MALTA

QORTI KOSTITUZZJONALI

**ONOR. IMHALLEF -- AGENT PRESIDENT
ALBERT J. MAGRI**

**ONOR. IMHALLEF
GEOFFREY VALENZIA**

**ONOR. IMHALLEF
GIANNINO CARUANA DEMAJO**

Seduta tat-12 ta' April, 2011

Appell Civili Numru. 12/2010/1

John Mizzi

v.

Avukat Generali

Il-Qorti:

Preliminari

Dan hu appell ad istanza tar-rikorrent John Mizzi minn sentenza moghtija mill-Prim' Awla tal-Qorti Civili, Gurisdizzjoni Kostituzzjonali, fit-28 ta' Ottubru 2010 li

ddecidiet ir-rikors billi laqghet l-eccezzjonijiet tal-intimat u cahdet it-talbiet tar-rikorrent bl-ispejjez kontra tieghu.

Ghal intendiment ahjar ta' dan l-appell, il-Qorti qeghdha tirriproduci *in toto* is-sentenza appellata kif jidher hawn taht:
"**Il-Qorti,**

"**I. PRELIMINARI.**

"Rat ir-rikors ta' John Mizzi ghar-rimedju kostituzzjonali datat 17 ta' Frar 2010 a fol. 1 tal-process fejn espona:-

"Illi dan ir-rikors huwa bbazat fuq l-**artikolu 4 tas-seba' Protokol tal-Konvenzjoni Ewropea ghad-drittijiet tal-bniedem** u cioe` l-principju tan-*ne bis in idem*; fuq l-**artikolu 7 tal-Konvenzjoni** (arbitrarjeta` tal-ligi penali); fuq l-**artikolu 6 (1)** (dewmien ta' proceduri kriminali).

"Illi hu kien tressaq quddiem il-Qorti tal-Magistrati (Ghawdex) akkuzat:-

"Li fil-25 ta' Mejju 1999 u qabel ghamel zvilupp jew halla jsir zvilupp fuq art li taghha huwa responsabbli minghajr il-permess tal-awtorita` tal-Ippjanar ghal dan l-izvilupp konsistenti fi ftuh ta' barriera u qtiegh ta' gebel tal-franka fl-inhawi tal-Ghansar limiti ta' San Lawrenz, Ghawdex kif ukoll ksur tal-ippjanar konsistenti billi ghandu estenzjoni tal-barriera minghajr il-permess mehtieg.

"Talli fl-istess zminijiet naqas li jobdi tali avviz biex jieqaf datat 26 ta' Marzu 1998 sabiex iwaqqaf immedjatament l-imsemmi zvilupp u jittiehdu dawk il-passi sabiex jieqaf il-ksur u jerga' lura s-sit ghall-istat originali.

"Naqas li jobdi l-ordnijiet legittimi tal-awtorita` kompetenti. **artikolu 4 tas-7 Protokoll.**

"Illi b'sentenza tal-Qorti tal-Magistrati (Ghawdex) bhala Qorti ta' Gudikatura Kriminali fil-25 ta' Frar 2009 huwa gie liberat mill-ewwel imputazzjoni izda misjub hati tat-tieni u t-tielet u kkundannat ghal multa ta' hamsin elf ewro kif

ukoll ghal sena prigunerija sospiza ghal sena u ordnat illi jregga’ s-sit fl-istat li kien fi zmien tliet xhur mid-data tas-sentenza taht penali ta' €59 kuljum fin-nuqqas.

“Illi b'sentenza moghtija fid-9 ta' Frar 2010, l-Onorabbli Qorti tal-Appell Kriminali fl-appell numru 84/2009 huwa gie liberat mit-tielet imputazzjoni minhabba preskrizzjoni pero` giet konfermata t-tieni imputazzjoni fl-interess taghha u bil-pieni hemm indikati.

“Illi kif jidher manifest mic-citazzjoni li originat il-proceduri kollha t-tieni imputazzjoni intrinsikament u necessarjament kwantu ghal zmien u kwantu ghal post jirreferu ghall-izvilupp imsemmi fi-ewwel imputazzjoni u cioe` l-barriera fl-inhawi fil-limiti ta' San Lawrenz, Ghawdex. Fl-ewwel imputazzjoni kien allegat illi kien qed isir zvilupp minghajr permess tal-awtorita`, liema zvilupp kien jikkonsisti fi <u>ftuh ta' barriera u qtiegh ta' gebel tal-franka kif ukoll ksur tal-ippjanar konsistenti billi ghandu estenzjoni tal-barriera minghajr il-permess mehtieg</u>. It-tieni imputazzjoni li taghmel referenza ghall-i*stop notice* illi kien hemm, hija bbazata fuq li naqas <u>iwaqqaf immedjatament l-imsemmi zvilupp, u jregga' lura s-sit ghall-istat originali</u>. Il-fatti, il-post u z-zmien huwa l-istess.

“Illi huwa manifest illi l-esponenti gie liberat milli kellu zvilupp minghajr permess tal-awtorita` u ghalhekk l-imputazzjoni li kien qieghed iqatta' l-blat jew jaghmel estenzjoni tal-barriera ma kinetx pruvata. It-tieni akkuza illi hija marbuta **bhala fatt** intrinsikament mal-ewwel wahda ma tistax tissusisti peress illi l-avviz jew *stop notice* kien ibbazat kjarament fuq il-premessa illi kien hemm zvilupp bla permess.

“Ghalkemm iz-zewg imputazzjonijiet ingabu fi procedura wahda necessarjament isegwi illi wara li nqatghet l-ewwel akkuza ma kellux jitkompla procediment fuq it-tieni, ghaliex giet nieqsa il-premessa kemm tal-ordni jew *stop notice*, ll-bazi taghha ma gietx accettata mill-Qorti li kien qed isir zvilupp minghajr permess u b'hekk ma setax jigi obbligat li jregga' lura s-sit ghall-istat originali ghaliex dak li kien qed jaghmel ma kienx effettivament kontra l-ligi.

“Illi l-Qorti tal-Appell Kriminali manifestament fil-paragrafi tas-sentenza taghha, u precizament fil-paragrafu 8 tghid "L-Awtorita` tal-lppjanar waslet ghall-konkluzjoni li fil-fatt huwa kien qabez il-konfini haga li l-istess appellant jammettiha ghalkemm jghid li dak iz-zmien, skont il-ligi, huwa seta' jaghmel hekk...." Biex jigi spjegat b'mod semplici, l-esponenti qed jikkontendi illi jekk f’akkuza ta' serq b'alternattiva tar-ricettazzjoni jirrizulta fl-ewwel akkuza illi mhux biss l-imputat ma seraqx imma lanqas kien hemm serq, ma jistax imbaghad jinstab hati tar-ricettazzjoni tal-istess oggett u fl-istess zmien . Altrimenti jkun qieghed jigi fuq l-istess fatt gudikat darbtejn.

“Il-Qorti Ewropea komposta bhala Grand Chamber fl-10 ta' Frar 2009 fil-kaz **Sergey Zolotukhin versus Russia** kellha tinvestiga l-interpretazzjoni tal-**artikolu 4 tal-protokol numru 7** li fuqu hija bbazata din l-azzjoni. Ir-raguni kienet illi kien hemm diversi sentenzi illi kienu konfiggenti. Peress li l-Konvenzjoni Ewropea titkellem fuq *offence* u cioe` reat - bid-divjet illi xi hadd jigi akkuzat darbtejn ghall-istess reat u kien hemm sentenzi ohrajn illi kienu jitkellmu fuq *the same fact* - l-istess fatt, dehrilha illi kellha taghmel gabra tal-gurisprudenza kollha u bhala Grand Chamber taghti direzzjoni u tiddefinixxi s-sitwazzjoni bl-interpretazzjoni korretta tal-**artikolu 4 tal-Kap 7**. Minn paragrafu 70 'il quddiem tal-istess sentenza tibda l-analazi tal-Qorti.

“Fil-paragrafu 82 tal-istess sentenza l-Qorti Ewropea iddecidiet *"[to]* ***take the view that Article 4 of protocol number 7 must be understood as prohibiting the prosecution or trial of a second offence in so far as it arises from identical fact of facts which are substantially the same****."*

“Illi f’dan il-kaz partikolari, wara illi nghatat is-sentenza tal-Qorti tal-Magistrati (Ghawdex) bhala Qorti ta’ Gudikatura Kriminali dwar l-ewwel akkuza ma sarx appell mill-Avukat Generali. Konsegwentament dik l-akkuza saret *res judicata* meta l-Onorabbli Qorti tal-Appell kienet qed tiggudika u tkompli l-proceduri fuq it-tieni imputazzjoni.

“Il-Qorti Ewropea qalet ukoll f’paragrafu 84 tal-istess sentenza *"The Court's enquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings."* Ta' min jghid illi din is-sentenza tal-Qorti Ewropea kienet unanima.

“Minn qari tas-sentenza tal-Appell Kriminali huwa manifest illi minkejja illi fuq l-istess fatti fl-istess zmien u cioe` qabel il-25 ta' Mejju 1999 li tirreferi kemm ghall-ewwel akkuza, kemm ghat-tieni akkuza u kemm ghat-tielet akkuza fl-istess post fl-inhawi tal-Ghansar, limiti ta' San Lawrenz, Ghawdex in konnessjoni ma’ barrier jew estenzjoni ta' barriera ghamel xoghol konsistenti fi tqattigh u estenzjoni.

“**Artikolu 7**

“L-**artikolu 7** tal-Konvenzjoni jolqot l-arbitrarjeta` u l-incertezza tal-ligi penali. Fis-sentenza **Kafkaris vs Cyprus**, il-Qorti Ewropea Grand Chamber 12 ta’ Frar 2008) qalet li mhux biss irid ikun hemm ic-certezza tal-ligi, imma anke wiehed irid jara l-kwalita` tal-ligi *"the quality of the law".*

“*The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see **S.W. vs the United Kingdom** and **C.R. vs the United Kingdom, 22 November 1995**. Series A no. 335-C, pp. 41-42, § 35, and pp. 68 and 69, §§ 33, respectively).*

"*Accordingly, it embodies, in general terms, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) (see* ***Kokkinakis vs Greece****, judgment of 25 May 1993. Series A no. 260-A, p. 22, § 52). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (Coeine and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; and Ac-hour, cited above. § 41)."*

"Huwa manifest li mhux bizzejjed l-opinjoni jew il-fehma tal-Awtorita` huma bizzejjed bhala fatt, haga li hija arbitrarja u tista' tkun arbitrarja mmens, imma jrid ikun hemm is-*substratum* tal-ksur tal-ligi tal-MEPA, u dan johrog mill-ordni moghtija. L-att tal-persuna akkuzata (*actus reus*) irid ikun ibbazat fuq ksur effettiv tal-ligi - haga li minhabba l-esponenti gie liberat.

"Is-semplici fatt ta' nuqqas ta' osservanza ta' ordni legali jrid ikun fih mhux biss n-nuqqas tal-ubbidjenza, imma li fattwalment tali ordni jkun hareg ghax kien hemm effettivament ksur. Altrimenti l-ligi penali tkun arbitrarja bl-applikazzjoni taghha, u tkun tiddependi fuq il-fehma, opinjoni, jew burdata tal-Awtorita`. *Stop Notice* tfisser li minkejja kull raguni wiehed ghandu jieqaf, u jibqa' wieqaf.

"L-avviz jaghmilha cara li l-premessa li fuqha huwa mibni huwa li kien hemm estenzjoni ta' barriera bla permess - haga li minnha gie liberat. Jekk formalment kien korrett l-avviz, certament ma kienx sostanzjalment korrett.

"Ghalhekk hemm *quality of law* deficjenti, arbitrarju. Dan hu ksur tal-**artikolu 7**.

"**Artikolu 6**

"Kif jirrizulta mis-sentenza tal-Appell Kriminali, l-avviz hareg fis-26 ta' Marzu 1998, u din id-data tikkostitwixxi l-*punto di partenza* tal-proceduri penali. L-akkuza formali

harget fl-4 ta' Awwissu 2000. Ghalkemm fi stadju tal-Appell ma kienx hemm dewmien. Imma s-sentenza finali nqatghet fid-9 ta' Frar 2009.

“Din kienet kawza sommarja!

“L-esponenti jaghmel riferenza ghas-sentenza tal-Qorti Kostituzzjonali **Francis Said vs Avukat Generali**. Dak kien kaz dwar kumpilazzjoni b'aspetti komplikati. Hawn *si tratta* ta' kawza sommarja.

“Ghaldaqstant l-esponenti jitlob bir-rispett illi din l-Onorabbli Qorti joghgobha: -

“1. Tiddikjara li kien hemm vjolazzjoni fil-konfront tal-esponenti taht l-**artikolu 4 tal-protokol numru 7, u l-artikolu 7, u l-artikolu 6 (1) tal-Konvenzjoni Ewropea** ghad-drittijiet tal-bniedem u konsegwentement thassar u tannulla l-istess jirrigwarda t-tieni imputazzjoni.

“2. Taghtih kumpens xieraq ghall-vjolazzjoni lamentati, inkluza r-rifuzjoni tal-multa kollha li jkun hallas ratealment.

“Rat li dan ir-rikors kien appuntat ghas-smigh ghas-seduta tal-25 ta’ Frar 2010.

“Rat ir-risposta tal-Avukat Generali ghar-rikors ntavolat mir-rikorrenti datat 25 ta’ Frar 2010 a fol. 13 tal-process fejn gie eccepit:-

“Illi t-talbiet rikorrenti huma nfundati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra r-rikorrenti.

“Illi l-argument tar-rikorrenti li l-kaz tieghu huwa kaz ta’ *'ne bis in idem'* ma jistax jigi accettat sempliciment ghall-fatt li kull akkuza li flimkien jaghmlu l-kaz kontra r-rikorrenti jirreferu ghall-fatti distinti u separati minn xulxin u minhabba f’hekk zgur ma tistax tigi accettata t-tezi tar-rikorrenti fir-rigward ta’ *ne bis in idem*;

“Illi fil-fatt t-tliet akkuzi kkoncernati jirreferu ghall-fatti kompletament separati u distinti in kwantu li l-ewwel

wahda tirefferi ghall-fatt li sar zvillup mhux awtorizzat, fit-tieni wahda r-rikorrenti naqas li jobdi avviz ta' twettiq u t-tielet wahda naqas li jobdi ordnijiet legittimi tal-awtorita` kompetenti li mhux necessarjament tirreferi ghall-msemmi avviz ta' twettiq;

“Illi ma segwiex li minhabba li giet ntavolata procedura wahda u minhabba li ladarba tittiehdet decizjoni fir-rigward tal-ewwel wahda allura neccessarjament it-tieni akkuza kellha necessarjament taqa’ u bl-istess argument l-fatt li giet deciza t-tieni akkuza ma jfissirx li t-tielet akkuza ma tistax treggi;

“Illi bir-rispett kollu dak li qed jghid r-rikorrenti f’paragrafu 10 r-reati in kwistjoni ma jirrizutax li huma *“arise from an identical fact or fact which are substantially the same”*;

“Illi fil-fatt, fatt minhom jirreferi ghall-istat ta' fatt li l-imputat ghamel zvillup bla permess, l-iehor ghall-fatt li ma ottemprax ruhu mal-avviz ta' twettiq u l-ahhar akkuza tirrigwarda nuqqas t'obbidjenza t'ordnijiet legittimi ta' awtorita` kompetenti;

“Illi ghandu jinghad li l-fatt wahdu u minnu nnifsu ta' nuqqas ta' ottempranza ghall-ordnijiet legittimi t'awtorita` pubblika - anke jekk eventwalment jirrizulta li dik l-ordni ma kellhiex ghalfejn tinhareg - minnha nnfisha huwa reat separat u distint mill-bqija u mhux kif qed jippretendi r-rikorrenti u zgur ma jfissirx li r-rikorrenti ghandu jiehu l-ligi b'idejh u jiddeciedi li jinjora l-ordni msemmija;

“Illi dak li qed jallega r-rikorrenti fir-rigward ta' dewmien zgur ma jistax jigi accettat *in vista* tal-fatt li biex jigu accertati certi fatti li minnhom nfushom jaghmlu l-*fattispeciae* tal-kaz, bil-fors kellu jittiehed certu ammont ta’ zmien u zgur ma jistax jigu mpuntat xi tip ta’ nuqqas da parti tar-rikorrenti f’dan ir-rigward;

“Ghaldaqstant l-esponenti filwaqt li jaghmel riferenza ghas-suespost u ghal kull prova jew sottimissjoni ohra li tista’ tingieb skont il-ligi, umilment jitlob lil din l-Onorabbli

Qorti sabiex tichad it-talbiet rikorrenti bl-ispejjez kontra l-istess rikorrenti.

“Rat il-verbal tas-seduta tal-25 ta’ Frar 2010 fejn meta ssejhet il-kawza dehru Dr. Joseph Bonello ghall-intimat u Dr. Joseph Brincat ghar-rikorrenti prezenti. Id-difensuri qablu li r-Registratur tal-Qorti tal-Appell Kriminali allega kopja tal-process kollu tal-kawza numru 84/09 deciz fid-9 ta’ Frar 2010. Il-Qorti laqghet it-talba u ordnat komunika tal-istess lir-Registrur tal-Qorti. Il-kawza giet differita ghall-kontinwazzjoni ghall-20 ta’ April 2010; u tal-20 ta’ April 2010 fejn meta ssejhet il-kawza dehru Dr. Joseph Brincat ghar-rikorrenti u Dr. Joseph Bonello ghall-intimat. Dr. Brincat nforma l-Qorti li pprezenta nota b’CD ta’ sentenza tal-Qorti Ewropea li giet notifikata lid-difensur tal-kontro-parti pero` li ma kienitx fil-process u allura gie ordnat li din tigi nserita fil-process. Id-difensuri talbu jaghmlu nota ta’ osservazzjonijiet. Il-Qorti laqghet it-talba u pprefiggiet terminu ta’ tletin (30) gurnata lir-rikorrenti bin-notifika/*visto* lid-difensur tal-kontro-parti li jkollu tletin (30) gurnata ghan-nota tieghu. Il-kawza giet differita ghas-sentenza in difett ta’ ostakolo ghat-28 ta’ Ottubru 2010.

“Rat ix-xhieda kollha hemm moghtija.

“Rat id-dokumenti esebiti.

Rat l-atti kollha l-ohra tal-kawza.

“**<u>II. KONSIDERAZZJONIJIET.</u>**

“Illi l-kawza illi ghandha quddiemha din il-Qorti hija kawza kostituzzjonali fejn ir-rikorrenti qed jallega li hemm ksur ta’ tlett artikoli: **l-artikolu 4 tal-Protokoll 7 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem u Libertajiet Fundamentali**; **l-artikolu 7 u l-artikolu 6 (1) tal-Konvenzjoni.**

“Illi permezz tal-ewwel parti tar-rikors tieghu, r-rikorrenti jsostni illi d-drittijiet tieghu skont dak indikat fl-**artikolu 4 tal-Protokoll 7 tal-Konvenzjoni** ma gewx osservati u dan peress illi l-principju sancit permezz tal-istess artikolu – *ne*

bis in idem ma giex osservat. Ir-rikorrenti qieghed jghid li dan sehh peress li fil-Qorti tal-Magistrati (Ghawdex) bhala Gidikatura Kriminali (u mbaghad fil-Qorti tal-Appell Kriminali), minkejja li l-ewwel zewg imputazzjonijiet fil-konfront tieghu ngiebu f'imputazzjoni wahda u cioe' illi (1) ghamel zvilupp jew halla li jsir zvilupp fuq art li huwa kien responsabbli ghaliha minghajr il-permess tal-awtorita` kompetenti u li kellu estensjoni ta' barriera minghajr il-permess mehtieg; u (2) li fl-istess zmien huwa naqas milli jobdi l-ordni tal-awtorita` biex jwaqqaf l-izvilupp, jsostni li wara li gie xolt mill-ewwel akkuza, ma kellux jitkomplew il-proceduri fuq it-tieni akkuza.

"Illi *in oltre*, permezz tat-tieni parti tar-rikors tieghu huwa jsostni illi kien hemm ksur iehor tad-drittijiet sanciti permezz tal-**artikolu 7 tal-Konvenzjoni** u dan peress li jikkontendi li skont huwa ma hijiex bizzejjed l-opinjoni jew il-fehma tal-Awtorita li tista' tkun arbitrarja biex wiehed jinzamm responsabbli izda jehtieg li jkun hemm "is-substratum tal-ksur tal-ligi tal-MEPA". Isostni in oltre illi l-att tal-persuna akkuzata – l-*actus reus* – irid ikun ibbazat fuq ksur tal-ligi - haga li minnha l-esponenti gie liberat. Isostni illi mhux bizzejjed illi tigi pruvata l-inosservanza ta' ordni legali, izda jehtieg li jirrizulta kien hemm effettivament ksur. Ghalhekk isostni li l-fatt kostituttiv tar-reat huwa arbitrarju u dan bi ksur tal-**artikolu 7 tal-Konvenzjoni**.

"Illi t-tielet branka tar-rikors hija bbazata fuq l-**artikolu 6 tal-Konvenzjoni**. Ir-rikorrenti jsostni illi gjaladarba l-proceduri kontrih bdew fis-26 ta' Marzu tal-1998 u spiccaw fid-9 ta' Frar 2009, il-proceduri kontra tieghu damu oltre z-zmien ragjonevoli u ghaldaqastanti d-dritt tieghu sancit permezz tal-**artikolu 6** ghal smiegh xieraq fi zmien ragjonevoli gie miksur.

"Illi min-naha tieghu, l-intimat jirrispondi billi jghid illi kull akkuza kontra r-rikorrenti tirreferi ghall-fatti distinti u separati minn xulxin u minhabba f'hekk zgur li ma tistax tigi accettata t-tezi tar-rikorrenti ta' *ne bis in idem.* In succint, l-eccezzjonijiet tal-intimat jghidu proprju hekk u cioe` li t-tliet akkuzi jirreferu ghal fatti distinti u separati in

kwantu li l-ewwel akkuza tirreferi ghar-reat illi sar zvilupp mhux awtorizzat filwaqt illi permezz tat-tieni akkuza, ir-rikorrenti gie akkuzat ili naqas li jobdi ordnijiet mahruga mill-awtorita` kompetenti. Isostni illi ma huwiex korrett li jinghad illi peress illi r-rikorrenti gie liberat minn akkuza wahda t-tieni akkuza kellha necessarjament taqa'. Jghid illi l-akkuzi ma jirrizultawx minn fatti identici jew sostanzjalment l-istess hekk kif sostnut mir-rikorrenti. In kwantu ghad-dewmien tal-proceduri li r-rikorrenti qieghed jibbazza parti mit-talbiet tieghu fuqhom, jirribatti billi jghid illi sabiex jigu accertati il-fatti tal-kaz, bil-fors li jkollu jittiehed ammont ta' zmien.

"Illi mill-atti processwali jirrizulta ppruvat li r-rikorrenti tressaq quddiem il-Qorti tal-Magistrati (Ghawdex) bl-akkuza (i) li fl-ahhar snin u qabel il-25 ta' Mejju 1999 huwa ghamel zvilupp jew halla li jsir zvilupp fuq art li taghha huwa responsabbli, minghajr il-permess tal-Awtorita` tal-Ippjanar ghal dan l-izvilupp konsistenti fi ftuh ta' barriera u qtiegh ta' gebel tal-franka fl-inhawi ta' Ghansar, limiti ta' San Lawrenz f'Ghawdex kif ukoll ksur tal-ippjanar konsistenti billi ghandu estensjoni tal-barriera minghajr il-permess mehtieg.; (ii) barra minn hekk r-rikorrenti tressaq bl-akkuza li fl-istess zminijiet naqas milli jobdi l-ordni tal-avviz biex jieqaf bin-numru ECF/455/98/ENMU/NENF datat 26 ta' Marzu 1998 sabiex iwaqqaf mmedjatament l-imsemmi zvilupp u sabiex jittiehdu dawk il-passi sabiex jieqaf il-ksur u sabiex iregga' lura s-sit ghall-istat originali; u (iii) ir-rikorrenti kien in oltre akkuzat ili naqas ili jobdi l-ordnijiet legittimi tal-awtorita` kompetenti.

"Illi b'sentenza tal-25 ta' Frar 2009, il-Qorti tal-Magistrati lliberat lir-rikorrenti mill-ewwel imputazzjoni u sabitu hati tat-tieni u t-tielet akkuza u kkundannatu jhallas multa ta' hamsin elf Ewro (€50,000) kif ukoll sena prigunerija sospiza ghal sena u ordnat li jregga` s-sit fl-istat li kien fi zmien tliet xhur mid-data tas-sentenza taht penali ta' disgha u hamsin (€59) kuljum fin-nuqqas.

"Illi jirrizulta illi r-rikorrenti appella mis-sentenza tal-25 ta' Frar 2009 hawn imsemmija u permezz tas-sentenza

mghotjia fid-9 ta' Frar 2010, l-Onorabbli Qorti tal-Appell Kriminali lliberat lir-rikorrenti mit-tielet imputazzjoni u kkonfermat s-sentenza appellata fil-bqija.

"(A) Kunsiderazzjonijiet dwar l-**artikolu 4 tal-Protokoll 7 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem u Libertajiet Fundamentali**.

"Illi kif inghad iktar 'il fuq, ir-rikorrenti qieghed isostni illi d-drittijiet tieghu sancit permezz tal-**artikolu 4 tal-Protokoll 7 tal-Konvenzjoni Ewropeja** gew miksura.

"Illi l-**artikolu 4 tal-Protokoll 7 tal-Konvenzjoni** jipprovdi illi persuna m'ghandhiex tigi ipprocessata jew ikkastigata darbtejn ghall-istess reat u fl-ewwel u t-tieni sub-inciz jipprovdi hekk:

"(1) Hadd ma jista' jkun ipprocessat jew jerga' jigi kkastigat ghal darb'ohra fi procedimenti kriminali taht il-gurisdizzjoni ta' l-Istess Stat ghal xi reat li dwaru jkun digà gie finalment liberat jew misjub hati skont *il-ligi u l-procedura penali ta' dak l-Istat.*

"(2) Id-disposizzjonijiet tal-paragrafu precedenti ma ghandhomx izommu milli l-kaz jerga' jinfetah skont *il-ligi u l-procedura penali ta' l-Istat inkwistjoni, jekk ikun hemm provi ta' xi fatti godda jew li jkunu ghadhom kif gew zvelati, jew inkella jekk ikun hemm xi vizzju fondamentali fil-procedimenti ta' qabel, li jista' jkollhom effett fuq kif jizvolgi l-kaz."*

"Illi r-rikorrenti qieghed isostni illi kien hemm ksur ta' dan id-dispostiv tal-ligi peress illi l-proceduri relatati mat-tieni imputazzjoni migjuba kontra tieghu kienu kemm kwantu ghaz-zmien u kemm kwantu ghal post jirreferu ghall-izvilupp imsemmi fl-ewwel imputazzjoni u cioe` il-barriera fl-inhawi fil-limiti ta' san Lawrenz f'Ghawdex. Isostni illi fl-ewwel imputazzjoni, r-rikorrenti kien akkuzat li kien qieghed jaghmel zvilupp jew ihalli li jsir zvilupp minghajr permess tal-awtorita`, liema zvilupp kien jikkonsisti fi ftuh ta' barriera u qtugh ta' gebel tal-franka kif ukoll ksur tal-ippjanar konsistenti billi ghandu estensjoni tal-barriera

minghajr il-permess mehtieg. It-tieni imputazzjoni hija li huwa naqas li jobdi avviz biex jieqaf datat 26 ta' Marzu 1998 u dan ghaliex naqas milli jieqaf milli jwaqqaf l-imsemmi zvilupp u li jregga' lura s-sit ghal-istat orginali. Ikompli jsostni r-rikorrenti li gjaladarba huwa gie liberat milli imputazzjoni illi kellu zvilupp minghajr permess tal-awtorita` tal-ippjanar, it-tieni imputazzjoni li hija intrinsikament marbuta mal-ewwel wahda ma tistax tissussisti peress illi l-avviz jew *stop notice* kien ibbazat kjarament fuq il-premessa li kien hemm zvilupp bla permess – imputazzjoni li r-rikorrenti gie lliberat minnha.

“Illi jidher anke illi l-ewwel akkuza migjuba fil-konfront tieghu saret ai termini tal-**artikolu 56 (1) (a) tal-Kap. 356 tal-Ligijiet ta' Malta** filwaqt illi t-tieni akkuza saret *ai termini* tal-**artikolu 56 (1) (c) tal-Kap. 356** u ghalhekk fuq zewgt disposizzjonijiet differenti tal-ligi. Jirrizulta ghalhekk li r-rikorrenti tressaq akkuzat fuq zewg disposizzjonijiet distinti tal-ligi.

“Illi fuq dan il-punt din il-Qorti taghmel referenza ghas-sentenza ricenti fl-ismijiet **“Il-Pulizija vs Richard Attard”** (Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali – 18 ta' Jannar 2010). F'din is-sentenza, il-Qorti gabret il-kazistika relevanti dwar dan il-principju ta' *ne bis in idem* u ghamlet kunsiderazzjonijiet approfonditi dwar dan. Fil-fatt elenkat il-kazistika lokali kemm dik mghotija mill-Onorabbli Qorti tal-Appell Kriminali kif ukoll dik mghotija mill-Onorabbli Qorti Kostituzzjonali; u wkoll trattat sentenzi mghotija mill-Qorti Ewropeja ghad-Drittijiet tal-Bniedem dwar dan il-punt. In kwantu dawn il-kunsiderazzjonijiet jolqtu proprju l-mertu tar-rikors odjern, il-Qorti ser tirriproduciehom hawn taht kif gej:

“(a) Meta fatt jivvjola aktar minn provvediment wieħed tal-Ligi.

*“Illi jista' jigri li l-istess fatt jista' jivvjola aktar minn provvediment wiehed tal-ligi u għalhekk jista' johloq diversi ragunijiet għall-inkriminazzjoni. X'inhu fatt kien spjegat fil-kaz ‘**Rex versus Rosaria Portelli’** fil-kaz deciz*

fit-23 ta' Frar, 1904 (Vol.XIX.P.IV p1). Il-Qorti kienet qalet hekk:

"*La legge intende il fatto principale in quanto meritevole di pena, o come altri si espresse non intende semplicemente il fatto storico o naturale nei suoi diversi momenti ma il fatto giuridco nel suo complesso."*

"Dwar dan il-Professur Mamo fin-Noti tiegħu dwar il-Procedura (pagina 45) jghid hekk:

"In any such case if the agent is tried for any one of the several violations of the law arising out of that fact, be it even the least serious, and a judgement is given, it shall not be lawful to subject the agent to another trial for the more serious violations."

*"This principle, first expressly affirmed in **"Rex versus Rosaria Portelli"** has now become settled law."*

*"Fil-fatt fit-2 ta' Dicembru, 1939, l-Imhallef Harding fil-kaz **'Camilleri versus Cilia'** kien qal li huwa principju stabbilit fil-gurisprudenza taghna li meta mill-istess fatt, mibni fuq l-istess intenzjoni, jinkisru zewg drittijiet jew aktar, m'hemmx pluralita' ta' offizi izda offiza wahda bil-vjolazzjoni li jkunu izgħar jkunu assorbiti fil-vjolazzjoni l-aktar serja. U jekk persuna tkun iggudikata ghal wahda mill-vjolazzjonijiet u jkun mehlus jew jinsab hati, is-sentenza izzomm kull prosekuzzjoni gdida li tista' ssir għal kull vjolazzjoni ohra, ukoll jekk il-vjolazzjoni li jkun tressaq fuqha l-ewwel darba tkun l-anqas wahda serja."*

*"Id-difiza ghamlet referenza wkoll għall-kaz **"Rex versus Agatha Mifsud et"** tal-15 ta' Gunju, 1918 (Vol, XXIII. Part I p.1077), kaz li huwa kkwotat ukoll mill-Professur Mamo f'pagina 44 ta' l-istess Noti citati. Il-Qorti kienet qalet hekk:-*

"L'eccezione sollevata dagli accusati ed accolta dalla Corte si fonda sul motivo che i fatti esposti nell'odierno atto di accusa per corruzione di minorenni sono quelli

stessi che furono addotti in un precedente giudizio per adulerio pel quale furono processati e liberati.”

“Illi lejn it-tmiem tas-sentenza l-Qorti ikkwotat b’approvazzjoni dak li qalet il-High Court Ingliza fil-kaz **“Regina versus Miles”** u qalet hekk:-

“No doubt it seems a little startling that a conviction for a common assault should afford an answer to a subsequent indictment for that same assault, upon conclusive evidence that it was accompanied by an intent to murder; but reason and good sense point out that, even at the risk of occasional miscarriages of justice when once a criminal charge has been adjudicated upon by a Court having jurisdiction, that adjucative ought to be final…….”

“<u>(b) Mill-kazistika tal-Onorabbli Qorti Kostituzzjonali.</u>

“Illi f’dan il-kamp zewg decizjonijiet tal-Qorti Kostituzzjonali huma relevanti:-

“(i) Dik fl-ismijiet **“Il-Pulizija (Spettur Angelo Caurana) versus Anthony Zammit, John Woods u Ahmed Esawi Mohamed Fakri”** ta’ l-10 ta’ Jannar 2005; u

“(ii) dik fl-ismijiet **“Il-Pulizija (Spettur Jesmond Borg) versus Kevin Gatt”** tal-15 t’April, 2008, li kkonfermat decizjoni ta’ din il-Qorti kif presjeduta datata 31 ta’ Lulju 2007.

“Illi fl-ewwel kaz il-Qorti Kostituzzjonali kienet sabet possibilita’ ta’ ksur tal-principju *“ne bis in idem”* minhabba li l-imputati kienu diga’ tilfu r-*remission* mill-perjodu ta’ prigunerija taghhom u allura, jekk jghaddu proceduri ohra quddiem il-Qorti, kien ikun qed jinkiser il-principju msemmi.

“Illi f’din id-decizjoni l-Onorabbli Qorti Kostituzzjonali kienet iffokat fuq il-kwistjoni jekk il-proceduri li l-imputati kienu ghaddew quddiem l-Awtoritajiet fil-Facilita’ Korrettiva ta’ Kordin kinux proceduri kriminali jew le. Il-

Qorti ddecidiet li dawn kienu proceduri kriminali u qieset *"il-loss of remission"* bhala piena kriminali.

"Illi fil-kawza **"Il-Pulizija versus Kevin Gatt"** l-Onorabbli Qorti Kostituzzjonali ezaminat jekk il-Kummissarju tal-Pulizija, wara li jkun ressaq persuna fuq ksur tal-kundizzjonijiet tal-liberta' provizzorja u dan kien punit, setax jibda procediment iehor billi jitlob espressament ghat-telfien tal-liberta' provvizorja ghaliex fl-ewwel rikors kien ghamel talba wahda. Il-Qorti Kostituzzjonali wkoll sabet li t-tieni procedura tikser il-principju ta' *"ne bis in idem".* Ovvjament hawn issir riferenza ghall dak li inghad fl-istess sentenza.

"<u>(c) Mill-kazistika tal-Qorti Ewropea Dwar id-Drittijiet tal-Bniedem.</u>

"Mid-decizjonijiet tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem il-Qorti qed tirreferi ghal dawn id-decizjonijiet:-

"Il-kaz **"Ponsetti and Chesnel versus France"** (decizjoni ta' l-14 ta' Settembru 1999) fejn r-rikorrenti kien allega li hemm ksur tal-principju tan-*"ne bis in idem"* ghaliex kien hemm sanzjonijiet amministrattivi kif ukoll kriminali minhabba li r-rikorrent ma kienx mela d-dikjarazzjonijiet tat-taxxa kien dikjarat mhux ammissibbli.

"Illi il-kaz **"Isaksen versus Norway"** kien jitratta dwar kundanna minhabba frodi tat-taxxa kif ukoll impozizzjoni tat-*tax surcharge* li kien dikjarat mhux ammissibbli. (decizjoni tat-2 t'Ottubru 2003)

"Illi kien hemm ukoll il-kaz **"Nilsson versus Sweden"** (deciz fit-13 ta' Dicembru 2005) fejn instab li kien hemm konnessjoni qawwija bejn il-kundanna tar-rikorrent minhabba offizi tat-traffiku u s-sospensjonital-licenzja tas-sewqan ghal tmintax-il xahar u ghalhekk ir-rikors kien dikjarat mhux ammissibbli.

"Illi fil-kazijiet **"Storbraten versus Norway"** (12277/04) u **"Mjelde versus Norway"** (11143/04) fejn kien hemm kundanna kriminali ghall-offizi dwar falliment wara li kienu

nhargu ordinijiet li bihom ir-rikorrenti kien skwalifikati milli jifformaw il-kumpaniji jew li jkunu diretturi u ghalhekk ir-rikorrenti allegaw ksur ta’ dan il-principju. Dan il-kaz kien ukoll dikjarat inammissibbli.

“Illi l-aħħar każ kien dak fl-ismijiet **“Franz Fischer versus Austria”** fejn jinhtieg li jinghataw aktar dettalji. Il-Qorti qed tipproduci l-aktar siltiet importanti:-

“THE FACTS

“I. THE CIRCUMSTANCES OF THE CASE

“On 6 June 1996, the applicant, whilst driving under the influence of drink, knocked down a cyclist who was fatally injured. After hitting the cyclist, the applicant drove off without stopping to give assistance and only gave himself up to the police later that night.

“On 13 December 1996, the St. Pölten District Administrative Authority (Bezirkshauptmannschaft), finding the applicant guilty of a number of road traffic offences, ordered him to pay a fine of 22,010 Austrian schillings (ATS) with twenty days’ imprisonment in default. This sentence included a fine of ATS 9,000 with nine days’ imprisonment in default imposed for driving under the influence of drink, contrary to sections 5 (1) and 99 (1)(a) of the Road Traffic Act 1960 (Straßenverkehrsordnung). On 18 March 1997 the St. Pölten Regional Court (Landesgericht) convicted the applicant under Article 81 § 2 of the Criminal Code (Strafgesetzbuch) of causing death by negligence “after allowing himself ... to become intoxicated ... through the consumption of alcohol, but not to an extent which exclude[d] his responsibility ...”, and sentenced him to six months’ imprisonment.”

“Omissis

“ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION.”

"The applicant alleged a violation of Article 4 of Protocol No. 7 which, so far as relevant provides as follows:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

"The applicant contended that he was punished twice for driving under the influence of drink, first by the District Administrative Authority under sections 5 (1) and 99 (1) (a) of the Road Traffic Act and, secondly, by the Regional Court, which found that the special circumstance of section 81 § 2 of the Criminal Code applied. In the applicant's view, the conviction by the criminal courts in its entirety, or at least the fact that the conviction was not limited to Article 80 of the Criminal Code, but also extended to Article 81 § 2, infringed Article 4 of Protocol No. 7. The applicant maintained that the present case was not comparable to the ***Oliveira v. Switzerland case*** *(judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V) as in that case the criminal courts had quashed the fine imposed by the police magistrate and stated that, if the fine had already been paid, it was to be deducted from the second fine. However, in his case two sentences were actually imposed".*

"Omissis

"The Court recalls that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see the Gradinger judgment cited above, p. 65, § 53)".

"As the Government pointed out, the Court's approach in the Gradinger and Oliveira judgments in order to determine whether the respective applicants were tried or punished again "for an offence for which [they had] already been finally acquitted or convicted" appears somewhat contradictory. The Court recalls that in each case two sets of proceedings arose out of one traffic

accident. In the Gradinger case, the applicant was first convicted by the criminal courts for causing death by negligence, but acquitted of the special element under Article 81 § 2 of "allowing himself to become intoxicated", where there was an irrebuttable presumption of intoxication with a blood alcohol level of 0.8 grams per litre. He was then convicted by the administrative authorities of driving "a vehicle under the influence of drink" contrary to sections 5 (1) and 99 (1)(a) of the Road Traffic Act, where the influence of drink is deemed present with a blood alcohol level of 0.8 grams per litre."

"In the Oliveira case, the applicant was first convicted by the police magistrate for failing to control her vehicle as she had not adapted her speed to the road conditions. Subsequently, she was convicted by the criminal courts of causing physical injury by negligence."

"In the Gradinger case the Court, while emphasising that the offences at issue differed in nature and aim, found a violation of Article 4 of Protocol No. 7 as both decisions were based on the same conduct (ibid., §§ 54-55). In the Oliveira case it found no violation of this provision, considering that it presented a typical example of a single act constituting various offences (concours idéal d'infractions) which did not infringe Article 4 of Protocol No. 7, since that provision only prohibited people being tried twice for the same offence (see the Oliveira judgment, previously cited, p. 1998, § 26). The Court observes that the wording of Article 4 of Protocol No. 7 does not refer to "the same offence" but rather to trial and punishment "again" for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. The Court, like the Austrian Constitutional Court, notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it

encompasses all the wrongs contained in the others (see paragraph 14 above). An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements".

"This view is supported by the decision in the case of ***Ponsetti and Chesnel v. France*** *(nos. 36855/97 and 41731/98 ECHR 1999-VI, [14.9.99]), relating to separate convictions for two tax offences arising out of the failure to submit a tax declaration, where the respondent Government also argued that this was an example of one act constituting more than one offence. Nevertheless, the Court examined whether the offences in question differed in their essential elements".*

"It can also be argued that this is what distinguishes the Gradinger case from the Oliveira case. In the Gradinger case the essential elements of the administrative offence of drunken driving did not differ from those constituting the special circumstances of Article 81 § 2 of the Criminal Code, namely driving a vehicle while having a blood alcohol level of 0.8 grams per litre or more. However, there was no such obvious overlap of the essential elements of the offences at issue in the Oliveira case".

"In the present case, the applicant was first convicted by the administrative authority for drunken driving under sections 5 (1) and 99 (1) (a) of the Road Traffic Act. In subsequent criminal proceedings he was convicted of causing death by negligence with the special element under Article 81 § 2 of the Criminal Code of "allowing himself to become intoxicated". The Court notes that there are two differences between the Gradinger case and the present: the proceedings were conducted in reverse order and there was no inconsistency between the factual assessment of the administrative authority and the

criminal courts, as both found that the applicant had a blood alcohol level above 0.8 grams per litre. However, the Court considers that these differences are not decisive. As said above, the question whether or not the non bis in idem principle is violated concerns the relationship between the two offences at issue and can, therefore, not depend on the order in which the respective proceedings are conducted. As regards the fact that Mr Gradinger was acquitted of the special element under Article 81 § 2 of the Criminal Code but convicted of drunken driving, whereas the present applicant was convicted of both offences, the Court repeats that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be tried twice. What is decisive in the present case is that, on the basis of one act, the applicant was tried and punished twice, since the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act, and the special circumstances under Article 81 § 2 of the Criminal Code, as interpreted by the courts, do not differ in their essential elements."

"The Court is not convinced by the Government's argument that the case was resolved due to the reduction of the applicant's prison term by one month, being equivalent to the fine paid in the administrative proceedings. The reduction of the prison term by virtue of the Federal President's prerogative of pardons cannot alter the above finding that the applicant was tried twice for essentially the same offence, and the fact that both his convictions stand. The Court therefore rejects the Government's preliminary objection based on the same argument".

"Finally, the Court observes that, in a case like the present, the Contracting State remains free to regulate which of the two offences shall be prosecuted. It further notes that the legal situation in Austria has changed following the Constitutional Court's judgment of 5 December 1996, so that nowadays the administrative offence of drunken driving under sections 5 (1) and 99 (1) (a) of the Road Traffic Act will not be pursued if the facts

also reveal the special elements of the offence under Article 81 § 2 of the Criminal Code".

"However, at the material time, the applicant was tried and punished for both offences containing the same essential elements. There has, thus, been a violation of Article 4 of Protocol No. 7".

"Illi applikati dawn l-insenjamenti ghall-kaz in ezami jinghad li hafna mill-kazistika kemm ta' Malta kif ukoll ta' barra aktar iddur dwar proceduri doppji jew jekk 'il-piena' jew kastig mghoti kienx ta' natura kriminali. Xi decizjonijiet tal-Qorti Ewropea Dwar id-Drittijiet tal-Bniedem kienu kkritikati ghax dehru kontradittorji. (Dwar dan ara **John A.E.Vervaele fl-Utrecht Law Review Volum 1 Issue Number 2 (December) 2005** http://www.utrechtlawreview.org/page102).

"Illi l-**artikolu 527 tal-Kap 9** jgħid hekk:-

'Wara sentenza li b'kawża tillibera imputat jew akkuzi, dan ma jistax ghall-istess fatt ikun suggett għal kawza ohra.'

"Omissis

"Illi mill-kazijiet hawn citati jidher li l-Qrati sabu li hemm 'l-istess fatt' meta l-azzjonijiet kollha kellhom tassew x'jaqsmu mal-istess fatt. Hekk fil-każ tal-**"Pulizija vs Rosaria Portelli"**, l-imputat kienet waddbet dish tal-fuhhar lejn Riccarda Borg. Id-dish tal-fuhhar laqat lil Riccarda Borg f'wiccha li rrizulta f'offiza hafifa. Izda framment laqat ghajn John Borg li kienu ghaddej ghall-affari tiegħu. Dan spicca jsofri offiza ta' natura gravi. Ezempju iehor tal-istess fatt johrog mit-tieni decizjoni hawn citata tal-Onorabbli Qorti Kostituzzjonali fejn persuna l-ewwel tressqet u nstabet hatja li kisret il-kondizzjonijiet tal-liberta' provizorja u imbagħad, wara l-kundanna, l-imputat tressaq biex jittratta akkuzi li jwasslu ghat-telf ta' bail.

"Illi ezempju iehor tal-istess fatt huwa dak fejn bniedem tressaq fuq adulterju u imbaghad, minhabba li l-adulterju

sar quddiem minorenni kien rega' tressaq quddiem il-Qorti dwar korruzzjoni ta' minorenni.

"Illi l-istess għamlet din il-Qorti kif preseduta fil-kawza '**Il-Pulizija vs Abu Nidar'** (15 ta' Settembru 2008) fejn qalet hekk:-

"Fil-fehma ta' din il-Qorti l-imputazzjonijiet odjerni u dawk li dwarhom il-Qorti tat decizjoni fit-28 t'April, 2006 huma prattikament l-istess fatti u huma maghqudin flimkien. Ir-reati msemmija fis-sentenza tat-28 t'April, 2006 kienu dwar it-tqegħid tad-droga f'karozza ta' terza persuna. L-imputazzjonijiet dwar il-ħolqien ta' reat kif ukoll l-irrapurtar falz lill-Pulizija huma intrinsikament marbuta mal-pussess tad-droga aggravat, l-aggravanti tad-distanza u l-assocjazzjoni biex dan isir. Ukoll jekk dan l-imputat ghandu imputazzjoni izjed mill-iehor – dik ta' l-ispaccjar tal-cannabis - xejn ma jnaqqas mill-fatt li z-zewg proceduri huma radikati fl-istess fatti. Il-Qorti hija tal-fehma li ma kienx hemm lok ghal spezzettar f'zewg charges".

"*Kien ikun mod iehor kieku persuna nstabet titlajja' għal skopijiet ta' prostituzzjoni u wara saret tfittxija fid-dar taghha u nstabet id-droga. Hawnhekk il-fatti mhux marbutin."*

Illi effettivament il-Professur Mamo fin-Noti dwar il-Procedura Kriminali jghid hekk:-

*'But it must be strongly emphasised that for the plea to succeed the fresh proceedings must be placed on the very same fact. (Criminal Appeal: **'Il-Pulizija vs Piscopo'** 21 ta' Marzu 1953). The mere circumstances that an act is done more or less at the same time (nello stesso contesto) as another act does not necessarily mean that they constitute one and the same fact, if the two are materially distinguishable as separate events. (v. Cr.App.**'Pulizija vs Saliba** 28/2/1953 and **Pol versus Cassar** 9/1/1954; cf also Cr.App **Police versus Attard**.')2*
"In any such case if the agent is tried for any one of the several violations of the law arising out of that fact, be it even the least serious, and a judgement is given, it shall

not be lawful to subject the agent to another trial for the more serious violations."

"Illi fid-dawl ta' dan kollu, u b'zieda ma dak illi inghad iktar 'il fuq, irid jinghad illi r-rikorrent ma giex mressaq darbtejn ghall-istess reat u lanqas ma gie mressaq darbtejn ghall-zewg reati li kellhom il-bazi taghhom l-istess fatt. Fil-fatt l-ewwel akkuza kontra tieghu tirrigwarda imputazzjoni ta' ksur tal-ligi in kwantu huwa wettaq jew halla li jsir zvilupp minghajr permess filwaqt illi t-tieni akkuza tirrigwarda nuqqas ta' osservanza tal-avviz ta' jieqaf mahrug mill-awtorita` kompetenti. Il-fatt illi r-rikorrenti gie liberat mill-ewwel akkuza ma jsegwix illi kellu bil-fors jigi liberat mit-tieni wahda proprju peress illi dawn ma jikkostitwux l-istess reat. Dan johrog car kemm mis-sentenzi moghtija mill-Qorti tal-Ewwel Istanza f'dan il-kaz presjeduta mill-Magistrat Giovanni Grixti, kif ukoll mid-decizjoni tal-Qorti tal-Appell Kriminali presjeduta mis-Sinjorija Tieghu l-Prim Imhallef Vincent De Geatano datata 9 ta' Frar 2010 u hawn issir riferenza ghall pagna 3 u 4 tal-istess sentenza tal-Qorti tat-tieni istanza li fiha tohrog id-differenza netta bejn in-natura taz-zewgt reati kontemplati, li huma ben distinti minn xulxin, u fil-fatt hekk gew trattati.

"Illi f'dan il-kuntest huwa sinifikanti l-fatt li fl-appell kriminali maghmul mill-istess rikorrenti odjern ma jirrizultax li dan l-aggravju, kif illum formulat tqajjem fl-istess sede kriminali u dan kif jirrizulta mir-rikors tal-appell tar-rikorrenti fil-proceduri kriminali datat 12 ta' Marzu 2009. Anzi jidher car mill-istess rikors li l-istess rikorrenti ghamel u fehem id-distinzjoni bejn l-ewwel akkuza u t-tieni akkuza, u li t-tieni akkuza kienet titratta nuqqas tar-rikorrenti li jobdi ordni legittima moghtija bl-avviz biex jieqaf, u fil-fatt l-aggravji tieghu kienu differenti sew mill-punti mqajjma f'dawn il-proceduri.

"Illi huwa veru li dawn huma procedura ta' natura kostituzzjonali, pero` l-argument tar-rikorrenti huwa llum li tali reat ma jistax jissussisti la darba huwa kien liberat mill-ewwel imputazzjoni, u ma kien hemm xejn x'jostakola lir-rikorrenti li jressaq dan l-aggravju fl-ewwel lok f'sede ordinarji kriminali, u dan huwa sinifikanti ghaliex kieku

fondat tali aggravju anke f’sede kriminali kien jipprovdi rimedju ordinarju. Izda jidher li r-rikorrenti dan ir-rimedju ordinarju ma utilizzahx.

“Illi din il-Qorti xorta wahda ezaminat dan il-punt hawn imqajjem mill-aspett ta` ksur ta’ drittijiet fundamentali tad-drittijiet tal-bniedem kif formulat f’dan ir-rikors u jirrizulta li l-allegazzjoni u l-fatt illi huwa naqas milli josserva l-avviz mahrug mill-awtorita`, dan il-fatt fih innifsu, jikkostitwixxi reat separat u indipendenti mill-fatt illi huwa ghamel zvilupp li skont l-awtorita` ma kienx skont il-ligi u allura taht dan l-aspett kostituzzjonali la hemm u lanqas jista’ jkun ksur tal-**artikolu 4 tal-Protokoll numru 7** u allura ghalhekk din il-Qorti ma tarax kif l-**artikolu 4 tal-Protokoll 7** seta’ gie miksur bil-proceduri migjuba kontra l-istess rikorrenti u ghalhekk dan l-ilment fuq din il-kaz qed jigi michud.

“Illi dwar l-allegat ksur tal-**artikolu 7 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem u Libertajiet Fundamentali** jinghad li l-ilment tar-rikorrenti huwa bbazat in oltre fuq it-tielet artikolu u cioe` l-**artikolu 7 tal-Konvenzjoni Ewropeja** li jipprovdi illi:-

“Hadd ma ghandu jitqies li jkun hati ta’ reat kriminali minhabba f’xi att jew ommissjoni li ma kinux jikkostitwixxu reat kriminali skont *ligi nazzjonali jew internazzjonali fil-hin meta jkun sar. Lanqas ma ghandha tinghata piena akbar minn dik li kienet applikabbli fiz-zmien meta r-reat kriminali jkun sar.”*

“It-tieni sub-inciz jipprovdi illi:-

“(2) Dan l-Artikolu ma ghandux jippregudika l-proceduri u l-applikazzjoni tal-piena ta’ xi persuna ghal xi att jew ommissjoni li, fiz-zmien meta jkun sar, kien kriminali skont *il-principji generali tal-ligi rikonoxxuti min-nazzjonijiet civilizzati.”*

“Illi huwa risaput illi dan l-artikolu jipprojbixxi li persuna tigi akkuzata b’reat meta fil-mument meta hija ikkommettiet l-att, dak l-att ma kienx jammonta ghal reat u ghalhekk dan

l-artikolu qieghed johloq projbizzjoni ghall-applikazzjoni retroattiva` tal-ligi penali; qieghed jipprovdi illi persuna tista' titressaq biss ghal reat illi kien jammonta ghal tali meta gie kommess l-att u finalment dan l-artikolu qieghed jipprovdi ghall-obbligu tal-istat illi johloq certezza legali – *legal certainty* – b'mod illi sabiex l-individwu jkun jaf jekk l-azzjoni hijiex wahda kriminali jew le, jehtieg li l-ligi li tikkostitwixxi dak ir-reat tkun accessibbli u cara.

"Illi f'dan is-sens mill-kazistika tal-Qorti Ewropeja fil-kaz **"Kokkinakis vs Greece"** (25 ta' Mejju 1993) gie ritenut li:-

"…Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."

"Illi fil-kaz in ezami u kif jirrizulta mir-rikors promotur, ir-rikorrenti jsostni illi l-proceduri migjuba kontra tieghu kisru d-drittijiet fundamentali tieghu in kwantu, skont hu, ma huwiex bizzejjed l-opinjoni jew il-fehma tal-Awtorita li tista' tkun arbitrarja biex wiehed jinzamm responsabbli izda jehtieg li jkun hemm "is-substratum tal-ksur tal-ligi tal-MEPA". Kif inghad iktar 'il fuq, huwa jsostni illi l-att tal-persuna akkuzata – l-*actus reus* – irid ikun ibbazat fuq ksur tal-ligi - haga li minnha l-esponenti gie liberat. Isostni illi mhux bizzejjed illi tigi pruvata l-inosservanza ta' ordni legali, izda jehtieg li jirrizulta kien hemm effettivament ksur. Isostni ghalhekk illi l-fatt kostituttiv tar-reat huwa arbitrarju u dan bi ksur tal-**artikolu 7 tal-Konvenzjoni**.

"Illi fid-dawl tal-**artikolu 7** innifsu, din il-Qorti ma tarax kif u b'liema mod id-dritt tar-rikorrenti sancit f'dan l-istess artikolu gie miksur in kwantu din il-Qorti ma jirrizultalhiex li r-rikorrenti instab hati ta' reat kriminali minhabba att jew ommissjoni li ma kinux jikkostitwixxu reat kriminali skont il-ligi nazzjonali jew internazzjonali fil-hin meta r-reat sehh, hekk kif jipprovdi dan l-istess artikolu. Fil-fatt jirrizulta car, kemm mis-sentenza tal-prim istanza, u kemm minn dik tal-appell li li r-reat li tieghu r-rikorrenti odjern instab hati tieghu kien in-nuqqas tieghu li jobdi l-ordni ta' l-avviz biex jieqaf mahruga skont id-disposizzjonijiet appositi tal-**Kap. 356** u precisament l-**artikolu 56 (1).** Fil-fatt huwa car li gie trattat l-agir tal-imputat li huwa naqas li josserva tali ordni, *"ordni li kienet legittima in kwantu l-avviz kien regolari fil-forma u fil-kontenut tieghu, u ghalhekk kellhu jigi osservat".* Dan bhala fatt lanqas gie kontestat mir-rikorrenti odjern bla ebda mod fl-istess procedure jew ohrajn disponibbli lilu skont l-ligi. Din il-Qorti lanqas ma qed tara li r-rikorrenti nghata piena akbar minn dik li kienet applikabbli fiz-zmien meta r-reat kriminali sar.

"Illi in kwantu ghall-fatt illi r-rikorrenti qieghed jibbaza l-argument tieghu fuq l-arbitratrjeta` u l-incertezza tal-ligi penali, lanqas tista' l-Qorti tara kif il-ligi f'dan is-sens hija wahda arbitrarja. Hija ta' rilevanza s-sentenza fl-ismijiet **Il-"Pulizija vs Lorainne Falzon"** (P.A. (Sede Kostituzzjonali – 2008) fejn il-Qorti ma sabitx ksur ta' l-**artikolu 7 tal-Konvenzjoni** u fejn f'din il-kawza gie argumentat mir-rikorrenti illi l-incertezza tal-ligi tikser l-**artikolu 7 tal-Konvenzjoni** izda l-Qorti rriteniet illi jekk l-agir tal-individwu jkun tali illi huwa, kif sejhitlu din il-Qorti, *reasonably foreseeable* illi l-imputat kien ser jikkometti reat, mela dan ma jistax wara jargumenta illi hemm incertezza fil-ligi u ghalhekk hemm ksur tal-**artikolu 7 tal-Konvenzjoni.**

"Illi huma wkoll ta' rilevanza fost ohrajn is-sentenzi fl-ismijiet **"Cantoni vs France"** (15 ta' Novembru 1996); u **"Streletz, Kessler and Krenz vs Germany"** (Qorti Ewropeja – 22 ta' Marzu 2001). In kwantu ghas-sentenza li rrefera ghaliha r-rikorrenti u cioe` is-sentenza fl-ismijiet **"Kafkaris vs Cyprus"** (12 ta' Frar 2008), jinghad illi

minkejja illi l-Qorti sabet ksur tal-**artikolu 7 tal-Konvenzjoni**, din l-istess Qorti rriteniet ukoll illi:-

*"The Court has acknowledged in its case-law that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, mutatis mutandis, **Sunday Times** no. 1, cited above, p. 31, § 49, and **Kokkinakis**, cited above, p. 19, § 40). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, mutatis mutandis, **Cantoni**, cited above). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (see **S.W. v. the United Kingdom**, cited above, § 36, and **Streletz, Kessler and Krenz v. Germany** [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II)."*

"Illi fil-kaz in ezami jidher car illi ma hemmx ksur tal-**artikolu 7 tal-Konvenzjoni** in kwantu l-ligi f'dan il-kamp ma hija bl-ebda mod arbitrarja hekk kif sostnut mir-rikorrenti. Il-Qorti ma tikkondividix dak sostnut mir-rikorrenti u cioe` illi l-ligi penali f'dan il-kamp tiddependi mill-*"fehma, opinjoni, jew burdata tal-Awtorita`".* Il-fatt illi l-avviz mahrug mill-awtorita` huwa ezercitat b'diskrezzjoni, ma ghandux jkun awtomatikament konkluz illi tali decizjoni ttiehdet b'mod arbitrarju. Ghalhekk il-Qorti ma hijiex tal-fehma illi hemm ksur tal-**artikolu 7 tal-Konvenzjoni** hekk kif allegat mir-rikorrenti.

“Illi dwar l-allegat ksur tal-**artikolu 6 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem u Libertajiet Fundamentali** jinghad li r-rikorrenti wkoll ressaq dawn il-proceduri bl-ilment illi l-proceduri kontra tieghu damu iktar minn dak li huwa meqjuz bhala zmien ragonevoli. Jidher illi l-avviz kontra tieghu inhareg fis-sena 2000. Is-sentenza mill-Qorti tal-Magistrati inghatat fil-25 ta’ Frar 2009 u kwazi sena wara, fid-9 ta’ Frar 2001, il-Qorti tal-Appell Kriminali tat is-sentenza taghha.

“Illi l-**artikolu 6 tal-Konvenzjoni Ewropeja** li jipprovdi illi:

“Fid-decizjoni tad-drittijiet civili u ta’ l-obbligi tieghu jew ta’ xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b’ligi. Is-sentenza ghandha tinghata pubblikament izda l-istampa u l-pubbliku jista’ jigi eskluz mill-proceduri kollha jew minn parti minnhom fl-interess tal-morali, ta’ l-ordni pubbliku jew tas-sigurtà nazzjonali f’socjetà demokratika, meta l-interessi tal-minuri jew il-protezzjoni tal-hajja privata tal-partijiet hekk tehtieg, jew safejn ikun rigorozament mettieg fil-fehma tal-qorti f’cirkostanzi specjali meta l-pubblicità tista’ tippregudika l-interessi tal-gustizzja.”

“Illi ghalhekk din il-Qorti trid tikkunsidra jekk fil-fatt il-proceduri kontra r-rikorrenti fil-fatt damux oltre z-zmien ragonevoli.

“Illi l-ewwel nett, din il-Qorti tosserva illi l-gurisprudenza stabbiliet tliet kriterji sabiex jigi determinat jekk smigh sarx fi zmien ragjonevoli kif mitlub fl-**artikoli 39 (2) tal-Kostituzzjoni** u **6 (1) tal-Konvenzjoni Ewropeja** u fil-fatt illi l-Qorti trid tikkunsidra:-

“1. in-natura jew komplessita` tal-kaz in kwistjoni;
“2. kondotta tal-partijiet fil-kawza;
“3. il-mod kif dawk il-proceduri gew trattati u kondotti mill-awtorita` gudizzjarja stess.

“Illi f’dan is-sens huma s-sentenzi fl-ismijiet **“George Xuereb vs Registratur tal-Qrati”** (Q.K. – 8 ta’ Novembru

2004) u **"Francis Said et vs L-Avukat Generali"** (P.A. (Sede Kostituzzjonali) – 18 ta' Gunju 2008), li jaghmel referenza ghaliha r-rikorrenti stess. B'referenza ghal din il-kawza, jrid jinghad illi l-proceduri ma kinux ta' natura kriminali u d-dewmien kien ta' ben tlieta u tletin (33) sena.

"Illi tenut kont ta' dan u sabiex il-Qorti taghraf tara jekk hemmx lezjoni tad-dritt sancit permezz tal-**artikolu 6 tal-Konvenzjoni** trid taghmel dan ukoll fid-dawl tal-obbligu tal-istat versu c-cittadin illi jassigura illi dan tal-ahhar ikollu smiegh xieraq entru zmien ragonevoli. Fil-kaz **"John Bugeja vs L-Avukat Generali et"** (Q.K.– 8 ta' Novembru 2003), l-Onorabbli Qorti Kostituzzjionali rriteniet illi:-

"Meta jinstab li kawza damet pendenti ghal zmien twil u damet irragonevolment biex inqaghtet, ikun gudizzju simplicistiku wisq li tintefa' l-htija ghad-dewmien fuq l-imhallef partikolari li jkun sema' l-istess kawza li damet. Ikun gudizzju x'aktarx immensament ingust li takkuza jew li tinsinwa li dak l-imhallef partikolari ikun tghazzen, tnikker jew generalment ma kienx diligenti f'xoghlu. Dan ghaliex, fil-verita`, l-abilita` ta' dak l-imhallef li jiddisponi mill-kawzi fi zmien ragonevoli ma tiddependix biss fuq il-kwalitajiet intrinsici u personali tieghu, izda, fil-parti l-kbira tiddependi fuq l-effikacja o meno ta' l-ambjent li jahdem fih. Fost il-fatturi li jikkondizzjonaw dan l-ambjent, insibu n-numru kbir ta' kawzi "qodma" (backlog) li "jitghabba" bih appena jilhaq imhallef, in-numru sinjifikanti ta' kawzi godda li jigu assenjati lilu regolarment, u dawk li jista' "jiret" meta jirtira xi gudikant, il-kwalita` u l-kumplessita` ta' l-istess kawzi, jekk l-imhallef jinghatax persuni debitament kwalifikati biex jassistuh, jekk jinghatax r-rizorsi necessarji biex jaghmel ir-ricerka tieghu, biex izomm ruhu aggornat fl-istudji tieghu, u biex isib il-hin necessarju ghad-deliberazzjoni u l-kitba tas-sentenzi."

"Id-dritt fundamentali ta' l-individwu li jkollu l-kawza tieghu mismugha u finalizzata eghluq iz-zmien ragonevoli, jimponi tassattivament fuq l-istat, li jrid josserva s-Saltna tad-Dritt, l-obbligu li jkollu fis-sehh sistema efficjenti t' amministrazzjoni tal-gustizzja. Il-gudikatura tifforma t-tielet kolonna li fuqha hu mibni l-istat. Fis-sistema taghna, huma

z-zewg kolonni l-ohra ta' l-istat, cjoe` l-ezekuttiv u l-legislattiv, li ghandhom obbligu li jipprovdu r-rizorsi, l-istrutturi u l-ghodod l-ohra kollha necessarji biex il-Qrati jkunu f' pozizzjoni li jwettqu l-gustizzja fi zmien ragonevoli".

*"Il-Qorti Ewropeja tad-Drittijiet tal-Bniedem dejjem ghallmet li l-**artikolu 6 tal-Konvenzjoni**:*

*"…. imposes on the Contracting States the duty to organise their juridical system in such a way that the Courts can meet the requirements of this provision **Salesi vs Italy** (26/02/1993). It wishes to reaffirm the importance of administerting justice without delays which might prejudice its effectiveness and credibility **Katte Klitsche de la Grange vs Italy** (27/10/1994) – (ara **A.P. vs Italy** 28/07/1999 Application 35265/97 – para. 18).*

*20. Biex wiehed jasal ghal decizjoni jekk kawza inqaghtetx fi zmien ragonevoli jew le, wiehed irid iqis il-fattispecji u c-cirkostanzi partikolari tal-kaz, fosthom "the complexity of the case, and …. the conduct of both the applicant and the competent authorities (**Buchholz vs Germany** 06/05/1981 para. 49), kif ukoll "the importance of what was at stake for the applicant in the litigation" (**Gast & Popp vs Germany** 25/02/2000 para. 70)." [emfazi mizjuda]".*

"Illi applikati dawn il-principji ghall-kaz in ezami, jinghad illi perjodu ta' ghaxar snin ghal proceduri li huma ta' natura sommarja certament ma huwiex qasir. Jidher illi minn ezami tal-atti processwali illi l-Qorti tal-Magistrati fil-fatt, minhabba indisposizzjoni, kellha ghal diversi drabi tiddiferixxi l-kawza ghal data ohra. Jidher ukoll pero` illi r-rikorrenti u d-difensur tieghu wkoll talbu numru sostanzjali ta' differimenti *oltre* dawk id-drabi illi r-rikorrenti, ghalkemm debitament notifikat, ghazel li ma jidhirx ghas-seduta. Illi allura, issa f'din is-sede, din il-Qorti thoss li f'dawn ic-cirkostanzi fejn r-rikorrenti stess kien ukoll kawza ghad-dewmien fl-eghluq ta' dan il-proceduri, huwa ma jistax issa jilmenta illi l-proceduri kontra tieghu damu iktar miz-zmien ragjonevoli meta allura jirrizulta li huwa

stess kien kompartecipi fil-maggor parti tad-dewmien illi kien hemm f'dawn il-proceduri.

"Illi ghalhekk din il-Qorti ma ssibx ksur tal-**artikolu 6 tal-Konvenzjoni**.

"**III. KONKLUZJONI.**

"Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi,** billi fil-waqt li tilqa' l-eccezzjonijiet kontenuti fir-risposta tal-intimat datata 25 ta' Frar 2010 biss inkwantu konsistenti ma' dak hawn deciz, **tichad it-talbiet tar-rikorrenti kontenuti fir-rikors tieghu tas-17 ta' Frar 2010** u dan ghaliex huma nfondati fil-fatt u fid-dritt ghaliex kif inghad ma hemmx ksur fil-konfront tar-rikorrenti tad-drittijiet fundamentali tal-bniedem hemm indikati taht l-**artikolu 4 tal-Protokoll numru 7**, u tal-**artikoli 7** u **6 tal-Konvenzjoni Ewropeja dwar id-Drittijiet u l-Libertajiet Fundamentali tal-Bniedem** u in vista ta' dan qed tirrevoka d-digriet taghha tal-11 ta' Mejju 2010 fejn issospendiet il-pagamenti rateali tal-multa kif inflitta bis-sentenza tal-Qorti tal-Appell Kriminali tad-9 ta' Frar 2010, b'dan li tali sentenza ghandha tigi esegwita anke kif indikat fid-digriet tal-Qorti tal-Appell Kriminali datata 15 ta' Frar 2010.

"Illi l-ispejjez ta' dawn il-proceduri huma a karigu tar-rikorrenti.

Rikors tal-appell tar-rikorrent

Ir-rikorrent hassu aggravat bis-sentenza surriferita tal-ewwel Qorti u interpona appell minnha b'rikors prezentat fit-3 ta' Novembru 2010.
In succinct l-aggravji tieghu huma s-segwenti:

Aggravju dwar l-Artikolu 4 tas-7 Protokoll (ne bis in idem)

L-appellant isostni li meta huwa gie liberat mill-ewwel akkuza li kien qed jaghmel xi haga llegali fil-proprjeta` tieghu, waqghet il-bazi tat-tieni akkuza li kellu jobdi ordni biex jieqaf minn zvillup illegali. Fl-Appell huwa kellu

gudikat favur tieghu[1] li ma ghamilx zvilupp illegali ghalhekk il-Qorti ma setghetx tkompli tikkunsidra fi stadju sussegwenti u tistabilixxi li kien hemm zvilipp illegali tant li anke hemm ordni li jrid iqieghed kollox kif kien taht penali.

Aggravju dwar ksur tal-Artikolu 7 tal-Konvenzjoni (arbitrarjeta` fl-applikakzzjoni tal-ligi penali).

Illi biex ordni tkun legittima, mhux rikjest biss il-forma u l-kontenut taghha, imma l-ordni trid tkun ibbazata fuq il-ligi. F'dan il-kaz, skont l-appellant, il-bazi tal-ordni kienet illi kien qieghed jghamel zvilupp illegali. Ghalhekk jekk ma kien qed isir xejn illegali, l-Awtorita` ma kellha l-ebda dritt illi tesigi ubbidjenza ghamja ghall-ordinijiet taghha. Dan igib arbitrarjeta` fil-ligi penali.

Aggravju dwar it-tul tal-proceduri Artikolu 6(1).

L-appellant jaghmel referenza ghall-fatt illi dam disa' snin fi proceduri li kienu sommarji. Hu jsostni li mqar jekk f'partijiet kellu htijiet hu, imma huma l-Qrati li jistghu jordnaw u jinsistu illi l-proceduri jsiru f'qasir zmien. Li kawza sommarja ddum biex tigi deciza disa' snin huwa terminu irragonevoli taht kwalunkwe konsiderazzjoni.

Ghal dawn ir-ragunijiet ir-rikorrent talab li din il-Qorti tirrevoka s-sentenza appellata u minflok tilqa' t-talbiet tieghu kif dedotti bl-ispejjez taz-zewg istanzi kontra l-intimat appellat.

Risposta tal-intimat appellat.

L-intimat appellat ipprezenta r-risposta tieghu fejn l-aggravji relattivi tal-appellant gew kollha kontestati u ghar-ragunijiet minnu premessi, talab li din il-Qorti joghgobha tikkonferma s-sentenza tal-ewwel Qorti, bl-ispejjez taz-zewg istanzi kontra l-appellant.

Fatti mertu tal-kawza

[1] Ma sarx appell mill-ewwel akkuza mill-prosekuzzjoni.

Qabel ma tghaddi sabiex tikkonsidra l-aggravji tal-appellant, din il-Qorti thoss li jkun qabel xejn opportun illi taghti sfond fil-qosor tal-fatti kollha mertu tal-kawza.

Ir-rikorrent kien gie akkuzat quddiem il-Qorti tal-Magistrati (Ghawdex) bhala Qorti ta’ Gudikatura Kriminali talli ghamel zvilupp konsistenti fi ftuh ta' barriera u qtugh ta' gebel tal-franka fl-inhawi ta' Ghansar, limiti ta' San Lawrenz, Ghawdex kif ukoll bi ksur tal-ippjanar konsistenti f’estensjoni ta’ barriera minghajr il-permess mehtieg. Ir-rikorrent gie akkuzat inoltre li fl-istess zminijiet naqas li jobdi l-ordni tal-avviz biex jieqaf numru ECF/445/98/ENMU/NENF datat 26 ta' Marzu, 1998 sabiex iwaqqaf immedjatament l-imsemmi zvilupp u li naqas li jobdi l-ordnijiet legittimi tal-Awtorita` Kompetenti.

B’sentenza tal-Qorti tal-Magistrati tal-25 ta’ Frar 2009 ir-rikorrent gie liberat mill-ewwel akkuza izda nstab hati tat-tieni u tielet akkuza. Hu appella minn dik is-sentenza u l-Qorti tal-Appell Kriminali f’sentenza tad-9 ta’ Frar 2010 liberat lir-rikorrent mit-tielet akkuza wkoll, pero` kkonfermat it-tieni imuptazzjoni.

<u>Konsiderazzjonijiet ta’ din il-Qorti</u>

Aggravju dwar l-Artikolu 4 tal-Protokoll numru 7.

F’dan l-aggravju l-appellant jikkontendi li fuq l-istess fatti li huma sostanzjalment l-istess, huwa m’ghandux jigi processat darbtejn. Isostni li kemm l-ewwel imputazzjoni (li gie liberat minnha) u kemm it-tieni imputatzzjoni jirreferu ghall-istess zvilupp u fl-istess zminijiet. Ghalhekk la darba hu gie liberat mill-ewwel akkuza, ma jistax jinghad fit-tieni akkuza li hu ghamel zvilupp kontra l-ligi.

L-ewwel Qorti (Sede Kostituzzjonali) iddecidiet illi r-rikorrent ma giex mressaq darbtejn ghall-istess reat u lanqas ma gie mressaq darbtejn ghall-zewg reati li kellhom il-bazi taghhom l-istess fatt. Hi qalet li l-ewwel akkuza kontra r-rikorrent tirrigwarda imputazzjoni ta’ ksur tal-ligi in kwantu huwa wettaq jew halla li jsir zvilupp minghajr permess filwaqt li t-tieni akkuza tirrigwarda

nuqqas ta’ osservanza tal-avviz ta’ twaqqif mahrug mill-awtorita` kompetenti. Il-fatt illi r-rikorrenti gie lliberat mill-ewwel akkuza, skont l-ewwel Qorti, ma jsegwix li kellu bil-fors jigi liberat mit-tieni wahda, proprju peress illi dawn ma jikkostitwux l-istess reat. L-allegazzjoni u l-fatt illi huwa naqas milli josserva l-avviz mahrug mill-awtorita`, dan il-fatt fih innifsu, jikkostitwixxi reat separat u indipendenti mill-fatt illi huwa ghamel zvilupp li skont l-awtorita`ma kienx skont il-ligi. L-ewwel Qorti ghalhekk ikkonkludiet li taht dan l-aspett la hemm u lanqas jista’ jkun ksur tal-Artikolu 4 tal-Protokoll numru 7.

Id-dispozizzjoni tal-Konvenzjoni li fuqha l-appellant qed jibbaza l-ewwel aggravu tieghu f’din il-kawza hija s-segwenti:

4(1) “Hadd ma jista’ jkun ipprocessat jew jerga jigi kkastigat ghal darb’ohra fi procedimenti kriminali taht il-gurisdizzjoni tal-istess Stat ghal xi reat li dwaru jkun diga` gie finalment liberat jew misjub hati skont il-ligi u l-procedura penali ta’ dak l-Istat.”

Din id-dispozizzjoni ghandha l-ghan li, salv ghall-eccezzjoni fit-tieni inciz taghha – li m’hijiex relevanti f’dan il-kaz – tassigura li persuna ma tigix assoggettata darbtejn ghall-proceduri li jkunu essenzjalment ta’ natura penali ghall-istess reat, salv naturalment, li l-ewwel proceduri jkunu gew finalment konkluzi (cioe` l-ewwel decizjoni tkun ghaddiet in gudikat). Din id-dispozizzjoni ma tipprojbix li persuna tghaddi proceduri penali ghall-istess reat fi Stat iehor.

L-appellant jaghmel referenza partikolari ghal kaz ta’ **Zolotukhin v Russia**[2]**,** sentenza mill-Grand Chamber tal-Qorti ta’ Strasbourg. F’dak il-kaz il-Qorti elenkat il-kazijiet li kienu jikkoncernaw l-applikazzjoni tal-Artikolu 4 tal-Protokoll 7 minn fejn jidher li l-Qorti kienet ittrattat din il-kwistjoni dwar “*whether the offences for which an applicant was prosecuted were the same*”, b’diversi modi. Il-Qorti pero` mbaghad ghaddiet biex tindika l-linja li hi

[2] Application no. 14939/03 10th February 2009

kienet ser tiehu biex tarmonizza il-mod kif il-kwistjoni kellha tigi kkunsidrata biex ma tibqax incertezza. Hi qalet hekk:
“The Court considers that the existence of a variety of approaches to ascertaining whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence. It is against this background that the Court is now called upon to provide a harmonised interpretation of the notion of the “same offence” – the *idem* element of the *non bis in idem* principle – for the purposes of Article 4 of Protocol No. 7. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 56, ECHR 2007-...)”.para 78.

Wara li ezaminat id-dokumenti internazzjonali li jinkorporaw il-principju tan-*non bis in idem* f’forma jew ohra, il-Qorti sabet li mhux dejjem tintuza l-istess terminologija biex jigi spjegat dan il-principju. Il-Qorti kkonkludiet ghalhekk li hija kienet favur “adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant”. Dan ghaliex “the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention. (compare *Franz Fischer*, cited above, § 25).

Ghalhekk il-Qorti kienet tal-fehma li “Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution

or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same” [Para 82] u li “The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings”.

Applikati dawn il-principji ghall-kaz in ezami din il-Qorti taghmel referenza ghas-sentenza tal-Qorti tal-Magistrati (Ghawdex) tal-25 ta’ Frar 2009 li lliberat lir-rikorrent (allura imputat) mill-ewwel akkuza billi ma kienx gie ppruvat[3] mill-prosekuzzjoni liema kienet l-*area* koperta bil-permess u ghalhekk il-Qorti ma setghetx issib l-imputat hati li estenda l-barriera tieghu oltre l-konfini lilu indikati fil-licenzja tal-Pulizija kif gie akkuzat fl-ewwel imputazzjoni. Izda l-istess Qorti ddecidiet ukoll li meta l-Awtorita` tal-Ippjanar indunat li l-barriera kienet, skont hi, estiza oltre dak li klien precedentement licenzjat, harget ordni sabiex l-imputat jieqaf mill-izvilupp, haga li l-imputat ma ghamilx ghax deherlu li biex jieqaf hu, kellhom jieqfu s-sidien l-ohra tal-barrieri f’Ghawdex. Il-Qorti tal-Magistrati sahqet li skont l-Artikolu 51 u 52 tal-Att, l-Awtorita` kellha l-obbligu u d-dritt li tordna waqfien ta’ zvilupp ghar-ragunijiet hemm elenkati jekk jidrilha li dak l-izvilupp mhux debitament kopert bil-permess.  L-imputat kellu josserva l-ordni tal-Awtorita` biex din tkun tista’ tirregola ruhha dwar dak l-izvilupp, izda l-imputat, *ex admissis* irrifjuta li jaghmel dan.
Il-Qorti tal-Appell Kriminali fid-9 ta’ Frar 2010 ikkonfermat din il-parti tas-sentenza fejn kienet sabet htija b’dan pero` li lliberat lir-rikorrent (allura appellant) mit-tielet akkuza wkoll. Mill-ewwel akkuza ma kienx sar appell mill-prosekuzzjoni.

