QORTI ĊIVILI – PRIM'AWLA

(Sede Kostituzzjonali)

ONOR. IMĦALLEF MIRIAM HAYMAN LL.D.

Seduta tallum l-Erbgħa 5 ta' Marzu 2025

Rikors Kostituzzjonali Nru.: 216/2022 MH

Numru: 3

Djilali Douib

vs

L-Uffiċjal Prinċipali tal-Immigrazzjoni

u l-Avukat tal-Istat

Il-Qorti:

Rat **ir-rikors tar-rikorrent tal-5 ta' Mejju 2022** permezz ta' liema ġie premess u mitlub -

1. "Illi l-esponenti huwa ta' nazzjonalita' Algerina u huwa wasal Malta fis-16 t'Ottubru 1997;

2. Illi l-esponenti izzewweg Mara ta' nazzjonalita' Maltija nhar is-26 t'April 2001 liema zwieg gie dikjarat null nhar is-27 ta' Dicembru 2005. Dan ifisser li l-esponenti kien jitqies persuna ezenti sal-2005;

3. Illi l-esponenti kien applika ghall-istatus ta' refugjat liema applikazzjoni kienet giet rifjutata;

4. Illi sussegwentament huwa beda relazzjoni ma' Chawah Farah illum ta' nazzjonalita' Maltija, bil-karta tal-identita' Maltija bin-numru 234418L;

5. Illi fis-17 ta' Mejju 2009 huma kellhom tifla bl-isem ta' Rafah izda peress li dak iz-zmien is-siehba tieghu Chawah Farah kienet ghadha mizzewga lil ragel iehor it-tifla ma kinitx giet registrata fuq isem l-esponenti madankollu t-tifla Rafah dejjem irrikonoxxiet lill-esponenti bhala missierha u hu dejjem mantniha (ritratti tal-esponenti flimkien ma' Chawah Farah u bintu Rafah annessi u mmarkati kolletivament DOK A);

6. Illi l-esponenti fil-25 t'Ottubru 2012 ikkuntratta z-zwieg tieghu ma' Chawah Farah fil-Moskea bi ritwal Musulmann (kuntratt taz-zwieg anness u mmarkat DOK B);

7. Illi lura ghas-sena 2016 l-esponenti kien instab hati ta' traffikar uman u huwa kien instab jirrisjedi illegalment f'Malta u sussegwentament l-Ufficjal Principali tal-Immigrazzjoni hareg Ordni tat-Tnehhija u ghar-Ritorn fil-konfront tal-esponenti liema decizjoni kienet komunikata lill-esponenti nhar l-24 ta' Marzu 2018;

8. Illi l-esponenti hass ruhu aggravat bid-decizjoni li jigi rimpatrijat wara li kien qieghed igawdi lil sehbitu u lil bintu hawn Malta u ghalhekk huwa interpona appell mill-imsemmija decizjoni quddiem il-Bord tal-Appell dwar l-Immigrazzjoni;

9. Illi l-Bord tal-Appelli dwar l-Immigrazzjoni fid-decizjoni datata l-1 ta' Novembru 2021 ddecieda li ma jilqax l-appell tal-esponenti b'wahda mir-ragunijiet tkun illi l-esponenti kien naqas milli jipproduci evidenza tar-relazzjoni tieghu mal-bint bijologika tieghu (decizjoni tal-Bord tal-Appelli dwar l-Immigrazzjoni annessa u mmarkata DOK C);

10. Illi l-esponenti appella mid-decizjoni tal-Bord tal-Appelli dwar l-Immigrazzjoni quddiem il-Qorti tal-Appell (Sede Inferjuri) sabiex tithassar u tigi revokata ddecizjoni appellata. Il-Qorti tal-Appell bi decizjoni tas-6 t'April 2022 naqset milli tiehu konjizzjoni tal-appell u

kkonfermat id-decizjoni ta' ritorn tal-esponenti (decizjoni tal-Qorti tal-Appell annessa u mmarkata DOK D);

11. Illi fil-mori tal-proceduri surreferiti peress li l-esponenti ghandu relazzjoni tajba hafna ma' bintu Rafah huwa kien beda proceduri ta' paternita' quddiem l-Onor. Qorti Civili, Sezzjoni tal-Familja, nhar id-19 ta' Dicembru 2019 u dan sabiex hu ikun jista' jirrikonoxxi lil Rafah formalment bhala bintu;

12. Illi permezz ta' sentenza datata 26 ta' Frar 2021 fl-ismijiet Douib Djillali vs Farah Chawaf, Nicholas Cuschieri u Direttur tar-Registru Pubbliku, l-Onor. Qorti Civili, Sezzjoni tal-Familja, laqghet it-talbiet tal-esponenti b'dan illi ddikjaratu bhala l-missier naturali u bijologiku tal-minuri Rafah u konsegwentament ordnat lid-Direttur tar-Registru Pubbliku sabiex jaghmel il-korrezzjonijiet tieghu fuq l-att tat-twelid tal-istess minuri Rafah (decizjoni tal-Qorti datata 26 ta' Frar 2021 annessa u mmarkata DOK E). Fil-fatt illum il-gurnata, l-att tat-twelid tal-minuri Rafah jindika lill-esponenti bhala l-missier naturali taghha (att tat-twelid ta' Rafah Douib Douib anness u mmarkat DOK F);

Raguni ghat-Talbiet f'dawn il-Proceduri

13. Illi d-decizjoni tal-intimat Ufficjal Principali tal-Immigrazzjoni biex l-esponenti jigi deportat lejn il-pajjiz tal-origini tieghu tidderuba lill-istess esponenti mit-tgawdija kemm ta' bintu minuri li tant ihobb u li ilu jmantni ghal snin shah minn mindu twieldet, filwaqt li tidderubah mic-cans li jkompli jizviluppa relazzjoni familjari maghha;

14. Illi kif gie pronunzjat mill-Qorti Ewropea ghad-Drittijiet tal-Bniedem fil-kawza Nazarenko v. Russia;

"(...) the complete and automatic exclusion of the applicant from his child's life (omissis) without properly considering the child's best interests, amounted to a failure to respect the applicant's family life,"

15. Illi minkejja l-fatt li l-esponenti minn dejjem kien igawdi relazzjoni tajba ferm ma' bintu, l-Artikolu 8 tal-Konvenzjoni Ewropea gie interpretat li jipprovdi sahansitra ghall-eventwali relazzjoni li jaf tizviluppa bejn genitur naturali u wild fejn sahansitra tali relazzjoni tkun ghadha mhix stabbilita kif gie enuncjat fis-sentenzi tal-Qorti ta' Strasburgu fl-ismijiet Nylund vs Finland u Shavdarov vs Bulgaria:

"The Court considers that Article 8 cannot be interpreted as only protecting family life which has already been established but, where the

circumstances warrant it, must extend to the potential relationship which may develop between a natural father and a child bourn out of wedlock."

16. Illi barra minn hekk, l-esponenti ilu jirrisjedi Malta aktar minn ghoxrin (20) sena u cioe' minn Ottubru tal-1997 u matul dan iz-zmien, huwa bena familja u integra b'mod konkret u shih mal-komunita' Maltija;

17. Illi f'dan ir-rigward, il-Committee of Ministers Recommendations Rec (2000)15 concerning the security of residence of long-term migrants jistipulaw f'paragrafu 4(b)

illi:

"As regards the protection against expulsion (...) In application of the principle of proportionality as stated in paragraph 4(a), member states should duly take into consideration the length or type of residence in relation to the seriousness of the crime committed by the long-term immigrant. More particularly, member states may provide that a long-term immigrant should not be expelled:- after five years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of two years' imprisonment without suspension:- after ten years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of five years of imprisonment without suspension. After twenty years of residence, a long-term immigrant should no longer be expellable."

18. Illi fl-isfond tas-suespost u fl-umli fehma tal-esponenti, id-decizjoni ta' ritorn tal-intimat Ufficjal Principali tal-Immigrazzjoni tal-24 ta' Marzu 2018 tammonta ghal ksur tad-dritt tal-istess esponent kif sancit taht l-Artikolu 32 tal-Kostituzzjoni ta' Malta u l-Artikolu 8 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertaijiet Fundamentali;

19. Illi l-esponenti jiddikjara li hu jaf personalment b'dawn il-fatti;

Talbiet

Jghid ghalhekk l-intimat, prevja kwalsiasi dikjarazzjoni necessarja u opportuna u ghar-ragunijiet premessi, kif ukoll ghal dawk kollha li jistghu jirrizultaw waqt it-trattazzjoni ta' dawn il-proceduri, ghaliex din l-Onorabbli Qorti m' ghandhiex:

i. Tiddikjara u tiddeciedi li bid-decizjoni ta' ritorn mahruga mill-intimat Ufficjal Principali tal-Immigrazzjoni fit-28 ta' Marzu 2018, is-sentenza tal-Bord tal-Appelli dwar l-Immigrazzjoni deciza nhar l-1 ta' Novembru 2021 u kif ukoll is-sentenza tal-Qorti tal-Appell (Sede Inferjuri) deciza nhar 6 t'April 2022, ir-rikorrenti garrab, qieghed igarrab u/jew jista' jgarrab ksur tal-jeddijiet fundamentali tieghu ghar-rispett tal-hajja privata u tal-familjari tieghu kif sanciti bl-Artikolu 32 tal-Kostituzzjoni ta' Malta u bl-Artikolu 8 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali;

ii. Tordna t-thassir tal-imsemmija decizjoni ta' ritorn mahruga mill-intimat Ufficjal Principali tal-lmmigrazzjoni fit-28 ta' Marzu 2018, is-sentenza tal-Bord tal-Appelli dwar l-Immigrazzjoni deciza nhar l-1 ta' Novembru 2021 u kif ukoll is-sentenza tal-Qorti tal-Appell (Sede Inferjuri) deciza nhar 6 t'April 2022, u konsegwentament tiddikjara li l-esponenti ghandu dritt jirrisjedi fil-gzejjer Maltin flimkien ma' Farah Chawafu bintu Rafah Douib Douib;

iii. Tiddikjara u tiddeciedi illi l-intimati jew min minnhom huma responsabbli ghal kumpens u danni sofferti mill-esponenti b'konsegwenza tal-imsemmija decizjoni ta' ritorn mahruga mill-intimat Ufficjal Principali tal-Immigrazzjoni fit-28 ta' Marzu 2018;

iv. Tillikwida l-istess kumpens u danni kif sofferti mir-rikorrenti, ai termini tal-ligi u tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertaijiet Fundamentali; u

v. Tikkundanna lill-intimati jew min minnhom ihallsu l-istess kumpens ta' danni likwidati ai termini tal-ligi u tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali.

Bl-ispejjez kollha kontra 1-intimati li minn issa huma ingunti sabiex jidhru ghas-subizzjoni."

Rat **ir-risposta tal-intimati Uffiċjal Prinċipali tal-Immigrazzjoni u tal-Avukat tal-Istat tat-30 ta' Ġunju 2022**[1] permezz ta' liema tressqu s-segwenti eċċezzjonijiet-

[1] Fol 41

1. *"Illi l-lanzjanza tar-rikorrent hija fis-sens illi qed jigu vjolati d-drittijiet tieghu ghar-rispett tal-hajja private u tal-familjari tieghu kif sanciti bl-artikolu 32 tal-Kostituzzjoni ta' Malta u bl-artikolu 8 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali;*

2. *Illi l-esponenti jirrespinġu l-allegazzjonijiet tar-rikorrent bħala infondati fil-fatt u fid-dritt stante li, kif ser jiġi spjegat aktar 'l isfel, l-ebda aġir ta' l-esponenti ma kiser jew illeda xi dritt fundamentali tar-rikorrent;*

3. *Illi l-fatti kif maghrufa lill-esponenti huma s-segwenti:*

a. *Illi r-rikorrent instab hati ta' traffikar uman permezz ta' sentenza tal-Appell Kriminali (12/2014) fl-ismijiet "Il-Pulizija vs Djillali Douib" deciza fil-15 ta' Novembru 2016 (kopja informali hawn annessa u mmarkata Dok 'PIO 1') fejn l-attur gie kkundannat ghal piena ta' sentejn prigunerija sospizi ghal erbgha snin u multa ta' 5,000eur;* [2]

b. *Illi r-rikorrent kien qieghed illegalment jirrisjedi gewwa Malta*[3]*;*

c. *Illi in vista ta' dak succitat, ir-rikorrent huwa immigrant projbit ai termini tal-Kapitolu 217 tal-Ligijiet ta' Malta. L-artikolu 5 tal-Kap. 217 tal-Ligijiet ta' Malta jistabilixxi s-setgha li ghandu l-Ufficjal Principali tal-Immigrazzjoni li johrog removal order u return decision propju meta persuna li tkun f'Malta illegalment tkun instabet ukoll hatja ta' reat li jgorr piena ta' iktar minn sena prigunerija;*

d. *Illi r-rikorrent illum ghandu fuqu imposti removal order u return decision (datati 24 ta' Marzu 2018), mahruga mill-esponent Ufficcjal Principal tal-Immigrazzjoniu abbazi tas-sentenza kriminali hawn fuq esposta;*

e. *Illi r-rikorrent appella mid-decizjoni tal-Ufficcjal Principal tal-Immigrazzjoni ghal-hrug tar-removal order u return decision quddiem il-Bord tal-Appelli dwar l-Immigrazzjoni u fl-1 ta'*

