QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON

Illum il-Hamis 25 ta` Frar 2021

Kawza Nru. 2
Rikors Nru. 211/2019/JZM

Avukat Dottor Marielise Tabone (KI 29792G) bhala mandatarja tal-assenti Mariella Birdsall (KI 39349G) prokura specjali hawn annessa u mmarkata bhala Dokument X

kontra

L-Avukat Generali, u b`effett tal-Avviz Legali 329 tal-2019, l-azzjoni gudizzjarja odjerna kompliet *ipso jure* kontra l-Avukat tal-Istat

u

Nicholas Simpson (KI 137159M) u Karyn Simpson (KI 208370M)

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors li kien prezentat fil-<u>31 ta` Ottubru 2019</u> li jaqra :–

1. Illi r-rikorrenti Mariella Birdsall hija l-unika wild tal-mejtin Oscar Pace Feraud u Mary Pace Feraud liema fond ossia 123, Devon, Old College Street, Sliema, kien inghata b`koncessjoni emfitewtika temporanja lin-nannu tal-intimata Karyn Simpson ossia Francis Mallia.

2. Illi l-mejjet missier ir-rikorrenti Mariella Birdsall ossia Oscar Pace Feraud u l-istess rikorrenti b`kuntratt ta` koncessjoni emfitewtika temporanja tat-18 ta` Ottubru 1967 fl-atti tan-Nutar Dottor Victor Bisazza li kopja tieghu qed tigi hawn annessa u mmarkata bhala Dokument MB1 kienu ikkoncedew lil Francis Mallia, illum mejjet, il-fond hawn fuq imsemmi versu c-cens annwu u temporanju ta` Lm 38 fis-sena ghal sbatax-il sena dekorribbli mit-18 ta` Ottubru 1967.

3. Illi din il-koncessjoni enfitewtika temporanja skadiet fis-17 ta` Ottubru 1984 u l-mejjet Francis Mallia peress li kien cittadin Malti u ordinarjament residenti fil-fond in kwistjoni a tenur tal-Att XXIII tal-1979, gie moghti lilu d-dritt biex jibqa` jghix fil-fond b`kera sad-doppju li kellha tkun Lm 76 u li kienet toghla darba kull hmistax-il sena ai termini tal-Att XXIII tal-1979.

4. Illi l-fond in kwistjoni kien iddevolva ghal fuq ir-rikorrenti Mariella Birdsall b`testment unica charta fl-atti tan-Nutar Dottor Rosario Frendo Randon datat 18 ta` Jannar 1964 fejn l-imsemmija Oscar u Mary konjugi Pace Feraud kienu nnominaw bhala eredi universali taghhom lir-rikorrenti Mariella Birdsall bil-kondizzjoni li jkollha tifel jew tifla jew li taddotta tifel jew tifla.

5. Illi din il-kondizzjoni avverat ruhha u b`digriet tal-Qorti Civili Sezzjoni Volontarja li jgib in-numru 574/1984 datat 16 ta` Lulju 1984, Mariella Birdsall giet dikjarat bhala l-unika eredi tal-imsemmija

konjugi Pace Feraud li qed jigi hawn anness u mmarkat bhala Dokument A.

6. Illi Mary Pace Feraud mietet fit-23 ta` Novembru 1963 skond certifikat tal-mewt li qed jigi hawn anness u mmarkat bhala Dokument B fejn ir-ragel taghha Oscar Pace Feraud kien hallas it-taxxa relattiva lill-Kummissarju tat-Taxxi Interni u dan skond Denunzja datata 20 ta` Gunju 1964 li ggib in-numru 1334 li qed tigi hawn annessa u mmarkata bhala Dokument C.

7. Illi sussegwentement, miet missier ir-rikorrenti ossia Oscar Pace Feraud nhar it-18 ta` Frar 1971 u dan skont certifikat tal-mewt li qed jigi hawn anness u mmarkat bhala Dokument D fejn ir-rikorrenti hallset it-taxxa relattiva lill-Kummissarju tat-Taxxi Interni u dan skont kif jirrizulta mid-Denunzja li datata 13 ta` Mejju 1971 li ggib in-numru 1544 li qed tigi hawn annessa u mmarkata bhala Dokument E.

8. Illi ghalhekk ir-rikorrenti hija l-proprjetarja tal-fond 123, Devon, Old College Street, Sliema, li llum qieghed okkupat mill-intimati Nicholas Simpson u Karyn Simpson li kienet baqghet fil-fond wara li n-nannu Francis Mallia gie rikoverat f`dar tal-anzjani.

9. Illi Francis Mary Mallia miet nhar id-9 ta` Frar 1994 gewwa id-dar tal-anzjani fin-Naxxar bl-isem `Holy Family Home`.

10. Illi l-intimata Karyn Simpson minkejja li qatt ma kienet tghix man-nannu taghha meta kien ghadu mimli bl-ghomor pero` kienet dahlet tokkupa l-fond in kwistjoni wara li n-nannu taghha kien iddecieda sabiex imur jghix gewwa d-dar tal-anzjani.

11. Illi r-rikorrenti qatt ma accettaw il-kera minghand il-konjugi Simpson li min naha taghhom iddepozitaw l-istess fir-Registru tal-Qorti tal-Magistrati.

12. Illi l-kera fit-18 ta` Ottubru 1999 saret ghal Lm 105.75c fis-sena u a tenur tal-Att X tal-2009 fl-1 ta` Jannar 2013 il-kera regghet zdiedet ghal €341.18c fis-sena, fl-1 ta` Jannar 2016 kellha terga` tizdied ghal €348.22c fis-sena filwaqt li kellha terga` toghla fl-1 ta` Jannar 2019.

13. Illi l-intimati Simpson qed ihallsu kera rrizorja ta` €209 fis-sena ghall-fond in kwistjoni u b`mod abbusiv u llegali stante illi l-Att XXIII tal-1979 li dahal fis-sehh fil-21 ta` Gunju 1979, tat protezzjoni mhux misthoqqa lill-intimati Simpson stante li huma kienu cittadini Maltin u ordinarjament residenti fil-fond in kwistjoni minkejja l-ftehim raggunt bejn d-direttarju u l-enfitewta.

14. Illi l-antekawza tar-rikorrenti ma kellhom ebda alternattiva sabiex jipprotegu l-proprjeta` taghhom minn rekwizizzjoni u/jew minn okkupazzjoni perpetwa u ghalhekk ma kellhomx triq ohra hlief li jikkoncedu b`titolu ta` enfitewsi temporanja l-fond imsemmi u dan stante illi gialdarba l-fond ma kienx dekontrollat u/jew dekontrollabbli kif jirrizulta mid-Dokument F li qed jigi hawn anness, oltre li kien soggett ghar-rekwizizzjoni kien soggett wkoll ghall-`fair rent` ossia d-disposizzjonijiet tal-Kap. 69 tal-Ligijiet ta` Malta u tal-Ordinanza XVI tal-1944 li huma marbutin mal-kera li l-fond seta` jgib fl-4 ta` Awwissu 1914.

15. Illi dan kien assolutament inaccettabbli ghall-antekawza tar-rikorrenti u ghalhekk l-unika mod biex jipprotegi l-proprjeta` taghhom mir-rekwizizzjoni u mill-fair rent kien illi jikkoncedih lill-mejjet in-nannu tal-intimata Karyn Simpson ossia Francis Mallia b`titolu ta` enfitewsi temporanja kif fil-fatt ghamel.

16. Illi l-antekawza tar-rikorrenti ma kellu l-ebda ghazla ohra biex jgawdi hwejgu u jipprotegi l-istess kif fuq inghad, salv li jbigh l-istess fond, haga li huwa ma riedx jaghmel stante li xtaq li jibqa` jgawdi hwejgu.

17. Illi ghalhekk ir-rikorrenti giet imcahhda mit-tgawdija tal-proprjeta` taghha minghajr ma giet moghtija kumpens xieraq ghat-tehid tal-istess fond b`mod sfurzat u mhux skont il-pattijiet kuntrattwali minnhom raggunti. Infatti, l-unika kumpens li gie offrut kien li jithallas iz-zieda fir-rata ta` inflazzjoni li ma setghet qatt teccedi d-doppju kif stabbilit fil-kuntratt originali, meta fil-fatt il-valur lokatizju tal-istess fond, dak iz-zmien u iktar illum, kien ferm izjed mill-kera annwali ta` €209 fis-sena liema kera bl-emendi tal-Att X tat-2009 u tal-Att XXVII tal-2018 huma xorta lezivi tad-drittijiet fundamentali tar-rikorrenti stante li ma jzommux il-proporzjon bejn id-drittijiet tas-sidien u dawk tal-inkwilin billi jircievu kera gusta fis-suq.

18. Illi l-Att XXIII tal-1979 ippriva lir-rikorrenti mill-proprjeta` taghha minkejja li l-antekawza taghha hadu hsieb biex jassiguraw li dan ma jsirx oltre li l-istess ligi qed tilledi d-drittijiet fundamentali tar-rikorrenti ta` proprjeta` kif protetti mill-Kostituzzjoni u mill-Konvenzjoni Ewropea stante li hija mhux qed tircievi l-kumpens adegwat u dan qed jikkawza sproporzjon bejn id-drittijiet tas-sidien u dawk tal-inkwilini Simpson.

19. Illi b`sentenza deciza mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-15 ta` Settembru 2009, fl-applikazzjoni numru 47045/06 fl-ismijiet "Amato Gauci vs. Malta", gie deciz illi f`kaz simili bhal dan ir-rikorrenti ghandha dritt titlob ukoll barra dikjarazzjoni ta` ksur tad-drittijiet fundamentali d-danni li hija sofriet minhabba din it-tali lezjoni tad-drittijiet fundamentali kif protetti mill-istess Kostituzzjoni u mill-Konvenzjoni Ewropea kif ukoll l-izgumbrament mill-fond imsemmi tal-istess inkwilini intimati Simpson.

20. Illi r-rikorrenti ghandha tircievi sia danni pekunjarji kif ukoll non pekunjarji f`ammonti sodisfacenti ghat-telf taghha kif gie deciz fil-kawza "Albert Cassar vs Malta" deciza mill-Qorti Ewropea tad-Drittijiet Fundamentali tal-Bniedem fit-30 ta` Jannar 2018.

