MALTA

QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
RAYMOND C. PACE

Seduta tat-30 ta' Novembru, 2010

Rikors Numru. 43/2008

Joanne Cassar (ID 535381(M)).

vs

Direttur tar-Registru Pubbliku u L-Avukat Generali

Il-Qorti,

<u>I. PRELIMINARI.</u>

Rat ir-rikors ta' Joanne Cassar (ID 535381(M)) datat 29 ta' Lulju 2008 a fol. 1 tal-process fejn gie premess:-

Illi l-attrici twieldet fl-24 ta' Settembru 1981 u giet registrata fl-att tat-twelid taghha bhala ta' sess maskili.

Illi minn ckunitha, l-esponenti kellha inklinazzjonijiet, atteggjamenti u orjentamenti femminili, kemm psikologikament kif ukoll esternament.

Illi ghalhekk, sabiex tehles mill-konflitti nterni ghar-rigward tal-personalitajiet taghha, l-attrici ssottomettiet ruhha ghall-operazzjoni kirurgika maghrufa bhala *"gender reassignment"* u b'hekk assumiet is-sess femminili b'mod irriversibbli.

Illi l-attrici kienet istitwiet kawza *a tenur* tal-**artikolu 257A tal-Kap 16**, fejn talbet sabiex tigi mibdula l-annotazzjoni dwar is-sess fic-certifikat tat-twelid taghha.

Illi in effetti, b'sentenza tal-Prim'Awla tal-Qorti Civili datata 28 ta' Gunju 2006 fl-ismijiet premessi dik il-Qorti qalet hekk:

"1. Tiddikjara illi l-attur assuma s-sess femminili b'mod irreversibbli kif kontemplat fl-**artikolu 257A (2) tal-Kap. 16** u dan kif gie ppruvat u kkonfermat mill-espert mediku li gie appositament nominat.

2. Tordna lill-konvenut sabiex jaghmel annotazzjoni fl-atti tat-twelid tal-attur rigward il-partikolaritajiet dwar is-sess assunt minnu, kif kontemplat fl-**artikolu 257A tal-Kap. 16** fis-sens illi s-sess tal-attur fi-istess certifikat tat-twelid jigi jaqra "femminili".

3. Tordna lill-konvenut sabiex jaghmel annotazzjoni wkoll fis-sens illi isem l-attur minn "Joseph", isir jaqra "Joanne" u dan kollox *ai termini* tad-disposizzjonijiet appositi tal-**Kap. 16** inkluzi l-**artikoli 257 A, 257 B**, u **257 C tal-istess Kap**.

Illi l-Qorti tordna ukoll li *ai termini* tal-**artikolu 256 tal-Kap 16 tal-Ligijiet ta' Malta** li kull korrezzjoni hawn ordnata ghandha ssir mid-Direttur tar-Registru Pubbliku fi zmien ghaxart ijiem minn dak in-nhar li s-sentenza tghaddi f' gudikat u ghandha ssir bis-sahha ta' kopja vera tas-sentenza li tinghata lilu mir-Registratur tal-Qrati Superjuri, bil-mod preskritt fl-istess dispozizzjonijiet tal-**Kap 16**."

Illi kopja legali ta' din is-sentenza qed tigi annessa u mmarkata “Dok A”.

Illi in segwitu ta' tali sentenza nhareg certifikat tat-twelid li juri lill-esponenti bhala mara.

Illi sussegwentement l-esponenti applikat sabiex tizzewweg lil certu Terence Abdilla (ID. 411384(M)) pero` r-Registratur tar-Registru Pubbliku irrifjuta li johrog it-tnidijiet taz-zwieg.

Illi minhabba tali cahda l-esponenti pprocediet *a tenur* tal-**artikolu 8 tal-Kap 255 tal-Ligijiet ta' Malta** fejn talbet lill-Qorti Civili (Sezzjoni Gurisdizzjoni Volontarja) sabiex taghti ordni lill-intimat Direttur tar-Registru Pubbliku *qua* Registratur taz-Zwigijiet sabiex johrog it-tnidijiet ghaz-zwieg bejn l-esponenti u Terence Abdilla (ID. 411384(M)).

Illi b'digriet taghha tat-12 ta' Frar 2007, il-Qorti Civili (Sezzjoni Gurisdizzjoni Volontarja) laqghet it-talba tal-esponenti u tat tali ordni.

Illi pero` l-intimat Direttur tar-Registru Pubbliku pproceda b'kawza fejn talab illi jigi revokat id-digriet moghti mill-Qorti Civili (Sezzjoni Gurisdizzjoni Volontarja). Permezz ta' sentenza tal-21 ta' Mejju 2008 il-Prim’ Awla tal-Qorti Civili laqghet it-talba tal-intimat odjern.

Illi *in oltre* fl-istess sentenza gie dikjarat illi:-

"L-annotazzjoni li saret fuq l-Att tat-Twelid tal-parti intimata bis-sahha tas-sentenza moghtija fit-28 ta' Gunju 2006, saret biss ghal skop tal-harsien tal-privatezza taghha u ma taghtiha l-ebda dritt li titqies bhala "mara" ghall-finijiet tal-kontrattazzjoni ta' zwieg;"

Illi fl-istess sentenza ddecidiet illi:

"Tilqa' t-tieni talba attrici u tiddikjara li zwieg bejn il-parti intimata u persuna ohra ta' sess maskil imur kontra d-

*dispozizzjonijiet tal-**Att tal-1975 dwar iz-Zwieg (Kapitolu 255 tal-Ligijiet ta' Malta**);*

Tilqa' limitatament it-tielet talba attrici billi tiddikjara li l-attur ma jistax johrog tnidijiet ghal zwieg jekk kemm-il darba ma jinghatax it-taghrif kollu mehtieg dwar il-partijiet li jridu jghaddu ghal zwieg. Izda tichad il-bqija tal-imsemmija talba;

Tilqa' r-raba' talba attrici u thassar u tirrevoka d-digriet moghti fit-12 ta' Frar 2007, mill-Qorti ta' Gurisdizzjoni Volontarja billi l-istess digriet jinbena fuq premessa li ma taqbilx mar-realta` (ghaliex il-partijiet li ghalihom jirreferi m'humiex ta' sess oppost) u ghaldaqstant mhux sostnut mill-elementi mehtiega mil-ligi flr-rigward;"

Illi l-ligi kif emendata, kif interpretata bis-sentenza hawn fuq imsemmija, tmur kontra l-insenjatament tal-Qorti Ewropea tad-Drittijiet tal-Bniedem **"Christine Goodwin vs The United Kingdom"** (Application no. 28957/95) deciza fil-11 ta' Lulju 2002.

Illi f'din is-sentenza, l-Qorti Ewropea qalet hekk:

"98. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision".

"99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see the Rees judgment, p. 19, §50; the F. v. Switzerland judgment of 18 December 1987, Series A no. 128, § 32)".

"100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that <u>at the date of this case</u> it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J in the case of Corbett v. Corbett, paragraph 21 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of Tran sexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors - the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women (see paragraph 58 above)."

Illi ghalhekk skont dan l-insenjament, minhabba l-accettazzjoni ta' kundizzjonijiet bhal *"gender identity disorder"* u l-izviluppi ricenti fix-xjenza, wiehed ma jistax, minhabba fatturi biologici, ma jirrikonoxxix ghall-finijiet u effetti kollha tal-ligi s-sess akkwistat.

Illi ghalhekk il-ligi ta' Malta ma tirrikonoxxix lit-transesswali bhala persuni tas-sess akkwistat ghall-finijiet u effetti kollha taghha inkluz *ai* finijiet tal-ligi taz-zwieg, u dan jilludi d-drittijiet fundamentali tal-esponenti fosthom l-**artikolu 32 (c) tal-Kostituzzjoni u l-artikoli 8 u 12 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem**.

Illi *in oltre* skont il-ligi ta' Malta persuna transesswali hija negata mill-possibbilta` li tizzewweg persuna ta' sess maskili u, *stante* illi tkun issottomettiet ruhha ghall-operazzjoni ta' *"gender reassignment"* u akkwistat is-sess femminili, lanqas ma tista' tizzewweg persuna ta' sess femminili.

Dan apparti li jilludi d-drittijiet fundamentali hawn fuq imsemmija, jilludu wkoll id-dritt tal-esponenti li ma tigix assuggettata ghal trattament inuman u degradanti kif sanciti fl-**artikolu 36 tal-Kostituzzjoni ta' Malta** u l-**artikolu 3 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem**.

Illi ghalhekk l-istess attrici talbet lill-konvenuti jghidu ghaliex din il-Qorti m'ghandhiex:-
i) Tiddikjara illi, minhabba li l-fatt illi l-ligi ta' Malta ma tirrikonoxxix lit-transesswali bhala persuni tas-sess akkwistat ghall-finijiet u effetti kollha taghha inkluz *ai* finijiet tal-ligi taz-zwieg, dan jilludi d-drittijiet fundamentali tal-esponenti fosthom l-**artikolu 32 (c) tal-Kostituzzjoni** u l-**artikoli 8 u 12 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem**.
ii) Tiddikjara illi, peress illi, skont il-ligi ta' Malta persuna transesswali hija negata mill-possibbilta` li tizzewweg persuna ta' sess maskili u lanqas ma tista' tizzewweg persuna ta' sess femminili kif hawn fuq spjegat, dan jilludu wkoll id-dritt tal-esponenti li ma tigix assuggettata ghal trattament inuman u degradanti kif sanciti fl-**artikolu 36 tal-Kostituzzjoni ta' Malta** u l-**artikolu 3 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem**.

iii) Taghtiha dawk ir-rimedji li jidhrilha xierqa ghat-twettiq ta' dawn id-drittijiet fondamentali fuq imsemmija, fosthom li tiddikjara illi l-intimat Direttur tar-Registru Pubbliku ma jistax jirrifjuta li johrog it-tnidijiet ghaz-zwieg tal-esponenti ma' persuna ohra ta' sess maskili a bazi tal-fatt illi l-esponenti twieldet bhala ragel u ssottomettiet ruhha ghall-operazzjoni hawn fuq imsemmija.

iv) Tiffissa kumpens dovut lill-esponenti minhabba dan il-ksur ta' drittijiet tieghu hawn fuq indikati,

u dan taht dawk il-provedimenti li jidhrilha xierqa u opportuni.

Rat id-dokumenti esebiti tar-rikorrenti annessi mar-rikors a fol 8 sa 45 tal-process.

Rat in-nota ta' l-Imhallef Joseph R. Micallef datata 30 ta' Lulju 2008 (fol 46) li biha astjena milli jiehu konjizzjoni ta' din il-kawza peress li hemm ragunijiet biex issir astensjoni *a tenur* tal-**artikolu 734 (1) (d) tal-Kapitolu 12 tal-Ligijiet ta' Malta**.

Rat li din il-kawza kienet appuntata ghas-smigh minn din il-Qorti kif ilum presjeduta ghas-seduta tat-22 ta' Ottubru 2008 .

Rat ir-risposta tad-Direttur tar-Registru Pubbliku u tal-Avukat Generali datata 9 ta' Settembru 2008 a fol. 52 tal-process fejn eccepew:-

Illi l-pretensjonijiet tar-rikorrent huma fis-sens illi *"il-fatt illi l-ligi ta' Malta ma tirrikonoxxix lit-transesswali bhala persuni tas-sess akkwistat ghall-finijiet u effetti kollha taghha inkluz ai finijiet tal-ligi taz-zwieg"* allegatament jivvjola d-drittijiet fundamentali tar-rikorrenti senjatament l-**artikoli 32 (c) u 36 tal-Kostituzzjoni ta' Malta** kif ukoll l-**artikoli 8, 12 u 3 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u Libertajiet Fundamentali.**

Illi l-esponenti jissottomettu illi l-istess pretensjonijiet huma nfondati fil-fatt u fid-dritt ghar-ragunijiet segwenti:-

1. Preliminarjament, l-inapplikabbilta` tal-**artikolu 32 tal-Kostituzzjoni ta' Malta** *stante* li dan l-artikolu huwa biss introduzzjoni ghal-lista tad-drittijiet umani kif inhu wara kollox l-**ewwel artikolu tal-Konvenzjoni Ewropea** u ghalhekk ma jistax jigi nvokat. Hija l-Kostituzzjoni stess illi fl-**artikolu 46 (1)** teskludi l-**artikolu 32** meta tipprovdi ghall-possibbilta` ta' allegazzjoni ta' ksur ta' drittijiet

fundamentali *a tenur* biss tal-**artikoli 33 sa 45 tal-istess Kostituzzjoni**.

2. Illi r-rikorrenti qieghda tippretendi illi azzjoni intavolata *ai termini* tal-Kodici Civili sabiex issir annotazzjoni fl-Att ta' Twelid relattiv liema annotazjoni hija ntiza sabiex tissalvagwardja persuna illi tkun issottomettiet ruhha ghall-operazzjoni ta' bdil tal-apparenza fizika milli toqghod tizvela dan il-fatt kull meta jkollha bzonn tuza dokument ufficjali, taghtiha d-dritt illi tizzewweg persuna tal-istess sess li twieldet bih hi.

L-**artikolu *257* A tal-Kodici Civili** huwa ntiz biss sabiex persuna illi tkun ottjeniet l-apparenza esterjuri ta' persuna tas-sess oppost ma tkunx imbarazzata meta tipproduci dokumenti ufficjali li juru xort'ohra. Dan bl-ebda mod ma jfisser jew jindika illi wara tali operazzjoni dik il-persuna tkun b'xi mod akkwistat 'gender' gdid izda jfisser biss illi dik il-persuna tkun protetta fl-isfera tal-hajja privata taghha u dan huwa *in linea* mal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.

Illi l-*Council of Europe Parliamentary Assembly Recommendation 1117* (1989) illi tirrigwarda l-kundizzjonijiet tat-transesswali irrikonoxxiet illi l-korrezzjonijiet illi jsiru fl-Atti Civili ta' persuna transesswali ghandhom isiru biss peress illi *"a refusal of such amendments of the civil status papers exposes persons in this situation to the risk of being obliged to reveal to numerous people the reason for the discrepancy between their physical appearance and legal status".*

Dan huwa principju assodat u stabbilit fil-gurisprudenza vasta tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem fejn huwa ritenut illi persuna transesswali *"... finds herself daily in a situation which, taken as a whole/ is not compatible with the respect due to her private life. Consequently, even having regard to the States' margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual ... has not been attained, and there has thus been a violation of article 8", (**B v France** (1993)).*

Illi fil-kawza fl-ismijiet **D Van Oosterwijck v Belgium** (applikazzjoni Numru 7654/76) il-Qorti Ewropea ikkundannat lill-istat Belgjan peress illi kien irrifjuta milli jirrikonoxxi *"an essential element of his personality: his sexual identity resulting from his changed physical form, his psychical make-up and his social role".*

Illi l-kelma 'sess' ghandha diversi tifsiriet u fl-aktar mod wiesgha taghha, din il-kelma bazikament tiddistingwi bejn dak illi effettivament jikkostitwixxi 'mara' u dak li jikkostitwixxi 'ragel'. Din id-distinzjoni tista' facilment tigi sintetizzata u migbura billi wiehed jghid illi d-distinzjoni bejn mara u ragel hija determinata mill-funzjonijiet rispettivi tal-mara u tar-ragel fil-process tar-riproduzzjoni.

Fil-kawza **Corbett vs Corbett (Otherwise Ashley)** (1971)) ***per Ormrod J,*** il-Qorti Ewropea tad-Drittijiet tal-Bniedem stabbiliet illi sabiex wiehed jkun jista' jiddetermina s-sess ta' persuna, wiehed irid jissottometti ruhu ghal diversi testijiet illi jirrigwardjaw il-*chromosomal*, *gonadal* u l-*genital sex*.

Illi l-'gender' huwa materja ferm kumplessa li tinvolvi fiha elementi diversi inkluz *genetic* jew *chromosomal gender*, *hormonal gender, anatomical gender* (apparenza fizika) u l-*psychological* jew *psychosocial gender* li jirrigwardjaw l-imgieba. It-transesswalizmu huwa karatterizzat minn diskrepanza bejn l-*anatomical gender* illi huwa determinat mill-*genes* u *hormones* u l-*psychological gender*.

L-esponenti jirrilevaw illi *ai termini* ta' azzjoni bbazata fuq l-**artikolu 257A tal-Kodici Civili**, il-prova li trid tingieb hija illi dik il-persuna mhux mizzewga, li hija domiciljata f'Malta u illi dik il-persuna tkun "ghaddiet minn bidla irriversibbli ta' sess li ma jkunx dak indikat fl-att ta' twelid jew inkella jekk kinitx dejjem tappartjeni ghal dak is-sess l-iehor".

Illi hemm diversi gradi ta' operazzjonijiet illi ghalkemm possibbilment irriversibbli, xorta wahda jkunu jirrigwardaw biss l-aspett u l-organi esterjuri tal-persuna u jzommu intatti l-organi interni u per konsegwenza ghalkemm tali

operazzjonijiet ikunu sufficjenti sabiex tintlaqa' t-talba taht l-**artikolu 257A tal-Kap 16**, dan ma jistax jinghad ghal talba taht xi artikolu iehor tal-Ligi fosthom il-ligi dwar iz-Zwieg.

3. Illi subordinatament u minghajr pregudizzju ghas-suespost, l-esponenti jecepixxu illi ma hemm l-ebda vjolazzjoni tal-**artikolu 8 tal-Konvenzjoni Ewropea** u dan peress illi dan l-artikolu filwaqt li jenuncja bhala dritt fundamentali d-dritt ta' kulhadd ghar-rispett tal-hajja familjari tieghu u jimpedixxi indhil minn awtorita` pubblika dwar ezercizju ta' dan id-dritt, fis-sub inciz (2) tieghu jikkontempla dawk il-kazijiet permessi mill-istess Konvenzjoni, li jirrendu legali u lecitu indhil mill-Istat b'deroga ta' dan id-dritt fundamentali.

Anke jekk kellu jigi meqjus minn din l-Onorabbli Qorti li hemm interferenza fir-rigward ta' dan id-dritt l-esponenti jecepixxu li din hija gustifikata permezz tas-**subinciz (2) tal-artikolu 8** in kwantu hija skont il-ligi u mehtiega f'socjeta` demokratika.

Illi l-**artikolu 8 tal-Konvenzjoni** ma jiggarantixxix li wiehed jkollu familja izda jippresupponi l-ezistenza ta' familja (**Marckx v Belgium** deciza fit-13 ta' Gunju 1979). F'dan ir-rigward, l-esponenti jaghmel riferenza ghad-decizjoni tal-Qorti Ewropea fil-kawza **E.B. v France** (application number 43546/02) fejn kien osservat illi *"the right to respect for "family life" does not safeguard the mere desire to found a family, it presupposes the existence of a family".*

4. Illi minghajr pregudizzju ghas-suespost, l-esponenti jecepixxu wkoll illi ma hemm l-ebda vjolazzjoni tal-**artikolu 12 tal-Konvenzjoni Ewropea** u dan peress illi d-dritt taz-zwieg huwa limitat ghall-unjoni bejn ragel u mara illi jkunu genetikament klassifikati bhala ragel u mara.

Illi fis-sustanza tieghu, iz-zwieg jinkludi fih il-kapacita` jew possibbilta` fizika illi wiehed jkun jista' jipprokreja. Illi fil-kawza **"Rees v UK"** (1986), il-Qorti Ewropea irriteniet illi *"... the right to marry guaranteed by **article 12** refers to*

the traditional marriage between persons of opposite biological sex. This appears also from the wording of the article which makes it clear that ***article 12*** *is mainly concerned to protect marriage as the basis of the family".*

Illi z-zwieg f'Malta huwa kuntratt ta' natura *sui generis* u ta' ordni pubbliku. Dan il-kuntratt jista' jigi kkontrattat biss bejn zewg persuni ta' sess oppost. Dan ifisser illi dawn iz-zewg persuni jkollhom l-istruttura kemm esterjuri u kemm anatomika, gonadal u kromosomika opposta. Jekk wiehed jinterpreta dan b'mod differenti jkun ifisser illi huwa permissibli illi jsir zwieg bejn zewg persuni tal-istess sess u dan huwa djatrikament oppost ghall-ordni pubbliku u ghall-*public policy* f'Malta.

Dan il-principju huwa assodat fil-gurisprudenza nostrali u ssir riferenza ghad-decizjoni fl-ismijiet "**Anthony Licari vs Caroline Licari**" (deciza mill-Qorti tal-Appell fil-31 ta' Mejju 2002) fejn inghad illi *"issa m'hemmx dubju illi z-zwigijiet u l-validita` taghhom huma materji ta' Ordni Pubbliku u li di fronte ghal dan l-interess pubbliku l-interess privat huwa wiehed sekondarju".*

Illi l-fatt illi persuna transesswali tkun ghaddiet minn trawma fejn hija tkun originarjament hassitha intrappolata f'gisem differenti u baqghet sakemm esterjorment tidher il-persuna illi hija tahseb illi hi, jixhed illi din il-persuna hija sfortunatament affetta minn anomalija psikologika. Wahda mir-ragunijiet il-ghala zwieg huwa annulat hija specifikatament din ir-raguni. Ghalhekk hemm lok illi zwieg ta' persuna transesswali jigi kkunsidrat illi huwa null *ab initio* u huwa ghalhekk difficili biex wiehed jikkoncepixxi, kif jista' jkun hemm dritt fondamentali illi jigi konkluz tali zwieg.

In fatti, il-***Council of Europe Parliamentary Assembly Recommendation (Nurmu 1117 – 1989)*** li tirrigwarda t-transesswali ddefiniet it-transesswalismu bhala *"a syndrome characterized by a dual personality, one physical, the other psychological, together with such a profound conviction of belonging to the other sex that the*

transsexual person is prompted to ask for the corresponding bodily "correction" to be made".

L-awtur **Viladrich PJ** fil-pubblikazzjoni **Matrimonial Consent** (Ed. 1993, Wilson & Lafleur Montreal) meta jikkumenta dwar il-kunsens necessarju sabiex zwieg ikun validu jsostni illi *'... there is grave lack [of discretion of judgement] when it is proven that a contracting party lacks intellectual and volitional maturity necessary to discern, in view of binding oneself in an irrevocable manner, the essential rights and duties of marriage, which are the object of mutual surrender and acceptance. The discretion of judgment refers to that degree of maturity of comprehension and of will of the contracting parties which enables them to give and receive each other, through a judicial bond, in a unique community of life and love. This community is indissolubly faithful, ordered to the good of the spouses as well as to the procreation and education of the offspring".*

L-esponenti jirreferu wkoll ghall-kawza fl-ismijiet **"Nicholas Agius vs Rita Agius gja Caruana"** (Citazzjoni Numru 1021/94VDG deciza fil-25 ta' Mejju 1995 mill-Prim' Awla tal-Qorti Civili) fejn kien osservat illi:-

*'Kwantu ghall-obbligazzjonijiet essenzjali taz-zwieg, din il-Qorti tifhem li, fin-nuqqas ta' definizzjoni jew indikazzjoni fil-**Kap 255**, dawn l-obbligazzjonijiet essenzjali huma dawk li fis-socjeta` Maltija dejjem u invarjabbilment gew ritenuti bhala obbligazzjonijiet essenzjali taz-zwieg. Dawn huma "the obligation concerning the conjugal act or carnal union, as bodily union and the basis of procreation; the obligation of community of life and love as an expression of the union between man and woman/ mutual well being, which is inseparable from the provision of an environment conductive to the reception and education of children; and the obligation to receive and bring up children within the context of a conjugal community. It is important to remember that these essential obligations must be mutual, permanent, continuous, exclusive and irrevocable so that there would be incapacity if one of .the contracting parties should be, due to a psychological cause,*

incapable of assuming these obligations with these essential characteristics'. Il-Qorti kompliet illi *"Inkapacita` jew impossibbilta` vera f'dan il-kuntest hi ipotizzabbli biss fil-presenza ta' anomalija psikologika serja li, indipendentement minn kif wiehed jaghzel li jiddefiniha jew jikklassifikha fil-kamp tal-psikjatrija jew tal-psikologija, tintakka sostanzjalment il-kapacita` 'di intendere e/o di volere'.* Il-Qorti kwotat lil **Bersini** illi jirritjeni illi *'L'incapacita` di assumere gli oneri essenziali della vita coniugale, rende la persona inabile al matrimonio, anche nell'ipotesi .... che al momenta di contrarre le nozze abbia avuto la discrezione di giudizio sifficiente per un valido consenso'*.

L-esponenti jirrilevaw ukoll illi r-rikorrenti ma ghandhiex il-kapacita` illi tipprokreja b'mod naturali u ghalhekk jekk din tiddeciedi illi tkun trid it-tfal, ikun hemm bzonn illi jintuzaw metodi artificjali sabiex jassistu lir-rikorrenti sabiex issir 'genitur' bhala omm. Fil-kaz **X, Y and Z v. UK** (ECHR 22 (04) 97) il-Qorti Ewropea ddecidiet illi minuri kkoncepit b'mezzi artificjali *tramite* donator ma jintitolax lil persuna illi pretendiet illi tkun rikonoxxuta bhala missier (f'dan il-kaz kien transesswali li ha sura ta' ragel) illi tigi rikonoxxuta tali. F'dan il-kuntest, il-Qorti irriteniet illi tali rikonoxximent ma kienx fl-ahjar interess tal-minuri u kkonkludiet illi l-**artikolu 8 tal-Konvenzjoni** ma jobbligax lill-Istati illi jirrikonoxxu bhala missier persuna illi ma kenitx il-missier bijologiku.

Di piu`, z-zwieg ta' persuna transesswali jista' jkun ukoll ta' detriment ghat-tfal illi dik il-persuna seta' kellha qabel ma qalbet is-sess taghha. Ikun certament kontra l-ordni pubbliku illi l-istess persuna tkun mara u fl-istess hin tkun ukoll il-missier ta' xi tfal.

5. Illi minghajr pregudizzju ghas-suespost l-esponenti jeccepixxu illi ma hemm l-ebda vjolazzjoni tal-**artikolu 3 tal-Konvenzjoni Ewropea u tal-Artikolu 36 tal-Kostituzzjoni**.

Illi l-esponenti jirribadixxu l-allegazzjoni illi r-rikorrenti b'xi mod qed tigi assoggettata ghal trattament inuman. Illi kif

kien kjarit mill-Qorti Ewropea fil-kaz **Ireland v UK** *"The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering mental or physical, which/ in the particular situation, is unjustifiable."*

6. Illi kemm ghar-ragunijiet fuq esposti kif ukoll ghal ragunijiet ohra li l-esponent jirrizerva li jgib, jekk ikun hemm bzonn, waqt it-trattazzjoni tal-kawza, t-talbiet tar-rikorrenti huma nfondati fil-fatt u fid-dritt u ghadhom jigu respinti.

Salv eccezzjonijiet ohra premessi mill-Ligi.

Rat il-verbal tas-seduta tat-22 ta' Ottubru 2008 fejn meta ssejhet il-kawza dehru d-difensuri tal-partijiet. Inghata digriet sabiex il-partijiet jipprezentaw ix-xhieda taghhom bil-procedura tal-affidavit. Dr.Victoria Buttigieg ghall-intimati talbet allegazzjoni tal-process deciz fil-21 ta' Mejju 2008. Dr. Camilleri rrimetta ruhu. Il-Qorti laqghet it-talba u ordnat l-allegazzjoni tal-istess.

Rat in-nota ta' sottomissjonijiet ta' Joanne Cassar datata 18 ta' Mejju 2010 a fol. 96 tal-process.

Rat il-verbal tas-seduta mizmuma quddiem il-Qorti fit-23 ta' Gunju 2010 fejn meta ssejhet il-kawza dehru Dr. Victoria Buttigieg ghall-intimati kollha u r-rikorrenti. Il-Qorti pprefeggiet tletin (30) gurnata zmien sabiex l-intimata tipprezenta n-nota ta' sottomissjonijiet/referenzi taghha. Il-kawza giet differita ghas-sentenza ghat-30 ta' Novembru 2010.

Rat in-nota ta' sottomissjonijiet tad-Direttur tar-Registru Pubbliku u tal-Avukat Generali datata 9 ta' Awwissu 2010, u n-noti ta' referenzi datati 12 ta' Awwissu 2010 a fol. 101 u a fol. 113 rispettivament.

Rat ix-xhieda kollha hemm moghtija.

Rat l-atti kollha pprezentati mill-partijiet u d-digrieti relattivi.

Rat id-dokumenti esebiti.

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

<u>II. KONSIDERAZZJONIJIET.</u>

Illi mill-atti processwali jirrizulta li r-rikorrenti twieldet fil-24 ta' Settembru 1981 u meta twieldet hija tqieset li kienet tifel u fil-fatt, missier ir-rikorrenti, irregistra t-tarbija bl-isem ta' Joseph Arthur Kevin Cassar. Fl-20 ta' Jannar 2005, r-rikorrenti ssottomettiet ruhha ghal-intervent kirurgiku f'Sussex & Hove Nuffield Hospital fi Brighton, ir-Renju Unit (vide fol 69 sa 71 tal-process civili anness ma' l-atti ta' dina l-kawza), liema interventi kienu jikkonsistu f'*penectomy, orchidecthomy, cliteroplasty, urethal reduction, labiaplasty, u kif ukoll penile inversion vaginoplasty,* u permezz tieghu ir-rikorrenti hadet is-sura fizika esterjuri ta' mara u dan minhabba li hija dejjem kellha inklinazzjonijiet, atteggjamenti u orjentamenti femminili, kemm psikologikament u kif esternament.

Illi jirrizulta li l-bidla li sehhet fil-parti tal-intimata fejn hija hadet is-sura ta' mara hija irreversibbli kif iddikjarat mill-kirurgu Mr. Philip J. Thomas b'certifikat datat 28 ta' Frar 2005 (Dok. "B' imsemmi fis-sentenza fl-ismijiet **"Joseph sive Joanne Cassar vs Direttur tar-Registru Pubbliku"** (P.A. (RCP) – 28 ta' Gunju 2006), u minn dak tal-Professur M.P. Brincat datat 16 ta' Jannar 2006 u mahluf 10 ta' Marzu 2006 fejn huwa kkonferma li r-rikorrenti odjern wara tali intervent ta' *"gender reassignment"* ghandu l-persuna ta' mara u dan billi ccertifika li *"her body habitus is that of a female and in my opinion she is phenotypically female"* kollox kif jirrizulta mill-istess rapport.

Illi kien ghalhekk li fit-13 ta' Settembru 2005 ir-rikorrenti intavolat proceduri *ai termini* ta' l-**artikolu 257A tal-Kodici Civili (Kap. 16 tal-Ligijiet ta' Malta)** fejn talbet illi peress li hija assumiet sess femminili b'mod irriversibbli kif kontemplat fl-istess artikolu ghandu ghalhekk jinbidel l-Att tat-Twelid taghha, fis-sens li s-sess taghha jigi ndikat

bhala dak femminili minflok dak maskili, u wkoll sabiex l-isem taghha minn "Joseph", jigi jaqra "Joanne" u dan skont id-disposizzjonijiet tal**-artikoli 257A, 257B, 257C tal-Kap. 16,** liema talbiet gew milqugha permezz ta' sentenza tat-28 ta' Gunju 2006 (Dok. "A") u fis-27 ta' Lulju 2006, id-Direttur tar-Registru Pubbliku ghamel l-annotazzjoni relattiva fl-Att tat-Twelid tar-rikorrenti (Cert. Nru. 5353/1981 – Dok. "JC" fl-atti tal-kawza Rikors Gur. Nru. 202/07/JRM) u dan fis-sens u b'hekk adirixxa ruhu mal-istess sentenza wara li lanqas sar appell mill-istess u allura wara li l-istess decizjoni ghaddiet in gudikat.

Illi permezz ta' ittra datata 26 ta' Settembru 2006, ir-rikorrenti talbet lir-Registratur taz-Zwigijiet sabiex jinhargu t-tnidijiet sabiex tkun tista' tizzewweg. L-istess talba regghet saret mir-rikorrenti permezz ta' l-ittra ufficjali datata 1-1 ta' Dicembru 2006. Din it-talba giet irrifjutata mir-Registratur intimat.

Illi fis-17 ta' Jannar 2007 ir-rikorrenti pprezentat rikors quddiem il-Qorti ta' Gurisdizzjoni Volontarja a tenur ta' l-**artikolu 8 (2) ta' l-Att dwar iz-Zwieg (Kapitolu 255 tal-Ligijiet ta' Malta)** fejn talbet lill-Qorti sabiex tordna lir-Registratur taz-Zwigijiet sabiex jippubblika t-tnidijiet ghaz-zwieg *"bejn l-esponenti u Terrence Abidilla"*. Il-Qorti ta' Gurisdizzjoni Volontarja presjeduta mill-Onorevoli Mhallef Gino Camileri permezz ta' digriet kamerali taghha datat 12 ta' Frar 2007 laqghet it-talba tar-rikorrenti fejn sostniet li:-

"Peress li z-zwieg li ser jigi kontrattat mhux kontra l-provedimenti tal-Kap. 255 u mhux kontra l-ordni pubbliku peress li hu zwieg bejn zewg persuni ta' sess differenti; Tilqa' t-talba u tordna lill-intimati johrog it-tnidijiet skont *il-ligi".*

Illi konsegwenti ghal dan id-digriet id-Direttur tar-Registru Pubbliku fil-kwalita' tieghu ta' Registratur taz-Zwigijiet intavola proceduri kontra r-rikorrenti fejn, fost talbiet ohra, talab illi jigi revokat *contrario imperio* d-digriet tal-Qorti ta' Gurisdizzjoni Volontarja tat-12 ta' Frar 2007 u dan peress li inghad li l-annotazzjoni li saret fl-Att tat-Twelid tar-rikorrenti saret biss ghal skopijiet ta' protezzjoni ta'

privatezza tal-istess u ma taghti ebda dritt lir-rikorrenti li titqies bhala mara ghall-kontrattazzjoni ta' zwieg u li allura z-zwieg bejn l-intimata u persuna ohra ta' sess maskil m'huwiex permess ghall-finijiet tal-**Kap. 255** u jmur kontra l-ordni pubbliku Malti.

Illi b'decizjoni moghtija minn Prim Awla tal-Qorti Civili datata 21 ta' Mejju 2008 fil-kawza fl-ismijiet **"Id-Direttur tar-Registru Pubbliku vs Joanne Cassar"** (P.A. (JRM) – 21 ta' Mejju 2008) laqghet l-ewwel talba attrici u ddikjarat li l-annotazzjoni li saret fuq l-Att ta' Twelid tal-parti intimata bis-sahha tas-Sentenza moghtija fit-28 ta' Gunju 2006, saret biss ghal skop ta' harsien tal-privatezza taghha u ma taghtiha l-ebda dritt li titqies bhala "mara" ghall-finijiet tal-kontrattazzjoni ta' zwieg; tilqa' t-tieni talba u tiddikjara li z-zwieg bejn il-parti intimata u persuna ohra ta' sess maskili imur kontra d-disposizzjonijiet tal-**Att tal-1975 dwar iz-Zwieg (Kapitolu 255 tal-Ligijiet ta' Malta)"** u ghalhekk laqghet limitatament it-tielet talba kif hemm indikat u r-raba' talba billi hassret u rrevokat *contrario imperio* id-digriet tal-Qorti ta' Gurisdizzjoni Volontarja datat 12 ta' Frar 2007 billi nghad li l-istess digriet inbena fuq il-premessa *"li ma taqbilx mar-realta' (ghaliex il-partijiet li ghalihom jirreferi m'humiex tas-sess oppost) u ghaldaqstant mhux sostnut mill-elementi mehtiega mill-ligi fir-rigward"* b'dan li giet allura michuda t-talba tar-rikorrenti sabiex tizzewweg persuna tas-sess maskili.

Illi ghalhekk saret il-procedura odjerna fejn ir-rikorrenti qed tilmenta li la darba presumibbilment, u dejjem in vista ta' kif din is-sentenza nterpretat il-Ligi ta' Malta, jirrizulta ghalhekk li l-Ligi, kif dejjem hekk interpretata, ma tirrikonoxxix li t-transesswali li jkun allura assuma s-sess differenti minn dak li twieled bih (f'dan il-kaz dak ta' mara minn dak ta' ragel), u liema sess gie wkoll irrokonoxxut bil-ligi tant li saru l-annotazzjonijiet tieghu a bazi tal-**artikoki 257 A sa D tal-Kap. 16,** baqa' xorta jigi kkonsidrat bhala persuna tas-sess li twieled bih u dan partikolarment ghal-ligijiet li jirregolaw iz-zwieg civili, b'dan li l-istess rikorrenti bis-sess ta' mara kif issa rikonnoxxut mill-Istat, gie mpedut milli jizzewweg persuna tas-sess oppost ta' dak lilu ndikat fic-certifikat tat-twelid taghha, u dan fih innifsu skont ir-

rikorrenti jilledilha d-drittijiet fundamentali taghha fosthom dawk kontemplati fl-**artikolu 32 (c) tal-Kostituzzjoni u l-artikoli 8 u 12 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem.**

Inoltre, skont l-istess rikorrenti, l-fatt li l-Ligi ta' Malta kif interpretata, qed tinnega lil persuna transesswali bhala persuna tas-sess akkwistat u rikonoxxut mill-ligi bhala tali, mill-possibilita’ li tenut kont tas-sess akkwistat taghha, tkun tista’ tizzewweg persuna ta' sess oppost ghal dak assunt minnha u cjoe’ persuna tas-sess maskili; dan ifisser ukoll li peress li skont ic-certifikat taghha tat-twelid mill-mument ta’ annotazzjoni hija kkonsidrata bhala mara, mela allura minn dak il-mument hija lanqas tista’ tizzewweg persuna ta' sess femminili, u dan jikser ukoll id-dritt ta' l-esponenti li ma tigix assuggettata ghal trattament inuman u degradanti kif sanciti **fl-artikolu 36 tal-Kostituzzjoni ta' Malta u l-artikolu 3 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem** ghaliex pratikament dan ifisser li d-dritt ta’ zwieg gie ghal kollox negat lilha.

Illi tenut kont ta` dan kollu u fid-dawl tal-eccezzjonijiet tal-intimat, jinghad fl-ewwel lok dwar l-applikabbilita’ ta’ l-**artikolu 32 (c) tal-Kostituzzjoni ta’ Malta** li r-rikorrenti qed tallega li dan l-artikolu jitkellem dwar ir-rispett ghall-hajja privata u familjari. F’dan il-kuntest jinghad li l-Qorti taqbel mas-sottomissjoni ta' l-intimati f'dan ir-rigward fis-sens li l-**artikolu 32 tal-Kostituzzjoni** mhuwiex wiehed enforzabbli taht l-**artikolu 46** ta' l-istess Kostituzzjoni li huwa l-artikolu li jaghti l-gurisdizzjoni lil din il-Qorti li tezamina ksur ta' drittijiet fundamentali tal-bniedem. Dan l-**artikolu 46** infatti jsemmi biss id-drittijiet fundamentali elenkati fl-**artikoli 33 sa 45 tal-Kostituzzjoni** u allura t-talbiet tar-rikorrenti fuq dan il-punt qed jigu michuda.

Illi dwar dan il-punt jinghad li l-**artikolu 32 tal-Kostituzzjoni** gie dejjem interpretat bhala artikolu li jikkontjeni biss dikjarazzjoni ta' principji li minkejja li huma principji bazici u li ghandhom jigu segwiti ma kienux enforzabbli quddiem Qorti. Pero' d-dritt ghar-rispett tal-hajja privata, tad-dar u tal-korrispondenza huma

msemmija wkoll fl-**artikolu 8** u jifformaw parti integrali mid-dritt sostantiv taghna fil-**Kapitolu 319 tal-Ligijiet ta' Malta**. (**"Joseph Schembri vs Onorevoli Prim Ministru bhala Kap tal-Gvern ta' Malta et"** – P.A (SK) - 25 ta' Jannar, 2002).

Illi dwar l-ilment tar-rikorrenti a bazi tal-**artikolu 8 tal-Konvenzjoni** dan jipprovdi li:-

"(1) Kulhadd ghandu d-dritt ghar-rispett tal-hajja privata tieghu, tal-familja tieghu, ta' daru u tal-korrispondenza tieghu.

(2) Ma ghandux ikun hemm indhil minn awtorità pubblika dwar l-ezercizzju ta' dan id-dritt hlief dak li jkun skont il-ligi u li jkun mehtieg f'socjetà demokratika fl-interessi tas-sigurtà nazzjonali, sigurtà pubblika jew il-gid ekonomiku tal-pajjiz, biex jigi evitat id-dizordni jew l-eghmil ta' delitti, ghall-protezzjoni tas-sahha jew tal-morali, jew ghall-protezzjoni tad-drittijiet u libertajiet ta' haddiehor".

Illi jinghad li in linja generali dan l-artikolu jipprojibixxi indhil arbitrarju tal-Istat fir-rispett tal-hajja privata tieghu inkluz dak tal-familja tieghu, ta' daru u tal-korrispondenza tieghu. Inoltre skont dan l-artikolu, mhux biss jipprojbixxi l-indhil da parti ta' l-Istat izda jippresupponi li ghandhom jittiehdu mizuri posittivi da parti ta' l-Istat sabiex jipprotegi dawn id-drittijiet. Hekk fil-kaz **"X and Y vs The Netherlands"** (26 ta' Marzu 198u) il-Qorti Ewropeja tad-Drittijiet Fundamentali tal-Bniedem (ECtHR) rriteniet f'paragrafu 23 li:-

"The Court recalls that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the Airey judgment of 9 October 1979, Series A no. 32, p. 17, para. 32). These obligations may involve the adoption of measures designed to secure respect for private life even

in the sphere of the relations of individuals between themselves".

Illi dawn il-mizuri posittivi jistghu ikunu jew mizuri li jirregolaw l-agir ta' l-Istat stess jew inkella mizuri illi jirregolaw l-indhil da parti ta' persuni ohra li jistghu jiksru d-drittijiet taghhom taht l-**artikolu 8.**

Illi l-gurisprudenza tal-Qorti Ewropeja taghti definizzjoni wiesgha ta' xi tfisser 'familja' hekk kif indikata fl-**artikolu 8 tal-Konvenzjoni Ewropeja.** Skont l-awturi ***Ovey and White*** dan ifisser li:-

"*The right to respect for family life, as guaranteed by Article 8 of the Convention, has as its principal element the protection of the integrity of the family…the Commission and the Court have considered the family to include husband and wife and children who are dependent on them, including illegitimate and adopted children'* **(Ovey and White, Jacobs & White The European Convention on Human Rights (Oxford)** (pagna*. 222*).

Illi fil-kaz **"Kroon and Others v. The Netherlands"** (27 ta' Ottubru 1994) il-Qorti Ewropeja qalet li:-

"The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation".

"According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner

calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family".

Illi f'dan il-kuntest jinghad li persuni transesswali ghamlu diversi tentattivi quddiem il-Qrati Maltin u l-Qorti Ewropeja sabiex, permezz tal-**artikolu 8**, is-sess taghhom assunt jew akkwistat jigi rikonoxxut legalment, u jirrizulta li dan irnexxa fuq diversi fronti. Fil-fatt fl-ewwel lok kien hemm l-ewwel ostakolu sabiex is-sess assunt jew akkwistat mill-istess persuni jigi rikonoxxut legalment fic-certifikati li johorgu mill-Istat bhac-certifikat tat-twelid. Dan fil-fatt sehh kemm mill-Qrati nostrali u hawn issir referenza ghas-sentenzi **"Raymond Gilford maghruf bhala Rachel Gilford vs Direttur tar-Registru Pubbliku"** (Q.K. 9 ta' Ottubru 2001); **"Joseph Ellul maghruf bhala Tracy Ellul vs Avukat Generali u d-Direttur tar-Registru Pubbliku"** (P.A. (RCP) - 2 ta' Novembru 2001); u **"Carmel Degiorgio vs Prim Ministru"** (P.A. (RCP) – 28 ta' Frar 2002) fost ohrajn, u kemm fis-sentenzi tal-Qorti Ewropeja (ECtHR) fll-ismijiet "**B vs France"** (1993) fejn gie nnotat li s-sitwazzjoni fir-rigward ta' persuni transesswali fl-Istati firmatarji tal-Konvenzjoni setghet tinbidel jekk jirrizulta li hemm iktar konsenus ghar-rikonoxximent tal-istess mill-Istati u b'hekk il-konkluzjonijiet setghu ikuu differenti minn dawk raggunti fil-kazijiet ta' **Rees** u ta' **Cossey** tant li f'din is-sentenza inghad li c-cirkostanzi kienu tali li n-nuqqas ta' l-Istat li jirrikonoxxi s-sess assunt tal-applikant kien jikser id-drittijiet fundamentali tieghu skont l-**artikolu 8 tal-Konvenzjoni**

Illi fil-fatt l-istess Qorti qalet li:-

"The Court thus reaches the conclusion on the basis of the above mentioned factors which distinguish the present case from the Rees and Cossey Cases and without it being necessary to consider the applicant's other arguments that she finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State's margin of appreciation, the fair balance which

has to be struck between the general interest and the interests of the individual has not been attained and there has thus been a violation of Article 8 ....."

Illi din id-decizjoni giet segwita b'dawk moghtija fil-21 ta' Jannar 1997 fl-applikazzjonijiet fl-ismijiet **"Kristina Sheffield vs United Kingdom" u "Rachael Horsham vs United Kingdom"** fejn inghad li:-

"Article 8 does not merely compel the State to abstain from ... interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life ... These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves." **("X and Y vs Netherlands"** (A 91 para 23) (1985).

Illi fil-fatt wara dawn is-sentenzi saru l-emendi fil-Ligi nostrali bl-introduzzjoni tal-**artikolu 257 A sa D tal-Kap. 16** permezz tal-**Att XVIII tal-2004** li permezz taghhom gie rikonnuxut li kull persuna <u>mhux mizzewga </u>u domiciljata f'Malta tista' taghmel azzjoni gudizzjarja li biha titlob li jsiru annotazzjonijiet dwar il-partikolaritajiet taghha dwar sess li jkunu gew assenjati lilu jew lilha fl-att ta' twelid taghha, kemm il-darba jigi ppruvat li l-persuna li tkun ghamlet l-azzjoni tkun ghaddiet minn bidla rriversibbli ta' sess li ma jkunx dak indikat fl-att ta' twelid jew inkella jekk kinitx dejjem tappartjeni ghal dak ta' sess iehor, u jekk ikun hekk il-kaz il-Qorti ghandha tilqa' t-talba jekk *"ikun gie sufficjentement stabbilit li l-attur ikollu sess li jghid li ghandu u l-kondizzjoni ta' l-attur tkun tista' tigi meqjusa bhala wahda permanenti'* u wkoll il-Qorti tista' tordna li ssir ukoll annotazzjoni fl-isem jew ismijiet ta' l-attur (**artikolu 257 B tal-Kap. 16).**

Illi skont l-**artikolu 257 C tal-Kap. 12** jirrizulta li tali annotazzjonijiet ghandhom ikollhom effett minn dak in-nhar li d-Direttur tar-Registru Pubbliku jnizzel dak it-tibdil fl-att ta' twelid, izda dan bl-ebda mod ma jolqot il-qrubija li tkun tezisti qabel id-data ta' l-istess annotazzjoni u kull

obbligu iehor li jorigina mill-istat ta' genitur jew kull kawza ohra. Skont l-**artikolu 257 D** persuna li favur taghha ssir tali annotazzjoni ghandha id-dritt li konformament mal-istess tezigi lill-Awtoritajiet kompetenti sabiex tinhargilha Karta tal-Identita' li tkun tindika s-sess u l-isem skont id-disposizzjonijiet maghmula mill-Qorti u dan japplika wkoll ghal kull kaz fejn awtorita' pubblika tkun mehtiega li tohrog xi certifikat jew dokument fir-rigward ta' kull persuna li bih jigi ndikat is-sess u l-isem tal-istess persuna kollox kif provdut fl**-artikolu 257 D tal-Kap. 16.**

Illi dan ifisser fl-opinjoni ta' din il-Qorti li b'effett tal-istess dikjarazzjoni gudizzjarja, u l-konsegwenti annotazzjonijiet, minn dak in-nhar tal-bdil tac-certifikat tat-twelid l-istess persuna ghandha u kellha tigi kkunsidrata ghall-finijiet u effetti kollha tal-ligi bhala tas-sess indikat fl-istess att ta' twelid, u dan jinsab provdut mill-istess Ligi, li ma pprovdiet l-ebda eccezzjoni ghall-istess ghal kull avveniment li l-istess persuna kellha taghmel wara tali tibdil.

Illi fil-fatt ir-rikorrenti usufruwiet minn tali disposizzjonijiet kif jidher mis-sentenza fl-ismijiet **"Joseph sive Joanne Cassar vs Direttur tar-Registru Pubbliku"** (P.A. (RCP) – 28 ta' Gunju 2006) u mill-annotazzjonijiet li saru konsegwenti ghall-istess. Dan kellu effett kbir fuq l-istess rikorrenti li bdiet tghix hajja li tirrispetta s-sess assunt u akkwistat, u issa legali taghha.

Illi fil-fatt fis-sentenza fl-ismijiet **"Id-Direttur tar-Registru Pubbliku vs Joanne Cassar"** (P.A. (JRM) – 21 ta' Mejju 2008) inghad li l-effett tal-istess disposizzjonijiet tal-ligi u tas-sentenza dikjaratorja *"jolqot radikalment l-identita' tal-persuna li tkun (u mhux biss id-dehra taghha) ghall-finijiet tal-istatus taghha f'ghajnejn il-ligi u ghall-finijiet u effetti kollha tal-istess ligi bla ebda distinzjoni ta' xejn".*

Illi f'dan il-kuntest din il-Qorti taddotta l-istess dikjarazzjoni izda mill-bqija tiddipartixxi minn dak li inghad fl-istess sentenza fis-sens li tali bdil fis-sess kif annotat ghandu jservi biss ghal certu sitwazzjonijiet. Dan ghaliex jidher li l-Ligi pprovdiet li r-rikonoxximent tas-sess assunt kellu jservi ghal kull avveniment fil-futur u dan huwa naturali,

ghaliex huwa biss b'rizultat tal-interventi li saru li attwalment is-sess tal-persuna ndikata kellu jigi l-ewwel mibdul bl-interventi appositi rikonoxxuti mill-ligi, u mbaghad fil-ligi; il-fatt li dan it-tibdil isir b'annotazzjoni, ma jbiddel xejn mill-fatt li permezz ta' l-istess is-sess assunt jew akkistat mill-persuna, dan gie rikonoxxut legalment; il-fatt li tali bidla fil-ligi sehhet minhabba li l-Qorti kienet sabet li n-nuqqas ta' rikonoxximent tal-Istat ta' sess assunt kien jikser l-**artikolu 8 tal-Konvenzjoni,** ma jfissirx li dan kien riferibbli biss ghad-dritt ta' rispett lejn il-hajja privata u dan ghaliex l-istess artikolu jipproteggi ukoll d-dritt ta' kull persuna ghall-familja u mkien fis-sentenzi li saret riferenza ghalihom ma inghad li dan il-bdil fis-sess tal-persuna ghandu jservi biss ghal xi skopijiet civili izda mhux ghall-ohrajn; fl-ahharnett il-fatt li tali dritt gie moghti biss lill persuna "mhux mizzewga" jfisser li l-legislatur kellu f'mohhu u kkonsidra x'effett tali bdil kien ser ikollu fuq persuna mizzewga b'dan li kien ser jaffettwa l-hajja mizzewga (proprju ghaliex kienet ser tinholoq sitwazzjoni fejn is-sess assunt jew akkwist ikun allura simili ghal dak tal-persuna l-ohra involuta f'tali zwieg), u allura tali dritt gie ristrett ghall-persuna mhux mizzewga, b'dan ghalhekk tali persuna li fil-futur setghet titlob li tizzewweg.

Illi huwa proprju dan il-punt li qam fil-kaz ta' **"Christine Goodwin v United Kingdom"** (11 ta' Lulju 2002) u **"I v United Kingdom"** (11 ta' Lulju 2002). Qabel dawn kien hemm il-kaz **"Rees v United Kingdom"** (ECtHR - 17 t'Ottubru 1986), fejn l-applikant kien twieled bhala mara izda wara li ha *"drug therapy"* u wara intervent kirurgiku maghruf bhala *"gender reassignment surgery",* huwa ried li s-sess assunt jew akkwistat tieghu ta' ragel jigi rikonoxxut legalment mill-Istat permezz ta' korrezzjoni fl-att ta' twelid. Dan dak iz-zmien inghad li ma kienx possibbli skont il-ligi tal-Istat, u l-Qorti Ewropeja f'dik is-sena sabet li l-Istat jista' ma jirrikonoxix is-sess assunt tar-rikorrenti u ghalhekk ma kinitx sabet lill-Istat hati ta' ksur ta' drittijiet umani skont **artikolu 8** ghaliex irriteniet li l-Istat ghandu johloq bilanc bejn l-individwu u s-socjeta' u l-margni ta' apprezzament tal-Istat f'dawn ic-cirkostanzi u sitwazzjonijiet kien jiggustifika l-agir tieghu. Erba' snin wara fil-kawza **"Cossey v United Kingdom"**, simili ghall-

kaz ta' **Rees,** il-Qorti Ewropea regghet qalet li ma kienx hemm ksur ta' l-**artikolu 8,** izda din id-darba sostniet li:-

"The Court... is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied <u>in the light of current circumstances</u>, it is important that the need for appropriate legal measures in this area should be kept under review".

Illi fil-kaz **"B. vs. France"** (ECtHR - 25 ta' Marzu 1992) l-applikant kien qieghed jilmenta dwar varji sitwazzjonijiet avversi li kien qieghed jiltaqa' maghhom kuljum u mhux biss il-bdil jew annotazzjoni fic-certifikat tat-twelid. F'dan il-kuntest wiesgha l-Qorti Ewropeja sabet li kien hemm vjolazzjoni tal-**artikolu 8** tant li qalet li:-

"*The Court thus reaches the conclusion, on the basis of the above-mentioned factors which distinguish the present case from the Rees and Cossey cases and without it being necessary to consider the applicant's other arguments, that she finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State's margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual (see paragraph 44 above) has not been attained, and there has thus been a violation of Article".*

Illi kif gja gie accenat ghalih f'din is-sentenza l-konsiderazzjonijiet tal-Qorti Ewropeja komplew jinbidlu u hadu zvolta decisiva ohra fil-kaz **"Christine Goodwin vs United Kingdom"** (ECtHR – 11 ta' Lulju 2002) u **"I vs United Kingdom".** Il-kaz ta' Christine Goodwin kien jittratta l-bdil ta' sess f'dokumenti ufficjali tal-Gvern u dan peress li l-applikant li meta twieled kien ragel, kien assuma u akkwista s-sess ta' mara u dan ma kienx gie rikonnuxt mill-Istat, tant li meta ir-rikorrenti baqghet tigi ikkunsidrata bhala ragel u dan ghal kull aspett fil-hajja taghha, inkluz ghal dak li jirrgwarda impjieg, beneficcji socjali, pensjoni u hajja mizzewga, hija ghalhekk sostniet

li dan it-trattamanent imur *inter alia* kontra l-**artikolu 8 tal-Konvenzjoni.** F'dan il-kaz ta' **Goodwin**, il-Qorti Ewropeja qalet:-

"85. The Court observes that in the case of Rees in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (see § 37). In the later case of Sheffield and Horsham, the Court's judgement laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".

Illi in vista tal-istess il-Qorti Ewropeja (EctHR) kompliet tghid li, l-essenza ta' Konvenzjoni hija r-rispett ghad-dinjita' u l-liberta' tal-individwu. B'hekk l-**artikolu 8** in partikolari, fejn in-nozzjoni tal-awtonomija tal-individwu huwa principju importanti, protezzjoni tinghata fl-isfera personali ta' kull individwu, inkluzi d-dritt li jistabbilixxu d-dettalji tal-identita' taghhom ta' bnedmin individwali.

Illi l-Qorti kompliet tghid li:-

"In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of Bellinger v. Bellinger (see paragraphs 50, 52-53)".

Illi kif inghad f'din il-kawza odjerna ir-rikorrenti intavolat proceduri *ai termini* ta' l-**artikolu 257A tal-Kodici Civili (Kap. 16 tal-Ligijiet ta' Malta)** fejn talbet illi jinbidel l-Att tat-Twelid taghha liema talba giet milqugha permezz ta' sentenza tat-28 ta' Gunju 2006 u fis-27 ta' Lulju 2006, id-Direttur tar-Registru Pubbliku ghamel l-annotazzjoni relattiva fl-Att tat-Twelid tar-rikorrenti. Ghalhekk huwa fatt li hija thalliet taghmel annotazzjoni f'certifikat ufficjali u llum l-istat civili taghha huwa dak ta' mara.

Illi l-intimat Registratur jghid li l-**artikolu 257A tal-Kapitolu 16** huwa ntiz sabiex persuna illi tkun ottjeniet l-apparenza esterjuri ta' persuna tas-sess oppost ma tkunx imbarazzata meta tipproduci dokumenti ufficjali li juru xort'ohra. Inoltre huwa jghid li effettivament il-'privatezza' tar-rikorrenti giet protetta u salvagwardjata bl-introduzzjoni ta' l-**artikolu 257A tal-Kodici Civili.**

Illi din il-Qorti hija tal-fehma li l-introduzzjoni ta' dan l-artikolu mhux intiz biss sabiex jissalvagwarda d-drittijiet tar-rikorrent fit-termini ta' privatezza kif qed jifhimhom l-intimat, izda l-kappa ta' protezzjoni hija bil-wisq ikbar ghaliex il-bdil fic-certifikat tat-twelid tar-rikorrenti jintitola l-istess, kif jippovdu l-istess artikoli, sabiex l-awtoritajiet kompetenti johorgu d-dokumenti kollha necessarji, inkluzi dawk tal-Karta tal-Identita`, u allura wkoll passporti, registrazzjoni tax-xoghol, u kull certifikati ohra, sabiex l-

istess persuna, fis-socjeta' u fit-trattamenti taghha mal-Awtoritajiet kompetenti tigi trattata ghall-finijiet u effetti kollha tal-ligi bhala mara, cjoe' konformament mas-sess taghha assunt jew minnha wara l-interventi imsemmija, u in vista tad-dikjarazzjoni tal-Qorti, u l-annotazzjojnijiet appositi. Din il-Qorti thoss li kemm il-darba Awtoritajiet Governattivi, nkluz l-intimat ma jirrikonoxxix, anke ghaz-zwieg, is-sess taghha assunt jew akkwistat bhala s-sess applikabbli ghaliha, anke ghall-fini tal-Ligi taz-Zwieg, dan jammonmta ghall-ksur tad-drittijiet taghha bhala mara u konsegwenti ksur tal-istess **artikolu 8 tal-Konvenzjoni.**

Illi ghalhekk huwa d-dritt tar-rikorrenti skont l-istess artikolu li tigi rikonoxxuta bhala mara, skont is-sess assunt taghha, mill-organi kollha tal-Istat, u dan anke in vista' tac-Certifikat tat-Twelid hekk annotat u emendat skont il-Ligi, u kull nuqqas ta' rikonoxximent bhala tali mhux biss imur kontra l-Ligi **(Kap. 16**), izda wkoll kontra d-disposizzjonijiet tal-**artikolu 8 tal-Konvenzjoni,** ghaliex kif gja spjegat, hawnhekk mhux qeghdin nitkellmu sempliciment fuq mezzi biex persuna transesswali ma tkunx imbarazzata, izda qeghdin nitkellmu dwar id-dinjita' u liberta' tal-individwu, u d-dritt tieghu li jigi rikonoxxut u trattat skont is-sess taghha akkwistat jew assunt, hekk kif issa rikonoxxut legalment, u dan in kwantu jirreferi ghall-atti kollha civili li jsehhu wara l-istess annotazzjoni. Din kienet il-linja ta' Qorti Ewropeja fil-kaz ta' Goodwin fejn qalet:-

"In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments (see references at paragraph 73). Most recently in the Sheffield and Horsham case in 1998, it observed that the respondent State had not yet taken any steps to do so despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted (cited above, paragraph 60). Even though it found no violation in that case, the need to keep this area under review was expressly re-iterated. Since then, a report has been issued in April 2000 by the

Interdepartmental Working Group which set out a survey of the current position of transsexuals in inter alia criminal law, family and employment matters and identified various options for reform. Nothing has effectively been done to further these proposals and in July 2001 the Court of Appeal noted that there were no plans to do so (see paragraphs 52-53). It may be observed that the only legislative reform of note, applying certain non-discrimination provisions to transsexuals, flowed from a decision of the European Court of Justice of 30 April 1996 which held that discrimination based on a change of gender was equivalent to discrimination on grounds of sex (see paragraphs 43-45 above)". Jinghad li r-Renju Unit irreagiet ghas-sentenza Goodwin u dan billi ghaddiet il-**"Gender Recognition Act 2004".** Hawn Malta saru l-emendi permezz tal-**artikolu 257 A u 257 D tal-Kap. 16** u f'dan il-kuntest is-sess tal-persuna tar-rikorrenti hekk akkwistat gie rikonoxxut, izda in kwantu l-istess jista' jigi b'xi mod interpretat, kif gie interpretat, li dan japplika biss ghal certu cirkostanzi wara li ssir tali annotazzjoni, tali decizjoni, tittiehed minn min tittiehed, jew ittiehdet minn min ittiehdet, inkluz allura mill-intimat, tmur kontra d-disposizzjonijiet tal-**artikolu 8 tal-Konvenzjoni,** u ghalhekk in kwantu l-istess rikorrenti ma gietx trattata u kkunsidrata bhala tas-sess femminili fil-kuntest tat-talba taghha biex tizzewweg persona tas-sess oppost ghal dak minnha assunt jew akkwistat, tali decizjoni, irrispettivament minn min inghatat, tilledi u kisret id-drittijiet tar-rikorrenti skont id-disposizzjonijiet tal-**artikolu 8 tal-Konvenzjoni Ewropeja.**

Illi jekk il-kawza tar-rikorrenti tigi trattata taht id-disposizzjonijiet tal-**artikolu 12 tal-Konvenzjoni Ewropeja** jinghad li dan jipprovdi li:-

"L-irgiel u n-nisa ta' età ta' zwieg ghandhom id-dritt li jizzewgu u li jkollhom familja, skont il-ligijiet nazzjonali li jirregolaw l-ezercizzju ta' dan id-dritt".

Illi fil-kawzi **"Rees vs United Kingdom"** (EctHR – 17 ta' Ottubru 1986 – Dok. "AG 6") u **"Cossey vs The United Kingdom"** (ECtHR – 27 ta' Settembru 1990), il-kwistjoni

tad-dritt ta’ zwieg ta’ persuni transesswali kienet tqanqlet, izda l-Qorti kienet qalet li:-

“In the Court’s opinion, the right to marry guaranteed by Article 12 (art. 12) refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family.’

Illli fil-kaz ta’ **“Cossey vs The United Kingdom”** (EctHR – 27 ta’ Settembru 1990 (Dok. “AG 7”) il-Qorti Ewropeja bidlet ftit il-fehma taghha u qalet li:-

“46. Although some Contracting States would now regard as valid a marriage between a person in Miss Cossey’s situation and a man, the developments which have occurred to date (see paragraph 40 above) cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the Court does not consider that it is open to it to take a new approach to the interpretation of Article 12 (art. 12) on the point at issue. It finds, furthermore, that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry”.

Illi fil-kaz ta’ **“Christine Goodwin vs. United Kingdom”** (EctHR – 11 ta’ Lulju 2002 – Dok. “AG 9”) il-Qorti Ewropea bidlet ghal kollox il-posizzjoni taghha dwar r-rikonoxximent tad-dritt ta’ transesswali li jassumi sess differenti minn dak li twieled bih u li jinsab indikat fic-certifikat tat-twelid tieghi, li jbiddel l-istess certifikat u wkoll li jkun jista’ jigi trattat ghall-finijiet u effetti kollha tal-ligi bhala persuna tas-sess oppost, u dan anke fil-kamp tal-Ligi taz-zwieg, tant li inghad:-

“97. The Court recalls that in the cases of Rees, Cosey and Sheffield and Horsham the inability of the transexuals

in those cases to marry a person of the opposite sex to their re-assigned gender was not found in breach of Article 12 of the Convention. These findings were based varuiously on the reasoning that the right to marry referred to the traditional marriage between persons of opposite biological sex (the Rees judgemen, p. 19 para. 49), the view tat continued adoption of biological criteria in domestic law for determining a person's sex for the purpose of marriage encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry and the conclusion that national laws in that respect could be regarded as restricting or reducing the right of a transsexual to marry in such a way or to such an extent that the very essence of the right is impaired (the Cosey judgment p. 18 para. 44-46, the Sheffield and Horsham judgment p. 2030 paras. 66-67). Reference was also made to the wording of Article 12 as protecting marriage as basis of the family (Rees loc.cit)".

"98. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision".

"99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see the Rees judgment, p. 19, §50; the F. v. Switzerland judgment of 18 December 1987, Series A no. 128, § 32)".

"100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that <u>at the date of this case</u> it can still be <u>assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J in the case of Corbett v. Corbett,</u>

paragraph 21 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of Tran sexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors - the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women (see paragraph 58 above)."

"101. The right under Article 8 to respect for private life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention, The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as according to law, they remain able to marry a person of their former sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so, In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed".

"103. It may be noted ....that fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for

leaving the matter entirely to the Contracting States as being within their margin of appreciation. <u>This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on an exercise of the right to marry. The margin of appreciation cannot extend that far. While it is for the Contracting State to determine inter alia the conditions under which a person claiming legal recognition as a transexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information, to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances"</u>

"104. The Court concludes that there has been a breach of Article 12 of the Convention in the present case".

Illi l-istess gie ritenut fil-kaz ta' **"I vs The United Kingdom"** (EctHR – 11 ta' Lulju 2002) u dak ta' **"Shalk and Kopf vs Austria"** (EctHR – 24 ta' Gunju 2010) liema kaz kien jitratta dwar l-allegazzjoni ta' persuni tal-istess sess li jizzewgu u f'dan il-kuntest inghad li l-posizzjoni llum hija li:-

"52. In the Christine Goodwin (cited above para 100-104) the Court departed from that case law: It considered that the terms used in Article 12 which referred to the right of a man and woman to marry no longer had to be understood as determining gender by purely biological criteria. In that context, the Court noted that there had been major social changes in the institution of marriage since the adoption of the Convention. Furthermore, it referred to Article 9 of the Charter of Fundamental Rights of the European Union, which departed from the wording of Article 12. Finally, the Court noted that there was widespread acceptance of the marriage of transsexuals in their assigned gender. <u>In conclusion the Court found that the impossibility for a post-operative transsexual to marry in her assigned gender violated Article 12 of the Convention".</u> Minn naha l-ohra zwieg bejn persuni tal-

istess sess gie michud u inghad li tali cahda jew nuqqas ta' rikonoxximent ma jmurx kontra d-drittijiet protetti fil-Konvenzjoni.

Illi dan gie wkoll kkonfermat fil-kazi **"Parry vs The United Kingdom"** u **"R. and F. vs The United Kingdom"** (EctHR – 28 ta' Novembru 2006) li kienu jittrattaw dwar kazi ta' koppja mizzewga konsistenti f'mara u ragel li kien assuma s-sess ta' mara *(male-to-female post-operative transsexual)* fejn ilmentaw li ma inghatawx legalment gharfien tas-sess assunt taghhom, u l-Qorti f'dan il-kaz irregettat l-allegazzjoni taghhom li dan jikser id-dritt fundamentali taghhom skont l-**artikolu 12,** ghaliex il-Qorti sostniet li:-

"The Court dismissed that complaint as being manifestly ill-founded. It noted that domestic law only permitted marriage between persons of opposite gender, <u>whether such gender derived from attribution at birth or from gender recognition procedure, while same sex marriages were not permitted.</u> Similiarly, Article 12 enshrined the traditional concept of marriage between a man and a woman. The Court acknowledged ....that it fell within the State's margin of appreciation how to regulate the effects of a change of gender <u>on pre-existing marriages".</u>

Illi mela dan ifisser li llum hija cara u konsistenti il-posizzjoni li hadet il-Qorti Ewropeja fis-sens li persuna li bidlet is-sess taghha b'mod irreversibbli bhal kaz odjern, ma tistax tigi mpeduta mill-Istat li tizzewweg persuna tas-sess oppost minn dak ta' dak minnha assunt jew akkwistat u rikonoxxut skont il-ligi. Dak li ma huwiex permess huwa zwieg bejn zewg persuni tal-istess sess, u persuna li bidlet is-sess taghha, kif provdut mil-Ligi, u rikonoxxuta bhala tali, ghandha d-dritt li tizzewweg persuna tas-sess oppost ghal dak minnha assunt jew akkwistat; altrimenti jekk tigi mpeduta milli taghmel dan, hija ma tkunx tista tizzewweg, ghaliex certament ma tistax tizzewweg persuna tas-sess simili ghal dak li twieldet bih ghaliex b'hekk tigi li qed tizzewweg persuna tal-istess sess, b'dan li f'dawn ic-cirkostanzi l-Istat ikun qed jikser id-

dritt taghha kif protett taht id-disposizzjonijiet tal-**Artikolu 12 tal-Konvenzjoni.**

Illi huwa veru li fis-sentenza fl-ismijiet **"Joseph Hili maghruf bhala "Nadia Hili vs L-Avukat Generali u d-Direttur tar-Registru Pubbliku"** (P.A. (TM) - 16 ta' Jannar, 2003) tali talba simili ghal dik odjerna kienet giet rigettata minkejja din il-gurisprudenza tal-Qorti Ewropeja peress li inghad li "*l-Qorti thoss, pero', li fil-kuntest tad-Drittijiet tal-Bniedem, qed nirreferu ghad-Drittijiet Fundamentali tal-Bniedem, drittijiet, cioe' li johorgu min-natura stess tal-Bniedem u li ma nholqux minn xi stat jew minn Organizazzjoni, izda li kienu jezistu sa mill-holqien tal-bniedem".* Fil-fatt l-istess Qorti sostniet li dak propost mir-rikorrenti ma kienx permessibbli, ghaliex ghalkemm *"l-bniedem jista' jakkwista drittijiet godda b'rizultat ta' avvanz fix-xjenza u fl-izvilupp li jsir fis-socjeta', pero', dan ma jistax iwassal ghall-holqien ta' dritt fundamentali gdid. Id-drittijiet fundamentali tal-bniedem jitwieldu fih malli dan isir suggett tad-dritt, u meta jitwieled, ragel jew mara, jakkwista u jsir proprjetarju ta' certi drittijiet inerenti ghan-natura tieghu. Dawn id-drittijiet isiru parti mill-personalita' tieghu, u, ghalkemm, persuna tista' tbiddel isimha u tista' tbiddel l-apparenza taghha (u, kif intwera, dik il-persuna ghandha dritt titlob li din l-ghazla taghha tigi rispettata), in-natura taghha ma tinbidilx, u jekk persuna titwieled bis-sess biologiku maskil, dik tibqa' n-natura ta' dik il-persuna, inerenti bid-drittijiet li l-ligi naturali tforniha".*

Illi izda din il-Qorti, rispettosament, tiddikjara li ma ghandhiex u lanqas ghandha taccetta dan l-insenjament ghaliex fl-ewwel lok il-Qorti Ewropea (EctHR) fid-decizjonijiet kollha fuq imsemmija kienet qed tittratta fuq drittijiet fundametali u fil-fatt il-kompetenza taghha attwali hija dik ta' Qorti ta' entita' vitali ghall-Istati kontraenti li tapplika u tinterpreta d-drittijiet fundamentali hekk kif indikati fil-Konvenzjoni Ewropea u d-drittijiet tal-Bniedem formanti parti mill-Protokolli relattivi, nkluz l-**artikoli 8 u 12** hawn inkonsiderazzjoni.

Illi fit-tieni lok id-Drittijiet Fundamentali tal-Bniedem huma dawk indikati fl-istess Konvenzjoni u tali drittijiet jinbidlu

jew ahjar jevolvu maz-zmien u huma d-drittijiet rikonoxxuti favur il-bniedem li tant huma importanti li l-ebda Stat ma jista’ jidderoga minnhom jew imur kontra taghhom hlief, jekk ikun il-kaz, kif provdut fl-istess Konvenzjoni. F’dan is-sens huma fundamentali u ghalhekk huma ta’ importanza massima, iktar u iktar ghalina li d-drittijiet fundamentali taghna jinsabu wkoll protteti bil-Kostituzzjoni. Certament li drittijiet fundamentali ma jfissrux li twieldu mal-bniedem, tant li f’dan il-kuntest ir-rikorrenti kienet gja ezercitat id-dritt li gie rikonoxxut mill-Qrati Maltin u wkoll mill-Qorti Ewropea li jkollha gharfien tas-sess assunt jew akkwistat minnha fic-certifikat tat-twelid taghha, dritt li certament ma twelidx maghha u lanqas ghall-ewwel ma kien rikonoxxut mill-gurisprudenza stess tal-Qorti Ewropeja. Din hija s-sahha tal-Konvenzjoni Ewropeja li ghandha tigi interpretata u zviluppata permezz tas-sentenzi tal-Qorti Ewropeja; b’hekk il-Konvenzjoni miktuba 60 sena ilu hija valida u hajja illum ukoll. Fil-kuntest tat-transesswalita’ kien hemm zviluppi interpretattivi li din il-Qorti ma tistax ma taghtix kazhom.

Illi fil-kuntest tad-dritt taz-zwieg ghal persuni transesswali n-negazzjoni ta’ dan id-dritt li jizzewgu persuna tas-sess oppost ta’ dak minnhom akkwistat jew assunt u illum annotat fic-certifikat tat-twelid taghom, ma jistax jigi interpretat fil-kuntest ta’ *‘margin of appreciation’* li huwa mholli lill-Istat jekk dan iwassal li dan id-dritt jigi effettivament negat. Hawn terga ssir riferenza ghal dak li inghad f’paragrafi 103 u 104 fil-kaz ta’ **“Christine Goodwin vs. United Kingdom”** (EctHR – 11 ta’ Lulju 2002) u ghalhekk din il-Qorti ssib li f’dan il-kaz hemm ksur tad-drittijiet fundamentali tar-rikorrenti skont l-**artikolu 12 tal-Konvenzjoni** bic-cahda da parte tal-intimat li jinhargu t-tnidijiet fil-konfront tar-rikorrenti sabiex hija tizzewweg lill-persuna tas-sess maskil, la darba ir-rikorrenti skont il-ligi Maltija hija kkonsidratat bhala mara.

Illi dwar il-Protezzjoni minn Trattament Inuman jew Degradanti l-artikolu 3 tal-Konvenzjoni jghid hekk: *“Hadd ma ghandu jigi assoggettat ghal tortura jew ghal trattament jew piena inumana jew degradanti”.* Fil-kaz in ezami qed jigi allegat li l-fatt li skont il-ligi ta' Malta

persuna transesswali hija negata mill-possibilita li tizzewweg persuna ta' sess maskili u lanqas ma tista' tizzewweg persuna ta' sess femminili dan huwa trattament inuman jew degradanti.

Illi kif jispjegaw **van Dijk u van Hoof** fit-tielet edizzjoni tal-ktieb **Theory and Practice of the European Convention on Human Rights** (Kluwer, The Hague, 1998):-

"There is no abstract, absolute standard for the kinds of treatment and punishment prohibited by Article 3. The question whether a treatment or punishment is inhuman or degrading must be judged by the circumstances of the case and the prevalent views of the time" (p. 311). Bhala regola, u a bazi ta' dak li gie deciz mill-Qorti Ewropea fil-kaz **Ireland v. United Kingdom** (18 ta' Jannar 1978)**,** ikun hemm trattament inuman meta jkun hemm *"the infliction of intense physical or mental suffering",* filwaqt li trattament degradanti jinkludi *"ill-treatment designed to arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"* (ara wkoll **Short Guide to the European Convention on Human Rights**, Council of Europe, Strasbourg, 1998, p.12). Biex trattament, jew ahjar maltrattament, jista' jinghad li jammonta ghal trattament inuman jew degradanti (jew it-tnejn) *"…it must attain a minimum level of severity…The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim"* **(Ireland v. United Kingdom, 18/1/78, A.21 (1978) p.65).**

Illi l-awtur **Luke J. Clements** jikteb li:-

"*Article 3 is one of the non derogable rights under Article 15 … . The duty placed upon the state is to ensure that within its jurisdiction …. no one is subjected to such ill treatment. … … … . Whilst torture and inhuman treatment connoted unnecessary assaults within the tortious meaning of the word, degrading treatment is concerned*

with behaviour that is designed to distress and humiliated the victim." Il-Kummissjoni Ewropea u l-Qorti Ewropea kkonsidraw li fl-interpretazzjoni ta' trattament degradanti *"….What matters is that the treatment …. should constitute 'an assault on precisely that which is one of the main purposes of Art. 3 to protect, namely a person's dignity ….' …. ."*

Illi fl-ahharnett fl-**East African Asians Case** *"…. the Commission considered that degrading treatment was not restricted to actual assaults but included acts of a serious nature designed to interfere with the dignity of a person … …. …".* F'dan il-kaz, disposizzjonijiet diskriminatorji kontenuti f'ligi gew ikkunsidrati mill-Kummissjoni Ewropea bhala trattament degradanti.

Illi din l-Qorti hija tal-fehma li n-nuqqas tal-salvagwardji kif konsidrati f'din id-decizjoni anke fil-kuntest sia ta' l-**artikolu 8** u sia tal-**artikolu 12,** sabiex ir-rikorrenti, persuna transesswali, tkun tista' tghix id-dinjita' u liberta' taghha bhal individwi ohra fil-pajjiz, ma jammontawx ghall-ksur tal-**artikolu 3 tal-Konvenzjoni u artikolu 36 tal-Kostituzzjoni ta' Malta** ghalkemm fil-kuntest ta' dak deciz din hija biss kwistjoni akkademika.

Illi fl-ahharnett il-Qorti thoss li d-dikjarazzjonijiet hawn fuq indikati, li jwasslu sabiex jintlaqghu l-ewwel u t-tielet talba attrici. huma rimedji adegwati u sufficjenti ghall-kaz in ezami u r-raba' talba ma ghandhiex tigi milqugha.

III. KONKLUZJONI.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi,** billi filwaqt li tilqa' l-ewwel u l-hames eccezzjoni tal-intimati fil-kaz biss li l-istess huma konformi ma' dak hawn deciz, izda tichad l-eccezzjonijiet l-ohra tal-intimati nkwantu nkonsistenti ma` dak hawn deciz, u fil-waqt li **tichad it-tieni u r-raba' talba tar-rikorrenti, izda tilqa' l-ewwel u t-tielet talba tar-rikorrenti fir-rikors taghha datat 29 ta' Lulju 2008 biss fil-kuntest ta' dak hawn deciz**, b'dan illi:-

i) Tiddikjara illi, minhabba illi l-fatt illi l-Ligi ta' Malta kif applikata u interpretata mill-intimat id-Direttur tar-Registru Pubbliku, ma rrikonoxxietx it-transesswali bhala persuni tas-sess akkwistat ghall-finijiet u effetti kollha taghha inkluz ai finijiet tal-ligi taz-zwieg, u ghalhekk u biss f'dan is-sens gew lezi id-drittijiet tar-rikorrenti skont l-**artikoli 8 u 12 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem.**

iii) Tiddikjara illi l-intimat Direttur tar-Registru Pubbliku ma jistax jirrifjuta li johrog it-tnidijiet ghaz-zwieg tar-rikorrenti ma' persuna ohra ta' sess maskil u dan a bazi tal-fatt illi r-rikorrenti twieldet bhala ragel u ssottomettiet ruhha ghall-operazzjoni fuq indikata u assumiet u akkwistat is-sess ta' mara u dan kif rifless fl-annotazzjonijiet li saru fic-certifikat tat-twelid taghha konsegwenti ghas-sentenza fl-ismijiet **"Joseph *sive* Joanne Cassar vs Direttur tar-Registru Pubbliku"** (P.A. (RCP) – 28 ta' Gunju 2006).

Bl-ispejjez kontra l-intimati.

< Sentenza Finali >

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