QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON

Illum il-Hamis 31 ta` Jannar 2019

Kawza Nru. 1
Rikors Nru. 83/2018 JZM

Carmel Aquilina
(KI 529754 [M])

kontra

Il-Kummissarju tal-Pulizija

u

L-Avukat Generali

Il-Qorti :

I. **Preliminari**

Rat ir-rikors li kien prezentat fl-14 ta` Awwissu 2018 u jaqra :–

Illi nhar is-17 ta` Marzu, 2009, l-esponenti mar gewwa id-depot tal-Furjana jirraporta lil certu Ronald Agius u Stepheanie Theuma mal-iskwadra ta` kontra r-reati ekonomici. L-esponenti nforma lill-Pulizija illi lura ghall-bidu tas-sena 2007, huwa dahal fi ftehim ma` Ronald Agius u Stephanie Theuma sabiex flimkien jaghmlu negozju. Il-partijiet ftehmu illi l-kapital u l-ispejjez involuti kellhom jinqasmu ugwalment bejniethom u l-profit kellu jinqasam bl-istess mod.

In vista ta` dan l-arrangament, bejn l-ghoxrin (20) ta` Frar, tal-elfejn u sebgha (2007) sat-tlieta (3) ta` Mejju tal-istess sena, avvanza fil-kont tas-socjeta` mmexxija minn Stephanie Theuma u Ronald Agius, xejn inqas minn mitejn u sittin elf u mija u hamsa u ghoxrin ewro (€260, 125).

Matul ix-xhur illi l-esponenti ghadda tali flejjes, Ronald Agius dejjem assigurah illi n-negozju kien miexi tajjeb u ma kien hemm l-ebda inkwiet u li l-merkanzija li kienet qieghda tigi importata kienet qieghda tinbiegh minghajr ebda problemi. Stante li l-esponenti huwa residenti u domiciljat l-Ingilterra, izda jkun regolarment Malta, il-maggior parti tal-komunikazzjoni illi saret bejn il-partijiet, saret tramite emails u komunikazzjoni telefonika.

Minkejja il-fatt illi Ronald Agius dejjem informa lill-esponenti illi n-negozju kien miexi tajjeb u minghajr ebda problemi, f`Awwissu tal-istess sena, ossia elfejn u sebgha (2007) l-esponenti gie nfurmat minn Ronald Agius illi kien hemm diversi problem bl-importazzjoni tal-merkanzija u li flus ta` l-esponenti ma kienux intuzaw hekk kif kien miftiehem originarjament. Ghalkemm Ronald Agius kemm il-darba qabel illi huwa kellu jirritorna tali flejjes lill-esponenti, madnakollu dan baqa` qatt ma sar. Ir-rikorrenti hass illi l-flejjes avvanzati lil Ronald Agius u Stepheanie Theuma gew mizapproprijati, tant hu hekk illi dawn

tal-ahhar ma onorawx il-ftehim li sar bejn il-partijiet u konsegwentament l-esponenti baqa` ma jafx x`sar bi flusu.

Tali agir min-naha ta` Agius u Theuma wassal ghal danni konsiderevoli fosthom dawk relatati ma` telf ta` bejgh u konsegwenzjali telf ta` qliegh u spejjez ohra.

Ghaldaqstant l-esponenti hassu aggravat b`dan l-agir u l-mod kif huwa gie ngannat minn Ronald Agius u Stephanie Theuma u konsegwentament mar gewwa d-depot tal-Furjana sabiex jaghmel l-imsemmi rapport.

L-ufficjal investigattiv Ivan Cilia wara li ghamel l-investigazzjonijiet necessarji u wara li kellem lir-rikorrenti, nhar l-14 ta` April, 2009 baghat ghal Ronald Agius u Stephanie Theuma li sussegwentament irrilaxxaw l-istqarrija taghhom ghar-rapport maghmul mir-rikorrenti.

Sussegwentament Ronald Agius u Stephanie Theuma gew infurmati illi kienu ser jinhargu akkuzi kontra taghhom. Fil-fatt huma, fis-sena 2009 gew akkuzati illi:

1. Approprjaw rwiehhom, billi dawru bi profitt ghalihom jew ghal persuni ohra, is-somma t` aktar minn elfejn tlieta mija u disgha u ghoxrin Euro u sebgha u tletin centezmu (€2,329.37) ghad-dannu ta` Charles Aquilina u John Bugeja, liema somma giet fdata jew ikkunsinnata lilhom taht titolu illi jgib mieghu l- obbligu tar-radd tal-haga jew li jsir uzu minnha specifikat;

2. U aktar talli, fl-istess dati, lokalitajiet u cirkostanzi, b`mezzi kontra l-ligi jew billi ghamlu uzu ta` ismijiet foloz, jew ta` kwalifiki foloz, jew billi inqdew b`qerq iehor, ingann, jew billi urew

haga b`ohra sabiex iggieghlu titwemmen l-ezistenza ta` intraprizi foloz, jew ta` hila jew setgha fuq haddiehor jew ta` krediti immaginarji, jew sabiex iqanqlu tama jew biza` dwar xi grajja kimerika, ghamlu qligh ta` aktar minn elfejn tliet mija u disgha u ghoxrin ewro u sebgha u tletin centezmu (€2,329.37) ghad-dannu ta` Charles Aquilina u John Bugeja.

Illi nhar l-ghoxrin (20) ta` Gunju, elfejn u tmintax (2018) il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali wara li rat l-imputazzjonijiet kontra Ronald Agius u Stephanie Theuma, b`referenza ghall-istqarrijiet rilaxxjati minn Agius u Theuma, wara li ghamelt referenza ghas-sentenza `Il-Pulizija vs Joseph Camilleri`, ddikjarat tali stqarrijiet rilaxxati mill-imputati bhala inammissibbli stante li fil-mument li gew rilaxxati tali stqarrijiet, l-imputati ma kienux assistiti minn avukat.

Konsegwentament il-Qorti tal-Magistrati ghaddiet sabiex ddikjarat lil Ronald Agius u Stephanie Theuma mhux hatja tal-imputazzjonijiet migjuba kontra taghhom u illiberathom minn kull akkuza. Illi ghandu jigi sostnut illi tali proceduri kriminali damu madwar disgha snin sabiex jigu decizi !!

Illi l-esponenti umilment jissottometti illi l-andament tal-proceduri kriminali fil-konfront ta` Ronald Agius u Stephanie Theuma f`Kumpilazzjoni Numru 1217/09 kien leziv tad-drittijiet fondamentali tieghu sanciti mill-Kostituzzjoni tar-Repubblika ta` Malta kif ukoll mill-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali hekk kif ser jigi elaborat f`dan ir-rikors u fis-smiegh tieghu minn dina l-Onorabbli Qorti.

A. Dritt ghal Smiegh Xieraq (Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6 tal-Konvenzjoni Ewropea)

I. Dwar l-Istqarriji rilaxxati mill-Imputati

Huwa palesi li kull persuna, kemm dik legali kif ukoll persuna naturali, ghandha d-dritt illi tgawdi minn smiegh xieraq meta tali persuna tibda proceduri ghal decizjoni quddiem qorti jew awtorita` ohra gudikanti. Tali dritt huwa salvagwardjajt mil- Artikolu 39 tal-Kostitutzzjoni ta` Malta, minn Kapitolu 319 tal-Ligijiet ta` Malta kif ukoll minn artikolu 6 tal-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem.

Ir-rikorrenti jemmen illi l-mod kif tmexxiet l-investigazzjoni li waslu ghal proceduri kriminali in kwistjoni, liema proceduri gew istitwiti quddiem il-Qorti tal-Magistrati (Malta) fl-ismijiet `Il-Pulizija vs Ronald Agius u Stephanie Theuma` u decizi nhar l-20 ta` Gunju, 2018 jilledi d-dritt tal-esponenti ghal smiegh xieraq kif protett mill-Artikolu 6 tal-Konvenzjoni Ewropeja tad-Drittijiet u Libertajiet Fondamentali tal-Bniedem u kif formanti parti mil-ligi domestika ta` Malta permezz tal-Kap 319 tal-Ligijiet ta` Malta u l-Artikolu 39 tal-Kostituzzjoni ta` Malta.

Il-fatti relevanti ghal dan ir-rikors kostituzzjonali jirrizultaw b`mod lampanti mill-procedura adottata mill-Pulizija Ezekuttiva sabiex hadet l-istqarrijiet tas-suspettati, liema stqarrijiet sussegwentament gew ddikjarati mill-Onorabbli Qorti tal-Magistrati bhala provi inammissibbli. Tali nuqqasijiet jemergu mill-fatt illi l-istat naqas milli jwettaq l-obbligu tieghu u jipprovdi legizlattivament ghad-dritt tal-akkuzat li jkollu l-avukat tal-ghazla tieghu prezenti waqt it-tehid tal-istess stqarrija. Tali nuqqas ppregudika bil-kbir id-dritt tal-esponenti li jkollu smiegh xieraq hekk kif protett mill-Konvenzjoni Ewropea u mill-Kostituzzjoni ta` Malta.

Kieku l-istat ipprovda ghal tali dritt, kif effettivament kellu kull responsabbilita` u obbligu li jaghmel, kieku d-drittijiet tal-esponenti kienu jigu salvagwardjati, l-investigazzjoni maghmula mill-Pulizija Ezekuttiva kienet tkun wahda <u>effettiva</u> u konsegwentament tali stqarrijiet qatt ma kienu jitqiesu bhala provi inammissibbli.

Id-dritt ghal smiegh xieraq skond fl-artikolu 6(1) u l-artikolu 6(3)(c) tal- Konvenzjoni Ewropeja gie estiz mill-gurisprudenza Ewropeja mhux biss ghad- dritt li ghalih hija intitolata l-persuna akkuzata matul il-proceduri penali fil-Qorti izda ukoll ghal pre-trial stage u cioe` ghall-istadju meta persuna tkun giet arrestata u interrogata.

Ghandu jigi rrimarkat illi tali gurisprudenza u cioe id-diversi sentenzi tal-Qorti Ewropea tad-Drittijiet tal-Bniedem li ghalihom qieghda ssir referenza f`dan l-umli rikors kostituzzjonali jmorru lura* ***kemm ghal qabel it-tehid tal-istqarriji de quo,*** *ossia qabel l-14 ta` April, 2009 kif ukoll gurispurdenza li emergiet wara t-tehid tal-istqarriji in kwistjoni.

Il-Qorti Ewropeja tad- Drittijiet tal- Bniedem, f`kull decizjoni li titratta assistenza legali, issostni li l-artikolu 6(3)(c) tal- Konvenzjoni ma jkunx gie osservat kull meta persuna arrestata ma tkunx inghatat assistenza legali qabel u* ***matul l-interrogazzjoni taghha****, fejn permezz ta` dina l-istess interrogazzjoni, l –akkuzat jkun jista` jinkrimina lilu nnifisu.

*Tant hu hekk illi l-Qorti Ewropea tad-Drittijeit tal-Bniedem, f`sentenza moghtija qabel it-tehid tal-istqarriji de quo, u cioe dik fl-ismijiet* ***`John Murray vs The United Kingdom`***[1] *sostniet:*

66. The Court is of the opinion that the scheme contained in the Order is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observes in this context that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of

[1] *Deciza nhar it-8 ta` Frar, 1996, Nru tal-Applikazzjoni: 18731/91*

interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him.

Under such conditions the concept of fairness enshrined in Article 6 (art. 6) requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6 (art. 6).

Ghandu jigi rilevat illi in segitu ghad-decizjoni hawn citata, il-Qorti Ewropea tad-Drittijiet tal-Bniedem tat diversi sentenzi ohrajn mfassla fuq l-istess linja ta` hsieb, fisthom u mhux biss il-kaz ta` Dayanan vs Turkey (13/10/2009) u l-kaz ta` A.T. vs Luxembourg (no. 30460/13, 09/04/2015).

*Min-naha l-ohra, mil-lat domestiku, f`dan ir-rigward kemm dina l-Onorabbli Qorti kif ukoll l-onorabbli Qorti Kostituzzjonali bbazzaw id-decizjoni tahghom fuq l-istess linja ta` hsieb inter alia il-kawza fl-ismijiet **`Il-Pulizija vs Aldo Pistella`** deciza minn dina l-Onorabbli Qorti nhar is-27 ta` Gunju, 2017 kif ukoll **`Il-Pulizija vs Alvin Privitera`** deciza nhar il-11 ta` April, 2011 fejn il-Qorti Kostituzzjonali sahqet illi:*

Illi fil-kaz in ezami huwa car li fiz-zmien tal-arrest tar-rikorrenti kien hemm in-nuqqas totali ta` legislazzjoni li tipprovdi ghall-assistenza ta` avukat fl-istadju qabel ma persuna tigi akkuzata formalment quddiem il-Qorti. Dan iffisser li lanqas biss kien hemm parametri fejn l-Istat seta` jew ma setghax jaghmel restrizzjoni ta` dan id-dritt ghall- assistenza legali u dan qed jinghad fid-dawl tal-gurisprudenza fuq citata tal-Qorti Ewropea. B`hekk ir- restrizzjoni ghall-access ghall-avukat lill-persuna arrestata kien wahda totali u f`dan l-isfond din il-Qorti thoss li dan imur kontra l-obbligi pozittivi li ghandu l-Istat sabiex jimplimenta kif suppost l-artikolu 6 tal-

Konvenzjoni Ewropea, u dan ghaliex bin-nuqqas ta` l-istess, l-istess drittijiet hemm stabilment sanciti u espressi jista` jkun li tali drittijiet hemm espressament sanciti jigu ghal kollox vanifikati."

Dwar l-obbligu tal-istat li jipprovdu dawk il-mekkanizmi procedurali necessarji sabiex id-drittijiet tal-bniedem ikunu salvagwardjati, qieghda ssir referenza ghal sentenza tal-Qorti Ewropea tad-Drittijiet ta; Bniedem ta` nhar it-8 ta` April, 2004 fl-ismijiet ***`Assanidze vs Georgia`***[2] *fejn il-Qorti rriteniet illi :*

" ... the Convention does not merely oblige the higher authorities of the Contracting States themselves to respect the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels. The higher authorities of the State are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected."

Illi di piu` fil-kaz ta` `**Strogan vs Ukraine**`[3] *il-Qorti Ewropea tad-Drittijiet tal-Bniedem rriteniet illi:*

"For the investigation to be regarded as `effective`, it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible."

F`dan ir-rigward, l-esponenti legittimament u ragjonevolment jistaqsi: kif seta` r-rapport tieghu jigi investigat b`mod effettiv meta l-istat naqas milli jinkorpora fil-legizlazzjoni domestika dawk il-mekkanizmi procedurali necessarji sabiex jigu salvagwardjati kemm id-drittijiet tas-suspettat kif ukoll tal-vittma?

[2] *Nru tal-Applikazzjoni: 71503/01*
[3] *Deciza nhar is-6 ta` Ottubru, 2016; Nru. Tal-Applikazzjoni 30198/11*

Minkejja li l-Publikazzjoni mahruga mill-Kunsill tal-Ewrope u intitolata ***`The European Convention on Human Rights and Policing`*** *tghallem illi:*

"*European citizens – and those living within the borders of European States – expect a great deal from their police services, but also rightly demand that the discharge of policing responsibilities is in accordance with the law, and furthermore, that it respects certain fundamental principles reflecting the nature of a democratic society.****"***

Fil-kaz odjern, l-investigazzjoni certament ma saritx b`tali mod li tissalvagwardja id-drittijiet fundamentali tal-bniedem u dan in vista tal-fatt illi l-istat naqas milli jippermetti, permezz ta` legizlazzjoni akdekwata, lill-persuna suspetta tkun assistita minn avukat tal-fiducja taghha. ***In turn dan wassal sabiex il-pulzija fl-istadju ta` investigazzjoni tal-ilment tal-vittima, utilizzat ghodda li kienu jivvjolaw id-drittijiet tal-bniedem, b`hekk illi l-investigazzjoni in turn giet li mhux biss kisret id-drittijiet tas-suspettati, izda ukoll ma kienitx effettiva li tipprotegi l-interessi tal-vittima langas!***

B`responsabbilita` qieghed jigi sottomess bir-rispett illi tali nuqqas grossolan min-naha tal-istat mhux talli xekkel l-amministrazzjoni tal-gustizzja izda, effettivament, stante li giet mxekkla l-investigazzjoni tar-rapport tal-esponenti, xekkel lill-esponenti bhala l-kwerelant milli jkollu smiegh xieraq. Fid-dawl tas-su espost kif ukoll fid-dawl tal-fatt illi l-istat naqas milli jipprovdi l-mekkanizmi procedurali necessarji sabiex l-investigazzjoni u l-istqarrija tal-imputati tkun tista` titqies bhala prova ammissibbli fil-process kriminali qieghda ssir referenza ghal dak deciz mill-Prim` Awla tal-Qorti Civili (Sede Kostituzzjonali) fil-kawza fl-ismijiet ***"Joseph John Gatt vs Ir-Registratur tal-Qrati et."***[4] *fejn gie deciz li:*

[4] *Deciza nhar id-29 ta` Lulju, 2010 per Onor. Imhallef J. R. Micallef*

"Illi d-dritt ghal smiegh xieraq, m`huwiex xi dritt illimitat, imma huwa regolat ragonevolment bil-procedura li tkun fis-sehh minn zmien ghal zmien. Imma dan igib mieghu wkoll li jekk il-procedura tistabilixxi regoli biex bihom jithaddem is-smigh kif imiss tal-kawzi, in-nuqqas ta` tharis tal-istess regoli a skapitu ta` xi parti ghandu, fil-fehma meqjusa ta` din il-Qorti, igib mieghu censura u jaghti lok ghal rimedju, izjed u izjed jekk ghan-nuqqas ta` tharis imsemmi l-parti ma jkollha l-ebda sehem jew htija.

Illi b`danakollu, jekk minhabba l-inadekwatezza tal-istrutturi li tfasslu biex tithaddem il-makna tal-amministrazzjoni tal-gustizzja jbati bla htija c-cittadin, l-Istat irid jaghmel tajjeb ghal tali tbatija."

Ghandu jigi mfakkar dak deciz mill-Qorti Ewropea tad-Drittijiet Fundamnetali tal-Bniedem fil-kawza fl-ismijiet ***`Salesi vs Italy`*** *fejn il-Qorti dwar l-implikazzjonijiet u l-implementazzjoni tal-artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem rriteniet illi :*

"…it must not be forgotten that Article 6 para. 1 (art. 6-1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements."

Fid-dawl ta` dak hawn fuq deciz, l-esponenti jsaqsi, kif jista` qatt jinghad li gie salvagwardjat id-dritt sancit fl-artikolu 39 tal-Kostituzzjoni sabiex kemm il-vittma kif ukoll is-suspettat ikollhom smiegh xieraq, meta l-istat stess lura ghaz-zmien tar-rilaxx tal-istqarriji de quo ippermetta li tipprevali fil-Ligi Maltija "a systematic restriction of access to a lawyer pursuant to the relevant legal provisions"[5] *li fl-ahhar mill-ahhar sabiex tali stqarriji gew dikjarati bhala provi inammissibbli u dan b`detriment ghar-rikorrenti?*

Illi tali nuqqas min-naha tal-Istat sabiex iwettaq l-obbligu tieghu

[5] *Vide Boz vs Turkey deciza nhar id-9 ta` Frar, 2010 kif ukoll Dayanan vs Turkey deciza nhar it-13 ta` Ottubru, 2009*

taht l-Artikolu 1 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem[6] *hekk kif marbut mal-Artikolu 6 tal-istess Konvenzjoni wassal sabiex l-esponenti effettivament gie pprivat milli jkollu smiegh xieraq.*

Ir-rikorrenti jaghmel referenza ghal sentenza ohra tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fl-ismijiet ***`Z.B. vs Croatia`***[7] *deciza nhar il-11 ta` Lulju, 2017:*

62. In the Court`s view, the conduct of the domestic authorities in the present case, together with the manner in which the criminal-law mechanisms were implemented, were defective to the point of constituting a breach of the respondent State`s positive obligations under the Convention concerning the applicant`s allegations of domestic violence.

Ghaldaqstant fl-isfond tas-su espost, l-esponenti jemmen bis-shih illi tali nuqqas krucjali procedurali min-naha tal-istat, mhux talli jilledi d-dritt fundamentali tas-suspettat izda jilledi wkoll id-dritt tal-kwerelant li r-rapport tieghu ikun investigat b`mod effettiv min-naha tal-awtoritajjiet koncernati, liema investigazzjoni twassal sabiex l-istess kwerelant ikollu smiegh xieraq in vista tad-drittijiet fundamentali tieghu.

II. Dwar l-Apprezzament tal-Provi

Illi l-esponenti jemmen illi l-mod kif tmexxew il-proceduri penali quddiem il-Qorti tal-Magistrati (Malta),b`mod partikolari kif l-Ewwel Onorabbli Qorti ghamlet l-apprezament tal-provi li wassal ghad-decizjoni ta` nhar l-20 ta` Gunju, 2018 sar b`nuqqas serju tal-amministrazzjoni tal-gustizzja li konsegwentament wassal sabiex l-esponenti gie mcahhad mid-dritt tieghu ghal smiegh xieraq kif protett

[6] *"Il-Partijiet Gholja Kontraenti ghandhom jassiguraw lil kull min jaqa that il-gurisdizzjoni taghhom id-drittijiet u l-Libertajjiet kif msemmija Fis-Sezzjoni I ta` din il-Konvenzjoni"*
[7] *Numru tal-Applikazzjoni 47666/13*

bl-artikolu 39 tal-Kostituzzjoni ta` Malta u l-Artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem.

Illi fl-umli fehma tal-esponenti, l-Onorabbli Qorti tal-Magistrati, fl-istadju tal-gharbiel tal-provi, naqset milli tikkunsidra u tapprezza il-kwalita`, validita` u l-kredibilita` tal-evidenza prodotta mill-Prosekuzzjoni kif ukoll naqset milli taghti l-kunsiderzzjoni mehtiega lill-argumenti u sottomissjonijiet mressqa minnu, b`tali mod li tali nuqqas wassal ghal decizjoni irragonevoli.

Illi kif ser jigi ampjamnet ippruvat waqt is-smiegh ta` dan ir-rikors, l-esponenti jemmen illi l-mod kif sar l-apprezzament tal-provi mill-Onorabbli Qorti tal-Magistrati li wassal ghad-decizjoni supra riferita kien wiehed manifestament irragonevoli.

A bazi tas-su espost, l-esponenti jaghmel referenza ghat-taghlim tal-awturi Van Dijk u Van Hoof, fil-ktieb "Theory and Practice of the European Convention on Human Rights (Kluwer Law International (The Hague) 1998)" fejn gie ritenut illi:

"When is a hearing "fair"? In the Kraska Case, the Court took as a starting point that the purpose of Article 6 is, inter alia: " ... to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessments of whether they are relevant to its decision."

