PRIM`AWLA TAL-QORTI CIVILI
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON

Illum il-Hamis 18 ta` Marzu 2021

Kawza Nru. 2
Rikors Nru. 238/2019 JZM

Margaret Caruana
[K.I. 0220656 (M)];

Violet Caruana
[K.I. 590054 (M)];

u

Carol Caruana
[K.I. 0444671 (M)]

kontra

L-Avukat Generali u b` digriet tal-1 ta` Settembru 2020 l-isem tal-intimat "Avukat Generali" inbidel u gie jaqra "Avukat tal-Istat"

u

Mary Bonello ghal kull interess li jista` jkollha

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors li kien prezentat fis-<u>6 ta` Dicembru 2019</u> li jaqra :–

1. Illi r-rikorrenti huma sidien qua censwalisti ta` dar bl-arja taghha numru tnejn u tletin (32) fi Triq San Bastjan, Rabat, Malta u dan kif jirrizulta l-kuntratt ta` bejgh originali ta` missier ir-rikorrenti John Caruana u l-causa mortis relattiva datata 15 ta` Jannar 2013 annessi u mmarkata bhala Dok A u Dok B.

2. Illi l-fond de quo huwa suggett ghal-lokazzjoni versu l-intimata Bonello u dan sa miz-zmien qabel 1 ta` Gunju 1995. Jinghad li l-ahhar kera kienet tammonta ghal mitejn u tliet ewro u tlettax il-centezmu tal-ewro (€2013.13) liema ammont gie mhallas fl-1 ta` Novembru 2018 u dan kif jirrizulta minn kopja tal-ahhar rcevuta mill-ktieb tal-kera (Dok C).

3. Illi jinghad li bl-applikazzjoni tal-Kapitolu 69 tal-Ligijiet ta` Malta l-kera odjerna hija protetta u dan stante li bdiet qabel l-1 ta` Gunju 1995.

4. Illi billi l-kera hija fissa bil-ligi u ma tistax tinbidel, minkejja li l-prezzijiet fis-suq dejjem gholew u llum-il gurnata tezisti diskrepanza enormi bejn il-kera annwali fuq il-fond u r-redditu li l-istess fond kien igib f` suq hieles.

5. Illi ghalkemm ricentement dahlet fis-sehh ligi gdida (l-Att X tas-sena 2009) sabiex itaffi d-diskriminazzjoni u l-ingustizzji li l-ligi specjali tal-kera kienu joholqu versu s-sidien ta` proprjeta` din l-istess

ligi bl-ebda mod ma tghin lill-esponenti peress li ma jaffettwax il-kera tal-fond.

6. Illi ghalhekk effettivament bl-istat li hija l-ligi r-rikorrenti ma ghandhomx speranza reali li qatt jiksbu jew il-pussess effettiv jew redditu reali mill-istess fond.

Ghaldaqstant, l-esponenti jitolbu umilment li din l-Onorabli Qorti joghgobha :

1) Tiddikjara li qeghdin jigu vjolati d-drittijiet fondamentali tar-rikorrenti kif sanciti mill-Artikoli 37 tal-Kostituzzjoni ta` Malta u l-Ewwel Artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropea (l-Ewwel Skeda tal-Kap. 319) u ghar-ragunijiet fuq esposti u cioe minhabba li, stante l-protezzjoni li l-Kapitolu 69 tal-Ligijiet ta` Malta jaghti lill-intimati fid-detenzjoni tal-fond dar bl-arja taghha numru tnejn u tletin (32) fi Triq San Bastjan, Rabat, Malta, r-rikorrenti qed jigu mcahhda l-pussess effettiv jew redditu reali mill-istess fond u lanqas speranza reali li qatt jiksbu l-istess u dan kif ser jirrizulta waqt is-smigh u t-trattazzjoni ta` dan ir-rikors.

2) Taghtiha dawk ir-rimedji li jidhrilha xierqa ghat-twaffiq ta` dawn id-drittijiet fondamentali fuq imsemmija, fosthom li tiddikjara illi l-intimata m`ghandhiex tibqa` tgawdi l-protezzjoni li jaghtija l-Kapitolu 69 tal-Ligijiet ta` Malta vis-a-vis il-fond mikri lilha ossia dar bl-arja taghha numru tnejn u tletin (23) fi Triq San Bastjan, Rabat, Malta.

3) Tiffissa kumpens dovut lill-esponenti minhabba dan il-ksur ta` drittijiet hawn fuq indikati,

u dan taht dawk il-provvedimenti li jidhrilha xierqa u opportuni.

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat ir-risposta li pprezenta l-intimat Avukat Generali (illum Avukat tal-Istat) fid-19 ta` Dicembru 2019 li taqra :-

Illi l-lanjanza tar-rikorrenti hija fis-sens illi bit-thaddim tad-dispozizzjonijiet tal-Kapitolu 69 tal-Ligijiet ta` Malta u bl-operazzjonijiet tal-ligijiet vigenti, fil-konfront taghhom qed jigu miksura l-artikolu 37 tal-Kostituzzjoni ta` Malta u l-ewwel artikolu tal-ewwel protokoll tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem u dan billi qed jigu mcahhda mit-tgawdija tad-dar numru tnejn u tletin (32) fi Triq San Bastjan, Rabat, Malta minghajr ma qed jinghataw kumpens adegwat.

1. Illi in linea preliminari r-rikorrenti jridu jgibu prova tat-titolu taghhom fuq il-proprjeta` in kwistjoni.

2. Illi l-esponent jopponi l-allegazzjonijiet u l-pretensjonijiet kollha tar-rikorrenti bhala infondati fil-fatt u fid-dritt.

3. Illi t-Kapitolu 69 tat-Ligijiet ta` Malta huwa inapplikabbli fil-kaz odjern u dan peress illi jidher li t-titolu ta` kera li ghandha l-intimata Bonello huwa titolu abbazi tal-Att XXIII tal-1979 u mhux abbazi tal-Kap. 69. Ghaldaqstant it-talbiet tar-rikorrenti kif impustati ma ghandhomx jintlaqghu.

4. Illi in linea preliminari wkoll in-nuqqas ta` applikabilita` tal-Artikolu 37 tal-Kostituzzjoni stante li fil-kaz odjern ma hemm l-ebda tehid forzuz tal-propreta`.

5. Illi dak li gara fil-kaz odjern huwa li l-Istat irregolarizza sitwazzioni ta` natura socjali fl-ambitu tal-gid komuni b`dana pero` li baqghu impregudikati d-drittijiet tas-sidien qua proprjetarji tal-fondi.

6. llli l-istat igawdi diskrezzioni wiesgha fl-apprezzament ta` htigijiet socjali tal-pajjiz u fl-ghazla tal-mizuri li ghandhom jittiehdu sabiex jigu ndirizzati dawk it-htigijiet socjali, specjalment f`kazijiet fejn dawk il-mizuri huma tali li jikkontrollaw l-uzu tal-proprjeta` u mhux li jcahhdu lis-sid mill-proprjeta`.

7. Illi tali diskrezzjoni tal-legislatur m`ghandhiex titbiddel sakemm din ma tkunx manifestament minghajr bazi ragjonevoli. Kif spjegat fis-suespost l-esponenti jishaq li fil-kaz odjern hemm bazli ragjonevoli li tiggustifika l-promulgazzjoni tal-lesgislazzjoni li tinsab taht skrutinju fil-kawza odjerna.

8. Illi jinghad ukoll illi l-Qorti m`ghandhiex il-funzjoni legislattiva li tiffissa l-kera izda dik li twettaq il-ligi li tirregola l-kera.

9. Illi llum bid-dhul tal-emendi l-godda fl-2009 fil-Kap 16 tal-Ligijiet ta` Malta, il-kera li r-rikorrenti tista` ddahhal mhux ser tibqa` stagnata ghal dejjem izda ser toghla kull tliet snin b`mod proporzjonali skont id-dispozizzjonijiet tal-artikolu 1531C tal-Kap 16 tal-Ligijiet ta` Malta. Illi minn dan jirrizulta wkoll illi bl-emendi introdotti bl-Att X tal-2009 il-pozizzjoni tar-rikorrenti giet miljorata minn dak meta saret il-kirja u ghaldaqstant ir-rikorrenti ma tistax tallega ebda ksur tad-drittijiet fundamentali taghha.

10. Illi l-Qorti Ewropea stess fil-gurisprudenza taghha fosthom fil-kaz ta` Amato Gauci v. Malta (App. Nru. 47045/06 deciz 15/09/2009) rrikonoxxietli "State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable." Ghalhekk anke` jekk fil-kaz odjern jirrizulta li l-kera dovuta lir-rikorrenti hija inferjuri ghall-valur lokatizju fis-suq, dan it-tnaqqis huwa kontro-bilancjat bil-margini wiesgha tal-Istat li jillegisla fil-kuntest ta` mizuri socjali.

11. Illi jsegwi ghalhekk, fl-umli fehma tal-esponent, li fil-kaz odjern din l-Onorabbli Qorti m`ghandhiex tevalwa din il-ligi fil-kuntest principalment ta` spekulazzjoni tal-proprjeta` imma ghandha tiskrutinja u tapplika l-ligi fil-qafas aktar wiesgha u cioe` l-aspett tal-proporzjonalita` fid-dawl tar-realta` ekonomika u socjali tal-pajjiz in generali.

12. Ulterjorment jigi rilevat illi fi kwalunkwe kaz l-Artikolu 1 tal-Ewwel Protokoll ma jikkoncedi ebda dritt li xi hadd jircievi profitt. Inoltre, fil-kaz odjern mill-aspett tal-proporzjonalital-ligi ghandha tigi applikata f`sens wiesgha u cioe` fid-dawl tar-realta` ekonomika u socjali tal-pajjiz in generali u mhux sempliciment a bazi ta` konsiderazzjonijiet ta` spekulazzioni tal-proprjeta` in kwistjoni.

13. Illi dejjem minghajr pregudizzju ghas-suespost, dato ma non concesso li din l-Onorabbli Qorti jidhrilha li kien hemm xi ksur tad-drittijiet fundamentali tar-rikorrenti, fatt li qed jigi kontestat, l-esponent jirrileva li fic-cirkostanzi tal-kaz, dikjarazzjoni ta` ksur hija sufficjenti u ma hemmx lok ghal rimedji ohra mitluba mir-rikorrenti.

