

**QORTI CIVILI PRIM' AWLA  
(GURISDIZZJONI KOSTITUZZJONALI)**

**ONOR. IMHALLEF MARK CHETCUTI LL.D.**

**Illum it-Tlieta, 26 ta' Gunju 2018**

Numru 2

**Rikors Nru. 106/2016**

**Alberto Raji-Chang  
vs  
Director General (Courts),  
Director of the Criminal Courts and Tribunals (Malta),  
Attorney General,  
Hon. Minister for Justice, Culture and Local Government**

**Il-Qorti,**

Rat ir-rikors tar-rikorrenti tal-20 ta' Dicembru 2016 li jghid hekk:

That pursuant to an extradition request from Chilean authorities, applicant was arraigned before the Court of Magistrates (Malta) as a court of committal under arrest on the 8th December, 2016 and was granted bail under a number of conditions including the making of a deposit of two thousand euro (€2,000).

That the Court of Magistrates (Malta) ordered that the said extradition proceedings be conducted in the English language and that is why this application is also being filed in the English language.

That following an application filed by the Attorney General, the Criminal Court, on 12th December, 2016, varied the said condition by ordering applicant to pay and additional sum of ninety eight thousand euro (€98,000).

That applicant is in a position to meet this condition.

That applicant was informed by representatives of the Registrar of Courts that sums of money in excess of eleven thousand euro (€11,000) will not be accepted. As a

consequence of this arbitrary decision applicant is currently still being unlawfully detained.

That applicant filed an application before the Criminal Court requesting it to vary the said condition to an amount that suits the Registrar of Courts or, alternatively, to order the Registrar of Courts to allow him to abide by the condition imposed by the Court. This request was rejected by the said Criminal Court on the 14th December, 2016. The conclusions are being reproduced verbatim:

"In view of the replies of the Registrar of Courts and the Attorney General with reference to the possibility of money laundering the applicant's request cannot be accepted.

"Consequently, this Court cannot adhere to applicant's request as outlined in his application."

That, apart from the fact that applicant's alternative request was ignored, since applicant has been granted bail and is in a position to meet the conditions imposed by the Court, his continued detention is not in accordance with the law. Therefore, on the 15th December, 2016, applicant filed an application before the Court of Magistrates requesting the said Court to order his release from custody. Such application was filed in terms of article 412B of the Criminal Code.

That the Court of Magistrates appointed the application for hearing with urgency on that same day. During this hearing the Registrar of Courts was represented by lawyers from the Attorney General's Office, that is the same office whose position regarding the granting of bail had been made amply clear in their application filed on the 12th December, 2016.

That during the sitting the Court of Magistrates heard Ms. Dolores Fenech on behalf of the Registrar of Courts who stated that the stand against accepting the deposit ordered by the Criminal Court was twofold. First of all the "policy" was based on "security reasons" relating to the handling and retention of large amounts of cash and, secondly, on a reasoned interpretation of anti-money laundering rules.

That by a decision delivered in camera on that same day the Court of Magistrates rejected applicant's request. The Court's conclusions are being reproduced verbatim: "It is this Court's opinion that the decision taken by the Registrar not to accept cash in considerable amounts is definitely not arbitrary. The Registrar of Court has every right to exercise extreme caution when receiving and/or handling cash money. This extreme caution is the result of the attention that the authorities need to give to the anti money laundering regime of laws and regulations. The position adopted by the Registrar is not only morally correct, but it is a position based on the respect that the relevant authorities need to give to the anti money laundering regime of rules and regulations.

"It is inconceivable how the applicant is requesting or expecting the Registrar of Courts to be oblivious to the anti money laundering laws. By requesting the applicant to produce the bail bond in the form of a bank draft, the Registrar of Courts is making it clear to the applicant that any funds that the Registrar has or is ready to handle, need to have a clean certificate of origin. The request by the Registrar is legitimate.

"It is the applicant's responsibility to fulfil, in accordance with the law, the obligation to bring forward the bail bond. The bail decree is there. He just needs to implement it in full observance of the law in its entirety.

"The reverse argument put forward by the applicant, that the Registrar of Court must accept the bail bond in cash, and it is then afterwards that the authorities may, if so they wish, investigate the origin of those funds and take the necessary steps according to law, does not hold ground.

"On the basis of the above, any allegation by the applicant, in the sense that notwithstanding the granting of bail, he is being put in a position by the Registrar which in effect does not allow him to actually benefit from the bail he was granted, does not hold ground.

"The continued detention of the applicant is therefore in accordance with the law."

That the above-mentioned facts and decisions make it amply clear that applicant is being unlawfully deprived of his liberty notwithstanding his being in a position to meet the conditions imposed upon him by the Criminal Court.

That the Registrar of Court has no right to exclude a method of payment and impose another that involves a third party - a bank - which is "a subject person" according to law and will object to converting the sum of money imposed by the Criminal Court into a bank draft. This is a fact that was presumably taken into account by the said Court when quantifying the amount of the deposit to be imposed. This evident from its decree of the 14th December, 2016.

That as things stand, the Criminal Court imposed a condition that it knew could not be met by the applicant for what are being coined as "legal reasons".

That applicant is therefore being deprived of his right to liberty safeguarded by Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Therefore applicant respectfully requests this Honourable Court:

1. To declare his arrest in the proceedings "The Police v. Alberto Raji-Chang" is in violation of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;
2. To give all the necessary directives in order that his right protected by the said Article 5 be adhered to including his immediate release from arrest;
3. With expenses against respondent.

Rat ir-risposta tal-Avukat Generali u l-Onorevoli Ministru ghall-Gustizzja, Kultura u Gvern Lokali li tghid hekk:

Illi l-pretensjonijiet tar-rikorrenti huma fis-sens illi "the Registrar of Court has no right to exclude a method of payment and impose another that involves a third party - a bank - which is 'a subject person' according to law and will object to converting the sum of money imposed by the Criminal Court into a bank draft. This is a fact that

was presumably taken into account by the said Court when quantifying the amount of the deposit to be imposed. This is evident from its decree of the 14<sup>th</sup> December, 2016. That as things stand, the Criminal Court imposed a condition that it knew could not be met by the applicant for what are being coined as 'legal reasons'. Illi r-rikorreni qieghed jallega li l-arrest tieghu huwa vjolattiv ghall-Artikolu 5 tal-Konvenzjoni Ewropeja u qed jitlob li bhala rimedju jinheles mill-arrest b'mod immedjat.

Illi l-esponenti jissottomettu li l-pretensjonijiet tar-rikorreni huma nfondati fil-fatt u fid-dritt u dan ghar-ragunijiet segwenti:

1. Illi in linea preliminarj, l-esponenti jecepixxu l-irritwalita' tar-rikors promotur stante li dan ir-rikors gie prezentat bil-lingwa Ingliza minghajr ma giet segwita l-procedura mahsuba fil-Judicial Proceedings (Use of English Language) Act (Kap. 189 tal-Ligijiet ta' Malta);

2. Illi in linea preliminarj wkoll, l-esponenti jissottomettu li l-Ministru tal-Gustizzja, Kultura u Gvern Lokali mhuwex il-legittimu kontradittur ai termini tal-Artikolu 181B tal-Kodici ta' Organizzazzjoni u Procedura Civili (Kap. 12 tal-Ligijiet ta' Malta);

3. Illi in linea preliminarj wkoll, in-nuqqas ta' interess guridiku tar-rikorreni li jkompli bil-procedura odjerna stante li wara l-intavolar tal-proceduri odjerni l-istess rikorreni ghamel id-depozitu stabbilit mill-Qorti Rimandanti u l-istess rikorreni inheles mill-arrest;

4. Illi minghajr pregudizzju u fil-mertu, l-esponenti jissottomettu li ma jissussisti ebda ksur tal-Artikolu 5 tal-Konvenzjoni Ewropeja. Illi f'dan il-kaz, l-arrest tar-rikorreni jinkwadra ruhhu perfettament taht il-paragrafu (f) tal-Artikolu 5(1) tal-Konvenzjoni, b'dana li l-arrest tar-rikorreni sehh stante l-proceduri ta' estradizzjoni quddiem il-Qorti Rimandanti fejn qed jintalab ir-ritom tar-rikorreni lejn ic-Chile. Illi tali arrest kien wiehed legittimu skont il-qafas legali li jipprovdi l-Att dwar l-Estradizzjoni.

Illi bhala fatti johrog mill-atti tal-proceduri tal-Qorti Rimandanti jirrizulta li r-rikorreni gie mressaq taht arrest fit-8 ta' Dicembru 2016 fi proceduri ta' estradizzjoni u f'liema seduta r-rikorreni talab u ottjena l-helsien mill-arrest.

L-esponenti jirreferu ghall-awturi stabbiliti f'dan il-kamp Harris, Boyle & Warbrick illi jghallmu illi: 'Detention may be justified by Article 5(1)(f) even though a formal request or an order for extradition has not been issued, provided that enquires have been made, since the enquires amount to 'action' being taken in the sense of that provision. Likewise, detention may be within Article 5(1)(f) even though deportation or extradition does not in fact occur'.

