MALTA

QORTI KOSTITUZZJONALI

S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO

ONOR. IMHALLEF
JOSEPH D. CAMILLERI

ONOR. IMHALLEF
JOSEPH A. FILLETTI

Seduta tad-19 ta' Frar, 2008

Appell Civili Numru. 635/1998/1

Meinrad Calleja

v.

Kummissarju tal-Pulizija, Direttur tal-Habs u Avukat Generali,
dan ta' l-ahhar ghal kull interess li jista' jkollu

Il-Qorti:

Preliminari

Dan hu appell minn sentenza moghtija mill-Prim Awla tal-Qorti Civili fl-24 ta' Novembru 2006 li permezz taghha dik

il-qorti laqghet in parti it-talbiet tar-rikorrent Meinrad Calleja u ddikjarat li d-Direttur tal-Habs kien kiser l-Artikoli 36 u 3 tal-Kostituzzjoni u tal-Konvenzjoni Ewropeja rispettivament fil-konfront tar-rikorrent, u kkundannat lill-istess Direttur ihallas lir-rikorrent is-somma ta’ Lm1,500 bhala rimedju ghall-pregudizzju soffert.

F’dan il-kaz, kif jidher car mir-rikors promotorju – li ser jigi riprodott flimkien mas-sentenza ta’ l-ewwel grad fl-inter taghha minn hawn u ftit iehor – il-lamentali tar-rikorrent jirrigwardaw il-perjodu, proprjament zewg perjodi, li fih huwa inzamm fid-Divizjoni 6 fil-Habs ta’ Kordin, fejn dak iz-zmien huwa kien prigunier taht arrest preventiv. Dan il-perjodu, kif inghad maqsum fi tnejn, kien bejn id-19 ta’ Novembru 1995 sas-7 ta’ Marzu 1996 u perjodu iehor bejn il-15 ta’ Mejju 1996 u t-28 ta’ Lulju 1996. Ir-rikorrent, illum appellat, ilmenta li l-mod kif huwa kien gie trattat f’dan il-perjodu kien jammonta ghal trattament inuman u degradanti bi ksur tad-disposizzjonijiet imsemmija, kif ukoll li kien hemm ksur tal-principju tal-presunzjoni ta’ l-innocenza salvagwardati mill-Artikolu 39(5) tal-Kostituzzjoni u mill-Artikolu 6(2) tal-imsemmija Konvenzjoni. L-ewwel qorti ma sabitx li kien hemm vjolazzjoni tal-presunzjoni ta’ l-innocenza izda sabet li kien hemm trattament inuman u degradanti[1].

Qabel ma tigi riprodotta s-sentenza ta’ l-ewwel grad fl-intier taghha, tajjeb li wiehed jippuntwalizza li apparti s-sentenza appellata f’dan il-process kien hemm zewg sentenzi preliminari ohra li pero` hadd ma hu qed jappella minnhom. In fatti fis-27 ta’ Mejju 1998 (ara fol. 26 tal-process) il-Prim Awla tat decizjoni dwar prova partikolari li ried igib ir-rikorrent; filwaqt li fl-14 ta’ Lulju 1999 (fol. 63) dik l-istess qorti laqghet l-ewwel eccezzjoni tal-intimati u lliberat lill-Kummissarju tal-Pulizija u lill-Avukat Generali mill-osservanza tal-gudizzju, filwaqt li cahdet it-tieni eccezzjoni taghhom (li kienet fis-sens li dik il-qorti kellha

[1] “Fil-kaz in ezami l-Qorti ssib li fit-trattament li r-rikorrent ilmenta minnu u meta tiehu l-ilmenti kollha fl-assjem taghhom u l-effett li kellhom fuqu fizikament u psikologikament, kien hemm elementi fl-ilmenti tar-rikorrent li jammontaw ghal trattament li wassal ghal ksur ta’ dritt fundamentali tar-rikorrent li ma jigix assoggettat ghal trattament inuman u degradanti.”

tiddeklina milli tisma' l-kawza ghax ir-rikorrent kellu rimedji ordinarji ohra). Fiz-zewg kazijiet l-ewwel qorti rriservat l-ispejjez ghad-decizjoni finali.

Is-sentenza appellata

Is-sentenza appellata tghid hekk:
"**Preliminari**

"Rat l-**att tar-rikors** li permezz tieghu r-rikorrent issottometta:

"Illi fid-19 ta' Novembru 1995 l-esponent gie mdahhal il-Facilita` Korrettiva ta' Kordin fejn mill-ewwel tpogga f'dik li hija maghrufa bhala "*Division 6"* li hija ntiza ghall-prigunieri li huma kkastigati u cioe` diga` processati u misjuba hatja u kif ukoll ghal dawk il-prigunieri li jkunu taht prevenzjoni detentiva li pero` ma jkunx fl-interess tal-gustizzja li jitpogga f'ripart iehor biex tigi evitata l-kontaminazzjoni tax-xhieda;

"Illi l-esponent jirrileva li huwa ma kienx jaqa' taht l-ebda wahda minn dawn il-kategoriji in kwantu illi la kien instab hati u fil-fatt il-proceduri kontrih ghadhom ghaddejjin, u lanqas ma seta' jigi allegat li seta' kien hemm xi riskji ta' kontaminazzjoni ta' xhieda peress li ma kien hemm ebda xhud fil-kawza kontrih fil-mument li kien qed jigi detenut fil-habs;

"Illi fis-7 ta' Marzu 1996 gie ttrasferit minn *Division 6* ghal *Division 3,* pero` fil-15 ta' Mejju 1996 rega' gie ttrasferit ghal *Division 6* fejn dam sat-28 ta' Lulju 1996 meta allura rega' gie ttrasferit ghal *Division 4;*

"Illi kemm dam f'*Division 6* l-esponent ma kienx igawdi mid-drittijiet li jgawdu minnhom prigunieri ohra bhal per ezempju li wiehed ikollu Radio jew jaqra gazzetti u inoltre l-esponent kien izolat u jghix f'cella li sahansitra kien fiha l-grieden u dan kif ser jigi ppruvat fil-kors ta' dawn il-proceduri;

"Illi ghalhekk qaghad kwazi sitt (6) xhur f' *Division 6* u dan bi ksur ta' dak li kienu jistabilixxu r-regolamenti tal-habs, kif ser jigi ppruvat aktar 'il quddiem;

"Illi aktar minn hekk hu nghata trattament ghal kollox inuman u degradanti, u di fatti, l-Avukati Difensuri ta' l-esponent fil-proceduri kriminali, rregistraw u vverbalizzaw diversi protesti f'dan is-sens;

"Illi ghal zmien twil hu kellu jghaddi billi jigi mcahhad minn drittijiet minimi li d-dinjita' umana jisthoqqilha u li prigunieri ohra kienu jgawdu, bhal per ezempju meta jattendi fil-kappella tal-habs kien ikollu persuna tghassu u anke meta kienu jarawh il-habs membri tal-familja, u l-Avukati tieghu sabiex ikun jista' jikkonsultahom, kien ikun b'idejh immanettjati;

"Illi f'okkazjoni ohra kien ghadu kemm gie lura minn operazzjoni medika u kontra l-parir tat-tabib tal-habs, l-esponent thalla kkarcerat fl-istess kundizzjonijiet li llum qieghed jilmenta minnhom ghalkemm issa gew rimedjati;

"Illi dwar dan it-trattament, l-awtoritajiet intimati kien hemm min kien jaf bihom, bhal per ezempju l-Bord tal-Vizitaturi tal-Habs u anke l-istess Direttur intimat dak iz-zmien Emanuel Cassar li fis-7 ta' Novembru 1996 kien talab struzzjonijiet tal-Ministru jekk ghandux ikompli jhalli lill-esponent jigi eskortat minn membru ta' *Special Response Team* meta johrog minn *Division* 6;

"Illi dan l-agir ta' l-intimati awtoritajiet li kienu kollha konsapevoli ta' dak li kien ghaddej minnu l-esponent, u li kull mizura mehuda ma kienetx gustifikata u kwindi l-agir ta' l-intimati huwa vjolazzjoni tad-dritt fundamentali ta' l-individwu li jkun imhares minn trattament inuman u degradanti u di piu` ma gietx rispettata in fronte l-prezunzjoni ta' innocenza kif imharsa mill-Kostituzzjoni u kif ukoll mill-Konvenzjoni Ewropeja;

"Illi ghalhekk huwa car li da parti ta' l-Awtoritajiet intimati kien hemm ksur pales tad-dritt fundamentali sancit minn artikolu 36 u 3 tal-Kostituzzjoni u Konvenzjoni Ewropeja

rispettivament u vjolazzjoni tal-principju tal-prezunzjoni ta' innocenza ai termini ta' l-artikolu 39(5) u artikolu 6(2) tal-Kostituzzjoni u l-Konvenzjoni Ewropeja rispettivament;

"Ghaldaqstant in vista tas-suespost u ghar-ragunijiet fuq imsemmija l-esponent qieghed bil-qima jitlob lil dina l-Onorabbli Qorti joghgobha tiddikjara li l-agir ta' l-awtoritajiet intimati kif fuq spjegati huma bi ksur ta' l-artikoli 36 u 3 tal-Kostituzzjoni u l-Konvenzjoni Ewropeja rispettivament u bi vjolazzjoni ta' l-artikolu 39(5) tal-Kostituzzjoni u l-artikolu 6(2) tal-Konvenzjoni Ewropeja u li taghti dawk il-provvedimentt u ordnijiet opportuni biex jigi ratifikat [recte: rettifikat] u rimedjat il-pregudizzju li sofra l-esponent.

"Rat ir-**risposta ta' l-intimati** a fol. 8 tal-process fejn issottomettew:

"(1) Preliminarjament, li la l-Kummissarju tal-Pulizija u lanqas l-Avukat Generali m'huma legittimi kuntraditturi f'din il-kawza stante li ta' l-ewwel mhux responsabbli mit-tmexxija tal-habs waqt li tat-tieni mhux legittimu kontradittur ghaliex galadarba jista' jigi identifikat il-legittimu kontradittur, l-*Attorney General* m'ghandux ghalfejn jigi mharrek u dan ai termini ta' l-artikoli 181B tal-Kodici ta' Organizzazzjoni u Proceduri Civili. Ghalhekk kemm il-Kummissarju tal-Pulizija kif ukoll l-Avukat Generali ghandhom jigi liberati bl-ispejjez kontra r-rikorrent.

