimu, ma tistax tpoggi fl-istess keffa l-valur tal-proprjeta` fis-suq hieles ma` dak il-valur li wiehed ghandu jhallas fil-kuntest ta` social housing. L-ghan wara dawn il-ligijiet huwa li jipprovdu ghall-interess generali u cjoe` li jipprovdu dar ta` abitazzjoni. Huwa risaput li l-Qorti Ewropea stess fil-gurisprudenza taghha fosthom fil-kaz ta` ***Amato Gauci vs Malta*** *rrikonoxxiet li : "State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable." Il-Qoiti Kostituzzjonali fis-sentenza taghha ricenti fl-ismijiet* ***Ian Peter Ellis pro et noe vs Maggur Alfred Cassar Reynaud et*** *tas-27 ta` Jannar 2017 qalet hekk: "Huwa pacifiku li fejn tidhol il-materja ta` Akkomodazzjoni socjali l-istati membri ghandhom margini wiesgha ta` apprezzament u, sakemm il-mizuri jkunu legittimi, l-ghan socjali ghandu jwassal ghal kumpens li jista` jkun ferm anqas mill-valur tal-fond jeuw il-valur lokatizju ta` fond fis-suq hieles".*

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

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

11. Illi jekk ir-rikorrenti qed jilmentaw li qed jigu pregudikati minhabba l-fatt li l-ammont tal-kera ma jirriflettix il-valur reali tal-fond in kwistjoni, dan ma jistax jigi rrimedjat bil-tnehhija tal-Artikoli tal-Kapitoli 69 jew tal-Att X tal-2009 jew bl-izgumbrament tal-okkupanti. Dan qed jinghad ghaliex ma jkunx jaghmel sens li wiehed jaghraf l-iskop, il-htiega u l-legittimita` tal-mizuri msemmija biex imbaghad jinnewtralizzahom billi jaghmilhom inapplikabbli bl-izgumbrament tal-okkupant.

12. Illi rigward l-emendi li dahlu fis-sehh permezz tal-Att X tal-2009 u Artikolu 1531C tal-Kapitolu tal-tigijiet ta` Malta, tajjeb li jinghad ukoll li l-emendi li jirrigwarda l-kera dahlu fis-sehh wara konsultazzjoni vasta fejn giet ukoll ippubblikata l-White Paper li ggib l-isem: "Ligijiet tal-Kera : Il-htiega ta` Riforma" f`Gunju tal-2008. Dan il-process ta` konsultazzjoni kien process bi tliet saffi :

(i) L-ewwel kien hemm it-tnedija tal-White Paper li kienet komplementata minn konsultazzjoni komprensiva li nkludiet : (a) diskussjoni pubblika, (b) interazzjoni ta` ittri elettronici, centru ghas-seijat telefonici u kontribuzzjonijtet fuq website (c) laqghat mal-Kunsill ta` Malta ghal Zvilupp Ekonomiku u Socjali u wkoll 10 ma` korpi kostitwiti u (d) partecipazzjoni f`mezzi tat-televizjoni, tar-radju u tal-gazzetti. L-interazzjoni ta` ittri elettronici, centru ghas-sejhat telefonici u kontribuzzjonijiet fuq website wasslet ghal aktar minn 2,000 reazzjoni u 800 mistoqsija li kollha kemm huma nghataw twegiba ndividwali. It-twegibiet tqieghdu wkoll fil-website : www.rentreform. gov.mt.

(ii) It-tieni fazi tal-process ta` konsultazzjoni giet wara l-pubblikazzjoni tal-Abbozz ta` Ligi Numru 17 imsejjah Att biex Jemenda l-Kodici Civili, Kap 16` ippubblikat f`Novembru 2008 u d-diskussjoni

sussegwenti fuq l-Abbozz fil-Kamra tar-Rapprezentanti f`Dicembru 2008 u Jannar 2009.

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

13. Illi l-premess qieghed jinghad sabiex jintwera li l-emendi ricenti dwar il-kera ma sarux b`mod superfluwu izda saru wara konsultazzjoni serja u intensa u dan wara li nhass il-polz tal-poplu u tal-entitajiet kollha milquta minn dan l-istitut. Maghdud ma` dan, xieraq jigi sottolineat li mill-qari tar-rikors kostituzzjonali ma jidhirx li xi hadd impona fuq ir-rikorrenti li dan il-fond irid jinkera bilfors. Lanqas ma jidher li kien hemm xi theddida imminenti u attwali li sfurzathom li jaghtu dan il-fond b`kiri (vide* ***Frances Montanaro et vs Avukat Generali et****, deciza nhar it-13 ta` April 2018 mill-Qorti Kostituzzjonali).

14. Illi rigward l-Artikolu 45 tal-Kostituzzjoni u Artikolu 14 tal-Konvenzjoni Ewropea, jigi rilevat illi ma hemm l-ebda ksur ta`dawn l-artikoli u dan ghaliex ma hemm l-ebda diskriminazzjoni fil-konfront tar-rikorrenti. Sabiex ir-rikorrenti jistghu jallegaw li gie lez id-dritt fundamentali taghhom ai termini tal-Artikolu 45 tal-Kostituzzjoni u Artikolu 14 tal-Konvenzjoni, huma jridu jippruvaw wkoll li saret diskriminazzjoni fuq bazi ta` `like with like` u dan ghaliex mhux kull agir huwa wiehed diskriminatorju.

Ghaldaqstant fid-dawl tas-suespost l-esponent umilment jitlob lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrenti bl-ispejjez kontra taghhom.

Rat ir-risposta li pprezentat l-intimata Elizabeth Farrugia fit-13 ta` Frar 2020 li taqra hekk :-

1. Illi preliminarjament, perrnezz tar-rikors promotur ir-rikorrenti qieghdin jabbuzaw mill-process tal-procedura kostituzzjonali, dan meta l-istess rikorrenti kellhom ghad-dispozizzjoni taghhom rimedji ordinarji quddiem il-Bord li jirregola l-Kera sabiex jigu mharsa d-drittijiet pretizi minnhom, u jekk ikun il-kaz jigi rivedut il-pagament tal-kera.

2. Illi preliminarjament ukoll, l-esponenti m`ghandhiex tkun hi li tkun ikkundanata bi ksur tad-Drittijiet Fundamentali tal-Bniedem, in vista tal-fatt li ebda cittadin privat ma jista` jkun misjub hati li kiser id-drittijiet ta` terzi. In segwitu ghal dak ecepit, l-esponenti mhijiex il-legittimi kontradittur u ghaldaqstant ghandha tigi liberata mill-osservanza tal-gudizzju.

3. Illi bla pregudizzju ghas-suespost u fil-mertu, il-premessi tal-atturi m`ghandhomx mis-sewwa u huma infondati fil-fatt u fid-dritt, u dan ghas-segwenti ragunijiet :

4. Illi l-esponenti assigurat li tottempera ruhha ma` dak li tghid il-ligi u cioe` mal-Ordinanza li tirregola t-Tigdid tal-Kiri ta` Bini, Kapitolu 69 tal-Ligijiet ta` Malta u l-Kodici Civili, Kapitolu 16 tal-Ligijiet ta` Malta, u per konsegwenza ma jistax jinghad li l-esponenti agixxiet hazin u/ jew mhux in linea ma` dak il-tghid il-ligi.

5. Illi l-esponenti qieghda tokkupa l-fond taht titolu validu fil-ligi, b`kera oghla mill-kera minima, hekk kif stabbilita` taht l-artikolu 1531C tal-Kodici Civili, Kapitolu 16 tal-Ligijiet ta` Malta. Jinghad wkoll li kull kera dovuta dejjem thallset bil-modalita` maqbula u dik mitluba. Di piu`, fl-ebda zmien ma kien hemm talba ghal xi awment fil-kera u ghaldaqstant tali proceduri huma tempestivi ghaliex kieku kien il-kaz, kien hemm metodi gudizzjarli ohra sabiex jigi rivedut il-pagament tal-kera, liema metodu gie kkalpestat ghal kollox permezz ta` dawn il-proceduri.

6. Illi minghajr pregudizzju ghas-suespost, l-esponenti m` ghandha tbati l-ebda spejjez konnessi ma` dawn il-proceduri stante li l-istess esponenti ma tistax tkun kkastigata ghax ottemprat ruhha ma` ordni legittima tal-ligi.

Ghaldaqstant u in vista tas-suespost, l-esponenti qieghda umilment titlob lil dina l-wisq Onorabbli Qorti sabiex tichad it-talbiet maghmula fir-rikors promotur, filwaqt li tilqa` l-eccezzjonijiet preliminari kollha u/ jew in parte migjuba mill-esponenti. Dan taht dawk il-provvedimenti kollha li dina l-wisq Onorabbli Qorti jidhrilha xierqa u opportuni.

Bl-ispejjez.

Rat id-digriet li tat fl-udjenza tat-3 ta` Marzu 2020 fejn laqghet it-talba tar-rikorrenti ghall-hatra ta` perit tekniku sabiex jaghmel valutazzjoni u jirrelata dwar il-valur lokatizju fis-suq tal-fond 23, Triq Hal-Tarxien, Rahal Gdid, ghaz-zmien ta` bejn l-1 ta` Jannar 1990 u llum b`intervalli ta` hames snin matul il-perijodu kollu. Ghal dan l-iskop kien mahtur il-Perit Mario Cassar.

Rat ir-relazzjoni tal-perit tekniku wara li kienet ikkonfermata bil-gurament.

Semghet ix-xiehda u rat il-provi l-ohra li tressqu fil-kors tal-kawza, inkluza l-eskussjoni tal-perit tekniku.

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

Rat in-noti ta` osservazzjonijiet.

Rat l-atti l-ohra tal-kawza.

II. <u>Provi</u>

1. <u>Il-wirt ta` Amadeo Muscat</u>

Amadeo Muscat miet fl-4 ta` Awissu 1974.

Kien mizzewweg darbtejn.

L-ewwel zwieg kien ma` Mary Gribben. Minn dan iz-zwieg twieldet ir-rikorrenti Giovanna sive` Joan mizzewga Mifsud residenti l-Awstralja rapprezentata f`din il-kawza mir-rikorrent Anthony Muscat. Wara li romol, Amadeo Muscat izzewweg lil Lucrezia sive` Grace Darmanin. Minn dan iz-zwieg twieldu zewg ulied : u cioe` ir-rikorrenti Anthony Muscat u Marie Scicluna.

Amadeo Muscat ghamel tliet testmenti, kollha unica charta u t-tlieta fl-atti tan-Nutar John Spiteri Maempel. It-testment principali kien dak tal-21 ta` Dicembru 1962, waqt li t-tnejn l-ohra kienu b`zieda ma` dak principali li kien ikkonfermat fil-hatra tal-eredi.