Ghalhekk fil-kaz odjern ghandna kaz li jiggustifika l-arrest u l-privazzjoni tal-liberta tar-rikorreni abbazi tal-Artikolu 5(1)(f) tal-Konvenzjoni Ewropeja bil-konsegwenza li d-detenzjoni tar-rikorreni hija wahda gustifikabbli u permissibbli u dan peress li l-arrest tar-rikorreni sar f'kuntest ta' proceduri ta' estradizzjoni kontra tieghu.

5. Illi gialadarba gie stabbilit li l-arrest tar-rikorreni kien imsejjes skont kif jipprovdi l-Artikolu 5(1)(f) tal-Konvenzjoni, l-esponenti jissottomettu n-nuqqas ta' applikabilita tal-Artikolu 5(3) tal-Konvenzjoni u dan peress li l-Artikolu 5(3) tal-Konvenzjoni

japplika jekk id-detenzjoni jew arrest isir fuq suspett ragjonevoli li persuna tkun wettqet reat u cioe jekk id-detenzjoni ssir abbazi tal-Artikolu 5(1)(c) tal-Konvenzjoni. Illi kif diga nghad aktar il fuq id-detenzjoni tar-rikorrenti saret f'kuntast ta' estradizzjoni bil-konsegwenza li gialadarba li l-arrest tar-rikorrenti sar skont dak li jipprovdi l-Artikolu 5(1)(f), l-Artikolu 5(3) tal-Konvenzjoni mhux applikabbli ghall-kaz odjern. Illi ghalhekk fil-kuntast ta' estradizzjoni, ir-rikorrenti ma jistax jillamenta mill-kundizzjonijiet tal-helsien mill-arrest maghmula mill-Qorti Rimandanti u dan stante n-nuqqas ta' applikabbilita tal-Artikolu 5(3) tal-Konvenzjoni Ewropeja fil-kuntast ta' estradizzjoni.

6. Illi minghajr pregudizzju ghas-suespost, jekk dina l-Onorabli Qorti thoss li ghandha tezamina jekk il-kontinwazzjoni tad-detenzjoni tar-rikorrenti hijiex wahda gustifikata u permissibbli fil-qafas tal-Artikolu 5(3) tal-Konvenzjoni, l-esponenti jissottomettu li mill-atti processwali jirrizulta li l-proceduri ta' estradizzjoni tar-rikorrenti qed jinstemghu b'eccellerita u speditezza. In fatti mill-atti jirrizulta li r-rikorrenti ttella' b'arrest minnufih quddiem il-Qorti tal-Magistrati fil-gurnata tat-8 ta' Dicembru 2016 u cioe ftit tas-sieghat wara li gie arrestat u dan bi tharis tal-ewwel parti tal-Artikolu 5(3) tal-Konvenzjoni.

Illi meta deher quddiem il-Qorti tal-Magistrati (Malta) ir-rikorrenti ghamel talba ghall-helsien mill-arrest (bail) liema talba fic-cirkostanzi ntlagghat b'numru ta' kundizzjonijiet u r-rikorrenti inheles mill-arrest. Eventwalment l-kundizzjonijiet tal-helsien mill-arrest gew modifikati mill-Qorti fejn l-ammont ta' depozitu gie rivedut. Illi sakemm ir-rikorrenti ghamel tali depozitu, il-beneficcu tal-helsien mill-arrest tnehha. Illi certament li l-prassi adottata mir-Registratur tal-Qorti li huwa ma jaccettax depoziti fi flus kontanti ta' aktar minn EUR11,500 hija prassi msejsa fuq ir-regolamenti dwar il-hasil ta' flus. Ghalhekk huwa ghal kollox legittimu li r-Registratur jirrikjedi li d-depoziti li jeccedu EUR11,500 jsiru permezz ta' bank draft u dan sabiex jigu mharsa l-ligijiet u r-regolamenti dwar il-hasil tal-flus.

Illi ghalhekk ma jistax jinghad li l-kontinwazzjoni tal-arrest tar-rikorrenti kien b'xi mod kappriccjuz jew arbitrarju.

Ghaldaqstant, thares minn fejn thares dan kollu ghandu jwassal lil dina l-Onorabli Qorti biex tiddikjara li r-rikorrent certament li ma garrabx l-ebda vjolazzjoni tad-dritt tieghu protett permezz tal-Artikolu 5 tal-Konvenzjoni.