21. Illi kif gie deciz mill-Qorti Ewropea tad-Drittijiet Fundamentali tal-Bniedem fil-11 ta` Dicembru 2018 (Rikors nru. 22456/15) fil-kawza fl-ismijiet "Franco Buttigieg and Others vs Malta" l-imsemmija Qorti kkonfermat illi l-insenjament kollu li saret referenza ghalih supra jghodd wkoll ghal dawk il-kazijiet fejn il-koncessjoni enfitewtika temporanja inghatat wara d-dhul fis-sehh tal-Att XXIII tal-1979, kif gara fil-kaz odjern, u l-istess Qorti sabet illi f`tali kaz xorta tezisti vjolazzjoni tal-Ewwel Artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropea u dan ghar-ragunijiet imsemmija fl-istess sentenza u konsegwentement ikkundannat lill-Istat Malti jhallas €22,000 bhala danni pekunjarji, €4,500 bhala danni non pekunjarji u €9,000 oltre kull taxxa pagabbli bhala spejjez legali lir-rikorrenti. Illi ai termini tas-sentenza fuq msemmija, il-Qorti Ewropea tad-Drittijiet Fundamentali tal-Bniedem iddecidiet illi f`kaz fejn ma jistax jkun hemm restitutio in integrum, ossia li l-fond jigi moghti lura battal lir-rikorrenti, d-danni minnhom sofferti ghandhom jigu kalkulati fuq id-differenza bejn dak li tkun effettivament rciviet tul iz-zmien mit-terminazzjoni tal-koncessjoni enfitewtika temporanja sal-prezentata tar-rikors odjern u dak li suppost rciviet skont ir-rata tas-suq fl-istess perijodu.

22. Illi b`sentenza ohra deciza mill-Qorti Ewropea ghad-Drittijiet Fundamentali tal-Bniedem fis-27 ta` Awwissu 2019, (Application no. 55747/16) fl-ismijiet "Portanier vs Malta", l-imsemmija Qorti ammoniet lill-Qorti Kostituzzjonali Maltija talli qieghda b`mod kontinwu u sistematika tabdika mir-responsabbilta` taghha u tonqos milli tordna l-izgumbrament tal-inkwilini f`kazijiet simili ghal dak odjern, meta fl-istess nifs ssib illi hemm lezjoni tad-drittijiet fundamentali tal-bniedem.

23. Illi l-kawza odjerna qieghda tigi limitata ghall-effetti taghha sal-31 ta` Dicembru 2018 wara liema perijodu r-rikorrenti ser jipprocedu b`kawza quddiem il-Bord tal-Kera a tenur tal-Att XXVII tal-2018, pero` jippretendu li nel frattemp hija ghandha tircievi d-danni kemm pekunjarji u kemm non-pekunjarji ai termini wkoll tal-Artikolu 41 tal-Konvenzjoni Ewropea li hija u l-antekawza minnhom sofrew tul iz-zmien mit-terminazzjoni tal-koncessjoni enfitewtika temporanja sal-31 ta` Dicembru 2018, b`riserva ghal kull azzjoni ohra biex l-Att XXVII tal-2018 jigi dikjarat wkoll li jilledi d-drittijiet kostituzzjonali u fundamentali tar-rikorrenti kif protetti mill-Kostituzzjoni ta` Malta u mill-Konvenzjoni Ewropea.

Ghaldaqstant ir-rikorrenti titlob bil-qima lil din l-Onorabbli Qorti, prevja kwalsiasi dikjarazzjoni necessarja u opportuna, u ghar-ragunijiet premessi, sabiex jghidu l-intimati il-ghaliex m`ghandhiex :

1. Tiddikjara u tiddeciedi illi fil-konfront tar-rikorrenti l-operazzjonijiet tal-Artikolu 12 partikolarment l-Artikolu 12(2) tal-Kap. 158 tal-Ligijiet ta` Malta kif emendat bl-Att XXIII tal-1979, u bl-operazzjonijiet tal-Ligijiet vigenti qeghdin jaghtu dritt ta` rilokazzjoni lill-intimati Simpson u jirrenduha impossibli lir-rikorrenti li tirriprendi l-pussess tal-fond 123, Devon, Old College Street, Sliema proprjeta` taghha.

2. Konsegwentement tiddikjara u tiddeciedi illi qed jigu vjolati d-drittijiet tar-rikorrenti ghat-tgawdija tal-proprjeta` 123, Devon, Old College Street, Sliema bi vjolazzjoni tal-Artikolu 37 tal-Kostituzzjoni ta` Malta, u l-Ewwel Artikolu tal-Ewwel Protocol tal-Konvenzjoni Ewropea (l-Ewwel Skeda tal-Kap. 319 tal-Ligijiet ta` Malta) u b`hekk taghti lir-rikorrenti r-rimedji kollha li jidhrulha xierqa fis-sitwazzjoni.

3. Tiddikjara u tiddeciedi illi l-intimat Avukat Generali huwa responsabbli ghal kumpens u danni sofferti mir-rikorrenti b`konsegwenza tal-operazzjonijiet tal-Att XXIII tal-1979 li ma kreawx bilanc gust bejn id-drittijiet tas-sidien u dawk tal-inkwilini, stante illi ma jirriflettux is-suq u lanqas il-valur lokatizju tal-proprjeta` in kwistjoni ai termini tal-Konvenzjoni Ewropea u tal-Ligi.

4. Tillikwida l-istess kumpens u danni pekunjarji u non pekunjarji kif sofferti mir-rikorrenti ai termini tal-Ligi.

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

Bl-ispejjez, komprizi dawk tal-ittra ufficjali tas-26 ta` Settembru 2019 li kopja taghha qed tigi hawn annessa u mmarkata bhala Dokument G u bl-ingunzjoni tal-intimati ghas-subizzjoni.

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat ir-risposta li pprezenta l-Avukat Generali (illum l-Avukat tal-Istat) fil-25 ta` Novembru 2019 u li taqra :-

1. Illi safejn it-talbiet huma mibnija fuq l-Artikolu 37 tal-Kostituzzjoni ta` Malta huma nsostenibbli minhabba li f`dan il-kaz l-Istat ma kiseb jew ha l-ebda pussess ta` xi gid li huwa tar-rikorrenti.

2. Illi f`kull kaz it-talbiet kollha tar-rikorrenti mhumiex siewja ghaliex kemm taht il-Kostituzzjoni ta` Malta u kif ukoll taht il-Konvenzjoni Ewropea, l-Istat ghandu kull jedd li jwettaq dawk il-ligijiet li jidhrulu xierqa biex jikkontrolla l-uzu ta` proprjetà skont l-interess generali. F`dan is-sens huwa maghruf fil-gurisprudenza li l-Istat igawdi minn diskrezzjoni wiesa` sabiex jidentifika x`inhu mehtieg fl-interess generali u sabiex jistabilixxi liema huma dawk il-mizuri mehtiega ghal harsien tal-interess generali.

3. Illi fil-fehma tal-esponent mizuri socjali implimentati biex jipprovdu dar ta` abitazzjoni lin-nies fil-bzonn jaqghu fil-kappa tal-interess generali. Taht dan il-profil l-artikoli tal-Kap 158 tal-Ligijiet ta`

Malta mdahhla fis-sistema legali permezz tal-Att XXXIII tal-1979, li huma mahsuba biex jipprotegu persuni milli jigu mkeccija mid-dar tal-abitazzjoni taghhom f`gheluq it-terminu koncess lilhom fil-kuntratt tal-enfitewsi, ma jistghux jigu klassifikati li mhumiex legittimi jew mhux fl-interess generali. Ghalhekk meta wiehed iqis li l-emendi tal-1979 kienu gew introdotti bi skop li l-Gvern tal-gurnata jimplimenta l-politika tieghu socjali u ekonomika fil-qasam tal-akkomodazzjoni, l-esponent ma jarax li dawn l-artikoli ghandhom jitqiesu li jmorru kontra d-drittijiet tal-bniedem kif imharsin bil-Kostituzzjoni u l-Konvenzjoni Ewropea.

4. Illi stabbilit li l-Kapitolu 158 tal-Ligijiet ta` Malta ghandu ghanijiet legittimi u huwa fl-interess generali, b`dana li ma hemm xejn hazin li l-ligi Maltija tiddisponi li f`gheluq enfitewsi temporanja l-okkupant li jkun qed juza` dik id-dar bhala r-residenza tieghu ghandu jithalla fid-dar taht titolu ta` kera, allura safejn ir-rikorrenti qeghdin jitolbu dikjarazzjoni gudizzjali li l-ligi tikser il-Kostituzzjoni ta` Malta u l-Konvenzjoni Ewropea, tali talbiet mhumiex misthoqqa.

5. Illi l-esponent ma jaqbilx mar-rikorrenti li huma ma jistghux jiehdu lura l-post. Qari kontestwali tal-Artikolu 12(3) mat-tifsira ta` kerrej kif misjuba fl-Artikolu 2 tal-Kap 158 tal-Ligijiet ta` Malta, juruk li t-tigdid tal-kirja favur il-kerrej hija mizura temporanja u mhux perpetwa.

6. Illi dwar l-isproporzjon fil-kera mhallsa, l-esponent sinccerament ma jhossx li l-kera li qieghda tithallas fil-prezent hija xi kera daqstant sproporzjonata. Hawnhekk wiehed ma jridx jinsa li meta jkun hemm prezenti ghanijiet legittimi mehuda fl-interess pubbliku, bhalma hawn f`dan il-kaz, il-kumpens dovut lis-sidien minhabba l-indhil fit-tgawdija ta` gidhom, jigbed lejh ammont li jkun ferm inqas mill-valur shih tas-suq.

7. Illi maghdud ma` dan, meta wiehed jigi biex ikejjel il-mizien tal-proporzjonalità wiehed irid iqis ukoll li l-protezzjoni tal-kera taht il-Kapitolu 158 tal-Ligijiet ta` Malta mhijiex perpetwa izda tispicca mal-inkwilin u kif ukoll li t-tiswijiet kollha li jolqtu l-post imissu biss lill-inkwilin u mhux lis-sid.