"(2) Illi preliminarjament ukoll, billi r-rikorrent seta' uza l-Artikolu 469A tal-Kodici ta' Organizzazzjoni u Procedura Civili, li ilu fis-sehh mill-1 t'Ottubru, 1995, din l-Onorabbli Qorti ghandha tiddeklina milli tisma din il-kawza ghaliex ir-rikorrent kellu rimedji ordinarji ohra. Dwar dan il-punt qed issir referenza ghall-kawza: Spiteri vs Prim Ministru (deciza fil-31 t'Awissu, 1977) fejn l-Ewwel Onorabbli Qorti kienet qalet: "Fic-cirkostanzi l-Qorti ddikjarat ruhha sodisfatta, ai termini tal-*provison"* 47(2) (illum 46) tal-Kostituzzjoni, li r-rikorrent kellu skond il-ligi mezzi ohra xierqa ta' rimedju ghall-ksur minnu allegat u billi, minhabba d-dewmien u n-nuqqas ta' azzjoni tar-rikorrent

fl-istadju opportun (attwalment kellu zmien hmistax–il gurnata ghall-appell) dehrilha li hekk kien desiderabbli, iddeklinat li tezercita' s-setghat taghha taht id-dispozizzjonijiet precedenti ta' dak l-artikolu'' **Il-Qorti ta' l-Appell kienet ikkonfermat din id-decizjoni. (Ara Pagni 560 u 569 tad-Decizjonijiet Kostituzzjonali (1964-1978).''**

"Ma din ukoll irid jizdied ir-rimedju l-iehor li jinghata mir-Regolamenti tal-Habs li permezz taghhom persuna tista' tressaq l-ilment taghha quddiem il-Bord tal-Vizitaturi.

"(3) Illi fil-mertu assolutament ma sar ebda ksur ta' l-artikoli msemmija mir-rikorrent.

"(4) Illi d-Divizjoni Sitta hija divizjoni ta' sigurta` massima u fiha jitpoggew prigunieri kemm issentenzjati u kemm dawk li m'humiex. Fiha jitpoggew persuni meqjusa bhala ta' theddida ghas-sigurta` jew minhabba l-imgieba perikoluza taghhom jew ghax jistghu jaharbu jew jippregudikaw xhieda relatata mal-kaz taghhom. Jitpoggew ukoll persuni b'kastig wara li jinstabu hatja li kisru r-regolamenti tal-habs. ***Dawn ta' l-ahhar normalment kienu jitpoggew fis-sular ta' fuq.***

"(5) Illi effettivament ir-rikorrent kien ikollu access ghall-gazzetti. Barra minn dan id-Divizjoni Sitta hija l-ahhar wahda li giet *refurbished* u nfethet f'Ottubru ta' l-1995 u tinsab f'kundizzjoni tajba. Id-Divizjoni 6 dejjem inzammet nadifa.

"(6) Illi n-nuqqas ta' radju jew televixin ma jammontax ghal xi ksur ta' l-artikoli msemmija mir-rikorrent. L-access ghal radju jew televixin huwa privilegg li jista' jitnehha fi kwalunkwe mument mid-Direttur tal-Habs. **Illi meta tqis il-gravita` ta' l-akkuzi tar-rikorrent, bilfors li jkollhom jittiehdu certu mizuri ta' sigurta`.** Eventwalment kien hemm access ghal kull min kien fid-Divizjoni Sitta (mhux b'kastig) biex jista' jara t-televixin kif ukoll il-vidjo fil-*common room* matul certu hin tal-gurnata.

"(7) Illi dwar il-verbali maghmula mill-avukati tar-rikorrent waqt il-proceduri kriminali, tela' jixhed id-Direttur tal-Habs ta' dak iz-zmien, is-Sur Emmanuel Cassar li kien spjega l-fatti kif wiehed jista' jara mill-process.

"(8) Illi r-rikorrent kien jithalla jmur il-kappella u dan ghaliex dan huwa permess mir-regolamenti tal-habs u biex seta' jezercita d-dritt tieghu ta' l-espressjoni religjuza. Kienet tittiehed prekawzjoni billi jigi eskortat biex ma jitkellimx mal-prigunieri l-ohra. Huwa wkoll skond ir-regolamenti tal-habs li persuna kienet tghassu waqt il-kollokju mal-familjari.

"(9) Illi kemm dam il-habs ir-rikorrenti ibbenifika darbtejn mill-*Prison Leave* – darba biex jattendi l-maghmudija tat-tifel tieghu u darb'ohra biex imur jara lit-tifel li kien ser jaghmel operazzjoni fi klinika privata.

"(10) Illi l-allegazzjonijiet kollha li gab ir-rikorrent bl-ebda mod ma jistghu jitqiesu bhala trattament inuman jew degradanti la skond il-Kostituzzjoni ta' Malta u lanqas skond il-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem. Dwar dan qed issir referenza ghall-kapitolu intier fil-ktieb "*The European Convention on Human Rights"* ta' O' Boyle, ta' l-istharrig ta' l-istess artikolu minn Fawcett f' "*The European Convention on Human Rights"* u ta' kwalunkwe awtur iehor.

"(11) Illi l-prezunzjoni ta' l-innocenza hija haga strettament li ghandha x'taqsam ma' preceduri gudizzjarji, jigifieri meta l-kaz ikun qieghed quddiem il-Qorti. Huwa d-dmir tal-Qorti li thares dan il-principju. Fir-rikors promotorju, ir-rikorrent imkien ma jirreferi ghal xi proceduri quddiem Qorti u ghalhekk ir-referenza ghall-artikolu 39(5) tal-Kostituzzjoni u ghal paragrafu (2) ta' l-artikolu 6 tal-Konvenzjoni dwar Id-Drittijiet tal-Bniedem hija rrelevanti.

"Illi fi kwalunke kaz ma jistax wiehed jifhem kif il-mizuri necessarji li jittiehdu f'habs fejn partikolarment l-akkuzi huma ta' natura gravi jistghu xi darba jitqiesu bhala li jmorru kontra dan il-principju.

“Ghaldaqstant din l-Onorabbli Qorti ghandha tichad it-talbiet kollha tar-rikorrent bl-ispejjez kontrih.

“Rat l-atti kollha tal-kawza u d-dokumenti ezibiti;

“Rat is-sentenzi preliminari taghha a fol 8 u 63 tal-process;

“Semghet ix-xhieda bil-gurament;

“Rat in-noti tal-partijiet;

“Eccezzjonijiet Preliminari

“B’sentenza preliminari taghha tal-14 ta’ Lulju 1999 (a fol 63 et seq), dina l-Qorti kienet laqghet l-ewwel eccezzjoni tal-intimati u lliberat lill-Kummissarju tal-Pulizija u lill-Avukat Generali mill-osservanza tal-gudizzju, izda cahdet it-tieni eccezzjoni ta’ l-intimati li r-rikorrent kellu rimedji ohra.

“Talbiet

“Ir-rikorrent qed jitlob li dina l-Qorti tiddikjara li l-agir ta’ l-awtoritajiet intimati kien bi ksur ta’ l-artikoli 36 u 3 tal-Kostituzzjoni u l-Konvenzjoni Ewropeja rispettivament u bi vjolazzjoni ta’ l-artikolu 39(5) tal-Kostituzzjoni u l-artikolu 6(2) tal-Konvenzjoni Ewropeja in kwantu vvjolaw id-dritt fundamentali tieghu li jkun imhares minn trattament inuman u degradanti u li ma gietx rispettata fil-konfront tieghu l-prezunzjoni ta’ innocenza kif imharsa mill-Kostituzzjoni u kif ukoll mill-Konvenzjoni Ewropeja.

“L-intimat Direttur tal-Habs wiegeb li t-trattament tar-rikorrent f’divizjoni 6 ma kienx jammonta ghall-ksur ta’ l-Artikolu 3 tal-Konvenzjoni u 36(1) tal-Kostituzzjoni imma r-rikorrent gie trattat bhala *high security risk.* Illi l-prezunzjoni ta’ l-innocenza tar-rikorrent giet rispettata f’kull hin u fil-perjodu meta nzamm f’divizjoni 6 taht detenzjoni preventiva huwa kien formalment akkuzat li kkommetta reati ta’ natura serja u cjoe` traffikar ta’ ammonti sostanzjali ta’ droga u attentat ta’ qtil ta’ persuna

prominenti fil-pajjiz. Inoltre fl-assjem tal-provi prodotti ghandu jirrizulta li r-rikorrent ma rnexxilux jilhaq dak il-grad ta' prova konvincenti 'l hinn minn rakkonti u allegazzjonijiet mhux pruvati li hafna minnhom huma bazati fuq *detto del detto*.

"Ligi

"Tortura jew ghal trattament jew piena inumana jew degradanti.

"L-Artikoli 36(1) tal-Kostituzzjoni u 3 tal-Konvenzjoni huma kwazi identici fl-portata u s-sinjifikat taghhom:

""36(1): Hadd ma ghandu jkun assoggettat ghal piena jew trattament inuman jew degradanti."

""3: Hadd ma ghandu jkun assoggettat ghal tortura jew ghal trattament jew piena inumana jew degradanti."

"Presunzjoni ta' innocenza

"L-artikolu 39(5) tal-Kostituzzjoni jipprovdi li: *Kull min jigi akkuzat b'reat kriminali ghandu jigi meqjus li jkun innocenti sakemm jigi pruvat jew ikun wiegeb li huwa hati,* mentri l-artikolu 6 (2) tal-Konvenzjoni jipprovvdi li*: Kull min ikun akkuzat b'reat kriminali ghandu jigi meqjus li jkun innocenti sakemm ma jigix pruvat hati skond il-ligi.*

"Provi

"Meinrad Calleja xehed li hu kien izomm djarju fuq bicca karta biex ikollu *record* ta' x'ezattament gara u ma garax. Xehed li meta ddahhal l-habs mill-ewwel tpogga go Divizjoni 6, li kienet divizjoni ta' kastig ghal dawk li kienu gew misjuba hatja u ghal dawk li kontra taghhom kienu ittiehdu passi dixxiplinari.

"Hu kien ilmenta mad-Direttur tal-Habs ghax kien qed jigi mizmum arbitrarjament f'*division* ta' kastig meta ma kienx ghadu kundannat u kien michud minn affarijiet li normalment huma koncessi lill-prigunieri ohra. Dan kollu

kellu effett fuq sahhtu fizikament u psikologikament. Kien jilmenta wkoll dwar l-istat tad-divizjoni fejn kien mizmum.

"Meta kien tpogga f'*division* 6 hu kien jithalla imsakkar il-hin kollu hlief ghal siegha kuljum u dam hekk ghal xahrejn shah. Imbaghad nizzluh isfel fejn seta johrog mic-cella u jiehu l-arja. Fid-Division 6 fic-cella ta' fuq kien hemm nuqqas ta' ventilazzjoni – billi kien hemm tieqa zghira bil-hadid – u fil-fatt wara li lmenta kienet inghalqet u irrangaw il-ventilazzjoni. Fic-cella f'dina d-divizjoni ma kienx hemm il-facilitajiet normali tant li kien ikollu jiekol jew fl-art jew fuq is-sodda. Kellu dawl qawwi fic-cella quddiemu li kien jibqa' mixghul sal-10 ta' bil-lejl. Ma kienx jithalla jzomm *toiletries* jew jiehu *shower* u ma kellux access ghall-affarijiet personali tieghu.

"Meta kien jiltaqa mal-Avukati difensuri tieghu kienu jiehduh bil-manetti. Ghamel xahrejn ma jistax icempel lill-familjari tieghu u kien ikun skortat ghal 24 siegha kuljum u l-vizti kienu jkunu sorveljati u jsiru f'postijiet differenti. Kien l-uniku prigunier ittrattat b'dan il-mod. Kien ikun prezenti ufficjal mal-mejda meta ikollu l-viziti mill-familjari tieghu li kien ikun bit-*telephone* jisma l-konversazzjoni mal-familjari tieghu. Kien ikun bil-manetti wara hgiega.

"Ghamel zmien meta kien ikun assolutament wahdu fid-division 6. Meta kien imur il-Kappella kien ikun manettjat u kien jithalla izolat fil-Kappella.

"Hu ma kienx thalla jcempel lill-ibnu ta' 4 snin fil-Christmas 1995 u fl-ewwel tas-sena. Imbaghad thalla jcempel wara l-festi u qabel ma rega' deher il-Qorti li qabel kienet irrakkomandat li hu jcempel lit-tifel (ara verbal a fol 107).

"Ir-rikorrent xehed li hu ma setax ikollu vizti mat-tifel ghax is-Surgent Zahra dejjem kien jiffissahomlu f'hinijiet mhux normali bhal haddiehor meta t-tifel ma setax jigi.

"Ir-rikorrent jghid li f'Division 6 kien hemm min anke pprova jaghmel suwicidju u semma lill certu Joseph Grech. Isemmi li s-Surgent Zahra, li kien ghassa mieghu, kien jheddu kontinwament, u jsemmi meta qallu li ma

kienx ser jara aktar lit-tifel tieghu; jew meta kienu fejn il-forka u qallu li ismu kien ser ikun fejn kien hemm dawk li hadu l-forka. Kien ghamel *complaint* fuq hekk mal-Ombudsman.

“Meta kien f’Division 6 kien sar *refurbisment* fid-division u s-Surgent Zahra kien qabbad lill-prigunier Alfred Bugeja, maghruf bhala l-Porporina biex ibajjad id-Division u dana wara li huwa kien ikkomplenja dwar l-istat ta’ dina d-Division

“Meta kien Division 6 kien iddahhal l-Isptar xi erba darbiet. Darba minnhom kien ghamel operazzjoni u wara l-operazzjoni reggghu haduh mill-ewwel f’Division 6 ghalkemm it-tabib kien irrakkomanda li jittiehdet go Division normali.

“Meta kien rega’ ddahhal f’Division 6 it-tieni darba hu rega’ kellu problema ta’ sahha u ttiehed l-isptar b’anzjeta u kellu *heart beat* mghaggla. Dr. Chris Muscat kien irrakkomanda li johrog minn Divizjoni 6 ghax kienet qed taghmillu hsara f’sahhtu. Ir-rikorrent isostni li d-Direttur tal-Habs kien injora t-talba tieghu u anke tat-tabib Muscat li riedu li jiccaqlaq minn dik id-Division.

“Meta kien f’din id-Division hu kien bata minn infezzjonijiet minhabba d-drenagg li ma kienx qed jahdem tajjeb u kien hemm numru kbir ta’ grieden. Kien anke ghamel ilment quddiem il-Qorti tal-Magistrati fuq hekk. Ighid li kien hemm prigunieri ohra li batew infezzjonijiet simili minhabba l-grieden. Kienu gew anke tas-Sanita` li ffumigaw il-post.

“Hu kien ilmenta dwar il-kondizzjoni tieghu fizika u psikologika kif ukoll dwar il-post fejn kien qed jigi mizmum mad-Direttur tal-Habs innifsu; quddiem il-Qorti tal-Magistrati; mal-Bord tal-Habs; mas-Surgent inkarigat minnu PS B. Zahra; mat-tobba tal-habs; mal-Ombudsman; ma’ l-Amnesty International; ma’ l-European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) u kien anke ghamel *hunger strike* bhala protesta, izda l-posizzjoni ma tbiddlitx.

“**Emanuel Cassar**, ex Agent Direttur tal-Habs, xehed li hu kien jirrispondi lill Ministeru ta’ l-Intern. Hu kien jiddeciedi fejn jitpoggew il-prigunieri u ma kien jikkonsulta ma’ hadd. Ir-rikorrent kien iddahhal il-habs u kien tpogga f’Division 6 minhabba n-natura tal-kaz li kien wiehed serju fejn kellu akkuza fuq assocjazzjoni ta’ traffikar ta’ 80 kilo droga u ghalhekk poggih hemm biex ma jkunx hemm attentati ta’ hrib. Hu kien gie nfurmat mid-Depot li r-rikorrent kien prigunier ta’ *high risk* u seta jkollu ghajnuna biex jahrab.

“Dwar Division 6 jghid li dina kienet ghadha kemm giet refurbished u mibdula bhala divizjoni ta’ sigurta` massima. Fiha zewg sulari, t’isfel ghal prigunieri *long term*, u ta’ fuq ghal dawk il-prigunieri li jigu dixxiplinati, kemm dawk sentenzjati kif ukoll dawk *awaiting trial*. F’din id-Division kien hemm prigunieri ohra meta r-rikorrent dahal. Din id-Division kellha regime differenti mill-kumplament tal-Habs per ezempju ma setghux jithallew affarijiet goc-cella; ma kienx hemm television; il-viziti kienu aktar ristretti; il-hinijiet ta’ fuq kienu differenti minn dawk tas-sular t’isfel. Ir-rikorrent ma kienx tpogga hemm bhala kastig imma ghax kien *high risk*.

“L-intimat Cassar jghid li ma kienx jaf li r-rikorrent kien qieghed fis-sular ta’ fuq u li meta sar jaf kien offrilu li jnizzlu fis-sular t’isfel izda dan ma riedx izda ma jiftakarx x’kienet ir-raguni ghaliex ma riedx. Lanqas ma jiftakar jekk kienx hu li offrilu li jinzel isfel jew haddiehor. Ighid li ma jiftakarx xi struzzjonijiet kien hemm bil-miktub dwar manetti.

“L-ewwel *complaint* tar-rikorrent kienet ghax kien tpogga Division 6 u ma thalliex jiehu *shower*. Hu jghid li ma kien ta ebda ordni biex ir-rikorrent ma jithalliex jiehu *shower*.

“Kellu *complaint* ohra li kien hemm dawl qawwi fil-faccata tac-cella li kienet iddum mixghula sal ghaxra ta’ bil-lejl. Id-dawl fic-cella kien ikkontrollat minn barra.

“Ighid li ghal bidu minhabba ragunijiet ta’ sigurta` ma kienx halla lir-rikorrent icempel imma mbaghad beda jinghata telefonati regolari fi Frar 1996. Ma jiftakarx jekk kienitx

saritlu talba biex ir-rikorrent icempel lit-tifel qabel tressaq il-*complaint* quddiem il-Magistrat. Ma jafx jekk wara kienx tah permess icempel lit-tifel jew le. Ighid li jekk ma tahx li jcempel, ir-raguni kienet ghax ma setax; raguni ta' sigurta` u affarijiet hekk.

"Ighid li r-rikorrent kien jinghata vizti mill-bidu pero` kien ikun eskortat u l-viziti jigu *monitored* skond ir-regolamenti. Dwar *television* jghid li ma kienx possibli li jitpogga wiehed fic-cella minhabba il-*voltage* u l-gazzetti minhabba sigurta`.

"Ir-rikorrent kien ghamel zmien twil fid-Division 6 u ried jaghtih cans ghax ma kienx bi hsiebu jzommu zmien twil hemm. Il-massimu ta' *long term* prisoner kien li jinzamm hemmhekk mhux iktar minn 6 xhur bejn 3 sa 6 xhur (fol 253).

"Ighid li r-rikorrent kien mar xi erba' darbiet l-isptar u cahad li hu ma kienx segwa rakkomandazzjoni tat-tabib biex ir-rikorrent ma jergax imur f'Division 6 wara li gie mill-isptar. Lilu la ta' l-isptar u la t-tabib ma ghamlulu xi rakkomandazzjoni biex dan ma jibqax fid-Division 6. Kien ikun mignun biex ma jsegwix ir-rakkomandazzjoni tat-tabib imbaghad jigrilu xi haga u jehel hu. Anzi jghid li l-unika rakkomandazzjoni li ghamillu Dr. Chris Muscat kienet li lir-rikorrent izommu f'cella bil-kancell, u li dan jirrizulta mill-*file* mediku.

"L-intimat xehed li fid-Division 6 qatt ma kien hemm problemi ta' drenagg u qatt ma kien hemm *infections*. Izda grieden kien hemm u dana meta kienu qed inehhu l-hamrija pero` l-grieden kienu taht kontroll. Ighid li ma kinitx xi haga kbira li hemmhekk tara xi gurdien. Kienu sabu wiehed mejjet izda mhux f'xi cella.

"Konsiderazzjonijiet Legali

"L-artikolu 3 tal-Konvenzjoni jipprezenta projbizzjoni assoluta u mhiex possibbli eccezzjonijiet jew deroga taht l-artikolu 15, u dana irrispettivament mill-agir tal-vittima (ara Chahal vs UK – 1996). Minhabba f'hekk "*the threshold for*

treatment falling within the scope of article 3 has been set high by the Convention organs".

"Fil-Greek case, saret distinzjoni bejn "*a certain roughness of treatment*" u atti li jaqghu taht l-artikolu 3 dwar tortura jew ghal trattament jew piena inumana jew degradanti.

"It-test li gie stabbilit mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem hu "*that of attaining a certain minimum level of severity*". L-approc basiku huwa li :

""*Ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim*". (ara Ireland vs U.K. para 162).

"Ghalhekk fil-kaz in ezami l-Qorti trid izzomm bilanc bejn id-drittijiet fundamentali tal-persuna deprivata mil-liberta` taghha u l-esigenzi ta' sitwazzjoni li tirrikjedi sigurta`.

"Kif jghidu l-awturi f'dina l-materja

""*A (convicted) prisoner's deprivation of liberty does not mean that he loses the protection of the other fundamental rights in the Convention. The enjoyment of these rights must however inevitably be tempered by the reasonable exigencies of his situation and the requirements of security will weigh significantly in any balancing exercise of justification… Prisoners are in a particularly vulnerable position , almost all, if not all, aspects of their lives, being subject to regulation by authority. The potential for interference and restriction in fundamental rights and freedoms is considerable and reflected by the wide number of issues raised in prisoner cases*". (K. Reid . The European Convention of Human Rights).

"Skond il-gurisprudenza tal-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem, id-dover tal-Qorti huwa li taccerta ruhha li jkun hemm "*the existence of legal and factual conditions of detention*" ; "*that personal dignity and the right of defence are guaranteed*"; "*to ensure that restrictions to these rights are strictly proportional to the goal to be achieved*"; "*that the person detained is not subjected to torture or any other inhuman or degrading treatment*" u "*to declare as unlawful detention measures that are secret or unlimited in duration*"

"Konsiderazzjonijiet ta' fatt

"Jirrizulta li r-rikorrent kien tressaq il-Qorti fuq akkuzi ta' traffikar ta' ammont sostanzjali ta' droga u ta' assocjazzjoni ta' trafffikar u in segwitu rega' tressaq fuq attentat ta' qtil ta' persuna prominenti fil-pajjiz. Fid-19 ta' Novembru 1995 kien iddahhal gewwa l-Facilita` Korrettiva ta' Kordin u mill-ewwel tqieghed f'Division 6, li huwa repart separat mill-bqija tal-habs. Wara hames xhur u cjoe` fis-7 ta' Marzu 1996 ir-rikorrent gie trasferit ghal Division 3. Imbaghad fil-15 ta' Mejju 1996 meta r-rikorrent kien tressaq it-tieni darba l-Qorti fuq akkuza ohra, hu rega' gie trasferit ghal darb'ohra f'Division 6 fejn dam sad-29 ta' Lulju 1996 meta mbaghad gie trasferit ghal Division 4 fejn ghadu hemm sal-lum. B'kollox dam daqs tmien xhur fid-Division 6.

"L-uniku intimat li fadal f'dina l-kawza hu d-Direttur tal-Habs. Emanuel Cassar kien agent Direttur mill-31 ta' Lulju 1995 sal-10 ta' Frar 1997. Imbaghad rega' mar hemm fit-8 ta' Frar 1999 u spicca f'Settembru 2002. Emanuel Cassar kien jiddeciedi fejn jitpoggew il-prigunieri u ma kien jikkonsulta ma hadd. Kien iwiegeb lill-Ministeru ta' l-Intern.

"Jibda biex jinghad li skond ir-rikorrent hu kien izomm djarju fuq bicca karta biex ikollu *record* ta' x'ezattament gara u ma garax u dak li xehed kien minn dak li ghadda minnu u dak li kellu annotat fil-karti li kien izomm. L-intimat sostna li l-maggjor parti ta' l-allegazzjonijiet li ghamel ir-

rikorrent kienu xejn hlief rakkonti mhux korroborati jew inkella detto del detto minn familjari tieghu.

“Illi huwa veru li r-rikorrent ghamel diversi ilmenti u rrakkonta diversi episodji, izda gie konfermat mill-provi li dawn l-ilmenti effettivament kienu saru ripetutament u lil diversi awtoritajiet; xi whud minn dawn l-ilmenti kienu, wara xi zmien, rimedjati; ohrajn kienu riskontrati minn dawn il-bordijiet jew awtoritajiet tal-habs u ta’ barra. Naturalment ir-rikorrent setgha biss jigi korroborat mill-familjari tieghu li kienu jinviztawh u jaraw is-sitwazzjoni li kien fiha, u minn xhiex kien ghaddej. Il-Qorti ma kienitx ser tistenna li r-rikorrent jigi korroborat mill-intimat jew mis-subordinati tieghu. Lanqas kienet ser tistenna li l-intimat jigi provvdut bir-*recordings* tat-telefonati, jew tal-orarju tal-vizti tieghu jew tal-file mediku u dokumenti ohra privileggjati. F’sitwazzjoni bhala din, il-posizzjoni tar-rikorrenti hi l-hin kollu ghat-telgha u l-kompitu tal-Qorti hu li tara jekk f’din is-sitwazzjoni r-rikorrent irnexxilux jipprova dak li qed jallega.

“Hemm qbil li t-trattament tar-rikorrent kien differenti minn ta’ prigunieri f’Divisions ohra. L-intimat jghid it-trattament kien l-istess bhal ta’ prigunieri ohra li kienu fid-Division 6 hlief ghal iskorta u viziti li kien ikollu, u ggustifika dan il-trattament ghax ir-rikorrent kien *high security risk*. Min-naha l-ohra ir-rikorrent isostni li t-trattament tieghu kien totalment differenti minn prigunieri ohra li anke kienu fl-istess divizjoni bhalu u mhux hekk biss imma ghalkemm hu ma kienx sentenzjat u lanqas ikkastigat, tpogga f’cella, f’divizjoni li ghalkemm jghidulha li hija *high security* fil-fatt hi *solitary confinement*. L-intimat jaqbel li r-rikorrent kien f’dik id-divizjoni mhux b’kastig.

“L-intimat jiggustifika l-fatt li hu pogga lir-rikorrent mill-ewwel f’Division 6 billi kellu informazzjoni li r-rikorrent kien perikoluz u kellu min setgha jghinu biex jahrab. Izda ma tressqet ebda prova sodisfacenti li, meta ddahhal l-ewwel darba f’divizjoni 6 il-kondotta tar-rikorrent kienet ta’ riskju ghas-sigurta`, hlief ghal fatt li hu kien akkuzat bi traffikar ta’ sostanza [recte: ammont] konsidervoli ta’ droga u *conspiracy*. Fit-tieni okkazjoni rega’ iddahhal fid-

divizjoni 6 minhabba akkuza dwar attentat ta' qtil. Ma giex svelat min kien tah l-informazzjoni mid-Depot lill-intimat li r-rikorrent kien perikoluz, li kien *high security* jew li kellu ghajnuna biex jahrab. Baqghet biss informazzjoni li jafha l-intimat biss.

“Mandankollu l-Qorti qed taccetta l-apprezzament ta' fatt li ghamel l-intimat li r-rikorrent kien *high risk* u li ghalhekk kellu jiehu l-mizuri li ha. Izda dan kien jimporta wkoll li fl-istess waqt id-drittijiet fundamentali tar-rikorrenti jibqghu illezi. Il-Qorti pero` hi tal-fehma, wara li semghet il-provi, li nonostante l-mizuri li ha, l-intimat ecceda fl-agir tieghu, b'mod li, kif ser jinghad, lleda d-drittijiet fondamentali tar-rikorrent, u “*he did not ensure that restrictions to these rights are strictly proportional to the goal to be achieved*”.

“Fir-rapport tieghu lill-Gvern ta' Malta wara l-vizta li saret f'Malta mill-European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) mit-13 sat-18 ta' Mejju 2001, dan il-kumitat rrefera ghall-principji applikabbli f'dina l-materja ta' *high security units* li huma kienu fformulaw fil-hdax-il rapport taghhom. Dawn il-principji kienu jghidu li:

“In every country there will be a certain number of prisoners considered to present a particularly high security risk and hence to require special conditions of detention. The perceived high security risk of such prisoners may result from the nature of the offences they have committed, the manner in which they react to the constraints of life in prison, or their psychological/psychiatric profile. This group of prisoners will (or at least should, if the classification system is operating satisfactorily) represent a very small proportion of the overall prison population. However, it is a group that is of particular concern to the CPT, as the need to take exceptional measures vis-à-vis such prisoners brings with it a greater risk of inhuman treatment.

“Prisoners who present a particularly high security risk should, within the confines of their detention units, enjoy a relatively relaxed regime by way of compensation for their

severe custodial situation. In particular, they should be able to meet their fellow prisoners in the unit and be granted a good deal of choice about activities. Special efforts should be made to develop a good internal atmosphere within high-security units. The aim should be to build positive relations between staff and prisoners. This is in the interests not only of the humane treatment of the unit's occupants but also of the maintenance of effective control and security and of staff safety.

“The existence of a satisfactory programme of activities is just as important - if not more so - in a high security unit than on normal location. It can do much to counter the deleterious effects upon a prisoner's personality of living in the bubble-like atmosphere of such a unit. The activities provided should be as diverse as possible (education, sport, work of vocational value, etc.). As regards, in particular, work activities, it is clear that security considerations may preclude many types of work which are found on normal prison location. Nevertheless, this should not mean that only work of a tedious nature is provided for prisoners.

“It is axiomatic that prisoners should not be subject to a special security regime any longer than the risk they present makes necessary. This calls for regular reviews of placement decisions. Such reviews should always be based on the continuous assessment of the individual prisoner by staff specially trained to carry out such assessment**. Moreover, prisoners should as far as possible be kept fully informed of the reasons for their placement** and, if necessary, its renewal; this will inter alia enable them to make effective use of avenues for challenging that measure.

“Fil-kaz in ezami, l-intimat, li kkunsidra lir-rikorrent bhala *high security risk*, kuntrarjament ghal dak suggerit mic-CPT, minflok *a relatively relaxed regime within the confines of detention*, biex ipatti ghar-regime li kien impona fuq ir-rikorrent, zamm lir-rikorrent appartat minn prigunieri ohra, wahdu, (*solitary*) f’cella bl-inqas affarijiet possibli fiha (lanqas mejda), b’nuqqas ta’ ventilazzjoni, bla

access ghal gazzetti, gurnali jew kotba, TV, Radio u dawl qawwi quddiemu ghal 16 il-siegha fil-gurnata minn liema cella ir-rikorrent setgha johrog minnha biss ghal siegha kuljum u fejn kien ikun skortat u anke mmanettjat hafna mill-hin. Inoltre skond ir-rikorrent (u hawn hu ma giex kontradett) hu qatt ma gie infurmat ghaliex kien tpogga f’dika d-divizjoni b’restrizzjonijiet inkluz rekluzjoni ghal zmien twil meta kien semplicement fuq detenzjoni preventiva u mhux qed jiskonta piena ta’ habs imposta minn Qorti.

“Skond hu r-rikorrent, Patrick Calleja, meta r-rikorrent tpogga f’dina d-divizjoni kien qed ibati hafna u d-dehra fizika tieghu nbidlet. Kien sar qisu annimal imgerrex li qed jikkumbatti biex jghix.

“Minn ezami tal-provi jirrizulta li r-rikorrent thalla f’Division 6 komplessivament ghall-8 xhur f’divizjoni, li apparti li kienet post ta *high security*, kienet post ta’ kastig. Carmelo Cachia, gwardjan il-habs, xehed li Divizjoni 6 hija Division ta’ kastig (ara ukoll xhieda ta’ Victor Agius) u min kien jigi dixxiplinat jew kastigat kien jintbghat hemm. Meta r-rikorrent dahal il-habs hu ma kienx hemm b’kastig u dan hu ammess mill-intimat.

“Meta r-rikorrent kien jiccaqlaq mic-cella kien jigi skortat dejjem mill-istess ufficjal il-hin kollu u kien ikun manettjat kemm meta jmur il-kappella, kemm meta jkellem l-Avukat kif ukoll meta jkollu l-vizta mill-familja. Dwar dan l-intimat xehed li ma jiftakarx x’kienu l-istruzzjonijiet dwar il-manetti u jghid li din kienet responsabilita` tal-ufficjali inkarigati. Izda r-rikorrent jiftakar sew kif kienu jiehduh bil-manetti.

“Ir-rikorrent isemmi okkazjoni partikolari meta ma thalliex icempel lill-familjari tieghu u lanqas lit-tifel ta’ 4 snin fil-Milied. Ir-rikorrent dahal f’Divizjoni 6 f’Novembru 1995 sa Frar 1996 hu ma kienx thalla jcempel lill-familjari tieghu ghalkemm kien ikollu viziti. Ir-rikorrent kien talab permess quddiem il-Qorti tal-Magistrati biex ikun jista’ jcempel lill-ibnu fil-Christmas jew fl-ewwel tas-sena u ghalkemm kien hemm rakkomandazzjoni mill-Qorti biex ikun jista jcempel lill-ibnu hu baqa ma thalliex icempel u kien biss fi Frar

1996 li nghata l-permess li jcempel regolari. Dwar dan l-episodju l-intimat jghid li ma jiftakarx jekk kienitx saritlu talba biex icempel lit-tifel qabel tressqet il-*complaint* quddiem il-Magistrat. Ma jafx jekk kienx tah permess lir-rikorrent biex icempel lit-tifel jew le, u jekk ma tahx ir-raguni kienet ghax ma setax. F'dan il-kaz semma ukoll raguni ta' sigurta` ghal telefonata ma tifel ta' 4 snin. Ir-rikorrent ikkonferma li fil-fatt hu ma kienx thalla jcempel.

"Jirrizulta ukoll li waqt il-*contact* u *non-contact visits* li kien ikollu r-rikorrent kien ikun dejjem prezenti s-Surgent Bernard Zahra. Ir-rikorrent kien ikun immanettjat u s-Surgent kien jisma' kull ma jinghad fuq telephone. Il-hinijiet tal-*contact visits* ma kienux ikunu regolari u gieli familjari tar-rikorrent marru ghalxejn jew kellhom idumu jistennew sakemm issir il-vizita (ara xhieda tal-mara tar-rikorrent).

"Meta kien Division 6 ir-rikorrent kien ghamel operazzjoni taht anestesija generali l-isptar u immedjatament wara l-operazzjoni reggha ddahhal f'Division 6 ghalkemm skond ir-rikorrent it-tabib tal-habs kien irrakkomanda li jittiehdet go Division normali.

"Meta kien f'Division 6 ir-rikorrent kellu problema ta' sahha u ttiehed l-isptar b'anzieta u *heart beat* mghaggla. Ir-rikorrent isostni li Dr. Chris Muscat kien irrakkomanda li hu johrog minn Divizjoni 6 ghax kienet qed taghmillu hsara f'sahhtu izda d-Direttur tal-Habs kien injora t-talba tieghu u anke tat-tabib Muscat.

"L-intimat Direttur tal-Habs jichad li hu ma segwiex ir-rakkomandazzjoni tat-tabib u jghid li, la ta' l-isptar u la t-tabib, ma ghamlulu xi rakkomandazzjoni biex ir-rikorrent ma jibqax f'division 6. Ighid li mhux daqshekk bahnan li ma joqghodx fuq parir ta' tabib, anzi jsostni li l-unika rakkomandazzjoni li ghamel Dr. Chris Muscat kienet li lir-rikorrent izommu f'cella bil-kancell, u din tirrizulta mill-*file* mediku (li pero` ma giex ezibit).

"Dr. Chris Muscat, meta xehed ma ftakarx dettalji, pero` kkonferma li r-rikorrent kien qed ibati minn diversi sintomi,

ugigh f'sidru, qtugh ta' nifs, pressjoni gholja u li kien nizzel kollox fl-istorja tar-rikorrent li qeghdha f'Kordin (li ma gietx ezibita). Darba kien baghtu l-isptar minhabba pressjoni gholja u kien issuggerixxa li jmur post iehor izda, wara dan is-suggeriment, l-istess baqa' jarah f'Division 6.

"Dr. Christopher Cassar ikkonferma ukoll li r-rikorrent kien qed ibati minn diversi kondizzjonijiet – *chest pain*, hruq ta' stonku, minn *hiatus hernia* li tista' tkun konnessa ma' anzjeta`. Jaf li qallu biex ma jibqax fid-Divizjoni 6 (ara fol 53). Meta mbaghad ir-rikorrent hareg minn Division 6 dan ma baqax jitlob ghal tabib daqs qabel.

"Jirrizulta minn dawn il-provi li r-rikorrent kien mar l-isptar diversi drabi minhabba l-istat ta' sahhtu meta kien f'din id-Division, u fl-okkazjoni meta sarlu intervent kirurgiku fuqu, hu kien rega' tpogga fl-istess cella wahdu f'Divizjoni 6 u mhux f'xi Divizjoni ohra ghall-konvalexxenza. L-intimat ma kellux bzonn tar-rakkomandazzjoni tat-tabib biex jiddeciedi jekk kienx floku li r-rikorrent ma jithalliex wahdu f'cella wara operazzjoni.

"Ir-rikorrent xehed wkoll li kien qed ibati minn infezzjonijiet minhabba d-drenagg li ma kienx qed jahdem tajjeb u li kien hemm numru kbir ta' grieden u kien ghamel ilment quddiem il-Qorti tal-Magistrati fuq hekk. Ighid ukoll li kien hemm prigunieri ohra li batew minn infezzjonijiet simili minhabba l-grieden. L-intimat isostni li ma kienx hemm problemi ta' drenagg u grieden kienu sabu wiehed mejjet meta kienu qed inehhu l-hamrija pero` mhux fic-celel. Carmelo Zahra, gwardjan il-habs xehed (ara fol 216) li kien hemm hafna grieden, ghalkemm ra wiehed biss, u dana setgha jghidu ghax kien hemm tracci ta' hafna. Dawn l-ilmenti dwar il-grieden kienu damu xi gimgha.

"Ir-rikorrent isemmi wkoll li hu kien ilmenta ma European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT). Fir-rapport tieghu dan il-kumitat isemmi (ara fol 139 et seq) li:

""In every country there will be a certain number of prisoners considered to present a particularly high

security risk and hence to require special conditions of detention. The perceived high security risk of such prisoners may result from the nature of the offences they have committed, the manner in which they react to the constraints of life in prison, or their psychological /psychiatric profile. This group of prisoners will (or at least should, if the classification system is operating satisfactorily) represent a very small proportion of the overall prison population. However, it is a group that is of particular concern to the CPT, as the need to take exceptional measures vis-à-vis such prisoners bring with it a greater risk of inhuman treatment. In this respect, the CPT would like to recall the principles set out in its 11th Annual Report.

“The Maximum Security Unit (MSU), which is situated in Division V1 (lower level), entered into service in 1995; its purpose is to accommodate prisoners to a confinement measure on investigative or security grounds. The MUS has rarely been used and was occupied at the time of the May 2001 visit.

“The material conditions and regime applicable in the MSU, call for no particular comment.

“However, the delegation did meet a prisoner who had spent almost six months in the Unit (in 1996-1997), apparently to counter a risk of collusion. He claimed that he had been subjected to a regime which was more severe than the one prescribed by the unit’s internal order, and which allegedly entailed, inter alia, being deprived of a radio, television, sports activities, and access to the library, as well as being handcuffed while receiving visits from his lawyer.

“The case was subsequently examined by the Ombudsman, whose findings were largely consistent with the complainant’s allegations. Moreover, the Ombudsman found that the prison authorities had ignored a prison doctor’s recommendation to remove the person concerned from solitary confinement. He also considered that the measures taken in respect of

the prisoner were excessive, despite being technically within the letter of the Prison Regulations, and that they amounted to the imposition of a disciplinary punishment (which was not formally the case).

"Hu accettat mill-intimat (ara nota a fol 11 tan-nota ta' sottomissjonijiet) li certi lmenti li ghamel ir-rikorrent fil-bidu meta kien fid-Divizjoni 6 u li irrizultaw li kienu gustifikati gew rimedjati fl-iqsar zmien possibli. Fosthom isemmi l-ilment dwar id-dawl qawwi; l-ilment dwar il-gazzetti, it-*television* u *radio*. Izda jirrizulta li r-rikorrent kellu diversi lmenti ohra li l-Qorti gja ezaminat li ma gewx rimedjati u li r-rikorrent isostni li kisrulu d-drittijiet fundamentali tieghu fosthom:

- Li nzamm f'post ta' kastig ghal zmien tmien xhur meta hu suppost kien prezunt innocenti u ma kienx sentenzjat jew kastigat u dana minghajr ma nghata raguni;

- Li thalla f'rekuzjoni prolungata, kwazi wahdu, bla kuntatt ma hadd (hlief li johrog ghal siegha kuljum mic-cella.)

- Li kien jigi sorveljat u skortat il-hin kollu u mmanettjat kull fejn imur;

- Li ma kien hemm ebda privatezza fil-kuntatti tieghu mal-familjari tieghu;

- Li ma kienx inghata kura medika adekwata meta kienet necessarja.

"Ir-rikorrent jaccetta li l-intimat Direttur tal-Habs kien imexxi tajjeb il-habs u jzomm il-buon ordni u d-dixxiplina imma kien intransigenti mieghu u ma kienx jittrattah bhal ma kien jittratta ma' prigunieri ohra u qatt ma tah spjegazzjoni ghaliex kien qieghed f'Divizjoni 6. Hu kien jitolbu biss li jinghata dak li kien dritt tieghu imma d-Direttur kien jghidlu issa naraw u dejjem gie negat.

“Il-fatt li r-rikorrent kien mizmum taht sigurta` stretta f’Divizjoni 6 meta hu ma kienx qed jiskonta piena moghtija minn Qorti mhux necessarjament iqajjem awtomatikament kwistjoni taht l-artikolu 3 tal-Konvenzjoni, u lanqas il-fatt li hu kellu problemi ta’ sahha ma jfisser li hu kellu jigi rilaxxjat, izda l-istat ghandu jassigura li persuna li tkun detenuta b’dak il-mod tkun mizmuma f’kondizzjonijiet kompatibbli mar-rispett tad-drittijiet fundamentali tieghu, u li mod kif jigu attwati dawk il-mizuri ma jassoggettawx lill persuna detenuta ghal tbatija u anzjeta` li teccedi l-livell accettabbli ta’ tbatija li wiehed jistenna meta persuna tkun detenuta f’habs u li l-istat ghandu jassikura li tinghata dik l-assistenza medika necessarja fic-cirkostanzi (ara Aerts vs Belgium 30/7/1998).

“L-ilmenti tar-rikorrent dwar il-kondizzjoni li kien jinzamm fiha u l-prolungament eccessiv u mhux necessarju tar-rekluzzjoni ghandhom jigu konsidrati fl-assjem taghhom.

““When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as the specific allegations made by the applicant. Dougoz vs Greece 6/3/2001 u Peers vs Greece 19/4/2001

“Fil-kaz in ezami l-Qorti ssib li fit-trattament li r-rikorrent ilmenta minnu u meta tiehu l-ilmenti kollha fl-assjem taghhom u l-effett li kellhom fuqu fizikament u psikologikament, kien hemm elementi fl-ilmenti tar-rikorrent li jammontaw ghal trattament li wassal ghal ksur ta’ dritt fundamentali tar-rikorrent li ma jigix assogettat ghal trattament inuman u degradanti.

“L-intimat kien jaf li r-rikorrent kien qed jigi trattat b’dak il-mod, izda minkejja dan u l-ilmenti tar-rikorrent, fuq medda ta’ tmien xhur, ma hax il-passi kollha necessarji, fil-poter tieghu, biex iwaqqaf dan it-trattament. Ir-restrizzjonijiet ghalkemm imposti fuq ir-rikorrent minhabba sigurta`, ma kienux proporzjonati ghall-finijiet li l-intimat ried jilhaq. Ghalhekk *a treatment of a detainee which in itself is inhuman does not lose its character through the mere fact*

that its only motive is the enhancement of security or the combat against crime. (Van Dijk u Van Hoof Theory and Practice of the European Convention on Human Rights 2nd Ed pagna 229):

"Kwantu ghat-talba tar-rikorrent li dina l-Qorti tiddikjara li l-agir ta' l-intimat kiser ukoll id-dritt fundamentali tieghu taht l-artikolu 39(5) tal-Kostituzzjoni u l-artikolu 6(2) tal-Konvenzjoni Ewropeja, l-Qorti l-ewwelnett tirrileva li dina t-talba u allegazzjoni tar-rikorrent ma gietx trattata mir-rikorrent u saret biss riferenza indiretta ghaliha fin-nota ta' sottomissjonijiet tieghu. Il-Qorti pero` tirrileva, li kif gja nghad il-fatt biss wahdu li persuna tigi mizmuma taht sigurta` stretta ma jfissirx awtomatikament li qed jigi lez xi dritt fundamentali. Fil-kaz in ezami rrizulta li gie lez id-dritt fundamentali tar-rikorrent li ma jigix trattat b'mod inuman u degradanti imma dina l-konkluzjoni ma tfissirx ukoll li gie lez d-dritt fundamentali l-iehor tal-presunzjoni ta' innocenza. Aktar u aktar meta r-rikorrent mhux qed jallega li b'dak li sar hu gie pregudikat fil-proceduri gudizzjari li saru kontra tieghu, imma li l-lanjanzi tieghu kienu jikkoncernaw principalment l-agir ta' l-intimat fil-konfront tieghu meta hu kien detenut fil-habs f'Divizioni 6.

"Decizjoni

"Ghal dawn il-motivi l-Qorti tiddeciedi billi ssib lill intimat Direttur tal-Habs hati ta' ksur ta' l-artikoli 36 u 3 tal-Kostituzzjoni u l-Konvenzjoni Ewropeja rispettivament fil-konfront tar-rikorrent, u tikkundannah ihallsu s-somma ta' Lm1,500 (elf u hames mitt lira Maltin) bhala rimedju ghal pregudizzju li sofra r-rikorrent.

"Bl-ispejjez kontra l-intimat Direttur tal-Habs."

<u>L-appell tad-Direttur tal-Habs</u>

Permezz ta' rikors presentat fil-5 ta' Dicembru 2006, id-Direttur tal-Habs appella minn din is-sentenza. L-aggravju tieghu hu enkapsulat fis-segwenti paragrafu:

“Illi l-aggravju ta’ l-esponent hu car u manifest u jikkonsisti fil-fatt li l-Ewwel Onorabbli Qorti ma kienx imissha sabitu hati ta’ ksur tal-Artikoli 36 u 3 tal-Kostituzzjoni u tal-Konvenzjoni rispettivament fil-konfront tar-rikorrent u lanqas kien imissha kkundannatu jhallsu s-somma ta’ Lm1,500 bhala rimedju, u dan ghar-ragunijiet segwenti.”

L-appellant ikompli billi jghid li f’materja bhal dik in ezami, u cioe` meta si tratta ta’ kazijiet fejn jigi allegat ksur tal-Artikolu 3 tal-Konvenzjoni, l-organi ta’ Strasbourg dejjem esigew li l-prova trid issir *“beyond reasonable doubt”*, grad dan li, jikkontendi l-appellant, ma intlahaqx mir-rikorrent appellat. L-appellant jghaddi imbaghad biex jirrikapitola u jezamina l-fatti allegati mir-rikorrent appellat quddiem l-ewwel qorti biex juri li l-ewwel qorti ghamlet apprezzament hazin taghhom u ghalhekk waslet ghal konkluzjoni zbaljata. Ighid li *“…c-cirkostanzi partikolari tal-kaz odjern kienu jikkonsistu fid-detenzjoni tar-rikorrent taht applikazzjoni ta’ mizuri ta’ sigurta` gholjin fid-dawl tal-fatt li r-rikorrent kien meqjus bhala* high risk *mhux biss fil-kuntest ta’ prevenzjoni minn kuntatt ma’ certi persuni fid-dawl tal-akkuzi serji li kellu imma specjalment minhabba l-possibilita` li jista’ jkollu ghajnuna biex jahrab.”* Ir-rikorrent jaghmel ukoll referenza ghal diversi decizjonijiet u sentenzi ta’ Starsbourg, fosthom id-decizjoni ta’ l-allura Kummissjoni fil-kaz **Arne Treholt v. Norway** deciza fid-9 ta’ Lulju 1991. Skond l-appellant, ghalhekk, mhux biss il-provi ma kienux iwasslu, izda it-trattament li ircieva l-appellat la kien jammonta ghal trattament inuman u anqas ghal trattament degradanti.

L-appellat Calleja, fir-risposta tieghu, jibda biex itenni l-gurisprudenza tal-Qorti ta’ l-Appell li meta si tratta tal-valutazzjoni tal-provi, it-tieni qorti ma tiddisturbax dak l-apprezzament jekk ma jkunx hemm raguni impellenti ghal dan. Jirribatti wkoll il-punt dwar il-grad ta’ prova rikjest f’kawzi simili mill-organi ta’ Strasbourg b’referenza ghal artikolu ta’ certu Ugur Erdal f’rivista legali (li pero` kopja taghha baqghet ma gietx ezibita, anqas man-nota ta’ l-appellat tat-13 ta’ Lulju 2007), u jwiegeb kwazi *point by*

point ghad-diversi argumenti mressqa mill-appellant. L-appellat talab li s-sentenza tigi konfermata fl-intier taghha.

Ghandu jinghad ukoll li kemm l-appellant kif ukoll, u tardivament, l-appellat ippresentaw in-noti ta' referenzi suggerita mill-Qorti fl-udjenza tas-7 ta' Mejju 2007 (l-appellant fil-15 ta' Gunju 2007 u l-appellat fit-13 ta' Lulju 2007).

Konsiderazzjonijiet ta' din il-Qorti

Din il-Qorti ezaminat bir-reqqa l-provi kollha migjuba quddiem l-ewwel qorti biex tasal ghall-konkluzjoni taghha kemm dwar l-appell kif ukoll dwar ir-risposta ta' l-appellat. Pero` qabel ma tghaddi ghall-fatti – li xi whud minnhom ser jigu rikapitolati in breve minn din il-Qorti – tajjeb li wiehed jizbriga t-terren mill-kwistjoni tal-grad ta' prova li r-rikorrent appellat kellu jilhaq quddiem l-ewwel qorti.

Issa, huwa minnu li diversi decizjonijiet tal-Kummissjoni kif ukoll sentenzi tal-Qorti ta' Strasbourg in tema ta' l-Artikolu 3 juzaw l-espressjoni *"proof beyond reasonable doubt"*. Dana l-i*standard* ta' *"beyond reasonable doubt"* jidher li kien gie l-ewwel darba addottat mill-Kummissjoni fil-kaz tal-Grecja, u baqa' jigi utilizzat f'kawzi li gew wara. Karen Reid, fil-ktieb taghha **A Practitioner's Guide to the European Convention on Human Rights**[2] tghid hekk:

"The Court in *Ireland v. United Kingdom* stated that it must examine all the material before it and may obtain evidence *proprio motu*. To assess this evidence it adopts, as the Commission did in *The Greek case*, the standard 'beyond reasonable doubt'. Such proof may also follow from the coexistence of sufficiently strong clear and concordant inferences or of similar unrebutted presumptions of fact. In this context the conduct of the parties when evidence is being obtained has to be taken into account."[3]

[2] 2nd ed. Sweet & Maxwell (London) 2004.
[3] Para. IIB-429, p. 528.

Uzu ta’ din l-espressjoni ta lok ghal kritika qawwija fid-*partly dissenting opinion* tal-Imhallef Malti fuq il-Qorti ta’ Strasbourg, l-Avukat Dott. Giovanni Bonello, fil-kaz **Sevtap Veznedaroglu v. Turkey** deciza fil-11 ta’ April 2000. L-Avukat Bonello esprima ruhu hekk:

“11. Independently of the failure by the majority to apply the rule that it was incumbent on the State to discharge the burden of evidence (v. § 9), I find the standard of proof - beyond reasonable doubt - required by the Court in torture cases to be legally untenable and, in practice, unachievable.

“12. Proof “beyond reasonable doubt” reflects a maximum standard relevant and desirable to establish *criminal* culpability. No person shall be judicially deprived of liberty, or otherwise penally censured, unless his guilt is manifest “beyond reasonable doubt”. I subscribe to that stringent standard without hesitation. But in other fields of judicial enquiry, the standard of proof should be proportionate to the aim which the search for truth pursues: the highest degree of certainty, in criminal matters; a workable degree of probability in others.

“13. Confronted by conflicting versions, the Court is under an obligation to establish (1) on whom the law places the burden of proof, (2) whether any legal presumptions militate in favour of one of the opposing accounts, and (3) “on a balance of probabilities”, which of the conflicting versions appears to be more plausible and credible. Proof “beyond reasonable doubt” can, in my view, only claim a spurious standing in ‘civil’ litigation, like the adversarial proceedings before this Court. In fact, to the best of my knowledge, the Court is the only tribunal in Europe that requires proof “beyond reasonable doubt” in non-criminal matters.

“14. Expecting those who claim to be victims of torture to prove their allegations “beyond reasonable doubt” places on them a burden that is as impossible

to meet as it is unfair to request. Independent observers are not, to my knowledge, usually invited to witness the rack, nor is a transcript of proceedings in triplicate handed over at the end of each session of torture; its victims cower alone in oppressive and painful solitude, while the team of interrogators has almost unlimited means at its disposal to deny the happening of, or their participation in, the gruesome pageant. The solitary victim's complaint is almost invariably confronted with the negation "corroborated" by many.

"15. For the Court to expect from torture victims any 'hard' evidence, beyond the eloquence of their injuries, is to reward and invigorate the 'inequality of arms' inherent in most torture scenarios.

"16. Thirdly, the Court has, in my view, side-tracked the key question of credibility. I ask if, relying on its memory in handling so many cases of torture, the Court has compelling reasons to award more faith and credit to security forces which have an unenviable track-record to live down, rather than to those who claim to be their victims. No allegation has been made against the personal integrity and uprightness of the applicant, other than the damning circumstance that she was the wife of a human rights activist. The test, in the event, should have been: on a balance of credibility, who is likelier to have provided the court with a more reliable version of the incidents? The security forces?

"17. Fourthly, it is difficult to envisage what "proof" the Court expected from the applicant in order to substantiate her claim that she was repeatedly tortured by being forcibly undressed, suspended, threatened with death and rape and deprived of food. These amusements are particularly ungenerous with those tangible signs dear to forensic experts. So, again, the only reasonable test ought to have been: on a balance of credibility, which of the two parties rests more convincingly on the side of truth?

"18. Personally, I would have little hesitation with the answer. The majority seem to have thought otherwise. And its conclusion is unassailable - if you start your assessment of credibility from the premise that the applicant, (whose personal integrity and honour are not in dispute), is neither to be trusted nor believed, while the security forces, repeatedly found guilty by this Court of killings, torture and inhuman behaviour, are.

"19. Finally, the Court has unanimously affirmed that the respondent State breached Article 3 in that it failed to investigate the applicant's complaints of torture. In other words, the Court has held the respondent State guilty of defaulting in its obligation to unearth evidence by means of a determined fact-finding exercise. But then, after having established that the dearth of evidence is the defendant's fault, the Court visited the consequences of this failure on the applicant. She has been penalised for not coming up with evidence that the Convention *obliges* the State to procure. Hard as I try, I cannot see this as a consequent technique of decision-making."

Ghalkemm fil-kaz in dizamina l-appellat Calleja ma hux qed allega xi forma ta' tortura, izda biss trattament inuman u degradanti, din il-Qorti taqbel li, bhala regola, l-uzu ta' l-espressjoni "beyond reasonable doubt" ghall-finijiet ta' prova mhux biss fil-kuntest ta' kawza ta' indoli civili izda aktar u aktar meta si tratta ta' xi haga li spiss tkun avverat ruhha b'tali mod li jista' jkun qed isir minn kollox biex il-fatti jigu mistura – din il-Qorti taghmilha cara, sabiex ma tigix fraintiza, dan ma hux il-kaz odjern, cioe` ta' Calleja – ma hux desiderabbli. Il-prova li r-rikorrent appellat kien jehtieglu jaghmel f'dan il-kaz kienet biss dik sal-grad tal-probabbli. S'intendi, trattandosi ta' allegazzjoni serja, dan ifisser li l-Qorti trid tkun kawta qabel ma taccetta dak li jghid xhud bhala li hu minnu. Hekk ghamlet il-Prim Awla tal-Qorti Civili f'dan il-kaz, u hekk sejra taghmel ukoll din il-Qorti. Ghall-kompletezza ghandu jinghad li aktar recentement, cioe` fis-sentenza tas-6 ta' Lulju 2005 fil-kaz

Nachova and others v. Bulgaria il-Qorti ta' Strasbourg (bhala Grand Chamber) ippruvat tispjega l-uzu tal-espressjoni "beyond reasonable doubt" hekk:

"147. It notes in this connection that, in assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see, among others, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 24, § 32; *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1211, § 68; *Tanli v. Turkey*, no. 26129/95, § 111, ECHR 2001-III; and

Ilaşcu and Others v. Moldova and Russia **[GC], no. 48787/99, § 26, ECHR 2004-VII).”**

Kien proprju ghalhekk li din il-Qorti ezaminat bir-reqqa l-provi kollha migjuba quddiem il-Prim Awla halli tara jekk l-ewwel qorti ghamlitx apprezzament korrett tal-provi li kellha quddiemha, biex wara tara kif dawk il-provi jinkwadraw fil-kuntest tad-disposizzjonijiet tal-ligi li l-ksur taghhom qed jigi allegat.

Minn dana l-ezami, din il-Qorti waslet ghal zewg konkluzzjonijiet. L-ewwel konkluzjoni hi li l-ewwel qorti ghamlet apprezzament generalment korrett tal-provi li kellha quddiemha. Fejn din il-Qorti, pero`, ma tistax taqbel mal-Prim Awla huwa fejn din ma ghamlitx id-distinzjoni bejn trattament inuman u trattament degradanti, u minflok jidher ikkunsidrat bhala li trattament inuman u dak degradanti huma l-istess haga.

Qabel ma tghaddi ghall-provi, din il-Qorti trid taghmel precisazzjoni ohra, u cioe` li hija qaghdet hafna attenta biex tispigola l-provi li huma legalment ammissibbli minn dawk li huma inammissibbli. Dan qed jinghad ghax hafna min dak li jghidu certi xhieda, bhal Patrick Calleja, hu l-appellant, kemm fl-affidavit tieghu (fol. 125 *et seq.*) kif ukoll meta ddepona *viva voce* quddiem l-ewwel qorti (fol. 187 *et seq.*) huwa “hearsay”. L-istess jista’ jinghad ghad-deposizzjoni ta’ Roberta Calleja, mart l-appellat (fol. 194 *et seq.*).

Minkejja dan, fil-fehma ta’ din il-Qorti, il-fatti ma jippresentawx fir-realta` problema. L-appellat gie akkuzat quddiem il-Qrati ta’ Gustizzja Kriminali b’reati serji konnessi ma’ traffikar ta’ kwantita` mhux zghira ta’ droga[4]. Meta, wara l-presentata tieghu fil-qorti, huwa gie *remanded in custody* id-Direttur tal-Habs gie infurmat, x’aktarx mill-Pulizija, li r-rikorrent kien prigunier *high risk* (fis-sens li minhabba n-natura tal-kaz, kellhom jittiehdu prekawzjonijiet aktar minn dawk li solitament jittiehdu ma’

[4] Ftit xhur wara huwa tressaq akkuzat ukoll b’komplicita fl-attentat ta’ omicidju tas-Segretarju Privat tal-Prim Ministru ta’ dak iz-zmien. Dan wassal ghat-tieni perjodu li huwa nzamm fid-Divizjoni 6.

prigunieri ohra minhabba l-possibilita` ta' harba). Dana l-"assessment" tar-riskju gie accettat mill-ewwel qorti u sejjer ukoll jigi accettat min din il-Qorti – u proprjament dana l-assessment lanqas gie kontestat mir-rikorrent quddiem l-ewwel qorti. Ir-rikorrent semplicement qed jikkontendi li l-mizuri li ttiehdu fir-rigward tieghu appena rifes l-ghatba tal-habs kienu diskriminatorji fil-konfront tieghu – ghax prigunieri ohra li kienu, bhalu, "awaiting trial" thallew igawdu l-privileggi solitament koncessi lil tali kategorija – u li fi kwalunkwe kaz il-mizuri li effettivament ittiehdu kienu ferm oltre dawk li kienu mehtiega biex jarginaw il-"high risk" li talvolta huwa setgha jippresenta.

Effettivament din il-Qorti hi tal-fehma li dak li jirrizulta hu li l-awtoritajiet tal-habs ma kienux preparati ghal kontingenza bhal dik li gew rinfaccati biha appena l-appellat ittiehed il-habs. In fatti, l-uniku post fejn, skond id-Direttur tal-Habs ta' dak iz-zmien, prigunier *high risk* bhall-appellat seta jinzamm kien fid-Divizjoni numru 6. Din id-divizjoni, pero`, kienet aktar maghrufa minn kulhadd, inkluzi l-istess ufficjali tal-habs[5], bhala d-divizjoni tal-kastig. Kif spjega l-allura Direttur tal-Habs (illum Assistent Kummissarju Emmanuel Cassar) din id-Divizjoni kellha madwar 20 cella, mqassma fuq zewg sulari. Ic-celel t'isfel kienu jintuzaw ghal *long term prisoners*, mentri dawk ta' fuq kienu jintuzaw ghal dawk il-prigunieri li kienu jinghataw kastig wara li jkunu ghaddew minn proceduri dixxiplinari. Ghal raguni li baqghet inspjegabbli tul dan il-process kollu – bid-Direttur iwahhal fl-ufficjal inkarigat mid-Divizjoni (ara fol. 228) u dan iwahhal f'haddiehor (fol. 266) – Calleja tpogga fis-sular ta' fuq fejn ic-cella kienet aktar skabruza ghas-semplici fatt li kellha bieb tal-hadid maghluq, mentri c-celel t'isfel kellhom il-bieb speci ta' kancell bil-vireg b'mod li tista' tara gewwa (u, naturalment, minn gewwa tara barra). Dan kien l-ewwel *foul* li sar. Inoltre, ic-cella ma kellha kwazi xejn bhala ghamara meta mqabbla ma' celel ohra f'divizjonijiet ohrajn. Mhux hekk biss, izda ghall-bidu hu ma nghatax permess jiehu docca. Din il-Qorti ma tistax tifhem – u hekk jidher li gralha l-ewwel qorti wkoll – kif l-ittehid tad-docca (li kienet tittiehed fl-istess divizjoni fis-

