



CONSTITUTIONAL COURT

JUDGES

**THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE ANTHONY ELLUL**

Sitting of Wednesday, 30th June, 2021.

Number: 12

Application number: 213/19/1 MH

The Police (Inspector Keith Vella)

v.

Omar Azumi

1. An appeal application was filed by the Attorney General on the 30th September, 2020 from a judgment delivered by the First Hall of the Civil Court in its Constitutional Jurisdiction on the 18th September, 2020 regarding a constitutional reference made by the Court of Magistrates (Malta) as a Court of Criminal Judicature asking it to determine whether the seizure of the undeclared cash in accordance with subsidiary legislation 233.07 breaches the accused's constitutional rights on the

basis of Article 1 Protocol 1 of the European Convention on Human Rights;

2. Having also seen the acts of the case before the Court of First Instance from which, *inter alia*, it results that:

2.1. On the 6th March, 2019, the accused Omar Azumi was charged in the Court of Magistrates (Malta) as a Court of Criminal Judicature of having on the 4th of March, 2019 at about 7:45pm at the Malta International Airport, Gudja, failed to declare to the Customs authorities that he was in possession of a sum equivalent to €10,000 or more in cash, whilst leaving Malta, in breach of Article 3 of subsidiary legislation 233.07 (Cash Controls Regulations) of the External Transaction Act (Chapter 233 of the Laws of Malta).¹ It transpires that the accused was in possession of €190,182.²

2.2. The Court of Magistrates (Malta) as a Court of Criminal Judicature was requested to order the forfeiture of all the objects exhibited in the eventuality of a declaration of the accused. It was also requested that in pronouncing judgment, or in any subsequent order, to sentence the person convicted, jointly or severally, to the payment, wholly or in part, to the Registrar of the costs incurred in connection with the employment in

¹ Fol. 2.
² Fol. 58.

the proceedings of any expert or referee, within such period and in such amount as shall be determined in the judgement or order, in terms of Article 533 of the Criminal Code;

2.3. On the 30th May, 2019 the accused filed an application³ wherein he requested the Court of Magistrates (Malta) as a Court of Criminal Judicature to make a constitutional reference to the Civil Court First Hall in terms of Article 46(3) of the Constitution of Malta and Article 4(3) of Chapter 319 of the Laws of Malta asking it to determine whether the seizure of undeclared cash in accordance with subsidiary legislation 233.07 breached his constitutional rights on the basis of Article 1 Protocol 1 of the European Convention of Human Rights;

2.4. In a reply filed on the 12th June, 2019, the Commissioner of Police objected to the accused's request and requested the Court of Magistrates (Malta) as a Court of Criminal Judicature to declare them frivolous and vexatious;⁴

2.5. By means of a decree dated 24th October, 2019, the Court of Magistrates (Malta) as a Court of Criminal Judicature decided that the accused's application is not frivolous and vexatious and upheld defendant's request. It consequently referred the matter to the First Hall,

³ Fol. 46 – 48.

⁴ Fol. 49 – 52.

Civil Court to determine, “... *whether the seizure of the undeclared cash in accordance with subsidiary legislation 233.07 breaches the accused’s constitutional rights on the basis of Article 1 of Protocol 1 of the European Convention on Human Rights*”.

2.6. The Civil Court, First Hall appointed the case for hearing for the 4th December, 2019;⁵

2.7. On the 2nd December, 2019, the Attorney General and Commissioner of Police filed a reply wherein they argued that regulation 3(4) of S.L. 233.07 was extensively amended by Legal Notice 85/2019 and contended that there is nothing unreasonable or disproportionate therein:

‘even more so because with the new amendments the legislator has introduced a mechanism whereby the person involved can enter into an agreement with the Commissioner depending on the amount of undeclared cash in excess of 10,000 euro. The more of undeclared cash the harsher the consequences. There is no breach of article 1 of the First Protocol because these measures are found at EU level and fall within the wide margin of appreciation of the State to interfere in property rights especially when considering that confiscation orders are globally recognized as an effective tool against money laundering, terrorism and drug trafficking.

In view of this there is no violation of article 1 of the First Protocol of the European Convention of Human Rights.’⁶

⁵ Fol. 63.

⁶ Fol. 65 – 67.

2.8. The accused and the Attorney General filed their respective submissions in writing;

2.9. By judgement delivered on the 18th of September, 2020, the First Hall, Civil Court in its Constitutional Jurisdiction replied to the question referred to it by the Court of Magistrates (Malta) as a Court of Criminal Judicature as follows:

‘as to the question of proportionality because of the reasons premised, the Court thus refers to the referring Court of Magistrates as a Court of Criminal Judicature “that the seizure of the undeclared cash in accordance with subsidiary legislation 233.07 breaches the accused’s constitutional rights on the basis of Article 1 of Protocol 1 European Convention of Human Rights”.

2.10. The following is the reasoning made by the first Court in it’s judgment:

‘The point in issue is whether the seizure of monies (which is also ex lege coupled with the imposition of a fine, multa) as envisaged under the regulation 3(4)(c) of S. of L. 233.07 breaches the afore mentioned Article 1 of the First Protocol to the above mentioned Convention.

In short the applicant questions the constitutionality of the punishment afforded under the said legislation due to the lack of correspondence between the crime committed and the punishment handed down with particular reference to the confiscation/seizure of proceeds in favour of the Commissioner, such to create a lack of proportionality to the prejudice of the applicant to the extent that the courts without even being granted any discretion in affording the disputed punishment will end up inflicting the automatic seizure of the undeclared sum in excess of the permitted ten thousand euros, (€10,000) additionally imposing a fine of 25% of the total sum found, therefore inclusive of the so called legal amount allowed and returned, thus failing to strike a proper balance between the demands of the general interests of the community to curb certain crimes emanating in particular from money laundering and the fundamental property rights of the applicant.

The Court a priori notes that the reference is penned to the extent as quoted above to be examined only from the point of view of the seizure of the undeclared cash, therefore that in excess of the allowed ten thousand euros. Obviously the Court of Magistrates was itself limited to the reference made. In fact a look at the catalyst application clearly indicates the limitation of this reference in that the constitutional issue raised is only limited to the actual seizure of the undeclared cash; it stops short of raising the more complex problems emanating from the subsidiary legislation under attack in that it clearly arouses further issue in the actual non-discretionary fine to be imposed when the undeclared sum is over a certain limit. The amount of the fine, the lack of consideration of the provenance of the monies and the fact that the courts have no discretion in this regard have proven to be of constitutional concern.

In fact in the note of submissions submitted by both parties the issues just pointed out were duly addressed.

Parties make reference to a recent Constitutional judgement, handed down by the first Hall of the Civil Court in its Constitutional Competence in the names of John Jason Agius vs The Attorney General⁷ ...

Aptly reference should be made to determining judgements of the European Court of Fundamental Human Rights in similar issues. Thus in the judgement in the names of Affaire Grifhorst vs France⁸ ...

The Court found that the application of the seizure and the fine applied together without a proper examination of the illicit provenance of the monies created a disproportionality against the interests and rights of the private citizen involved, scarified for the good of the general interest of society. As evidenced in the emphasised paragraph the European Court lauded the recent amendments of the concerned French legislation wherein no automatic seizure was any longer applicable, as also the reduction to one fourth of the monies to which the fine was to be applied. Furthermore the said amendments also provided for a judicial scrutiny regarding the monies involved and their forfeiture. The amendments were in fact intended for no other reason but to respect the disputed issue of proportionality.

The same questionable situation is prevalent in the punishment laid down in the subsidiary legislation in question, that in the case of the excess undeclared amount found, the automatic seizure of the excess of ten thousand euros would operate as also the fine of 25% on the whole amount of cash found. A punishment which is mandatory and permits no scrutiny of the courts. A punishment which in actual fact does not even consider or examine the actual provenance of these monies. Thus although the law is triggered to curtail the transfers of

⁷ 108/2018JVC decided 23/01/2020 appealed Judgement by the Constitutional Court is adjourned for the 5th of October, 2020.

⁸ 283336/02: 26/2/2009 (published in French).

monies proceeding from crime, as in money laundering, drugs, human trafficking, oil smuggling, illicit gaming proceeds etc, all intended for public good, in actual fact the monies in question have no definite established illegal provenance except for the breach of the law established in the subsidiary legislation in question, that is and merely the lack of the required declaration. Therefore their illegality stems only from the fact that they are an undeclared amount and will suffer the same seizure even if their provenance is clean, licit and legal. A similar situation was in fact examined by the European Court of Human Rights in the name of Ismayilov vs Russia⁹ ...

This same principle was also reiterated in the case Vasilevski vs the Former Yugoslav Republic of Macedonia¹⁰ a case which concerned the automatic confiscation of a truck used in sugar smuggling not withstanding the said vehicle was actually sold after the crime ...

In the publication issued by the European Strasbourg Court under the auspices of the European Council under the name of "Guide on Article 1 of Protocol No.1 to the European Court on Human Rights; Protection of Property"¹¹ it is said that ...

As premised the reference under examination is limited to the lack of proportionality in the punishment in so far as ALL the excess monies are subject to seizure in favour of the Commissioner. The Court is of the opinion that though public interest does necessitate the cross border control of movement of monies, especially monies emanating from criminal activities of any nature, those of dubious provenance, however lack of judicial scrutiny as to provenance of said proceeds and to the particular facts of the case, leaves much to be desired with regards to balancing the interest of the public that of curtailing the breach of the law and the individual's property rights, thus breaching proportionality and striking an unbalance "... between the means employed and the aim sought to be realised. In striking the fair balance thereby required between the general interest of the community and the requirements of the protection of the individual's fundamental rights,..."¹²

Also the forfeiture in question is in stark contrast to monies emanating from money laundering crimes where the law, Chapter 373 of the Laws of Malta, in article 7 thereof provides the machinery for a convicted person whose assets have been so forfeited by a court order on conviction to challenge civilly the same forfeiture. Therefore, a mechanism of judicial scrutiny is provided to separate non compromised assets from dirty proceeds and have the former released.

⁹ Application no. 30352/03) 6.04.2009.

¹⁰ Application 26653/08 28/07/2016.

¹¹ Updated 30/04/2020.

¹² Theory & Practice of the European Convention on Human Rights (4th Edit, 2006), P. Van Dijk u J.H and Hoof.

Multo magis therefore should a scrutiny be available when the crime in issue is the lack of declaration as per required form and just that.

Such is the challenged punishment that in actual fact besides suffering the 25% fine on the whole undeclared amount found, that of €200,182.0 therefore the sum of €50,045.50, the subsidiary legislation in issue also imposes the seizure of the sum in excess of ten thousand euros therefore the sum of €190,182. This last sum must be added to the mentioned fine thus the sum lost and confiscated/seized by the Commissioner would be to the amount of €240,227.50 This final last amount speaks volumes as to proportionality issue in question.

Of particular interest here and echoing the anti-constitutionality of extreme disproportionate punishments are two quotes from the Grifhorst case above cited ...

Lastly it is to be noted that the subsidiary legislation merits of this reference has today been amended¹³ in the sense that any monies in excess of ten thousand euros are “ of a value of more than thirty thousand euro (€30,000), the Commissioner shall detain the sum in excess of ten thousand euro (€10,000), or the whole amount when he cash is indivisible and deposit it in the Depository as provided in sub-regulation (7) and the person shall, on conviction, be liable to a fine (multa) equivalent to fifty five per cent (55%) of the sum carried in excess of ten thousand euro (€10,000) together with another fine (multa) of fifty euro (€50).”¹⁴

Furthermore the new amendments prospect not a mandatory seizure in favour of the commissioner but a detention on his part of the excess amount, as also an obligation to deposit the same excess amount with the appointed depository. The competent authorities,¹⁵ are then obliged to carry out an assessment of the necessity and proportionality of the detention within specified times. The law also speaks of a detected criminal activity justifying the continuous detention and criminal proceedings being taken even under any other law as a result thereof.¹⁶

Obviously this Court is not delving any further in these amendments as, as premised, it is circumscription in its assessment by the reference received. However already a brief and cursive look at these new regulations reveal a more balanced approach towards the punishment and seizure/confiscation of excess monies, regard also be had to their actual provenance’.

¹³ 7th July 2020 L.N. 285/2020.

¹⁴ Regulation 5(b).

¹⁵ Being The financial intelligence Analysis Unit, Asset Recovery Bureau, the Commissioner, Malta. Security Services and Malta Financial Services Authority. Vide article 2 of the regulation as amended.

¹⁶ Regulation 9(b)(c).

3. On the 30th September, 2020 the Attorney General appealed from that judgement and claimed that:

'1) Article 3 of SL 233.07 is legitimate and necessary in the fight against serious crimes

2) The punishment should serve as a deterrent.

3) The punishment is reasonable and proportionate also in view of the new amendments introduced last year

4) Forfeiture of monies is recognized not only in Malta but also at EU level

That therefore for the above reasons, the Attorney General whilst referring to all the acts of the proceedings and whilst reserving his right to produce further evidence as allowed by law, humbly requests this Honourable Constitutional Court to cancel and revoke the judgment of the Civil Court Frist Hall (Constitutional Jurisdiction) delivered on the 18th September 2020 and instead declare that the accused did not suffer any violation of his fundamental human rights'.

4. On the 14th May, 2021 the respondent filed a note wherein he gave reasons why the appeal should be dismissed.

Considers that:

5. By Legal Notice 285/2020, which came into force on the 7th July, 2020, *The Cash Control Regulations* subject of this constitutional reference were repealed.¹⁷ *The Cash Control Regulations, 2020* presently in force provide that any person entering, leaving, or transiting

¹⁷ Regulation 7.

through Malta and carrying a sum of a value of ten thousand euro (€10,000) or more in cash who fails to declare such sum to the Commissioner, shall on conviction be liable to a fine (*multa*) equivalent to fifty-five per cent (55%) of the sum carried in excess of ten thousand euro (€10,000) together with another fine (*multa*) of fifty euro (€50). However, the confiscation of the sum in excess of €10,000 is no longer mandatory. Instead, regulation 3(10) of Legal Notice 285 of 2020 now provides that there shall be a fund administered by the Commissioner for Revenue, known as the Depository, for the sole purpose of receiving cash detained in accordance with *The Cash Control Regulations, 2020*. Any cash deposited therein may only be detained for a limited time of 30 days (which, if deemed necessary, may be extended up to a maximum of 90 days from the day the cash was detained) after which period the cash shall be released to the person from whom it was detained unless criminal activity has been detected by the '*competent authorities*'.¹⁸ In the latter case, the person from whom the cash is detained must be notified accordingly and given reasons for the continued detention of the cash¹⁹ during which time criminal proceedings shall commence.²⁰

¹⁸ Defined as the Financial Intelligence Analysis Unit, the Police, the Asset Recovery Bureau, the Commissioner for Revenue, the Malta Security Services and the Malta Financial Services Authority.

¹⁹ Regulation 3(10)(c)(ii).

²⁰ Regulation 3(10)(c)(i).

6. However, the procedure contemplated in Legal Notice 285 of 2020 is not the merits of this reference and therefore this Court does not need to make any further considerations about it. The decree delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 24th October, 2019 related to subsidiary legislation 233.07. Legal Notice 285 of 2020 was published on the 7th July, 2020 and repealed subsidiary legislation 233.07.

7. In the judgement ***Ir-Repubblika ta' Malta v. Matthew-John Migneco*** delivered on the 15th November, 2011, the First Hall, Civil Court (Constitutional Jurisdiction) said:

'għal dak li jirrigwarda l-aspetti ta' dritt marbutin mar-riferenza din il-Qorti ttenni li hija marbuta li tqis il-kwestjoni "kostituzzjonali" skond il-parametri tar-riferenza magħmula lilha. Billi l-kwestjoni tkun inqalgħet quddiem Qorti li mhix il-Prim' Awla tal-Qorti Ċivili jew il-Qorti Kostituzzjonali, u billi l-proċediment ma jkunx tressaq quddiem din il-Qorti direttament minn min jallega l-ksur tal-jedd fundamentali partikolari, din il-Qorti jkollha tqis fedelment il-kwestjoni fil-mod u t-termini mgħoddijin lilha mill-Qorti li tkun għamlet ir-riferenza, u jekk tonqos li tagħmel dan jew titbiegħed milli tqis dak lilha riferut, tkun qegħda tiddeċiedi extra petita;'

8. Reference is also made to judgments given by this Court, ***II-Pulizija v. Ahmed Alhadi Khalleefah Suwah*** delivered on the 23rd November, 2020 and ***The Police v. Nelson Arias***, delivered on the 28th September, 2012.

9. Therefore the appeal has to be decided on the basis of the question made by the Court of Magistrates (Malta) as a Court of Criminal Judicature according to the decree of the 24th October, 2019 which refers to the *Cash Control Regulations* in force at the time.

10. The former *Cash Control Regulations* which came into force on the 15th June, 2007 by virtue of Legal Notice 149 of 2007, similarly provided that any person entering or leaving Malta, or transiting through Malta and carrying a sum equivalent to Lm4,293 (€10,000) or more in cash is obliged to declare such sum to Customs. Failing this obligation, sub-regulations (3) and (4) provided as follows:

'(3) Where any cash has not been declared as provided in sub-regulation (1), the Comptroller shall seize the undeclared amount in excess of Lm4,293, or the whole amount when the cash is indivisible.

(4) A person who makes a false declaration for the purpose of these regulations or who does not fulfil the obligation to declare such sum in terms of sub-regulation (2) of this regulation, shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) equivalent to twenty-five per centum of the value, represented in local currency on the date of entry or leaving Malta or transiting through Malta, by the cash carried, but in any case not exceeding a fine (multa) of twenty thousand liri.'

11. These regulations were further amended by Legal Notices 411 of 2007, 112 of 2013, 40 of 2017 and 85 of 2019.²¹ The latter had substituted regulation 3 with the following:

'3. (1) Any person entering or leaving Malta, or transiting through Malta and carrying a sum of a value of ten thousand euro

²¹ Published on the 23rd April 2019.

(€10,000) or more in cash shall be obliged to declare such sum to the Commissioner.

(2) The obligation to declare every sum as mentioned in sub-regulation (1) shall not be fulfilled unless such person has completed the applicable form, appearing in the Schedule, and has handed in such form to the Commissioner when entering or leaving Malta, or transiting through Malta.

(3) A person who makes a false declaration for the purposes of these regulations or who does not fulfil the obligation to declare such sum in terms of subregulation (2), shall be guilty of an offence.

.....

(c) If the sum mentioned in sub-regulation (1) which is falsely declared or not declared is of a value of twenty thousand and one euro (€20,001) or more, the Commissioner shall seize the sum in excess of ten thousand euro (€10,000) or the whole amount when the cash is indivisible and the person shall, on conviction, be liable to a fine (multa) equivalent to twenty-five per cent (25%) of the value of all the cash being carried, including the sum of ten thousand euro (€10,000), as represented in local currency on the date when the person is entering or leaving Malta or is transiting through Malta, provided that in no case shall the fine (multa) exceed fifty thousand euro (€50,000), and the court shall also order the forfeiture in favour of the Commissioner of the undeclared amount of cash in excess of ten thousand euro (€10,000), or the whole amount when the cash is indivisible.

.....

(e) All amounts of cash confiscated by order of the court by virtue of these regulations shall become the property of the Government and shall be released in favour of the Commissioner and no application shall be required to be made to the competent court by the Commissioner to take possession thereof

.....".

12. Legal Notice 85 of 2019 also provided that:

'3. These regulations shall also have effect with regard to a non declaration or a false declaration of cash that takes place before the coming into force of these regulations, until a final judgement is delivered by the court.'

13. In the Maltese version of the same Legal Notice,²² the same regulation reads as follows:

‘3. Dawn ir-regolamenti għandhom igħoddu wkoll fir-rigward ta’ nuqqas ta’ dikjarazzjoni ta’ flus jew dikjarazzjoni falza ta’ flus li jkun seħħ qabel id-dħul fis-seħħ ta’ dawn ir-regolamenti sakemm ma tkunx diġa’ ingħatat sentenza finali mill-qorti.’

14. It therefore follows that regulation 3 as substituted by Legal Notice 85 of 2019 was the applicable version of the law when the present Constitutional Reference was made to the Civil Court, First Hall in its Constitutional Jurisdiction.

15. Before the Court of Magistrates (Malta) as a Court of Criminal Judicature, Inspector Keith Vella testified²³ that the accused was stopped after passing through the immigration check, before departing on a flight to Manchester via Istanbul, at the Malta International Airport and found carrying 2 €50 notes, 2 £20 Sterling notes, 1 Sterling note, 2 £5 Sterling note, 1 £5 Sterling note, one 50 Turkish Lira, one 20 Turkish Lira and one 5 Turkish Lira (which in total amount to €182) as well as €200,000 cash in various denominations of Euro notes. A total of €200,182. €10,000 were returned to him on the spot whereas the balance of €190,182 was

²² The English translation is not entirely faithful to the Maltese text.

²³ Fol. 23 *et seq.*

seized by Customs Officers and exhibited in court during the sitting of the 21st March, 2019.²⁴

16. In its reference to the Civil Court First Hall, the referring Court stated that *'If the accused is found and declared guilty of the charge brought against him, he will be subjected to a fine (multa) and forfeiture in favour of the Commissioner of the undeclared cash, being €190,182.'*

17. In terms of regulation 3(4)(c) of the former *Cash Control Regulations* quoted above, the fine in question would amount to €50,000²⁵ meaning that, on conviction, the punishment established by law for the offence in question would add up to €240,182, that is, €40,000 more than the actual amount of undeclared cash the accused was caught carrying.

18. In ***Gyrlyan v. Russia*** (Application number 35943/15) decided on the 9th October, 2018, the ECtHR held as follows:-

*"21. The Court reiterates its consistent approach that a confiscation measure, even though it involves a deprivation of possessions, falls within the scope of the second paragraph of Article 1 of Protocol No. 1, which allows the Contracting States to control the use of property to secure the payment of penalties. However, this provision must be construed in the light of the general principle set out in the first sentence of the first paragraph and there must, therefore, exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Ismayilov*, § 30, and *Paulet*, § 64, both*

²⁴ Fol. 22.

²⁵ €200,182 x 25% = €50,045.50. However the law capped the fine to a maximum of €50,000.

cited above, and Grifhorst v. France, no. 28336/02, §§ 85-86, 26 February 2009).

22. *By contrast with previous cases against Russia in which the Court identified defects in the legal framework governing the confiscation of foreign currency (see Baklanov v. Russia, no. 68443/01, § 46, 9 June 2005; Sun v. Russia, no. 31004/02, §§ 29-33, 5 February 2009; and Adzhigovich v. Russia, no. 23202/05, §§ 30-34, 8 October 2009), the sanction for non-compliance with the obligation to declare any amount of foreign currency exceeding USD 10,000 was established in Article 16.4 of the Code of Administrative Offences, which provided for either a fine or a confiscation order (see paragraph 15 above). The Court is therefore satisfied that the interference with the applicant's property rights was provided for by law, as required by Article 1 of Protocol No. 1".*

19. In the present case it is undisputed that the fine and forfeiture in question are contemplated by law. Also, there is no doubt that regulations in question are aimed to curb money laundering and other serious financial crimes, drug trafficking, financing of terrorism or other crimes and fiscal evasion. Therefore, the confiscation measure seeks to protect the general interest of the community by combating criminality.

20. In this context reference is made to *Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community*²⁶ which in its preambles provides as follows:

'(2) The introduction of the proceeds of illegal activities into the financial system and their investment after laundering are detrimental to sound and sustainable economic development ...

...

²⁶

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0009:0012:EN:PDF>.

(5) Accordingly, cash carried by any natural person entering or leaving the Community should be subject to the principle of obligatory declaration. This principle would enable the customs authorities to gather information on such cash movements and, where appropriate, transmit that information to other authorities ...

(6) In view of its preventive purpose and deterrent character, the obligation to declare should be fulfilled upon entering or leaving the Community. However, in order to focus the authorities' action on significant movements of cash, only those movements of EUR 10 000 or more should be subject to such an obligation. Also, it should be specified that the obligation to declare applies to the natural person carrying the cash, regardless of whether that person is the owner.

...

(13) The powers of the competent authorities should be supplemented by an obligation on the Member States to lay down penalties. However, penalties should be imposed only for failure to make a declaration in accordance with this Regulation.'

21. Moreover, Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No 1889/2005, which shall apply from 3rd June, 2021, in its preambles provides:

'(2) The reintroduction of illicit proceeds into the economy and the diversion of money to finance illicit activities create distortions and unfair competitive disadvantages for law-abiding citizens and companies, and are therefore a threat to the functioning of the internal market. Moreover, those practices foster criminal and terrorist activities which endanger the security of citizens of the Union ...

...

(17) For the prevention of money laundering and terrorist financing, an obligation to declare cash should be imposed on natural persons entering or leaving the Union. In order not to restrict free movement unduly or overburden citizens and authorities with administrative formalities, the obligation should be subject to a threshold of EUR 10 000. It should apply to carriers carrying such amounts on their person, in their luggage or in the means of transport in which they cross the

external borders. They should be required to make the cash available to the competent authorities for control and, if necessary, to present it to those authorities. The definition of 'carrier' should be understood as excluding those carriers who undertake the professional conveyance of goods or people.

...

(35) In order to encourage compliance and deter circumvention, Member States should introduce penalties for noncompliance with the obligations to declare or disclose cash. Those penalties should apply only to the failure to declare or disclose cash under this Regulation and should not take into account the potential criminal activity associated with the cash, which may be the object of further investigation and measures that fall outside the scope of this Regulation. Those penalties should be effective, proportionate and dissuasive, and should not go beyond what is required to encourage compliance. Penalties introduced by Member States should have an equivalent deterrent effect across the Union on the infringement of this Regulation.'

22. The Court of First Instance found that *'the seizure of the undeclared cash in accordance with subsidiary legislation 233.07 breached the accused's constitutional rights on the basis of Article 1 of Protocol 1 European Convention of Human Rights'* after considering that:

i. the automatic seizure of the excess of ten thousand euros as well as the mandatory fine of 25% on the whole amount of cash found is mandatory and permits no scrutiny of the courts to separate non compromised assets from dirty proceeds (as is the case under Chapter 373 of the Laws of Malta);

ii. although the law is intended to curtail the transfers of monies proceeding from crime, in actual fact the monies in question have no definite established illegal source except for the breach of the law

established in the subsidiary legislation in question, that is, merely the lack of the required declaration;

iii. the sum subject to forfeiture plus the fine that would be applicable in the present case, speaks volumes as to the proportionality issue in question.

23. Indeed, notwithstanding that the Constitutional Reference subject of this appeal was limited to the order of forfeiture of the sum in excess of €10,000, the additional fine in question is also relevant in assessing the proportionality of the forfeiture imposed by the regulations in question. The imposition of a fine also falls within the ambit of Article 1 Protocol 1 of the European Convention. In this regard, reference is made to **Mamidakis v. Greece** (Application no. 35533/04) decided on the 11th January, 2007, wherein the ECtHR held:-

“4. En l'occurrence, la Cour observe que l'amende litigieuse est une ingérence dans le droit garanti par le premier alinéa de l'article 1 du Protocole no 1, car elle prive le requérant d'un élément de propriété, à savoir de la somme qu'il doit payer ; cette ingérence se justifie conformément au second alinéa de cet article, qui prévoit expressément une exception pour ce qui est du paiement d'impôts, d'autres contributions ou d'amendes. Toutefois, cette disposition doit être interprétée à la lumière du principe général énoncé dans la première phrase du premier alinéa, et il doit donc exister un rapport de proportionnalité raisonnable entre les moyens employés et le but recherché (Phillips c. Royaume-Uni, no 41087/98, § 51, CEDH 2001-VII).

45. Par conséquent, l'obligation financière née du paiement d'une amende peut léser la garantie consacrée par cette disposition, si elle impose à la personne en cause une charge excessive ou porte

fondamentalement atteinte à sa situation financière (voir Orion-Břeclav S.R.O. c. République tchèque (déc.), no 43783/98, 13 janvier 2004).²⁷

24. That therefore, in order to establish whether there is ‘a *reasonable relationship of proportionality between the means employed and the aim pursued*’ it is paramount to consider the punishment for the crime in question in its entirety.

25. In this context reference is made once more to *Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community and Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No 1889/2005*. Article 3 of both regulations reads as follows:

²⁷ Translated into English: -

“4. In the instant case, the Court observes that the fine at issue is an interference with the right guaranteed by the first paragraph of Article 1 of Protocol No. 1, since it deprives the applicant of an element of property, namely the sum he has to pay; that interference is justified in accordance with the second paragraph of that Article, which expressly provides for an exception in respect of the payment of taxes, other contributions or fines. However, this provision must be interpreted in the light of the general principle set out in the first sentence of the first paragraph, and there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued (Phillips v. the United Kingdom, no. 41087/98, § 51, ECHR 2001-VII).

45. Consequently, the financial obligation arising from the payment of a fine may adversely affect the guarantee enshrined in this provision if it imposes an excessive burden on the person concerned or fundamentally prejudices his financial position (see Orion-Břeclav S.R.O. v. the Czech Republic (dec.), no. 43783/98, 13 January 2004)”.

<i>'1. Any natural person entering or leaving the Community and carrying cash of a value of EUR 10 000 or more shall declare that sum to the competent authorities of the Member State through which he is entering or leaving the Community in accordance with this Regulation. The obligation to declare shall not have been fulfilled if the information provided is incorrect or incomplete.'</i>	<i>'1. Carriers who carry cash of a value of EUR 10 000 or more shall declare that cash to the competent authorities of the Member State through which they are entering or leaving the Union and make it available to them for control. The obligation to declare cash shall not be deemed to be fulfilled if the information provided is incorrect or incomplete or if the cash is not made available for control.'</i>
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26. The same Regulations of the European Parliament and of the Council further provide that:

<i>'1. Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare laid down in Article 3. Such penalties shall be effective, <u>proportionate</u> and dissuasive.'</i> (Article 9)	<i>'Each Member State shall introduce penalties which shall apply in the event of failure to comply with the obligation to declare accompanied cash laid down in Article 3 or the obligation to disclose unaccompanied cash laid down in Article 4. Such penalties shall be effective, <u>proportionate</u> and dissuasive.'</i> (Article 14)
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27. In the opinion of this Court, the imposition of a fine of 25% of the total value of all the cash being carried²⁸ *per se* cannot be deemed disproportionate when one considers the aim behind the regulations in question.

²⁸ Including the sum of ten thousand euro (€10,000) which could have been taken out of the country without being declared.

28. Regarding the order of forfeiture of the sum in excess of €10,000, in the case of **Sadocha v. Ukraine** decided on the 11th July, 2019 the ECtHR held as follows:

*“27. The remaining question for the Court to determine is whether the interference struck the requisite fair balance between the protection of the right of property and the requirements of the general interest, taking into account the margin of appreciation left to the respondent State in that area. The requisite balance will not be achieved if the property owner concerned has had to bear “an individual and excessive burden”. Moreover, although the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, the Court must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity to put his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake (see *Boljević*, cited above, § 41; *Denisova and Moiseyeva v. Russia*, no. 16903/03, §§ 58-59, 1 April 2010; and *Rummi v. Estonia*, no. 63362/09, § 104, 15 January 2015)”.*

29. In the present case the accused gave the police a sworn statement²⁹ on the 5th March, 2019 explaining that most of the cash he was found carrying, was given to him by a certain Mr Hesham Zayed with whom he has a business relationship, namely a company that had been recently registered in the United Kingdom. The sum of €200,000 in cash was intended to open a business account in the UK for that company. He specified that Hesham told him to declare the money at customs both in Malta and in the UK. However, he did not do so because he was in a hurry to catch the flight to Manchester³⁰ because he had an appointment

²⁹ Fol. 7 *et seq.*

³⁰ Through Istanbul (transit).

for a shoulder operation at Salford Hospital in Manchester, UK on the 7th March and didn't want to miss it.³¹

30. Hesham Zayed indeed gave the police a voluntary declaration on the same day³² stating that the €200,000 in cash was his. He stated that he gave the money to the accused to open a bank account in Manchester for a company he owns named *FX & Payments Ltd*, of which the accused is a director. He said that he told him many times to declare the cash at customs both locally as well as in Istanbul and in the UK. He explained to the police that he has various companies in Malta, Turkey and Libya but no bank allows him to transfer funds from Libya and neither was he allowed to deposit funds from Libya in local banks, even if same were declared at Maltese Customs. Hence, he was forced to use cash even though he would much rather do it via bank transfer. But he claimed that he does not have that option.

31. As a matter of fact the charges brought against the accused on the 6th March, 2019 are limited to the breach of Article 3 of Subsidiary Legislation 233.07. Whereas on the 21st March ,2019 Inspector Keith Vella testified that the investigation on the origin of the funds is still ongoing,³³ from the acts of the present proceedings it does not seem that

³¹ This notwithstanding, he said he stopped for a coffee.

³² Fol. 27 *et seq.*

³³ Fol. 25.

police filed any further charges regarding the cash in question. To date, neither did police allege that the money in question derived from proceeds of crime or that it was being smuggled for tax evasion or that any other criminal offence was committed or was about to be committed by means of said cash.

32. Indeed, the sum of €10,000 was immediately given back to the accused after Customs officers ran the currency check on him,³⁴ and only the additional sum of €190,182 was seized for the sole reason that the accused had failed to declare same in terms of the Cash Control Regulations subject of the present constitutional reference. The Court understands that had there been any suspicion that the funds derived from criminal activity, the entire amount would have been seized and not only the sum in excess of €10,000.

33. This notwithstanding, should the accused be found guilty of breaching regulation 3 of the former *Cash Control Regulations*,³⁵ the Court of Magistrates would have had no other option but to order the forfeiture of the sum of €190,182 over and above ordering the accused to also pay a fine (*multa*) of €50,000. Without prejudice to any pending investigations regarding the origin of the funds in question, this Court cannot conclude that the aggregate punishment provided for in the said

³⁴ Fol. 25.

³⁵ Today no longer in force as explained above.

regulations would be justified and/or proportionate in these circumstances.

34. This does not mean that the punishment contemplated in the former *Cash Control Regulations* is unjustified in all cases. Obviously, such an assessment is relative to the particular circumstances of each case. In fact, this is where the regulations in question are lacking, as they do not give the accused the opportunity to prove that the money seized by the authorities and subject to forfeiture, is from a legitimate source. In terms of the former *Cash Control Regulations*³⁶ the Court of Magistrates as a Court of Criminal Judicature is bound by law to order the forfeiture irrespective of whether the seized cash was linked to criminal activity or not.

35. In the case ***Yasar v. Romania*** (Application number 64863/13) of the 26th November ,2019. The ECtHR held:

“60. As regards the striking of a fair balance between the means employed by the domestic authorities for the purpose of preventing criminal activities relating to illegal fishing in the Black Sea and the protection of the applicant’s property rights, the Court reiterates that such a balance depends on many factors, and the behaviour of the owner of the property is one element of the entirety of circumstances which should be taken into account (see AGOSI, cited above, § 54). The Court must consider whether the applicable procedures in the present case were such as to enable reasonable account to be taken of the degree of fault or care attributable to the applicant or, at least, of the relationship between his conduct and the breach of the law which occurred; and also whether the procedures in question afforded him a reasonable opportunity to put his case to the relevant authorities (ibid.,

³⁶ Prior to their repeal by Legal Notice 285 of 2020.

§ 55). *In ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures (see B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi, cited above, 43)*”.

36. The court refers again to the judgement **Gyrlyan v. Russia**

(Application number 35943/15) decided on the 9th October, 2018:

“30. The Court is not convinced by the Government’s argument that an assessment of proportionality was incorporated in the domestic decisions. It does not appear that the above considerations relating to the lawful origin of the money, the unintentional nature of the applicant’s conduct or the absence of indications of any other customs offences, played any role in their decision-making. The sentencing court merely referred to the “nature and dangerousness of the offence” and “information on the [applicant’s] character” but did not ask whether or not the confiscation order was in the public interest or whether the requisite balance was maintained in a manner consonant with the applicant’s right to the peaceful enjoyment of his possessions. Accordingly, the Court finds that the scope of the review carried out by the domestic courts was too narrow to satisfy the requirement of seeking the “fair balance” inherent in the second paragraph of Article 1 of Protocol No. 1 (see Paulet, cited above, § 68).

31. Moreover, contrary to the Government’s claim that the court had opted for the most lenient penalty, Article 16.4 does not appear to leave the sentencing court any discretion in the matter by imposing a choice between a fine equivalent to at least the undeclared amount or confiscation of the undeclared cash. In either case, it was the entire undeclared amount that was forfeited to the State. In the Court’s view, such a rigid system is incapable of ensuring the requisite fair balance between the requirements of the general interest and the protection of an individual’s right to property (see Grifhorst, cited above, § 103 in fine, and also Vasilevski v. the former Republic of Macedonia, no. 22653/08, § 57, 28 April 2016, and Andonoski v. the former Yugoslav Republic of Macedonia, no. 16225/08, § 38, 17 September 2015, in which the domestic legislation prevented the courts from considering the relationship between the applicant’s conduct and the offence)”.

37. This is relevant insofar as the former *Cash Control Regulations* subject of this reference, impose, on conviction, the automatic forfeiture of all undeclared cash in excess of €10,000 and did not give the accused the opportunity to prove that the money was from a legitimate source. In

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the circumstances, the element of proportionality required both in terms of Article 1 Protocol 1 of the Convention as well as the above quoted EU Regulations Numbers 1889/2005 and 2018/1672, is absent.

38. Therefore, the complaint of the Attorney General is dismissed.

For these reasons, the Court rejects the Attorney General's appeal with costs.

The Registrar is to ensure that the file and a copy of this judgment sent back to the Court of Magistrates (Malta) as a Court of Criminal Judicature hearing the case ***The Police (Inspector Keith Vella) v. Omar Azumi***.

Mark Chetcuti
Chief Justice

Giannino Caruana Demajo
Judge

Anthony Ellul
Judge

Deputy Reg-istrar
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