8. Illi ghalhekk meta wiehed jizen dan kollu, il-konkluzjoni hija li anke dan il-parti tal-ilment tar-rikorrenti dwar in-nuqqas ta`

proporzjonalità mhuwiex gustifikat ghaliex ma hemm l-ebda ksur tal-ligi u b`hekk kull talba ghal rimedji mitluba minnhom mhix misthoqqa.

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 pprezentaw l-intimati Simpson fis-<u>27 ta` Novembru 2019</u> u li taqra :-

1. Illi, preliminarjament, jigi rilevat illi kontestwalment mal-prezenti proceduri, ir-rikorrenti pprezentat rikors iehor kontra l-istess intimati fil-Bord li Jirregola l-Kera - Rikors Nru. 246/19SG appuntat ghal 5 ta` Dicembru 2019 li ghalih qieghed hawn isir referenza u li kopja tieghu (minghajr id-dokumenti) qieghed jigi hawn anness bhala dok A - b`referenza ghall-okkupazzjoni taghhom tal-istess fond 123 "Devon" Old College Street Sliema. Filwaqt illi fil-prezenti rikors ir-rikorrenti qieghda titlob lill-Qorti fl-ewwel lok - ara talba 1 - tiddikjara u tiddeciedi illi l-intimati Simpson ghandhom id-"dritt ta` rilokazzjoni" tal-fond imsemmi skont il-ligijiet hemmhekk citati li "jirrenduha impossibli lir-rikorrenti li tirriprendi l-pussess" tal-istess fond proprjeta` taghha, fir-rikors quddiem il-Bord li jirregola l-Kera l-istess rikorrenti, `inter alia`, ukoll qieghda titlob "l-izgumbrament" tal-istess intimati- ara talba IV.

Ghalhekk, jidher illi fl-ewwel lok ir-rikorrenti ghandha tiddeciedi liema wahda mill-proceduri imsemmija tixtieq isegwi ghaliex minhabba il-konflitt evidenti imsemmi fit-talbiet rispettivi taghha fiz-zewg proceduri u l-kontrosens bejniethom, procedura wahda ma tistax timxi fl-istess hin tal-ohra billi - ghas-sahha tal-argument u minghajr pregudizzju ghall-esponenti - jekk il-Bord li Jirregola l-Kera kellu jilqa` it-talba hemmhekk imsemmija ta` zgumbrament, allura it-talbiet kontra l-intimat Avukat Generali ma jistghux iregu fl-interezza taghhom u kif hemmhekk intavolati.

2. Illi fil-mertu :

a. Il-prezenti proceduri jiffurmaw parti mill-katina shiha ta` proceduri gudizzjarji illi l-proprjetarja tal-fond de quo ittentat kontra l-esponenti matul medda ta` snin u fil-fatt l-ahhar procedura kien proprju r-rikors guramentat numru 423/2A13 JA li spicca biex mar

dezert. Fil-fatt l-esponenti qeghdin jaghmlu referenza ghall-atti tal-istess rikors guramentat u, ghal kull buon fini qeghdin hawnhekk formalment jitolbu illi l-atti kollha tal-kawza imsemmija nkluz il-provi hemmhekk prodotti jigu allegati u annessi ma` dawn l-atti u dana ghal fini ta` speditezza u ghal ekonomija tal-gjudizzju. Fil-fatt, kif jirrizulta mill-kontenut tal-istess atti kif komparati mal-atti prezenti jirrizulta bl-aktar mod car illi l-imsemmija Mariella Birdsall `is on a fishing trip`! Filwaqt illi fl-atti prezenti r-rikorrenti qieghda titlob - ara talba I - dikjarazzjoni minn dina l-Qorti fis-sens illi l-intimati Nicholas u Karyn Simpson ghandhom "dritt ta` rilokazzjoni" tal-fond 123 "Devon" Old College Street Sliema, fir-rikors guramentat 423/2013JA l-istess rikorrenti - ara talba 1. – tablet il-Qorti sabiex "tiddecciedi u tiddikjara li l-konvenuti qeghdin jokkupaw il-fond in kwistjoni minghajr ebda titolu validu fil-ligi"! Konferma ohra ta` dan l-agir tar-rikorrenti huwa il-fatt illi, kif fuq imsemmi, kontestwalment mal-prezenti proceduri ir-rikorrenti istitwiet proceduri ohra fil-Bord li Jirregola l-Kera - Rik. Nru. 246/2019SG appuntat ghal 5 ta` Dicembru 2019 u li ghalih qieghda hawn issir referenza. F`dawn l-atti Birdsall qieghda tiddikkjara l-intimati Simpson ghandhom "dritt ta` inkwilinat" skont il-ligi fuq il-fond de quo li pero` qieghda wkoll titlob l-izgumbrament taghhom f`certa cirkostanza.

Illi l-esponenti flimkien ma` wliedhom bhala familja jokkupaw b`titolu validu fil-ligi u cioe` dak ta` kera l-fond in kwistjoni u cioe` "Devon" 123 Old College Street Sliema u dana a tenur tal-Kapitolu 69 tal-Ligijiet ta` Malta.

b. Illi originarjament il-fond in kwistjoni kien okkupat minn nanniet materni taghha Francis u Evelyn konjugi Mallia b`titolu validu ta` lokazzjoni u bhala r-residenza ordinarja taghhom. Evelyn Mallia mietet fl-1 ta` Dicembru 1987 u, ftit wala l-mewt ta` nannitha billi nannuha Francis Mallia safa wahdu, l-esponenti Karyn Simpson (dakinhar Crockford) marret tghix ma` nannuha fil-fond de quo u dana bhala l-unika residenza ordinaria taghha. Fil-fatt, dan jirrizulta wkoll mir-Registru Elettorali ghaz-zmien relattiv - ara dokumenti esibiti fl-Atti tar-Rikors guramentat numru 423/2013JA. Ghalhekk, l-allegazzjoni kuntrarja fil-paragrafu 10 tar-Rikors odjern maghmula mir-rikorrenti hija ghal kollox gratuita u mhux veritiera.

c. Illi Francis Mallia miet fid-9 ta` Frar 1994 meta l-esponenti Karyn Simpson kienet ghadha tirrisjedi fil-fond in kwistjoni u t-titolu validu ta` lokazzjoni taghha fuq il-fond in kwistjoni gie ghal kollox sanat bid-dispozizzjonijiet tal-imsemmi Kapitolu 69 tal-Ligijiet ta` Malta li jiddefenixxi `kerrej` ukoll : "Fil-kaz ta` dar ta`abitazzjoni,

meta l-kerrej ma jhallix warajh armla jew armel, dawk il-membri tal-familja tal-kerrej li jkunu joqghodu mieghu fiz-zmien tal-mewt tieghu".

d. Illi fil-15 ta` Mejju 1999, l-esponenti Karyn imwielda Crockford izzewwget lil Nicholas Simpson u sa minn dakinhar il-fond in kwistjoni ikkostitwixxa u ghadu jikkostitwixxi d-dar matrimonjali u residenza unika ordinarja taghhom fejn jabitaw flimkien ma` wliedhom Andrew u Maryana.

e. Illi ghalkemm ir-rikorrenti Birdsall ilha snin twal tipprova b`kull mezz, kif fuq imsemmi, sabiex tisfratta lill-esponenti mill-fond in kwistjoni, hija matul dan iz-zmien kollu qatt ma indenjat ruhha tidher personalment quddiem ebda Qorti u/jew taghti xi xhieda guramentata kif lanqas qatt ma accettat il-kera tal-fond u/jew ippruvat tilhaq transazzjoni mal-esponenti li dejjem xtaqu jaghmlu dan. Fil-fatt, l-esponenti ghadhom sal-lum jiddepozitaw il-kera fir-Registru tal-Qorti tal-Magistrati (Malta) - ara kopja tal-ahhar cedola maghmula - Dok B.

Ghalhekk l-esponenti flimkien maz-zewg uliedhom imsemmija qeghdin jiddetjenu bhala inkwilini il-fond de quo u dana ai termini tal-Kap 69, Kap 158 u bl-operazzjoni tal-Ligijiet l-ohra kollha vigenti li kirja protetta ta` dina n-natura.

Ghaldaqstant it-talbiet tar-rikorrenti sa fejn jolqtu lill-intimati u b`mod specjali sa fejn jistghu l-istat ta` lokazzjoni protetta taghhom ghandhom jigu ghal kollox respinti kontra taghha bl-ispejjez.

Salv kull azjoni ta` danni u azzjoni ohra spettanti lill-esponenti kontra l-imsemmija Birdsall skont il-ligi.

Rat il-lista tax-xhieda, kif ukoll id-dokumenti li kienu prezentati mar-risposta.

Rat illi bhala effett tal-Avviz Legali 329 tal-2019, l-azzjoni gudizzjarja odjerna kompliet *ipso jure* mhux aktar kontra l-Avukat Generali izda kontra l-Avukat tal-Istat minghajr il-htiega ta` ebda formalita`.

Rat id-digriet li tat fl-udjenza tal-10 ta` Dicembru 2019 fejn kienet milqugha talba tar-rikorrenti ghall-hatra ta` perit tekniku sabiex jistma u jirrelata dwar il-valur lokatizju fis-suq tal-fond 123, Devon, Old College Street, Sliema, ghaz-zmien ta` bejn is-17 ta` Ottubru 1984 kull hames snin sal-31 ta` Dicembru 2018. Kien mahtur ghal dan l-iskop il-Perit Mario Cassar.

Rat ir-relazzjoni li pprezentat il-perit tekniku, liema relazzjoni kienet ikkonfermata bil-gurament mill-perit tekniku.

Semghet ix-xiehda u rat il-provi l-ohra li tressqu fil-kors tal-kawza, inkluzi r-risposti moghtija mill-perit tekniku ghad-domandi li saru in eskussjoni.

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. Xiehda

Mariella Birdsall xehdet illi ommha l-mejta Mary Pace Feroud kienet wirtet il-fond 123, Devon, Old College Street, Sliema, minghand il-genituri taghha Alfred u Concetta konjugi Aquilina. Il-fond imbaghad ghadda ghandha b`wirt minghand ommha.