[5] Ara d-deposizzjonijiet ta' Carmelo Cachia (fol. 212) u Victor Agius (fol. 214).

sular t'isfel) seta' jippregudika s-sigurta` ghal dik li hija possibilita` ta' harba. Huwa minnu li fl-4 ta' Dicembru 1995 id-Direttur offra lil Calleja li jinzel f'cella isfel fl-istess Divizjoni u dan irrifjuta (kien biss fid-29 ta' Dicembru li effettivament nizel isfel, fol. 230), izda anke isfel ir-regim applikabbli f'dik id-Divizjoni kien wiehed spartan ghall-ahhar, bil-prigunier ma jistax ikollu televizjoni, radju, hwejjeg personali, gazzetti ecc. li prigunieri ohra, anke dawk sentenzjati, kellhom bhala privilegg. Din il-Qorti, bhall-ewwel qorti, tifhem li jista' jkun hemm ragunijiet, oggettivament riskontrabbli, ghala prigunier, anke prigunier *awaiting trial* bhalma kien Calleja, ikun taht *regime* ta' sorveljanza jew ta' appartament jew isolazzjoni minn prigunieri ohra, partikolari. Pero`, kif gustament osservat l-ewwel qorti, meta jkun hemm il-htiega ta' tali *regime* irid ikun hemm xi haga jew xi hwejjeg li jaghmlu tajjeb ghal dawk ir-restrizzjonijiet jew ghal dak l-izolament zejjed, bhal, per ezempju, aktar attivita fizika, qari, jew xi forma ta' xoghol manwali. Fil-kaz ta' l-appellat huwa ghamel granet – it-tul, frankament din il-Qorti ma tarahx li huwa tant relevanti f'dan il-kaz – minghajr gazzetti, minghajr kotba, minghajr il-hwejjeg personali tieghu. Jigi precizat li il-*high risk* li kien qed jigi ravvizat mill-awtoritajiet ma kienx xi riskju ta' suwicidju[6], u allura din il-Qorti ma tistax tifhem ghala, kuntrarjament ghal dak li kien jigri fir-rigward ta' prigunieri ohra, l-affarijiet personali, bhall-*blade* biex iqaxxar il-lehja, ma kienx jista' jzommhom imma kienu jinzammu – skond ir-regoli tad-Divizjoni – f'*locker* isfel u kull darba li l-appellat kien ikollu bzonnhom irid jistaqsi ghalihom, fi kliem iehor jispicca kwazi jittallab ghalihom. Il-Qorti terga' tistaqsi: x'ziedu fis-sigurta` ghal dak li hu perikolu ta' harba jew ta' kontaminazzjoni tal-provi, dawn il-mizuri? L-istess jista' jinghad ghall-fatt li kull fejn kien imur entro l-konfini tal-habs pero` barra mid-Divizjoni 6 kien dejjem ikun immanettjat, apparti li jkun skortat. Jirrizulta li anke biex imur sal-kappella kien jittiehed immanettjat (mhux car jekk il-manetti kienux

[6] Din il-Qorti tosserva fir-rigward tal-kaz **Arne Treholt v. Norway**, li ghalih jaghmel referenza l-appellant, li apparti li l-fatti kienu differenti minn dawk odjerni u li l-awtoritajiet Norvegizi ssodisfaw lill-Kummissjoni min-neccessita` tal-mizuri li kienu ttiehdu fil-konfront ta' Treholt, xi whud minn dawn il-mizuri kienu wkoll mehtiega *"in order to minimize the risk of the applicant inflicting harm on himself"* – ara pagna 26 tad-dokument relattiv anness man-nota ta' l-appellant tal-15 ta' Gunju 2007.

jitnehhew meta jkun fil-kappella), kif ukoll biex imur jiltaqa' mal-familjari tieghu ghall-viziti, jew biex ikellem lill-avukati. Din il-Qorti tikkoncedi li l-esperti f'materja ta' sigurta` (jew sigurezza) huma (suppost) l-awtoritajiet tal-habs; pero` meta persuna tigi assoggettata ghal trattament partikolari u palesement differenti minn dak moghti lil prigunieri ohra fl-istess kategorija, ikun jinkombi fuq l-awtorita` involuta li tispjega b'mod konvincenti n-neccessita` ta' tali differenza fit-trattament. Fil-process din il-Qorti ma sabet ebda spjegazzjoni konvincenti. Hekk, biex wiehed jiehu ezempju iehor, wiehed jista' jifhem li gazzetti u forsi anke *magazines* lokali jigu censurati biex wiehed ma jhallix messaggi jaslu ghand dak li jkun, pero` difficilment wiehed jiggustifika l-assenza totali ta' kull gazzetta, *magazine* jew ktieb mil-librerija.

Din il-Qorti ma tarax li ghandha tidhol f'aktar dettalji – dwar telefonati, n-numru u l-frekwenza tal-viziti mill-familjari, ikel li seta' jingab mill-familjari, u affarijiet ohra – u dan ghas-semplici raguni li, kif inghad, l-ewwel qorti ghamlet apprezzament sostanzjalment tajjeb tal-provi. Ma hemmx dubju li dan kollu kellu effett negattiv kemm fuq il-kondizzjoni fizika imma aktar fuq il-psike tal-appellat li kien qed jara lilu nnifsu diskriminat minghajr ma jinghata raguni jew xi spjagazzjoni ghal tali trattament differenti. Fejn din il-Qorti ma taqbilx ma l-ewwel qorti huwa jekk dana kollu kienx jammonta ghal trattament inuman jew degrandanti (jew ghat-tnejn).

Kif diga` gie osservat, l-ewwel qorti ma ddistingwietx bejn trattament inuman u trattament degradanti. Huwa veru li trattament inuman huwa fih innifsu neccassarjament degradanti, pero` l-invers mhux necessarjament huwa minnu. Issa, skond il-gurisprudenza ormaj kopjuza ta' Strasbourg, *"Inhuman treatment covers at least such treatment as deliberately causes severe mental and physical suffering."* [7] F'dan il-kaz din il-Qorti ma ssib xejn f'dan is-sens: it-trattament diskriminatorju u restrittiv li ghalih kien assoggettat l-appellat Calleja ma jistax jinghad li twettaq biex deliberatament jigi kkawzat lilu sofferenza

[7] Karen Reid, *op. cit.* para. IIB-420, p. 522.

kbira mentali jew fizika. Kien pjuttost, kif inghad, ir-rizultat ta’ istituzzjoni li ma kenitx ippreparata tilqa’ *a high risk prisoner* bhalma kien Calleja, akkopjat ma xi ftit zelu zejjed da parti ta’ certi ufficjali, subalterni tad-Direttur, li l-istess Direttur ma ssorveljax bizzejjed. Anqas jirrizulta li kien hemm dak il-grad ta’ sofferenza mentali jew fizika li twassal biex it-trattament jinghad li kien inuman. L-istess ma jistax jinghad, pero`, ghal dak li hu trattament degradanti:

“The defining feature of degrading treatment…is the element of humiliation or debasement; the threshold of severity would appear to require that the humiliation is severe. However, in *Peers v. Greece* the Court ruled that the conditions of detention constituted degrading treatment where it expressly found that there was no intention to humiliate.” [8]

Fil-kaz in dizamina it-trattament specjali (in kwantu differenti) moghti lil Calleja, prigunier presunt innocenti, ghalkemm oggettivament prigunier *high risk*, ma giex pruvat li kien mehtieg ghall-finijiet ta’ sigurta`; anzi jirrizulta li certi aspetti ta’ dan it-trattament kienu zgur in eccess ta’ dak li kien ragjonevolment mehtieg ghall-finijiet ta’ tali sigurta`. Dan it-trattament ma setax ma jumiljax lill-appellant f’ghajnejn prigunieri ohra, f’ghajnejn membri tal-familja tieghu u f’ghajnejn l-avukati tieghu, kif ukoll f’ghajnejh stess. Jigi ribadit li, ghalkemm ma tirrizultax l-intenzjoni li jigi hekk umiljat, oggettivament gie umiljat. Kif inghad fil-kaz ***Peers v. Greece*** (19 ta’April 2001) li ghalih ghamlu wkoll referenza l-abbili difensuri ta’ l-appellant Dott. Mario Demarco, Dott. Josette Grech u Dott. Toni Abela:

“67. The Court recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the

[8] **Jacobs& White: The European Convention on Human Rights** (4th ed, Clare Ovey and Robin C. A. White), OUP 2006, pp. 82-83.

case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

"68. Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions*, 1997-VIII, pp. 2821-22, § 55).

……..

"74. In the light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX)."

U aktar recentement, fil-kaz **Yancov v. Bulgaria**, deciza fil-11 ta' Dicembru 2003 inghad hekk:

"105. In considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Even the absence of such a purpose cannot conclusively rule out a finding of a

violation of Article 3 (see, for example, *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III; and *Kalashnikov v. Russia*, no. 47095/99, § 101, ECHR 2002-VI).

"106. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, Ireland v. the United Kingdom. judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

"107. The Court has consistently stressed that the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (*Kudła v. Poland* [GC], no. 30210/96, §§ 93-94, ECHR 2000-XI)."

<u>Decide</u>

Għall-motivi premessi din il-Qorti tilqa' l-appell tad-Direttur tal-Ħabs fis-sens illi tħassar u tirrevoka s-sentenza appellata in kwantu din sabet lill-imsemmi Direttur ħati ta' trattament inuman fil-konfront tar-rikorrent appellat Meinrad Calleja, kif ukoll in kwantu kkundannatu jħallas lill-imsemmi Calleja s-somma ta' Euro 3,494.06 kif ukoll l-ispejjeż kollha tal-kawża, iżda tikkonfermaha in kwantu sabitu ħati ta' trattament degradanti fil-konfront ta' l-istess

Calleja bi ksur tal-Artikoli 36 u 3 tal-Kostituzzjoni u tal-Konvenzjoni rispettivament; tiffissa l-kumpens bhala rimedju ghall-pregudizzju soffert mill-appellat fis-somma ta' Euro 2,300, u tordna lill-appellant ihallas din is-somma lill-appellat. Kwantu ghall-ispejjez tal-kawza, kemm ta' l-ewwel kif ukoll ta' din l-istanza. Dawn ghandhom jithallsu kwantu ghal erba' partijiet minn hamsa (4/5) mill-appellant Direttur tal-Habs u r-rimanenti kwinta parti minn hamsa (1/5) mill-appellat Calleja.

< Sentenza Finali >

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