Fl-ewwel testment, l-eredi universali kienu martu Lucrezia Muscat u t-tliet uliedu.

Dawn il-fatti huma kkonfermati mid-dokumenti, testmenti u ricerki li kienu prezentati mar-rikors promotur.

Billi l-prova tat-titolu saret mir-rikorrenti b`mod sodisfacjenti u sal-grad rikjest mil-ligi, il-qorti qeghda tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel eccezzjoni tal-Avukat tal-Istat.

2. Xiehda

Ir-rikorrent Anthony Muscat xehed illi huwa twieled fid-dar 23, Triq Hal-Tarxien, Paola ("**il-fond**") li kienet id-dar tar-residenza tal-familja.

Il-fond kien akkwistat minn missierhom skont nota ta` insinwa bin-nru. 4788/1955. Il-fond kien debitament denunzjat ghall-finijiet ta` successjoni.

Xehed illi wara l-mewt ta` missierhom ommhom Lucrezia Muscat (li kienet ukoll uzufruttwarja) sabet ruhha f`qaghda finanzjarja iebsa, tant li kellha titlaq mill-fond sabiex tkun tista` tikri l-fond bil-ghan li zzid id-dhul taghha.

Skont Anthony Muscat, il-kirja bdiet lejn l-ahhar tas-snin tmenin ghalkemm ma kenitx prezentata skrittura ta` lokazzjoni.

Lucrezia Muscat mietet fl-4 ta` Marzu 1997.

Hi u ohtu mit-tieni zwieg Marie Scicluna wirtu lil ommhom.

Fil-kontroezami Anthony Muscat xehed illi kemm kienet ilha ghaddejja l-kirja huma qatt ma marru quddiem il-Bord li Jirregola l-Kera sabiex jitolbu zieda fil-kera.

L-intimata Elizabeth Farrugia xehdet illi ilha tghix fil-fond ghal dawn l-ahhar 31 sena. Maghha jghix biha li ghandu 43 sena. Fil-bidu kienet thallas kera ta` Lm 100 fis-sena. L-ammont tal-kera li thallas baqa` l-istess matul is-snin. Ir-rikorrenti qatt ma talbu awment fil-kera u baqghu jaccettaw il-hlas tal-kera sa ftit taz-zmien qabel ipprezentaw il-kawza odjerna. Billi r-rikorrenti ma accettawx il-hlas tal-kera, bdiet tiddepozita l-kera that l-awtorita` tal-qorti. Qabel saret din il-kawza fil-21 ta` Jannar 2020, ir-rikorrenti kienu pprezentaw ittra ufficjali fis-7 ta` Novembru 2019.

3. Ir-relazzjoni tal-perit tekniku

Skont ir-relazzjoni tal-perit tekniku, jirrizulta illi :-

- Il-fond jikkonsisti f`*terraced house* li ilha mibnija aktar minn 80 sena.

- L-arja superficjali tal-art fejn inbena l-fond hija ta` cirka 103 mk waqt illi l-arja **effettivament** kostruwita kienet ta` cirka 65 mk kull sular.

- Tenut kont tal-ghamla, id-daqs u l-istat attwali tal-post, il-fond ghandu valur fis-suq, jekk liberu u frank, ta` **€260,000**.

- Fl-1990 il-valur lokatizju kien ta` **€1350** fis-sena.

- Fl-2019 il-valur lokatizju kien ta` **€9,100** fis-sena.

4. <u>L-eskussjoni</u>

Il-perit tekniku wiegeb ghal domandi **<u>in eskussjoni.</u>**

Xehed illi il-valur lokatizju tal-proprjeta` kien ikkalkolat abbazi tal-valur fis-suq meta mqabbel ma` proprjetajiet simili.

Il-proprjeta` ma tgawdi minn ebda prospett ta` zvilupp.

5. <u>Il-piz probatorju ta` relazzjoni teknika</u>

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

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

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

materja taht ezami ("**Grima vs Mamo et noe**" **–** Qorti tal-Appell – 29 ta` Mejju 1998)**.**

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

Il-*giudizio dell`arte espress mill-perit tekniku ma jistax u ma ghandux, aktar u aktar fejn il-parti nteressata ma tkunx ipprevaliet ruhha mill-fakolta` lilha moghtija ta` talba ghan-nomina ta` periti addizzjonali, jigi skartat facilment, ammenokke` ma jkunx jidher sodisfacentement illi l-konkluzjonijiet peritali huma, fil-kumpless kollha tac-cirkostanzi, irragonevoli*" – ("**Bugeja *et* vs Muscat et**" **–** Qorti tal-Appell – 23 ta` Gunju 1967).

Fil-kaz tal-lum, jirrizulta bhala fatt li wara li kienet prezentata u mahlufa r-relazzjoni tal-perit tekniku, il-partijiet ma ressqux talba ghall-hatra ta` periti addizzjonali izda saret eskussjoni tal-perit tekniku.

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

III. L-eccezzjonijiet preliminari

1. L-ewwel (1) eccezzjoni tal-intimata Farrugia

Kien eccepit li r-rikorrenti ma ezawrewx ir-rimedji ordinarji disponibbli skont il-Kap 69 qabel ipproponew l-azzjoni odjerna.

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

Il-Prim`Awla tal-Qorti Civili ghandu jkollha gurisdizzjoni originali li tisma` u tiddecidi kull talba maghmula minn xi persuna skont is-subartikolu (1) ta` dan l-artikolu, u tista` taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex twettaq, jew tizgura t-twettiq ta` kull wahda middisposizzjonijiet tal-imsemmija artikoli 33 sa 45 (maghdudin) li ghall-protezzjoni taghhom tkun intitolata dik il-persuna :

Izda l-Qorti tista`, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skont dan is-subartikolu f`kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienudisponibbli favur dik il-persuna skont xi ligi ohra.

L-istess principju jirrizulta fl-**<u>Art 4(2) tal-Kap 319</u>**.

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

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

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

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

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

c. Kull kaz ghandu l-fattispecje partikolari tieghu;

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

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

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

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

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

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

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

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

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

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

Fid-decizjoni li tat fis-27 ta` Frar 2006 fil-kawza **<u>Sonia Zammit et v. Ministru tal-Politika Socjali et</u>** (mhux appellate) din il-qorti diversament presjeduta rreferiet ghal aktar gurisprudenza :-

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

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

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

"Il-Prim Awla tal-Qorti Civili ghandha poteri diskrezzjonali wiesgha biex tiddeciedi li ma tezercitax il-poteri taghha meta r-rikorrent ma ezawriex ir-rimedji possibbli taht il-ligi ordinarja."

(***Domenico Savio Spiteri vs Chairman Planning Authority et"*** – *Qorti Kostituzzjonali deciza 31 ta` Mejju 2000).*

Stabbiliti l-parametri, din il-qorti trid tqis jekk skont il-fatti tal-kaz tal-lum : (i) ir-rikorrenti kellhomx ghad-dispozizzjoni taghhom rimedji ordinarji li kienu accessibbli, xierqa, effettivi u effikaci sabiex jindirizzaw il-lanjanzi taghhom ; u (ii) jekk ir-rimedju ordinarju kienx ikopri ghal kollox il-lanjanzi tar-rikorrenti. Fi kwalunkwe kaz, tibqa` d-diskrezzjoni tal-qorti li taghzel "*li tezercita s-setghat taghha*" anke meta min iressaq l-ilment seta` kellu bnadi fejn ifittex rimedju.

Il-qorti tqis illi l-fatt li r-rikorrenti ma hadux passi ohra, ghajr ghall-procediment tal-lum, ma jnaqqas xejn mid-dritt tal-azzjoni taghhom.

L-ghan ewlieni ta` procediment kostituzzjonali u/jew konvenzjonali huwa li l-persuna li tkun qed iggarrab ksur tal-jeddijiet fondamentali taghha tinghata rimedju effettiv u minghajr dewmien.

Hija gurisprudenza stabbilita illi, anke jekk procediment kostituzzjonali huwa ntiz li jkun mezz straordinarju sabiex jinkiseb rimedju, cittadin li jilmenta minn ksur tal-jeddijiet fondamentali tieghu m`ghandux ikun obbligat ifittex rimedju ordinarju, jekk ir-rimedju li jista` jinghata fil-procediment ordinarju ma jindirizzax b`mod effettiv l-ilment tieghu.

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

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

L-intimata Farrugia ssostni li jekk ir-rikorrenti riedu zieda fil-kera, kellhom jagixxu skont il-Kap 69.

Jirrizulta ppruvat li r-rikorrenti qatt ma talbu lill-inkwilina sabiex thallas kera oghla minn dik li kienet ilha thallas is-snin sa mill-bidu tal-kirja.

Jirrizulta wkoll li ma hadu l-ebda azzjoni ordinarja sabiex il-kera toghla. Tant hu hekk li dak li riedu r-rikorrenti, qabel kienet istitwita din il-kawza, kien li l-intimata Farrugia tizgombra mill-fond u taghtihom il-pussess battal.

Riferibbilment ghad-disposizzjonijiet tal-Kap 69 fil-kuntest tal-eccezzjoni li qeghda tkun trattata bhalissa, il-qorti tosserva li l-**Art 3 tal-Kap 69** jipprekludi awment fil-kera jew bdil fil-kondizzjonijiet tal-kirja, jekk mhux bil-permess tal-Bord li Jirregola l-Kera.

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

Jinghad :-

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

Skont il-Kap 69, difficli li jkun hemm ripreza tal-fond ghaliex jehtieg li jkunu sodisfatti numru ta` kondizzjonijiet stringenti qabel ma` l-Bord ikun jista` jilqa` t-talba tas-sid.

Fil-kaz tal-lum, il-kirja favur l-intimata Farrugia hija regolata bil-Kap 69.

Tenut kont tan-natura tal-lanjanza taghhom, ir-rikorrenti ma setghux itejbu l-posizzjoni taghhom billi jipprocedu quddiem il-Bord. Li kieku r-rikorrenti marru quddiem il-Bord biex jitolbu awment fil-kera, l-

ammont li l-Bord seta` jiffissa huwa baxx meta mqabbel mal-kera li l-fond igib fis-suq hieles.

Il-qorti tmur oltre.

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

Huwa opportun li jinghad illi t-talba tar-rikorrenti hija centrata fuq allegat ksur tad-drittijiet fondamentali taghhom. Jista` jinghad li l-Bord ghandu setgha illi jawtorizza awment fil-kera skont parametri stretti dettati mil-ligi. Pero` l-Bord m`ghandux poter li jistharreg allegat ksur ta` jeddijiet fondamentali tal-persuna hekk kif tutelati mill-Kostituzzjoni u/jew mill-Konvenzjoni u li jaghti rimedji konformement. Dikjarazzjoni dwar lezjoni ta` jeddijiet fondamentali tista` tinghata biss minn din il-qorti. Tajjeb jinghad ukoll illi l-presentata ta` kawza wahda minflok tnejn tissarraf f`ekonomija ta` gudizzju, tenut kont illi ghax dik odjerna hija kawza aktar effettiva twassal aktar `il boghod minn procediment ordinarju, billi din il-qorti kif adita hija munita b`firxa akbar ta` setghat, b`mod u manjiera li r-rimedju li taghti jipprovdi ghal-lanjanza b`mod aktar shih.