14. Salv eccezzjonijiet ulterjuri.

Ghaldaqstant fid-dawl tas-suespost ma hemm l-ebda lezjoni tad-drittijiet fundamentali tar-rikorrenti u din l-Onorabbli Qorti ghandha tichad l-allegazzjonijiet u t-talbiet kollha bhala infondati fil-fatt u fid-dritt u dan bl-ispejjez kontra l-istess rikorrenti.

Rat ir-risposta li pprezentat l-intimata Mary Bonello fit-30 ta` Dicembru 2019 li taqra :-

1. Illi fl-ewwel lok, in linea preliminari, ir-rikorrenti jridu jgibu prova tat-titolu li fuqu qed jibbazaw l-azzjoni odjerna.

2. Illi, inoltre, in linea preliminari, l-esponenti m`hijiex il-legittima kontradittur tat-talbiet tar-rikorrenti kif dedotti u dan billi kwalsiasi rimedju li jista` talavolta jkunu spettanti lill-istess rikorrenti ma jistax jinghata mill-konvenuta, ossija mic-cittadin, izda jista` jinghata biss mill-Gvern ta` Malta. Illi l-esponenti assigurat li tottempera ruhha ma` dak li tghid il-ligi u xejn izjed u ghalhekk ghandha tigi hekk dikjarata u mehlusa mill-osservanza tal-gudizzju.

Illi kif inghad fis-sentenza fl-Angela sive Gina Balzan v. L-Onorevoli Prim` Ministru et, deciza mill-Qorti Kostituzzjonali nhar is-7 ta` Dicembru 2012 :

"Il-bilanc bejn l-interessi differenti jrid joholqu l-Gvern, u hu l-Gvern li jrid ibati l-konsegwenzi jekk jonqos minn dan id-dmir tieghu. Ghan-nuqqas tal-Gvern ma ghandux ibati c-cittadin".

3. Illi, minghajr ebda pregudizzju ghas-suespost u fil-meritu, l-ilment tar-rikorrenti taht l-Artikolu 37 tal-Kostituzzjoni ta` Malta huwa totalment infondat fil-fatt u fid-dritt billi, kif jirrizulta car mill-qari tar-rikors promotorju tal-istess rikorrenti, huma baqghu s-sidien tal-proprjeta`, u bhala tali ghadhom vestiti b`jeddijiet in re, u ghalhekk l-ilment proprju tal-istess rikorrenti kif dedott ma jirrigwardax tehid ta` proprjeta` izda kontroll ta` uzu tal-istess. Sabiex wiehed jista` jitkellem dwar tehid forzus jew obbligatorju, persuna trid tigi zvestita jew spussessata minn kull dritt li ghandha fuq dik il-proprjeta`. Huwa evidenti li fil-kaz prezenti, tali zvestiment ma sarx peress illi kera tikkostitiwixxi biss kontroll ta` uzu ta` proprjeta. Ghaldaqstant ir-rikorrenti ma tilfux ghal kollox il-jeddijiet taghhom fuq il-fond in kwistjoni u ghalhekk dan il-kaz ma jammontax ghal deprivazzjoni totali tal-proprjeta`.

Kif inghad fis-sentenza fl-ismijiet Josephine Bugeja et vs. Avukat Generali, deciza mill-Qorti Kostituzzjonali nhar is-7 ta` Dicembru 2009:

"kaz ta` kontroll ta` uzu ta` proprjeta`, bhal ma huwa l-kaz in ezami, ma jaqax entro l-parametri u konsegwentement il-protezzjoni

tal-artikolu 37 tal-Kostituzzjoni, izda se mai jista` jaqa` entro l-parametri taht il-protezzjoni tal-artikolu 1 tal-Ewwel Protokol tal-Konvenzjoni Ewropea".

4. Illi, minghajr ebda pregudizzju ghas-suespost u fil-meritu, kwalunkwe referenza ghall-Kap 69 tal-Ligijiet ta` Malta min-naha tar-rikorrenti huwa inapplikabbli fil-kaz ojdern stante illi t-titolu ta` kirja tal-esponenti Bonello huwa titolu bbazat fuq l-Att XXIII tal-1979 u mhux abbazi l-Kap 69 tal-Ligijiet ta` Malta.

5. Illi, minghajr ebda pregudizzju ghas-suespost u fil-meritu, il-kirja li minnha qed jilmentaw l-atturi u li hija l-mertu ta` dawn il-proceduri damet tigi accettata ghal diversi snin, addiritura, qabel l-1995 u bhalma ammettew l-atturi fir-rikors taghhom stess sal-1 ta` Novembru 2018. Din baqghet tigi accetata minghand l-esponenti u ghaldaqstant din titqies bhala accettazzjoni tacita tal-istess kirja fis-somma li din kienet qed tithallas. Kull kera dovuta dejjem thallset bil-modalità maqbula u mitluba, u fl-ebda hin qatt u hadd ma talab xi zjieda u/jew xi awment. Ghalhekk l-atturi ma jistawx issa jilmentaw dwar kirja li kienet qed tigi accettata ghal diversi snin, inkluz minnhom stess, b`eccezzjoni biss ghal din l-ahhar sena, u lanqas ma jistaw jilmentaw li d-drittijiet fondamentali taghhom kienu qed jigu fil-frattemp ivvjolati la darba l-kirja kienet qed tigi accettata minghajr oggezzjoni. Illi inoltre t-tehid tal-istess fond minghand l-esponenti ghandu jirrizulta li jkun leziv tad-drittijiet taghha anki fil-kuntest ta` dawk li huma legitimate expectations taghha ladarba ilha tabita fl-istess fond ghal diversi snin bhala l-fond ta` residenza taghha, ghamlet fih spejjez konsiderevoli sabiex il-fond jinzamm fi stat tajjeb ta` manutenzjoni, u dan anke kif ser jirrizulta matul il-mori ta` din il-kawza.

6. Illi inoltre u minghajr pregudizzju ghas-suespost l-konvenuta Bonello zgur li m`ghandha l-ebda kontroll fuq il-legislazzjoni mghoddija mill-Istat Malti tul iz-zmien u huwa ghalhekk li qatt ma tista` tkun responsabbli ghal xi danni li jistghu jirrizultaw. Naturalment, fil-kaz odjern m`hemm l-ebda lok ghal danni li jkunu attribwiti lejn l-istess konvenuta.

7. Illi, minghajr ebda pregudizzju ghas-suespost u fil-meritu, ir-rimedju li jista` talvolta jkun spettanti lir-rikorrenti ma jista` qatt jikkonsisti fl-izgumbrament tal-esponent u dan kemm ghaliex m`huwiex ilkompitu ta` din l-Onorabbli Qorti illi titratta u tiddeciedi tali talba, kemm ghaliex, kif gja` inghad, kwalsiasi rimedju spettanti lill-istess rikorrenti jista` jinghata biss mill-Gvern ta` Malta u mhux mill-esponent, ossija mic-cittadin. Illi f`kull kaz u minghajr pregudizzju ghas-suespost, l-esponenti m`ghandha tbati l-ebda spejjez in konnessjoni ma` dawn il-proceduri, in kwantu li ma tistax tkun kkundannata talli ottemperat ruhha ma` ordni legittima tal-istat.

8. Illi ghalhekk, minghajr pregudizzju ghas-suespost u fil-meritu, it-talbiet tar-rikorrenti huma totalment infondati fil-fatt u fid-dritt billi la tista` tirrizulta lezjoni tad-drittijiet fundamentali taghha kif protetti bl-Artikolu 37 ta l-Kostituzzjoni ta` Malta, u lanqas bl-Ewwel Artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropea.

9. Salv eccezzjonijiet ulterjuri.

Rat id-digriet li tat fl-udjenza tal-21 ta` Jannar 2020 fejn laqghet it-talba tar-rikorrenti ghall-hatra ta` perit tekniku sabiex jistma u jirrelata dwar il-valur lokatizju fis-suq tal-fond 32, Triq San Bastjan, Rabat, Malta, ghaz-zmien ta` bejn id-9 ta` Novembru 1971 u kull hames snin sussegwenti sal-21 ta` Jannar 2019. Kienet mahtura ghal dan l-iskop il-Perit Marie Louise Caruana Galea.

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

Semghet ix-xhieda u rat il-provi l-ohra li tressqu fil-kors tal-kawza, inkluz ir-risposti li tat il-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. Provi

1. Xhieda

Ir-rikorrenti Margaret Caruana xehdet illi hija minn dejjem taf il-post in kwistjoni bhala proprjeta` ta` missierha Giovanni Caruana li kien wirtu minghand il-buznanna tieghu Rosina Caruana. Fil-fond kienu jghixu l-genituri ta` Giovanni Caruana u ohtu ossia l-intimata Mary Bonello li meta zzewget baqghet tghix fil-post flimkien mal-genituri taghha. Giovanni Caruana miet fl-2012 u l-fond de quo ghadda b`wirt favur it-tliet uliedu ossia r-rikorrenti.

L-intimata Mary Bonello xehdet li twieldet fil-21 ta` Ottubru 1945. Tghid li dejjem ghexet fil-fond de quo flimkien mal-genituri taghha u ma` hutha. Ghalkemm izzewget lil Lawrence Bonello fil-21 ta` April 1968 baqghet tghix fl-istess fond flimkien ma` zewgha u l-genituri taghha fejn rabbiet lit-tliet uliedha : wahda minn uliedha mietet ta` eta` ckejkna hafna ; waqt illi t-tnejn l-ohra ma baqghux ighixu hemm meta zzewgu.

Stqarret li sakemm kien ghadu haj missierha l-kera kien ihallasha hu. Meta missierha miet, hi bdiet thallas il-kera ta` Lm30 fis-sena lil huha Giovanni Caruana ossia lil missier ir-rikorrenti. Wara l-mewt ta` Giovanni Caruana fil-5 ta` Lulju 2012, l-eredi tieghu u

cioe` r-rikorrenti li jigu n-neputijiet taghha ziedu l-kera ghal €203 fis-sena.