Stqarret illi meta hija wirtet il-fond kien diga` okkupat minn Francis Mallia li jigi n-nannu tal-intimata Karyn Simpson. Francis Mallia kien mar ighix f`dar tal-anzjani fejn miet fid-9 ta` Frar 1994. Intant l-intimata Karyn Simpson née Crockford bdiet tghix fil-fond de quo fejn ghadha tirrisjedi sal-lum flimkien mal-familja taghha.

Qalet illi kienet ilha snin twal tipprova tiehu lura l-pussess battal tal-fond.

Karyn Simpson xehdet illi hija bdiet tghix fil-fond de quo flimkien man-nannu taghha Francis Mallia fl-1989. Francis Mallia miet fl-1994. Hija baqghet tghix fil-fond li eventwalment sar id-dar tar-residenza tal-familja taghha. Hija bdiet tiddepozita l-kera l-qorti fl-1994 wara li miet Francis Mallia.

Nicholas Simpson ikkonferma d-deposizzjoni tal-mara tieghu.

III. It-titolu

It-titolu ta` Mariella Birdsall sabiex tippromwovi din l-azzjoni jirrizulta ppruvat mid-dokumenti li pprezentat. It-titolu taghha ma kienx ikkontestat ; kif lanqas ma kienu kkontestati d-dokumenti li pprezentat bhala prova.

IV. It-talbiet

Waqt li tkun qeghda tqis it-talbiet, il-qorti sejra taghti konsiderazzjoni wkoll ghall-eccezzjonijiet li ressqu l-intimati.

1. L-ewwel (1) talba

Il-qorti qeghda tintalab tiddikjara u tiddeciedi li l-Art 12 tal-Kap 158, kif emendat bl-Att XXIII tal-1979, partikolarment is-subartikolu (2), filwaqt illi jaghti lill-intimati Simpson dritt ta` rilokazzjoni, kien jaghmilha mpossibbli lis-sid (f`dan il-kaz Mariella Birdsall) li tiehu lura l-pussess tal-proprjeta` taghha.

Il-qorti taghmel referenza ghas-sentenza li tat il-Qorti Kostituzzjonali fis-27 ta` Marzu 2020 fil-kawza fl-ismijiet **Matthew Said et v. Arthur Vella et** fejn ippronunzjat ruhha dwar talba identika. F`dik il-kawza, l-appell kien interpost mill-intimati Vella. It-tielet aggravju taghhom kien dwar id-dikjarazzjoni li ghamlet l-ewwel qorti : "*illi l-art. 12 tal-Kap. 158 jaghmilha impossibbli ghall-atturi li jiehdu lura l-pussess tal-propjeta` taghhom*."

Il-Qorti Kostituzzjonali qalet hekk :

17. Huwa minnu illi, ukoll taht l-art. 12 tal-Kap. 158, u bla ma tqis ukoll l-art. 12B, ma kienx ghal kollox "impossibbli" li s-sid jiehu lura l-propjeta`, ghalkemm x`aktarx difficli u kien hemm incertezza dwar meta. Ghalhekk kien ikun ahjar li kieku, flok esprimiet ruhha f`termini assoluti ta` impossibilita`, l-ewwel qorti esprimiet ruhha f`termini aktar relativi.

18. Ghalhekk l-aggravju sejjer jintlaqa` fis-sens illi l-parti tassentenza fejn jinghad "li jaghmilha impossibbli ghar-rikorrenti li jirriprendu pussess tal-propjeta` taghhom" tinbidel hekk : "li jaghmilha difficli u haga x`aktarx incerta ghall-atturi li jiehdu lura lpussess tal-propjeta` taghhom.

19. … il-konsiderazzjonijiet li ghamlet u r-rimedju li tat l-ewwel qorti kienu relativi ghaz-zmien u ghall-posizzjoni legali qabel ma dahlu fis-sehh l-emendi maghmula bl-Att XXVII tal-2018 u ghalhekk ma jolqtux il-jeddijiet tal-partijiet taht dawk l-emendi. Fil-fatt it-talbiet tal-atturi kienu dwar l-effett tal-art. 12 tal-Kap. 158 fuq id-drittijiet taghhom u mhux dwar l-effett tal-art. 12B li ddahhal fil-Kap. 158 bl-art. 4 tal-Att XXVII tal-2018, u ghalhekk id-drittijiet li jista` jkollhom il-partijiet taht l-art. 12B ma jintlaqtux bid-dikjarazzjoni tal-ewwel qorti.

Din il-qorti taghmel taghha dan il-pronunzjament.

Ghalhekk sejra tipprovdi dwar l-ewwel (1) talba, billi tiddikjara u tiddeciedi illi fil-konfront ta` Mariella Birdsall, mandanti tar-rikorrenti, l-operazzjonijiet tal-Artikolu 12 tal-Kap 158 tal-Ligijiet ta` Malta, kif emendat bl-Att XXIII tal-1979, partikolarment l-Artikolu 12(2), u bl-operazzjonijiet tal-ligijiet vigenti, qeghdin jaghtu dritt ta` rilokazzjoni lill-intimati konjugi Simpson li jaghmilha difficli u haga x`aktarx incerta ghall-istess Mariella Birdsall li tikseb lura l-pussess tal-proprjeta` taghha.

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

Il-qorti qeghda tintalab ukoll li tiddikjara u tiddeciedi li fir-rigward tal-fond 123, Devon, Old College Street, Sliema, Mariella Birdsall garrbet vjolazzjoni tal-jeddijiet fondamentali taghha ghat-tgawdija tal-proprjeta` hekk kif dawn huma mharsa bl-Art 37 tal-Kostituzzjoni u bl-Art 1 Prot 1 tal-Konvenzjoni.

Min-naha tar-rikorrenti noe, il-vjolazzjoni lamentata hija cirkoskritta ghaz-zmien ta` bejn is-<u>17 ta` Ottubru 1984 u l-31 ta` Dicembru 2018</u>.

a) <u>Ir-relazzjoni tal-perit tekniku</u>

Fil-kors tal-kawza kien mahtur perit tekniku li pprezenta relazzjoni.

Fir-relazzjoni teknika, saru dawn **<u>l-osservazzjonijiet</u>** :-

1. Il-fond huwa *terraced house* komposta minn zewg sulari u bejt. L-arja u s-sottoswol huma haga wahda mal-fond.

2. Il-fond huwa abitabbli, bis-servizzi tad-dawl u tal-ilma, u qed jinzamm fi stat tajjeb ta` manutenzjoni.

3. Wara li qies l-ghamla, id-daqs u l-istat attwali tal-post, il-perit tekniku kkonkluda illi l-fond ghandu valur fis-suq, jekk liberu u frank, ta` **<u>€315,000</u>**.

4. Fl-1985 il-valur lokatizju tal-fond kien ta` **<u>€1271</u>** fis-sena. L-istess fit-tliet snin ta` wara l-1985. Fil-kaz tal-1984, il-figura li nghatat kienet ta` €211 peress illi l-istima kellha tibda b`effett mis-17 ta` Ottubru 1984 (mhux tas-sena kollha).

5. Fl-2018 il-valur lokatizju tal-fond kien ta` **<u>€11,025</u>** fis-sena.

b) <u>L-eskussjoni tal-perit tekniku</u>

Il-perit tekniku wiegeb ghal domandi **in eskussjoni.**

Xehed illi l-fond ghandu *footprint* ta` cirka 118 m.k.

Meta mqabbel ma` proprjetajiet simili fil-lokalita`, il-valur lokatizju ta` kull metru kwadru huwa €3700.

Tenut kont tal-istat attwali tal-proprjeta`, fis-sens illi hija nieqsa minn finituri moderni, kienet applikata rata ta` €2500 ghal kull metru kwadru.

c) Il-piz probatorju tal-konsiderazzjonijiet teknici

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

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

Ghalkemm qorti mhix marbuta li taccetta l-konkluzjonijiet ta` perit tekniku kontra l-konvinzjoni taghha (*dictum expertorum numquam transit in rem judicata*), fl-istess waqt dak *ma jfissirx pero` illi qorti dan tista` taghmlu b` mod legger jew kapriccjuz. Il-*

*konvinzjoni kuntrarja taghha kellha tkun ben informata u bazata fuq ragunijiet li gravament ipoggu fid-dubju dik l-opinjoni teknika lilha sottomessa b` ragunijiet li ma ghandhomx ikunu privi mill-konsiderazzjoni tal-aspett tekniku tal-materja taht ezami* ("**Grima v. 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 v. Mercieca**" **–** Qorti tal-Appell – 6 ta` Ottubru 1999 **;** "**Saliba v. Farrugia**" – Qorti tal-Appell – 28 ta` Jannar 2000 u "**Calleja noe v. 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 v. 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 mill-perit tekniku, il-partijiet ma talbux il-hatra ta` periti addizzjonali. Saru domandi in eskussjoni mill-intimati.

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

d) **L-Art 37 tal-Kostituzzjoni**

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

Is-subartikolu (1) tal-Art 37 tal-Kostituzzjoni 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.

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

Bosta kienu fl-ghadd id-drabi fejn il-qrati taghna qiesu jekk limitazzjoni fit-tgawdija ta` proprjeta` tistax tigi ekwiparata ma` tehid forzuz kif kontemplat fl-Art 37 tal-Kostituzzjoni.

Il-linja traccjata fid-decizjonijiet tal-Qorti Kostituzzjonali li huma anqas ricenti fiz-zmien (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 **<u>Mary Anne Busuttil v. Tabib John Cassar et</u>** tal-31 ta` Ottubru 2014) kienet illi bl-applikazzjoni tal-emendi ghall-Kap 158 li saru bl-Att XXIII tal-1979 il-proprjeta` baqghet tas-sid u kwindi ma kienx hemm tehid forzuz li jaghti dritt ghal kumpens ghaliex dak li sehh kien kontroll fl-uzu tal-proprjeta` li mhuwiex tehid forzuz.

Fl-istess waqt kif inghad fis-sentenza li tat il-Qorti Kostituzzjonali fid-29 ta` Marzu 2019 fil-kawza fl-ismijiet **<u>Rebecca Hyzler et vs 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 jidher illi 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 qeghda 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 (op. cit.)</u> ; <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 l-gurisprudenza l-aktar ricenti.