Kif osservat din il-qorti diversament presjeduta fis-sentenza li tat fit-30 ta` Jannar 2018 fil-kawza fl-ismijiet **Sergio Falzon et v. Alfred Farrugia et** [konfermata mill-Qorti Kostituzzjonali b`sentenza tal-14 ta` Dicembru 2018] :

> " … *disposizzjonijiet li huma applikabbli mill-Bord li Jirregola l-Kera jikkostitwixxu in effett ostakolu legali ghar-rikorrenti biex jirriprendu l-pussess tal-proprjeta` taghhom stante li l-intimati Farrugia ssodisfaw ir-rekwiziti tac-cittadinanza u tar-residenza ordinarja fuq indikati kif ukoll il-kondizzjonijiet tal-kirja. Certament f`tali kuntest il-Bord wiesgha kemm hi wiesgha il-kompetenza tieghu, mhuwiex fakoltizzat bil-Ligi li jizgumbra inkwilin li qed jonora l-obbligazzjonijiet tal-kirja - materja li hija ghal kollox irrilevanti ghall-ezercizzju tallum.*
>
> *Illi huwa ovvju li it-talbiet odjerni, fis-sustanza taghhom, imorru oltre konsiderazzjoni ta` allegat ksur tal-obbligi tal-kerrej. Anzi*

l-intimati inkwilini ghamlu enfasi fuq l-osservazzjoni rigida taghhom tal-kondizzjonijiet tal-kirja.

Inoltre r-rikorrenti qed jitolbu kumpens ghall-ksur tad-drittijiet fondamentali li, kif gie ribadit mill-Qorti Ewropea f`Strasbourg:

[t]o date the Court has always held that constitutional redress proceedings are effective in respect of complaints under Article 1 of Protocol No. 1, in so far as it has always been considered that there are no limits on the means of redress (including financial redress) which may be provided by the courts of constitutional jurisdiction." (Apap Bologna v. Malta, ECHR 46931/12 deciza 30 ta` Awwissu 2016)."

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

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

Ghalhekk, filwaqt illi tiddikjara li sejra tezercita s-setghat taghha kif previst bl-Art 46(2) tal-Kostituzzjoni u bl-Art 4(2) tal-Kap 319, qeghda tichad l-ewwel (1) eccezzjoni tal-intimata Farrugia, anke ghaliex hija tal-fehma li bl-ebda mod ma sar abbuz tal-process gudizzjarju min-naha tar-rikorrenti.

2. It-tieni (2) eccezzjoni tal-intimata Farrugia

L-intimata Farrugia teccepixxi li mhijiex legittimu kontradittur fil-kawza odjerna billi huwa biss l-Istat illi jista` jkun ritenut responsabbli ghall-vjolazzjoni tad-drittijiet fondamentali tal-persuna.

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

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

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

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

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

Fil-kaz tal-intimata, il-lezjoni lamentata mir-rikorrenti mhijiex diretta kontra taghha izda kienet imharrka billi ghandha interess fl-esitu tal-procediment.

Proceduri tax-xorta tal-lum jinvolvu zewg aspetti : i) ir-responsabbilita` ghall-vjolazzjoni u ii) l-persuna li trid twiegeb. Dawn iz-zewg aspetti mhux necessarjament ikunu konnessi tant illi waqt li l-vjolazzjoni tkun giet imwettqa mill-Istat, ir-rimedju jista` jolqot lill-persuna.

Fil-kawza fl-ismijiet **Raymond Cassar Torreggiani et v. Avukat Generali et** deciza mill-Qorti Kostituzzjonali fit-22 ta` Frar 2013, saret din l-osservazzjoni :-

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

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

> *"20. Din il-Qorti tosserva li, ghalkemm taqbel mat-tezi li, ladarba l-kazin agixxa skont il-ligi, allura m`ghandux legalment jirrispondi ghall-inkostituzzjonalita` tal-ligi applikata minnu jew jehel spejjez tal-kawza, izda mill-banda l-ohra, il-proceduri odjerni necessarjament jaffettwaw lill-kazin stante li dan hu*

parti fir-rapport guridiku li huwa regolat b`ligi li l-kostituzzjonalita` taghha qed tigi attakkata. Ghaldaqstant il-prezenza tieghu f`dawn il-proceduri hija necessarja ghall-finijiet tal-integreta` tal-gudizzju. Il-kazin bhala inkwilin tal-fond ghandu interess guridiku f`din il-kawza peress li l-meritu jikkoncerna lilu direttament. Ghal din ir-raguni huwa ghandu jkun partecipi fil-gudizzju u ghalhekk huma legittimi kuntradittturi. Ghaldaqstant lewwel Qorti kienet korretta meta laqghet it-talba ghas-sejha fil-kawza tal-kazin intimat."

Fil-kaz tal-lum, ir-rikorrenti qeghdin jitolbu l-izgumbrament tal-intimata Farrugia.

Billi l-effett ta` dak li qed jintalab mir-rikorrenti jolqot lill-intimata **direttament** hija ghandha l-interess li tiddefendi l-posizzjoni taghha.

It-tieni (2) eccezzjoni tal-intimata Farrugia qeghda tigi respinta.

IV. It-talbiet

Il-qorti sejra tqis il-mertu tat-talbiet.

1. L-ewwel (1) talba

Ir-rikorrenti qeghdin jitolbu lill-qorti sabiex :

Tiddikjara illi l-intimata Elizabeth Farrugia qed izzomm il-fond riferut hawn fuq b`kirja taht il-Kapitolu 69 tal-Ligijiet ta` Malta, bl-operat tal-Att X tal-2009 u tal-Attikolu 1531C tal-Kapitolu 16 tal-Ligijiet ta`Malta.

Fuq l-iskorta tal-provi akkwiziti, l-ewwel talba tirrizulta ppruvata u ghalhekk qeghda tkun milqugha.

2. It-tieni (2) talba

Il-qorti qeghda tintalab sabiex :

Tiddikjara illi ghar-ragunijiet fuq spjegati, u ghal dawk li se jirrizultaw fil-provi, il-Kapitolu 69 tal-Ligijiet ta` Malta, l-emendi tal-Att X tal-2009, u senjatament l-artikolu 1531C tal-Kapitolu 16, jivvjolaw id-drittijiet fondamentali tar-rikorrenti kif sanciti fl-Artikolu 1 tal-Protokoll nru. 1 tal-Konvenzjoni Ewropea, kif ukoll fl-Artikolu 14 tal-istess Konvenzjoni, u kif ukoll fl-artikoli 37 a 45 tal-Kostituzzjoni ta` Malta.

Il-vjolazzjoni lamentata tkopri z-zmien ta` bejn l-<u>1 ta` Jannar 1990 u llum</u>.

a) <u>L-Art 37 tal-Kostituzzjoni</u>

Safejn it-tieni talba tirreferi ghal allegata vjolazzjoni tal-Art 37 tal-Kostituzzjoni, kienet eccepita l-inapplikabbilita` ta` dik id-disposizzjoni tal-Kostituzzjoni.

<u>Is-subartikolu (1) tal-Art 37 tal-Kostituzzjoni</u> jghid :-

Ebda proprjetà ta` kull xorta li tkun ma ghandu jittiehed pussess taghha b`mod obbligatorju, u ebda nteress fi jew dritt fuq proprjetà ta` kull xorta li tkun ma ghandu jigi miksub b`mod obbligatorju, hlief meta hemm disposizzjoni ta` ligi applikabbli ghal dak it-tehid ta` pussess jew akkwist –

(a) ghall-hlas ta` kumpens xieraq ;

(b) li tizgura lil kull persuna li tippretendi dak il-kumpens dritt ta` access lil Qorti jew tribunal indipendenti u imparzjali mwaqqaf b`ligi sabiex jigi deciz l-interess taghha fi jew dritt fuq il-proprjetà u l-ammont ta` kull kumpens li ghalih tista` tkun intitolata, u sabiex tikseb hlas ta` dak il-kumpens ; u

(c) li tizgura lil kull parti fi proceduri f`dik il-Qorti jew tribunal dwar pretensjoni bhal dik dritt ta` appell mid-decizjoni taghha lill-Qorti tal-Appell f`Malta :

Izda f`kazijiet specjali l-Parlament jista`, jekk hekk jidhirlu xieraq li jaghmel fl-interess nazzjonali, b`ligi jistabbilixxi l-kriterji li ghandhom jitharsu, maghduda l-fatturi u c-cirkostanzi l-ohra li

ghandhom jitqiesu, biex jigi stabbilit il-kumpens li ghandu jithallas dwar proprjetà li jittiehed pussess taghha jew li tigi akkwistata b`mod obbligatorju; u f`kull kaz bhal dak il-kumpens ghandu jigi iffissat u ghandu jithallas skont hekk.

Din il-qorti tirrileva li dak li nghad mill-qrati taghna (fil-passat u fi zminijiet aktar ricenti) f`kazi li jirrigwardaw l-emendi ghall-Kap 158 li saru bl-Att XXIII tal-1979 dwar jekk limitazzjoni fit-tgawdija ta` proprjeta` tistax tigi ekwiparata ma` tehid forzuz kif kontemplat bl-Art 37 tal-Kostituzzjoni jghoddu *mutatis mutandis* ghall-applikazzjoni tad-disposizzjonijiet tal-Kap 69.

i. <u>Gurisprudenza anqas ricenti</u>

Fid-decizjonijiet li tat il-Qorti Kostituzzjonali dwar kazi (fosthom : **<u>Josephine Bugeja v. Avukat Generali et</u>** tas-7 ta` Dicembru 2009, **<u>Angela sive Gina Balzan v. L-Onorevoli Prim Ministru et</u>** tas-7 ta` Dicembru 2012, **<u>Mary Anne Busuttil v. Tabib John Cassar et</u>** tal-31 ta` Ottubru 2014) il-linja kienet li ladarba l-proprjeta` tibqa` tas-sid, ma jistax jinghad li kien hemm tehid forzuz li jaghti dritt ghal kumpens ghaliex dak li sehh attwalment huwa kontroll fl-uzu tal-proprjeta` li mhuwiex tehid forzuz.

<u>Izda</u> kif inghad fis-sentenza li tat il-Qorti Kostituzzjonali fid-29 ta` Marzu 2019 fil-kawza fl-ismijiet **<u>Rebecca Hyzler et v. Avukat Generali et</u>** :
`illum il-gurisprudenza turi li l-qrati ma baqghux tal-istess hsieb`.

ii. <u>Gurisprudenza aktar ricenti</u>

Il-gurisprudenza aktar ricenti hadet xejra diversa.

Fid-decizjoni li nghatat fid-**<u>29 ta` Novembru 2018</u>** fil-kawza fl-ismijiet **<u>Brian Psaila v. Avukat Generali et</u>**, din il-qorti diversament sabet ksur tal-Art 37 tal-Kostituzzjoni, u cahdet eccezzjoni li kienet inghatat mill-Avukat Generali li bl-emendi ghall-Kap 158 li dahlu bl-Att XXIII tal-1979 ma kienx hemm tehid forzuz ta` proprjeta` izda kontroll tal-uzu fl-interess pubbliku.

Saru zewg appelli minn din id-decizjoni.

Il-qorti sejra tillimita ruhha ghall-appell tal-Avukat tal-Istat li ntant ha post l-Avukat Generali bhala legittimu kontradittur f`kawzi ta` din ix-xorta.

In partikolari tirreferi ghall-aggravju li kien jirrigwarda l-Art 37 tal-Kostituzzjoni.

Fis-sentenza li tat fis-**<u>27 ta` Marzu 2020</u>** il-Qorti Kostituzzjonali qalet hekk :-

> *11. Fl-ewwel aggravju tal-appell tieghu l-Avukat tal-Istat jghid illi, peress li kien hemm biss kontroll ta` uzu tal-proprjetà tal-attur u ma kien hemm ebda "tehid forzuz ta` proprjetà", u s-sid ma giex "zvestit minn kull dritt li ghandu fuq dik il-proprjetà", il-kaz ma jintlaqatx bl-art. 37 tal-Kostituzzjoni.*
>
> *12. Dan l-aggravju huwa manifestament hazin.*
>
> *13. L-artikolu 37 tal-Kostituzzjoni ma jghidx biss li ma tista` tittiehed ebda proprjetà minghajr il-hlas ta` kumpens xieraq, izda wkoll illi "ebda interess fi jew dritt fuq proprjetà" ma jista` jittiehed minghajr dak il-kumpens. Fic-cirkostanzi tal-kaz tallum huwa car illi lill-attur, bis-sahha tal-ligi impunjata, ittehidlu l-jedd li jkollu l-pussess battall tal-fond, li certament huwa "interess" fil- proprjetà u dritt fuqha.*
>
> *14. Dan l-ewwel aggravju tal-Avukat tal-Istat huwa ghalhekk michud.*

Fuq l-istess linja kienu s-sentenzi li tat il-Qorti Kostituzzjonali fil-kawzi fl-ismijiet :

<u>Estelle Azzopardi et v. Mikelina Said et</u> tal-14 ta` Dicembru 2018 ;

<u>Gabriella Mangion et v. Avukat Generali et</u> tal-31 ta` Jannar 2019 ;

<u>Rebecca Hyzler et v. Avukat Generali et</u> (op. cit.) ;

<u>Alfred Testa pro et noe et v. Avukat Generali et</u> tal-31 ta` Mejju 2019 ; u

<u>Josephine Azzopardi pro et noe et v. l-Onor. Prim Ministru et</u> tad-29 ta` Novembru 2019.

Il-qorti sejra tadotta din il-gurisprudenza u sentenzi ohra li gew wara ghaliex fil-fehma taghha din il-linja ta` gurisprudenza tghodd ukoll ghad-disposizzjonijiet tal-Kap 69.

Issib ksur tal-Art 37 tal-Kostituzzjoni.

Ghalhekk qeghda tichad kull fejn kien eccepit mill-intimati li mhuwiex applikabbli l-Art 37 tal-Kostituzzjoni ghall-kaz odjern.

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

Id-disposizzjoni tipprovdi illi :-

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

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

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

Il-qorti taghmel referenza ghad-decizjoni moghtija mill-Grand Chamber tal-ECtHR fil-5 ta` Jannar 2000 fil-kaz **Beyeler v. Italy** fejn inghad hekk :-

*"98. As the Court has stated on a number of occasions, Article 1 of Protocol No. 1 comprises three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, `distinct` in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, among other authorities, the **James and Others v. the United Kingdom** judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, which reproduces in part the analysis given by the Court in its **Sporrong and Lönnroth v. Sweden** judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also the **Holy Monasteries v. Greece** judgment of 9 December 1994, Series A no. 301-A, p. 31, § 56, and **Iatridis v. Greece** [GC], no. 31107/96, § 55, ECHR 1999-II)."*

L-Art 1 Prot 1 huwa gwidat minn tliet principji :-

a) Kull persuna, sew dik naturali kif ukoll jekk morali, ghandha dritt ghat-tgawdija tal-proprjeta` b`mod pacifiku ;

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

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

Huwa pacifiku li l-Istat ghandu margini ta` apprezzament wesghin meta jigi biex idahhal legislazzjoni li tkun intiza sabiex tipprova ssib tarf ta` problemi ta` akkomodazzjoni residenzjali.

Madanakollu l-interferenza mill-Istat trid tkun (i) legali (ii) motivata b`ghan legittimu fl-interess generali, u (iii) tohloq bilanc gust.

Ghandu dejjem jinzamm proporzjon ragjonevoli bejn il-mezzi u l-ghan persegwiti mill-Istat sabiex jikkontrolla l-uzu tal-proprjeta`.

Ir-*raison d`etre* tal-proporzjonalita` huwa l-"*bilanc xieraq*" li ghandu jinzamm bejn l-esigenzi tal-interess generali u l-htiega tal-harsien tad-drittijiet fondamentali tal-persuna.

Il-qrati huma msejha sabiex jaghmlu analizi komprensiva tal-interessi tal-partijiet kollha sabiex ikun accertat li konsegwenza tal-indhil tal-Istat il-persuna ma titghabbiex b`piz eccessiv u sproporzjonat.

i) <u>Gurisprudenza tal-ECtHR</u>

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

"The second paragraph reserves to States the right to enact such laws as they deem necessary to control the use of property in accordance with the general interest.

…

Such laws are especially common in the field of housing, which in our modern societies, is a central concern of social and economic policies.

…

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

…

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

…

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

…

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

Fil-kaz ta` **<u>Amato Gauci v. Malta</u>** li kien deciz fil-15 ta` Settembru 2009, l-ECtHR qalet :-

*"56. Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see **<u>Sporrong and Lönnroth</u>** cited above, §§ 69-74, and **<u>Brumărescu v. Romania</u>** [GC], no. 28342/95, § 78, ECHR 1999-VII).*

*57. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State`s interference the person concerned had to bear a disproportionate and excessive burden (see **<u>James and Others</u>**, cited above, § 50; **<u>Mellacher and Others</u>**, cited above, § 48, and **<u>Spadea and Scalabrino v. Italy</u>**, judgment of 28 September 1995, § 33, Series A no. 315-B).*

58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation

complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions of the rent received by individual landlords and the extent of the State`s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord`s property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State`s conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner (see ***Immobiliare Saffi v. Italy****, [GC], no. 22774/93, § 54, ECHR 1999-V; and Broniowski, cited above, § 151).*

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

…

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

Il-qorti sabet vjolazzjoni ta` Art 1 Prot 1 tal-Konvenzjoni.

Fid-decizjoni tat-22 ta` Novembru 2011 fil-kaz **Saliba et v. Malta**, l-ECtHR irrimarkat :-

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

(ara wkoll : **Zammit & Attard Cassar v. Malta** li kien deciz mill-ECtHR fit-30 ta` Lulju 2015 ; u **Cassar v. Malta** li kien deciz mill-ECtHR fit-30 ta` Jannar 2018).

Fid-decizjoni li tat l-ECtHR fil-11 ta` Dicembru 2018 fil-kaz ta` **Buttigieg and others v. Malta** inghad :-

"41. The Court notes that it has found in plurality of cases against Malta concerning the same subject matter that, despite the considerable discretion of the State in choosing the form and deciding on the extent of control over the use of property in such cases, having regard to the low rental value which could have or was received by the applicants, their state of uncertainty as to whether they would ever recover the property (despite more recent amendments), the lack of procedural safeguards in the application of the law and the rise in the standard of living in Malta over the past decades, a disproportionate and excessive burden was imposed on the applicants who were made to bear most of the social and financial costs of supplying housing accommodation (see Amato Gauci, cited above, § 63; Anthony Aquilina v. Malta, no. 3851/12, § 67, 11 December 2014; and Cassar v. Malta, no. 50570/13, § 61, 30 January 2018). In those cases the Court found that the Maltese State had failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant`s right of property and that there had thus been a violation of Article 1 of Protocol No.1 to the Convention.

42. Having regard to the facts of the case and the parties` observations, the same considerations apply in the present case.

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

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

Fejn jidhol l-Art 1 Prot 1 tal-Konvenzjoni, bosta kienu matul is-snin id-decizjonijiet tal-qrati taghna fejn kienet dikjarata vjolazzjoni.

Il-lista tad-decizjonijiet hija twila u facilment traccjabbli.

Fl-assjem taghhom id-decizjonijiet kienu mirquma, attenti u ndirizzaw il-qofol tal-kwistjoni. Kellhom piz sinjifikanti li wassal ghal bidla fil-legislazzjoni.

Fl-istess waqt il-qorti tghid li l-bidliet fil-legislazzjoni kienu tardivi. Min-naha tal-Istat matul is-snin kien hemm wisq tkaxkir tas-saqajn li wassal ghal pronunzjamenti wiehed wara l-iehor mill-ECtHR kontra pajjizna.

Fil-qasam tal-harsien tal-jeddijiet fondamentali tal-persuna, il-qawl : *meglio tardi che mai* : ma jaghmel ebda sens. Ragunament ta` dik ix-xorti forsi jaghmel sens ghall-gejjieni ; certament pero` ma jaghmel ebda sens ghall-imghoddi.

Fejn si tratta ta` ksur ta` jeddijiet fondamentali, l-Istat ghandu l-obbligu, ladarba qeghdin nghixu f`socjeta` demokratika fondata fuq is-saltna tad-dritt u l-gustizzja, li jiddritta l-ghawg fil-pront u bla dewmien.

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

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

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

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

L-Ordinanza XXI tal-1931 li Tirregola t-Tigdid tal-Kiri ta` Bini (illum Kap 69 tal-Ligijiet ta` Malta) hadet post l-Att XXIII tal-1929 u kienet intiza sabiex ikollha effett sal-31 ta` Dicembru 1933 ghalkemm in segwitu saret definittiva. Il-ligi kienet necessitata minn nuqqas qawwi ta` djar ta` abitazzjoni wara l-herba tat-Tieni Gwerra Dinija. Ghalhekk kien mehtieg illi l-kera tad-djar titrazzan fi zmien ta` skarsezza sabiex il-valur lokatizju jkun gust. Kien frott dan l-intervent legislattiv illi hafna nies setghu jifilhu jhallsu sabiex ikollhom saqaf fuq rashom. Waqt li l-ligi serviet l-iskop originali taghha, maz-zmien gabet maghha konsegwenzi negattivi fis-sens illi bdiet tohnoq is-suq u bdew jonqsu l-postijiet disponibbli ghall-kera.

