



**MALTA**

**QORTI CIVILI  
PRIM'AWLA**

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**Illum it-23 ta' Marzu, 2017.**

**Fil-Prim'Awla tal-Qorti Civili  
(Sede Kostituzzjonali)**

**Rikors Numru 80/2015 SM**

**Daniel Gatt**

**vs.**

**Avukat Generali**

Il-Qorti,

- 1.0. Rat ir-rikors promotur datat il-5 ta' Novembru, 2015, li permezz tieghu r-rikorrenti fuq indikat espona sintetikament is-segweni:

- 1.1. Illi fil-lejl ta' bejn it-28 u 29 ta' Gunju, 2008, il-pulizija sabu lil Letizia Sultana u lil Louise Sultana jabbuzaw mid-droga kokaina fil-parkegg ta' Gianpula;
- 1.2. Illi l-imsemmija Letizia infurmat lill-pulizija li d-droga kien taħliela l-gharus tagħha r-rikorrenti prezenti;
- 1.3. Illi fid-29 ta' Gunju, 2008, l-istess rikorrenti irrilaxxa stqarrija lill-ispettur debitament assistit fejn ammetta li flimkien ma l-istess gharusa tiegħu kienu xtraw gramma kokaina gimgha qabel bl-intenzjoni li johduha flimkien, (ara foll 27);
- 1.4. Illi meta r-rikorrenti rrilaxxa l-istess stqarrija r-rikorrenti ma kienx assistit minn avukat stante li dak iz-zmien l-ligi ma kienitx tipprovdi għad-dritt tal-assistenza legali f'dawn ic-cirkostanzi;
- 1.5. Illi r-rikorrenti kien għad kellu tmintax- (18) il sena;
- 1.6. Illi din kienet ukoll l-ewwel esperjenza tiegħu ta' interrogatorju;
- 1.7. Illi sussegwentement fl-20 ta' Jannar, 2009, ir-rikorrenti gie mressaq il-qorti biex iwiegeb għall-inputazzjonijiet lilhu hemm indirizzati, (ara foll 24);
- 1.8. Illi sussegwentement fl-10 ta' Novembru, 2014, ir-rikorrenti instab hati tal-istess imputazzjonijiet u kien ikkundannat għal piena ta' sitt (6) xhur prigunerija u multa;
- 1.9. Illi l-istess rikorrenti interpona appell mill-imsemmija sentenza;
- 1.10. Illi l-procedura kriminali fuq riferita kienet ibbazata fuq l-istqarrija rilaxxata mir-rikorrenti, (ara paragrafu numru wiehed punt tlieta, (1.3.), aktar qabel);
- 1.11. Illi l-istess stqarrija nġhatat mingħajr ma r-rikorrenti kien assistit minn avukat ta' fiducja;

- 1.12. Illi tali nuqqas t'assistenza jikkostitwixxi ksur tal-artiklu 39 tal-Kostituzzjoni ta' Malta, (minn issa 'l quddiem il-Kostituzzjoni), u tal-artiklu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem, (minn issa 'l quddiem il-Konvenzjoni);
  - 1.13. Illi tali nuqqas t'assistenza hu leziv id-dritt fundamentali tar-rikorrenti ghal smigh xieraq u tikkostitwixxi pregudizzju kbir ghall-istess rikorrenti;
  - 1.14. Illi d-dritt tal-assistenza legali waqt l-investigazzjoni gie stabbilit permezz tal-gurisprudenza tal-**Qorti Ewropea tad-Drittijiet Fundamentali tal-Bniedem**, (minn issa 'l quddiem il-**Qorti ta' Strasburgu**, ara: **Salduz vs. Turkey: 27 ta' Novembru, 2008**; **Dayanan vs. Turkey: 13 t'Ottubru, 2009 (II)**; **Pischalnikov vs. Russia: 24 ta' Settembru, 2009**; **Plonka vs. Poland: 31 ta' Marzu, 2009**; u tal-**Qorti Kostituzzjonali** ara: **Pulizija vs. Alvin Privitera: 11 ta' April, 2011**; u **Pulizija vs. Esron Pullicino: 12 t'April, 2011**;
  - 1.15. Illi rigward ir-rimedju mitlub mir-rikorrenti dan jirreferi ghall-kawza fl-ismijiet **Panovits vs. Cipru**, datata l-**11 ta' Dicembru, 2008**, li stabbilit li rikorrenti ghandu jitqieghed, kemm jista' jkun, fl-istess posizzjoni li kien fiha fil-mument meta inkissret id-disposizzjoni in dizamina;
  - 1.16. Illi in vista tal-premess ir-rikorrenti adixxa din il-qorti biex din:
    - 1.16.1. Tiddikjara li minhabba li r-rikorrenti gie mcahhad mill-assistenza legali waqt l-arrest tieghu, gie lilhu lez id-dritt tieghu ghal smigh xieraq kif sancit mill-artiklu 39 tal-Kostituzzjoni u mill-artiklu 6 tal-Konvenzjoni;
    - 1.16.2. Takkorda dawk ir-rimedji xierqa u effettivi fic-cirkostanzi;
- 2.0. Rat ir-risposta tal-intimat datata s-7 ta' Dicembru, 2015, li permezz taghha sintetikament irrisponda bil-mod segwenti:

