QORTI ĊIVILI – PRIM'AWLA

(Sede Kostituzzjonali)

Onor. Imħallef Dr. Giovanni M Grixti LL.M., LL.D.

Rikors Nru: 365/21 GG

Brian Tonna (K.I 0316764M)

vs.

L-Onorevoli Speaker tal-Kamra tad-Deputati; u

Ic-Chairperson tal-Kumitat Permanenti Dwar il-kontijiet Pubblici

Kawza numru: 7

Illum 8 t'Ottubru, 2024

Il-Qorti,

Rat ir-**Rikors Kostituzzjonali ta' Brian Tonna** (K.I 0316764M) ippreżentat quddiem din il-Qorti diversament preseduta fl-24 ta' Mejju, 2021;

Illi fl-20 ta' Marzu, 2021, l-esponent tressaq quddiem il-Qorti tal-Magistrati (Malta) bhala qorti istruttorja akkuzat b'diversi reati, fosthom ir-reat ta' hasil ta' flus kontemplat fl-artikolu 3(1) tal-Kap

373 tal-Ligijiet ta' Malta (kopja ta' l-imputazzjonijiet qed tigi annessa u mmarkata bhala Dok BT1).

Illi fis-6 ta' April, 2021 l-esponent nghata l-helsien mill-arrest taht diversi kundizzjonijiet fosthom li ma jikkommettix delitt iehor ta' natura volontarja waqt li jkun mehlus mill-arrest (kopja tal-kundizzjonijiet qed tigi annessa u mmarkata bhala Dok BT2).

Illi l-istruttorja fil-kawza fl-ismijiet *Repubblika ta' Malta vs Brian Tonna et* ghadha llum pendenti peress li l-prosekuzzjoni ghadha fi stadju bikri tal-gbir tal-provi.

Illi, a parti dan il-kaz, l-esponent qed jigi investigat fuq kazijiet ohra, inkluz dwar ir-rwol tieghu in konnessjoni mal-kuntratt moghti lill-Eletrogas Malta Ltd.

Illi permezz ta' ittra mibghuta mill-iskrivana tal-Kumitat Permanenti dwar il-Kontijiet Pubblici datata 9 ta' April, 2021, l-esponent intalab jaghti x-xiehda tieghu fl-14 ta' April, 2021 dwar rapport ta' l-Awditur Generali intitolat *An Investigation of Matters Relating to the Contracts awarded to ElectroGas Malta Ltd by Enemalta Corporation* datat Novembru, 2018 (kopja ta' l-ittra qed tigi annessa u mmarkata bhala Dok BT3).

Illi ma' din l-ittra giet mibghuta kopja tal-*Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives* (kopja annessa u mmarkata bhala Dok BT4).

Illi waqt is-seduta ta' l-14 ta' April, 2021, l-avukat sottoskritt spjega lill-imsemmi Kumitat li l-esponent kien ser jinvoka d-dritt tas-silenzju. Ir-ragunijiet minnu migjuba kienu tnejn: (i) ir-rwol ta' l-esponent fir-rigward tal-materja investigata mill-Awditur Generali tifforma wkoll il-meritu ta' inkjesta jew inkjesti magisterjali; u (ii) l-esponent gie akkuzat bir-reat ta' hasil ta' flus fi proceduri kriminali separati, u l-*predicate offence/s* ta' dan ir-reat ma gewx indikati mill-prosekuzzjoni, la fix-xiehda ta' l-ufficjali investigaturi u wisq inqas fl-akkuzi (kopja tat-traskrizzjoni tas-seduta ta' l-14 ta' April, 2021 quddiem il-Kumitat annessa u mmarkata bhala Dok BT5).

Illi dakinhar ic-Chairperson tal-Kumitat Permanenti dwar il-Kontijiet Pubblici talab lill-Ispeaker tal-Kamra tad-Deputati jaghti *Ruling* dwar jekk l-esponent seghtax jinvoka l-imsemmi dritt tas-silenzju. Fit-talba tieghu ghal *Ruling*, l-imsemmi Chairperson, filwaqt li osserva li ma kien jaf b'ebda proceduri konnessi mal-kaz ta' l-Electrogas, huwa ma ghamel l-ebda referenza ghall-ewwel punt sollevat mill-avukat ta' l-esponent dwar investigazzjonijiet u inkjesti pendenti.

Illi permezz ta' *Ruling* moghti fis-Seduta 449 tad-19 ta' April, 2021, l-Ispeaker tal-Kamra tad-Deputati irritjena, *inter alia*, li kull xhud li jigi msejjah jidher quddiem il-Kumitat Permanenti dwar il-Kontijiet Pubblici li ma jkollu l-ebda akkuzi fil-konfront tieghu in konnessjoni mal-materja li tkun qed tigi trattata mill-istess Kumitat, ghandu jitla' quddiem il-Kumitat biex jirrispondi ghad-domandi li jsirulu izda ma jistax jigi kostrett jirrispondi dawk id-

domandi li skont ix-xhud jew l-avukat tieghu jistghu jinkriminawh.

Illi l-esponent rega' gie mitlub mill-iskrivana tal-Kumitat Permanenti dwar il-Kontijiet Pubblici sabiex jaghti x-xiehda tieghu fil-21 ta' April, 2021. Dakinhar ic-Chairperson tal-Kumitat wissa' lill-esponent li r-*Ruling* tad-19 ta' April, 2021 kien car u ma kienx jippermettilu jinvoka d-dritt tas-silenzju. Ghalkemm l-avukat ta' l-esponent ghamel tentattiv jaghmel sottomissjonijiet dwar dan ir-*Ruling*, huwa gie mwaqqaf hesrem u infurmat li tali *Ruling* ma setghax jigi dibattut. L-esponent, kemm minhabba d-direzzjoni zbaljata moghtija mill-imsemmi Chairperson lill-Ispeaker kif ukoll minhabba l-kontentut ta' l-imsemmi *Ruling*, gie kostrett jixhed wara li t-talbiet ta' l-avukat tieghu sabiex isiru sottomissjonijiet dwar ir-*Ruling* gew michuda (kopja tat-traskrizzjoni tas-seduta tal-21 ta' April, 2021 quddiem il-Kumitat annessa u mmarkata bhala Dok BT6).

Illi l-esponent rega' gie mitlub mill-iskrivana tal-Kumitat Permanenti dwar il-Kontijiet Pubblici sabiex jaghti x-xiehda tieghu fit-28 ta' April, 2021 u fil-5 ta' Mejju, 2021. Huwa gie wkoll mitlub minn dan il-Kumitat, iktar minn darba, sabiex jesebixxi diversi dokumenti. Wahda minn dawn it-talbiet giet segwita minn *email* mill-imsemmija skrivana datata 22 ta' April, 2021 (*email* annessa u mmarkata bhala Dok BT7). Meta l-esponent, tramite l-avukat tieghu, informa lill-Kumitat li l-maggor parti tad-dokumentazzjoni mitluba kienet giet elevata fuq ordni ta' zewg Magistrati Inkwirenti, huwa gie ordnat jaghmel rikorsi fl-inkjesti magisterjali relattivi sabiex jottjeni kopji ta' din id-dokumentazzjoni.

Illi jinghad ukoll bl-akbar rispett li z-zewg intimati ma humiex godda ghal-lezjonijiet tad-drittijiet fondamentali sanciti bl-Artikoli 34 u 39 tal-Kostituzzjoni ta' Malta u bl-Artikoli 5 u 6 tal-Konvenzjoni Ewropea – bid-differenza li filwaqt li f'kazijiet precedenti l-Kumitat Permanenti dwar il-Kontijiet Pubblici ghazel li jistenna l-ezitu tal-proceduri kostituzzjonali u konvenzjonali, f'dan il-kaz il-Kumitat ma ha ebda prekawzjoni simili u l-esponent gie infurmat li kienu ser jittiehdu l-passi necessarji kontrih jekk huwa ma jibdix jixhed immedjatament.

1. ksur tad-dritt tieghu ta' smigh xieraq sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea kif ukoll mill-Artikolu 39 tal-Kostituzzjoni ta' Malta.

Illi, kif inghad, skond ir-*Ruling* ta' l-Onorevoli Speaker tal-Kamra tad-Deputati tad-19 ta' April, 2021, l-Ispeaker tal-Kamra tad-Deputati irritjena, *inter alia*, li kull xhud li jigi msejjah jidher quddiem il-Kumitat Permanenti dwar il-Kontijiet Pubblici li ma jkollu l-ebda akkuzi fil-konfront tieghu in konnessjoni mal-materja li tkun qed tigi trattata mill-istess Kumitat, ghandu jitla' quddiem il-Kumitat biex jirrispondi ghad-domandi li jsirulu izda ma jistax jigi kostrett jirrispondi dawk id-domandi li skont ix-xhud jew l-avukat tieghu jistghu jinkriminawh.

Illi jinghad bl-akbar rispett li l-konkluzjonijiet raggunti fir-*Ruling* imsemmi jindirizzaw biss il-posizzjoni ta' xhud li jkun ghaddej proceduri kriminali u mhux xhud li jkun qed jigi investigat. Dan

qed jinghad bla pregidizzju ghall-fatt li, kif inghad, l-esponent jinsab effettivament akkuzat bir-reat ta' hasil ta' flus fi proceduri kriminali pendenti u l-*predicate offence/s* ta' dan ir-reat ma gewx indikati mill-prosekuzzjoni, la fix-xiehda ta' l-ufficjali investigaturi u lanqas fl-akkuzi ossia imputazzjonijiet. Dan necessarjament ifisser li, in vista ta' dak li jiddisponi l-artikolu 658 tal-Kodici Kriminali, ix-xiehda ta' l-esponent quddiem il-Kumitat Permanenti dwar il-Kontijiet Pubblici tista' tintuza mill-prosekuzzjoni fil-kawza kriminali pendenti fil-konfront tieghu, u cioe` proceduri fejn illum suppost ghandu d-dritt tas-silenzju.

Illi Harris, O'Boyle & Warbrick, fil-ktieb taghhom *Law of the European Convention on Human Rights* (Second Edition), jghidu hekk:

"The right to a fair hearing includes freedom from self-incrimination in criminal cases. In one sense, this is an unexpected reading of Article 6(1), in that when Council of Europe member states added to the rights of the accused in the Seventh Protocol to the Convention, they considered including freedom from self-incrimination but decided not to do so. Nonetheless, the Court's subsequent jurisprudence under Article 6 fills an obvious and unfortunate gap. As the Court stated in *Saunders v UK*, 'the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6'." (p 259)

Illi skond gurisprudenza kopjuza tal-Qorti Kostituzzjonali u tal-Qorti ta' Strasbourg, id-dritt tas-silenzju jibda mill-istadju bikri ta' l-investigazzjoni u ma huwiex limitat ghal meta persuna tigi imputata jew akkuzata b'reati kriminali.

Illi l-esponent qieghed jissottometti, ghar-raguni spjegata iktar 'il fuq, li d-dritt tieghu ghal smigh xieraq li qed jigi lez bix-xiehda tieghu quddiem il-Kumitat Permanenti dwar il-Kontijiet Pubblici huwa s-smigh quddiem il-qrati ta' gurisdizzjoni kriminali fil-proceduri fl-ismijiet *Repubblika ta' Malta vs Brian Tonna et.*

Illi qed jigi ghalhekk sottomess li kemm il-*Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives* kif ukoll ir-*Ruling* ta' l-Onorevoli Speaker tal-Kamra tad-Deputati tad-19 ta' April, 2021 huma lezivi tad-dritt tieghu ta' smigh xieraq sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea kif ukoll mill-Artikolu 39 tal-Kostituzzjoni ta' Malta.

2. Ksur tad-dritt tieghu tal-liberta` personali sancit mill-Artikolu 5 tal-Konvenzjoni Ewropea kif ukoll mill-Artikolu 34 tal-Kostituzzjoni ta' Malta.

Illi ir-Regola 4 tal-*Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives* tiddisponi hekk:

"A person who, having been duly served with a copy of the warrant as prescribed in article 3 above, fails, without lawful excuse, to appear before the Committee, or having appeared before the Committee refuses to be sworn or, subject to guideline 19 below, to answer questions shall be guilty of contempt of the House and shall be liable to the penalties prescribed in article 11 of the House of Representatives (Powers and Privileges) Ordinance (CAP 113)."

Illi wahda mill-pieni prospettati fis-subartikolu (5) ta' l-artikolu 11 ta' l-Ordinanza dwar il-Privileggi u s-Setghat tal-Kamra tad-Deputati (Kap 113 tal-Ligijiet ta' Malta) ghal "nuqqas ta' qima" ("contempt") hija dik ta' "prigunerija ghal zmien mhux izjed minn sitt xhur".

Illi l-esponent, in vista tal-proceduri kriminali fil-konfront tieghu u l-inkjesti magisterjali fejn huwa wiehed mill-persuni "suspettati", ghamel tentattiv sabiex jipprevalixxi ruhu mid-dritt tas-silenzju, dritt, kif inghad iktar 'l fuq, sancit mill-gurisprudenza tal-Qorti Kostituzzjonali u mill Qorti ta' Strasbourg. Ghalhekk l-esponent jista' potenzjalment, fl-eventwalita` li jinsisti li jipprotegi d-dritt tieghu ghal smigh xieraq, jigi punit b'piena ta' prigunerija effettiva.

Illi, a parti minn hekk, fis-6 ta' April, 2021 l-esponent nghata l-helsien mill-arrest taht diversi kundizzjonijiet fosthom li ma jikkommettiex delitt iehor ta' natura volontarja waqt li jkun mehlus mill-arrest.

Illi ghalhekk l-esponent mhux biss huwa potenzjalment espost ghall-piena ta' prigunerija minhabba dak li jiddisponi is-subartikolu (5) ta' l-artikolu 11 ta' l-Ordinanza msemmija, izda addirittura espost li jitlef il-helsien mill-arrest tieghu minhabba ksur tal-kundizzjoni indikata.

Illi qed jigi ghalhekk ukoll sottomess li kemm il-*Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives* kif ukoll ir-*Ruling* ta' l-Onorevoli Speaker tal-Kamra tad-Deputati tad-19 ta' April, 2021 huma lezivi tad-dritt tieghu tal-

liberta` personali sancit mill-Artikolu 5 tal-Konvenzjoni Ewropea kif ukoll mill-Artikolu 34 tal-Kostituzzjoni ta' Malta.

Ghaldaqstant l-esponent, ghar-ragunijiet premessi, jitlob lil din l-Onorabbli Qorti sabiex:

1) Tiddikjara li l-*Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives* jikser id-dritt tieghu ghal smigh xieraq kif sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea u mill-Artikolu 39 tal-Kostituzzjoni ta' Malta in kwantu jobbligah jirrispondi ghal mistoqsijiet mill-membri tal-Kumitat Permanenti dwar il-Kontijiet Pubblici li jistghu jiksrulu d-dritt ta' smigh xieraq;

2) Tiddikjara li r-*Ruling* ta' l-Onorevoli Speaker tal-Kamra tad-Deputati tad-19 ta' April, 2021, jikser id-dritt tieghu ghal smigh xieraq kif sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea u mill-Artikolu 39 tal-Kostituzzjoni ta' Malta in kwantu jobbligah jirrispondi ghal mistoqsijiet mill-membri tal-Kumitat Permanenti dwar il-Kontijiet Pubblici li jistghu jiksrulu d-dritt ta' smigh xieraq;

3) Tiddikjara li l-*Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives* jikser id-dritt tieghu tal-liberta` personali sancit mill-Artikolu 5 tal-Konvenzjoni Ewropea u mill-Artikolu 34 tal-Kostituzzjoni ta' Malta in kwantu jesponih potenzjalment ghat-telf tal-liberta` personali tieghu fl-eventwalita` li jinsisti li jinvoka d-dritt tas-silenzju;

4) Tiddikjara li r-*Ruling* ta' l-Onorevoli Speaker tal-Kamra tad-Deputati tad-19 ta' April, 2021 jikser id-dritt tieghu tal-liberta` personali sancit mill-Artikolu 5 tal-Konvenzjoni Ewropea u mill-Artikolu 34 tal-Kostituzzjoni ta' Malta in kwantu jesponih potenzjalment ghat-telf tal-liberta` personali tieghu fl-eventwalita` li jinsisti li jinvoka d-dritt tas-silenzju;

5) Tordna l-isfilz mill-proceduri quddiem il-Kumitat Permanenti dwar il-Kontijiet Pubblici dwar rapport ta' l-Awditur Generali intitolat *An Investigation of Matters Relating to the Contracts awarded to ElectroGas Malta Ltd by Enemalta Corporation* ta' kull xiehda minnu moghtija u ta' kull dokument minnu esebit;

6) Tiddikjara li kull xiehda moghtija mill-esponent u kull dokument minnu esibit fuq talba tal-Kumitat Permanenti dwar il-Kontijiet Pubblici hija leziva tad-dritt fondamentali tieghu sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea u mill-Artikolu 39 tal-Kostituzzjoni ta' Malta;

7) Tiddikjara li kull xiehda moghtija mill-esponent u kull dokument minnu esibit fuq talba tal-Kumitat Permanenti dwar il-Kontijiet Pubblici hija leziva tad-dritt fondamentali tieghu sancit mill-Artikolu 5 tal-Konvenzjoni Ewropea u mill-Artikolu 34 tal-Kostituzzjoni ta' Malta;

8) Taghti id-direttivi kollha, inkluz danni, sabiex jigu sanciti d-drittijiet fondamentali u kostituzzjonali ta' l-esponent kif protetti mill-istess Kostituzzjoni u Konvenzjoni.

Bl-ispejjez kontra l-intimati li minn issa huma ngunti ghas-subizzjoni.

Rat ir-**Risposta tal-intimati l-Onorevoli Speaker tal-Kamra tad-Deputati u c-Chairperson tal-Kumitat Permanenti dwar il-Kontijiet Pubblici** ippreżentata quddiem din il-Qorti diversament preseduta fil-11 ta' Gunju, 2021:

Illi c-Chairperson tal-Kumitat Permanenti tal-Kontijiet Pubblici ma ghandux personalta' guridika distinta u separata mill-Parlament u ghalhekk ghandu jigi liberat mill-osservanza tal-gudizzju;

Illi lis-Speaker tal-Kamra ghalkemm jippresjedi l-istess Kamra u l-laqghat taghha ma ghandux ir-rappresentanza legali taghha u tal-istat malti u ghalhekk ghandu jigi liverat mill-osservanza tal-gudizzju;

Illi fil-fatt ir-ruling huwa korrett u skont il-ligi u bl-ebda mod ma jikser id-drittijiet fondamentali tar-rikorrent;

Illi l-gudizzju mhux integru minghajr il-presenta tal-prosekuzzjoni jew il-persuni li qeghdin imexxuha;

Illi r-rikorrenti se mai ghandu dritt ghas-silenzju f'materji dwar liema huwa ghaddej minn akkuza kontra tieghu, f'materja ohra ghandu d-dritt li ma jixhedx jekk ix-xhieda tieghu tista' twassal ghall-biex jinkrimina ruhu. Dan id-dritt

tieghu dejem giet rispettat mill-istess Parlament u mill-Kumitat u xhieda ta' dan hija id-dikumentazzjoni tax-xhieda tal-istess rikorrenti moghtija quddiem l-istess Kumitat fejn huwa ghazel f'diversi okkazzjonijiet li ma jixhidx billi jista jinkrimina ruhu. Dan kien id-dritt tieghu u gie rispettat b'mod assolut mill-Parlament, mill-Kumitat u anke mill-istess Speaker kif jirrizulta fl-istess ruling tieghu.

Illi fil-fatt ma hemm xejn li jilledi d-dritt fondamentali tar-rikorrent ghar-regola numru 4 tal-gwida ghax-xhieda. Din hija regola necessarja li tat dritt lill min jixhed li f'certi kazijiet jkun jista' ma jirrispondiz bie ma jinkiminax ruhu. Din hija regola mahsuba ghal chieda li ma ghandhom xejn x'jibzghu mill-gustizzja u ghalhekk hija necessarja ghall-andament korrett tal-proceduri parlamentari. Naturalment xhud ghandu dritt li ma jixhidx jekk b'dak li jghid jista' jinkrimina ruhu. Inoltre xhud li qieghed taht akkuza ghand dr-ritt ghas-silenzju. Dan huwa rikonoxxur fir-ruling li ta' l-ispeaker stess.

Il-kaz prezenti huwa differenti mill-kazi precedenti citati fir-rikors promutur ghaliex ir-rikorrenti mhuwiex ghaddej minn proceduri gudizzjarji dwar il-materja dibattuta imma dwar affarijiet ohra u ghalhekk fil-kaz in specje ma jistax jakkampa b'mod assolut id-dritt ghas-silenzju imma jista' dejjem jirrifjuta li jweiheb jekk jahseb li risposta tista' tinkriminah. Dan id-dritt gie rikonoxxur u exercitat mir-rikorrenti fil-prattika u fir-risposti li ta ghad-domandi li sarulu, kif ampjament jirrizulta.

Illi ghalhekk it-talbiet tar-rikorrenti huma infondati fil-fatt u fid-dritt u ghandhom jigu rigettati. Inoltre dwar il-hames talba tar-rikorrenti din hija *non sequitur* ghaliex ir-rrapport tal-Awditur maghmul ghall-kamra ma jista' bl-ebda modjilledi d-drittijiet fondamentali tar-rikorrent. Din il-Qorti ma ghandix il-gurisdizzjoni tissindika jew tikkontrolla l-procedura fil-Parlament imma ghandh biss gurisdizzjoni f'materja ta' ksur ta' drittijiet fondamentali. Il-proceduri fil-Parlament ma humiex intizi biex wiehed jistabilixxi responsabilita' kriminali jew meno fir-rikorrent imma huma intizi biss ghall-kontroll tal-Gvern mill-Opposizzjoni li hija haga desiderabbli jekk mhux ukoll necessarja f'demokrazija.

Rat it-traskrizzjonijiet tax-xhieda li ddeponew quddiem din il-Qorti diversament preseduta;

Semghet ix-xhieda bil-gurament;

Rat id-dokumenti esebiti mal-att promutur u mix-xhieda;

Rat in-nota ta' sottomissjonijiet ta' kull parti;

Rat l-atti kollha;

Ikkunsidrat:

Fatti:

1. Il-fatti ta' dan il-kaz jirrigwardaw incident waqt seduta tal-Kumitat Permanenti ("**Kumitat Permanenti**") dwar il-Kontijiet Pubblici fi hdan il-Parlament Malti u l-konsegwenti *ruling* tal-Ispeaker tal-Kamra tad-Deputati rigwardanti l-istess incident, liema fatturi r-rikorrent iqis li huma lezivi tad-drittijiet fondamentali tieghu. Mill-assjem tal-provi jemergi illi r-rikorrent kien imsejjah, permezz ta' ittra bid-data tad-9 t'April, 2021 mibghuta mill-Lumitat Permanenti, sabiex jidher quddiem l-istess Kumitat Permanenti fl-14 t'April, 2021 u jwiegeb dwar rapport ta' l-Awditur Generali[1]:

> Nirreferi ghar-rapport tal-Awditur Generali intitolat "*An Investigation of Matters Relating to the Contracts awarded to Electrogas Malta Ltd by Enemalta Corporation*" datat Novembru 2018 li qieghed jigi ezaminat mill-Kumitat Permanenti dwar il-Kontijiet Pubblici.
>
> Permezz ta' dan l-avviz inti qieghed tigi mitlub taghti ix-xhieda tieghek dwar l-imsemmi rapport u tkun fil-Kamra tal-Kumitati fil-Parlament il-Belt Valletta **nhar l-Erbgha, 14 t'April 2021 fis-2.00pm**. sabiex tirrispondi ghall-mistoqsijiet li jistghu jsirulek in konnessjoni mar-rapport imsemmi.
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> Ma din l-ittra qieghda nibghatlek, ghall-informazzjoni tieghek, kopja tal-*Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives* flimkien ma' kopja tar-rapport in kwestjoni u kopja tal-*abridged form* tal-istess rapport.

2. Illi f'dik il-laqgha, r-rikorrenti, assistit mill-avukat tieghu, inform lill-Kumitat Permanenti li kien fi hsiebu jinvoka d-dritt ta' silenzju peress illi kien imputat f'kawza kriminali bir-reat ta' hasil ta' flus u

[1] Kopja tal-ittra tal-Kumitat Permanenti a fol 20 tal-atti.

kien ukoll indagat bhala persuna suspettata f'inkjesta fl-*in genere* fuq l-istess materja li dwarha rraporta l-Awditur Generali. Il-posizzjoni mehudha mir-rikorrenti tat lok ghal dibattitu bejnu u l-Kumitat Permanenti li wassal sabiex ic-Chairperson tal-Kumitat Permanenti jitlob decizzjoni mill-Ispeaker tal-Kamra tar-Rapprezentanti[2]. Il-parti deciziva ta' dan ir-*ruling* taqra hekk:

> Ghaldaqstant is-Sedja qieghda tiddeciedi li kull xhud li jigi msejjah jidher quddiem il-Kumitat Permanenti dwar il-kontijiet Pubblici li ma jkollu l-ebda akkuzi fil-konfront tieghu in konnessjoni mal-materja li tkun qed tigi trattata mill-istess Kumitat, ghandu jitla quddiem il-Kumitat biex jirrispondi ghad-domandi li jsirulu izda ma jistax jigi kostrett jirrispondi dawk id-domandi li skont ix-xhud jew l-avukat tieghu jistghu jinkriminawh. Dan kif stabbilit fil-linji gwida tal-2011 fid-dawl tas-sentenzi fuq citati.

3. Illi ir-Regola numru 4 tal-gwida ghax-xhieda li jidhru quddiem il-Kumitat Permanenti, provduta fl-ilsien Ingliz u msejjah *Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives*[3] tipprovdi hekk:

> A person who, having been duly serviced with a copy of the warrant as prescribed in article 4 above [sic] fails, without lawful excuse, to appear before the Committee, or having appeared before the Committee refuses to be sworn, or subject to guideline 19 below, to answer questions shall be guilty of contempt of the House and shall be liable to the penalties prescribed in article 11 of the House of Representatives (Powers and Privileges) Ordinance (CAP 113).

4. Sussegwenti ghal dan ir-*ruling*¸ r-rikorrenti rega intalab jattendi laqgha tal-Kumitat Permanenti fejn allura c-Chairperson tieghu informah bil-kontenut tieghu u li dan ma kienx soggett ghal-

[2] Ruling moghti mill-Ispeaker l-Onor. Anglu Farrugia fis-seduta 449 tad-19 ta' April 2021 dwar jekk xhud imsejjah quddiem il-Kumitat dwar il-Kiontijiet Pubblii jista' jaghzel li ma jixhedx – Fol 290 sa 298 tal-atti.

[3] Dok BT4 a fol 21 tal-atti

diskussjoni u wara t-tentattiv tal-avukat tieghu sabiex jipperswadi lill-Kumitat Permanenti li fil-konfront tar-rikorrenti hemm pendenti proceduri kriminali u ohrajn preliminari, r-rikorrenti, rinfaccjat bil-possibilita' ta' karcerazzjoni bhala konsegwenza, ghazel illi jwiegeb ghall-mistoqsijiet b'mod allura li ihoss li dan l-agir ikum kontra d-drittijiet fundamentali tieghu fuq zewg livelli kif minnu postulat fir-rikors promutur;

Ikkunsidrat:

5. Illi jibda biex jinghad illi mir-*ruling* Ispeaker tal-Kamra tar-Rapprezentanti kif ukoll mill-gwida ghax-xhieda, dak li qed ikun kontestat bhala leziv tad-drittijiet fondamentali huwa dak fejn jolqot l-obbligu li persuna tixhed fic-cirkostanzi hemm indikati u mhux li persuna tkun obligata li tidher jekk hekk imsejha jew li tirrifjuta li tinghata l-gurament;

6. Illi mill-*iter* processwali quddiem il-Kumitat Permanenti, l-Qorti hi tal-fehma li l-aktar parti relevanti tieghu hi dik fejn ic-Chairperson ddikjara illi ma jafx bi proceduri fl-*in genere* fejn ir-rikorrenti huwa pesuna suspettata u wisq anqas ghandu informazzjoni li xi membru tal-Kumitat Permanenti huwa hekk infurmat u li ghalhekk ir-raguni li r-rikorrenti jirrifjuta li jixhed mhix wahda valida. Dan apparti ir-*ruling* u l-kontenut tal-gwida ghax-xhieda. Illi sabiex kollox jitqieghed in perseptiva, tajjeb li ssir referenza ghal dik l-udjenza quddiem il-Kumitat Permanenti li fiha r-rikorrenti ghazel ill jixhed:

> **IC-CHAIRPERSON**: Ix-xhud qed jghid li ghandu parir biex ma jixhedx. Jien, li naf x'*rulings* tal-Ispeaker kien hemm fuq din il-materja, u iktar importanti naf x'kienet is-sentenza tal-Qorti

Kostituzzjonali taghna, qed intenni li galadarba fil-konfront tas-Sur Tonna sal-lum m'hemmx proceduri kriminali li huma *sub judice* huwa ma jistax jezercita d-dritt li jaghzel li ma jwegibx, hlief ghall-principju, li japplika ghal kwalunkwe xhud, li huwa li jista' dejjem jaghzel li ma jinkriminax lilu nnifsu. Pero' li tigi hawnhekk bi *blanket statement* u tghid li ghandek parir – filwaqt li nirrispetta lil Dr. Tonna Lowell - … Dan mhuwiex dritt li tiddeciedi tezercitah "hekk", anzi biex inkunu ghedna kollox, skont l-Ordnijiet Permanenti, jekk xhud jirrifjuta li ma jixhedx u ma jwegibx mistoqsijiet li jsirulu minn dan il-Kumitat minghajr raguni valida, allura mbaghad hemm mizuri li jista' jiehu l-Ispeaker tal-Kamra fil-konfront tax-xhud. Nerga' ntenni li lili ma jirrizultalix dak li hemm inkwadrat fis-sentenza tal-Qorti Kostituzzjonali, u cioe' li hemm proceduri kriminali fil-konfront tas-Sur Tonna, li huma *sub judice*, li jirrigwardaw is-suggett li qed jiddiskutu dan il-Kumitat *cioe'* l-kuntratt ta; ElectroGas u l-*power station*. Dr. Tonna Lowell qalilna li lis-Sur Tonna saritlu xi mistoqsija f'inkjesta magisterjali, u filwaqt li m'inhiex qed nghid li ma saritx, il-fatt li saret il-mistoqsij ma jikkwalifikax bhala proceduri kriminali li huma *sub judice* fuq il-materja li qed jiddiksuti dan il-Kumitat[4]

7. Illi ghalhekk il-fehma tac-Chairperson kif minnu arginata skond ir-*ruling* tal-Onor. Speaker u kombinata mal-gwida ghax-xhieda u li taw lok ghar-raguni ghaliex ir-rikorrenti ghazel li jixhed huma minnu meqjusa bhala lezivi tad-drittijiet fondamentali tieghu bi ksur tal-jedd ta' smiegh xieraq ex Artikolu 6 tal-Konvenzjoni u l-artikolu 39 tal-Kostituzzjoni ta' Malta fuq naha u ksur tal-jedd tal-liberta' personali ex Artikolu 5 tal-Konvenzjoni u l-Artikolu 34 tal-Kostituzzjoni ta' Malta;

L-ewwel ilment:

8. Illi r-rikorrenti huwa tal-fehma illi fatti konsimili huma gia dikjarati bhala lezivi ta' dawn il-jeddijiet f'sentenzi tal-Qorti

[4] Mehud mir-Rapport Ufficjali u Rivedur tal-Kumitat Permanenti Dwar il-Kontijiet Pubblici tat-Tlettax-il Parlament - Laqgha Nru 82 tal-Erbgha, 14 t'April, 2021 pagna 3 u esebit a fol 227 sa 236 tal-atti.

Kostituzzjonali fl-ismijiet **Frank Sammut v L-Onorevoli Speaker tal-Kamra tad-Deputati Dr. Angelo Farrugia et** [5] u **Tancred Tabone v L-Onorevoli Speaker tal-Kamra tad-Deputati et**[6]**.** Fil-fatt il-mertu ta' dawn iz-zewg sentenzi huwa kwazi identiku ghall-kwistjoni hawn devoluta ghajr ghall-zewg aspetti partikolari, jigifieri li fic-cirkostanzi li jsawru dawk il-kawzi, c-Chairperson tal-Kumitat Permanenti kien ghazel li jistenna l-ezitu tal-proceduri civili qabel ma jissokta bl-interrogatorju filwaqt illi fil-kaz in disamina ghazel li jinsisti li jsiru mistoqsijiet sal punt li r-rikorrenti ta x-xiehda tieghu li tnizzlet bil-miktub. Dak li u komuni u li jolqot il-mertu ta' din il-kawza huwa r-*ruling* tal-Onor. Speaker tal-Kamra u l-gwida ghax-xhieda, lkoll meqjusa bhala lezivi tad-drittijiet fondamentali mill-atturi;

9. Il-Qorti tqis li huwa opportun li ticcita parti sostanzjali tas-sentenza Frank Sammut ghall-intendiment ahjar tal-kuncett in disamina u b'mod partikolari s-segwenti:

> 34. Fil-fehma konsidrata ta' din il-Qorti l-pern tal-kwistjoni li għandha quddiemha toħroġ mill-pretensjoni tal-attur appellat illi ladarba ġie akkużat quddiem Qorti Kriminali b'reati relatati ma' fatti li qed jiġu investigati mill-Kumitat Permanenti dwar il-Kontijiet Pubbliċi, hu għandu d-dritt għas-silenzju quddiem l-istess kumitat u konsegwentement m'għandu l-ebda obbligu li jidher quddiemu sabiex jagħti x-xhieda tiegħu u sabiex jipproduċi d-dokumenti li ġie mitlub jieħu miegħu. Fil-fehma tiegħu, ġia ladarba tressaq quddiem il-Qorti tal-Maġistrati (Malta) bħala qorti istruttorja akkużat, fost akkużi oħra, b'korruzzjoni u ħasil ta' flus, m'għandux biss id-dritt li ma jirrispondix domandi magħmulin lilu mill-Kumitat li jistgħu jinkriminawħ fil-proċeduri kriminali msemmijin iżda għandu wkoll id-dritt tas-silenzju li, fost affarijiet oħra, jagħtih id-dritt li 33 ma jidhirx quddiem l-istess Kumitat sabiex jagħti x-xhieda tiegħu u sabiex jipproduċi d-dokumenti rikjesti minnu. Dak li din il-Qorti għalhekk ġiet mistoqsija tiddeċiedi huwa jekk il-Linji Gwida li ġew adottati mill-Kumitat Permanenti dwar

[5] Qorti Kostituzzjonali 26 ta' Jannar 2018
[6] Qorti Kostituzzjonali 13 ta' Lulju, 2020.

ix-Xogħol tal-Kamra u r-Ruling mogħti mill-iSpeaker tal-Kamra tad-Deputati fit-3 ta' Frar, 2014 jiksrux id-dritt fondamentali għas-smigħ xieraq tal-attur appellat ikkontemplat taħt l-Artikolu 6 tal-Konvenzjoni Ewropea kif ukoll taħt l-Artikolu 39 tal-Kostituzzjoni peress li l-istess Linji Gwida u Ruling ma jipprovdux għal dan id-dritt tas-silenzju.

34. Jiġi puntwalizzat mill-bidu li d-dritt għal smigħ xieraq taħt l-Artikolu 6 tal-Konvenzjoni Ewropea ma jsemmix espressament id-dritt li persuna ma tinkriminax lilha nfisha jew id-dritt għas-silenzju iżda dawn id-drittijiet ġew meqjusa mill-ġurisprudenza tal-Qorti fi Strasburgu bħala li jemanaw mid-dritt għal smigħ xieraq li fil-Kostituzzjoni tagħna u mħares bl-Artikolu 39 tal-Kostituzzjoni.

35. Fl-ewwel lok din il-Qorti tinnota li ma kien hemm l-ebda kontestazzjoni min-naħa tar-rikorrent appellat dwar in-natura tal-proċeduri quddiem il-Kumitat Permanenti dwar il-Kontijiet Pubbliċi. Huma ma kkontestawx il-fatt li l-proċeduri msemmijin m'humiex intiżi sabiex issir xi determinazzjoni dwar xi dritt jew obbligu ċivili jew dwar imputazzjoni kriminali iżda huma proċeduri essenzjalment amministrattivi ta' natura investigattiva sabiex jiġu stabbiliti l-fatti anke jekk il-fatti stabbiliti jistgħu jagħtu lok eventwalment għal xi azzjoni minn Rik. Kost. 13/14 34 awtoritajiet oħra. F'dawn iċ-ċirkostanzi il-Qorti fi Strasburgu rriteniet li jkunx hemm vjolazzjoni tad-dritt għal smigħ xieraq fil-każ ta' informazzjoni ottenuta b'setgħat obbligatorji jkun jiddependi mill-użu li jsir minn dik l-informazzjoni fil-proċess.[7]

36. Di fatti r-rikorrenti appellati ma jsostnux li l-proċeduri quddiem il-Kumitat Permanenti jinkwadraw bħala proċeduri fid-determinazzjoni ta' dritt jew obbligu ċivili jew ta' imputazzjoni kriminali iżda jippretendu li għandhom id-dritt għas-silenzju u li ma jinkriminawx ruħhom unikament minħabba l-fatt li huma ġew akkużati fi proċeduri oħrajn quddiem Qorti Kriminali bir-reati hawn fuq imsemmijin. Ġia ladarba ma kien hemm l-ebda kontestazzjoni, din il-Qorti m'hijiex ser tindaga oltre dwar in-natura tal-proċeduri quddiem il-Kumitat Permanenti dwar il-Kontijiet Pubbliċi.

37. B'danakollu l-linja gwida 19 tipprovdi li "No witness is to be compelled to answer a question which might incriminate him/her" u għalhekk il-Linji Gwida nfushom, hi x'inhi n-natura tal-proċeduri quddiem il-Kumitat Permanenti, jagħtu lil kull xhud id-dritt li ma jiġix kostrett jinkrimina lilu nnifsu.

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[7] 1 ECHR I.J.L. and Others v The United Kingdom, 19/12/2000 #100; ara wkoll Fayed v The United Kingdom, 21/9/1990 #61; Saunders v The United Kingdom, 17/12/1996

38. F'dawn il-proċeduri, iżda, din il-Qorti ma hix msejjħa tiddeċiedi jekk dak li sar u qiegħed isir fil-Kumitat Permanenti hux konformi mal-Linji Gwida msemmija iżda dak li ġiet imsejjħa tiddeċiedi din il-Qorti hu jekk l-istess Linji Gwida u r-Ruling tal-iSpeaker fihom infushom jilledux id-drittijiet kostituzzjonali u konvenzjonali invokati mir-rikorrenti.

39. Ġia ġie stabbilit li proċeduri ta' natura investigattiva sabiex jiġu stabbiliti l-fatti bħal dawk quddiem il-Kumitat Permanenti ma jinkwadrawx fi proċeduri għad-determiazzjoni ta' dritt jew obbligu ċivili jew ta' imputazzjoni kriminali. Il-Qorti fi Strasburgu, iżda, irriteniet li d-dritt kontra l-awtoinkriminazzjoni u d-dritt għas-silenzju li jinsiltu mid-dritt għal smigħ xieraq huma xorta waħda invokabbli mill-individwu fi proċeduri bħal dawn fejn kontestwalment mal-proċeduri msemmija jkunu qegħdin jittieħdu kontra tiegħu proċeduri tax-xorta li jaqgħu fil-parametri tal-Artikolu 6 tal-Konvenzjoni.

40. Hekk fil-każ **Shannon v. United Kingdom** fejn l-applikant kien ġie msejjaħ biex jiġi intervistat minn investigaturi finanzjarji kien ġia ġie imputat mill-pulizija b'reati ta' *false accounting* u *conspiracy to defraud* il-Qorti irriteniet li:

> "41. .... the requirement for the applicant to attend an interview with financial investigators and to be compelled to answer questions in connection with events in respect of which he had already been charged with offences was not compatible with his right not to incriminate himself. There has therefore been a violation of Article 6 § 1 of the Convention".[8]

41. Għaldaqstant, fil-proċeduri pendenti quddiem il-Kumitat Permanenti dwar Kontijiet Pubbliċi, ir-rikorrenti għandhom id-drittijiet li ma jiġux kostretti jinkriminaw lilhom infushom u d-dritt tas-silenzju liema drittijiet, kif rajna, jiskaturixxu mid-dritt għal smigħ xieraq u dan in vista tal-fatt li kontestwalment mal-proċeduri quddiem il-Kumitat Permanenti hemm ukoll proċeduri kriminali kontra r-rikorrenti dwar fatti li jidher huma jew jistgħu jkunu relevanti għall-indaġni li qiegħed jagħmel l-istess Kumitat.

42. Fid-dawl tal-prinċipji premessi din il-Qorti hi msejjħa tiddeċiedi fl-ewwel lok jekk il-Linji Gwida intestati Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives humiex leżivi tad-dritt tar-rikorrenti għal smigħ xieraq.

[8] ECHR 4/10/2005, #41. Dan il-każ kien differenti minn dak fil-kawżi **I.J.L and Others v The United Kingdom** u **Fayed v The United Kingdom** loc. cit. supra proprju għaliex f'dawn il-kawżi l-applikant kienu għadhom ma ġewx imputati b'reati kriminali

43. Il-linja gwida 19 tal-isemmi Gwida kjarament u mingħajr kwalifiki jipprovdi li:

> "No witness is to be compelled to answer a question which might incriminate him/her".

44. Dan ifisser li x-xhud għandu d-dritt li ma jiġix kostrett li jinkrimina ruħu iżda persuna imputata b'reat kriminali ma għandhiex biss id-dritt li ma tiġix kostretta li twieġeb domandi li jistgħu jinkriminawha iżda għandha addirittura d-dritt għas-silenzju u ċioè li tibqa' siekta tant li "The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused". Għalhekk id-dritt ewlieni li għandha persuna akkużata hu li tibqa' siekta u d-dritt li ma tweġibx domandi li jistgħu jinkriminawha huwa intiż biex jassigura li d-dritt tal-akkużat għas-silenzju jiġi mħares.