7. Illi jsegwi ghalhekk li t-talbiet tar-rikorrenti ghandhom jigu michuda.

8. Salv eccezzjonijiet ulterjuri.

9. Bl-ispejjez.

Rat ir-risposta tad-Direttur Generali (Qrati) u Registratur Qrati u Tribunali Kriminali li tghid hekk:

1. Illi t-talbiet tar-rikorrenti huma infondati fil-fatt u fid-dritt inter alia minhabba s-segwenti ragunijiet:

2. Illi in linea preliminari, l-esponenti jecepixxu l-irritwalita tar-rikors promotur stante li dan ir-rikors gie prezentat bil-lingwa Ingliza minghajr ma giet segwita l-procedura mahsuba fil-Judicial Proceedings (Use of English Language) Act (Kap. 189 tal-Ligijiet ta'Malta);

3. Illi in linea preliminari wkoll, l-esponenti jissottomettu li l-eccipjenti Direttur Generali (Qrati) u Registratur Qrati u Tribunali Kriminali mhumiex il-legittimi kontraditturi ghal din il-kawza u kwindi ghandhom jigu lliberati mill-osservanza tal-gudizzju;

4. Illi in linea preliminari wkoll, in-nuqqas ta' interess guridiku tar-rikorrenti li jkompli bil-procedura odjerna stante li l-mertu huwa illum ezawrit billi r-rikorrenti ghamel id-depozitu mitlub u nheles mill-arrest;

5. Illi fil-meritu l-eccipjenti jirrilevaw illi ma kien hemm ebda ksur kif lamentat mir-rikorrenti u kwindi t-talbiet tar-rikorrenti huma nfondati fil-fatt u fid-dritt.

6. Illi l-prassi adottata mir-Registratur tal-Qorti li ma jaccettax depoziti fi flus kontanti aktar minn EUR11,500 hija prassi msejsa fuq ir-regolamenti dwar il-hasil ta' flus u kwindi huwa ghal kollox legittimu li l-istess Registratur jirrikjedi li d-depoziti li jeccedu EUR11,500 jsiru permezz ta' bank draft u dan sabiex jigu mharsa l-ligijiet u r-regolamenti dwar il-hasil tal-flus. Dan il-punt gja kkonfermat mill-Qorti tal-Magistrati (Malta) fid-decizjoni taghha tal-15/12/16 per Mag I. Farrugia. Ghalhekk ghandu jirrizulta illi l-punt in dibattitu gja gie trattat u deciz mill-Qorti.

7. Illi ghalhekk it-talbiet attrici huma nfondati fil-fatt u fid-dritt.

8. Salvi, jekk ikun il-kaz, eccezzjonijiet ossia risposti ulterjuri.

Ghaldaqstant l-esponenti jitlob bir-rispett illi dina l-Onorabbli Qorti joghghobha tichad in toto t-talbiet tar-rikorrenti bl-spejjez kontra l-stess rikorrenti.

Illi b'verbal datat 30 ta' Jannar 2017, in kwantu ghall-ewwel eccezzjoni, il-Qorti ordnat li l-proceduri jinstemghu bil-lingwa Ingliza salv ghal verbali u s-sentenza tal-Qorti.

Id-difensur tar-rikorrent issottometta li fil-mori tal-proceduri nghata r-rilaxx mill-arrest u ghalkemm ma ghandux interess aktar fit-tieni talba tieghu, xorta sehhet l-allegata vjolazzjoni tad-dritt tieghu sancit mill-artikolu 5 tal-Konvenzjoni u talab li l-kawza titkompli n-kwantu ghall-ewwel talba.

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

Rat li l-kawza thalliet ghas-sentenza.

## **Ikkunsidrat**

### **Interess guridiku**

Illi in linea preliminari l-intimati qed jeccepixxu n-nuqqas ta' interess guridiku tar-rikorrenti li jkompli bil-procedura odjema stante li wara l-intavolar tal-proceduri odjerni l-istess rikorrenti ghamel id-depożitu stabbilit mill-Qorti rdimandanti u l-istess rikorrenti inheles mill-arrest.

L-element tal-interess guridiku huwa marbut mal-kuncett ta' vittima fil-kuntest ta' kawzi ghat-tfittxija ta' drittijiet u libertajiet fundamentali tal-bniedem. Il-Qorti ta' Strasbourg interpretat “the concept of “victim” autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act (ara **Sanles Sanles vs Spain**, no. 48335/99, ECHR 2000-XI u **Micallef vs Malta**). Bazikament “the word ‘victim’ entails the presence of some link between the violation and the claimant”.

Fil-kaz in ezami mhux kontestat li r-rikorrent gie rilaxxjat wara li hallas id-depożitu u fil-fatt ma baqax detent u effettivament irtira t-tieni talba tieghu f'dawn il-proceduri. Izda hu xorta wahda qed jinsisti li jigi dikjarat illi l-arrest kontinwat tieghu sakemm effettivament inheles kien bi ksur tal-artikolu 5 tal-Konvenzjoni Ewropeja ghall-Protezzjoni Dwar id-Drittijiet tal-Bniedem. Hu jikkontendi li ghamel sbatax il-gurnata karcerat billi r-Registratur tal-Qorti ma accettax l-pagament cash tad-depożitu li hu kien lest jaghmel. Ghalhekk f'dawk is-sbatax il-gurnata nkisrulu d-drittijiet fundamentali tieghu.

