QORTI CIVILI PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF MARK CHETCUTI LL.D.

Illum it-Tlieta, 28 ta' Gunju 2016

Numru 1

Rikors Nru. 30/2015

Rosanne Galea, John David Galea

vs

Avukat Generali, Kummissarju tal-Pulizija

Il-Qorti,

Rat ir-rikors kostituzzjonali tar-rikorrenti tal-14 ta' April 2015 li jghid hekk:

Fatti tal-Kaz
Illi l-esponenti fiz-zmien meta gew akkuzati quddiem il-Qorti tal-Magistrati (Malta) kienu d-diretturi tas-Socjeta Future Focus Limited liema socjeta kostitwita fis-sena elfejn (2000), u li kienet tipprovdi tahrig inter alia fl-informatika liema tahrig kien isir principalment anke jekk mhux esklussivament minn fond f'Triq il-Maggazini, Furjana fejn hemm skola allestita ghal dan il-ghan.

Illi l-esponenti gew akkuzati illi in rapprezentanza tas-socjeta Future Focus Limited, sabiex jiksbu xi vantagg jew beneficcju ghalihom infushom jew ghal haddiehor, f'xi dokument mahsub ghal xi awtorita pubblika, xjentement ghamlu dikjarazzjoni jew stqarrija falza, jew taw taghrif falz.

Illi l-fatti li kkaratterizzaw il-kawza kienu illi l-esponenti bhala diretturi tas-socjeta Future Focus Limited kienu ntrabtu illi jipprovdu tahrig fl-informatika permezz ta' korsijiet ghal Malta College for Arts, Science and Technology

(MCAST), istitut akkademiku governattiv. Dan l-istitut governattiv minhabba d-domanda qawwija ghal dan is-suggett, ma kienx ser ilahhaq biex jakkomoda l-istudenti kollha li kienu ser jintraprendu dan il-kors. Ghalhekk, inharget talba lill-istituzzjonijiet edukattivi privati sabiex joffru, taht is-supervizjoni tal-istitut, is-servizzi taghhom. Fost l-offerenti kien hemm s-socjeta tal-esponenti li kienet gia fis-sena precedenti provdiet dan it-tahrig f'isem l-MCAST. Inhargu 'tenders' ghal dan il-fini u in segwitu l-Pulizija giet mitluba tinvestiga l-metodu tal-ipprocessar taghhom minhabba allegati irregolaritajiet, senjatament, fil-konfront tas-socjeta tal-esponenti, li ghamlet dikjarazzjonijiet foloz dwar li l-fond taghhom kien jipprovdi accessibilita lil persuni b'dizabilita. Jirrizulta illi l-esponenti kienu dahlu offerta ghal tnejn mit-tlett 'tenders' li kienu nhargu, li kienu entrambi accettati.

Illi l-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali permezz ta' sentenza datata ghoxrin (20) ta' Marzu tas-sena elfejn u tlettax (2013) fl-ismijiet Il-Pulizija vs Rosanne Galea et ma sabietx lill-esponenti hatja tal-akkuza migjuba fil-konfront taghhom u ghalhekk illiberathom minn kull imputazzjoni u htija.

Illi l-Avukat Generali hassu aggravat bis-sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali u ghalhekk interpona umli appell. Il-Qorti tal-Appell Kriminali permezz ta' sentenza datata sitta (6) ta' Marzu tas-sena elfejn u erbatax (2014) fl-ismijiet Il-Pulizija vs Rosanne Galea et irrevokat is-sentenza appellata u wara li rat l-artikolu 188 tal-Kap. 9 tal-Ligijiet ta' Malta ddikjarat lill-esponenti hatja tal-imputazzjoni migjuba kontra taghhom u kkundannathom ghal piena ta' prigunerija ta' tmintax-il xahar kull wiehed u wahda minnhom b'dana pero illi dan it-terminu ghandu jkun sospiz ghal zmien sentejn.

Ilmenti Kostituzzjonali
1) Dritt tal-Assistenza Legali
Illi l-esponenti kienu irrilaxxaw zewg stqarrijiet a tempo vergine meta gew interrogati mill-Pulizija, minghajr ma inghataw l-opportunita ghall-access tal-assistenza legali minn avukat tal-fiducja taghhom peress illi l-ligi f'dak iz-zmien ma kienetx tippermetti dan.

Peress illi l-ligi fiz-zmien illi fih l-esponent gie arrestat u investigat ma kienetx tipprovdi ghad-dritt tal-assistenza legali lill-arrestat f'ebda hin tal-arrest, qabel jew matul l-interrogazzjoni kif ukoll ma kienetx tippermetti li l-persuna investigata access tal-file tal-Pulizija u dan jikkostitwixxi ksur tad-dritt fundamentali tal-esponent ghal smigh xieraq ai termini tal-artikolu 39 tal-Kostituzzjoni ta' Malta u artikolu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem.

Illi sahansitra l-Qorti tal-Appell Kriminali fl-ezaminazzjoni tal-provi sabiex waslet ghall-konkluzzjonijiet taghha, strahet partikolarment fuq l-istqarrijiet tal-esponenti, liema stqarrijiet gew mehuda minghajr l-esponenti kellhom access ghal assistenza legali minn avukat tal-fiducja taghhom.

Illi ghalhekk jigi umilment sottomess illi din il-procedura kellha necessarjament tigi ntavolata u dan peress illi jidher car illi l-Onorabbli Qorti tal-Appell Kriminali

tat piz lill-istqarrijijet rilaxxata mir-rikorrenti fil-konsiderazzjoni taghha biex tinghata s-sentenza u konsegwentement issib htija fl-esponenti, Dan ghaliex, il-Qorti tal-Appell Kriminali, tghid testwalment hekk:

Fl-istqarrija taghha l-appellata Rosanne Galea tammetti illi persuna b'wheelchair ma tistax taccedi ghal dan il-fond meta hi tghid "le, mhux accessibbli ghal kull persuna b'dizabilita, imma huwa accessibbli ghall-maggoranza ta' persuni b'dizabilita hlief persuni illi ghandhom bzonn wheelchair." Deherilha illi ma kellhiex tiddikjara dan fid-dokumenti tat-tender il Kopja Informali ta' Sentenza Pagna 14 minn 16 Qrati tal-Gustizzja ghaliex qatt ma kellhom persuna b'wheelchair minn mindu fethu f'Dicembru tas-sena elfejn (2000). L-istess jammetti l-appellat John Galea fejn filwaqt illi ammetta illi kien iddikjara illi l-fond kien accessibbli ghal persuni b'dizabilita, spjega illi dizabilita tista' tfisser hafna sitwazzjonijiet u mhux biss wheelchair, allura f'dak il-kaz il-post kien accessibbli ghal hafna dizabilitajiet. Argumenta illi skont it-tender documents ma giex definit ebda standards ta' accessibility for persons with disabilities. Hawn qieghda l-kontroversja f'dan il-kaz. Filwaqt illi l-Avukat Generali qieghed jargumenta illi access ghall-persuni b'dizabilita ghandha tfisser access b'wheelchair, l-appellati qeghdin jghidu illi access ghal persuni b'dizabilita tista' tfisser hafna affarijiet ghal hafna forom ta' dizabilitajiet u l-fond hu accessibbli ghal hafna nies b'dizabilita ghad illi jista' jkun hemm diffikultajiet ghal persuni f'wheelchair. Argumentaw, per ezempju, illi rampa tista' sservi ghal wheelchair izda ghal amputee bi prostasis hija l-ghar haga li jista' jkollu. Terga', filwaqt illi ammettew illi l-fond kellu tarag, u dan kien problema, izda ma kien hemm ebda definizzjoni fit-tender document ta' xhiex kellha tkun id-dizabilita u x'kien mistenni mill-applikanti. Skont it-tender, is-servizz shih kellu jigi ipprovdut wara l-mobilisation period u mhux f’dak l-istadju tat-tender, fejn f’dak l-istadju wkoll ma kienx hemm kejl tal-Qorti fuq xiex timxi u ghalhekk l-argument tal-Qorti tal-Magistrati kien korrett u kellha tigi konfermata minn din il-Qorti.

Ikkunsidarat:

Din il-Qorti ma taqbilx ma' dan l-argument. Tibda biex taghmilha cara u tafferma bhala principju ...

Konsegwentement, jidher car illi l-Qorti tal-Appell Kriminali tat piz qawwi lil istqarrija tar-rikorrenti (liema huma rrilaxxaw minghajr assistenza legali) sabiex waslet ghas-sejbien ta' htija taghhom.

Illi l-eskluzjoni totali ta' avukat tal-fiducja tal-esponenti mill-istadju tal-investigazzjoni, partikolarment waqt it-tehid tal-istqarrija huwa leziv tad-drittijiet fundamentali taghhom ghall-smigh xieraq u hija ta' pregudizzju kbir ghall esponenti;

Illi d-dritt tal-assistenza legali ghall-persuni suspettati waqt l-investigazzjoni, bhala aspett tad-dritt fundamentali ghal smigh xieraq ai termini tal-artikolu 39 tal-Kostituzzjoni u artikolu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem gie stabbilit permezz tal gurisprudenza kopjuza u kostanti tal-Qorti Ewropea tad-drittijiet fundamentali tal-bniedem liema dritt gie ritenut illi jigi

miksur anke jekk il-persuna suspettata u investigata tibqa' siekta tul il-kors kollu tal-arrest taghha;

Illi fil-kaz Salduz vs Turkey deciz fis-sebgha u ghoxrin (27) ta' Novembru tas-sena elfejn u tmienja (2008);

"In order for the right to a fair trial to remain sufficiently 'practical and effective' ..., art 6 S 1 [of the Convention] requires that as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction." (S55)

Illi inoltre l-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kaz Dayanan v. Turkey (13.10.2009 (II) irriteniet is-segwenti;

“As emerges from the generally recognized international norms, which the Court accepts and which complement its case-law, a suspect must be afforded assistance by a lawyer as soon as he has been deprived of his liberty, whether or not he is to undergo interrogations.

In the instant case it is not disputed that the applicant was not assisted by a lawyer when he was in custody, as such assistance was not allowed by the law in force at the relevant time. In itself, such a systematic restriction based on relevant statutory provisions warrants the conclusion that the requirements of article 6 have not been met, irrespective of the fact that the applicant remained silent throughout his custody."

Illi inoltre il-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-sentenza Pischalnikov v. Russia deciza fl-erbgha u ghoxrin (24) ta' Settembru tas-sena elfejn u disgha (2009) spjegat fid-dettal il-funzjonijiet varji u teknici tal-avukat fl-istadju tal-investigazzjoni:

"Having been denied legal assistance, the applicant was unable to make the correct assessment of the consequences his decision to confess would have on the outcome of the criminal case ... In the absence of assistance by counsel, who could have provided legal advice and technical skills, the applicant could not make full and knowledgeable use of his rights afforded by the criminal procedural law ..."

L-istess principji intqalu mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-sentenza Plonka vs Poland deciza fil-wiehed u tletin ta' Marzu tas-sena elfejn u disgha (2009);

'The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial

(Poitrimol v. France, 23 November 1993, § 34, Series A no. 277-A, and Demebukov v. Bulgaria, no. 68020/01, § 50, 28 February 2008).

The Grand Chamber has recently stressed that in order for the right to a fair trial to remain sufficiently "practical and effective" article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see Salduz v. Turkey [GC], no. 36291/02, § 55, 27 November 2008).

In view of the circumstances the guarantee of fairness enshrined in article 6 required that the applicant had the benefit of the assistance of a lawyer from the very first stage of police questioning. In this regard, it is not for the Court to speculate on what the applicant's reaction or her lawyer's advice would have been had she had access to a lawyer at the initial stage of the proceedings (see Salduz, cited above, § 58).

The Court considers that in the present case the applicant was undoubtedly directly affected by the lack of access to a lawyer during her questioning by the police. Neither the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the police custody.

The foregoing considerations are sufficient to enable the Court to conclude that there has been a breach of article 6 § 1 of the Convention in conjunction with article 6 § 3 (c). Having regard to this finding, the Government's preliminary objection must be rejected.

Illi ghaldaqstant jirrizulta car u inekwivoku mill-gurisprudenza kopjuza u kostanti tal-Qorti Ewropea tad-Drittijiet tal-Bniedem illi tali ksur jissussisti awtomatikament mic-cahda tal-access tal-assistenza legali Iill-persuna suspettata u dan indipendetament mic-cirkostanzi, karattru, antecedenti, vulnerabbilita o meno, tal-persuna investigata (Salduz vs Turkey; Brusco vs France; Panovits vs Cyprus; Pischalnikov vs Russia; Dayanan vs Turkey; Plonka vs Poland; Pavlenko vs Russia; Boz vs Turkey; Demirkaya vs Turkey).

Illi f'Malta l-Qorti Kostituzzjonali wkoll sabet ksur tad-dritt fundamentali ta' smigh xieraq fis-sentenzi Pulizija vs Alvin Privitera u Pulizija vs Esron Pullicino.

Illi, fil-fatt, fil-kaz Il-Pulizija vs Alvin Privitera deciza fil-hdax (11) ta' April tas-sena elfejn u hdax (2011), il-Qorti Kostituzzjonali sahqet illi:

"Il-Qorti tikkonkludi li fil-kaz odjern kien hemm lezjoni tad-dritt tal-appellant ghal smigh xieraq kif sancit fl-artikolu 6(3)(c) konguntivament mal-artikolu 6(1) tal-Konvenzjoni Ewropeja meta huwa ma nghatax l-assistenza legali. Din il-Qorti hi tal-fehma li d-dritt li persuna arrestata tigi assistita minn avukat ghandu

jinghata fil-bidunett tal-investigazzjoni u qabel ma dik il-persuna tirrilaxxja stqarrija."

L-istess Qorti Kostituzzjonali fil-kaz Il-Pulizija vs Esron Pullicino deciza fit-tnax (12) ta' April tas-sena elfejn u hdax (2011) irriteniet illi:

Ghalhekk, skont il-Qorti ta' Strasbourg, ir-regola hija li akkuzat ghandu jkollu access ghall-avukat fl-istadju bikri tal-investigazzjoni.

Din il-Qorti tirrileva li r-raguni li l-Qorti Ewropeja tinsisti fuq id-dritt ghall-assistenza legali fl-istadju inizjali tal-investigazzjoni hija minhabba l-principju li hadd ma ghandu jinkrimina ruhu kif ukoll biex jinzamm bilanc bejn id-drittijiet tal-akkuzat u dawk tal-prosekuzzjoni.

Illi dwar ir-rimedju mitlub minnhom, l-esponenti jaghmlu referenza inter alia ghad-decizjoni tal-Qorti Ewropeja fl-ismijiet Panovits vs Cipru, deciza fil-11 ta' Dicembru, 2008, fejn il-Qorti qalet:

'It reiterates that when an applicant has been convicted despite an infringement of his rights as guaranteed by article 6 of the Convention, he should, as far as possible, be put in the position that he would have been in had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial de novo or the reopening of the proceedings.'

2) Enuncjazzjoni zbaljata tal-Ipotezi tal-Ligi
Illi t-tieni lment tal-esponenti jikkoncerna l-enuncjazzjoni zbaljata tal-ipotezi tal-ligi f'diversi punti tas-sentenza ppronuncjata mill-Qorti tal-Appell Kriminali li jwasslu ghal ksur tad-dritt fundamentali tal-esponenti ghal smigh xieraq ai termini tal-artikolu 39 tal-Kostituzzjoni tal Malta u artikolu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem. Fil-fatt, fid-diversi konsiderazzjonijiet li ghamlet il-Qorti tal-Appell Kriminali sabiex waslet ghall-konkluzjoni taghha, l-istess Qorti ghamel konsiderazzjonijiet legali mhux fattwali liema konkluzzjonijiet huma ghalhekk zbaljati u wasslu sabiex l-esponenti ma kellhomx smigh xieraq.

Fl-ewwel lok, il-Qorti tal-Appell Kriminali rriteniet illi "filwaqt illi huwa minnu illi gudikant jista' ma joqghodx fuq relazzjoni teknika, pero dan ma jistax jaghmlu kapricojazment u jista' biss ma joqghodx fuq rakkomandazzjonijiet teknici jekk ikollu rapport iehor illi jmeri jew ivarja l-ewwel rapport. Il-Qorti ma jkollhiex esperjenza f'certa oqsma teknici illi gieli jkollha thabbat wiccha maghhom u ghalhekk tinnomina periti li jkunu esperti fil-materja sabiex jghinuha u jaghmlu r-rakkomandazzjonijiet taghhom. Dawn ir-rakkomandazzjonijiet ghandhom jigu osservati u mhux imwarrba ghax hekk biss il-Qorti jista' jkollha s-serhan tal-mohh illi tiehu decizjonijiet bazati fuq rakkomandazzjonijiet maghmula minn persuni teknici."

Illi din il-konkluzjoni maghmula mill-Qorti ma tohrog imkien mil-ligi anzi sahansitra l-Kodici Kriminali jipprovdi illi "min ghandu jiddecidi mhux marbut li joqghod ghall-fehma tal-periti kontra l-perswazjoni tieghu" (artikolu 656 tal-Kodici Kriminali). Dan ifisser illi l-Qorti tal-Appell Kriminali mhux talli ma

segwitx id-dettami tal-ligi hekk kif provduti fil-Kodici Kriminali izda sahansitra marret kontra dak provdut fl-istess Kodici.

Illi fit-tieni lok l-istess Qorti tal-Appell Kriminali ghamlet enunzjazzjoni zbaljata ohra tal-ligi meta rriteniet illi "L-importanti hu illi dakinhar illi gie pprezentat it-tender document fil-hdax (11) ta' Settembru tal-elfejn u tmienja (2008) dak id-dokument kien jghid xi haga illi ma kienx veru. L-appellati kienu jafu b'dan, hadu gwadann minn din il-gidba billi l-process ghadda fl-istadju tal-evalwazzjoni, Il-fatt illi gie istallat stair climber fl-ghoxrin (20) ta' Novembru tal-elfejn u tmienja (2008) ma jbiddel xejn ghas-sitwazzjoni legali li qed jaffrontaw l-appellati. Dan l-istair climber gie istallat wara l-prezentata tad-dokument tat-tender fejn allura l-appellati ircevew vantagg minn dan id-dokument sforz ghall-gidba illi kien fih. Dan jaqa' nettament taht ic-censura tal-artikolu 188 tal-Kap. 9 li ghaliha l-appellati ghandhom iwiegbu."

F'kull stadju ta' sejha ghal tender hemm zewg stadji u cioe l-bidding process u s-selection process li jwassal ghall-iffirmar tal-kuntratt. Bejn dawn iz-zewg perjodi hemm dak li jissejjah l-mobilisation period li fl-istess kuntratt gie imfisser bhala "l-avviz bil-quddiem ghal min jiehu t-tender biex ilesti ruhu li jaghmel dak kollu li jkun wieghed fl-offerta." Illi ghalhekk l-accessibilita ghal persuni bi bzonnijiet b'dizabilita kellha tkun sodisfatta u ezistenti fil-mument tal-iffirmar tal-kuntratt u ghalhekk d-dikjarazzjoni maghmula mill-esponenti illi l-post kien accessibli ghal persuni b'dizabilita ma kinitx dikjarazzjoni falza ai termini tal-ligi stante illi tali accessibilita kellha tissussisti biss fil-mument tal-iffirmar tal-kuntratt u effettivament fil-mument illi l-esponenti iffirmaw il-kuntratti relattivi kellhom il-post taghhom accessibli ghal persuni b'dizabilita. Inoltre, kif irrimarkat ben tajjeb il-Qorti tal-Magistrati, is-sejha biex jigu provduti s-servizzi ta' tahrig, rikjest fit-tender, kien jispecifika biss li l-fond kellu jkun accessibli ghal persuni b'dizabilita u li mkien ma giet marbuta din tal-accessibilita ma' xi kriterji specifici apparti l-fatt illi kif irrizulat l-esponenti bhala impjegati tas-socjeta Future Focus Limited kienu diga jimpjegaw maghhom persuni bi bzonnijiet specjali. Stante illi jezistu gradi varji ta' dizabilita liema gradi ma gewx specifikati fit-tender u tenut kont illi l-post kien accessibli ghal persuni b'dizabilita, dan iwassal biex l-esponenti fil-mument illi tefghu t-tender taghhom ma kienux qed jaghmlu dikjarazzjoni falza.

Inoltre, huwa kuncett basilari illi fil-ligi penali jridu jikkonkorru zewg elementi u cioe kemm il-mens rea kif ukoll l-actus reus. Sahansitra, l-artikolu 188 (l-artikolu illi l-esponenti gew akkuzati bih) jirrikjedi illi kull min jaghmel dikjarazzjoni jew stqarrija falza jew ta' taghrif falz ikun ghamel dan xjentement. Dan ifisser illi jrid ikun hemm kemm intenzjoni specifika kif ukoll dik generika. Kif spjega ben tajjeb Manzini li jaghti spiegazzjoni taz-zewg tipi ta' mens rea f'dan id-dolo. Huwa jsostni li: "il dolo generico consiste nella volonta' cosciente e libera e nell' intenzione di compiere la falsificazione sapendo di agire senza diritto", filwaqt li: "dolo specifico ha come fine di procurare a se o ad altrui un vantaggio o di recare ad alri un danno." Illi l-Qorti tal-Appell Kriminali lanqas biss ikkunsidrat l-element tal-mens rea meta giet biex tanalizza l-fatti speci tal-kaz u l-imputazzjoni hekk kif dedotta fil-konfront tal-esponenti u ghaldaqstant il-bona fide tal-esponenti kellha tittiehed in konsiderazzjoni ghal fini tar-reat imputabbli lilhom. Dan ifisser illi l-Qorti tal-Appell Kriminali naqset milli tikkunsidra element principali fis-sejbien o meno ta' htija fil-konfront tal-

esponenti liema element huwa espressament rikjest mil-ligi stess u ghalhekk dan iwassal ghal ksur tad-dritt fundamentali tal-esponenti ghal smigh xieraq ai termini tal-artikolu 39 tal-Kostituzzjoni tal Malta u artikolu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem.

Ghaldaqstant l-esponenti jitolbu reverentement lil dina l-Onorabbli Qorti joghgobha:

1. Tiddikjara illi minhabba c-cahda tal-assistenza legali waqt l-arrest gew lezi d-drittijiet tal-esponenti ghal smigh xieraq kif sanciti fl-artikolu 39 tal-Kostituzzjoni ta' Malta u fl-artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem;

2. Tiddikjara illi minhabba kif gie kondott il-process kriminali fil-kawza fl-ismijiet Il-Pulizija vs Rosanne Galea et deciza mill-Qorti tal-Appell Kriminali fis-sitta (6) ta' Marzu tas-sena elfejn u erbatax (2014) gew lezi d-drittijiet tal-esponenti ghal smigh xieraq kif sanciti fl-artikolu 39 tal-Kostituzzjoni ta' Malta u fl-artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem;

3. Takkorda dawk ir-rimedji effettivi u xierqa fic-cirkostanzi.

Rat ir-risposta tal-Avukat Generali u l-Kummissarju tal-Pulizija li tghid hekk:

1. Illi l-ilment tar-rikorrenti huwa li kien hemm ksur tad-drittijiet fundamentali taghhom minhabba li kemm qabel u kif ukoll waqt l-interrogazzjoni huma ma inghatawx id-dritt ghall-assistenza legali, gew imcahhad mill-access ghal-file tal-pulizija li jikkoncerna l-kaz u minhabba enuncazzjoni zbaljata tal-ipotezi tal-ligi.

2. Illi preliminarjament l-esponent Kummissarju tal-Pulizija jirrileva li ai termini tal-artikolu 181B tal-Kap. 16 dawn il-proceduri huma bizzejjed integri bil-presenza tal-esponent Avukat Generali wahdu ghall-ghanijiet ta' dawn il-proceduri konvenzjonali/kostituzzjonali . Ghalhekk l-Kummissarju tal-Pulizija ghandu jigi lliberat mill-osservanza tal-gudizzju.

Id-Dritt ta' Assistenza Legali

3. Illi d-dritt moghti miil-artikolu 6 tal-Konvenzjoni u mill-artikolu 39 tal-Kostituzzjoni huwa d-dritt ghal smigh xieraq u mhux id-dritt ghal-ghajnuna ta' avukat qabel jew waqt illi tittiehed stqarrija. Dan ifisser, li jekk in-nuqqas ta' konsultazzjoni ma' avukat fil-mument tat-tehid tal-istqarrija ma gabet l-ebda pregudizzju serju ghall-akkuzat fl-ezitu tal-proceduri kriminali allura dan tal-ahhar ma jkollu l-ebda ragun li jinvoka ksur tas- smigh xieraq abbazi ta dan in-nuqqas.

4. Il-jedd ghal smigh xieraq ma jinghatax biex min hu hati jahrab il-konsegwenzi ta' ghemilu minhabba xi formallta nieqsa minn konsegwenzi gravi u reali (ara Joseph Bugeja vs Avukat Generali, Qorti Kostituzzjonali, 14 ta' Jannar 2013). Biex in-nuqqas ta' assistenza legali jista' potenzjalment iwassal ghal ksur ta' smigh xieraq irid jigi muri b'mod sodisfacenti li minhabba dak in-nuqqas inholoq perikolu illi r-rikorrenti nstab hati meta ma kellhux jistab hati. Jekk in-nuqqas ta' konsultazzjoni ma' avukat fil-mument tat-tehid tal-istqarrija ma gabet l-ebda pregudizzju serju ghall-akkuat fl-ezitu tal-proceduri kriminali

allura dan tal-ahhar ma jkollu l-ebda ragun jinvoka ksur tal-jedd ta' smigh xieraq abbazi ta' dan in-nuqqas. Marbut ma dan, id-dritt tas-smigh xieraq irid jigi kkunsidrat fil-kuntest tat-totalita tal-proceduri kollha u mhux fir-rigward ta' xi moment specifiku.

5. Illi effettivament ir-rikorrenti odjerni bebda mod ma kienu imgieghla jaghtu l-istqarrija li taw lill-Pulizija. Anzi, inghataw t-twissija skond il-ligi u cioe li ma kienux obbligati jitkellmu sakemm ma kienx hekk mixtieq izda dak li ser jghidu seta' jingieb bhala prova kontra taghhom. Minn ezami ta' dawn l-istqarrijiet jidher bic-car li r-rikorrenti fehmu l-import tac-cirkstanza li kienu jinsabu fiha u t-twegibiet taghhom kienu cari u jikkorispondu mal-kuntest ta kull mistoqsija li saritilhom. Inoltre waqt il-proceduri quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali r-rikorrenti ikkonfermaw l-istqarrijiet li huma irrilaxxaw lill-Pulizija meta' xehdu viva voce quddiem il-Magistrat. L-istqarrijiet tar-rikorrenti huma parti mill-process kriminali u fl-ebda hin ma kien hemm xi ilment formali minn naha taghhom li l-istqarrijiet gew mehuda b'abbuz.

6. Illi minghajr hsara ghall-premess ix-xebh li r-rikorrenti jipprovaw jisiltu ma certu kazijiet moghtija mill-Qorti Kostituzzjonali u mill-Qorti Ewropea ma huwa ta' ebda ghajnuna ghalihom. Apparti li fdawk il-kazijiet il-kontenut tal-istqarrija kien l-uniku fattur determinanti li seta' jwassal ghas-sejbien ta' htija (kuntrarjament ghal dan il-kaz), tajjeb li jinghad ukoll li fdawk is-sentenzi giet espressa l-fehma li l-jedd tal-assistenza legali ghandu jinghata ghall-iskop preciz illi jkun hemm garanzija illi kull stqarrija moghtija mill-persuna interrogata tkun inghatat b'ghazla hielsa, b'gharfien tal-jedd li tibqa' siekta u bla theddid, vjolenza jew b'mod abbuziv. Il-ksur tal-jedd ghal smigh xieraq isehh meta l-istqarrija tittiehed abbuzivament u mhux bil-fatt biss li tkun ittiehdet minghajr l-ghajnuna ta' avukat. Ir- rikorrenti jidher li qed jilmentaw mill-istqarrijiet f'dawn il-proceduri ghax il-Qorti tal-Appell "tat piz qawwi lil l-istqarrija tar-rikorrenti sabiex waslet ghas-sejbien ta' htija" pero huma ma jaghtux ragunjiet validi ghalfejn il-Qorti kellha tiskarta dawk l-isqarrijiet li d'altronde huma parti integrali mill-process kriminali. Apparti dan l-esponenti isostnu li meta wiehed jaqra s-sentenza tal-Qorti tal-Appell isib li l-Qorti waslet ghas-sejbien ta' htija fuq konsiderazzjonijiet ohra.

7. Ghalhekk dan l-ilment imressaq mir-rikorrenti ghandu jigi michud minn din l-Onorabbli Qorti.

8. Illi minghajr pregudizzju ghas-suespost, dwar l-ilment li r-rikorrent ma nghatax access ghall-file tal-pulizija dan huwa assolutament minghajr ebda fundament guridiku jekk mhux ukoll fieragh. Dan minhabba li ma jezisti l-ebda dritt taht il-Konvenzjoni Ewropeja jew taht l-Kostituzzjoni li akkuzat ghandu access ghall-file tal-pulizija. L-akkuzat jigi pprocessat u ggudikat fuq l-evidenza li titressaq il-Qorti u mhux fuq dak li jkun hemm fil-file tal-pulizija. Jigi b'hekk li anki dan l-ilment ghandi jigi michud.

Enuncazzjoni zbaljata tal-Ipotezi tal-ligi

9. Illi r-rikorrenti qed jallegaw li l-Qorti tal-Appell ghamlet enuncazzjoni zbaljata tal-ipotezi tal-ligi u b'hekk garbu ksur tal-artikolu 39 tal-Kostituzzjoni u tal-artikolu 6 tal-Konvenzjoni Ewropea.

10. Illi l-esponenti jibda biex jghid li huwa evidenti li r-rikorrenti mhumiex kuntenti mill-fatt li huma instabu hatja mill-Qorti tal-Appell, wara rikors ta' appell li gie intavolat mill-Ufficju tal-Avukat Generali u issa qed jippruvaw jattakaw dik is-sentenza permezz ta' dawn il-proceduri kostituzzjonali. Fis-sustanza ir-rikorrenti qed jistiednu lil din l-Onorabbli Qorti terga' tidhol fil-mertu tal-process kriminali, taghmel apprezzament mill-gdid tal-provi migjuba u ghalhekk taghmilha ta' Qorti tat- Tielet jew Raba Istanza. L-artikoli 6 u 39 tal-Kostituzzjoni ma jiggarantixxu l-ebda dritt li akkuzat ikollu xi rimedju quddiem qorti tat-tielet grad wara s-sentenza tal-Qorti tal-Appell Kriminali u ghalhekk mhuwiex il-kompitu ta' din l-Onorabbli Qorti li tistharreg mill-gdid il-konkluzjoni li waslet ghaliha l-Qorti tal-Appell Kriminali meta irrevokat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali.

11. L-esponenti jissottomettu li l-artikolu 39(1) u (2) tal-Kostituzzjoni ta' Malta jipprovdu li sabiex jigi garantit id-dritt ghal smigh xieraq, is-smigh ghandu jsir fi zmien ragonevoli, u jinstema' minn Qorti indipendenti u imparzjali mwaqqfa b'ligi. L-artikolu 6(1) tal-Kap. 319 tal-Ligljiet ta' Malta jmur ftit lil hinn meta jipprovdi li s-smigh ghandu jkun pubbliku u ghandu jkun quddiem tribunal indipendenti u imparzjali mwaqqaf b'ligi. Illi minn dawn l-elementi kollha msemmija, ir-rikorrenti lanqas element wiehed ma jelenkaw jew jilmentaw minnu.

12. Ghalhekk dan l-ilment imressaq mir-rikorrenti ghandu jigi michud minn din l-Onorabbli Qorti.

13. Salv eccezzjonijiet ulterjuri.

14. Ghaldaqstant fid-dawl tas-suespost l-esponent umilment jitlob lil din l-Onorabbli Qorti jogghobha tichad it-talbiet kollha tar-rikorrenti bl-ispejjez kontra taghhom.

Rat li l-kawza giet ceduta fil-konfront tal-Kummissarju tal-Pulizija fil-21 ta' Ottubru 2015;

Rat l-atti u n-noti ta' sottomissjonijiet prezentati;

Rat li r-rikors thalla ghas-sentenza.

Ikkunsidrat

L-ilmenti tar-rikorrenti huma bbazati fuq l-artikolu 6 tal-Kovenzjoni u l-artikolu 39 tal-Kostituzzjoni cioe ksur tad-dritt ta' smigh xieraq.

> 6. (1) Fid-decizjoni tad-drittijiet civili u tal-obbligi tieghu jew ta' xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat għal smigh imparzjali u pubbliku fi żmien ragonevoli minn tribunal indipendenti u

imparzjali mwaqqaf b'ligi. Is-sentenza ghandha tinghata pubblikament izda l-istampa u l-pubbliku jista' jigi eskluz mill-proceduri kollha jew minn parti minnhom fl-interess tal-morali, tal-ordni pubbliku jew tas-sigurtà nazzjonali f'socjetà demokratika, meta l-interessi tal-minuri jew il-protezzjoni tal-hajja privata tal-partijiet hekk tehtieġ, jew safejn ikun rigorozament mehtieg fil-fehma tal-qorti f'cirkostanzi specjali meta l-pubblicità tista' tippregudika l-interessi tal-gustizzja.

(3) Kull min ikun akkuzat b'reat kriminali ghandu d-drittijiet minimi li gejjin:
(a) li jkun infurmat minnufih, b'lingwa li jifhem u bid-dettal, dwar in-natura u r-raguni tal-akkuza kontra tieghu;
(b) li jkollu zmien u facilitajiet xierqa ghall-preparazzjoni tad-difiza tieghu;
(c) li jiddefendi ruhu persunalment jew permezz ta' assistenza legali maghzula minnu stess jew, jekk ma jkollux mezzi bizzejjed li jhallas l-assistenza legali, din ghandha tinghata lilu b'xejn meta l-interessi tal-gustizzja jehtiegu hekk;
(d) li jezamina jew li jara li jigu ezaminati xhieda kontra tieghu u li jottjeni l-attendenza u l-ezami ta' xhieda favur tieghu taht l-istess kundizzjonijiet bhax-xhieda kontra tieghu;
(e) li jkollu assistenza b'xejn ta' interpretu jekk ma jkunx jifhem jew jitkellem il-lingwa uzata fil-qorti.

39. (1) Kull meta xi hadd ikun akkuzat b'reat kriminali huwa ghandu, kemm-il darba l-akkuza ma tigix irtirata, jigi moghti smigh xieraq gheluq zmien ragonevoli minn qorti indipendenti u imparzjali mwaqqfa b'ligi.
(2) Kull qorti jew awtorità ohra gudikanti mwaqqfa b'ligi ghad-decizjoni dwar l-ezistenza jew l-estensjoni ta' drittijiet jew obbligi civili ghandha tkun indipendenti u imparzjali; u meta l-proceduri ghal decizjoni bhal dik huma mibdija minn xi persuna quddiem qorti jew awtorità ohra gudikanti bhal dik, il-kaz ghandu jigi moghti smigh xieraq gheluq zmien ragonevoli.

Tali lment hu indirizzat ghal zewg episodji distinti. L-ewwel ilment jirrigwarda n-nuqqas ta' assistenza legali waqt li r-rikorrenti kienu qed jigu interrogati mill-pulizija qabel ma gew akkuzati. It-tieni lment jirrigwarda nuqqasijiet legali mill-Qorti tal-Appell Kriminali li waslu ghal kundanna tar-rikorrenti fil-proceduri kriminali mehuda kontrihom. Dawn in-nuqqasijiet huma s-segwenti cioe (a) id-dikjarazzjoni tal-Qorti li ghandha toqghod fuq rakkomandazzjonijiet teknici ta' esperti mqabbda mill-Qorti billi l-Kodici Kriminali jipprovdi fl-artikolu 656 illi l-gudikant mhux marbut li joqghod ghal fehma tal-periti kontra l-perswazzjoni tieghu; (b) id-dikjarazzjoni tal-Qorti illi ma jaghmilx differenza jekk wara l-prezentata tat-tender document mir-rikorrenti huma ghamlu alterazzjonijiet li ppermetta aktar access ghal persuni b'dizabilita, ghaliex f'dak il-mument tal-

prezentata tat-tender document id-dikjarazzjoni maghmula mir-rikorrenti fl-istess document li l-fond kien accessibbli ghal persuni b'dizabilita fil-fatt ma kienx. Ir-rikorrenti jsostnu illi l-Qorti naqset tqis li f'dawn is-sitwazzjonijiet bejn il-bidding process u selection process hemm perjodu meqjus bhala mobilisation period fejn min jobbliga ruhu jkun lest li jwettaq dak mwieghed meta jigi ffirmat il-kuntratt. In oltre l-istess tender document ma kienx jispecifika x'tip ta' accessibilita kien mistenni ghal persuni b'dizabilita. Apparti dan l-artikolu 188 tal-Kap. 9 li bih gew akkuzati r-rikorrenti jirrikjedi l-element specifiku tal-mens rea u dan ma giex kunsidrat mill-Qorti tal-Appell Kriminali.

Nuqqas ta' rapprezentanza waqt l-interrogazzjoni u li waslet biex ir-rikorrenti jirrilaxxaw stqarrija

Il-principji applikabbli

Fl-ewwel lok l-artikolu 39(1) tal-Kostituzzjoni ma japplikax ghal sitwazzjonijiet li jipprecdu t-tehid ta' proceduri kriminali u ghalhekk l-ilment tar-rikorrenti ma jistax jigi kunsidrat a bazi tal-artikolu 39. Izda l-artikolu 6 tal-Konvenzjoni hu ta' interpretazzjoni aktar wiesa u dan l-ilment jista' jigi kunsidrat taht dan l-artikolu.

Din il-kwistjoni tqajmet f'diversi kawzi b'diversi konsiderazzjonijiet maghmula mill-Qorti Kostituzzjonali mhux dejjem bl-istess konkluzjoni raggunta mill-istess Qorti. A skans ta' ripetizzjni, dan gie rilevat mill-Grand Chamber tal-Qorti Ewropea ghad-Drittijiet tal-Bniedem fil-kawza **Borg vs Malta** tat-12 ta' Jannar 2016 (ara para. 35 sa 46 tal-istess sentenza). Fil-kawza Borg, fejn il-proceduri kostituzzjonali ittiehdu wara sentenza finali tal-Qorti tal-Appell Kriminali kif inhu dan il-kaz, il-Qorti Ewropea qalet hekk fuq id-dritt ta' assistenza legali fl-istadju tal-interrogazzjoni:

> 43. In this case the accused had made two statements in the absence of a lawyer, in the first denying any connection with possession or trafficking of drugs, and in the second admitting to having taken ecstasy pills (which amounts to possession according to the domestic case-law) but denying trafficking, although he had mentioned facts which connected him to other persons involved in trafficking.
>
> 44. The Constitutional Court reiterated the same reasoning applied in the cases of Alvin Privitera and Esron Pullicino, cited above. It further

> noted case-law subsequent to Salduz in which the Court had found a violation despite the fact that the applicant had remained silent while in police custody (Dayanan v. Turkey, no. 7377/03, 13 October 2009) and despite there being no admission of guilt in the statements given by the applicants (Yeşilkaya v. Turkey, no. 59780/00, 8 December 2009). In Boz v. Turkey (no. 2039/04, 9 February 2010) the Court had stressed that the systemic restriction of access to a lawyer pursuant to the relevant legal provisions breached Article 6. The Constitutional Court further referred to the finding in Cadder v. Her Majesty's Advocate [2010] UKSC 43, which concerned the same situation in the Scottish legal system and where that court had agreed to follow Salduz to the letter.

Jidher mill-estratt ta' din is-sentenza kwotata, illi l-Qorti Ewropea, salv f'kazijiet ferm eccezzjonali, ma tippermetti ebda eccezzjoni ghar-regola li hu dritt fondamentali ta' akkuzat li jkun assistit waqt li qed jigi interrogat, aktar u aktar meta ser ihalli stqarrija li minnha nfisha hi inkriminanti, ghalkemm mhux necessarju fil-fatt lit kun saret stqarrija ghal fini ta' ksur. In-nuqqas ta' oppozizzjoni tal-interrogat li jaghmel stqarrija jew jirrispondi d-domandi; il-fatt li fi zmien li ttiehdet l-istqarrija l-ligi domestika ma kinitx tipprovdi ghal tali assistenza; il-fatt li l-interrogat ikun inghata twissija u ma kien hemm ebda koerzjoni, ingann, theddid jew vjolenza ma hu ta' ebda solliev ghall-intimat biex tigi gustifikata n-nuqqas tad-dritt ta' assistenza legali. Jidher anki li l-fatt li l-kawza kostituzzjonali saret wara tmiem il-proceduri kriminali ma hix ta' ostakolu ghal fatt li l-vjolenza tkun sehhet. Dan jidher li kienu c-cirkostanzi kif qalet l-istess Qorti Ewropea f'parti ohra tal-istess sentenza Borg f'kuntest iehor:

> 54. They (cioe l-Gvern) submitted that in the present case the applicant was twenty-seven years old, and the amount of drugs involved was 816 grams of heroin which was 47% pure, which had been transported to Malta by two couriers who had already been used by the applicant for this purpose. Other objects associated with drug importation and trafficking had been seized by the police from the applicant's residence, such as telephones and a piece of paper with foreign names written on it. Other evidence besides his statement was collected and brought to the attention of the trial courts. Although the applicant chose not to sign the statement, he had voluntarily answered the questions put to him during questioning, he had been cautioned about his right to remain silent, and at no point was he threatened or coerced into giving a statement. Moreover, he answered some questions and refused to answer others, and categorically denied involvement in the drug transaction. Furthermore, the applicant was not a first offender, as according to his conviction sheet he had been arraigned on one previous occasion (concerning driving a modified car without a seatbelt).

Ghal kompletezza qed jigi wkoll sottomess dak li qal il-Gvern a rigward:

> 53. The Government considered that the right to see (sic) a lawyer in the early stages of a police investigation was not absolute and could be subject to restrictions. They referred to the cases of Imbrioscia, cited above; John Murray, cited above; and Ahmet Mete v. Turkey (no. 77649/01, 25 April 2006), as well as Salduz (cited above). The Government, recapitulating the facts and findings in the case of Salduz, considered that in reaching its conclusion the Grand Chamber gave particular weight to the applicant's age. The Government reiterated that the faithful interpretation of Salduz was that "a violation can only be found if the conviction of an accused person is solely based on incriminating statements that an accused made while being questioned, where the accused person was not given access to legal assistance". In their view any other interpretation thwarted the logic around the judgment. The Government further referred to the facts and findings in Płonka v. Poland (no. 20310/02, 31 March 2009); Aleksandr Zaichenko v. Russia (no. 39660/02, 18 February 2010); Nechiporuk and Yonkalo (cited above); and Huseyn and Others (also cited above) and noted that in those cases the applicants were convicted solely on the basis of their statements in which the applicants had admitted wrongdoing.

B'dana kollu l-Qorti Ewropea xorta sabet vjolazzjoni.

Applikazzjoni tal-principju ghal fatti

Jidher illi f'dan il-kaz l-istess fatti bhal dak fil-kaz ta' Borg jissusistu ghalkemm ir-reat kien wiehed differenti. Ma hemmx hjiel li r-rikorrenti gew ingannati jew sfurzati jirrilaxxaw stqarrija meta fil-perjodu li fih saret fl-2008 il-ligi ma kinitx tipprovdi ghal assistenza legali. B'danakollu l-Qorti Ewropea qed taghmilha cara illi tali stqarrija tmur kontra d-dritt tal-akkuzat ghal smigh xieraq u hi vjolazzjoni tal-artikolu 6. Din il-Qorti ma thoss li ghandha tmur kontra pronunzjament daqshekk car tal-Qorti Ewropea, u fic-cirkostanzi tqis li l-fatt wahdu li ttiehdet stqarrija f'dawn ic-cirkostanzi, kemm jekk l-istqarrija influitx o meno fuq il-htija tar-rikorrenti, hi lesiva tad-drittijiet tar-rikorrenti. Ghalhekk tqis l-ewwel talba bhala gustifikata. Il-Qorti pero fic-cirkostanzi tqis li ghandha wkoll tqis ir-rimedju mitlub ghal tali vjolazzjoni. Ir-rikorrenti ma jitolbu ebda rimedju specifiku. Il-Qorti tqis illi kemm il-Kap. 319 fiz-zmien tal-interrogazzjoni u l-bdil fil-ligi domestika dwar l-assistanza legali waqt l-interrogazzjoni fl-2010 kienu jew suppost kienu gia ben noti ghar-rikorrenti waqt is-smigh tal-proceduri

kriminali u qabel is-sentenza tal-Qorti tal-Magistrati u wisq aktar fil-proceduri quddiem il-Qorti tal-Appell. Madankollu huma qatt ma hassew il-htiega li jilmentaw fuq l-ghotja tal-istqarrijiet u l-pregudizzju percepit minnhom issa bl-ghoti taghhom. Fl-ebda stadju tal-process kriminali ma talbu referenza kostituzjonali fuq il-kwistjoni tal-ammissibilita tal-istqarrijiet, lanqas quddiem il-Qorti tal-Appell Kriminali. Kien biss wara s-sentenza tal-Qorti tal-Appell Kriminali fejn instabet hatja li hassew li d-drittijiet taghhom gew mittiefsa. In oltre jidher minn qari tas-sentenza tal-Appell Kriminali illi l-Qorti tal-Appell ma strahatx biss fuq l-istqarrijiet tal-akkuzati izda hadet in konsiderazzjoni d-dikjarazzjoni ffirmata li saret mir-rikorrenti meta pprezentaw it-tender fejn issottomettew li l-fond kien accessibbli ghal persuni b'dizabilita u r-rapport teknici tal-Qorti li kkonfermaw in-nuqqas ta' accessibilita. Dawn kienu provi oggettivi li ma kienx jistriehu fuq l-istqarrija tar-rikorrenti. Konsiderazzjoni fattwali simili saret mill-Qorti Ewropea.

Fis-sentenza **Gafgen v Germany** (no. 22978/05, 03 June 2010) il-Qorti qalet hekk:

> 164. In determining whether the proceedings as a whole were fair, regard must also be had as to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, inter alia, Khan, cited above, §§ 35 and 37; Allan, cited above, § 43; and the judgment in Jalloh, cited above, § 96). In this connection, the Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (compare, in particular, Khan, cited above, §§ 35 and 37).

Il-Qorti ghalhekk tqis fic-cirkostanzi illi d-dikjarazzjoni gudizjarja ta' lezjoni ta' dritt sancit bl-artikolu 6 hu 'just satisfaction' u jikkostitwixxi rimedju ghal kaz.

Nuqqasijiet fid-decizjoni tal-Qorti tal-Appell Kriminali

Il-principji applikabbli

Kif jghidu l-awturi **Harris, O"Boyle & Warbrick** fil-ktieb 'Law of the European Convention on Human Rights' a fol. 202 u 204 (Tieni Edizzjoni):

> The application of Article 6 has presented the Court, and formerly the Commission, with various problems. A delicate question is the closeness with which it should monitor the functioning of national courts. The Court has studiously and properly followed the 'fourth instance' doctrine, according to which, as the Court regularly states, 'it is not its function to deal with errors of fact or law allegedly committed by a national Court unless and in so far as they may have infringed rights and freedoms protected by the Convention'.[1] The right to a fair hearing, which is one such Convention right, has, as its wording generally suggests, been interpreted as providing only a procedural, not a substantive, guarantee. Accordingly, the Court will intervene in respect to 'errors offact or law' by a national court only insofar as they bear upon compliance with the procedural guarantees in Article 6: it does not intervene under Article 6 because they affect the 'fairness' of the national court decision on its merits.[2] However, this last statement must be read subject to a limitation that is to be found in some recent Court jurisprudence to the effect that there may be a breach of Article 6 where a national court decision on the merits has been 'arbitrary or manifestly unreasonable'.[3]
>
> Finally, it is relevant to note that in some contexts a breach of Article 6 will only be found to have occurred upon proof of ' actual prejudice' to the applicant. This is the case in the application of the residual 'fair hearing' guarantee in Article 6(1),[4] and is true of some specific Article 6 guarantees. As to the latter, Stavros[5] states in respect of criminal cases:
>
>> This tendency has manifested itself in the context of Article 6(3)(a), (b) and (d) and sometimes in the context of the right to an impartial tribunal. This is not, however, always the case. The Convention organs appear to regard the presence of actual prejudice inherent in the failure to observe other guarantees,[6] pronouncing automatically the breach of the Convention.

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[1] *Garcia Ruiz v Spain* 1999-I; 31 EHRR 589 para 28 GC. Italics added. On the 'fourth instance' doctrine, *see* above, p 14.

[2] See eg, *Anderson v UK No 44958/98* hudoc (1999) DA.

[3] *Cammilleri v Malta No 51760/99* hudoc (2000) DA (no breach on the facts).

[4] See below, p 246. Thus in a 'fair hearing' case, 'where the procedural flaw is not central to the notion of a fair hearing … a violation will be registered if the shortcoming in question caused actual prejudice to the defence': *Harper v UK No 11229/84*, 1986 unreported, quoted in Stavros, p 44.

[5] Stavros, p 44. Footnotes omitted. The same approach applies to civil cases.

[6] Ed. The author refers to the *Artico* and *Luedicke* cases, below, pp' 320 and 327, concerning Article 6(3) (c) and (e) respectively. The same must be true of the Article 6(1) guarantee of a public hearing in viewmof the purpose it serves. The requirement of 'actual prejudice' is most vividly illustrated by the ruling that an accused who is acquitted is

> In cases in which 'actual prejudice' is sought, this will be decided on the basis of the hearing 'as a whole', so that a procedural deficiency that is outweighed by other aspects of the hearing[7] or that is rectified on appeal[8] will not involve a breach of Article 6.

Applikazzjoni tal-principji ghal fatti

Harsa lejn it-tlett aggravji konnessi ma' dan l-ilment, il-Qorti hi propensa tqis li dawn l-aggravji huma biss il-ftuh ta' appell gdid minn kawza li llum hi res judicata u billi ma hemmx triq ohra mnejn ighaddu r-rikorrenti, allura qed jirrikorru ghal rimedju kostituzjonali. Harsa sew lejn l-aggravji fil-fatt ma juru xejn hlief nuqqas ta' qbil ma' dak deciz mill-Qorti tal-Appell, principalment fuq kwsitjoni ta' interpretazzjoni procedurali u ta' fatti ma' dak li tipprovdi l-ligi kriminali.

Madankollu l-Qorti tqis illi l-gustizzja titlob illi l-ilment xorta jigi investigat fl-ispecifiku tieghu biex il-Qorti tara s-sentenza kinitx wahda arbitrarja jew manifestament irragonevoli jew jekk ir-rikorrenti soffrewx 'actual prejudice' fl-applikazzjoni tal-garanzija residwa tas-smigh xieraq.

L-ewwel ilment jirrigwarda dak li qalet il-Qorti fuq l-aderenza ma' rapport ta' esperti mqabbda minnha. Ir-rikorrenti jsostnu li l-ligi tipprovdi li l-gudikant ma ghandux jintrabat ma' rapport ta' espert kontra l-perswazzjoni tieghu. Dan l-aggravju hu frivolu ghax il-ligi kull ma taghmel hu illi taghti l-fakolta lil gudikant li jiskarta opinjoni esperta bhal kull prova ohra ammissibbli fil-ligi fejn l-istess gudikant ma jqis li hi rilevanti jew attendibbli ghal kaz. Ma jfissirx b'daqshekk li l-gudikant ghandu arbitrarjament jiskarta opinjoni teknika bla ragun fondat. F'dan il-kaz kull ma ghamlet il-Qorti tal-Appell hu li stqarret li opinjoni esperta f'materja specjalizzata fiha piz kbir meta l-Qorti mhix esperta fil-materja. Tali opinjoni ghandha tigi osservata mhux skartata nonostante li l-gudikant jista ma joqghodx fuq relazzjoni teknika (kliem sottolineat tal-Qorti tal-Appell Kriminali).

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no longer a 'victirn' and so cannot complain of a breach of Article 6: *Heancy and McGuiness v lreland* 2000-XII; 33 EHRR 264. For the 'reasonable time' exception to this, see below, p 278, n 721.

[7] *See* eg, *Stanford vs UK* A 282-A (1994).
[8] See eg, *Edwards vs UK* A 247-B (1992); 15 EHRR 417.

Kwindi ma ntqal xejn arbitrarju jew manifestament zbaljat jew pregudizjevoli ghad-drittijiet tar-rikorrenti.

It-tieni lment tar-rikorrent hu dwar interpretazzjoni ta' fatt ghal ligi kriminali. Il-fatt li r-rikorrenti hassewhom urtati bl-argumentazzjoni tal-Qorti fuq il-kwistjoni, ma jfissirx li tali argumentazzjoni hi arbitrarja jew manifestament irragonevoli. Il-Qorti tal-Appell qieset illi l-mument rilevanti ghal sejbien ta' htija ta' reat li bih kienu akkuzati r-rikorrenti kein il-mument li fih sar it-tender. Dan kien il-mument li fih gie kommess ir-reat ai fini tal-ligi kriminali. Kwistonijet ohra relatati ma' tenders tal-Gvern kienu irrilevanti ghal skopijiet kriminali. Tali interpretazzjoni hi wahda lecita u ammissibbli fil-kamp kriminali u ma fiha xejn arbitrarju jew irragonevoli. Ebda pregudizju li jmur kontra l-artikolu 6 ma gie rekat lir-rikorrenti. Dak li gie mimsus invece hu s-sejbien ta' htija ghal reat fuq il-fatti tal-kaz meta quddiem il-Qorti tal-Magistrati r-rikorrenti ma nstabux hatja ghax dik il-Qorti tat interpretazzjoni differenti. Ma hemmx xejn fil-gudikat li jwassal ghal applikazzjoni hazina tal-ligi. In oltre jigi rilevat illi dan l-argument kien wiehed mill-argumenti u aggravji mqajma mill-prosekuzjoni fl-appell u li l-Qorti tal-Appell ikkunsidrat u ddecidiet dwaru.

Ghalhekk dan l-ilment ma fihx siwi anqas.

L-ahhar ilment tar-rikorrenti jirrigwarda n-nuqqas tal-Qorti tal-Appell li jikkonsidra l-mens rea bhala element essenjali biex tinstab htija taht l-artikolu 188 tal-Kap. 9 li bih instabu hatja r-rikorrenti. Din il-Qorti ma tqis fondata tali allegazzjoni. Il-Qorti qieset illi r-rapporti peritali esebiti fl-atti tal-kawza urew illi fil-mument tal-prezentata tat-tender document mir-rikorrenti, il-fond kollu ma kienx accessibbli ghal persuni li juzaw il-wheel chair. Dan wahdu juri illi meta gie prezentat it-tender document ir-rikorrenti kienu jafu li qed jikkonfermaw il-falz meta ddikjaraw li kien accessibbli ghal persuni b'dizabilita. Il-Qorti qieset illi tali kondizzjoni fit-tender kienet wahda bla limitazzjoni u l-istqarrija tar-rikorrenti li l-fond kien accessibbli ghal maggoranza ta' persuni b'dizabilita u li qatt ma kellhom xi hadd b'wheel chair juza l-fond ma kinitx ghajr ingann f'dikjarazzjoni ta' tender pubbliku, intiz biex jiehdu vantagg mid-dokument tat-tender bil-gidba li kien fih u sabiex b'din il-gidba l-process ighaddi fl-istadju tal-evalwazzjoni fejn

permezz ta' din il-gidba kienu partecipi. Il-Qorti altru milli ssib li l-Qorti kriminali kkunsidrat l-element tal-mens rea, cioe x-xjenza ta' dak li r-rikorrenti kienu qed jaghmlu u li kien kontra dak li kienu jipprovdu l-kondizzjonijiet specifici tat-tender, dejjem bl-interpretazzjoni li l-Qorti Kriminali tat lil kondizzjoni fit-tender mertu kollu tal-kaz, liema interpretazzjoni, din il-Qorti ma tistax ticcensura bhala arbitrarja jew manifestament irragonevoli.

Ghalhekk dan l-ilment tar-rikorrenti bbazat fuq nuqqasijiet fis-sentenza tal-Qorti tal-Appell Kriminali hi bla bazi.

Decide

Ghar-ragunijiet fuq moghtija l-Qorti qed tilqa' l-ewwel talba tar-rikorrenti u ssib li l-istqarrijiet moghtija mir-rikorrenti lil pulizija fl-istadju ta' interrogazzjoni kienu lesivi tad-dritt ta' smigh xieraq sancit bl-artikolu 6 tal-Konvenzjoni Ewropea, u fic-cirkostanzi tqis li tali dikjarazzjoni hi 'just satisfaction' ghal vjolazzjoni subita; tichad it-tieni talba tar-rikorrenti ghax bla fundament legali jew fattwali. Spejjez jinqasmu nofs bin-nofs bejn il-partijiet.

Onor. Mark Chetcuti LL.D.
Imhallef

Anne Xuereb
Deputat Registratur