- 2.1. Illi jirrespingi l-pretensjonijiet tar-rikorrenti *stante* li c-cirkostanzi tal-kaz ma jirraprezentaw l-ebda ksur tad-drittijiet fundamentali tar-rikorrenti kif sanciti fl-artiklu 39 tal-Kostituzzjoni u fl-artiklu 6 tal-Konvenzjoni;
- 2.2. Illi l-fatt li persuna ma tkunx assistita minn avukat waqt interrogazzjoni taghha ma tfissirx awtomatikament li nkissrilha d-dritt taghha ghal smigh xieraq;
- 2.3. Illi kull kaz ghandu jigi ezaminat fic-cirkostanzi partikolari tieghu u mhux biss fir-rigward tal-mument specifiku kif indirizzat mir-rikorrenti;
- 2.4. Illi effettivament ir-rikorrenti ma kienx imgieghel jirrilaxxa l-istqarrija li ta *stante* li jirrizulta li nghata d-debita twissija li ma kienx obligat jitkellem izda dak li seta' jghid seta' jingieb bhala prova kontra tieghu;
- 2.5. Illi ghalhekk l-istqarrija rilaxxata mir-rikorrenti kienet wahda volontarja;
- 2.6. Illi qorti ta' gurdizzjoni penali hi kompetenti tevalwa l-validita` u l-ammissibilita` tal-provi migjuba quddiemha;
- 2.7. Illi ebda qorti ma stabbiliet bhala principju universali li n-nuqqas ta' assistenza legali waqt l-interrogatorju hu awtomatikament ekwivalenti ghal lezjoni tad-drittijiet tal-akkuzat kif sanciti fl-artiklu 39 tal-Kostituzzjoni u fl-artiklu 6 tal-Konvenzjoni, ara: **Charles Steven Muscat vs. Avukat Generali**: datata t-8 t'Ottubru, 2012; **John Attard vs. Prim Ministru et** datata l-31 ta' Meju, 2013; **Ir-Repubblika ta' Malta vs. Alfred Camilleri** datata l-31 t'Ottubru, 2014; **Ir-Repubblika ta' Malta vs. Martin Dimech** datata s-26 t'April, 2013, u **Il-Pulizija vs. Norman Lowell** datata t-2 t'Ottubru, 2012;
- 2.8. Illi fiz-zmien in dizamina l-ebda interrogat ma kellu d-dritt tal-assistenza legali waqt l-interrogatorju u ghalhekk ir-rikorrenti ma kellu l-ebda lezjoni ta' dritt li ma kellux;
- 2.9. Illi fir-rigward tar-rimedju mitlub mir-rikorrenti l-intimat jissottolinea li *dato ma non concesso*, dikjarazzjoni ta' ksur ghandha tkun sufficienti;

- 2.10. Salv risposti ulterjuri;
- 2.11. Illi konsegwenza tal-istess din il-qorti ghandha:
  - 2.11.1. Tirrespingi t-talbiet tar-rikorrenti;
  - 2.11.2. Bl-ispejjez kontra r-rikorrenti;
3. Semghet lix-xhud riprodott;
4. Ezaminat id-dokumenti esebiti;
5. Rat id-digriet taghha datat iz-17 ta' Mejju, 2016, li permezz tieghu, wara talba appozita tal-abbli rapprezentanti legali tal-partijiet, awtorizzat lill-istess biex jittrattaw il-procedura odjerna bil-modalita` u fit-termini hemm indikati, (ara foll 38);
6. Rat in-nota ta' sottomissjonijiet tar-rikorrenti datata l-1 t'Awwissu, 2016, (ara foll 54), flimkien ma' dik sottomessa mill-intimat datata fiz-17 t'Ottubru, 2016, (ara foll 64);
7. Rat il-verbal tal-abbli rapprezentanti legali tal-partijiet datat l-1 ta' Novembru, 2016, li permezz tieghu ddikjaraw li kienu qed jistrieu fuq is-sottomissjonijiet skritti taghhom fuq riferiti;

Ikkunsidrat:

8. Illi essenzjalment, ir-rikorrenti qieghed issosstni li l-fatt li meta irrilaxxa l-istqarrija tieghu lill-Ispettur Borg fil-prezenza tal-kuntistabli Cordina fid-29 ta' Gunju, 2008, (ara foll 27), inkisirlu d-dritt tieghu ghal smigh xieraq kif sancit fl-artiklu 39 tal-Kostituzzjoni u l-artiklu 6 tal-Konvenzjoni;
9. Illi *daparti* tieghu l-intimat isosstini li ma kien hemm l-ebda ksur tad-drittijiet fundamentali tar-rikorrenti *stante* li hu mexa' fil-limiti tal-ligi kif kienet f'dak il-mument;
10. Illi *di piu`*, l-intimat isosstni wkoll li apparti l-istqarrija kien hemm ukoll provi ohra li kienu jwasslu ghas-sejbien tal-htija tar-rikorrenti, (ara foll 35);

11. Illi jirrizulta wkoll li r-rikorrenti nghata d-debita twissija skont il-ligi qabel ma ghazel li jirrilaxxa l-istqarrija tieghu, (ara foll 27 u 34);

Ikkunsidrat:

**A. Rigward l-artiklu 39 tal-Kostituzzjoni:**

12. Illi l-posizzjoni vigenti fir-rigward hi dik naxxenti mis-sentenza tal-**Qorti Kostituzzjonali** fl-ismijiet **Malcolm Said vs. Avukat Generali et** datata l-**24 ta' Gunju, 2016**, li stabbiliet li meta jittiehdu xi azzjonijiet qabel mal-persuna involuta tkun akkuzata formalment fil-qorti għall-imputazzjonijiet addebitata lilha, dan:

“Ma jfissirx... illi dak li jkun sar qabel ma l-attur ikun akkuzat ma jistax jolqot, bi pregudizzju għalih, dak li jigri wara li jigi akkuzat b'mod li minhabba dak li jkun sar qabel, ma jkunx jista' jinghata smigh xieraq. Li jfisser hu illi l-ksur – jekk it-tehid tal-istqarrija jkun sar bi ksur tad-drittijiet tal-attur – isehh mhux bil-fatt li tkun ittiehdet l-istqarrija (meta l-attur kien għadu mhux “akkuzat”) izda bil-fatt li jsir uzu minn dik l-istqarrija waqt il-process kriminali, meta allura l-attur ikun “akkuzat”;

“Għal din ir-raguni ma jistax jinghad *a priori* illi l-artiklu 39 huwa għal kollox inapplikabbli;

**B. Rigward l-artiklu 6 tal-Konvenzjoni:**

13. Illi dan l-artiklu (kif *del resto* wkoll dak indikat fil-paragrafu precedenti), jistabbilixxi li fid-determinazzjoni t'akkuza kriminali, l-akkuzat hu intitolat għal smigh xieraq;
- 14.0. Illi fl-essenzjalita` tieghu dan l-artiklu Konvenzjonali jintitola lil kull akkuzat li:
  - 14.1. Ikollu d-dritt li jiddefendi ruhhu personalment;
  - 14.2. Ikollu d-dritt li jiddefendi ruhhu alternattivament permezz t'assistenza legali tal-ghazla tieghu;

- 14.3. Illi fin-nuqqas ta' finanzi – jinghata assistenza legali gratuwita serja;
15. Illi fir-rigward tal-interrogatorju bhal ma hu fil-kaz in dizamina l-Qorti ta' Strasburgu bi kjarazza tirrikonoxxi d-dritt ghall-assistenza legali waqt l-interrogazzjoni ta' persuna suspettata;
16. Illi f'dan ir-rigward l-istess qorti irriteniet fil-kawza **Salduz vs. Turkija** datata s-**27 ta' Novembru, 2008** li:
- “... the rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction”;
17. Illi *di piu`* il-gurisprudenza tal-istess **Qorti ta' Strasburgu** tissottolinea li m'hemmx bzonn li jsir ezami tal-proceduri fl-intier taghhom jekk jirrizulta li kien hemm restrizzjoni sistematika ghad-dritt tal-assistenza legali, (ara **Dayanan vs. Turkey** datata **t-13 t'Ottubru, 2009**; **Pavlenko vs. Russia** datata l-**1 t'April, 2010**, u **Pischalnikov vs. Russia** datata l-**24 ta' Settembru, 2009**);

Ikkunsidrat:

18. Illi l-posizzjoni lokali fir-rigward komplet tevolvi fid-dawl tas-sentenza tal-**Qorti Ta' Strasburgu** fl-ismijiet **Mario Borg vs. Malta ECHR Applikazzjoni Nru: 37537/13**, datata t-**12 ta' Jannar, 2016**: Li rriteniet partikolarment is-segwenti:

“(i) **General Principles:**

“56. Early access to a lawyer is one of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right of a fair trial is to be ensured to the highest possible degree by democratic societies (see **Salduz vs. Turkey [GC]**, no. 36391/02, § 54, ECHR 2008);

“57. The Court reiterates 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**, cited above § 55);

“58. Denying the applicant access to a lawyer because this was provided for on a systematic basis by the relevant legal provisions already falls short of the requirements of Article 6 (*ibid.*, § 56);

“(ii) **Application to the Present Case**”:

“59. The Court observes that the post – **Salduz** case-law referred to by the Government (paragraph 53 *in fine*) does not concern situations where the lack of legal assistance at the pre-trial stage stemmed either from a lack of legal provisions allowing for such assistance or from an explicit ban in domestic law.

“60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, **Salduz** cited above § 56; **Navone and Others vs. Monaco**, nos. 62880/11, 62892/11 and



62899/11, §§ 81-85, **24 October, 2013**; **Brusco vs. France**, no. 1466/07, § 54, **14 October, 2010**, and **Stojkovic vs. France and Belgium**, no. 25303/08 §§ 51 – 57, **27 October, 2011**). A systematic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see for example, **Dayanan vs. Turkey**, no. 7377/03 §§ 31 – 33, **13 October, 2009**; **Yesilkaya vs. Turkey**, no. 59780/00 **8 December, 2009**; **Fazli Kaya vs. Turkey** no. 24820/05, **17 September, 2013**);

- “61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent, (see **Salduz** cited above § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government has not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment);
- “62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons, (see **Salduz** cited above §§ 52, 55 and 56);
- “63. There has accordingly been a violation of Article 6 § 1 of the Convention”;

Ikkunsidrat:

19. Illi in vista tal-premess ghandu allura jkun pacifiku li fil-kawza estensivament citata fil-paragrafu precedenti, il-Qorti ta' Strasburgu tissottolinea bi kjarezza u minghajr ma thalli spazju ghal ebda dubju fir-rigward, li allura kull stqarrija li ssir minghajr assistenza legali – salv f'kazijiet verament eccezzjonali – hi lesiva tal-artiklu 6 tal-Konvenzjoni;
20. Illi l-istess linja legali giet issa wkoll segwita lokalment, (ara **Prim'Awla tal-Qorti Civili** fil-kawza fl-ismijiet **Malcolm Said vs. Avukat Generali**, datata l-14 ta' Jannar, 2016, u **Trevor Bonnici vs. Avukat Generali**, datata l-10 ta' Novembru, 2016;

Ikkunsidrat:

21. Illi l-fatti rizultanti mill-kaz in dizamina jikkonkorru ghall-fatt li r-rikorrenti ma kellux assistenza legali waqt l-interrogatorju tieghu tad-29 ta' Gunju, 2008, (ara foll 27);
22. Illi in vista tal-insenjament superjuri fuq elenkat l-assenza ta' tali ghajnuna legali waqt l-interrogatorju hi bizzejjed biex tikristallizza l-ksur tal-artiklu 6 tal-Konvenzjoni u tal-artiklu 39 tal-Kostituzzjoni;
23. Illi konsegwentement ghandu jirrizulta wkoll pacifiku li l-istess rikorrenti sofra lezjoni tad-dritt tieghu ta' smigh xieraq;

Ikkunsidrat:

- 24.0. Illi in vista tas-suespost din il-qorti hi sodisfatta li r-rikorrenti pprova l-kaz tieghu skont il-ligi u konsegwentement:
  - 24.1. Takkolji t-talbiet tar-rikorrenti;
  - 24.2. Tirrespingi r-risposti tal-intimat;
  - 24.3. Tiddikjara li konsegwenza tal-istess ir-rikorrenti inkisirlu d-dritt tieghu ghal smigh xieraq fit-termini tal-artiklu 39 tal-Kostituzzjoni u tal-artiklu 6 tal-Konvenzjoni;

- 24.4. Tikkundanna lill-intimat Avukat Generali biex ihallas lir-rikorreni l-ammont ta' elfejn u hames mitt euro, (€2,500.00), in rimedju ghal dan l-ksur tad-dritt fundamentali tar-rikorreni.

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Onor. Imhalled Silvio Meli

## **DECIZJONI FINALI**