Kien biss snin wara bl-Att XXXI tal-1995 illi l-legislatur addotta posizzjoni differenti sabiex jaghti nifs lis-suq tal-kera. B`dak l-Att il-kirijiet il-godda u cioe` dawk li jsiru wara l-1 ta` Gunju 1995 ma baqghux soggetti ghal-ligijiet specjali tal-kera. Ghall-kirijiet li saru qabel l-1 ta` Gunju 1995 baqghu jghoddu l-ligijiet ta` qabel ; ghalkemm saru emendi fil-kaz ta` dawn il-kirja, il-piz fuq is-sidien fis-sostanza ma ttaffhiex.

L-Ordinanza XXI tal-1931 kellha skop legittimu u saret fl-interess generali ghaliex kien intiz sabiex persuni ma jispiccawx barra t-triq u jkollhom fejn joqghodu. L-istorja socjali tal-pajjiz tixhed li l-legislazzjoni

saret ghal skop tajjeb u kienet necessarja. Il-legislatur ipprova jsib bilanc bejn interessi konfliggenti.

It-tkattir tal-gid mal-medda tas-snin wera pero` li dak l-intervent legislattiv - ghalkemm kellu propositi tajba - ma kienx baqa` joffri bilanc anzi holoq sproporzjon u zvantagg evidenti u notevoli ta` parti fil-konfront ta` ohra. Il-kera li s-sidien setghu jippercepixxu bl-effett tal-Kap 69 meta mqabbla mal-kera fis-suq hieles oggettivament baqghet baxxa.

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

Fil-kaz odjern jirrizulta li l-kirja tal-fond bdiet lejn l-ahhar tas-snin tmenin meta l-intimata bdiet tikri minghand Lucrezia sive Grace Muscat versu hlas ta` Lm 100 fis-sena. Ghalkemm il-kirja baqghet tiggedded *ope legis* matul is-snin l-ammont tal-kera baqa` l-istess. Kien biss wara l-ittra ufficjali tad-9 ta` Novembru 2019 illi r-rikorrenti bdew jirrifjutaw il-hlas tal-kera, wara li talbu lill-inkwilina sabiex din tizgombra mill-fond. Min-naha taghha l-inkwilina bdiet tiddepozita l-kera taht l-awtorita` tal-qorti. Bhala fatt ir-rikorrenti qatt ma talbu zieda fil-kera tal-kond.

Kienet x`kienet ir-raguni li wasslet lil Lucrezia Muscat sabiex tikri l-fond, jibqa` fatt illi jekk dak iz-zmien sid jew uzufruttwarju ried jara ntrojtu mill-proprjeta` billi jikrieha kien kostrett joqghod ghal legislazzjoni li kienet tohnoq il-liberta` tal-kontrattazzjoni.

Fiz-zgur meta bdiet il-kirja de qua hadd ma seta` ragjonevolment jipprevedi li l-ligijiet vigenti kienu sejrin jinbidlu bil-mod u manjiera li sar b`mod partikolari matul dawn l-ahhar ghaxar snin.

L-accettazzjoni tar-rikorrenti tal-fatt tal-kirja m`ghandhiex tiftiehem li tfisser illi ma kienx hemm vjolazzjoni tal-Art 1 Prot 1

tal-Konvenzjoni ghaliex l-istat ta` nuqqas ta` ghazla kienet realta` fil-pajjiz li baqghet tippersisti anke sa zminijiet ricenti.

L-isvolta fil-legislazzjoni giet kawza tas-sentenzi tal-Qorti Kostituzzjonali u tal-ECtHR fejn kien dikjarat illi <u>l-applikazzjoni</u> tal-ligijiet specjali tal-kera kienu qeghdin jiksru l-jeddijiet fondamentali tas-sidien.

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

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

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

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

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

Bl-emendi ricenti fiz-zmien gara li filwaqt li l-inkwilini nghataw protezzjoni, ma garax l-istess fil-kaz tas-sidien li kellhom joqghodu ghad-dettami tal-ligi, ghaliex il-legislatur naqas milli joffrilhom rimedju

adegwat skont il-ligi ordinarja sabiex joggezzjonaw b`mod effettiv ghar-restrizzjonijiet fuq il-kundizzjonijiet lokatizzji. L-uniku triq li kellhom kienet li jfittxu kenn quddiem il-qrati ta` indole kostituzzjonali jew konvenzjonali (ara s-sentenza li tat din il-qorti diversament presjeduta fil-11 ta` Mejju 2017 fil-kawza fl-ismijiet **Josephine Azzopardi et v. L-Onorevoli Prim Ministru et**)

Kif inghad minn din il-qorti diversament presjeduta fis-sentenza li tat fit-30 ta` Mejju 2018 fil-kawza fl-ismijiet **David Pullicino et vs Avukat Generali et** [konfermata b`sentenza tal-Qorti Kostituzzjonali tal-31 ta` Jannar 2019] :

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

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

Il-pern tal-ilment tar-rikorrenti huwa d-disposizzjonijiet tal-Kap 69 qeghdin ikunu lesivi ghall-jeddijiet fondamentali taghhom ghaliex qeghdin igarrbu sproporzjon qawwi kontra taghhom fir-ritorn li jista` jkollhom li kieku t-tgawdija tal-propjeta` kellha tithalla tilhaq il-milja taghha.

Kien kif kien ifformulat l-ilment tar-rikorrenti, u kif dan imbaghad kien rifless fit-talbiet, din il-qorti tirrileva li m`ghandux jitqieghed in diskussjoni l-jedd tal-Istat illi jikkontrolla b`legislazzjoni l-uzu tal-proprjeta` meta dan ikun fl-interess pubbliku. Fl-istess waqt l-Istat huwa obbligat li jaassikura li bil-ligijiet li jsiru kif ukoll bl-applikazzjoni taghhom jinzamm bilanc u proporzjonalita` bejn l-interess generali u ta` dak privat.

Huwa evidenti li matul iz-zmien anke l-legislatur irrealizza li dak li wasslu biex jintervjeni fl-1931 kien jehtieg ripensament motivat minn bidla lejn l-ahjar fil-qaghda ekonomika u socjali tal-pajjiz. Skont l-emendi tal-2009 u tal-2010 ghall-Kap 16, il-kera kellha tizdied kull tlett snin. Cio` nonostante xorta wahda baqghet karenti l-proporzjonalita` li jrid l-Art 1 Prot 1 tal-Konvenzjoni, ghaliex ghalkemm bl-emendi tal-2009 kien hemm miljorament ghas-sid meta mqabbel mas-sitwazzjoni precedenti, baqa` kostrett joqghod ghal quantum ta` zieda dettat mil-ligi li stabbiliet mhux biss kemm ghandu jkun l-awment izda anke kull meta kellu jkun hemm awment. Qabel id-dhul fis-sehh tal-emendi, ir-rikorrenti odjerni kienu ilhom snin twal igarrbu lezjoni tal-jedd taghhom skont l-Art 1 Prot 1 tal-Konvenzjoni.

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

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

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

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

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

Fil-kaz tal-lum, jirrizulta ppruvat illi l-kera li qeghda tithallas mill-intimata Farrugia, abbazi tad-disposizzjonijiet tal-Kap 69, hija bil-wisq inferjuri ghall-kera fis-suq kif din zdiedet bejn l-1990 u llum.

Il-figuri (**<u>mhux ikkontestati</u>**) li saret referenza ghalihom aktar kmieni jitkellmu wahedhom.

Ghalhekk huwa ppruvat l-isproporzjon li ma jridx Art 1 Prot 1 tal-Konvenzjoni u li qed jingarr mir-rikorrenti. Tenut kont tal-fatti u cirkostanzi tal-kaz tal-lum kif evolvew mal-medda tas-snin sal-lum, il-piz li kellu jingarr mis-sidien kien sproporzjonat u eccessiv. Ir-rikorrenti kienu privati mit-tgawdija tal-proprjeta` bla ma nghataw kumpens xieraq.

Billi kien accertat ksur tal-jeddijiet fondamentali tar-rikorrenti kif imharsa bl-Art 1 Prot 1 tal-Konvenzjoni, qeghda tilqa` t-tieni talba anke f`dan ir-rigward.

Kwindi qeghda tichad l-eccezzjonijiet relattivi tal-intimati.

c) <u>L-Art 45 tal-Kostituzzjoni u l-Art 14 tal-Konvenzjoni</u>

Iz-zewg disposizzjonijiet jittrattaw il-protezzjoni tal-persuna minn diskriminazzjoni.

i) <u>L-Artikolu 45 tal-Kostituzzjoni</u>

Fis-subartikolu (1) jinghad illi : "*ebda ligi ma ghandha taghmel xi disposizzjoni li tkun diskriminatorja sew fiha nnifisha jew fl-effett taghha.*"

Is-subartikolu (3) jitlob li l-ilment ikun abbinat ma` wiehed elementi li jaghmlu d-diskriminazzjoni. Tant hu hekk li s-subartikolu (3) ighid :-

> "*F`dan l-artikolu, il-kelma "diskriminatorju" tfisser ghoti ta`trattament differenti lil persuni differenti attribwibbli ghal*

kolloxjew principalment ghad-deskrizzjoni taghhom rispettiva skont ir-razza, post ta` origini, opinjonijiet politici, kulur, fidi, sess, orjentazzjoni sesswali jew identità tal-generu li minhabba fihom persuni ta` deskrizzjoni wahda bhal dawn ikunu suggetti ghal inkapacitajiet jew restrizzjonijiet li persuni ta` deskrizzjoni ohrabhal dawn ma jkunux suggetti ghalihom jew ikunu moghtija privileggi jew vantaggi li ma jkunux moghtija lil persuni ta`deskrizzjoni ohra bhal dawn."

Il-kaz ta` llum ma jinkwadra ruhu taht ebda wiehed mill-elementi tas-subartikolu (3). Kwindi ma ssibx ksur tal-Art 45 tal-Kostituzzjoni.

Ghalhekk qeghda tichad dik il-parti tat-tieni (2) talba safejn tirrigwarda vjolazzjoni tal-Art 45 tal-Kostituzzjoni, u tilqa` r-relattivi eccezzjonijiet.

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

Id-disposizzjoni tghid :-

"It-tgawdija tad-drittijiet u libertajiet kontemplati f`din il-Konvenzjoni ghandha tigi assigurata minghajr diskriminazzjoni ghal kull raguni bhala huma s-sess, raza, kulur, lingwa, religjon, opinjoni politika jew opinjoni ohra, origini nazzjonali jew socjali, assocjazzjoni ma` minoranza nazzjonali, proprjeta`, twelid jew status iehor."

Issir referenza ghas-sentenza ta` din il-dorti kif diversament presjeduta tad-19 ta` Ottubru 2000 fil-kawza fl-ismijiet **<u>Victoria Cassar vs Awtorita` Marittima ta` Malta et</u>,** fejn inghad hekk dwar l-applikazzjoni tal-Art 14 tal-Konvenzjoni :-

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

Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence, since it has effect solely in relation to the "enjoyment of the

rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.

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

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

…

Illi in effetti fil-kaz appena citat, iktar komunament maghruf bhala "Abdulaziz, Cabales and Balkandali" (1973) holoq precedent u wessa sew l-applikazzjoni tal-artikolu 14, billi ghalkemm gie ritenut li l-istess artikolu mhux awtonomu, pero` jaghti tifsira iktar wiesgha lid-drittijiet fundamentali l-ohra, bhal dak tal-artikolu 8, meta applikat flimkien mal-istess artikolu 14.

…

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

Jidher li l-ilment tar-rikorrenti skont l-Art 14 tal-Konvenzjoni huwa abbinat mas-sejbien ta` vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni.

Hija l-fehma ta` din il-qorti li r-rikorrenti ma jistghux jilmentaw illi kienu trattati diversament minn sidien ohra fl-istess sitwazzjoni taghhom. L-ghazla mil-legislatur tad-data tal-1 ta` Gunju 1995 ma tistax titqies fiha nnfisha bhala diskriminatorja kontra r-rikorrenti.

Fl-istess waqt l-ilment tar-rikorrenti jsir aktar rilevanti fil-kuntest tal-emendi ghal-ligijiet tal-kera li saru bl-Att X tal-2009. Hemm il-legislatur fl-isforz tieghu sabiex itaffi r-restrizzjonijiet fuq il-kera ghamel intervent fejn impona limitazzjoni fuq id-dritt ta` kif ghandu jkun hemm awment fil-kera.

Ezaminati u meqjusa l-fatti u c-cirkostanzi kollha tal-kaz, il-qorti ssib illi r-rikorrenti garrbu lezjoni tad-drittijiet fondamentali taghhom, kif imharsa bl-Art 14 tal-Konvenzjoni, meta l-lezjoni tkun abbinata ma` ksur tal-Art 1 Prot 1 tal-Konvenzjoni, kif diga` kien accertat u rrizulta fil-kaz tal-lum.

Ghalhekk qeghda tilqa` t-tieni (2) talba tar-rikorrenti safejn din tirrigwarda ksur tal-jeddijiet fondamentali taghhom kif tutelati bl-Artikolu 14 tal-Konvenzjoni, u tirrespingi l-eccezzjonijiet tal-intimati fir-rigward.

3. <u>It-tielet (3) talba</u>

Fit-tielet domanda, qed jintalab mill-qorti li :

Tiddikjara konsegwentement illi l-Kapitolu 69 tal-Ligijiet ta` Malta, l-emendi tal-Att X tal-2009, u senjatament l-artikolu 1531C tal-Kapitolu 16 huma nulli u bla effett, erga omnes, jew inkella fil-konfront tal-kirja ta` bejn il-partijiet Muscat u Farrugia.

Ir-rikorrenti qeghdin jitolbu dikjarazzjoni ta` nullita` tal-legislazzjoni citata fit-tielet talba <u>bhala konsegwenza</u> tas-sejbien ta` vjolazzjoni tal-jeddijiet fondamentali taghhom skont it-tieni talba.

Il-qorti tirreferi ghad-decizjoni li tat il-Qorti tal-Appell fl-24 ta` April 2015 fil-kawza fl-ismijiet **<u>Michael Angelo Briffa et vs Nadia Merten</u>** fejn inghad hekk :-

> *" ... illi l-art. 6 tal-Kostituzzjoni jghid car illi "jekk xi ligi ohra tkun inkonsistenti ma` din il-Kostituzzjoni, ... il-ligi l-ohra ghandha, safejn tkun inkonsistenti, tkun bla effett". Il-qorti ghalhekk, jekk issib ksur tal-Kostituzzjoni, ma tistax thalli illi, bis-sahha tal-art. 12(4) tal-Kap. 158, issir il-konverzjoni tac-cens ghax jekk taghmel hekk tkun qieghda thalli li jinghata effett lil ligi wkoll safejn tkun inkonsistenti mal-Kostituzzjoni (Ara Cedric Mifsud et noe v. Avukat Generali u Carmelo Camilleri, Kost. 31 ta` Jannar 2014). Ir-rimedju ghalhekk jista` jkun biss illi l-qorti taqtal-kawza bhallikieku l-art. 12(4) ma ghandu ebda effett, i.e. billi ma thallix illi ssehh il-konverzjoni, bil-konsegwenza illi l-konvenuta tibqa` bla titolu.*
>
> *16. Lanqas ma huwa relevanti l-fatt illi r-rimedju moghti mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kaz ta` Amato Gauci kien il-kundanna tal-gvern li jhallas id-danni u mhux il-kundanna tal-kerrej ghal zgumbrament. Qabel xejn kawzi quddiem il-Qorti Ewropea jsiru kontra l-istat u mhux kontra cittadini privati: il-kerrej, li ma kienx parti fil-kawza, ma setax jigi kundannat li jizgombra. Barra minn hekk, ir-rimedju li tista` taghti dik il-qorti huwa biss kontra l-istat: ma ghandha ebda setgha tordna zgumbrament ta` cittadini privati. Ukoll, dik il-qorti tista` biss tghid illi irravvizat ksur ta` xi disposizzjoni tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali izda ma ghandha ebda setgha li tghid illi l-ligi domestika "tkun bla effett"."*

Il-qorti tghid li kemm l-Ordinanza XXI tal-1931 kif ukoll l-Att X tal-2009 kellhom skop legittimu u saru fl-interess generali. Tal-ewwel kienet mahsuba sabiex tevita sitwazzjoni fejn persuni jispiccaw barra t-triq minghajr saqaf fuq rashom, minghajr l-icken nuqqas jew htija da parti taghhom. Tat-tieni kienet l-ewwel tentattiv sabiex jinstab bilanc bejn interessi konfliggenti.

L-istorja socjo-ekonomika ta` dawn il-Gzejjer turi li l-legislazzjoni in kwistjoni kienet necessarja kemm fiz-zmien li saret u anke wara. Pero` ghaddew ukoll ghexieren ta` snin. Il-gid kotor mal-izvilupp lejn l-ahjar tal-pajjiz. Dan il-fatt kellu jixpruna lill-Istat sabiex ma jippermettix stagnar fil-legislazzjoni

li ma setax ikun rimedjat b`interventi legislattivi mil-lum ghall-ghada minghajr wisq hsieb radikali fit-tul.

Fl-istess waqt il-qorti tirrileva li l-fatt illi, <u>abbazi tal-provi fil-kaz odjern</u> kien accertat sproporzjon u zvantagg ghad-detriment tar-rikorrenti li kien lesiv ghall-jeddijiet fondamentali taghhom, ma jaghmilx bhala konsegwenza l-legislazzjoni de qua nulla u bla effett, sahansitra erga omnes kif qieghed jinghad mir-rikorrenti.

Propju xejn minn dan.

Il-kaz odjern, *inter partes* kien u *inter partes* ghandu jitqies anke fid-decizjonijiet li jittiehdu fir-rigward.

Ghalhekk qeghda tichad it-tielet (3) talba u tilqa` l-eccezzjonijiet li biha kienet kontestata l-istess talba.

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

Ir-raba` domanda saret bla bzonn mhux biss ghaliex ghandha sinjifikat generiku, imma anke ghaliex l-ispecifiku ghandu jirrizulta fit-talbiet ta` wara.

Ghalhekk il-qorti qeghda tastjeni milli tiehu konjizzjoni ulterjuri tagha.

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

Il-hames domanda taqra :

Tiddikjara illi b`konsegwenza tat-talbiet precedenti, l-intimata Elizabeth Farrugia m`ghandha l-ebda titolu validu fil-ligi li jtiha l-jedd tkompli tokkupa l-proprjeta`bin-numru 23,Triq Hal Tarxien, Paola.

Il-qorti mhijiex kompetenti li taghti decizjoni dwar titolu. Jispetta lilha li taghti decizjonijiet (u rimedji jekk ikun il-kaz) dwar ksur ta` jeddijiet fondamentali tal-persuna. Pronunzjament ta` x-xorta li qed jintalab fil-hames domanda jispetta lit-tribunal u/jew qorti ta` gurisdizzjoni ordinarja.

Il-hames talba qeghda tkun michuda.

6. <u>Is-sitt (6) talba</u>

Fis-sitt domanda, ir-rikorrenti qeghdin jitolbu lill-qorti sabiex :

Tordna b`hekk lill-intimata Elizabeth Farrugia sabiex tizgombra mill-proprjeta` indikata, u dana billi tivvakaha u taghti lura l-pussess shih taghha lir-rikorrenti, u taghti terminu qasir perentorju ghal dan il-ghan.

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

> *"Dwar x`ghandu jkun ir-rimedju, l-ewwel Qorti pprovdiet billi qalet illi l-intimati Bajada ma jkunux jistghu jinqdew bl-Artikolu 12A tal-Kap. 158 biex jilqghu ghal kull azzjoni li tista` taghmel ir-rikorrenti fil-forum kompetenti biex tikseb l-izgumbrament taghhom. Din il-Qorti, wara li hasbet fit-tul fuq din il-materja, tara li dan mhux rimedju li tista` taghti.*
>
> *Il-bilanc bejn l-interessi differenti jrid joholqu l-Gvern, u hu l-Gvern li jrid ibati l-konsegwenzi jekk jonqos minn dan id-dmir tieghu. Ghan-nuqqas tal-Gvern ma ghandux ibati c-cittadin. La darba, f`dan il-kaz, il-ligi per se ma gietx meqjusa li tikser il-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem, ma tistax tigi dizapplikata ghall-kaz. Din il-Qorti gia` osservat f`kuntest iehor li meta jkun hemm ordni ta` rekwizizzjoni u l-Gvern iqieghed persuna ohra in situ b`kera li titqies baxxa, ir-rimedju mhux li tithassar dik l-ordni ta` rekwizizzjoni izda li jinghata kumpens adegwat bhala just satisfaction u dan talli ma nholoqx bilanc gust bejn l-interessi involuti. F`dawn ic-cirkostanzi, ma tkunx l-ordni ta` rekwizizzjoni nnifisha li tkun kisret id-dritt ta` proprjeta` tas-sid, izda l-mekkanizmu ta`*

kumpens (ara Montanaro Gauci v. Direttur Akkomodazzjoni Socjali et, deciza minn din il-Qorti fil-25 ta` Novembru 2011). Anke l-kaz meritu ta` din il-kawza m`huwhiex il-passi li ha l-Gvern fl-interess generali li huma hziena izda l-mekkanizmu li holoq biex jigi determinat l-applikazzjoni tal-ligi u l-quantum tal-kumpens. Ghalhekk, anke f`dan il-kaz, ir-rimedju ghandu jkun ta` kumpens, kif del resto jipprovdi l-Artikolu 41 ta` Konvenzjoni Ewropeja, l-uniku ligi li nstab li gie miksur.

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

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

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

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

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

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

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

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

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

Il-qorti tishaq illi – wiesgha kemm jista` wiehed jifhem li huma s–setghat taghha - mhuwiex dan il-forum appozitu sabiex tinghata decizjoni dwar jekk inkwilin ghandux jigi zgumbrat jew le.

Huma t-tribunali jew qrati ordinarji li ghandhom il-kompetenza li jesprimu ruhhom dwar talba ghal zgumbrament.

Fil-kaz tal-lum jirrizulta li l-inkwilini gabet ruhha skont il-ligijiet vigenti. Ghalhekk m`ghandhiex legalment tirrispondi ghall-kostituzzjonalita` ta` kif kienu applikati l-ligijiet li jharsu l-posizzjoni taghha.

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

Konsegwentement is-sitt talba qeghda tkun <u>respinta.</u>

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

Fis-seba` domanda, ir-rikorrenti talbu l-likwidazzjoni u l-hlas ta` kumpens u/jew danni.

a) <u>Gurisprudenza</u>

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

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

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

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

Inghad hekk :-

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

"Rigward il-quantum tal-kumpens stabbilit mill-ewwel Qorti, din il-Qorti tosserva fl-ewwel lok li kull kaz ghandu jigi trattat u deciz fuq il-fattispecie tieghu. Barra minn hekk, jekk il-Qorti Ewropeja hasset li f` certi kazijiet kellha taghti kumpens f` ammont inferjuri ghal dak li nghata lir-rikorrenti mill-ewwel Qorti, ma jfissirx li allura l-Qrati Maltin tilfu l-awtonomija taghhom b` mod li bilfors kumpens li jinghata ikun f` ammont vicin dak li taghti l-Qorti Ewropeja. Fil-kaz odjern l-ewwel Qorti hadet in konsiderazzjoni l-fatturi kollha li jimmilitaw kemm favur kif ukoll kontra r-rikorrenti u deherilha li l-kumpens xieraq li ghandha taghti f` dan il-kaz ikun fl-ammont ta` hamsa u ghoxrin elf Euro (EUR 25,000). Hija kkonsidrat id-dewmien da parti tar-rikorrenti li jiehdu l-proceduri opportuni, il-valur tal-immobbli, iz-zmien tant twil li r-rikorrenti ilhom privati mill-godiment tal-proprjeta` taghhom minghand ma nghata ebda kumpens, l-istat tal-fond u l-ezistenza tal-fattur tal-interess pubbliku. Ma` dawn ghandu jigi senjalat il-fatt li qabel l-ispossessament tal-proprjeta` taghhom ir-rikorrenti kellhom permess mill-Bord kompetenti sabiex jizviluppaw il-fond."

Issa ghalkemm, huwa minnu illi l-valur tal-kumpens akkordat mill-Qorti wara sejba ta` lezjoni tad-drittijiet fondamentali ma jekwiparax necessarjament ma` likwidazzjoni ta` danni civili attwali sofferti, ma jfissirx li d-danni materjali ghandhom jigu injorati ghall-finijiet tal-ezercizzju odjern. Il-Qorti trid tqis il-

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

Meta jinghata kumpens fi procediment ta` din ix-xorta, ghandu jinghata konsiderazzjoni l-ghan li jkun immotiva l-mizura u cioe` l-interess pubbliku.

Fid-decizjoni **Cassar v. Malta** tat-30 ta` Jannar 2018 (App. 50570/13) l-ECtHR qalet hekk dwar kif kellu jkun applikat l-Art 41 tal-Konvenzjoni ghal dak il-kaz :-

A. Damage

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

representing EUR 2,000 annually since 1988, should be upheld in full.

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

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

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

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

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

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

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

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

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

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

Fuq l-istess binarju kienet id-decizjoni fil-kaz ta` **Portanier v. Malta**, tas-27 ta` Novembru 2019 (App. 55747/16) fejn inghad hekk :

"55. The Court notes that it has repeatedly found that the sums awarded in compensation by the Constitutional Court do not constitute adequate redress. The Court makes reference to its considerations in paragraphs 24 and 25 above. The Court considers that, just like an award for pecuniary damage under Article 41 of the Convention, an award for pecuniary damage made by a domestic court must be intended to put the applicant, as far as possible, in the position he would have enjoyed had the breach not occurred. It transpires from the information and cases brought before the Court that this is often not the case. Such pecuniary awards are also often not accompanied by an adequate award of non-pecuniary damage and/or an order for the payment of the relevant costs (ibid. § 90 and Grech and Others, cited above, § 62). No domestic case-law dispelling such conclusions has been brought to the Court`s attention in the present case.

56. In the light of the above considerations relating to the relevant time, the Court concludes that although constitutional redress proceedings are an effective remedy in theory, they were not so in practice, in cases such as the present one. In consequence, they cannot be considered an effective remedy for the purposes of Article 13 in conjunction with Article 1 of Protocol No. 1 concerning arguable complaints in respect of the rent laws in place, which, though lawful and pursuing legitimate objectives, impose an excessive individual burden on applicants.

...

62. The Court must proceed to determine the compensation the applicant is entitled to in respect of the loss of control, use and enjoyment of the property which he has suffered for the period December 2008 to September 2017, when the violation came to an end.

63. The Court notes that the annual rental value of the property estimated on the basis of its sale value according to the court-appointed architect was EUR 5,600. Nevertheless the domestic court considered its value to be more likely EUR 3,000 to 4,000 (see paragraph 14 above). The latter appears to be in line with the Government`s architect`s valuation which also reflects similar figures. With that in mind, in assessing the pecuniary damage sustained by the applicants, the Court has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It has also considered the legitimate purpose of the restriction suffered, bearing in mind that legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (see, inter alia, Ghigo v. Malta (just satisfaction), no. 31122/05, § 18 and 20, 17 July 2008). Furthermore, the rent already received by the applicant for the relevant period must be deducted.

64. The Court reiterates that an award for pecuniary damage under Article 41 of the Convention is intended to put the applicant, as far as possible, in the position he would have enjoyed had the breach not occurred. It therefore considers that interest should be added to the above award in order to compensate for the loss of value of the award over time. As

such, the interest rate should reflect national economic conditions, such as levels of inflation and rates of interest. The Court thus considers that a one-off payment of 5% interest should be added to the above amount (ibid., § 20).

65. The Court thus awards the applicant EUR 8,000."

Issir referenza wkoll ghall-gurisprudenza mill-aktar ricenti, senjatament id-decizjoni tal-ECtHR fil-kaz ta` **Marshall and Others v. Malta** tal-11 ta` Gunju 2020 fejn inghad :-

"94. The Court must proceed to determine the compensation the applicants are entitled to in respect of the loss of control, use and enjoyment of the property which they have suffered. However, the Court notes that the only valuation submitted by the court-appointed architect referred to 2014. The rental value of the premises was clearly not the same in the preceding decades. In consequence the Court is unable to identify in which year the disproportionality arose. For the same reasons the Court considers that it has no objective basis on which to determine the pecuniary damage for the years preceding 2014.

95. Thus, in assessing the pecuniary damage sustained by the applicants, the Court has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It has also considered the legitimate purpose of the restriction suffered, bearing in mind that legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (see, inter alia, Ghigo v. Malta (just satisfaction), no. 31122/05, § 18 and 20, 17 July 2008). In the present case however, the Court keeps in mind that the property was not used for securing the social welfare of tenants or preventing homelessness (compare, Fleri Soler and Camilleri v. Malta (just satisfaction), no. 35349/05, § 18, 17 July 2008). Thus, the situation in the present case might be said to involve a degree of public interest which is significantly less marked than in other cases and which does not justify such a substantial reduction compared with the free market rental value (see, Zammit and Attard, cited above, § 75).

96. Furthermore, the sums already received by the applicants for the relevant period must be deducted.

97. The Court reiterates that an award for pecuniary damage under Article 41 of the Convention is intended to put the applicant, as far as possible, in the position he would have enjoyed had the breach not occurred. It therefore considers that interest should be added to the above award in order to compensate for loss of value of the award over time. As such, the interest rate should reflect national economic conditions, such as levels of inflation and rates of interest. The Court thus considers that a one-off payment of 5% interest should be added to the above amount.

98. The Court thus awards the applicants, jointly, EUR 500,000. As requested, the amount awarded is to be paid directly into the bank account designated by the applicants` representatives.

99. Bearing in mind the Constitutional Court`s award of EUR 25,000, which remains payable to the applicants, the Court need not award a further sum in non-pecuniary damage, it therefore rejects such claim."

b) <u>Likwidazzjoni</u>

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

Il-qorti sabet vjolazzjoni tal-Art 37 tal-Kostituzzjoni, u tal-Art 1 Prot 1 u tal-Art 14 tal-Konvenzjoni.

Ghalkemm id-diskrepanza bejn il-kera attwalment percepita u l-valur lokatizju li l-fond igib fis-suq hieles hija fattur determinanti sabiex ikun stabbilit jekk kienx vjolat il-principju tal-proporzjonalita`, fl-istess waqt hemm fatturi ohra li l-qorti ghandha tqis meta tigi ghal-likwidazzjoni tal-kumpens ghal-lezjoni subita.

Dwar quantum ta` kumpens, kemm f`danni pekunjarji, kif ukoll f`danni morali, il-qorti tosserva li ma hemmx uniformita` ghaliex il-qrati taghna kienu kawti sabiex iqisu kull kaz fuq il-fattispeci partikolari tieghu.

i) <u>Danni pekunjarji</u>

- **<u>Osservazzjoni generali</u>**

Fejn si tratta ta` danni <u>pekunjarji</u> din il-qorti hija tal-fehma li wasal iz-zmien, meta tqis il-quantum tal-likwidazzjonijiet li qeghdin isiru mill-ECtHR f`kazi fejn tirrizulta vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni li fihom Malta tkun l-intimata, illi fl-ahjar interess tal-gustizzja, il-qrati taghna jfasslu <u>linji gwida</u> meta tigi biex issir likwidazzjoni, bla ma jiddipartixxu mill-principju li kull kaz ghandu jkun gudikat fuq il-fatti u cirkostanzi partikolari tieghu. Il-qorti sejra tghid x`ghandhom ikunu l-linji gwida <u>u</u> kif ghandhom jigu applikati ghall-kaz prezenti.

- **<u>Il-massimu</u>**

Il-kostatazzjonijiet, l-osservazzjonijiet u l-konkluzjonijiet tal-perit tekniku li kien mahtur mill-qorti fil-kawza tal-lum jikkostitwixxu **<u>prova ta` fatt</u>**.

Fir-relazzjoni peritali hemm inkluza tabella (a fol 51). Din turi li ghaz-zmien ta` bejn l-1 ta` Jannar 1990 u l-31 ta` Dicembru 2019 il-valur lokatizju fis-suq tal-fond 23, Triq Hal Tarxien, Rahal Gdid, kien ilahhaq total ta` **<u>€109,532</u>**. Dan l-ammont huwa maqsum u mifrux fuq perijodi ta` hames snin bejn l-ewwel u l-ahhar data.

Aktar kmieni, il-qorti ddikjarat li kienet sejra taghmel taghha dak li rrizulta mir-relazzjoni anke ghaliex l-accertamenti tal-perit tekniku ma kienux kontestati minn ebda parti fil-kawza.

Il-figura ta` €109,532 tikkostitwixxi <u>l-massimu</u> tad-danni pekunjarji. Dan l-ammont ghandu pero` jkun aggjustat skont il-linji gwida li sejra taghti.

- **<u>Linji gwida</u>**

L-isproporzjon bejn il-kera attwalment percepita mir-rikorrenti u dik li setghet tkun ippercepita fis-suq hieles, ghalkemm hija l-fattur ewlieni li jipprova l-vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni, mhuwiex kriterju assolut meta tigi biex isir il-likwidazzjoni tal-kumpens.

Il-qorti rrilevat aktar kmieni li d-danni li jigu likwidati fi procediment kostituzzjonali u/jew konvenzjonali mhumiex danni civili li jigu likwidati f`kawzi kondotti fil-procedimenti ordinarji ghaliex huma danni li jigu likwidati minhabba l-vjolazzjoni accertata tal-jeddijiet fondamentali tal-persuna. Dan ifisser li meta fi procediment tax-xorta bhal dak tal-lum il-qorti tigi biex taghmel il-likwidazzjoni ghandha tqis fatturi li ghandhom rilevanza u li jincidu fuq il-komputazzjoni tal-quantum tal-kumpens.

a. Ghandha titnaqqas il-kera li kienet mhallsa u accettata fiz-zmien in kwistjoni

Jirrizulta ppruvat li l-intimata Farrugia dejjem hallset il-kera dovuta saz-zmien meta din giet rifjutata mir-rikorrenti ftit qabel kienet prezentata l-kawza odjerna.

Il-qorti tghid illi kull kera li thallset mill-inkwilini fil-perijodu in kwistjoni ghandha tonqos mill-figura ta` €109,532.

Nafu li minn mindu bdiet il-kirja sa llum il-kera dejjem kienet dik ta` Lm 100 ekwivalenti ghal €232.40 fis-sena.

Il-kera li thallset bejn l-1 ta` Jannar 1990 u d-9 ta` Novembru 2019 kienet ta` **€6972** (u cioe` 30 sena).

B`hekk il-figura originali ta` €109,532 ghandha tinzel ghal €102,560.

b. L-interess generali

Aktar kmieni l-qorti tat sfond storiku-legali ta` x`wassal biex saru l-ligijiet specjali tal-kera. M`ghandhiex dubju mis-siwi u mil-legittimita`

tal-intervent legislattiv tenut kont tal-fatt li fiz-zmien li saru, u anke ghal snin wara, taw kenn u wens lil bosta persuni f`dawn il-Gzejjer.

Dan il-fattur ghandu jwassal ghal tnaqqis ta` <u>35%</u> fil-figura ridotta ta` €102,560.

Adottat rata ta` 35% sabiex tpatti ghas-snin l-ohra li ha l-Istat Malti sabiex jipproponi ligijiet li kienu ntizi sabiex isewwu l-isproporzjon li garrbu s-sidien tal-propjeta` mikrija matul is-snin.

Ir-rata kienet tkun diversa li kieku l-Istat Malti gharaf jintervjeni fil-pront, qabel beda jsib ruhu rinfaccjat b`decizjonijiet sfavorevoli moghtija mill-qrati Maltin u mill-ECtHR.

Il-figura tinzel ghalhekk ghal <u>€66,664</u>.

c. <u>Passivita` tar-rikorrenti</u>

Kemm ir-rikorrenti kif ukoll l-antekawza taghhom baqghu jaccettaw il-hlas tal-kera sa ftit taz-zmien qabel kienet istitwita din il-kawza.

Kienet ghazla taghhom li stennew 30 sena sakemm ipprezentaw l-azzjoni odjerna.

Li ssir talba sabiex il-valur lokatizzju tal-fond jigi stmat b`effett mill-1 ta` Jannar 1990 hija talba eccessiva.

Il-qorti jidhrilha li r-rikorrenti u l-antekawza taghhom m`ghandhomx jithallew jibbenfikaw mill-passivita` taghhom ghalhekk ghandu jkun hemm **<u>tnaqqis ulterjuri ta` 35%</u>** minhabba l-komportament kjarament passiv tar-rikorrenti.

Il-figura ghalhekk ghandha terga` tinzel u ssir **<u>€43,331.60</u>** arrotondata ghas-somma ta` **<u>€43,332</u>**.

d. **<u>Il-fond</u>**

Il-qorti rat ir-relazzjoni.

Semghet ix-xiehda tal-perit tekniku.

Tenut kont tan-natura tal-fond, il-qorti ma tarax li ghandu jkun hemm tnaqqis fid-danni pekunjarji minhabba dan l-aspett.

e. **<u>Riassunt</u>**

Id-danni pekunjarji qeghdin jigu likwidati fl-ammont ta` <u>€43,332</u>.

ii) **<u>Danni mhux pekunjarji</u>**

Indipendentement mid-danni pekunjarji li jikkostitwixxu telf effettiv ghar-ragunijiet fuq premessi, il-qorti tghid li r-rikorrenti haqqhom jircievu wkoll il-hlas ta` danni morali fl-ammont ta` **<u>€5,000</u>** ghaliex sprovvisti kif kienu minn rimedju ordinarju effettiv kif jindirizzaw il-lanjanzi taghhom kienu kostretti jirrikorru ghal procediment ta` din ix-xorta semplicement ghaliex l-Istat Malti qaghad lura ghal ghexieren ta` snin milli jsib tarf tal-izbilanc u tal-isproporzjon li kienu qeghdin igarrbu.

f. **<u>Riassunt tad-danni komplessivi</u>**

Qeghda tigi likwidata somma globali ta` €48,332 in kwantu ghal €43,332 bhala danni pekunjarji u in kwantu ghal €5000 bhala danni morali.

g. **<u>Il-hlas</u>**

Il-hlas tal-ammont likwidat ghandu jsir mill-Avukat tal-Istat. L-intimata Farrugia m`ghandha thallas ebda kumpens jew

danni lir-rikorrenti ghaliex jirrizulta li ottemperat ruhha mal-ligijiet vigenti. M`ghamlet xejn kontra l-ligi.

8. <u>It-tmien (8) talba</u>

Fit-tmien domanda, ir-rikorrenti talbu lill-qorti sabiex taghti kull rimedju u/jew provvediment iehor mehtieg.

Huwa minnu li kienet michuda t-talba tar-rikorrenti ghall-izgumbrament tal-intimata Farrugia mill-fond de quo ghar-ragunijiet li kienu mfissra aktar kmieni, fl-istess waqt il-qorti **<u>m`ghandhiex</u>** toqghod lura milli tippronunzja ruhha dwar x`ghandu jsir mil-lum `il quddiem dwar il-jedd tal-inkwilina Farrugia ladarba l-qorti sabet vjolazzjoni tal-jeddijiet fondamentali tar-rikorrenti skont it-tieni talba.

Ghalhekk fl-ambitu tat-tmien talba, il-qorti qeghda tiddikjara li l-intimata Farrugia ma tistax tibqa` toqghod fuq id-disposizzjonijiet tal-Kap 69 ghall-fini tal-okkupazzjoni taghha tal-fond de quo.

V. <u>L-ispejjez tal-kawza</u>

L-intimata Farrugia m`ghandhiex tinkorri spejjez gudizzjarji.

L-ispejjez ghandhom ikunu nkorsi in kwantu ghal nofs mir-rikorrenti u in kwantu ghan-nofs l-iehor mill-Avukat tal-Istat.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-qorti qeghda tipprovdi dwar it-talbiet u dwar l-eccezzjonijiet, billi qeghda taqta` u tiddeciedi hekk :-

Tilqa` l-ewwel (1) talba.

Tilqa` t-tieni (2) talba safejn din tirrigwarda l-vjolazzjoni tal-jeddijiet fondamentali tar-rikorrenti ghat-tgawdija tal-proprjeta` taghhom tal-fond 23, Triq Hal-Tarxien, Paola, kif dawn il-jeddijiet huma mharsa bl-Art 37 tal-Kostituzzjoni ta` Malta, bl-Art 14 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali, u bl-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-istess Konvenzjoni.

Tichad il-bqija tal-istess talba safejn din kienet tirrigwarda l-vjolazzjoni tal-jeddijiet fondamentali tar-rikorrenti skont l-Art 45 tal-Kostituzzjoni ta` Malta.

Tichad it-tielet (3) talba.

Tastjeni milli tiehu konjizzjoni ulterjuri tar-raba` (4) talba.

Tichad il-hames (5) u s-sitt (6) talbiet.

Tipprovdi dwar is-seba` (7) talba billi tillikwida favur ir-rikorrenti danni komplessivi fl-ammont ta` tmienja u erbghin elf u tlett mija tnejn u tletin ewro (€48,332) in kwantu ghal tlieta u erbghin elf u tlett mija tnejn u tletin ewro (€43,332) bhala danni pekunjarji u in kwantu ghal hamest elef ewro (€5,000) bhala danni mhux pekunjarji ghall-vjolazzjoni tal-jeddijiet fondamentali taghhom skont kif kien deciz fit-tieni (2) talba.

Tkompli tipprovdi dwar is-seba` (7) talba billi tordna lill-intimat Avukat tal-Istat sabiex ihallas lir-rikorrenti s-somma hekk likwidata bl-imghax legali b`effett mil-lum.

Tipprovdi dwar it-tmien (8) talba billi tiddikjara li l-intimata Farrugia ma tistax tibqa` tistrieh fuq id-disposizzjonijiet tal-Kap 69 ghall-fini tal-okkupazzjoni taghha tal-fond de quo.

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

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

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur