THE FIRST HALL OF THE CIVIL COURT
CONSTITUTIONAL JURISDICTION

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

Today, Wednesday 10th of July, 2024

Case Number 1

Application Number: 424/2023 ISB

Dr. Paul Scarrow

Vs

Avukat Ġenerali u

Kummissarju tal-Pulizija

The Court,

Having seen the **Application** filed by **Dr Paul Scarrow**, in virtue of which, the plaintiff has asked the Court to:

(1) to determine individually all the above constitutional grievances and to decide that the accused applicant is being denied the right to a fair trial and the right to an effective remedy;

(2) to declare and to decide that in the present case, the accused was entitled to withdraw his consent to be tried summarily and that the refusal by the Court of Magistrates (Malta) to allow him to withdraw his consent for valid reasons is tantamount to a violation of his right to a fair trial;

(3) to allow the accused to withdraw his consent for the reasons indicated and confirmed by him on oath, and to declare and determine that the refusal to grant him this right violated his rights under Articles 6 and 13 of the European Convention;

(4) to declare and decide that the Magistrate before whom Dr. Scarrow was charged is not in a position to exercise oversight on the conclusions and results reached by an (equal) peer, and that the error-correction function is lost because the two Magistrates are on equal footing, and this too constitutes a violation of his fair trial rights;

(5) to grant the accused, on his request, the right to be judged by a higher court, namely, the Criminal Court, and to order the Attorney General to take the necessary steps for this order to be implemented;

(6) to declare and decide that the medical experts appointed by the Inquiring Magistrate did not act with impartiality and procedural integrity, and performed what is essentially an adversarial role vis-a-vis Dr Paul Scarrow in violation of the applicant's fair trial rights, and this led to his being criminally charged;

(7) To declare and decide that the aforementioned circumstances seriously prejudiced the principle regarding the presumption of innocence;

(8) to declare and decide that the refusal by the Court of Magistrates hearing the case "The Police vs. Paul Scarrow" to order a constitutional reference as the request was deemed to be merely frivolous and vexatious is inconsistent with the provisions contained in Article 46 of the Constitution and in Article 4 of Kap. 319 and constitutes an infringement of his right to an effective remedy;

(9) to order the payment of compensation to Dr. Paul Scarrow consisting of pecuniary damages, non-pecuniary damages and costs.

And this after submitting:

1. *That one of the greatest desiderata for a man undergoing a criminal process is that he will have a fair trial. The published case law of the European Court of Human Rights shows the tremendous efforts that the Court has made to show what a fair trial implies.*

2. *That the applicant (Medical Council Registration No. 3112) is undergoing criminal proceedings and is being charged with the involuntary homicide of a patient who attended St James Hospital outpatient unit.*

<u>The first complaint</u>

3. *The applicant, Dr Paul Scarrow, made a formal request to the Court of Magistrates to be allowed to withdraw his consent for*

the case to be tried summarily for the reasons stated in the request (Document "A") and in the subsequent written pleadings (Document "B"), namely, that he had not been properly informed, firstly, by the hospital's lawyer and, secondly, by the Court, in accordance with the applicable legal provision, before the hospital's lawyer registered his consent on his behalf. For these reasons, his consent had not been properly secured. However, the Court of Magistrates (Malta) rejected his request.

4. *That the "Attorney General's Consent", dated 25th January 2021, was presented in court by the prosecuting officer on 17 June 2021. The court records indicate that on the 17th day of June 2021, when the applicant appeared before the Court of Magistrates for the first sitting, he was asked "Whether the accused objects to the case being dealt with summarily …", he purportedly replied "No", and the reply is recorded as being the applicant's when actually it was the reply entered by the hospital's lawyer.*

5. *That Article 370(4)(a) of the Criminal Code stipulates that the Court "**shall ask the accused whether he objects to his case being dealt with summarily, and shall give him a reasonable time to reply to this question**".*

6. *That Dr. Scarrow's consent was not secured in accordance with the relevant provisions of the Criminal Code of Malta. In the first place, on 25 May 2021, Dr Alessandro Lia, copying Dr Pawlu Lia, wrote to Dr Paul Scarrow (Document "E"): "Could you kindly confirm whether you believe you should be assisted by the hospital's legal counsel or whether you believe that it would be more appropriate that you are assisted by your own*

personal legal counsel". That although on the 17th day of June 2021, Dr Paul Scarrow was purportedly assisted by legal counsel, it clearly results that they were at loggerheads. Indeed, the applicant was being blamed from the outset by the hospital's legal counsel for having involved the other doctors and the hospital ("The last two were only included in the civil proceedings because they were implicated by you during your unassisted testimony during inquiry stage."). There was serious discordance between the applicant and Dr Alessandro Lia and Dr Pawlu Lia as he was strongly disagreeing with them on the way they were defending the hospital and purportedly defending him at the same time. This was the reason why he felt the need to transfer his defence to his own personal legal counsel of his choice. ("… or whether you believe that it would be more appropriate that you are assisted by your own personal legal counsel"). He subsequently did.

7. *That the reply "No" was not given by Dr. Paul Scarrow but by Dr. Alessandro Lia, without any prior explanation (or for that matter, without any subsequent explanation) of the legal and procedural implications. Dr Paul Scarrow did not give his explicit consent to Dr Alessandro Lia for the case to be tried summarily. There was therefore no voluntary informed consent.*

8. *In the second place, Dr. Scarrow denies that he was given a reasonable time to consider the matter, notwithstanding that he was in a vulnerable position at that time. His lawyer at the time simply entered a "NO" reply.*

9. *That the Guide on Article 6 (Criminal limb), updated 31/8/2022, Council of Europe, under "B. Waiver, para 11, stipulates:*

"Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen the consequences of his conduct (Hermi v. Italy [GC], 2006, § 74; Sejdovic v. Italy [GC], 2006, § 87). Thus, for instance, the Court has held that the applicants who voluntarily and in full knowledge accepted to be tried in summary proceedings …."

10. *Two vital duties essential to a fair hearing were not observed: the hospital lawyer failed to explain to him as the person standing accused the legal implications of the reply entered on behalf of the accused in terms of Article 370(4)(a) of the Criminal Code, whereas the Court on its part failed to abide by the procedural requirement contained in Article 370(4)(a) binding the Court to give the defendant "a reasonable time to reply to this question." Instead, the Magistrate[1] carrying out the examination of the accused devolved this decision-making process to the hospital's lawyer, without asking Dr. Scarrow anything to guage his awareness and to secure his involvement in the decision.*

11. *In the present case, it certainly cannot be said that Dr. Paul Scarrow acted "in full knowledge" or that he could have foreseen the legal implications of Dr. Alessandro Lia's decision.*

<u>The second complaint</u>

12. *Furthermore, considering that a fellow Magistrate conducting the Criminal Inquiry[2], (1) after having, from inception,*

[1] Magistrate Dr. Claire Stafrace Zammit, the Magistrate before whom Dr. Scarrow was charged.
[2] Magistrate Dr. Natasha Galea Sciberras, the Inquiring Magistrate.

designated and adjudicated the case as one of "Negligence" and (2) after immediately issuing a search warrant against the applicant based on his "Negligence", and (3) after ruling that there were enough reasons for him to be charged with the involuntary homicide of the patient, Dr Paul Scarrow does not agree that he should be tried before another Magistrate, both Magistrates having, hierarchically, equal standing.

13. *That for the aforementioned reason, the defendant applicant contends that he should be tried before a higher court, namely, the Criminal Court. No Magistrate is in a position to exercise oversight on the conclusions and results reached by her (equal) peer. They stand on equal footing. Magistrate Dr Claire Stafrace Zammit is not in a position to exercise oversight on the above conclusions reached by fellow Magistrate Dr Natasha Galea Sciberras. The error-correction function is lost because the two Magistrates are on equal footing. This situation involves hierarchical complexities which are causing no concerns to anyone except to the defendant. For this reason, the applicant Dr Paul Scarrow contends that he should be tried before the Criminal Court, that is, a higher court.*

<u>The third complaint</u>

14. *The medical experts appointed by the Inquiring Magistrate did not act with impartiality and procedural integrity. Instead of standing back and allowing the prosecuting officer to bring forward the evidence at the Criminal Inquiry stage before the Inquiring Magistrate, the medical experts entered the arena and acted as prosecutors, performing what is essentially an adversarial role vis-a-vis Dr Paul Scarrow. They conducted a detailed and harrowing cross examination of the applicant*

while the prosecution watched in silence (and comfort) as the medical experts performed its work. The medical experts' conduct was short of trustworthiness, and led to a prejudiced and biased outcome, exposing Dr. Paul Scarrow to a future criminal trial that lacked fairness.

15. *The medical experts were granted absolute and unfettered discretion as to which evidence to provide and which evidence not to provide. Likewise, they were given unfettered discretion to accept as evidence methods of ascertainment that were inconsistent with the standards imposed by the European Council of Legal Medicine Rules (2014) as well as other legal instruments.*

16. *Through their actions, (a) the Inquiring Magistrate, acting with unjustified haste to issue a search warrant based on "Negligence" against the applicant and (b) the medical experts with their newly assumed roles of prosecutors, by conducting a harrowing cross examination of the defendant doctor while the prosecutors watched in gallery-like fashion as the medical experts performed the prosecutor's role, failed to act impartially and to maintain procedural integrity. This 'modus operandi' annihilated Dr Scarrow's right to silence as they were all in agreement that he is guilty. The Inquiring Magistrate and the court appointed medical experts, through their conduct and their advocacy, burdened Dr Paul Scarrow with the onus of proving his innocence. That is certainly not the way that the European Convention on Human Rights intended the position to be for any person who stands accused.*

17. *During the Compilation of Evidence against Dr Scarrow before Magistrate Dr Claire Stafrace Zammit, the prosecuting officer*

merely presented a copy of the Process-verbale number 742/20 in its entirety, containing full disclosures (but with omissions of vital proof necessary for the proper administration of justice) and put into the witness stand the persons mentioned in the Inquiry, asking them to confirm their reports or to confirm their earlier testimony.

The fourth complaint

18. *That while raising these constitutional issues, the applicant Dr Paul Scarrow requested Court of Magistrates to order a Constitutional Reference to the Civil Court First Hall in its Constitutional Jurisdiction in terms of Article 46 of the Constitution of Malta and in terms of Article 4 of Chapter 319 of the Laws of Malta. However, on 20 June 2023 the Court of Magistrates (Malta) sitting as a Court of Criminal Judicature dismissed this request (Document "D"), thereby failing to adhere to the dictates of the above cited Article 46(3) and Article 4(3) respectively. The rejection of the applicant's request, which was four square with the said legal provisions, raises fresh concerns in the mind of the defendant applicant regarding the guarantees of a fair trial. The request was deemed to be merely frivolous and vexatious.*

19. *That in his reply before the Court of Magistrates filed on the 22nd March 2023 (Document "C"), the Attorney General stated:*

    "That, the applicant argues that his request should be seen as a fundamental principle of protection under the European Convention of Human Rights. The exponent points out that only a Court in its Constitutional jurisdiction would be best suited to adjudge such a matter and therefore such a matter falls out of the competence of this Honourable Court."

20. *However, the Magistrate decided to dismiss the accused's request for a constitutional reference notwithstanding that the Attorney General pointed out that "only a Court in its Constitutional jurisdiction would be best suited to adjudge such a matter".*

21. *The Court quoted verbatim Article 46(3) but failed to act in accordance with the dictates of that provision: "the court in which the question arose shall dispose of the question in accordance with that decision." Unfortunately, the Court of Magistrates failed to seek a decision from the competent court, the Civil Court First Hall (Constitutional Jurisdiction), on a matter that the Court of Magistrates does not have the competence to decide upon.*

22. *Unfortunately, the Court stated in Document "D" that "if the Court accedes to it, this becomes a question put by that Court and not by the party making it originally." With the greatest respect, this is incorrect. The Court of Magistrates would be simply upholding the procedure that is stipulated in the Constitution and would not be treating as its own the constitutional grievances that it would be referring to the competent court for the reason that it does not have the competence to determine them itself.*

23. *While considering the application of the procedure under Article 370(4) of the Criminal Code, the Court of Magistrates was acting as 'a judge in her own cause'. Magistrate Dr Claire Stafrace Zammit stated:*

"Indeed the applicant is questioning the procedure under Article 370(4) of the Criminal Code whereby the accused gave

his consent for these proceedings to be tried in a summary manner. Given that this Court adopted religiously the procedure laid down in this Article, it is very unclear what is the constitutional issue that the accused is raising."

24. *The Magistrate violated the principle "nemo judex in causa propria". The Magistrate vehemently opposed the notion that she had failed to take into account "informed consent" and not give the defendant "a reasonable time to reply to this question." The implied reasoning is that if I disagree with the assertion that I failed to give the accused a reasonable time to answer, then the defendant cannot be saying the truth because I "adopted religiously the procedure laid down in this Article". However, this makes the Magistrate a judge in her own cause. This is an additional reason why the case should be decided by a higher court, namely, the Criminal Court.*

25. *The issue is not whether the accused will be given the right to present his defence, to bring forward witnesses, to request additional medical experts or to be allowed to testify in his defence. The issue here concerns matters that have already occurred and that have placed in jeopardy the right to a fair trial. By stating that "This Court is also deeming the request made by accused as premature since no final decision has yet been made on the charges brought against him", the Court, with the greatest respect, fails to comprehend what is already placing in jeopardy the right to a fair trial in the present case. The Magistrate fails to consider any of the above as serious obstacles.*

26. *That the refusal by the Magistrate before whom Dr. Scarrow was charged to allow a constitutional reference constitutes a violation of the right to an effective remedy guaranteed by*

Article 13 of the European Convention as well as a violation of the right to a fair trial in the sense that the Magistrate is refusing to apply a mechanism stipulated in the Constitution of Malta and in the European Convention Act because it has wrongly concluded that she would be endorsing the contents of the request for a constitutional reference.

27. *That the above complaints prejudice the right of the accused applicant to a fair trial as guaranteed by Article 6 of the European Convention and Article 39 of the Constitution of Malta as well as Article 13 of the Convention guaranteeing the right to an effective remedy.*

28. *That it is not enough for the State to abstain from directly infringing rights; authorities must also take positive action to secure the exercise of the rights.*

Having seen the Court's decree dated the 30th August 2023, by virtue of which the case was appointed for hearing for the 27th October 2023 at 9:30 a.m.;

Having seen the **reply** filed by the defendants, the **Advocate General** and the **Commissioner of Police,** on the 15th September 2023 (fol 25) in virtue of which they pleaded:

*Ir-rikorrent qiegħed jallega li fil-proċeduri kriminali fl-ismijiet **Il-Pulizija (Spettur Jonathan Ransley) vs. Dr Paul Scarrow**, preżentement pendenti quddiem il-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali u presjeduta mill-Maġ. Dr. C. Stafrace Zammit (minn issa l-quddiem, "il-Qorti tal-Maġistrati"), inqalgħu diversi kwistjonijiet li fil-fehma tiegħu wasslu jew x'aktarx ser iwasslu għal ksur tal-jeddijiet fundamentali tiegħu kif sanċiti mill-Artikolu 6 u tal-Artikolu 13 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem ("il-Konvenzjoni Ewropea") u tal-preżunzjoni tal-innoċenza.*

It-talbiet u l-pretensjonijiet tar-rikorrent huma infondati fil-fatt u fid-dritt u għalhekk għandhom jiġu miċħuda għas-segwenti raġunijiet li qed jingħataw mingħajr preġudizzju għal xulxin. Qabel ma

jingħataw l-eċċezzjonijiet, sejjer isir aċċenn għall-fatti pertinenti sabiex dina l-Onorabbli Qorti jkollha l-isfond kollu quddiemha.

Ulterjorment, minn issa jiġi rilevat li d-dokumenti indikati mar-rikors promotur ma ġewx notifikati lill-esponenti, u li ġew notifikati biss b'kopja tar-rikors promotur. Għalhekk, u għal kull buon fini, l-esponenti qegħdin jirriżervaw li jippreżentaw risposta ulterjuri wara li jkunu notifikati bl-imsemmija dokumenti.

L-Isfond Fattwali

F'Awwissu tas-sena 2018, skattat inkjesta maġisterjali dwar l-mewta suspettuża ta' persuna wara li l-istess persuna kienet irrikorriet għal għajnuna medika fi sptar privat fil-jiem eżatt qabel mewtha. Ir-rikorrent huwa tabib li kien invista tali persuna f'dan l-isptar.

Fil-kors tal-inkjesta maġisterjali nżammet seduta fejn ir-rikorrent irrilaxxa stqarrija ġuramentata quddiem il-maġistrat inkwirenti dwar dak li seħħ. Preżenti għal din is-seduta kien hemm spettur tal-Pulizija kif ukoll iż-żewġ esperti mediċi li ħatret il-maġistrat inkwirenti sabiex jassistuha fl-inkjesta. Ir-rikorrent kien infurmat bid-dritt tiegħu li jikkonsulta u li jkollu avukat miegħu preżenti waqt l-istqarrija iżda rrifjuta li jikkonsulta jew li jkollu avukat miegħu. Ulterjorment, ir-rikorrent kien infurmat bil-jedd tiegħu għas-silenzju iżda għażel li ma jeżerċitax dan il-jedd u wieġeb id-domandi li sarulu.

L-inkjesta maġisterjali eventwalment ġiet konkluża, bil-maġistrat inkwirenti tikkonkludi li prima facie kien hemm lok ta' proċeduri kriminali kontra r-rikorrent talli b'nuqqas ta' ħsieb, bi traskuraġni, jew b'nuqqas ta' ħila fl-arti jew professjoni tiegħu jew b'nuqqas ta' tħaris ta' regolamenti, ikkaġuna l-mewt tal-persuna surreferita f'Awwissu 2018, u dan ai termini tal-Artikolu 225(1) tal-Kap. 9 tal-Liġijiet ta' Malta.

Ir-rikorrent tressaq quddiem il-Qorti tal-Maġistrati. L-ewwel seduta li għaliha kien preżenti r-rikorrent kienet miżmuma nhar is-17 ta' Ġunju, 2021. Hu deher assistit minn avukat tal-għażla tiegħu. Sar l-eżami tiegħu ai termini tal-Artikolu 392 tal-Kap. 9 u wieġeb li ma kienx ħati tal-imputazzjoni miġjuba kontrih. L-Avukat Ġenerali kienet tat l-kunsens tagħha sabiex il-każ jitmexxa bil-proċedura sommarja ai termini tal-Artikolu 370(4) tal-Kap. 9. Mistoqsi jekk kellux oġġezzjoni li l-każ tiegħu jinstema' bil-proċedura sommarja, ir-rikorrent wieġeb fin-negattiv u għalhekk il-Qorti tal-Maġistrati saret kompetenti biex tisma' u tiddetermina l-każ.

Fil-11 ta' Marzu, 2022, l-avukat li kien qiegħed jippatroċinja lir-rikorrent irrinunzja għall-patroċinju u minfloku, l-avukat li qiegħed jassisti lir-rikorrent f'dawn il-proċeduri assuma l-patroċinju.

Preżentement, il-kawża tinsab imħollija għall-provi tad-Difiża. L-ilmenti li abbaži tagħhom ġiet formulata din il-kawża kostituzzjonali bdew jiġu senjalati proprju wara li l-Prosekuzzjoni għalqet il-provi tagħha u għalhekk kien imiss l-istadju tal-provi tad-Difiża.

L-ilmenti jinkludu talba tar-rikorrent li jirtira l-kunsens tiegħu għall-proċedura sommarja u biex issir referenza kostituzzjonali. Dawn it-talbiet ġew miċħuda mill-Qorti tal-Maġistrati.

Wara li ġew miċħuda r-rikorsi tiegħu, ir-rikorrent fetaħ dawn il-proċeduri kostituzzjonali.

L-Eċċezzjonijiet

1. *Preliminarjament, l-esponenti ma humiex il-leġittimi kontraditturi ta' din l-azzjoni u għalhekk għandhom jiġu liberati mill-osservanza tal-ġudizzju stante li l-ilmenti tar-rikorrenti huma diretti prinċiparjament kontra l-Qrati u l-esponenti ma għandhomx ir-rappreżentanza ġudizzjarja tal-Qrati.*

2. *In kwantu għall-allegat ksur tal-**Artikolu 13** tal-Konvenzjoni Ewropea, ir-rikorrent huwa manifestament żbaljat fl-invokazzjoni ta' dan l-artikolu. Dak li jeżiġi dan l-artikolu huwa li kull min jallega li nkisirlu xi wieħed jew aktar mill-jeddijiet fundamentali kontemplati fil-Konvenzjoni Ewropea jkollu l-jedd għal mekkaniżmu li bih jista' iressaq tali ilment u, jekk jingħata raġun, jingħata rimedju effettiv.*

   *Il-fatt li l-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali ċaħditlu t-talba tiegħu għal referenza kostituzzjonali ma jfissirx li ma għandux mezz ta' kif iressaq lanjanzi kostituzzjonali jew konvenzjonali. Filfatt, dawn il-proċeduri **fihom infushom** huma r-rimedju effettiv li r-rikorrent qiegħed jallega li ma għandux (ara f'dan is-sens **Angela sive Gina Balzan vs. Avukat Ġenerali**, Qorti Kostituzzjonali, 31 ta' Jannar, 2019 u **Perit Ian Cutajar et vs. Avukat Ġenerali et**, Qorti Kostituzzjonali, 6 ta' Ottubru, 2020).*

3. *In kwantu għall-allegat ksur tal-**Artikolu 6** tal-Konvenzjoni Ewropea, għandu jiġi mfakkar li l-jedd għal smigħ xieraq għandu jitqies fit-totalità tal-proċeduri u ma jittieħdux merament inċidenti iżolati. Fid-dawl tal-fatt li l-proċeduri kriminali miġjuba kontra r-rikorrent għandhom għaddejjin u saħansitra għadhom fil-*

*prim'istanza, minn issa jiġi eċċepit **l-intempestività** ta' dawn il-proċeduri u għalhekk, ai termini tal-Artikolu 46(2) tal-Kostituzzjoni ta' Malta u tal-Artikolu 4(2) tal-Kap. 319 tal-Liġijiet ta' Malta, din l-Onorabbli Qorti għandha tirrifjuta li teżerċita s-setgħat tagħha.*

4. *Mingħajr preġudizzju għas-suespost, u **fil-mertu**, ir-rikorrent indika erba' (4) punti għala, fil-fehma tiegħu, ġie leż il-jedd fundamentali tiegħu għal smigħ xieraq. Għaldaqstant, dawn l-ilmenti ser jiġu indirizzati wieħed wieħed.*

   L-ewwel punt imressaq mir-rikorrent huwa li, skond hu, qatt ma ried li l-każ tiegħu jitmexxa bil-proċedura sommarja kif kontemplata fl-Artikolu 370(4) tal-Kap. 9, u dan għar-raġuni li ser tiġi indirizzata fl-analiżi tat-tieni ilment tiegħu.
   Dwar dan l-ewwel punt, ir-rikorrent jargumenta li l-avukat li kellu naqas milli jispjegalu xi tfisser li kawża tinstema' bil-proċedura sommarja kif imfissra fl-Artikolu 370(4) u li l-Qorti tal-Maġistrati ma tagħtux żmien xieraq biex iwieġeb għad-domanda jekk għandux oġġezzjoni li jiġi pproċessat bil-proċedura sommarja.
   In kwantu għall-punt li allegatament l-avukat tar-rikorrent naqas milli jispjegalu l-affarijiet jew li pproċeda b'manjiera kontra x-xewqat tar-rikorrent, din hi materja li l-Istat Malti assolutament ma jistax iwieġeb għaliha. L-avukat difensur tar-rikorrent kien wieħed imqabbad minnu u kwalunkwe nuqqas li seta' wettaq dak l-avukat għandu jwieġeb għalih dak l-istess avukat, u mhux l-Istat Malti.
   In kwantu għall-punt li l-approvazzjoni mogħtija għall-proċedura sommarja ma saritx bil-kunsens jew għarfien tar-rikorrent, jibda billi jingħad li din hi materja li għandha tiġi ppruvata sal-grad rikjest mil-Liġi u, hawn ukoll, kwalsiasi nuqqas tal-avukat li kien jappatroċinja lir-rikorrent huwa nuqqas tiegħu u mhux tal-Istat. In kwantu għal kif saret din id-domanda u ż-żmien mogħti lir-rikorrent sabiex jikkunsidra l-pożizzjoni tiegħu mill-Qorti tal-Maġistrati, hawn ukoll ir-rikorrent irid jipprova dan sal-grad rikjest mil-Liġi, u dan speċjalment in vista tal-fatt:

   a. *li ma hemm ebda indikazzjoni li seħħ dak allegat mir-rikorrent waqt is-seduta meta ta l-kunsens tiegħu;*

   b. *li mhux talli ma huwiex persuna vulnerabbli kif allegat fir-rikors promotur iżda talli huwa professjonista intelliġenti u ċertament kapaċi jieħu ħsieb l-affarijiet tiegħu; u*

   c. *li dan il-kunsens allegatament vizzjat ġie senjalat għall-ewwel darba mir-rikorrent fl-ewwel seduta mħollija għall-provi tad-difiża, kważi sentejn wara li ngħata l-kunsens, wara li l-prosekuzzjoni eżawriet il-provi kemm favur u kemm kontra r-*

rikorrent u aktar minn sena wara li l-avukat li qiegħed jippatroċinja lir-rikorrent kien assuma l-patroċinju tiegħu.

5. *It-tieni punt imressaq mir-rikorrent huwa li fil-fehma tiegħu ma jistax jingħata smigħ xieraq għaliex ladarba saret inkjesta maġisterjali b'konklużjonijiet kontra l-interessi tiegħu, hu ma għandux jiġi ġġudikat minn maġistrat ieħor iżda minn imħallef peress li żewġ maġistrati "jinsabu ġerarkikament fuq l-istess livell."*

   Mingħajr tlaqlieq, dan l-ilment huwa manifestament fieragħ u vessatorju. Maġistrat fil-Qorti tal-Maġistrati bħala Qorti ta' Ġudikatura Kriminali jiddeċiedi l-każijiet quddiemu abbażi tal-provi miġjuba wara proċess avversarju bejn il-Prosekuzzjoni u d-Difiża. Ma huwiex kostrett jabbraċċja l-fehmiet ta' maġistrat inkwirenti, liema fehmiet huma, fl-aħjar ipoteżi, riflessjoni dwar il-provi miġjuba waqt l-inkjesta maġisterjali.
   B'żieda ma' dan, għandu jingħad ukoll li l-maġistrat inkwirenti f'dan il-każ sempliċiment osservat li prima facie kien hemm każ li seta' jitmexxa kontra r-rikorrent u din il-konklużjoni b'ebda mod u manjiera ma tista' tissarraf f'pressjoni, indħil jew direzzjoni lill-maġistrat li qed tippresjedi l-każ kriminali miġjub kontra r-rikorrent. Wieħed irid iżomm dejjem quddiem għajnejh li l-maġistrat li jikkonduċi l-in genere jasal għar-rakkomandazzjoni fuq bażi ta' raġunijiet biżżejjed filwaqt li s-sejbien ta' ħtija li tinstab minn Qorti tal-Maġistrati trid tissodisfa l-livell ta' prova necessarju ta' kawża kriminali.

6. *It-tielet lanjanza hi dwar l-esperti mediċi maħtura fl-inkesta maġisterjali u li "aġixxew qieshom il-prosekuturi". L-ewwel nett, għandu jiġi mfakkar li esperti tekniċi maħtura f'inkjesta ma humiex prosekuturi. Il-ħatra ta' esperti tekniċi f'inkjesta ssir sabiex il-maġistrat inkwirenti ikun assistit minn persuni speċjalizzati waqt il-ġbir tal-provi fejn l-ispeċjalizazzjoni tagħhom hi importanti u neċessarja fit-tfittix tal-verità. F'dan il-każ, il-maġistrat inkwirenti evidentement kellha bżonn l-assistenza teknika ta' esperti minħabba n-natura medika tal-investigazzjoni li kienet qed twettaq.* ***Jekk l-esperti tekniċi għamlu domandi li skomodaw lir-rikorrent, ifisser biss li kienu qegħdin jagħmlu xogħolhom sew billi jesploraw kull possibilità fl-investigazzjoni li kienu qegħdin jassistu fiha****.*

   Ħaġa oħra li r-rikorrent konvenjentement ma jsemmix fir-rikors promotur huwa li l-aġir tal-esperti tekniċi lamentat minnu seħħ waqt li hu kien qiegħed jagħti stqarrija ġuramentata quddiem il-maġistrat inkwirenti f'liema seduta attendew spettur tal-Pulizija u ż-żewġ esperti in kwistjoni.

Għal din is-seduta, ir-rikorrent kien infurmat bid-dritt tiegħu għas-silenzju, bid-dritt tiegħu li jikkonsulta ma' avukat (għażel li ma jikkonsultax), u bid-dritt tiegħu li jkollu avukat preżenti (qal li ma kienx hemm bżonn).

Ir-rikorrent kellu dawn id-drittijiet kollha u għażel li jwieġeb id-domandi li sarulu. L-Istat Malti ma għandu ebda tort talli r-rikorrent ħass li ma kellux jutilizza jew ma utilizzax bi sħiħ dawn id-drittijiet. Apparti minn hekk, hu ma kienx, u qatt ma seta' jiġi, imġiegħel iwieġeb id-domandi li sarulu u ma jistgħu jsiru ebda inferenzi mis-silenzju tiegħu. Fl-istess ħin, ir-rikorrent kien jaf li dak li jista' jgħid jista' jinġieb bi prova, kemm favurih kif ukoll kontrih.

Ir-rikorrent ma kellu jipprova xejn waqt l-istqarrija ġuramentata tiegħu; l-esperti tekniċi għamlulu domandi li r-rikorrent liberament għażel li jwieġeb. Ir-rikorrent ingħata d-drittijiet kollha tiegħu; l-Istat Malti ma għandu ebda tort jekk issa r-rikorrent qiegħed jiddubita jekk għamilx l-għażla t-tajba.

F'dan il-kuntest għalhekk, l-allegazzjoni li ġiet miksura l-preżunzjoni tal-innoċenza tar-rikorrent kif sanċit mill-Kostituzzjoni u mill-Konvenzjoni Ewropea hi manifestament fiergħa.

Mill-bqija, sempliċiment jingħad li r-rikorrent ma għandu ebda jedd jiddetta kif għandha titmexxa inkjesta maġisterjali. Hu ma jistax jippretendi, mill-bank tad-difiża, jiddeċiedi hu jekk messux ħareġ mandat ta' tfittxija kontrih (li ħareġ fuq suspett li r-rikorrent kellu notamenti mediċi rilevanti għall-każ), jew jiddetta hu kif kellhom jagħmlulu d-domandi l-esperti tekniċi tal-maġistrati inkwirenti.

Fuq kollox, jekk għal xi raġuni jew oħra ir-rikorrent ma jaqbilx mal-konklużjonijiet tal-esperti tekniċi, hu għandu kull jedd li jagħmlilhom kontro-eżamijiet u jressaq provi kuntrarja.

7. *L-aħħar punt huwa dwar il-fatt li t-talba tar-rikorrent għal referenza kostituzzjonali ġiet miċħuda. L-ewwel nett, u għal kull buon fini, l-esponenti jirreferu għal dak diġà eċċepit in kwantu għall-Artikolu 13 tal-Konvenzjoni Ewropea.*

   Fit-tieni nett, u kuntrarjament għal dak li qiegħed jgħid ir-rikorrent, referenza kostituzzjonali ma hiex ta' parti li titlobha. Fundamentalment kull meta ssir referenza kostituzzjonali, din tkun qegħda ssir għaliex il-qorti fejn il-materja ta' natura kostituzzjonali jew konvenzjonali tqajmet tqis li għandha bżonn id-direzzjoni ta' din l-Onorabbli Qorti. Fejn kawża ad hoc hi dritt u għażla tal-persuna li tkun qiegħda tilmenta minn ksur ta' xi dritt fondamentali, referenza mhijiex tal-partijiet iżda ***tal-qorti referenti biss*** *(ara* ***Il-Pulizija (Spettur Oriana Spiteri) vs. Miloud Elforjani****, Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali), 16 ta' Mejju, 2022).*

In kwantu għall-allegazzjoni li ġie vvjolat il-prinċipju ta' nemo iudex in causa propria, għandu jingħad li d-deċiżjoni dwar jekk issirx referenza kostituzzjonali, bħar-rikuża, hi waħda purament proċedurali. Din id-deċiżjoni ma tirrendix lill-ġudikant li jiddeċidiha bħala parti mill-kawża. Apparti minn hekk, deċiżjoni dwar jekk għandiex issir referenza kostituzzjonali ma hiex determinanti ta' jeddijiet jew obbligi ċivili u għalhekk taqa' barra mill-parametri ta' dak protett mill-Artikolu 6 tal-Konvenzjoni Ewropea jew l-Artikolu 39 tal-Kostituzzjoni ta' Malta.

8. *Mingħajr preġudizzju għas-suespost, u fi kwalunkwe każ, il-pretensjonijiet tar-rikorrent huma infondati fil-fatt u fid-dritt.*
9. *Magħdud dan kollu għalhekk, huwa ċar li r-rikorrent ma sofriex u ma huwiex ser isofri minn ksur tal-jeddijiet fundamentali tiegħu. Huwa ċar li r-rikors promotur huwa imfassal fuq argumenti frivoli u vessatorji bl-iskop li l-każ tiegħu ma jiġix iġġudikat minn maġistrat minkejja l-fatt li r-rikorrent issoġġetta lilu nnifsu għall-proċedura sommarja. Konsegwentement, din l-Onorabbli Qorti għandha tiddikjara t-talbiet tar-rikorrent bħala fiergħa u vessatorji.*
10. *Salv eċċezzjonijiet ulterjuri.*

Having seen that during the audience of the 27th of October 2023, the Court upheld to the plaintiff's request so that these proceedings be held in the English language;

Having also seen that during its audience of the 27th October 2023, the Court ordered that a legal copy of the proceedings in the names of **Il-Pulizija Spettur Jonathan Ransley vs Dr Paul Scarrow** pending before the Court of Magistrates as a Court of Criminal Judicature as presided by Magistrate Dr Claire Micallef Stafrace be filed in the records of this case;

Having seen the application filed by the plaintiff on the 14th November 2023 (fol 33), whereby the plaintiff requested that the Court issue an interim measure and orders the suspension of the criminal proceedings in the names **Il-Pulizija Spettur Jonathan Ransley vs Dr Paul Scarrow** until the constitutional redress proceedings are determined by means of a final judgment. Having also seen the decree of this Court of the 15th November 2023 (fol 40) whereby the notification of the said application was ordered with a five-day reply period;

Having seen the reply submitted by the defendants on the 17th November 2023 (fol 43);

Having seen the Note filed by the Registrar of the Criminal Courts and Tribunals filed on the 12th January 2024 (fol 50) whereby a legal copy of the proceedings in the names of **Il-Pulizija Spettur Jonathan Ransley vs Dr Paul Scarrow** were submitted (fol 51 to 55);

Having seen that during its audience of the 17th January 2024, the parties put forward their submissions with respect to the request for an interim measure;

Having seen the **decree** of this Court dated 12th February 2024 (fol 63), whereby the Court decided the following:

> *Dismisses the plaintiff's request filed through his application of the 14th November 2023 requesting an interim measure to have the criminal proceedings before the Court of Magistrates as a Court of Criminal Judicature suspended pending the determination of this case on its merits.*

Having seen that during the audience of the 17th of April 2024, in virtue of a decree granted on the same day (fol 91), the Court refused the plaintiff's request to subpeona Magistrate Dr Claire Zammit Stafrace and Judge Natasha Galea Sciberras as witnesses;

Having also seen that during its audience of the 17th of April 2024 **Stephania Calafato Testa Assistant Registrar (Criminal Courts)** testified and presented a document (Doc SCT1, fol 94 to fol 102) and the plaintiff **Dr Paul Scarrow** also testified and presented a set of documentation (Doc PS1, fol 124 to fol 231);

Having also seen that during its audience of the 17th April 2024, the respective parties' legal counsels declared that they have no further evidence to produce;

Having seen the parties' respective note of submissions;

Further Considers:

That from the evidence produced, the Court considers the following resulting facts:

The Court has taken cognizance of the legal copy of the proceedings submitted to this Court in the name **Il-Pulizija Spettur Jonathan**

Ransley vs Dr Paul Scarrow pending before the Court of Magistrates as a Court of Criminal Judicature as presided by Magistrate Dr Claire Stafrace Zammit.

In his testimony, the plaintiff **Dr Paul Scarrow** stated that when the incident, which resulted in him being charged with involuntary homicide, occured, the hospital had their own lawyer who was there to assist him and go through the case, but problems developed very early in the proceedings. He explains that he had sent several emails to the said lawyers which remained unanswered.

On the 17th of June 2021, when he was due to appear in Court, he phoned the CEO of the hospital and informed him of the situation and asked for a meeting as the lawyers had not met with him before the hearing date.

The plaintiff explains that during the sitting of the 17th of June 2021, he was first asked whether he was guilty and after replying several times that he was innocent, he was advised that the correct manner was to state '*not guilty*'. He was then asked whether he agreed that the case be tried summarily, to which he did not reply as he did not understand what that meant. Despite this, the 'no' stated by the lawyer present on his behalf was registered. The plaintiff explains that the lawyer supposedly representing him was representing the hospital and therefore decisions were made without his input. He therefore asked to have a separate lawyer represent him but it took until January 2022 for him to engage a new lawyer as this had to be approved due to his professional indemnity insurance.

Questioned by the Court, he confirms that there was only one sitting which took place prior to him being assisted by his new lawyer, by which time the prosecution was still presenting its evidence.

The plaintiff states that problems with the hospital's lawyers started in 2018 when during the inquiry, despite preparing him for his witness statement, they did not attend with him on the day. Following the sitting he realised that the persons putting the questions to him were the legal expert Dr Scerri and the medical surgery expert Dr Laferla as well as the magistrate, and not the victim's lawyers.

Asked whether the legal implications of having summary proceedings were explained to him, he replied that they were not. Asked whether had had contact with his lawyer during the sitting, he states that he tried

to ask questions but was continuously ignored. When he raised the question of rights with his lawyer he was advised to stay quiet as otherwise he would not be represented.

The plaintiff confirms that subsequently, he asked the Court of Magistrates to withdraw his consent for the case to be heard summarily but this was refused.

He explains that in his view it was a conflict of interest to have the same legal representatives as the hospital. However, it appears that the lawyers were not of the same view. Nevetheless, he felt more at ease having his own legal represenative. He explains that once he engaged his own lawyer, the hospital refused to release the medical records of the person he had treated.

The plaintiff emphasises that he never gave the lawyer in question his consent to approve that the case be tried summarily. Nor was he given any time to consider the matter despite his vulnerable position at the time. The plaintiff's wish is to be tried by a judge, which right is being denied to him as he cannot withdraw his consent.

The plaintiff states that there is no separation of authority in the fact that it is a Magistrate who will decided on the case after it was also a Magistrate who conducted the inquiry. He states that all that has occured from the inquiry stage into the trial stage is a handover whereby the presiding Magistrate took the process verbal from the inquiring Magistrate and simply asked the experts to confirm it and now it's up to him to make a defense. He explains that the conclusion of the inquiry himself is incriminating him, and have a direct influence on the second Magistrate.

The plaintiff explains that in his view the medical experts appointed by the Inquiring Magistrates should ask questions but not act as lawyers themselves. He states that he was asked questions without being permitted to justify his answers.

Asked by the Court whether he voiced this concern with the inquiring Magistrate, he says that he couldn't as everyone was asking a lot of questions and in such a situation it is difficult to give the whole picture.

The plaintiff alleges that the way the questioning was handled was such as to arrive at a particular conclusion and at no point was he given the opportunity to defend himself. Furthermore, he states that they had absolute and unfettered discretion as to which evidence to take into

account and which not to. He specifically mentions that no toxicology report was done.

The plaintiff is of the view that the way things were conducted has shifted the burden of proof to him to prove his innocence.

He explains that he feels that he has been denied his rights also due to the fact that the Court of Magistrates has refused his request for a constitutional reference on this basis of this being frivolous and vexatious. The plaintiff states that withdrawal of consent (as per GDPR legislation) should be an easy matter which in this case is being refused by the Magistrate, who states that she has followed the correct procedure to obtain consent. He explains that the Magistrate, in this case, in judging her own actions which goes against the principle of *nemo judex in causa propria.*

Asked by the Court whether the plaintiff has sought advice about re-opening the inquiry stage, he says he hasn't as when he finally sought the assistance of a new lawyer, they were already at trial stage.

The plaintiff explains that due to the defects in the procedure so far, he is certain that he will not be able to get a fair trial and there is no remedy applicable to his circumstances and it is for these reasons that he has filed this case.

The plaintiff presented a number of documents, and this Court has taken cognizance thereof.

Under cross-examination and when asked whether he or his lawyer have cross-examined or challenged the witnesses brought forward by the prosecution, the plaintiff stated that cross-examinations were reserved and thus confirms that he still can examine the witnesses. Nevetheless, he is of the view that the burden of proof has shifted onto himself to prove the incorrectness of the witnesses.

The plaintiff makes it clear that he does not want the process annulled by the Constitutional Court but for his case to be heard by a Judge and not a Magistrate.

Further Considers:

That from the **submissions** made by the parties, the Court highlights the following salient points:

In his submissions, the **plaintiff** outlines the complaints put forward by him during these proceedings.

The first complaint concerns the right to consent and the withdrawal of consent for the case to be tried summarily. He explains that the Court of Magistrates failed to inform him and failed to explain to him the question that was being put forward to him and thus there was a failure to ensure his understanding of the legal implications. Moreover, there was a failure in ensuring that the reply was essentially his and not his lawyer's, who was also representing the hospital. Furthermore, he states that there were inconsistencies by the Court of Magistrates not adhering to EU Legislation. He stresses that he is therefore requesting to withdraw his consent for summary proceedings and consequently for his case to be heard by a Judge of the superior courts.

The second complaint put forward by the plaintiff relates to his concern that the Magistrate hearing the compilation of evidence and eventually deciding the case was hierarchically on the same level with the Magistrate who conducted the Criminal Inquiry and dependent solely on the said inquiry Process-Verbal. The plaintiff insists that from the hearing's inception, the presumption of innocence was lost, based on the conclusions of the process-verbal. Furthermore, the Magistrate hearing the case is not in a position to exercise oversight as the two Magistrates are on equal footing. He outlines a number of EU Regulations and Directives which were breached, stating that at no stage prior to the arraignment and start of the criminal process were procedural safeguards and effective challenge of evidence allowed. Moreover, the passive acceptance of the Process-Verbal shifts the burden of proof onto him to prove his innocence instead of the prosecution proving their case to the grade of beyond reasonable doubt.

The third complaint put forward by the plaintiff concerns the role of the court-appointed medical experts who were allowed to take on the direction of the Court of Magistrates. The plaintiff argues that the court-appointed experts' conduct was that of prosecutor, judge and jury in so far as questioning was concerned. He states that the manner in which they conducted the questioning was such as to not allow him to tell the full story but instead were targeted questions designed to infer and undermine his competence and proficiency.

The fourth and final complaint concerns the refusal by the Court of Magistrates (Malta) to make a constitutional reference to the Civil Court First Hall (Constitutional Jurisdiction). He argues that the Court of

Magistrates is not competent to decide on constitutional matters and hence in refusing to adhere to the plaintiff's request, it is either wrongly ruling that the matters raised are not of a constitutional nature or it has wrongly ruled that it has the 'vires' to pronounce itself on constitutional matters when it has no such competence. Thus, he states that the Court of Magistrates was overstepping its powers.

Further Considers:

On the other hand, the defendants **Attorney General** and the **Commissioner of Police,** insist on the preliminary pleas raised by them.

In the first plea they argue that as respondents they are non-suited due to the fact that when the four complaints are looked into, it is evident that none relate to the respondents.

In terms of the preliminary plea that there is no issue with respect to Article 13, the defendants argue that these proceedings in themselves consist of the remedy which the defendant is seeking. In support of this statement they refer to the decision of the Constitutional Court in the names **Perit Ian Cutajar et vs Avukat Ġenerali et** decided on the 6th October 2020.

In virtue of the third plea, the defendants argue that with respect to the alleged breach of Article 6, these proceedings are premature and hence, this Court should refuse to exercise it powers. They argue that the plaintiff's claims are premature given that the criminal proceedings he is undergoing have not reached their conclusion.

With regard to the merits of this case, the defendants argue that none of the plaintiff's claims that he has suffered a breach of rights are founded. They submit that the line of reasoning put forward by the plaintiff, to the effect that a Magistrate cannot exercise oversight over the conclusions reached by her peer, are frivolous and vexatious as the magistrate presiding over the Court of Magistrates as a Court of Criminal Judicature is to decide the case pending before her based on the evidence brought by both the defence and the prosecution and the magistrate must find that a charge has been proved beyond reasonable doubt by the prosecution. Defendants submit that the evidence compiled during an Inquiry does not in any way bind a Magistrate presiding over a criminal case, and the prosecution still has to being proof in the requested grade for guilt to be found. Moreover, they stress

the fact that the plaintiff does not have a fundamental right to choose his forum but only a fundamental right to a fair trial. Furthermore, they argue that the fact alone that the plaintiff states that he did not understand what was meant by his case being tried by summarily is not a violation of his right to a fair trial since he shall, in any case, be afforded all of the guarantees of that fundamental right.

They point out to the fact that the plaintiff only raised the matter as to his consent two years after the consent was given, and when it was his turn to bring evidence before the Court of Magistrates. The complaint relating to the conduct of the experts during the inquiry is in the view of the defendants based on another mistaken premise that the experts are there merely to preserve evidence, whereas in this case their intervention was crucial to understanding the medical circumstances of the case and hence the medical experts where in a much better position to ask questions so that the facts could be better established. Furthermore, they add that the plaintiff is free to question the medical experts himself during the hearing of the case.

Further Considers:

Once all the facts have been established and the submissions of the parties known, the Court shall first consider the legitimacy of the action brought before it. Although the defendants did not plea as such, albeit reference being made in the reply to the fact that the Court of Magistrates had decreed a request for a preliminary reference as frivolous and vexatious, however, given that this is a matter of public order, the Court deems opportune to take regard thereof. The parties were well aware of this circumstance, both having made reference to the request for a preliminary reference and the ensuing decree.

Indeed, in the case **Baldacchino Maria vs Pace Edwin** decided by the First Hall of the Civil Court on the 3rd Ottubru 2003, the Court confirmed that a procedural issue may be brought forward by the Court ex officio:

> *Dan premess, il-Qorti tirrileva li f'dan il-każ jeżisti punt proċedurali assorbenti li l-Qorti għandha d-dmir li tissolleva ex officio u tiddeċidieħ, avolja ma ġiex hekk sollevat mill-konvenut;... Kif osservat fis-sentenza fl-ismijiet **Markiz Anthony Cassar Desain et vs Giovanni Pace et**, Appell Ċivili, 15 ta' Ottubru 1965, 'il-proċedura hi liġi ta' ordni pubbliku.*

Għalhekk ma jistax jiġi ammess li proċedura stabbilita mil-liġi tiġi sostitwita b'oħra, lanqas bil-kunsens tal-parti opposta. U l-eċċezzjoni relattiva, jekk ma tiġix sollevata, jew tiġi rinunzjata mill-parti l-oħra, għandha tiġi sollevata mill-Qorti ex officio.

Għaldaqstant kienet korretta d-deċiżjoni tal-ewwel Qorti li qajmet minn jeddha l-kwistjoni dwar jekk il-proċedura adoperata mill-appellanti kinitx dik korretta jew le.

Now, in the decision of the 19th May 2004 by the Court of Appeal (Inferior Jurisdiction) in the case **Veronique Amato Gauci et vs Marco Zammit et**, the Court stated that:

Illi għal dak li jirrigwarda l-azzjonijiet ċivili, il-proċedura tillimita ħafna l-inizjattivi li l-Qorti tista' tieħu minn rajha. Fost dawn, per eżempju, hemm il-ġurisdizzjoni, fejn jekk jirriżultalha illi m'għandhiex kompetenza jew ġurisdizzjoni biex tisma' kawża, il-Qorti tista' ex officio tqajjem din il-kwistjoni peress illi hi ta' ordni pubbliku……

*1. Huwa prinċipju magħruf illi l-Imħallef ċivili għandu, fl-għoti tas-sentenza f'kawża, joqgħod rigorożament fil-limiti tal-kontestazzjoni b'mod illi waqt li hu obbligat jokkupa ruħu mill-kwistjonijiet kollha dedotti fil-ġudizzju mill-partijiet, min-naħa l-oħra ma jistax jittratta u jirrisolvi kwistjonijiet li l-partijiet ma ssollevawx u ma ssottomettewx għad-deċiżjoni tiegħu, ammenocche non si tratta minn kwistjonijiet ta' ordni pubbliku li l-Imħallef hu obbligat jirrileva ex officio; **Joseph Gatt vs Joseph Galea**; Appell Ċivili, 12 ta' Lulju 1965; **Reġina mart Francis Cacciattolo vs Francis Cacciattolo**, Appell Ċivili, 30 ta' Ġunju 1976;*

……

*Ġie ukoll stabbilit mill-ġurisprudenza li l-kwistjonijiet ta' proċedura jikkonsistu fi kwistjoni ta' natura pubblika, u li konsegwentement tali kwistjonijiet jistgħu jiġu sollevati mill-ġudikant ex officio. Hekk per eżempju, fid-deċiżjoni fl-ismijiet **Cefai Maurice et vs Fenech Doris**, deċiża mill-Qorti tal-Appell fit-22 ta' Novembru 2002, intqal illi:*

Huwa paċifiku illi l-liġi ta' proċedura 'si debbono osservare alla lettera e non per equipollens' (Vol. XVIII p.i p. 879). Dan

għaliex il-proċedura hi konsidrata liġi ta' ordni pubbliku u in kwantu statwita mil-liġi ma tistax tiġi sostitwita bi proċedura oħra, lanqas bil-kunsens tal-parti opposta. B'mod li l-eċċezzjoni relattiva jekk ma tiġix sollevata mill-parti l-oħra, jew tiġi rinunzjata, għandha tiġi mill-Qorti sollevata 'ex officio' (Vol. XXXVI, P.I, p.204; Vol. XLIV P.I, p. 421).

Għaldaqstant kienet korretta d-deċiżjoni tal-ewwel Qorti li qajmet minn jeddha l-kwistjoni dwar jekk il-proċedura adoperata mill-appellanti kinitx dik korretta jew le.

Further considers:

That it results that prior to filing this action, by means of an application in the acts of the case in the names **Il-Pulizija (Spettur Jonathan Ransley) vs Dr Paul Scarrow,** dated the 26th of May 2023, the plaintiff (therein accused) asked the Court of Magistrates as a Court of Criminal Judicature to uphold his request for a constitutional reference on the matters raised in the said application. This Court has gone through the said application and notes that the reasons and matters raised in the said application were exactly the same as those put forward by means of these proceedings, more specifically in respect of the first three compaints listed in the application, that is:

1. The plaintiff has made a formal request to the Court of Magistrates as a Court of Criminal Judicature to be allowed to withdraw his consent for the case to be tried summarily as the reply recorded was not his but of his lawyer who had not communicated with him, which was refused.

2. That in view that the inquiry was carried out by a Magistrate, the trial should be carried out by a Judge, as a person of a higher authority.

3. The medical experts appointed by the Inquiring Magistrate did not act with impartiality and procedural integrity.

4. The way in which the inquiry was handled has shifted the burden of proof onto the plaintiff to prove his innocence.

It results that by means of a decree in the same proceedings, cited above, dated the 20th June 2023 (fol 202), the Court of Magistrates as

a Court of Criminal Judicature, in an exhaustive and very motivated decree arrived at the following conclusions:

> *"...this Court is finding it difficult to see where the alleged contravention of right to fair trial is especially when the actual criminal proceedings have not yet concluded in essence the accused failed to prove to this Court that there is a real and material reason of a violation of his fundamental human rights and this is the reason why this Court is deeming his request as both frivolous as well as vexatious."*

The Court observes what was stated by the Constitutional Court in its decision in the names **Alan Mifsud et vs Avukat Ġenerali et** decided on the 23rd November 1990, where the Court came to the following conclusions:

> *"Is-sentenza li minnha sar, dan l-appell waqt li kkunsidrat illi skond l-art. 46(5) tal-Kostituzzjoni ta' Malta:*
>
> *"Ma jkunx hemm appell minn xi deċiżjoni skond dan l-artikolu li xi talba jew it-tqanqil ta' xi kwistjoni tkun sempliċement frivola jew vessatorja" qalet effettivament li r-rikors tar-rikorrent ma jikkostitwixxi appell mid-deċiżjoni ta' dik il-Qorti ta' Maġistrati tant illi:*
>
> *"din il-Qorti ma tistax tordna r-revoka jew riforma ta' dik id-deċiżjoni li hija inapplellabbli, din il-Qorti tista' tieħu konjizzjoni tat-talba u tagħti rimedju jekk ikun il-każ, dejjem fil-limiti preskritti, billi din il-Qorti skond id-disposizzjonijiet tas-subartikoli (2) ta' l-artikolu 46 tal-Kostituzzjoni għandha diskrezzjoni wiesgħa fl-għażla ta' rimedji biex tiżgura l-protezzjoni tad-drittijiet tal-bniedem";*
>
> *Bid-dovut rigward għal dik l-Onorabbli Qorti din il-pożizzjoni ma tantx hija sodisfaċneti;*
>
> *Qiegħed infatti jingħad illi:*
>
> *(a) l-Ordinanza tal-Qorti tal-Maġistrati li ddikjarat li l-kwistjoni sollevata mir-rikorrenti hija frivola u vessatorja, hija inappellabbli;*
> *(b) illi konsegwentement il-Qorti tal-Maġistrati korrettament ordnat il-prosegwiment tal-kawża;*

(c) illi l-kwistjoni materja ta' dan ir-rikors quddiem il-Prim'Awla tal-Qorti Ċivili hija l-kwistjoni identika sollevata quddiem il-Qorti tal-Maġistrati u dddikjarata frivola u vessatorja;

(d) illi minħabba din l-inappellabbilita l-Prim' Awla ma tistax tordna r-revoka u ir-riforma ta' dik id-deċiżjoni;

(e) illi dik l-Onorabbli Qorti, però` tista tieħu konjizzjoni tar-rikors u tagħti rimedju, dejjem fil-limiti preskritti, billi dik il-Qorti għandha diskrezzjoni wiesgħa fl-għażla tar-rimedju biex tassigura l-protezzjonijiet tad-drittijiet fundamentali;

Dawn il-ħames prepożizzjonijiet ma jistgħux joqogħdu flimkien. Jekk il-kwistjoni sollevata hija frivola u vessatorja u l-Qorti tal-Maġistrati korrettament ordnat il-prosegwiment tal-kawża quddiemha (prepożizzjonijiet (a) u (b)) – tant illi l-Prim' Awla tal-Qorti Ċivili ma tistax tirrevoka jew tirriforma dik id-deċiżjoni (prepożizzjoni (d)) - allura fuq l-istess kwistjoni (proposizzjoni (ċ), ma huwiex possibbli li dik l-Onorabbli Qorti tikkontempla rimedji fejn m'hemmx – ex admissis – kwistjoni għaliex mhux possibli li tikkonsidra rimedji għal problema li hija frivola u vessatorja, ċjoe ma hija problema xejn;

Il-Qorti tifhem illi "frivola" riferibbilment għall-kwistjoni Kostituzzjonali li tiġi sollevata quddiem xi qorti – barra l-Qorti Kostituzzjonali jew il-Prim' Awla tal-Qorti Ċivili – tfisser li dik il-kwistjoni hija, ta' ebda preġja jew valur, vana, nieqsa mis-serjeta`, manifestament nieqsa mis-sens, li ma jistħoqqilhiex attenzjoni; waqt li "vessatorja" tfisser li l-kwistjoni ġiet sollevata mingħajr raġunijiet suffiċjenti u bl-iskop li ddejjaq u tirrita lill-kontroparti;

*Iż-żewġ konċetti kienu diġa ġew akkwisiti fl-ordinament tagħna qabel il-Kostituzzjoni ta' l-1964. Difatti l-art. 223(4) tal-Kodiċi ta' Proċedura Ċivili jipprovdi għall-każijiet ta' appelli fiergħa u vessatorji nkwantu **frivoli** u **fiergħa** huma ġuridikament ta' l-istess portata. Waqt li l-artikolu 223 jorbot iż-żewġ kwalifiki – fiergħa u vessatorji – l-artikolu 46 tal-Kostituzzjoni jpoġġihom f'pożizzjoni alternattiva.*

*Issa biex jiġi rispettat il-vot ta' l-artikolu 45 subinċis (5) tal-Kostituzzjoni, irid jiġi assikurat illi deċiżjoni ta' qorti kompetenti li tgħid li xi kwistjoni kostituzzjonali sollevata quddiemha hija frivola u/jew vessatorja mhux soġġetta għall-appell, ma tiġi aġġirata u effettivament annullata, **indirettament**;*

L-ewwel Onorabbli Qorti kkunsidrat illi l-Qorti tal-Maġistrati assigurat il-prossegwiment tal-kawża, bis-saħħa ta' l-inappellabbilita` tad-deċiżjoni tagħha li l-kwistjoni sollevata kienet frivola u vessatorja. Imma dan mhuwiex biżżejjed, jekk kemm -il darba wara rikors bħall-preżenti, fuq* ***l-istess materja,*** *fuq* ***kwistjoni identika****, jkun hemm il-possibilita` li l-Onorabbli Prim' Awla tal-Qorti Ċivili jew din l-istess Qorti Kostituzzjonali ma taqbilx ma' dik id-deċiżjoni, u taddotta xi rimedju – li bilfors u neċessarjament jinċidi fuq il-kawża li tkun għadha għaddejja jew tkun ġiet konkluża, quddiem il-Qorti li tkun ħadet id-deċiżjoni ta' frivolezza jew vessatorjetal u kull rimedju li jista' jingħata neċessarjament u inevitabbilment jimplika mhux biss riforma imma revoka sostanzjali jew mhux formali, ta' l-ewwel deċiżjoni ***għaliex din kienet sempliċement l-esklużjoni ta' kwalsiasi rimedju****;*

Il-Qorti tifhem li l-pożizzjoni proċedurali korretta li nħolqot bil-provvedimenti kostituzzjonali hija fis-sens illi kull persuna li waqt xi proċediment quddiem xi qorti – li mhix il-Prim' Awla tal-Qorti Ċivili jew il-Qorti Kostituzzjonali – jidhrilha li qamet xi kwistjoni kostituzzjonali li – dik il persuna trid tagħżel – jew li tipproċedi permezz ta' rikors quddiem il-Prim'Awla tal-Qorti Ċivili jew billi tissolleva l-kwistjoni sabiex dik il-Qorti tibgħat l-istess quddiem il-Prim' Awla tal-Qorti Ċivili. Meta tingħażel din it-triq ta' riferenza, il-persuna tkun qiegħda effettivament tinkorri r-riskju proċedurali li dik il-Qorti tiddeċidi li l-kwistjoni tieqaf hemm jekk tiġi kkonsiderata frivola jew vessatorja. Altrimenti d-disposizzjonijiet kostituzzjonali proċedurali, fir-rigward, ma jistax ikollhom sens u konsistenza. Di fatti l-kwistjoni preżenti sollevata mir-rikorrenti quddiem il-Qorti tal-Maġistrati – ġiet effettivament eżaminata minn tliet qrati – mill-Qorti tal-Maġistrati, mill-Prim' Awla tal-Qorti Ċivili u minn din il-Qorti Kostituzzjonali. – Dan imur kontra l-prinċipju fundamentali tas-sistema tagħna li hija bbażata fuq żewġ gradi ġurisdizzjonali u li tippermetti biss it-tielet eżami fil-kamp ristrett tar-ritrattazzjoni. U l-kontro sens proċedurali jirrikaċċja aktar meta jiġi kkonsiderat illi qed jingħata triplu eżami għall-materja li l-liġi lanqas ma tikkonċedilna d-doppju eżami normali inkwati l-materja hija frivola u/jew vessatorja;

Għal dawn ir-raġunijiet, il-Qorti filwaqt li tikkonferma d-dikjarazzjoni li hemm fis-sentenza ta' l-Onorabbli Prim'Awla

> *tal-Qorti Ċivili li t-talbiet tar-rikorrenti huma mingħajr ebda bażi legali inkwantu jidhrilha li r-rikorrenti ma kellu ebda dritt li jipproċedu permezz ta' rikors li l-kontenut tiegħu kien jirrigwarda l-istess kwistjoni kostituzzjonali li l-Qorti tal-Maġistrati kienet iddikjarat frivola u vessatorja u wisq anqas jinterponu dan l-appell li huwa in effett fieragħ u vessatorju.*

This line of reasoning has also been recently confirmed by the Constitutional Court in the case **L-Avukat Dr Anthony P Farrugia vs Financial Intelligence Analysis Unit u l-Avukat tal-Istat** decided on the 25th October 2023, whereby it concluded the following:

> *23. Evidenti li l-leġislatur ma riedx jagħti dritt ta' appell fejn deċiżjoni taħt l-Art. 46 tkun iddikjarat li t-tqanqil ta' kwistjoni tkun sempliċement frivola jew vessatorja. Għalhekk m'għandux ikun li wara r-rikorrent jagħmel talba identika billi minflok jiftaħ kawża kostituzzjonali, fejn ovvjament ser jerġa' jiġi eżaminat il-punt. Dik il-materja ġiet determinata b'mod defenittiv fl-istadju meta r-rikorrent talab lill-Qorti tal-Appell (Sede Inferjuri) sabiex tordna referenza ai termini tal-Art. 46(3) tal-Kostituzzjoni u Art. 4 tal-Kap. 319. Ir-raġunament li għamlet il-Qorti tal-Appell (Sede Inferjuri) meta ċaħdet it-talba tar-rikorrent sabiex tordna referenza, fiha nnifisha turi li dik il-qorti kkunsidrat it-talba bħala "sempliċement frivola jew vessatorja" (Art. 46(3) tal-Kostituzzjoni)."*

This Court has nothing to add other than to make this reasoning its own. From a reading of the application filed on the 26th of May 2023, cited above, and the application which initiated these proceedings, it results that these proceedings result from issues and merits which are identical, particularly and referably to the first three compaints found in the application and the corresponding requests made by plaintiff.

Hence, this Court will not consider or decide on the merits of this case in respect of these first three complaints, as they have already been declared frivilous and vexatious by means of the decree of the Court of Magistrates as a Court of Criminal Judicature of the 20th June 2023, whereby the request for a Constitutional reference was dismissed.

Hence and to this effect, this Court will be rejecting the requests of the plaintiff as listed in the application and as referring to the first three complaints listed in the application.

In respect of the fourth and last complaint, and the respective requests, the Court necessarily refers to the the first plea of the defendants, whereby it is said that they "*mhumiex il-leġittimi kontradituri ta' din l-azzjoni u għalhekk għandhom jiġu liberati mill-osservanza tal-ġudizzju stante illi l-ilmenti tar-rikorrenti huma diretti prinċiparjament kontra l-Qrati u l-esponenti ma għandhomx ir-rapprezentanza ġudizzjarja tal-Qorti*".

The defendants thus submit that the issues raised by the plaintiff (now limited to the fourth complaint) are directed towards the Courts of whom they are not the representatives at law and hence, they contend, are not the rightful defendants in this action. On the other hand, the plaintiff argues that both defendants have an interest in these proceedings as they directly impact the ongoing criminal proceedings in which they are involved.

The Court observes that while it is true that the plaintiff's fourth complaint concerns the manner in which matters were handled by the Court of Magistrates in coming to its decree, the defendants still form an integral part of the criminal proceedings *de quo*. In so far as this procedure is directly attacking those proceedings, it is certainly the case that both the Advocate General and the Commissioner of Police have an interest in these proceedings, the outcome of which could result in a change in the criminal proceedings. Therefore, the Court is of the view that both defendants have a direct interest in forming part of these proceedings and are hence well-suited.

Nevertheless, and taking into accounts article 181B (2) of Chapter 12 of the Laws of Malta, it is evident, that The State Advocate should have been suited too as defendant in these procedures, to answer to the complaints put forward by the plaintiff, not least the fourth complaint. It is a well established principle that neither the Attorney General nor the Commissioner of Police may represent the Courts in such proceedings, but it is the State Advocate who should.

In this regards, the Court observes that during the sitting of the 27th October 2023, the plaintiff's counsel expressed his intention to call the

State Advocate to these proceedings precisely in view of the plea raised, and the Court directed same to file an application to this effect – however, such an application was never filed before this Court and hence the State Advocate remains a non-party to these proceedings.

To this effect, and in respect of the fourth complaint and the relative requests to the same complaint, the Court concludes that the defendants are not the legitimate opposing parties to answer to such requests. Consequently it has no alternative but to dismiss the relative requests in this respect too.

DECIDE

Therefore, having made the above considerations after having examined all the fact of this case, this Court, whilst deciding on the pleas as above stated, hereby dismisses the complaints and claims put forward by the plaintiff in their entirety.

The costs of these proceedings shall be borne by the plaintiff.

Ian Spiteri Bailey
Hon. Judge

Amanda Cassar
Deputy Registrar