Qalet illi hija dejjem hadet hsieb taghmel kull tip ta` xoghol fil-post, kemm ta` natura straordinarja, kif ukoll dawk ta` natura ordinarja, sabiex il-post jinzamm fi stat tajjeb. Huha Giovanni Caruana dejjem kien jghidilha biex taghmel dak li tixtieq ghaliex finalment il-post kien taghha. Madanakollu qatt ma wrieha xi dokument li juri li l-post kien ser jghaddi ghandha b`titolu ta` proprjeta`. Il-kera baqghet tithallas regolarment sakemm ir-rikorrenti ma baqghux jaccettaw il-kera b`effett minn Novembru 2019. Ghalhekk bdiet tiddepozita l-kera taht l-awtorita` tal-qorti.

Lawrence Bonello xehed illi l-fond de quo kien ilu ghal snin shah iservi bhala r-resdenza tal-familja tieghu. Saru diversi xoghlijiet fil-post sabiex inzamm fi stat ta` manutenzjoni tajba.

2. Ir-relazzjoni tal-perit tekniku

Il-perit tekniku ghamlet dawn **il-kostatazzjonijiet** :-

- Il-fond huwa *townhouse* sitwat f`zona residenzjali u mfittxija tar-Rabat.

- Il-binja saret fis-seklu ghoxrin u hija mqassma fuq zewg sulari.

- Fil-livell tal-pjan terran il-faccata ghandha wisa` ta` 5.1m mentri fl-ewwel sular il-faccata ghandha wisa` ta` 8.4m. Id-differenza hija dovuta ghall-fatt illi fil-livell tal-pjan terran hemm hanut proprjeta` ta` terzi.

- Il-fond ghandu kejl kumulattiv intern ta` cirka 133m.k. fuq iz-zewg sulari u *site area* ta` cirka 108m.k.

- Il-finishes huma qodma u mhux skont l-i*standards* tal-lum.

- Waqt illi s-soqfa fil-livell tal-pjan terran huma fi stat tajjeb, dawk fil-livell tal-ewwel sular fihom xi konsenturi u anke marki ta` sadid indikattivi ta` perkolazzjoni ta` ilma mill-bejt.

- Il-fond jista` jigi zviluppat fi tliet sulari bi tliet filati *basement*.

- Tenut kont tas-sit, id-daqs u l-istat attwali tal-post, il-perit tekniku waslet ghall-konkluzjoni illi l-fond ghandu valur fis-suq, jekk liberu u frank, ta` **€360,000**.

Biex ivvalutat il-valur lokatizzju, il-perit tekniku ghamlet referenza ghal zewg mudelli ta` kalkolu. L-ewwel mudell kien ibbazata fuq kombinazzjoni tar-*Retail Price Index* u r-*Rental Index* ghas-snin ta` bejn l-2003 u l-2020. Dan il-mudell gab rati ta` kera gholjin wisq. Ghalhekk ibbazat il-konkluzjonijiet taghha fuq it-tieni mudell li huwa mfassal ricerka tal-valur tal-kera ta` proprjetajiet simili matul is-snin. Stabbiliet li fl-1971 il-valur lokatizju tal-fond kien ta` **€839** fis-sena, waqt li fl-2020 il-valur lokatizju kien ta` **€10,800** fis-sena.

3. L-eskussjoni

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

Xehdet illi l-ewwel mudell huwa mfassal fuq statistika gejja mill-Ufficcju Nazzjonali tal-Istatistika, waqt illi it-tienu mudell huwa bbazat

fuq ricerka li tidhol f`aktar dettall. Il-valur tal-proprjeta` fis-suq kien ikkalkolat b`metodu komparattiv fejn jittiehed kont tal-valur ta` proprjetajiet simili fid-daqs, kundizzjoni u lokalita`.

4. Il-piz probatorju ta` relazzjoni teknika

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 skont 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 kinetx 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**" – *op. cit*.).

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 tal-perit tekniku, il-partijiet ma ressqux talba ghall-hatra ta` periti addizzjonali izda saret eskussjoni tal-perit tekniku.

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

III. L-eccezzjonijiet preliminari

1. L-eccezzjoni numru wiehed (1) tal-intimat Avukat tal-Istat u l-eccezzjoni numru wiehed (1) tal-intimata Bonello

Kien eccepit illi r-rikorrenti ghandhom jaghmlu l-prova tat-titolu ghall-proprjeta` de quo.

Tajjeb jinghad illi flimkien mar-rikors promotur kienu prezentati ghadd ta` dokumenti fosthom skrittura privata dwar kirja ta` fond. Dawn id-dokumenti m`ghandhom x`jaqsmu xejn ma` din il-kawza, u anke jekk tardivament ghall-ahhar ir-rikorrenti ssenjalaw dan il-fatt fin-nota ta` osservazzjonijiet taghhom. Filwaqt li tiddeplora u ccanfar lir-rikorrenti li pprezentaw dokumenti b`disattenzjoni kwazi kwazi bla kont, tiddikjara li sejra tiskarta ghal kollox dawk id-dokumenti billi ma jikkostitwixxu ebda prova ghall-fini tal-kawza tal-lum.

Premessa din ir-rimarka, il-qorti tirrileva li l-gurisprudenza kostanti tal-qrati taghna hija fis-sens illi fil-kawzi ta` indole kostituzzjonali mhuwiex **<u>indispensabbli</u>** illi r-rikorrenti jipprova t-titolu tieghu ghall-proprjeta` ghaliex kawzi bhal din tal-lum mhumiex kawzi ta` rivendika fejn il-prova tat-titolu hija *sine qua non* sabiex tirnexxi l-azzjoni.

Fis-sentenza li tat fis-7 ta` Frar 2017 fil-kawza **<u>Robert Galea v. Avukat Generali et</u>** din il-qorti diversament presjeduta qalet hekk :-

> *"Illi biex wiehed ikun f`qaghda li juri li garrab ksur tal-jedd fondamentali tieghu taht l-artikolu 37 tal-Kostituzzjoni m`ghandux ghalfejn jipprova titolu assolut u lanqas wiehed originali bhallikieku l-azzjoni dwar ksur ta` jedd fondamentali kienet wahda ta` rivendika (Kost. 27.3.2015 fil-kawza fl-ismijiet **<u>Ian Peter Ellis et vs Avukat Generali et</u>**). Huwa bizzejjed, ghall-finijiet ta` dak l-artikolu, li wiehed juri li ghandu jedd fil-haga li tkun li bih jista` jieqaf ghall-pretensjonijiet ta` haddiehor.*
>
> *Imbaghad, ghall-finijiet tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, huwa bizzejjed li l-persuna turi li kellha l-pussess tal-haga li tkun."*

Dan premess, il-qorti tghid illi bhala fatt ir-rikorrenti ghamlu l-prova tat-titolu taghhom ghall-fond de quo. Infatti jirrizulta ppruvat :-

a) Illi b`testment unica charta tat-3 ta` April 2003 fl-atti tan-Nutar Dottor Gerard Spiteri Maempel il-wirt ta` Giovanni Caruana, senjatament il-proprjeta` de quo, ghaddiet favur it-tliet uliedu, rikorrenti fil-kawza odjerna.

b) Illi b`dikjarazzjoni causa mortis tal-15 ta` Jannar 2013 fl-atti tan-Nutar Francesca Schwalbe, ir-rikorrenti ddikjaraw l-eredita` ta` Giovanni Caruana u hallsu t-taxxi relattivi inkluz fuq il-proprjeta` de qua.

Dawn il-provi ma gewx kontestati.

Sahansitra l-intimata Bonello kkonfermat illi l-proprjeta` kienet tappartjeni lil huha Giovanni Caruana tant li mhux hallset il-kera lilu izda baqghet thallas il-kera lil uliedu r-rikorrenti billi kienu l-eredi tieghu.

Wara li rat l-atti, il-qorti hija sodisfatta li r-rikorrenti ghandhom titolu tajjeb sabiex jippproponu l-kawza odjerna.

Billi t-titolu tar-rikorrenti jirrizulta ppruvat, sejra tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel (1) eccezzjoni tal-intimat Avukat tal-Istat u tal-ewwel (1) eccezzjoni tal-intimata Bonello.

2. <u>L-eccezzjoni numru tlieta (3) tal-intimat Avukat tal-Istat u l-eccezzjoni numru erbgha (4) tal-intimata Bonello</u>

Kien eccepit illi l-kirja in kwistjoni mhijiex regolata bil-Kap 69 izda bil-Kap 158 u ghalhekk it-albiet tar-rikorrenti kif dedotti ghandhom ikunu respinti.

L-intimata Bonello ma ghamlet ebda referenza ghal din l-eccezzjoni fin-nota ta` sottomissjonijiet taghha.

Min-nota ta` sottomissonijiet tal-Avukat tal-Istat jirrizulta illi din l-eccezzjoni hija bbazata unikament fuq dak illi jirrizulta minn dokument anness mar-rikors promotur.

Il-qorti diga` esprimiet ruhha dwar dawn id-dokumenti li minn qari taghhom huwa bil-wisq evidenti illi dawn m`ghandhom x`jaqsmu assolutament xejn mal-kawza ta` llum u ghalhekk dak imnizzel fihom bl-ebda mod ma jista` jigi applikat ghall-kaz ta` llum.

Fic-cirkostanzi, il-qorti qeghda tastjeni milli tiehu konjizzjoni ulterjuri tal-eccezzjoni numru tlieta (3) tal-intimat Avukat tal-Istat u tal-eccezzjoni numru erbgha (4) tal-intimata Bonello.

3. L-eccezzjoni numru tnejn (2) tal-intimata Bonello

L-intimata Bonello tikkontendi li mhijiex il-legittima kontradittur sabiex tirrispondi ghat-talbiet tar-rikorrenti.

Huwa accettat mill-gurisprudenza taghna illi f`kawzi ta` indole kostituzzjonali u/jew konvenzjonali huwa l-Istat illi ghandu jwiegeb ghall-vjolazzjoni ta` drittijiet fondamentali billi huwa l-Istat illi ghandu l-obbligu illi jassigura illi l-ligijiet ma joholqux zbilanc ngust bejn id-drittijiet tac-cittadin privat u l-obbligi tal-Istat. Fil-kawza tal-lum, ir-rikorrenti qeghdin jilmentaw illi d-disposizzjonijiet tal-Kap 69 qeghdin joholqu relazzjoni forzuza ghad-detriment taghhom vis-à-vis l-intimata

Bonello bhala inkwilina taghhom. Ghalhekk qeghdin jitolbu dikjarazzjoni illi l-applikazzjoni tad-disposizzjonijiet tal-Kap 69 tikser il-jeddijiet fondamentali taghhom kif imharsa bl-Art 37 tal-Kostituzzjoni u bl-Art 1 Prot 1 tal-Konvenzjoni.

