THE FIRST HALL OF THE CIVIL COURT
(CONSTITUTIONAL JURISDICTION)

HON. JUDGE
IAN SPITERI BAILEY LL.M. LL.D.

Today, Wednesday, the 12th of June, 2024

Case Number: 3

Application No: 126/2022 ISB

Andreas Kuemmert (ID60700A)

Vs

Avukat tal-Istat

u

Kummissarju tal-Pulizija

The Court,

Having seen the **Application** filed by plaintiff **Andreas Kuemmert** on the 2nd of March 2022, whereby he requested this Court to:

> *(1) Tiddikjara li n-notifika f'gurnal lokali tal-imputazzjonijiet migjuba fil-kawzi hawn fuq imsemmija kontra tieghu huma in vjolazzjoni tal-Artiklu 6(3) tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem, u jilledu d-dritt tieghu taht l-istess artiklu.*

(2) Tiddikjara li l-arrest tieghu biex ingieb il-qorti u nzamm lejl shih arrest jivvjola l-artiklu 5(1) tal-Konvenzjoni Ewropea, ghax il-Qorti li ordnat il-mandat kienet qed tagixxi fuq notifika li hija kontra l-ligi u l-konvenzjoni ewropea.

(3) Taghtih rimedju effettiv u kumpens xieraq ghad-danni minnu sofferti.

(4) Bl-ispejjez kollha ta' din il-kawza.

And this after having stated:

Illi fit-23 ta' Lulju 2021 huwa sab li kellu żewġ kawżi bin-numri 21 u 22 fuq il-lista tal-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali seduta tat-traffik.

Illi lejliet l-istess seduta fit-15:00 marru l-pulizija tal-Mosta, ħabbtulu l-bieb fejn naturalment sabuh u ġie arrestat u eventwalment meħud id-Depot tal-Pulizija. Huwa ngħata l-opportunita` li jkellem l-avukat sottoskritt fejn dan ipprova jispjega lill-pulizija li l-istess Andreas Kuemmert ma kien bl-ebda mod notifikat u jaf bil-kawża u naqas li ma jidhirx u ma kienx sewwa li arrestawh ukoll fit-15:00 tat-22 ta' Lulju meta s-seduta kienet fil-11:30 ta' 'l għada 23 ta' Lulju 2021.

Meta 'l għada deher bil-manetti quddiem il-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali u imħabbel kif kien ġie ppreżentat quddiem il-maġistrat li saret kif ġie l-istess notifikat. Il-kas kien jirreferi għal xi akkużi ta' kontravenzjonijiet tat-traffiku li kienu jirreferu għas-sena 2013. Meta saru mistoqsijiet oħrajn irriżulta li dan kien notifikat mhux personalment imma permezz tal-ġurnali anzi ta' ġurnal wieħed li jidħol fil-proċess tal-maġistrat u dan kien ikkunsidrat bħala validament notifikat għall-finijiet u effetti kollha tal-liġi.

Din is-sistema hija bbażata fuq regolament illi sar, regolamenti magħrufa bħala 9.22 iġifieri regolamenti numru 22 taħt il-Kap. 9 tal-Kodiċi Kriminali li legalment però huwa l-avviż legali 335 tas-sena 2014 kif sussegwentement emendat sas-sena 2019.

B'din is-sistema ġara li persuna titqies notifikata jekk tiġi ppubblikata f'gazzetta waħda lokali u mhux neċessarjament l-iktar ġurnali li jinqara f'dan il-pajjiż. Pero` dan business tajjeb għal dak il-ġurnal għax għal kull inserzjoni li ssir jitħallas tal-avviż.

Din is-sistema llum lanqas għadha tiġi operata. Kienet stramba wkoll meta kienet invigore li dan kien japplika għal ċertu qrati u lanqas għall-qrati kollha. Tant hu hekk li stranament l-iskeda numru wieħed il-kawżi li setgħu jiġu nnotifikati b'dak il-mod tal-Maġistrat Dr Joe Mifsud, tal-Maġistrat Dr Caroline Farrugia Frendo, tal-Maġistrat Dr Astrid May Grima u tal-Maġistrat Dr Victor George Axiaq.

Ċertament ma jistax ikollok regoli ta' proċedura li jiddistingwu skont il-Maġistrat.

Pero` anke r-regolamenti li kellu dritt jagħmel ministru bil-Kodiċi Kriminali ma jagħtuhx poter illi ibiddel il-Kodiċi Kriminali stess u dan qabel nibdew nitkellmu

fuq il-vjolazzjoni tad-Drittijiet Fundamentali tal-Bniedem kemm taħt il-Kostituzzjoni u kemm taħt il-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem.

Skont il-Kodiċi Kriminali Artiklu 360 (2) jgħid, "iċ-ċitazzjoni għandha ssemmi ċar ...

Ikompli l-Kodiċi Kriminali fl-Artiklu 362 (1) jgħid, "li ċ-ċitazzjoni għandha tingħata f'idejn il-persuna li għandha tiġi mħarrka, u jekk din il-persuna ma tkunx tista' tinstab faċilment, iċ-ċitazzjoni għandha titħalla fid-dar fejn hija s-soltu tkun toqgħod. Filkaż lejn wieħed jew l-ieħor l-uffiċċjali eżekutur għandu jagħmel rapport ta' dan lill-qorti."

Għandu jingħad ukoll illi fl-Artiklu 362 ġie inserit poter tal-ministru responsabbli mill-Ġustizzja li wara li jikkonsulta mal-ministru responsabbli għall-Pulizija jagħmel proċeduri speċjali għan-notifika ta' ċitazzjoni u ta' kull dokument ta' reati li jaqgħu taħt l-Artiklu 360 A (1).

Il-poter mogħti lill-ministru fl-Artiklu 362 (2) li jagħmel regolamenti bħal li taħrika tasal bil-posta ma tawhx il-poter ukoll li jaqbeż dak li tgħid il-kostituzzjoni fil-parti rilevanti tad-drittijiet tal-bniedem jew anke l-Konvenzjoni Ewropeja fl-Artiklu 63 (3)(A).

Illi din l-ideja li ċitazzjoni kemm ikun avżat biss il-persuna u basta javżawh li għandu l-qorti kienet skont teorija li teżisti qabel fuq il-liġi kif daħlet fl-1914 aktar minn seklu ilu u ċertament qabel il-Kostituzzjoni u qabel meta il-Konvenzjoni Ewropeja għad-Drittijiet tal-Bniedem ġiet applikabbli għall-Malta. Dak iż-żmien minħabba ġurisprudenza li kien hemm u li għad sa ċertu punt hemm huwa filfatt ibbażat fuq il-kunċett Taljan għal kollox, illi iċ-ċitazzjoni huwa, "avviso a comparire." Il-kodiċi tagħna kien diġà jaħseb għal dettalji mportanti fiċ-ċitazzjoni u mhux sempliċiment, "avviso a comparire" kif tgħid din is-sentenza li qed tiġi kkowata għaliex il-bażi kollha ta' dan ir-regolament u ta' notifika bl-addoċċ kif kienet qed issir u kif saret fil-kas preżenti huma kollha frott tal-istess teorija. Qed issir referenza għas-sentenza il-Pulizija kontra Joseph Zahra deċiża fl-2003 fejn il-president tal-qorti ta' dak iż-żmien l-Onor. Imħallef Dr Vincent DeGaetano kien qal is-segwenti, "Fejn allura n-notifika u l-fatti seta' wieħed jiġborhom matul iż-żmien u mhux neċessarjament fiċ-ċitazzjoni li tkun ippreżentata lilu minkejja li l-Kodiċi jitkellem ċar."

Sentenza oħra li tagħmel dan il-kunċett aktar ċar hija l-appell kriminali il-Pulizija kontra Patrick Borg tas-sena 2007 fejn jingħad is-segwenti.

Illi din l-interpretazzjoni li ċ-ċitazzjoni hija biss avviso a comparire biex hu imbagħat l-akkużat jew l-imputat ikun jaf x'inhi l-kawża wara li jidher il-qorti u l-prosekutur jispjega l-fatti hija assolutament vjolazzjoni tal-Kostituzzjoni u tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem.

Nibdew bil-Kostituzzjoni peress li hija l-liġi suprema tal-pajjiż. Fl-Artiklu 39 (2) tal-Kostituzzjoni jingħad u ssir enfasi li t-taħrika għandha ssir u tingħata lill-imputat saħansitra bil-miktub u mhux wieħed jippretendi bħalma ssuġġerixxa l-Onor. Imħalleff Dr Vincent DeGaetano fis-sentenza tiegħu il-Pulizija vs Zahra, li wieħed jista' jiġbor l-informazzjoni matul il-kumpilazzjoni għax il-kumpilazzjoni tkun għadha għaddejja. Naturalment, il-kumpilazzjoni ssir bil-fomm u mhux kif tgħid il-kostituzzjoni bil-miktub. La l-kostituzzjoni qalet bil-miktub l-ebda mħallef ma' jista' jgħid illi minflok bil-miktub basta li ssir bil-fomm.

Il-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem fl-Artiklu 6 (3) filfatt tagħmilha ċara li l-persuna mħarrka jew akkużata immedjatament għandha tkun mgħarrfa preċiżament biex inhi akkużata.

Interessanti, huwa l-kas Haxhia vs Albania fejn fil-paragrafu 127 jingħad dan li ġej.

"127 The provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (see Kamasinski v. Austria, judgment of 19 December 1989Series A no. 168, pp. 36-37, & 79). Article 6 & 3 (a) of the Convention affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to these acts. That information should be detailed (see Pélissier and Sassi v. France [GC], no. 25444/94, & 51, ECHR 1999-II). In addition, the object and purpose of Article 6 & 1 and show that a person charged with a criminal offence "is entitled to take part in the hearing and to have his case heard" in his presence by a "tribunal" (see, amongst others, Barberà, Messegué and Jabardo v. Spain, 6 December 1988, && 68 and 78, Series A no. 146).

Qed isir enfasi li jingħad illi l-persuna għandha tingħata l-informazzjoni kompletament u bil-miktub bħala l-prinċipju ġenerali tal-Artiklu 6 (3) tal-Konvenzjoni Ewropeja u mhux li jgħidulu tippubblikaha fil-gazzetti jew issir taf biha mod ieħor.

Interessanti f'dan il-kas tal-Albanija huwa fost l-imħallfin li ħadu sehem fil-qorti Ewropeja kien hemm ukoll imħallef Malti l-Onor. Imħallef Dr Vincent DeGaetano li l-pożizzjoni tiegħu kienet li ma sab l-ebda oġġezzjoni għall-paragrafu 127 tas-sentenza hawn imsemmija u tal-informazzjoni li trid tingħata bil-miktub lill-akkużat.

Hemm differenza bejn dak li qal l-imħallef DeGaetano fl-2003 u dak li qal l-imħallef DeGaetano ma' sħabu l-imħallfin tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem ġewwa Strasbour fit-8 ta' Ottubru 2013, għaxar snin wara.

Il-liġi tistenna li jkun hemm notifika effettiva u mhux notifika presunta.

Li Magistrat hareg mandat ta' arrest kontra l-esponenti ma jfissirx li dak l-arrest kien sar legali. La darba l-bazi tal-poter kellha tkun notifika valida, la ma kienx hemm dik il-validità, konsegwentement l-ordni tal-Magistrat ghall-arrest kienet nulla.