Illi fil-fehma tal-Qorti r-rikorrent ghandu interess guridiku li jkompli b'dina l-kawza billi huwa ghandu l-vesti ta' vittima u l-Qorti trid tiddeciedi jekk fil-fatt inkisrux id-drittijiet fundamentali tar-rikorrent fiz-zmien imsemmi mir-rikorrent.

### **Legittimu kontradittur**

Illi in linea preliminari wkoll, l-eccipjenti Direttur Generali (Qrati); Registratur Qrati u Tribunali Kriminali u l-Ministru tal-Gustizzja, Kultura u Gvem Lokali ssottomettew li ai termini tal-artikolu 181B tal-Kodici ta' Organizzazzjoni u Procedura Civili (Kap. 12 tal-

Ligijiet ta' Malta) huma mhumiex il-legittimi kontraditturi ghal din il-kawza u kwindi ghandom jigu liberati mill-osservanza tal-gudizzju.

Illi l-Avukat Generali ma ressaq ebda eccezzjoni li hu mhuiex il-legittimu kontradittur. Ghalhekk huwa gie korrettement imharrek.

Dwar l-intimati l-ohra l-Qorti tqis li l-kwestjoni ta' min ghandu jwiegeb ghal ksur ta' jedd fundamentali tintrabat mal-ghamla tal-ksur allegat u wkoll mar-rimedju li jista' jinghata.

Skond l-artikolu 181B.(1) il-Gvern ghandu jkun rapprezentat fl-atti u fl-azzjonijiet gudizzjarji mill-kap tad-dipartiment tal-gvern li jkun inkarigat fil-materja in kwistjoni u, fejn dan ma japplikax, sussidjarjament fil-persuna tal-Avukat Generali, li dejjem u f'kull kaz irid jigi notifikat bl-atti gudizzjarji li jitressqu kontra l-Gvern.

Fir-rigward tal-Ministru ma hemmx dubju li ma kellux ghalfejn jigi citat ladarba li l-ligi tispecifica li ghandu jigi citat il-Kap tad-Dipartiment koncernat. Ghalhekk huwa ghandu jigi liberat mill-osservanza tal-gudizzju.

Mir-rikors promotorju u mill-assjem tal-provi jirrizulta li r-rikorrent qiegħed iressaq l-ilment tiegħu direttament kontra l-intimati, Direttur Generali (Qrati) u Registratur Qrati u Tribunali Kriminali billi huma rrifjutaw li jaccettaw id-depozitu li huwa ried jagħmel u minhabba hekk għamel sbatax il-gurnata il-habs.

L-intimati imsemmija jirraprezentaw lill Gvern fil-kwistjonijiet li jirrigwardaw l-andament ordinarju tal-amministrazzjoni pubblika inerenti fid-Dipartiment tal-Qorti u ghalhekk il-kwistjoni prezenti tidhol fil-mansjonijiet tagħhom.

Illi ghalhekk fid-dawl tal-artikolu 181B tal-Kap. 12 u l-insenjament gurisprudenzali in materja l-eccezzjoni ta' dawn l-ahhar l-intimati mhux se tigi milqugħa.

### **Proceduri ta' estradizzjoni**

Fl-ewwel talba tiegħu r-rikorrent qed jitlob li dina l-Qorti tiddikjara illi l-arrest tiegħu fil-proceduri "The Police vs Alberto Raji-Chang" hija bi ksur ta' l-artikolu 5 tal-

Konvenzjoni Ewropeja għall-Protezzjoni Dwar id-Drittijiet tal-Bniedem. Ir-rikorrent ma jispjefikax taht liema sub-artikolu ta' dana l-artikolu huwa qed jivoka dan l-artikolu.

L-intimati wiegbu li f' dan il-kaz, l-arrest tar-rikorrenti jinkwadra ruhhu taht il-paragrafu (f) tal-artikolu 5(1) tal-Konvenzjoni, b'dana li l-arrest tar-rikorrenti sehh stante l-proceduri ta' estradizzjoni quddiem il-Qorti Rimandanti fejn qed jintalab ir-ritorn tieghu lejn ic-Chile. Illi għalhekk dana l-arrest irid jigi ezaminat fil-qafas legali li jipprovdi l-Att dwar l-Estradizzjoni.

Illi bhala fatt jirrizulta mill-atti tal-proceduri li r-rikorrenti gie mressaq taht arrest fit-8 ta' Dicembru 2016 fi proceduri ta' estradizzjoni u f'liema seduta r-rikorrenti talab u ottjena l-helsien mill-arrest (ara fol. 31et seq).

Illi l-art. 5 tal-Konvenzjoni fl-ewwel (1) subinciz jaqra hekk:-

Kulhadd għandu d-dritt għal-liberta u għas-sigurta tal-persuna.

Dan l-artikolu jipprotegi d-dritt għal-liberta tal-individwu kontra l-interferenza arbitrarja tal- Istat, izda fl-istess waqt jirrikonoxxi li jezistu cirkostanzi li jimmeritaw deroga għal dan id-dritt. Fil-fatt dana l-artikolu jkompli billi jipprovdi li:

Hadd ma għandu jigi ipprivat mil-liberta tieghu hlief fil-kazijiet li gejjin u skond il-procedura preskritta bil-ligi :

Fosthom l-artikolu 5(f) tal-Konvenzjoni Ewropea jipprovdi li persuna tista' tigi mcahhda mil-liberta' personali taghha fil-kaz li:

L-arrest jew id-detenzjoni skond il-ligi ta' persuna biex jigi evitat li tidhol minghajr awtorita fil-pajjiz jew ta' persuna li kontra taghha tkun qed issir kawza għad-deportazzjoni jew għall-estradizzjoni.

Id-disposizzjoni konvenzjonali kontenuta fil-paragrafu (f) hija eccezzjoni għar-regola generali kontenuta fl-artikolu 5(1).

Fil-kaz in ezami d-detenzjoni tar-rikorrent kienet tinkwadra ruhha taht wahda mill-eccezzjonijiet li tipprovdi għalihom it-tieni parti tas-subinciz (1)(f) tal-artikolu 5 tal-Konvenzjoni.

L-intimati pero jissottomettu li gialadarba gie stabbilit li l-arrest tar-rikorrenti kien imsejjes skont kif jipprovdi l-artikolu 5(1)(f) tal-Konvenzjoni, ghalhekk ma japplikax l-artikolu 5(3) tal-Konvenzjoni u dan peress li l-artikolu 5(3) tal-Konvenzjoni japplika jekk id-detenzjoni jew arrest isir fuq suspett ragjonevoli li persuna tkun wettqet reat u cioe jekk id-detenzjoni ssir abbazi tal-artikolu 5(1)(c) tal-Konvenzjoni. Ghalhekk, skond l-intimati, fil-kuntest ta' estradizzjoni, ir-rikorrenti ma jstax jillamenta mill-kundizzjonijiet tal-helsien mill-arrest stante li l-artikolu 5(3) tal-Konvenzjoni Ewropeja ma japplikax fil-kuntest ta' estradizzjoni.

L-artikolu 5(1)(c) jghid hekk:-

L-arrest jew detenzjoni skond il-ligi ta' persuna effettwata sabiex tigi migjuba quddiem l-awtorita legali kompetenti fuq suspett ragjonevoli li tkun ikommettiet reat jew meta jkun meqjus ragjonevolment mehtieg biex jigi evitat li tikkommetti reat jew li tahrab wara li tkun ghamlet reat.

It-tielet (3) subinciz jipprovdi li:-

Kull min ikun arrestat jew detentat skond id-disposizzjonijiet tal-paragrafu (1)(c) ta' dan l-Artikolu ghandu jingieb minnufih quddiem imhallef jew funzjonarju iehor awtorizzat b`ligi biex jezercita setgha gudizzjarja u jkollu dritt ghal proceduri fi zmien ragjonevoli jew ghal helsien waqt pendenza tal-proceduri.

Il-helsien jista' jkun taht kundizzjoni ta' garanziji biex jidher ghall-proceduri.

Kif jinghad fil-ktieb, "Theory and Practice of the European Convention on Human Rights" ta' **Van Dijk, Van Hoof, Van Rijn u Zwaak** (4<sup>th</sup> Edit 2006 p 481):

Article 5 Paragraph 1 under (f) does not require that the detention of a person against whom action is being taken with a view to deportation or extradition must be reasonably considered necessary, for example to prevent his committing an offence or fleeing.

In this respect article 5(1) under (f) provides a lower level of protection than article 5 Paragraph 1 under (c): all that is required under (f) is that action is being taken with a view to deportation or extradition.

Dan, ovjament, ma jfissirx li persuna tista' tinzamm arrestata indefinittivament sakemm jigu decizi l-proceduri relattivi fil-konfront taghha. L-istess awturi jghidu dan fil-kuntest tal-kontinwazzjoni tad-detenzjoni (op cit p 482):

Thus, although the duration of detention is only mentioned in paragraph 3 of Article 5 and this provision refers only to detentions under paragraph 1(c), the Court stipulates that the period of detention may not exceed a reasonable time. The reasonableness of the length of detention has to be assessed in each individual case.

Illi fil-kaz in ezami r-rikorrent qed jitlob li dina l-Qorti tiddikjara illi l-arrest tieghu fil-proceduri "The Police vs Alberto Raji-Chang" hija bi ksur tal-artikolu 5 tal-Konvenzjoni Ewropea ghall-Protezzjoni Dwar id-Drittijiet tal-Bniedem. Huwa minnu li l-proceduri li hemm kontra r-rikorrent huma fil-qafas tal-proceduri tal-estradizzjoni, izda r-rikorrent qed jilmenta mhux minhabba it-tul tal-proceduri ta' estradizzjoni, imma billi ghamel sbatax il-guranta l-habs sakemm inghata bail effettiv u huwa jsostni li dan mhux gustifikat taht l-artikolu 5(3) tal-Konvenzjoni.

### **Konsiderazzjonijiet tal-Qorti**

L-esponent issottometta li r-Registratur tal-Qorti ma kienx accetta illi huwa jiddepozita s-somma ta' €98,000 ghax din is-somma kienet in excess ta' hdax-il elf euro (€11,000) li hu kien lest li jaccetta bhala depozitu in cash. Hu jikkontendi li r-Registratur tal-Qorti ma kellu ebda dritt li jeskludi metodu ta' pagament u li jimponi metodu iehor li jinvolvi terzi persuni - bank - li huwa "a subject person" ai termini tal-ligi tal-money laundering. Ighid li dan presubbilment kien fattur illi l-Qorti qieset meta ffissat l-ammont tad-depozitu li kellu jithallas ghax skond hu l-Qorti Kriminali imponiet kundizzjoni li kienet taf li qatt ma setghet tigi onorata mill-esponent minhabba dak li qed jigi deskritt bhala "legal reasons".

Ir-rikorrent fix-xhieda tieghu jghid li:

He explained to them (lir-Registratur) that as the Banks had frozen his accounts, he could not do that.(li jgib bank draft). They told him that another person can do that for him. So Dr.Mathew Brincat, a friend of his, produced the draft for €98,000 and he was released.He is facing extradition proceedings from Chile for fraud and money laundering because he applied for Maltese Nationality which was accepted after due diligence was performed. Chile has not produced any type of proof against him for fraud or money laundering.

Doris Fenech, Director Criminal Court, testified that when a deposit for bail is made there are forms to be filled and in one of them there is a declaration which has to be made whether the money deposited belongs to the person who is making the deposit

or to someone else. The reason the Registrar does not accept cash over €10,000 is because of money laundering and they follow the procedure as the banks do, and the threshold is almost the same. The deposit was finally made by Dr Mathew Brincat in the form of a cheque (Dok. DF1 u 2 a fol. 103). The Court as such is not bound by money-laundering regulations but they look at these regulations and follow them. The Court is not a subject person of these regulations. It is a policy which they follow because they are not covered and it has been followed for some time even by her predecessor Mr. Joseph Sacco. This was not the first time that they followed this procedure. In this case we were not suspicious because of the big amount of money which was going to be deposited. What raised their suspicions was the consistency of the amount being paid out in cash not the amount that the Court had imposed as bail. The considerable amount of money that was being paid in cash raised the alarm bells. She would have had no problem had the amount been brought as a bank draft.

Ir-rikorrent isostni li huwa kien f'posizzjoni li jotttempera ruhu mal-kundizzjonijiet imposti mill-Qorti u ghalhekk in konsegwenza tad-decizjoni arbitrarja tar-Registratur li jirrifjuta li jaccetta depozitu ta' €98,000 in cash, u huwa baqa' jinzamm fi stat ta' arrest illegalment ghal sbatax il-gurnata.

Is-sottomissjoni tar-rikorrent li l-Qorti Kriminali meta imponiet dak id-depozitu kienet taf li huwa qatt ma seta jonora dik l-ordni minhabba "legal reasons" hi asserzjoni gratwita u ma hi sorretta minn ebda prova. Ir-rikorrent stess ighid li ma kinitx problema ghalih li jhallas dak l-ammont. Il-kwistjoni ma kinitx dwar l-ammont tal-bail iffissat mill-Qorti izda l-mod ta' pagament li ried jaghmlu.

Ir-rikorrent jissottometti li r-Registratur tal-Qorti ma kellu ebda dritt li jeskludi metodu ta' pagament (cash) u li jimponi metodu iehor (bank draft) li jinvolvi terzi persuni - bank - li huwa "a subject person" ai termini tal-ligi tal-money laundering. Jishaq li r-Registratur mexa fuq "policy" u mhux fuq regolamenti, minhabba "security reasons" relatati maz-zamma u l-iprocessar ta' somom konsiderevoli ta' flus kontanti meta huwa ma kienx "subject person".

Jibda biex jinghad li fil-proceduri taht l-artikolu 409A tal-Kap. 9 dwar habeas corpus wara li r-rikorrent kien talab ir-rilaxx mid-detenzjoni, l-istess argumenti tressqu quddiem il-Qorti tal-Magistrati u dik il-Qorti kienet iddecidiet li d-detenzjoni kontinwata tar-rikorrent kienet skond il-ligi u li r-rifjut tar-Registratur li jaccetta depozitu ta' cash fl-ammont ta' €98,000 ma kinitx dezijoni arbitraja imma kienet wahda legittima (ara fol. 63 u fol. 66).

Illi l-policy adottata mir-Registratur tal-Qorti li ma jaccettax depoziti fi flus kontanti ta' aktar minn €11,500 hija prassi msejsa fuq ir-regolamenti dwar il-hasil ta' flus. Il-posizzjoni li r-Registratur jirrikjedi li d-depoziti li jeccedu €11,500 jsiru permezz ta' bank draft hija wahda legittima u intiza biex jitharsu l-ligijiet u r-regolamenti dwar il-hasil tal-flus. Ma jfissirx illi ghaliex l-intimati Registratur u Direttur mhumiex "subject" a fini tal-Money Laundering Act, allura huma bhala istituzzjoni pubblika ma ghandhomx jaraw u jghassu li ma jkunx hemm ksur tal-ligi dwar hasil tal-flus.

L-intimati kienu gustifikati li joqogħdu attenti u jieħdu prekawzjonijiet u mizuri ragjonevoli (li bihom r-rikorrent gie infurmat) biex jaraw minn fejn ammont daqstant kbir ta' flus in kontanti kien gej qabel isir id-depożitu u jitolbu speci ta' certificate of origin tal-flus jew li jitolbu bank draft. Gie anke suggerit lir-rikorrent li jgib terza persuna biex tagħmel id-depożitu għalih.

Inoltre r-Registratur kien aktar milli gustifikat li jieħu mizuri prekawzjonali meta gie infurmat li l-kontijiet bankarji tar-rikorrenti kienu ffrizati u li kien hemm il-proceduri ta' estradizzjoni fuq allegazzjoni ta' frodi u money laundering.

Jirrizulta li eventwalment kien sar depożitu minn Dr Mathew Brincat, habib tar-rikorrent, għalhekk ma jistax jinghad li s-suggeriment tar-Registratur li terza persuna tagħmel id-depożitu għar-rikorrent kienet xi rikjesta impossibili.

Mhux ragjonevoli da parti tar-rikorrent li jippretendi li r-Registratur jaccetta l-ammont ta' cash offrut b'għajnejh magħluqa imbagħad wara hu (u mhux ir-rikorrent) jivverifika l-genwinta ta'dawk il-flus. Kieku għamel hekk imbagħad jekk jirrizultalu xi haga kien ikun tard wisq.

Il-kwistjoni li kellhom l-intimati ma kinitx dwar l-ammont ta' flus li l-Qorti kienet iffissat bhala depozitu imma l-fatt li dak l-ammont kien ser jithallas in cash u dana qajjem suspett u huma hadu l-prekawzjonijiet li huma dejjem jiehdu f'kazijiet bhala dawn.

Illi fil-fehma tal-Qorti ghalhekk id-decizjoni tal-Registratur li jitlob bank draft jew depozitu minn terza persuna u li ma jaccettax depozitu in cash ta' €98,000 minghajr certifikazzjoni dwar l-origini ta' dawk il-flus kienet wahda legittima, gustifikata u mhux arbitrarja u konsegwentement id-detenzjoni tar-rikorrent sakemm iddepozita l-flus ma kinitx tikser l-artikolu 5 tal-Konvenzjoni. Ma jidhirx li r-rikorrenti inzamm detenut wara li sar id-depozitu u gie rilaxxat.

### **Decide**

Ghal dawn il-motivi l-Qorti tiddeciedi billi tichad l-eccezzjoni preliminari tal-intimati dwar l-interess guridiku tar-rikorrent, tilqa' l-eccezzjoni tal-intimat Ministru ghall-Gustizzja, Kultura u Gvern Lokali li mhux legittimu kuntradittur b'dawn il-proceduri, u fil-mertu tichad l-ewwel talba tar-rikorrent u ma tkomplix tiehu konjizzjoni tat-tieni talba peress li ma hemmx bzonnha stante r-rilaxx tar-rikorrenti, bl-ispejjez kontra tieghu.

Onor. Mark Chetcuti LL.D.

Imhalled

Anne Xuereb

Deputat Registratur