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

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

Fil-procediment odjern l-Istat huwa rapprezentat mill-intimat Avukat tal-Istat. Jekk ir-rikorrenti jaghmlu l-prova tal-allegat ksur tad-drittijiet fondamentali taghhom, u bhala rimedju jinghataw

kumpens (kemm jekk pekunarju kif ukoll jekk morali) huwa l-Istat illi ghandu jaghmel tajjeb ghall-hlas tal-kumpens.

Fil-kaz tal-intimata Bonello, il-lezjoni lamentata mir-rikorrenti fil-kawza odjerna mhijiex diretta kontra taghha izda kienet imharrka billi ghandha interess fl-esitu tal-procediment. Dan qed jinghad ghaliex proceduri tax-xorta tal-lum jinvolvu zewg aspetti : i) ir-responsabbilita` ghall-vjolazzjoni ; u ii) l-persuna li trid twiegeb. Dawn iz-zewg aspetti mhux necessarjament illi jkunu konnessi ghaliex waqt li l-vjolazzjoni tista` tkun twettqet mill-Istat, ir-rimedju jista` jolqot persuna li ma tkunx l-Istat.

Fis-sentenza li tat il-Qorti Kostituzzjonali fit-22 ta` Frar 2013 fil-kawza fl-ismijiet **Raymond Cassar Torreggiani et v. Avukat Generali et** saret din l-osservazzjoni :-

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

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

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

Peress illi l-intimata hija l-inkwilina tal-fond de quo, ghandha l-interess li trid il-ligi sabiex tiddefendi l-pozizzjoni taghha. Ghalhekk ghandha tkun parti fil-kawza, anke jekk finalment il-legittimita` taghha tkun tirrizulta bhala passiva.

It-tieni (2) eccezzjoni tal-intimata Bonello qeghda tigi michuda.

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

1. L-ewwel talba

a) L-Art 37 tal-Kostituzzjoni

Safejn l-ewwel talba tirreferi ghall-Art 37 tal-Kostituzzjoni ta` Malta ("**il-Kostituzzjoni**") il-qorti sejra tirreferi ghall-Art 47(9) tal-Kostituzzjoni li jaqra hekk :-

> *Ebda haga fl-artikolu 37 ta` din il-Kostituzzjoni ma ghandha tolqot il-hdim ta` xi ligi fis-sehh minnufih qabel it-3 ta` Marzu 1962 jew xi ligi maghmula fi jew wara dik id-data li temenda jew tissostitwixxi xi ligi fis-sehh minnufih qabel dik id-data (jew xi ligi li, minn zmien ghal zmien, tkun emendata jew sostitwita bil-mod deskritt f`dan is-subartikolu) u li ma –*
>
> *(a) izzidx max-xorta ta` proprjetà li jista` jittiehed pussess taghha jew id-drittijiet fuq u interess fi proprjetà li jistghu jigu miksuba;*
>
> *(b) izzidx mal-finijiet li ghalihom jew cirkostanzi li fihom dik il-proprjetà jista` jittiehed pussess taghha jew tigi miksuba;*
>
> *(c) taghmilx il-kondizzjonijiet li jirregolaw id-dritt ghal kumpens jew l-ammont tieghu anqas favorevoli lil xi persuna li jkollha jew li tkun interessata fil-proprjetà; jew*
>
> *(d) tipprivax xi persuna minn xi dritt bhal dak li huwa msemmi fil-paragrafu (b) jew paragrafu (c) tal-artikolu 37(1) ta` din il-Kostituzzjoni.*

Fil-kaz tal-lum jirrizulta li l-kirja favur l-intimata Bonello hija regolata bil-Kap 69 liema ligi saret qabel it-3 ta` Marzu 1962 u allura kienet *saved* bl-Art 47(9) tal-Kostituzzjoni.

Il-qorti rat il-gurisprudenza dwar l-Art 37 u l-Art 47(9) tal-Kostituzzjoni fil-kuntest tal-Kap 88 billi dik il-gurisprudenza ssib applikazzjoni *mutatis mutandis* ghall-kaz tal-Kap 69.

Fil-kawza fl-ismijiet **Lawrence Fenech Limited v. Kummissarju tal-Artijiet et** deciza mill-Qorti Kostituzzjonali fid-9 ta` Novembru 2012 tressaq aggravju fis-sens li l-Ewwel Qorti ma setghetx issib ksur tal-Art 37 tal-Kostituzzjoni minhabba l-Art 47(9). L-aggravju

kien milqugh proprju ghaliex il-Kap 88 sar ligi tal-pajjiz qabel it-3 ta` Marzu 1962.

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

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

> *"L-intimati jikkontendu li l-Art 37 tal-Kostituzzjoni mhuwiex applikabbli ghall-kaz tal-lum in vista tal-Art 47(9) tal-Kostituzzjoni.*
>
> *Il-Qorti terga` taghmel riferenza ghas-sentenza tal-Qorti Kostituzzjonali fil-kawza "**Bezzina Wettinger et vs Il-Prim` Ministru et**" (op. cit.)*
>
> *Fis-sentenza taghha, il-Qorti Kostituzzjonali kkonfermat dak li qalet l-Ewwel Qorti :-*
>
> *Illi ghalhekk din il-Qorti taqbel mal-konkluzjoni tal-Ewwel Qorti illi l-Kapitolu 88 – bhala ligi li kienet fis-sehh qabel it-3 ta` Marzu 1962 – huwa salvagwardjat bl-istess Kostituzzjoni ai termini tal-Artikolu 47(9), u konsegwentement dan l-aggravju qed jigi respint.*
>
> *Illi dwar dan il-punt, din il-Qorti taghmel riferenza wkoll ghas-sentenza ta` din il-Qorti (PA/RCP) tat-22 ta` Marzu 2002 fil-kawza "**Francis Bezzina Wettinger et vs Kummissarju tal-Artijiet**" fejn inghad hekk :-*
>
> *Illi kif inghad f`**Pawlu Cachia vs Avukat Generali et** (9/4/99 Rik. Nru. 586/97/VDG), il-hdim ta` xi ligi fis-sehh minnufih qabel id-data msemmija ma tistax tkun anti-kostituzzjonali fis-sens li tippekka kontra l-artikolu 37. L-istess jinghad ghal xi amending act jew substituting act*

maghmula f`dik id-data jew wara dik id-data purche` li tali att li hekk jemenda jew jissostitwixxi dik il-ligi ma jkunx jaghmel xi wahda mill-affarijiet imsemmi fil-paragrafi (a) sa (d) tal-imsemmi artikolu 47(9).

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

Issa l-Qorti tirribadixxi li fil-kawza tal-lum, ir-rikorrenti qeghdin jilmentaw minn vjolazzjoni tal-Art 37 tal-Kostituzzjoni ghaliex il-Bord tal-Arbitragg dwar l-Artijiet illikwida kumpens li, skont ir-rikorrenti, ma kienx xieraq u adegwat.

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

Riferibbilment ghall-kaz tal-lum, jirrizulta li l-Kap 69 jirregola l-kirja mertu ta` din il-kawza. Il-Kap 69 sar qabel it-3 ta` Marzu 1962. Ghalhekk l-Ordinanza kienet *saved* bl-Art 47(9) tal-Kostituzzjoni. Ghalkemm wara t-3 ta` Marzu 1962, saru emendi ghall-Kap 69, is-*saving clause* tghodd ukoll ghal dawk l-emendi. Ghall-fini ta` kompletezza, b`referenza ghall-fattispeci tal-kaz tal-lum, il-qorti m`ghandhiex prova li saru emendi ghall-Kap 69 li jaqghu taht xi wahda mill-eccezzjonijiet ravvizati fil-paragrafi (a) sa (d) tal-Art 47(9) tal-Kostituzzjoni. Tghid dan ghaliex bl-introduzzjoni tal-Artikolu 1531B il-legislatur ghamilha cara illi ghal kirja li kienet fis-sehh qabel l-1 ta`

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

Il-qorti tqis illi ghaliex id-disposizzjonijiet tal-Kap 69 kienu *saved* bl-Art 47(9) tal-Kostituzzjoni, ma tistax tigi avvanzata mir-rikorrenti pretensjoni ta` vjolazzjoni tal-Art 37 tal-Kostituzzjoni. Ghalhekk l-ewwel talba <u>limitatament u safejn</u> tirreferi ghal vjolazzjoni tal-Art 37 tal-Kostituzzjoni qeghda tkun r<u>espinta</u>.

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

Id-disposizzjoni taqra hekk :-

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

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

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

Id-disposizzjoni hija gwidata minn tliet principji :-

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

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

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

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

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

Fis-sentenza **<u>Amato Gauci v. Malta</u>** (15 ta` Settembru 2009 : finali 15 ta` Dicembru 2009) l-ECtHR kienet qalet :-

*56. Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see **<u>Sporrong and</u>***

Lönnroth *cited above, §§ 69-74, and* ***Brumărescu v. Romania*** *[GC], no. 28342/95, § 78, ECHR 1999-VII).*

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

58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. …. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner (see ***Immobiliare Saffi v. Italy****, [GC], no. 22774/93, § 54, ECHR 1999-V; and Broniowski, cited above, § 151).*

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

…

"In the present case, having regard to the low rental value which could be fixed by the Rent Regulation Board, the applicant`s state of uncertainty as to whether he would ever recover his property, which has already been subject to this regime for nine years, the lack of procedural safeguards in the application of the law and the rise in the standard of

living in Malta over the past decades, the Court finds that a disproportionate and excessive burden was imposed on the applicant. The latter was requested to bear most of the social and financial costs of supplying housing accommodation to Mr and Mrs P. (see, mutatis mutandis, ***Hutten-Czapska****, cited above, § 225). It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant`s right of property.*

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

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

(a) Whether there was an interference

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

example, where the said restrictions are alleged to be unlawful (ibid.).

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

*46. Subsequently, in **R & L, s.r.o. and Others** (cited above) the Court specifically examined whether Article 1 of Protocol No. 1 protected applicants who had purchased property in the knowledge that rent restrictions imposed on the property might contravene the Convention. In that case, when the applicants had acquired their respective properties their rents had been set in accordance with the rent regulations applicable at the time and the applicants could not have increased the rents above the threshold set by the State. Nor were they free to terminate the rent agreements and conclude new ones with different – higher – levels of rent. The Court did not find it decisive that one of the applicants had purchased the property before the domestic courts had taken issue with the legislation in place which had given a legitimate expectation that the status of such properties would be addressed by the national legislator in due course. The Court held that it could not be said that the applicants as landlords had implicitly waived their right to set the level of rents, as, for the Court, waiving a right necessarily presupposed that it would have been possible to exercise it. There was no waiver of a right in a situation where the person concerned had never had the option of exercising that right and thus could not waive it. It followed that the rent-control regulations had constituted an interference with the landlords` right to use their property (ibid., § 106).*

*47. In the more recent **Zammit and Attard Cassar** (cited above, § 50) case, in a situation where the applicants` predecessor in title had knowingly entered into a rent agreement in 1971 with relevant restrictions (specifically the*

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

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

*set the rent themselves or to freely terminate the agreement. Clearly, they could not be said to have waived any rights in that connection (see **Zammit and Attard Cassar**, cited above, § 50).*

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

*50. The Court has previously held that rent-control schemes and restrictions on an applicant`s right to terminate a tenant`s lease constitute control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. It follows that the case should be examined under the second paragraph of Article 1 of Protocol No. 1 (see **Hutten-Czapska v. Poland** [GC], no. 35014/97, §§ 160-61, ECHR 2006-VIII; **Bittó and Others v. Slovakia**, no. 30255/09, § 101, 28 January 2014; and **R & L, s.r.o. and Others**, cited above, § 108).*

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

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

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

*53. In the present case the Court can accept that the applicable legislation in the present case pursued a legitimate social-policy aim, specifically the social protection of tenants (see **Amato Gauci**, cited above, § 55, and Anthony Aquilina, cited above, § 57). It is, however, also true that the relevance of that general interest may have decreased over*

time, particularly after 2008 (see Anthony Aquilina, cited above, § 57), even more so given that following that date, the only person benefiting from the impugned measures was P.G., whose financial situation as shown before the domestic courts and which is not being contested before this Court, leaves little doubt as to P.G`s necessity for such a property, and at a regulated rent. This Court will therefore revert to this matter in its assessment as to the proportionality of the impugned measure.

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

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

55. The Court will consider the impact that the application of the 1979 Act had on the applicants` property. It notes that the applicants could not exercise their right of use in terms of physical possession as the house was occupied by tenants and they could not terminate the lease. Thus, while the applicants remained the owners of the property they were subjected to a forced landlord-tenant relationship for an indefinite period of time.

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

especially since the tenancy could be inherited – as in fact happened in the present case. It is clear that these circumstances inevitably left the applicants in uncertainty as to whether they would ever be able to recover their property.

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

*58. The same cannot be said after the passage of decades, during which the rent had remained the same (as stated by the parties and the domestic courts, the rent is still EUR 466 annually). The Court has previously held that there had been a rise in the standard of living in Malta over the past decades (see **Amato Gauci**, cited above, § 63, and **Anthony Aquilina**, cited above, § 65). Thus, the needs and the general interest which may have existed in 1979 must have decreased over the three decades that ensued (see **Anthony Aquilina**, cited above, § 65). It is noted that as stated by the Government in paragraph 40 above, the minimum wage in 2015 was EUR 720.46 per month, while in 1974 (the date when Malta adopted a national minimum wage) it amounted to the equivalent of less than EUR 100 per month (see **Amato Gauci**, cited above, § 60).*

*59. The Court need not identify the exact year at which the rent payable was no longer reasonable. It observes that cases against Malta concerning the same subject matter, that is to say renewal of leases by operation of law - whose rent had been set on an open market – (see **Amato Gauci, Anthony Aquilina, and Zammit and Attard Cassar**, all cited above), which have invariably lead to findings of a violation of Article 1 of Protocol No. 1, concerned periods after the year 2000. Furthermore, the Government of the respondent State have often argued that Malta suffered a boom in property prices in 2003 (see, for example, **Apap Bologna v. Malta**, no. 46931/12, § 97, 30 August 2016).*

Lastly, although not determinative, it was only in 2008 that the applicants refused to accept the rent, once P.G. had inherited the property. In the light of the above it suffices for the Court to consider that a rent based on the value of the property as it stood in 1962 with the relevant adjustment which amounted to EUR 466 annually in 1988 and thereafter – was certainly not reasonable for the years following 2000.

60. In particular, even if one had to concede that the valuations submitted by the applicants are on the high side, the Court notes that the first-instance domestic court, in 2011, accepted EUR 3,000 per month (that is to say EUR 36,000 per year) as the rental market value of the property (see paragraph 18 above). Thus, the amount of rent received by the applicants, around EUR 39 a month, that is to say EUR 466 per year, for a fourteen-room house in Sliema, a highly sought-after location, is indeed "derisory" as was also found by the first-instance domestic court (see paragraph 18 above). Indeed, that amount of rent contrasts sharply with the market value of the premises in recent years, as accepted by the domestic court or as submitted by the applicant, as it amounted to a little more than 1% of the market value. The Court considers that State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable. Nevertheless, this may not lead to results which are manifestly unreasonable (see ***Amato Gauci****, cited above, § 62).*

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

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

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

L-ilment tal-applikanti kien illi r-restrizzjonijiet dwar kera kienu ta` piz eccessiv. Kien allegat ghalhekk mill-applikanti li garrbu vjolazzjoni tal-jeddijiet fondamentali taghhom hekk kif tutelati bl-Art 1 Prot 1 tal-Konvenzjoni. Il-kaz kien jittratta dwar kirja ta` fond kummercjali li kienet qed tigi mgedda *ope legis* u cioe` bis-sahha tal-Kap 69. Ghalkemm tal-lum huwa kaz ta` fond residenzjali, il-principji jghoddu xorta. L-ECtHR sabet li kien hemm lezjoni tal-Art 1 Prot 1 tal-Konvenzjoni minkejja l-emendi tal-Att X tal-2009.

Inghad hekk :-

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

(a) Whether there was interference

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

*49. More recently, in **R & L, s.r.o. and Others v. the Czech Republic** (nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09, 3 July 2014) the Court specifically examined whether Article 1 of Protocol No. 1 protected applicants who had purchased property in the knowledge that rent restrictions imposed on the property might contravene the Convention. In that case, when the applicants had acquired their respective houses their rents had been set in accordance with the rent regulations applicable at the time and the applicants could not have increased the rents above the threshold set by the State. Nor were they free to terminate the rent agreements and conclude new ones with different – higher – levels of rent. The Court held that it could not be said that the applicants as landlords had implicitly waived their right to set the level of rents, as, for the Court, waiving a right necessarily presupposed that it would have been possible to exercise it. There was no waiver of a right in a situation where the person concerned had never had the option of exercising that right and thus could not waive it. It followed that the rent-control regulations had constituted an interference with the landlords` right to use their property (ibid. § 106).*

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

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

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

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

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

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

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

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

(c) Whether the Maltese authorities struck a fair balance

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

58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the conditions of the rent received by individual landlords and the extent of the State`s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation

of the system and its impact on a landlord`s property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State`s conduct (see Immobiliare Saffi v. Italy, [GC], no. 22774/93, § 54, ECHR 1999-V, and Broniowski, cited above, § 151).

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

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

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

between the interests of the tenants and those of the owners (ibid and, mutatis mutandis, ***Statileo v. Croatia****, no. 12027/10, § 128, 10 July 2014).*

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

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

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

65. Having assessed all the elements above, and notwithstanding the margin of appreciation allowed to a State in choosing the form and deciding on the extent of control over the use of property in such cases, the Court finds that, having regard to the relatively low rental value of the premises and the lack of procedural safeguards in the application of the law, a disproportionate and excessive burden was imposed on the applicants, who have had to bear a significant part of the social and financial costs of supporting a commercial enterprise. It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants` right to the enjoyment of their property.

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

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

"41. The Court notes that it has found in plurality of cases against Malta concerning the same subject matter that, despite the considerable discretion of the State in choosing the form and deciding on the extent of control over the use of property in such cases, having regard to the low rental value which could have or was received by the applicants, their state of uncertainty as to whether they would ever recover the property (despite more recent amendments), the lack of procedural safeguards in the application of the law and the

rise in the standard of living in Malta over the past decades, a disproportionate and excessive burden was imposed on the applicants who were made to bear most of the social and financial costs of supplying housing accommodation (see Amato Gauci, cited above, § 63; Anthony Aquilina v. Malta, no. 3851/12, § 67, 11 December 2014; and Cassar v. Malta, no. 50570/13, § 61, 30 January 2018). In those cases the Court found that the Maltese State had failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant`s right of property and that there had thus been a violation of Article 1 of Protocol No.1 to the Convention.

42. Having regard to the facts of the case and the parties` observations, the same considerations apply in the present case. There has accordingly been a violation of Article 1 of Protocol No.1 to the Convention."

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

Fejn jidhol l-Art 1 Prot 1 tal-Konvenzjoni, bosta kienu matul is-snin id-decizjonijiet tal-qrati taghna fejn kienet dikjarata vjolazzjoni. Il-lista tad-decizjonijiet hija twila u facilment traccjabbli. Fl-assjem taghhom id-decizjonijiet kienu mirquma, attenti u ndirizzaw il-qofol tal-kwistjoni. Kellhom piz sinjifikanti li wassal ghal bidla fil-legislazzjoni. Fl-istess waqt il-qorti tghid li l-bidliet fil-legislazzjoni li kien hemm sal-lum kienu tardivi. Min-naha tal-Istat matul is-snin kien hemm wisq tkaxkir tas-saqajn li wassal ghal pronunzjamenti wiehed wara l-iehor mill-ECtHR kontra pajjizna. Fil-qasam tal-harsien tal-jeddijiet fondamentali tal-persuna, il-qawl : *meglio tardi che mai* : ma jaghmel ebda sens. Ragunament ta` dik ix-xorti forsi jaghmel sens ghall-gejjieni ; certament pero` ma jaghmel ebda sens ghall-imghoddi. Fejn si tratta ta` ksur ta` jeddijiet fondamentali, l-Istat ghandu l-obbligu, ladarba qeghdin nghixu f`socjeta` demokratika fondata fuq is-saltna tad-dritt u l-gustizzja, li jiddritta l-imghawweg fil-pront u bla dewmien.

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

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

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

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

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

Kien biss snin wara bl-Att XXXI tal-1995 illi l-legislatur addotta posizzjoni differenti sabiex jaghti nifs lis-suq tal-kera. B`dak l-Att il-kirijiet il-godda u cioe` dawk li jsiru wara l-1 ta` Gunju 1995 ma baqghux soggetti ghal-ligijiet specjali tal-kera. Ghall-kirjiet li saru qabel l-1 ta` Gunju 1995 baqghu jghoddu l-ligijiet ta` qabel. Fil-kaz ta` dawn il-kirjiet saru bidliet fil-ligi izda l-isproporzjon kontra s-sidien fis-sostanza baqa` jipprevali. Ghalkemm inghad pubblikament mill-awtoritajiet governattivi aktar kmieni dan ix-xahar li se tkun indirizzata s-sitwazzjoni ta` dawn il-kirjiet b`mod effettiv, wiehed irid jistenna kif sejra tkun fid-dettall il-ligi li sejra tghaddi mill-Parlament qabel ma jkun hemm pronunzjament mill-qrati.

iv) Konsiderazzjonijiet

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

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

Jirrizulta ppruvat illi l-kera li r-rikorrenti setghu jippercepixxu minhabba l-effetti tal-Kap 69 meta mqabbla mal-kera fis-suq hieles oggettivament hija bil-wisq baxxa. Fil-kaz ta` llum mhux maghruf sewwa sew meta bdiet il-kirja. Mix-xiehda tal-intimata Bonello jirrizulta illi kienet tghix fil-fond de quo sa mit-twelid u baqghet tghix fl-istess fond anke wara li z-zwieg taghha fil-21 ta` April 1968. Tghid ukoll illi sakemm kien ghadu haj missierha l-kera kien ihallasha hu izda meta dan gie nieqes il-kera bdiet thallasha hi. Mhux maghruf meta gie nieqes missierha u ghalhekk lanqas ma huwa maghruf meta bdiet tithallas il-kera mill-intimata Bonello.

Min-nota ta` sottomissjonijiet tar-rikorrenti, kif ukoll mir-ricevuti tal-kera li kienu esebiti fl-atti jirrizulta illi sal-2013 il-kera mhallsa mill-intimata Bonello kienet fl-ammont ta` €70 fis-sena. Jirrizulta wkoll illi bejn l-2014 u l-2016 hallset kera fl-ammont ta` €180 fis-sena u bejn l-2017 u l-2018 thallset kera ta` €203.13 fis-sena. Il-kera zdiedet effett tal-bidla fil-legislazzjoni. Kienet x`kienet ir-raguni li wasslet ghall-kirja favur l-inkwilini Bonello jibqa` l-fatt illi jekk dak iz-zmien is-sid ried jiehu xi gwadann mill-proprjeta` tieghu ma kellux triq ohra hlief illi jottempra ruhu mal-ligijiet vigenti. Zgur illi ma kienx previst mis-sid li kien sejjer ikun hemm bdil tant qawwi `l fuq fis-suq tal-kera li gab mieghu bidla fil-ligijiet anke minhabba l-influwenza markata tad-

decizjonijiet tal-Qorti ta` Strasbourg. L-istat ta` nuqqas ta` ghazla kienet realta` fil-pajjiz taghna li thalla jippersisti mill-Istat sa zminijiet ricenti. L-isvolta lejn l-ahjar giet unikament minhabba s-sentenzi tal-ECtHR u tal-Qorti Kostituzzjonali taghna. Hemm kien dikjarat *senza se e senza ma* li bl-applikazzjoni tal-ligijiet specjali tal-kera sehh ksur tal-jeddijiet fondamentali tas-sidien.

Fid-decizjoni tal-ECtHR fil-kaz ta` **Zammit and Attard Cassar v. Malta** (op. cit.) kien rimarkat illi :- *"at the time, the applicants` predecessor in title could not reasonably have had a clear idea of the extent of inflation in property prices in the decades to come ..." (para 50).*

Fis-sentenza li tat il-Qorti Kostituzzjonali fid-29 ta` April 2016 fil-kawza fl-ismijiet **Maria Ludgarda sive Mary Borg v. Rosario Mifsud et** inghad illi :- *"kien biss fl-ahhar snin illi ghall-ewwel darba gie dikjarat li l-Artikolu 12(2) jilledi d-dritt fundamentali protett taht l-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropea (sentenza tal-Qorti Ewropea fil-kaz Amato Gauci vs Malta, 15 ta` Dicembru 2009). …. Dan m`huwiex kaz ta` ksur ta` dritt fundamentali li jsehh ta` darba, izda vjolazzjoni kontinwata tal-Artikolu 1 tal-Ewwel Protokoll. Fic-cirkostanzi dan l-argument hu nfondat. Issir ukoll riferenza ghas-sentenza tal-Qorti Ewropea fil-kaz Anthony Aquilina v Malta Applikazzjoni 3851/12) tal-11 ta` Dicembru 2014, li kienet titratta wkoll kaz ta` controlled rent. Minkejja li s-sid kien baqa` jircievi l-kera l-qorti xorta ddikjarat ksur tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, ghalkemm ikkunsidrat dan `il fatt meta llikwidat id-danni."*

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

Bl-emendi l-aktar ricenti ghall-Kap 69, gara li filwaqt li l-inkwilini nghataw protezzjoni, ma garax l-istess lis-sidien li kellhom joqghodu ghal dak li kienet tipprovdi l-ligi ghaliex il-legislatur naqas milli joffrilhom rimedju adegwat skont il-ligi ordinarja sabiex joggezzjonaw b`mod effettiv ghar-restrizzjonijiet fuq il-kundizzjonijiet lokatizji. L-uniku triq disponibbli ghas-sidien kienet li jfittxu kenn quddiem il-qrati ta` indole kostituzzjonali jew konvenzjonali.

Tajjeb jinghad illi a tenur tal-Art 14 tal-Kap 69 is-sid illi "*irid jgholli l-kera jew ibiddel il-kondizzjonijiet tal-kiri*" kellu jsegwi l-procedura stabbilita fl-Ordinanza, u jindika l-kondizzjonijiet il-godda qabel l-iskadenza tal-kirja. L-inkwilin jibqa` bil-jedd illi jressaq l-oggezzjonijiet tieghu quddiem il-Bord li Jirregola l-Kera. Ghad illi l-legislatur haseb ghal ezenzjoni ghar-regola stabbilita fl-Art 3, fl-istess waqt holoq eccezzjoni bl-Art 4 ghaliex kienu limitati s-setghat tal-Bord billi dan ma setax jawtorizza awment fil-kera li jkun oghla minn 40% tal-valur lokatizju tal-fond kif kien fl-1914. Anke fil-kaz li s-sid jitlob lura l-pussess tal-fond, il-legislatur haseb ghal cirkostanzi specifici fejn il-Bord jista` jilqa` t-talba tas-sid. Dan johrog mid-dispost tal-Art 9 tal-Kap 69. L-assjem tal-premess iwassal ghall-fehma li l-uniku rimedju tajjeb u effettiv li kellhom ir-rikorrenti kien proprju procediment bhal dak tal-lum.

Kif inghad minn din il-qorti diversament presjeduta fis-sentenza li tat fit-30 ta` Mejju 2018 fil-kawza fl-ismijiet **<u>David Pullicino et v. Avukat Generali et</u>** :

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

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

Jirrizulta li l-legislazzjoni attwali tolqot lir-rikorrenti bi sproporzjon evidenti u sfavorevoli ghalihom. Mhuwiex in diskussjoni l-jedd tal-Istat illi jikkontrolla b`legislazzjoni l-uzu tal-proprjeta` meta dan ikun fl-interess pubbliku. Fl-istess waqt l-Istat huwa obbligat juri li fl-applikazzjoni ta` dik il-legislazzjoni jkunu qeghdin jinzammu bilanc u proporzjonalita` bejn l-interess generali u ta` dak privat. Il-kwistjoni ghandha tibqa` nkwadrata madwar il-fatt illi bl-applikazzjoni

tad-disposizzjonijiet tal-Kap 69 ghas-sitwazzjoni tar-rikorrenti qed ikun hemm ksur tal-Art 1 Prot 1 tal-Konvenzjoni. Fil-kaz tar-rikorrenti huwa ppruvat sproporzjon notevoli kontra taghhom fir-ritorn li jista` jkollhom li kieku t-tgawdija tal-propjeta` kellha tithalla tilhaq il-milja taghha.

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

Tajjeb jinghad illi bl-emendi li kienu ntrodotti ghall-Kap 16 bl-Att X tal-2009, ghad li kien hemm awment fil-kera, xorta wahda baqa` jirrizulta sproporzjon kontra r-rikorrenti bejn l-awment fil-kera skont l-Art 1531C tal-Kap 16 u l-valur lokatizju tal-fond fis-suq hieles. Dan oltre ghall-fatt li s-sid baqa` kostrett joqghod ghal quantum ta` zieda dettat mil-ligi li stabbiliet mhux biss kemm ghandu jkun l-awment izda anke kull meta. Qabel id-dhul fis-sehh tal-emendi, ir-rikorrenti odjerni kienu ilhom snin twal igarrbu lezjoni tal-jedd taghhom skont l-Art 1 Prot 1 tal-Konvenzjoni.

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

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

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

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

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

B`referenza ghall-kaz tal-lum, jirrizulta ppruvat illi l-kera percepita mir-rikorrenti, abbazi tad-disposizzjonijiet tal-Kap 69, hija bil-wisq inferjuri ghall-kera fis-suq. Il-figuri li saret referenza ghalihom aktar kmieni jitkellmu wahedhom. Hija l-fehma konsiderata ta` din il-qorti illi meqjusa l-fatti u cirkostanzi tal-kaz tal-lum kif evolvew mal-medda tas-snin sal-lum il-piz li kellu jgorr is-sid kien sproporzjonat u eccessiv. Ghalhekk huwa ppruvat l-isproporzjon li ma jridx l-Art 1 Prot 1 tal-Konvenzjoni u li qed jingarr mis-sid.

Fid-dawl tal-premess, il-qorti qeghda tilqa` l-ewwel (1) talba tar-rikorrenti in kwantu illi t-thaddim tad-dispozizzjonijiet tal-Kap 69 qeghdin jaghtu lok ta` tigdid tal-kirja *ope legis*. Tichad l-eccezzjonijiet kollha tal-intimati safejn dawn jolqtu l-mertu ta` dik il-parti tal-ewwel (1) talba li tirrigwarda d-dikjarazzjoni ta` ksur tal-jeddijiet fondamentali tar-rikorrenti kif protetti bl-Art 1 Prot 1 tal-Konvenzjoni. Ghalhekk tilqa` l-ewwel (1) talba tar-rikorrenti safejn din tirrigwarda ksur tal-jeddijiet fondamentali taghhom kif tutelati bl-Art 1 Prot 1 tal-Konvenzjoni.

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

Ir-rikorrenti talbu rimedju adegwat ghall-vjolazzjoni illi garrbu. Fl-ambitu ta` din id-domanda, talbu dikjarazzjoni fis-sens illi l-intimata Bonello ma tistax tibqa` tistrieh fuq il-Kap 69 sabiex tibqa` tokkupa l-fond de quo. Ghalkemm ir-rikorrenti ma talbux l-izgumbrament tal-intimata Bonello mill-fond de quo, din xorta eccepiet bis-seba` (7)

eccezzjoni taghha illi kwalsiasi rimedju li jinghata ghal-lezjoni li garrbu r-rikorrenti, ir-rimedju m`ghandux ikun l-izgumbrament taghha mill-fond. Ladarba saret din l-eccezzjoni, il-qorti sejra xorta wahda taghmel il-konsiderazzjonijiet taghha.

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

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

konjugi Bajada ma haqqhomx jibqghu fil-post ladarba ghandhom proprjeta` immobbli ohra, pero`, ghal dan ma hasibx il-Legislatur, u ma jahtux il-konjugi Bajada li jippruvaw jiehdu vantagg mil-ligi kif inhi.

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

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

Fis-sentenza li tat il-Qorti tal-Appell fl-24 ta` April 2015 fil-kawza **Michael Angelo Briffa et v. Nadia Merten** inghad illi :-

16. Lanqas ma huwa relevanti l-fatt illi r-rimedju moghti mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kaz ta` Amato Gauci kien il-kundanna tal-gvern li jhallas id-danni u mhux il-kundanna tal-kerrej ghal zgumbrament. Qabel xejn kawzi quddiem il-Qorti Ewropea jsiru kontra l-istat u mhux kontra cittadini privati: il-kerrej, li ma kienx parti fil-kawza, ma setax jigi kundannat li jizgombra. Barra minn hekk, ir-rimedju li tista` taghti dik il-qorti huwa biss kontra l-istat: ma ghandha ebda setgha tordna zgumbrament ta` cittadini privati. Ukoll, dik il-qorti tista` biss tghid illi irravvizat ksur ta` xi disposizzjoni tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali izda ma ghandha ebda setgha li tghid illi l-ligi domestika "tkun bla effett".

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

> *16. As the Court has held on a number of occasions, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see Iatridis v. Greece (just satisfaction) [GC}, no. 31107/96 §32, ECHR 2000- XI, and Guiso-Gallissay v. Italy Just satisfaction) [GC], no. 58858/00, § 90, 22 December 2009). The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the violation allows of restitutio in integrum it is the duty of the State held liable to effect it, the Court having neither the power nor the practical possibility of doing so itself. If; however, national law does not allow - or allows only partial reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate."*

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

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

with the principles of protection of property rights under the Convention."

Bla hsara ghall-kuntest tad-dritt fejn kienet ippronunzjata l-gurisprudenza fuq riferita, din il-qorti tafferma li din il-gurisprudenza tghodd ukoll *mutatis mutandis* ghal-legislazzjoni mertu tal-kawza odjerna. Il-qorti tghid ukoll illi procediment ta` x-xorta tal-lum mhuwiex il-forum appozitu sabiex tinghata decizjoni dwar jekk inkwilin ghandux jigi zgumbrat jew le. Huma t-tribunali jew qrati ordinarji li ghandhom il-kompetenza li jesprimu ruhhom dwar talba ghal zgumbrament. Ghall-fini tal-procediment odjern, dik rilevanti hija l-konsiderazzjoni ta` jekk ligi tkunx ivvjolat il-jeddijiet fondamentali tal-persuna u allura jekk abbazi tal-fattispeci ta` kull kaz dik il-ligi ghandhiex tkun applikata bejn il-partijiet kemm-il darba l-applikazzjoni taghha tkun leziva ghad-drittijiet fundamentali tal-persuna koncernata. Fil-kaz tal-lum jirrizulta li l-inkwilini gabu ruhhom skont il-ligijiet vigenti. Ghalhekk m`ghandhomx legalment tirrispondi ghall-kostituzzjonalita` o meno tal-ligi kif applikata. L-Istat huwa responsabbli ghall-promulgazzjoni tal-ligi. Ghalhekk ghandu jkun l-Istat illi jwiegeb.

Konsegwentement qeghda tilqa` l-eccezzjoni numru sebgha (7) tal-intimata Bonello billi tiddikjara li mhijiex sejra tordna l-izgumbrament tal-intimata Bonello mill-fond de quo. Fl-istess waqt qeghda tipprovdi dwar it-tieni (2) talba billi tiddikjara li l-intimata Bonello ma tistax tibqa` tistrieh fuq l-applikazzjoni tad-dispozizzjonijiet tal-Kap 69 sabiex tibqa` tokkupa l-fond de quo.

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

Ir-rikorrenti talbu l-likwidazzjoni ta` kumpens.

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 ; **Victor Gatt et v. Avukat Generali et** deciza fil-5 ta` Lulju 2011 ; u **Ian Peter Ellis et v. Avukat Generali et** deciza fl-24 ta` Gunju 2016).

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

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

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

Il-Qorti qalet hekk :-

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

"Rigward il-quantum tal-kumpens stabbilit mill-ewwel Qorti, din il-Qorti tosserva fl-ewwel lok li kull kaz ghandu jigi trattat u deciz fuq il-fattispecie tieghu. Barra minn hekk, jekk il-Qorti Ewropea 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 Ewropea. Fil-kaz odjern l-ewwel Qorti hadet in konsiderazzjoni l-fatturi kollha li jimmilitaw kemm favur kif ukoll kontra r-rikorrenti u deherilha li l-kumpens xieraq li ghandha taghti f` dan il-kaz ikun fl-ammont ta` hamsa u ghoxrin elf Euro (EUR 25,000). Hija kkonsidrat id-dewmien da parti tar-rikorrenti li jiehdu l-proceduri opportuni, il-valur tal-immobbli, iz-zmien tant twil li r-rikorrenti ilhom privati mill-godiment tal-proprjeta`

taghhom minghand ma nghata ebda kumpens, l-istat tal-fond u l-ezistenza tal-fattur tal-interess pubbliku. Ma` dawn ghandu jigi senjalat il-fatt li qabel l-ispossessament tal-proprjeta` taghhom ir-rikorrenti kellhom permess mill-Bord kompetenti sabiex jizviluppaw il-fond."

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

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

Fid-decizjoni **<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 binarju kienet id-decizjoni fil-kaz ta` **Portanier v. Malta** tas-27 ta` Novembru 2019 (App. 55747/16).

Inghad hekk:

"*55. The Court notes that it has repeatedly found that the sums awarded in compensation by the Constitutional Court do*

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

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

...

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

63. The Court notes that the annual rental value of the property estimated on the basis of its sale value according to the court-appointed architect was EUR 5,600. Nevertheless the domestic court considered its value to be more likely EUR 3,000 to 4,000 (see paragraph 14 above). The latter appears to be in line with the Government`s architect`s valuation which also reflects similar figures. With that in mind, in assessing the pecuniary damage sustained by the applicants, the Court has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It has also considered the legitimate purpose of the restriction suffered, bearing in mind that legitimate

objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (see, inter alia, Ghigo v. Malta (just satisfaction), no. 31122/05, § 18 and 20, 17 July 2008). Furthermore, the rent already received by the applicant for the relevant period must be deducted.

64. The Court reiterates that an award for pecuniary damage under Article 41 of the Convention is intended to put the applicant, as far as possible, in the position he would have enjoyed had the breach not occurred. It therefore considers that interest should be added to the above award in order to compensate for the loss of value of the award over time. As such, the interest rate should reflect national economic conditions, such as levels of inflation and rates of interest. The Court thus considers that a one-off payment of 5% interest should be added to the above amount (ibid., § 20).
65. The Court thus awards the applicant EUR 8,000."

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

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

95. Thus, in assessing the pecuniary damage sustained by the applicants, the Court has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It has also considered the legitimate purpose of the restriction suffered, bearing in mind that legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social

justice, may call for less than reimbursement of the full market value (see, inter alia, Ghigo v. Malta (just satisfaction), no. 31122/05, § 18 and 20, 17 July 2008). In the present case however, the Court keeps in mind that the property was not used for securing the social welfare of tenants or preventing homelessness (compare, Fleri Soler and Camilleri v. Malta (just satisfaction), no. 35349/05, § 18, 17 July 2008). Thus, the situation in the present case might be said to involve a degree of public interest which is significantly less marked than in other cases and which does not justify such a substantial reduction compared with the free market rental value (see, Zammit and Attard, cited above, § 75).

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

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

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

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

ii) <u>Likwidazzjoni</u>

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

Il-qorti sabet vjolazzjoni tal-Art 1 Prot 1.

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

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

a) <u>Kumpens pekunjarju</u>

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

Il-qorti tibda billi tosserva illi l-kirja favur l-intimata Bonello u l-antekawza taghha ilha ghaddejja ghal snin twal. Min-naha tar-rikorrenti, il-vjolazzjoni lamentata kienet cirkoskritta ghaz-zmien ta` bejn id-<u>9 ta` Novembru 1971 u l-21 ta` Jannar 2020</u>.