Il-qorti qeghda <u>tichad</u> kull fejn kien eccepit li mhuwiex applikabbli l-Art 37 tal-Kostituzzjoni ghall-kaz odjern.

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

Safejn it-tieni talba tirreferi ghal allegata vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni, l-eccezzjonijiet tal-intimati huma diretti sabiex jikkontestaw il-pretensjoni tar-rikorrenti abbazi ta` din id-disposizzjoni li tipprovdi hekk :-

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

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

Izda d-disposizzjonijiet ta` qabel ma ghandhom b`ebda mod inaqqsu d-dritt ta` Stat li jwettaq dawk il-ligijiet li jidhrulu xierqa biex jikkontrolla l-uzu tal-proprjeta skond l-interess

generali jew biex jizgura l-hlas ta` taxxi jew kontribuzzjonijiet ohra jew pieni.

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

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

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

Dak li ried jikseb il-legislatur bl-Att XXIII tal-1979 kien kontroll tal-uzu tal-proprjeta`.

Huwa pacifiku li l-Istat ghandu margini ta` apprezzament wesghin meta jigi biex jintroduci legislazzjoni li tkun intiza sabiex fl-interess pubbliku jkunu ndirizzati problemi fil-qasam tal-akkomodazzjoni ghall-fini residenzjali.

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

Ghandu 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"* 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` **Amato Gauci v. Malta** 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 ***Sporrong and Lönnroth*** *cited above, §§ 69-74, and* ***Brumărescu v. Romania*** *[GC], no. 28342/95, § 78, ECHR 1999-VII).*
57. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State`s

*interference the person concerned had to bear a disproportionate and excessive burden (see **__James and Others__**, cited above, § 50; **__Mellacher and Others__**, cited above, § 48, and **__Spadea and Scalabrino v. Italy__**, judgment of 28 September 1995, § 33, Series A no. 315-B).*

*58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. 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 taghha tat-22 ta` Novembru 2011 fil-kaz ta` **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, bil-bosta matul is-snin kienu d-decizjonijiet tal-qrati taghna fejn kienet dikjarata vjolazzjoni. Taghmel referenza biss ghal xi whud fost hafna ohra :

<u>Dr. Cedric Mifsud et v. l-Avukat Generali et</u>
25 ta` Ottubru 2013 ;

<u>Angela sive` Gina Balzan v. L-Onorevoli Prim Ministru et</u>
7 ta` Dicembru 2012 ;

<u>AIC Joseph Barbara et v. L-Onor Prim Ministru et</u>
31 ta` Jannar 2014 ;

<u>Maria Ludgarda Borg et v. Rosario Mifsud et</u>
29 ta` April 2016 ;

<u>Concetta sive` Connie Cini v. Eleonora Galea et</u>
31 ta` Jannar 2014 ;

<u>Robert Galea v. Avukat Generali et</u>
7 ta` Frar 2017 ;

<u>Rose Borg v. Avukat Generali et</u>

11 ta` Lulju 2016 ;

id-diversi kawzi bl-*occhio*
Josephine Azzopardi et v. L-Onor Prim Ministru et
25 ta` April 2018 ;

Sergio Falzon et v. Alfred Farrugia et
30 ta` Jannar 2018.

Il-lista tad-decizjonijiet hija twila u facilment traccjabbli. Fl-assjem taghhom dawn id-decizjonijiet indirizzaw il-qofol tal-kwistjoni u kellhom piz sinjifikanti li wassal ghal bidla fil-legislazzjoni.

Fl-istess waqt tghid ukoll li l-bdil fil-legislazzjoni kien tardiv.

Min-naha tal-Istat matul is-snin kien hemm tkaxkir tas-saqajn evidenti li wassal ghal pronunzjamenti wiehed wara l-iehor mill-ECtHR kontra Malta.

Tishaq illi fil-qasam tal-harsien tal-jeddijiet fondamentali tal-persuna, l-espressjoni : *meglio tardi che mai* : ma tregix. Tista` tkun ta` konfort ghall-gejjieni ; certament pero` ma tghoddx ghall-imghoddi.

Fejn si tratta ta` ksur ta` jeddijiet fondamentali, l-Istat ghandu l-obbligu li jirrimedja, anke b`legislazzjoni, fil-pront u bla dewmien, ladarba din taghna hija socjeta` demokratika fondata fuq is-saltna tad-dritt u l-gustizzja.

f) Risultanzi

Fil-mertu dak li se jinghad ighodd kemm ghall-Art 37 tal-Kostituzzjoni kif ukoll ghall-Art 1 Prot 1 tal-Konvenzjoni li t-tnejn jikkostitwixxu l-bazi tal-ilment ta` Mariella Birdsall.

Fil-kaz tal-lum, ic-cens ghal 17 sena beda jiddekorri mit-18 ta` Ottubru 1967 u ghalaq fis-17 ta` Ottubru 1984. Waqt li kien ghaddej il-kuntratt, dahal fis-sehh l-Att XXXIII tal-1979 fejn *inter alia* dahal l-Art 12 fil-Kap 158.

Bl-applikazzjoni tas-subartikoli (2) u (3) tal-Art 12, meta cens temporanju ma jkunx jeccedi t-30 sena, fi tmiem il-kuntratt, ic-censwalist ghandu l-ghazla li jikkonverti it-titolu tieghu *ope legis* ghal kera dment li jkun cittadin Malti, li l-fond ikun id-dar ta` abitazzjoni tieghu, u li jhallas kera li tasal sad-doppju li kien ihallas bhala cens bil-quantum tal-kera ikun determinat skont indici ta` inflazzjoni bil-modalita` stabbilita fil-ligi.

Kemm kellha tithallas kera lis-sid bhala korrispettiv talli t-titolu sar lokazzjoni ma thalliex ghall-kontrattazzjoni libera ta` bejn is-sid u l-inkwilin (gia` censwalist) izda kien determinat mil-ligi stess. B`hekk ghalkemm meta nghatat il-koncessjoni, il-partijiet kienu liberi illi jikkontrattaw il-pattijiet u kondizzjonijiet li dehrilhom, inkluz ukoll l-ammont tal-canone u z-zmien tal-koncessjoni, din il-liberta` twarrbet mil-legislatur bis-sahha tal-Att XXIII tal-1979 fil-mument tal-konverzjoni tat-titolu ghal kera.

L-intervent legislattiv gab mizura ta` kontroll li kienet intiza sabiex tkun evitata sitwazzjoni fejn cittadin Malti li kien qed jokkupa fond bhala residenza ordinarja tieghu f`gheluq terminu ta` cens jew subcens temporanju ma jispiccax bla saqaf fuq rasu ghaliex f`gheluq il-koncessjoni enfitewtika ma jkunx jiflah ihallas il-canone pretiz mis-sid jew ghal xi raguni ohra ma jkunx jista` jasal mas-sid.

Is-sitwazzjoni ekonomika u socjali ta` Malta fiz-zmien li sar l-Att XXIII tal-1979 kienet tirrendi necessarju l-intervent tal-Istat sabiex jipprova johloq bilanc bejn interessi konfliggenti.

It-tkattir tal-gid mal-medda tas-snin wera pero` li dak l-intervent legislattiv, ghalkemm kellu skop tajjeb, ma kienx baqa` joffri bilanc adegwat. Anzi holoq sproporzjon u zvantagg konsiderevoli kontra s-sidien. Il-kera li s-sidien setghu jippercepixxu bl-effett tal-Art 12(2) tal-Kap 158, imqabbla mal-kera fis-suq hieles, oggettivament bdiet issir baxxa wisq, u sena wara l-ohra zdiedet id-disparita` kontra s-sidien.

Dawn l-ahhar ghoxrin sena, specjalment wara d-dhul ta` Malta fl-UE, gabu maghhom influss ta` haddiema barranin li riedu jahdmu Malta. Dawn kienu jehtiegu postijiet fejn jirrisjedu. Dan wassal ghal zvilupp qawwi ta` bini gdid ghal skopijiet ta` kera. Is-settur tal-bini residenzjali gab ritmu mghaggel ta` zvilupp u kompetizzjoni fil-prezzijiet mhux lejn il-baxx izda bil-maqlub lejn l-gholi.

Ghalkemm il-qaghda ekonomika tal-pajjiz certament mhijiex ward u zahar ghal kulhadd, specjalment ghal dawk li huma vulnerabbli jew zvantaggjati jew li jinsabu taht nett fl-istrati socjali tas-socjeta` taghna, jibqa` l-fatt illi hija bil-wisq ahjar minn dik li kienet fl-1979, meta l-Istat hass il-htiega li jaghmel l-Att XXIII tal-1979.

Il-qofol tal-ilment tar-rikorrenti huwa li bl-applikazzjoni tal-Art 12 tal-Kap 158 ghas-sitwazzjoni taghha hemm ksur car tal-jeddijiet fondamentali taghha, ghaliex jirrizulta sproporzjon qawwi kontra taghha fil-kera li tista` tippercepixxi li kieku t-tgawdija tal-propjeta` kellha tithalla f`idejha minghajr l-indhil ingustifikat tal-Istat.

Mhuwiex ikkontestat il-jedd tal-Istat illi jikkontrolla, b`legislazzjoni, l-uzu tal-proprjeta` fl-interess pubbliku. Fl-istess waqt, l-Istat ghandu l-obbligu li jassikura li bl-applikazzjoni ta` dik il-legislazzjoni, jinzamm bilanc u proporzjonalita`.

Matul iz-zmien anke l-legislatur gharaf li dak li wasslu biex jintervjeni fl-1979 kien jehtieg ripensament minhabba bidla lejn l-ahjar fil-qaghda ekonomika u socjali tal-pajjiz.

Il-qorti tqis li bl-emendi tal-2009 u tal-2010 ghall-Kap 16, il-kera kellha tizdied kull tlett snin (mhux kull 15-il sena kif kien l-istat tad-dritt bl-Att XXIII tal-1979). Cio` nonostante xorta wahda dawk l-emendi ma sehhilhomx jilhqu dak il-bilanc u dak il-proporzjon li huwa rikjest mill-Art 1 tal-Prot 1 tal-Konvenzjoni, ghaliex ghalkemm bl-emendi tal-2009 kien hemm titjib ghas-sid meta mqabbel mas-sitwazzjoni precedenti, is-sid baqa` kostrett joqghod ghal quantum ta` zieda dettat mil-ligi li ddeterminat mhux biss kemm ghandu jkun l-awment izda anke kull meta. Qabel id-dhul fis-sehh tal-emendi, ir-rikorrent kien ilu s-snin igarrab lezjoni li l-Art 1 Prot 1 tal-Konvenzjoni ma jridx li jkun.