[2] Il-piena tista tkun wahda effettiva o meno;

[3] vide l-fatti tal-kaz kif enuncjati fid-decizjoni tal-Board tal-Appelli dwar l-Immigrazzjoni

Novembru 2021 l-istess Bord cahad l-appell tieghu (ara 'Dok C' anness mar-rikors promotur);

f. *Illi r-rikorrent appella mid-decizjoni tal-imsemmi Bord quddiem il-Qorti tal-Appell (sede inferjuri) liema Qorti astjeniet milli tiehu konjizzjoni tal-appell u ddikjaratu inammissibbli, irritu u null permezz ta' sentenza moghtija fis-6 ta' April 2022 (ara 'Dok D' anness mar-rikors promotur) u dan stante li r-rikorrent kien qed jitlob li ssir revizjoni tal-provi u mhux illijigi diskuss xi punt ta' dritt;*

g. *Illi permezz tas-sentenza moghtija fis-26 ta' Frar 2021 fl-ismijiet 'DD kif korrett permezz tad-digriet data 28 ta' Jannar 2021 vs FC et' l-Qorti Civili (Sezzjoni Familja) iddikjarat illi l-attur huwa l-missier naturali u bijologiku tal-minuri Rafah Douib Douib (ara 'Dok E' anness mar-rikors promotur);*

<u>Eċċezzjonijiet Preliminari</u>

4. *Illi l-esponenti jecepixxu illi l-artikolu 46 tal-Kostituzzjoni ta' Malta jeskludi azzjoni kostituzzjonali sabiex jkun hemm dikjarazzjoni ta' lezjoni tal-artikolu 32 tal-Kostituzzjoni ta' Malta. Konsegwentament ma jistax jinstab ksur tal-artikolu 32 tal-Kostituzzjonali ghaliex m'huwiex wiehed mill-artikoli azzjonabbli tal-Kostituzzjoni;*

5. *Illi l-esponenti jecepixxu illi l-proceduri odjerni huma xejn ghajr abbuz tal-proceduri gudizzjarji u dan stante illi r-rikorrent diga pproceda b'talbiet ezawrjenti quddiem il-Bord tal-Appelli dwar l-Immigrazzjoni u konsegwentament quddiem il-Qorti tal-Appell (sede inferjuri). Gialadarba r-rikorrent ezawrixxa r-rimedji ordinarji moghtija bil-ligi, l-esponent huma tal-fehma illi dina l-Onorabbli Qorti ghandha tiddeklina milli tezercita l-poteri kostituzzjonali taghha;*

6. *Illi fir-rigward tat-tieni talba tar-rikorrent fejn qieghed jintalab it-thassir tad-decizjonijiet tal-ufficcjal principal tal-immigrazzjoni, tal-Bord tal-Appelli dwar l-Immigrazzjoni u tal-Qorti tal-Appell (sede inferjuri), l-esponenti jecepixxu illi din it-talba hija improponibbli stante illi l-Qrati Kostituzzjonali m'ghandhomx funzjoni illi jarrogaw fuqhom l-poteri decizjonali tal-awtoritajiet amministrattivi u gudizzjarji kif stabbiliti fil-ligi u lanqas ghandhom jigu utilizzati sabiex Sentenza ta' Qorti tmeri Sentenza*

ohra ta' Qorti ohra. Kwindi, l-irritwalita' ta' din it-talba qieghda tigi formalment eccepita;

Eċċezzjonijiet fil-Mertu:

7. *Illi l-esponenti jibda billi jirrileva illi fil-proceduri quddiem il-Bord tal-Appelli dwar l-Immigrazzjoni, ir-rikorrent ma gab ebda prova sabiex juri illi huwa ghandu a positive familiar relationship mat-tifla tieghu Rafah Douib Douib. Huwa inghata l-opportunita' illi jressaq tali provi izda qatt ma pprezentahom. Anzi kien propju waqt is-sottomissjonijiet orali li instemghu quddiem il-Bord tal-Appelli dwar l-Immigrazzjoni li l-attur semma il-fatt li ghandu tifla u pprezenta c-certifikat tat-twelid taghha. Il-Bord kien sussegwentement innota illi "...no tentative was made or shown to have been made by the appellant to regulate such situation by filing proceedings in court in order to obtain a judgment recognizing appellant as the father of the child." Kien biss fil-gurnata li kellha tinghata s-sentenza mill-Bord tal-Appelli dwar l-Immigrazzjoni li l-attur ipprezenta l-proceduri ghal dikjarazzjoni ta' paternita' quddiem il-Qorti Civili (Sezzjoni Familja).*

8. *Illi huwa siewi f'dan is-sens li ssir referenza ghal dak li gie deciz mill-Bord tal-Appelli dwar l-Immigrazzjoni fis-sentenza taghha fejn ikkunsidrat is-segwenti:*

> *"The Board refers to court documents presented by appellant showing that he proceeded to file said paternity case. Paternity case was filed only in the year 2019 – coinciding with the date when the Immigration Appeals Board was going to deliver judgment, which judgment was not delivered for reasons explained supra. Also, DNA test was carried out with the result bring issued only on the 4th November 2019. Board notes that besides the confirmation that appellant is the biological father of a child born way back in the year 2009, appellant failed to present any evidence whatsoever showing his relationship with the child. When appellant filed the paternity case, daughter father way back in 2009 was already ten (10) years old and no evidence whatsoever of any kind of relationship was presented. Apart from the Birth certificate, no other evidence was produced."*

9. *Illi c-citazzjoni suesposta hija important ghaliex ir-rikorrent qieghed jipprova jpengi stampa illi huwa ghandu xi relazzjoni pozittiva familjari ma' bintu ghaliex intavola proceduri ta'*

paternita'. Dawn il-proceduri li fihom nnifishom huma biss dikjaratorji ai fini ta' paternita, gew intavolati ghaxar (10) snin wara t-twelid tal-minuri minkejja l-fatt illi xejn ma zamm lill-attur milli jintavola tali proceduri qabel. Kien biss fil-gurnata meta l-Bord kellu jaghti d-decizjoni tieghu illi r-rikorrent holom li jintavola l-proceduri ta' paternita;

10. *Illi ghalhekk, gialadarba ir-rikorrent ma rnexxilux juri din il-positive familiar relationship, huwa ma jistax jabbuza minn proceduri kostituzzjonali sabiex kif jghid il-Malti, jekk ma jghaddiex mill-bieb, jghaddi mit-tieqa. Illi l-ezistenza ta' relazzjoni bijologika m'hijiex bizzejjed sabiex tigi kkonstata a close personal relationship to attract the protection of article 8*[4]*. Illi konsegwentament l-fatt illi huwa rnexxilu jirrikonoxxi lill-bintu wara ghaxar (10) snin ma jfissirx illi issa ghandu d-dritt illi jiskappa removal order u return decision legali imposti fuqu. Lanqas ma jfisser illi ghandu xi dritt illi jirrisjedi fil-gzejjer Maltin kif qieghed jallega;*

11. *Illi bir-rispett dovut lejn il-Committee of Ministers li gew citati mill-attur dawn ir-rakomandazzjonijiet m'humiex ligi u m'ghandhom ebda vinkolu fuq id-diskrezzjoni tal-awtoritajiet nazzjonali tas-stat membri. Dan il-fatt jista' jigi kkonstatat facilment mill-website tal-commitee stess: https://www.coe.int/en/web/cm/adopted-texts-information:*

"Recommendations are not binding on member States";

12. *Illi ghalhekk jekk l-attur qed jikkotendi illi ghaliex skont hu ghamel hamsa u ghoxrin sena residenti gewwa Malta huwa ghandu jedd li ma jigix espulz mill-pajjiz minhabba il-committee of ministers recommendations rec (2000) 15, johrog car illi din ir-rakomandazzjoni m'hija xejn hlief rakomandazzjoni li tista' o meno tigi adottata mis-stati membri;*

13. *Illi tajjeb li jigi rilevat sahansitra anke talba tar-rikorrent biex jinghata status ta` refugjat giet michuda mir-Refugee Appeals Board kif jindika r-rikorrent stess fir-rikors promotur. Illi din ma kienet xejn hlief tentattiv iehor sabiex ir-rikorrent jara x'jaghmel sabiex jiggranfa mat-tiben u jipprova jikseb xi forma ta' permess sabiex jibqa' jirrisjedi Malta;*

[4] Vide L.V the Netherlands, paragrafi 37-40

14. *Illi jinghad ukoll li d-dritt ghal familja li jikkontempla l-artikolu 8 tal-Konvenzjoni Ewropeja m`huwiex xi dritt assolut u tali interferenza fil-hajja familjari hija legittima u gustifikata peress li tali mizura taqa` taht l-interessi tal-Istat li jzomm is-sigurta` pubblika u biex jigi evitat dizordni jew eghmil ta` delitti. Fuq kollox zgur li l-kaz odjern ma jaqax taht dawk il-kazijiet ta` "extreme urgency" u "irreparable harm to life and limb" li jiggustifikaw xi talba ghal dritt ta residenza gewwa Malta;*

15. *Illi l-Qorti Civili (Sede Kostituzzjonali) permezz ta' digriet kamerali tal-4 ta' Ottubru 2018 fl-ismijiet "**Sherif Mohamed Shennawyh Vs. Avukat Generali et"** (kopja informali tad-digriet qed jigi anness u mmarkat bhala Dok '**PIO 3**') kkunsidrat is-segwenti:*

" Ikkunsidrat:

> *..the Court is not an appeal tribunal from the asylum and immigration tribunals of Europe…*
>
> *"Where national immigration and asylum procedures carry out their own proper assessment of risk and are seen to operate fairly and with respect for human rights, the Court should only be required to intervene in truly exceptional circumstances".*
>
> *Illi fil-każ preżenti, m'hemm l-ebda dubbju li l-awtoritajiet Maltin aġixxew mhux biss rite, imma wkoll recte, kif jidher ex facie s-sentenza studjata tal-Immigration Appeals Board li mhux biss applikat il-liġi dwar l-immigrazzjoni imma wkoll daħlet fil-fond dwar l-aspetti ta' jeddijiet fundamentali.*
>
> *Illi quddiem din il-Qorti, kif għamel quddiem il-Bord imsemmi, ir-rikorrent jiċċita favur tiegħu il-jedd fundamentali għall-ħajja familjari. Jgħid li għandu għadd ta' tfal, erbgħa minnhom minorenni. 'danakollu, ma jgħidx ċar u tond jekk hux qiegħed imantnihom jew le. Ma jidhirx li jgħixu miegħu. Ma jirriżultax li m'hemmx min jieħu ħsiebhom fl-assenza tiegħu waqt is-smiegħ tal-kawża kostituzzjonali li fetaħ. Jidher li nstab ħati ta' vjolenza domestika, li, waqt id-depożizzjoni viva voce tiegħu quddiem din il-Qorti, huwa rrifera għaliha bħala kwistjoni normali bejn il-miżżewwġin – attitudni li qajla mpressjonat lil din il-Qorti bħala xi rabta kbira mal-familja tiegħu. Fi kwalunkwe każ m'hemm l-*

ebda allegazzjoni kredibbli ta' xi ħsara serja u rreparabbli għal dawn it-tfal. Min-naħa l-oħra, l-fatt li ġie misjub ħati ta' delitt li l-piena li għaliha huwa soġġett tintitola lill-awtoritajiet kompetenti biex jiddeportawh iwieżen il-miżien iktar favur id-deportazzjoni tar-rikorrent meta fil-kefef tal-miżien jitpoġġew l-allegat jedd għall-familja min-naħa tar-rikorrent u s-sigurta` pubblika min-naħa l-oħra."

16. *Illi l-esponenti jirrilevaw illi il-fatti specie tal-kaz succitat huma komparabbli mal-kaz odjern ghalkemm jitrattaw talba ghal interim measure. Multo magis, l-istess taghlim illi dik l-Onorabbli Qorti stipulat fid-digriet kamerali ghandu japplika ghal każ odjern u dan ghaliex anki fil-fatti specie tal-vertenza li ghandha quddiema dina l-Onorabbli Qorti, l-minuri m'hijiex ta' eta zghira imma ta' tlettax-il sena (13) u tirrisjedi ma' ommha. Aktar minn hekk, xejn ma jzommha milli zzur lill-missier bijologiku fil-pajjiz tal-origini tieghu;*

17. *Illi l-esponent jirrileva illi l-Qrati Nostrana kif ukoll il-Qorti Ewropeja fi Strasburgu diga' kellha l-opportunita' tistharreg kwistjonijiet li huma simli ghall-vertenza odjerna. Per ezempju fis-sentenza tat-22 ta' Ottubru 2019 tal-Qorti Civili (sede Kostituzzjonali) fl-ismijiet* ***"Sherif Mohamed El Shennawyh vs Avukat Generali et" (82/2018)***

"Illi r-rikorrent ma jallegax li l-Ordni ta' Tneħħija mhix waħda legali. Bħal kull Stat Sovran ieħor, Malta għandha l-jedd li tkeċċi barranin misjuba ħatja ta' reati kriminali serji; Illi hemm għadd ta' każi deċiżi mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem b'fattispeċje simili għal dak preżenti li fihom il-Qorti sabet li l-espulsjoni ta' persuna barranija kienet waħda proporzjonata, fosthom Comert v Denmark (10.04.2006), Uner v The Netherlands (18.10.2006), Kulekci v Austria (01.06.2017), Salem v Denmark (01.12.2016) u Samsonnikov v Estonia (03.07.2012) iċċitati fid-deċiżjoni tal-Immigration Appeals Board;

Illi l-Qorti ma ssibx li l-istess Ordni hija sproporzjonata, tenut kont tal-istorja ta' atti kriminali ripetuti mir-rikorrent, li huma theddida serja għas-sigurta` pubblika, u għad-drittijiet ta' kull persuna li tgħix f'Malta bla biża' u fil-paċi;

Illi l-ilment ta' ksur tal-ħajja familjari huwa wieħed ċiniku u fieragħ għall-aħħar; manifestament qiegħed isir biex ir-rikorrent ikompli

jgħix hawn Malta, u mhux biex jieħu ħsieb t'uliedu. Din il-Qorti ssibha ferm ripunjanti li wara li ma ħax ħsieb uliedu, ir-rikorrent jipprova jinqeda bihom għall-vantaġġ tiegħu innifsu;"

18. *Illi bi hniena jinghad illi l-awtoritajiet qieghdin jaqdu dmirijiethom meta jimponu tali ordnijiet ta' tnehhija stante illi certament huwa fl-interess pubbliku illi immigrant projbit li kkometta reat ta' traffikar ta' uman li gab mieghu sentejn prigunerija (sospizi ghal erba' snin) jigi espulz mill-istess pajjiz li kien laqghu b'idejh miftuha ghal dawn is-snin kollha;*

19. *Illi dina l-Onorabbli Qorti ghandha tara dak li fil-giurisprudenza assodata tal-ECHR tissejjah il-Boutlif criteria, liema kriterja giet stabbilita fil-kaz ta Boutlif v. Switzerland (54273/00, 47, ECHR 2001-IX) fejn gie kkunsidrat mill-Qorti fi Strasburgu illi if the commission of criminal offences in the home state is the justification for expulsion, the relevant considerations in making such determinations are the following:*

- *The nature and seriousness of the offence committed by applicant*
- *The length of the applicant's stay in the country from which he or she is to be expelled;*
- *The elapsed since the offence was committed and the applicant's conduct during that period;*
- *The nationalities of the various persons concerned;*
- *The applicant's family situation, such as the length of marriage, and other factors expressing the effectiveness of a couple's family life;*
- *Whether the spouse knew about the offence at the time when he or she entered into a family relationship*
- *Whether there are children of the marriage, and if so, their age; and*
- *The seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled*

20. *Illi applikat il-boutliff criteria fil-kaz odjern johrog car illi r-reat ta traffikar ta uman huwa reat serjissimu li certament jmur kontra l-ordni pubbliku; li r-residenza tieghu ma tistax titqies li baqghet wahda legali gialadarba hemm is-sentenza Kriminali ta' htija fil-konfront tieghu; li l-Minuri llum l-gurnata ghanda tlettax (13) il-sena u finalment li ma jirrizultax illi la l-minuri u lanqas l-attur mhux ser jigu pregudikati bir-ritorn tar-rikorrent f'pajjizu.*

21. *Illi aktar minn hekk dwar l-iment tar-rikorrent bbazat fuq l-artikolu 32 tal-Kostituzzjoni u l-artikolu 8 tal-Konvenzjoni l-esponenti jirrilevaw illi fejn hemm ilment illi r-removal jista' jinteferixxi mad-dritt ta' immigrant projbit ghar-rispett tal-hajja familjari, l-artiklu 13 tal-konvenzjoni in konessjoni mal-artikolu 8 jirrikjedi illi stat irid jaghti facilita' lill-persuna illi jikkontesta b'mod effettiv id-deportazzjoni permezz ta' salvagwardja procedurali (vide **De Souza Ribeiro v. France** [GC], § 83**; M. and Others v. Bulgaria**, §§ 122-132; **Al-Nashif v. Bulgaria**, § 133). Illi hareg car diga illi l-attur kellu kull rimedju opportun moghti lilu permezz tal-proceduri quddiem il-Bord u l-Qorti tal-Appell. Ghajr jista' jinghad illi l-Istat ma pprovdiex mekkanizmi sabiex persuna tikkontesta l-espulsjoni taghha minn pajjiz;*

22. *Illi fil-gwida dwar l-art. 8 tal-Konvenzjoni Ewropea nsibu s-segwenti:*

*"**In order to determine whether the interference is necessary in a democratic society, it is important to bear in mind that States are entitled to control the entry of aliens into their territory and their residence there. The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences** (ibid., § 68; Üner v. the Netherlands [GC], § 68). When assessing the proportionality of the interference under the right to private life, the Court has generally applied the criteria established in Üner v. the Netherlands [GC] (see, for example, Zakharchuk v. Russia, §§ 46 – 49) as regards settled migrants. For instance, in Levakovic v. Denmark, §§ 42-45, applying the Üner criteria, the Court did not find a violation of the "private life" of an adult migrant convicted of serious offences, who had no children, no elements of dependence with his parents or siblings, and had consistently demonstrated a lack of will to comply with the law.*

*Very serious reasons are required to justify the expulsion of a settled migrant **who has lawfully** spent all or the major part of his or her childhood and youth in a host country (Maslov v. Austria [GC], § 75). In the very specific case of a foreigner, who had arrived in the host country as a child with a tourist visa, which expired shortly after his arrival, and who had not known about his unlawful stay until he was 17 years old, the Court did not consider the applicant a "settled migrant" **because his residence in the host country had not been lawful.** In such*

a case, it could neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 nor that it would violate that provision only in very exceptional circumstances. ***Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case (Pormes v. the Netherlands*,*** *§ 61).*"

23. *Illi gialadarba d-dritt ghal hajja familjari ma jistax jitqies bhala wiehed awtomatiku imma jrid jigi ezaminat fil-fatti specie tal-każ, it-talbiet proposti fir-rikors in risposta huma fieragha. Il-fatti specie tal-każ odjern huma in sintezi ta' immigrant illi kkometta reat relatat ma' traffikar ta uman u gie kkundanat sentejn prigunerija sospizi ghal erbgha snin u li ghalhekk ir-residenza tieghu ma kinitx wahda legali jew kontinwa. Mill-lenti tal-artikolu 8 tal-Konvenzjoni dan ir-reat diga' ghandu certu piz. Mhux biss, il-fatti specifici bhal per ezempju illi huwa qatt ma kellu relazzjoni familjari ma' bintu u rrikonoxxiha biss ghaxar (10) il-sena wara t-twelid taghha u wara li gew impost fuqu removal order u return decision jindikaw b'mod car l-mizura mehuda tiffigura fis-subartikolu tnejn (2) tal-artikolu 8 tal-Konvenzjoni Ewropeja ghaliex:*

"There shall be no interference by a public authority with the exercise of this right ***except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others****."*

24. *Illi tenut kont is-suespost, l-ewwel talba indikata fir-rikors promotur in risposta m'ghandiex tigi milqugha stante illi m'hemm ebda ksur tal-artikolu 8 tal-Konvenzjoni Ewropea jew tal-artikolu 32 tal-Kostituzzjoni ta' Malta ghaliex l-interferenza hija legali u gustifikata. Konsegwentament it-talba ghal permess ta' residenza mfissra fit-tieni talba indikata fir-rikors promotur in risposta lanqas m'ghanda tigi milqugha u dan ukoll ghaliex huma semmai l-awtortijajiet kompetenti illi jirregolaw d-dhul u hrug ta' third country nationals gewwa t-territorju ta' Malta;*

25. *Illi finalment it-talba ghad-danni hija wahda fieragha specjalment meta wiehed jqies illi l-minuri llum l-gurnata ghandha tlettax (!3) il-sena u riesqa lejja l-eta adulta. Dan jfisser illi m'hemm ebda*

ostaklu illi zzomm hajja familjari mar-rikorrent fil-futur anki jekk missiera ma jirrisjediex gewwa l-gzejjer ta' Malta;

Għaldaqstant għal dawn ir-ragunijiet premessi l-esponenti umilment jitolbu lil dina l-Onorabbli Qorti jogħġobha tiċħad it-talbiet tar-rikorrenti bl-ispejjez kontra tieghu;"

Rat il-provi tal-partijiet u s-sottomissjonijiet magħmula.

Rat l-atti allegati tal-proċeduri tal-Appell Numru 125/21 fl-ismijiet *Djilali Douib vs L-Uffiċjal Prinċipali tal-Immigrazzjoni*.

Rat li l-kawża tħalliet għallum għas-sentenza.

Rat l-atti l-oħra tal-kawża.

Ikkunsidrat:

Permezz tal-proċeduri odjerni r-rikorrent qed jitlob lill-Qorti tiddikjara li d-deċiżjoni ta' ritorn maħruġa mill-intimat Ufficjal Principali tal-Immigrazzjoni fit-28 ta' Marzu 2018, is-sentenza tal-Bord tal-Appelli dwar l-Immigrazzjoni deċiża nhar l-1 ta' Novembru 2021 u kif ukoll is-sentenza tal-Qorti tal-Appell (Sede Inferjuri) deċiża nhar 6 t'April 2022, huma leżivi tad-drittijiet fundamentali tiegħu għar-rispett tal-ħajja privata u tal-familjari tiegħu kif protetti bl-Artikolu 32 tal-Kostituzzjoni ta' Malta ("il-Kostituzzjoni") u bl-Artikolu 8 tal-Konvenzjoni

Ewropea għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali ("il-Konvenzjoni"). Huwa qed jitlob ukoll rimedji għal dan il-ksur senjatament it-tħassir ta' tali sentenzi, dikjarazzjoni li huwa għandu dritt jgħix fil-gżejjer Maltin flimkien ma' Farah Chawafu bintu Rafah Douib Douib u wkoll il-likwidazzjoni u ħlas ta' kumpens u danni biex jagħmlu tajjeb għal tali leżjoni.

L-intimati jirrespinġu dawn il-pretensjonijiet bħala nfondati fil-fatt u fid-dritt.

Mill-atti jirriżulta li –

i. Fis-16 t'Ottubru 1997 ir-rikorrent, li għandu nazzjonalita' Alġerina wasal f'Malta b'mod regolari permezz ta' Visa;

ii. Meta wasal Malta huwa kien applika għal status ta' refuġjat iżda din it-talba ġiet rifjutata;

iii. Sentejn wara l-wasla tiegħu f'pajjiżna huwa daħal f'relazzjoni ma' mara Maltija, Charmaine Briffa, u fis-26 t'April 2001 iżżewġu. Wara ħames snin dan iż-żwieġ sfaxxa u fis-27 ta' Diċembru 2005 ġie dikjarat null;

iv. Ir-rikorrent dam jibbenefika mill-*freedom of movement* f'Malta għall-perjodu kollu taż-żwieġ iżda wara t-tmiem taż-żwieġ dan id-dritt intilef. Pero' huwa baqa' jirrisjedi f'Malta illegalment;

v. Circa fis-sena 2008 huwa beda relazzjoni ma' ċerta Chawah Farah li llum ta' nazzjonalita' Maltija, u sena wara, fis-17 ta' Mejju 2009 huma kellhom tifla bl-isem ta' Rafah. F'dik l-epoka pero' Chawah kienet miżżewġa lil raġel ieħor u allura isem ir-rikorrent ma' tniżżilx fuq iċ-ċertifikat tat-twelid tat-tifla;

vi. Ir-rikorrent u Chawah Farah iżżewġu bir-rit musulman fil-25 t'Ottubru 2012;

vii. Sadanittant, ir-rikorrent kien tressaq quddiem il-Qorti tal-Maġistrati (Malta) bis-segwenti akkużi –

1. *"Talli matul l-ahhar gimghat f'dawn il-gzejjer, bil-hsieb li jaghmel xi qliegh li jkun, ghen u assista, ta' parir jew habrek biex persuna ohra tidhol jew taghmel tentattiv biex tidhol jew tohrog minn Malta bil-ksur tal-Ligijiet ta' Malta, jew li, sew f'Malta sew barra minn Malta, ikkongura f'dak is-sens ma' xi persuna ohra bi ksur tal-Artikolu 337A tal-Kapitolu 9 tal-Ligijiet ta' Malta;*

2. *Talli fl-istess zmien, lok u cirkostanzi ffalsifika, biddel jew ghamel xi tibdil f'passaport li huwa jaf li gie ffalsifikat, imbidel jew li sar*

tibdil fih bi ksur tal-artikolu 5 tal-Kapitolu 61 tal Ligijiet ta' Malta;

3. Talli fl-istess zmien, lok u cirkostanzi ghamel falsifikazzjoni ohra, jew xjentement ghamel uzu minn dokument iehor iffalsifikat, bi ksur tal-artikolu 189 tal-Kapitolu 9 tal-Ligijiet ta' Malta."

viii. Permezz ta' sentenza datata 20 ta' Novembru 2013, il-Qorti tal-Maġistrati sabet lill-imputat ħati tal-akkużi miġjuba kontrih u kkundannatu għal terminu ta' priġunerija ta' tletin (30) xahar li kellhom jibdew jiddekorru minn dakinhar tas-sentenza;

ix. Djilali Douib appella minn din is-sentenza billi talab lill-Qorti tal-Appell sabiex filwaqt illi tikkonferma s-sentenza appellata, fejn sabitu ħati ta' l-imputazzjonijiet imressqa kontra tiegħu, tirriformaha fil-parti tal-piena, u dan billi timponi piena aktar ekwa u ġusta għal fatti tal-każ odjern;

x. B'sentenza datata 15 ta' Novembru 2016 il-Qorti ddeċidiet hekk –

"Għaldaqstant, għal dawn ir-raġunijiet fil-waqt li tikkonferma s-sentenza dwar il-htija, tilqa' l appell ta' l-appellant dwar il-piena. Thassar u tirrevoka l-piena nflitta ta' tletin xahar prigunerija. Minflok, tikkundanna lil Djillali Douib ghal piena ta' sentejn prigunerija. Rat l-artikolu 28A tal Kodici Kriminali tordna li tali piena ma ssehh hlief jekk l-imsemmi Djallali Douib jikkometti reat iehor li ghalih hemm il-piena tal-prigunerija fi zmien erba' snin mil-lum. Minbarra dan tikkundannah ghal hlas ta' multa ta' hames telef euro (€5,000)."

xi. Sussegwentement, fl-24 ta' Marzu 2018 ir-rikorrent ġie notifikat b' Ordni tat-Tneħħija u għar-Ritorn maħruġa mill-Uffiċjal Prinċipali tal-Immigrazzjoni fil-konfront tiegħu ai termini tal-artikolu 5 tal-Att dwar l-Immigrazzjoni;

xii. Ir-rikorrent intavola proċeduri quddiem il-Bord tal-Appelli dwar l-Immigrazzjoni kemm biex jimpunja l-Ordni ta' Tneħħija u anke l-Ordni li biha hu jkun projbit milli jidħol lura Malta għal perjodu ta' ħames snin li jibdew jiddekorru mill-24 ta' Marzu 2018;

xiii. Fid-19 ta' Novembru 2019 ir-rikorrent intavola proċeduri quddiem il-Qorti Ċivili (Sezzjoni Familja) sabiex għall-finijiet u effetti kollha tal-liġi jiġi rikonoxxut bħala l-missier naturali tat-tifla Rafah u b'sentenza datata 26 ta' Frar 2021 il-Qorti laqgħet din it-talba;

xiv. Ftit xhur wara, fl-1 ta' Novembru 2021, il-Bord tal-Appelli dwar l-Immigrazzjoni iddeċieda hekk -

"The Board has considered all documented proof, evidence and witnesses produced. The Board has also considered the paternity case filed and its outcome. Board also took cognisance of verbal submissions made.

When the return decision accompanied by a removal order together with entry ban were handed to appellant, appellant was in actual fact illegally staying in Malta as per Chapter 217 Article 5 of the Laws of Malta.

The Board in its considerations did not take cognisance of the appellant's submissions in relation to respect for the impact it will have on his family and on the implications such decision might have if appellant returns to his home country, however as indicated supra, responsibility in ensuring that appellants stay was legal rested only on appellant himself, and certainly in no way was it any of the Authorities' responsibility nor default nor inaction of the Authorities In regard to the outcome of the paternity case, appellant failed to present any evidence to proof his relationship with his biological daughter except for the birth certificate. Appellant only proceeded to present the paternity case in December of the year 2019, ten years following the birth the daughter he fathered way back in 2009.

On the basis of all evidence produced, appeal is being rejected."

xv. Ir-rikorrent appella minn din id-deċiżjoni tal-Bord u b'sentenza tas-6 t'April 2022 il-Qorti tal-Appell (Sede Inferjuri) ikkunsidrat u ddeċidiet hekk –

"7. Il-Qorti ser tgħaddi sabiex tikkonsidra qabel xejn is-sottomissjoni tal appellat Uffiċjal Prinċipali tal-Immigrazzjoni magħmula ai termini tas-subartikolu 25A(8) tal-Kap. 217. Jikkontendi li minn qari tar-rikors tal-appell, kien jirriżulta b'mod ċar li permezz tal-aggravji li qed iressaq l-appellant qed jitlob li ssir reviżjoni tal-provi li saru quddiem il-Bord u mhux li jiġi diskuss xi punt ta' dritt. In sostenn tal-argument tiegħu, huwa jagħmel riferiment għal diversi deċiżjonijiet ta' din il Qorti u tal-Qorti tal-Appell (Superjuri).

8. Il-Qorti tagħraf li tassew l-appell odjern ma sarx fil-parametri stabbiliti mis subartikolu 25A(8) tal-Kap. 2171, u għaldaqstant m'għandhiex tieħu konjizzjoni tiegħu. Tikkonsidra li l-argumenti miġjuba mill-appellant fir-rikors tal-appell tiegħu huma kollha msejsa fuq il-provi li saru quddiem il-Bord, u għalhekk huma diretti lejn l-apprezzament tagħhom kif magħmul mill-Bord. Tagħraf li l-appellant qed jikkontendi li l-Bord kien żbaljat meta qies li huwa seta' jirregolarizza l-pożizzjoni tiegħu, u jargumenta li ma kien hemm l-ebda obbligu legali jew terminu li fih huwa kien tenut jintavola proċeduri għall-fini ta' dikjarazzjoni ta' paternità. Iżda mingħajr l-ebda tlaqliq il-Qorti tgħid li hawn l-appellant mhux qed iqajjem l-ebda punt ta' liġi sabiex jiġi deċiż minnha. L-istess tgħid fir-rigward tal-argument tiegħu li ċ-ċertifikat tat-twelid tat-tifla tiegħu huwa evidenza biżżejjed tar-relazzjoni li huwa kellu u għad għandu magħha. Dan kollu l-Qorti tgħid għal darb'oħra jolqot l apprezzament ta' dawk il-provi miġjuba quddiem il-Bord li wassluh għad-deċiżjoni finali tiegħu, fejn ċaħad it-talba tal-appellant sabiex titwarrab l-Ordni tat-Tneħħija tiegħu.

<u>Decide</u>

Għar-raġunijiet premessi, il-Qorti tastjeni milli tieħu konjizzjoni tal-appell odjern, filwaqt li tiddikjarah inammissibbli u b'hekk irritu u null.

L-ispejjeż tal-appell odjern u dawk tal-proċeduri quddiem il-Bord, għandhom ikunu a karigu tal-appellant."

Eċċezzjonijiet Preliminari

1. **Fir-raba' eċċezzjoni tal-intimati** huma jargumentaw li l-artikolu 46 tal-Kostituzzjoni ta' Malta jeskludi azzjoni kostituzzjonali sabiex jkun hemm

dikjarazzjoni ta' lezjoni tal-artikolu 32 tal-Kostituzzjoni ta' Malta. Konsegwentament isostnu li ma jistax jinstab ksur tal-artikolu 32 tal-Kostituzzjonali ghaliex m'huwiex wiehed mill-artikoli azzjonabbli tal-Kostituzzjoni.

Dan l-artikolu, partikolarment il-paragrafu (ċċ) jipprovdi hekk -

"Billi kull persuna f'Malta hija intitolata għad-drittijiet u libertajiet fundamentali tal-individwu, jiġifieri, id-dritt, tkun xi tkun ir-razza, post ta' oriġini, fehmiet politiċi, kulur, twemmin, sess, orjentazzjoni sesswali jew identità tal-ġeneru tagħha, iżda suġġett għar-rispett tad-drittijiet u l-libertajiet ta' oħrajn u tal-interess pubbliku, għal kull waħda u kollha kemm huma dawn li ġejjin, jiġifieri-

(.....)

(ċċ) ir-rispett għall-ħajja privata u familjari tiegħu, id-disposizzjonijiet li ġejjin ta' dan il-Kapitolu jkollhom effett sabiex jagħtu protezzjoni għad-drittijiet u libertajiet imsemmija qabel, salvi dawk il-limitazzjonijiet ta' dik il-protezzjoni kif jinsabu f'dawk id-disposizzjonijiet li huma limitazzjonijiet maħsuba biex jiżguraw illi t-tgawdija tal-imsemmija drittijiet u libertajiet minn xi individwu ma tippreġudikax id-drittijiet u libertajiet ta' oħrajn jew l-interess pubbliku."

L-eċċezzjoni tal-intimati hija ġustifikata.

Hija l-Kostituzzjoni stess li tgħid li fl-artikolu 46 (1) - li jipprovdi dwar it-twettiq tad-dispożizzjonijiet protettivi tad-drittijiet tal-bniedem - l-Artikolu 32 huwa eskluż u huma msemmija biss l-Artikoli 33 sa 45.

L-Artikolu 46(1) tal-Kostituzzjoni jgħid hekk:

> "*Bla ħsara għad-disposizzjonijiet tas-subartikoli (6) u (7) ta' dan l-artikolu, kull persuna li tallega li* ***xi waħda mid-disposizzjonijiet tal-artikoli 33 sa 45 (magħdudin)*** *ta' din il- Kostituzzjoni tkun ġiet, tkun qed tiġi jew tkun x'aktarx ser tiġi miksura dwarha, jew kull persuna oħra li l-Prim'Awla tal-Qorti Ċivili f'Malta tista' taħtar ad istanza ta' xi persuna li hekk tallega, tista', bla ħsara għal kull azzjoni oħra dwar l-istess ħaġa li tkun tista' ssir legalment, titlob lill-Prim'Awla tal-Qorti Ċivili għal rimedju.*"

Għalhekk jidher tant ċar li persuni li jħossu li nkisrilhom jew se jinkisrilhom xi wieħed mid-drittijiet fundamentali tagħhom jistgħu jiftħu kawża quddiem din l-Onorabbli Qorti hekk kif provdut mill-Artikolu 46(1) u din il-kawża jistgħu jibbażawha **biss** fuq wieħed jew aktar mill-Artikoli 33 sa 45 (33 u 45 inklużi) tal-Kostituzzjoni u fuq l-ebda artikolu ieħor.

Għalhekk it-talba tar-rikorrent għal dikjarazzjoni ta' leżjoni tad-drittijiet fundamentali tiegħu a bażi ta' dan l-Artikolu hija nfondata fil-fatt u fid-dritt.

Din l-eċċezzjoni ser tiġi milqugħa u għall-istess raġunijiet, it-talbiet tar-rikorrent marbuta mal-artikolu 32 tal-Kostituzzjoni ser jiġu miċħuda.

2. **Fil-ħames eċċezzjoni tal-intimati** huma jeċċepixxu li l-proċeduri odjerni huma abbuż tal-proċess ġudizzjarju stante illi r-rikorrent diġa' pproċeda b'talbiet eżawrjenti quddiem il-Bord tal-Appelli dwar l-Immigrazzjoni u konsegwentament quddiem il-Qorti tal-Appell (sede inferjuri). Isostnu wkoll li ladarba r-rikorrent eżawrixxa r-rimedji ordinarji mogħtija bil-liġi, din il-Qorti għandha tiddeklina milli teżerċita l-poteri kostituzzjonali tagħha.

Din l-eċċezzjoni hija nfondata fil-fatt u fid-dritt. Il-fatt waħdu li r-rikorrent utilizza r-rimedji ordinarji kollha disponibbli għalih sabiex jikkontesta l-Ordni ta' Tneħħija u għar-Ritorn, ma jipprekludihx milli jressaq ilmenti marbuta mal-eżerċizzju tad-drittijiet fundamentali tiegħu.

Huwa pależi nfatti li l-ġurisdizzjoni għas-smiegħ ta' kawżi ta' natura kostituzzjonali u konvenzjonali tappartjeni biss lill-Qrati f'din il-vesti straordinarja. Ebda Qorti, Tribunal jew Bord ta' kompetenza ordinarja ma għandu l-poter li jitratta u jiddeċiedi dwar lanjanzi marbuta ma' allegat ksur ta' drittijiet fundamentali kif proprju huwa l-każ odjern. Hija f'din il-kompetenza tagħha li l-Qorti teżamina kemm hi proporzjonata d-deċiżjoni meħuda ma l-esigenzi ta' l-Istat u d-drittijiet fundamentali tal-bniedem affetwat.

Il-Qorti, fis-sede kostituzzjonali tagħha, mhijiex ser tiddeklina milli teżerċita l-poteri tagħha biex tisma' l-każ u għalhekk **l-eċċezzjoni ser tiġi miċħuda.** Jingħad ukoll illi kieku r-rikorrenti m'utiltizzawx dawk ir-rimedji ordinarji li skont l-intimat illum huma ta' xkiel għalih, kien ikun rinfaċċat b'eċezzjoni dwar dan.

3. **Fis-sitt eċċezzjoni tal-intimati** ġiet sollevata l-improponibilita' tat-tieni talba tar-rikorrent [fejn qiegħed jintalab it-tħassir tad-deċiżjonijiet tal-uffiċċjal prinċipal tal-immigrazzjoni, tal-Bord tal-Appelli dwar l-Immigrazzjoni u tal-Qorti tal-Appell (sede inferjuri)], stante li, fil-fehma tagħhom, il-Qrati Kostituzzjonali m'għandhomx funzjoni li jarrogaw fuqhom il-poteri deċiżjonali tal-awtoritajiet amministrattivi u ġudizzjarji kif stabbiliti fil-liġi u lanqas għandhom jiġu utilizzati sabiex sentenza ta' Qorti tmeri sentenza oħra ta' Qorti oħra. Kwindi, ġiet eċċepita l-irritwalita' ta' din it-tieni talba.

Anke din l-eċċezzjoni mhijiex akkoljibbli.

Għalkemm mhuwhiex il-kompitu tal-Qrati fil-vesti kostituzzjonali li jużurpaw il-funzjoni u l-kompetenza tal-Qrati, Tribunali u Bordijiet ordinarji fl-eżerċizzju tal-poteri tagħhom, pero' huwa l-poter tal-istess Qrati kostituzzjonali li jevalwaw dawk is-sentenzi fid-dawl tal-protezzjoni tad-drittijiet fundamentali tal-bniedem.

Jekk, f'tali ndaġni, jinstab li dawk is-sentenzi ikunu leżivi tad-drittijiet fundamentali tal-bniedem, allura iva, l-Qrati Kostituzzjonali għandhom poteri wiesgħa biżżejjed biex jirrimedjaw għal dan, fosthom billi jħassru dawk is-sentenzi sabiex iwaqqfu kull vjolazzjoni tad-drittijiet imsemmija.

L-eċċezzjoni sejra tiġi miċħuda.

Mertu

Fil-bqija tal-ewwel talba r-rikorrent qed jitlob lill-Qorti tiddikjara u tiddeċiedi li bid-deċiżjoni ta' ritorn maħruġa mill-intimat Uffiċjal Prinċipali tal-Immigrazzjoni fit-28 ta' Marzu 2018, is-sentenza tal-Bord tal-Appelli dwar l-Immigrazzjoni deċiża nhar l-1 ta' Novembru 2021 u kif ukoll is-sentenza tal-Qorti tal-Appell (Sede Inferjuri) deċiża nhar is-6 t'April 2022, ir-rikorrenti ġarrab, qiegħed iġarrab u/jew jista' jġarrab ksur tal-jeddijiet fundamentali tiegħu għar-rispett tal-ħajja privata u tal-familjari tiegħu kif sanċiti bl-Artikolu 8 tal-Konvenzjoni.

Dan l-artikolu jipprovdi hekk -

> *"(1) Kulħadd għandu d-dritt għar-rispett tal-ħajja privata tiegħu u tal-familja tiegħu, ta' daru u tal-korrispondenza tiegħu.*

(2) Ma għandux ikun hemm indħil minn awtorità pubblika dwar l-eżerċizzju ta' dan id-dritt ħlief dak li jkun skont il-liġi u li jkun meħtieġ f'soċjetà demokratika fl-interessi tas-sigurtà nazzjonali, sigurtà pubblika jew il-ġid ekonomiku tal-pajjiż, biex jiġi evitat id-diżordni jew l-egħmil ta' delitti, għall-protezzjoni tas-saħħa jew tal-morali, jew għall-protezzjoni tad-drittijiet u libertajiet ta' ħaddieħor."

Il-Qorti tqis opportun li telenka qabel xejn il-prinċipji li jirriżultaw mill-każistika tal-Qorti Ewropea għad-Drittijiet tal-Bniedem ("QEDB") u dik lokali dwar l-applikazzjoni tal-artiklu 8 tal-Konvenzjoni.

Fil-każ **Ekramy Abdel Aziz Mobarak vs L-Uffiċjal Prinċipali tal-Immigrazzjoni et deċiż fil-11 ta' Lulju 2024** din il-Qorti diversament preseduta qalet hekk –

"<u>Art 8 tal-Konvenzjoni</u>

Il-Qorti tibda biex tinnota li I-legami tal-familjari kollha mal-wild, sabiex ikollu kemm jista' jkun ħajja eqreb lejn dik normali bħal tfal oħra, ma huwiex biss dritt tal-ġenitur, iżda kif jingħad fid-duttrina anglosassona, huwa wkoll dritt tal-minuri. (ara Deċiżjoni tal-Appell Superjuri tal-14 ta' Diċembru 2018 fl-ismijiet Joseph Micallef f'ismu propju u bħala kuratur 'ad litem' tal-minuri Jay Jay Micallef v. Lesya Micallef nee' Grinishina).

(…….)

Fil-każ ta' Evers -vs- Germanja il-Qorti tal-QEHD osservat "the mere fact that the applicant had been living in a common household with his partner and her mentally disabled daughter and that he was the daughter's biological father did not constitute a family link which was protected by Article 8". Apparti dan "In cases concerning a parent's

relationship with his or her child, there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a de facto determination of the matter" (Ara Ribić -vs- Croatia, § 92).

Li jintitola lil dak li jkun il-ħarsien tal-artikolu 8 ma hiex biss il-konnessjoni bijoloġika, lanqas il-fatt li dak li jkun qiegħed jirrisjedi ma' omm il-wild. Hemm fattur ħafna iktar importanti minn hekk, konsistenti fl-aspett emozzjonali u rabta ossia 'bonding' bejn il-ġenitur u wild. L-esibizzjoni tar-ritratti ma humiex biżżejjed, għaliex dawn huma evidenza biss tal-mument."

Fil-każ **Zezev v Russia deċiż mil-QEDB fit-12 ta' Ġunju 2018** ingħad hekk -

"33. States are entitled to control the entry and residence of aliens on their territories (see, among many other authorities, Abdulaziz, Cabales and Balkandali v. the United Kingdom, § 67, 28 May 1985, Series A no. 94, and Boujlifa v. France, 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel, for example, an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see Mehemi v. France, 26 September 1997, § 34, Reports 1997-VI; Dalia v. France, 19 February 1998, § 52, Reports 1998-I; Boultif, cited above, § 46, ECHR 2001-IX; and Slivenko v. Latvia [GC], no. 48321/99, § 113, ECHR 2003-X).

34. Where immigration is concerned, Article 8 cannot be considered as imposing a general obligation on a State to respect the choice of married couples of the country of their matrimonial residence and to authorise family reunion on its territory (see Gül v. Switzerland, 19 February 1996, § 38, Reports 1996-I). However, the removal of a person from a country where close family members are living may amount to an infringement of the right to respect for family life, as guaranteed by Article 8 § 1 of the Convention (see Boultif, cited above, § 39). Where children are involved, their best interests must be taken into account and national decision-making bodies have a duty to assess evidence in respect of the practicality, feasibility and proportionality of

any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see Jeunesse v. the Netherlands [GC], no. 12738/10, § 109, 3 October 2014)."

Fil-każ **Maslov v Austria deċiż fit-23 ta' Ġunju 2008** il-QEDB qalet hekk -

"68. The main issue to be determined is whether the interference was "necessary in a democratic society". The fundamental principles in that regard are well established in the Court's case-law and have recently been summarised as follows (see Üner, cited above, §§ 54-55 and 57-58):

"54. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, § 67, Series A no. 94, and Boujlifa v. France, 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see Dalia v. France, 19 February 1998, § 52, Reports 1998-I; Mehemi v. France, 26 September 1997, § 34, Reports 1997-VI; Boultif, cited above, § 46; and Slivenko v. Latvia [GC], no. 48321/99, § 113, ECHR 2003-X).

55. The Court considers that these principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there. In this context the Court refers to Recommendation 1504 (2001) on the non-expulsion of long-term immigrants, in which the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member States, inter alia, to guarantee that long-term migrants who were born or raised in the host country cannot be expelled under any circumstances (see paragraph 37 above). While a number of Contracting States have enacted legislation or adopted policy rules to

the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (see paragraph 39 above), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph.

.....

57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in Moustaquim, cited above; Beldjoudi v. France, 26 March 1992, Series A no. 234-A; and Boultif, cited above; see also Amrollahi v. Denmark, no. 56811/00, 11 July 2002; Yilmaz v. Germany, no. 52853/99, 17 April 2003; and Keles v. Germany, no. 32231/02, 27 October 2005). In the Boultif case the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:

– the nature and seriousness of the offence committed by the applicant;

– the length of the applicant's stay in the country from which he or she is to be expelled;

– the time elapsed since the offence was committed and the applicant's conduct during that period;

– the nationalities of the various persons concerned;

– the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

– whether the spouse knew about the offence at the time when he or she entered into a family relationship;

– whether there are children of the marriage, and if so, their age;

– the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:

– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled;

– the solidity of social, cultural and family ties with the host country and with the country of destination.

As to the first point, the Court notes that this is already reflected in its existing case law (see, for example, Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001, and Tuquabo-Tekle and Others v. the Netherlands, no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers' Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification (see paragraph 38 above).

As to the second point, it is to be noted that, although the applicant in the case of Boultif was already an adult when he entered Switzerland, the Court has held the 'Boultif criteria' to apply all the more so (à plus forte raison) to cases concerning applicants who were born in the host country or who moved there at an early age (see Mokrani v. France, no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be."

Mil-lat ta' eżitu kuntrarju għat-talbiet avvanzati nsibu li l-Qorti Ewropeja tad-Drittijiet tal-Bniedem kellha dan xi tgħid fid-deċiżjoni

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"36. A statement of the general principles can be found in Unuane (cited above, §§ 70-76). In summary, even though Article 8 of the Convention does not contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of Article 8 of the Convention (see Üner v. the Netherlands [GC], no. 46410/99, § 57, ECHR 2006-XII and the references therein). In Boultif v. Switzerland, no. 54273/00, ECHR 2001-IX the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria are the following:

– *the nature and seriousness of the offence committed by the applicant;*

– *the length of the applicant's stay in the country from which he or she is to be expelled;*

– *the time elapsed since the offence was committed and the applicant's conduct during that period;*

– *the nationalities of the various persons concerned;*

– *the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;*

– *whether the spouse knew about the offence at the time when he or she entered into a family relationship;*

– *whether there are children of the marriage, and if so, their age; and*

– *the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.*

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37. In Üner, the Court made explicit two further criteria implicit in those identified in Boultif:

– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

– the solidity of social, cultural and family ties with the host country and with the country of destination.

38. All the above factors should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction (see Üner, cited above, § 60).

39. In assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued, the Contracting States enjoy a certain margin of appreciation (see Slivenko v. Latvia [GC], no. 48321/99, § 113, ECHR 2003-X, and Boultif, cited above, § 47). However, as the State's margin of appreciation goes hand in hand with European supervision, the Court is empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8 (see Maslov v. Austria [GC], no. 1638/03, § 76, ECHR 2008).

40. The requirement for "European supervision" does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (see Ndidi v. the United Kingdom, no. 41215/14, § 76, 14 September 2017; Hamesevic v. Denmark (dec.), no. 25748/15, § 43, 16 May 2017; and Alam v. Denmark (dec.), no. 33809/15, § 35, 6 June 2017).

(b) Application of the general principles to the facts of the case at hand

41. In the present case the Government have accepted that the applicant's deportation would constitute an interference with his rights under Article 8 § 1 of the Convention (see paragraph 30 above). Moreover, it does not appear to be in doubt that the deportation order was "in accordance with the law" and "in pursuit of a legitimate aim" (the prevention of disorder and crime) for the purposes of Article 8 § 2 of the Convention. Consequently, the principal issue to be determined is whether the deportation order struck a fair balance between the applicant's Convention rights on the one hand and the community's interests on the other (see Ndidi, cited above, § 74, Slivenko, cited above, § 113, and Boultif, cited above, § 47).

42. In determining this issue, the Court will not – unless there are strong reasons for doing so – substitute its own assessment of the merits for that of an independent and impartial domestic court or tribunal which has examined the facts carefully, applied the relevant human rights standards consistently with the Convention and the Court's case-law, and balanced the interests of the applicant against those of the general public. However, where there has not been such an examination, the Court remains empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8 of the Convention (see Unuane, cited above, §§ 76 and 79 see also Ndidi, cited above, § 76 and Maslov, cited above, § 76).

43. In the case at hand the applicant principally directed his complaints towards the Upper Tribunal's decision-making process, and in particular what he perceived to be its failure to conduct an Article 8 compliant proportionality assessment. The Government expressly asserted that the Immigration Rules did not prevent the striking of a fair balance on the facts of individual cases (see paragraph 29 above) and the Court has accepted this to be the case. In Unuane the Court did not consider that the requirements of paragraphs 398 and 399 of the Immigration Rules necessarily precluded the domestic courts and tribunals from employing the Boultif and Üner criteria (see paragraphs 36 and 37 above) for the purpose of assessing whether an expulsion measure was necessary and proportionate (see Unuane, cited above, § 83). It therefore falls to the Court to consider whether, on the facts of the case before it, the domestic courts and tribunals conducted a balancing exercise as required by the Court's case-law under Article 8 of the Convention (see Unuane, cited above, §§ 84-85).

44. In this context, the Upper Tribunal undoubtedly gave detailed consideration to the facts of the applicant's case, and it did balance the seriousness of his offence against the likely impact on his family and private life (see paragraphs 17-18 above). In doing so, it had regard to many of the criteria identified by the Court in Boultif and Üner (both cited above – see paragraphs 36 and 37 above), including the nature and seriousness of the offence committed by the applicant; his family situation, including whether his wife knew about the offence at the time when she entered into the relationship; and the impact his deportation would likely have on his wife and children. The Tribunal did not consider the difficulties the applicant's wife and children would face in Nigeria since it was not seriously suggested that they would return with him (see paragraph 19 above).

45. Nonetheless, the Upper Tribunal did not conduct this balancing exercise by reference to the case-law of the Court. Insofar as it considered those factors identified by the Court in its Boultif and Üner judgments at all (see paragraphs 36 and 37 above), it did so without explicit reference to those judgments and solely within the framework provided by the Immigration Rules, with a view to determining whether the impact of the applicant's deportation on his wife and children would be "unduly harsh" and whether there existed any additional "very compelling circumstances" required in order for his appeal to succeed. As the Upper Tribunal did not conduct the balancing exercise as required by Article 8 of the Convention, it therefore falls to the Court, in exercise of its supervisory jurisdiction, to give the final ruling on whether the applicant's expulsion would be reconcilable with that Article 8 (see Unuane, cited above, § 85).

46. Having conducted the required balancing exercise itself, the Court considers that, on the basis of the information before the Upper Tribunal, the applicant's expulsion would, however, in any event be reconcilable with Article 8 of the Convention. After all, while the applicant asserted in his application form that his deportation would be a disproportionate interference with his right to respect for his family and private life, he did not further advance this argument in the application form itself or in his observations before this Court, nor did he provide any additional information to that which was before the Upper Tribunal.

47. The applicant first came to the United Kingdom in 2003, when he was thirty-one years old (see paragraph 5 above). Thereafter, he was convicted of a number of driving offences. In 2007 he was convicted for tendering a false statement and received a suspended sentence (see

paragraph 8 above). The fraud offence, which gave rise to the deportation order, concerned the operation of a document factory (producing documents for use in fraud) between January 2010 and January 2014. The applicant was convicted in November 2014 and sentenced to a period of four years and eight months imprisonment (see paragraph 9 above). It is not clear from his submissions to the Court if he has since been released or if he remains in immigration detention, although in December 2021 the Government informed the Court that he had only recently been released from detention (see paragraph 23 above). Thus, on the basis of the information before the Court, the applicant has spent eleven years at liberty in the United Kingdom, for four of which he was engaged in criminal offending.

48. The applicant does not appear to have been economically integrated in the United Kingdom. According to the Upper Tribunal, his family's income had been derived from his wife (see paragraph 17 above). For the four years prior to his incarceration he was involved in a criminal enterprise. It would appear that he has only recently been released from detention (see paragraph 23 above), and he has submitted no evidence to suggest that he has found employment. Moreover, he has submitted no other information to substantiate his integration (see, for example, Külekci v. Austria, no. 30441/09, § 49, 1 June 2017).

49. The Court would agree with the Upper Tribunal that the fraud offence committed by the applicant was serious. The Court has tended to consider the seriousness of a crime in the context of the balancing exercise under Article 8 of the Convention not merely by reference to the length of the sentence imposed but rather by reference to the nature and circumstances of the particular criminal offence or offences and their impact on society as a whole. While it has consistently treated crimes of violence and drug-related offences as being at the most serious end of the criminal spectrum (see, for example, Maslov, cited above, § 85; A.W. Khan v. the United Kingdom, no. 47486/06, § 40, 12 January 2010; Dalia v. France, 19 February 1998, § 54, Reports of Judgments and Decisions 1998 I; and Baghli v. France, no. 34374/97, § 48, ECHR 1999 VIII), in Lukic v Germany, no, 25021/08, 20 September 2011 it accepted that multiple convictions for fraud were sufficient to outweigh the interests of a long-term resident alien who had been born in Germany and had spent his childhood and his youth there. Although the applicant in the present case does not have multiple convictions, the offence of which he was convicted was conducted over a four-year period and involved a large number of victims and

significant sums of money (see paragraph 8 above). Moreover, while the OASys report, which has not been updated since 2016, suggested that he posed a low risk of serious harm to any group of individuals, it also indicated that the applicant had not recognised the impact and consequences of his offending on the victims, community and wider society and that there was a noticeable risk that the applicant would continue to behave in the way that he did before he was found out (see paragraph 16 above). It did not, as the applicant now asserts (see paragraph 27 above), state that the risk of reoffending was low.

50. When viewed in the context of the seriousness of the offence, the Upper Tribunal did not consider that the impact of the applicant's deportation would be "unduly harsh" on his wife and children. Rather, it found that the applicant's family was an ordinary family which, like any other family, would be affected by the applicant's deportation, but that this fact alone could not establish the applicant's case. In reaching this conclusion, it gave very little weight to the report of the consultant clinical psychologist since it considered that the report as a whole showed a number of matters of considerable concern (see paragraph 18 above). The applicant has made no submissions about the impact his deportation would have on his family and he has not sought to persuade the Court that the Upper Tribunal had been wrong not to give weight to the conclusions of the clinical psychiatrist. Having considered the matter, for the reasons identified by the Upper Tribunal, the Court is therefore also not able to place any great weight on this report.

51. The third party intervenors suggest that in cases such as the present the bests interests of the children should be a primary consideration (see paragraphs 34-35 above). In this regard, the Court has indicated that in all decisions concerning children, their best interests, while not decisive, have to be afforded "significant weight" (see Jeunesse v. the Netherlands [GC], no. 12738/10, § 109, 3 October 2014 and Üner (cited above)). However, it has made it clear that where an offender is being deported as a consequence of a criminal offence, the deportation decision first and foremost concerns him (see Krasniqi v. Austria, no. 41697/12, § 48, 25 April 2017). Therefore, while the Court does not apply an "unduly harsh" test, in the context of deportation as a consequence of a criminal offence it has nevertheless accepted that the family's interests may be outweighed by other factors, including the seriousness of the offence (see, for example, Üner, cited above, § 64; see also Krasniqi, cited above, § 48).

52. In the present case, while the applicant's deportation would undoubtedly be difficult for his wife and children, there is nothing to

suggest that their need for his support is particularly acute. His children are now nineteen, seventeen and twelve years old. His eldest daughter has type 1 diabetes, but there is no evidence to suggest that the applicant's presence in the United Kingdom is important for her physical well-being. According to the evidence before the Upper Tribunal, the children did not have contact with him during the whole period while he was in prison (see paragraph 17 above). Following his custodial sentence he was detained in immigration detention (see paragraph 31 above). It is not known whether he returned to the family home following his release from detention.

53. Even if the applicant has returned to the family home, his wife has family in the United Kingdom and has established ties in the community (see paragraph 12 above). The family, which has already coped with his lengthy absence while in prison and immigration detention, would therefore have a support network in the event of his deportation. In addition, although the Upper Tribunal proceeded on the basis that the applicant's family would not return to Nigeria with him, there is no evidence to suggest that they could not do so. The applicant himself lived in Nigeria for the first thirty-one years of his life (see paragraph 5 above). Although his wife and children are British citizens, his wife is of Nigerian origin and his children would be entitled to Nigerian citizenship through him (see paragraph 12 above). The case is therefore readily distinguishable from that of Unuane, in which the applicant's partner and children had to stay in the United Kingdom as the eldest child was awaiting heart surgery and the Upper Tribunal had itself acknowledged that they needed the applicant to be there with them to provide support (see Unuane, cited above, § 89).

54. The applicant has not brought forward any arguments which would speak against the possibility of his family visiting him in Nigeria and staying in contact via telephone and the internet (see Salem v. Denmark, no. 77036/11, § 81, 1 December 2016; see also Külekci, cited above, §49). Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, Külekci, cited above, § 50).

55. Finally, the applicant has not provided the Court with any information about his release, or about his conduct following his release.

56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in

the United Kingdom is not such as to outweigh the public interest in his deportation.

57. Accordingly, his deportation would not violate Article 8 of the Convention."

Interessanti parti mill-opinjoni dissenti fil-każ appena ċitat *per* l-Imħallef **Guerra Martins** flimkien ma l-**Imħallef Motoc.** Qalu hekk:

"7. Contrary to the majority, I consider that the Upper Tribunal failed to strike an appropriate balance between the public and private interests by underestimating, without sufficient justification, one of the most relevant criteria established by the Court, namely the best interests and well-being of the children. In fact, when it assessed the nature of the relationship between the father and the children, although it accepted that there was contact between them, it clearly overestimated the fact that the children had not visited the father during his incarceration. This fact should not have been decisive because there are many reasons that could have justified it, including the protection of the children's well-being."

Fl-isfond ta' din il-ġurisprudenza l-Qorti tagħmel is-segwenti kunsiderazzjonijiet partikolarment a bażi tal-kriterji tal-*Boultif case* u *Uner case* elenkati fil-każijiet suċċitati –

1. Ir-rikorrent ilu f'Malta aktar minn **27 sena**, li minnhom 19 -il sena għix hawn illegalment;

2. Kien matul dan iż-żmien li fih kien f'Malta illegalment li r-rikorrent fis-sena 2008 daħal f'relazzjoni ma' Chawah Farah li huwa żżewweġ erba' snin wara kif juri ċ-ċertifikat taż-żwieġ esebit in atti[6];

3. Huwa minnu r-rikorrent fetaħ il-proċeduri fil-Qorti biex jirrikonoxxi l-paternita' tat-tifla li twieldet minn din ir-relazzjoni, Rafah, **meta din diġa' kellha għaxar snin.** Detto cio' ma jfissirx li fil-frattemp ma' kienx hemm *bonding* jew ħajja familjari bejniethom flimkien mal-bqija tal-familja;

4. Proprju dwar il-ħajja familjari tiegħu ma' martu, ma' bintu u ma' iben martu minn relazzjoni oħra r-rikorrent xehed fost oħrajn li[7] bintu *Rafah dejjem lilu kienet taf bħala missier "u fil-fatt jien dejjem mantnejtha sa minn meta twieldet u sa minn dejjem qattajna ħafna ħin flimkien bħal bint u missier....."*. Żied jgħid li "*jien u Farah ilna noqogħdu flimkien sa mill-elfejn u tmienja (2008) kif jixhdu l-ittri postali hawn annessi.";*

5. Ir-rikorrent kompla jixhed[8] -

> *"Illi ħafna mill-ħin tiegħi jien inqattgħu ma' marti Chawah u binti Rafah – fid-dar noqogħdu jien, Chawah, Rafah u Raouf (iben Chawah). Dan it-tifel ta' Chawah li llum għandu dsatax -il sena wkoll għandu relazzjoni tajba ħafna miegħi tant li jirreferi għalija*

[6] Fol 9
[7] Fol 72
[8] Fol 73

bħala missieru wkoll. Ġieli meta jkollu problema ma jgħidx lill-ommu iżda jgħid lili. L-hena tagħna noħorġu flimkien u ngħinu lil xulxin fil-ħajja ta' kuljum.Meta t-tifla jkollha xi problema hija dejjem iddur fuqna bħala ġenituri tagħha u meta tarani nkwetat fuq din l-affari jiddispjaċiha ħafna għaliex ilkoll ninsabu inkwetati fuq il-futur tagħna.";

6. Martu Farah Chawah xehdet li minkejja li meta twieldet binthom Rafah isem Djilali ma setax ikun reġistrat bħala missierha għax fl-epoka hija kienet miżżewġa raġel ieħor, hija dejjem kienet taf li Djilali huwa missierha. Kompliet tixhed li[9] -

"Sa mit-twelid tagħha huwa dejjem kien parteċipi fit-trobbija tagħha u għadu hekk sal-ġurnata tal-lum. Huwa dejjem ħallas għall-bżonnijiet tagħha u dejjem kien il-figura paterna fil-familja tagħna;

Illi tant kemm jien għandi relazzjoni tajba ma' Djilali li aħna żżewwiġna bir-rit Musulman fl-elfejn u tnax (2012);

Illi jien għandi tifel bl-isem ta' Raouf minn raġel ieħor. Raouf illum għandu dsatax -il sena. Minkejja li missieru bijoloġiku mhuwhiex Djilali, Djilali għandu wkoll relazzjoni tajba ħafna ma' Raouf. Dawn iqattgħu ħafna ħin flimkien u Raouf spiss jirreferi għal Djilali bħala missieru;

Illi jien, Djilali, Rafah u Raouf noqogħdu kollha flimkien u nqattgħu ħafna ħin flimkien – dejjem konna hemm għal xulxin u dejjem ngħinu lil xulxin fejn hemm bżonn bħala familja li fil-fatt aħna;

Illi aħna dejjem ħriġna bħala familja u l-hena tagħna nqattgħu l-ħin flimkien – il-baħar, ġor-restoranti, immorru nimxu u mmorru l-festini dejjem flimkien;"

7. Xehed Mohammed Raouf Cuschieri[10], iben Farah Chawah li qal hekk –

[9] Fol 74
[10] Fol 114

" Illi jien ilni naf lil Djilali Douib sa mit-trobbija tiegħi. In fatti nirreferi għalih bħala missieri. Huwa dejjem ħa ħsiebi daqslikieku kont it-tifel bijoloġiku tiegħu – dejjem ħa ħsieb l-edukazzjoni tiegħi, dejjem ħa ħsieb li ma jonqosni xejn u li dejjem inkun kuntent.

Illi tant kemm jien għandi relazzjoni tajba ħafna ma' Djilali li sħabi wkoll jaħsbu li huwa l-missier bijoloġiku tiegħi.

Illi Djilali huwa l-figura paterna f'ħajti u dan għaliex ma tantx għandi rapport tajjeb mal-missier bijoloġiku tiegħi.

Illi jien u Djilali nqattgħu ħafna ħin flimkien. L-hena tagħna noħorġu flimkien ma' ommi Farah u l-istep sister tiegħi Rafah. Aħna familja magħquda u dejjem fittixna l-ġid ta' xulxin,

Illi jien ma nimmaġinax ħajti mingħajr Djilali fiha u dan għaliex hu kien dejjem preżenti f'ħajti sa minn meta kont żgħir ħafna."

8. Ġiet preżentata wkoll mir-rikorrent dikjarazzjoni mit-tabiba Dr Josianne Cutajar li għalkemm mhijiex ġuramentata, l-Qorti mhijiex ser tiskartaha in vista tal-kontenut tagħha miktub bl-idejn, tal-fatt li hija minnha stess ffirmata, wkoll li hawn si tratta ta' tfittxija ta' dritt fundamentali. Din tgħid hekk[11] -

"Mr Douib and his family have been under my care more than 10 years. He is married to Farah Chawaf 234418L through their religious matrimony. The family has two kids Rafah (biological daughter) & Raouf (father figure + responsibility). Mr Douib has been the main breadwinner, ideal husband & father in this family unit. He takes good care of his wife who....has some chronic health ailments with slip disc causing limited.....and finally support well all member of the family unit.

[11] Fol 156

Both mother Farah and the two kids are completely dependent on Djilali."

9. Bħala parti mill-provi tar-rikorrent ġew esebiti wkoll numru ta' dokumenti u korrispondenza li juru li l-indirizz postali tiegħu huwa dak ta' martu;

10. Ir-rikorrent esebixxa wkoll diversi ritratti li juruħ f'mumenti diversi ma' martu Farah, ma' bintu Rafah u ma' iben martu Raouf. Dwar dawn ir-ritratti l-Qorti tagħmel żewġ rimarki:

(a) M'hemmx dubju li r-ritratti a fol 79 ma' bintu Rafah huma *superimposed*. Tant huma ovji li kif ingħad mill-Qorti stess seduta stante li *"it's so badly done, it's naive*[12]*".* Il-Qorti tagħmilha ċara li dan il-komportament mhuwhiex aċċettabbli u mhijiex ġustifikabbli r-raġuni mogħtija mir-rikorrent li ma kellux ritratti oħra għax tilef il-mobile. Seta' ġab ritratti mingħand il-familja tiegħu jew fin-nuqqas jixhed li ma kellux. Dawn ir-ritratti partikolari ser jiġu skartati mill-Qorti;

[12] Fol 124

(b) Fir-rigward tal-bqija tar-ritratti, ċertament li kif ingħad fil-ġurisprudenza suesposta, *l-esibizzjoni tagħhom mhijiex per se ndikatur tal-ħajja familjari, għaliex dawn huma evidenza biss tal-mument*. Pero'għal fini tal-każ odjern il-Qorti tiddeduċi wkoll li l-kuntest tar-ritratti esebiti juri okkażjonijiet ta' kwotidjanita' familjari fuq medda ta' snin kemm ma' martu, kif ukoll ma' bintu u anke ma' iben martu. Dawn meta meħuda flimkien max-xhieda u provi msemmija fis-suespost, jagħtu xhieda wkoll ta' ħajja familjari bejn ir-rikorrent u l-familja tiegħu;

11. Irriżulta wkoll mill-provi li r-rikorrent għandu mpjieg stabbli f'Malta bħala coach driver u ilu fih sa mill-1997[13];

12. Il-Qorti mhux se tinnega li apparti dawn il-provi mressqa, hija xtaqet kieku tisma' anke lil bint ir-rikorrent Rafah sabiex tiġi solidifikata t-teżi tar-rikorrent dwar l-eżistenza u r-rabta familjari tiegħu f'Malta, liema xhieda setgħet titressaq bis-salvagwardji kollha disponibbli għall-persuni minorenni, għalkemm jingħad ukoll li llum din mhux xi tifla zgħira;

[13] Fol 122

13. Pero' fit-totalita' tagħhom, u meħudin flimkien il-provi mressqa fil-kawża odjerna, l-Qorti tqis li r-rikorrent irnexxielu juri li huwa għandu ħajja familjari f'Malta għall-fini tal-artikolu 8 tal-Konvenzjoni;

14. Il-Qorti madankollu trid tevalwa wkoll jekk interferenza fit-tgawdija tal-ħajja familjari tar-rikorrent ai fini tal-Konvenzjoni hijiex ġustifikata u neċessarja f'soċjeta demokratika u b'mod partikolari jekk hijiex proporzjonata mad-dritt tal-Istat li jżomm is-sigurta' pubblika u biex jiġi evitat diżordni jew għemil ta' delitti;

15. Ċertament li r-reati li tagħhom instab ħati r-rikorrent mhumhiex leġġeri. Il-Qorti ma tistax pero' ma tinnutax li fis-sentenza tal-Qorti tal-Appell fil-proċeduri kriminali surreferiti deċiżi fil-15 ta' Novembru 2016, dik l-istess Qorti ddeċidiet li tirriforma l-piena ta' 30 xahar priġunerija. Hija nnutat hekk[14] -

"...l-fedina penali eżebita mill-prosekuzzjoni tindika li l-appellant sal-ġurnata tal-lum għandu fedina penali kompletament netta. Jirriżulta wkoll li l-appellant għandu mpjieg fiss u sentenza karċerarja effettiva ma tkunx piena sodisfaċenti fid-dawl tal-każijiet hawn fuq imsemmija. ***L-appellant għandu jingħata l-aħħar opportunita' biex ikun jista' jgħix fis-soċjeta' u jkun raġel produttiv għalih u għall-familja tiegħu***[15]**.**

[14] Fol 55

[15] Tipa grassa u sottolinear tal-Qorti

Illi fic-cirkostanzi din il-Qorti hi tal-fehma li piena karcerarja effettiva mhix wahda ekwa u gusta.

Ghaldaqstant, ghal dawn ir-ragunijiet fil-waqt li tikkonferma s-sentenza dwar il-htija, tilqa' l appell ta' l-appellant dwar il-piena. Thassar u tirrevoka l-piena nflitta ta' tletin xahar prigunerija. Minflok, tikkundanna lil Djillali Douib ghal piena ta' sentejn prigunerija. Rat l-artikolu 28A tal Kodici Kriminali tordna li tali piena ma ssehh hlief jekk l-imsemmi Djallali Douib jikkometti reat iehor li ghalih hemm il-piena tal-prigunerija fi zmien erba' snin mil-lum. Minbarra dan tikkundannah ghal hlas ta' multa ta' hames telef euro (€5,000)..”

16. La l-Qorti tal-Appell Kriminali fil-proċeduri appena msemmija ma kkunsidratx lir-rikorrent bħala xi theddida jew periklu għas-sigurta’ tal-pubbliku, tant li tagħtu ċans li jirriforma ruħu għall-ġid tiegħu u ta’ familtu, din il-Qorti fil-każ odjern ma tarax għalfejn m’għandhiex tħalli lir-rikorrent ikompli jgħix il-ħajja familjari tiegħu f’Malta ma’ familtu. Fiċ-ċirkustanzi ma jirriżultax li l-Ordni ta’ Tneħħija u Ritorn u l-proċeduri naxxenti minnha huma proporzjonati meta mqabbla mat-tgawdija tad-drittijiet fundamentali tar-rikorrent ai termini tal-artiklu 8 tal-Konvenzjoni. Dana kollu jingħad ukoll fl-isfond tal-fatt li għal xi raġuni mhux spjegata lill-Qorti, ir-rikorrenti almenu f’okkażżjoni minnhom jidher li reġa kien taħt kustodja preventiva, **la ta’ din ma nġabet prova u lanqas mod ieħor[16];**

[16] **Ara verbal a folio 135 fejn jidher lil kopja tal-verbal ingħat lil Correctional Officer.**

17. Il-Qorti tirrileva wkoll li matul is-snin kollha li ilu f'Malta huwa naturali li r-rikorrent integra wkoll fil-ħajja soċjali u kulturali Maltija. Fuq kollox jekk huwa jitneħħa minn Malta, u aktar minn hekk tiġi nforzata fil-konfront tiegħu l-Ordni li ma jirritornax f'pajjiżna għal ħames snin li jsegwu, dan se jkollu mpatt mhux biss fuqu imma wkoll fuq il-ħajja familjari tiegħu u l-membri tal-familja tiegħu;

18. Kif xehed ir-rikorrent stess -

"Illi jekk jien nisfa mkeċċi minn Malta jien se jkissruli l-familja tiegħi u d-dritt li ngawdi lill-mara Maltija tiegħi u lill-unika tifla li għandi. Jien ili noqgħod Malta ħamsa u għoxrin sena u bnejt ħajti prattikament fuq din il-gżira peress illi meta dħalt Malta kelli madwar tletin sena. L-uniċi ħbieb tiegħi jinsabu f'Malta u ma nimmaġinanix noqgħod xi mkien ieħor għax issa l-kultura ta' Malta qegħda fija u wara ħamsa u għoxrin sena hawnhekk ma nista' ngħix fl-ebda komunita' oħra;

Illi jekk se nisfa mkeċċi minn Malta jien ikolli nħalli warajja hawnhekk lill-unika bint li għandi għaliex din f'dawn it-tlettax -il sena dejjem għexet hawn u m'għandhiex idea ta' kulturi oħrajn għajr dik ta' Malta – lanqas titkellem bl-Għarbi ma taf."

19. Mart ir-rikorrent *Chawah Farah ukoll tixhed hekk*[17]-

"Illi meta t-tifla Rafah tarana nkwetati fuq din l-affari hija tinkwieta wkoll għall-futur tagħna għaliex żgur illi ma nistgħux ngħixu 'l bogħod minn xulxin. It-tifla dejjem għexet magħna sa minn mindu twieldet u aħna l-ġenituri tagħha li dejjem konna hemm għaliha. Jien ilni noqgħod Malta wieħed u għoxrin sena sa mill-elfejn u wieħed (2001) u ma nimmaġinaniex immorru noqgħodu x'imkien ieħor 'il bogħod mit-tfal

[17] Fol 74

tagħna li aħna tant inħobbu. F'Malta aħna qattajna l-isbaħ żmien ta' ħajjitna u fiha ffurmajna l-familja ċkejkna tagħna;

Illi jekk ir-raġel Djilali jiġi ordnat jitlaq minn Malta huwa se jkun qiegħed jiġi mċaħħad milli jgawdi dak li ilu jgawdi għal dawn l-aħħar ħamsa u għoxrin (25) sena għaliex huwa ilu joqgħod Malta sa mill-elf disa' mija sebgħa u disgħin (1997). Jien ma nimmaġinanix ngħix ħajti mingħajru għaliex huwa r-raġel li miegħu qsamt dawn is-snin kollha.

Jien jiddispjaċini ħafna meta naħseb biss li l-futur tal-familja tagħna li tant ħdimna għalih flimkien għal dawn l-aħħar snin jista' jisfa' fix-xejn fiż-żmien qarib. Aħna dejjem ħdimna biex insaħħu r-relazzjoni familjari tagħna u nitnikket meta naħseb illi r-raġel Djilali jista' jiġi prekluż milli jkompli jgawdi lili u lil mimmi t'għajnejna Rafah."

20. Raouf Cuschieri xehed ukoll f'dan ir-rigward[18] -

"Illi jien u l-familja tiegħi ma nistgħux nitilqu minn Malta. Jien għandi x-xogħol tiegħi hawnhekk u missieri kien ukoll importanti fil-mixja edukattiva u fil-mixja tax-xogħol tiegħi. Sħabi u familti huma kollha Maltin u ħajti hija totalment ibbażata hawn imdawwar b'ommi Farah, 'missieri' Djilal u l-istep sister Rafah."

21. F'dan il-kuntest issir referenza għal każ **Sezen v The Netherlands deċiż fil-31 ta' Jannar 2006 –**

"However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore

[18] Fol 114

remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands.";

22. B'żieda ma dan il-Qorti tagħmel ukoll referenza għal dak li ntqal in tematika fl-istudju ppublikat mill-**London School of Economics and Political Science, (LSE)** dwar **Human Rights Futures Project** fi Frar 2013[19], fejn si tratta l-Att dwar il-Immigrazzjoni Ingliza[20] u ordni ta' deportazzjoni naqraw:-

"Well before the Human Rights Act (HRA) was passed, when deciding whether to deport criminals and over-stayers the Home Secretary had to weigh a large number of factors to decide if the public interest required their deportation.

The grounds on which a person who is not a British citizen is liable to deportation from the UK, under the Immigration Act 1971, include: –

-if the Secretary of State deems the deportation to be "conducive to the public good"[21]

– where a court recommends deportation in the case of a person over the age of 17 who has been convicted of an offence punishable with imprisonment.[22]

Until recently, under the Immigration Rules,[23] when deciding whether to deport someone on these grounds, the public interest had to be balanced against any compassionate circumstances of the case and the Secretary of State had to take into account factors including the person's domestic circumstances, their strength of connections with the UK and their personal history.[24]It was possible for the Secretary of State (or the tribunal, hearing an appeal against a decision to deport) to conclude that the compassionate circumstances of the case outweighed the public interest in deporting the individual.

This was amended, following the controversy in 2006 over the Home Office releasing foreign prisoners without considering deportation, to become where a person is liable to deportation, "the presumption shall

[19] https://www.lse.ac.uk/sociology/assets/documents/human-rights/HRF7-KlugDeportation.pdf
[20] Illum mibdula pero xorta b'emfasi fuq l-interessi tal-minorreni.
[21] Immigration Act 1971 s3(5)(a)
[22] Immigration Act 1971 s3(6).
[23] The Immigration Rules set out the practice to be followed in the administration of the Immigration Act 1971, and later immigration Acts.
[24] Immigration Rules. The factors listed were: – age – length of residence in UK – strength of connections with the UK, personal history - including character, conduct and employment record – domestic circumstances – previous criminal record and the nature of any offence of which the person has been convicted – compassionate circumstances – any representations received on the person's behalf.

be that the public interest requires deportation" – unless it was a breach of the European Convention on Human Rights (ECHR) or Refugee Convention.[25]"

….

"Deportation and the right to respect for private and family life under Article 8 HRA

Decisions of the Upper Tribunal (Immigration and Asylum Chamber) on the June 2012 Immigration Rules

In two decisions of the Upper Tribunal (Immigration and Asylum Chamber), the following principles have been established in respect of the June 2012 rules[26]:

• The first question is whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims.

• Since the Rules do not provide a complete code for consideration of Article 8 claims (e.g. categories of offender are left out/those seeking leave to enter or remain as a visitor for private medical treatment in a claim that raises Article 8), it will be necessary to go on to make an assessment of Article 8 applying the criteria established by law.

• The procedure adopted in relation to the introduction of the new Rules provided a weak form of Parliamentary scrutiny and so Parliament has not altered the legal duty of the judge determining appeals to decide on proportionality for himself or herself.

• There can be no presumption that the Rules will normally be conclusive of the Article 8 assessment or that a fact-sensitive inquiry is normally not needed.

[25] New para 364 of the Immigration Rules: "…while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport." Statement of Changes in Immigration Rules, House of Commons, 19 July 2006.

[26] MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC) 31 October 2012; Izuazu (Article 8 – new rules)

• The Rules may be considered in the context of the proportionality assessment, but the more the Rules restrict otherwise relevant and weighty considerations from being taken into account (e.g. best interests of the child), the less regard will be had to them in that exercise.

• In particular when considering proportionality, it is the degree of difficulty the couple face continuing family life outside the UK rather than the 'surmountability' of the obstacle (the term used in the Rules) that is the focus of judicial assessment, but as a factor rather than a test.

Principles established at the European Court of Human Rights (ECtHR)

• A State is entitled to control the entry of aliens into its territory and their residence there.[27]

• The ECHR does not guarantee the right of an alien to enter or to reside in a particular country and Contracting States have the power to expel an alien convicted of criminal offences in order to maintain public order and protect society. [28]

• However, if such decisions interfere with the rights in Article 8, they must be in accordance with the law and justified under Art 8(2) as necessary and proportionate to the legitimate aim pursued.[29]

• Article 8 does not contain an absolute right for any category of alien not to be expelled, but there are circumstances where the expulsion of an alien will give rise to a violation of Art 8. [30]

• To assess whether an expulsion is justified under Art 8(2) the ECtHR will consider factors including: – the nature and seriousness of the offence and time elapsed since it was committed. – the length of time in the country and the solidity of social, cultural and family ties with the host country and with the country of destination. – the spouse and if there are any children, their ages, best interests and wellbeing. The

[27] Subject to its treaty obligations. Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985.
[28] Uner v Netherlands (2006) para 54 and 56.
[29] Dalia v. France, judgment of 19 February 1998
[30] 20 For example, Moustaquim v. Belgium (1991), Beldjoudi v. France, Boultif v. Switzerland (2001), Amrollahi v. Denmark, no. 56811/00, 11 July 2002; Yılmaz v. Germany, no. 52853/99, 17 April 2003; and Keles v. Germany, 32231/02, 27 October 2005

seriousness of the difficulties which they are likely to encounter[31] in the destination country.[32]

• In the case of a young adult who has not yet founded a family of his own, only the first two of these are relevant.[33]

• For a settled migrant who has lawfully spent all or the major part of their childhood and youth in the host country, very serious reasons are required to justify expulsion.[34]

• Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. [35]

- *In immigration cases the Court has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence, [36] beyond normal emotional ties.[37] 26*

• Not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, there can be circumstances where the expulsion of a settled migrant may constitute an interference with their right to respect for "private life" under Art 8 which encompasses the social ties between settled migrants and the community in which they are living. [38]

• Where expulsions are challenged on the basis of Article 8 violation, it is not imperative that, in order to be effective, a remedy should have automatic suspensive effect (contrast where there is a real risk of suffering treatment contrary to Article 3).[39]

• However, where there is an arguable claim that expulsion would violate Art 8, Art 13 with Art 8 require that the state make available the effective possibility of challenging the deportation and of having the relevant issues examined with sufficient procedural safeguards and

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[32] Boultif v Switzerland (2001) and Uner v Netherlands (2006).
[33] Maslov v Austria (2008).
[34] Maslov v Austria (2008)
[35] S v UK European Commission on Human Rights (1984)
[36] Slivenko v Latvia (2003); Kwakye-Nti and Dufie v the Netherlands (2000); Khan v UK (2010)
[37] S v UK European Commission on Human Rights (1984)
[38] Uner v Netherlands (2006)
[39] De Souza Ribeiro v France (Application No. 22689/07) [2012] ECHR 2066 Grand Chamber.

thoroughness with guarantees of independence and impartiality." (sottolinear emfasi ta' din il-Qorti.)

23→Di piu' mill-World Report 2024: Human Rights Watch ma jagħtix stampa tajba tas-sitwazzjoni fl-Alġerija[40]. Jissemma fost oħrajn li t-tgawdija tad-drittijiet fundamentali huma ripressi. U għar-rigward ta' barranin li jidħlu fil-pajjiż, dawn spiss jiġu arbitrarjament imkeċċija mingħajr screening jew process ġust. Dan kollu jkompli jimmilita kontra r-ritorn tar-rikorrent lejn pajjiżu u anke fir-rigward tal-bqija tal-familja tiegħu li inevitabilment ikollhom jiffaċjaw dawn id-diffikultajiet mhux biss biex jidħlu fil-pajjiż iżda anke biex jibqgħu hemm imqar għal tul ta' żmien. Fir-rigward hu wkoll opportun li wieħed iħares ukoll lejn dak li jgħid ir-rapport maħrug minn Amnesty International dwar l-Alġerija datat 2023, li ma jagħti ebda konfort għar-rispett tad-drittijiet tal-bniedem[41].

Huwa vera li b'mod partikolari l-membri femminili tar-rikorrenti mhux neċessarjament isegwuh fid-deportazzjoni jekk dan ikun il-każ, pero' kieku biss anke biex iżżommu kuntatt fiżiku miegħu fil-pajjiż indikat hu ta' preokkupazzjoni għall-Qorti stante dak appena riportat;

[40] World Report 2024: Algeria | Human Rights Watch
[41] https://www.amnesty.org

23. L-intimati jiċċitaw a favur tagħhom is-sentenza ta' din il-Qorti diversament preseduta fl-ismijiet **Sherif Mohamed El Shennawyh vs Avukat Ġenerali et deċiż fit-22 t'Ottubru 2019**. Madankollu l-Qorti ssib li l-paragun bejn dak il-każ u dan odjern ma jreġix stante li fil-każ l-ieħor iċ-ċirkustanzi tal-każ kienu differenti. Fost oħrajn, fil-każ l-ieħor kien hemm problema ta' vjolenza domestika minn naħa tar-rikorrent lejn il-familja tiegħu tant li martu u wliedu kienu marru jgħixu fix-xelter Dar Qalb ta' Ġesu`, Santa Venera. Inoltre r-rikorrent ma kienx jipprovdi manteniment għal uliedu. Il-*bread winner* tal-familja kienet martu. Tul iż-żmien li dam Malta akkumula fedina penali b'diversi reati. B'hekk it-tqabbil bejn iż-żewġ każijiet ma twassal imkien;

23 Fid-dawl tal-kunsiderazzjonijiet kollha magħmula l-Qorti ssib li r-rikorrent sofra ksur tad-drittijiet fundamentali tiegħu ai termini tal-artikolu 8 tal-Konvenzjoni. L-ewwel talba ser tintlaqa' limitatament kif ingħad. Peress li t-tieni talba hija konsegwenzjali għall-ewwel talba, din ser tintlaqa' wkoll.

24 Għall-istess raġunijiet u ħlief safejn kompatibbli ma' dak deċiż, l-eċċezzjonijiet tal-intimati enumerati minn sebgħa sa ħamsa u għoxrin ser jiġu miċħuda

25 Il-bqija tat-talbiet tar-rikorrent huma għal-likwidazzjoni u ħlas ta' danni għall-ksur ta' drittijiet fundamentali. Il-Qorti pero' tqis li fiċ-ċirkustanzi tal-każ, dikjarazzjoni ta' ksur ta' drittijiet fundamentali u t-tħassir tal-Ordni ta' Tneħħija u ta' Ritorn u s-sentenzi surreferiti tal-1 ta' Novembru 2021 u tas-6 t'April 2022 huma suffiċjenti bħala rimedju. Jiġi mfakkar li l-awtoritajiet kompetenti fil-ħruġ tal-Ordni mpunjata, kif ukoll il-Bord tal-Appelli dwar l-Immigrazzjoni aġixxew fil-parametri tal-poteri leġiżlattivi tagħhom u ħadu deċiżjonijiet bażati fuq l-informazzjoni u l-provi li kellhom a dispożizzjoni tagħhom. Ma hemmx għalhekk lok għal kumpens u danni a favur Djilali Douib.

Għal dawn il-motivi l-Qorti taqta' u tiddeċiedi billi –

1. **Tilqa' r-raba' eċċezzjoni tal-intimati filwaqt li tiċħad il-bqija tal-eċċezzjonijiet tagħhom;**

2. **Tilqa' limitatament l-ewwel talba tar-rikorrent u tiddikjara u tiddeċiedi li bid-deċiżjoni ta' ritorn maħruġa mill-intimat Uffiċjal Prinċipali tal-Immigrazzjoni fit-28 ta' Marzu 2018, is-sentenza tal-**

Bord tal-Appelli dwar l-Immigrazzjoni deċiża nhar l-1 ta' Novembru 2021 u kif ukoll is-sentenza tal-Qorti tal-Appell (Sede Inferjuri) deċiża nhar 6 t'April 2022, ir-rikorrent ġarrab, qiegħed iġarrab u/jew jista' jġarrab ksur tal-jeddijiet fundamentali tiegħu għar-rispett tal-ħajja privata u tal-familjari tiegħu kif sanciti bl-Artikolu 8 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali;

3. **Tilqa' t-tieni talba u tordna t-tħassir tal-imsemmija deċiżjoni ta' ritorn maħruġa mill-intimat Uffiċjal Prinċipali tal-Immigrazzjoni fit-28 ta' Marzu 2018, is-sentenza tal-Bord tal-Appelli dwar l-Immigrazzjoni deċiża nhar l-1 ta' Novembru 2021 u kif ukoll is-sentenza tal-Qorti tal-Appell (Sede Inferjuri) deċiża nhar 6 t'April 2022, u konsegwentement tiddikjara li r-rikorrent għandu dritt jirrisjedi fil-gżejjer Maltin flimkien ma' Farah Chawaf u bintu Rafah Douib Douib;**

4. **Tiċħad il-bqija tat-talbiet tar-rikorrenti;**

5. **L-ispejjeż tal-kawża jinqasmu hekk: tlett kwarti (¾) mill-intimati solidalment bejniethom u kwart (¼) mir-rikorrent.**

Onor. Miriam Hayman LL.D.
Imħallef

Rita Falzon
Dep. Reġ.