

*FREEDOM OF EXPRESSION
ART 10 CAP 319 OF THE LAWS OF MALTA
ART 41 OF THE CONSTITUTION OF MALTA
BANNER
CAP 552 OF THE LAWS OF MALTA
LN 36 OF 2018
FAILURE TO EXPEND ORDINARY REMEDIES
QUALITY OF LAW*



**CIVIL COURT - FIRST HALL
(CONSTITUTIONAL JURISDICTION)**

THE HON. MADAM JUSTICE

**LORRAINE SCHEMBRI ORLAND
LL.D., M.Jur. (Eur.Law), Dip.Trib.Eccles.Melit.**

Sitting of Tuesday, 16 July 2019

Case Number: 1

Constitutional Application Number: 79/2018/LSO

**Dr Peter Caruana Galizia (ID
30056M), Matthew Caruana
Galizia (ID 130886M), Andrew
Caruana Galizia (ID 384287M)
and Paul Caruana Galizia (ID
8989M)**

16 July 2019.

vs

The Planning Authority

The Court,

I. PRELIMINARIES

Having seen the Constitutional application of Dr Peter Caruana Galizia (ID 30056M), Matthew Caruana Galizia (ID 130886M), Andrew Caruana Galizia (ID 384287M) and Paul Caruana Galizia (ID 8989M) dated 3 August 2018 whereby they expounded: -

1. That on 16 October 2017 Daphne Caruana Galizia was assassinated by a bomb placed under her car.

2. That the Police initiated an investigation regarding this homicide, during which the applicants were being given very sparse information regarding its progress: *(See the judgment Dr Peter Caruana Galizia et vs the Commissioner of Police (95/2017/SM decided on 12 June 2018 by the First Hall of the Civil Court in its Constitutional Jurisdiction), whereby it was stated by the Court that: "it transpires in effect that the plaintiffs were being systematically ignored by the investigators")*; however, this led to the arraignment in court of three persons who were being investigated for the execution of the assassination, and the compilation of evidence against these three persons was initiated.

3. That, subsequently, the applicants were not informed of any progress in regard to the search of whoever ordered the Daphne Caruana Galizia's murder, even though months had passed since her assassination and, moreover, they were given to understand that the case was being considered as closed in view of the above-mentioned arrests and arraignments.¹

4. That on 31 March 2018, the applicants, who are Daphne Caruana Galizia's husband and sons (and therefore the heirs), placed a banner on a private property in Old Bakery Street, Valletta (a photo of the banner is attached herewith and marked as Doc. A), with the words:

"Why aren't Keith Schembri and Konrad Mizzi in prison, Police Commissioner?

Why isn't your wife being investigated by the police Joseph Muscat?

Who paid for Daphne Caruana Galizia to be blown up after she asked these questions?"

5. That, a few days later, a 'Stop and Enforcement Notice regarding Billboards and Advertisements' was placed by the respondent Authority on the facade of the said property dated 3 April 2018 (a copy

¹ See the reply of the Attorney General, the Commissioner of Police and the Deputy Commissioner of Police Silvio Valletta for the case filed by the applicants 95/2017/SM, where they state: "That without prejudice to this position, the plaintiffs should revise their position even in view of the arrests made and the proceedings which have now been initiated in Court in regard to the persons under investigation who committed this crime."

of which is attached herewith and marked as Doc. C) for the removal of the said banner since it allegedly violated the regulations of Legal Notice 36 of 2018 and the provisions of the development plans.

6. That on 7 April 2018, the banner was removed.

7. That since, at the time, the applicants were not aware of the fact that the banner had been removed by the authorities, they reported its theft to the Police (report number: 15450/1/2018).

8. That on 15 April 2018, the applicants put up the banner again (a photo of which is attached herewith and marked as Doc. D) at the same private property with the words:

"Why aren't Keith Schembri and Konrad Mizzi in prison, Police Commissioner?

Why isn't your wife being investigated by the police, Joseph Muscat?

Who paid for Daphne Caruana Galizia to be blown up after she asked these questions?

This is our second banner our first got stolen. "

9. That, without prior notice, this banner was removed and taken away from the premises less than twelve hours after it was mounted, presumably by the respondent Authority.

10. That this conduct by the authorities is abusive and carried out with the sole purpose of hindering the applicants' right to free expression with the effect that they would not be able to deliver their message. This purpose is clear and manifest in the fact that the applicants' banner in no way falls under the regulations cited by the respondent authority since, pursuant to Legal Notice 36 of 2018:

➤ **"billboard"** means any advertisement equal to, or larger than, six square metres (6m²) which is permanently or temporarily mounted on any structure whether free-standing or wall-mounted and which billboard is not directly related to the advertisement of products sold or activity conducted within the site of the billboard;

➤ **"advertisement"** means any word, letter, model, sign, placard, board, notice, device or representation, whether illuminated or not, in the nature of and employed wholly or in part for the purposes of advertisement, announcement or direction, including any boarding or similar structure used or adapted for use for the display of advertisements;²

➤ **3.(1) No advertisement** shall be displayed in any place which is visible from the road, and no advertising vehicle may be placed on the road or on a place which is visible from the road, without the permission of the Authority given under these

² Underlining by the applicants

regulations and Schedules I and II, unless such an advertisement falls within the provisions of regulation 4.³

11. That, therefore, it is clear that the applicants had every right to mount the said banners without any permission from the respondent authority and that the removal of the said banners was clearly an abuse of the power granted to the Planning Authority under the same Regulations, wherein such abuse of power amounts to the infringement of the applicants' right to express themselves and to deliver their message (even though in truth the banners were only a series of questions), with both rights being protected by Article 41 of the Constitution of Malta and Article 10 of the European Convention.

12. That this fact was brought to the attention of the respondent Authority by the applicants by virtue of an official letter dated 16 April 2018 bearing number 1278/18 (copy attached herewith and marked as Doc. E), for which the applicants received an imperious official reply from the respondent Authority (copy attached herewith and marked as Doc. F) where it declared that:

“In effect, it transpires that the “right” you profess is not that of freedom of expression “without disproportionate interference”, but the entitlement you deem to have to act arbitrarily and in flagrant violation of the laws of the country.”

³ Underlining by the applicants

13. That in view of this disappointing reply, the applicants had no other choice other than to proceed with this case in order to request the protection of their rights by this Court.

Therefore, and for the reasons explained above, the applicants humbly request this Court, subject to any declaration which it deems necessary in the circumstances:

- 1) To declare that the application and interpretation by the respondent Authority of the Regulations in Notice 36 of 2018, which led to the issue of the 'Stop and Enforcement Notice regarding Billboards and Advertisements' amounts to unjustified, disproportionate and unnecessary interference in a democratic society and therefore to the violation of Article 10 of the European Convention incorporated in the Laws of Malta through Chapter 319 and Article 41 of the Constitution of Malta;
- 2) Without prejudice to the first request, to declare that the removal of the banners from a private property in itself amounts to unjustified, disproportionate and unnecessary interference in a democratic society and therefore to the violation of Article 10 of the European Convention incorporated in the Laws of Malta in Chapter 319 and Article 41 of the Constitution of Malta;
- 3) To grant those effective remedies which it deems appropriate in order that the applicants return to the state they beheld prior to the violation;

4) To apportion the appropriate compensation amount for this infringement and to sentence the respondent Authority to pay this apportioned amount to the applicants.

With costs.

Having seen that this application was appointed for hearing at the sitting of 2 October 2018 and ordered that the respondent would be notified of this same application with a right to reply within twenty (20) days.

Having seen the Planning Authority's reply dated 17 August 2018 at fol 19 of the proceedings where it respectfully expounded:

1. Preliminarily, this Honourable Court should refuse to enforce its Constitutional/Conventional powers, pursuant to the *proviso* in the second sub-indent of Article 4 of Cap. 319 of the Laws of Malta and the *proviso* in the second sub-indent of Article 46 of the Constitution, since the plaintiffs had appropriate means for remedy available to them pursuant to the Planning Law (*See Article 97 of Chapter 552 of the Laws of Malta and Articles 13, 36 and 50 of Chapter 551 of the Laws of Malta*), whereby they could have contested the issue of the Stop and Enforcement Notice number 68/18. The plaintiffs did not contest the Notice in question through the means granted by the Law and therefore they appeared to have succumbed, accepted and acknowledged the order contained in the same Notice.

2. That, in the merits of the case, and without prejudice to the premised, the plaintiff requests are unfounded in fact and in right, and are simply

frivolous and therefore should be denied with costs. This is not a case where the Authority, through its actions (consisting of the issue and execution of enforcement notice number 68/18), hindered in some way the exercise of the plaintiffs' right to freedom of expression, as protected in Article 10 of the European Convention and/or Article 41 of the Constitution of Malta. This is a case where the plaintiffs are claiming that they have/had the "right" to act, and in flagrant violation of the Planning Laws — by carrying out a development (*See Article 70(2) of Cap. 552 of the Laws of Malta*), namely the mounting of a billboard on the facade of a residential property, without requesting nor even obtaining permission for this as required by Law.

3. That the applicants make their claims in this case, *inter alia*, on their unfounded assertion that "*the banner ... does not, in any way, fall under the regulations quoted by the Authority*". Incidentally, the provisions of the Law quoted by the plaintiffs, which, in their opinion, "strengthen" this claim, in truth only serve to confirm that the banner in question qualifies as a billboard, and therefore constitutes a development according to the meaning given in Article 70(2) of Cap. 552 of the Laws of Malta, for which a permit issued by the Planning Authority was required. Suffice to say that, as proven by the photos filed by the plaintiffs themselves ("Doc. A" and "Doc. C" attached in annex with the application), the banner in question, with the announcement (which, as stated by the plaintiffs "*delivers their message*") shown on the same banner, was bigger than six square metres, and was mounted on the wall of the premises, that is a residential property, which was visible from the street. The plaintiffs

never requested nor even obtained a development permit to mount this billboard as required by Law. Therefore, mounting this billboard, as a matter of law, is considered as an illegal development and amounts to an illicit cause. Ultimately this is a state of fact which the plaintiffs themselves acknowledged and accepted when they deliberately chose not to contest the same enforcement notice issued against them through the appropriate appeal proceedings.

4. The Planning Authority's decision or conduct, which is the plaintiffs' object of complaint, involves the execution of the same Authority's legal obligation to press forward with the appropriate enforcement proceedings, as has actually transpired, in order to remove the billboard mounted by the plaintiffs in clear and manifest violation of the law regulating the erection and retention of billboards.

5. The plaintiffs insist on their fundamental right "to express themselves and to deliver their message". The expression of the plaintiffs' opinions, and the delivery of their message, can never act as a screen to execute an activity which disregards regulations, without any restrictions or limitations, and with the insistence of retaining a billboard which constitutes an illegal development.

6. The plaintiffs are presumptuous to describe as "imperious" the Authority's reply to the official letter which they had filed. This description applies to the abusive and illegal conduct carried out by these same plaintiffs, and the claims for which they are putting together

this action. Because no one can expect, as the plaintiffs are expecting, that they can be granted a special exemption from the legal framework which governs this country (which is applicable to everyone indiscriminately), with the pretext that they wished their opinion to be heard. Otherwise, it would mean that whoever wished to voice their opinion, would be able to do so with total disregard to the laws of the country, and anarchy would ensue.

7. Everybody has the right to freedom of expression. This is a right which has to be earnestly protected; however only as long as this freedom is exercised according to Law. Otherwise, it would no longer be freedom of expression, but it would be changed to an arbitrary exercise, if not an abuse, of a right. The Authority once more reiterates that in this case, the “right” claimed by the plaintiffs is not that of freedom of expression without disproportionate interference, but the entitlement they deem to have to act arbitrarily, and in flagrant violation of the Laws of the country.

8. It is unequivocally stated that a claim based on an illegality, as is the one filed by the plaintiffs in this case, can never amount to a right which should be protected by a Court, not even when considered from a broader perspective solely used in proceedings such as these.

9. The plaintiffs first mounted, twice over, a banner on the facade of a residential property in breach of the law, and now they are using as a pretext the right to express themselves and to deliver their message, in order to be granted a privilege entailing the non-observance of the regulations

emanating from the law. This, in effect, is the remedy which the plaintiffs are requesting to be granted by this Honourable Court - and that is to be protected in their flagrant abuse of the Law, not only by having the Court grant “its seal of approval” for their violation of the Law, but moreover by rewarding them, by way of payment of compensation, for carrying out this illegality. “This Court cannot grant protection where there is a state of illegality, **whoever that may be**. (Decree given by this Honourable Court (presided differently) on 13 June 2016 in the records of the Warrant of Prohibitory Injunction number 861/2016 AE in the names “Rosette Thake and Dr Ann Fenech in their respective capacities as General Secretary and President of the Executive Committee of the Nationalist Party and representing the Nationalist Party vs 1. The Planning Authority, formerly the Malta Authority for the Environment and Planning; and 2. The Malta Transport Authority”).

10. That, therefore, the plaintiffs cannot complain that (i) the implementation of the regulations of Legal Notice 36 of 2018 which led the Planning Authority to issue enforcement notice 68/18; or (ii) the execution of the same enforcement notice on the part of the Authority through the appropriate enforcement action, where the illegal billboard in question was removed; stand for “unjustified, disproportionate and unnecessary interference” in the exercise of their right to freedom of expression. The deduced motive in this case is not the plaintiffs’ fundamental right to deliver their message in a legal manner, but the plaintiffs’ right to deliver this message without any restrictions *inter alia* by means of the billboard which they had mounted without permission.

11. The plaintiffs' "right" to deliver their message specifically by means of a billboard, without any restrictions and even against the law, is neither a sacred right under the Constitution nor under the Convention. Such conduct is unacceptable, punishable, and certainly not protected by the Law. Therefore, every action taken by the Authority to stop the illegality carried out by the plaintiffs does not amount, in any way, to a violation of Article 41 of the Constitution of Malta or of Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (as incorporated in the European Convention Act Cap. 319 of the Laws of Malta).

12. Moreover, for all the reasons which have already been explained in this reply, no remedy - including that of payment of compensation - should be granted to the plaintiffs for their clearly illegal conduct. Once again, reference is made to the Authority's reply to the official letter which was filed by the plaintiffs on 16 April 2018. That which was stated in this reply — which the plaintiffs described as imperious content - is nothing other than a reflection of the principles expressed by the Constitutional Court in the judgement in the names '**John and Helen, the Vella spouses and GV Gozo Developments Limited vs The Commissioner of Lands et'** (decided by the Constitutional Court on 24 April 2015) where it was stated that whoever gains an advantage by carrying out an illegality cannot expect the law to grant them a remedy. "This is a principle of public order, to overcome the mentality that you would benefit from "securing" the gains by

breaking the law in order that maybe eventually the illegality would be sanctioned, a mentality which rewards those who break the law and punishes those who try to protect it in all matters” -

Therefore, all the plaintiffs’ requests do not merit to be received and should be denied, with costs against them, whereby this Honourable Court should declare the plaintiffs’ action simply as a frivolous one.

Having seen all the minutes of the sittings including those of Tuesday, 4 June 2019 where, when the application was called, the parties’ defence counsels appeared. Thereby appeared Dr Peter Caruana Galizia, and Oliver Magro as the Planning Authority’s representative. The Court heard the pleading of Dr Therese Comodini Cachia and of Dr Ian Borg, whereby the pleading was recorded on the electronic system. The case was deferred for judgement to 16 July 2019 at 9.30 a.m.