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*".

Fis-sentenza tas-27 ta` Marzu 2015 fil-kawza "**Ian Peter Ellis et vs Avukat Generali et**, 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."*

Il-qorti tishaq fuq il-htiega li 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 kollha tal-partijiet sabiex ikun accertat jekk bhala konsegwenza tal-indhil mill-Istat, il-persuna tkun tghabbiet b`piz eccessiv u sproporzjonat.

Fil-kaz tal-lum, jirrizulta li r-rikorrenti garrbet sproporzjon lesiv ghall-jeddijiet fondamentali taghha fit-tgawdija tal-proprjeta` taghha.

Ghalhekk filwaqt li qeghda tilqa` t-tieni talba fis-sens li ssib li r-rikorrenti garrbet vjolazzjoni tal-Art 37 tal-Kostituzzjoni u tal-Art 1 Prot 1 tal-Konvenzjoni, u kwindi qeghda tichad l-eccezzjonijiet tal-intimati fejn dawn il-vjolazzjonijiet kienu kkontestati.

g) <u>Rimedji xierqa</u>

Fl-ambitu tat-tieni talba, ir-rikorrenti talbet li tinghata **<u>rimedji xierqa</u>**.

Wara li qieset l-ewwel eccezzjoni tal-intimati Simpson, id-Dok A li pprezentaw masr-risposta (ara : fol 54 et seq) u l-fatt li l-vjolazzjoni lamentata kienet cirkoskritta ghaz-zmien ta` bejn is-<u>17 ta` Ottubru 1984 u l-31 ta` Dicembru 2018</u> il-qorti hija tal-fehma li r-rimedju xieraq ghandu jkun kostitwit mill-ghoti ta` kumpens fl-ghamla ta` **<u>danni pekunjarji u danni morali</u>**.

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

Il-qorti qeghda tkun mitluba tiddikjara u tiddeciedi li l-Avukat Generali (illum l-Avukat tal-Istat) huwa responsabbli ghall-hlas ta` kumpens in vista tal-vjolazzjoni subita tal-jeddijiet fondamentali ta` Mariella Birdsall.

L-Istat (rapprezentat mill-Avukat tal-Istat) huwa responsabbli ghall-promulgazzjoni ta` ligi. Ghalhekk jekk bl-applikazzjoni ta` ligi ssehh vjolazzjoni tal-jeddijiet fondamentali tal-persuna, l-Avukat tal-Istat ghandu jaghmel tajjeb ghall-vjolazzjoni tal-jeddijiet fondamentali li din il-qorti accertat (*supra*) li garrbet Mariella Birdsall.

Il-qorti sejra <u>tilqa</u>` t-tielet talba.

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

Il-qorti qeghda tintalab tillikwida kumpens u danni.

i) <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 **Ian Peter Ellis et v. Avukat Generali et** deciza fl-24 ta` Gunju 2016).

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

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

Decizjoni li kkunsidrat fid-dettall din il-kwistjoni hija s-sentenza li tat il-Qorti Kostituzzjonali fil-kawza **Raymond Cassar Torregiani et v. Avukat Generali et** deciza fid-29 ta` April 2016.

Il-qorti qalet hekk :-

> "*Dwar il-quantum tal-kumpens dovut issir referenza ghas-sentenza ta` din il-Qorti* ***Igino Trapani Galea Feriol pro et noe et V Kummissarju tal-Artijiet et*** *deciza fil-31 ta` Ottubru 2014, fejn f` materja ta` komputazzjoni ta` kumpens ghal lezjoni ta` dritt fondamentali sancit fl-artikolu konvenzjonali fuq citat gie osservat:*
>
> *"Rigward il-quantum tal-kumpens stabbilit mill-ewwel Qorti, din il-Qorti tosserva fl-ewwel lok li kull kaz ghandu jigi trattat u deciz fuq il-fattispecie tieghu. Barra minn hekk, jekk il-Qorti Ewropeja hasset li f` certi kazijiet kellha taghti kumpens f` ammont inferjuri ghal dak li nghata lir-rikorrenti mill-ewwel Qorti, ma jfissirx li allura l-Qrati Maltin tilfu l-awtonomija taghhom b` mod li bilfors kumpens li jinghata ikun f` ammont vicin dak li taghti l-Qorti Ewropeja. Fil-kaz odjern l-ewwel Qorti hadet in konsiderazzjoni l-fatturi kollha li jimmilitaw kemm favur kif ukoll kontra r-rikorrenti u deherilha li l-kumpens xieraq li ghandha taghti f` dan il-kaz ikun fl-ammont ta` hamsa u ghoxrin elf Euro (EUR 25,000). Hija kkonsidrat id-dewmien da parti tar-rikorrenti li jiehdu l-proceduri opportuni, il-valur tal-immobbli, iz-zmien tant twil li r-rikorrenti ilhom privati mill-godiment tal-proprjeta` taghhom minghand ma nghata ebda kumpens, l-istat tal-fond u l-ezistenza tal-fattur tal-interess pubbliku. Ma` dawn*

ghandu jigi senjalat il-fatt li qabel l-ispossessament tal-proprjeta` taghhom ir-rikorrenti kellhom permess mill-Bord kompetenti sabiex jizviluppaw il-fond."

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

Meta jinghata kumpens fi procediment ta` din ix-xorta, ghandu jinghata konsiderazzjoni l-ghan li jkun immotiva l-mizura u cioe` l-interess pubbliku (ara : QK : **<u>Carmen Cassar v. Direttur ghall-Akkomodazzjoni Socjali et</u>** : 12 ta` Lulju 2011).

Issir referenza ghas-sentenza tal-Qorti Kostituzzjonali tal-31 ta` Jannar 2014 fil-kawza : **<u>Concetta sive Connie Cini v. Eleonora Galea et</u>** : fejn inghad :-

"25. F`materja ta` kumpens il-gurisprudenza patria kif ukoll dik tal-Qorti Ewropeja identifikat is-segwenti principji :

"The Court would reiterate that compensation terms under the relevant legislation may be material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate balance on applicants. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference." [ECHR 31443/96 para.176 Bronoiswki v. Poland, decided 22 June 2004].

26. Fil-kawza Louis Apap Bologna v. Calcidon Ciantar et deciza 24 Frar 2012, din il-Qorti osservat hekk:

"F`kazijiet bhal dawn il-kumpens xieraq ghandu jiehu in konsiderazzjoni l-ghan legittimu li mmotiva l-mizura tar-rekwizizzjoni u li l-kumpens jista` jkun anqas mill-kumpens shih li altrimenti jkun dovut skond il-kriterji tas-suq. Il-Qorti Ewropea fil-kazijiet ta` Edwards v Malta u Ghigo v Malta 17 Lulju 2008] ddecidiet li :

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

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

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

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

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

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

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

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

33. Kif gja` osservat minn din il-Qorti fil-kawza Josephine Bugeja v. Avukat Generali, deciza 7 Dicembru 2009, ghad-determinazzjoni tal-fattur tal-proporzjonalita` ghandu jittiehed kont tal-effetti legali u prattici li l-applikazzjoni tal-

artikolu ser iggib mieghu. Dan l-ezami ghandu jsir mhux in vacuo, izda skont il-fattispecje tal-kaz. "Huwa l-ezercizju ta` dak id-dritt fil-prattika u b`mod konkret, u mhux l-ezistenza tieghu fl-astratt, li jista` bhal fil-kaz in ezami, talvolta jammonta ghal-lezjoni ta` dritt fondamentali" [para.45]. Jigi ribadit li l-Qorti ghandha thares lejn l-effett prattiku tas-sitwazzjoni, peress li, kif sostnut mill-Qorti Ewropeja, il-konvenzjoni tiggarantixxi drittijiet li huma "practical and effective" biex jigi stabbilit jekk is-sitwazzjoni fil-fatt tammontax ghal esproprijazzjoni de facto."

Fis-sentenza ta` din il-qorti diversament presjeduta tas-7 ta` Frar 2017 fil-kawza : **Robert Galea v. Avukat Generali et**, inghad :-

"Illi ghal dak li jirrigwarda t-talba tal-kumpens il-Qorti tqis li din it-talba hija l-effett naturali tas-sejbien tal-ksur tal-jedd invokat. Huwa mizmum li, ladarba Qorti ssib li r-rikorrent garrab ksur tal-jedd tieghu kif imhares bl-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, ma huwiex bizzejjed li tieqaf b`semplici dikjarazzjoni bhal dik. Ghalkemm ir-rimedju xieraq mhuwiex lanqas u tabilfors il-kundanna ta` hlas ta` kumpens bhallikieku l-haga li dwarha sehh il-ksur kienet inbieghet, xi ghamla ta` kumpens huwa misthoqq u doveruz. Hawn ukoll, il-Qorti qieghda zzomm quddiem ghajnejha li l-ksur imgarrab mir-rikorrent jikkonsisti f`indhil dwar u mhux f`tehid tal-gid tieghu;

Illi b`zieda ma` dan, ir-rikorrent jitlob ukoll il-hlas tad-danni "ai termini tal-artikolu 41 tal-Konvenzjoni Ewropeja";

Illi l-Qorti tibda biex tghid li l-kumpens misthoqq lill-persuna wara li jkun instab li din garrbet ksur ta` xi jedd fondamentali taghha ma huwiex l-istess bhal-likwidazzjoni u hlas ta` danni mgarrba. Minbarra dan, ir-rikorrent ma jistax jistrieh fuq l-ghoti ta` kumpens taht l-artikolu minnu msemmi tal-Konvenzjoni. Fl-ewwel lok, il-Konvenzjoni taghmel mil-ligijiet ta` Malta safejn id-dispozizzjonijiet taghha kienu inkorporati fil-Kapitolu 319 tal-Ligijiet ta` Malta. L-imsemmi artikolu ma kienx hekk inkorporat. Fit-tieni lok, huwa maqbul li d-dispozizzjonijiet ta` dak l-artikolu jghoddu ghall-Qorti ta` Strasbourg u mhux ghall-qrati domestici tal-Pajjizi Membri tal-Kunsill tal-Ewropa (Ara Kost. 30.9.2016 fil-kawza fl-ismijiet Maria Stella Azzopardi Vella et vs Avukat Generali et);

Illi b`daqshekk ma jfissirx li t-talbiet tar-rikorrent dwar l-ghoti ta` rimedju mhumiex sejrin jintlaqghu. Jekk ma jistghux jintlaqghu talbiet ghal-likwidazzjoni ta` kumpens u danni bis-sahha tal-imsemmi artikolu 41 tal-Konvenzjoni, jista` u sejjer jinghata rimedju taht il-kriterji tal-ghoti ta` rimedju bhal dan minn din il-Qorti fis-setghat u kompetenza attwali taghha (Kost. 17.12.2010 fil-kawza fl-ismijiet Philip Grech pro et noe vs Direttur tal-Akkomodazzjoni Socjali et).

Ghalhekk, il-Qorti tasal ghall-fehma li t-tieni rimedju mitlub mir-rikorrenti fit-tielet, ir-raba` u l-hames talbiet tieghu ma jisthoqqlux jintlaqa`, imma sejjer jinghata kumpens taht it-tieni talba tieghu;

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

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

Istat u mhux ic-cittadin li, min-naha tieghu, ghandu jedd jinqeda biha fil-parametri taghha u safejn din ma titqiesx li qieghda tikser il-jedd fondamentali tas-sid;

Illi kif inhu mizmum u mghallem "fil-kaz ta` ligi leziva tad-drittijiet konvenzjonali jew kostituzzjonali, huwa l-Istat u mhux ic-cittadin li ghandu jirrispondi. Ghax huwa principalment l-obbligu tal-Istat, u mhux tal-inkwilin, li jassigura li d-drittijiet fondamentali tas-sid ma jinkisrux" (Kost. 24.2.2012 fil-kawza fl-ismijiet Louis Apap Bologna vs Kalcidon Ciantar et; u Kost. 6.2.2015 fil-kawza fl-ismijiet Sean Bradshaw et vs L-Avukat Generali et);

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

Fis-sentenza ta` din il-qorti diversament ippreseduta moghtija fit-30 ta` Jannar 2018 fil-kawza fl-ismijiet **Sergio Falzon et v. Alfred Farrugia et** (u konfermata b`sentenza tal-Qorti Kostituzzjonali tal-14 ta` Dicembru 2018) inghad :-

Illi fil-kaz odjern il-Qorti taqbel li dikjarazzjoni ta` ksur mhijiex sodisfacenti in vista tal-fatt li skont ir-rapport peritali, l-esponenti ghamlu telf pekunjarju konsiderevoli u ser ikomplu jaghmlu telf bl-applikazzjoni tal-ligi sakemm il-fond jintradd lura. Ghaldaqstant taqbel mar-rikorrenti li dikjarazzjoni ta` ksur mhijiex idonea sabiex terga` issir reintegrazzjoni tal-proporzjonalita` u tpoggi lir-rikorrenti fl-istatus quo ante ;

…

Ghal dak li jirrigwarda kumpens bhala rimedju ghad-danni non-pekunjarji ghas-sejbien ta` lezjoni tad-dritt fondamentali tar-rikorrenti kawza tal-applikazzjoni f`dan il-kaz tal-Artikolu 12(2) tal-Kap. 158, ir-rikorrenti ghandhom jedd ghalih meta tqis li ilhom mis-sena 1985 (izjed minn tletin sena) ma jiehdu

kumpens gust ghall-fond taghom, u dan minkejja l-liberalizzazzjoni tas-suq fis-sena 1995 u li l-iskop legittimu sfuma mat-trapass taz-zmien. Tali jedd ghandu jigi kkalkulat mid-data tat-terminazzjoni tal-koncessjoni subenfitewtika, cioe`, mis-sena 1985.

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

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

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

Ikkonsidrat li

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

Izda dik il-Qorti kkonsidrat ukoll il-fattur li r-rikorrenti damu milli jipprevalu ruhhom mir-rimedju kostituzzjonali kif ukoll kkonsidrat ir-rimedju li kien ser jinghata b`dak il-gudizzju, li permezz tieghu l-intimati ma jistghux ikomplu aktar jistriehu fuq l-Att XXIII.1997 biex jibqghu jokkupaw il-fond de quo. Din il-Qorti ma taqbilx li ghandu jkun hemm tnaqqis dwar id-dewmien. (Dwar id-dewmien vide contra s-sentenza tal-Qorti

Ewropea fil-kaz fl-ismijiet "Apap Bologna vs Malta" deciza r fit-30 ta` Novembru 2016 fejn irrimarkat:-

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

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

(ara wkoll : 2 ta` Marzu 2018 : QK : **<u>Thomas Cauchi et v. Avukat Generali et</u>**)

Fid-decizjoni **<u>Cassar v. Malta</u>** 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. <u>Damage</u>

84. The applicants claimed 1,260,996 euros (EUR) in respect of pecuniary damage. That sum reflected (i) the rent due to them from 1998 to 2015 amounting to EUR 730,330 calculated on the basis of the valuation of an estate agent at EUR 3,500 per month, (EUR 42,000 annually) in 2015, projected backwards to the year 1998 based on two indices

for property prices published by the Central Bank of Malta – by means of example, such projections show the rents for the respective years as follows: EUR 6,857 annually in 1988, EUR 18,476 in 1998 and EUR 41,649 in 2008; (ii) EUR 502,006 in simple interest at 8% (capped so as not to exceed the rent of a particular year); and (iii) EUR 28,660 (supported by an architect`s report) in repairs needed to the property since the tenant had failed to take adequate care of the property. In this connection the applicants noted that as things stand, they will remain suffering the effects of the violation even after the Court judgment, for an unspecified amount of years to come. In this light they also considered that their claim of EUR 54,000 in respect of non-pecuniary damage already suffered, representing EUR 2,000 annually since 1988, should be upheld in full.

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

86. The Court notes that the applicants are entitled to compensation in respect of the loss of control, use, and enjoyment of their property from around 2000 to date. The Court notes on the one hand that the rent suggested by the

Government is not based on any valuation or other criteria, and appears to be a simple division of an aleatory sum they proposed. On the other hand, while the applicant`s valuation is based on an estate agent, and was not accompanied by an architect`s report, the domestic court found that EUR 3,000 as opposed to the EUR 3,500 alleged by the applicants appeared reasonable. However, the Court also notes that the comparators used by the estate agent refer to renovated buildings with high quality finishing and furnishing. While no information has been submitted as to the quality of the interior of the applicants` property the Court observes that the applicants claim that their property needs repairs as it has not been well taken care of (see paragraph 84 above). Thus, the latter cannot be considered to be in the same condition and at the same rental value as the former. Therefore, the Court considers that the valuation submitted by the applicants is on the high side, but may nonetheless provide a relevant indication and workable basis.

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

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

real sale value. In consequence it must be accepted that the limitations on the property affected the purchase price.

*89. The Court reiterates that an award in respect of pecuniary damage under Article 41 of the Convention is intended to put the applicant, as far as possible, in the position he or she would have enjoyed had the breach not occurred (see, mutatis mutandis, **Kingsley v. the United Kingdom** [GC], no. 35605/97, § 40, ECHR 2002-IV). It therefore considers that interest should be added to the award in order to compensate for the loss of value of the award over time (see **Runkee and White v. the United Kingdom**, nos. 42949/98 and 53134/99, § 52, 10 May 2007). As such, the interest rate should reflect national economic conditions such as levels of inflation and rates of interest (see, for example, **Akkuş v. Turkey,** 9 July 1997, Reports of Judgments and Decisions 1997-IV, § 35; **Romanchenko v. Ukraine**, no. 5596/03, 22 November 2005, § 30, unpublished; and **Prodan v. Moldova**, no. 49806/99, § 73, ECHR 2004-III (extracts)). It notes that the applicants claimed the statutory rate of eight per cent, and the Government`s objection in that respect. The Court considers that a rate of five per cent interest is more realistic (see **Amato Gauci**, cited above, § 78, and **Ghigo v. Malta** (just satisfaction), no. 31122/05, § 20, 17 July 2008) thus a one-off payment at 5% interest should be added (see **Anthony Aquilina**, cited above, § 72, in fine).*

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

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

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

Fuq l-istess linja kienet id-decizjoni li tat l-ECtHR fil-kaz ta` **Portanier v. Malta** fis-27 ta` Novembru 2019 (App. 55747/16) fejn inghad :-

"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."

ii) <u>Likwidazzjoni</u>

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

Il-qorti sabet vjolazzjoni kemm tal-Art 37 tal-Kostituzzjoni kif ukoll tal-Art 1 Prot 1 tal-Konvenzjoni.

Ghalkemm id-diskrepanza bejn il-kera attwalment percepita (bl-applikazzjoni tal-Art 12 tal-Kap 158) u l-valur lokatizju li l-fond igib fis-suq hieles hija il-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.

Kien rilevat aktar kmieni li d-danni li jigu likwidati fi procediment kostituzzjonali u/jew konvenzjonali mhumiex danni civili li jigu likwidati f`kawzi kondotti fi procedimenti ordinarji ghaliex huma danni li jigu likwidati minhabba vjolazzjoni accertata tal-jeddijiet fondamentali tal-persuna. Propju ghalhekk 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.

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

a) <u>Danni pekunjarji</u>

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

Fejn si tratta ta` danni <u>pekunjarji</u> din il-qorti hija tal-fehma illi, tenut kont 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, fl-ahjar interess tal-gustizzja, il-qrati taghna ghandhom ifasslu <u>linji gwida</u> ghall-fini ta` likwidazzjoni, bla ma jiddipartixxu mill-principju li kull kaz ghandu jkun gudikat fuq il-fatti u cirkostanzi partikolari tieghu.

<u>Il-qorti sejra tghid fil-fehma taghha x`ghandhom ikunu l-linji gwida u kif ghandhom jigu applikati ghall-kaz prezenti</u>.

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

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

Fir-relazzjoni peritali hemm inkluza tabella (a fol 79) li turi ghaz-zmien ta` bejn is-17 ta` Ottubru 1984 u l-31 ta` Dicembru 2018 il-valur lokatizju fis-suq tal-fond 123, Devon, Old College Street, Sliema, kien ilahhaq total ta` **<u>€141,499</u>**.

Aktar kmieni, il-qorti ddikjarat li kienet sejra taghmel taghha dak li rrizulta mir-relazzjoni.

Il-figura ta` <u>€141,499</u> 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>**

i. <u>Ghandha titnaqqas il-kera li kienet mhallsa u accettata fiz-zmien in kwistjoni</u>

Wara li ghalaq il-kuntratt ta` cens temporanju fis-17 ta` Ottubru 1984, il-fond baqa` jigi okkupat minn Francis u Evelyn konjugi Mallia li kienu n-nanniet tal-intimata Simpson b`titolu ta` kera bis-sahha tal-Att XXIII tal-1979. Hemm kontestazzjoni netta bejn ir-rikorrenti u l-intimati Simpson dwar meta l-intimata Simpson bdiet tirrisjedi fil-post u wara mal-familja taghha. **<u>Ghall-fini tal-ezercizzju prezenti</u>**, din il-kontestazzjoni ftit li xejn ghandha rilevanza ghar-raguni li fil-kawza li kienet istitwita fil-Bord li Jirregola l-Kera (ara Dok A) inghad mir-rikorrenti li l-intimati Simpson huma l-inkwilini tal-fond !

Dan premess jirrizulta li fiz-zmien meta kien ghadu fis-sehh il-kuntratt ta` cens temporanju kien jithallas canone ta` Lm 38 fis-sena [ekwivalenti ghal €89] ghall-perjodu kollu ta` 17-il sena.

Jidher illi meta t-titolu sar kera b`effett tal-Att XXIII tal-1979, kien hemm l-aggustament tal-kera skont l-Art 12 tal-Kap 158. Dan il-punt qed jigi senjalat ghaliex fir-rikors promotur inghad li f`gheluq ic-cens, il-kera saret Lm 76 fis-sena [ekwivalenti ghal €117]. Ghalkemm ir-rikorrenti tghid illi l-intimati qeghdin ihallsu kera ta` €209 fis-sena, mic-cedola ta` depozitu (Dok B a fol 59) jirrizulta illi l-ammont ta` kera li qieghed jigi depozitat huwa ta` €197.58 fis-sena, minn liema ammont jitnaqqsu l-ispejjez u drittijiet tad-depozitu.

Ma jirrizultax minn meta l-kera zdiedet minn €117 ghal €197.58 fis-sena.

Lanqas ma huwa maghruf jekk bejn l-1984 u s-snin ta` wara kienx hemm awment gradwali.

Mic-cedola ta` depozitu (Dok B) jidher li Simpson kienu moruzi f`xi hlasijiet tant illi skont id-Dok B ghamlu depozitu wiehed ta` €743.48 li kien jirrapprezenta erba` hlasijiet annwi ta` kera ghaz-zmien ta` bejn il-11 ta` Jannar 2014 u l-10 ta` Jannar 2018.

Mix-xiehda ta` Karyn Simpson jirrizulta illi hija bdiet tiddepozita l-kera l-qorti fl-1994 wara li miet Francis Mallia.

Ma jirrizultax x`gara mill-hlas tal-kera ghaz-zmien ta` bejn l-1984 u l-1994.

Tenut kont ta` dan kollu, il-qorti mhijiex sejra tnaqqas kera li setghet thallset ghaliex, mill-mod kif svolgew il-fatti fil-kors tas-snin, mhuwiex probabbli li Mariella Birdsall accettat kera wara li ghalaq ic-cens temporanju.

ii. <u>L-interess generali</u>

Il-qorti m`ghandhiex dubju mis-siwi u mil-legittimita` tal-intervent legislattiv tenut kont tac-cirkostanzi taz-zmien li sar.

Dan il-fattur ghandu jwassal ghal <u>tnaqqis ta` 35%</u> fil-figura ta` <u>€141,499</u>.

Adottat rata ta` 35% sabiex tpatti ghas-snin l-ohra li ha l-Istat Malti sabiex jipproponi bidliet fil-ligijiet sabiex isewwi l-isproporzjon li garrbu s-sidien.

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

Il-figura tinzel ghalhekk ghal €91,974.35 li qeghda tigi arrotondata ghal **<u>€91,974.</u>**

iii. <u>Il-fond</u>

Il-qorti rat ir-relazzjoni.

Qieset b`reqqa dak li xehed il-perit tekniku ghal domandi li saru in eskussjoni.

Rat ukoll ir-ritratti li kienu prezentati mill-perit tekniku.

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

iv. <u>Passivita`</u>

Kien biss kontestwalment ma` din il-kawza illi Mariella Birdstall ipprezentat kawza fil-Bord li Jirregola l-Kera fejn *inter alia* talbet aggustament fil-hlas tal-kera u *occorrendo* l-izgumbrament tal-intimati Simpson. Fi zminijiet precedenti, jirrizulta li kienet istitwiet ukoll

proceduri civili ordinarji kontra l-intimati Simpson, li ma wasslu mkien anke ghaliex kien hemm dezerzjoni. Meta tqis li ghaddew 35 sena bejn id-data tal-gheluq ta` cens (1984) u d-data tal-prezentata tal-procediment odjern (2019), il-qorti ma tistax taccetta li ghaliex Birdsall baqghet lura milli tirrikorri ghal proceduri gudizzjarji effettivi li setghu jwassluha ximkien tiehu vantagg illum ghall-passivita` taghha meta l-vjolazzjoni taghha bdiet 35 sena ilu. Ghalhekk sejra taghmel tnaqqis ulterjuri ta` **35%.**

B`hekk id-danni pekunjarji jinzlu minn €91,974 ghal €59,783.10 **[€59,783 : ghad-dritt]**

b) Danni mhux pekunjarji

Indipendentement mid-danni pekunjarji li jikkostitwixxu telf effettiv ghar-ragunijiet fuq premessi, il-qorti tghid li Mariella Birdsall haqqha tircievi wkoll il-hlas ta` danni morali fl-ammont ta` **€5,000** ghaliex ghaz-zmien in kwistjoni, sprovvista minn rimedju ordinarju effettiv kif tindirizza l-lanjanzi taghha, kienet kostretta tirrikorri ghal procediment ta` din ix-xorta ghaliex l-Istat Malti qaghad lura ghal ghexieren ta` snin milli jsib tarf b`legislazzjoni adegwata u effettiva tal-izbilanc u tal-isproporzjon li kienu qeghdin igarrbu sidien ta` proprjetajiet, inkluz ir-rikorrent. Il-vjolazzjoni li garrbet ma kenitx dovuta ghall-fatt li sar l-Att XXIII tal-1979 fiz-zmien meta kien promulgat, izda bil-fatt li l-Istat li diga` kien qieghed jikkontrolla l-uzu tal-proprjeta` bl-Att XXIII tal-1979 halla l-qaghda legislattiva stagnata ghal bosta snin, ghad illi l-hajja socio-ekonomika tal-pajjiz kienet avvanzat b`mod u manjiera li l-applikazzjoni tad-disposizzjonijiet li dahlu fil-Kap 158 bl-Att XXIII tal-1979 kienu qeghdin materjalment johloq zbilanc u sproporzjon kontra s-sidien.

c) Riassunt

Il-qorti qeghda tillikwida l-kumpens dovut lil Mariella Birdsall fl-ammont ta` €64,783 in kwantu ghal €59,783 bhala danni pekunjarji u in kwantu ghal €5,000 bhala danni morali.

5. Il-hames (5) talba

Is-somma globali li qeghda tigi likwidata fl-ammont ta` <u>€64,783</u> ghandha tithallas <u>biss</u> mill-intimat Avukat tal-Istat.

V. <u>Spejjez</u>

Il-qorti tghid li l-intimati Simpson m`ghandhomx ihallsu spejjez gudizzjarji, billi rrizulta li qaghdu mal-ligijiet vigenti.

L-ispejjez gudizzjarji ghandhom jithallsu fl-intier taghhom mill-Avukat tal-Istat.

<u>Decide</u>

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

Tichad l-eccezzjonijiet kollha tal-intimati.

Tipprovdi dwar l-ewwel (1) talba billi tiddikjara u tiddeciedi li fil-konfront ta` Mariella Birdsall (mandanti tar-rikorrenti) l-operazzjonijiet tal-Artikolu 12, partikolarment l-Artikolu 12(2), tal-Kap. 158 tal-Ligijiet ta` Malta, kif emendat bl-Att XXIII tal-1979, u bl-operazzjonijiet tal-ligijiet vigenti, qeghdin jaghtu dritt ta` rilokazzjoni lill-intimati konjugi Simpson li jaghmilha difficli u haga x`aktarx incerta ghall-istess Mariella Birdsall li tiehu lura l-pussess tal-fond 123, Devon, Old College Street, Sliema, proprjeta` taghha.

Tilqa` t-tieni (2) u t-tielet (3) talbiet.

Riferibbilment ghar-raba` (4) talba, tillikwida favur Mariella Birdsall (mandanti tar-rikorrenti) kumpens komplessiv fl-ammont ta` erbgha u sittin elf seba` mija tlieta u tmenin ewro (€64,783) in kwantu ghal disgha u hamsin elf seba` mija tlieta u tmenin ewro (€59,783) in linea ta` danni pekunjarji u in kwantu ghal hamest elef ewro (€5,000) in linea ta` danni

morali ghall-vjolazzjoni li garrbet tad-drittijiet fondamentali taghha skont kif deciz fit-tieni (2) u t-tielet (3) talbiet.

Riferibbilment ghall-hames (5) talba, tordna lill-intimat Avukat tal-Istat sabiex ihallas lir-rikorrenti noe s-somma hekk likwidata, bl-imghax legali b`effett mil-lum.

Tordna li l-ispejjez kollha ta` din il-kawza ghandhom jithallsu 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