*Il-Qorti Ewropea tad-Drittijiet tal-Bniedem f`dan ir-rigward f`sentenza deciza nhar il-15 ta` Novembru, 2007 fl-ismijiet `**Khamidov vs Russia**` [8] rriteniet illi:*

[8] *Nru. Tal-Applikazzjoni 72118/01*

"173. On the other hand, whilst acknowledging the domestic judicial authorities` prerogative to assess the evidence and decide what is relevant and admissible, the Court reiterates that Article 6 § 1 places the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (see Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288, p. 19, § 59)."*

Stante li l-esponenti jemmen illi l-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem hija prospetta sabiex tiggrantixxi drittijiet illi huma prattici u effettivi[9]*, kif ukoll fid-dawl tal-fatt illi l-apprezzament tal-provi odjern sar b`tali mod illi cahhad lill-esponenti milli ssir gustizzja,*[10] *gie lez id-dritt fundamentali tieghu li jkolli smiegh xieraq.*

Fid-dawl ta` diversi nuqqasijiet illi saru fl-istadju tal-apprezzament tal-provi, liema nuqqasijiet sejrin jigu spjegati fil-mori tas-smiegh ta` dan ir-rikors kostituzzjonali u kif tali nuqqasijiet jimpingu fuq id-drittijiet fundamentali tar-rikorrenti, l-esponenti jaghmel referenza ghal sentneza ohra tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fl-ismijiet ***`Carmel Saliba vs Malta`***[11] *deciza nhar l-24 ta` April, 2017 fejn il-Qorti ddecidiet:*

"79. The Court considers that the various failures mentioned above, might not individually suffice to find that the applicant had an unfair trial. Nevertheless, the Court cannot ignore the various shortcomings in the proceedings in the present case, particularly the failure to give reasons in respect of the conflicting evidence (see paragraphs 69-74 above) and in respect of the applicant`s requests which were shot down with little or no motivation whatsoever (see paragraphs 76 and 77 above).

[9] *Vide Cudak v. Lithuania [GC], no. 15869/02, § 58*
[10] *Vide Bochan v Ukraine [GC], no. 22251/08*
[11] *Nru. Tal-Applikazzjoni: 24221/13*

80. The foregoing considerations are sufficient to enable the Court to conclude that there had been a violation of Article 6 § 1 of the Convention."

III. Dwar Smiegh Xieraq fi Zmien Ragonevoli

Kif gie indikat aktar qabel, tali proceduri kriminali mertu ta` dan ir-rikors kostituzzjonali xprunaw nhar nhar is-17 ta` Marzu, 2009 meta l-esponenti mar gewwa id-depot tal-Furjana jirraporta lil certu Ronald Agius u Stepheanie Theuma mal-iskwadra tal-pulizija ta` kontra r-reati ekonomici.

Sussegwentament Ronald Agius u Stephanie Theuma gew imressqa quddiem il-Qorti tal-Magistrati (Malta) akkuzati bl-imputazzjonijiet supra citati. Illi ghalkemm f`tali proceduri kriminali ma xehdux aktar minn hmistax –il xhud, kif inhu ben indikat fis-sentenza tal-Qorti tal-Magistrati, tali proceduri, ghal ragunijiet mhux imputabbli ghall-esponenti, damu sejrin ghal aktar minn disgha snin u konsegwentament is-sentenza finali nghatat nhar l-20 ta` Gunju, 2018.

Illi fl-umli fehma tal-esponenti, meta wiehed jikkunsidra l-ammont ta` xhieda kif ukoll il-kumplessita` tal-kaz odjern, disa snin` ma jista qatt jitqies bhala zmien ragonevoli hekk kif sancit fl-artikolu 39 tal-Kostituzzjoni ta` Malta u l-artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem.

Fid-dawl tas-suespost, l-esponenti jaghmel referenza ghas-sentenza tal-Qorti Kostituzzjonali fl-ismijiet ***`Anton Camilleri vs Avukat Generali`***[12] *deciza nhar l-1 ta` Frar, 2016 fejn il-Qorti sostniet:*

[12] *Rikors Nru 71/10 JRM*

"Din il-Qorti, bhall-ewwel Qorti, hi tal-fehma li r-rikorrent m`ghandux jitghabba b`nuqqasijiet procedurali li hu ma kellux htija ghalihom ..."

*In kwantu d-dmir ewlieni li l-kawzi jitmexxew b`heffa u efficjenza, minkejja wkoll l-inerzja tal-partijiet u/jew tal-esperti teknici, dan jaqa` fuq il-Qorti u, ladarba hemm ukoll dmir fuq l-awtorita` pubblika li taghmel disponibbli rizorsi bizzejjed biex il-qrati jkunu jistghu jwettqu dan id-dmir taghhom,* ***din il-Qorti ma taqbilx mal-argument tal-Avukat Generali illi l-iStat ghandu jkun ezonerat minn responsabbilita` ghal dewmien ta` tant snin biex tingata` kawza ta` komplessita` mhux aktar mill-medja."*** *(enfasi tal-esponenti)*

Qieghda ssir referenza wkoll ghas-sentenza moghtija fil-kawza fl-ismijiet ***`Central Mediterrranean Development Corporation Limited vs Avukat Generali`****, deciza fl-14 ta` Novembru 2002 mill-Prim`Awla tal-Qorti Civili (Sede Kostituzzjonali) fejn il-Qorti ghamlet referenza ghall-kawzi `Vocaturo vs Italy u `G.H vs Austria, fejn il-Qorti Ewropea rriteniet illi: "It is for contracting states to organise their legal systems in such a way that their Courts can guarantee the right to everyone to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time".*

Ghandu jigi mfakkar illi d-dritt sancit fl-artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem jirrispetta wkoll il-principju tal-effikacja billi dewmien esagerat jimmilita kontra l-access garantit ghall-gustizzja li ghandu jigi zgurat mill-Istat lil kull cittadin. Kif jghallmu l-awturi Jacobs White & Ovey :

"The object of the provision of article 6(1) is to protect the individual concerned from living too long under the stress of uncertainty and, more generally to ensure that justice is administered without delays which might jeopardize its effectiveness and

credibility."[13]

Di piu` l-gurisprudenza tghallimna illi meta l-Qorti tigi biex tikkunsidra jekk tali dewmien kienx wiehed ragjonevoli jew le, il-Qorti ghandha tikkunsidra il-kumplessita tal-kaz, l-imgieba tal-Qorti u l-imgieba ta` min ikun qieghed jilmenta.

Fil-kaz odjern, fir-rigward tal-kumplessita tal-kaz ghandu jigi rilevat illi tali proceduri kriminali ma kellhomx kumplessita iktar mill-medja. Bir-rispett qieghed jigi sottomess illi gurisprudenza Ewropea tghallimna illi problema rizultanti mill-kumplessita` organizzativa tal-proceduri nazzjonali u cioe dawk attribbli lill-istat, m`ghandhom qatt jitqiesu bhala parti mill-kumplessita` tal-kaz in ezami. Minkejja dan kollu, u sforz tali dewmien irragonevoli, tali proceduri damu disgha snin shah sabiex jigu konkluzi bir-rikorrenti jghix b`tali incertezza dwar l-ezitu tal-kawza kriminali ghal aktar minn disgha snin.

Ghalkemm wiehed irid ihares lejn il-proceduri fit-totalita` taghhom, certi mankanzi, jew anke aspett partikolari wiehed, hekk kif gara f`dan il-kaz, jistghu jkunu tant determinanti ghall-ezitu ta` kawza fil-kaz konkret li dawk il-mankanzi flimkien jew dak in-nuqqas wiehed partikolari ikunu/tkun bizzejjed biex Qorti tasal ghall-konkluzzjoni li ma kienx hemm "smiegh xieraq".

In oltre, f`dan ir-rigward, il-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-sentenza* ***`Lupeni Greek Catholic Parish and Others vs Romania`***[14] *deciza nhar id-29 ta` Novembru, 2016 ikkonkludiet illi:

"142. ***It is for the Contracting States to organise their judicial systems in such a way that their courts are able to guarantee the right of everyone to obtain a final decision on***

[13] *The European Convention on Human Rights - 6th ed. p.273 fejn jiccitaw mis-sentenza tal-ECHR fil-kaz :Bottazzi v Italy App. Nru 34884/97 - 28 Lulju 1999.*
[14] *Application no. 76943/11*

<u>disputes concerning civil rights and obligations within a reasonable time</u> *(see Comingersoll S.A. v. Portugal [GC], no. 35382/97, § 24, ECHR 2000-IV, and Vassilios Athanasiou and Others v. Greece, no. 50973/08, § 26, 21 December 2010).*

143. The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court`s case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see Sürmeli v. Germany [GC], no. 75529/01, § 128, ECHR 2006-VII).

150. Albeit the case in itself was not a particularly complex one, the lack of clarity and foreseeability in the domestic law rendered its examination difficult (see paragraph 121 above); those shortcomings are entirely imputable to the national authorities and, in the Court`s opinion, contributed decisively to extending the length of the proceedings.

151. Having regard to all the elements submitted to it, the Court concludes that the applicants` case was not heard within a reasonable time.

152. There has therefore been a violation of Article 6 § 1 of the Convention on account of the length of the proceedings."

Bir-rispett kollu pero fl-umli fehma tal-esponenti, dewmien ta` aktar minn disgha snin, fid-dawl tac-cirkostanzi odjerni, ma jista` qatt jitqies bhala wiehed ragjonevoli u konsegwentament frott tali dewmien gie lez id-dritt fundamentali tal-esponeti li jkollu smigh xieraq fi zmien ragonevoli.

IV Dwar il-fatt li l-esponenti ma kellu l-ebda dritt li jappella mis-sentenza tal-Qorti tal-Magistrati

Illi l-esponenti hassu aggravat mis-sentenza moghtija mill-Onorabbli Qorti tal-Magistrati (Malta) u b`hekk xtaq jitneproni appell quddiem il-Qorti tal-Appell Kriminali (Sede Inferjuri).

Ghaldaqstant ftit jiem biss wara l-ghoti tas-sentenza, l-esponenti, bhala l-parte civile fil-kawza kriminali mertu ta` dan ir-rikors kostituzzjonali, pprezenta nota fl-atti tal-imsemmija kawza a tenur tal-artikolu 414 tal-Kodici Kriminali fejn permezz taghha talab lil dik l-Onorabbli Qorti sabiex kopja tas-sentenza flimkien mal-atti tal-kawza u max-xhieda jibtaghtu ghand l-Avukat Generali sabiex sussegwentament l-Avukat Generali ikun jista jappella. Ta` min jinnota ukoll li anke l-Pulizija ghamlu talba simili lill-Avukat Generali, fil-kaz odjern.

F`dan ir-rigward, referenza qieghda ssir ghall-artikolu 413 tal-Kodici Kriminali. Permezz ta` tali disposizzjoni legali, il-legizlatur jistipula tlett partijiet illi ghandhom dritt ta` appell fi stanzi differenti. Primarjament l-artikolu 413(1)(a) jistipula illi l-persuna akkuzata, f`kull sitwazzjoni u cirkostanza, b`eccezzjoni ghall-artikolu 28I tal-Kodici Kriminali, ghandha dritt ta` appell. Min-naha l-ohra il-parti offiza u cioe il-kwerelant, ghandu dritt ta` appell* ***BISS*** *meta l-proceduri kriminali jaqghu fil-kompetenza originali tal-Qorti tal-Magistrati (Malta) u fuq certu punti legali biss, liema punti jinsabu elenkati fl-artikolu 413(1)(b). Rigward dan id-dritt ta` appell il-gurisprudenza tghallimna illi sabiex l-appell min-naha tal-kwerelant ikun wiehed ammissibbli jehtieg jigi ppruvat ukoll illi l-Prosekuzzjoni tmexxiet mill-kwerelant u mhux mill-Pulizija Ezekuttuva kif ukoll jekk jigi ppruvat illi tali proceduri kriminali setghu jigi istitwiti biss permezz tal-kwerela tal-parti offiza.

Ghaldaqstant stante li tali offizi jaqghu taht il-kompetenza estiza tal-Qorti tal-Magistrati u konsegwentamant l-esponenti bhala l-parti leza gie legislattivament prekluz milli jinterponi appell minn tali sentenza, talab lill-Avukat Generali sabiex jappella minn tali gudizzju, li min-naha tieghu ghazel li ma jappellax u in vista ta` dan tali gudizzju illum il-gurnata jikkostitwixxi "res judicata".

Illi l-esponenti jsostni illi galadarba l-Istat jippermetti lill-persuna akkuzata tinterponi appell fi kwalunkwe sitwazzjoni irrespettivament taht liema kompetenza jaqa` ir-reat in kwistjoni, irrespettivament fuq liema aggravji, u irrespettivament min mexxa l-Prosekuzzjoni u min-naha l-ohra pprekluda assolutament lill-parti leza milli tinterponi appell minn reati li jaqghu fil-kompetenza estiza tal-Qorti tal-Magistrati, qieghed jinholoq zbilanc bejn il-partijiet, liema zbilanc mhux jippermetti lill-vittma, bhar-rikorrenti, milli jkollu dritt ta` appell u b`hekk qieghed jigi lez id-dritt ta` smigh xieraq.

Kemm il-Qrati nostrana kif ukoll dawk Ewropej jghallmu illi l-principju tal-"equality of arms" ghandu jikkaratterizza kull process guridiku. In difett ta` dan l-element procedurali, jinholoq zbilanc processwali. Stante li fil-kaz de quo, ir-restrizzjoni tal-legizlatur mhux talli sahhet il-pozizzjoni legali tal-imputati izda ppregudikat gravament il-pozizzjoni legali tal-esponenti.

Di fatti, frot tali restrizzjoni, inholoq zbilanc processwali fejn min-naha l-akkuzat kellu dritt ta` appell u min-naha l-ohra l-parti offiza ma kellha l-ebda dritt li taghmel u l-uniku soluzzjoni kienet li tittallab lill-Avukat Generali sabiex jaghmel dan ghan-nom taghha, li min-naha tieghu, kif effettivament gara fil-kaz odjern, ghazel li dan ma jaghmlux.

Ghandu jinghad ukoll, li f`cirkostanza simili, l-vittima ammess fil-proceduri penali skond id-dispozizzjonijiet tal-Kodici Kriminali, minkejja li quddiem il-Qorti tal-Magistrati jista` jkollu sehem attiv shih fihom, ma ghandu l-ebda mezz kif jikkontesta d-decizjoni tal-Avukat Generali li ma jinterponix appell.

Konsegwentament il-posizzjoni tal-imputati, permezz ta` tali restrizzjoni, setghet giet ventilata u msahha ulterjorment bhala konsegwenza diretta tal-fatt li l-potenzjalita` biex rikorrenti jinterponi l-appell tieghu giet menomata.

B`rizultat ta` din il-lezjoni ta` dan il-principju procedurali li jsawwar id-dritt ta` smiegh xieraq u li minnu ghandu jgawdi kull persuna, il-posizzjoni tal-imputati giet ivvantaggjata filwaqt li l-qaghda tal-esponenti qua vittima, giet mankament zvantaggjata.

*Fid-dawl tas-su espost, jigi mfakkar dak li gie mghallem mill-Qorti Ewropea tad-Drittijiet tal-Bniedem f`diversi stanzi. Fis-sentenza fl-ismijiet `**A.B. vs Slovakia**`[15], il-Qorti rriteniet illi:*

"55. The principle of equality of arms – one of the elements of the broader concept of fair trial – requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (see Dombo Beheer B.V. v. the Netherlands, judgment of 27 October 1993, Series A no. 274, p. 19, § 33; Ankerl v. Switzerland, judgment of 23 October 1996, Reports of Judgments and Decisions 1996-V, pp. 1567-68, § 38). In this context, importance is to be attached to, inter alia, the appearance of the fair administration of justice. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures (see P., C. and S. v. the United Kingdom, no. 56547/00, § 91, 16 July 2002).

Kwindi, fid-dawl tas-suespost, ir-rikorrenti jishaqq illi tali projbizzjoni tammonta ghal ksur tad-drittijiet fondamentali tal-istess esponenti skond l-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni Ewropea

Konkluzjoni

[15] *Deciza nhar l-4 ta` Marzu, 2003, Numru tal-Applkazzjoni 41784/98*

Fid-dawl tas-suespost l-esponenti umilment jishaqq li huwa ampjament car li gew lezi l-imsemmija drittijiet fondamentali tieghu. Ghaldaqstant ir-rikorrenti umilment jitlob lil dina l-Onorabbli Qorti joghgobha:

1. Tiddikjara l-agir tal-intimati jew min minnhom, illegali u li jilledi d-drittijiet fondamentali tar-rikorrenti billi jiksru l-artikoli 39 tal-Kostituzzjoni ta` Malta, kif ukoll l-artikolu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem, jew liem minnhom ; u

2. Tordna lill-intimati jew min minnhom ihallsu kumpens xieraq lir-rikorrenti, tenut kont ic-cirkostanzi kollha li l-Qorti tqis bhala rilevanti ; u

3. Taghti dawk l-ordnijiet u direttivi ohra li jidhrilha xierqa skond il-ligi u cirkostanzi tal-kaz.

Rat il-lista tax-xhieda u l-elenku ta` dokumenti.

Rat ir-risposta li pprezentaw l-intimati fl-10 ta` Settembru 2018 li taqra hekk :-

*1. Illi l-azzjoni tar-rikorrent ma tistax tirnexxi fuq l-**artikolu 39 tal-Kostituzzjoni ta` Malta** u l-**artikolu 6 tal-Konvenzjoni Ewropea** ghaliex fil-proceduri kriminali fl-ismijiet, "**Il-Pulizija vs. Ronald Agius u Stephanie Theuma**" decizi bis-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fl-20 ta` Gunju 2018 (Dok. AG1), la kienu qeghdin jigi determinati jeddijiet jew obbligi civili tar-rikorrent u wisq anqas kienu qeghdin jigu decizi akkuzi kriminali li nhargu kontrih;*

*2. Illi waqt proceduri kriminali l-garanziji procedurali msemmija fl-**artikolu 39 tal-Kostituzzjoni ta` Malta u l-artikolu 6***

tal-Konvenzjoni Ewropea *jghoddu biss ghal kull min ikun qieghed jigi mixli b`reat. Sewwasew fil-kaz taghna r-rikorrent Carmel Aquilina ma kienx persuna akkuzata fil-proceduri kriminali li huwa qed jilmenta dwarhom fir-rikors kostituzzjonali tieghu. Ghalhekk ladarba l-proceduri kriminali mertu ta` din it-tilwima kostituzzjonali ma kinux diretti kontrih, huwa ma jistax jilmenta minhabba l-mod ta` kif dawn tmexxew u gew konkluzi;*

*3. Illi hawnhekk wiehed ma jridx jinsa wkoll illi kif insibu miktub fl-**artikolu 3(1) tal-Kap 9 tal-Ligijiet ta` Malta** kull reat inissel azzjoni kriminali u azzjoni civili. Taht l-**artikolu 4(1) tal-Kap 9 tal-Ligijiet ta` Malta** hemm imfisser li l-azzjoni kriminali mhijiex azzjoni tal-vittima izda hija azzjoni essenzjalment pubblika li tmiss lill-Istat u titmexxa fl-isem tar-Repubblika ta` Malta bil-mezz tal-Pulizija Ezekuttiva jew tal-Avukat Generali, kif ikun il-kaz, skont il-ligi. Imbaghad skont l-**artikolu 6 tal-Kap 9 tal-Ligijiet ta` Malta**, l-azzjoni kriminali u l-azzjoni civili jitmexxew ghal rashom. Ghalhekk il-fatt li Ronald Agius u Stephanie Theuma gew mehlusa mill-proceduri kriminali b`rabta mal-akkuzi ta` misapproprijazzjoni u ta` frodi bi hsara tar-rikorrent, dan ma jfissirx li r-rikorrent gie mcahhad milli jekk irid iressaq l-azzjoni privata tieghu fis-sura tal-azzjoni civili;*

*4. Illi ghalhekk jekk ir-rikorrent ried li jkun suggett ghal smigh xieraq imhares bl-**artikolu 39 tal-Kostituzzjoni ta` Malta** u l-**artikolu 6 tal-Konvenzjoni Ewropea** huwa messu fetah proceduri civili fuq il-parametri tal-azzjoni delittwali. Zgur u mhux forsi però r-rikorrenti ma jistax isejjah favurih il-garanziji kostituzzjonali u konvenzjonali dwar il-proceduri kriminali fl-ismijiet, "**Il-Pulizija vs. Ronald Agius u Stephanie Theuma**" ghaliex kif inghad aktar kmieni, fi proceduri kriminali dawk il-garanziji jmissu biss lill-persuna akkuzata;*

Ghalhekk fid-dawl ta` dawn ic-cirkostanzi l-azzjoni tar-rikorrent kif mibnija fuq il-vjolazzjoni tas-smigh xieraq hija bla bazi u ghandha tigi michuda minnufih;

5. Illi bla hsara ghal dak li ghadu kif gie mtenni, safejn l-ilment tar-rikorrent huwa msejjes fuq il-fatt li l-Pulizija interrogaw u hadu stqarrijiet lil Ronald Agius u lil Stephanie Theuma bla ma tawhom il-jedd li jiehdu parir minn avukat, l-esponenti jibdew billi jghidu li dan il-fatt, jekk xejn, jolqot lil dawn iz-zewg persuni u mhux lir-rikorrent li fit-tehid tal-istqarrijiet ma kellu l-ebda sehem;

6. Illi f`kull il-kaz, ir-rikorrent ma fissirx u lanqas wera fil-konkret kif is-smigh tal-proceduri kriminali gew imtappna minhabba l-mod ta` kif gew mehuda l-istqarrijiet ta` Ronald Agius u ta` Stephanie Theuma. F`dan il-kuntest, il-principji mnissla mill-gurisprudenza lokali u Ewropea marbuta mal-istqarrijiet moghtija fl-istadju tal-interrogazzjoni ma gewx imxellfa ghaliex kif hemm miktub fis-sentenza, il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali ma qisitx l-istqarrijiet maghmula minn Ronald Agius u Stephanie Theuma;

7. Illi ghalkemm ir-rikorrent jghid fir-rikors kostituzzjonali tieghu li l-jedd tas-smigh xieraq tieghu bhala kwerelant gie miksur minhabba l-fatt li l-istqarrijiet ta` Ronald Agius u Stephanie Theuma gew mehuda b`mod hazin, huwa mkien ma fisser xi gwadann kien ha jikseb li kieku dawn l-istqarrijiet tqisu bhala ammissibbli jew li kieku dawn l-istqarrijiet saru bl-ghajnuna ta` avukat. Ir-rikorrent ma jfissirx x`kien ha jkun hemm differenti fl-ezitu tal-process kriminali li kieku l-istqarrijiet kienu validi u ammissibbli;

8. Illi lil hinn minn dan, xorta wahda r-rikorrent ma jistax jghid li huwa gie pregudikat minhabba l-mod ta` kif ittiehdu l-istqarrijiet ta` Ronald Agius u Stephanie Theuma. Dan ghaliex ladarba dawn l-istess persuni ghazlu li jixhdu fil-proceduri kriminali stess, allura r-rikorrent kellu kull jedd, kif fil-fatt ghamel permezz tal-avukat tieghu, li jsaqsihom id-domandi u b`hekk jikkontrolla l-verzjoni taghhom. Ghalhekk dan l-ilment tar-rikorrent dwar l-istqarrijiet mhuwiex tajjeb u ghandu jigi michud;

9. Illi safejn l-ilment tar-rikorrenti huwa dirett lejn il-konkluzjoni milhuqa mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fis-sentenza finali taghha, jissokta jinghad li r-rikorrent ma jistax jinqeda b`dawn il-proceduri kostituzzjonali ghas-semplici raguni, li skont hu, il-Qorti zbaljat fis-sentenza taghha. Huwa maghruf kemm fid-duttrina, kif ukoll fil-gurisprudenza li mhijiex il-funzjoni ta` din l-Onorabbli Qorti li ssewwi "zbalji" tal-qrati ordinarji. Ma jista` jkun hemm l-ebda dubbju illi l-gurisdizzjoni ta` din il-Qorti hija limitata biss biex tinvestiga u tiddetermina jekk kienx hemm jew le vjolazzjoni ta` xi jedd fundamentali u mhux biex tistharreg jekk il-qrati ordinarji ddecidewx b`mod tajjeb il-kawza li kellhom quddiemhom;

10. Illi f`dan il-kaz huwa car anke bil-mod ta` kif gie mfassal ir-rikors kostituzzjonali, li r-rikorrent qieghed jistieden lil din l-Onorabbli Qorti sabiex hija tidhol fil-mertu fattwali tal-kaz li gie finalment maqtugh mill-Qorti tal- Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali. Tabilhaqq ir-rikorrent imkien ma fisser b`liema mod gie mkasbar lilu l-jedd ta` smigh xieraq. Kulma ghamel ir-rikorrent huwa li kkontesta b`mod generiku r-ragunijiet li wasslu lill-Onorabbli Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali biex helset lil Ronald Agius u lil Stephanie Theuma mill-akkuzi mressqa kontrihom. Fil-fehma tal-esponenti tali kontestazzjoni tohrog `il barra mill-isharrig kostituzzjonali;

11. Illi multo magis mhux kull interpretazzjoni hazina tal-fatti hija ksur ta` jedd fundamentali u mhux kull meta kawza tintilef minhabba interpretazzjoni jew apprezzament hazin tal-fatti jaghti jedd illi l-mertu jkun ezaminat mill-gdid fid-dawl tal-ligijiet li jharsu l-jeddijiet fondamentali. Kif spiss jinghad f`dawn l-okkazjonijiet, qorti moghnija b`setghat kostituzzjonali/konvenzjonali mghandhiex tigi mibdula f`qorti ta` revizjoni. Tabilhaqq proceduri kostituzzjonali mhumiex mahsuba biex iservu ta` appell jew kassazzjoni minn sentenzi li jkunu ghaddew in gudikat, u dan specjalment meta titqajjem allegata vjolazzjoni tas-smigh xieraq. Sewwasew f`dan il-kaz, ir-rikorrent qieghed jipprova jghatti l-ilment tieghu bil-libsa kostituzzjonali meta dan ma huwa xejn hlief appell gdid mill-apprezzament milhuq mill-Qorti tal- Magistrati (Malta) bhala Qorti ta`

Gudikatura Kriminali. Ilment bhal dan ma jistax jigi mistharreg mil-lenti kostituzzjonali u ghalhekk ghandu jigi mwarrab;

12. Illi f`din il-qaghda, wiehed ma jridx iwarrab minn quddiem ghajnejh ukoll il-fatt li l-azzjoni kostituzzjonali mghandhiex tintuza biex wara li jkunu gew mitmuma l-proceduri kriminali, tinfetah opportunità gdida biex jitressqu provi godda jew provi differenti li ma tressqux fil-proceduri kriminali;

13. Illi f`kull kaz ir-rikorrent ma jfissirx bl-ebda mod kif u taht liema cirkostanzi l-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali gharblet b`mod hazin ir-rizultanzi processwali. Hekk ukoll ir-rikorrent ma jaghti l-ebda hjiel fir-rikors kostituzzjonali tieghu ghaliex il-Qorti tal-Magistrati fuq il-provi li kellha quddiemha kellha tasal ghal decizjoni differenti minn dik illi waslet ghaliha fis-sentenza taghha. Ghalhekk anke minn dan l-aspett l-ilment tar-rikorrent mghandux jitqies bhala wiehed xieraq;

14. Illi dwar l-ilment tar-rikorrent fuq dewmien mhux misthoqq fil-proceduri kriminali, l-esponenti jitilqu billi jergghu jtennu li l-proceduri kriminali li qed jigu attakati minnu ma kinux jincidu fuq l-infurzar ta` xi drittijiet civili jew kriminali tar-rikorrent, b`dana ghalhekk li t-talba tieghu ghall-kumpens minhabba dewmien fil-proceduri gudizzjarji ma haqqhiex li tintlaqa`;

15. Illi dwar dan l-aspett jinghad ukoll li l-fatt li l-proceduri kriminali damu ghaddejja disgha snin ma jfissirx b`daqshekk li b`mod awtomatiku ghandu jinsab li kien hemm dewmien ingustifikat. Tabilhaqq hija gurisprudenza kostanti u stabbilita li l-element taz-zmien mghandux jigi determinat fl-astratt jew min-numru ta` snin li tkun damet ghaddejja l-kawza, imma ghandu jitqies fid-dawl tac-cirkostanzi partikolari tal-kaz li jkun. Ghalhekk, il-procedura gudizzjarja mertu tal-allegazzjoni trid tkun ezaminata fis-shih taghha u ma jistax ikun ezaminat biss element jew parti wahda minn din il-procedura;

16. Illi sabiex dina l-Onorabbli Qorti tkun tista` tqis b`mod serju t-talba tar-rikorrent irid jigi ppruvat li mhux biss il-kaz dam pendenti izda li tali dewmien kien wiehed kappriccjuz u mahsub biss biex jizvantaggah fit-tgawdija tad-drittijiet tieghu skont il-ligi. Sewwasew fil-kaz tallum id-dewmien ma kienx wiehed irragonevoli izda kien dovut minhabba n-natura u l-komplessità tal-proceduri inkwistjoni, il-htiega li jinhatru esperti u l-ghadd ta` xhieda li kellhom jittellghu. Minbarra dan, ma kienx hemm telf ta` hin minhabba l-ghemil tal-Istat;

17. Illi f`kull kaz ir-rikorrent ma weriex xi hsara garrab minhabba l-fatt li l-proceduri kriminali damu disa` snin biex intemmu. Dan ghaliex ir-rikorrent ma kellux ghalfejn joqghod jistenna li jispiccaw il-proceduri kriminali jekk huwa ried jimxi bil-proceduri civili;

18. Illi qajla hemm bzonn illi jinghad, ir-rikorrent ma jistax minflok jezercita l-azzjoni civili kontra min allegatament gablu l-hsara, jinqeda b`dawn il-proceduri kostituzzjonali bex jipprova jiehu xi kumpens mill-poplu Malti. Ghalhekk anke dan il-parti tal-ilment mghandux jigi milqugh;

19. Illi fl-ahharnett, ir-rikorrent lanqas mghandu ragun jilmenta mill-fatt li huwa ma kellux jedd illi jappella mis-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali. Kif intqal aktar kmieni l-azzjoni kriminali hija wahda pubblika u mhux wahda privata. Ghalhekk jekk ir-rikorrent ried li jenforza l-jeddijiet privati tieghu huwa kellu jissokta bl-azzjoni civili u mhux jippretendi li jinghata jedd ta` appell fil-proceduri kriminali li mhumiex tieghu izda huma tal-Istat kontra l-akkuzat;

20. Illi fuq l-istess linja ta` hsieb, ir-rikorrent mhuwiex siewi meta jilmenta mill-fatt li mhemmx ugwaljanza tal-armi bejnu u bejn l-akkuzati Agius u Theuma ghaliex dak li donnu qed jahrab lir-rikorrenti huwa l-fatt li l-proceduri kriminali huma bejn l-Istat u l-akkuzati u mhux bejnu u l-akkuzati. Tassew, fil-proceduri kriminali r-regola tat-

trattament indaqs tal-partijiet tghodd biss bejn il-prosekuzzjoni u l-akkuzati;

21. Illi l-ebda zbilanc processwali ma gie mahluq minhabba l-fatt li r-rikorrent ma kellux jedd li jappella mis-sentenza appellata. Dan ghaliex jekk ried, ir-rikorrent dejjem kellu miftuha ghalih it-triq tal-azzjoni civili u privata;

22. Illi fl-istess hin, ir-rikorrent lanqas ma huwa gust li joqghod ilissen il-fatt li huwa jrid joqghod jittallab lill-Avukat Generali biex isir appell. Ghal darbohra, meqjus li l-proceduri huma pubblici u mhux privati, id-decizjoni dwar jekk ghandux isir appell mis-sentenza kriminali taqa` fir-responsabbilità tal-Avukat Generali u mhux f`hogor ir-rikorrent;

23. Illi jekk issa l-Ufficcju tal-Avukat Generali hass fil-kuxjenza tieghu wara li xtarr kif imiss l-atti kollha tal-process kriminali, li s-sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali kienet wahda gusta, ma jistax ir-rikorrent igieghlu illi jappella bilfors. Appell kriminali mghandux isir kif gib u lahaq, b`mod superficjali jew biex wiehed jiehu cans, izda ghandu jsir biss jekk kemm-il darba hemm bazi legali u fattwali biex dan isir. Il-Qorti tal-Appell Kriminali tenniet kemm-il darba li appell minn sentenza tal-ewwel Qorti – inkluz ghalhekk appell maghmul mill-Avukat Generali – mghandux jintlaqa` jekk l-Ewwel Qorti, bil-provi li kellha quddiemha setghet legittimament u ragonevolment tasal ghad-decizjoni li effettivament waslet ghaliha. Dan huwa principju li l-Avukat Generali jzomm f`mohhu hu u janalizza l-atti processwali fid-deliberazzjoni tieghu dwar jekk iressaqx appell jew le. Wiehed ma jridx jinsa li hemm hajjet l-akkuzati involuti u ghalhekk appell kriminali mghandux isir bl-addocc. Zgur u mhux forsi, l-Ufficcju tal-Avukat Generali ma jistax jigi mgieghel jew jigi ppressat minn xi hadd biex isir appell, jekk fil-konvinciment morali tieghu l-appell mghandux isir. Ikun tabilhaqq ingust u kontra l-interess tal-gustizzja li jsir appell li ma jkunx f`loku. Ghalhekk anke dan l-ahhar ilment tar-rikorrent mghandux jinghata widen;

24. Illi naturalment billi fil-kaz tallum ma sehhet l-ebda vjolazzjoni tas-smigh xieraq, ir-rikorrent ma haqqu jiehu l-ebda kumpens u l-ebda rimedju iehor minn din l-Onorabbli Qorti;

Ghaldaqstant ghar-ragunijiet fuq imsemmija l-esponenti umilment jitolbu lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrent bl-ispejjez kontra tieghu.

Rat l-elenku ta` dokumenti.

Rat id-digriet li tat fl-udjenza tal-4 ta' Ottubru 2018 fejn tat direzzjoni lill-partijiet sabiex qabel isir l-ezami tal-mertu, jigu trattati u decizi l-ewwel, it-tieni, it-tielet u r-raba` eccezzjonijiet.

Semghet is-sottomissjonijiet bil-fomm li saru fl-udjenza tat-8 ta` Novembru 2018.

Rat id-digriet li nghata f`din lahhar udjenza fejn il-kawza talliet ghal-lum sabiex tinghata decizi dwar l-ewwel erba` eccezzjonijiet.

Rat l-atti l-ohra nkluzi n-noti ta` referenzi u s-sentenzi ndikati fin-noti.

II. <u>Fatti</u>

Fil-bidu tas-sena 2007, ir-rikorrent ghamel negozju ma` certu Ronald Agius u Stephanie Theuma. Il-partijiet ftehmu illi kemm il-kapital u kif ukoll il-profitt kellhom jinqasmu nofs bin-nofs. Ir-rikorrent ghalhekk avvanza l-ammont ta` €260,125. Fix-xhur ta` wara dejjem kien assigurat minn Ronald Agius illi n-negozju kien sejjer tajjeb u li l-

merkanzija mportata kienet qeghda tinbiegh minghajr problemi. Billi r-rikorrent huwa residenti u domiciljat l-Ingilterra, il-bicca l-kbira tal-komunikazzjoni bejn il-partijiet kienet issir b`emailsl jew telefonati.

Ghall-habta ta` Awissu 2007, ir-rikorrent kien mgharraf illi kien hemm diversi problemi bl-importazzjoni tal-merkanizja u li l-flus li kien investa ma kinux gew uzati skont kif miftiehem. Il-partijiet qablu illi Ronald Agius kellu jirritorna lir-rikorrent il-flus li kien investa. Dan izda baqa` ma garax. U r-rikorrent baqa` fil-ghama dwar li kien sar bi flusu.

Billi hass ruhu aggravat, ir-rikorrent ghamel rapport kontra Ronald Agius u Stephanie Theuma mal-Iskwadra ta' l-Pulizija kontra r-Reati ekonomici. Il-Pulizija investigat ir-rapport, u kellmet lil Ronald Agius u lil Stephanie Theuma li rrilaxxjaw stqarrija. In segwitu kienu stitwiti proceduri kriminali kontra taghhom. Kienu akkuzati b`misapproprijazzjoni.

B'sentenza moghtija fl-20 ta` Gunju 2018 fil-kawza fl-ismijiet '**Il-Pulizija vs Ronald Agius u Stephanie Theuma'**, il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali ddikjarat lill-imputati mhux hatja u lliberathom minn kull imputazzjoni u piena. Il-kawza damet ghaddejja madwar disa` snin.

Wahda mir-ragunijiet li wasslet ghal-liberazzjoni tal-imputati kienet il-fatt li l-istqarrija li kienu ghamlu kienet giet skartata billi fiz-zmien meta kienu rilaxxjati l-istqarrijiet, minhabba l-istat tad-dritt nostran kif kien dak iz-zmien, akkuzat ma kellux dritt illi jkun assistit minn avukat ta` fiducja tieghu waqt ir-rilaxx tal-istqarrija. Din il-privazzjoni kienet dikjarata bhala leziva tad-dritt ghal-smigh xieraq[16]

[16] Ara: **Mario Borg v. Malta** deciza **mill-**Qorti Ewropea tad-Drittijiet tal-Bniedem fit-12 ta' Jannar 2016; **The Republic of Malta vs Chukwudi Onyeabor** deciza mill-Qorti tal-Appell Kriminali fl-1 ta` Dicembru 2016; **Carmel Saliba vs Avukat Generali** deciza mill-Qorti Kostituzzjonali fis-16 ta' Mejju 2016, **Stephen Nana Owusu vs Avukat Generali** deciza mill-Qorti Kostituzzjonali fit-30 ta' Mejju 2016, **Malcolm Said vs Avukat Generali et** deciza mill-Qorti Kostituzzjonali fl-24 ta' Gunju 2016 u **Aaron Cassar vs Avukat**

mill-Qorti Kostituzzjonali. Billi fil-kors tar-rilaxx tal-istqarrija rispettiva taghhom minghajr l-assistenza ta` avukat ta` fiducja, l-imputati setghu ghamlu dikjarazzjonijiet inkriminatorji, dawk l-istqarrijiet rilaxxjati bdew jigu skartati. Hekk gara fil-kaz kontra Ronald Agius u Stephanie Theuma.

Ir-rikorrenti jghid illi bid-decizjoni tal-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali huwa garrab ksur tal-jedd tieghu ghal smigh xieraq hekk kif tutelat bl-Art 39 tal-Kostituzzjoni ta` Malta **("il-Kostituzzjoni")** u bl-Art 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali ("**il-Konvenzjoni**") abbazi tal-fatt illi minhabba nuqqas fis-sistema procedurali nostra,n ixxekklet ir-retta amministrazzjoni tal-gustizzja ghaliex ladarba kienet skartata l-istqarrija, hu, bhala vittma ta` reat, bata restrizzjoni fl-investigazzjoni effettiva tar-rapport li kien ghamel lill-pulizija.

Ir-rikorrent jibni l-lanjanza tieghu fuq erba`binarji : a) il-fatt illi giet skartata l-istqarrija tal-imputati u konsegwentment ir-rapport tieghu ma setax jigi investigat b'mod effettiv; b) l-apprezzament zbaljat tal-provi; c) smigh xieraq fi zmien ragonevoli; u d) ebda dritt ta` appell mis-sentenza li jfisser ksur tal-principju tal-*equality of arms*. Dawn l-ilmenti jittrattaw il-mertu tal-vertenza odjerna u ghalhekk il-Qorti tirrizerva li tinvestigahom fi stadju ulterjuri, jekk ikun il-kaz.

III. L-istanza odjerna

L-intimati jilqghu ghal-lanjanzi tar-rikorrenti billi jikkontendu illi fil-kors tal-kawza kontra Ronald Agius u Stephanie Theuma, la kienu qeghdin jigu determinati i-drittijiet jew l-obbligi tar-rikorrent, u lanqas kienu qeghdin jittiehdu proceduri kontra r-rikorrent. Ighidu li t-tutela tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni tghodd **biss** ghall-imputat ta` kawza kriminali mhux ghall-parte civile. Ir-rikorrent

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Generali et deciza mill-Qorti Kostituzzjonali fil-11 ta' Lulju 2016; **Il-Pulizija vs Aldo Pistella**, deciza mill-Prim'Awla tal-Qorti Civili – Sede Kostituzzjonali fis-27 ta' Gunju 2017

ma setax iressaq ilment f`sede bhal dik ta` kompetenza ta` din il-Qorti dwar il-mod kif kienu kondotti l-proceduri kriminali. Isostnu li l-proceduri kriminali u dawk civili huma ndipendenti minn xulxin. Ghalhekk ghalkemm Ronald Agius u Stephanie Theuma kienu liberati mill-akkuzi dedotti kontra taghhom, u s-sentenza kontra taghhom saret gudikat, xejn ma jzomm lir-rikorrent milli jistitwixxi proceduri civili kontra taghhom.

IV. L-ewwel erba` (4) eccezzjonijiet preliminari

L-intimati qeghdin jeccepixxu li r-rikorrent m`ghandux l-interess guridiku li jippromwovi l-azzjoni odjerna billi ma jikkwalifikax bhala "***vittma***" ghall-finijiet u effetti kollha tal-ligi. Ir-rikorrent la huwa imputat u lanqas persuna suspettata fil-kuntest ta` pretensjoni dwar ksur tad-dritt ghal smigh xieraq. L-intimati jikkontendu li l-Art 39 tal-Kostituzzjoni u l-Art 6 tal-Konvenzjoni huwa applikabbli **biss** ghall-imputat u mhux ghall-*parte civile*.

Il-partijiet ghamlu referenza ghal ghadd ta` sentenzi li trattaw il-kwistjoni ta` x`jikkostitwixxi l-istatus ta` *vittma*.

Qabel ma taghmel l-osservazzjonijiet dwar l-erba` eccezzjonijiet preliminari, sejra tirreferi ghal decizjonijiet li kienu citatii.

V. Gurisprudenza

1. Qorti Kostituzzjonali

i) Francis Xavier sive Frank Mifsud vs Avukat Generali Rikors Nru. 582/1997

Fl-ewwel istanza l-kawza kienet deciza fid-9 ta' Ottubru 1998.

Kienet deciza mbaghad mill-Qorti Kostituzzjonali fit-2 ta` Novembru 2011.

Ir-rikorrent kien ipprezenta zewg kwereli. Ittiehdu passi kontra l-persuni mertu tal-kwereli. Dawn kienu liberati fil-procediment kriminali. Ir-rikorrent hass ruhu aggravat u nvoka ksur tad-dritt tieghu ghal smigh xieraq ghaliex skont hu l-Magistrat kien ostili max-xhieda tal-Prosekuzzjoni. Ghalhekk intavola rikors kostituzzjonali fejn allega li bhala kwerelant garrab lezjoni tad-dritt tieghu ghal-smigh xieraq skont l-Art 39 tal-Kostituzzjoni u ta` l-Art 6 tal-Konvenzjoni. Fiz-zewg istanzi, il-qrati kostituzzjonali ghamlu l-osservazzjoni li r-rikorrent ma kienx l-imputat fil-proceduri kriminali izda biss parte civile u bhala tali ma setax jinvoka ksur tad-dritt tieghu ghal smigh xieraq.

Fis-sentenza tal-Ewwel Qorti inghad hekk :-

> "*Li dan ir-rikors ghandu bhala antecedenti tieghu zewg kwereli li r-rikorrenti pprezenta fl-ghassa tal-pulizija, fil-Belt Valletta, rispettivament dwar ingurja allegatament gravi kommessa fil-konfront tieghu minn Emanuel Coleiro fit-28 ta' Ottubru, 1995 u dwar ingurja kommessa fil-konfront tieghu wkoll fl-1 ta' Ottubru, 1992 minn Frank Spiteri.*
>
> *Issa, bir-rikors promotorju tieghu, ir-rikorrenti qieghed jitlob lil din il-Qorti biex tiddikjara li f'dawn iz-zewg kawzi privati decizi mill-Qorti tal-Magistrati (Malta) rispettivament fit-28 ta' April, 1995 u fit-13 ta' Jannar, 1994, huwa ma kellux smiegh xieraq bi ksur ta' l-Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6 ta' l-Ewwel Skeda tal-Kap 319 u biex taghti rimedju effettiv sancit bl-Artikolu 13 tal-Konvenzjoni Ewropea.*

Kif gia gie accennat, l-intimat issottometta li dawn it-talbiet huma nfondati ghaliex l-Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6 talKonvenzjoni Ewropeja jitkellmu dwar id-dritt ghas-smiegh xieraq "Kull meta xi hadd ikun akkuzat b'rejat" [Art. 29(1) Kost.] fid- "decizjoni dwar l-ezistenza jew l-estensjoni ta' drittijiet jew obbligi civili" [Art. 39(2) Kost.] u "in the determination of his civil rights and obligations or of any criminal charge against him"(Art. 6 Konvenzjoni) u s-sitwazzjoni tar-rikorrent (kwerelant f'kawza kriminali) ma tinkwadra ruhha f'ebda ipotesi kontemplata fl-imsemmija artikoli.

Din il-Qorti taqbel perfettament ma' din is-sottomissjoni ghaliex fiz-zewg kawzi kriminali in kwistjoni l-akkuzati kienu rispettivament Emanuel Coleiro u Frank Spiteri u, ghalhekk, dawn biss jistghu jilmentaw minn vjolazzjoni tad-dritt tas-smiegh xieraq garantit mill-Kostituzzjoni u mill-Konvenzjoni Ewropea.

Huwa wkoll car li l-Qorti, fiz-zewg procedimenti msemmija, ma kienetx mitluba tiddetermina dwar l-ezistenza jew estensjoni tad-drittijiet jew obbligi civili tar-rikorrenti li kien biss kwerelant u xejn aktar.

Fil-fehma tal-Qorti, xejn ma jiswa li jigi sottomess mir-rikorrenti li huwa, bhala kwerelant, igawdi d-dritt civili ghar-reputazzjoni tajba tieghu b'garanzija ugwali ta' smiegh xieraq. Dan qieghed jinghad ghaliex, kif gia intqal, ir-rikorrenti ma kienux "l-akkuzat" fiz-zewg kawzi kriminali, u ghalhekk, kien ikollu d-dritt ta' smiegh xieraq kieku kien qieghed jagixxi civilment kontra Emanuel Coleiro u Frank Spiteri ghall-ingurja billi huwa fi procediment civili bhal dan li l-Qorti tkun mitluba biex tiddetermina dwar l-ezistenza jew estensjoni tad-drittijiet civili tar-rikorrenti".

Sar appell.

Fis-sentenza taghha, il-Qorti Kostituzzjoni esprimiet ruhha b`dan il-mod :-

1. *Gie ritenut illi "A criminal prosecution brought by an applicant will involve the determination of his civil rights and obligations where such an obligation is the remedy provided in national law for the enforcement of a civil right, as for example, in the case in some legal systems in connection with the right for a reputation. Art. 6 also applies on the basis that civil rights and obligations are being determined when the victim of a crime joins a criminal prosecution as a civil party claiming compensation or injury caused by the crime" (Helmers vs Sweden, (A212 1991) Tomasi vs France (A241 1992) u Moreira de Azevedo vs Portugal (A189 1990)),*

2. *"In the present case the Commission, whilst maintaining the general principle that the right to enjoy a good reputation constitues a "civil right" within the meaning of the above provision, considers nevertheless that the proceedings chosen by the present applicant to seek rehabilitation aginst alleged attacks on his honour, namely by way of the private prosecution proceedings, do not fall with the scope of Article 6 (1) of the Convention. Unlike a civil action for making defamatory remarks which could also have been brought by the applicant under Article 823 of the Civil Code (BGB), a private prosecution is dealt with in normal criminal proceedings and its purpose is to punish the accused person concerned for having committed a criminal offence. However, the right of access to the courts which Article 6 (1) of the Convention grants to anyone who seeks the*

determination of his civil rights does not include any rights to bring criminal proceedings against a third person, either by means of a public prosecution or by means of a private prosecution". (Decizjoni tal-Kummissjoni 7116/75, 8282/78, 8491/79, u 8530/78)

3. *Fil-kaz Helmers fuq citat il-Qorti Ewropej hekk elaborate :-*

"The Court notes first like the Commission that although Article 6 (1) does not guarantee a right for the individual to institute a criminal prosecution himself, such a right was confirmed on the applicant by the Swedish legal system in order to allow him to protect his reputation. Indeed this remedy was referred to by the Government in the context of application number 8637/79 as an effective one for this purpose. As to the effect of the symbolic nature of the claim or damages, the existence of a dispute (contestation) concerning a civil right does not necessarily depend on whether or not monetary damages are claimed. What is important is whether the outcome of the proceedings is decisive for the civil right …. This was certainly so in the present case, as the outcome of both the private prosecution and the claim for the damages depended on an assessment of the merits of Mr. Helmer's complaint that the accused had unjustifiably attacked and harmed his good reputation".

Insenjament dan segwit ukoll fil-kawza "Tolstoy Milatavsky vs. United Kingdom deciza fit-13 ta' Lulju, 1995 (App. No. 1813A/91) fejn gie ribadit il-principju illi "According to established case-law, art. 6-1 applies …. also in relation to a defendant in such proceedings (defamation) where the outcome is directly decisive for his or her "civil obligations" vis-a-vis the plaintiff".

4. *Fil-kaz Golder vs. United Kingdom deciz fil-21 ta' Frar, 1975, il-Qorti Ewropeja kienet sa minn dak iz-zmien irribadiet illi :-*

   "one point has not been put in issue and the Court takes it for granted: the 'right' which Golder wished, rightly or wrongly to invoke against Laud before an English Court was a "civil right" within the meanng of article 6 para. 1".

   Finalment fil-kaz Tomasi vs. France deciza fis-27 ta' Awissu, 1992, (application no. 12850/87) gie ritenut illi :-

   "The investigating judge will find the civil application admissible – as he did in ths instance – provided that, in the light of the facts relied upon, he can presume the existance of the damage alleged and a direct link with an offence.

   The right to compensation claimed by Mr. Tomasi therefore depended on the outcome of his complaint, in other words on the conviction of the perpetrators of the treatment complained of. It was a civil right notwithstanding the fact that the Criminal Courts had jurisdiction". (see mutatis mutandis the Moreira de Azevedo vs Portugal Judgment of October 23 rd , 1990).

   F'dan il-kaz il-Qorti sabet illi kien applikabbli s-subinciz 1 ta' l-artikolu 6 tal-Konvenzjoni.

   Il-Qorti kellha issa tapplika dan l-insenjament fl-isfond ta' l-orjentament guridiku malti li jirregola kawzi ta' diffamazzjoni, kemm fl-isfera civili kif ukoll fl-isfera kriminali. Dan ghaliex jekk jirrizulta li kien essenzjali ghad-determinazzjoni tad-dritt civili ta' l-appellant l-process kriminali provokat minn diskors diffamatorju, allura kien japplika l-

insenjament appena citat. Jekk, ghall-kuntrarju, dan ma kienx il-kaz, u allura jirrizulta illi l-appellant kellu rimedju iehor quddiem il-qrati civili, indipendenti mill-process kriminali li kien jassiguralu l-protezzjoni ta' tali dritt, allura din il-Qorti difficilment setghet taccetta s-sottomissjoni li kien ikun applikabbli s-subinciz 1 ta' l-art. 6 ta' l-ewwel skeda tal-Kap 319 u ta' l-art. 39 tal-Kostituzzjoni.

Il-malafama mertu tal-proceduri kriminali tentati mir-rikorrent quddiem ilQorti Kriminali tal-Magistrati jinkwadraw ruhhom fl-art. 252 tal-Kodici Kriminali li jittratta dwar kull min bil-hsieb li jtellef jew inaqqas il-gieh ta' xi hadd iwegghu bi kliem. Rejat dan li hu ghal kollox differenti mix-xorta ta' malafama regolata bl-Att dwar l-Istampa (il-Kap 248). B'dan l-Att persuna malafamata ghandha espressament accessibbli ghaliha kemm il-procedura kriminali kontra l-persuna li tkun hatja tar-rejat, kif ukoll il-procedura civili ghad-danni, u l-iter ta' kull azzjoni hu separat u distint u determinat bl-istess ligi. Danni civili li apparti dawk reali u attwali li seta' jsofri l-malafamat kienu wkoll morali u rizarcibbli bhala konsegwenza diretta tad-dikjarazzjoni fl-azzjoni civili li l-konvenut kien ivvjola l-jedd ghal fama tajba li kellu l-attur. Fil-kaz ta' din ix-xorta ta' malafama wiehed seta' forsi jargumenta li l-malafamat kien adegwatament kopert anke fir-rigward tal-jeddijiet tieghu ghas-smiegh xieraq bl-azzjoni civili li ghaliha kien intitolat. Dan hu diskutibbli u f'kull kaz mhux mertu ta' din il-kawza.

Mill-banda l-ohra pero', dan zgur ma kienx il-kaz fejn il-malafama tkun saret biss bil-kliem u fejn allura l-unika azzjoni li biha il-malafamat seta', fl-ewwel lok, jiddefendi l-unur tieghu, kienet tramite l-azzjoni kriminali fittermini ta' l-artikolu 252 tal-Kap 9. Infatti kien biss f'dawn il-proceduri li l-

malafamat bil-kliem seta' jottjeni dikjarazzjoni gudizzjarja illi l-unur tieghu, li ghalih kellu jedd fondamentali, kien gie mzeblah. F'dawn ic-App.Kost. 582/97 23 cirkostanzi ghalkemm hu rikonoxxut il-principju li "kull rejat inissel azzjoni kriminali u azzjoni civili" (Art. 3(1) tal-Kap 9) u li "l-azzjoni kriminali titmexxa quddiem il-qrati ta' gurisdizzjoni kriminali u biha tintalab piena kontra l-hati" (subinciz 2) waqt li "l-azzjoni civili titmexxa quddiem il-qrati ta' gurisdizzjoni civili u biha jintalab il-hlas tal-hsara li ssir bir-rejat" (subinciz 3), il-malafamat ma setghax civilment jipprocedi biex jiddefendi l-unur tieghu jekk ma jkunx f'posizzjoni li jipprova li hu kien sofra bhala konsegwenza tal-malafama bl-kliem danni attwali u reali.

Dan iwassal ghall-konkluzzjoni illi f'din ix-xorta ta' kawzi l-process kriminali kien, jew almenu seta' jkun, determinanti biex il-malafamat ikun jista' jiddefendi l-unur u r-reputazzjoni tieghu. Meta jokkorru sitwazzjonijiet u cirkostanzi bhal dawn l-individwu kellu kull dritt illi jezigi l-protezzjoni ta' l-art. 6 tal-Konvenzjoni ta' l-art. 39 tal-Kostituzzjoni ghal smiegh xieraq fil-process kriminali, anki jekk intrometta ruhu biss bhala parti civili, daqslikieku kien parti f'kawza civili minnu promossa biex jiddefendi d-dritt civili tieghu ghall-unur u reputazzjoni tajba.

Din l-interpretazzjoni, fil-fehma tal-Qorti, tirrifletti l-insenjament tal-Qorti Ewropeja li ghalih saret riferenza, b'mod partikolari l-kaz "Helmers" kif ukoll il-kaz "Fayed vs. United Kingdom" minnha deciz fil-21 ta' App.Kost. 582/97 24 Settembru, 1994, u li ghalih l-istess appellat ghamel riferenza. "The result of the "criminal" proceedings in question must be directly decisive for such a right or obligation: mere tenuous connections or remote consequences not being sufficient to bring art. 6

(1) to play". Fil-kaz taht ezami din il-Qorti kienet sodisfatta illi l-proceduri kriminali kienu, jew seta' kellhom, rilevanza determinanti ghall-protezzjoni tad-dritt ta' reputazzjoni u fama tajba tal-malafamat. L-azzjoni tar-rikorrent kienet allura tregi li kieku l-kaz tieghu kien fattwalment sostenibbli."

ii) <u>Premier Leasing and Investments Company Limited vs L-Avukat Generali et (Rik. Nru. 77/2013)</u>

Kienet deciza fl-ewwel istanza fit-28 ta` Lulju 2014, u mill-Qorti Kostituzzjonali fis-6 ta` Frar 2015.

Ir-rikorrenti ghamlet *hire purchase agreement* ma` konjugi Agius ghax-xiri ta` vettura. Kien miftiehem illi ghalkemm thallsu flus mal-kuntratt u hargu kambjali ghall-bqija tal-prezz, il-vettura kellha tibqa` proprjeta` tar-rikorrenti sakemm jithallas il-prezz kollu.

Gara illi Agius inqabdu b'ammont konsiderevoli ta` droga u tressqu l-Qorti mixlija bir-reat ta` traffikar ta` droga u hasil ta` flus. Harget ordni ta` frizar tal-assi kollha taghhom. Ir-rikorrenti talbet ir-rilaxx tal-vettura mertu tal-kuntratt li kellha ma` Agius izda t-talba kienet michuda billi l-vettura kienet tifforma parti mill-*corpus deliciti* ghaliex intuzat fil-konsenja tad-droga. Il-pagamenti tal-kambjali lanqas ma ghaddew billi l-assi kienu ffrizati.

L-Ewwel Qorti rriteniet illi r-referenza ghall-ksur ta`drittijiet naxxenti mill-Art 6 tal-Konvenzjoni kienet *"ghal kollox barra minn lokha"* billi l-proceduri kriminali ttiehdu kontra l-konjugi Agius u mhux kontra r-rikorrent. Qalet ukoll illi ma hemm ebda ncertezza legali bejn dak illi jistipola l-Art 22A tal-Kap 101 u l-Art 23 tal-Kap 9 billi dan tal-ahhar jittratta dwar ordni ta` konfiska li tinhareg mas-sentenza finali waqt illi l-Art 22A tal-Kap 101 jittratta ordni ta` frizar li tinhareg meta jkunu pendenti l-proceduri kriminali u jirreferi ghal sekwestru ta` l-

proprjeta` tal-imputati. Billi fil-kaz in ezami l-kwistjoni kienet dwar vettura proprjeta` tar-rikorrenti, l-ordni ta` frizar ma kenetx tapplika.

Fis-sentenza taghha, il-Qorti Kostituzzjonali qalet hekk :

> ***51.*** *Din il-Qorti tosserva li fil-kaz odjern l-Artikolu 6[1] tal-Konvenzjoni hu inapplikabbli tenut kont tal-fatt li la hemm proceduri civili diretti sabiex jiddeterminaw drittijiet jew obbligi civili tal-appellant, u wisq anqas hemm proceduri kriminali fil-konfront tal-istess appellanti. Il-proceduri kriminali huma diretti biss kontra l-konjugi Agius u l-ordni tal-iffrizar tolqot biss il-proprjeta` taghhom, inkluz allura l-flus li nstabu fir-residenza taghhom.*
>
> ***52.*** *Inoltre, il-fatt li l-qrati kriminali fil-kawza kriminali kontra l-konjugi Agius ezercitaw id-diskrezzjoni taghhom billi ma awtorizzawx il-hlas tal-kreditu tal-appellanti, mhux leziv tad-dritt ta' smiegh xieraq tal-appellanti. Dan qed jinghad tenut kont ukoll tal-fatt li l-appellanti kienet ghamlet rikorsi ghal dan il-ghan li kienu gew debitament ikkunsidrati mill-Qorti, izda gew michuda b'digrieti motivati, specifikatament ghar-raguni li dwar il-flus maqbuda kien jezisti suspett fondat li dawn kienu provenjenti minn attivita` kriminali.*
>
> ***53.*** *Rigward in-nuqqas ta' certezza legali li skont l-appellanti tezisti minhabba kontradizzjoni bejn l-Art.23 tal-Kap.9 u l-Artikolu 22A [1] talKap.101, din il-Qorti tosserva li filwaqt li l-Artikolu 23 jifforma parti mil-ligi penali generali u ghalhekk huwa applikabbli ghar-reati, l-Art.22A [1] tal-Kap.101 hija dispozizzjoni ta' ligi specjali, u ghalhekk f'kaz ta' konflitt tipprevali din tal-ahhar fuq l-istregwa tal-massima lex specialis derogat legi generali. F'dan l-ahhar artikolu l-legislatur ried li fil-kaz tar-reati kontemplati fl-istess artikolu,*

wara li tkun inghatat ordni tal-iffrizar tal-proprjeta` tal-akkuzat bhala mizura provvizorja u kawtelatorja, il-qrati kriminali li jkunu qed jisimghu l-kaz, xorta wahda jkollhom id-diskrezzjoni li jawtorizzaw ir-rilaxx ta' flus favur kredituri bona fide li l-kreditu taghhom jirrizali sa qabel il-hrug tal-ordni. Izda b'daqshekk, ma jfissirx li hemm konflitt mal-Artikolu 23 li min-naha tieghu jezenta mill-konfiska oggetti li fuqhom terzi li ma jkunux ippartecipaw fid-delitt jkollhom jedd. Anzi din il-Qorti tara li l-Artikolu 22A[1] jikkomplimenta l-Artikolu 23, stante li anke matul il-proceduri kriminali l-Qorti ghandha s-setgha li tirrilaxxa proprjeta` milquta b'ordni tal-iffrizar kif fuq indikat.

54. *Ghaldaqstant dan l-aggravju huwa manifestament nfondat.*

iii) <u>Jason Genovese vs Kummissarju tal-Pulizija et Rikors Nru. 66/2014</u>

Fl-ewwel istanza, il-kawza kienet deciza fit-12 ta` Mejju 2015, u mill-Qorti Kostituzzjonali fit-12 ta` Frar 2016.

Ir-rikorrenti lmenta minn lezjoni tad-drittijiet fundamentali tieghu abbazi tal-Art 6 u l-Art 13 tal-Konvenzjoni, minhabba dewmien fil-proceduri kriminali kontra terzi.

L-Ewwel Qorti ddikjarat l-azzjoni mhux ammissibbli billi rriteniet illi l-Art 6(1) tal-Konvenzjoni ma kienx japplika ghat-talbiet tar-rikorrent. Ghamlet dawn l-osservazzjonijiet :

"***Hu ovvju li r-rikorrent mhuwiex wiehed mill-akkuzati fil-proceduri in kwistjoni u ghalhekk il-qofol tal-kwistjoni li trid tigi ezaminata llum***

huwa jekk il-proceduri kriminali jistghux jiddeterminaw xi dritt civili tieghu gjaldarba huwa ammess f'dawk il-proceduri bhala parte civile.

Jekk it-twegiba ghal din il-mistoqsija hija fl-affermattiv, allura l-artiklu 6(1) huwa applikabbli ghall-kaz tal-lum.

Ikun utili li jigi riprodott l-artiklu 410 (3) tal-Kodici Kriminali (Kap.9 tal-Ligijiet ta' Malta) li japplika f'dan il kaz. Il-process kriminali kontra l-akkuzati gie introdott mill-Pulizija ex officio, u allura huwa lejn dan is-subartiklu li wiehed ghandu jhares sabiex jiddetermina d-drittijiet u obbligi tal-parte civile fi proceduri ex officio:

"410 (3) Fil-kazijiet ta' proceduri maghmulin mill-Pulizija 'ex officio', il-Pulizija u l-parti offiza jistghu jkunu assistiti minn avukat jew prokuratur legali, illi jista' jaghmel ezami u kontro ezami lix-xhieda, igib provi u jaghmel, sabiex isahhah l-akkuza, kull osservazzjoni ohra li l-qorti jidhrilha li tista' ssir skont il-ligi. Il-parti offiza tista' tkun prezenti fil-qorti waqt is-seduti.

(4) Minghajr pregudizzju ghad-disposizzjonijiet tas-subartikolu (3) u bla hsara ghad-disposizzjonijiet tas-subartikolu (6), parti offiza li jkollha interess li tkun prezenti matul proceduri maghmulin mill-Pulizija jkollha l-jedd li tikkomunika dak linteress lill-pulizija billi taghti l-partikolaritajiet taghha flimkien mal-indirizz fejn tkun toqghod u malli jsir dan dik il-parti offiza ghandha tigi notifikata b'avviz li jkun fih id-data, il-post u l-hin tal-ewwel smigh f 'dawk il-proceduri u jkollha l-jedd li tkun prezenti fil-qorti matul dak is-smigh u matul kull smigh iehor li jigi wara wkoll jekk tkun xhud."

<u>Kwistjonijiet ta' Dritt</u>

<u>Distinzjoni bejn l-Azzjoni Civili u l-Azzjoni Kriminali</u>

Il-Ligi taghna taghmel distinzjoni netta bejn iz-zewg tipi ta' azzjoni li jitnisslu mill-istess reat izda jimxu indipendentement minn xulxin, bi kriterji differenti li japplikaw ghall-piz probatorju. Fil-kamp kriminali l-prova trid tkun oltre kull dubbju ragjonevoli filwaqt li fil-kamp civili huwa bizzejjed li l-prova ssir skont il-grad inqas rigoruz tal-bilanc ta' probabilita'.

Ghaldaqstant hija wisq possibbli li akkuzat li jinheles mill-akkuzi migjuba kontrih fil-forum kriminali minhabba li l-prosekuzzjoni ma tkunx ippruvat il-kaz sal-grad rikjest xorta jinstab li hu responsabbli ghad-danni fil-forum civili.

Din id-distinzjoni ssib espressjoni elokwenti u semplici fl-artikolu 3 tal-Kap. 9 tal-Ligijiet ta' Malta:

"3. (1) Kull reat inissel azzjoni kriminali u azzjoni civili.

(2) L-azzjoni kriminali titmexxa quddiem il-qrati ta' gurisdizzjoni kriminali, u biha tintalab piena kontra l-hati.

(3) L-azzjoni civili titmexxa quddiem il-qrati ta' gurisdizzjoni civili, u biha jintalab il-hlas tal-hsara li ssir bir-reat"

Minn dan l-artiklu jitnissel ukoll l-iskop ewlieni taz-zewg toroq procedurali, is-sejba ta' htija tal-akkuzat, u l-hlas tal-hsara kkagunata bir-reat rispettivament.

L-intimati jiccitaw minn sentenza moghtija mill-Qorti Kostituzzjonali fil-kaz ***Francis Xavier sive Frank Mifsud vs Avukat Generali*** *(Dec. fit-2 ta' Novembru 2011). Dik il-kawza kienet tikkoncerna kwerela ghall-allegat malafama kommessa fejn ir-rikorrent, allura kwerelant/parte civile, fil-process kriminali, ssottometta li irrispettivament minn jekk ilproceduri minnu tentati kienux civili jew kriminali, hu kellu "d-dritt ghal smiegh xieraq una volta illi jkun accettat li kien igawdi dritt civili ghal reputazzjoni tajba." F'dik il-kawza wkoll il-prosekuzzjoni tmexxiet mill-Pulizija esekuttiva u mhux mill-kwerelant jew parti leza, tant li ssentenza nghatat fil-konfront tal-Pulizija u l-akkuzat.*

Il-Qorti ser tirraporta dak iccitat mill-Qorti Kostituzzjonali li fil-fehma konsiderata taghha huwa ta' rilevanza ghall-punt legali in ezami:

*"Gie ritenut illi "A criminal prosecution brought by an applicant will involve the determination of his civil rights and obligations where such an obligation is the remedy provided in national law for the enforcement of a civil right, as for example, in the case in some legal systems in connection with the right for a reputation. Art. 6 also applies on the basis that civil rights and obligations are being determined when the victim of a crime joins a criminal prosecution as a civil party claiming compensation or injury caused by the crime. (**Helmers vs Sweden**,(A212 1991) **Tomasi vs France** (A241 1992) u **Moreira de Azevedo vs Portugal** (A189 1990)."*

*FIl-kaz deciz fis-27 ta' **Tomasi vs. France** Awwissu 1992, (application no. 12850/87) gie ritenut (mill-Grand Chamber tal-Qorti Ewropea) illi:-*

"The right to compensation claimed by Mr. Tomasi therefore depended on the outcome of his complaint, in other words on the conviction of the perpetrators of the treatment complained of. It was a civil right notwithstanding the fact that the Criminal Courts had jurisdiction. (see mutatis mutandis the Moreira de Azevedo vs Portugal - Judgment of October 23rd, 1990)". (sottolinear ta' din il-Qorti)"

*F'dan il-kaz (**Tomasi**) il-Qorti sabet illi kien applikabbli s-subinciz 1 ta' l-artikolu 6 tal-Konvenzjoni.*

*"Il-Qorti Kostituzzjonali fil-kaz citat ta' **Francis Xavier sive Frank Mifsud vs Avukat Generali** applikat is-segwenti kejl sabiex jigi determinat l-applikabilita' tal-artikolu 6:*

"Jekk jirrizulta li kien essenzjali ghad-determinazzjoni tad-dritt civili ta' l-appellant l-process kriminali provokat minn diskors diffamatorju, allura kien japplika l-insenjament appena citat. Jekk, ghall-kuntrarju, dan ma kienx il-kaz, u allura jirrizulta illi l-appellant kellu rimedju iehor quddiem il-qrati civili, indipendenti mill-process kriminali li kien jassiguralu l-protezzjoni ta' tali dritt, allura din il-Qorti difficilment setghet taccetta s-sottomissjoni li kien ikun applikabblins-subinciz 1 ta' l-art. 6 ta' l-ewwel skeda tal-Kap 319 u ta' l-art. 39 tal-Kostituzzjoni.

*Din l-interpretazzjoni, fil-fehma tal-Qorti, tirrifletti l-insenjament talQorti Ewropea li ghalih saret riferenza, b'mod partikolari l-kaz "**Helmers**" kif ukoll il-kaz "**Fayed vs. United Kingdom**" minnha deciz fil-21 ta' Settembru, 1994, u li ghalih l-istess appellat ghamel riferenza. 'The result of the "criminal" proceedings in question must be directly decisive for such a right or obligation: mere*

tenuous connections or remote consequences not being sufficient to bring art. 6 (1) to play".

<u>Gurisprudenza tal-Qorti Ewropea</u>

Sabiex l-artiklu 6 jigi applikat, irid ikun hemm kontestazzjoni bejn zewg partijiet privati izda dan gie ezaminat ukoll fil-kuntest partikolari tal-process kriminali.

*Bhala principju generali l-Qorti Ewropea kellha l-okkazzjoni li tidhol fid-definizzjoni ta' "drittijiet u obbligazzjonijiet civili " sabiex tiddetermina l-ammissibilita' ta' kwistjoni taht l-**artiklu 6(1)** :*

*Although the Court has stated in some cases that the concept of civil rights and obligations is autonomous and cannot be interpreted solely by reference to the domestic law of the respondent state[17], it has also stated that for Article 6 to apply there must be a **right in national law** which is capable of being classified by the European Court as civil.[18] (**Guide to the Implementation of Article 6 of the European Convention on Human Rights - Echr Handbook No.3 p.11**).*

Huwa principju ammess li dak li hu rilevanti mhuwiex il-karattru tal-ligi li minnha jitnissel id-dritt, imma l-karattru sostantiv tad-dritt fih innifsu.[19]

*Fil-kaz in ezami, r-rikorrent qed ifittex kumpens ghad-danni sofferti b'kagun tal-aggressjoni u serq kommess mill-akkuzati. Id-dritt ghallkumpens minhabba att illecitu huwa palezament dritt ta' karattru civili. (Ara ad.ez. l-**Art.3 tal-Kap 9** fuq*

[17] See e.g. Ringeisen v. Austria, 16 July 1971, para. 94, and König v. the Federal Republicof Germany, 28 June 1978, para. 88
[18] Z and others v. the United Kingdom, 10 May 2001, and Roche v. the United Kingdom,19 October 2005.
[19] Ringeisen v AUstria Op.cit.

*citat, il-kuncett ta' delitt fil-ligi civili, u l-preskrizzjoni kif stabbilita fl-**artiklu 2154(1) tal-Kap.16**) u jista', f'certu gurisdizzjonijiet, jintalab anke fil-kors ta' proceduri kriminali. B'hekk issorgi l-kwistjoni tal-applikabbilita' tal-artiklu 6(1).*

*Skont l-awturi **Harris, O'Boyle & Warbrick**[20]:*

"Civil rights and obligations may be determined in criminal proceedings. This is so, for example, where a criminal prosecution is the remedy provided in national law for the enforcement of a civil right, as, for example, in some legal systems in connection with the right to a reputation.[21]

Article 6 also applies where a legal system allows the victim of a crime to be joined as a civil party in criminal proceedings against the offender in order to obtain damages or otherwise protect his or her civil rights; however, it does not apply in such cases where the victim's purpose in being joined is to punish the offender or to intervene on an 'actio popularis' basis not to obtain a personal civil remedy."[22]

*Il-Qorti Ewropea, fil-kawzi **Tommasi vs France**[23], **Acquaviva vs France**[24] u **Perez vs France**[25] kienet rinfaccjata b'sitwazzjoni fejn ilparte civile fi proceduri kriminali seta' jitlob kumpens ghad-danni .Filkuntest tal-procedure kriminali Franciza, l-ghotja tal-kumpens hija preordinata ghas-sejba ta' htija fil-process kriminali b'differenza malprocedura taghna.*

[20] Law of the European Convention on Human Rights, 3rd edition, p.392
[21] "See e.g.Helmers vs Sweden A 212-A (1991); 15 EHRR 285 PC. But Article 6 does not apply if the defamation prosecution is intended to punish:Rekasi v Hungary No 315061/96, 87-1 DR 164(1996)."
[22] "Perez v France 2004 - 1 ;40 EHRR 909 GC .See also Garimpo v Portugal No.66752/01 hudoc (2004)DA.
[23] App. No. 12580/87 - 27 August 1992.
[24] App. No. 19248/91 (GC) - 21 November 1995
[25] App.No. 47287/99 - 12 February 2004

*Il-pozizzjoni tal-Ligi Franciza giet imfissra mill-Qorti Ewropea fil-kaz ta' **Perez**:-*

"1.'Civil proceedings must await the outcome of criminal proceedings"'(Article 4 § 2 of the Code of Criminal Procedure). The civil court must suspend judgment until the criminal court has issued a final ruling in the prosecution.

2. A final criminal judgment prevails over a civil claim." A civil court is bound by the final decision in a prosecution. The primacy of a decision in a criminal case is not prescribed by law in the strict sense but derives from case-law;"

*Fl-istess kaz, **Perez v France**, il-Qorti Ewropea ikkumentat fuq il-kaz **Tommasi v France** u sabet li:*

"The right to compensation claimed by Mr Tomasi therefore depended on the outcome of his complaint, in other words on the conviction of the perpetrators of the treatment complained of. It was a civil right, notwithstanding the fact that the criminal courts had jurisdiction (see, mutatis mutandis, the Moreira de Azevedo v. Portugal judgment of 23 October 1990, Series A no. 189, p. 17, § 67)."[26]

*Fil-kaz **Acquaviva v France**, il-Qorti irriteniet li:*

"47. The Court notes that the Acquaviva's application, which was allowed by the investigating judge and not opposed by the prosecuting authority, temporarily denied them access to the civil courts for the purpose of seeking compensation for any damage that they may have

[26] § 47 tas-sentenza.

sustained. By choosing the avenue of criminal procedure, the applicants set in motion judicial criminal proceedings with a view to securing a conviction, which was a prior condition for obtaining compensation, and retained the right to submit a claim for damages up to and during the trial.

The finding of self-defense – which excluded any criminal or civil liability – made by the Indictment Division of the Versailles Court of Appeal ..... deprived them of any right to sue for compensation. The outcome of the proceedings was therefore, for the purposes of Article 6 § 1, directly decisive for establishing their right to compensation."

"F'kaz iehor, ***Calvelli and Giglio v Italy***[27] *intqal hekk:*

"62. ....It notes that it is common ground that the applicants were joined as civil parties and that, accordingly, even though the proceedings in the criminal courts concerned only the determination of the criminal charge against the doctor, they were apt to have repercussions on the claims made by the applicants as civil parties. The Court considers that Article 6 § 1 is applicable to the criminal proceedings, the decisive factor being that, from the moment the applicants were joined as civil parties until the conclusion of those proceedings by a final ruling that prosecution of the offence was timebarred, the civil limb of those proceedings remained closely linked to the criminal limb. In that connection, the applicants were entitled, in accordance with the Court's settled case-law, to rely on Article 6 § 1 (see, among many other authorities, Torri v. Italy, judgment of

[27] Application no. 32967/96 - 17 January, 2002.

1 July 1997, Reports 1997-IV, p. 1179, § 23).”(Sottolinear ta' din il-Qorti.)

*Il-Qorti Ewropea fil-kaz ta' **Perez**, rat il-htiega li tfisser "a new approach" ghar-raguni li :-*

*“3.The Court considers that its case-law may present a number of drawbacks, particularly in terms of legal certainty for the parties, in that after **Tomasi** it found it necessary to ascertain whether, firstly, there was a “dispute” over a “civil right” which was arguably recognised under domestic law and, secondly, whether the outcome of the proceedings was directly decisive for such a right.*

4.The Court thus wishes to end the uncertainty surrounding the applicability of Article 6 § 1 of the Convention to civil-party proceedings, particularly since a number of other High Contracting Parties to the Convention have similar systems.”

-omissis-

5.The Court further notes that, even where criminal proceedings are determinative only of a criminal charge, the decisive factor for the applicability of Article 6 § 1 is whether, from the moment when the applicant is joined as a civil party until the conclusion of those criminal proceedings, the civil component remains closely connected with the criminal component (see Calvelli and Ciglio v. Italy [GC], no. 32967/96, § 62, ECHR 2002-I), in other words whether the criminal proceedings affect the civil component. A fortiori, Article 6 must apply to proceedings relating both to the criminal charge and to the civil component of the case."(sottolinear ta' din il-Qorti).

Applikati l-principji hawn fuq traccjati, hija l-fehma konsiderata ta' din il-Qorti li l-proceduri kriminali fil-Ligi Maltija mhumiex determinanti ghall-otteniment tad-dritt civili ghad-danni mfittxa mir-rikorrent.

*L-**Art .532A** ma jbiddel xejn minn din is-sitwazzjoni.*

*Ghalkemm id-dritt ghall-kumpens reklamat mir-rikorrent huwa indubbjament dritt civili, mhix konvinta li, bl-applikazzjoni **tal-artiklu 532A tal-Kap.9** ikun hemm joinder of the civil and criminal actions bliskop ,ghall-azzjoni civili, ta' risarciment tad-danni. Minn ezami **tal-artiklu 410 (3) tal-Kap 9**, jirrizulta biss li l-parte civile tinghata certu drittijiet procedurali fil-kors tal-process kriminali. Essenzjalment ir-rwol tal-parte civile huwa biex jiehu sehem attiv, minghajr ma jissostitwixxi l-prosekuzzjoni, fl-ezami tax-xhieda, fl-interrogatorju, fil-kontroezamijiet, li jressaq il-provi tieghu u anke li jaghmel sottomissjonijiet. Imma l-iskop tal-process kriminali jibqa' dejjem wiehed - is-sejba ta' htija oltre kull ragjonevoli dubju.*

*Minn harsa lejn l-**art.532A**, gja rapportat iktar 'il fuq, il-Qorti tikkonkludi li l-kundanna tal-akkuzat, gjaladarba jinsab hati, ghall-hlas tad-danni lill-vittma, hija biss fakultattiva ghall-Qorti, - mizura li tista' tordna meta tipprefiggi l-piena applikabbli. Difatti fir-rikors tieghu quddiem il-Qorti tal-Magistrati, ir-rikorrent kull ma ghamel kien li "ressaq ghall-attenzjoni tal-Qorti d-disposizzjoni tal-artiklu 532A talKap.9" minghajr talba ut sic ghal-likwidazzjoni, hlas u kundanna ghad-danni. Talba simili mhix kontemplata fil-ligi procedurali kriminali taghna ghalhiex il-piena li ghandha tigi applikata tibqa' fid-diskrezzjoni tal-gudikant.*

*Inoltre ma jistax jinghad li l-proceduri kriminali ghandhom impatt determinanti fuq l-azzjoni civili. L-artiklu 3 tal-Kap.9 jitkellem car dwar is-separazzjoni bejn iz-zewg azzjonijiet. L-azzjoni civili mhix sospiza sakemm tigi determinata l-htija tal-akkuzat u tista' tirnexxi anke jekk lakkuzat jigi liberat fil-process kriminali. Difatti, anke l-applikazzjoni tal-**artiklu 532A** m'hi determinanti fuq l-azzjoni civili in kwantu l-**artiklu 24 tal-Kap 446** espressament jhalli lill-vittma l-jedd li jfittex kull ammont iehor in eccess tad-danni li joghgobha tordna l-Qorti kriminali.*

Ghaldaqstant fid-dawl tal-premess ir-rimedju civili li ghandu r-rikorrent jibqa' wiehed indipendenti mill-process kriminali, filwaqt li l-process kriminali bl-ebda mod ma jincidi fuq il-jedd li jfittex tali rimedju civili. Konsegwentement mhuwiex applikabbli ghall-kaz in ezami s-subinciz 1 ta' l-art. 6 ta' l-ewwel skeda tal-Kap 319."

Il-Qorti Kostituzzjonali qablet mal-fehma tal-Ewwel Qorti u osservat hekk :

29. L-Ewwel Qorti tajjeb irriteniet illi l-principji hawn fuq enuncjati mill-Qorti ta' Strasbourg ma japplikawx ghas-sistema Maltija, fejn id-distinzjoni bejn l-azzjoni civili u l-azzjoni kriminali hija ben distinta u separata, mhux biss ghax hekk jipprovdi l-Artikolu 3 tal-Kodici Civili lokali, izda wkoll ghaliex anke l-grad ta' prova rikjest f'kull wahda minnhom huwa differenti. Huma korretti ghalhekk l-intimati meta jghidu illi jista' jigri li ghalkemm wiehed jinheles mill-akkuzi migjuba kontrih, izda xorta jista' jinsab responsabbli ghad-danni rekati minnu fl-azzjoni civili. Dan jista' jsehh biss in kwantu l-azzjonijiet huma separati u indipendenti u ghalhekk ma tezistiex il-'close connection' li ghamlet referenza ghaliha l-Qorti ta' Strasbourg.

30. Fir-rigward imbaghad tas-sentenza tal-Qorti ta' Strasbourg li jikkwota r-rikorrenti Gorou v. Greece, jinghad illi dan ikkwota biss partijiet individwali mill-konsiderazzjonijiet tal-Qorti, li wahedhom ma jirrendux tajjeb l-ideja ta' dak li sahhqet dwaru l-istess Qorti. Is-segwenti bran, jaghmel diversi referenzi ghall-kaz tal-istess Qorti Perez v. France u jispjega t-taghlim tal-Qorti Ewropea dwar meta l-Artikolu 6(1) ghandu japplika ghall-parte civile:

"24. The Court reiterates that the Convention does not confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence. To fall within the scope of the Convention such right must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a "good reputation" (see Perez, cited above, § 70).

25. The import of this case-law is that Article 6 § 1 of the Convention applies to proceedings involving civil-party complaints from the moment the complainant is joined as a civil party, unless he or she has waived the right to reparation in an unequivocal manner (see Perez, cited above, § 66).

26. In the present case the applicant applied for civil-party status, claiming a sum equivalent to about three euros, in criminal proceedings concerning charges of perjury and defamation. Accordingly, Article 6 § 1 is applicable, above all because the impugned proceedings involved the right to a "good reputation" (see Perez, cited above, §§ 70-71, and Schwarkmann v. France, no. 52621/99, § 41, 8 February 2005). Moreover, the proceedings had an economic aspect, on account

of the sum – however symbolic – of about three euros which the applicant claimed in joining them as a civil party.

Having regard to the foregoing, this preliminary objection of the Government must be dismissed."[28]

31. Dawn il-principji gew ukoll ikkonfermati fil-Practical Guide to Article 6 – Civil Limb[29] *fejn jinghad :*

"23. Article 6 § 1 is applicable to a civil-party complaint in criminal proceedings (Perez v. France [GC], §§ 70-71), except in the case of a civil action brought purely to obtain private vengeance or for punitive purposes (Sigalas v. Greece, § 29; Mihova v. Italy (dec.)). The Convention does not confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence. To fall within the scope of the Convention, such right must be ***indissociable*** *[enfasi ta' din il-Qorti] from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a "good reputation" (Perez v. France [GC], § 70; see also, regarding a symbolic award, Gorou v. Greece (no. 2) [GC], § 24). Therefore, Article 6 applies to proceedings involving civil-party complaints from the moment the complainant is joined as a civil party, unless he or she has waived the right to reparation in an unequivocal manner".*

32. Jirrizulta ghalhekk illi l-Artikolu 6(1) ma japplikax ghal parte civile meta l-azzjoni tkun biss sabiex tigi stabbilita l-htija o meno tal-imputat skont l-akkuzi migjuba kontrih, izda jehtieg illi dik l-azzjoni kriminali tkun strettament marbuta mal-

[28] ECHR 12686/03, 20/03/2009, para 24-26
[29] Council of Europe / European Court of Human Rights, 2013, pg 8

jedd tal-vittma illi tipprocedi b'azzjoni civili, anke jekk tali azzjoni civili tkun semplicement talba ghal kumpens simboliku jew ghal protezzjoni tar-reputazzjoni tal-istess.

33. Kif ben ikkwotat l-Ewwel Qorti mis-sentenza tal-Qorti Kostituzzjonali ***Francis Xavier sive Frank Mifsud v. Avukat Generali*** *deciza fit-2 ta' Novembru 2001, l-Artikolu 6(1) ma jistax jitqies illi japplika jekk l-appellant "kellu rimedju iehor quddiem il-qrati civili, indipendenti mill-process kriminali li kien jassiguralu l-protezzjoni ta' tali dritt..."*[30] *bhal ma hu fil-kaz odjern fejn l-appellant ghandu a disposizzjoni tieghu rimedju quddiem il-Qorti Civili li jimxi indipendentement mill-procediment kriminali.*

34. Ir-rikorrent jissokta jghid illi gia` ladarba, permezz tal-Artikolu 532A tal-Kap 9, huwa ghandu dritt ex lege illi jikseb kumpens finanzjarju ghad-danni sofferti minnu permezz tal-proceduri kriminali, l-istess proceduri huma determinanti ta' dritt civili tieghu u ghalhekk l-istat ghandu l-obbligu li jassigura u jipprotegi d-dritt fundamentali tieghu ghal smigh xieraq. Izda din il-Qorti ma tqisx illi l-Artikolu 532 gab il-fuzjoni ta' l-azzjoni kriminali u dik civili naxxenti minn reat.

35. Fis-sentenza appellata[31] *l-Ewwel Qorti irriteniet illi ma hijiex konvinta li bl-applikazzjoni tal-Artikolu 532A, ikun hemm joinder of the civil and criminal actions. L-istess tirritjeni din il-Qorti. L-iskop ewlieni ta' proceduri kriminali jibqa` s-sejba ta' htija tal-imputat oltre kull dubju ragjonevoli u l-konsegwenti attribuzzjoni tal-piena f'kaz affermattiv. Il-kelma '****tista****'* [32] *turi illi tali mizura mhijiex obbligatorja izda diskrezzjonali*

[30] Pg 21
[31] Pga. 29
[32] Fl-Art.24[1] tal-Kap. 446

ghall-Qorti. Inoltre, l-Artikolu lanqas ma jipprekludi lill-parti leza milli tipprocedi bi proceduri civili sabiex tizgura l-jedd civili taghha fil-konfront tal-imputati. Lanqas ma jigri, bhal f'gurisdizzjonijiet ohra, illi l-azzjoni civili tigi sospiza sabiex u sakemm tigi determinata l-kawza kriminali, tant, illi kif gia` gie osservat, il-kawza civili tista` tirnexxi minkejja l-helsien tal-akkuzat fil-proceduri kriminali.

36. Ghaldaqstant, dan kollu jmur biex juri illi l-indipendenza tal-azzjoni civili minn dik kriminali fis-sistema gudizzjarja taghna hija wahda cara u inekwivoka u tenut kont tal-fatt illi l-process kriminali li fih huwa parte civile l-appellant ma jincidi bl-ebda mod fuq l-infurzar ta' dritt civili tieghu quddiem il-qrati civili, l-Artikolu 6(1) ma huwiex applikabbli ghall-kaz odjern."

iv) <u>Onor. Dr. Simon Busuttil vs L-Avukat Generali et</u> Rikors Nru. 86/2017

Fl-ewwel istanza, il-kawza kienet deciza fit-12 ta` Lulju 2018, waqt li mill-Qorti Kostituzzjonali kienet deciza fid-29 ta` Ottubru 2018.

Ir-rikorrent ipproceda skont l-Art 546(4A) tal-Kap 9 b'*notitia criminis* dwar fatti li hargu mill-kwistjoni tal-Panama Papers. Il-Magistrat ordna li ssir investigazzjoni *in genere*. Il-persuni kollha li ndika r-rikorrent u li kienu sejrin jigu nvestigati ghamlu appell mid-decizjoni tal-Magistrat u r-revoka taghha a tenur tal-Art 546(4B) tal-Kap 9.

L-appell mid-decizjoni tal-Magistrat kien assenjat lill-Onor. Imhallef Antonio Mizzi. Billi l-mara tal-Imhallef hija Membru Parlamentari Ewropew tal-Partit Laburista, u billi kienet esprimiet

ruhha fil-pubbliku kemm fuq il-media socjali u anke fil-Parlament Ewropew dwar il-fatti mertu tal-inkjesta, ir-rikorrent kien tal-fehma li se sejjer igarrab pregudizzju u ghalhekk talab ir-rikuza tal-Imhallef sedenti. L-Imhallef cahad it-talba. Billi r-rikorrent dehrlu li bid-decizjoni tal-Imhallef huwa kien ser igarrab ksur tal-jedd fundamentali tieghu ghal smigh xieraq huwa pprezenta rikors kostituzzjonali. L-Avukat Generali eccepixxa illi r-rikorrent ma kellux dritt jistitwixxi l-procediment kostituzzjonali billi ma kellux *victim status*.

L-Ewwel Qorti esprimiet ruhha hekk :

> *"Kien eccepit illi r-rikorrent m`ghandux l-interess guridiku sabiex jippromwovi l-azzjoni odjerna, ghaliex ma jikkwalifikax bhala "vittma".*
>
> *Ir-rikorrent la huwa imputat u lanqas persuna suspettata fil-kuntest ta` pretensjoni dwar ksur tal-jedd ghal smigh xieraq.*
>
> *Skont l-Avukat Generali l-Art 39 tal-Kostituzzjoni u l-Art 6 tal-Konvenzjoni japplikaw biss ghall-imputat, mhux ukoll ghall-parte civile.*
>
> *Il-Qorti tqis illi fl-ambitu tal-Konvenzjoni, l-Art 34 ighid illi "every natural person as well as every non-governmental organization (NGO) or group of individuals can apply to the European Court of Human Rights (ECtHR)".*
>
> *Sabiex ikun hemm "victim status", l-Art 34 ighid illi l-applikant ghandu jkun "the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto".*
>
> *Similment fl-Art 4(1) tal-Konvenzjoni u fl-Art 46(1) tal-Kostituzzjoni, hija persuna li tallega li d-drittijiet taghha gew, qed jigu jew x` aktarx ser jigu miksura li tista` tezercita l-azzjoni.*
>
> *Fil-**Practical Guide on Admissibility Criteria** mahrug mill-Qorti Ewropeja tad-Drittijiet tal-*

*Bniedem ("**ECHR**") [Fourth Edition – 28 ta` Frar 2017] jinghad hekk dwar "Victim Status" :-*

"15. The word "victim", in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation. Hence, Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end (Vallianatos and Others v. Greece [GC], §§ 47). The notion of "victim" is interpreted autonomously and irrespective of domestic rules such as those concerning interest in or capacity to take action (Gorraiz Lizarraga and Others v. Spain, § 35), even though the Court should have regard to the fact that an applicant was a party to the domestic proceedings (Aksu v. Turkey [GC], § 52; Micallef v. Malta [GC], § 48). It does not imply the existence of prejudice (Brumărescu v. Romania [GC], § 50), and an act that has only temporary legal effects may suffice (Monnat v. Switzerland, § 33).

16. The interpretation of the term "victim" is liable to evolve in the light of conditions in contemporary society and it must be applied without excessive formalism (ibid., §§ 30-33; Gorraiz Lizarraga and Others v. Spain, § 38; Stukus and Others v. Poland, § 35; Ziętal v. Poland, §§ 54-59).

The Court has held that the issue of victim status may be linked to the merits of the case (Siliadin v. France, § 63 ; Hirsi Jamaa and Others v. Italy [GC], § 111).

The Court can examine the question of victim status ex officio (Buzadji v. the Republic of Moldova [GC], § 70).

b. Direct victim

17. In order to be able to lodge an application in accordance with Article 34, an applicant must be able to show that he or she was "directly affected" by the measure complained of (Tănase v. Moldova [GC], § 104; Burden v. the United Kingdom [GC], § 33; Lambert and Others v. France [GC], § 89). This is indispensable for putting the protection mechanism of the Convention into motion (Hristozov and Others v. Bulgaria, § 73), although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (Micallef v. Malta [GC], § 45; Karner v. Austria, § 25; Aksu v. Turkey [GC], § 51).

18. Moreover, in accordance with the Court`s practice and with Article 34 of the Convention, applications can only be lodged by, or in the name of, individuals who are alive (Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], § 96).

c. Indirect victim

19. If the alleged victim of a violation has died before the introduction of the application, it may be possible for the person with the requisite legal interest as next-of-kin to introduce an application raising complaints related to the death or disappearance of his or her relative (Varnava and Others v. Turkey [GC], § 112). This is because of the particular situation governed by the nature of the violation alleged and considerations of the effective implementation of one of the most

fundamental provisions in the Convention system (Fairfield v. the United Kingdom (dec.)).

20. In such cases, the Court has accepted that close family members, such as parents, of a person whose death or disappearance is alleged to engage the responsibility of the State can themselves before the European Court of Human Rights claim to be indirect victims of the alleged violation of Article 2, the question of whether they were legal heirs of the deceased not being relevant (Van Colle v. the United Kingdom, § 86).

21. The next-of-kin can also bring other complaints, such as under Articles 3 and 5 of the Convention on behalf of deceased or disappeared relatives, provided that the alleged violation is closely linked to the death or disappearance giving rise to issues under Article 2.

…

d. <u>Potential victims and actio popularis</u>

28. Article 34 of the Convention does not allow complaints in abstracto alleging a violation of the Convention (Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], § 101). In certain specific situations, however, the Court has accepted that an applicant may be a potential victim. For example, where he was not able to establish that the legislation he complained of had actually been applied to him on account of the secret nature of the measures it authorised (Klass and Others v. Germany) or where an alien`s removal had been ordered, but not enforced, and where enforcement would have exposed him in the receiving country to treatment contrary to Article 3 of the Convention or to an infringement of his rights under Article 8 of the Convention (Soering v.

the United Kingdom) or where a law punishing homosexual acts was likely to be applied to a certain category of the population, to which the applicant belonged (Dudgeon v. the United Kingdom). The Court has also held that an applicant can claim to be a victim of a violation of the Convention if he or she is covered by the scope of legislation permitting secret surveillance measures and if the applicant has no remedies to challenge such cover surveillance (Roman Zakharov v. Russia [GC], §§ 173-78).

29. In order to be able to claim to be a victim in such a situation, an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient (Senator Lines GmbH v. fifteen member States of the European Union (dec.) [GC]). For the absence of a formal expulsion order, see Vijayanathan and Pusparajah v. France, § 46; for alleged consequences of a parliamentary report, see Fédération chrétienne des témoins de Jéhovah de France v. France (dec.); for alleged consequences of a judicial ruling concerning a third party in a coma, see Rossi and Others v. Italy (dec.).

30. An applicant cannot claim to be a victim in a case where he or she is partly responsible for the alleged violation (Paşa and Erkan Erol v. Turkey).

31. The Court has also underlined that the Convention does not envisage the bringing of an action popularis for the interpretation of the rights it contains or permit individuals to complain about a provision of a domestic law simply because they consider, without having been directly affected by it, that it may contravene the Convention (Aksu v.

Turkey [GC], § 50; Burden v. the United Kingdom [GC], § 33).

32. However, it is open to a person to contend that a law violates his or her rights, in the absence of an individual measure of implementation, if he or she is required either to modify his or her conduct or risks being prosecuted or if he or she is a member of a class of people who risk being directly affected by the legislation (ibid., § 34; Tănase v. Moldova [GC], § 104; Michaud v. France, §§ 51-52; Sejdić and Finci v. Bosnia and Herzegovina [GC], § 28).”

Il-Qorti tqis illi l-ECHR accettat l-istatus ta` “potential victims” fil-kazi eccezzjonali fejn ikun hemm periklu imminenti ghal dritt protett bil-Konvenzjoni.”

Fil-kaz tal-lum, ir-rikorrent jikkontendi li ghandu locus standi anke fil-procediment odjern in vista tal-fatt illi kien hu li pprezenta r-rikors a tenur tal-Art 546(4A) tal-Kap 9 sabiex il-Magistrat jaghmel il-prova dwar l-in genere kif jitlob l-Art 546(1) tal-Kap 9.

Il-Qorti tqis illi hekk kif ir-rikorrent kellu locus standi sabiex jaghti bidu ghall-procediment quddiem il-Magistrat Ian Farrugia sabiex dan jinvestiga jekk kienx hemm il-pre-rekwiziti kollha mehtiega sabiex tibda investigazzjoni u tiskatta l-inkjesta magisterjali, hekk ukoll huwa kellu locus standi quddiem il-Qorti Kriminali, wara li sar appell mill-provvediment tal-Magistrat Dr Ian Farrugia. Ladarba r-rikorrent odjern kien mill-bidu nett fil-procediment li tressaq il-Magistrat Ian Farrugia, u kellu locus standi, daqstant iehor ghandu locus standi li jaghmel l-azzjoni odjerna jekk, fil-fehma tieghu, kien hemm lezjoni tal-jedd tieghu ghal smigh xieraq kif protetti bil-Kostituzzjoni u bil-Konvenzjoni. Ghalhekk ir-rikorrent

jikkwalifika bhala "victim" ghall-fini tat-tutela tal-jeddijiet fondamentali tieghu, u kwindi ghandu l-interess guridiku li jippromwovi l-azzjoni tal-lum.

Il-Qorti Kostituzzjonali esprimiet ruhha diversament u ddipartiet mill-konkluzjonjiet tal-Ewwel Qorti.

Qalet hekk :-

"*16. It-tieni aggravju jolqot l-interess guridiku tal-attur u gie mfisser hekk :*

»L-ewwel onorabbli qorti kienet zbaljata meta cahdet l-eccezzjoni preliminari dwar in-nuqqas ta' interess guridiku tal-appellat stante li mhuwiex 'vittma' ai termini tal-Konvenzjoni Ewropea u l-Kostituzzjoni ta' Malta.

»Illi l-ewwel onorabbli qorti cahdet dina l-eccezzjoni preliminari wara li osservat illi:

»"Il-qorti tqis illi hekk kif ir-rikorrent kellu locus standi sabiex jaghti bidu ghall-procediment quddiem il-Magistrat Ian Farrugia sabiex dan jinvestiga jekk kienx hemm il-pre-rekwiziti kollha mehtiega sabiex tibda investigazzjoni u tiskatta l-inkjesta magisterjali hekk ukoll huwa kellu locus standi quddiem il-Qorti Kriminali, wara li sar appell mill-provvediment tal-Magistrat Dr Ian Farrugia. Ladarba rrikorrent odjern kien mill-bidu nett fil-procediment li tressaq [sc. qudiem] il-Magistrat Ian Farrugia, u kellu locus standi, daqstant iehor ghandu locus standi li jaghmel l-azzjoni odjerna jekk, filfehma tieghu, kien hemm lezjoni tal-jedd tieghu ghal smigh xieraq kif protetti bil-Kostituzzjoni u bil-Konvenzjoni. Ghalhekk ir-rikorrent jikkwalifika bhala 'victim' ghall-fini tat-

tutela tal-jeddijiet fondamentali tieghu, u kwindi ghandu l-interess guridiku li jippromwovi lazzjoni tal-lum."

»Illi certament li wiehed mill-presupposti processwali biex persuna tkun tista' tressaq azzjoni kostituzzjonali jew konvenzjonali huwa li dak li jkun irid juri li huwa vittma tal-vjolazzjoni kostituzzjoni jew konvenzjonali li tkun qed tigi allegata (ara L-Irlanda v. Ir-Renju Unit – applikazzjoni numru 5310/71 deciza mill-Qorti Ewropea ghad-Drittijiet tal-Bniedem fit-18 ta' Jannar 1978 u D v. Ir-Repubblika Federali talGermanja – applikazzjoni numru 9320/81 deciza fil-plenarja millKummissjoni fil-15 ta' Marzu 1984). Ghalhekk mhuwiex permissibbli li persuna tressaq azzjoni konvenzjonali jew kostituzzjonali fl-astratt (ara Klass u ohrajn v. Il-Germanja – applikazzjoni numru 5029/71 deciza fis-6 ta' Settembru 1978) fejn jinghad illi "… an individual applicant should claim to have been actually affected by the violation he alleges" u aktar 'il quddiem li l-azzjoni konvenzjonali "does not institute for individuals a kind of actio popolaris for the interpretation of the Convention; it does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention".

»Illi fil-fehma tal-esponenti minkejja l-fatt li talba sabiex issir Inkjesta magisterjali tista' ssir minn kull persuna b'daqshekk ma jfissirx li tali persuna ghandha l-istatus ta' 'vittma' ai termini tal-Konvenzjoni u lKostituzzjoni: dik il-persuna la tista' titqies vittma diretta u lanqas wahda indiretta. Infatti, fil-kaz odjern l-appellat la huwa imputat u lanqas huwa persuna suspettata izda huwa biss il-persuna li pprezenta rikors konfermat bil-gurament skont id-disposizzjonijiet tal-artikolu 546(4A) tal-Kodici Kriminali (Kap. 9 tal-Ligijiet ta' Malta) quddiem il-Magistrat tal-Ghassa u dan sabiex

tinfetah inkjesta magisterjali. Illi l-appellat huwa terza persuna li talbet lill-Magistrat tal-Ghassa sabiex tinfetah inkjesta magisterjali. Illi minkejja li l-istess appellat xehed fil-proceduri odjerni sabiex jipprova juri li huwa vittma ta' vjolazzjoni, madankollu dak li xehed dwaru mhuwiex kif huwa jista' jigi kkunsidrat bhala vittma (ma weriex li huwa ghandu interess dirett bhal ma ghandu interess dirett imputat jew suspettat f'kuntest ta' allegazzjoni ta' vjolazzjoni taddritt ghal smigh xieraq) izda xehed fuq il-mertu tal-allegat nuqqas ta' imparzjalità tal-Imhallef Mizzi. Illi kemm il-qrati nostrana kif ukoll il-qorti ta' Strasburgu diversi drabi rritenew li l-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni japplikaw biss ghall-imputat izda ma japplika ghal hadd aktar lanqas ghal parte civile meta l-azzjoni tkun biss sabiex tigi stabbilita htija o meno tal-imputat skont l-akkuzi migjuba kontrieh izda jehtieg illi dik l-azzjoni kriminali tkun strettament marbuta mal-jedd tal-vittma illi tipprocedi b'azzjoni civili, anke jekk tali azzjoni civili tkun semplicement talba ghal kumpens simboliku jew ghal protezzjoni tar-reputazzjoni tal-istess (vide Jason Genovese v. Il-Kummissarju tal-Pulizija et deciza mill-Qorti Kostituzzjonali fit-12 ta' Frar 2016). Issa fil-kaz odjern l-appellat lanqas ma ghandu stat ta' parte civile izda huwa persuna li talbet li ssir l-Inkjesta u l-irwol taghha huwa cirkoskritt ghal talba ghal ftuh tal-inkjesta magisterjali izda b'daqshekk ma jassumi l-ebda stat iehor u wisq inqas stat ta' 'vittma' ai fini tal-Kostituzzjoni u l-Konvenzjoni Ewropea.

»Illi fil-fehma tal-esponenti n-nuqqas ta' victim status tal-appellat huwa fatali ghall-azzjoni odjerna u dan stante li galadarba l-istess appellat ma ghandux l-interess guridiku necessarju li jirrikjedu kemm ilKostituzzjoni kif ukoll il-Konvenzjoni Ewropea sabiex tigi proposta azzjoni straordinarja

bhal dik odjerna, l-ewwel onorabbli qorti kellha tghaddi sabiex tiddikjara tali nuqqas da parti tal-appellat.

»Illi jsegwi ghalhekk li dan l-aggravju huwa gust u ghandu jigi milqugh.

« 17. L-attur wiegeb hekk:

»»L-appellat Simon Busuttil jichad bis-sahha l-argument tal-Avukat Generali fit-tieni aggravju tieghu u cjoè li Simon Busuttil "m'huwiex vittma ai termini tal-Konvenzjoni Ewropea u l-Kostituzzjoni ta' Malta".

»Biex isosti dan l-aggravju fieragh u vessatorju tieghu l-Avukat Generali jiccita zewg sentenzi tal-QEDB, wahda tal-1978 u ohra tal1984.

»… … …

»Li missu ghamel l-Avukat Generali huwa li jikkwota mis-sentenza tal-QEDB Iordachi v. Moldova (10.10.2009).

»F'din is-sentenza l-QEDB iddikjarat li grupp ta' avukati Moldovani li kienu jahdmu fil-qasam tad-drittijiet tal-bniedem kellhom ragun jghidu li kienu "vittma" ai termini tal-Konvenzjoni Ewropea u li inkisrulhom iddrittijiet taghhom b'ligi li kienet tipprovdi ghall-intercettazzjoni telefonika ta' certu kategoriji ta' persuni, fosthom huma. F'din is-sentenza l-QEDB wessghet sew id-definizzjoni ta' "victim".

»Din ma kkwotahiex l-Avukat Generali.

»Bhalma l-Avukat Generali ma kkwotax mis-sentenza tal-QEDB in re Weber and Saravia v. Germany (2006). Il-Qorti Ewropea hawnhekk

iddecidiet li gurnalista Germaniza u l-assistent taghha kellhom status ta' vittma ghaliex kienu parti minn kategorija ta' persuni li kienu suggetti li jkollhom it-telefonati taghhom minn barra l-pajjiz taht sorveljanza (il-kaz gie dikjarat li kien inamissibbli ghal ragunijiet ohra).

»Lanqas ma l-Avukat Generali ikkwota minn Norris v. Ireland (26.10.1988) fejn regghet twessghet id-definizzjoni ta' vittma. Lapplikant kien ilmenta li ligijiet li kienu joholqu reat kriminali atti omesswali kienu ligijiet li kienu qed jiksru id-dritt ghall-hajja privata.

»L-Avukat Generali seta' ccita mis-sentenza Burden v. UK (29.4.2008), imma lanqas din ma ghamel. Harbitlu. Hawnhekk il- QEDB iddikjarat li kienu vittma zewg ahwa nisa ghal finijiet ta' ligi fiskali Ingliza, anke jekk l-imposizzjoni tat-taxxa kienet xi haga potenzjali u fil-futur.

»Fl-ahharnett, fis-sentenza tal-QEDB Association of European Integration and Human Rights v. Bulgaria (2007) inghatat interpretazzjoni liberali ferm ta' victim status. Fost ohrajn qalet:

»"The Court therefore accepted that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting them, without having to allege that such measures were in fact applied to him or her (see Klass and Others, judgment of 6 September 1978, Series A no. 28, pp. 16-20, §§ 30-38; Malone v. the United Kingdom, judgment of 2 August 1984, Series A no. 82, p. 31, § 64; and Weber and Saravia v. Germany ((dec.), no. 54934/00, §§ 78 and 79, ECHR 2006"

»Anke jekk wiehed jaqra il-Van Dijk, 4th ed., Chp.10:

»"The Court requires that the determination concerns a right that can be said, at least on arguable grounds, to be recognised under domestic law … The Court does not to have to be convinced that the legal claim is well founded under domestic law; it is enough for it to determine that the claim is sufficiently tenable. The fact that the claim concerned was addressed as an issue in national proceedings constitutes sufficient ground for the "arguability" of the existence of a right."

»Il-QEDB fis-sentenza Editions Périscope v. France (26.3.1992), p.65:-

»"The Court requires that the determination concerns a right that can be said, at least on arguable grounds, to be recognised under domestic law … The Court does not to have to be convinced that the legal claim is well founded under domestic law; it is enough for it to determine that the claim is sufficiently tenable. The fact that the claim concerned was addressed as an issue in national proceedings constitutes sufficient ground for the "arguability" of the existence of a right".

»Fil-kaz odjern, skond l-artikolu 535 u 538 tal-Kodici Kriminali kemm id-denunzjant kif ukoll il-kwerelant "jista'" (u ghalhekk ghandu dritt) jaghmel denunzja jew kwerela (kif nafu, ir-rapport isir minn ufficjal pubbliku).

»Kemm hu veru, meta l-Pulizija Ezekuttiva ma tipprocedix fuq tali denunzja jew kwerela, dan id-"dritt" jissarraf fid-dritt ta' azzjoni kontemplat fl-artikolu 541 tal-Kodici Kriminali.

»Bl-istess mod, skond l-art. 546(4A), dak l-istess dritt li kemm iddenunzjant kif ukoll il-kwerelant kellhom li jadixxu lill-Pulizija Ezekuttiva, gie estiz b'mod li issa jistghu ukoll jadixxu direttament awtorità gudizzjarja – il-magistrat.

»Kemm hawn si tratta ta' dritt jirrizulta wkoll kemm mill-kontrapposizzjoni tad-dritt tal-persuna suspettata li tigi notifikata, kif ukoll – u aktar – mid-dritt ta' kull wahda mill-partijiet li tappella quddiem il-Qorti Kriminali: id-dritt ta' azzjoni, li jintegra d-dritt, jispetta kemm liddenunzjant/kwerelant kif ukoll lis-suspettat (art. 546(4B)).

» Fid-dawl ta' dan naraw kemm it-tieni aggravju tal-Avukat Generali huwa fieragh u vessatorju u ghandu jigi dikjarat tali, apparti li jkun michud.

« 18. Dan l-aggravju jisthoqq li jintlaqa'. Ghandha ssir distinzjoni bejn illegittimazzjoni biex taghmel denunzja ta' reat – li taht l-art. 535 talKodici Kriminali hija moghtija lil "kull persuna" – u l-legittimazzjoni biex tressaq azzjoni taht l-art. 46 tal-Kostituzzjoni jew l-art. 4 tal-Att dwar ilKonvenzjoni Ewropea ["Kap. 319"], li hija moghtija lil "kull persuna li tallega li xi wahda mid-disposizzjonijiet tal-artikoli 33 sa 45 maghdudin) ta' din il-Kostituzzjoni tkun giet, tkun qed tigi jew tkun x'aktarx ser tigi miksura dwarha", fil-kaz tal-Kostituzzjoni, jew lil "kull persuna li tallega li xi wiehed mid-Drittijiet tal-Bniedem u Libertajiet Fundamentali jkun gie, ikun qed jigi jew ikun x'aktarx ser jigi miksur dwarha" fil-kaz tal-Kap. 319.

19. Dan ifisser illi min iressaq azzjoni dwar drittijiet fondamentali jrid juri li huwa dritt tieghu li sejjer jinkiser, jew x'aktarx sejjer jinkiser, bl-ghemil li dwaru jsir l-ilment. Fi kliem iehor, irid juri interess

guridiku jew – fllingwagg tal-gurisprudenza dwar il-Konvenzjoni – li huwa "vittma", ghax, kif wara kollox sewwa qlet l-ewwel qorti, din tallum ma hijiex actio popularis.

20. Fil-proceduri quddiem il-Qorti Kriminali l-attur ma huwiex fost il- "persuni suspettati" u la ma hija sejra tinghata decizjoni dwar akkuza kriminali kontra l-attur u lanqas ma hija sejra tinghata decizjoni dwar drittijiet civili tieghu. Il-posizzjoni legali tal-attur b'ebda mod ma hija sejra tinbidel, tkun xi tkun id-decizjoni li taghti l-Qorti Kriminali fuq ir- rikorsi mressqa quddiemha taht l-art. 546(4B) tal-Kodici Kriminali. Ghalhekk il-kazijiet imsemmija fit-twegiba tal-attur ma ghandhomx relevanza ghall-kaz tallum billi f'dawk il-kazijiet kollha l-"vittmi" kellhom drittijiet taghhom milquta, jew li setghu jintlaqtu, jew sabu l-posizzjoni legali taghhom mhedda jew mibdula bil-ligijiet jew ghemil impunjati.

21. Tassew illi l-ligi stess taghti dritt lill-attur – bhala l-persuna li ghamel irrapport – illi jiftah proceduri taht l-art. 546(4B) tal-Kodici Kriminali, li necessarjament jimplika li ghandu jkun parti f'dawk il-proceduri meta, bhal fil-kaz li dwaru saret il-kawza tallum, ikunu nbdew minn haddiehor, ghax bhal ma ghandu dritt jikkontesta d-decizjoni tal-magistrat ghandu wkoll id-dritt li jiddefendiha meta kontestata minn haddiehor.

22. Madankollu, il-fatt li l-attur ghandu interess li jkun parti fil-proceduri quddiem il-Qorti Kriminali taht l-art. 546(4B) tal-Kodici Kriminali ma jfissirx illi f'dawk il-proceduri sejra tittiehed decizjoni fuq akkuza kriminali kontra l-attur jew li sejra tinghata decizjoni fuq id-drittijiet civili tieghu, jew illi sejra ssir xi haga li tista' 'l quddiem tolqot decizjoni bhal dawk; ghalhekk ma hemmx il-kondizzjoniiet

mehtiega biex ikun legittimat iressaq ilment dwar nuqqas ta' smigh xieraq.

23. Fil-kaz tallum l-interess tal-attur huwa l-interess ta' kull cittadin li jara li l-ligi tithares, izda, billi din ma hijiex actio popularis, dan ma huwiex bizzejjed biex jaghtih il-legittimazzjoni biex jista' jmexxi bl-azzjoni tallum.

24. Dan l-aggravju ghalhekk sejjer jintlaqa' …"

2. Qorti Ewropea tad-Drittijiet tal-Bniedem

i) Norris vs Ireland
Appl. No. 10581/83

Dan il-kaz kien deciz mill-Qorti Ewropea tad-Drittijiet tal-Bniedem ('**ECtHR**') fis-26 ta` Ottubru 1988.

David Norris, persuna omosesswali u attivist fil-kamp tal-jeddijiet ta` persuni b`orjentazzjoni sesswali bhal tieghu, hass ruhu aggravat b`ligijiet li saru fl-Irlanda illi kienu jqisu certa prattici omosesswali bejn irgiel adulti konsenzjenti bhala reati u allura kriminalment punibbli. David Norris qatt ma kien suggett ghal azzjoni kriminali pero` kien qieghed isofri pregudizzju billi l-ligi kienet qed tinterferexxi mad-dritt tieghu ghar-rispett tal-hajja privata. Tressqet ukoll evidenza dwar diskriminazzjoni illi kien qieghed igarrab kif ukoll dwar l-impatt negattiv illi kellu fuq is-sahha mentali tieghu billi hass illi ma setax jitkellem apertament dwar in-natura omosesswali tieghu stante illi b`hekk kien ikun espost ghal azzjoni kriminali.

Il-Gvern tal-Irlanda eccepixxa illi l-applikant ma kienx *vittma* fis-sens intiz mill-Art 25 tal-Konvenzjoni, u ghalhekk ma setax jinvoka ksur tad-drittijiet tieghu skont il-Konvenzjoni.

Tajjeb jinghad illi f'dan il-kaz ma kienx allegat ksur tal-Artikolu 6 tal-Konvenzjoni.

Il-Qorti ghamlet dawn l-osservazzjonijiet :-

> "***I. WHETHER THE APPLICANT IS ENTITLED TO CLAIM TO BE A VICTIM UNDER ARTICLE 25 PARA. 1 (art. 25-1)***
>
> *28. The Government asked the Court - and had made the same plea before the Commission - to hold that the applicant could not claim to be a "victim" within the meaning of Article 25 para. 1 (art. 25-1) of the Convention which, so far as is relevant, provides that:*
>
> *"The Commission may receive petitions ... from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention ..."*
>
> *The Government submitted that, since the legislation complained of had never been enforced against the applicant (see paragraphs 11-14 above), his claim was more in the nature of an actio popularis by means of which he sought a review in abstracto of the contested legislation in the light of the Convention.*
>
> *29. The Commission considered that Mr Norris could claim to be a victim. In this connection, it referred to certain earlier decisions of the Court, namely the Klass and Others judgment of 6 September 1978, the Marckx judgment of 13 June*

1979 and the Dudgeon judgment of 22 October 1981 (Series A nos. 28, 31 and 45).

In the Commission's view, although the applicant has not been prosecuted or subjected to any criminal investigation, he is directly affected by the laws of which he complains because he is predisposed to commit prohibited sexual acts with consenting adult men by reason of his homosexual orientation.

30. The Court recalls that, whilst Article 24 (art. 24) of the Convention permits a Contracting State to refer to the Commission "any alleged breach" of the Convention by another Contracting State, Article 25 (art. 25) requires that an individual applicant should be able to claim to be actually affected by the measure of which he complains. Article 25 (art. 25) may not be used to found an action in the nature of an actio popularis; nor may it form the basis of a claim made in abstracto that a law contravenes the Convention (see the Klass and Others judgment, previously cited, Series A no. 28, pp. 17-18, para. 33).

31. The Court further agrees with the Government that the conditions governing individual applications under Article 25 (art. 25) of the Convention are not necessarily the same as national criteria relating to locus standi. National rules in this respect may serve purposes different from those contemplated by Article 25 (art. 25) and, whilst those purposes may sometimes be analogous, they need not always be so (ibid., p. 19, para. 36).

Be that as it may, the Court has held that Article 25 (art. 25) of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of

implementation, if they run the risk of being directly affected by it (see the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 21, para. 42, and the Marckx judgment, previously cited, Series A no. 31, p. 13, para. 27).

32. In the Court's view, Mr Norris is in substantially the same position as the applicant in the Dudgeon case, which concerned identical legislation then in force in Northern Ireland. As was held in that case, "either [he] respects the law and refrains from engaging - even in private and with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution" (Series A no. 45, p. 18, para. 41).

33. Admittedly, it appears that there have been no prosecutions under the Irish legislation in question during the relevant period except where minors were involved or the acts were committed in public or without consent. It may be inferred from this that, at the present time, the risk of prosecution in the applicant's case is minimal. However, there is no stated policy on the part of the prosecuting authorities not to enforce the law in this respect (see paragraph 20 above). A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question. This conclusion is further supported by the High Court's judgment of 10 October 1980, in which Mr Justice McWilliam, on the witnesses' evidence, found, inter alia, that "One of the effects of criminal sanctions against homosexual acts is to reinforce the

misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease" (see paragraph 21 above).

34. On the basis of the foregoing considerations, the Court finds that the applicant can claim to be the victim of a violation of the Convention within the meaning of Article 25 para. 1 (art. 25-1) thereof.

That being so, the Court does not consider it necessary to examine further the applicant's allegations with regard to, inter alia, threats of prosecution, claims of interference with his mail, the upholding of a complaint against a television programme on which he appeared and the evidence he gave before the High Court of Ireland of his psychiatric problems (see paragraph 10 above)."

L-ECtHR irriteniet illi ghalkemm ir-rikorrent ma kienx soggett ghal proceduri kriminali, huwa xorta wahda seta` jikkwalifika bhala *vittma* billi kien qieghed jintlaqat direttament mil-ligijiet in kwistjoni.

Qieset ukoll illi r-rikorrent kien qieghed iressaq l-ilment tieghu bhala persuna li, konsegwenza tal-orjentazzjoni sesswali tieghu, kellu l-probabilita` gholja li jwettaq xi wiehed mill-atti sesswali li kienu projbiti u allura effettivament kien qieghed isofri minn *fear of prosecution*.

F'dan il-kaz l-istat ta` *vittma* kien accettat u rikonoxxjut fil-persuna illi potenzjalment setghet tispicca mixlija b'reat.

ii) <u>Association for European Integration and Human Rights and Ekimdzhiev vs Bulgaria</u>
Appl. No. 62540/00

Il-kaz kien deciz mill-ECtHR fis-28 ta` Gunju 2007.

Ir-rikors kien intiz sabiex jolqot l-Special Surveillance Means Act tal-1997 tal-Bulgaria. Ir-rikorrenti ma kienu soggetti ghal ebda sorveljanza pero` kkontestaw il-fatt illi skont din il-ligi kull cittadin seta` jigi sorveljat minghajr ebda pre-avviz jew avviz waqt jew wara s-sorveljanza.

Il-Gvern Bulgaru eccepixxa illi l-applikanti ma kellhomx *victim status* a tenur tal-Art 34 tal-Konvenzjoni.

Kien eccepit ukoll illi r-rikorrenti ma setghux jinvokaw vjolazzjoni tad-dritt tutelat bl-Art 8 tal-Konvenzjoni billi kienu persuna morali mhux fisika.

Ir-rikorrenti sostnew illi bhala entita` li thares id-drittijiet fundamentali tal-persuna kellhom kull interess jippromwovu l-azzjoni.

L-ECtHR ghamlet dawn l-osservazzjonijiet :-

> *57. Article 34 of the Convention provides, as relevant:*
>
> *"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ..."*

58. The Court considers that this case closely resembles the cases of Klass and Others v. Germany, Malone v. the United Kingdom, and Weber and Saravia v. Germany. In all these cases the Court found that to the extent that a law institutes a system of surveillance under which all persons in the country concerned can potentially have their mail and telecommunications monitored, without their ever knowing this unless there has been either some indiscretion or subsequent notification, it directly affects all users or potential users of the postal and telecommunication services in that country. The Court therefore accepted that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting them, without having to allege that such measures were in fact applied to him or her (see Klass and Others, judgment of 6 September 1978, Series A no. 28, pp. 16-20, §§ 30-38; Malone v. the United Kingdom, judgment of 2 August 1984, Series A no. 82, p. 31, § 64; and Weber and Saravia v. Germany ((dec.), no. 54934/00, §§ 78 and 79, ECHR 2006-...).

59. In line with its holdings in these cases, the Court finds that the second applicant, being an individual, can claim to be victim, within the meaning of Article 34, on account of the very existence of legislation in Bulgaria permitting secret surveillance. It notes in this connection that the applicants do not contend that measures of surveillance were actually applied to them; it is therefore inappropriate to apply a reasonable-likelihood test to determine whether they may claim to be victims of a violation of their Article 8 rights (see Halford v. the United Kingdom, judgment of 25 June 1997, Reports of Judgments and Decisions 1997-III, pp. 1018-19, §§ 55-57).

60. As regards the applicant association, the Court notes that it has already held that a legal person is entitled to respect for its "home" within the meaning of Article 8 § 1 of the Convention (see Société Colas Est and Others v. France, no. 37971/97, § 41, ECHR 2002-III; Buck v. Germany, no. 41604/98, § 31, 28 April 2005; and Kent Pharmaceuticals Limited and Others v. the United Kingdom (dec.), no. 9355/03, 11 October 2005). The applicant association is therefore, contrary to what the Government suggest, not wholly deprived of the protection of Article 8 by the mere fact that it is a legal person. While it may be open to doubt whether, being such a person, it can have a "private life" within the meaning of that provision, it can be said that its mail and other communications, which are in issue in the present case, are covered by the notion of "correspondence" which applies equally to communications originating from private and business premises (see Halford, cited above, p. 1016, § 44; Aalmoes and Others v. the Netherlands (dec.), no. 16269/02, 25 November 2004; and Weber and Saravia, cited above, § 77, with further references). The former Commission has already held, in circumstances identical to those of the present case, that applicants who are legal persons may fear that they are subjected to secret surveillance. It has accordingly accepted that they may claim to be victims (see Mersch and Others v. Luxembourg,nos. 10439-41/83, 10452/83 and 10512/83 and 10513/83, Commission decision of 10 May 1985, Decisions and Reports (DR) 43, p. 34, at pp. 113-14). The applicant association is therefore entitled to the protection afforded by Article 8.

61. Furthermore, unlike the situation obtaining in the cases of Scientology Kirche

Deutschland (cited above) and Herbecq and Association "Ligue des droits de l'homme" v. Belgium (nos. 32200/96 and 32201/96, Commission decision of 14 January 1998, DR 92-A, p. 92), the Article 8 rights in issue in the present case are those of the applicant association, not of its members. There is therefore a sufficiently direct link between the association as such and the alleged breaches of the Convention. It follows that it can claim to be a victim within the meaning of Article 34 of the Convention.

62. The Government's objection must therefore be rejected.

63. The Court further considers that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

Il-Qorti rriteniet illi assocjazzjoni illi ghandha personalita` guridika tista` tressaq l-ilment taghha kostitwit mill-biza`li l-korrispondenza taghha tkun soggetta ghal kontrolli ad insaputa taghha.

Il-Qorti ghalhekk sabet illi ladarba kien hemm konnessjoni diretta bejn ir-rikorrenti u l-allegat ksur tad-drittijiet tutelati mill-Konvenzjoni, ir-rikorrenti setghet tikkwalifika bhala *vittma* u allura kellha *locus standi* sabiex tressaq l-ilment taghha.

iii) <u>Tanisma vs Turkey</u>
Appl. No. 32219/15

Il-kaz kien deciz mill-ECtHR fis-17 ta` Novembru 2015.

Il-fatti kienu li iben ir-rikorrent ikkommetta suwicidju waqt illi kien qieghed jippresta servizz militari. Jumejn qabel ma miet huwa kien imsawwat u mghajjar minn ufficjal tieghu. Saret inkjesta militari li kkonkludiet li s-suwicidju kien konsegwenza ta` problemi ekonomici u familjari. Saret kawza ghad-danni. Il-Qorti Militari cahdet it-talba.

Quddiem l-ECtHR, sar ilment illi l-Qorti Militari ma kinitx indipendenti u imparzjali u allura kien hemm vjolazzjoni ghad-dritt ghal smigh xieraq skont l-Art 6 tal-Konvenzjoni.

Din il-Qorti fliet id-decizjoni tal-ECtHR b`reqqa u ma jirrizultax li kien hemm eccezzjoni dwar il-*locus standi* tar-rikorrenti jew dwar il-*victim status*.

iv. <u>Habran and Dalem vs Belgium</u>
Appl. No. 43000/11 u 49380/11

Il-kaz kien deciz mill-ECtHR fis-17 ta` Jannar 2017.

Ir-rikorrenti kienu soggetti ghal proceduri kriminali wara attentat armat fuq vettura blindata li halla vittmi. Fil-kors tal-proceduri kriminali r-rikorrenti lmentaw illi l-att ta` akkuza kien jirreferi ghal stqarrijiet rilaxxjati minn kriminali li kkoperaw mal-Pulizija u li kienu saru xhieda tal-Posekuzzjoni. Ikkontestaw il-validita` ta` dawk l-istqarrijiet billi ghamlu l-argument illi dawk ix-xhieda kienu kkoperaw biex jiehdu vantagg. Sostnew ukoll illi dik il-mossa ppregudikat id-difiza taghhom billi bhala persuni akkuzati ma kinux informati bl-identita` tal-persuni li l-Prosekuzzjoni kellha bhala xhieda. Ir-rikorrenti nstabu hajta u kienu kkundannati.

Quddiem l-ECtHR ir-rikorrenti allegaw li garrbu ksur tad-dritt taghhom ghal smigh xieraq. Il-pern tal-kwistjoni kien kollu dwar jekk stqarrija rilaxxjata minn persuni, bi precedenti kriminali, li kkoperaw mal-Pulizija kinitx effettivament leziva tad-dritt ghal smigh xieraq.

Premessi dawn il-fatti, din il-Qorti tosserva li l-punti li kienu trattati f`dak il-kaz ma jiccentraw xejn mal-kaz in dizamina. L-unika rilevanza ta` dik is-sentenza ghall-kaz odjern huwa d-dikjarazzjoni tal-Qorti illi meta si tratta ta` allegata vjolazzjoni tal-Art 6, il-Qorti trid tara jekk il-process kriminali kienx gust u xieraq :-

"*96. The Court, in making its assessment, will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses (see Al-Khawaja and Tahery, cited above, § 118, and Schatschaschwili, cited above, § 101).*"

Din il-Qorti tqis illi f`dak il-kaz il-*vittmi* tal-allegata vjolazzjoni skont l-Art 6 kienu l-akkuzati nfushom, u ghalhekk il-proceduri kriminali stitwiti kontra taghhom kienu mmirati sabiex jistabilixxu l-htija o meno taghhom stess. Kwindi setghu jinvokaw il-protezzjoni tad-dritt kif sancit bl-Art 6.

Din il-Qorti tosserva wkoll illi f`dak il-kaz ma tqanqlet ebda eccezzjoni ghar-rigward ta` jekk l-applikanti setghux imexxu bl-azzjoni taghhom skont il-Konvenzjoni.

Lanqas ma sar accenn ghall-kwistjoni ta` *victim status*.

v. <u>De Tommaso vs Italy</u>
Appl. No. 43395/09

Dan il-kaz kien deciz mill-ECtHR fit-23 ta` Frar 2017.

Fatti : Ir-rikorrent kien instab hati diversi drabi dwar firxa ta` akkuzi inkluz traffikar ta` droga u pussess ta` armi. Minhabba suspetti dwar il-provenjenza tal-introjtu ta` r-rikorrent, il-

Prosekuzzjoni talbet u kisbet mill-Corte d`Assise li r-rikorrent jitpogga taht sorveljanza specjali mill-Pulizija b`numru ta` kondizzjonijiet. In segwitu l-Qorti tal-Appell irrevokat l-ordni ta` sorveljanza ghax sabet illi fil-mument tat-talba, il-periklu reklamat mill-Prosekuzzjoni ma kienx gustifikat minhabba attivita` kriminali da parti ta` r-rikorrent.

Ir-rikorrent mar quddiem il-Qorti ta` Strsabourg fejn ilmenta minn vjolazzjoni ghad-dritt tieghu dwar smigh xieraq ghax sostna li l-proceduri quddiem il-qrati Taljani ma kinux miftuha ghall-pubbliku. Inghad ukoll illi l-indole kriminali li jahseb ghalih l-Art 6 ma kienx ighodd ghall-kaz in dizamina billi investigazzjoni ma kenitx l-istess bhal imputazzjoni.

L-ECtHR ghamlet dawn l-osservazzjonijiet :

> "*143. The Court observes at the outset that the criminal aspect of Article 6 § 1 of the Convention is not applicable, since special supervision is not comparable to a criminal sanction, given that the proceedings concerning the applicant did not involve the determination of a "criminal charge" within the meaning of Article 6 of the Convention (see Guzzardi, cited above, § 108, and Raimondo, cited above, § 43). It remains to be determined whether Article 6 § 1 of the Convention is applicable in its civil aspect.*
>
> *144. The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("contestation" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and finally, the result of the proceedings must be directly decisive for the*

right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, Mennitto v. Italy [GC], no. 33804/96, § 23, ECHR 2000-X; Micallef v. Malta[GC], no. 17056/06, § 74, ECHR 2009; and Boulois v. Luxembourg [GC], no. 37575/04, § 90, ECHR 2012).

145. In this regard, the character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, and so on) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are not of decisive consequence (see Micallef, cited above, § 74).

146. The Court notes that unlike the Guzzardi case, the present case is characterised by the fact that the preventive measures imposed on the applicant did not amount to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention but to restrictions on his liberty of movement. Accordingly, the question whether the right to liberty is "civil" in nature does not arise in the present case (see Guzzardi, cited above, § 108, and also Aerts v. Belgium, 30 July 1998, § 59, Reports of Judgments and Decisions 1998-V, and Laidin v. France (no. 2), no. 39282/98, § 76, 7 January 2003).

147. However, the question of the applicability of the civil limb of Article 6 arises in another respect. The Court has held – in the context of imprisonment – that some restrictions on detainees' rights, and the possible repercussions of such restrictions, fall within the sphere of "civil rights". By way of example, the Court observes

that it has found Article 6 to be applicable to certain types of disciplinary proceedings relating to the execution of prison sentences (see Gülmez v. Turkey, no. 16330/02, §§ 27-31, 20 May 2008, in which the applicant was prohibited from receiving visits for one year).

148. In the cases of Ganci v. Italy (no. 41576/98, §§ 20-26, ECHR 2003-XI), Musumeci v. Italy (no. 33695/96, § 36, 11 January 2005) and Enea v. Italy ([GC], no. 74912/01, § 107, ECHR 2009) the Court found that Article 6 § 1 was applicable to the high-security regime under which some prisoners could be placed in Italy. In these cases the restrictions imposed on the applicants mainly entailed a prohibition on receiving more than a certain number of visits from family members each month, the ongoing monitoring of correspondence and telephone calls and limits on outdoor exercise time. For example, in Enea (cited above, § 107) the Court held that the complaint concerning the restrictions to which the applicant had allegedly been subjected as a result of being placed in a high-security unit was compatible ratione materiae with the provisions of the Convention since it related to Article 6 under its civil head. It found that some of the restrictions alleged by the applicant – such as those restricting his contact with his family – clearly fell within the sphere of personal rights and were therefore civil in nature (ibid., § 103).

149. The Court also concluded that any restriction affecting individual civil rights had to be open to challenge in judicial proceedings, on account of the nature of the restrictions (for instance, a prohibition on receiving more than a certain number of visits from family members each month, or the ongoing monitoring of correspondence and telephone calls) and of their

possible repercussions (for instance, difficulty in maintaining family ties or relationships with non-family members, or exclusion from outdoor exercise) (ibid., § 106).

150. In Stegarescu and Bahrin v. Portugal (no. 46194/06, §§ 37-38, 6 April 2010) the Court applied Article 6 § 1 to disputes concerning the restrictions (visits limited to one hour per week and only behind a glass partition, outdoor exercise limited to one hour per day, and the first applicant's inability to pursue studies and sit examinations) to which detainees in high-security cells were subjected.

151. The Court therefore observes that there has been a shift in its own case-law towards applying the civil limb of Article 6 to cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private right belonging to an individual (see Alexandre v. Portugal, no. 33197/09, § 51, 20 November 2012, and Pocius v. Lithuania, no. 35601/04, § 43, 6 July 2010).

152. In the Court's view, the present case has similarities with the cases cited above: although the restrictions imposed in a prison context in those cases concerned contact with family members, relations with others or difficulties in maintaining family ties, they resemble those to which the applicant was subjected. The Court refers in particular to the requirement not to leave the district of residence, not to leave home between 10 p.m. and 6 a.m., not to attend public meetings and not to use mobile phones or radio communication devices.

153. The Court notes that in the present case, a "genuine and serious dispute" arose when the District Court placed the applicant under special supervision, dismissing his arguments. The dispute was then conclusively settled by the judgment of the Bari Court of Appeal, which acknowledged that the preventive measure imposed on the applicant was unlawful.

154. The Court further observes that some of the restrictions complained of by the applicant – such as the prohibition on going out at night, leaving the district where he lived, attending public meetings or using mobile phones or radio communication devices – clearly fall within the sphere of personal rights and are therefore civil in nature (see, mutatis mutandis, Enea, cited above, § 103, and Ganci, cited above, § 25).

155. In view of the foregoing, the Court concludes that the applicant's complaint concerning the restrictions to which he was allegedly subjected as a result of being placed under special supervision is compatible ratione materiae with the provisions of the Convention, since it relates to Article 6 in its civil aspect. As this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds, the Court declares it admissible.

Il-Qorti osservat illi l-kaz skatta minhabba l-kwistjoni tas-sorveljanza u l-kondizzjonijiet li kienu mposti. Billi s-sorveljanza *di per se* ma tistax ekwiparata ma` sanzjoni kriminali, stante illi dak il-procediment mhuwiex gudizzju dwar ir-rikorrent, il-Qorti eskludiet l-applikabilita` tal-*criminal limb provisions* tal-Art 6. Madankollu qieset illi ghall-kaz kienu jghoddu s-*civil limb provisions* tal-istess artikolu billi l-kondizzjonijiet tas-sorveljanza kellhom impatt dirett fuq id-drittijiet *civili* tal-applikant.

Huwa proprju in-ness bejn il-procediment *penali* u l-konsegwenzi li dan kellu fuq id-drittijiet *civili* tar-rikorrent li kien il-fondament tal-azzjoni skont l-Art 6.

Li kieku dak in-ness ma kienx determinat u accertat, allura ir-rikorrent ma kienx jikkwalifika ghall-*victim status* sabiex imexxi b`success l-azzjoni tieghu a tenur tal-Art 6.

vi) <u>D.M.D vs Romania</u>
Appl. No. 23022/13

L-ECtHR tat decizjoni fit-3 ta` Ottubru 2017.

Il-kaz kien jittratta allegat nuqqas da parti tal-awtoritajiet Rumeni i jipprotegu l-interessi tal-minuri minn abbuz domestiku. Il-proceduri kienu stitwiti minn iben kontra missieru. Wara procedura li damet sejra tmien snin, il-missier instab hati ta' abbuz fiziku u mentali fuq ibnu minuri. Ir-rikorrent ilmenta li ma kienux likwidati d-danni favur tieghu. Il-qorti hadet posizzjoni fis-sens illi ma kellha ebda obbligu tillikwida danni billi ma szaret ebda talba f`dan is-sens la mill-minuri u lanqas mill-Prosekuzzjoni. Ir-rikorrent ilmenta wkoll li kien garrab ksur tal-jedd ghal smigh xieraq.

Il-Qorti osservat illi :

> *62. The Court finds at the outset that the present case concerns a dispute (contestation in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law (see Bochan, cited above, § 42; see also,mutatis mutandis, Anđelković v. Serbia, no. 1401/08, § 25, 9 April 2013). Domestic law provided for the right to receive compensation (see paragraph 23 above) and the applicant's*

complaint with the Court of Appeal constituted a genuine and serious dispute (see paragraph 17 above). The proceedings were directly decisive for the right in question and the decision rendered by the Court of Appeal represented the final resolution of the matter (see respectively paragraphs 19 and 20 above).

63. Further, the Court notes that according to the applicable law, the courts were under an obligation to rule on the matter of compensation even without a formal request to that end from the applicant, who was a minor and therefore a person without legal capacity at the relevant time. Moreover, both the courts and the prosecutor had to actively seek information from the victim about the extent of the damage incurred (see paragraph 24 above). The law thus afforded reinforced protection to the vulnerable persons, such as the applicant, by placing an extended responsibility on the authorities to take an active role in this respect (see, mutatis mutandis, Lamarche v. Romania, no. 21472/03, § 34, 16 September 2008). For this reason and in the light of the object of the investigation, the proceedings went beyond mere litigation between private individuals, thus engaging the State's responsibility with respect to Article 6 § 1 of the Convention.

64. In this connection, the Court considers that the case is to be examined form the stand point of the courts' obligation to secure the applicant's rights in the concrete and exceptional circumstances of the case. Whether the applicant expressly requested compensation or not is irrelevant, as the courts had an obligation to examine on their own initiative the question of damages.

65. In particular, despite the express provisions of Article 17 of the CCP (see paragraph 24 above), only the first domestic court which convicted D.D. examined the matter of compensation (see paragraph 11 above). In its decision of 26 April 2012 rendered in the last set of proceedings, the County Court did not award compensation to the applicant and failed to give any reasons for its choice (see paragraphs 13 and 16 above).

66. In turn, the Court of Appeal did not examine the merits of the complaint brought before it by the applicant concerning the lower court's omission to award damages (see paragraph 19 above). It did no more than observe that neither the applicant nor the prosecutor requested compensation before the lower court, thus precluding the court from examining that issue. In doing so, the Court of Appeal refrained from examining the extent of the domestic courts' own role or that of the prosecutor in securing the applicant's best interests, in particular with regard to the provisions of Article 17 of the CCP.

67. Moreover, the Court of Appeal's reasoning had no legal foundation (see, mutatis mutandis, Anđelković, cited above, § 27, with further references). In the light of the unequivocal wording of the obligation enshrined in Article 17 of the CCP, the Court of Appeal should have examined on the merits the right to compensation, deciding whether or not the applicant was entitled to an award.

68. In conclusion, the Court considers that the omission on behalf of the domestic courts to apply Article 17 of the CCP in favour of the applicant and thus examine whether compensation should have

been awarded to him amounted to a denial of justice (see, mutatis mutandis, Anđelković, cited above, § 27, and Bochan (no. 2), cited above, § 64).

69. There has accordingly been a violation of Article 6 § 1 of the Convention. Consequently, the Court dismisses the objection raised by the Government concerning the alleged non-exhaustion of domestic remedies.

Il-Qorti Rumena kellha obbligu statutorju illi tqis il-kwistjoni tad-danni f'dawk il-kazi fejn il-vittma tar-reat tkun minuri, b`deroga ghall-principju generali illi vittma ghandha titlob kumpens ghal danni, u fin-nuqqas il-qorti tkun prekluza milli tillikwida danni *ex officio*. Huwa biss bir-rinunzja espressa ghall-kumpens da parti tal-vittma illi l-qorti tkun ezentata mill-obbligu legali illi tistharreg jekk hemmx lok ghall-kumpens. Fil-kaz in disamina ma nghatat l-ebda ezenzjoni u l-obbligu tal-qorti kien jissussisti, indipendentment minn talba, jekk il-vittma tar-reat tkunx ippartecipat fil-proceduri kriminali. Ladarba l-vittma kienet minuri, il-qorti kienet obbligata tistharreg il-kwistjoni tal-kumpens ghad-danni. Ir-rikorrent kien vittma ta` reat u kellu drittijiet li kienu tutelati mil-ligi Rumena. Billi fil-kaz de quo dik il-ligi kienet applikata hazin mill-qorti Rumena, skattat it-tutela tad-dritt tal-minuri skont l-Art 6 tal-Konvenzjoni, ghaliex il-proceduri fir-Rumanija kellhom jidderminaw id-drittijiet tal-minuri, haga li ma saritx Dan in-nuqqas kellu wkoll impatt dirett fuq id-drittijiet civili tal-minuri ghal-kumpens. B'hekk l-applikazzjoni hazina tal-ligi tat lok ghal vjolazzjoni tal-Art 6.

vii) <u>Sidiropoulos and Papakostas vs Greece</u>
Appl. No. 33349/10

L-ECtHR tat decizjoni fil-25 ta` April 2018.

Il-kaz kien jittratta dwar proceduri kriminali fejn ufficjal tal-pulizija ntab hati li ghamel tortura fuq r-rikorrenti sabiex igieghlhom

jammettu reat. Il-pulizija kien ikkundannat ghal piena ta` hames snin prigunerija li gew konvertiti f'piena pekunjarja ta` €5 ghal kull gurnata ta` habs, u hlas ta` €44 favur kull rikorrent bhala risarciment ghad-danni. Ir-rikorrenti hassewhom aggravati, u marru quddiem il-Qorti ta` Strasbourg fejn ilmentaw illi l-Istat Grieg kellu l-obbligu illi jhares lic-cittadini tieghu minn trattament inuman u degradanti skont l-Art 3 3 tal-Konvenzjoni.

Il-Qorti ghamlet dawn l-osservazzjonijiet :

> "*89. The Court notes from the outset that criminal proceedings and an administrative investigation were instituted against the police officer CE It notes that the two proceedings could have had consequences for the criminal or personal situation of the perpetrator because of the incriminated acts. Therefore, it considers it necessary to take into consideration all the proceedings at issue in order to decide whether, in the present case, dissuasive and sufficient protective measures against torture in accordance with the requirements of Article 3 of the Convention have been taken.*
>
> *90. As regards the criminal proceedings, the Court finds that the guilt of the EC police officer for the acts with which he was accused was recognized by the national courts. This procedure resulted in a conviction for torture caused by electric shocks (see paragraphs 43-45 above).*
>
> *91. With regard to the sentence imposed on the EC police officer, the Court notes from the outset that the fact that the first applicant was a minor at the material time was not taken into account in the context of the imposition of sentence and that the Court of Appeal, acknowledging to CE mitigating circumstances, sentenced him to five years' imprisonment. It*

further observes that the sentence imposed was commuted to a penalty of EUR 5 per day of imprisonment and that the amount was payable in thirty-six installments over a period of three years.

92. The Court notes in this regard that Article 137B of the CC, which represses the acts in question, provides for a prison sentence of at least ten years. It observes that the Court of Appeal, in applying Articles 79, 84 and 94 of the Penal Code, considered that the sentence of five years in total was appropriate in view of the torture inflicted on the applicants. The Court further notes that under Article 83 of the CC, where the domestic law provides for a reduced sentence, a prison sentence initially set at least 10 years may be converted into a prison sentence of up to twelve years or to a term of imprisonment of at least two years. However, judgment no °80, 81, 82/2014 the Court of Appeal does not include any specific justification that would clarify the discrepancy between the penalty applicable in principle and the sentence ultimately imposed, the Court can only note this disparity and is not in to decide on the reasons for it.

93. The Court further observes that under Article 82 of the Penal Code, a custodial sentence of more than two years and not exceeding five years is commuted into a financial penalty, unless the court, by a judgment containing a special justification, considers that not commuting the sentence is necessary in order to deter the perpetrator from committing such offenses in the future (see paragraph 48 above). It agrees with the Government's argument that the commutation of sentences of liberty into financial penalties may be beneficial to the penitentiary system and, in particular, may prevent or combat overcrowding.

94. The Court further observes that, while the Court of Appeal found that the offense committed by the EC police officer was of a particular moral unworthiness for the "legal civilization and personality" of the applicants, it nevertheless commuted the penalty imposed in a fine of EUR 5 per day of imprisonment when the maximum provided for by the provisions of domestic law was EUR 100 per day of imprisonment. Admittedly, the Court does not have jurisdiction to determine what sentence constituted an appropriate remedy.However, it observes that, by imposing the aforementioned pecuniary sanction and allowing its payment in thirty-six installments, the Court of Appeal only took into account the financial situation of the EC police officer.

95. In the view of the Court, such a sanction can not be considered to deter the perpetrator or other State agents from committing similar crimes or to be perceived as fair by the victims. This is especially so since the acts complained of have been described as torture. The purpose of the provisions of domestic law sanctioning torture inflicted by State agents is to afford genuine protection to persons, in particular where the persons concerned are placed, like the applicants, under the sole control of the police - and include effective measures to punish and prevent abuse by state agents (see, mutatis mutandis , Ciğerhun Öner v. Turkey (n° 2) , n° 2858/07 , § 100, 23 November 2010, Zeynep Özcan,cited above, § 43, 20 February 2007, and Abdülsamet Yaman , cited above, § 55).

96. In sum, the Court considers that the leniency of the penalty imposed on the EC police officer is manifestly disproportionate in view of the seriousness of the treatment inflicted on the applicants (see Zontul , cited above, § 108, Ali and

Ayşe Duran , cited above, § 54, Atalay , cited above, § 44 and, mutatis mutandis, Derman , cited above, § 28).

97. It goes on to point out that an administrative inquiry was opened against the police officer concerned. By a decision of 8 July 2003, the case was closed with regard to the use of an electric shock device and EC was fined 100 EUR for wearing and using a portable transceiver without prior permission. This procedure was concluded before the completion of the criminal proceedings, in which it was found that EC had tortured the applicants. In the meantime, the officer had left the service at his own request. However, the Court observes that the two proceedings reached substantially different conclusions and that EC never suffered the consequences of its actions as a police officer, having left the service on its own. Indeed, CE served with the police for eight years after the events, without suffering the consequences of his actions. Moreover, because of the length of the criminal proceedings, Article 49 § 2 of the Presidential Decree[o] 22/1996 which provides for the repetition of disciplinary proceedings could not be applied, EC having meanwhile left the service (see paragraph 51 above). In addition, when leaving the service, EC was promoted, with all the moral and financial implications (see paragraph 18 above). In this context, it recalls that the lack of rigor in the application of the penal and disciplinary system, as in the present case, is not likely to deter the police from committing illegal acts such as those denounced by the applicants (see, to that effect, Zeynep Özcan , cited above, § 45, Okkalı , cited above, §§ 76 and 78, and, mutatis mutandis , Abdülsamet Yaman , cited above, § 55).

98. With regard to the promptness of the investigation (see paragraph 87 above), the Court considers that, in the circumstances of the case, it is more appropriate to examine the question from the point of view of Article 6 § 1 of the Convention, which guarantees the right to have one's case heard within a reasonable time (see paragraphs 101-118 below).

c) <u>Conclusion</u>

99. The Court therefore considers that the penal and disciplinary system, as applied in this case, has proved far from rigorous and could not create a deterrent force capable of ensuring the effective prevention of unlawful acts such as those denounced by the applicants. In the particular circumstances of the case, it thus concludes that the outcome of the proceedings at issue against the police officer did not offer an appropriate remedy for the violation of the value enshrined in Article 3 of the Convention. (Zeynep Özcan , cited above, § 45). Accordingly, the Government's objections based on lack of victim status and non-compliance with the six-month period must be rejected.

100. Accordingly, there has been a violation of Article 3 of the Convention under its procedural limb.

F'dan il-kaz l-ECtHR irrikonoxxiet illi r-rikorrenti l-applikanti kellhom *victim status*. Ir-rikorrenti ma kienux l-akkuzati fil-proceduri kriminali izda l-vittmi. Il-Qorti osservat illi l-applikazzjoni hazina tal-ligi mill-Qorti Griega flimkien mal-piena li kienet imposta ma kinitx taghmel gustizzja mal-vittmi tar-reat. Osservat ukoll illi piena kienet

redikola u certament ma kenitx se sservi ta` deterrent. Billi r-rikorrenti bhala vittmi tar-reat ma nghatawx rimedju effettiv ghat-trattament li garrbu huma setghu jgawdu minn *victim status* u konsegwentment setghu imexxu bl-azzjoni taghhom.

VII. Konsiderazzjonijiet ta` din il-Qorti

Fil-kors tat-trattazzjoni bil-fomm li ghamlu d-difensuri fl-udjenza tat-8 ta` Novembru 2018, saret referenza u kienet dibattuta s-sentenza tal-Qorti Kostituzzjonali tad-29 ta` Ottubru 2018 fil-kawza '**L-Onor. Dr. Simon Busuttil vs L-Avukat Generali et**' u l-effett li jista` jkollha ghall-fini tad-decizjoni ta` din il-Qorti dwar l-erba` eccezzjonijiet preliminari fil-kaz tal-lum. Dik is-sentenza nzertat li kienet l-aktar wahda ricenti moghtija kemm mill-qrati Maltin kif ukoll mill-ECtHR fejn kienet trattata l-kwistjoni ta` l-karenza ta` *victim status* bhala pregudizzjali sabiex persuna tippromwovi azzjoni dwar allegata vjolazzjoni tal-Konvenzjoni.

Tajjeb jinghad illi kienet din il-Qorti **kif presjeduta** li fl-ewwel istanza tat is-sentenza dwar il-mertu tat-talbiet u tal-eccezzjonijiet fil-kawza '**L-Onor. Dr. Simon Busuttil vs L-Avukat Generali et**' fit-12 ta` Lulju 2018. Fil-kors tat-trattazzjoni bil-fomm li saret fil-kawza tal-lum, saru sottomissjonijiet min-naha tal-intimati fis-sens illi dik is-sentenza kienet issahhah il-fondatezza tal-eccezzjonijiet preliminari li qeghdin jigu decizi llum. Min-naha tar-rikorrent, inghad illi dik id-decizjoni tal-Qorti Kostituzzjonali ma kellhiex issib sostenn minn din il-Qorti fil-kuntest tal-fattispeci tal-kaz tal-lum. Mhux biss. Izda kien hemm insistenza da parti tar-rikorrent illi d-decizjoni t-tajba kienet dik tal-ewwel istanza.

Dan premess, din il-Qorti tirrimarka li bis-sentenza fil-kawza 'L-Onor. Dr. Simon Busuttil vs L-Avukat Generali et' li tat il-Qorti Kostituzzjonali kienet revokat is-sentenza tal-Ewwel Qorti. B`harsien tal-principju li fis-sistema guridiku ta` pajjizna ma hemmx *the rule of precedent* (kif hemm fir-Renju Unit) din il-Qorti kif presjeduta tistqarr li ghandha r-riservi

taghha dwar ir-*ratio decidendi* li abbazi tieghu kienet revokata s-sentenza tal-ewwel istanza. Fl-istess waqt, u bl-aktar rispett xieraq u dovut lejn il-fehmiet espressi mill-Qorti Kostituzzjonali f`dak il-kaz, taghzel li tieqaf hawn.

Dan premess, din il-Qorti tghid <u>minghajr l-icken esitazzjoni</u> illi l-fattispeci, cirkostanzi, u <u>fuq kollox</u> il-kwistjoni ta` dritt, li kienu l-fondament tal-kawza '<u>L-Onor. Dr. Simon Busuttil vs L-Avukat Generali et</u>' ma jistghux jigu estrapolati mill-kuntest taghhom sabiex jigu b`xi mod applikati ghall-kaz tal-lum, billi m`ghandhom x`jaqsmu xejn mal-kwistjoni li qeghda tigi dibattuta fil-kaz tal-lum.

Filwaqt illi fil-kawza '<u>L-Onor. Dr. Simon Busuttil vs L-Avukat Generali et</u>', fil-fehma ta` din il-Qorti, *si trattava* ta`kaz ta`*uncharted territory* kemm ghall-fatti, u fuq kollox fuq l-aspetti ta` dritt, li ma jsibu l-ebda somiljanza fil-gurisprudenza fuq riferita, il-kwestit li trid tiddeciedi fil-kaz tal-lum din il-Qorti huwa kristallin.

<u>Fis-sostanza</u> : Il-kwesit fil-kawza tal-lum huwa dan :- Tistax persuna li tkun ammessa bhala *parte civile* f`kawza kriminali, tipproponi azzjoni ghal allegata vjolazzjoni tal-Art 6 tal-Konvenzjoni fil-konfront taghha, ghaliex ma tkunx tista`tinterponi appell mid-decizjoni li tkun ittiehdet kontra l-akkuzat, wara li l-Prosekuzzjoni tkun ghazlet li ma tappellax ?

***Tutt`altro cielo* b`riferenza ghal kawza '<u>L-Onor. Dr. Simon Busuttil vs L-Avukat Generali et</u>'.**

Fil-kaz tal-lum, jirrizulta li wara li kien investigat ir-rapport li sar mir-rikorrent kontra Ronald Agius u Stephanie Theuma, il-Pulizija *ex officio* xliet lil dawn iz-zewg persuni b`akkuzi relatati ma` r-reat ta` hasil ta` flus. Fil-kors tal-procediment kriminali, ir-rikorrent talab (u kien ammess) bhala parte civile skont l-Art 410(3) tal-Kap 9.

Huwa evidenti mill-gurisprudenza fuq citata li l-kwistjoni **reali u sostanzjali** li ghandha quddiemha din il-Qorti llum diga` kienet trattata *mutatis mutandis* fil-qrati taghna u l-ECtHR.

Jidher illi nghatat direzzjoni nterpretativa fis-sens illi l-*parte civile*, kif kien ir-rikorrent fil-kawza kriminali li kienet istitwita kontra Ronald Agius u Stephanie Theuma, ma jikkwalifikax ghall-istatus ta` *vittma* ghall-fini tal-istanza kif promossa.

Jidher **mill-gurisprudenza** illi d-dritt tutelat bl-Art 6 tal-Konvenzjoni huwa accessibbli biss ghal dik il-persuna li tkun *the subject* ta` proceduri fejn se jkunu determinati drittijiet jew obbligi civili, jew inkella dik il-persuna tkun imputat fi proceduri kriminali li jiddeterminaw il-htija o meno tieghu.

Meqjusa l-gurisprudenza citata aktar kmieni, u riferibbilment ghall-fattispeci tal-kaz tal-lum, l-ezami li trid taghmel din il-Qorti huwa li tara jekk fil-qafas legislattiv ta` pajjizna, il-process kriminali huwiex essenzjali sabiex ikun hemm determinazzjoni tad-drittijiet civili tar-rikorrent. Jekk jirrizulta fl-affermattiv, allura r-rikorrent ikun jista` jressaq ilment skont l-Art 6 tal-Konvenzjoni. Jekk jirrizulta li r-rikorrent ghandu jew kellu rimedju **alternattiv** li seta` jippersegwixxi fil-qrati ordinarji civili, indipendentement mill-esitu tal-proceduri kriminali, allura ma jkunux jista` jipprocedi sabiex jinvoka l-applikazzjoni favur tieghu tal-Art 6 tal-Konvenzjoni u tal-Art 39 tal-Kostituzzjoni.

Ghalkemm l-akkuzi li bihom kienu mixlija Ronald Agius u Stephanie Theuma kienu dwar hasil ta` flus, din il-Qorti ma tarax illi sabiex ir-rikorrent jippreserva d-drittijiet civili tieghu kellu ta` bilfors jistenna l-esitu ta` l-azzjoni kriminali ghaliex l-akkuzi kienu ghal hasil ta` flus.

Jidher illi ghar-rigward tal-kaz tal-lum ma hemmx *victim status* ghall-*parte civile* meta bil-proceduri kriminali tkun determinata **biss** htija kriminali. Accertat illi r-rikorrent kien ammess bhala *parte civile* fil-kawza kriminali, ma jirrizultax illi fil-kawza kriminali kien hemm aspett civili li kien qed jigi trattat u deciz ukoll.

Qed jinghad dan ghaliex fis-sistema guridiku taghna **sal-lum**, il-qrati ta` ndole kriminali ma jaghmlu l-ebda likwidazzjoni ta` danni fil-kaz ta` s-sejbien ta` htija kriminali tal-imputat. Skont l-ordinament guridiku taghna, il-proceduri civili u dawk kriminali jimxu indipendentement minn xulxin. Ghalhekk, kien x`kien l-esitu tal-proceduri kriminali, ir-rikorrent kellu dejjem id-dritt tieghu ghall-azzjoni civili ghad-danni, dment li zamm attiva l-azzjoni bla ma hallieha taqa` in preskrizzjoni.

Fil-kaz tal-lum, ma jirrizultax li **sal-lum** ir-rikorrent ipprezenta kawza civili kontra Ronald Agius u/jew Stephanie Theuma sabiex dawn, jew min minnhom, ikunu kundannati jirrifondu dawk l-ammonti li jikkontendi li kienu versati lilhom, abbazi ta` liema materja kien awtorizzat jippartecipa bhala parte civile fil-kawza kriminali kontra dawk iz-zewg persuni.

Premess dan kollu, din il-Qorti hija tal-fehma li tenut kont tal-fatti u cirkostanzi tal-kaz, fl-isfond tal-gurisprudenza tal-qrati taghna u tal-Qorti ta` Strasbourg, ir-rikorrent ma setax jippromwovi l-azzjoni odjerna billi m`ghandux *victim status* u ghalhekk m`ghandux *locus standi.*

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi billi filwaqt illi qeghda tilqa` l-ewwel (1), it-tieni (2), it-tielet (3) u r-raba` (4) eccezzjonijiet preliminari, qeghda tichad it-talbiet kollha.

Tordna lir-rikorrent sabiex ihallas l-ispejjez kollha ta` din il-kawza.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur