CIVIL COURT FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. MR JUSTICE
JOSEPH ZAMMIT MCKEON

Today Thursday 30th January 2020

Case No. 1
Application No. 93/18 JZM

Emanuel Delia – ID. No. 0560176M

vs

The Honourable Minister for Justice, Culture and Local Government Owen Bonnici (ID. 273280M)

and

the Director General of the Cleansing and Maintenance Division Ramon Deguara (ID. 83474M)

and

by decree of the 14th January 2019 Dr

Joseph Brincat was authorised to intervene in the case *in statu et terminis*

The Court:

I. Preliminaries

Having regard to the application filed on the 24th September 2018 which reads as follows –

The Facts

1. That on Saturday 15th September 2018 at around half past ten in the morning (10.30 a.m.), the plaintiff with the assistance of a number of other activists placed a banner on the hoarding which is covering the Great Siege monument in Republic Street, Valletta, where the banner represented the Maltese flag, with the word "JUSTICE" and the picture of the assassinated journalist Daphne Caruana Galizia. At the same time, the plaintiff, in the presence of a number of activists and other persons, also placed flowers, candles and other related objects in front of the said banner and all this in remembrance of the said Daphne Caruana Galizia as a call for justice to be done for her assassination and in regard to the persons whom she investigated as part of her work.

2. That at around two o'clock in the afternoon (2.00 p.m.) of the same day, the plaintiff received information that the said banner, flowers, candles and other objects were removed by Government workers.

*3. That since this fact was still not confirmed by the plaintiff when the above-mentioned objects were removed, he proceeded by filing a report at the Valletta Police Station (**copy attached here in annex and marked as Doc. A**) where he explained what had happened and requested the Police to carry out its*

investigations.

4. *That whilst he was filing the report with the Police, the plaintiff was informed that the said banner, flowers, candles and other objects had been removed by the Cleansing and Maintenance Division workers within the Ministry for Justice, Culture and Local Government. The plaintiff, through his lawyer and in the presence of the Police, contacted the respondent, the Director General of the Cleansing and Maintenance Division within the Ministry for Justice, Culture and Local Government, Mr Ramon Deguara, who confirmed that the banner, flowers, candles and other objects had been removed by the Cleansing and Maintenance Division workers. The plaintiff, through his lawyer, requested the Director General of the Cleansing and Maintenance Division that the said banner, flowers, candles and other objects are returned to him immediately at the Valletta Police Station. On his part, the Director General of the Cleansing and Maintenance Division informed the plaintiff's lawyer that the said banner, flowers, candles and other objects were being returned to the plaintiff by the Division workers at the Valletta Police Station, as in fact happened a little while later.*

5. *That as soon as the said banner, flowers, candles and other objects were returned to him, that is at around half past five in the afternoon (5.30 p.m.), the plaintiff once again placed the said banner on the hoarding which is covering the Great Siege monument and also placed the flowers, candles and other relative objects on the ground in front of the said monument, in preparation for an activity which was to held the following day, that is, on Sunday 16th September 2018, eleven months after the murder of Daphne Caruana Galizia.*

6. *That at around eight o'clock in the evening (8.00 p.m.) of the same day of Saturday 15th September 2018, the plaintiff filed an urgent application for the registry to be opened after hours in order to file an application for the issue of a warrant of prohibitory injunction against the respondent authorities, which were, ex admissis, responsible for the removal and appropriation of the said*

banner, flowers, candles and other objects, which in fact are the protest manifestation of the plaintiff, as well as a section of the people who are still insisting and expecting justice to be done for the stolen life of Daphne Caruana Galizia and in regard to the persons she investigated as part of her work.

7. *That by decree of that same day, that is, Saturday 15th September 2018, the Honourable First Court of the Civil Court ordered the notification of the warrant to the respondents with a ten day period for reply whilst appointing the same warrant for a hearing on 5th October 2018 at 11.30 a.m. And therefore, almost three weeks after the facts which led to the plaintiff filing an urgent application. In its decree, the Court did not make provision that the warrant should be temporarily granted.*

8. *That in view of all this, the plaintiff, together with some other persons, had to keep watch of the said banner, flowers, candles and objects during the night between Saturday 15th September 2018 and Sunday 16th September 2018 as well as during the day on Sunday 16th September 2018 in order to ensure that these were not removed again by the respondents, a responsibility which the plaintiff rightly considers to be that of the State. At around four o'clock in the morning (4.00 a.m.) on Sunday 16th September 2018, some Cleansing and Maintenance Division workers went to the Great Siege monument to remove and appropriate once again the said banner, flowers, candles and other objects, but when they saw the plaintiff and other persons present at the location, the same workers decided to leave the place.*

9. *That in the early hours of Tuesday 18th September 2018, some Cleansing and Maintenance Division workers once again removed and took the said banner, flowers, candles and other objects from in front of the Great Siege monument and therefore the plaintiff once again filed a report at the Valletta Police Station. Once again workers under the responsibility of the respondent Director General of the Cleansing and Maintenance Division, and of the Minister for Justice, Culture and Local Government admitted*

once again to the Police that they were the ones who had removed and taken the said banner, flowers, candles and other objects and, in the present of officials and members of the Police Corps, they informed the plaintiff that the respondent Minister for Justice had personally given instructions to the Cleansing and Maintenance Division for this to be done. The said banner, flowers, candles and other objects were returned to the plaintiff by the Cleansing and Maintenance Division workers and he was requested to sign a receipt which noted all the above, a copy of which is attached and marked as Doc. B. The plaintiff, together with several other persons, immediately went to the Great Siege monument and, together with other persons, once again placed the banner on the hoarding which is covering the Great Siege monument and placed the flowers, candles and other relative objects in front of the same banner.

10. That on Wednesday 19th September 2018, once again in the early hours of the morning, some Cleansing and Maintenance Division workers again removed and took the same banner, flowers, candles and other objects from in front of the Great Siege monument and, instead of offering to return them back to the plaintiff, the respondent Director General of the Cleansing and Maintenance Division proceeded to file them at the registry of the First Hall of the Civil Court by means of a Schedule of Deposit number 1750/2018 in the records of the warrant of prohibitory injunction in the names of Emanuel Delia et vs the Minister for Justice, Culture and Local Government et (Warrant of Prohibitory Injunction No 1462/2018), whereby the said Schedule of Deposit was signed by the Attorney General's Office and in which it was stated that the said objects should be released "to whomever has a right over them according to law".

11. That as fact the plaintiff is aware of seventeen (17) occasions when the said objects were removed from the monument, or near it, or more recently, its hoarding, but since this always happened during the night, he could never identify who was conducting these actions. It was only on the 15th September 2018 that the plaintiff became aware with certainty that they were Government employees, that is, workers under the responsibility of the respondent Minister for Justice, Culture and Local Government, the Permanent Secretary and the Director General of the Cleansing and Maintenance Division, were, by order of the same respondents, removing and taking any flowers, candles, posters and other objects which were placed in front of the Great Siege monument.

12. That at this stage, the plaintiff felt that he had to proceed with this case, since it is clear that the proceedings with the issue of the warrant of prohibitory injunction against the respondents and which the plaintiff requested from the Court, were not going to be respected by the respondents themselves such that they immediately repeated this conduct which the plaintiff requested for them to be prohibited from conducting, and therefore the same plaintiff had no other alternative than to seek to safeguard his fundamental rights through this Court.

The interpellant's constitutional complaints

Violation of Article 10 of the European Convention and of Article 41 of the Constitution of Malta

13. *That it should not be contested that in a democratic society, the interpellant should enjoy the right to express himself and to protest where he feels that the authorities are not doing enough to safeguard the rule of law. In fact, this is a right sanctioned by Article 10 of the European Convention on Human Rights. That this right is not qualified nor limited in any way according to the opinion of State officials regarding that which this protest is being conducted and that even if the officials have an opinion which does not agree with that which is being said by whoever is protesting, they still have the duty to protect the individual's right.*

14. *The interpellant is maintaining that the consistent removal by the State of the memorial and the related objects, which should be considered – and which repeatedly and publicly was declared by the interpellant and other persons to be intended – as the manifestation of his protest and that of a section of the people, was conducted and is being conducted in violation of his fundamental right to freely express himself without interference from the State.*

15. *That it should also stand to reason that in order that this Court establishes whether there was a violation of the interpellant's right of free expression, it should investigate: whether there was interference on the part of the State, whether such interference was legal, whether it was conceived for a legitimate purpose and whether it was necessary in a democratic society. If the interference in question failed on one position only, therefore there would be a violation of the right to free expression.*

16. The interpellant maintains that the respondents' conduct fails on three tests and therefore amounts to a violation of Article 10 of the Convention in his regard.

17. That in order that the respondents' conduct could be considered as legal, it had to be based on a non-arbitrary law, which is clear and accessible to the people. It is stated that there is no law which authorises the Minister for Justice, Culture and Local Government to remove items which are intended as a protest and memorial. In fact, no law was quoted by the Minister in various statements

which he gave to the local media, in order to justify the arbitrary removal of the above-mentioned objects.

18. That there is neither a legitimate purpose for the removal of the banner, flowers and candles. Article 10 mentions the nine instances of legitimate purposes. These are when the interference is necessary for

a) the protection of national security;
b) the protection of territorial integrity;
c) the protection or public safety;
d) the prevention of disorder or crime;
e) the protection of health;
f) the protection or morals;
g) the protection of the reputation or rights of others;
h) preventing the disclosure of information received in confidence;
i) maintaining the authority and impartiality of the judiciary.[1]

It is evidently clear that the respondents' action does not fall under any one of these legitimate purposes.

19. That above all, the respondents' conduct is not necessary in a democratic society. To the contrary, that the respondents' conduct is actually anti-democratic. It is a well-known principle that in order that interference in a right is considered as "necessary in a democratic society" there should be a pressing social need to necessitate the interference. It is respectfully stated that there was no such need in this case; in fact society would continue with its everyday life if the interpellant's protest was not removed and therefore there was no impelling reason why this was removed. Therefore, the respondents' conduct also fails on this position.

20. That therefore the interpellant maintains that the respondents' conduct is a form of abusive and illegitimate censorship, which is out of place in a democratic country, and

therefore violates the plaintiff's fundamental right to express himself freely.

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[1] *D.J. Harris* et al, "Law of the European Convention on Human Rights" *(Oxford, 2018) 631-632*

Violation of Article 6 and Article 13 of the European Convention

21. That in each warrant of prohibitory injunction against the Government, in order for this to be granted, first and foremost there has to be a declaration on the part of a Government representative, that in fact the Government was intending to carry out that which the plaintiff wanted to be prohibited by the warrant. Without this declaration, the warrant would lose its purpose, and can only be denied.

22. That in the plaintiff's case, the respondents actually carried this out since they are not precluded by a provisional order of the Court so as not to remove the banner, flowers, candles and other related objects from the Great Siege monument until the hearing of the same warrant. And to date, there is nothing to stop them from doing this again. Moreover, it is stated that instead of returning the appropriated objects, as had happened prior to the filing of the warrant, the respondents, without first offering the items to the interpellant, deposited them at the Court to be released to whomever has a right to them according to law.

23. That therefore even if the interpellant could prove that he has the right to these items and would place them again as before, there was nothing to withhold the respondents from removing them again and depositing them at the Court, therefore even on the day of the warrant's hearing. If this is done, and the interpellant has now learnt, and is almost certain, that this shall be done, the declaration which is necessary on the day of the hearing, would not be able to be made, and the warrant itself would be futile, since the interpellant would be unable to stop the respondents from doing something which they would have already done.

24. That therefore it is said that the respondents, through their conduct, are exploiting the warrant civil proceedings and the

interpellant thus has no remedy for the evident violation of his right to free expression; this is in violation of Article 6 whereby they are rendering the warrant proceedings as ineffective and are acting as the Government in order to influence unilaterally the outcome of the judicial proceedings, also in violation of the principle of equality of arms. This is also in violation of Article 13 of the European Convention as shall be considered in detail during the case hearing.

Therefore, and for the reasons listed herein, the interpellant humbly requests that should it please this Court to:

1. *Declare that, through the respondents' conduct, the interpellant's fundamental right, as protected by Article 10 of the European Convention and Article 41 of the Constitution of Malta, was violated.*

2. *Declare that, through the respondents' conduct, the fundamental right to access to the court and effective remedy, as protected by Article 6 and Article 13 of the European Convention, was violated.*

3. *Consequently, to order the respondents to return the items taken from the site of the protest, whereby these items were deposited against the law under the authority of the Court and to desist from removing them again.*

4. *Liquidate an amount as compensation for pecuniary and non-pecuniary damages for the above-mentioned violations.*

5. *Sentence the respondents to pay the compensation as liquidated.*

6. *Grant every order and provision which it deems appropriate*

in order to ensure the interpellant's fundamental rights and as far as possible, return him to the status he had prior to the violation.

With costs, including the warrant of prohibitory injunction in the same names, numbered 1750/2018.

Having regard to the reply which the respondents filed together on the 10th October 2018, which reads as follows –

That the interpellant's claims are founded on two positions in the meaning that in the first instance "he is maintaining that the consistent removal by the State of the memorial and the related objects, which should be considered - and which repeatedly and publicly were declared by the interpellant and other persons to be intended - as the manifestation of his protest and that of a section of the people, was conducted and is being conducted in violation of his fundamental right to freely express himself without interference from the State" and in the second instance that "therefore it is said that the respondents, through their conduct, are exploiting the warrant civil proceedings and the interpellant thus has no remedy for the evident violation of his right to free expression; this is in violation of Article 6 whereby they are rendering the warrant proceedings as ineffective and are acting as the Government in order to influence unilaterally the outcome of the judicial proceedings, also in violation of the principle of equality of arms. This is also in violation of Article 13 of the European Convention as shall be considered in detail during the case hearing".

That the interpellant submits that the plaintiff's claims are unfounded in fact and in right for the following reasons:

1. *That in regard to the alleged breach of Article 10 of the European Convention and Article 41 of the Constitution of Malta, the interpellant submits that both Article 10 of the European Convention as well as Article 41 of the Constitution of Malta, whilst these enounce the right to freedom of expression as a fundamental*

right, in its sub-article (2), it considers the exceptions in which cases it is permissible by the same Convention to render interference by the State as legal and licit by the revocation of this fundamental right. The interpellant submits that it is evident that the right protected by this Article is not an absolute one but there are certain restrictions which the State may impose, in a proportionate manner, in regard to its exercise on the basis of specific reasons. The exercise of this right also brings about obligations and responsibilities.

The interpellant submits that the State enjoys certain margins of appreciation in order to limit this right. As has always been maintained by the European Court for Human Rights, these restrictions are permissible when these are prescribed by a law, are implemented for a legitimate objective and are necessary in a democratic society.

That the interpellant submits that according to Article 4(2) of the Cultural Heritage Act (Cap. 445 of the Laws of Malta "(2) Every citizen of Malta as well as every person present in Malta shall have the duty of protecting the cultural heritage as well as the right to benefit from this cultural heritage through learning and enjoyment. The cultural heritage is an asset of irreplaceable spiritual, cultural, social and economic value, and its protection and promotion are indispensable for a balanced and complete life." Article 2 of Cap. 445 of the Laws of Malta stipulates that "cultural heritage" means movable or immovable objects of artistic, architectural, historical, archaeological, ethnographic, palaeontological and geological importance and includes information or data relative to cultural heritage pertaining to Malta or to any other country. This includes archaeological, palaeontological or geological sites and deposits, landscapes, groups of buildings, as well as scientific collections, collections of art objects, manuscripts, books, published material, archives, audio-visual material and reproductions of any of the preceding, or collections of historical value, as well as intangible cultural assets comprising arts, traditions, customs and skills employed in the performing arts, in applied arts and in crafts and other intangible assets which have a historical, artistic or ethnographic value". That Article 53(1)(a) of Cap. 445 in regard to wilful damage or destruction of cultural property, stipulates that it is a criminal offence for a person who "wilfully, or through negligence,

unskillfulness or non-observance of regulations causes damage to or destroys any cultural property whether or not such cultural property has been registered in any inventory in accordance with this Act, and even if such cultural heritage property is owned by the person who has caused the damage or destruction, or is lawfully administered by such a person". That all this means that the plaintiff cannot invoke a fundamental right and the exercise of such a right in order to cause damage to a national monument which falls within the scope of the Maltese cultural heritage and that the same plaintiff, as a Maltese citizen and a person who resides in Malta, has the obligation to protect it just as every other Maltese citizen and any person in Malta has the same obligation.

That this is also reflected in Article 161 of the Criminal Code (Cap. 9 of the Laws of Malta) which s in regard to damages to public monuments and more specifically stipulates that "Whosoever shall destroy, throw down, deface, or otherwise damage any monument, statue, or other object of art, destined for public utility or public embellishment, and erected by, or with the permission of the public authority, shall, on conviction, be liable to imprisonment for a term from six to eighteen months or to a fine (multa) not exceeding three thousand and five hundred euro (€3,500): Provided that the court may, in minor cases, apply any of the punishments established for contraventions".

That in the opinion of the interpellant, the right to freedom of expression is not intended in order that a person damages the national cultural heritage but should be exercised by the individual with respect both to the cultural heritage as well as in a manner that respects the laws in force. That in no way can it be said that the interpellant in any way interfered with the enjoyment or the exercise of the plaintiff's right due to the fact that nobody has the right to cause damages to the national monument, that is, the Great Siege monument nor has he the right to leave objects permanently affixed or placed on the Great Siege monument or part thereof. That in regard to the latter, Regulation 4 of the Abandonment, Dumping, Disposal of Waste in Streets and Public Places or Areas Regulations (S.L. 549.40) stipulates that it is not permissible that any person leaves or deposits litter or "any object, material or other substance deposited in a public place causing or adding a disorderly appearance of such place or detrimentally causing an effect on the proper

use of the place, or which may, in general, increase the risk of health or environmental hazard to the public or the surrounding environment, or which may be a nuisance to the public". That in Schedule 2 of the same regulations one finds that in the case of a protest or public meeting or similar activity, the public place should be cleaned by the event organisers and if this is not done within twenty-four hours from the end time of the organised event, these objects as deposited shall be considered as dumped objects, rubbish, waste, swill or objects which have been dumped or deposited.

That therefore even for the sake of argument it is maintained that the removal of the objects constitutes interference in the exercise of the plaintiff's right, however it is clear and such interference is prescribed by law as shown by the interpellant. That there is also no doubt that such interference is a legitimate and necessary one in a democratic society. That above all, the plaintiff is not being hindered in any way from exercising the right to freedom of expression since there is no ban on the plaintiff to make his voice heard and to express his ideas. For sure the plaintiff cannot expect that in order to exercise his right, he can cause damage to the national monument and deposit things permanently on it, where the national monument and its protection is protected by domestic law.

2. *That nor is the plaintiff's allegation valid, that he suffered an infringement to the right to a fair hearing in violation of Article 6 of the European Convention, due to a failure of access to court and that therefore he has no remedy under domestic law in violation of Article 13 of the European Convention.*

That in regard to the principle of access to the courts, the interpellant refers to the authors van Dijk and van Hoof in their publication ***Theory and Practice of the European Convention on Human Rights*** *(third edition) observe that "This right of access to court means that the person concerned not only has a right to apply to a court for the determination of his rights and obligations and to present his case properly and satisfactory, but - as mentioned before – also has a right to it that there is an independent and impartial court to make this*

determination; otherwise this right of access is not secured. In addition, that court must have the required jurisdiction to make the determination". That in regard to this right of access to court, the interpellant indicates that the European Court had several occasions where it explained that 'the right to a court' although it does not stem from the wording of the article itself, is nonetheless an important part of the right protected by Article 6 and interpreted it as 'the right of access to a court'. That the interpellant had no order issued in his regard in order to prohibit him to do something, as the plaintiff seems to be alleging. That, moreover, the plaintiff took it upon himself to request and obtain the issue of a counter-warrant in order to thwart the application for the issue of the warrant of prohibitory injunction which he himself filed on the pretext that the objects were deposited in the records of the application for the issue of the warrant and that according to the plaintiff that which he was requesting to be stopped had in fact been done. That it was solely this fact and nothing else that stopped the warrant proceedings and nothing else and this has to be understood in the context that an application for the issue of a warrant of prohibitory injunction is only a precautionary measure that a person protects their rights, whereby this measure is not a definite one.

Article 13 of the Convention does not require any particular procedure regarding how a remedy should be granted. The most important thing is that an effective remedy is granted before a national authority. In the opinion of the interpellant this Honourable Court in its constitutional jurisdiction is a national authority which can grant an effective remedy to the plaintiff if it is found that conventional infringements have occurred. In fact, it has the authority to grant moral compensation to the plaintiff if a ruling is granted in his favour for his complaints.

In other words, Article 13 does not require that the remedy should be within the framework of ordinary proceedings as the plaintiff seems to be expecting. To the contrary, the important thing is to have a remedy before a national authority, irrespective of whether by means of an application before the ordinary Courts or by means of a constitutional/ conventional case.

For example a complaint under Article 13 had been dismissed by the European Court for Human Rights in the judgment Nazzareno Zarb vs. Malta decided on the 4th July 2006, because for the failure in ordinary law to provide a remedy in the case of unjustified delays in the proceedings, the remedy under Cap. 319 of the Laws of Malta was effective before the courts through constitutional powers.

It is actually these constitutional proceedings which have the potential li grant that which the plaintiff is seeking, that is, a remedy. That by filing these conventional proceedings, the plaintiff himself is acknowledging that the Maltese system provides for a domestic remedy which is effective. If this were not the case, the plaintiff would not be wasting his time and money to initiate these proceedings.

Therefore, in regard to the plaintiff's complaint of a violation of Article 13 of the European Convention, this is manifestly unfounded if not futile because these proceedings and this Honourable Court as a national authority have the power to grant an effective remedy to the plaintiff if he succeeds to prove that any of his fundamental rights, as protected under the European Convention, have been breached.

3. That it ensues that all the complaints and requests of the plaintiff should be denied.

4. Except for other pleas.

5. With costs.

Having regard to the decree handed down in the sitting of the 14th January 2019 where it accepted that Dr Joseph Brincat intervenes in the cause *in statu et terminis* limitedly in order to assert his right of freedom of expression as protected by Article 10 of the Convention in order that the Great Siege Monument situated in Valletta remains untouched.

Having regard to the decree handed down on the 12th February 2019 where the respondents were granted permission to file a supplementary reply regarding the alleged lack of judicial interest of the plaintiff.

Having regard to the respondents' supplementary reply which was filed on the 14th February 2019, which reads as follows –

That the interpellants object that the plaintiff does not have the necessary judicial interest to promote today's action. That it is certain that the plaintiff does not qualify and cannot be considered a "victim" according to the terms of the European Convention and the Constitution of Malta;

That one of the pre-mentioned procedures in order that a person can initiate a constitutional or conventional action is that in which they would have to prove that they are a victim of the constitutional or conventional violation which is being alleged (see Ireland vs The United Kingdom - application number 5310/71, decided by the European Court for Human Rights on the 18th January 1978 and D vs The Federal Republic of Germany - application number 9320/81 decided in the plenary by the Commission on the 15th March 1984). Therefore it is not permissible that a person initiates a conventional or constitutional action in the abstract (see Klass et al vs Germany - application number 5029/71 decided on the 6th September 1978) where it is stated that "… an individual applicant should claim to have been actually affected by the violation he alleges" and further below that the conventional action "… 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".

The interpellants also refer to the judgment of this Honourable Court as presided in the names of Carmel Aquilina vs The Commissioner of Police et (constitutional application number 83/2018JZM) decided on the

31st January 2019 where this Honourable Court made extensive reference both to our case law as well as that of Strasbourg regarding the issue of what constitutes victim status. That an action of an alleged violation of fundamental rights cannot be done in abstracto or take the form of an actio popolaris.

That, in the opinion of the interpellants, the lack of victim status of the plaintiff is critical for today's action due to the fact that since the same plaintiff does not have the necessary judicial interest required both by the Constitution as well as the European Convention in order that an extraordinary action such as that of today is proposed, in the opinion of the interpellants, this Honourable Court should proceed to declare such a failing on the part of the plaintiff.

Subject to and open to any other objection if necessary.

Having regard to its decree of 14th February 2019 where it denied the interpellants' request as deduced in their application of 4th February 2019 in order for a judgment to be handed down in part limitedly regarding their supplementary objection.

Having heard and seen all the other evidence which was presented during the case.

Having regard that the case was deferred for judgment to today regarding the case in its entirety, that is, regarding all the requests and objections including the objection as deduced in the supplementary reply.

Having regard that the parties and the intervenor in the cause were given the faculty to present observation notes.

Having regard to the observation notes which were presented by the parties as well as the intervenor in the cause.

Having regard to all the records of the case.

II. The action

The plaintiff complains that due to a series of incidents which occurred in Republic Street, Valletta, in front of the Great Siege Monument, between the 15th and 19th September 2018, his right to freedom of expression, as protected by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("**the Convention**") and by Article 41 of the Constitution of Malta ("**the Constitution**").

The plaintiff states that on the 15th September 2018, in front of the Great Siege Monument, he together with other activists, placed a banner representing the Maltese flag, with the word "JUSTICE" and a photos of the journalist Daphne Caruana Galizia who was murdered on 16th October 2017. Besides the banners, flowers, candles and other objects were placed in memory of the slain journalist.

He contends that on the same day, a short time after the items were placed, he received information that Government employees had removed all the objects including the banner from in front of the Monument. He states that he filed a report in this regard at the Valletta Police Station and requested that the objects be returned to him. This was done and he took everything back. He stated that he went straight away near the Great Siege Monument and placed all the objects again where they previously were in front of the Monument.

This state of fact kept re-occurring for a number of days in the sense that he and his fellow activists would place objects in front of that Monument and the Government workers would remove them from there.

Subsequently, the objects were deposited with the respondent Director General under the Authority of the Court.

The plaintiff is complaining that through the conduct of the State, represented by the respondents in this case, he was hindered from freely exercising the right to expression. The manner in which the removal of the objects was conducted constitutes a violation of that right since he (and other activists like him) had chosen that manner and that place to exercise the right. The State had no right to interfere or hinder the manner in which he exercises that right.

The plaintiff ensues with his complaint that to date there is nothing withholding the governmental authorities from removing the objects which are placed in front of the Great Siege Monument.

He contends that his request for the issue of a warrant of prohibitory injunction was rendered futile since, due to the fact that these proceedings were directly against the Government, there had to be a declaration by the Government regarding its plan of action. In the case in question the Government at no time has declared its intention to continue with the removal of the objects from in front of the Monument de quo. In that situation, the plaintiff maintained that he was being precluded from requesting the issue of the warrant of prohibitory injunction. According to the plaintiff, this constituted a violation of his right to a fair hearing according to Art. 6 of the Convention since there was no equality of arms; moreover, he was being deprived of access to court. Thereby, the plaintiff maintained, his right to an effective remedy according to Art. 13 of the Convention was breached.

Similarly, in that which concerned the plaintiff's complaints.

This leads us to the respondents' defence against these complaints.

In regard to the alleged violation of the right to free expression, the respondents contend that that right is not absolute but is subject to restrictions which not only render the State interference permissible, but also licit and legal. The restrictions limit the right to expression when the State intervention is determined by law, the intervention would have a legitimate purpose, and it would be necessary in a democratic society.

The respondents refer to the Cultural Heritage Act (Cap. 445 of the Laws of Malta) and put forward the argument that the protection of a fundamental right could not be invoked in order to cause damage to a national monument which qualifies as cultural heritage. Then there is Art. 161 of Cap. 9 which states that whoever causes damage to public monuments commits a crime.

The respondents contest the plaintiff's claim that they violated the plaintiff's right to freedom of expression.

They also state that the removal of the objects from the Monument and its vicinity was solely intended in order that no damage is caused to the said Monument.

They also refer to the Abandonment, Dumping, Disposal of Waste in Streets and Public Places or Areas Regulations (S.L. 549.40) where it is prohibited to deposit any object in a public place causing a disorderly appearance of such place or which may be a nuisance to the public. Thanks to the Regulations, whoever organises a public activity has the obligation to clean up any objects left at the location within twenty-four hours. Therefore, according to the respondents, even if it were to be declared that the removal of the objects constitutes a form of interference in the plaintiff’s right, that interference arose from the law, which renders the State interference not only legitimate but also necessary.

The respondents affirm that the plaintiff was in no way hindered from expressing his ideas. At the same time they insist that in the exercise of rights, the plaintiff should not expect, nor would it be tolerated

of him, to cause damage to the Monument or to place against the Monument, in such a manner that these become permanent, since the preservation of that Monument as part of the national heritage has the protection of the law.

In regard to the alleged violation of the plaintiff's rights as protected by Art. 6 of the Convention, the respondents state that this complaint is unfounded since the plaintiff was not denied any access to court. It was the plaintiff himself, of his own volition, who chose to stop the proceedings for the issue of a warrant of prohibitory injunction after he was satisfied that the objects in question had been deposited under the Authority of the Court.

In regard to the alleged violation of the plaintiff's rights according to Art. 13 of the Convention, the respondents noted that this Convention provision does not stipulate any formula regarding how the remedy should be granted or whether the remedy should actually be available by means of ordinary proceedings. The crux of the matter is that a remedy for the complaint is granted. The Court has both the authority as well as the power to grant that remedy if the plaintiff succeeds in his complaint.

III. Witnesses

The Parliamentary Secretary, the Hon. Dr Deo Debattista testified that the Cleansing and Maintenance Division falls under his responsibility as Parliamentary Secretary.

He testified that the removal of the flowers, photos, candles and other messages which were left near the Great Siege Monument ("**the Monument**") was carried out by the Cleansing and Maintenance Division.

He testified that the removal was undertaken on order of the Hon. Minister Dr Owen Bonnici ("**the Minister**").

He testified that the order was given to him verbally in person.

He testified that the reason he was given for the removal was that restoration works were going to be undertaken on the Monument.

He declared that he did not know the date when the decision was taken to undertake restoration works on the Monument since national monuments do not fall under his remit. The Minister was not obliged to keep him informed of every decision taken regarding monument restoration. He becomes involved once a request is made for the cleansing of the monuments.

He continued to declare that he never personally gave any order to clean up the vicinity of the Monument.

Nor could he state when the cleansing was done, that is, whether it was before or after the hoarding was erected around the Monument. However, the cleansing was done regularly and on more than twenty occasions. There were discussions in regard to when would be the most appropriate time for the cleansing, and it was agreed that this should be done in the evening during the nightshift, when the workers do their round to clean up Valletta from 10.00 p.m. onwards.

Police Inspector Priscilla Caruana Lee testified on behalf of the Police Commissioner.

She testified that in relation to the case, eight reports had been filed at the Valletta Police Station between September and October 2018. These included reports regarding the appropriation of a banner, flowers and candles from the Monument.

She said that the Police were never informed in advance that the items were going to be removed.

The first report that had been filed regarding the removal of the objects was in March 2018. It had been filed by police officers who were on foot patrol in Valletta and noted that the objects had been removed. Eventually reports had been filed regarding the removal of objects by the plaintiff, Christopher Roman Schwaiger, Karol Aquilina and Robert Aquilina.

She testified that when any restoration of a national monument was going to be undertaken, the Police are not always consulted. There is always consultation when Police assistance would be required to remove items or to place barriers.

She added that there was a particular incident where the police spotted some people near the Monument. In regard to these, diverse CCTV footage were taken and examined. Nothing illegal resulted from these, and nothing was found regarding the persons who were near the Monument. Consequently, there was no reason to take steps.

In the cross-examination, she testified that despite the fact that various reports had been filed, no steps were ever taken.

She testified that the Police are not always notified in advance where a public protest or manifestation is held. There are times when the Police would not be aware of anything.

The Police are informed due to the fact that following the murder of Daphne Caruana Galizia, a public manifestation is held on the 16th of every month. The Police are present to ensure that order is maintained.

Frank Mercieca - Director General - Courts of Justice testified

that the Court Registrar received five Schedules of Deposit which were all filed by the Director General of the Cleansing and Maintenance Division ("**the Director**") within the Ministry for Justice, Culture and Local Government. The Schedules were relevant to the deposit of a banner, flowers, candles and photos. In the Schedules, the request in effect was that these should be released to whomever has a right to them according to law.

Ramon Deguara - Director General - Cleansing and Maintenance Division testified that his Division came under the Ministry for Justice, Culture and Local Government. He receives instructions both from the Minister as well as from the Parliamentary Secretary Debattista.

He testified that the cleansing of public monuments takes place on a regular basis in the sense that if flowers are placed on a public holiday, these are removed some time later. Even when a specific order is not given for the cleansing, this is done anyway as it forms part of the tasks of the Division.

With reference to the Monument in question, he declared that the decision for its cleansing was taken in relation to the Monument restoration.

The cleansing started with effect from September 2018 by Division employees.

Prior to September 2018, he had given clear instructions to his workers that nothing should be handled from the vicinity of the Great Siege Monument.

Then, in the beginning of September 2018, Minister Bonnici gave instructions for the cleansing to be undertaken in relation to the Monument restoration.

From then onwards, the Division workers cleansed it every night daily as part of their duties.

From the beginning of September 2018 onwards the workers started cleansing at night between 10.00 p.m. and 3.00 a.m. both inside the hoarding and outside.

He testified that the instructions he had were that we were not to intervene for certain periods prior to September. After the decision to undertake the restoration had been taken, it was also decided to cleanse both behind the hoarding as well as outside of it. This order was given directly by the Minister verbally during a phone call.

He declared that when the items were collected in September 2018, as a Division they had talked to the Police regarding this. The Police took the items to the Station.

Eventually the items were deposited at the court.

They were all objects which had been placed outside the hoarding. There were objects which had been placed on the ground in front of the hoarding and photos which had been affixed to the hoarding itself. Everything that was there was removed. Any object extraneous to the Monument is removed within 24 hours from its placement on the Monument.

He declared that in front of the Monument objects were being placed more frequently than on any other public monuments. Instead of commemorative wreaths being placed as is done at other public monuments, flower bouquets, candles, photos and papers with text written on them were being placed at the Great Siege Monument. Since it was not known to whom these removed objects belonged, these were deposited at the court in order that they are withdrawn by whomever had the right to them according to law. In fact, among the items which were removed, there was also a painting with the words "Be Yourself a

Butterfly", whereby it transpired that Dr Edward Duca, a University lecturer, as well as the organiser of Science in the City, was its custodian. In fact, the withdrawal of this painting was requested.

Notary Dr Robert Aquilina testified that he is one of the activists who regularly gather at protests to raise awareness among the people of that which they consider to be a democratic crisis of illegality. The essence of the protests is that there should be a punishment for whoever breaks the law such that justice is truly served in an equal manner for everyone and at the same time to fight against criminality.

He testified that the choice of the area where the objects were to be placed was purely spontaneous. However, the choice had a purpose. The area in the vicinity of the Great Siege Monument is a prominent area in front of the Courts of Justice. The Monument represent three figures which represent Faith, Fortitude and Civilisation. These values also reflect the purpose and the meaning of the protests.

He explained that although on the 16th day of every month, a protest is held in front of the Court building, every day there are people who place flowers, candles and messages in front of the Monument by way of protest.

He declared that on January 2018 there was an incident where a woman went to the location and removed several of the items that were there. A report was filed with the Police regarding this fact. This woman was approached where she explained that she had knocked over some objects when she tripped up, whereas the CCTV footage showed that this woman picked up the cane and deliberately started clearing the objects that were there. After this incident, Government exponents started requesting that the activists' actions be stopped. So much so that Jason Micallef – Chairman of Valletta 2018 – and a Valletta Councillor filed a motion to the Valletta Local Council to remove and stop the activists' actions.

He testified that the situation escalated on the 7th September 2018 when some Government workers applied some oil on the bronze figures of the Monument with the consequence that the pedestal got stained. The following day, on the 8th September 2018, Victory Day, after the President of the Republic placed a wreath of flowers on the Monument, this was closed up with a wooden structure ("**hoarding**"). The area which was closed up was quite sizeable.

He added that when this hoarding was set up, barriers were also placed at the bottom of the steps such that all access to the Monument and its vicinity was closed off.

When some activists then went to place candles, flowers and photos, these were stopped from doing so by the authorities. There was also a group of people, probably Government supporters, who were objecting to the placement of the objects. Each object that was being placed there was being removed.

He declared that on the one-year anniversary of the murder of Daphne Caruana Galizia, that is on the 16th October 2018, a commemoration vigil was held. A considerable number of candles, flowers and messages were placed in front of the hoarding. On the evening between the 18th and 19th October 2018, the activists received information that all the objects had been removed. The activists requested that the objects be returned in order that they would place them back where they were. These objects were not waste which was dumped near the Monument but were placed there for a specific purpose and with the notion that the objects remained the property of the activists.

He said that every time the objects were removed from the location, the information that they were given was that they were removed by order of the Minister.

He explained that amongst the objects that were taken, there were two banners: the first banner shows the Maltese flag with the word

JUSTICE; whilst the second banner, which was made on the first anniversary from the death of Daphne Caruana Galizia, shows the Maltese flag with the face of Daphne Caruana Galizia on it.

He testified that it has not been determined when the protests shall stop. The protests will stop when justice shall be done in regard to the murder of Daphne Caruana Galizia. That time has not come yet because, although serious allegations have been made in regard to the Government exponents, these persons are not being investigated. The protests shall continue until a serious investigation is conducted and all the leads are pursued. The protests are not being carried out to mourn the death of a person but because things are happening in our country for which justice needs to be done.

He continued that at the protests the plaintiff would be present, among others.

The plaintiff was present on the 15th September 2018 when the banner was affixed, and the flowers and candles were placed. He distributed leaflets of a collection of provisions from the Constitution and from the Convention which dealt with freedom of expression.

Maria Grazia Cassar - President - "Din l-Art Helwa" Organisation - testified that the task of "Din l-Art Helwa" ("**DLH**") is to identify those monuments which needed restoration and to find sponsors who are ready to pay for the restoration; then it acts as the project coordinator.

She testified that in 2010 the Great Siege Monument restoration project was undertaken. Fimbank covered all the costs of the project whilst the structure was provided by the Valletta Rehabilitation Project, which was a government entity. In that instance, after it had been ascertained that the Monument needed to be restored, DLH had contacted the Ministry for Tourism and the issue was handled by the Hon. Dr Mario de Marco who was the Parliamentary Secretary at the time. An agreement was reached in that the restoration had to be started and finished by the 8th September, since on that day the commemorative ceremony of Victory

Day is held. The restoration was undertaken under the supervision of the Valletta Rehabilitation Project.

She declared that the restoration was finished on time. After 2010, DLH was not informed nor was it involved in any additional restoration works of the same Monument.

She explained that when candles and other objects started to be placed on the Monument, DLH's position was that this would not cause damage to the Monument. The flowers were placed on the pedestal and the Monument with the bronze figures was not being touched.

In the cross-examination, she testified that the DLH's position in regard to the fact that flowers, candles and other objects were not causing damage to the monument was discussed over the telephone. She said that it could be the case that this issue was never formally discussed in a meeting of the Organisation. In point of fact, the Organisation never felt the need to discuss the fact that the Monument was now being used as a symbol of protest.

She testified that she herself, personally, divested from any position she holds within the DLH, spoke to the Occupy Justice activists regarding this issue.

She also said that since objects started to be placed regularly near the Monument, she never inspected the Monument to check if any damage was being caused.

The plaintiff testified that he is an activist in civil society as well as a blogger.

He states that back on the 16th October 2018 when the murder of journalist Daphne Caruana Galizia occurred, he was not yet that active

within civil society because he was employed at the time. The day after the murder, the victim's children went to court in relation to cases which their mother had pending. As soon as they went out of the main door of the court building, they crossed the road and placed a photo of their mother and flowers in front of the Great Siege Monument.

On the 18th October 2018 a group of journalists met and together walked in protest from City Gate to the Monument where they placed flowers and messages with calls for justice and for the protection of the sources who used to forward information to the journalist.

After that day, there were many instances when he himself personally went to place flowers, candles, messages, a poster and even a banner in front of the Monument. He had personally bought the objects placed there.

He declared that on the following Sunday another protest was held by another group of citizens; this also concluded in front of the Monument where flowers, candles and condolence messages were placed.

He personally took part in another protest. This also concluded in front of the Court building where several persons placed candles, flowers and other objects in front of the Monument.

He explained that he personally as well as several other persons maintained their protest ongoing by regularly placing in front of the Court: flowers, candles and several messages; this was to appeal for justice in order that the stories which were published and investigated by Daphne Caruana Galizia would move forwards and justice would be done.

He reiterated that the activists always ensured to keep the place in a good state and they would change the flowers and candles regularly, water the plants, and change the photos and messages before they became defaced.

Ever since these protests have been held, no complaint was ever made that any damage was being caused to the Monument.

He said that between the 18th October 2017 and 8th September 2018, there were 26 instances where the objects of the protest were removed by unknown persons. The activists at times found none of the objects which they had left. Occasionally they also found the objects thrown away in a rubbish bin and sometimes they also found the objects had been moved and broken. During this same period, appeals were made, including by Jason Micallef (Chairman of Valletta 2018) in order that the objects would be removed. At the same time, the Valletta Council also discussed a motion by a Councillor in order to remove the objects from in front of the Monument. The motion was refused because the Monument did not fall under the remit of the Local Council.

He explained that a few days before 6th September 2018, some Government employees removed objects from in front of the Monument and it seemed that they were undertaking preparatory work for the commemorative ceremony of Victory Day which was to take place on the 6th of September. Scaffolding was also erected; it seemed that the bronze figures were being treated so that they would be polished. When the works were finished, oil stains appeared on the pedestal. When the commemorative ceremony was over, the activists placed the protest objects in front of the Monument again. The Government workers once again cleaned up prior to the ceremony which was held on the 8th September. On that same day, immediately after the ceremony, the Government employees erected scaffolding around the Monument and the Police blocked the access to the Monument except for the steps which leads to the vicinity of the Monument at the elevated part of the square. The floral wreath which had been placed by the President of Malta on that same day was placed in front of the structure at the foot of the Monument. The activists started placing back the protest objects whereby a few of them even put the candles through the barriers. These were removed immediately.

He testified that on the 10th September 2018, he wrote on his blog that the structure around the scaffolding was just an excuse because the Monument was in good condition even due to the fact that extensive restoration had been done on it eight years before. He also said that the barriers placed by the Police were not necessary. Rather, they were hindering free access to the public square. The barriers were removed a few days later.

He declared that on the 15th September 2018, together with other activists, he hung up a banner to the structure. This depicted the Maltese flag, a graphic photo of Daphne Caruana Galizia and the word 'JUSTICE'. He himself had ordered and paid for the banner. Flowers and candles were also placed on the ground in front of the structure which was covering the Monument. A manifest regarding freedom of expression was also distributed.

He continued that some time later the Government workers removed everything. On that same day he wrote to the Commissioner of Police whereby he requested him to investigate the case and to return to him the objects which were the property of the plaintiff. A report was also filed at the Valletta Police Station. Subsequently, he was informed by the Police that the Civil Protection Department had drawn the attention of the Valletta Police that the activists had left some objects which were dangerous to the public. The Police went on the scene and they found nothing which could constitute a danger. Therefore, they left all the objects where they have been placed by the activists. Some time later some Government workers cleaned the area. Upon his insistence and that of his lawyer Dr Karol Aquilina, the Director of the Cleansing Department was contacted. It transpired that the objects had been removed by his workers and were then taken to the Valletta Police Station. After he had retrieved them, he placed them again in front of the Monument.

He presented a pen-drive with a series of photos where he is shown placing the objects in front of the Monument. One of the photos also shows an inscription on the banner which states that the banner is the property of Occupy Justice and of Manuel Delia.

On the 15th of September 2018, he filed an application where he requested that a warrant of prohibitory injunction be issued in order that the Government would be prevented from removing the protest objects again. The application was due to be heard on the 5th October 2018. On the night between the 15th and 16th September 2018, the activists kept watch on the scene and a vigil was held on 16th September 2018.

He continued to declare that on the 18th September 2018 the objects were removed again, this time very carelessly because the ground was strewn with petal remains, plastic fragments from the candles and wax from toppled candles. Another report was filed and the objects were returned by the Cleansing Department. The objects were placed once more near the Monument. Together with other activists, he complained of the fact that the Government was acting without waiting for the sitting of 5th October 2018. On the evening between the 18th and 19th September 2018, the objects were removed again; this time the objects were deposited at the court. The activists placed other objects again in front of the Monument.

He declared in point of fact that the floral wreath which had been placed by the President of the on the 8th September 2018 was still there despite the fact that it had wilted and withered.

These episodes continued to repeat themselves with the objects being removed each time.

He testified that the choice of the site had been coincidental. However, this protest site has become a symbol of expression of various citizens who do not agree with the way that Daphne Caruana Galizia was murdered, and who believe that the institutions failed to safeguard freedom of expression. The ongoing preservation of this protest site provides a place to those who wish to express themselves freely. This site is definitely not intended as a grave or a monument for the victim. The protest is not intended solely to show grief. It has mainly civic objectives: the need for justice to be done; the need that journalists work freely; and

the necessity that when journalists uncover corruption, the institutions take action in its regard. These legitimate requests are being put forward in a public place.

He maintained that the Monument in itself has no particular relevance in the protest. It is the site that has relevance, that is, a place in the capital city of the country, in a main square where a protest regarding important aspects of civic and public life, that is, justice, democracy and the rule of law, need to be promoted in a prominent place. Moreover, the site is also located right in front of the main door of the Courts where justice is sought and done.

The protest symbols keep the protest ongoing until whoever is protesting would be satisfied that justice has been done.

He reiterated that the protest is not a permanent event; rather there is a certain impatience on the part of the activists including himself that their expectations are accepted and they would be able to carry on with their life.

Until justice is done, the protest remains justified.

In the cross-examination, he testified that there were several instances when he had placed flowers or candles in front of the Monument, but he had never sought permission from the authorities, as he never deemed that this was necessary. He confirmed that several persons had placed objects in front of the Monument and many times, this had been done in his presence. Amongst the items there would also be lit candles.

He said that there were around three occasions where the removed objects were returned. There were also occasions where the objects were deposited at the court. He knows this because he was notified regarding the Schedules of Deposit. He never requested to withdraw the deposited

objects.

He testified that in relation to the protest objects were only placed in front of the Monument.

He confirmed that neither he nor the other activists were stopped from protesting or from organising a manifestation.

Nor was he ever stopped from expressing himself or to publish his writings on his blog.

Nor was he ever arrested or questioned.

Nor was he prohibited from protesting.

He maintained that his complaint is solely directed to the removal of protest objects from in front of the Monument. He explained that the placement of objects is a way of protesting and therefore their removal breaches his right to express himself.

He acknowledges that the Monument is public property.

He is not alleging that he has any title of ownership on this Monument.

He does not expect that no one can approach him regarding his actions.

He expects that the objects that they place remain there as long as these do not obstruct anyone and do not cause danger.

Joseph Magro Conti – Superintendent of Cultural Heritage – testified that he took up his position in April 2018.

He testified that the superintendence has an overly broad role. Amongst other things, it ensures that the cultural heritage, be it immovable, movable and intangible, is protected. It promotes preservation and restoration. It also manages an inventory. It provides consultancy to governmental entities in particular to the Planning Authority in the development sector. It offers consultancy to the Government regarding policies.

He testified that since he has held his position, he never received any indication or application for works which had to be done on the Great Siege Monument.

In the cross-examination, he testified that the superintendence got involved only when the restoration required would be of a certain importance, that is, where the situation would be serious due to breakages or flaw. Maintenance works are also carried out which would also include superficial cleansing. The superintendence is not involved in regular and superficial maintenance matters.

Anne Demarco testified that prior to 8th September 2018, the objects which were placed in front of the Great Siege Monument in Valletta used to be left there even for three weeks prior to being removed. When the objects were left there, they would go and clean up, re-arrange the items, remove the old candles and place new ones. As soon as the items were removed, they would go and replace everything. After the 8th September 2018, the Monument was barred and the objects were being removed every day. Therefore, she started going to Valletta, at least twice a day, to place a photo, candle and flowers.

She continued testifying that the objects were placed on the pedestal or on the soil around the pedestal. In the soil they even planted the plants which the activists go to water personally and remove the dead leaves from the plants. At the site, other objects were placed in memory of the murder of Daphne Caruana Galizia.

She explained that the meaning behind the protests and the placement of the objects is aimed at getting justice done one day and at conducting a proper investigation.

The choice of the place was randomly made after some flowers had already been placed by third parties. The place is ideal because it is in a central location which can be seen by everyone. Above all, it is directly opposite the main door of the Court where justice is administered.

She said that the plaintiff is among those who are present at the protests. On one occasion he even provided a banner and wrote on it that it was his property and he even paid for it out of his own pocket. He consistently took with him plants, flowers and candles at the activities.

In the cross-examination, she testified that there would be flowers, candles and other objects which would be hers. All that she does or places is done spontaneously without being compelled by anyone. The plaintiff never told her to place items near the Monument. In effect, the plaintiff does not form part of Occupy Justice, which is a pressure group composed of a group of women who united in protest following the murder of Daphne Caruana Galizia.

Christopher Schwaiger testified that he is a journalist employed by newsbook.com.mt.

He testified that on the 15th September 2018, he was walking in Republic Street, Valletta, and when he got to the Great Siege Monument, he saw two Cleansing Department workers removing the banners, flowers

and candles which were in front of the Monument. He started filming all that was happening. In that instant he was approached by a man who identified himself as Maurice Spiteri, a senior official over those workers. He requested him to stop filming because he could endanger the workers who were cleaning. He continued filming. Spiteri started holding the witness' hand and covering the lens of the equipment. A report was filed at the Valletta Police Station.

Adv. Dr Karol Aquilina testified both in his personal capacity as well as legal consultant to the plaintiff, in the latter instance, after he was exempted from professional secrecy.

He testified that he is one of those persons who place candles and flowers in front of the Great Siege Monument in Valletta. He also attended every vigil, every protest and every other related activity.

At the protests, in particular those which are held in front of the Monument, and when objects are placed in front of the Monument, there are a number of people including the plaintiff, who attends every activity.

He knows that the plaintiff and other persons also place several objects in front of the Monument including flowers, candles, and banners which are the property of the plaintiff. So much so that the plaintiff had written on one of the banners that it was his property and when the removed items were collected, these were returned to the plaintiff.

He declared that the choice of location where the objects are being placed was random and related only to the fact that it is located in front of the Court building, therefore it is a call for justice.

On the 20th March 2018, he personally bought some candles from Wembley Store and placed them in front of the Monument. The following day, the candles were still there, however the day after they were stolen. He filed a report with the Police regarding this and even gave them photos

of the candles. He also requested for an investigation to be conducted.

He added that he was informed that two particular persons on the night of the 21st March 2018 and on the night of the 22nd March 2018 had removed the objects from in front of the Monument. This was reported to the Police and they were also given the names of the parties concerned. The Police took no action regarding this.

Thereafter there were other incidents where the objects were removed from in front of the Monument.

He continued to testify that on the 15th September 2018, another protest was held which he was requested to attend such that he would be able to provide consultation, as necessary. On that day, the Monument was surrounded with barriers. Therefore, the activists hung up a banner onto the wooden barriers which surrounded the Monument. Some items were also placed in front of the Monument. Some time in the afternoon a journalist from RTK and newsbook.com saw some Government workers cleaning the front of the Monument. He captured a video which was published. Together with the plaintiff and the journalist, he went to file a report at the Valletta Police Station. Contact was made with Ramon Deguara, Cleansing Director, who gave instructions to his workers in order to return the objects to the plaintiff. As soon as the objects were returned, they were placed in front of the Monument once again. When he spoke to Deguara, the latter told him that he had followed the instructions which were given directly by Minister Bonnici. He spoke personally with Minister Bonnici and told him that the order for the removal of the objects was unacceptable and constituted a violation of the right to freedom of expression. In point of fact, the order was still not withdrawn. He maintained that a report was filed with the Police regarding every incident.

Rachel Williams from the Group Occupy Justice testified that on the 16th day of every month flowers and candles are placed in front of the Great Siege Monument in Valletta.

She testified that she saw the plaintiff placing flowers and candles in front of the Monument.

She said that the plaintiff is a constant presence at the protest manifestations which take place in front of the Monument. On the 15th September 2018 he was the mastermind behind the banner which was affixed on that day.

Emanuel Sciriha - Director - Civil Courts and Tribunals testified that eight Schedules of Deposit were filed by the Director General of the Cleansing and Maintenance Division. The objects deposited consist of flowers, candles, banners and photos. He explained that amongst the Schedules of Deposit, there was one concerning the banner with a butterfly on it. In regard to this, a withdrawal was requested from Dr Edward Duca who is a University lecturer as well as organiser of Science in the City.

Francis Chetcuti – Senior Conservator - Heritage Malta testified that the restoration of national monuments falls under the competence of Heritage Malta.

He testified that in 2011 the Great Siege Monument in Valletta had been restored on commission of third parties. After this restoration, Heritage Malta ensured to undertake the maintenance of the Monument by preserving the protective coating of the Monument. This maintenance is done periodically. The most recent maintenance was done in 2018.

He continued to testify that during the works in 2018, Heritage Malta had noticed some damage on the stonework of the Monument; this damage was due to the candles and pot plants which are being left on the Monument. Damage was also caused by the adhesives used to affix some photos. There also appeared traces of colour which ran from the printed photos which were affixed. This led to damage in the aesthetic value of the monument because of the stains. Some damage was also caused to the stone since the candle wax sealed the pores of the stone with the

consequence that this could disintegrate. The candle wax is a paraffin which discolours with the sun's rays and this also reduces the aesthetic value since the wax becomes yellowish. Since the stone is harsh, it gets stained with anything that falls on it. The stone is also getting stained with the placement of pot plants which leave soil stains around them, resulting in various circles.

He declared that when the maintenance work was carried out, several treatments were applied on the stone however there are stains of a permanent nature and there are still traces of wax in the stone pores. He continued to state that every time that items are placed on the stone of the monument, including coloured artificial flowers, photos, coloured paper, candles and other items extraneous to the Monument, these get damp with the dew and stain the stone permanently. Therefore, damage is being caused to the stone besides the fact that the Monument is losing its aesthetic value.

The intervenor in the cause testified that whilst he finds no objection that the plaintiff writes whatever he deems fit and that he expresses his opinion. According to his best opinion, the right to freedom of expression does not given any right to the plaintiff to do whatever he wishes with property which is not in his domain.

Nor does he have any objection that a memorial in honour of Daphne Caruana Galizia is set up in a location permissible by law. However, nobody has the right to set up a memorial where there already exists another memorial which belongs to the common heritage of the Maltese.

He testified that that which is conveyed in the various monuments, in the historical and cultural heritage of the country is his right of expression.

He added that the Monument is a material object which illustrates the collective expression of thought, belief, opinion and even worship.

When a monument is erected, whatever that may be, this becomes public domain. It would belong to all the people and should receive the protection of the entire people. A public monument belongs to everybody and at the same time belongs to nobody. Therefore, once it is public nobody has the right to change anything to it without Government consent.

Police Assistant Commissioner Stephen Mallia testified that as a rule where it concerns a manifestation of a crowd of more than twenty people, an application has to be submitted with the meetings office at the Police General Headquarters in order that the Police Commissioner would grant a "no objection".

He testified that in regard to the case in question, it appears that an application was always submitted by email to the meetings office.

He referred to the activities which were held in the Mosta district and in Valletta on the 16th October 2018.

In regard to the activity to be held in Valletta, the plaintiff submitted an application for permission to hold a demonstration.

In point of fact, a permit for the manifestation which is held every month in Valletta is not being requested.

On their part, the Police are not requesting permission prior to each manifestation.

However, since it is a known fact that a manifestation is being held in Valletta on the 16th day of every month,

for this specific reason, the Police are planning ahead for this. In

fact, from the previous evening, they keep greater watch in the Great Siege Monument area and ensure that good order is maintained even during the manifestation and that everything moves along peacefully.

He explained that in regard to the placement of objects in front of the Monument, there is no obligation that the Police are informed in advance.

Nor is it a Police task to remove the items which are left behind after the demonstration.

He adds that the Police are not involved either in the issue of objects which would have been placed in front of the Monument.

They only intervene when there are acts of vandalism.

In that case a report is filed and they conduct an investigation.

No report regarding damages has been filed with the Police.

He declared that when a crowd of more than twenty people is addressed in a public manifestation, the law does not require in any instance that a permit must be requested. In every case, both when an activity would have already started as well as when it is still to begin, the Police do not intervene to stop a person from expressing himself/herself.

These manifestations were peaceful and therefore there was no breach of the law.

The role of the Police is to protect those who are expressing themselves and as a tendency the Police presence during the activity

solely served the purpose to ensure that the activity was not hindered.

In regard to this particular case, the Police were never given instructions to stop the activists.

Supplementary reply

In the supplementary reply, the respondents objected that there was a lack of judicial interest on the part of the plaintiff in order to promote and pursue today's action.

They contend that the plaintiff does not qualify as a "victim" according to the Convention and the Constitution of Malta;

To support the objection, the respondents refer to the evidence which, according to them, shows that there were several persons who protested by placing objects on the Monument, as well as evidence that, according to them, shows that the plaintiff personally did not take part in the protest activity and the placement of the objects.

The plaintiff replied to this objection by listing in detail the instances when he was personally present.

Moreover, several persons testified and confirmed that the plaintiff was a person whose presence was synonymous with the protests.

The plaintiff presented a compact disc with a series of photos where his presence is evident during the protests as well as the placement on his part of those which he called protest objects on the Monument.

A photo and invoice were also presented which show that the banner which represented the Maltese flag, with a photo of Daphne Caruana Galizia, and with the word 'JUSTICE' was ordered and paid for personally by the plaintiff. In fact, the plaintiff made a note on the banner where he indicated that it was his property and that of Occupy Justice.

The intervenor in the cause replied to this objection by premising that "*where freedom of expression is involved there is certainly a judicial interest as long as it is identified that a person has tried by all their means and the means normally available to them to express themselves*."

The intervenor in the cause continues that the plaintiff has no right on the Great Siege Monument. Therefore, he cannot say that he is a "victim" of the inadequacy of freedom of expression because he expects to change that which is already represented by the Monument so that he would create a more recent event.

From the precise examination of the procedural records, it is clearly evident that the plaintiff denies that he is expecting to have a right on the Monument, so much so that the infringement of which he complained does not, in any way, refer to any expected right in regard to the Monument.

The plaintiff's complaint is focused specifically on the fact that through the arbitrary removal of the objects which were placed in front of the Monument, he suffered an infringement of his fundamental right to protest against the murder of Daphne Caruana Galizia, and to protest in order that justice is done both in regard to the same murder, as well as in regard to investigations regarding who was responsible for that murder, and in regard to what link there might be with Government exponents or persons with close connections to the Government - an allegation of great severity.

The plaintiff's complaint is therefore limited to the protests, and to the objects which he, and other activists, chose to use in order to deliver their protest and message. The means used were identified as photos of Daphne Caruana Galizia, flowers, candles, messages and banners which

were placed on the Monument which is located directly opposite the Court building, which is the place where justice is administered.

All this premised, the Court shall consider whether the complaint is sufficient so that the plaintiff qualifies as a victim and therefore to have a judicial interest in order to promote this case.

The respondents refer to the judgment handed down by the Court as presided on the 31st January 2019 in the case "**Carmel Aquilina vs The Commissioner of Police et**". In the decision extensive reference was made to the case-law of the ECHR regarding the meaning of and who qualified for victim status.

The Court points out that the plaintiff had raised an appeal from this judgment in that case.

In the judgment that it handed down on the 27th September 2019 in that case, the Constitutional Court partially accepted the grievance and returned the records to the First Court to continue hearing the case.

For the purpose of the interpretation of victim status, the Court refers to the case-law which was mentioned in the judgment of the case '**Carmel Aquilina vs The Commissioner of Police et**'.

On the basis of the case-law referred to therein, it appears that the right protected by Art. 6 of the Convention is only accessible for that person who themselves would be the subject of proceedings where rights or civil obligations were going to be determined, or else that person would be charged in criminal proceedings which determine their guilt or otherwise.

In this case, the matter concerns the determination of civil rights

which the plaintiff complains of having been infringed.

The Court refers to the observation made by the Constitutional Court in the case in the names of **Carmel Aquilina vs The Commissioner of Police et** (*supra*) where it was stated that:

12. It has to be said first and foremost that the active legitimisation to file an action under the provisions of the Constitution which protect the fundamental rights and the one to file an action under the European Convention Act, although similar and related, are not altogether identical. Art. 116 of the Constitution states that in order to file an action pursuant to articles 33 to 45 of the Constitution, "any personal interest in support of his action" is required, whereas pursuant to the European Convention Act, it is necessary that the actor proves that he is a "victim" of a violation of a right which is protected by the European Convention. Although, as stated, the two concepts are aligned and are similar, since whoever is a victim also has a personal interest due to this, they are not identical, because the personal interest may also be broader.

With reference to this case, the Court considers that the plaintiff presented enough evidence to show that he was personally present during the protests and vigils that were organised. Some of them were organised by himself so much so that for the manifestation which was held in Valletta on the occasion of the one year anniversary since the murder of Daphne Caruana Galizia, he himself notified the police and obtained clearance in order that the manifestation could go ahead without hindrance. The plaintiff also sufficiently proved satisfactorily that he placed several objects in front of the Monument as a sign of protest (as mentioned above) including a banner which he commissioned and paid for himself.

These facts are enough to show that the plaintiff has a direct and personal judicial interest in order to complain regarding the removal of the protest objects.

It transpires that the plaintiff's interest, as required by law, was and

still stands and is real, both when the case was filed, as well as during this case.

The Court notes that the return of the objects to the plaintiff should be considered independently from the infringement as such.

Whether the State or any governmental entity had a right to remove or discard the objects from a location where they were placed in another matter.

It states this because independently of the fact whether there was an infringement as per the plaintiff's complaint, the objects remained the property of the plaintiff. If anything, there arises the issue whether his use of those objects, or the future use of similar objects, is subject to a limitation.

Therefore, the objection raised in the supplementary reply is being rejected.

IV. The first request

Through the first request, the plaintiff is requesting a declaration from the court that through the respondents' conduct, he suffered a violation of his fundamental right to freedom of expression, as this right is protected by Art. 10 of the Convention and by Art. 41 of the Constitution.

1. Generalities

Freedom of expression is an essential and fundamental right

in a democratic and pluralistic society. In fact, there cannot be democracy without pluralism. Freedom of thought, and therefore diversity and tolerance, are vital and the most basic values for the progress of society and for the development of the individual. The State is the guarantor of the right to freedom of expression and therefore has the obligation to preserve and protect that right, both when the disseminated ideas or promoted manifestations are well received but above all when the ideas are offensive, provocative, disturbing and even shocking.

2. Art. 41 of the Constitution

a) Right

The provision reads: -

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sub-article (1) of this article to the extent that the law in question makes provision

(a) that is reasonably required -

(i) in the interests of defence, public safety, public order, public morality or decency, or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, protecting the privileges of Parliament, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or

(b) that imposes restrictions upon public officers,

and except as far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

b) Case-law of the Maltese Courts

The Court refers to the judgment handed down on the 25th June 1976 in the case in the names of "**Mons Philip Calleja vs Inspector Dennis Balzan**" where the Court of Appeal stated that –

"One of the positive elements of freedom of expression is the choice of the medium of expression itself …"

In the judgment handed down on the 29th November 1986 in the case "**Dr Eddie Fenech Adami noe vs The Commissioner of Police et**", the Constitutional Court stated the following: -

"The Court, when it takes into account the apprehension of the authorities concerned and their desire for serious incidents to be avoided in our country, it cannot forget that we are a people who show tolerance towards each other, we are civilised enough in order to ensure that everyone should have the freedom to meet and speak even though we may disapprove of what is being said, and on the other part, we also ensure that in our public or private meetings, whatever they may be, other persons' rights are freedoms are not affected. If there is any fear

that there are some who may threaten these rights and freedoms which are not only rights and freedoms affirmed in the Constitution, but exist first and foremost in man's same essence, it would be the duty of the authority responsible for maintaining public safety and public order, to ensure that the threat is minimised through all its available means, but never by minimising the same rights and freedoms which would thus be illegally threatened."

(see also: (Constitutional Court: "Ignatius Busuttil vs The Commissioner of Police et": 28th of April 2017)

3) Art. 10 of the Convention

a) Right

The provision reads: -

1. Everybody has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

b) Doctrine

In page 779 et seq of "**Theory and Practice of the European Convention on Human Rights**" (Fourth Edition – 2006 – Intersentia) Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak state the following: -

… the first paragraph of Article 10 offers a broad protection … The content of the expressions seems to be irrelevant too as the Court has held, with reference to the demands of a democratic society, that Article 10 is also applicable to information or ideas that offend, shock or disturb.

The fact that Article 10 protects the free expression of opinions implies that a rather strong emphasis is laid on the protection of the specific means by which the opinion is expressed. The Court has expressly upheld that Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed.

… the Court has taken the position that the exceptions to the freedom of expression "must be narrowly interpreted and the necessity for any restrictions must be convincingly established". (emphasis by this Court)

… Even when statements paint an extremely negative picture … they can be permissible as long as they do not encourage violence, armed resistance or insurrection and do not constitute hate speech.

In page 444 et seq of "**Law of the European Convention on Human Rights**" (Oxford - Second Edition – 2009) the authors Harris, O`Boyle & Warwick state the following: -

The scope of protection under Article 10 is to be broadly interpreted so as to encompass not only the substance of information and ideas, but also a diverse variety of forms and means in which they are manifested, transmitted, and received. *Because of the demands of pluralism, tolerance and broadmindedness, the scope of protection under Article 10 is broadened to cover information or ideas that are unpalatable to the State.* (emphasis by this Court)

...

The notion of public interest has an autonomous and broad meaning in the Convention. It has been liberally construed in the case law to encompass social, economic, cultural or even commercial and religious aspects …

In page 278 et seq of "**European Human Rights Law**" (Oxford – Third Edition – 2008) the authors Janis, Kay & Bradley state the following: -

Necessarily States feel a particular need to restrict expression in situations affecting military, diplomatic or intelligence matters. When such restrictions have been challenged under the Convention, the European Court has considered them under Article 10(2) which permits limitations on expression "necessary in a democratic society in the interests of public safety (and) for the prevention of disorder or crime."

In page 428 et seq of "**The European Convention on Human Rights**" (Oxford – Fifth Edition – 2010) the authors White & Ovey state: -

The situations in which a restriction may be justifiable include the need to protect important public interests – such as national security, territorial integrity, freedom from crime and disorder, health and morality, and the authority and impartiality of the judiciary – and also other individual rights, such a person`s right to privacy and reputation. The margin of appreciation allowed to Contracting Parties in restricting freedom of expression will vary depending on the purpose and nature of the limitation and of the expression in question …

On the other side of the balance, to be weighed against the importance of the aim pursued by the restriction, is the nature of the expression restricted. The Strasbourg Court takes into account the fact that, in the context of effective political democracy and respect for human rights mentioned in the Preamble to the Convention, freedom of expression not only is important in itself but also plays a central role in the protection of the other rights under the Convention. Thus, the Court consistently gives a higher level of protection to publications and speech which contribute towards social and political debate, criticism, and information – the broadest sense.

c) Case-law of the ECHR

In the case **Handyside vs the United Kingdom** which was decided

on the 7th December 1976, the right to freedom of expression was described as "*one of the basic conditions for the progress of democratic societies and for the development of each individual*".

(see also: **Lingens vs Austria**, 8th July 1986; **Şener vs Turkey**, 18th July 2000; **Thoma vs Luxembourg**, 29th March 2001; **Marônek vs Slovakia**, 19th April 2001; and **Dichand and Others vs Austria**, 26th February 2002)

The right comprises three components:

a) **the freedom for a person to hold an opinion**: this freedom should be exercised practically without any limitation because the right in itself that a person holds an opinion is a precondition of each democratic society. No State – truly democratic – can impose ideas on its citizens or discriminate between citizens who hold different opinions. Everybody is at liberty to embrace whichever opinion they wish, and this opinion should be respected, even where there is disagreement.

b) **the right that a person receives information and ideas** – every citizen has the right to information particularly regarding matters of public interest.

and

c) **the right to be given information and ideas** – thus the citizens have the right to make a choice over another.

Although the right to freedom of expression should be exercised without any interference on the part of the State, rather that right should be protected by the State, at the same time that right is not absolute so much so that in sub-article (2) of Art. 10 of the Convention, there is an exhaustive list of cases and situations

where State interference is permissible in the exercise of the right.

It ought to be stated that every reference to the State should be understood in a broad sense and therefore includes every entity, department or public authority.

In this case, the State representatives are two respondents.

In order for the State interference to be legitimate, it is necessary that three main requirements are met: -

i) the interference, that is, the imposition of limitations, conditions, restrictions or penalties must be imposed obligatorily by law.

ii) the interference is necessary in a democratic society.

iii) the interference is intended to protect one or more of the following values and interests:

1. the national security.
2. the territorial integrity of the country.
3. public security.
4. the prevention of disorder or crime in the country.
5. the protection of health.
6. the protection of morals.
7. the protection of the reputation or rights of other

persons.

8. the prevention of the disclosure of information received in confidence.

9. maintaining the authority and impartiality of the judiciary.

The three elements which form the protection of the right to freedom of expression are cumulative and <u>not</u> alternative to each other.

Therefore, if it transpires that the interference fails on at least one requirement, that interference would constitute an infringement of the right to freedom of expression.

The exercise to be conducted by the court is to see that there is proportionality between the interference in the exercise of the right and the purpose which that restriction is trying to achieve.

If the interference surpasses the legitimate purpose, that interference is deemed as not necessary in a democratic society, and consequently would infringe the right to freedom of expression.

This was stated in the judgment of the 21st January 1999 in the case of **<u>Janowski vs Poland</u>**.

The ECHR here remarked: -

30. The Court reiterates the fundamental principles which emerge from its judgments relating to Article 10:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" As set forth in Article 10, this freedom is subject to exceptions,

which must, however, be construed strictly, and the need for any restrictions must be established convincingly …

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see the above-mentioned Lingens judgment, p. 25, § 39).

(iii) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the above- mentioned Lingens judgment, pp. 25-26, § 40, and the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, p. 12, § 28). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see the above-mentioned Jersild judgment, p. 24, § 31).

(i) <u>Force of law</u>

Where the State interference is intended in order to enforce the law, the Court would have to consider the quality of the law in question, as well as the spirit of the legislator.

The law has to be public, accessible, certain and would have foreseeable consequences.

In the case of **<u>The Sunday Times vs the United Kingdom</u>** decided

on the 26th April 1979, it was observed that:

> *[f]irstly, the law has to be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice*.

Although in the above-mentioned case the ECHR found that the law was qualitative and satisfactory, in the case of **Rotaru vs Romania** which was decided on the 4th May 2000, it found that the cited law was not qualified as a law because it was not drafted and written with precision in order that the citizens could regulate themselves adequately.

In the case of **Magyar Jeti Zrt vs Hungary** decided on the 4th December 2018, it stated the following: -

> *59. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. The level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed. The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails (see*

Karácsony and Others v. Hungary [GC], nos. 42461/13 and 44357/13, §§ 123-25, ECHR 2016 (extracts), and the cases cited therein).

ii) Legitimate Purpose

Upon having considered the quality of the law, the Court has to proceed with examining the value or the interest which that law is aimed to protect by ensuring whether this is part of any one of the circumstances listed in sub-article (2).

It already noted earlier on that the list of circumstances indicated in Art. 10(2) which permits State interference, on the basis of a legitimate purpose, is complete and exhaustive. No other reason which is not indicated therein may qualify as legitimate.

iii) Necessary in a democratic society

If it transpires that the interference has a force of law and is the result of a legitimate purpose, therefore the Court has to resort to the last element and therefore to establish whether the interference is required in a democratic society.

It is necessary that there is proportionality between the purpose which has to be achieved and the means used to achieve that purpose.

The means that the State uses to achieve its purpose are the interference which is provided for in sub-article (2).

There is proportionality **only** if it is shown satisfactorily that the interference is based on a pressing social purpose.

In the case of **Kandzhov vs Bulgaria** decided on the 6th November 2008 it was observed that: -

" … *For the Court, it is clear that in gathering signatures calling for the resignation of the Minister of Justice and in displaying two posters making statements about the Minister the applicant was exercising his right to freedom of expression (see, mutatis mutandis, Appleby and Others v. the United Kingdom, no. 44306/98, § 41, ECHR 2003-VI). His arrest and subsequent detention for doing so therefore amounted, quite apart from the opening of criminal proceedings against him, to an interference with the exercise of this right (see Chorherr v. Austria, judgment of 25 August 1993, § 23, Series A no. 266-B; and Steel and Others, cited above, §§ 92 and 93).*

71. Such interference gives rise to a breach of Article 10 unless it can be shown that it was "prescribed by law", pursued one or more legitimate aim or aims as defined in paragraph 2 and was "necessary in a democratic society" to attain them.

72. The Court has already found that the applicant's arrest and detention were not "lawful" within the meaning of Article 5 § 1 (c). Since the requirement under Article 10 § 2 that an interference with the exercise of freedom of expression be "prescribed by law" is similar to that under Article 5 § 1 that any deprivation of liberty be "lawful" (see Steel and Others, cited above, p. 2742, § 94; and Hashman and Harrup v. the United Kingdom [GC], no. 25594/94, § 34 in fine, ECHR 1999-VIII), it follows that the applicant's arrest and detention were not "prescribed by law" under Article 10 § 2.

73. Furthermore, assuming that the measures taken against the applicant may be taken to pursue the legitimate aims of preventing disorder and protecting the rights of others (see Steel and Others, cited above, § 96), they were clearly disproportionate to these aims. The events must be seen in the context of a political debate which, although, critical of the Government, was not violent. Thus, as found by the Supreme Court of Cassation, the applicant's actions on 10 July 2000 were entirely peaceful, did not obstruct any passers-by and were hardly likely to provoke others to violence (see

paragraphs 25 and 26 above, and Steel and Others, cited above, § 110). However, the authorities in Pleven chose to react vigorously and on the spot in order to silence the applicant and shield the Minister of Justice from any public expression of criticism. They also kept the applicant in custody for an inordinate amount of time – three days and twenty-three hours – before bringing him before a judge who ordered his release. These measures were clearly not "necessary in a democratic society". In a democratic system the actions or omissions of the Government and of its members must be subject to close scrutiny by the press and public opinion. Furthermore, the dominant position which the Government and its members occupy makes it necessary for them – and for the authorities in general – to display restraint in resorting to criminal proceedings, and the associated custodial measures, particularly where other means are available for replying to the unjustified attacks and criticisms of their adversaries (see, mutatis mutandis, Castells v. Spain, judgment of 23 April 1992, § 46, Series A no. 236)."

In the case of **Observer and Guardian vs the United Kingdom,** which was decided on the 26th November 1991, the ECHR stated the following regarding the adjective "necessary" found in sub-article (2):

70. The key issue in the present case is whether it was necessary in the circumstances to impose temporary injunctions on the applicants at any stage.

71. The adjective "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention is not synonymous with "indispensable" or as flexible as "reasonable" or "desirable", but it implies the existence of a pressing social need.

72. `The notion of necessity implies that the interference of which complaint is made corresponds to this pressing social need, that it is proportionate to the legitimate aim pursued and that the reasons given by the national authorities to justify it are relevant and sufficient (Eur. Court H.R., Barthold judgment of 25 March 1985, Series A No. 90, pp. 24-25, para. 55).

73. The initial responsibility for securing Convention rights and freedoms lies with the individual Contracting State. Accordingly, Article 10 para. 2 (Art. 10-2) of the Convention leaves the Contracting State a margin of appreciation, ultimate supervision of which remains with the Convention organs. The scope of the margin of appreciation will vary depending on the aim pursued under Article 10 para. 2 (Art. 10-2) of the Convention. The aim of the restriction in the present case is the maintenance of the authority of the judiciary, the protection of national security being a background element (see paras. 67-69 above).

74. The Court has acknowledged that the margin of appreciation available to States in assessing the pressing social need to protect certain aspects of national security is a wide one (Eur. Court H.R., Leander judgment of 26 March 1987, Series A No. 116, p. 25, para. 59). The Court has also held that the expression "maintaining the authority and impartiality of the judiciary" not only refers to maintaining public confidence in the ability of the machinery of justice to determine legal rights and obligations and to settle disputes, but also encompasses the protection of the rights of litigants (Eur. Court H.R., aforementioned Sunday Times judgment, p. 34, paras. 55-56). However, the State's margin of appreciation in this area is more restricted as the notion of the "authority" of the judiciary has a more objective basis, reflecting a fairly substantial measure of common ground in the domestic law and practice of the Contracting States (ibid, pp. 35-37, para. 59).

75. Freedom of expression constitutes one of the essential foundations of a democratic society, in particular freedom of political and public debate. This is of special importance for the free press which has a legitimate interest in reporting on and drawing the public's attention to deficiencies in the operation of Government services, including possible illegal activities. It is incumbent on the press to impart information and ideas about such matters and the public has a right to receive them (cf. mutatis mutandis the aforementioned Sunday Times judgment,
p. 40, para. 65, and Eur. Court H.R., Lingens judgment of 8 July 1986, Series A No. 103, p. 26, paras. 41-42).

There were several causes where the ECHR observed that it is the onus of the national authorities which have to examine what constitutes a pressing social need.

However, the national authorities should seek guidance from the principles originating from the ECHR case-law.

In the judgment which was handed down in the case **Nadtoka vs Russia (No. 2)** on the 8th October 2019, the Court remarked: -

> *42. The Court will examine the issue of whether the interference was "necessary in a democratic society" in the light of the relevant principles developed in its case-law that were summarised, in particular, in Novaya Gazeta and Milashina (cited above, §§ 55-57).*
>
> *43. The Court further reiterates that, when examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", it may be required to ascertain whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see, with further references, Axel Springer AG v. Germany [GC], no. 39954/08, § 84, 7 February 2012). Furthermore, when analysing an interference with the right to freedom of expression, the Court must, inter alia, determine whether the reasons adduced by the national authorities to justify it were relevant and sufficient. In doing so, the Court has to satisfy itself that these authorities applied standards which were in conformity with the principles embodied in Article 10 and relied on an acceptable assessment of the relevant facts (see Perinçek v. Switzerland [GC], no. 27510/08, § 196, ECHR 2015 (extracts)).*

In the case of **Elvira Dmitriyeva vs Russia** decided on the 30th April 2019, the Court reiterated that:

74. The Court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see Handyside v. the United Kingdom, 7 December 1976, § 49, Series A no. 24; Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, § 101, ECHR 2012; and Bédat v. Switzerland [GC], no. 56925/08, § 48, ECHR 2016).

75. As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly. The adjective "necessary", within the meaning of Article 10 paragraph 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, § 187, 8 November 2016).

76. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it

are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see Mouvement raëlien suisse v. Switzerland [GC], no. 16354/0 6, § 48, ECHR 2012 (extracts); Morice v. France [GC], no. 29369/10, §124, ECHR 2015; and Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC], no 17224/11, § 75, ECHR 2017).

…

84. The Court reiterates that it is normally not sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms; what is rather required is that it was necessary in the specific circumstances (see Perinçek v. Switzerland [GC], no. 27510/08, § 275, ECHR 2015 (extracts), and The Sunday Times v. the United Kingdom (no. 1), 26 April 1979, § 65 in fine, Series A no. 30). In the context of public assemblies, this means that the absence of prior authorisation and the ensuing "unlawfulness" of the action do not give carte blanche to the authorities; they are still restricted by the proportionality requirement of Article 11 (see Kudrevičius and Others, cited above, § 151). It follows that the fact that the applicant breached a statutory prohibition by "campaigning" for participation in a public event that had not been duly approved is not sufficient in itself to justify an interference with her freedom of expression. The Court must examine whether it was necessary in a democratic society to sentence her to a fine, having regard to the facts and circumstances of the case.

85. The Court notes in this connection that the message published by the applicant criticised the authorities for not allowing a public event demanding the resignation of the Prime Minister, Mr Medvedev, suspected of large-scale corruption. The issues raised in that Internet post were a matter of public concern and the applicant's comments therein contributed to an

on-going political debate. The Court reiterates in this connection that under its case-law, expression on matters of public interest is entitled to strong protection (see Perinçek, cited above, § 230). There is therefore little scope under Article 10 § 2 of the Convention for restrictions on political speech or on expression on matters of public interest (see Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV) and very strong reasons are required for justifying such restrictions (see Feldek v. Slovakia, no. 29032/95, § 83, ECHR 2001-VIII, and Sergey Kuznetsov, cited above, § 47, with further references).

86. The Court further reiterates that it is important for the public authorities to show a certain degree of tolerance towards peaceful unlawful gatherings (see Kudrevičius and Others, cited above, § 150, and Navalnyy v Russia [GC], nos. 29580/12 and 4 others, § 143, 15 November 2018). There was no reason to believe that the event in question, although not duly approved, would not be peaceful. Indeed, the impugned Internet post did not contain any calls to commit violent, disorderly or otherwise unlawful acts during the public event.

(see also the decision of the ECHR handed down on the 23rd April 2015 in the case of **Morice vs France**)

The case of **Murat Vural vs Turkey** which was decided on the 21st October 2014 concerned the sentence of 13 years' imprisonment which was inflicted on Murat Vural after he had thrown paint onto the statue of Mela Ataturk, who is considered to be the founder of modern secular Turkey.

The Court of Strasbourg had found that Murat Vural's right to freedom of expression had been violated.

The Court said the following: -

"54. In light of its case-law the Court considers that, in deciding

whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question. The Court notes that the applicant was convicted for having poured paint on statues of Atatürk, which, from an objective point of view, may be seen as an expressive act. Furthermore, the Court notes that in the course of the criminal proceedings against him the applicant very clearly informed the national authorities that he had intended to express his "lack of affection" for Atatürk (see paragraphs 11, 18 and 22 above), and subsequently maintained before the Court that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology and the Kemalist ideology itself (see paragraph 40 above).

55. In this connection, regard must be had to the fact that, contrary to what was submitted by the Government, the applicant was not found guilty of vandalism, but of having insulted the memory of Atatürk (see paragraph 20 above). In fact, the national courts accepted that the applicant had carried out his actions in order to protest against the Ministry of Education's decision not to appoint him as a teacher (see paragraph 19 above).

56. In light of the foregoing the Court concludes that through his actions the applicant exercised his right to freedom of expression within the meaning of Article 10 of the Convention and that that provision is thus applicable in the present case. It also finds that the applicant's conviction, the imposition on him of a prison sentence and his disenfranchisement as a result of that conviction constituted an interference with his rights enshrined in Article 10 § 1 of the Convention."

Reference shall also be made to the decision handed down on the 15th January 2019 by the Court of Strasbourg in the case of **Matasaru vs The Republic of Moldova**. The plaintiff as well as the respondents made reference to this decision. However, both parties are not agreeing regarding matters of interpretation.

The case of **Matasaru vs The Republic of Moldova** was regarding Matasaru being found guilty because he had publicly protested in front of the General Prosecutor's office by using obscene sculptures. The sculptures were intended to bring out the likeness of public officials with genital organs with the purpose of showing the corruption and political control over the institutions. The domestic courts regarded the action as immoral and offensive in regard to the public officials and politicians who were Matasaru's target. He was condemned to a suspended jail sentence.

The case proceeded to the ECHR which found that the interference on the part of the State, which came in conflict with Matasaru's right to free expression, was not required in a democratic society. Therefore, the sentence imposed on him was not justified either, even if this was a suspended jail sentence.

The Court of Strasbourg considered that the sentence did not keep the necessary balance between the plaintiff's right to express his opinions freely and the politicians' and public officials' right to their dignity. In fact, the Court stated that the interference was intended as a deterrent against other persons exercising the right pursuant to Art. 10 of the Convention.

In the judgment, the following reflections ensued:

> *29. The Court has also held that opinions, apart from being capable of being expressed through the media of artistic work, can also be expressed through conduct. For example, it has considered that the public display of several items of dirty clothing for a short time near Parliament, which had been meant to represent the "dirty laundry of the nation", amounted to a form of political expression (see Tatár and Fáber v. Hungary, no. 26005/08 and 26160/08, § 36, 12 June 2012). Likewise, it has found that pouring paint on statues of Ataturk was an expressive act performed as a protest against the political regime at the time (see Murat Vural v. Turkey, no. 9540/07, §§ 54-56, 21 October 2014). Detaching a ribbon from*

a wreath laid by the President of Ukraine at a monument to a famous Ukrainian poet

on Independence Day has also been regarded by the Court as a form of political expression (see Shvydka v. Ukraine, no. 17888/12, §§ 37-38, 30 October 2014).

30. In Maria Alekhina and Others v. Russia (no. 38004/12, 17 July 2018) the Court examined the actions of the Pussy Riot punk band (who attempted to perform a song from the altar of Moscow's Christ the Saviour Cathedral against Vladimir Putin and in response to the ongoing political process). It considered their actions, described by them as a "performance", to constitute a mix of conduct and verbal expression which amounted to a form of artistic and political expression and that it was to be protected as such.

31. In the present case, the domestic courts convicted the applicant in criminal proceedings for his protest in front of the Prosecutor General's Office on 29 January 2013. The conviction interfered with the applicant's right to freedom of expression and the parties agree on that. Such interference will constitute a breach of Article 10 of the Convention unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" for the achievement of those aims.

32. As regards the issue whether the interference in question was prescribed by law, the applicant agreed that there was legal basis under Article 287 of the Criminal Code but argued that that provision was not applicable to the particular circumstances of his case. He expressed the view that his case fell to be examined under the provisions of Article 354 of the Code of Administrative Offences. The Court takes note of the domestic courts' finding that the sculptures exposed in public by the applicant were obscene and their classification of that act as hooliganism within the meaning of the Moldovan law. However, the domestic courts failed to explain in a satisfactory manner why they opted for the criminal sanction provided for by Article 287 of the Criminal Code and not for that provided for by Article 354 of the Code of Administrative Offences. Be that as it may, in view of its findings below, the Court considers it unnecessary to decide whether the interference with the applicant's right to freedom of expression was prescribed by law.

Furthermore, the Court is prepared to

accept that the interference in question pursued the legitimate aim of protecting the reputation of others.

33. The test of whether the interference complained of was "necessary in a democratic society" requires it to determine whether it corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient. In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression, as protected by Article 10 of the Convention (for an analysis of the relevant principles in more detail, see Gündüz v. Turkey, no. 35071/97, § 38, ECHR 2003-XI; Murphy v. Ireland, no. 44179/98, §§ 65-69, ECHR 2003-IX (extracts), including the further references cited therein; Aydın Tatlav v. Turkey, no. 50692/99, §§ 22-27, 2 May 2006; and Giniewski v. France, no. 64016/00, §§ 43-54, ECHR 2006-I).

34. The Court notes that the applicant was found guilty of hooliganism on account of the fact that during his protest in front of the Prosecutor General's Office he had exposed in public sculptures of an obscene nature and because he had attached to them pictures of a politician and several senior prosecutors, thus offending them and infringing their right to dignity.

35. The Court notes in the first place that the domestic courts found Article 10 of the Convention to be inapplicable to the applicant's conduct (see paragraph 10 above), a finding the Court cannot agree with. It also notes that they did not conduct a proper balancing exercise of the different interests involved and imposed a very heavy sanction on the applicant in the form of a suspended prison sentence. In the Court's view, the circumstances of the instant case present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, not only had negative repercussions

on the applicant but it could also have a serious chilling effect on other persons and discourage them from exercising their freedom of expression. The fact that the sentence was suspended does not alter that conclusion (see Cumpănă and Mazăre v. Romania [GC], no. 33348/96, § 116, ECHR 2004-XI).

36. In the light of the above, the Court concludes that although the national authorities' interference with the applicant's right to freedom of expression may have been justified by the concern to restore the balance between the various competing interests at stake, the criminal sanction imposed on him by the national courts was manifestly disproportionate in its nature and severity to the legitimate aim pursued by the domestic authorities. Thus, the domestic courts went beyond what would have amounted to a "necessary" restriction on the applicant's freedom of expression."

The same line of thought was reaffirmed in the judgment of the 7th March 2019 in the case of **Sallusti vs Italy** where the ECHR said the following:

52. In particular, the Court points out that the test of "necessity in a democratic society" requires it to determine whether the interference complained of corresponded to a "pressing social need", whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the sanction imposed was "proportionate to the legitimate aim pursued"

If the above-mentioned three requirements are satisfied together to form the limitation to the right to freedom of expression, then it would mean that the State would have acted within the parameters of Art. 10, with the consequence that the interference would not breach the right to freedom of expression.

In the case of **Autronic AG vs Switzerland** decided on the 22nd May 1990, it stated the following: -

> *Where there has been an interference in the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established.*

(see also: ECHR: **Worm vs Austria**: 29th August 1997)

In Pag 12 of the **Handbook for legal practitioners on Protecting the Right to Freedom of Expression under the European Convention on Human Rights** (published by the Council of Europe) the author **Dominika Bychawska-Siniarska** states the following:

> *States are compelled to justify any interference in any kind of expression. In order to decide the extent to which a particular form of expression should be protected, the Court examines the type of expression (political, commercial, artistic, etc.), the means by which the expression is disseminated (personal, written media, television, etc.), and its audience (adults, children, the general public, a particular group). Even the "truth" of the expression has a different significance according to these criteria.*

Each State interference should be given the most restrictive interpretation since each limitation to the exercise of the fundamental right – whichever right may be invoked - equated to the denial to the exercise of the right.

In its pronouncement of the 18th May 1977 in the case of **The Sunday Times vs the United Kingdom**, the European Commission of Human Rights of the Council of Europe had stated the following regarding the objections provided for by Art. 10(2) of the Commission:

> "*[s]trict interpretation means that no other criteria than those*

mentioned in the exception clause itself may be at the basis of

any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning ...

In the case of exceptional clauses … the principle of strict interpretation meets certain difficulties because of the broad wording of the clause itself. It nevertheless imposes a number of clearly defined obligations on the authorities."

Therefore, where there is doubt, this should proceed in favour of the exercise of the right.

The author of the Handbook (op. cit.) **Dominika Bychawska-Siniarska** continues as follows:

Where the Court finds that all three requirements are fulfilled, the state's interference will be considered legitimate. The burden to prove that all three requirements are fulfilled stays with the state. The Court examines the three conditions in the order provided above. Once the Court finds that the state has failed to prove one of the three requirements, it will not examine the case further and will decide that the respective interference was unjustified, and therefore that freedom of expression was violated.

(see also the decision handed down by the ECHR on the 20th November 2018 in the case of **Toranzo Gomez vs Spain**) which was decided on the 20th November 2018, the ECHR said the following:

a) Considerations of this Court

The respondents and the intervenor in the cause do not contest the plaintiff's right to express his opinions freely, including the right to protest.

In this case, it transpires that when protests were held in public, both when a permit was requested for them, as well as when these were held without a permit being requested in advance, the Police allowed the persons who were protesting as a crowd to do so freely and without hindrance.

The Court refers to the frank, responsible, clear and unequivocal testimony of the Police Assistant Commissioner Stephen Mallia.

No one contested that which was stated under oath by the witness.

This case was triggered as a consequence of the events that occurred on the 15th September 2017 and the days thereafter, near the Great Siege Monument, in Republic Street, on the other side of the road, opposite the main door of the Courts of Justice, in Valletta.

The objects which were used in the protest on that same day, and which were placed outside of the Monument, were removed a short while after they were placed on the spot.

It transpires to be proven that at the time mentioned by the plaintiff in the application initiating proceedings, the protest objects placed by the plaintiff, and other persons with his same opinions, were removed from the site each time that they were placed there.

Prior to those days, it transpires to be proven that there were several instances when on the same spot similar objects were placed with the purpose of a protest and these were left untouched.

Rather the respondent Ramon Deguara, Director General of the Cleansing and Maintenance Division, testified that the orders that he had were that the objects were to be left untouched.

In point of fact, it transpires that a totally surreal state of fact was created and executed between the State (represented by the respondents) and the plaintiff where each time that he placed, or others of his same opinion, placed objects on the site, whereby these objects were intended to be protest objects, these were removed by the State (represented by the respondents) from the place which had been chosen. According to the plaintiff, as corroborated by other persons who testified, the site was chosen randomly.

The said Ramon Deguara testified that in reference to the Monument in question, the decision regarding its cleansing was taken in relation with the restoration which was being undertaken on the Monument.

Francis Chetcuti, Senior Conservator within Heritage Malta, confirmed that restoration work had been carried out.

In order for the restoration work to be carried out, the Monument was surrounded with a wooden structure which covered the Monument and the space around it. Police barriers were also placed to close all access to the steps leading up to the Monument.

The respondents contend that the State interference was executed by force of law, was serving a legitimate purpose, and was necessary in a democratic society.

i) Force of law

The respondents referred to **Art. 4(2) of Cap. 445** which reads as follows: -

"*Every citizen of Malta as well as every person present in Malta shall have the duty of protecting the cultural heritage as well as the right to benefit from this cultural heritage through learning and enjoyment. The cultural heritage is an asset of irreplaceable spiritual, cultural, social and economic value, and its protection and promotion are indispensable for a balanced and complete life*."

Reference was also made to the meaning which ***Art. 2 of Cap. 445*** *gives to that which is to be considered as* "cultural heritage"*:*

"means movable or immovable objects of artistic, architectural, historical, archaeological, ethnographic, palaeontological and geological importance and includes information or data relative to cultural heritage pertaining to Malta or to any other country. This includes archaeological, palaeontological or geological sites and deposits, human remains, landscapes, underwater and seascapes, groups of buildings, as well as scientific collections, collections of natural specimens and art objects, manuscripts, books, published material, archives, audio-visual material and reproductions of any of the preceding, or collections of historical value, as well as intangible cultural assets comprising arts, traditions, customs and skills employed in the performing arts, in applied arts and in crafts and other intangible assets which have a historical, artistic or ethnographic value"

Art. 70(1)(a) of Cap. 445 considers it a criminal offence those acts by any person who:

"*wilfully, or through negligence, unskillfulness or non-observance of regulations causes damage to or destroys any cultural property whether or not such cultural property has been registered in any inventory in accordance with this Act, and even if such cultural heritage property is owned by the person who has caused the damage or destruction, or is lawfully administered by such a person*"

The plaintiff does not contest that the Great Siege Monument is an expression of all Maltese because it commemorates an important event in

our country's history.

It stands to reason that the Monument forms an integral part of the Maltese heritage.

As a national Monument, it is the property of all the Maltese with the institutions serving as guardians.

The argument is presented that the plaintiff cannot expect to use the Monument as a memorial to Daphne Caruana Galizia who was murdered on the 16th October 2017.

The respondents present the argument that the plaintiff cannot on the one hand invoke a fundamental right, and on the other hand, in order to exercise that right, cause damage to a national Monument.

Having premised that which was stated by the respondents, the Court states that in this case, although in paragraph 14 of the application initiating proceedings, the word "memorial" is mentioned in reference to the site, during the collection of evidence, it transpires that the site was not chosen to become a memorial in the meaning of a permanent memorial.

From all the evidence it clearly transpired why the site of the Monument was chosen. It certainly was not intended to be a memorial; and that site could never serve as a memorial. The Great Siege Monument, the work of sculptor Antonio Sciortino, was inaugurated on the 8th May 1927. It was placed and it remains on the same site where it is located today, that is in Great Siege Square. The building which was directly opposite was Auberge d'Auvergne, which however was destroyed by enemy attacks in World War Two. In the sixties of the previous century, the building of the Courts of Justice replaced the Auberge. It is very evident that the site of the Monument could never have the function of a memorial because that Monument already permanently commemorates a

historic and glorious event of our people, that is, the Great Siege of 1565.

It certainly transpires that the site was intended to be a place from where a protest can be held, that is from a public prominent space which catches the attention of the public. The purpose of placing the objects on the site de quo was intended in order that site with the protest objects placed there would serve as a watch-tower with the purpose of reminding whoever has the responsibility to observe the rule of law that all the persons which were directly or indirectly involved in the murder of Daphne Caruana Galizia would be brought to the courts, answer for their responsibilities, and take their justice.

With this premised, Francis Chetcuti, senior conservator, testified in detail in regard to the restoration work which was done in September 2018. In regard to the condition of the Monument prior to the restoration, he testified as follows:

> *"I state that in 2011 the restoration of the Great Siege Monument was commissioned by third parties, who did the restoration as I have just explained. I explain that after this restoration was done by the private company on commission, Heritage Malta carried out the maintenance of this restoration by preserving the protective coating of the monument, whereby this maintenance has to be done periodically. That this was done last year. I state that when we carried out the maintenance on the part of Heritage Malta, an assessment was made on the damage on the stone of the Great Siege monument which consisted of damage caused by candles and plants which were being left on the monument and there was also damage caused by adhesives which were used to affix some photos. There were also traces of colour which ran from some of the printed photos which were affixed. The latter led to damage in the aesthetic value of the monument because of the stains. That, on the other hand, the candles were causing damage to the stone which is porous (besides open pores) since they were sealing the stone pores with the consequence that the air in the stone was being sealed with the possibility that the stone would suffer surface disintegration and stone spalling due to the salt crystallisation. Moreover, the candle wax is a paraffin which discolours with the sun's rays and even*

visually reduces the monument's aesthetic value since the wax becomes yellowish. That the monument stone is roughly made and anything that is dropped on the stone of this type stains and reduces the artistic value of the stone. There are also soil stains with the plant circles which stain the stone permanently if they are not cleaned up immediately. It has to be said that when cleansing work on the stone was carried out, various types of treatment were applied but unfortunately there was some wax which got caught up in the pores which could not be removed in any way, with the consequence that the monument still has traces of wax on the stone. That each time that items were placed on the stone of the monument (even coloured artificial flowers) damp with dew, for example, coloured paper, candles, other objects which are extraneous to the monument, this could stain the stone of the monument and therefore cause damage to the same monument, especially its aesthetic value."

The respondents also referred to ***Art. 161 of Cap. 9*** *which states the following: -*

"Whosoever shall destroy, throw down, deface, or otherwise damage any monument, statue, or other object of art, destined for public utility or public embellishment, and erected by, or with the permission of the public authority, shall, on conviction, be liable to imprisonment for a term from six to eighteen months or to a fine not exceeding three thousand and five hundred euro(€3,500):

Provided that the court may, in minor cases, apply any of the punishments established for contraventions."

The Court carefully examined the testimony of Assistant Commissioner Stephen Mallia and of Inspector Priscilla Caruana Lee. The two of them agree regarding the fact that although various reports were filed, nobody was charged in relation to the damage caused to the Monument. Rather, Assistant Commissioner Mallia stated: -

"There are in this case, if we are talking about damages, I do not recall that were any reports. The reports we received were in regard to the allegations of theft of candles and items from the monument, and flowers, but regarding damages, as far as I know, we did not

receive any."

He also testified that generally the Police presence was for the purpose of order control only. The Police "*safeguard whomsoever is expressing themselves*."

Despite what Francis Chetcuti testified, it appears that neither Heritage Malta, nor the Ministry for Justice, Culture and Local Government, deemed it appropriate that they should file a report regarding damage to the Monument, as described by Chetcuti, in order that whoever was responsible would answer for it.

In this case, the objects in question were removed from in front and off the wooden hoarding which had been erected round the Monument. The hoarding had been erected since the 8th September 2018 and, as confirmed by Ramon Deguara, no flowers, candles or photos were found behind the hoarding.

Therefore, since the objects were removed from in front of the hoarding, the laws regarding the protection of monuments and the cultural heritage cannot be applied.

These laws *could* be applied if the objects were removed directly from the Monument. There would also be an analysis of whether the State interference would be upheld on the basis of the law for the purpose of Art. 10 of the Convention.

Both the respondents as well as the intervenor in the cause refer to Subsidiary Legislation 549.40 entitled Abandonment, Dumping, Disposal of Waste in Streets and Public Places or Areas Regulations.

Art.2 of the Regulations defines public property as that which "*includes but is not limited to buildings, walls, fences, bastions, electricity*

or light poles, bus stops, traffic lights, directional poles, trees, dustbins, benches, and monuments".

There is also a definition of "*litter*" which *includes*: -

> *(i) any solid or liquid, domestic or commercial waste, whether contained or loose, refuse, debris or rubbish and without limiting the generality of the above includes any glass, metal, plastic, paper, fabric, wood, food, chewing gum, cigarette butts, derelict vehicles, vessels, equipment, or machinery, in whole or in parts,* ***garden remnants and clippings****, soil, sand, concrete rocks or any other building material;*
>
> *(ii) any object, material or other substance deposited in a public place causing or adding a disorderly appearance of such place or detrimentally causing an effect on the proper use of the place, or which may, in general, increase the risk of health or environmental hazard to the public or the surrounding environment, or which may be a nuisance to the public ..."*

Art. 4 of the Regulations provides for leaving litter and other objects. It states: -

> *"No person shall throw down, drop, leave, or otherwise spill or deposit any litter in any public place, street, sea, or open space to which the public has access, unless such depositing and leaving is lawfully authorized:*
>
> *Provided that for the purpose of this regulation, Schedule 1 lists, but not exclusively, acts and omissions which shall be deemed to be an offence of leaving litter or depositing or spilling of objects under this regulation."*

The article quoted above refers to the First Schedule of the Regulations.

For this case, paragraph (a) is valid: -

"In accordance with regulation 4, acts or omissions listed hereunder shall be deemed to be an offence under the said regulation:

(a) deposit, drop, place or throw any dust, dirt, paper, ash, cigarette butt, refuse, box, barrel, or any other article or thing in any public place"

Then in the Second Schedule it is stated that: -

"In accordance with regulation 10(4), objects and materials listed hereunder shall be deemed to be dumped or deposited refuse, litter, waste, swill or any other objects:

…

(k) Uncollected litter remaining after the lapse of twenty-four hours from the termination of an event organised by a person, or a body of persons, in a public place, including a rally, protest, concert, festival, public meeting or similar activity, unless

the organiser shows that sufficient arrangements had been made for cleaning after the event."

The respondents contend that the objects which were left in front of the Monument were "waste".

The plaintiff contests this as a fact and states that those objects were a means to protest.

In his testimony, the plaintiff declared that the purpose for which the objects are a means by which he and other activists keep their protest ongoing. In that way, after the end of the protest manifestation, the protest display remains since whoever passes by the Monument would see the objects and remember why the protest was held.

This Court rules out that the objects which were left in the period in question, and which are being left in place to date, qualify as "waste".

The Court asks:

If the purpose is to prolong and keep the protest ongoing, would the plaintiff and others of his same opinion take the risk that the main objects like the candles be wasted and extinguished without them being replaced, or the flowers left to wilt and die without being replaced with fresh ones?

Otherwise what kind of protest would it be?

Who would be attracted to the purpose of the protest if at the site of the protest there would only be extinguished candles and dead flowers?

Besides these questions, there is the evidence of a particular witness (not contradicted), that is Anne Demarco, who twice a day goes to the site in order to place candles and fresh flowers.

It transpires that the objects in question were removed by persons employed by the Department, for which the respondent Director General Ramon Deguara is responsible, on direct order by Minister Owen Bonnici.

Ramon Deguara testified:

"Cleansing around the monuments is carried out on a regular basis, that is, if you place flowers in connection with a public feast obviously these will also be removed after a certain period of time."

Although flowers placed in front of public monuments are removed because these wilt and wither, Deguara testified that this is done "*after a certain period of time*".

This statement is <u>very relevant</u> in the context of this case because whilst it is a confirmation of that which is normally done, in regard to the objects in question in this case, it does not transpire that the cleansing was carried out as was normally done near other public monuments. So much so that in regard to the objects in question, it transpires that these were removed a short while after they were placed on the site.

The respondents gave no explanation as to why this occurred in this case contrary to that which was carried out near other public monuments.

The Court also reiterates that prior to September 2018, the orders which the Cleansing and Maintenance Division workers had were that they should not touch anything from in front of the

Monument.

This order remained in force until it was changed by a direct decision of the respondent Minister (see the testimony of the Hon. Dr Deo Debattista and of Ramon Deguara).

And the objects were removed from the site not because they were waste but because there was an order by Minister Bonnici.

From the evidence there transpires to be no explanation as to why until September 2018 the protest objects were left in place.

The candles and flowers were allowed daily at the Monument by the public authorities as from October 2017.

During those eleven months no public authority complained regarding the damage or inconvenience at the Monument.

Nor did anyone consider those objects as waste.

The issue of the need for restoration was raised, and therefore to remover the objects, eleven months after the objects or other similar ones were placed on the site for the first time.

For this Court, this *modus operandi* of the respondents is not at all convincing.

The Court is concerned regarding the way in which the decision was taken to restore the Monument. It clearly transpired that the Superintendence for the Cultural Heritage was not informed (see the testimony of Superintendent Joseph Magro Conti).

It transpires that the Monument was extensively restored in 2011. Until that restoration was carried out, no protest objects were being placed at the Monument. And yet restoration was still required.

Despite Francis Chetcuti's deposition, this Court is not morally objective and convinced that the restoration was ordered because the Monument had suffered damages with the protest objects. If this were truly the case, the objects would not have been left on the site for eleven months without being removed.

If a restoration had been planned, it does not appear that the decision to carry out the cleansing was formally taken.

According to Ramon Deguara's testimony, it transpires that he rreceived instructions **directly** from Minister Bonnici by means of a telephone call.

Had the decision regarding the restoration and cleansing been planned, it would have probably been a formal one, and not simply a direct telephone call from the Minister to a high official of a department which falls under the remit of the Ministry. One cannot ignore the fact that even the Parliamentary Secretary, the Hon. Dr Deo Debattista, was given instructions like those of the official concerned.

This Court finds it rather difficult to accept, on the basis of the criterion of probability, that the restoration decision had long been taken.

In this case this is not plausible.

The need for restoration was not proven by some official public deed. If the restoration was planned – and therefore it was not urgent –

was it possible that everything depended on a telephone call by the respondent Minister?

The Court has the firm conviction, which is based on the entirety of the evidence acquired in this case, that the removal of the protest objects was carried out with the specific plan and intention to hinder the plaintiff's right, and that of others of his same opinion, to express his opinions freely in that manner, and from that site, that is, a location situated opposite the main door of the Court building.

On the part of the plaintiff, the people who testified declared that the Monument *ut sic* has nothing to do with the purpose of the protest. The Monument came into the scene randomly because it happened to be located right opposite the Court building.

The purpose of the protests which have been ongoing on a regular basis since the day after the murder of Daphne Caruana Galizia, that is, from the 17th October 2017, are a call and a loud cry for justice to be done. It is a known and ascertained fact, both in Malta, as well as overseas, that prior to being murdered, Daphne Caruana Galizia was conducting a journalistic investigation directed towards several individuals, including individuals who were very close to the Government of the day. For the purposes of the issue which is being decided today, the content of these investigations and the individuals concerned are not relevant. What is relevant is whether the fact of the murder is related to the investigations which the journalist was enquiring about. It was for this reason that a number of persons joined together – including the plaintiff – in order to deliver their message that justice should be done in the sense that the due investigations should be carried out not only to find out who was the principal and the executor of the journalist's murder but also to pursue every lead given by the journalist with the purpose of revealing the crimes and the individuals who committed those crimes.

The Courts are the institution entrusted to implement Justice. In the presence of the Courts, individuals are charged of crimes. After the due process, the accused individuals are handed down a judgment according to the charges brought against them. Therefore, although the Monument *ut sic* was a random choice, the location and immediate vicinity of the Monument was not chosen

by coincidence in order to hold a protest on the need for justice to be done according to law simply because that place is located opposite the building of the Courts of Justice.

Having considered all the above, the Court states that in this case, it was not proven that the State interference had the force of the law.

ii) Legitimate Purpose

In order that the purpose of the interference would be legitimate, it must form part of one of the objections identified in sub-article (2) of Article 10 of the Convention.

In their note of submissions, the respondents indicate that the interference was legitimate, and finds its basis in the protection of others' rights since the exercise of the right as expected by the plaintiff was hindering the enjoyment of the Monument.

It is true that in this case the objects were removed when they were in front of the hoarding, however, there remains the fact that when the hoarding was removed the objects were still being placed and removed.

From the evidence presented by the plaintiff, it transpires that the protests had and still have a determined purpose. Once this objective is reached protests would no longer need to be held and therefore that protest objects be placed on the site. There is only one objective, that is, for justice to be done as explained further above.

In regard to the protest objects, it must be said that these have been placed at the same place since the 17th October 2017 and therefore to date for more than two years. Justice must take its course and the necessary investigations must be carried out. It may not be that the

outcome will be achieved in the short term although it is a fact that the investigation has already led to some results. This however does not mean that the plaintiff, and other persons of his same opinion, should be prohibited from expressing themselves in the method and manner which has already been discussed in detail further above.

It has already been indicated that in this case it has been proven to the satisfaction of this court that the purpose of the removal of the protest objects was not the protection of the Monument but the disposition to hinder the continuation of the protests.

There is a significant difference between protesting once a month, by holding a manifestation, and placing objects for these to be removed a short while later, and everything moves on until the following month, as opposed to reminding daily that the protest was still ongoing with the placement of the objects.

Therefore, the purpose of the State interference was not legitimate pursuant to Art. 10(2) of the Convention.

iii) <u>Necessary in a democratic society</u>

Case-law clearly explains that for interference to take place, this should be necessary in a democratic society as it would be dictated by a pressing social need.

The Court does not find any basis for the reasons brought forward by the respondents in order to justify the State interference in the exercise of the plaintiff's right to freedom of expression.

The ECHR has often made it clear that although the national

authorities have the discretion in order to establish that which is necessary, and make use of the available means in order to achieve the objective, ultimately only the Court has the right and obligation to decide whether there is proportionality between the purpose and the exercise of the right.

The purpose of the plaintiff's protests has already been explained.

The Court does not have the slightest doubt that the repercussions of the protests annoy the State.

They also annoy those in the public opinion who do not share the purpose of the protest nor the method of how this is expressed.

This sentiment however is not enough in order to render the removal of the protest objects necessary in a democratic society.

The Court finds that the plaintiff suffered a violation of his fundamental rights as protected by Art. 10 of the Convention and by Art. 41 of the Constitution.

Therefore, it is accepting the first request as deduced against the respondents.

V. The second request

1. Art. 6 of the Convention

The plaintiff complains that he also suffered a violation of his

fundamental rights as protected by Art. 6 of the Convention.

According to the plaintiff, his complaint is focused on the fact that where the Government is involved, the proceedings for a warrant of prohibitory injunction loses its significance because of that which is requested by the third (3) sub-article of Art. 873 of Cap. 12.

The plaintiff contends that when the issue of a warrant of prohibitory injunction is requested against the Government, there is a requirement that the Government would have to declare that it was intending to do that which the warrant was attempting to stop. In the absence of a declaration to that effect, the warrant cannot be issued. The plaintiff complains that this is exactly what happened in his case. In fact, there is no declaration from the Government side or its representatives regarding the Government's intention to remove the protest objects. Therefore, the plaintiff states he lost the opportunity to request the issue of the warrant, and therefore, according to the plaintiff, he was denied the right to access the court.

This court declares that it is not competent to enter into the merits of the manner in which a procedure is conducted in regard to a request for the issue of a warrant of prohibitory injunction, since that is a matter determined by law, governed by Art. 873 of Cap. 12, which is the competence of a court of ordinary jurisdiction.

Moreover, it transpires that in the presence of the ordinary court, the plaintiff withdrew the request for the issue of a warrant of prohibitory injunction against the Government or its representatives.

Once the facts are established, the Court shall consider those points of the law which form those aspects of the right to a fair hearing as protected by the Convention, which are relevant to this case.

i) <u>The right of access to court</u>

The Court makes reference to the judgment handed down on the 5th April 2018 by the Grand Chamber of the ECHR in the case of **Zubac vs Croatia** where it was stated: -

"76. The right of access to a court was established as an aspect of the right to a tribunal under Article 6 § 1 of the Convention in Golder v. the United Kingdom (21 February 1975, §§ 28-36, Series A. no. 18). In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court (see Roche v. the United Kingdom [GC], no. 32555/96, § 116, ECHR 2005-X; see also Z and Others v. the United Kingdom [GC], no. 29392/95, § 91, ECHR 2001-V; Cudak v. Lithuania [GC], no. 15869/02, § 54, ECHR 2010; and Lupeni Greek Catholic Parish and Others v. Romania [GC], no. 76943/11, § 84, ECHR 2016 (extracts)).

77. The right of access to a court must be "practical and effective", not "theoretical or illusory" (see, to that effect, Bellet v. France, 4 December 1995, § 36, Series A no. 333-B). This observation is particularly true in respect of the guarantees provided for by Article 6, in view of the prominent place held in a democratic society by the right to a fair trial (see Prince Hans- Adam II of Liechtenstein v. Germany [GC], no. 42527/98, § 45, ECHR 2001-VIII, and Lupeni Greek Catholic Parish and Others, cited above, § 86).

78. However, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, which regulation may vary in time and in place according to the needs and resources of the community and of individuals (see Stanev v. Bulgaria [GC], no. 36760/06, § 230, ECHR 2012). In laying down such regulation, the Contracting States enjoy a certain

margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see Lupeni Greek Catholic Parish and Others, cited above, § 89, with further references)."

The Court also makes reference to the **Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (Civil Limb)** which is an official publication of the Council of Europe. It is going to refer to the issue which was updated on the 31st December 2017 for the specific issue which it has in this case: -

85. The right to a fair trial, as guaranteed by Article 6 § 1, requires that litigants should have an effective judicial remedy enabling them to assert their civil rights (Běleš and Others v. the Czech Republic, § 49; Naït-Liman v. Switzerland [GC], § 112).

86. Everyone has the right to have any claim relating to his "civil rights and obligations" brought before a court or tribunal. In this way Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect (Golder v. the United Kingdom, § 36; Naït-Liman v. Switzerland [GC], § 113). Article 6 § 1 may therefore be relied on by anyone who considers that an interference with the exercise of one of his or her civil rights is unlawful and complains that he or she has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 § 1. Where there is a serious and genuine dispute as to the lawfulness of such an interference, going either to the very existence or to the scope of the asserted civil right, Article 6 § 1 entitles the individual concerned "to have this question of domestic law determined by a

tribunal" (Z and Others v. the United Kingdom [GC], § 92; Markovic and Others v. Italy [GC], § 98). The refusal of a court to examine allegations by individuals concerning the compatibility of a particular procedure with the fundamental procedural safeguards of a fair trial restricts their access to a court (Al-Dulimi and Montana Management Inc. v. Switzerland [GC], § 131).

87. The "right to a court" and the right of access are not absolute. They may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (Philis v. Greece (no. 1), § 59; De Geouffre de la Pradelle v. France, § 28; Stanev v. Bulgaria [GC], § 229; Baka v. Hungary [GC], § 120; Naït-Liman v. Switzerland [GC], § 113).2 Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (Lupeni Greek Catholic Parish and Others v. Romania [GC], § 89; Naït-Liman v. Switzerland [GC], § 115)."

In the decision handed down by the ECHR in the case of **Bellet vs France** of the 4th December 1995, it stated the following: -

"36. The fact of having access to domestic remedies, only to be told that one's actions are barred by operation of law does not always satisfy the requirements of Article 6 para. 1 (art. 6- 1). The degree of access afforded by the national legislation must also be sufficient to secure the individual's "right to a court", having regard to the principle of the rule of law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights (see the de Geouffre de la Pradelle judgment previously cited, p. 43, para. 34)."

There are limitations to the right.

In fact, in the above-cited **Guide**, it continues to state the following:

"105. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a "legitimate aim" and if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (Ashingdane v. the United Kingdom, § 57; Fayed v. the United Kingdom, § 65; Markovic and Others v. Italy [GC], § 99; Naït-Liman v. Switzerland [GC], §§ 114-115)."

The plaintiff cannot complain of failure of access to court.

It states this because it transpires as fact that the plaintiff was in no way impeded from approaching the courts for every complaint that he had.

More specifically, and with reference to the request for the issue of a warrant of prohibitory injunction, it must be stated that the absence of a declaration on the part of the Government within the context of Art. 873(3) of Cap. 12 has minimal relevance. It states this because even if the declaration were made, and even if, as a result of that declaration, the issue of the warrant would have been accepted, this would have been a precautionary warrant. It considers that the plaintiff was free to present any judicial act he deemed appropriate.

ii) Equality of arms

In Pag 201 of **"Law of the European Convention on Human Rights** (Second Edition; 2009; OUP) the authors **Harris, O`Boyle and Warbrick** state the following regarding Art. 6 of the Convention: -

> *The Court* (with reference to the Court of Strasbourg) *has stressed that "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively" (Perez v France – 2004-I ; 40 EHRR 909 para 64 GC).*

In Pag 224 they state: –

> *Article 6 does not control the content of a state`s national law ; it is only a procedural guarantee of a right to a fair hearing in the determination of whatever legal rights and obligations a state chooses to provide in its law.*

Then in Pag 251 they maintain that: –

> *The right to a fair hearing supposes compliance with the principle of equality of arms. This principle, which applies to civil as well as criminal proceedings, requires each party to be given a reasonable opportunity to present his case under conditions that do not place*

him at a substantial disadvantage vis-à-vis his opponent. In general terms, the principle incorporates the idea of a fair balance between the parties.

In the book entitled **Protecting the right to a fair trial under the European Convention on Human Rights** (Council of Europe Human Rights Handbooks - 2012), the authors **Dovydas Vitkauskas and Grigoriy Dikov** explain the principle of equality of arms as follows: -

"Equality of arms" requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis-à-vis another party (Brandstetter).

While "equality of arms" essentially denotes equal procedural ability to state the case, it usually overlaps with the "adversarial" requirement – the latter in accordance with the rather narrow understanding of the Court concerning the access to and knowledge of evidence – and it is not clear on the basis of the Court`s consistent case-law whether these principles in fact have independent existence from each other (but see Yvon v. France, §§29-40). It can safely be said that issues with non-disclosure of evidence to the defence24 may be analysed both from the standpoint of the requirement of adversarial character of the proceedings (ability to know and test the evidence before the judge) and the "equality of arms" guarantee (ability to know and test evidence on equal conditions with the other party).

In some civil cases it would not appear inappropriate to also look at the question of the ability to access and contest evidence as part of the general requirement of "access to a court" (McGinley and Egan v. the United Kingdom). In Varnima Corporation International S.A. v. Greece (§§28-35), for instance, the domestic courts applied two different limitation periods to the respective claims of each party (the applicant company and the state), disallowing the applicant`s claim while admitting the one filed by the authorities).

A minor inequality which does not affect fairness of the proceedings as a whole will not infringe Article 6 (Verdú Verdú v. Spain, §§23-29). At the same time, as a general rule, it is for the parties alone to decide whether observations filed by another

participant in the proceedings call for comment, no matter what actual effect the note might have had on the judges (Ferreira Alves (No. 3) v. Portugal, §§35-43).

While there is no exhaustive definition as to what are the minimum requirements of "equality of arms", there must be adequate procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties. These may include opportunities to: a) adduce evidence, b) challenge hostile evidence, and c) present arguments on the matters at issue (H. v. Belgium, §§49-55).

The opposing party must not be given additional privileges to promote its view, such as the right to be present before a court while the other party is absent (Borgers v. Belgium, §§24-29).

The presence of a prosecutor in civil proceedings opposing two private parties can be justified if the dispute affects also the public interest or if one of the parties belongs to a vulnerable group in need of special protection (Batsanina v. Russia, §§20- 28).

The requirement of "equality of arms" enjoys a significant autonomy but is not fully autonomous from the domestic law since Article 6 takes into account the inherent differences of accusatorial systems – for instance, to the extent that it is for the parties to decide in that system which evidence to present or witnesses to call at trial – and inquisitorial systems, where the court decides what type and how much of the evidence is to be presented at trial. An applicant in an inquisitorial system, for instance, cannot rely on the principle of the "equality of arms" or Article 6 §3d in order to call any witness of his choosing to testify at trial (Vidal).

The case-law on the question of experts is rather complicated, because on the one hand they appear to be treated as any other witness (Mirilashvili); on the other, certain additional requirements of neutrality may be levelled at the experts who play a "more substantive procedural role" than a mere witness (Boenisch v. Austria, §§28-35; Brandstetter, §§41-69).26

It may be stated that there is no unqualified right, as such, to appoint an expert of one`s choosing to testify at trial, or the right to appoint a further or alternative expert. Moreover, the Court has traditionally considered that there is no right to demand the neutrality of a court-appointed expert as long as that expert does not enjoy any procedural privileges which are significantly disadvantageous to the applicant (Brandstetter).
The requirement of neutrality of official experts, however, has been given more emphasis in the Court`s recent case-law, especially where the opinion of the expert plays a determining role in the proceedings (Sara Lind Eggertsdóttir v. Iceland, §§55- 41). The right to appoint a counter-expert may appear where the conclusions of the original expert commissioned by the police trigger a criminal prosecution, and there is no other way of challenging that expert report in court (Stoimenov v. "the former Yugoslav Republic of Macedonia", §§38-43).

There could be other exceptional circumstances – such as a sudden and complete change of evidence given by a court appointed expert in the course of the same hearing – where a problem of fairness and defence rights may arise if the court does not consider calling a further expert to testify (G.B. v. France, §§56-70).

In a criminal trial, the requirement of equality of arms under Article 6 §1 sometimes overlaps with the defence rights under Article 6 §3, such as the right to question witnesses. Hence, alleged violations of these provisions are usually examined in conjunction (Bricmont). »

In the decision of this Court as presided of the 29th April 2014 in the case in the names **Edgar Publio Bonnici Cachia vs Attorney General** (which was confirmed by a judgment of the Constitutional Court: of the 5th December 2014), the following was stated:-

*From Pag 81 to Pag 267 of the Fourth Edition (2011) of **A Practitioner's Guide to the European Convention on Human Rights** (Sweet & Maxwell), the jurist Karen Reid deals with what she calls the "problem areas" of "fair trial guarantees". The Court shall extract paragraphs from this text which, in its opinion, are relevant*

to the merits of this cause: -

Pag 81: -

The key principle governing Art 6 is fairness … of the proceedings as a whole …

Pag 82: -

The right to a fair trial is seen as holding so prominent a place in democratic society that the Court has stated that there is not justification for interpreting Art 6 Para 1 restrictively. Whatever the importance of public interest in, for example, fighting organised crime, the fair administration of justice cannot be sacrificed to expedience …

As to fairness, it is perhaps simpler to say what it does not mean.

The Commission frequently stated, and the Court continues to emphasise, that the Convention organs are not courts of appeal from domestic courts and cannot examine complaints that a court has made errors of fact or law or reached the wrong decision or that a person was, for example, wrongly convicted. They will not enter into the merits of decisions. For this reason, complaints concerning miscarriages of justice are unlikely to succeed before them.

Domestic courts are in the best position to assess the evidence before them, to decide what is relevant or admissible. Matters of appreciation of domestic law and the categorisation of claims in domestic law are also primarily for the appreciation of domestic courts …

Pag 83: -

From the Convention point of view, it is not so much the result that is in question but the process of "hearing" …

Equality of arms between the parties, or "a fair balance" must be achieved. This means that each party must be afforded a reasonable opportunity to present his case – including his evidence – under

conditions which do not place him at a substantial disadvantage vis-à- vis his opponent …

Pag 84: -

The accused, and in civil proceedings the parties, must be able to participate effectively in proceedings …

Pag 85: -

Measures taken in the conduct of a criminal trial must be reconcilable with an adequate and effective exercise of the rights of the defence. The importance of securing defence rights in criminal proceedings has been identified as a principle of democratic society and, in this respect, Art 6 must be interpreted to render them practical and effective rather than theoretical and illusory …

The proceedings are looked at as a whole and one restriction on the defence may be insufficient to render the proceedings as a whole unfair …

Pag 156: -

The Commission did not exclude that the refusal by a court to order an expert, hear a witness or to accept other types of evidence might in certain circumstances render the proceedings unfair. Since, however, it was for the national courts to decide what was necessary or essential to decide a case, it commented that only in exceptional circumstances would it conclude that a decision of a national court in such a matter violated the right to a fair hearing. It gave the example of where an applicant adduced some evidence which the court rejected outright, refusing to allow verification of it and without giving sufficient reasons for its refusal …

*Where in "**Accardi v. Italy**" (30598/02 – Dec. January 20. 2005 – ECHR 2005-II) the decision of a domestic court not to order a psychologist's report or to call the expert requested by the defence was based on logical and pertinent arguments and the conclusion that such evidential measures were of no relevance to the proceedings, there was no infringement of the rights of the defence*

or the fairness principle….

…

*In its judgment of the 26th July 2011 in the case "**Huseyn and Others vs Azerbaijan**" the Court of Strasbourg stated the following*: -

*175. More specifically, all of the applicants consistently claimed that neither they nor their counsel had been given sufficient access to the prosecution evidence after the pre-trial investigation had been completed and before the trial commenced, nor had they enjoyed such access after the trial had commenced, despite their repeated complaints to that effect. The Court reiterates that the right to an adversarial trial under Article 6 § 1 of the Convention means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment on them (see **Brandstetter v. Austria,** 28 August 1991, §§ 66-67, Series A no. 211). Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility of putting all relevant defence arguments before the trial court and thus of influencing the outcome of the proceedings (see **Can v. Austria**, no. 9300/81, Commission report of 12 July 1984, § 53, Series A no. 96; **Connolly v. the United Kingdom**, no. 27245/95, Commission decision of 26 June 1996; and **Mayzit v. Russia**, no. 63378/00, § 78, 20 January 2005). The facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings (see **C.G.P. v. the Netherlands**, no. 29835/96, Commission decision of 15 January 1997, and **Foucher v. France**, 18 March 1997, §§ 31- 38, Reports*

1997-II). The issue of the adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case.

…

*188. The Court reiterates that the principle of equality of arms, as one of the fundamental elements of the broader concept of a fair trial, requires each party to be given 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 opponent (see **Nideröst-Huber v. Switzerland**, 18 February 1997, § 23, Reports 1997-I). That right means, inter alia, the opportunity for the parties to a trial to present their own legal assessment of the case and to comment on the observations made by the other party, with a view to influencing the court`s decision (see, mutatis mutandis, **Lobo Machado v. Portugal**, 20 February 1996, § 31, Reports 1996-I, with further references). The requirement of equality of arms, in the sense of a "fair balance" between the parties, applies in principle to both criminal and civil cases ; in criminal cases a lesser degree of latitude is allowed for any deviations from that requirement (see **Dombo Beheer B.V. v. the Netherlands**, 27 October 1993, §§ 32-33, Series A no. 274).*

…

196. At the outset, the Court notes that the prosecution`s case was based to a large degree on numerous witnesses whose pre- trial statements were produced in court. However, it appears that all of these witnesses were called to testify at the trial and that, in principle, the applicants were given an opportunity to question them. As to the defence witnesses, it is true that the Assize Court allowed the examination of only some of the witnesses requested by the defence, but refused to call all of the persons whom the defence sought to examine. While Article 6 § 3 (d) of the Convention is aimed at ensuring equality in criminal proceedings between the defence and the prosecution as regards the calling and examination of witnesses, it does not give an accused person an unlimited right to obtain the attendance of witnesses in court. The domestic law may thus lay down conditions for the admission and examination of

*witnesses provided that such conditions are identical for witnesses on both sides. Similarly, the domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence, for instance on the ground that the court considers their evidence unlikely to assist in ascertaining the truth (see **X v. Austria**, no. 4428/70, Commission decision of 1 June 1972). Having regard to the available material, the Court finds that it has not been clearly shown how any of the witnesses whom the Assize Court refused to examine would have been able to assist the applicants` defence against the specific accusations put forward against them.*

…

*200. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicants were given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see Khan, cited above, §§ 35 and 37, and Allan, cited above, § 43). Where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance (see Allan, cited above, § 47, and **Bykov v. Russia** [GC], no. 4378/02, § 95, ECHR 2009-...)*

*In the case "**Klimentyev vs Russia**" which was decided by the Court of Strasbourg on the 16th November 2006, the applicant's complaint was that he had suffered a violation of his right to a fair hearing because he had not been given the opportunity to examine the court experts' reports. In that case the European Court had found no violation because the domestic law granted the opportunity to the accused to examine those reports and therefore it was the applicant's failing of not having taken that opportunity. The Court stated the following: -*

'95. The Court recalls that according to the principle of equality of

*arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see e.g. **Jespers v. Belgium**, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61; **Foucher v. France**, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, § 34; **Bulut v. Austria**, judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, p. 380-381, § 47).*

96. On the facts, the Court observes that the case for the prosecution rested, inter alia, on a number of expert reports (technical, medical, graphological and other) ordered by the prosecution during the pre-trial stage of proceedings in 1995 and 1996. Four out of more than sixteen decisions ordering such reports were served on the applicant with delays ranging from two to three and a half months, whilst the remaining twelve decisions were served within a month from the respective dates of their delivery (see paragraphs 34-37 in the summary of facts). The applicant principally argued that the late notification of these decisions had effectively deprived him of the possibility to participate in the ordering of the expert examinations and that the subsequent admission of the respective expert examinations had been in breach of Article 6.

97. Having regard to the circumstances of the case, the relevant domestic law and the parties` submissions, the Court cannot subscribe to the applicant`s argument. To begin with, the Court observes that at the time of service of these sixteen decisions both the applicant and his counsel were officially informed about the procedural rights of the accused, including the right to challenge an expert, seek the appointment of a particular person as an expert, adduce further questions, be present during the expert examination in person and make any comments and be informed of expert conclusions (see paragraph 37 above). The applicant and his counsel had an unrestricted opportunity to make related requests and motions in writing and, indeed, there is no indication in the case-file that any of the requests of the defence were turned down as belated or otherwise inadmissible. On the contrary, the

authorities granted and implemented all of the applicant`s requests in this respect. Moreover, there is nothing in the case-file to suggest, and indeed the applicant has not alleged that he was unable, personally or with the assistance of his defence counsel, to study the impugned expert examinations beforehand, contest them throughout the trial and appeal proceedings or avail himself of his rights under Sections 89 and 290 of the Criminal Procedure Code by requesting the trial court to order additional or repetitive expert examinations.'

…

*In its judgment of the 30th September 2011 in the case "**J.E.M Investments Ltd vs Attorney General et**" the Constitutional Court had stated the following –*

'the right to a fair hearing does not guarantee the correctness of the judgments on the merits but only guarantees the adherence to certain procedural principles (independence and impartiality of the Court and of the adjudicator, audi alteram partem and hearing and pronouncement of a judgment in public) which are conducive to the correct administration of justice.

The function of the Court, in its Constitutional jurisdiction, is not that to revise the judgments of other Courts to state whether these were decided correctly or not, but is limited to the function to see whether these judgments breached the Constitution of the European Convention'.

*Harris, O`Boyle & Warbrick state in their book "**Law of the European Convention on Human Rights**" (Second Edition – 2009 - OUP) that in line of principle the Court (that is the ECHR) allows States a wide margin of appreciation as to the manner in which national courts operate … A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of results as of conduct, with national courts being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial. (emphasis of this Court_ [see page 202]. And they continue that in some contexts a breach of Article 6 will only be found to have occurred upon proof of "actual prejudice" to the*

applicant … [see page 204]

By equality of arms this means that each party has to be granted the equal opportunity to present its case and explain the reasons which constitute its case.

The right to a fair hearing should be considered in the context of the laws of procedure of the Convention member states and should never be interpreted as even a **substitute** of those laws.

A request for the issue of a warrant of prohibitory injunction against the Government is determined by Art. 873(3) of Cap. 12. If the specific requirements as stipulated by law are not satisfied, the warrant of prohibitory injunction against the Government cannot be issued. Among these requirements, there is the declaration. If the declaration is not made or cannot be made, this does not mean that the principle of equality of arms has been violated.

Therefore, the second request is being rejected in regard to the alleged violation of the plaintiff's fundamental rights as protected by Art. 6 of the Convention.

2. Art. 13 of the Convention

The second request also extends to the alleged violation of Art. 13 of the Convention.

In his note of submissions, the plaintiff does not go into detail regarding his complaint; in fact, he only complained of an infringement.

The respondents contest the complaint on the basis of right by arguing that Art. 13 of the Convention does not require that the remedy

should in effect be available within the framework of ordinary proceedings. What matter is that there is an available and effective remedy.

Art. 13 of the Convention reads: -

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

It ought to be stated that any remedy can be granted as long as it is effective, practical and legal.

The choice of remedy depends on the particular circumstances of the case.

Martin Kuijer in his writing: "**Effective Remedies as a Fundamental Right": Seminar on Human Rights and Access to Justice in the EU: European Judicial Training Network: 2014**: states: -

"*The Court demands a domestic remedy to deal with the substance of an "arguable complaint" under the Convention. Article 13 does not require a domestic remedy in respect of any supposed grievance, no matter how unmeritorious; the claim of a violation must be an arguable one. The question of whether the claim is arguable should be determined in the light of the particular facts and the nature of the legal issue or issues raised.*

Likewise, the domestic remedy should be able to grant appropriate relief. The latter condition is to say that the `authority` needs to be competent to take binding decisions (which means that an Ombudsman does not meet the required standards) and that it should be competent to order restitutio in integrum or award damages. Likewise, the notion of an effective remedy under Article

13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.

The remedy required by Article 13 needs to be "effective" in practice as well as in law. Its effectiveness does not, however, depend on the certainty of a favourable outcome for the applicant.

On reading ECHR case-law regarding the application of Art. 13 of the Convention, it appears that the direction of the court was that Art. 13 does not require any particular procedure for its application. What is required is that an effective remedy is made available through the law. Therefore, where the law makes provision for a remedy, there is no case for complaint according to Art. 13.

This was stated in the case of **Amann vs Switzerland** decided on the 16th February 2000 where the ECHR observed that:

"88. The Court reiterates first of all that in cases arising from individual petitions the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it (see the Holy Monasteries v. Greece judgment of 9 December 1994, Series A no. 301-A, pp. 30-31, § 55).

It further observes that Article 13 of the Convention requires that any individual who considers himself injured by a measure allegedly contrary to the Convention should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see the Leander judgment cited above, pp. 29-30, § 77). That provision does not, however, require the certainty of a favourable outcome (see the D. v. the United Kingdom judgment of 2 May 1997, Reports 1997-III, p. 798, § 71).

89. In the instant case the Court notes that the applicant was able to consult his card as soon as he asked to do so, in 1990,

when the general public became aware of the existence of the card index being kept by the Public Prosecutor's Office. It also points out that the applicant brought an administrative-law action in the Federal Court and that on that occasion he was able to complain, firstly, about the lack of a legal basis for the telephone tapping and the creation of his card and, secondly, the lack of an "effective remedy" against those measures. It notes that the Federal Court had jurisdiction to rule on those complaints and that it duly examined them. In that connection it reiterates that the mere fact that all the applicant's claims were dismissed is not in itself sufficient to determine whether or not the administrative-law action was "effective".

90. The applicant therefore had an effective remedy under Swiss law to complain of the violations of the Convention which he alleged. There has not therefore been a violation of Article 13."

In the case **Kudla vs Poland** of the 26th October 2000, the Court of Strasbourg maintained that:

"151. The Court finds nothing in the letter of Article 13 to ground a principle whereby there is no scope for its application in relation to any of the aspects of the "right to a court" embodied in Article 6 § 1. Nor can any suggestion of such a limitation on the operation of Article 13 be found in its drafting history.

Admittedly, the protection afforded by Article 13 is not absolute. The context in which an alleged violation – or category of violations – occurs may entail inherent limitations on the conceivable remedy. In such circumstances Article 13 is not treated as being inapplicable but its requirement of an "effective remedy" is to be read as meaning "a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in [the particular context]" (see the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 31, § 69). Furthermore, "Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws to be challenged before a national authority on the ground of being contrary to the Convention" (see the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 47, §

85). ***Thus, Article 13 cannot be read as requiring the provision of an effective remedy that would enable the individual to complain about the absence in domestic law of access to a court as secured by Article 6 § 1.*** *(emphasis added)*

…

152. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum.

By virtue of Article 1 (which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention.

The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, as a recent authority, Selmouni v. France [GC], no. 25803/94, § 74, ECHR 1999-V). The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (ibid.).

In that way, Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the travaux préparatoires (see the Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651), is to provide a means whereby individuals can obtain relief at national level for violations

of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6 § 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings.

…

157. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, the Kaya judgment cited above). The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, İlhan v. Turkey [GC], no. 22277/93, § 97, ECHR 2000-VII).

The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, the Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 42, § 113, and the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, pp. 1869-70, § 145)."

The same position was reaffirmed in the judgment handed down by the ECHR on the 8th June 22006 in the case of **Surmeli vs Germany**: -

> *"98. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so. It is therefore necessary to determine in each case whether the means available to litigants in domestic law are "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (see Kudła, cited above, §§ 157-58)."*

Of interest is that which is stated by the ECHR in the decision of the 9th July 2013 in the case of **Maria Theresa Deguara Caruana Gatto and Others vs Malta**: -

> *"80. The Court reiterates that the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, İlhan v. Turkey [GC], no. 22277/93, § 97, ECHR 2000- VII). The term "effective" is also considered to mean that the remedy must be adequate and accessible (see Paulino Tomás v. Portugal (dec.), no. 58698/00, ECHR 2003-XIII). However, the Court also reiterates that the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see Sürmeli v. Germany [GC], no. 75529/01, § 98, ECHR 2006-VII) and the mere fact that an applicant's claim fails is not in itself sufficient to render the remedy ineffective (Amann v. Switzerland, [GC], no. 27798/95, §§ 88-89, ECHR 2002-II).*

81. The Court notes that in respect of their complaints under Article 1 of Protocol No. 1 and Article 6 of the Convention, the applicants asked the Court of Appeal to refer the case to the constitutional jurisdictions. A referral was made in respect of the applicants' complaints concerning their property rights, encompassing the complaint regarding the alleged legislative interference with pending proceedings.

82. Thus, the Court notes that a remedy was provided under Maltese law, enabling the applicants to raise their Convention complaints with the national courts. Following the referral, they pursued constitutional proceedings before the Civil Court (First Hall) in its constitutional jurisdiction and, on appeal, before the Constitutional Court. Moreover, the Court observes that the applicants were in fact successful at first instance, and although the judgment was overturned on appeal, there is nothing to indicate that, had the Constitutional Court found in favour of the applicants, it would not have provided adequate redress (see, mutatis mutandis, Gera de Petri Testaferrata Bonici Ghaxaq v. Malta, (merits) no. 26771/07, § 70, 5 April 2011).

83. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

This case-law confirms that, that which Art. 13 of the Convention requires is that the national law would give remedy, in the sense that if a court is called upon to consider whether there was an infringement of a fundamental right protected by the Convention, and it finds that there was an infringement, then in that case, it would grant an effective remedy. As long as the domestic law offers an effective remedy, a complaint on the basis of Art. 13 cannot be upheld.

Nor can a complaint be upheld because of the manner in which the procedure in the domestic law would have been drafted.

In this case, there is no violation of Art. 13.

Therefore, the request is being denied as well as the remainder of the second request in as far as it concerns the alleged violation of the plaintiff's fundamental rights as protected by Art. 13 of the Convention.

VI. The first part of the third request

As deduced, the third requested is split in two.

In the first part, the plaintiff is requesting that the Court orders the respondents to return the objects which were taken from the protest site and which were deposited under the authority of the court.

In the second part, the plaintiff is requesting the Court to order the respondents to desist from removing them again.

At this stage, the Court shall only consider the first part of the third request, because further on it shall consider the second part of the third request together with the sixth request.

In regard to the first part of the third request, reference is made to the testimony given by Frank Mercieca, Director General of the Courts, in the hearing of the 12th November 2018.

The witness presented five Schedules of Deposit: Doc FM1: Schedule No. 1908/18:

Banner in a cardboard box.

Doc FM2: Schedule No. 1795/18:

Objects consisting of photos, candles and flowers.

Doc FM3: Schedule No. 1750/18:

Banner, candles and flowers which were affixed to the hoarding,

as well as flowers and candles which were on the pedestal of the Monument.

Doc FM4: Schedule No. 1889/18:
Photos, flowers and candles in four cardboard boxes.

Doc FM5: Schedule No. 1973/18:
Banner, flowers and candles in six cardboard boxes.

During this case, the Registrar of the Civil Courts and Tribunals presented four applications which were brought to the attention of this Court, whereby two of these applications were in regard to Schedules No. 1973/2018 and 1889/2018, where he requested that he would be allowed to dispose limitedly of the remains of the flowers and candles. The Court ordered that the plaintiff should be notified of the applications and he was given time in order to present a reply. The plaintiff did not present a reply. The Court accepted the Registrar's requests in order to dispose of the remains of the flowers and candles.

This means that the Registrar still has photos and two banners in his possession.

The Court is accepting the first part of the third request by ordering that the plaintiff withdraws the photos and the two banners.

VII. <u>The fourth and fifth requests</u>

In regard to the pecuniary damages, the Court considers that the plaintiff should be fully satisfied with the way it has made provision in regard to the first part of his third request.

Since no other pecuniary damages were sustained, the request for the liquidation of these damages is being rejected.

The request for the liquidation of non-pecuniary damages takes a different perspective.

Taking into account all of the facts and circumstances of the cause, the Court is of the firm conviction that a declaration of a violation according to the first request would not be enough to make good for the severity of the violation suffered by the plaintiff.

It states this taking into account the excuse brought forward by the respondents in order to justify the removal of the protest objects. It is only a futile pretext that one makes use of the Monument in order to gain some sort of advantage. The Monument is what it is: an honour to the Maltese people of all times. And that is how it should remain. Whoever makes use of it for any other reason should not be protected. The Court considers that this does not apply to the plaintiff. However, it applies to the respondents.

The removal was intended to discourage that form of protest. The removal in order to take a stand every time that objects were placed was evidently a systematic method of hindrance and impediment which should never have occurred. It was absurd on the part of whoever ordered the removal to think that the plaintiff had an interest to case the deterioration of the site of the Monument in order to be mocked for allowing the site run to ruin. The removal was a disproportionate act. It is not in the interest of the State to witness a division in the making. In this case, due to the respondents' conduct, that site has become an instrument of discord, which should never happen.

In order to send a clear signal that the right to freedom of expression should be seriously protected, the Court is liquidating non-pecuniary damages to the amount of €1,000 in favour of the plaintiff.

It is the same amount which was liquidated by the Constitutional Court in its last pronouncement in a matter of violation of the right to freedom of expression, that is, Ignatius Busuttil vs The Commissioner of Police et (op. cit.)

VIII. The second part of the third request and the sixth request

The Court shall deal with the second part of the third request and the sixth request together since one of its provisions covers them both.

It is initiating with the sixth request.

The plaintiff is requesting that where possible his fundamental rights should be returned to the status they were in prior to the violation.

The status of the protest site in September 2018 is not the same today. At the time there was the hoarding around the Monument. Today the hoarding is no longer there as the Monument was uncovered after the restoration.

Since the hoarding was removed, the violated fundamental right of the plaintiff cannot be returned to the status it held on the day of the violation. However, this does not mean that the plaintiff would not be provided with an effective remedy for the future.

Within the scope of the sixth request for the state of fact existing today, the Court makes these observations.

The Great Siege Monument in Valletta today appears as follows:

a) the Three Bronze Figures which represent Faith, Fortitude and

Civilisation.

b) behind the three figures and beneath them, there is a pedestal in white stone or marble.

c) on the middle part of the pedestal there is the year 1565 etched in the Latin letter MDLXV, the year of the Great Siege.

d) the pedestal with the figures on it is surrounded with a rectangular pink stone. the base of the structure is surrounded with flowers and plants planted in the soil.

In regard to the sixth request, the Court is **recommending** to the plaintiff (and to the other persons of his same opinion) that in the exercise of the right to freedom of expression, including the method and manner of carrying out the protest, he should show a high sense of care, responsibility, respect and sensitivity towards the Siege Monument and its immediate vicinity by:-

i) As a principle of civilisation, any attachments or placement of protest objects, as described above, to the Three Figures, and the white pedestal, should be avoided.

ii) The placement of protest objects, as described above, including candles, flowers or plants, on the white stone or marble pedestal should be avoided.

iii) Protest objects may be placed with caution and responsibility onto the highest level of the structure composed of the pink stone in order not to cause damage.

iv) The same applies to the lower bottom part which is planted.

Common sense, sincere love for the country, its symbolism and even the past, and the respect for the diversity of opinions are values amongst many others which render this people, a strong people. These values should always remain a point of reference and should be valuable also

because, whilst the right to protest remains protected, the much needed balance is maintained. Therefore, when it is no longer necessary for the plaintiff (and for the others with his same opinion) to protest from that site, everything should return to the status as that prior to 16th October 2017. Nor should the search for an alternative site, as prominent as this, even in the vicinity or proximity of the actual site, be excluded.

In light of the premised, for the purpose of the sixth request, the Court orders that the protest objects may be placed in the method and manner recommended and indicated by the Court.

In regard to the second part of the third request, the Court orders that whilst its order is being observed pursuant to the sixth request, the protest objects should not be removed. It is stating this because through the plaintiff's conduct it is understanding that his interest is to keep his call for justice ongoing, which therefore means that the call for justice cannot be delivered with depleted and extinguished candles, dead flowers, ugly photos, damage or other negative details. Even in this context, common sense, responsibility and accountability should prevail since these are all key values in a democratic society.

Decides

For all the premised reasons, the Court is pronouncing and deciding this case by:

Rejecting the respondents' objection as deduced in their supplementary reply.

Rejecting the objections on the merit of the respondents as deduced against the first request of the plaintiff.

Accepting the first request of the plaintiff.

Accepting the objections on the merit of the respondents as deduced against the second request of the plaintiff.

Rejecting the second request of the plaintiff.

Rejecting the objections on the merit of the respondents as deduced against the other requests of the plaintiff.

Accepting the first part of the third request of the plaintiff by ordering that the plaintiff withdraws the photos and the two banners from the Court registry, and their subsequent release to the plaintiff.

Making provision in regard to the fourth request of the plaintiff by liquidation in favour of the plaintiff a non-pecuniary compensation to the amount of one thousand Euro (€1,000) for the violation suffered by the plaintiff according to the first request.

Making provision in regard to the fifth request by ordering the respondents to pay the plaintiff the sum of one thousand Euro (€1,000) liquidated as non-pecuniary compensation for the violation suffered by the plaintiff according to the first request.

Accepting the second part of the third request and the sixth request of the plaintiff according to the modalities recommended and indicated in Part IX of this judgment.

Ordering the plaintiff to pay for the costs related to the second request and those of the warrant of prohibitory injunction with number 1750/2018.

Ordering the intervenor in the cause to pay his costs.

Ordering the respondents to pay all the other costs.

The Hon. Joseph Zammit McKeon
Judge

Amanda Cassar

Deputy Registrar