Having seen the decree of this Court dated the 11th of March 2022, in virtue of which the case was appointed for hearing for the 2nd of May 2022 at 9:30 a.m.

Having seen the **Reply** filed by the **State Advocate and the Commissioner of Police** filed on the 29th of April 2022 (fol 9) in virtue of which they pleaded:

1. *Illi din it-tweġiba qiegħda ssir b'ħarsien tad-digriet mogħti minn din l-Onorabbli Qorti nhar il-11 ta' Marzu 2022, li ġie nnotifikat lilu flimkien mar-*

rikors promotur nhar id-19 t'April 2022, bi żmien għoxrin (20) jum min-notifika għar-risposta;

2. *Illi ibda biex, jidher illi hemm **żball tipografiku fl-okkju** u dan billi l-karta ta' l-identita' tar-rikorrent Andreas Thomas Kuemmert hija 6**1**700A u mhux 6**0**700A u b'hekk jeħtieġ issir korrezzjoni fl-okkju;*

3. *Illi permezz tar-rikors promotur, r-rikorrent talab li din l-Onorabbli Qorti:*

   *(1) tiddikjara li n-notifiki f'ġurnal lokali tal-imputazzjonijiet miġjuba fil-kawżi hawn fuq imsemmija kontra tiegħu huma in vjolazzjoni tal-**Artikolu 6(3) tal-Konvenzjoni Ewropea** għad-Drittijiet tal-Bniedem, u jilledu d-dritt tiegħu taħt l-istess artiklu;*
   *(2) tiddikjara li l-arrest tiegħu biex jinġieb il-qorti u nżamm lejl sħiħ arrest jivvjola l-**Artiklu 5(1) tal-Konvenzjoni Ewropea**, għax il-Qorti li ordnat il-mandatt kienet qed taġixxi fuq notifika li hija kontra l-liġi u l-konvenzjoni ewropea;*
   (3) tagħtih rimedju effettiv u kumpens xieraq għad-danni minnu sofferti;

4. *Illi l-intimati qegħdin jirrispinġu dawn l-allegazzjonijiet u l-pretensjonijiet marbutin magħhom stante illi talli allegazzjonijiet huma nfondati fil-fatt u fid-dritt. Fil-frattemp, qegħdin iresqu dawn l-eċċezzjonijiet li ġejjin b'rabta mal-ilment sopraċitat;*

5. *Illi jidher li kienu nħarġu żewġ ċitazzjonijiet fil-konfront tar-rikorrent sabiex huwa jidher fis-Seduta tat-Traffiku skedata għas-**6 ta' Novembru 2018** (u mhux fl-2013 kif erronjament indikat mir-rikorrent) fl-10:30 ta' filgħodu quddiem dak iż-żmien il-Maġistrat Francesco Depasquale;*

6. *Illi jidher li meta ċ-ċitazzjonijiet nħarġu, r-rikorrent ma setax jiġi notifikat bil-mezzi soliti, u għaldaqsant ġie applikat l-Regolament 8 subartikolu 1 subinċiż b tal-**Liġi Sussidjarja 9.22** li jipprovdi –*

   "Barra minn hekk estratti tal-att ġudizzjarju għandhom jiġu ppublikati darba fil-Gazzetta jew f'wieħed mill-ġurnali ta' kuljum, liema estratti għandu jkun fihom l-isem u l-kunjom ta' min wettaq ir-reat, in-numru tad-dokument ta' identifikazzjoni legalment validu ta' min wettaq ir-reat, il-Qorti rispettiva ta' fejn ser isir is-seduta, id-data u l-ħin ta' fejn ser issir is-seduta u l-akkużi:

   Iżda, jekk l-aħħar indirizz reġistrat ma jkunx magħruf, għandu jkun biżżejjed u persuna għandha titqies bħala notifikata, jekk l-estratti tal-att ġudizzjarju jiġu ppubblikati skont il-paragrafu (b)".

7. *Illi fir-rikors promotur ir-rikorrent jilmenta illi din il-proċedura ta' notifika m'hijiex waħda konformi mad-dispożizzjonijiet tal-Artikolu 6 subartikolu 3 tal-Konvenzjoni Ewropea;*

8. *Illi l-Artiklu tal-Konvenzjoni surreferit jistabilixxi li –*

   (3) Kull min hu akkużat b'reat kriminali għandu d-drittijiet minimi li ġejjin:

   (a) Li jkun infurmat minnufih, b'lingwa li jifhem u fid-dettall, dwar in-natura u r-raġuni tal-akkuża kontra tiegħu".

9. *Illi filfatt fid-deċiżjoni tal-Kummissjoni tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-każ Erdogan vs Turkey (14723/89) mogħtija fid-9 ta' Lulju 1992, ġie ritenut li inkwantu għall-artikolu 6(3)(a) "**does not require compliance with any particular procedures for informing the accused of the nature and cause of the accusation against him**";*

10. *Illi dak li jirrikjedi l-artikolu 6(3)(a) sepliċiment huwa li persuna mixlija b'akkużi kriminali tkun taf u tifhem x'inhuma dawk l-akkużi. Is-subinċiż (a) jrid jinqara mas-subinċiż (b) li jassigura li l-akkużat "ikollu żmien u faċilitajiet xierqa għall-preparazzjoni tad-difiża tiegħu";*

11. *Illi fil-każ odjern, in-notifika ta' mputazzjonijiet kriminali hija parzjalment regolata mir-regolamenti stabiliti taħt il-Liġi Sussidjara 9.22. Ai termini tar-Regolament 3 dawn ir-regolamenti japplikaw unikament għal proċeduri quddiem il-Qorti tal-Maġistrati kif indikat fl-ewwel skeda;*

12. *Illi t-tifsira mogħtija għal "Qorti tal-Maġistrati" hija l-Qorti tal-Maġistrati (Malta) jew Qorti tal-Maġistrati (Għawdex) skont il-każ, bħala Qorti ta' Ġudikatura Kriminali skont l-artikolu 370(1) tal-Kap 9. Għalhekk minn dan wieħed jislet li **dawn ir-regolamenti japplikaw limitatament għal kawżi sommarji quddiem il-Qorti tal-Maġistrati fil-kompetenza oriġinali tagħha**. L-indikazzjoni tal-Maġistrati nfishom fl-ewwel skeda saret unikament għaliex dawn il-Maġistrati huma assenjati seduti partikolari, fosthom fejn ikun hemm imputazzjonijiet dwar aċċess, manteniment, u bħalma ġara f'dan il-każ, tat-traffiku;*

13. *Illi l-Liġi Sussidjarja 9.22 tistipola kif ai termini tar-Regolament 4 n-notifika għandha ssir permezz tal-kunsinna taċ-ċitazzjoni lill-akkużat. Huwa biss meta din il-kunsinna ma tirnexxix li jiskatta r-regolament 8 surreferit. Ta' min ifakkar li r-**Regolament 8 jikkontempla żewg proċeduri: l-affissjoni tal-imputazzjonijiet mal-bieb tar-residenza, u l-pubblikazzjoni fil-gazzetta. In kwantu għal publikazzjoni fil-gazzetta tajjeb jingħad ukoll li l-Avviż jikkontjeni l-isem u l-kunjom tal-imputat u n-numru tad-dokument tal-identifikazzjoni tiegħu, il-Qorti, id-data u l-ħin tas-seduta u kruċjalment l-imputazzjonijiet**;*

14. *Illi tajjeb jingħad ukoll li, kuntrarjament għal dak allegat mir-rikorrent, dawn ir-Regolamenti saru legalment billi ai termini tal-artikolu 699 (a) tal-Kap 9, il-Ministru għall-Ġustizzja jista' jagħmel regolamenti sabiex jirregola l-metodi tan-notifika tal-Atti Ġudizzjarji taħt il-Kodiċi Kriminali;*

15. *Illi kif diġa ingħad ma hemm ebda indikazzjoni speċifika dwar kif persuna akkużata għandha tiġi mgħarrfa bl-akkużi miġjuba kontriha. **L-obbligu naxxenti mill-Artikolu 6(3)(a) tal-Konvenzjoni huwa biss li l-persuna akkużata tkun infurmata minnufih u b'lingwa li tifhem dwar in-natura u r-raġuni tal-akkuża kontra tiegħu. Imkien ma jingħad li bilfors trid tiġi kkunsinjata karta bl-akkużi kif aċċenat mir-rikorrent**;*

16. *Illi l-Artikolu 6 tal-Konvenzjoni Ewropeja jipprovdi li s-smigħ għandu jkun pubbliku u għandu jkun quddiem qorti jew tribunal indipendenti u mparzjali mwaqqaf bil-liġi. L-esponenti jirrilevaw illi ma sar xejn matul il-proċess kriminali li b'xi mod seta' jinċidi fuq id-drittijiet tar-rikorrent, u ma jirriżulta minn imkien li b'xi mod ġiet mittiefsa xi waħda mill-protezzjonijiet mogħtija bl-Artikolu 6 tal-Konvenzjoni Ewropeja;*

17. *Illi f'dan ir-rigward jingħad li: (a) l-proċeduri kollha qedgħin jinżammu u qegħdin jiġu determinati minn qorti indipendenti u mparzjali; (b) ir-rikorrent għandu aċċess għall-qorti; (ċ) is-smigħ kollu qiegħed isir fil-presenza tar-rikorrent; (d) il-partijiet qedgħin jiġu trattati b'mod ugwali mingħajr ebda vantaġġ proċedurali minn xi persuna fuq oħra; (e) ir-rikorrent qiegħed jingħata l-opportunità kollha biex jiddefendi l-każ tiegħu mingħajr xkiel; (f) r-rikorrent huwa megħjun minn avukat tal-fiduċja tiegħu tul il-proċeduri; u (ġ) ir-rikorrent qiegħed jingħata ż-żmien u l-faċilitajiet xierqa għall-preparazzjoni tal-każ tiegħu;*

18. *Illi fuq kollox għandu jiġi mfakkar li f'analiżi ta jekk seħħx ksur tad-dritt tas-smigħ xieraq, wieħed irid iqis it-totalita' tal-proċeduri u mhux jalaċċja ma' xi nċident partikolari waħdu;*

19. *Illi wieħed irid iqis x'seħħ meta eventwalment ir-rikorrent inġib quddiem il-Qorti tal-Maġistrati (Malta) Bħala Qorti ta' Ġudikatura Kriminali preseduta mill-Maġistrat Victor Axiaq. Waqt dik is-seduta, r-rikorrent ġie mgħarraf bl-akkużi fil-konfront tiegħu u b'konformita ma' dak previst u rikjest mill-artikolu 6(3)(b) tal-Konvenzjoni, l-Qorti kkonċediet differiment lir-rikorrent sabiex ikun jista' jirregola ruħu u jipprepara d-difiża tiegħu b'mod aħjar. F'dan il-kuntest għalhekk l-esponent jistaqsi, kif jista' r-rikorrent jargumenta li ma kellux jew mhux qiegħed jingħata smigħ xieraq?;*

20. *Illi ma hemm l-ebda dubbju li r-rikorrent jaf x'inhuma l-akkużi kontrih u apparti minn hekk, huwa ngħata l-opportunita' li jipprepara d-difiża tiegħu. Fis-sustanza għalhekk, assolutament b'ebda mod ma jista' jingħad li r-rikorrent ma kellux jew mhux ser ikollu smigħ xieraq;*

21. *Illi n-notifika fil-gazzetta hija meqjusa waħda legali wara tlett ijiem mill-publikazzjoni. Tant li l-artikolu 8 subartikolu 3 u 4 tal-Liġi Sussidjarja jipprovdu –*

    "Kopji tal-estratti ppubblikati kif meħtieġ bil-proviso għas-subregolament (1)(b) għandhom jiġu eżebiti quddiem il-Qorti mill-Uffiċjal tal-Prosekuzzjoni u dan il-fatt għandu jitniżżel fil-proċeduri tal-Qorti.

    ***In-notifika li ssir skont is-subregolament (1) għandha, fil-każijiet kollha, titqies li saret <u>tliet ijiem</u> wara l-pubblikazzjoni**".*

22. *Illi jingħad li l-Artikolu 5 tal-Konvenzjoni Ewropeja huwa ntiż sabiex iħares lill-individwu minn detenzjoni arbitrarja. Sabiex id-detenzjoni ma tkunx arbitrarja, dik id-detenzjoni trid tkun skont il-liġi u konsistenti mal-għan tal-istess dispożizzjonijiet tal-liġi, u ċioè li l-individwu jiġi mħares mill-arbitrajetà. Madanakollu dan il-prinċipju ma huwiex assolut;*

23. *Illi l-Artikolu 5 tal-Konvenzjoni Ewropeja jikkontjeni lista eżawrjenti tar-raġunijiet li għalihom tista' titneħħa l-libertà ta' xi persuna, fosthom skond is-subinċiż (1)(b): "Kulħadd għandu dritt għal liberta' u għas-sigurta' tal-persuna. Ħadd ma għandu jiġi privat mil-liberta' tiegħu ħlief fil-każijiet li ġejjin u skond l-proċedura preskritta mil-liġi: ... (b) l-arrest jew id-detenzjoni skond il-Liġi ta' persuna għal nuqqas ta' tħaris ta' ordni skond il-Liġi ta' Qorti jew sabiex jiġi żgurat it-twettiq ta' xi obbligu preskritt mil-liġi". Relevanti wkoll għal dan il-każ is-subinċiż (1)(ċ), meta l-arrest jew detenzjoni ta' persuna tkun skont il-liġi u magħmul sabiex persuna tkun*

*miġjuba quddiem awtorità legali kompetenti, fuq **suspett raġonevoli** li tali persuna kkomettiet reat, jew meqjus raġonevolment meħtieġ biex jiġi evitat il-kommissjoni ta' reat, jew biex jiġi evitat li dik il-persuna taħrab;*

24. *Illi m'hemm l-ebda dubju illi in vista tar-Regolament surreferit r-rikorrent kien debitament notifikat. Peress li hu ma deherx il-Qorti, l-Qorti kienet ġustifikata li tordna mandat t'arrest sabiex huwa jinġieb quddiemha u jaffaċċja l-ġustizzja;*

25. *Illi għalhekk, kemm ir-raġuni għal ħruġ tal-mandat ta' arrest u l-mandat innifsu isibu bażi fil-Liġi. L-iskop tal-mandat huwa awtoriżżat mill-artikolu 5 tal-Konvenzjoni. Għaldaqstant ma hemm l-ebda raġuni biex jiġi ddikjarat li seħħ ksur tal-artikolu 5 tal-Konvenzjoni Ewropea;*

26. *Illi fid-dawl ta' dan kollu u tal-pre-ċitati Artikolu 5 u 6 tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem, l-esponenti isostnu li r-rikorrent ma sofra minn ebda ksur tad-drittijiet fundamentali;*

27. *Illi jsegwi għalhekk li t-talbiet rikorrenti għandhom jiġu miċħuda fl-intier tagħhom minn din l-Onorabbli Qorti;*

28. *Salv eċċezzjonijiet ulterjuri jekk ikun il-każ.*

Having seen that during the Court's audience of the 2nd of May 2022, the Court, upon the plaintiff's request, declared that these proceedings be held in the English language.

Having seen the note filed by the plaintiff on the 20th of June 2022, (fol 17) in virtue of which the plaintiff presented to the Court a number of documents (fol 18 till fol 68), which the Court has taken cognisance of.

Having seen the note filed by the plaintiff on the 20th of June 2022, (fol 69) in virtue of which the plaintiff presented to the Court two sworn declerations (fol 70 till fol 72).

Having seen that during the Court's audience of the 12th of October 2022, the plaintiff's counsel declared that the plaintiff had no further evidence to produce.

Having seen that during the Court's audience of the 7th December 2022, **Police Inspector Sarah Magri** gave testimony.

Having seen that during the Court's audience of the 8th March 2023, **Police Inspector Sarah Magri** gave testimony and presented two documents (Doc SM1 and Doc SM2, fol 81 till fol 85).

Having seen that during the Court's audience of the 5th of May 2023, the plaintiff **Andreas Kuemmert** was cross-examined.

Having seen that during the Court's audience of the 28th June 2023, **Victor Gafa`** gave testimony. Having also seen, that the defendants' counsel declared that there was no further evidence to produce on their part.

Having seen the submissions made by the defendants.

Having seen the note filed by the plaintiff on the 29th April 2024.

Having seen that during the Court's audience of the 18th March 2024, the case was put off for today for the Court to deliver judgement.

Considers:

That from the evidence produced, the following **facts** result:

In his affidavit the plaintiff **Andreas Thomas Kummert** states that on the 22nd July 2021 in the early afternoon, whilst at home with his wife and son, the door bell of their house rang and when his wife opened the door, she called him as there were two police officers asking for him. The plaintiff was informed by the said police officers that they had come to pick him up, in execution of a court order. When he asked why, he was told not to complicate matters and to go with them, which he did.