Illi din il-Qorti wara li ezaminat l-atti processwali tal-kawza kriminali hi tal-fehma li l-ewwel u t-tieni akkuza ma jammontawx ghall-istess fatt u lanqas ghall-istess reat. Il-fatt li l-appellant ma osservax l-avviz mahrug mill-

[3] Il-Qorti tal-Magistrati ma qalitx, kif l-appellant qed jissottometti fin-nota tal-appell tieghu, li hu ma kien qed jaghmel xejn illegali fil-proprjeta` tieghu, imma biss li l-prosekuzzjoni ma gabitx prova dwar l-*area* li kienet koperta bil-permess.

Awtorita`, u l-fatt li l-appellant kien ghamel zvilupp kontra l-ligi, ma humiex l-istess haga u lanqas jikkostitwixxu l-istess reat.

Il-Qorti tal-Magistrati lliberat lill-appellant mill-ewwel akkuza billi ma ngabitx prova dwar l-*area* tal-barriera li fuqha kien hemm licenzja u l-*area* l-ohra li fiha, skont l-akkuza, kienet saret l-estenzjoni illegali fuqha. It-tieni akkuza kienet wahda separata u indipendenti mill-ewwel akkuza billi l-Awtorita` harget ukoll ordni biex l-appellant jieqaf mill-izvilupp li kien qed jaghmel. L-appellant ma obdiex din l-ordni u kompla bl-izvilupp. Ghalhekk apparti l-kwistjoni dwar l-allegazzjoni tal-Awtorita` dwar l-estenzjoni illegali originali, kien hemm ukoll il-kaz tal-ksur tal-ordni tal-Awtorita` biex l-appellant jieqaf sakemm isiru l-investigazzjonijiet mill-Awtorita`. Il-fatti ghalhekk m'humiex sostanzjalment l-istess. Inoltre l-akkuzi ma kienux cirkoskritti ghall-istess zmien. Fil-fatt l-ewwel akkuza kienet cirkoskritta ghal zmien partikolari meta kien sar l-izvilupp illegali mentri t-tieni akkuza kienet tirreferi ghal dak iz-zmien kif ukoll ghaz-zmien wara li nharget l-ordni biex l-appellant ma jkomplix jizviluppa imma li hu injora u ma obdiex u baqa' ghaddej bl-izvilupp, ta' liema akkuza huwa nstab hati. L-izvilupp li sar wara li nharget l-ordni kien bla dubbju illegali. Ghalhekk il-fatt tal-estenzjoni illegali u l-fatt li l-appellant naqas li jobdi l-ordni ta' infurzar huma zewg reati differenti fis-sustanza. L-appellant kellu jobdi l-ordni tal-Awtorita` li <u>meta nharget</u> kienet wahda legittima, salv id-dritt li jirreklama l-gustizzja intrinsika ta' dik l-ordni fis-sede proprja.

Finalment jigi rilevat li skont il-gurisprudenza tal-Qorti ta' Strasbourg "The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata"*. F'dan il-kaz kien hemm biss procediment wiehed li ttiehdet kontra l-appellant fuq tlett reati. Hu gie processat darba wahda biss u l-appell mis-sentenza tal-Qorti tal-Magistrati m'ghandux jigi kkunsidrat bhala xi procediment gdid.

Dan l-aggravju ghalhekk qed jigi michud.

L-Artikolu 7 tal-Konvenzjoni Ewropeja

Fit-tieni aggravju tieghu l-appellant isostni li biex ordni tkun legittima, mhux rikjest biss il-forma u l-kontenut taghha, imma l-ordni trid tkun bazata fuq il-ligi. F’dan il-kaz, skont l-appellant, il-bazi tal-ordni kienet illi kien qieghed isir zvilupp illegali. Ghalhekk la darba ma kien qed isir xejn illegali, l-Awtorita` ma kellha l-ebda dritt illi tesigi obbidjenza ghamja ghall-ordinijiet taghha. Dan igib arbitrarjeta’ fil-ligi penali.

L-Artikolu 7 tal-Konvenzjoni jipprovdi li:

“(1) Hadd m’ghandu jitqies li jkun hati ta’ reat kriminali minhabba f’xi att jew omissjoni li ma kinux jikkostitwixxu reat kriminali skont ligi nazzjonali jew internazzjonali fil-hin meta jkun sar. Lanqas m’ghandha tinghata piena akbar minn dik li kienet applikabbli fiz-zmien meta r-reat kriminali jkun sar”.

Dan l-artikolu jfisser li ħadd m’ghandu jinstab hati ta’ reat li, meta jkun sar, ma jkunx konsidrat bhala reat mil-ligi. Lanqas ma tista’ tinghata piena aktar harxa minn dik li kienet tapplika meta gie kommess ir-reat. Inoltre l-ligi kriminali m’ghandhiex tigi interpretata b’mod wiesgha, bhal per ezempu permezz t’analogija, li tista’ tkun ta’ pregudizzju lill-persuna akkuzata b’reat izda huwa mehtieg li kull reat ikun imfisser sew fil-ligi b’mod li l-persuna tkun taf x’tghid il-ligi u x’jista jehel.

L-ewwel Qorti ddecidiet li d-dritt tar-rikorrenti sancit f’dan l-artikolu ma giex miksur billi ma jirrizultalhiex li r-rikorrent instab hati ta’ reat kriminali minhabba att jew ommissjoni li ma kinux jikkostitwixxu reat kriminali skont il-ligi fil-hin meta sehh ir-reat. L-ewwel Qorti ma rat li kien hemm xejn arbitrarju jew incert fil-ligi penali in kwistjoni jew li din kienet tiddependi mill-*“fehma, opinjoni, jew burdata tal-Awtorita`”.*

Illi f’dan il-kaz l-Awtorita` tal-Ippjanar kienet harget l-ordni skont l-Artikolu 51 u 52 tal-Att dwar l-Ippjanar u hi kellha l-

obbligu u d-dritt li tordna waqfien ta' zvilupp ghar-ragunijiet elenkati fil-ligi u dan jekk kien jidhrilha, dejjem skont il-ligi, li dak l-izvilupp ma kienx debitament kopert bil-permess. Stante li meta nharget l-ordni din kienet wahda legittima, u ma ngabet ebda prova li dan ma kienx hekk, l-appellant kellu josserva dik l-ordni biex l-Awtorita` tkun tista' tinvestiga l-izvilupp. L-appellant izda, *ex admissis* irrifjuta li jaghmel dan ghax ppretenda li *biex jieqaf hu iridu jieqfu s-sidien l-ohra tal-barrieri f'Ghawdex.*

Dan l-aggravju qed jigi wkoll michud.

L-Artikolu 6 tal-Konvenzjoni Ewropeja

Fl-ahhar aggravju tieghu l-appellant sostna li kawza sommarja ddum biex tigi deciza disa' snin huwa terminu irragonevoli taht kwalunkwe konsiderazzjoni. Anke jekk hu kellu xi htijiet, hija l-Qorti li kellha tordna u tinsisti illi l-proceduri jsiru f'qasir zmien.

L-ewwel Qorti ma sabitx ksur tal-Artikolu 6 tal-Konvenzjoni billi fil-fehma taghha fic-cirkostanzi tal-kaz, fejn r-rikorrenti stess kien ukoll kawza ghad-dewmien fl-eghluq ta' dawn il-proceduri, huwa ma jistax issa jilmenta illi l-proceduri kontra tieghu damu iktar miz-zmien ragjonevoli meta jirrizulta li huwa stess kien kompartecipi fil-maggor parti tad-dewmien illi kien hemm f'dawn il-proceduri.

Din il-Qorti tikkondividi dak li qalet l-ewwel Qorti. Minbarra r-riferenzi li ghamlet fir-rigward tal-ligi u gurisprudenza f'dan ir-rigward, liema citazzjonijiet din il-Qorti taghmel taghha wkoll, hija ser tirreferi ghal gurisprudenza ohra li jsahhah l-fehma taghha.

Fil-kaz ta' **Eckle v. Germany**[4] il-Qorti ta' Strasbourg qalet li ghalkemm "An applicant is not required actively to co-operate with the judicial authorities but nonetheless his conduct may be taken into account as an objective factor for which the Government is not responsible". Il-Qorti qalet ukoll f'kaz iehor li "some time-wasting or dilatory

[4] 1983

conduct will not prevent a violation where it does not contribute substantially to the overall length of proceedings". [**Kudla v. Poland]**[5].

Issa fil-kaz in ezami l-appellant kien talab hdax-il differiment, il-prosekuzzjoni talbet zewg differimenti u l-Qorti ddifferiet is-seduta erbatax-il darba. L-appellant qatt ma oggezzjona ghal dawn id-differimenti. Il-kawza bdiet fit-13 ta' Settembru 2000 u l-Prosekuzzjoni ghalqet il-provi taghha fis-6 ta' Frar 2002 mentri l-imputat iddikjara li m'ghandux aktar provi fit-22 ta' Novembru 2006. Fil-5 ta' Dicembru 2008 saret it-trattazzjoni mid-difensuri, u fil-25 ta' Frar 2009 inghatat is-sentenza mill-Qorti tal-Magistrati. L-appell minn dik is-sentenza gie deciz fid-9 ta' Frar 2010.

Ma hemmx dubbju li kawza sommarja ma kellhiex iddum daqshekk biex tigi konkluza fil-prim istanza. Kien hemm differimenti da parti tal-Qorti li setghu jigu evitati, izda l-imputat ukoll kellu htija meta talab hafna differiment li kienu jammontaw komplessivament ghal snin, ghalhekk ma jistax issa jilmenta minn dewmien, meta hu baqa' dejjem passiv ghax hekk kien jaqbillu. F'dan il-kaz in-nuqqas tal-appellant "contribute(d) <u>substantially</u> to the overall length of proceedings".

Fil-kaz **Ciricosta and Viola v. Italy** (1995) li kien dwar "an application to suspend works likely to interfere with property rights and where the applicants had requested at least 17 adjournments and not objected to six others requested by the other party, though 15 years on its face appeared unreasonable, the Court held that, while the courts were responsible for some delay, they did not bear the primary responsibility and did not accept that the judge was negligent in not putting an end to the applicant's dilatory conduct".

Ghaldaqstant din il-Qorti hija tal-fehma li, fic-cirkostanzi partikolari tal-kaz, dan l-aggravju mhux gustifikat.

<u>Decide</u>

[5] 30210/96

Ghal dawn il-motivi tiddeciedi billi tichad l-appell u tikkonferma s-sentenza appellata, spejjez tal-appell ghall-appellant.

< Sentenza Finali >

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