45. Il-linji gwida in kwistjoni jipprovdu li fil-prinċipju l-persuna msejjħa biex tixhed quddiem il-Kumitat Permanenti hija obbligata li tixhed u għalhekk li ma tibqax siekta u l-unika eċċezzjoni li tipprevedi hi dik li persuna ma tiġix kostretta twieġeb għal domandi li jistgħu jinkriminawha. Dan ifisser li l-Linji Gwida in kwistjoni ma jħarsux id-dritt għas-silenzju ta' persuni imputati b'reat kriminali bħal ma huma r-rikorrenti appellati għalkemm iħarsulhom d-dritt tagħhom li ma jiġix mġiegħla jinkriminaw ruħhom bil-konsegwenza li jinkorru f'sanzjonijiet għal disprezz jekk jagħżlu li jibqgħu siekta.

46. Għalhekk, in kwantu li l-Linji Gwida jipprevedu sanzjonijiet punittivi għal persuna imputata b'reat kriminali jekk din tagħżel li teżerċita d-dritt tagħha għas-silenzju l-istess Linji Gwida jiksru d-dritt tar-rikorrenti appellati għal smigħ xieraq sanċit bl-Artikolu 39 u 6 tal-Kostituzzjoni u tal-Konvenzjoni rispettivament.

47. L-istess konsiderazzjonijiet sostanzjalment japplikaw għar-rigward tat-talbiet tar-rikorrenti dwar ir-Ruling tal-iSpeaker Dok. PC5. Huwa minnu li l-istess Ruling ingħata fil-konfront ta' terza persuna li ma hix parti fil-proċeduri tal-lum iżda c-Chairman tal-Kumitat Permanenti dwar il-Kontijiet Pubbliċi kien tal-fehma li ġia ladarba l-mertu tal-punt legali trattat mill-iSpeaker f'dak ir-Ruling huwa identiku għall-punt sollevat fir-rigward tar-rikorrenti appellati tal-lum allura ma kienx hemm ħtieġa li ssir referenza mill-ġdid lill-iSpeaker fuq l-istess punt. Huwa evidenti, għalhekk, li fil-fehma tal-istess Chairman dak ir-Ruling

kien ukoll applikabbli għas-sitwazzjoni tar-rikorrenti appellati f'dawn il-proċeduri.

48. Ir-Ruling imsemmi jagħmilha ċara li xhud quddiem il-Kumitat Permanenti ma għandux id-dritt li jibqa' sieket tant li fih jingħad li x-xhud għandu jidher quddiem l-istess Kumitat u għandu jwieġeb id-domandi li jsirulu u fil-każ biss ta' domanda li tista' tinkriminah huwa għandu d-dritt li jitlob li jiġi eżentat milli jwieġeb dik id-domanda partikolari. Tant hu hekk li fl-istess Ruling ġie riservat lis-Sedja d-dritt li tiddeċiedi jekk id-domanda li x-xhud "ipprefera" li ma jweġibx għax tista' tinkriminah għandhiex tiġi mwiegba jew le.

49. Dan ifisser li dak ir-Ruling ukoll, in kwantu applikabbli għar-rikorrenti appellati, ma jħarisx id-dritt tagħhom għas-silenzju in kwantu persuni imputati b'reat kriminali għalkemm iħarsilhom id-dritt tagħhom li ma jiġux mġiegħla jinkriminaw ruħhom.

11. Dan ukoll huwa l-hsieb tal-Qorti ta' Gustizzja tal-Unjoni Ewropea kif tixhed is-sentenza citata mill-intimati fin-nota ta' sottomissjonijiet taghhom dwar id-dritt ta' silenzju. L-intimat jaghmlu referenza ghas-sentenza fl-ismijiet **DB v Commissione Nazionale per le Societa' e la Borsa (Consob)**[9] fejn kien deciz illi "40. *The right to silence cannot reasonably be confined to statements of admission or wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on question of fact which may subsequently be used in support of the prosecution.... 41. That said, the right to silence cannot justify every failure to cooperate with the competent authorities, <u>such as a refusal to appear at a hearing planned by those authorities or delaying tactics designed to postpone it</u>.*[10]

11. Il-Qorti hi tal-fehma illi l-konsiderazzjonijiet tal-Qorti Kostituzzjonali maghmula fil-konferma tas-sentenza tal-

[9] GC – Case C-481/19, 2.2.2021
[10] Enfasi ta' din il-Qorti.

Prim'Awla tal-Qorti Civili ghandhom japplikaw ghal-kwistjoni in disamina kwantu jirrigwarda l-allegata lezjoni tal-jedd ta' smiegh xieraq.

12. Jizdied ikun osservat li s-segwenti principji kif applikati mill-Qorti Ewropea ghad-Drittijiet tal-Bniedem huma ugwalment ta' rilevanza ghal-dan il-kaz:

> Fis-sentenza taghha[11], l-Qorti ta' Strassbourg irriteniet illi:
>
> "... the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent".
>
> "….In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence at issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

13. Ir-rikorrenti tressaq quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja flimkien ma' persuni ohra fl-20 ta' Marzu 2021 imputat b'diversi reati fosthom dawk tal-hasil ta' flus u assocjazzjoni bil-ghan li jamghlu reati bejn is-sena 2005 u s-sena 2019[12]. Ghalkemm dawn l-allegati reati ma jsemmux specifikatament l-allegat involviment tieghu fil-kwistjoni tal-Electrogass mertu tar-rapport tal-Awditur u tas-sussegwenti stharrig mill-Kumitat Permanenti, l-invokar ghad-dritt tas-silenzju mir-rikorrenti f'inqas minn xahar wara, kienet wahda lecita u kellha tkun rispettata mic-Chairperson tal-istess Kumitat Permanenti. L-istess Kumitat Permanenti kellu ukoll jistharreg

11 *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX.
12 Dok BT1 a fol 10 *et seq* kopja tax-xilja tar-rikorrenti u ohrjan in atti Repubblika ta' Malta vs Brian Tonna et.

b'mod aktar effettiv l-allegazzjoni li l-mertu tar-rapport tal-Awditur Generali kien ukoll mertu ta' inkjesta fl-*in genere* kondotta minn Magistrat Inkwirenti fejn kien indagat l-allegat rwol tar-rikorrenti. Id-dritt ghas-silenzju kif mfisser fis-sentenza Frank Sammut huwa mahsub li jhares il-jedd fundamentali kontra s-*self incrimination* u f'xenarju fejn persuna hija fic-centru ta' allegazzjonijiet bhal dawk mertu ta' din il-kawza, dan il-jedd ghandu jassumi importanza ta' livell aktar ghola mhux biss ghaliex kien gia imputat izda ukoll ghaliex kien gia assista u kien ghadu qed jassisti fi proceduri hekk imsejha *pre trial*. Ghalhekk ir-*Ruling* u l-gwida ghax-xhieda fejn jitkellem dwar proceduri kriminali ossia akkuzi pendenti, jonqsu milli jharsu l-jedd ta' smiegh xieraq;

It-tieni lment:

14. L-ilment tar-rikorrenti dwar dan l-incident, ossia dwar ir-*Ruling* tal-iSpeaker u l-*Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives* jestendi fuq aspett iehor ta' allegat lezioni tal-jedd konvenzjonali u dak kostituzzjonali senjatament l-Artikolu 5 tal-Konvenzjoni u l-Artikolu 34 tal-Kostituzzjoni ta' Malta li jitrattaw dwar il-jedd tal-Liberta' Personali;

15. L-artikolu 5 tal-Konvenzjoni Ewropea Ghad-Drittijiet tal-Bniedem jipprovdi:

> (1) Kulħadd għandu d-dritt għal-libertà u għas-sigurtà tal-persuna.Ħadd ma għandu jiġi ipprivat mil-libertà tiegħu ħlief fil-każijietli ġejjin u skont il-proċedura preskritta bil-liġi:
> .....

(b) l-arrest jew id-detenzjoni skont il-liġi ta' persuna għalnuqqas ta' tħaris ta' ordni skont il-liġi ta' qorti jewsabiex jiġi żgurat it-twettiq ta' xi obbligu preskritt mil-liġi;

16. L-artikolu 34 tal-Kostituzzjoni jipprovdi hekk:

34 Ħadd ma għandu jiġi pprivat mill-libertà personali tiegħu ħlief kif jista' jkun awtorizzat b'liġi fil-każijiet li ġejjin, jiġifieri –
…
(ċ) fl-esekuzzjoni tal-ordni ta' qorti li tikkundannah għaldisprezz lejn dik il-qorti jew lejn qorti jew tribunalieħor jew fl-esekuzzjoni tal-ordni tal-Kamra tad-Deputati li tikkundannah għal disprezz lejha stess jewlejn il-membri tagħha jew għal ksur ta' privileġġ

17. Ir-rikorrenti jesponi l-kaz tieghu bil-mod segwenti. Fi kliem ir-Regola 4 tal-*Guide*, persuna li tonqos mill-obbligu li tidher jew li tixhed tkun hatja ta' nuqqas ta' qima lejn il-Kamra tar-Rapprezentanti u tista' tehel il-piena msemmija fl-artikolu 11 tal-House of Representatives (Powers and Privileges) Ordinance li f'dan il-kaz hija ta' prigunerija ghal zmien mhux izjed minn sitt xhur. Ir-rikorrenti mhuhiex qieghed daqstant jattakka din ir-regola kwantu l-piena imponibbli tista' tkun leziva tal-jeddijiet tieghu izda qieghed jabbina maghha l-fatt li kien kostrett li jixhed stante li sejbien ta' nuqqas ta' qima jista' jwasslu ghall-piena ta' prigunerija b'mod li b'hekk ukoll ikun kiser wahda mill-kundizzjonijiet ghall-helsien mill-arrest tieghu moghtija mill-Qorti Istruttorja, jigifieri li ma jaghmilx reat iehor ta' natura volontarja waqt li jkun mehlus mill-arrest;

18. L-ilment tar-rikorrenti huwa msejjes fuq kondizzjoni partikolari ghalih wara li sab ruhu f'sitwazzjoni fejn, skond hu, ma kellux ix-xelta li jibqa' sieket ghaliex jekk jaghmel hekk seta possibilment ikun misjub hati ta' nuqqas ta' qima mill-Kamra

tar-Rapprezentanti u soggett ghall-piena ta' prigunerija bil-konsegwenza li hekk ikun ukoll kiser wahda mill-kundizzjonijiet ghall-helsien tieghu mill-arrest kif imposta mill-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja wara li kien tressaq b'arrest biex iwiegeb ghall-imputazzjonjiet msemmija *supra* [13]

19. L-ilment tar-rikorrenti f'dan ir-rigward huwa li r-*Ruling* u l-Linji Gwida jistghu potenzjalment ikunu lezivi tal-jedd fundamentali tieghu ghall-liberta'. Jibda biex jinghad illi kif osservat minn diversi awturi dwar dan l-Artikolu, ghalkemm il-Konvenzjoni titkellem dwar protezzjoni tal-liberta' u sigurta', hija fil-fatt siekta dwar it-tieni aspett taghha ta' sigurta' bhala ukoll hija siekta l-Kostituzzjoni fl-Artikolu 34 taghha;

20. L-ewwel osservazzjoni li din il-Qorti jidrilha li ghandha ssir ghall-interpretazzjoni ahjar tal-kwistjoni in disamina hi li:

> Article 5(1) contains an enumeration of the cases in which deprivation of liberty is permitted. This is an exhaustive enumeration, that must be interpreted narrowly. Only such an approach is consistent with the aim and purpose of Article 5 to ensure that no one is arbitrarily deprived of his liberty.[14]

21. Din il-materja hija wisq drabi assocjata ma' kwistjonijiet ta' erogazzjoni ta' piena jew sanzjoni karcerarja wara sejbien ta' htija ta' nuqqas ta' qima (*contempt)* lejn il-qrati. Tajjeb li ssir referenza ghas-segwenti sentenza tal-Qorti ta' Strassbourg li minnha qed tkun citata parti sostanzjali:

> 62. The Court reiterates that any deprivation of liberty must, in addition to falling within one of the exceptions set out in

[13] Dok BT1 a fol 10 tal-atti
[14] Theory and Practice of the European Convention on Human Rights – Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds.) 4th Ed

sub-paragraphs (a)-(f) of Article 5 § 1 of the Convention (see *Assanidze v. Georgia* [GC], no. 71503/01, § 170, ECHR 2004-II), be "lawful". Where the "lawfulness" of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, 29 January 2008). This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 63, ECHR 2002-IV, and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 116, ECHR 2008). "Quality of law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see, for instance, *Nasrulloyev v. Russia*, no. 656/06, § 71, 11 October 2007, and *Mooren v. Germany* [GC], no. 11364/03, § 76, 9 July 2009). The standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III).

63. Compliance with national law is not, however, sufficient. Article 5 § 1 of the Convention requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see *Bozano v. France*, 18 December 1986, § 54, Series A no. 111). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1. The notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi*, cited above, § 67). While the Court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis. Furthermore, detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith on the part of the authorities (see *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, § 53, 13 January 2009; *Bozano*, cited above, § 59; and *Saadi*, cited above, § 69) or where the domestic authorities have neglected to attempt to apply the relevant legislation correctly (see *Benham v. the United Kingdom*, 10 June 1996, § 47, *Reports of Judgments and Decisions* 1996-III, and *Liu v. Russia*, no. 42086/05, § 82, 6 December 2007).

ii. Application of these principles to the circumstances of the case

64. At the outset, the Court notes that it does not need to answer the question of whether there could have been reasons for the Georgian authorities to take measures against the perceived disturbance of the public order or the need to enable the Tbilisi Court of Appeal to continue its work without being disturbed by the noise made by the applicants

demonstrating outside the courthouse. What is at stake in the present case is the lawfulness of the applicants' deprivation of liberty. The Court further observes that it is not in dispute between the parties that the applicants' arrest and being locked up in the duty room of the Tbilisi Court of Appeal by the bailiffs, as well as their subsequent punishment by detention, as imposed by the President of the Tbilisi Court of Appeal, represented a continuous situation of deprivation of liberty within the meaning of Article 5 § 1 of the Convention. It can be assessed as falling into two periods – before and after the applicants were brought before the judge who sanctioned their detention in her decision of 29 June 2006.

65. As regards the first period of the applicants' deprivation of liberty, the Court is ready to accept that since they were arrested on the basis of a suspicion that they had committed the offences of breach of public order and contempt of court, that period could fall within the exception authorised by 5 § 1 (c) of the Convention (compare, for instance, with *Makhmudov v. Russia*, no. 35082/04, § 80 and 81, 26 July 2007, and *Schwabe and M.G.*, cited above, § 70). However, exercising its power to refer to the quality of the domestic law for the purposes of ascertaining the "lawfulness" of a questioned period of detention (see paragraph 62 above), the Court observes that the circumstances surrounding the applicants' arrest and being locked for some three hours in the duty room of the Tbilisi Court of Appeal can hardly be held compatible with the relevant domestic provisions.

66. Thus, if the Court is to accept the Government's argument that the applicants were taken into custody on the basis of the Code of Administrative Offences, and that their detention at that time fell within the statutory limit of three hours permitted for such administrative arrest (see paragraph 36 above), a clear problem would arise with respect to the powers of arrest of court bailiffs as such. The Court notes that bailiffs were not amongst the exhaustive list of those State agents who were empowered to conduct administrative arrests under that Code (see paragraph 35 above).

67. On the other hand, as could be seen from the verbatim records of the applicants' arrest (see paragraph 12 above), their arrest was linked to section 76(3) § 1 of the Courts Act, notably to its sub-paragraph (f), which entitled bailiffs to arrest individuals suspected of committing the offences of breach of public order and contempt of court. However, that domestic provision, which stated that bailiffs could conduct arrests "for the purpose of handing [offenders] to the police", did not provide for any statutory time-limit during which an arrested individual could be kept in custody pending his or her appearance before a judicial officer. Consequently, it remains largely unexplained on the basis of which domestic legal provision, the court bailiffs took the liberty of locking the applicants up in the duty room of the Tbilisi Court of Appeal for at least three hours. Indeed, the Court notes that it was only subsequent to the applicants' arrest on 29 June 2006 that the Georgian legislator finally fixed, on 29 December 2006, a maximum permissible period for the duration of an arrest of an individual suspected of having committed the relevant offences (see paragraph 31 above).

68. Another matter for the Court’s concern is that it cannot be discerned with a sufficient degree of certainty either from section 76(3) § 1 (f) of the Courts Act, which served as the basis for the applicant’s arrest, or from Article 208 § 6(1) of the CCP, which became the basis for the subsequent finding of the applicants’ guilt, whether it was legally possible to arrest individuals outside court-houses. The wording of these provisions limited the territorial scope of both the court bailiffs’ powers of arrest and the offences of breach of public order and contempt to the interior of court buildings. That being so, the Court has certain doubts that the applicants could have foreseen at the relevant time and to a degree that was reasonable in the circumstances that their street picket in front of the Tbilisi Court of Appeal could entail their arrest and detention under the above-mentioned domestic provisions. It reiterates in this respect that national law must be of sufficient quality and, in particular, must be foreseeable in its application, in order to avoid all risks of arbitrariness (see *M. v. Germany*, no. 19359/04, § 104, ECHR 2009).

69. As regards the second period of the applicants’ deprivation of liberty, their detention for thirty days, given that the President of the Tbilisi Court of Appeal imposed that measure in her decision of 29 June 2006 as a punishment for the offences of breach of public order and contempt of court under Article 208 § 6(1) of the CCP, the Court considers that that period can fall under the exception provided for under Article 5 § 1 (a) of the Convention (see, for instance, *Schwabe and M.G.*, cited above, § 74 and 83, and *M. v. Germany*, also cited above, § 87). However, the President never discussed the major legal issue of whether the bailiffs had had the power to arrest the applicants outside the court building and whether the applicants’ behaviour out of doors could legitimately attract liability under the relevant domestic provisions. Her findings were based solely on the explanatory notes provided by the court bailiffs and, similarly to those notes, the findings lacked any detailed explanation and were strikingly succinct, and resulted in the endorsement in her decision of the obviously untrue statement that the applicants had committed the acts “inside the court building, in its central entrance” (see paragraphs 12, 15 and 17 above). It is thus evident that the judge was negligent in reviewing both the factual and the legal basis for the applicants’ detention (compare with *Hakobyan and Others v. Armenia*, no. 34320/04, § 123, 10 April 2012), and exercised her authority in manifest opposition to the elementary procedural guarantees against arbitrariness provided for by the Convention (compare with *Menesheva v. Russia*, no. 59261/00, § 92, ECHR 2006-III).

70. In the light of the foregoing the Court concludes that the applicants’ arrest for some three hours could not be considered to have been based on sufficiently clear and foreseeable domestic provisions, whilst the subsequent imposition of detention for thirty days was made in an arbitrary manner, without the requisite exercise of good faith on behalf of the domestic authorities.

71. Accordingly, there has been a violation of Article 5 § 1 of the Convention.[15]

22. Tajjeb ukoll li ssir referenza ghall-fehma kif esposta fil-ktieb citat *supra* fejn l-awturi jissenjalaw:

> The question of whether a detention complies with the requirent 'a procedure prescribed by law' is closely related to the question of whether the detention was 'lawful'. These requrements, the latter of which is expressly mentioned in the individual exceptions under (a)-(f), and which are usually bracketed together by the Court, essentially refer back to national law. It means that the deprivation of liberty must be imposed in confirmity with the substantive and procedural rules of the applicable national law. The Court is competent to review whether this requirement has been complied with, but is not called upon to give its own interpretation of national law. (See, *e.g.*, the judgment of 24 October 1979 , *Winterwerp*, para.46; judgment of the 18 December 1986, *Bozano*, para.58; judgment of 10 June 1996, *Benham*, para 39-47)[16]

23. Il-qofol tal-kwistjoni ghalhekk jidher li hu li dik id-detenzjoni rizultanti fit-telfien tal-liberta', irrespettivament mill-ammont ta' hin jew zmien li tkun ipperdurat, tista' tkun leziva tad-dritt in disamina jekk mhix provenjenti mill-ligi. Issa, fil-kwistjoni hawn devoluta, r-rikorrent qieghed jilmenta mill-potenzjali lezjoni tal-jedd tieghu li jkun kkundannat ghall-inkarcerazzjoni f'kaz li ma jinvoka d-dritt ta' silenzju tieghu, liema regola gia hija meqjusa leziva tal-jedd tieghu ghas-smiegh xieraq fil-paragrafi precedenti. destinat li jfalli kemm il-darba huwa intiz biex jattakka l-validita' tal-imposizzjoni ta'

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[15] **CASE OF KAKABADZE AND OTHERS v. GEORGIA** *(Application no. 1484/07)* Third Section - 2 October 2012

[16] Theory and Practice of the European Convention on Human Rights – *cit.* pagna 463 – 9.4.1

priguneriјa bhala sanzjoni ghan-nuqqas ta' koperazzjoni quddiem il-Kumitat Permanenti la darba tali piena hija wahda kontemplata bhala lecita sia mill-Konvenzjoni kif ukoll mill-Kostituzzjoni. Wisq drabi l-kwistjoni ta' cahda ta' liberta' personali hija attakkata mill-aspett ta' nuqqas ta' proporzjonalita' izda fil-kaz odjern r-rikorrenti, konsapevoli tal-fatt illi tali sanzjoni hija permessa b'mod konvenzjonali u kostituzzjonali, qed jattakka r-*Ruling* u l-*Guide for Witnesses* mill-ottika ta' ksur tal-jedd ghall-liberta' personali;

24. Din is-sanzjoni, izda, hija avdata f'idejn Awtorita' b'poteri gudizzjarji li jehtigilha taghti process ta' smiegh xieraq qabel tasal biex tikkundanna lix-xhud ghan-nuqqas tieghu li jwiegeb ghall-mistoqsijiet li jkunu saru lilu mill-Kumitat. Dak il-process ghadu ma sehhx u wisq anqas r-rikorrenti ma ressaq id-difiza tieghu quddiem il-Kamra tad-Deputati. Mill-ottika tal-"potenzjali" ghalhekk, l-ilment tar-rikorrenti ma jistax jirnexx;

25. Lanqas ma ghadu sehh xi process fil-konfront tar-rikorrenti li bih jista' potenzjalment ikun dikjarat li kiser il-kundizzjoni tal-helsien mill-arrest tieghu f'kaz li jkun "jikkometti <u>delitt</u> li ma jkunx wiehed ta' natura involontarja" filwaqt li jkun mehlus mill-arrest fuq kundizzjonijiet" [17]. Dan huwa process li jista' jsehh fit-termini tal-artikolu 579 (1) tal-Kapitolu 9 tal-Ligijiet ta' Malta jew is-subartikolu (2) tieghu billi fl-ewwel ipotezi l-Qorti tara jekk kienx hemm ksur u <u>tista</u>' tinvoka l-garanzija mhollija ghall-helsien mill-arrest, jew fit-tieni kaz fejn il-Pulizija tressaq lill-imputat biex iwiegeb ghal dak l-allegat ksur

[17] Art 579(1) tal-Kodici Kriminali

u hemm tkun passibbli ta' sejbien ta' htija u tkun ukoll passibbli *inter alia* ghall-inkarcerazzjoni wara process *ad hoc.*[18] L-ilment tar-rikorrenti ghalhekk huwa wiehed intempestiv u ma ghandux ikun akkolt;

26. Kwantu d-danni mhux pekunjarji, wara l-kunsiderazzjonijiet taghha dwar l-ewwel ilment, pasibbli tqis illi dan l-incident huwa passibbli ghall-hlas tal-ammont ta' elf euro (1,000.00)

Ghal dawn ir-ragunijiet, taqta' u tiddeciedi billi tilqa' l-ewwel, it-tieni, il-hames u s-sitt talba, filwaqt illi tichad it-tieni u t-tielet talba u konsegwentement:

1. Tiddikjara li l-*Guide for Witnesses appearing before the Public Accounts Committee of the House of Representatives* jikser il-jedd tieghu ghal smigh xieraq kif sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea u mill-Artikolu 39 tal-Kostituzzjoni ta' Malta in kwantu jobbligah jirrispondi ghal mistoqsijiet mill-membri tal-Kumitat Permanenti dwar il-Kontijiet Pubblici li jistghu jiksrulu d-dritt ta' smigh xieraq;

2. Tiddikjara li r-*Ruling* ta' l-Onorevoli Speaker tal-Kamra tad-Deputati tad-19 ta' April, 2021, jikser id-dritt tieghu ghal smigh xieraq kif sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea u mill-Artikolu 39 tal-Kostituzzjoni ta' Malta in kwantu jobbligah jirrispondi ghal mistoqsijiet mill-membri tal-Kumitat Permanenti

[18] Artikolu 579 (3) Kodici Kriminali

dwar il-Kontijiet Pubblici li jistghu jiksrulu d-dritt ta' smigh xieraq;

3. Tordna l-isfilz mill-proceduri quddiem il-Kumitat Permanenti dwar il-Kontijiet Pubblici dwar rapport ta' l-Awditur Generali intitolat *An Investigation of Matters Relating to the Contracts awarded to ElectroGas Malta Ltd by Enemalta Corporation* ta' kull xiehda minnu moghtija u ta' kull dokument minnu esebit;

4. Tiddikjara li kull xiehda moghtija mill-esponent u kull dokument minnu esibit fuq talba tal-Kumitat Permanenti dwar il-Kontijiet Pubblici hija leziva tad-dritt fondamentali tieghu sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea u mill-Artikolu 39 tal-Kostituzzjoni ta' Malta;

Stante li ma tara ebda raguni ghaliex ghandu jinghata xi kumpens non pekunjarju jew li taghti xi direttivi ohra, tastjeni milli tiehu konjizzjoni tat-tmien talba;

L-ispejjez ghandhom ikunu sopportati ugwalment mill-intimati.

Onor. Dr. Giovanni M Grixti

Imħallef

Nicole Cini

Deputat Reġistratur