FIL-QORTI TAL-MAĠISTRATI (MALTA)
BĦALA QORTI TA' ĠUDIKATURA KRIMINALI

MAĠISTRAT NATASHA GALEA SCIBERRAS B.A., LL.D.

Kawża Nru: 112/2010

Il-Pulizija
(Supretendent Norbert Ciappara)

vs

Jeffrey Spiteri
(ID 541582(M))

Illum: 26 ta' Ġunju 2019

Il-Qorti,

Wara li rat l-imputazzjoni miġjuba fil-konfront tal-imputat **Jeffrey Spiteri** ta' 26 sena, imwieled il-Pieta` fit-2 ta' Ottubru 1982, iben missier mhux magħruf u Anna Spiteri, residenti No. 75, Triq il-Marsa, Marsa, detentur tal-karta tal-identita` bin-numru 541582(M);

Akkużat talli f'dawn il-Gżejjer fit-2 ta' Frar 2004 u matul l-aħħar ġranet ta' qabel din id-data:

a) Forna jew ipprokura jew offra li jforni jew li jipprokura d-droga eroina speċifikata fl-ewwel Skeda tal-Ordinanza dwar il-Mediċini Perikoluży, Kap. 101 tal-Liġijiet ta' Malta lill-persuna jew persuni jew għall-użu ta' persuna/i mingħajr ma kellu liċenzja mill-President ta' Malta u mingħajr

ma kien awtoriżżat bir-regoli tal-1939 għall-Kontroll Intern tad-Drogi Perikolużi (G.N. 292/1939) jew minn xi awtorita` mogħtija mill-President ta' Malta li jforni d-droga u mingħajr ma kien fil-pussess ta' awtoriżżazzjoni għall-importazzjoni jew esportazzjoni maħruġa mit-Tabib Prinċipali tal-Gvern skont id-disposizzjonijiet tas-sitt Taqsima tal-Ordinanza msemmija u mingħajr ma kellu liċenzja jew kien xort'oħra awtoriżżat li jimmanifattura jew iforni d-droga msemmija u mingħajr ma kellu liċenzja li jipprokura l-istess droga u dan bi ksur tar-regoli tal-1939 għall-Kontroll Intern tad-Drogi Perikolużi (G.N. 292/1939), kif sussegwentement emendati u bi ksur tal-Ordinanza dwar il-Mediċini Perikolużi, Kap. 101 tal-Liġijiet ta' Malta.

Rat l-atti kollha tal-każ u d-dokumenti eżebiti, inkluż l-Ordni ta' l-Avukat Ġenerali bis-saħħa tas-subartikolu (2) tal-Artikolu 22 tal-Ordinanza dwar il-Mediċini Perikolużi (Kap. 101), sabiex din il-kawża tinstema' minn din il-Qorti bħala Qorti ta' Ġudikatura Kriminali;

Rat illi fis-seduta tal-21 ta' Jannar 2019, il-partijiet ddikjaraw illi kienu qegħdin jeżentaw lil din il-Qorti, kif preseduta, milli terġa' tisma' l-provi kollha mressqa sa dakinhar quddiem il-Qorti kif diversament preseduta;

Rat illi l-partijiet irrimettew ruħhom għad-deċiżjoni tal-Qorti.

Ikkunsidrat:

Illi mix-xhieda tal-**Assistent Kumissarju Norbert Ciappara**, jirriżulta illi għall-ħabta ta' Frar 2009, huwa kien irċieva informazzjoni kunfidenzjali u dan fis-sens illi l-imputat odjern kien ma' ċerta Madeleine Ancilleri ftit qabel din instabet mejta ħdejn iċ-Ċentru tad-*Detox* ossia ħdejn l-Isptar San Luqa ġewwa Gwardamangia. Għalhekk fl-20 ta' Frar 2009, huwa kien ipproċeda bl-arrest tal-imputat odjern u nterrogah, u fl-imsemmi jum, l-istess imputat irrilaxxja stqarrija lill-pulizija. Din l-istqarrija tinsab esebita fl-atti bħala Dok. NC1.[1] Ix-xhud jgħid ukoll illi l-unika prova li kienet qegħda tistrieħ fuqha l-Prosekuzzjoni in sostenn tal-akkuża miġjuba kontra l-imputat kienet proprju l-istess stqarrija.[2]

Illi fis-seduta tal-21 ta' Jannar 2019, id-difiża rrilevat illi l-unika prova fl-atti hija l-istqarrija tal-imputat, rilaxxjata minnu fi Frar 2009, kif ikkonfermat ukoll mix-xhieda tal-Assistent Kummissarju Norbert Ciappara, liema stqarrija hija inammissibbli bħala prova u dan in linea ma' ġurisprudenza riċenti. Dwar dan il-punt, il-Prosekuzzjoni rrimettiet ruħha.

[1] Ara l-istqarrija a fol. 17 sa 19 tal-proċess.
[2] Ara din ix-xhieda a fol. 30 sa 32 tal-proċess.

Ikkunsidrat ukoll:

Kif ingħad, l-imputat irrilaxxja l-istqarrija tiegħu lill-Pulizija Eżekuttiva nhar l-20 ta' Frar 2009 u dan wara li ngħata s-solita twissija skont il-liġi. Fiż-żmien in kwistjoni, il-liġi Maltija ma kinitx tipprovdi lill-persuna arrestata d-dritt li tottjeni parir legali qabel l-interrogatorju tagħha u wisq inqas id-dritt li tkun assistita minn avukat waqt l-istess interrogatorju. L-ewwel dritt daħal fis-seħħ fl-10 ta' Frar 2010 permezz tal-Avviż Legali 35/2010, fil-waqt illi t-tieni dritt imsemmi daħal fis-seħħ fit-28 ta' Novembru 2016, permezz tal-Avviż Legali 401 tal-2016.

F'dan ir-rigward issir referenza għas-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem tat-12 ta' Jannar 2016 fil-każ **Mario Borg v. Malta**, kif ukoll għas-sentenza tal-Qorti tal-Appell Kriminali fl-ismijiet **The Republic of Malta vs Chukwudi Onyeabor** tal-1 ta' Diċembru 2016, fejn hemmhekk il-Qorti għamlet referenza għal diversi sentenzi tal-Qorti Kostituzzjonali ossia **Carmel Saliba vs Avukat Generali** tas-16 ta' Mejju 2016, **Stephen Nana Owusu vs Avukat Generali** tat-30 ta' Mejju 2016, **Malcolm Said vs Avukat Generali et** tal-24 ta' Ġunju 2016 u **Aaron Cassar vs Avukat Generali et** tal-11 ta' Lulju 2016 u għaddiet sabiex tiddeċiedi illi "*the denial of the right to legal assistance at the pre-trial stage as a result of a systematic restriction applicable to all accused persons must today be held to be in violation of the conditions for the admissibility of an accused's statement*."

Il-Qorti tirreferi wkoll għas-sentenza mogħtija mill-Qorti Kostituzzjonali fil-5 ta' Ottubru 2018, fl-ismijiet **Christopher Bartolo vs Avukat Ġenerali et**, f'liema każ fl-istqarrijiet tiegħu, ir-rikorrenti minkejja li qabel irrilaxxja l-ewwel stqarrija, kien ingħata parir mingħand l-avukat tiegħu li f'dak l-istadju ma jgħid xejn lill-pulizija, huwa xorta waħda rrisponda għad-domandi waqt l-interrogatorju li sarlu, bir-riżultat li stqarr fatti li kienu inkriminanti għalih, in kwantu ammetta li kien jixtri d-droga kemm għall-użu personali tiegħu, kif ukoll sabiex ibiegħ minnha lil terzi. Fis-sentenza tagħha, il-Qorti Kostituzzjonali qalet hekk dwar l-istqarrijiet rilaxxjati mill-istess rikorrenti mingħajr il-jedd ta' assistenza legali waqt l-interrogatorji tiegħu:

"*36. Mill-premess jirrizulta manifest li l-istqarrijiet rilaxxjati mir-rikorrent ser ikollhom kif fil-fatt gja` kellhom quddiem il-Qorti Kriminali impatt fil-proceduri kriminali, mhux in kwantu ghall-ammissjonijiet, izda in kwantu l-kontenut taghhom kien ittiehed in konsiderazzjoni fil-quantum tal-piena imposta fuqu mill-Qorti Kriminali, u issa huwa car li anke l-Qorti tal-Appell Kriminali ser tiehu konsiderazzjoni tal-kontenut tal-istqarrijiet f'dan ir-rigward. Ghalhekk, ghalkemm il-proceduri kriminali ghadhom pendenti u ghalhekk ma jistax f'dan l-istadju jigi determinat jekk kienx hemm lezjoni ta' smigh xieraq f'dawk ilproceduri, jekk l-istqarrijiet jithallew fil-process tal-proceduri kriminali, dawn*

wisq probabbilment ser isir uzu minnhom mill-Qorti tal-Appell Kriminali bi pregudizzju jew vantagg ghall-akkuzat fil-kwantifikazzjoni tal-piena, kemm dik karcerarja kif ukoll ghal dak li tirrigwarda l-multa li tista' tigi imposta.

37. Fid-dawl tal-premess it-tehid tal-istqarrijiet zgur li ser ikollhom impatt fuq l-ezitu tal-process kriminali u, ladarba dan isir, x'aktarx ser isir ksur tad-dritt tal-rikorrent ghal smigh xieraq tenut kont tal-fatt li dawn gew rilaxxjati mirrikorrent fl-assenza ta' avukat li jassistih. Ghalhekk huwa xieraq li, filwaqt li f'dan l-istadju ma jistax jinghad jekk kienx hemm lezjoni ta' dan id-dritt fundamentali tar-rikorrent peress li l-proceduri kriminali ghadhom pendenti, dawn ma jithallewx jibqghu fl-inkartament tal-process kriminali." [sottolinear tal-Qorti]

Allura minkejja illi r-rikorrenti f'dak il-każ, kien ingħata l-jedd li jikkonsulta ma' avukat qabel l-ewwel interrogatorju tiegħu u anke eżerċita dan il-jedd, il-Qorti ordnat illi l-istqarrijiet tiegħu ma jitħallewx fl-inkartament la darba kien ser ikollhom impatt fuq l-eżitu tal-proċess kriminali u dan stante illi ma ngħatax il-jedd għall-assistenza legali waqt l-interrogatorji tiegħu. Din kienet ukoll il-konklużjoni tal-Qorti tal-Appell Kriminal fis-sentenza tagħha tal-20 ta' Novembru 2018, fl-ismijiet **Il-Pulizija vs Claire Farrugia**, f'liema każ dik il-Qorti skartat bħala inammissibbli l-istqarrijiet tal-imputata, waħda minnhom ġuramentata, u dan għaliex għalkemm hija ngħatat id-dritt li tottjeni parir legali qabel l-istqarrijiet tagħha, madankollu hija ma ngħatatx id-dritt li tkun assistita minn avukat waqt l-interrogatorji li sarulha u dan stante li dan id-dritt ma kienx għadu viġenti fiż-żmien in kwistjoni. F'dan is-sens ukoll iddeċidiet l-istess Qorti fis-sentenza tagħha fl-ismijiet **Il-Pulizija vs Emad Masoud** tas-16 ta' Mejju 2019 u iżjed riċentement fis-sentenza tagħha fl-ismijiet **Il-Pulizija vs Sandro Spiteri** tat-18 ta' Ġunju 2019, f'liema każ, l-imputat kien irrilaxxja stqarrija mingħajr il-jedd li jottjeni parir legali qabel l-interrogatorju tiegħu u wisq inqas li jkun assistit minn avukat waqt l-istess interrogatorju.

Fis-sentenza fl-ismijiet **Il-Pulizija (Spettur Malcolm Bondin) vs Aldo Pistella** tal-14 ta' Diċembru 2018, f'liema każ l-appellat kien ingħata l-jedd li jottjeni parir legali qabel l-interrogotarju tiegħu u anke eżerċitah, iżda ma ngħatax il-jedd li jkun assistit minn avukat waqt dan l-interrogatorju, stante illi anke f'dak il-każ, fiż-żmien in kwistjoni, dan il-jedd ma kienx viġenti fil-liġi Maltija, il-Qorti Kostituzzjonali reġgħet irribadiet il-konklużjonijiet tagħha fis-sentenza preċedenti fl-ismijiet **Christopher Bartolo vs Avukat Ġenerali et**:

"*14. Għalkemm, bħall-ewwel qorti, taqbel mal-appellanti illi f'dan l-istadju għadu ma seħħ l-ebda ksur tal-jedd għal smigħ xieraq, madankollu, kif osservat fil-każ ta' Malcolm Said, il-qorti xorta hija tal-fehma li ma jkunx għaqli li l-proċess kriminali jitħalla jitkompla bil-produzzjoni tal-istqarrija tal-akkużat Pistella ladarba din, għallinqas f'parti minnha, ittieħdet mingħajr ma Pistella*

kellu l-għajnuna ta' avukat. Għalhekk, għalkemm għadu ma seħħ ebda ksur tal-jedd għal smigħ xieraq, fiċ-ċirkostanzi huwa għaqli illi, kif qalet l-ewwel qorti, ma jsir ebda użu mill-istqarrija fil-proċess kriminali sabiex, meta l-proċess kriminali jintemm, ma jkunx tniġġes b'irregolarità – dik li jkun sar użu minn stqarrija li ttieħdet mingħajr ma l-interrogat kellu l-għajnuna ta' avukat – li tista' twassal għal konsegwenzi bħal tħassir tal-proċess kollu."

Fil-każ ta' **Philippe Beuze vs Belgium** deċiż mill-*Grand Chamber* tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem fid-9 ta' Novembru 2018, dik il-Qorti reġgħet adottat il-kriterju tal-*overall fairness of the proceedings* sabiex tistħarreġ jekk seħħitx o meno leżjoni tad-dritt għal smiegħ xieraq. Għalkemm sabet li f'dan il-każ seħħet vjolazzjoni tal-Artikolu 6 tal-Konvenzjoni, il-Qorti mxiet lil hinn minn dawk id-deċiżjonijiet li fihom instabet vjolazzjoni tal-imsemmi artikolu la darba kien hemm restrizzjoni sistematika fil-liġi domestika tad-dritt ta' persuna suspettata jew arrestata ta' aċċess għall-avukat, u ddeċidiet illi l-Qorti għandha dejjem tistħarreġ iċ-ċirkostanzi partikolari tal-każ, tenut kont ta' numru ta' kriterji, mhux eżawrjenti, elenkati fid-deċiżjoni tagħha. Dik il-Qorti qalet hekk dwar id-dritt ta' aċċess għall-avukat u dwar l-istħarriġ li għandu jsir f'kull każ:

"***(a) Preliminary comments***

114. The Court observes, by way of introduction, that the Grand Chamber has already had occasion, in a number of cases, to rule on the right of access to a lawyer under Article 6 §§ 1 and 3 (c) of the Convention (see, as recent examples, Dvorski v. Croatia [GC], no. 25703/11, ECHR 2015; Ibrahim and Others, cited above; and Simeonovi, cited above).

115. In the present case, as can be seen from paragraphs 3 and 90 above, the applicant complained first that he had not had access to a lawyer while in police custody and, in addition, that even once he had been able to consult with a lawyer, his lawyer could not assist him during his police interviews or examinations by the investigating judge or attend a reconstruction of events.

116. The applicant's complaints concern statutory restrictions on the right of access to a lawyer, the first alleged restriction being of the same nature as that complained of in the Salduz judgment. It should be pointed out that, further to that judgment, the Grand Chamber provided significant clarification on the right of access to a lawyer in its Ibrahim and Others judgment, even though the restriction complained of in the latter case was not one of a general and mandatory nature. The present case thus affords the Court an opportunity to explain whether that clarification is of general application or whether, as claimed by the applicant, the finding of a statutory restriction is, in itself, sufficient for there to have been a breach of the requirements of Article 6 §§ 1 and 3 (c).

117. The present case also raises questions concerning the content and scope of the right of access to a lawyer. The Court observes that, since the Salduz judgment, its case-law has evolved gradually and that the contours of that right have been defined in relation to the complaints and circumstances of the cases before it. The present case thus affords an opportunity to restate the reasons why this right constitutes one of the fundamental aspects of the right to a fair trial, to provide explanations as to the type of legal assistance required before the first police interview or the first examination by a judge. It also allows the Court to clarify whether the lawyer's physical presence is required in the course of any questioning or other investigative acts carried out during the period of police custody and that of the pre-trial investigation (as conducted by an investigating judge in the present case).

118. Those questions will be examined in the light of the general principles set out below.

(b) General principles

(i) Applicability of Article 6 in its criminal aspect

119. The Court reiterates that the protections afforded by Article 6 §§ 1 and 3 (c), which lie at the heart of the present case, apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see Ibrahim and Others, cited above, § 249, and Simeonovi, cited above, §§ 110-11, and the caselaw cited therein).

(ii) General approach to Article 6 in its criminal aspect

120. The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see Ibrahim and Others, cited above, § 250). The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings ...

121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated

consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see, for example, Salduz, cited above, § 50;Al-Khawaja and Tahery, cited above, § 118; Dvorski, cited above, § 76; Schatschaschwili, cited above, § 100; Blokhin, cited above, § 194; and Ibrahim and Others, cited above, § 251).

122. Those minimum rights guaranteed by Article 6 § 3 are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see Ibrahim and Others, cited above, §§ 251 and 262, and Correia de Matos, cited above, § 120).

(iii) Right of access to a lawyer

123. The right of everyone "charged with a criminal offence" to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see Salduz, cited above, § 51, and Ibrahim and Others, cited above, § 255).

(α) Starting-point of the right of access to a lawyer

124. Where a person has been taken into custody, the starting-point for the right of access to a lawyer is not in doubt. The right becomes applicable as soon as there is a "criminal charge" within the meaning given to that concept by the Court's case-law (see paragraph 119 above) and, in particular, from the time of the suspect's arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period (see Simeonovi, cited above, §§ 111, 114 and 121).

(β) Aims pursued by the right of access to a lawyer

125. Access to a lawyer at the pre-trial stage of the proceedings also contributes to the prevention of miscarriages of justice and, above all, to the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see Salduz, cited above, §§ 53 54; Blokhin, cited above, § 198; Ibrahim and Others, cited above, § 255; and Simeonovi, cited above, § 112).

126. The Court has acknowledged on numerous occasions since the Salduz judgment that prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody. Such access is also preventive, as it provides a fundamental safeguard against coercion and illtreatment of suspects by the police (see Salduz, cited above, § 54; Ibrahim and Others, cited above, § 255; and Simeonovi, cited above, § 112).

127. The Court has also recognised that the vulnerability of suspects may be amplified by increasingly complex legislation on criminal procedure, particularly with regard to the rules governing the gathering and use of evidence (see Salduz, cited above, § 54, and Ibrahim and Others, cited above, § 253).

128. Lastly, one of the lawyer's main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself (see Salduz, cited above, § 54; Dvorski, cited above, § 77; and Blokhin, cited above, § 198) and for his right to remain silent.

129. In this connection, the Court has considered it to be inherent in the privilege against self-incrimination, the right to remain silent and the right to legal assistance that a person "charged with a criminal offence", within the meaning of Article 6, should have the right to be informed of these rights, without which the protection thus guaranteed would not be practical and effective (see Ibrahim and Others, cited above, § 272, and Simeonovi, cited above, § 119; the complementarity of these rights had already been emphasised inJohn Murray v. the United Kingdom, 8 February 1996, § 66, Reports of Judgments and Decisions 1996-I; Brusco v. France, no. 1466/07, § 54, 14 October 2010; and Navone and Others, cited above, §§ 73-74). Consequently, Article 6 § 3 (c) of the Convention must be interpreted as safeguarding the right of persons charged with an offence to be informed immediately of the content of the right to legal assistance, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing (see Simeonovi, cited above, § 119).

130. In the light of the nature of the privilege against self-incrimination and the right to remain silent, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the

privilege against self-incrimination takes on particular importance (see Ibrahim and Others, cited above, § 273, and case-law cited therein).

(γ) Content of the right of access to a lawyer

131. Article 6 § 3 (c) does not specify the manner of exercising the right of access to a lawyer or its content. While it leaves to the States the choice of the means of ensuring that it is secured in their judicial systems, the scope and content of that right should be determined in line with the aim of the Convention, namely to guarantee rights that are practical and effective (see Öcalan v. Turkey [GC], no. 46221/99, § 135, ECHR 2005-IV; Salduz, cited above, § 51; Dvorski, cited above, § 80; and Ibrahim and Others, cited above, § 272).

132. Assigning counsel does not in itself ensure the effectiveness of the assistance he or she may afford an accused (see Öcalan, cited above, § 135; Sakhnovskiy v. Russia[GC], no. 21272/03, § 95, 2 November 2010; and M v. the Netherlands, no. 2156/10, § 82, 25 July 2017), and to that end, the following minimum requirements must be met.

133. First, as the Court has already stated above (see paragraph 124), suspects must be able to enter into contact with a lawyer from the time when they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview (see Brusco, cited above, § 54, and A.T. v. Luxembourg, cited above, §§ 86-87), or even where there is no interview (see Simeonovi, cited above, §§ 111 and 121). The lawyer must be able to confer with his or her client in private and receive confidential instructions (see Lanz v. Austria, no. 24430/94, § 50, 31 January 2002; Öcalan, cited above, § 135; Rybacki v. Poland, no. 52479/99, § 56, 13 January 2009; Sakhnovskiy, cited above, § 97; and M v. the Netherlands, cited above, § 85).

134. Secondly, the Court has found in a number of cases that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (see Adamkiewicz v. Poland, no. 54729/00, § 87, 2 March 2010; Brusco, cited above, § 54; Mađer v. Croatia, no.56185/07, §§ 151 and 153, 21 June 2011; Šebalj v. Croatia, no. 4429/09, §§ 256-57, 28 June 2011; and Erkapić v. Croatia, no. 51198/08, § 80, 25 April 2013). Such physical presence must enable the lawyer to provide assistance that is effective and practical rather than merely abstract (see A.T. v. Luxembourg, cited above, § 87), and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced (see John Murray, cited above, § 66, and Öcalan, cited above, § 131).

135. The Court has found, for example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may undermine the fairness of the proceedings: (a) a refusal or difficulties encountered by a lawyer in seeking access to the criminal case file, at the earliest stages of the criminal proceedings or during the pre-trial investigation (see Moiseyev v. Russia, no. 62936/00, §§ 217-18, 9 October 2008; Sapan v. Turkey, no. 17252/09, § 21, 20 September 2011; and contrast A.T. v. Luxembourg, cited above, §§ 79-84); (b) the non-participation of a lawyer in investigative measures such as identity parades (see Laska and Lika v. Albania, nos. 12315/04 and 17605/04, § 67, 20 April 2010) or reconstructions (see Savaş v. Turkey, no. 9762/03, § 67, 8 December 2009; Karadağ v. Turkey, no. 12976/05, § 47, 29 June 2010; and Galip Doğru v. Turkey, no. 36001/06, § 84, 28 April 2015).

136. In addition to the above-mentioned aspects, which play a crucial role in determining whether access to a lawyer during the pre-trial phase has been practical and effective, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (see Hovanesian v. Bulgaria, no. 31814/03, § 34, 21 December 2010; Simons, cited above, § 30; A.T. v. Luxembourg, cited above, § 64; Adamkiewicz, cited above, § 84; and Dvorski, cited above, §§ 78 and 108).

(iv) Relationship between the justification for a restriction on the right of access to a lawyer and the overall fairness of the proceedings

137. The principle that, as a rule, any suspect has a right of access to a lawyer from the time of his or her first police interview was set out in the Salduz judgment (cited above, § 55) as follows: "... 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."

138. The Salduz judgment also demonstrated that the application on a "systematic basis", in other words on a statutory basis, of a restriction on the

right to be assisted by a lawyer during the pre-trial phase could not constitute a compelling reason (ibid., § 56). In spite of the lack of compelling reasons in that case, the Court nevertheless analysed the consequences, in terms of overall fairness, of the admission in evidence of statements made by the accused in the absence of a lawyer. It took the view that this defect could not have been cured by the other procedural safeguards provided under domestic law (ibid., §§ 52 and 5758).

139. The stages of the analysis as set out in the Salduz judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case-specific decisions taken by the competent authorities.

140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention (see, in particular, Dayanan, cited above, § 33, and Boz v. Turkey, no. 2039/04, § 35, 9 February 2010). Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form (see, among other authorities, Çarkçı v. Turkey (no. 2), no. 28451/08, §§ 43-46, 14 October 2014), and sometimes in greater detail (see, among other authorities, A.T. v. Luxembourg, cited above, §§ 72-75).

141. Being confronted with a certain divergence in the approach to be followed, in Ibrahim and Others the Court consolidated the principle established by the Salduz judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those stages and the relationship between them (see Ibrahim and Others, cited above, §§ 257 and 258-62).

(α) Concept of compelling reasons

142. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see Salduz, cited above, §§ 54 in fine and 55, and Ibrahim and Others, cited above, § 258). A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is

a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons.

143. The Court has also explained that where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see Ibrahim and Others, cited above, § 259, and Simeonovi, cited above, § 117).

(β) The fairness of the proceedings as a whole and the relationship between the two stages of the test

144. In Ibrahim and Others the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see Ibrahim and Others, cited above, § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer (see paragraph 97 above) to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. However, as can be seen from the Ibrahim and Others judgment, followed by the Simeonovi judgment, the Court rejected the argument of the applicants in those cases that Salduz had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the Dayanan case and other judgments against Turkey (see paragraph 140 above).

145. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see Ibrahim and Others, cited above, § 265).

146. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even

more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 273 in fine).

147. Lastly, it must be pointed out that the principle of placing the overall fairness of the proceedings at the heart of the assessment is not limited to the right of access to a lawyer under Article 6 § 3 (c) but is inherent in the broader case-law on defence rights enshrined in Article 6 § 1 of the Convention (see the case-law on Article 6 § 1 cited in paragraph 120 above).

148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused.

149. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3(c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case.

(γ) Relevant factors for the overall fairness assessment

150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see Ibrahim and Others, cited above, § 274, and Simeonovi, cited above, § 120):

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice."

F'dak il-każ, meta l-Qorti Ewropea ġiet biex teżamina dawn il-kriterji fil-kuntest taċ-ċirkostanzi li kellha quddiemha, fil-waqt illi saħqet illi kienet qed issib vjolazzjoni tal-Artikolu 6 fid-dawl ta' diversi fatturi meħudha lkoll flimkien u mhux kull fattur meqjus separatament, ikkunsidrat *inter alia* illi fl-istess każ, ir-restrizzjonijiet fuq id-dritt tal-aċċess għall-avukat kienu estensivi u dan fis-sens illi l-akkużat ġie interrogat waqt li kien fil-kustodja tal-pulizija mingħajr ma qabel ingħata l-opportunita` li jottjeni parir legali jew li jkollu avukat preżenti u fil-kors tal-investigazzjoni ġudizzjarja li seħħet wara, ma ngħatax il-possibilita` li jkun assistit minn avukat, kif lanqas ma ngħata dan id-dritt f'atti investigattivi oħrajn sussegwenti. F'dawk iċ-ċirkostanzi, mingħajr ma ngħata informazzjoni ċara dwar id-dritt tiegħu għas-silenzju, huwa rrilaxxja stqarrijiet dettaljati u sussegwentement ta wkoll verżjonijiet differenti dwar il-fatti, bir-riżultat illi għamel stqarrijiet, li għalkemm ma kinux inkriminanti fis-sens restrittiv ta' din il-kelma, effettwaw sostanzjalment il-posizzjoni tiegħu, speċjalment fir-rigward ta' akkuża partikolari. Dawn l-stqarrijiet ġew ilkoll ikkunsidrati bħala ammissibbli fil-proċeduri kontra tiegħu. In oltre tali stqarrijiet kellhom rwol importanti fil-proċeduri u fir-rigward ta' akkuża minnhom, kienu jiffurmaw parti integrali mill-provi li a bażi tagħhom huwa nstab ħati.

Fil-każ deċiż mill-Qorti Kostituzzjonali fl-ismijiet **Paul Anthony Caruana vs Avukat Ġenerali et** nhar il-31 ta' Mejju 2019, l-attur ilmenta minn ksur tal-jedd tiegħu għal smiegħ xieraq fid-dawl tal-fatt illi ma ngħatax id-dritt tal-aċċess għall-avukat kemm qabel irrilaxxja l-istqarrija tiegħu lill-pulizija kif ukoll waqt l-

interrogatorju tiegħu, u għaldaqstant talab lill-Qorti kemm sabiex tiddikjara illi ġew leżi d-drittjiet fundamentali tiegħu kif sanċiti fl-Artikolu 39 tal-Kostituzzjoni, kif ukoll fl-Artikolu 6 tal-Konvenzjoni Ewropea, kif ukoll sabiex takkorda dawk ir-rimedji effettivi inkluż li tannulla, tħassar u tirrevoka s-sentenza mogħtija fil-konfront tiegħu mill-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali, li permezz tagħha kien instab ħati tal-imputazzjonijiet miġjuba kontra tiegħu u ġie kkundannat għal terminu effettiv ta' priġunerija.

F'dan il-każ, wara li rreferiet għall-każ ta' **Ibrahim and Others v. United Kingdom** deċiż mill-Qorti Ewropea fit-13 ta' Settembru 2016 u kompliet illi allura l-fatt waħdu li persuna ma tkunx tħalliet tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni, ukoll jekk ma kienx hemm raġunijiet impellenti għal dan in-nuqqas, ma huwiex biżżejjed biex, *ipso facto*, jinsab ksur tal-jedd għal smigħ xieraq, iżda wieħed irid iqis il-proċess fit-totalità tiegħu, il-Qorti Kostituzzjonali għamlet referenza wkoll għad-deċiżjoni f'**Beuze v. Belgium** u għall-kriterji hemmhekk indikati (u fuq ċitati minn din il-Qorti) li a bażi tagħhom wieħed għandu jeżamina l-proċeduri fl-intier tagħhom fid-dawl tal-impatt tan-nuqqasijiet proċedurali fl-istadju ta' qabel il-proċeduri. Il-Qorti kompliet hekk dwar l-ilment tal-attur:

"*20. Fid-dawl ta' dawn il-konsiderazzjoniiet, l-aggravju tal-attur – safejn igħid illi "l-fatt waħdu illi persuna li tkun instabet ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil-liġi maltija, awtomatikament ikun ifisser illi saret vjolazzjoni tad-dritt fundamentali tas-smigħ xieraq ta' dik l-istess persuna taħt l-artikolu 6 tal-Konvenzjoni Ewropea" – huwa ħażin u huwa miċħud.*

21. Fil-każ tallum kien hemm raġuni tajba għala l-attur ma tħalliex ikellem avukat qabel jew waqt l-ewwel interrogazzjoni. Ir-raġuni hi li kien hemm il-ħsieb li ssir controlled delivery lil terza persuna li kienet tipprovdi lill-attur bid-droga, u biex din l-operazzjoni tirnexxi kien meħtieġ li l-attur ma jitħalla jikkomunika ma' ħadd biex ma titwassalx il-kelma lil dan it-terz.

...

23. L-attur ingħata t-twissija li trid il-liġi qabel ma ta l-istqarrija, u ma saret ebda allegazzjoni li l-istqarrija saret fiċ-ċirkostanzi msemmija fl-art. 658 tal-Kodiċi Kriminali. ... Ħlief għall-fatt li ma kellux avukat dak il-ħin, l-attur ma ressaq ebda argument serju kontra l-validità u l-veraċità tal-istqarrija.

24. Għandu jingħad ukoll illi l-attur ma nżammx aktar milli kien meħtieġ biex tirnexxi l-operazzjoni tal-controlled delivery; dakinhar stess kien meħlus u seta' liberament ikellem avukat.

25. Barra minn hekk, <u>l-istqarrija magħmula lill-pulizija ma kinitx ir-raġuni li wasslet għall-kundanna tal-attur</u>: l-attur instab ħati mill-qorti ta' ġurisdizzjoni kriminali għax ammetta l-ħtija għal dawk l-akkużi li ma ġewx ritirati. Dan għamlu fil-preżenza tal-avukat wara li ikkonsulta miegħu u quddiem maġistrat li wissih bil-konsegwenzi tal-ammissjoni u tah l-opportunità li jeħodha lura.

26. Tassew illi l-attur igħid illi kien kondizzjonat bil-fatt li kien ġà ta stqarrija lill-pulizija qabel ma ammetta quddiem il-qorti...

27. Dan jista' f'ċerti ċirkostanzi jkun fattur relevanti, iżda fil-każ tal-lum l-attur seta' jiċħad dak li stqarr fl-istqarrija u wkoll, jekk tassew kif qal hu kien fis-sakra meta għamilha u għalhekk l-istqarrija ma għamilhiex "volontarjament", jikkontestaha taħt l-art. 658 tal-Kodiċi Kriminali – seta' saħansitra jirtira l-ammissjoni li għamel quddiem il-qorti – għax il-qorti ta' ġurisdizzjoni kriminali, presjeduta minn ġudikant togat, kienet taf biżżejjed, fid-dawl tas-sentenza ta' Salduz, li kienet ingħatat qabel, li ma kellhiex toqgħod fuq l-istqarrija weħedha, aktar u aktar jekk tkun ġiet irtirata, jekk ma jkunx hemm xiehda oħra li ma tħallix dubju dwar il-ħtija. Bilkemm għalfejn ngħidu wkoll illi l-attur kien inqabad in flagrante, bi kwantità ta' droga fuq il-persuna tiegħu u fid-dar fejn kien joqgħod.

28. Il-qorti aktar temmen illi l-attur ammetta quddiem il-qorti mhux għax kondizzjonat bl-istqarrija li kien ta iżda għax kien jaf bix-xiehda l-oħra kontrieh u biex jieħu l-benefiċċju, li fil-fatt ingħata, taħt l-art. 29 tal-Ordinanza dwar il-Mediċini Perikoluži [Kap. 101]." [sottolinear ta' din il-Qorti]

Fil-każ li għandha l-Qorti quddiemha llum, kif ingħad, il-Prosekuzzjoni qed tistrieħ unikament fuq l-istqarrija rilaxxjata mill-imputat, mingħajr il-jedd li jottjeni parir legali qabel l-interrogatorju tiegħu u mingħajr il-jedd li jkun assistit waqt tali interrogatorju. Huwa evidenti illi jeħtieġ li din il-Qorti teżamina ċ-ċirkostanzi li għandha quddiemha mhux mill-ottika ta' ksur tal-jedd għal smiegħ xieraq stante li m'għandhiex kompetenza li tagħmel dan, iżda sempliċiment mil-lat tal-valur probatorju li għandha tingħata l-istess stqarrija, tenut kont madankollu tal-ġurisprudenza fuq indikata. Mis-suespost, il-Qorti jidhrilha illi fil-każ ta' Beuze, sabiex sabet vjolazzjoni tal-jedd tal-akkużat għal smiegħ xieraq, il-Qorti Ewropea fil-valutazzjoni tagħha tal-*overall fairness of the proceedings* straħet ħafna fuq il-fatt illi l-akkużat ma ngħatax aċċess għall-avukat qabel u/jew waqt l-interrogatorji diversi li sarulu, illi fl-istqarrijiet tiegħu għamel dikjarazzjonijiet inkriminanti u illi fir-rigward ta' akkuża partikolari, l-istqarrijiet tiegħu kellhom impatt tali illi wasslu għal sejbien ta' ħtija. Fil-każ ta' Paul

Anthony Caruana, imbagħad, fil-waqt illi ma sabitx ksur tad-dritt tal-attur għal smiegħ xieraq, il-Qorti Kostituzzjonali qieset bħala fattur determinanti l-fatt illi huwa nstab ħati mill-Qorti tal-Maġistrati mhux fid-dawl tal-istqarrija rilaxxjata minnu lill-pulizija, iżda a bażi tal-ammissjoni tiegħu fil-proċeduri. Effettivament din il-Qorti tinnota illi dejjem tibqa' kunsiderazzjoni determinanti kemm l-istqarrija rilaxxjata mingħajr il-jedd ta' aċċess għall-avukat, ikollha impatt fuq l-eżitu tal-proċeduri, jew fi kliem ieħor fuq is-sejbien ta' ħtija tal-imputat.

Fid-dawl ta' dawn is-sentenzi u anke tal-ġurisprudenza tal-Qrati tagħna u tal-Qorti Ewropea hemmhekk ċitati, il-Qorti jidhrilha illi m'għandhiex tistrieħ fuq l-istqarrija tal-imputat li, kif ingħad, hija l-unika prova f'dawn il-proċeduri, u għaldaqstant qegħda tiskartaha.

Skartata l-istqarrija tal-imputat, ma jibqax prova fl-atti in sostenn tal-imputazzjoni miġjuba kontra tiegħu.

Konklużjoni

Għal dawn il-motivi, il-Qorti qed issib lill-imputat mhux ħati tal-imputazzjoni miġjuba kontra tiegħu u qegħda tilliberah minnha.

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