The plaintiff explains that he was taken to Floriana, all his items were confiscated and was allowed to place a call to his lawyers, then he was guided into a small cell where he was left until the following day. He states the following day he was allowed to call his lawyer and he was subsequently handcuffed and taken to court, where he went in front of the Magistrate in the same clothes he had worn the previous day, without having washed and without having been allowed to contact his wife. The plaintiff explains that when the sitting commenced, his handcuffs were taken off and he couldn't understand what was happening. Eventually he was allowed to leave and given a paper with a date for a hearing.

The plaintiff explains that he was never served with any documents for a court hearing and the first time he heard of such procedures was when he was taken into custody. He states that his wife who was pregnant at the time was visibly stressed and had high temperature which was cause of concern and hence he was afraid of leaving her alone whereas his son, who was 11, did not understand what was going on. He explains that his lawyer pleaded before the Court of Magistrates that there was a human rights violations and this is the reason for the present case.

Asked, during cross-examination, whether he was informed of the accusations against him, the plaintiff states that he was brought to court and there was a short discussion in Maltese and he was sent away. He confirms that he was allowed one call to his lawyer.

The plaintiff was shown document SM1 and when asked to confirm his signature on the document, he stated that it looked like his signature but he doesn't remember the document.

He confirms that when he was taken to Floriana he wasn't informed what he was being accused of, nor was he shown any documents. He explains that all he was told was that he was going to be presented to the Judge the morning after and they had this order to take him.

In his affidavit, **Joseph Brincat** stated that he received a call from the plaintiff that he had been arrested and he couldn't understand why. He stated that Assistant

Commissioner Nezren Grixti had refused to follow the common procedure that a person is released on his commitment that he would appear the next day at the police station to be taken to court.

He explains that the plaintiff is a very proper person who always informs him immediately upon receiving papers. He explains that it was only the next day in court that he read the charges which had never been materially handed to him or served upon him and he was presumed notified following an advert in the Malta Independent.

He explains that he raised the issue as to a breach of human rights before the Court of Magistrates and the case is now being adjourned pending the outcome of these proceedings.

In her testimony, **Police Inspector Sarah Magri** stated that the plaintiff's case was one on the list of the traffic sittings which had commenced before then Magistrate Dr Francesco Depasquale, and continued before Magistrate Dr Victor Axiaq when the former became Judge. She explained that there was an issue with the summons in this case, delivery of which was trusted to the private sector. If physical notification was not possible, then notification was carried out by affixing a notice on the door of the residence of the person in question and the publishing of a notice in a local newspaper - which in this case has been "The Malta Independent". Since the plaintiff had failed to appear befoe the Court for his sitting despite the legal notification, then a warrant of arrest was issued by the Court.

The witness confirms that the plaintiff was taken to the police lock-up so as to be present in Court the following day. She also confirms that the arrest was carried out from the same address where the notice of hearing was affixed.

The witness presented to the court all documentation showing the details of the arrest, the time, date and when he was released as well as all the officers involved, together with a copy of the arrest warrant. She confirms that the plaintiff was given all his rights and the officer in charge was PC 424.

Questioned as to how many similar arrests used to take place at the time, she says they were quite numerous due to the procedure adopted at the time under sub-legislation 9.22.

In his testimony, **Police Seargent 766 Victor Gafa`** stated that he was stationed at the Police Headquarters in Floriana where arrested persons are hosted. He confirms that he was on duty on the day when the plaintiff was arrested and was brought in at about 15.15.

Asked to explain what goes on at that stage, he stated that the arrest would have already been done and he would be given all the details along with the warrant of arrest and he checks that the document states that the arrested person had been given his rights. The witness confirms that the document in question is Dok SM1 and confirms his signature of the document as well as that of the plaintiff.

He explains that he confirmed the arrest warrant and that he explained to the plaintiff his rights and the plaintiff signed for each one of them. He also confirms having given the plaintiff a copy of the arrest warrant.

Considers further:

That from the **submissions** made up by the defendants, the Court notes the following:

The **State Advocate** and the **Commissioner of Police** started by pointing out that the plaintiff is alleging that the notification procedure contemplated in Regulation 8(1)(b) of Subsidiary Legislation 9.22 is not in line with the provisions of Article 6 sub-article 3 of the European Convention on Human Rights.

They submit that Article 6(3) does not specify how the accused should be informed of the charges brought against him – the obligation therein is that the accused is informed promptly and in a language which he understands and in detail, of the nature and cause of the accusation against him.

Furthermore, the plaintiff attended court with his own lawyer and the case was not decided on that same day but he was given time to prepare his defence. Moreover, when analysing whether there had been a violation of the right to a fair hearing, one had taken into account the totality of proceedings and not a particular incident.

They explain that when the plaintiff was brought before the Court of Magistrates, the charges were explained and he was given time to prepare his defence, hence one cannot argue that the plaintiff was not given a proper hearing.

They insist that the arrest was legally valid as confirmed by PS766 Victor Gafa` in his testimony as it was based on a warrant of arrest issued by the Court of Magistrates, and all his right were given and the plaintiff actually signed to confirm this.

Moreover, nothing about the plaintiff's detention was arbitrary as it was based on a legal warrant of arrest, obtained following the notification of the plaintiff being carried out in a correct manner and therefore there is no breach of Article 5 of the Convention.

Considers further:

The plaintiff by virtue of these proceedings is asking the court for a declaration that the notification of the accused through publication in newspapers violates his rights as protected by Article 6(3) of the European Convention and that therefore his arrest in order to be brought before the courts violates Article 5(1) of the European Convention.

Violation of Article 6(3) of the European Convention

Article 6(3) of the European Convention stipulates the following:

> *3) Everyone charged with a criminal offence has the following minimum rights:*
>
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
>
> *(b) to have adequate time and facilities for the preparation of his defence;*
>
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
>
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
>
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

The plaintiff argues that the publication of the charges in a newspaper violates the said right as it does not amount to promptly informing the accused of the charges brought against him.

The Court starts by referring to the **Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb)** issued by the European Court of Human Rights as updated in April 2021, which states clearly that:

> *1. The key principle governing the application of Article 6 is fairness (Gregačević v. Croatia, § 49). However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (Ibrahim and Others v. the United Kingdom [GC], § 250).*
>
> *2. In each case, the Court's primary concern is to evaluate the overall fairness of the criminal proceedings. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole, and not on the basis of an isolated consideration of one particular aspect or one particular incident. However, it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (ibid., § 250). In this connection, where a procedural defect has been identified, it falls to the domestic courts in the first place to carry out the assessment as to whether that procedural shortcoming has been remedied in the course of the ensuing proceedings, the lack of an assessment to that effect in itself being prima facie incompatible with the requirements of a fair trial according to Article 6 of the Convention (Mehmet Zeki Çelebi v. Turkey, § 51). Moreover, the cumulative effect of various procedural defects may lead to a violation of Article 6 even if each defect, taken*

> *alone, would not have convinced the Court that the proceedings were unfair (Mirilashvili v. Russia, § 165).*

The Court also observes the conclusions of the European Court in the case of **C vs Italy**, decided on the 11th of May 1988, where the Court concluded the following:

> *b. The Commission observes that, according to the applicant's statements, he was first informed about the proceedings against him when he was being held at Bergamo for other reasons and there, in December 1979, received notification of the order committing him for trial issue d on 5 December 1979 by the Pordenone investigating judge.*
>
> *The Commission has considered whether this information constituted satisfaction by the Italian authorities in the present case of the provisions contained in Article 6 para . 3 (a) of the Convention.*
>
> *The Commission notes first of all that the order committing the applicant for trial contained a statement of the material facts alleged against the applicant as well as their legal classification, together with detailed information on the reasons for the charge.*
>
> *It considers therefore that the actual text of the order for committal, by virtu e of its content, satisfied the requirements of information to the accused as defined in Article 6 para . 3(a) of the Convention.*
>
> *It is next necessary to consider whether, in the present case, the applicant may be considered to have been "informed promptly" of "the accusation" against him.*
>
> *The Commission notes first of all that Article 6 para. 3(a) of the Convention applies to persons "charged" with an offence.*
>
> *It is true that, under Italian law, there is no specific point during the investigation as of which a person involved in criminal proceedings is formally "charged". However, in the contact of the Convention, the words "charged" and "accusation" correspond to an autonomous concept and must be interpreted as relating to a material and not a formal situation. For example, with regard to the determination of the length of criminal proceedings, the Court has held that the definition of a charge covers not only the official notification given to an individual of an allegation that he has committed an offence but also any measure whereby the situation of the suspect has been substantially affected (cf. Eur. Court H.R., Deweer judgment of 27 February 1980, Series A no. 35, p.24, para. 46; Eckle judgment of 15 July 1982, Series A no. 51, p. 33, para. 73)*
>
> *In this case, the Commission notes that, up to the time the committal order was served on him, the applicant's situation was not affected by the existence of criminal proceedings. It is therefore from the time of*

notification at the latest that the applicant must be considered to have been "charged" within the meaning of the Convention.

It is true that the Commission has acknowledged in a previous case that the judicial communication provided by the Italian law may constitute information within the meaning of Article 6 para. 3(a) (Borzicek v. Italy, Comm. Report 2.3.88, para. 72). In the present case, the communication was not received by the applicant as the beginning of the proceedings, contrary to the provisions of the Italian CCP. However, the Commission does not consider that there has on that account been a breach of Article 6 para. 3 (a) of the Convention.

It notes that the fulfilment of specific formalities is always required for the purpose of informing a foreign national living abroad of the existence of proceeds against him. It is not necessarily to be expected that a formal communication, under the procedure of mutual assistance in judicial matters, should be effected at the very beginning of a criminal investigation, at a time when it is impossible to foresee whether there will be a committal for trial. On the other hand, once a person has been committed for trail, there is at least no doubt that he has been "charged" within the meaning of Article 6 para. 3 (a) of the Convention and must be "informed promptly" of the accusation against him.

In the present case, the Commission notes that the committal order was served on the applicant four months before the beginning of his trial, thus ensuring that he had adequate time and facilities for the preparation of his defence, since he was able to appoint three defence lawyers of his own choosing, including the official defence counsel who had already acted during the investigative proceedings. The information received by the applicant at the Bergame prison was therefore transmitted in good time for the preparation of his defence, which is the principal underlying purpose of Article 6 para. 3 (a) of the Convention.

Although the receipt of information at an earlier stage could have carried certain advantages for the applicant, the Commission is unable to find any appearance of a violation of Article 6 para. 3 (a) of the Convention.

It follows that the complaint based of Article 6 para. 3 (a) is manifestly ill-founded and must be rejected in accordance with Article 27 para. 2 of the Convention.

In his final note of the 29th April 2024, plaintiff refers to the case reported in the above quoted guidelines, Mattoccia vs Italy, 2000, and emphasis that the guidelines state that "*the accused must at least be provided with sufficient information to understand fully the extent of the charges against him, in order to prepare an adequate defence*".

The Court observes that, based on the facts surrounding this particular case, it cannot conclude that there is any element of unfairness towards the plaintiff. The plaintiff appeared before the Court of Magistrates and was duly assisted by the lawyer of his own choice and he was granted adequate time to prepare in order to defend his case. In fact, nothing was decided on that very day and the Court accedded to a request by the defence for an adjournment. Moreover, upon the plaintiff's request, proceedings from thereon where held in English, a language which the plaintiff understands. Furthermore, once claiming that he had a case to file before this Court, the Court of Magistrates put off the criminal case until this case is decided, hence giving the plaintiff all the opportunity to proceed legally as he deemed fit, with the Court of Magistrates awaiting the result before proceeding further. Hence, having "*regard to the development of the proceedings as a whole"* – the Court has no doubt that the plaintiff cannot realistically plead a breach of his fundamental human right based on article 6(3) of the European Convention.

In light of the above considerations and in light of the facts of this case, the Court is of the view that **notification by means of publication in newspapers does not <u>in itself</u> violate Article 6(3) of the European Convention**. A violation would indeed take place if the accused in question would not then be given adequate time to prepare his defence, which as a matter of fact, does not result here.

Furthermore, this Court notes that the reasons for the plaintiff's arrest were somewhat different from the charges themselves due to the fact that the arrest took place and the related warrant was issued with the scope of ascertaining that the plaintiff attends Court the next day.

Moreover, the Court notes that the plaintiff's defence council had spoken to the Police Inspector and had asked him to adopt, what he refers to as "*a very common procedure that a person is released on his commitment that he would appear the next day at the police station to be taken to Court*" - and the Court can only but conclude that there was thus no objection *per se* to the arrest in terms of breach of human rights, whereas the request made by the defence was subject to the discretion of the Police Inspector.

Therefore, this Court does not find a violation of Article 6(3) of the European Convention and hence dismisses the plaintiff's complaint in this regard.

<u>Violation of Article 5(1) of the European Convention</u>

Artilce 5(1) of the European Convention states the following:

> *(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *(a) the lawful detention of a person after conviction by a competent court;*

> *(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
>
> *(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authorities on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
>
> *(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
>
> *(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
>
> *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

The plaintiff claims that his arrest violated the said article due to the fact that it was issued on the basis of a notification which in itself violates the same Convention.

In view of the above-conclusion, in the sense that the notification through publication does not in itself violate article 6(3) of the Convention, this Court finds that the plaintiff's arrest was justified in terms of Article 5(1)(a) of the Convention in so far as the arrest took place to ascertain that the plaintiff fullfils his obligation to appear before Court.

This notwithstanding, the Court observes, as already stated above, that the reason for the plaintiff's arrest was not the charges *per se* - but the obligation to appear before the Court on the presrcibed date. The Court notes that the charges were originally issued asking the plaintiff to be present before the Court of Magistrates on the 6th November 2018, the minutes of which sitting indicate that the plaintiff (defendant in that case) failed to appear despite being positively notified with the summons as per the above explained procedure. The Court has also taken note of the notification on the published gazzette, from where it clearly transpires that the details in respect of the charge are clearly stated and explained. The case was put off for the 26th February 2019 and the Court issued a Warrant of Arrest in order to ensure his presence at the following sitting.

In terms of the minutes of the second sitting before the Court of Magistrates, that of the 26h February 2019, there results that plaintiff once again wasn't present, and the Court was informed by the Police Officers that when they tried to execute the warrant of arrest in the indicated address, they were informed by a certain Jacqueline Theuma that the defendant hadn't lived there for around 4 years. His case had to be put off again for the 4th June 2019 and the Court ordered the Police Officers to execute the arrest warrant.

The Court notes that during the sitting of the 4th June 2019, the Police Officers who tried to execute the arrest warrant informed the Court that at the same address, they had now found a certain Michelle Tangile who informed them the plaintiff was away on a business trip and couldn't say when he was due back in Malta. The Court had to once again put off the case, this time for the 29th October 2019.

It transpires from the minutes of the sitting of the 29th October 2019, that the Police had tried to execute the warrant on the eve of that sitting, but nobody answered the door bell at the same address. So the case had to be put off again.

Due to Covid restrictions, the following sitting was held on the 23rd July 2021, and that is when the plaintiff had attended following the execution of the arrest warrant at an address in Mosta.

The Court cannot but note that the plaintiff failed to given clear explanations as to his place of abode, and failed to clarify why the Police were, on one occasion infomed that he had left that premises in question and, on the subsequent occasion, informed that he was only away on a business trip. Whatever the case, in terms of purely valid regulations, the plaintiff was deemed to have been notified of the charge and sitting he was to attend, and it was only natural for the Court to issue an arrest warrant in the circumstances above described and for the Police to execute such a warrant.

The Court also refers to the **Guide on Article 6 of the European Convention on Human Rights Right to Liberty & Security** issued by the European Court of Human Rights as updated in April 2021, which states clearly that:

> *5. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (De Tommaso v. Italy [GC], § 80; Guzzardi v. Italy, § 92; Medvedyev and Others v. France [GC], § 73; Creangă v. Romania [GC], § 91).*
>
> *6. The requirement to take account of the "type" and "manner of implementation" of the measure in question enables the Court to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good (De Tommaso v. Italy [GC], § 81; Nada v. Switzerland [GC], § 226; Austin and Others v. the United Kingdom [GC], § 59).*

Put into practice as to the facts surrounding this case, the Court cannot but conclude that the arrest in this case, the reason for such arrest, the way it was executed, the time spent under arrest and the scope for this arrest, did not in any remote way prejudice the plaintiff in terms of Article 5(1) of the European Convention, to the effect that this Court cannot come to the conclusion that the plaintiff's rights in terms of this mentioned Article have been breached.

Moreover, the Court notes that if the plaintiff was of the view that the arrest was illegal or unlawful, he had a remedy available to him during the time of his arrest in terms of Article 409A of Chapter 9 of the Laws of Malta, which the plaintiff did not avail himself of.

Therefore, in light of the above, **this Court does not find a violation of Article 5(1) of the European Convention and hence dismisses the plaintiff's complaint in this regard too.**

Conclusion

TO THIS EFFECT, after having examined all the acts, the Court is, in the light of the above-mentioned considerations and based on the resulting facts of this case, upholding the pleas put forward by the defendants whilst dismissing the plaintiff's requests.

All expenses shall be at the responsibility of the plaintiff.

Ian Spiteri Bailey
Hon. Judge

Amanda Cassar
Deputy Registrar