Having taken cognizance of the evidence provided.

II. CONSIDERATIONS

That in this case, the plaintiffs are requesting the protection of their right to freedom of expression, as protected through **Article 10 of the European Convention on the Protection of Human Rights**, forming part of the laws of Malta through the European Convention Act (**Cap. 319 of the Laws of Malta**), hereinafter referred to as “**The Convention**”, as well as through **Article 41 of the Constitution of**

Malta, hereinafter referred to as “**The Constitution**”. This is because a banner which they had hung onto the facade of a private building in Valletta had been removed, twice over. They maintain that there was disproportionate interference which was not reasonably justified or necessary in a democratic society when the Planning Authority (“Authority”) ordered their removal through the application and interpretation of the relevant regulations of **Notice 36 of 2018 and of Cap. 552 of the Laws of Malta**.

Therefore, they are requesting this Court to give all the appropriate orders in order to rectify this violating conduct and to reintegrate them in their right, besides appropriate compensation for the infringement.

That the Authority opposed the request, by objecting, in the first place, that this Court should opt not to continue hearing this case in application of the *proviso* of **Article 4(2) of Cap. 319** and of **Article 46(2) of the Constitution**; and that the requests are simply frivolous and unfounded in law since in this case, the plaintiffs are claiming that they have a right to act in flagrant violation of the planning laws without any restrictions. In short, the objections in this regard are that the plaintiffs are claiming that their right to expression should be protected without any restrictions or limitations and they are using it as a screen for the illegal conduct. It also states that the banner constitutes a *development* according to the meaning given in **Article 70(2) of Cap. 552 of the Laws of Malta** and it was mounted without the plaintiffs requesting the required permit. Therefore, the Authority simply acted in the execution of its legal obligation.

FACTS WHICH EMERGE FROM THE ACTS

The main facts are not contested.

The present case refers to two banners which were mounted on a private property with the words:-

"Why aren't Keith Schembri and Konrad Mizzi in prison, Police Commissioner?

Why isn't your wife being investigated by the police, Joseph Muscat?

Who paid for Daphne Caruana Galizia to be blown up after she asked these questions?"

The first banner was mounted on 31 March 2018 and subsequently removed on 7 April 2018 on the order of the respondent Authority after a 'Stop and Enforcement Notice regarding Billboards and Advertisements' was affixed to the facade of the same property dated 3 April 2018 on account of the alleged violation of the regulations of **Legal Notice 36 of 2018** and the provisions of the development plans.

The plaintiffs erected the second banner with the same message on 15 April 2018 on the same private property. On the second banner, the following words were added: "This is our second banner our first got stolen."

This second banner was removed within a few hours by the respondent Authority.

All this happened following the assassination of the journalist Daphne Caruana Galizia, wife and mother of the plaintiffs respectively, which occurred on 16 October 2017 by means of a bomb placed in her car. The plaintiffs complain that despite the fact that, materially, three persons were arraigned in court on suspicion of committing the crime, to date they have been given very sparse information regarding the progress of the Police investigation in regard to the search for whoever could have ordered Daphne Caruana Galizia's murder. On the contrary, as Dr Peter Caruana Galizia testified, the Police intimated that the case was closed upon the arrest of the three persons who are currently undergoing compilation proceedings.

It transpires that the plaintiffs brought these facts to the attention of the respondent Authority by means of an official letter dated 16 April 2018 (Off. Let. No. 1278/18), to which the Authority replied by opposing and imputing the plaintiffs of "*arbitrary conduct in flagrant violation of the laws of the country*".

That the Stop and Enforcement Notice regarding Billboards and Advertisements (Doc. B at fol 8) was issued on 3 April 2018 as signed by Kevin Ciantar, for the Executive Chairperson, whereby one is addressed to the Owner, and the other is addressed to the Occupier. Through the same Notice, it transpires that the violation of the planning control refers to the "*Mounting of a billboard/banner*" onto the facade, without the required permit." The same Notice includes the order

for the removal of the said billboard/banner, including any boarding or similar structure “*with immediate effect*”, and in default thereof, there is a warning that the Authority has the power to enter the property to remove any illegality mentioned in this Notice.

Evidence and Witnesses

That enforcement file number ECF 68/18 was exhibited. It transpires, from the enforcement officer’s report dated 3 April 2018, who received instructions to issue an enforcement notice regarding “a large black canvas sign (with white and red writing) fixed onto the 1st and 2nd floor balconies of properties 31-32 Old Bakery Street, Valletta.” The owner was unknown. According to this report, the case was considered as urgent.

"Case was discussed with management and it was agreed that enforcement notice (adverts) is to be issued on the owner and occupier."

Plaintiff **Dr Peter Caruana Galizia** testified by means of an affidavit (**fol 65**) recounting the background which led to this case. His wife Daphne Caruana Galizia was an investigative journalist who, mainly through her blog entitled ‘Running Commentary’, wrote about corruption at the highest levels of the Government of Malta. He said that he and his sons are convinced that her murder is related to her writings and that this occurred due to the feeling of impunity in the country where there is no reaction or investigation by the country’s institutions. He said that despite the fact that three persons were charged with the execution of his wife’s assassination,

they are convinced that there was a person who had engaged whoever was materially responsible for the murder to commit this crime.

Despite the fact that months had passed since the arrest and from the initiation of the compilation, neither he nor his sons were given further information regarding the progress in regard to the search for whoever ordered her murder. On the contrary, they were given the impression that the case was being considered as closed.

Therefore, and in order to apply pressure on the competent authorities, they obtained permission from the owners of the private property at Old Bakery Street, Valletta, to mount the banner in question. He had requested legal advice as to whether he needed permission for this action, however he was advised that a permit was required only if it were an advertisement.

“To me, this was purely a message of a political nature in the controversy in the country regarding the state of impunity, which, in his opinion, facilitated my wife's murder.”

He said that a few days after they had mounted the banner on 31 March 2018, a Stop and Enforcement Notice regarding Billboards and Advertisements was affixed to the facade of the building by the Authority. He was not notified of this however he saw it coincidentally when he passed by after he had returned from a week abroad.

On 7 April 2018, that is, prior to the 15-day deadline granted for the appeal according to **Article 86(12) of Cap. 504 of the Laws of Malta**, the banner was removed. Therefore, there was

no purpose for him to appeal since even in his regard no appeal would grant him back the right to expression since the banner was removed.

Since they did not know who had removed the banner, one of his sons reported its theft (Rep. 15450/1/2018).

They mounted another banner on 15 April 2018 at the same private property, but this banner was removed without prior notice. He said that some neighbours told them that the police had turned up and closed the road whilst the banner was removed with a crane. However, they did not know who had ordered the removal.

He said that he and his sons could not accept this attitude from the respondent Authority which was exploiting this Legal Notice so that any attempt to put pressure in order to establish who ordered the murder of his wife and his sons' mother *"would be nipped in the bud since someone somewhere was scared of the truth which could emerge from a serious and intensive investigation as was appropriate and for which my sons and I have an inalienable right under Article 2 of the European Convention."*

Under cross-examination (fol 164) he said that he and his sister are the owners of property number 31, Old Bakery Street whilst his sons are the owners of property number 32-33 subject to its usufruct. He said that they were careful to ensure that the banners were tied properly since it was windy. He did not communicate with the Authority as when he saw the Legal Notice, he noted that it did not apply to his case as they were not advertising anything, they only wished to make a statement.

Carmel sive Charles Gafa, Principal Direct Action Officer at the Planning Authority (fol 70 et seq) gave evidence. When asked whether the photocopy of the file presented in the proceedings was the photocopy of the whole file which he brought along, he replied:

“I do not know as today we are paperless”.

He said that the Authority became aware of the message through various reports it received. He did not know how many reports were received “*but several reports were received.*” He stated that the customer care office received the reports, or these were lodged with the complaints office.

When referred to the report fol 34 (enforcement officer's report) to explain the words “received instructions” namely who issued the instructions, he stated that the instructions were issued by the managers. Then he stated that he takes the decision for the direct action “*after this is discussed and it is agreed that direct action should be taken.*” Then he stated that he did not take part in the meeting where these instructions were issued.

When asked whether there was any urgency in this case, he replied, “*So, in regard to billboards having a certain type of message, yes... the Authority is considering them as urgent.*” He said that the content is ignored. If it is illegal, it is removed.

He said that in his opinion the billboard carried a message and not an advertisement. He stated that there are various criteria for urgent action to be taken and mentioned that if several complaints are received, then the case is given priority.

When asked how many complaints would be considered as several, he replied, *"I am not the one who would consider them as several; when it was decided, I repeat, when the notice was issued. However even if one takes a look at social media, the comments on them is somewhat extraordinary, isn't it?"*

He repeated that he was not the one to decide whether the case should be considered as urgent. He stated that he gets involved in the case when the notice would have been notified according to law and there would be no appeal. It is notified legally by being affixed on the site.

When asked who took the decision for direct action to be taken, he stated that he did this after discussing the case with the Executive Chairman and with his directors and he mentioned Johann Buttigieg.

He stated that the enforcement notice says that the banner had to be removed with immediate effect. However, the decision to take direct action was not taken upon issue of the enforcement notice. Between 24-48 hours passed from the issue of the enforcement notice to the decision to take direct action.

After direct action was taken, he stated that the Authority had no interest to pursue looking for the property owners.

He was shown the document at fol 47 (Enforcement End Case Report) where it is written:

"Case was discussed with management and it was agreed that enforcement notice (adverts) is to be issued on the owner and occupier", he stated that he was not involved in the decision.

He said that direct action is decided by the Executive Chairman. *"I always discuss each direct action with the Executive Chairman."* He confirmed that it was Johann Buttigieg who gave him the instructions regarding the billboard and also regarding every billboard around Malta. He told him to go and remove the billboard.

In regard to the second time that they removed the billboard, he stated that there is nothing regarding the second direct action since they considered it as a breach of the first notice.

He testified again (fol 153) and stated that the instructions in regard to billboards are clear such that the Authority has the right to act even with immediate effect. Where these types of billboards or adverts are concerned, the Authority acts regardless of the content. They never made a distinction between one message and another.

When questioned regarding whether reports had been received about this case, he replied that there had been some outcry because there were four feasts in Valletta. Feasts were held in honour of four saints in Valletta all at the same time and the City was festooned and there were more objections for this development.

Dr Ian Borg:

"See whether you agree with me that the Authority also considers the urgency of the case in relation to the number of reports due to consideration of injury to amenity which also transpires from the Law".

Witness:

"...in this particular case I remember that there was some outcry due to this since on that day something historic had occurred...four feasts had been combined and Valletta had been festooned... it could have been instigated by certain committees, clubs, people, there would be more objections to such a development... "

Dr Ian Borg:

"And see if you agree with me that the Authority also considers the urgency of the case in relation to the number of reports due to consideration of injury to amenity which also transpires from the law".

Witness:

"The fact that the location where it was exhibited falls under an Urban Conservation Area where there are certain aesthetics, the City, the balconies, first and foremost, in order to place an advert of your shop, the Authority also obliges you to maintain the aesthetics of the location. Apart from that, in this case it is certain that the type of message, or the type of banner, streamer, billboard, call it whatever you like, surely did not complement the buildings in the street... "

In regard to the Authority's files, he stated that they see them through the network.

Johann Buttigieg, Executive Chairman of the Planning Authority gave evidence (fol 90). He stated that it transpires from the file that *"on 2 April 2019 there was a minute that "This office received instructions to issue an enforcement notice..."*.

When questioned regarding who gave the instructions, he replied that:

"Ninety-nine percent they would either be from my office or else from the enforcement director's office... I cannot say, I forgot."

"I give instructions in general regarding the issue for example, there is a general instruction on banners, these are to be removed immediately... regardless to whom they belong."

-omissis-

Dr Therese Comodini Cachia:

And the general instruction was published?

Witness: *No, it is an internal procedure of the Authority.*

Dr Therese Comodini Cachia:

What are the criteria of the internal procedure of the Authority in this general instruction?

Witness: *That if there is a banner falling under legal notice 36/18, it had to be removed."*

He stated that the definition of banner is established in Cap. 552 of the Laws of Malta and that this is a notice, that is, announcement.

“Dr Therese Comodini Cachia:

Are you carrying a copy of the general instructions which you issued?

Witness: *No.*

Dr Therese Comodini Cachia:

Can you present a copy of them?

Witness: *The instructions are given verbally."*

When questioned to explain his decision in regard to the banner in question, he stated *“because a banner which is longer than three metres, over two metres wide, if this is not an announcement, tell me and explain to me what an announcement is?”*

Dr Therese Comodini Cachia:

“Having issued this general instruction, did you make a distinction between a political declaration and an advertisement declaration in the meaning of an advertisement or an announcement for a business?”

Witness:

“The Legal Notice does not reflect whether it is for a business or not.”

He also testified that he gave the general instructions verbally almost two or three months after he became CEO in 2013. He stated that he took the decision for direct action to be taken for every advert of this type. He only considers whether the banner is among those exempted by law. He stated that the enforcement notice was issued because the banner was mounted on a private property and three days’ grace was given before it was removed.

He also stated that the urgency of the case was due because they abide by the Legal Notice which practically considers that the banner should be removed after three days.

He testified again (fol 107) and presented photos of the banners which were removed on the same day of 6 April 2018. He said that they do not make a distinction according to the content.

Ordinary Law

The provisions of Ordinary Law relevant to the case are:

Legal Notice 36 of 2018:

"billboard" means any advertisement equal to, or larger than, six square metres (6m²) which is permanently or temporarily mounted on any structure whether free-standing or wall-mounted and which billboard is not directly related to the advertisement of products sold or activity conducted within the site of the billboard;

"advertisement" means any word, letter, model, sign, placard, board, notice, device or representation, whether illuminated or not, in the nature of and employed wholly or in part for the purposes of advertisement, announcement or direction, including any boarding or similar structure used or adapted for use for the display of advertisements; (Definition in Cap.552).

3.(1) *No advertisement shall be displayed in any place which is visible from the road, and no advertising vehicle may be placed on the road or on a place which is visible from the road, without the permission of the Authority given under these Regulations and Schedules I and II, unless such an advertisement falls within the provisions of regulation 4.*

Cap. 552: *"development" means any interventions that fall under the provisions described in article 70;"*

Art 70(2) *"For the purposes of this article, and, unless the context otherwise requires, for all other purposes in this Act, "development" means the carrying out of*

building, engineering, quarrying, mining or other operations for the construction, demolition or alterations in, on, over, or under any land or the sea, the placing of advertisements or the making of any material change in use of land or building and sea, other than..." and then the law specifies a number of exemptions.

Preliminary Considerations

This Court states without hesitation that the banners in this case had a strong and powerful message. It is absolutely irrelevant for the purposes of the protection of the right to free expression, this message could also offend, bother or even instigate controversy. It stands to reason that this right is not absolute but is counterbalanced by the limitations for legitimate State reasons, and by measure of proportionality.

The words are targeting the persons/bodies entrusted with the responsibility and duty to investigate the murder of Daphne Caruana Galizia and to bring those persons (principals) who gave the order for her murder to the country's judicial authorities.

This is being indicated immediately since it stands to reason that messages which instigate controversy or are shocking or bother people attract the protection of the Convention and of the Constitution. The right to free expression would not require any enforcement if only fine words are protected.

As has been competently argued by the plaintiffs' defence counsel, the message has political content in the broad meaning of the word but is closely related to the search for truth by Daphne Caruana Galizia's relatives. Herewith, the competent defence counsel argued the matter on another drift, where the questions are being asked by Daphne Caruana Galizia's relatives who have the right to insist on the State Authorities' accountability regarding who committed this crime against his wife and their mother.

The Authority, on its part, aside from the preliminary objections which shall be debated, limits itself on the merits, to insist that the plaintiffs are using their right to free expression as a screen for their illegal, abusive and arbitrary conduct.

Having considered that the Authority is the hidden hand of the State in regard to building development. There is no doubt, therefore, that it can be quoted in such cases if it prejudices the fundamental human rights in the exercise of its powers and can be held responsible for such prejudice and sentenced to grant the appropriate remedies.

Having considered that the regulations of Legal Notice 36 of 2018 undoubtedly impose on the Authority the responsibility to control the mounting of billboards and banners on buildings, and it is necessary that these are mounted with the Authority's permission when they come under the definition of the same Legal Notice. (Underlining by this Court).

However, this does not mean that the Planning Authority has been entrusted with the responsibility or the power to censor free expression in our country. When taken in their logical sense, the Authority's arguments actually lead to this conclusion that, however, in the opinion of this Court, this is an illegal and undemocratic meaning.

That every law, whether ordinary or subsidiary, should be interpreted with respect to the principles, the text and even the spirit of the Constitution and of the European Convention (**Art. 6 of the Constitution⁴ and Art. 3(2) of Cap. 319⁵**).

Not every banner or billboard falls under the definition of the Regulations, and it should be thus, otherwise we would come to the difficult situation where the Development and Planning Authority, which is an authority that has been established to regulate buildings and development only, would be able to act with all the powers granted to it by the Law to censor and restrain free expression in the country, mainly through banners and billboards. Herewith, in contrast to the Authority's assertions, the arbitrariness and illegality which should be sifted, is not that of the individual but of the State which is being charged with the violation of fundamental rights.

⁴ "6. Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

⁵ "3. (2) Where any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said Human Rights and Fundamental Freedoms shall prevail, and such ordinary law, shall, to the extent of the inconsistency, be void."

Non-Accountability

In fact, from Johann Buttigieg's testimony, it transpires that the exercise carried out in his office lacks the due transparency, accountability and clarity in the execution of his powers as Chief Executive Officer of the Planning Authority. He testified that he had given a general instruction a short while after he took up his current position, to remove all billboards and banners. It transpires that this order was only given verbally, it was not drafted anywhere in writing as a point of reference neither internally, nor externally for ordinary citizens. In fact, Carmel Gafa testified that the Authority is paperless. No minutes are taken for whatever is said and although meetings are held to take decisions regarding direct action, Gafa himself, who is the person in charge for direct action, could not even be accurate because there was nothing in writing.

Moreover, Johann Buttigieg testified that he checks whether a billboard or banner falls within the exceptions in law, and if this is not included in these exceptions, then it is removed.

These exceptions derive from Regulation 4 of Legal Notice 36 of 2018 - Billboards and Advertisements Regulations, 2018. This Court examined the exemptions which apply for "advertisements" at certain sites (4(1) (1a - 1e, 1i-1m); traffic sign or a sign announcing the name of any city, town or village; (41f-1g); billboard which has the consent of the President of the Republic and used exclusively for activities of the Office of the President or which advertise EU or NGO projects (41n-1p).

That it is evident that the banners in question, although bigger than 6 square metres, are neither advertisements, nor a sign of a town's name or of an EU/NGO or President's project. Even if it were to be considered as a billboard (because they are banners), therefore it is factual that they do not come under the exempted cases, however regardless, the definition given in the Regulations ties the billboard to an advertisement. (Reg. 2)

An *advertisement* pursuant to the Environment and Planning Development Act (Cap. 552 of the Laws of Malta) means:

“any word, letter, model, sign, placard, board, notice, device or representation, whether illuminated or not, in the nature of and employed wholly or in part for the purposes of advertisement, announcement or direction, including any boarding or similar structure used or adapted for use for the display of advertisements;” (Underlining by this Court). “*Advertisement, announcement or direction*” are the terms used in the English text.⁶

Systemic Failure

That in the reasoned opinion of this Court, the Authority's simplistic approach through the discretion of the CEO's office led to a systemic failure and is not proper to achieve the purpose of the Regulations and of the Law and to protect the supreme laws of the country. On the contrary, it can easily

⁶ Reg. 3(1) for example states:

“No advertisement shall be displayed in any place which is visible from the road, and no advertising vehicle may be placed on the road or on a place which is visible from the road, without the permission of the Authority given under these Regulations and Schedules I and II, unless such an advertisement falls within the provisions of regulation 4.”

lead to the abuse of the discretion, as has occurred in this case, where the Authority acted ultra vires. Without written clear and accessibly guidelines, the said Regulations give licence to censor private persons whose message is neither an advertisement, nor a notice, nor a direction as intended by the legislator in drafting the legislative framework that regulates building and development.

That, on the one part, Johann Buttigieg and even Carmel Gafa, maintained that they ignore the content of the billboards/banners. In reality, if this were true, and the contrary has not been proven, this is actually one of the most glaring shortcomings in the administrative structure in which the Authority operates. In such a case, the plaintiffs' defence counsel is right to show her concern that the Authority removes every billboard/banner indiscriminately, whether it is an advertisement or not.

This Court is also concerned because in regard to the general instruction, it can only rely on the CEO's word, since there is nothing in writing which can be verified. If what he testified is true, then he alone has the authority to decide what is an advertisement, or not and subsequently triggers the enforcement procedure. Both Johann Buttigieg as well as Carmel Gafa testified that they ignore the content as if this were favourable and satisfactory. On the contrary, the law itself qualifies that this power is granted only in regard to advertisements. **Therefore, one queries, where are the guidelines in order to avoid censorship of those messages which are not advertisements?**

This also leads to an absurd argument, implicit in the Authority's line of defence, that a person who is requesting information regarding his wife's murder should request permission from the Planning Authority which only has the restricted power to regulate building and development in the country.

One point arising from the evidence concerns the urgency, which, according to Johann Buttigieg as well as Carmel Gafa, was due to the number of complaints and reports they received. The Enforcement Officer's Report (fol 34) starts by saying "*This office received instructions to issue an enforcement notice In view of the urgency of the case....*" Carmel Gafa then linked the urgency with the number of complaints which they may have received. In regard to the reports or complaints, these witnesses could not even clarify who made the complaints, with whom, and how many were made. The Authority's defence counsel asked Carmel Gafa in the cross-examination:

"See whether you agree with me that the Authority also considers the urgency of the case in relation to the number of reports due to consideration of injury to amenity which also transpires from the Law".

Carmel Gafa referred to "a certain type of message..., yes... *the Authority is considering them as urgent.*". He referred to social media "*Comments which you read there are something extraordinary, isn't it?*" and that there had been an outcry since there were four feasts in Valletta and there were more objections for this development.

He also testified that *“Apart from that, in this case it is certain that the type of message, or the type of banner, streamer, billboard, call it whatever you like, surely did not complement the buildings in the street...”*.

He still did not explain by what he meant by *“a certain type of message”* however this reference is also indicative that the urgency of the Authority's action was triggered by the content of the message, and this creates a conflict with the insistence that the Authority ignores the content of the messages. On the contrary, in regard to the reports they may have received, regarding which there is no evidence nor an enforcement file, which should have been the file completed for the case, this strengthens the plaintiffs' argument that the message was removed because it was disliked. In a situation where the power of the State was called upon to protect the message, this power was used to quash the message.

As already premised, this is all stated with the reservation that this right is not absolute. Nevertheless, as shall clearly transpire, the Authority has not attempted to justify the conduct, the interference, by referring to a legitimate purpose, but simply relied on the plaintiffs' failure to obtain permission from the Planning Authority.

These considerations shall be pondered when this Court considers the requests and objections in depth and shall be considered as an integral part of its considerations and conclusions.

PRELIMINARY OBJECTIONS

Failure to Expend Ordinary Remedies

That, preliminarily, the Authority invited this Court to refuse to continue hearing this case pursuant to the *proviso* in Article 4(2) of Cap. 319 of the Laws of Malta and of Article 46(2) of the Constitution.

In its reply, the Authority referred to *Articles 97 of Chapter 552 of the Laws of Malta and Articles 13, 36 and 50 of Chapter 551 of the Laws of Malta*, which allowed the plaintiffs to contest the issue of the Stop and Enforcement Notice number 68/18. They failed to do this and therefore it implied that they succumbed, accepted and acknowledged the order in that same Notice.

It stands to reason that acceptance, or not, of the objection based on this *proviso* or even the *ex officio* application of the *proviso* is at the discretion of this Court. That the objective of the Court should be to set right that person who is suffering the infringement of a fundamental right in an efficient manner and with the shortest delay. Ultimately, the ordinary Courts do not have recourse to ordinary case law in regard to infringements of the most fundamental rights but the Courts in their constitutional competence.

That this was affirmed in the case “**Tonio Vella vs The Commissioner of Police et**” (C.C. – 5 April 1991) it is evident that the Maltese legislator did not wish to establish as

an absolute principle in our Constitutional law that prior to a person resorting to this Court in its Constitutional jurisdiction, they should always and peremptorily exhaust all available remedies under ordinary law, including those remedies which are not reasonably expected to provide effective remedy. The Court has very broad discretion in regard to the exercise or not of its Constitutional jurisdiction. Obviously, such discretion should be used fairly and reasonably.

That when another appropriate remedy is mentioned, it has to be evident that this would be an accessible, acceptable, effective and suitable remedy to address the infringement or the objected threat of infringement.⁷ In order to be deemed as effective, it is not necessary that the remedy is presented as one that shall grant the plaintiff guaranteed success, it is enough to demonstrate that it can be executed in a practical manner, and that it would be accessible, effective and efficient.⁸ The existence that there truly is (or was) an appropriate alternative remedy must be demonstrated by the respondent who shall have the burden of proof to convince this Court to choose not to exercise its powers to hear the case. (See **Tretyak vs Director of Citizenship and Expatriate Affairs**⁹, which was confirmed by the Constitutional Court on 16 January 2006 where the relevant criteria are explained in an *exhaustive* manner).

⁷ See Const. 5.4.1991 in the case in the names Vella vs The Commissioner of Police et (Coll. Vol: LXXV.i.106)

⁸ P.A. Const. 9.3.1996 in the case in the names Clifton Borg vs The Commissioner of Police (not published)

⁹ Const. App. No. 22/05/JRM

Ultimately, the ordinary Courts do not have recourse to ordinary case law in regard to infringements of the most fundamental rights. This appertains to the Courts in their constitutional competence. This Court also understands that the citizen who is suffering the infringement of his fundamental rights or of a threat of infringement, is not bound to seek remedy with the ordinary Court when this would be ineffective. In this circumstance, the incorrect application of Article 46(2) and 4(2) means a futile prolongation of the suffering of whoever is the victim of an infringement of fundamental rights.

This Court agrees with this precept.

That, in her verbal submissions, the plaintiffs' defence counsel said that the remedies identified in the reply are not effective because the Board of Appeal was simply applying ordinary law and strengthening the discretion of the Authority granted to it by Law.

That it stands to reason that the existence that there truly is (or was) an appropriate alternative remedy must be demonstrated by the respondent who shall have the burden of proof to convince this Court to choose not to exercise its powers to hear the case. The Authority does not go into detail regarding this point because its defence counsel simply limited himself to declare that he relies on procedural findings.

That the articles quoted by the Authority in its reply, concern the right of appeal to the Environment and Planning Review Tribunal,

established under the 2016 Act - Environment and Planning Review Tribunal Act (Cap. 551 of the Laws of Malta).

First and foremost, it is to be noted that the Act stipulates a 15-day period for the appeal however in this case, the banners were removed, the first within three days from when it was mounted and in the second instance, within twelve hours.

Having considered that the complaint filed today is in regard to the infringement of the right to freedom of expression. The plaintiffs are maintaining that *inter alia* the Authority did not act according to law, and that the law is lacking the qualities required to satisfy the criteria of quality of law. Moreover, they are requesting those constitutional and conventional remedies in order to redress the infringement they suffered by a declaration that their fundamental right was infringed.

That these complaints certainly cannot be effectively handled and addressed by the Board of Appeal especially in view of the statements regarding the systemic failures which this Court previously made.

Therefore, it is denying this first objection and chooses to continue hearing this case since the complaints raised fall under its competence and the remedy requested cannot be granted by the Board of Appeal.

The Second Objection - The Requests are simply frivolous

The Authority once again did not amplify further on this objection. In its reply it states that the plaintiffs expect to have a right to act in flagrant violation of the Planning Laws “*by carrying out a development consisting of the mounting of a billboard*”.

Herewith, the Court had to resort to Cap. 552 in order to obtain better information regarding the word “development” and it did not find any backing in the text of Article 70 of Cap. 552 to which the Authority refers in its reply.

However, frankly, even without the definition provided by law, stretching the definition of this word “development” to also cover the erection of a banner, **which is not an advertisement**, and which has no structural support (and therefore no construction), involves an exercise which goes beyond all logic.

The above-mentioned **Article 70 of Cap. 552** refers to the “advertisement”.

In regard to what construes an “advertisement” this Court has already considered that the words on the banner do not even remotely fall under this category. The plaintiffs were not advertising any product, service or object. In fact, in the ordinary definition of the word, according to the Oxford English Dictionary an “advertisement” is “*a notice, picture or film telling people about a product, job or service*”.¹⁰ The words on the banner are none of these.

¹⁰ See also for example, concordant with this definition, Article 31(1)(b) of the Directive of the Council 84/450/CEE of 10 September 1984 concerning misleading and comparative advertising between one product and another; Directive 2005/29/CE(1) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices which prohibits advertising regarding price reductions.

On the contrary, these are questions made by private citizens, directly affected by a crime which insofar is not resolved, in their search for the truth and accountability of the country's institutions, two pillars of a truly democratic society.

In this setting, the word “frivolous” certainly does not apply to the plaintiffs’ complaint.

As has been affirmed *“simply trivial and or vexatious” means that the requests of the former appear to be futile, void of seriousness, clearly void of meaning, and do not deserve attention (CC Mifsud vs The Attorney General (LXXIV.1.234) and this is manifestly clear that it is not reasonably possible to contest it, that this instigation, and that request are in effect frivolous. And it must be also said, in regard to the other conclusion of vexatious, where there were not enough reasons to support the instigation or the request to such an extent that, therefore, the motivation for which this was done is to annoy and frustrate the counterparty.”*

Similarly the Constitutional Court in the case **Alan Mifsud vs The Attorney General et.**, (decided on 23 November 1990) said in reference to the words in the context of proceedings of a constitutional reference that *“The court understands that ‘frivolous’ in reference to the Constitutional issue raised in any court - except for the Constitutional Court or the First*

Hall of the Civil Court - means that this issue is of no prestige or value, futile, void of seriousness, clearly void of meaning, which does not deserve attention whilst 'vexatious' means that the issue was raised without sufficient reasons and with the purpose of annoying and frustrating the counterparty."

The Court considers that the complaint is not futile and without prestige. This request is based on the illegality of the Authority's decision and also on the quality of law which it is invoking to justify its interference. Therefore, the case is useful and therefore this objection shall also be denied.

Merit

The plaintiffs' request is based on the protection endorsed by **Article 41 of the Constitution** and **Article 10 of the Convention** which protect freedom of expression.

In the case decided by the Grand Chamber of the European Court of Human Rights in the names of **Axel Springer AG vs Germany**¹¹, the following was stated:

"78. 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

¹¹ Decided on 7 February 2012

"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". As set forth 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." (Underlining by this Court).

Article 41 of the Constitution reads as follows:-

(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) or 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 so 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.”

That in the judgement given on 25 June 1976 in the case “**Mons. Philip Calleja vs Inspector Dennis Balzan**” the Court of Appeal said –

“One of the positive elements of freedom of expression is the choice of the medium of expression itself. That someone silently and totally in peace just holds a poster in his hands with something written on it through which he expresses his opinion which in some way is not against the law is perhaps the MINIMUM due to each citizen. That then, the opinion thus expressed in that writing is displeasing someone else who has a different opinion is nothing else except the manifestation of that same right to freedom of expression.”

Similarly, in the judgement of 29 November 1986 in the case “**Dr Eddie Fenech Adami noe vs The Commissioner of Police et**”, the Constitutional Court affirmed:-

“The Court, when it focuses on the interest that the authorities concerned and their wish that serious incidents are avoided in our country, it cannot forget that we are a people who show tolerance to each other, we are civilized enough in order to ensure that others have the freedom to meet and speak even if whatever is said may not be to our liking, and on the other hand, we must also ensure that in our public or private meetings, whatever they may be, the rights and freedoms of others 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 minimized through all its available means, but never by minimizing the same rights and freedoms which would thus be illegally threatened.” (Also refer to in this regard concerning the duty of the authority to monitor and allow whoever is exercising this right without interference, the judgement of the Constitutional Court in the names “**Francis Zammit Dimech et vs The Commissioner of Police**” decided by the Constitutional Court on 30 November 1987.

Article 10 of the Convention states:

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.”*

It stands to reason that the qualification “*necessary in a democratic society*” is more restrictive than the qualification of “*reasonably justifiable*” used in the Constitution.

That herewith it has to be explained that the Court shall handle the two provisions together.

In this context, Article 41 of the Constitution, similarly to Article 10 of the Convention overall, establishes criteria in order to create a balance between the right to free expression, on the

one hand, and on the other hand, the rights and interests of the State, as well as of private persons, always within the parameters of that which is necessary or justifiable in a democratic society.

The right protected by **Article 41 of the Constitution** and **Article 10 of the Convention** in their terms is not an absolute one, but is restricted to the responsibilities and restrictions as long as they are “*reasonably justifiable*” (Art. 41) or “*necessary*” or “*necessary in a democratic society*” (Art. 10) - that which the case-law in Strasbourg normally refers to as “a pressing social need” for the protection of other rights and interests defined therein. The authors Harris, O'Boyle & Warbrick speak of “imperative necessities” as a measure which may justify State interference in the exercise of freedom of expression.¹²

That from reading these articles, it ensues that this court has applied the following criteria in order to reach its decision:

1. Whether there was interference/intervention in the claimed right.
2. Whether the interference emanates from the law or was applied in enforcing a law.
3. Whether the interference was conducted in the execution of legitimate aims as explained in the above-mentioned sub-articles 41(2) or 10(2).
4. Whether the interference was reasonably justifiable or necessary, in a democratic as well as proportional society

¹² Law of the European Convention on Human Rights -3rd edition; pp 613

in its application against the plaintiffs, considering the margins of appreciation of the State.

Application to this Case

It reiterates once more that the Authority absolutely did not include anything in these criteria but only states that the plaintiffs were breaking the law. In effect, in constitutional and conventional investigations, which are supreme over ordinary law, this charge is revoked. In this case, the plaintiffs state that not even the first criteria were satisfied.

The Court herewith statutorily must comment that its focus in such cases does not shut down if the plaintiff/victim is acting in violation of ordinary law. If it were to do so, it would be blind to the supremacy of the fundamental rights which are inherent in every human being. It is explained that this does not mean that ordinary law should not be observed - this is not the case. However, if ordinary law is detrimental to the supreme laws of the country, this Court has the duty to intervene in order to remedy the infringement of a fundamental right and to prevent that infringement from persisting.

A person who is exercising his inherent right to dignity, which is a right that is supreme to ordinary law, may always seek the protection of that supreme law.

The conduct of the State, the use of the power of the State, is then measured a) according to whether the interference was executed according to law, b) whether

it was necessary and c) whether the use was executed in a proportional manner in order to maintain a balance between the aims of the legislator and the rights of the person concerned.

I. Intervention/Interference by the State Authority

That this court does not need to dwell too much on this point. The plaintiffs erected a banner on a private property with a message of political significance. The word “political” does not refer to the partisan politics between parties but is being used in the broader and wider sense of a message which bears resonance of interest to the society in general.

It agrees that the intervention was executed over two positions:

1. Undoubtedly when the Banners were removed through the Enforcement Order, there was interference in the right to free expression.
2. Moreover, this Court agrees with the plaintiffs’ submission that there was also an intervention when the Authority expected that the applicants had to and should apply for development permission issued by the Authority to exercise their fundamental right.

Therefore, the Court finds that there was interference by the Authority in the exercise of the plaintiffs’ right to free expression.

II. Legality

Primarily one has to question on which legal basis did the Authority act. Secondly, whether the law invoked satisfies the necessary qualities (quality of law).

As maintained by the ECHR in **The Sunday Times vs The United Kingdom** (decided on 26 April 1979):

"49. In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must 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."

That the Authority insists that it acted to enforce the law, precisely Legal Notice 36 of 2018 and Cap. 552 of the Laws of Malta. The relevant provisions have already been amply considered above by this Court.

That in the pleading, the plaintiffs submitted that the cited law fails the criteria of quality required by the Convention. This required that the legal provisions are accessible and the consequences to be foreseeable to the ordinary citizen, at least through the assistance of a legal person.

In this case, the Authority insists that the banner is an “*advertisement*” for the purposes of the said Legal Notice and a “*development*” according to Law. If this were true, then the Authority’s conduct is deemed as legal.

However, this Court does not agree with this interpretation. That which was mounted is a banner - tarpaulin, which is not a billboard, and it was hung on an external wall of a building, and was not supported by a frame or structure (evidence to this was not presented by the Authority).

In the opinion of the Court, the law enunciates unequivocally regarding an “*advertisement*” and has already explained that the Authority's interpretation is not backed by the words and definition of the legislator. “*Advertisement*” does not have a complex or artificial meaning. Everybody understands what an advertisement is. In this case, the plaintiffs were not advertising an object, a product or a service as amply discussed above.

In fact, in the opinion of this Court, the enforcement was not conducted through the force of the law but more precisely, through the incorrect application of that Law. This transpires from Johann Buttigieg's own testimony who said that a few months after becoming the CEO, he gave a general instruction which triggered the enforcement mechanism. This order was not drafted in writing and there are no guidelines regarding its interpretation or in Law.

Besides this, through Carmel Gafa's testimony, it seems that there were also some meetings regarding this message in particular, which indicates that the case was addressed more specifically by the Authority.

Undoubtedly it was that order which triggered the Authority's enforcement mechanism and the Authority officials acted upon this order from the CEO which to them had the force of the Law. Moreover, since there is no paper trail nor any guidelines regarding the interpretation imposed by the CEO, the executive order in itself does not satisfy the requirements of transparency and accountability, and even less so those of clarity and foreseeability. Such that the private citizen, faced with Legal Notice 36 of 2018, can never logically reach the conclusion that a banner with a political message according to the above-mentioned explanation, was an "advertisement".

In this case, the law is clear - it discusses advertisements or advertising.

In view of all this, the Court deems that the respondent Authority's conduct was not executed through the force of the Law, on the contrary, it was *ultra vires* the duties granted to the Authority by the legislator and, since it led to the effective censure of a private

citizen, constitutes violating conduct of the plaintiffs' right.

Moreover, in view of the fact that the administrative order, which has the force of the law for the Authority's employees, is not accessible, clear or foreseeable, it goes against the quality required by the Constitution and the Convention which should be satisfied in every law.

III. Legitimate Purposes

The Court should also investigate whether the interference was conducted in the execution of legitimate aims as explained in the above-mentioned sub-articles 41(2) or 10(2).

The Authority did not invoke any one of the said reasons in order to justify its interference. It acted solely on the basis of the consideration that the plaintiffs broke the law when they mounted the banners without a permit.

Therefore, none of the purposes applies as a justification.

It is the onus of the State to defend its conduct on the basis of one or more of the objections raised, which in this case, it failed to do.

That this court went through the objections, that is the legitimate aims, which could have maybe justified the Authority's conduct. Besides the fact that cases of political expression should receive the highest

protection, from courts of legitimate aims defined in the Constitution and in the Convention, it deems that none of them is applicable in the case in question.

Therefore, it also finds that the Authority's conduct was not justifiable.

IV. If the interference were reasonably justifiable or necessary, in a democratic as well as proportional society in its application against the plaintiffs, considering the margins of appreciation of the State.

Political Expression - the Highest Degree of Protection

It considered first and foremost that Daphne Caruana Galizia was a journalist who, through her writings, aimed to expose corruption at the highest political echelons in the country. It is evident that many of her writings offended and upset some people. The message on the banners asks questions which are intrinsically related to her murder. Dr Peter Caruana Galizia explained that *"To me, this was purely a message of a political nature in the controversy in the country regarding the state of impunity, which, in his opinion, facilitated my wife's murder."*

Therefore, this Court agrees that the content of the message is political, not in the sense of partisan politics, but in the sense of insistence for accountability in the country. As submitted in the pleading, this is a message which concerns the

rule of law within the scope of democracy. *“Which means that a political message which make you think ... which raises questions, and which continues to encourage that dialogue and that debate which are so necessary in a democratic society.”*

Therefore, this Court deems that the message contained on the banner is among those which attract the highest protection of the Law.

Similarly, in the case **Savva Terentyev vs Russia**,¹³ the European Court in Strasbourg applied the highest level of protection to the right to political expression.

The Court first confirmed the general principle which guides the application of Article 10, that is:

"1. The general principles for assessing whether an interference with the exercise of the right to freedom of expression has been “necessary in a democratic society” are well-settled in the Court’s case-law and were reiterated in a number of cases. The Court has stated, in particular, 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 Article 10 § 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

¹³ 28 August 2018

society" (see, among the recent authorities, **Morice v. France** [GC], no. 29369/10, § 124, ECHR 2015; **Pentikäinen v. Finland** [GC], no. 11882/10, § 87, ECHR 2015; **Perinçek**, cited above, § 196; and **Bédat v. Switzerland** [GC], no. 56925/08, § 48, ECHR 2016)."

Then it resumes:

"2. Moreover, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest. It is the Court's consistent approach to require very strong reasons for justifying restrictions on such debate, for broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned (see **Feldek v. Slovakia**, no. 29032/95, § 83, ECHR 2001-VIII, and **Sürek v. Turkey** (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV). (Underlining by this Court).

This protection is extended to every type or form of expression. As was maintained in the case **Mătăsarú vs The Republic of Moldova**¹⁴:

"3. 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

¹⁴ 15 January 2019

*Parliament, which had been meant to represent the “dirty laundry of the nation”, amounted to a form of political expression (see *Tatár and Fáber vs Hungary*, no. 26005/08 and 26160/08, § 36, 12 June 2012). Likewise, it has found that pouring paint on statues of Atatürk was an expressive act performed as a protest against the political regime at the time (see *Murat Vural vs 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 vs Ukraine*, no. 17888/12, §§ 37-38, 30 October 2014).”*

That as transpires from the considerations of this Court, it is evident that the Authority acted without justification, in an arbitrary and abusive manner. There is nothing in its conduct which could be justified as necessary in a democratic society (a pressing social need) or reasonably necessary in a democratic society. The reference to the incorrect application of a subsidiary law which should regulate advertising, does not clear the Authority.

The vague unproven reference to reports and complaints on some social media, or from some unidentified or non-identifiable member of the public, certainly should not be given any importance. Even if there were reports and complaints, a democratic society is not a society led by mob rule but one that is led by the above-mentioned principles which give the highest protection to the form of political expression.

Therefore, in this case, this Court does not find that there was a pressing social need for the removal of the banners, nor was the conduct reasonably required in a democratic society. In effect it does not transpire that the Authority conducted an internal exercise to consider the impact of the message within the scope of the supreme laws of the country - an obligation borne by the Authority as an agent of the State.

That once it does not find that there is any legitimate purpose for the Authority's conduct, there is truly no reason for this Court to examine whether the means used were proportionate to obtain that purpose.

Consequently, it finds that there is no justification in the terms of the Convention or of the Constitution for the respondent Authority's conduct.

Remedy

That in the pleading the plaintiffs' defence counsel explained that they are not insisting that they would be authorised to re-mount the banner in its original location.

Actually, in view of the above, there is no need for any authorization from this Court as it has been deemed that they have an inherent right to expose this message without requiring a permit from the Authority.

The respondent did not state anything regarding this request.

That this Court is of the opinion that the applicants should be given non-pecuniary compensation besides the infringement declaration.

Having considered that the applicants are the husband and sons of Daphne Caruana Galizia respectively, and by means of the banners in question, they were not just asking question as external observers to the incident, regarding a murder intimately connected with her work, but also questions, as her relatives, regarding who was going to be held responsible for her murder. The fact that their voice was silenced, twice over, and without being granted the opportunity to defend their case, surely caused them great sorrow.

Therefore, it apportions the compensation for non-pecuniary damages *ex aequo* to the amount of five thousand euro (€5,000) for each of the applicants.¹⁵

III. **CONCLUSION:**

That, therefore, for these reasons, this Court, **pronounces and decides**, that whilst it denies all the objections of the respondent Authority, it disposes of the requests as follows:

- 1) It accepts the first request and declares that the respondent Authority's application and interpretation of the Regulations

¹⁵ See the judgement in the case of Belpietro vs Italy.

in Notice 36 of 2018, which led to the issue of the 'Stop and Enforcement Notice regarding Billboards and Advertisements' amounts to unjustified, disproportionate and unnecessary interference in a democratic society and therefore to the violation of **Article 10 of the European Convention** incorporated in the Laws of Malta through Chapter 319 and of **Article 41 of the Constitution of Malta;**

2) It accepts the second request and declares that the removal of the banners from a private property amounts in itself to unjustified, disproportionate and unnecessary interference in a democratic society and therefore to the violation of Article 10 of the European Convention incorporated in the Laws of Malta in Chapter 319 and Article 41 of the Constitution of Malta;

3) It accepts the third request in the sense that upon request of the said applicants, it considers that the infringement declaration of the said rights is sufficient in order that the infringement be remedied besides that which shall be apportioned in non-pecuniary compensation.

4) It accepts the fourth request and apportions the appropriate amount of compensation for such a violation to the amount of five thousand euro (€5,000) payable to each one of the applicants and consequently condemns the respondent Authority to pay the amount duly apportioned to the applicants together with legal interests as from today until the date of effective payment.

Costs are to be borne by the respondent Authority.

Read.

**The Hon. Madam Justice Lorraine Schembri Orland
LL.D., M.Jur.(Eur.Law), Dip.Trib.Eccles.Melit.
16 July 2019**

**Josette Demicoli
Deputy Registrar
16 July 2019**