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

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

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

Il-kostatazzjonijiet, l-osservazzjonijiet u l-konkluzjonijiet tal-perit tekniku li kien mahtur fil-kaz odjern jikkostitwixxu **prova ta` fatt**.

Fir-relazzjoni taghha l-perit tekniku pprezentat zewg tabelli (a fol 84 u 85) li juru l-valur lokatizzju tal-fond 32, Triq San Bastjan ir-Rabat ghaz-zmien ta` bejn l-1971 u l-2020. Il-perit ibbazat il-konkluzjonijiet taghha fuq it-tabella numru 2 (fol. 85) ghaliex fil-fehma taghha din taghti stampa aktar reali tal-valur lokatizzju matul is-snin. Il-qorti tikkondividi din il-**prova ta` fatt** u ghalhekk sejra tibbaza l-komputazzjoni taghha fuq it-tabella numru 2. Minn din it-tabella numru 2 jirrizulta li l-valur lokatizju ghall-fond de quo fis-suq ghaz-zmien ta` bejn l-1971 u l-2020 kien dak ta` **€180,035**. Dan l-ammont huwa mifrux fuq intervalli ta` hames snin fuq il-perjodu kollu.

Il-figura ta` €180,035 tikkostitwixxi l-massimu tal-kumpens pekunjarju, liema ammont ghandu pero` jkun aggjustat skont il-linji gwida li sejra taghti.

- **Linji gwida**

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

Sal-2013 il-kera kienet tammonta ghal €70 fis-sena. Fl-2014 il-kera zdiedet ghal €180 fis-sena skont kif il-ligi. Fl-2017 il-kera rega` zdiedet ghal €203.13 fis-sena. Ir-rikorrenti baqghu jaccettaw il-hlas tal-kera sal-2019. Il-qorti qeghda tqis illi fuq medda ta` 48 sena li ghaddew bejn l-1971 u l-2019 thallsu total ta` kera ta` **€4089.39**. Ghalhekk l-figura massima ta` **€180,035** ghandha tonqos ghal **€175,945.61** arrotondata ghal **€175,946**.

ii. L-interess generali

Aktar kmieni l-qorti tat sfond storiku-legali ta` x`wassal biex saru l-ligijiet specjali tal-kera. M`ghandhiex dubju mis-siwi u mil-legittimita` tal-intervent legislattiv tenut kont tal-fatt li fiz-zmien li saru, u anke ghal snin wara, taw kenn u wens lil bosta persuni f`dawn il-Gzejjer. Dan il-fattur ghandu jwassal ghal tnaqqis ta` **35%** fil-figura ridotta ta` €175,946. Adottat rata ta` 35% sabiex tpatti ghas-snin l-ohra li ha l-Istat Malti sabiex jipproponi ligijiet li kienu ntizi sabiex isewwu l-isproporzjon li garrbu s-sidien tal-propjeta` mikrija matul is-snin. Ir-rata kienet tkun diversa li kieku l-Istat Malti gharaf jintervjeni qabel ma beda jsib ruhu rinfaccjat b`decizjonijiet sfavorevoli moghtija mill-qrati Maltin u mill-ECtHR. Il-figura ta` €175,946 ghandha tinzel ghal €114,364.90 arrotondata ghal **€114,365**.

iii. Inerzja tal-Istat

Matul is-snin kien hemm inerzja u riluttanza min-naha tal-Istat li jintervjeni b`mod deciziv b`legislazzjoni aggjornata ghar-realtajiet socjo-ekonomici tal-pajjiz, nonostante li kemm il-qrati kostituzzjonali Maltin kif wkoll l-ECtHR kienu qeghdin jaghmluha cara lill-Istat Malti bid-decizjonijiet taghhom illi l-izbilanc u l-isproporzjon kontra s-sidien ta` fondi residenzjali bl-applikazzjoni tad-disposizzjoni tal-Kap 69 kien qieghed ikun lesiv ghall-jeddijiet fondamentali taghhom u ma setax ikompli jitwarrab fil-genb bla ma jkun indirizzat b`mod effettiv b`interventi legislattivi godda. Huwa proprju ghalhekk illi semplici dikjarazzjoni ta` ksur tad-drittijiet fondamentali tar-rikorrenti mhix bizzejjed sabiex taghmel tajjeb ghall-vjolazzjoni subita.

iv. Passivita` tar-rikorrenti

Il-qorti jidhrilha li ghandu jkun hemm tnaqqis ulterjuri ta` **35%** minhabba l-komportament kjarament passiv tar-rikorrenti. Kienet ghazla taghhom u tal-antekawza taghhom li joqghodu lura sas-6 ta` Dicembru 2019 sabiex jipprezentaw l-azzjoni odjerna. Ghal din il-qorti, l-imgieba tar-rikorrenti ma kenitx kwistjoni ta` kawtela izda pjuttost attitudini ta` *wait and see* skont dak li qed jigi deciz mill-qrati.

Ir-rikorrenti m`ghandhomx jigu "premjati" talli baqghu passivi. Il-figura ghalhekk ghandha terga` tinzel u ssir **€74,337.25**.

v. Il-fond

Il-qorti rat ir-relazzjoni.

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.

Il-kumpens pekunjarju qieghed jigi likwidat fl-ammont arrotondat ta` €74,337.

b) Kumpens mhux pekunjarju

Indipendentement mill-kumpens pekunjarju li jikkostitwixxu telf effettiv, il-qorti tghid li r-rikorrenti haqqhom jircievu wkoll danni morali fl-ammont ta` **€5,000** ghaliex sprovvisti kif kienu minn rimedju ordinarju effettiv kif jindirizzaw il-lanjanzi taghhom kienu kostretti jirrikorru ghal procediment ta` din ix-xorta semplicement ghaliex l-Istat Malti qaghad lura ghal ghexieren ta` snin milli jsib tarf tal-izbilanc u tal-isproporzjon li kienu qeghdin igarrbu sidien ta` proprjetajiet b`legislazzjoni adegwata u effettiva.

c) Riassunt

Qieghed jigi likwidat favur ir-rikorrenti kumpens globali ta` **€79,337** ghall-vjolazzjoni accertata tal-jeddijiet fondamentali taghhom, liema kumpens ghandu jithallas mill-intimat Avukat tal-Istat. Tghid hekk ghaliex l-Istat (rapprezentat f`din il-kawza mill-Avukat tal-Istat) huwa responsabbli ghall-promulgazzjoni ta` ligi. Jekk bl-

applikazzjoni ta` ligi ssehh vjolazzjoni tal-jeddijiet fondamentali tal-persuna, l-Avukat tal-Istat ghandu jaghmel tajjeb ghall-vjolazzjoni tal-jeddijiet fondamentali u jhallas kumpens. L-intimata Bonello m`ghandha thallas ebda kumpens lir-rikorrenti ghaliex qaghdet mal-ligijiet vigenti. M`ghamlet xejn kontra l-ligi. Lanqas spejjez gudizzjarji m`ghandha tbati.

Decide

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

Tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel (1) u tat-tielet (3) eccezzjonijiet tal-intimat Avukat tal-Istat.

Tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel (1) u tar-raba` (4) eccezzjonijiet tal-intimata Bonello.

Riferibbilment ghall-ewwel (1) talba, tilqa` l-eccezzjonijiet tal-intimati safejn dawn jirrigwardaw allegata vjolazzjoni tal-jeddijiet fondamentali tar-rikorrenti hekk kif dawn huma mharsa bl-Art 37 tal-Kostituzzjoni ta` Malta.

Tichad safejn l-ewwel (1) talba tittratta vjolazzjoni tal-jeddijiet fondamentali tar-rikorrenti hekk kif huma mharsa bl-Art 37 tal-Kostituzzjoni ta` Malta.

Tichad l-eccezzjonijiet tal-intimati safejn fl-ewwel (1) talba r-rikorrenti jilmentaw minn vjolazzjoni tal-jeddijiet fondamentali taghhom kif dawn huma mharsa bl-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tal-Jeddijiet Fondamentali u tad-Drittijiet tal-Bniedem.

Tilqa` l-ewwel (1) talba safejn din tittratta l-ilment tar-rikorrenti minn vjolazzjoni tal-jeddijiet fondamentali taghhom kif dawn huma mharsa bl-Ewwel (1) Artikolu tal-Ewwel (1)

Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tal-Jeddijiet Fondamentali u tad-Drittijiet tal-Bniedem.

Riferibbilment ghat-tieni (2) talba, tiddikjara li mhijiex sejra tordna l-izgumbrament tal-intimata Bonello mill-fond 32, Triq San Bastjan, Rabat, Malta. Ghalhekk qeghda tilqa` s-seba` (7) eccezzjoni tal-istess intimata.

Riferibbilment ukoll ghat-tieni (2) talba, tiddikjara illi accertata l-vjolazzjoni tal-jeddijiet fondamentali tar-rikorrenti kif dawn huma mharsa bl-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Jeddijiet Fondamentali, l-intimata Bonello ma tistax tistrieh aktar fuq l-applikazzjoni tad-disposizzjonijiet tal-Kap 69 tal-Ligijiet ta` Malta sabiex tibqa` tokkupa l-fond 32, Triq San Bastjan, Rabat, Malta.

Tichad l-eccezzjonijiet kollha tal-intimati safejn dawn jirrigwardaw it-tielet (3) talba.

Riferibbilment ghat-tielet (3) talba, tillikwida favur ir-rikorrenti kumpens komplessiv fl-ammont ta` disgha u sebghin elf u tliet mija sebgha u tletin ewro (€79,337) in kwantu ghal erbgha u sebghin elf u tliet mija sebgha u tletin ewro (€74,337) bhala kumpens pekunjarji u in kwantu ghal hamest elef ewro (€5,000) bhala kumpens morali, ghall-vjolazzjoni tal-jeddijiet fondamentali taghhom hekk kif dawn huma mharsa bl-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali.

Tordna lill-intimat Avukat tal-Istat sabiex ihallas lir-rikorrenti s-somma hekk likwidata, bl-imghax legali b`effett mil-lum.

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

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

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur