QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON

Illum it-Tnejn l-1 ta` Lulju 2019

Kawza Nru. 1
Rikors Nru. 123/18 JZM

Kenneth Cassar

kontra

Avukat Generali

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fis-<u>7 ta` Dicembru 2018</u> li jaqra hekk :–

Fatti tal-Kaz

Illi l-esponenti tressaq b`arrest nhar id-disgha u ghoxrin (29) ta` Ottubru tas-sena elfejn u tmintax (2018) quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali akkuzat inter alia, illi minghajr il-hsieb illi joqtol jew li jqieghed il-hajja tas-siehba tieghu Anita Magro fil-periklu, kkaguna feriti ta` natura hafifa fuqha.

Illi minkejja diversi talbiet sabiex jinghata l-helsien mill-arrest dawn gew michuda ghal ragunijiet moghtija fid-digrieti relattivi, l-ahhar fosthom, nhar it-tnejn u ghoxrin (22) ta` Novembru 2018 fejn il-kawza giet differita ghal kwazi xahrejn u cioe` it-tmintax ta` Jannar tas-sena 2019. Illi l-Prosekuzzjoni ghalqet il-provi taghha u l-kawza tinsab ghal provi tad-difiza.

Ilmenti Kostituzzjonali

1) Ir-rekwizit ta` dehra kull hmistax-il gurnata japplika ghal Qorti tal-Magistrati bhala Qorti Struttorja izda mhux ghal dik ta` Gudikatura Kriminali

Illi ai termini tal-Artikolu 401 (1) tal-Kap 9 tal-Ligijiet ta` Malta fil-kaz ta` Qorti ta` Magistrati bhala Qorti Struttorja il-ligi tipprovdi:

"… ukoll kemm il-darba ma jkunx inghata l-helsien mill-arrest, l-akkuzat ghandu jingieb quddiem il-Qorti ghal inqas darba kull hmistax-il gurnata sabiex il-Qorti tiddeciedi jekk ghandux jibqa` arrestat;"

Illi dan ifisser illi fil-kaz ta` Qorti Struttorja l-persuna akkuzata tgawdi minn beneficcju li minn tal-inqas kull hmistax-il gurnata tingieb quddiem il-Qorti sabiex jigi ezaminat u determinat jekk id-detenzjoni ulterjuri taghha tkunx gustifikata, liema beneficcju u salvagwardja ma

japplikax ghall-kaz odjern peress illi hawnhekk si tratta ta` Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali, u dan filwaqt b`mod generali li il-pieni applikabbli ghal reati trattati minn Qorti Struttorja jkunu ferm oghla minn dawk ir-reati trattati minn Qorti ta` Gudikatura Kriminali.

Illi ghaldaqstant in-nuqqas ta` provvediment fil-Ligi li jipprovdi terminu entru liema d-detenzjoni ulterjuri tieghu ghandha tkun ezaminata tiksirlu d-drittijiet fundamentali tieghu ai termini tal-Artikoli 5 u 6 tal-Konvenzjoni Ewropea u l-Artikoli 34 u 39 tal-Kostituzzjoni ta` Malta.

2) Dritt ta` Revizjoni moghti lill-Avukat Generali fl-ghoti tal-helsien mill-arrest izda mhux lill-akkuzat

Illi inoltre l-esponenti jirrileva illi l-Kodici Kriminali jaghti lill-Avukat Generali l-fakulta` illi jitlob revizjoni fil-kazijiet kollha illi jigu akkordati l-beneficcju tal-helsien mill-arrest oltre l-fakulta illi jitlob revizjoni tal-kundizzjonijiet tal-helsien mill-arrest galadarba l-persuna mressqa b`arrest tinghata l-helsien mill-arrest.

Illi mill-banda l-ohra pero` l-akkuzat li ma jigix akkordat il-helsien mill-arrest ma ghandu l-ebda dritt ta` appell u/jew revizjoni u illi dan johloq sitwazzjoni ta` inequality of arms, nuqqas ta` protezzjoni minn arrest jew detenzjoni arbitrarja u oltre ksur ta` dritt ghal smiegh xieraq.

Illi jigi rilevat illi filwaqt li f`kazijiet f`ta Qorti Struttorja persuna akkuzata ghandha dritt [li la huwa appell u lanqas huwa revizjoni] li tirrikorri quddiem il-Qorti Kriminali u taghmel talbiet ghal helsien mill-arrest meta l-atti jkunu rinvijati lill-Avukat Generali, dan id-dritt huwa kompletament inezistenti f`kazijiet bhal kaz de quo fejn il-kaz ikun qed jigi mismugh minn Qorti bhala Gudikatura Kriminali.

Illi dan kollu huwa bi ksur din il-fakulta` mhix estiza ghall-akkuzat illi jitressaq b`arrest fejn meta ghandek akkuzat illi jitressaq b`arrest u tigi michuda t-talba tieghu li jinghata l-helsien mill-arrest [bhal fil-kaz odjern] ghandu l-ebda dritt ta` appell jew fakulta` li jitlob revizjoni minn Qorti ohra diversament presjeduta [bhalma ghandu l-Avukat Generali] tad-decizjoni tac-cahda mill-beneficcju tal-helsien mill-arrest.

Illi l-esponenti umilment jirrileva illi n-nuqqas ta` mekkanizmu illi jippermetti li persuna akkuzata dritt u fakulta` ta` revizjoni tad-decizjonijiet dwar il-helsien mill-arrest bhalma ghandu del resto l-avukat generali jammontaw ghal ksur tad-dritt fundamentali ghal smiegh xieraq, dan l-istat ta` fatt huwa leziv ghall-Artikoli 5 u 6 tal-Konvenzjoni Ewropea u l-Artikoli 34 u 39 tal-Kostituzzjoni ta` Malta.

Illi dawn il-lanjanzi jaqghu taht dik li l-gurisprudenza rriferiet ghalihom bhala ***mankanzi partikolari tul il-kumpilazzjoni illi jwasslu jew se jwasslu ghal nuqqas ta` smiegh xieraq fil-procediment kriminali.***

Illi ssir riferenza ghas-sentenza fl-ismijiet "St. Paul`s Court Limited vs L-Onor. Prim Ministru et noe" (Rik. Kost. Nru : 552/96 VDG - deciza fis-16 ta` Settembru 1998) fejn inghad li :

"kif tajjeb josservaw l-awturi Harris, O`Boyle u Warbrick :-

"In contrast with the other more precise guarantees in Article 6(1), the right to a "fair hearing" has an openended, residual quality. It provides an opportunity both for adding other specific rights not listed in Article 6 that are considered essential to a "fair hearing" and for deciding whether a "fair hearing" has occurred on the particular facts of a given case when the proceedings are looked at as a whole." (pg. 202). (Vide ukoll "Khallouf Fatiha vs Kummissarju Tal-Pulizija" - Prim Awla (Sede Kostituzzjonali) deciza fit-28 ta` Dicembru 2001)."

Illi dwar l-istess artikolu inghad fis-sentenza "Kostovski vs The Netherlands" (20 ta` Novembru 1989. Series A-166 12 EHRR434) li :-

"The effect of Article 6 (1) is, inter alia, to place the `tribunal` under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision".

Illi, minkejja dan, jista` jinghad li l-elementi kollha ta` dan id-dritt ma jistghux jigu definiti a priori u specifikatament, stante li l-istess principju hawn kawtelat huwa tassew wiesgha tant li inghad li :-

"It is a nebulous concept which absorbs other elements not explicitly mentioned in Article 6 but which are considered essential for deciding whether a fair hearing has occurred on the particular facts of a given case".

"The right to a fair hearing requires a court to appreciate impartially all the matters of fact and of law submitted to it by both parties with reference to the particular issue which it is called upon to decide, since, as held by the European Commission, it is not possible to state in the abstract the content of this requirement." ("The Right To Be Heard By An Independent and Impartial Tribunal" (1997) Dr. Roberta Gauci LL.D).

Illi inoltre fil-ktieb "Article 6 of the European Convention on Human Rights – The Right To A Fair Trial" ta` Andrew Grotrian jinghad illi :-

"The requirement of fairness covers the proceedings as a whole, and not only those in an oral hearing. The question of whether a person has had a `fair hearing` is thus approached by looking at the whole proceedings, although a particular incident may have a decisive effect."

Wiehed ghandu, bhala regola, jezamina l-proceduri firrigward tal-kaz partikolari fit-totalita` taghhom (ara, fost decizzjonijiet ohra, "Dr. Lawrence Pullicino v. Onor. Prim Ministru et."(Qorti Kostituzzjonali - 18 ta` Awwissu, 1998.)

Illi in effetti l-imsemmi awtur jelenka l-principji illi jinkorpora fih l-imsemmi artikolu 6 tal-Konvenzjoni Ewropea u dawn jikkonsistu inter alia f`:-

"The most established right added to Article 6 (1) is the principle of the equality of arms. This is important to understand the operation of the underlying principle of `fairness` and although it is not explicitly expressed in Article 6 (1) it is necessarily implied. This concept comprises the idea that each party should have an equal opportunity to present his case and that neither party should enjoy any substantial advantage over his opponent. This concept of equality of arms was first mentioned in the Neumaister case (27/6/1968) and has been a feature of Article 6(1) ever since. The Commission has expressed the principle in respect of both criminal and non-criminal cases and in the context of civil cases between private parties, the Court has said:"

"The court agrees with the Commission that as regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis a vis his opponent." ("Dombo Beheer BV vs The Netherlands", 27 ta` Ottubru 1993)

Illi l-awturi Van Dijk u Van Hoof, fil-ktieb Theory and Practice of the European Convention on Human Rights (Kluwer Law International (The Hague) 1998) jispjegaw hekk :-

"The Commission and the Court have avoided to give an enumeration of criteria in the abstract. In each individual case the course of the proceedings has to be assessed to decide whether the

hearing concerned has been a fair one. What counts is the picture which the proceedings as a whole present, although certain aspects per se may already conflict with the principle of a fair hearing in such a way that an opinion can be given about the fairness of the trial irrespective of the further course of the proceedings, e.g., the way in which the evidence is collected during a preliminary hearing. Depending on the stage of the proceedings and its special features, the manner of application of Article 6 may differ." (pp. 428-429).

Ghaldaqstant l-esponent jitlob reverentement lil dina l-Onorabbli Qorti joghgobha :-

1. Tiddikjara illi gew lezi d-drittijiet tal-esponenti ghal smigh xieraq kif sanciti fl-Artikoli 5 u 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem, u fl-artikoli 34 u 39 tal-Kostituzzjoni ta` Malta;

2. Takkorda dawk ir-rimedji effettivi u xierqa fic-cirkostanzi;

Rat ir-risposta li pprezenta l-intimat fit-3 ta` Jannar 2019 li taqra hekk :–

Illi l-ilment tar-rikorrent huwa mibni fuq zewg binarji kif imfisser fir-rikors promotur tieghu u cioe` illi "in-nuqqas ta` provvediment fil-Ligi li jipprovdi terminu entru liema d-detenzjoni ulterjuri tieghu ghandha tkun ezaminata tiksirlu d-drittijiet fundamentali tieghu ai termini tal-Artikoli 5 u 6 tal-Konvenzjoni Ewropea u l-Artikoli 34 u 39 tal-Kostituzzjoni ta` Malta" u "n-nuqqas ta` mekkanizmu illi jippermetti li persuna akkuzata dritt u fakulta` ta` revizjoni tad-decizjonijiet dwar il-helsien mill-arrest bhalma ghandu del resto l-avukat generali jammontaw ghal ksur tad-dritt fundamentali ghal smigh xieraq, dan l-istat ta` fatt huwa leziv ghall-Artikoli 5 u 6 tal-Konvenzjoni Ewropea u l-Artikoli 34 u 39 tal-Kostituzzjoni ta` Malta".

Illi l-esponenti jikkontesta l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti stante illi huma nfondati fil-fatt u fid-dritt ghar-ragunijiet segwenti :

1. Illi ghal dak li jirrigwarda l-allegat ksur tal-Artikolu 5 tal-Konvenzjoni Ewropeja u tal-Artikolu 34 tal-Kostituzzjoni jibda biex jinghad li dawn l-artikoli huma intizi sabiex iharsu lill-individwu minn detenzjoni arbitrarja. Illi sabiex id-detenzjoni ma tkunx wahda arbitrarja skont l-artikoli msemmija dik id-detenzjoni trid tkun skont il-ligi u konsistenti mal-ghan tal-istess artikoli u cioe` li l-indivdwu jigi mhares mill-arbitrarjeta`. Illi madanakollu dan il-principju mhuwiex wiehed assolut u dan stante li dawn l-artikoli jikkontjenu lista ezawrenti tar-ragunijiet li ghalihom tista` titnehha l-liberta` ta` xi persuna. Wahda mir-ragunijiet li skont l-artikolu 5 (1) tal-Konvenzjoni Ewropeja jiggustifikaw il-privazzjoni mil-liberta` hija dik mahsuba fil-paragrafu (c) tal-istess artikolu u cioe` meta l-arrest jew detenzjoni ta` persuna tkun skont il-ligi u effetwata sabiex il-persuna tigi migjuba quddiem l-awtorita` legali kompetenti fuq suspett ragonevoli li tkun ikkommettiet reat jew meta jkun meqjus ragonevolment mehtieg biex jigi evitat li tikkommetti reat jew li tahrab wara li tkun ghamlet reat. In kwantu ghas-suspett ragonevoli mehtieg skont l-Artikolu 5 (1) (c) imsemmi, il-kriterju tar-ragonevolezza huwa wiehed oggettiv. Suspett ragonevoli jippresupponi l-ezistenza ta` fatti jew informazzjoni tali li jissodisfaw li osservatur oggettiv li l-persuna koncerntata setghet ikkomettiet reat. L-istess insibu fl-Artikolu 34 (1) (f) tal-Kostituzzjoni ta` Malta.

Illi r-rikorrenti mhuwiex qieghed jikkontesta li l-arrest sar `skont il-ligi` u `skont il-procedura preskritta bil-ligi`. L-arrest tar-rikorrenti sar ai termini tal-provvedimenti tal-Kodici Kriminali u dan stante li l-Pulizija kienet tissodisfa r-rekwizit ta` suspett ragonevoli kemm sabiex tarresta u kemm sabiex tressaq lir-rikorrenti quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali b`akkuzi ta` reat kriminali.

Illi gialadarba gie stabbilit li l-arrest inizzjali kif ukoll il-prezentata b`arrest tar-rikorrenti kien imsejjes u mqanqal fuq suspett ragonevoli skont kif jipprovdu l-Artikolu 5 (1) (c) tal-Konvenzjoni u l-Artikolu 34 (1) (f) tal-Kostituzzjoni, il-pass li jmiss huwa li wiehed jezamina jekk il-kontinwazzjoni tad-detenzjoni tar-rikorrenti huwiex gustifikat u permissibbli fil-qafas tal-Artikolu 5(3) tal-Konvenzjoni u tal-Artikolu 34 (3) tal-Kostituzzjoni. Illi jirrizulta li r-rikorrenti prezenta tlett rikorsi sabiex jinheles mill-arrest (rikors wiehed kien ipprezentat quddiem il-Qorti Kriminali u zewg rikorsi ohra kienu prezentati quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali) liema talbiet li gew prezentati quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali ma ntlaqghux u dan peress li dik il-Qorti ma hassitx li kien ghaqli li r-rikorrenti jinheles mill-arrest. Illi ghalhekk certament li ma jistax jinghad li l-kontinwazzjoni tal-arrest tar-rikorrenti huwa b`xi mod kappriccjuz, specjalment tenut kont tal-fatt li l-Magistrat li cahad it-talba ghall-helsien mill-arrest ikkunsidrat il-gravita` tar-reat li jinstab mixli bih ir-rikorrenti u fatturi ohra assocjati ma` risku ta` intralc lill-process kriminali.

Illi in kwantu r-rikorrenti jallega li l-Artikolu 401(1) tal-Kodici Kriminali (Kap. 9 tal-Ligijiet ta` Malta) huwa leziv stante li huwa applikabbli biss ghall-proceduri li jkunu qeghdin jinstemghu quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja, l-esponenti jissottometti li t-tieni proviso tal-artikolu 401(1) tal-Kap. 9 li fuqu jibni l-allegazzjoni tieghu ir-rikorrenti huwa marbut mal-fattur ta` zmien li fih il-kumpilazzjoni ghandha tinghalaq skont l-artikolu 401 (1) tal-Kap. 9 tal-Ligijiet ta` Malta kif ukoll hija marbuta man-natura tal-proceduri tal-istruttorja. Illi l-istruttorja hija forma ta` investigazzjoni gudizzjarja li ghandha zewg skopijiet principali (a) li jingabru u jigu preservati l-provi li eventwalment jingiebu quddiem il-Qorti u (b) li jigi deciz jekk hemmx ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta` akkuza. Ghalkemm id-decizjoni tal-bidu, cioe` jekk persuna tigix akkuzata u b`liema reati tigi hekk akkuzata hija mholliha esklussivament f`idejn il-Pulizija Ezekuttiva, hija l-Qorti li trid tiddeciedi jekk, fid-dawl tal-provi li jkunu ngabru hemmx jew le ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta` akkuza. Illi mill-banda l-ohra meta l-Qorti tal-Magistrati tkun qieghedha tagixxi

bhala Qorti ta` Gudikatura Kriminali dik il-Qorti tkun qieghdha tigi mitluba sabiex tiddeciedi fil-mertu l-akkuzi migjuba in konfront tal-akkuzat. Illi fil-fehma tal-esponenti l-proviso li minnhu qieghed jilmenta r-rikorrenti mhuwiex leziv tad-dritt tieghu tal-liberta` minn detenzjoni arbitrarja u dan stante li l-istess rikorrenti ghandu kull dritt li jipprezenta rikors f`kull waqt quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali sabiex jitlob il-helsien mill-arrest u dan minghajr ma jiddependi mit-thaddim tat-tieni proviso tal-Artikolu 401 (1) tal-Kap. 9 tal-Ligijiet ta` Malta. Teknikament dan ifisser li jekk il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali tichad rikors ghall-helsien mill-arrest, l-akkuzat ikun jista` jipprezenta rikors iehor l-ghada stess li jinghata d-Digriet ta` cahda mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali.

Illi ghal dak li jirrigwarda l-allegazzjoni tar-rikorrenti li l-persuna akkuzata ma ghandhiex dritt ta` revizjoni ta` decizjonijiet dwar il-helsien mill-arrest u dan ghall-kuntrarju tad-dritt li ghandu l-Avukat Generali li jappella mill-ghoti tal-helsien mill-arrest, l-esponenti jirrileva li f`kaz li l-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali tichad it-talba, l-esponenti jissottometti li l-akkuzat ghandu d-dritt li jipprezenta talba ohra ghall-helsien mill-arrest liema talba toffri salvagwardji bizzejjed sabiex awtorita` gudizzjarja tezamina jekk l-arrest jkunx ghadu necessarju. Illi d-dritt ta` appell mhuwiex dritt assolut u li jista` jigi suggett ghall-limitazzjonijiet. Illi fil-kaz odjern, il-Kodici Kriminali jahseb sabiex persuna li jkollha proceduri pendenti quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali tkun tista` tintavola talbiet ghall-helsien mill-arrest quddiem dik il-qorti biss u dan jaghmel hafna sens peress li r-rikorsi jsiru fl-atti ta` dik il-kawza liema qorti tkun familjari mal-proceduri kriminali pendenti kontra l-akkuzat. Il-fatt li dak id-digriet mhux appellabbli da parti tal-akkuzat bl-ebda mod ma jnaqqar mid-dritt tieghu protett permezz tal-artikolu 5 tal-Konvenzjoni u l-aritkolu 34 tal-Kostituzzjoni u dan peress li l-akkuzat ghandu kull dritt li jipprezenta rikors iehor, anke minnufih wara tali cahda, sabiex jitlob il-helsien mill-arrest.

2. Illi ghal dak li jirrigwarda l-allegat ksur ta` dritt ghal smigh xieraq kif protett permezz tal-Artikolu 6 tal-Konvenzjoni Ewropeja u l-Artikolu 39 tal-Kostituzzjoni ta` Malta, l-ewwel kwistjoni li qed jillamenta minnha r-rikorrenti huwa nuqqas ta` access ghall-Qorti naxxenti mill-fatt li l-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali ma ghandhiex obbligu li ggib lill-akkuzat quddiemha sabiex tiddeciedi ghandux jibqa` arrestat filwaqt li t-tieni kwistjoni hija li l-akkuzat ma ghandux dritt ta` appell minn cahda tat-talba ghall-helsien mill-arrest.

Illi in kwantu ghal dak li jirrigwarda l-artikolu 6 tal-Konvenzjoni Ewropeja u l-artikolu 39 tal-Kostituzzjoni, l-esponenti jibda biex jissottometti li l-Artikolu 6 tal-Kostituzzjoni ta` Malta jipprovdi li sabiex jigi garantit id-dritt ghal smigh xieraq, is-smigh ghandu jsir fi zmien ragjonevoli, u jinstemgha minn Qorti ndipendenti u mparzjali mwaqqfa b`ligi. L-Artikolu 6 (1) jipprovdi wkoll li s-smigh ghandu jkun pubbliku u ghandu jkun quddiem tribunal indipendenti u mparzjali mwaqqaf b`ligi.

Illi sabiex jigi determinat jekk ir-rikorrenti soffriex ksur tad-dritt tieghu ghal smigh xieraq, irid jigi ezaminat il-process kollu fit-totalita` tieghu. L-esponenti jirrileva illi ma sar xejn matul il-process relattiv ghar-rikorrenti li b`xi mod seta` jincidi fuq id-dritt tar-rikorrenti ta` process gust u wisq inqas saret xi influwenza lil min kellu jiggudika.

Illi jezistu salvagwardji bizzejjed fid-dritt procedurali nostrali sabiex jovvjaw ghal kull periklu ta` ntralc ta` smigh xieraq liema salvagwardji jiggarantixxu process xieraq u smigh gjust.

Illi ma hemm l-ebda dubju li l-procedura in konfront tar-rikorrenti qieghdha tinstema` minn `qorti` u cioe` mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali u ghalhekk ir-rekwiziti ta` `tribunal` li ghalih jirreferi l-Artikolu 6 tal-Konvenzjoni u `qorti` li ghalih jirreferi l-Artikolu 39 tal-Kostituzzjoni huma sodisfatti

u f`dan ir-rigward issir riferenza ghas-sentenza tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem fl-ismijiet* ***Le Compte, Van Leuven and Meyere*** *deciza fit-23 ta` Gunju 1981 fejn gie stabbilit illi `… the use of the term "tribunal" is warranted only for an organ which satisfies a series of further requirements – independence of the executive and of the parties to the case, duration of its members` term of office, guarantees afforded by its procedure – several of which appear in the text of article 6 (1) itself`.

Illi l-fatt fih innifsu illi l-Qorti hija presjeduta minn Magistrat hija garanzija fiha nnfisha ta` indipendenza u imparzjalita`. In oltre, il-procedura nnifisha toffri garanziji estensivi biex jissalvagwardjaw lill-gudikant minn pressjonijiet esterni. Fil-kaz ***Piersack*** *deciz fl-1 ta` Ottubru 1982 il-Qorti Ewropea osservat illi `Whilst impartiality denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 par. 1 of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect`.*

Illi l-esponenti jirrileva ukoll li l-fatt li ligi tipprovdi access limitat ghall-Qorti bl-ebda mod ma jfisser li hemm ksur tad-dritt ghal smigh xieraq. Tali restrizzjonijiet u limitazzjonijiet huma permissibbli u mhux lezivi tal-Artikolu 6 tal-Konvenzjoni u tal-Artikolu 39 tal-Kostituzzjoni. Illi l-punt kardinali relatat mal-kaz odjern jibqa` li dan id-dritt ta` access jista` jkun limitat u dan kien stabbilit mill-inqas sa mill-1994 fil-kaz Fayed v UK. Il-Qorti Ewropea stabbiliet ukoll f`diversi kazijiet illi anke meta individwi ikunu prekluzi milli jadixxu lill-qorti ghal ragunijiet differenti, dan ma jwassalx ghal ksur tad-dritt ta` access ghall-qorti.

F`dan ir-rigward l-esponenti jirreferi wkoll ghad-decizjoni fl-ismijiet Devenney v. The United Kingdom[1] *fejn il-Qorti Ewropea*

[1] Application Number 24265/94 deciza fid-19 ta` Marzu 2002.

osservat illi dawn il-limitazzjonijiet `… are permitted by implication since the right of access by its very nature calls for regulation by the State`.

3. Illi jsegwi li l-lanjanzi u t-talbiet kollha tar-rikorrenti ghandhom jigu michuda.

4. Salv eccezzjonijiet ulterjuri.

5. Bl-ispejjez.

Rat il-verbal tal-udjenza tal-14 ta` Jannar 2019.

Rat illi f`din l-udjenza kien dikjarat mir-rikorrent illi huwa kien inghata l-helsien mill-arrest fit-28 ta` Dicembru 2018. Ghalhekk iddikjara illi fil-kaz li tirrizulta vjolazzjoni tal-jeddijiet fondamentali tieghu skont l-Art 5 u 6 tal-Konvenzjoni u skont l-Art 34 u 39 tal-Kostituzzjoni, allura r-rimedju li kien qed jitlob kien il-hlas ta` kumpens.

Rat id-dokumenti li tressqu bhala prova, inkluz l-atti tal-kawza fl-ismijiet `*Il-Pulizija vs Kenneth Cassar*` li hija pendenti quddiem il-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali.

Rat illi l-kawza thalliet ghas-sentenza bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-nota ta` osservazzjonijiet illi pprezenta l-intimat.

Rat illi r-rikorrent ma pprezentax nota ta` osservazzjonijiet.

Rat l-atti l-ohra tal-kawza.

II. **Fatti**

Fis-27 ta` Ottubru 2018, fil-23:30, Anita Magro ghamlet rapport fl-Ghassa ta` l-Pulizija ta` Marsaskala fejn allegat li sfat imsawta u mhedda mis-sieheb taghha Kenneth Cassar, ir-rikorrenti odjern. Billi si trattava ta` kaz ta` vjolenza domestika, kienu nfurmat s-*social workers* biex jassistu lil Anita Magro. Dawn intervistawha u hejjew *risk assessment report*. Mill-istharrig li sar, kien ikkostatat li Anita Magro kienet f`periklu u f`riskju li tissubixxi aktar vjolenza.

Jirrizulta li l-Pulizija marru fid-dar fejn kienu jabitaw ir-rikorrent, Anita Magro, u l-erba` uliedhom. Il-Pulizija sabu lir-rikorrent b`sikkina f`idu. Jidher illi r-rikorrent obda lill-Pulizija meta kien intimat biex jitlaq is-sikkina minn idu. Jidher ukoll li r-rikorrent irrezista milli johrog mid-dar mal-Pulizija izda wara li kien imwissi ripetutament, ceda u ttiehed il-Kwartieri Generali tal-Pulizija taht arrest.

Meta kien fil-kustodja tal-Pulizija, kien interrogat. Qabel irrilaxxja stqarrija fit-28 ta` Ottubru 2018, ir-rikorrent ipprevalixxa ruhu mid-dritt illi jiehu parir legali. Fil-fatt hekk ghamel u kellem lill-Avukat tal-Ghajnuna Legali Dr Raisa Colombo.

Skont certifikat mediku mahrug mit-Tabib Ian Gauci mic-Centru tas-Sahha tal-Floriana, Anita Magro kienet qieghda ssofri minn *scalp tenderness*.

Fid-29 ta` Ottubru 2018 ir-rikorrent tressaq taht arrest fejn kien akkuzat *inter alia* talli :-

1 Minghajr il-hsieb li joqtol jew li jqieghed il-hajja tas-siehba tieghu Anita Magro fil-periklu, ikkaguna griehi ta` natura hafifa ta` importanza zghira fuqha ;

2 Ikkaguna lis-siehba tieghu Anita Magro biza` li ser tintuza vjolenza kontriha jew kontra l-proprjeta` taghha jew kontra l-persuna jew il-proprjeta` ta` xi hadd mill-axxendenti, dixxendenti, ahwa subien jew bniet jew xi persuni msemmija fl-Artikolu 222(1) u dan bi ksur tal-Artikolu 251B(1) tal-Kapitolu 9.

Fl-udjenza tad-29 ta` Ottubru 2018 quddiem il-Qorti tal-Magistrati, kien verbalizzat illi :

"*Id-difiza mhux qed tikkontesta l-validita` tal-arrest*."

kif ukoll illi :

"*Id-difiza qieghda titlob il-liberta` provvizorja tal-imputat.*

L-Ufficjal Prosekutur qed togezzjona ghal tali helsien mill-arrest.

Il-Qorti wara li rat il-fedina penali tal-imputat, kif ukoll ir-rapport mid-Domestic Violence Unit, u wara li semghet is-sottomissjonijiet tal-partijiet, tichad it-talba ghal-helsien mill-arrest."

Jirrizulta li l-fedina penali tar-rikorrent hija kopjuza.

Tixhed imgieba refrettarja da parti tar-rikorrent.

Jirrizulta illi Kenneth Cassar kien instab hati ta` reati konnessi ma` vjolenza domestika fuq il-persuna ta` Anita Magro inkluz ukoll billi hebb ghaliha, heddidha, inkluz ukoll b`sikkina, ghamel hsara fil-proprjeta` taghha jew holoq fiha biza` illi ser tintuza vjolenza kontra taghha personalment jew kontra familjari.

B`rikors tat-12 ta` Novembru 2018, ir-rikorrent rega` talab il-helsien mill-arrest. L-Avukat Generali wiegeb ghar-rikors fit-22 ta` Novembru 2018 fejn oggezzjona ghat-talba tar-rikorrent primarjament abbazi tal-fatt li kien ghad jonqos jixhdu diversi persuni x`jiddeponu, u ghalhekk kien hemm il-biza` illi jinterferixxi max-xhieda jew b`xi mod jintralcja l-kors tal-gustizzja. Fl-istess risposta kien osservat ukoll illi r-reati li bihom kien akkuzat ir-rikorrent huma reati serji li jinvolvu vjolenza domestika fuq Anita Magro. L-Avukat Generali rrimarka li r-rikorrent kien diga` fil-passat instab hati ta` reati simili, fatt dan li kien jimmilita kontra l-affidibilita` tar-rikorrent li *una volta* jinghata l-helsien mill-arrest kien propens jerga` iwettaq reati simili. B`digriet tat-22 ta` Novembru 2018, it-talba ghall-helsien mill-arrest kienet michuda ghas-segwenti ragunijiet :

"1. In-natura serja tar-reati addebitati fosthom reati li jinvolvu vjolenza domestika fuq is-siehba tieghu Anita Magro ;

2. Il-fedina penali voluminuza tal-imputat ;

3. Illi l-imputat ma joffrix affidabilita` u kredibilita` sabiex ikun jista` jinghata l-helsien mill-arrest."

Fil-11 ta` Dicembru 2018, ir-rikorrent rega` talab il-helsien mill-arrest. L-Avukat Generali pprezenta risposta fid-19 ta` Dicembru 2018 fejn rega` oggezzjona ghat-talba ghall-istess ragunijiet li kienu nghataw f`okkazjonijiet precedenti. B`digriet tas-27 ta` Dicembru 2018, it-talba kienet milqugha b`numru ta` kondizzjonijiet li kienu mposti ghall-osservanza mir-rikorrent.

Fis-16 ta` Jannar 2019 Kenneth Cassar talab varjazzjoni fil-kundizzjonijiet tal-helsien mill-arrest. B`digriet li nghata fil-11 ta` Frar 2019, il-kondizzjonijiet kienu varjati.

III. <u>Provi</u>

L-unika prova li pprezenta r-rikorrent huma l-atti tal-kawza fl-ismijiet *Il-Pulizija vs Kenneth Cassar.*

Il-Qorti ghamlet ezami ta` dawn l-atti.

Jirrizulta illi l-persuni li xehdu ddeponew kollha dwar il-mertu tal-imputazzjonijiet li bihom kien mixli r-rikorrent.

Ghall-fini tal-procediment odjern, dik ix-xiehda ma ticcentra xejn.

Ghalhekk il-Qorti mhijiex sejra tqis dik ix-xiehda ghaliex mhijiex rilevanti ghall-accertamenti li trid taghmel fil-procediment tal-lum.

Min-naha tal-Avukat Generali tressaq bhala xhud is-Surgent Maggur Martin Caruana li kkonferma li r-rikorrent dahal fil-Facilita` Korrettiva ta` Kordin b`arrest fid-29 ta` Ottubru 2018 u nheles mill-arrest fit-28 ta` Dicembru 2018. Ikkonferma li kien akkuzat b`atti ta` vjolenza domestika.

IV. <u>L-azzjoni tal-lum</u>

Il-kawza fl-ismijiet `*Il-Pulizija vs Kenneth Cassar*` ghadha pendenti. Ghalhekk din il-Qorti sejra toqghod lura milli tippronunzja ruhha b`xi mod dwar il-mertu tal-azzjoni li ghadha pendenti, u sejra tqis l-azzjoni tar-rikorrenti, u relattivi talbiet, fil-kwadru tal-kompetenzi kostituzzjonali u konvenzjonali taghha.

Dan premess, jirrizulta li r-rikorrent qieghed jilmenta minn lezjoni tad-drittijiet fundamentali tieghu kif imharsa bl-Art 5 u 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-

Libertajiet Fondamentali ("**il-Konvenzjoni**") u bl-Art 34 u 39 tal-Kostituzzjoni ta` Malta ("**il-Kostituzzjoni**").

L-ilmenti huma tnejn :-

1. Li persuna taht arrest tingieb quddiem il-Qorti kull hmistax-il gurnata japplika biss ghall-Qorti tal-Magistrati bhala Qorti Istruttorja mhux ghall-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali.

Ir-rikorrent jilmenta illi din is-sitwazzjoni hija kkawzata minn nuqqas ta` disposizzjoni tal-ligi li tkopri dawk is-sitwazzjonijiet fejn persuna tkun tinsab taht arrest pendenti proceduri quddiem il-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali. Skont ir-rikorrent, in-nuqqas ta` terminu li fih ghandha tkun ikkunsidrata d-detenzjoni ulterjuri tieghu jikser id-drittijiet fundamentali tieghu fuq riferiti.

2. Li l-Avukat Generali ghandu dritt illi jitlob revizjoni ta` kull kaz fejn jigi akkordat il-helsien mill-arrest. Dan id-dritt mhuwiex disponibbli ghall-akkuzat ukoll meta t-talba tieghu ghall-helsien mill-arrest tkun respinta.

Skont ir-rikorrent, dan l-istat ta` dritt igib sitwazzjoni ta` *inequality of arms*, u allura ksur tal-jedd ghall-smigh xieraq.

V. L-ewwel ilment (Art 34 tal-Kostituzzjoni u Art 5 tal-Konvenzjoni)

Dawn iz-zewg disposizzjonijiet jittrattaw id-dritt ghal-liberta` u ghas-sigurta`tal-persuna minn arrest arbitrarju. Il-harsien japplika u jestendi ghal kulhadd minghajr distinzjoni.

Ir-rikorrent ma jghidx abbazi ta` liema subartikolu partikolari tad-disposizzjoni principali qieghed isejjes l-ilment tieghu. Fl-istess waqt minn qari tar-rikors promotur, il-Qorti qeghda tifhem li l-ilment huwa mpernjat fuq l-**Art 5(1)(c)** [tal-Konvenzjoni] li jaqra hekk :

> *Kulhadd ghandu d-dritt ghal-liberta` u ghas-sigurta` tal-persuna. Hadd ma ghandu jigi pprivat mil-liberta` tieghu hlief fil-kazijiet li gejjin u skont il-procedura preskritta bil-ligi :*
>
> *…*
>
> *l-arrest jew detenzjoni skont il-ligi ta` persuna effettwata sabiex tigi migjuba quddiem l-awtorita` legali kompetenti fuq suspett ragonevoli li tkun ikommettiet reat jew meta jkun meqjus ragonevolment mehtieg biex jigi evitat li tikkommetti reat jew li tahrab wara li tkun ghamlet reat.*

Rilevanti wkoll ghall-kaz tal-lum huma dawn subartikoli ohra mill-istess Art 5 :-

> *3. Kull min ikun arrestat jew detenut skont 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 ragonevoli jew ghal helsien waqt pendenza tal-proceduri. Il-helsien jista` jkun taht kundizzjoni ta` garanziji biex jidher ghall-proceduri.*
>
> *4. Kull min ikun ipprivat mil-liberta` tieghu b`arrest jew detenzjoni jkollu dritt li jaghmel proceduri biex il-legalita` tad-detenzjoni tieghu tigi*

deciza malajr minn qorti u l-liberta` tieghu tigi ordnata jekk id-detenzjoni ma tkunx skont il-ligi.

5. Kull min ikun vittma ta` arrest jew detenzjoni bi ksur tad-disposizzjonijiet ta` dan l-Artikolu jkollu dritt esegwibbli ghal kumpens."

L-Art 34 tal-Kostituzzjoni huwa simili ghall-Art 5 tal-Kovenzjoni.

Mill-Art 34 tal-Kostituzzjoni, il-Qorti sejra tislet dawk is-subartikoli li ghandhom rilevanza ghall-kaz taht ezami :-

(1) Hadd ma ghandu jigi pprivat mill-libertà personali tieghu hlief kif jista` jkun awtorizzat b`ligi fil-kazijiet li gejjin, jigifieri –

…

(f) fuq suspett ragonevoli li huwa jkun ikkommetta, jew ikun sejjer jikkommetti, reat kriminali ;

…

(3) Kull min jigi arrestat jew detenut -

(a) sabiex jingieb quddiem qorti fl-esekuzzjoni tal-ordni ta` qorti ; jew

(b) fuq suspett ragonevoli li jkun ikkommetta, jew li jkun sejjer jikkommetti, reat kriminali, u li ma jigix mehlus, ghandu jingieb quddiem qorti mhux aktar tard minn tmienja u erbghin siegha wara; u jekk xi hadd arrestat jew detenut f`xi kaz bhal dak li huwa msemmi fil-paragrafu (b) ta` dan is-subartikolu ma jigix iggudikat fi zmien ragonevoli, f`dak il-kaz, bla hsara ghal kull proceduri ohra li jistghu jingiebu kontra tieghu, huwa ghandu jigi mehlus jew bla kondizzjoni jew b`kondizzjonijiet ragonevoli, maghduda b`mod partikolari dawk il-kondizzjonijiet li jkunu mehtiega ragonevolment biex jigi zgurat li huwa jidher f`data aktar tard ghall-kawza jew ghall-proceduri preliminari ghall-kawza.

(4) Kull min ikun arrestat jew detenut illegalment minn xi persuna ohra jkollu dritt ghal kumpens ghal hekk minn dik il-persuna.

Il-jedd li jsib il-harsien bl-artikoli tal-Konvenzjoni u tal-Kostituzzjoni fuq citati huwa mnebbah minn tlett principji :

i. **Certezza tad-dritt** –

Id-dispozizzjoni tal-ligi illi tippermetti l-arrest jew id-detenzjoni kontinwata trid tkun cara u l-konsegwenzi ta` applikazzjoni taghha ghandhom ikunu prevedibbli.

ii. **Propozjonalita`.**

iii. **Harsien minn arrest arbitrarju** –

Dan il-principju huwa vitali.

Arrest huwa legali **biss** jekk ikun permess mil-ligi u jekk isegwi l-procedura stabbilita mil-ligi. Ghalhekk arrest ikun arbitrarju meta ma jkunx permess mil-ligi.

Ic-cirkostanzi li jaghmlu l-arrest legali huma dawk indikati fl-Art 5 tal-Konvenzjoni u fl-Art 34 tal-Kostituzzjoni. Kull arrest jew detenzjoni li ma johorgu barra mill-parametri ta` dawn id-disposizzjonijiet jirrendi arbitrarju l-arrest, u konsegwentement mhux permess mil-ligi.

L-Art 5(1)(c) tal-Konvenzjoni u l-Art 34(1)(f) tal-Kostituzzjoni jahsbu ghal sitwazzjoni fejn, ghad li ma jkunx hemm kundanna ta` persuna fi procediment kriminali li jkun beda u jkun ghaddej, l-arrest jew id-detenzjoni ta` dik il-persuna jservu bhala mizura preventiva jew kawtelatorja fl-interess tal-ordni pubbliku jew ghal ragunijiet specifici partikolari ghall-kaz. Dawn ic-cirkostanzi huma partikolari ferm u ghax huma hekk, ghandhom jinghataw interpretazzjoni stretta, u m`ghandhomx iservu sabiex inaqqsu l-liberta` tal-persuna jew sabiex jivvjolaw il-prezunzjoni tal-innocenza sakemm tigi dikjarata htija.

Sabiex arrest ikun legali, irid jirrizulta minn dispozizzjoni tal-ligi li tippermetti l-arrest jew li tiggustifika d-detenzjoni.

Fil-kaz tal-lum ir-rikorrent mhux qieghed jikkontesta l-arrest.

Ghall-fini ta` kompletezza, u fil-kuntest tal-gudizzju li ghad trid taghmel dwar il-lanjanzi tar-rikorrent, il-Qorti sejra taghmel dawn l-osservazzjonijiet.

L-Art 355V tal-Kap 9 ighid hekk :-

> *Meta jkun hemm ragunijiet bil-ligi ghall-arrest ta` persuna, il-Pulizija tista` titlob il-hrug ta` mandat ta` arrest minghand Magistrat, hlief jekk skont xi dispozizzjoni tal-ligi dak l-arrest jista` jsir minghajr mandat.*

<u>L-Art 355X(1) tal-Kap 9</u> jaqra hekk :-

> *Kull ufficjal tal-Pulizija jista` jarresta minghajr mandat lil persuna li tkun fl-att ta` ghemil jew li tkun ghadha kemm ghamlet delitt punibbli bi prigunerija, jew li jkollu suspett ragonevoli fiha li qeghda biex taghmel jew li tkun ghadha kif ghamlet xi delitt.*

Fil-kaz tal-lum jirrizulta illi r-rikorrent kien arrestat wara rapport li ghamlet is-siehba tieghu dwar allegata vjolenza domestika min-naha tar-rikorrent fil-konfront taghha. Mill-*Incident Report* li kien ipprezentat fl-atti tal-process kriminali, jirrizulta li kienet infurmata l-Magistrat tal-Ghassa li ordnat l-arrest ta` r-rikorrent. Meta marru l-Pulizija jfittxu lir-rikorrent fid-dar tar-residenza tieghu u tas-siehba tieghu, sabuh b`sikkina f`idu. Il-Pulizija hadu kont tal-istat ta` fatt li sabu quddiehom, u li mir-rapport tal-vittma kien irrizulta li kienet sofriet xi griehi. Mill-istharrig li ghamlu s-*social workers* instab li kien hemm riskju gholi ta` aktar vjolenza domestika.

Tenut kont ta` dan l-isfond ta` fatti, mhux biss irrizulta li kien hemm raguni ghall-arrest, liema raguni kienet tohrog specifikament minn dispozizzjoni tal-ligi, izda wkoll kien hemm ordni tal-Qorti ghall-arrest. F`dan il-kaz l-arrest kien preventiv u kien jinkwadra fic-cirkostanza prevista fl-Art 5(1)(c) tal-Konvenzjoni u fl-Art 34(1)(f) tal-Kostituzzjoni. Stabbilit illi l-arrest skatta minn dispozizzjoni tal-ligi, ghandu jigi determinat ukoll xhinu l-iskop tal-arrest.

L-arrest preventiv huwa permess fil-kuntest ta` proceduri kriminali fejn :

i. il-persuna arrestata tkun ser titressaq il-Qorti fuq suspett illi wettqet reat ; jew

ii. sabiex jigi evitat illi l-persuna tikkommetti xi reat iehor jew li tahrab wara li tkun wettqet ir-reat.

Fil-kaz ta` **Schwabe and M.G. vs Germany** li kien deciz mill-ECtHR fl-1 ta` Dicembru 2011, inghad hekk :

> *72. Sub-paragraph (c) thus permits deprivation of liberty only in connection with criminal proceedings (see Ječius, cited above, § 50). It governs pre-trial detention (see Ciulla, cited above, §§ 38-40). This is apparent from its wording, which must be read in conjunction both with sub-paragraph (a) and with paragraph 3, which form a whole with it (see,inter alia, Ciulla, cited above, § 38, and Epple v. Germany, no. 77909/01, § 35, 24 March 2005). Paragraph 3 of Article 5 § 1 states that everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of Article 5 must be brought promptly before a judge – in any of the circumstances contemplated by the provisions of that paragraph – and must be entitled to trial within a reasonable time (see also Lawless (no. 3), cited above, pp. 51-53, § 14).*

Trid issir distinzjoni bejn il-fatt li persuna titressaq taht arrest u l-fatt tal-konkluzjoni tal-investigazzjoni u tal-kaz.

Il-fatt li persuna titressaq il-Qorti taht arrest ma jistax jitqies bhala sinjal ta` htija, ghaliex fil-mument illi persuna tingieb taht arrest, il-process ikun ghadu fi stadju wisq bikri, u x`aktarx ikun ghad hemm biss informazzjoni minima. F`dan l-istadju l-objettiv huwa illi ssir investigazzjoni tal-kaz sabiex jigi determinat jekk fic-cirkostanzi partikolari l-arrest ghandux jigi konvalidat jew inkella le.

Fejn l-arrest ikun mirat ghall-iskop li ma jitwettaqx reat iehor jew li l-persuna ma tahrabx, fil-**Guide on Article 5 of the European Convention on Human Rights: Right to liberty and security**, pubblikat mill-Kunsill tal-Ewropa, u aggornat sat-30 ta` April 2019, jinghad hekk :

> *78. The second alternative of that provision ("when it is reasonably considered necessary to prevent his committing an offence") does not permit a policy of general prevention directed against an individual or a category of individuals who are perceived by the authorities as being dangerous or having the propensity to commit unlawful acts. This ground of detention does no more than afford the Contracting States a means of preventing a concrete and specific offence as regards, in particular, the place and time of its commission and its victim(s). In order for a detention to be justified under the second limb of Article 5 § 1 (c), the authorities must show convincingly that the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention*."

Fil-kaz ta` **Merabishvili vs Georgia** li kien deciz fit-28 ta` Novembru 2017, l-ECtHR osservat illi :

183. To be compatible with that provision, an arrest or detention must meet three conditions.

184. First, it must be based on a "reasonable suspicion" that the person concerned has committed an offence, which presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence. What is "reasonable" depends on all the circumstances, but the facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge (see, among other authorities, Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, § 32, Series A no. 182; Labita v. Italy [GC], no. 26772/95, § 155, ECHR 2000-IV; and O`Hara v. the United Kingdom, no. 37555/97, §§ 34 and 36, ECHR 2001-X).

185. Secondly, the purpose of the arrest or detention must be to bring the person concerned before a "competent legal authority" – a point to be considered independently of whether that purpose has been achieved (see, among other authorities, Brogan and Others v. the United Kingdom, 29 November 1988, §§ 52-53, Series A no. 145-B; Murray v. the United Kingdom, 28 October 1994, §§ 67-68, Series A no. 300-A; and K.-F. v. Germany, 27 November 1997, § 61, Reports 1997-VII).

186. Thirdly, an arrest or detention under sub-paragraph (c) must, like any deprivation of liberty under Article 5 § 1 of the Convention, be "lawful" and "in accordance with a procedure prescribed by law" (see, among other authorities, Guzzardi v. Italy,

6 November 1980, § 102, Series A no. 39; Kemmache v. France (no. 3), 24 November 1994, §§ 37 and 42, Series A no. 296-C; and K.-F. v. Germany, cited above, § 63). Those two expressions, which overlap to an extent, refer essentially to domestic law and lay down the obligation to comply with its substantive and procedural rules (see, among other authorities, Winterwerp, §§ 39 and 45; Kemmache (no. 3), §§ 37 and 42; K.-F. v. Germany, § 63; and Assanidze, § 171, all cited above). That is not, however, sufficient; Article 5 § 1 of the Convention also requires that domestic law itself be compatible with the rule of law. This in particular means that a law which permits deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application (see, among other authorities, Amuur v. France, 25 June 1996, § 50, Reports 1996-III; Jėčius, cited above, § 56; Baranowski v. Poland, no. 28358/95, § 52, ECHR 2000-III; and Kakabadze and Others v. Georgia, no.1484/07, §§ 62 and 68, 2 October 2012). It also means that an arrest or detention must be compatible with the aim of Article 5 § 1, which is to prevent arbitrary deprivation of liberty (see, among other authorities, Winterwerp, § 39; Jėčius, § 56;Baranowski, § 51; Assanidze, § 171; and Kakabadze and Others, § 63, all cited above). This presupposes, in particular, that a deprivation of liberty genuinely conforms with the purpose of the restriction permitted by the relevant sub-paragraph of Article 5 § 1 (see Winterwerp, cited above, § 39; Ashingdane v. the United Kingdom, 28 May 1985, § 44, Series A no. 93; and Saadi v. the United Kingdom [GC], no. 13229/03, § 69, ECHR 2008)."

Fil-kaz ta` **S.V. and A. vs Denmark** li kien deciz fit-22 ta` Ottubru 2018, l-ECtHR irrilevat hekk :-

89. In the context of sub-paragraph (c) of Article 5 § 1, a strict interpretation of the term "offence" constitutes an important safeguard against arbitrariness. It will be recalled that this provision does not, according to the Court`s established case-law, permit a policy of general prevention directed against an individual or a category of individuals who are perceived by the authorities, rightly or wrongly, as being dangerous or having the propensity to commit unlawful acts. This ground of detention does no more than afford the Contracting States a means of preventing a concrete and specific offence (see, for example, Guzzardi v. Italy, 6 November 1980, § 102, Series A no. 39; Ciulla v. Italy, 22 February 1989, § 40, Series A no. 148; and Shimovolos, cited above, § 54) as regards, in particular, the place and time of its commission and its victim(s) (see M. v. Germany, no. 19359/04, §§ 89 and 102, ECHR 2009). This can be seen both from the use of the singular ("an offence") and from the object of Article 5, namely to ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion (see Guzzardi, cited above, § 102, and M. v. Germany, cited above, § 89).

…

91. The condition that there should be no arbitrariness also demands that both the order to detain and the execution of the detention genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 (see Saadi, cited above, § 69). Where, for example, detention is sought to be justified by reference to the first limb of Article 5 § 1 (c) in order to bring a person before the competent legal authority on reasonable suspicion of having committed an offence, the Court has insisted upon the need for the

authorities to furnish some facts or information which would satisfy an objective observer that the person concerned may have committed the offence in question (seeJames, Wells and Lee v. the United Kingdom, nos. 25119/09 and 2 others, § 193, 18 September 2012, and O`Hara v. the United Kingdom, no. 37555/97, §§ 34-35, ECHR 2001-X). Similarly, the Court is of the view that in order for a detention to be justified under the second limb of Article 5 § 1 (c), the authorities must show convincingly that the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention.

92. Finally, in the context of sub-paragraph (c) of Article 5 § 1, the reasoning of the decision ordering a person`s detention is a relevant factor in determining whether the detention must be deemed arbitrary. In respect of the first limb of sub-paragraph (c) the Court has found that the absence of any grounds in the judicial authorities` decisions authorising detention for a prolonged period of time was incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1 (see Urtāns v. Latvia, no.16858/11, § 28, 28 October 2014). Conversely, it has found that an applicant`s detention on remand could not be said to have been arbitrary if the domestic court gave certain grounds justifying the continued detention, unless the reasons given were extremely laconic and did not refer to any legal provision which would have permitted the applicant`s detention (ibid.; see also Mooren, cited above, § 79, with further references).

Tajjeb jinghad illi l-Pulizija jehtieg ikollha bizzejjed informazzjoni jew ezistenza ta` fatti li jiggustifikaw l-arrest. Dan ma jfissirx li meta tarresta, il-Pulizija jrid ikollha fil-pussess taghha l-provi kollha li jistghu

jwasslu ghall-htija tal-persuna fi procediment kriminali sal-grad `l hinn minn kull dubju dettat mir-raguni. Fl-istess waqt, meta l-persuna titressaq il-qorti u tigi akkuzata, il-Pulizija huma obbligati jipprezentaw kwadru ta` fatti li huma ndikattivi li r-reat ikunu twettaq mill-imputat. Min se jiggudika ghandu jaghmel l-evalwazzjonijiet tieghu sabiex jistabilixxi jekk l-arrest ghandux jinzamm fis-sehh. L-imputat jinzamm taht arrest preventiv jekk id-detenzjoni tkun gustifikata. Jekk ma tkunx, l-arrest ma jibqax aktar ragonevoli, u l-imputat ghandu jinghata l-helsien mill-arrest.

Fil-kaz ta` **<u>Ilgar Mammadov v Azerbaijan</u>** li deciz fit-22 ta` Mejju 2014, l-ECtHR qalet hekk :

> *87. The Court reiterates that in order for an arrest on reasonable suspicion to be justified under Article 5 § 1 (c), it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody (see Brogan and Others v. the United Kingdom, 29 November 1988, § 53, Series A no. 145-B). Nor is it necessary that the person detained should ultimately have been charged or taken before a court. The object of detention for questioning is to further a criminal investigation by confirming or discontinuing suspicions which provide the grounds for detention. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see **Murray v. the United Kingdom**, 28 October 1994, § 55, Series A no. 300-A).*
>
> *88. However, the requirement that the suspicion must be based on reasonable grounds*

forms an essential part of the safeguard against arbitrary arrest and detention. The fact that a suspicion is held in good faith is insufficient. The words "reasonable suspicion" mean the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will depend upon all the circumstances (see ***Fox, Campbell and Hartley v. the United Kingdom****, 30 August 1990, § 32, Series A no. 182). The length of the deprivation of liberty may also be material to the level of suspicion required (see* ***Murray****, cited above, § 56).*

89. When assessing the "reasonableness" of the suspicion, the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured. Consequently, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence (see Fox, Campbell and Hartley, cited above, § 34 in fine).

90. The Court notes that the applicant in the present case complained of the lack of "reasonable" suspicion against him throughout the entire period of his detention, including both the initial period following his arrest and the subsequent periods when his remand in custody had been authorised and extended by court orders. In this connection, the Court reiterates that the persistence of reasonable suspicion that the person arrested has committed an offence is a prerequisite for the lawfulness of the continued

detention (see, among many other authorities, Stögmüller v. Austria, 10 November 1969, p. 40, § 4, Series A no. 9, and McKay v. the United Kingdom [GC], no. 543/03, § 44, ECHR 2006-X). Accordingly, while reasonable suspicion must exist at the time of the arrest and initial detention, it must also be shown, in cases of prolonged detention, that the suspicion persisted and remained "reasonable" throughout the detention.

…

94. The Court notes that, as a general rule, problems concerning the existence of a "reasonable suspicion" arise at the level of the facts. The question then is whether the arrest and detention were based on sufficient objective elements to justify a "reasonable suspicion" that the facts at issue had actually occurred (see Włoch v. Poland, no. 27785/95, § 108, ECHR 2000-XI). The very specific context of the present case calls for a high level of scrutiny of the facts. The Court`s task is to verify whether there existed sufficient objective elements that could lead an objective observer to reasonably believe that the applicant might have committed the acts alleged by the prosecuting authorities."

Ladarba persuna tkun giet arrestata, jiskatta d-dritt li johrog mill-Art 5(3) tal-Konvenzjoni u mill-Art 34(3) tal-Kostituzzjoni. Il-persuna tkun trid titressaq il-qorti "minnufih".

Dwar l-applikazzjoni tal-Art 5(3), fil-**Guide on Article 5 of the European Convention on Human Rights: Right to liberty and security** (op. cit. - pag. 31) jinghad hekk :

*160. Judicial control of interferences by the executive with the individual`s right to liberty is an essential feature of the guarantee embodied in Article 5 § 3 (**Brogan and Others v. the United Kingdom**, § 58; **Pantea v. Romania**, § 236**; Assenov and Others v. Bulgaria**, § 146). Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention" and "from which the whole Convention draws its inspiration" (**Brogan and Others v. the United Kingdom**, § 58).*

*161. Judicial control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures (**Ladent v. Poland**, § 72).*

Fil-kaz ta` **Aquilina vs Malta** li kien deciz fid-29 ta` April 1999 l-ECtHR kienet irrilevat :-

47. As the Court has pointed out on many occasions, Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (see, inter alia, the Assenov and Others v. Bulgaria judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, p. 3298, § 146). It is essentially the object of Article 5 § 3, which forms a whole with paragraph 1 (c), to require

provisional release once detention ceases to be reasonable. The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3. This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons (see the De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, pp. 21-24, §§ 44, 47 and 51). In other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention.

48. To be in accordance with Article 5 § 3, judicial control must be prompt. Promptness has to be assessed in each case according to its special features (see the De Jong, Baljet and Van den Brink judgment cited above, pp. 24 and 25, §§ 51 and 52). However, the scope of flexibility in interpreting and applying the notion of promptness is very limited (see the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, pp. 33-34, § 62).

49. In addition to being prompt, the judicial control of the detention must be automatic (see the De Jong, Baljet and Van den Brink judgment cited above, p. 24, § 51). It cannot be made to depend on a previous application by the detained person. Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court (see the De Jong, Baljet and Van den Brink judgment

cited above, pp. 25-26, § 57). It might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny (see, mutatis mutandis, the Kurt v. Turkey judgment of 25 May 1998, Reports1998-III, p. 1185, § 123). Prompt judicial review of detention is also an important safeguard against ill-treatment of the individual taken into custody (see the Aksoy v. Turkey judgment of 18 December 1996, Reports 1996-VI, p. 2282, § 76). Furthermore, arrested persons who have been subjected to such treatment might be incapable of lodging an application asking the judge to review their detention. The same could hold true for other vulnerable categories of arrested persons, such as the mentally weak or those who do not speak the language of the judicial officer.

50. Finally, by virtue of Article 5 § 3 the judicial officer must himself or herself hear the detained person before taking the appropriate decision (see the De Jong, Baljet and Van den Brink judgment cited above, p. 24, § 51).

51. The Court shares the parties` view that the applicant`s appearance before a magistrate two days after his arrest (see paragraph 9 above) could be regarded as "prompt" for the purposes of Article 5 § 3.

(ara wkoll : **Stephens v. Malta (No. 2)** : para. 52-53 : deciza mill-ECtHR fil-21 ta` April 2009)

Fil-provvediment illi taghti dwar il-konvalida tal-arrest u tad-detenzjoni kontinwata, il-qorti tkun taghti r-ragunijiet biex issostni u tiggustifika dak il-provvediment. Fost ir-ragunijiet li huma accettati f`kazi ta` r-rifjut tal-helsien mill-arrest, il-kazistika tal-ECtHR erba` (4) kriterji. Terga` tirreferi ghall-**Guide on Article 5 of the European Convention on Human Rights: Right to liberty and security** (pag 36).

Il-kriterji huma :

> *(a) the risk that the accused will fail to appear for trial,*
>
> *(b) the risk that the accused, if released, would take action to prejudice the administration of justice, or*
>
> *(c) commit further offences, or*
>
> *(d) cause public disorder*
>
> *(Buzadji v. the Republic of Moldova [GC], § 88; Tiron v. Romania, § 37; Smirnova v. Russia, § 59; Piruzyan v. Armenia, § 94). Those risks must be duly substantiated, and the authorities` reasoning on those points cannot be abstract, general or stereotyped (Merabishvili v. Georgia [GC], § 222). However, nothing precludes the national judicial authorities from endorsing or incorporating by reference the specific points cited by the authorities seeking the imposition of pre-trial detention (ibid., § 227)*

Fil-kaz tal-lum, ic-cahda tal-helsien mill-arrest kienet motivata mill-qorti. Fil-fatt ir-rikorrent ma ressaq ebda kontestazzjoni dwar dan. Ir-rikorrent lanqas ma jidher illi qieghed jilmenta dwar dewmien mill-qorti fl-ghoti tal-provvediment taghha. Effettivament dak illi

qieghed jilmenta minnu r-rikorrent huwa l-assenza ta` terminu ghad-determinazzjoni ta` jekk l-arrest preventiv ta` persuna arrestata ghadux aktar gustifikat.

Ir-rikorrent jirreferi ghall-**Art 401(1) tal-Kap 9**. Id-dispozizzjoni taqra hekk :

> *Il-kompilazzjoni ghandha tinghalaq fi zmien xahar, illi, ghal raguni tajba, jista` jigi mgedded mill-President ta` Malta ghal perijodi ohra kull wiehed minnhom ta` xahar, u kull tigdid bhal dan ghandu jsir fuq talba bil-miktub maghmula mill-qorti:*
>
> *Izda z-zmien fuq imsemmi m`ghandux b`kollox jigi hekk imgedded ghal aktar minn tliet xhur :*
>
> *Izda wkoll kemm-il darba ma jkunx inghata l-helsien mill-arrest, l-akkuzat ghandu jingieb quddiem il-qorti ghall-anqas darba kull hmistax-il gurnata sabiex il-qorti tiddecidi jekk ghandux jibqa` arrestat.*

Ir-rikorrent jilmenta illi dwar il-fatt illi ghalkemm it-terminu ta` hmistax-il jum (indikat fit-tieni proviso : *supra*) japplika ghal proceduri quddiem il-Qorti tal-Magistrati bhala Qorti Istruttorja, dak it-terminu ma japplikax ukoll ghal proceduri quddiem il-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali.

Minn qari tal-Art 401(1) jirrizulta illi huwa minnu illi din id-dispozizzjoni ssib l-applikazzjoni taghha fl-istadju tal-kumpilazzjoni biss. Jidher ukoll illi din id-dispozizzjoni hija mahsuba ghal stadju partikolari tal-procediment fejn il-qorti tkun adita biss illi tigbor u tipprezerva l-provi u tiddetermina jekk hemmx ragunijiet bizzejjed sabiex l-imputat jitqieghed taht att ta` akkuza.

Jidher pero` illi l-legislatur haseb ghal salvagwardja li ssib applikazzjoni fil-kazijiet l-ohra kollha.

Il-Qorti tirreferi ghall-**Art 412B(1) tal-Kap 9** li jaqra :-

> *Kull min ikun jinsab taht arrest ghal reat li dwaru jkun qed jigi imputat jew akkuzat quddiem il-Qorti tal-Magistrati u li, f`kull stadju iehor minbarra dak li jirreferi ghalih l-artikolu 574A, jallega li l-kontinwazzjoni tad-detenzjoni tieghu ma tkunx skont il-ligi, **jista` f`kull waqt jaghmel rikors lill-qorti fejn jitlob il-helsien tieghu mill-arrest**. Rikors bhal dak ghandu jigi appuntat ghas-smigh b`urgenza u flimkien mad-data tas-smigh ghandu jigi notifikat fl-istess jum li jsir lill-Kummissarju tal-Pulizija jew, skont il-kaz, lill-Kummissarju tal-Pulizija u lill-Avukat Generali, li jistghu jipprezentaw risposta ghalih sa mhux aktar tard mill-jum tas-smigh.*" (enfasi mizjuda)

Fil-kaz tal-lum jidher illi r-rikorrent talab il-liberta` provvizorja dakinhar tad-29 ta` Ottubru 2018 meta tressaq b`arrest. Dakinhar stess, wara li semghet il-partijiet, il-qorti cahdet it-talba ghall-helsien mill-arrest. Fit-12 ta` Novembru 2018, ir-rikorrent rega` ghamel talba bhal dik tad-29 ta` Ottubru 2018. Anke din it-talba kienet respinta. Issa l-**Art 412B(1) tal-Kap 9** ighid illi persuna li tkun taht arrest "*jista` f`kull waqt jaghmel rikors lill-qorti fejn jitlob il-helsien tieghu mill-arrest*". Dan jfisser illi ma kien hemm xejn xi jzomm lir-rikorrent milli jintavola rikors b`talba ghall-helsien mill-arrest anke diversi drabi. Bhala fatt id-dispozizzjoni taghti lill-akkuzat/detenut parametri ta` azzjoni wiesa` hafna. Kien imbaghad fil-11 ta` Dicembru 2018 illi r-rikorrent rega` pprezenta rikors iehor b`talba ohra simili ghal dawk precedenti. Il-frekwenza tat-talbiet tispetta lir-rikorrent. Jekk ma talabx, specjalment jekk kien hemm bdil tac-cirkostanzi, ma jistax ir-rikorrent jaddebita xi nuqqas lill-Istat.

Ghalkemm, bhala fatt, fil-mori tal-kawza, precizament fit-28 ta` Dicembru 2018, il-qorti ordinarja laqghet it-talba tar-rikorrent ghall-helsien mill-arrest, jibqa` wkoll il-fatt li, ghar-ragunijiet kollha esposti, u fuq l-iskorta tal-gurisprudenza tal-ECtHR, din il-Qorti ma ssibx li kien hemm vjolazzjoni tal-Art 5 tal-Konvenzjoni u tal-Art 34 tal-Kostituzzjoni.

VI. <u>It-tieni lment</u>
(Art 6 tal-Konvenzjoni u Aart 39 tal-Kostituzzjoni)

Ir-rikorrent jilmenta wkoll illi mill-fatt illi filwaqt li l-Avukat Generali ghandu dritt ta` appell minn provvediment li taghti l-qorti dwar helsien mill-arrest, l-istess dritt mhuwiex disponibbli ghall-persuna arrestata.

Skont ir-rikorrent, dan jikser il-principju tal-*equality of arms.*

Il-parti rilevanti tal-**<u>Art 6(1) tal-Konvenzjoni</u>** taqra hekk :–

Fid-decizjoni tad-drittijiet civili u ta` l-obbligi tieghu jew ta` xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b`ligi.

Il-parti rilevanti fl**<u>-Art 39 Kostituzzjoni</u>** huma s-subartikolu (1) u (2) li jipprovdu hekk :-

(1) Kull meta xi hadd ikun akkuzat b`reat kriminali huwa ghandu, kemm-il darba l-akkuza ma tigix irtirata, jigi moghti smigh xieraq gheluq zmien ragonevoli minn qorti indipendenti u mparzjali mwaqqfa b`ligi.

> *(2) Kull qorti jew awtorità ohra gudikanti mwaqqfa b`ligi ghad-decizjoni dwar l-ezistenza jew l-estensjoni ta` drittijiet jew obbligi civili ghandha tkun indipendenti u imparzjali ; u meta l-proceduri ghal decizjoni bhal dik huma mibdija minn xi persuna quddiem qorti jew awtorità ohra gudikanti bhal dik, il-kaz ghandu jigi moghti smigh xieraq gheluq zmien ragonevoli.*

Jirrizulta li l-procediment li dwaru r-rikorrent qieghed jilmenta ghadu mhuwiex mitmum.

Inghad mill-qrati taghna illi ghalkemm huwa minnu li t-tutela tad-dritt ta` smigh xieraq tista` tigi evalwata in relazzjoni ghall-proceduri kollha u ghalhekk ikun prematur li wiehed jiddeciedi fi stadju bikri tal-process, meta diga` jkun hemm ragunijiet bizzejjed li fuqhom il-qorti tkun tista` ssib lezjoni, hija m`ghandhiex toqghod tistenna sakemm jintemm il-kaz kollu jew tistenna li attwalment jigi miksur id-dritt pretiz biex tiddeciedi jekk hemmx lezjoni jew le, ghaliex jista` jaghti l-kaz li jkun tard wisq jew li l-persuna tibqa` minghajr rimedju.

Fis-sentenza li tat fil-25 ta` Marzu 2011 fil-kawza fl-ismijiet **<u>David sive David Norbert Schembri vs Avukat Generali</u>**, il-Qorti Kostituzzjonali ghamlet referenza ghal dak li qalet l-Ewwel Qorti meta din sostniet illi :-

> *"kellha tqis il-process kollu, u mhux episodju wiehed mehud wahdu. Ghalkemm dwar id-decizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza ma hemmx rimedju ordinarju iehor, ghax dik id-decizjoni hija finali, dwar id-decizjoni fuq l-akkuza nfisha il-process ordinarju ghadu ghaddej, u ghalhekk ir-rikorrent ghadu jista` jinqeda bir-rimedji li taghtih il-ligi ordinarja. Dan huwa relevanti ghax il-jedd imhares taht l-Artikolu 6 huwa dwar id-decizjoni*

fuq l-akkuza kriminali, u mhux dwar id-decizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza. Fil-kaz tal-lum id-decizjoni illi l-kawza kriminali kontra r-rikorrent ghandha titmexxa `l quddiem, fiha nfisha u wehedha, ma tolqot ebda jedd fondamentali mhares taht l-artikolu tal-Konvenzjoni li fuqu qieghed jistrieh ir-rikorrent".

Il-Qorti Kostituzzjonali osservat illi l-appellant ma kienx qabel mal-Ewwel Qorti dwar il-kwistjoni illi kellu jitqies il-process kollu u mhux episodju wiehed. L-appellant ghamel l-argument illi :-

" … l-ghoti ta` rimedju jista` jigi anticipat jekk ikun se jinkiser dritt. Fis-sentenza tal-Qorti ta` Strasbourg fil-kaz fl-ismijiet Imbroscia v. Switzerland jinghad li :

`The manner in which article 6(1) and 3(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case.`

Kif tikteb Karen Reid fil-ktieb "A Practitioner`s Guide to the European Convention on Human Rights", 3 rd Edition page 70

"While the conformity of a trial with the requirements of Article 6 must be assessed on the basis of the trial as a whole, a particular incident may assume such importance as to constitute a decisive factor in the general appraisal of the trial overall".

Minkejja dan l-argument, il-Qorti Kostituzzjonali kkonfermat dak li kien deciz mill-Ewwel Qorti u cahdet dak l-aggravju.

Fid-decizjoni li tat fis-26 ta` April 2013 fir-Referenza li kienet saret mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fil-kawza fl-ismijiet **Il-Pulizija vs Dr Melvyn Mifsud**, il-Qorti Kostituzzjonali osservat illi hija l-gurisprudenza kostanti taghha u tal-ECtHR li l-ezami dwar ikunx hemm vjolazzjoni tad-dritt ghal smigh xieraq irid isir billi jittiehed qies tal-procedimenti kollha fl-assjem taghhom u li ghalhekk dan l-ezercizzju, fil-principju, huwa ndikat li jsir biss fi tmiem il-procedimenti u mhux qabel.

Fid-decizjoni li tat fis-16 ta` Marzu 2011 fil-kawza **Morgan Ehi Egbomon vs Avukat Generali** il-Qorti Kostituzzjonali accettat dak li kienet qalet l-Ewwel Qorti illi sabiex il-qorti tkun tista` tiddeciedi dwar allegazzjoni ta` nuqqas ta` smigh xieraq hemm bzonn illi jsir apprezzament tal-process kriminali kollu. Ladarba f`dak il-kaz il-process kriminali kien ghadu mhux mismugh u mitmum, kien ghadu mhux maghruf kif u taht liema cirkostanzi jistghu joperaw ir-regoli illi l-appellant qieghed jilmenta dwarhom.

Fil-Pag 140-141 tal-ktieb : **A Commentary on the Constitution of Malta** : **Dr Tonio Borg** ighid hekk :-

> *The trial or proceedngs had to be seen as a whole and one incident or irregularity does not necessarily vitiate the entire proceedings. (See Anthony Zarb et vs Minister for Justice (CC) (16 October 2002) (729/99): "For the question to be decided whether a fair hearing took place or not, according to the previously mentioned articles of the Constitution, one cannot and should not simply focus one`s attention on a part only of the proceedings before a court and if one finds any shortcoming, whatever it may be, one comes to the inexorable conclusion that the entire proceedings are therefore vitiated. On the other hand, for one to arrive at the conclusion whether there was a breach of the fundamental right of a fair hearing, it is necessary that the entire iter of the judicial proceedings be analysed. The*

assessment has to be based on the entirety of all the elements which form the judicial proceedings since it is only through such a comprehensive assessment that one can reasonably decide whether there was any violation of the said fundamental right" (see also Dr L Pullicino vs Prime Minister et (CC) (18 August 1998) (kollezzjoni Vol LXXII.1.159) where though some irregularities in the jury trial had occurred, the trial as a whole had been fair; see also Josephine Calleja vs Attorney General et (465/94) and Gregorio Scicluna vs Attorney General et (463/94) (both decided by the (CC) on 15 October 2003). See also Victor Lanzon et noe vs Commissioner of Police (CC) (29 November 2004) (15/02) where the interview by Police of a minor in absence of lawyer was not by itself deemed to be in breach of Article 6. See also Police vs Carmelo Ellul Sullivan et (CC) (25 September 2015) (29/10) where the fact that a new magistrate had been appointed who had not heard the witnesses viva voce was not per se considered to be in breach of Article 6 because the trial had not yet been concluded, and the defence would have the right to cross-examine the witnesses before the new magistrate, and the trial had to be seen as a whole; and George Pace v Attorney General et (CC) (31 October 2014) (56/11): "The right to a fair hearing is granted so that after a hearing within a reasonable time, a person who is innocent is not given a guilty verdict, and such person is given all the necessary means for such purpose; and also so that guilty persons do not evade the consequences of their actions."

(ara wkoll : **Malcolm Said vs Avukat Generali et** : 24 ta` Gunju 2016)

Fid-decizjoni li tat fit-12 ta` Frar 2016 fil-kawza fl-ismijiet **General Workers` Union vs L-Avukat Generali**, il-Qorti Kostituzzjonali spjegat illi :

Dwar jekk l-azzjoni hijiex intempestiva l-Avukat Generali jilmenta li l-ewwel Qorti kienet zbaljata meta ma ikkonsidratx li f`kuntest ta` allegata lezjoni tad-dritt ghal smigh xieraq l-azzjoni ttentata mill-union hija wahda intempestiva peress li l-proceduri li minnhom qed tilmenta l-istess Union (GWU v. l-Enemalta Corporation – fuq tilwima tax-xoghol dwar allegazzjoni ta` ksur ta` ftehim li kien iffirmat bejn il-partijiet fis-sena 2002 fir-rigward ta` Stephen Leonardi, membru tal-union,) ghadhom pendenti.

L-Avukat Generali jargumenta li stharrig dwar allegazzjoni ta` ksur tad-dritt tas-smigh xieraq jitlob li l-evalwazzjoni tal-procedura li minnha jkun qed isir lament titqies fit-totalita` taghha. Jghid li huwa inkoncepibbli li f`dan l-istadju ssir l-evalwazzjoni necessarja tal-garanziji kostituzzjonali u konvenzjonali peress li tali evalwazzjoni tista` ssir biss meta l-process ikun mitmum ladarba l-evalwazzjoni trid issir b`riferenza ghall-process fl-intier tieghu … Waqt illi taht il-Konvenzjoni l-Qorti Ewropea tad-Drittijiet tal-Bniedem ma ghandhiex is-setgha illi tqis allegazzjoni dwar ksur ta` drittijiet fondamentali qabel ma min iressaq l-ilment ikun inqeda bir-rimedji domestici kollha, taht il-Kostituzzjoni u taht l-Att dwar il-Konvenzjoni Ewropea il-Prim`Awla tal-Qorti Civili "tista`, jekk tqis li jkun desderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha ... f`kull kaz meta tkun sodifatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienu disponibbli ... skont xi ligi ohra".

Huwa ghalhekk imholli fid-diskrezzjoni tal-Prim`Awla – dejjem fil-parametri stabbiliti fil-gurisprudenza – li taghzel "li tezercita s-setghat taghha" wkoll meta min iressaq l-ilment ikollu jew kellu mezzi ohra ta` rimedju, u meta l-Prim`Awla taghzel li tinqeda bis-setghat kostituzzjonali taghha l-Qorti Kostituzzjonali bhala regola ma tiddisturbax dik l-ghazla hlief meta tkun manifestament hazina jew meta hekk ikun mehtieg biex il-proceduri kostituzzjonali ma jigux trivalizzati.

Din il-Qorti tapprezza illi jkun ta` ostakolu ghall-efficjenza tal-gustizzja u tal-amministrazzjoni pubblika jekk, malli titressaq kawza b`allegazzjoni li l-process quddiem tribunal jew korp imwaqqaf b`ligi huwa bi ksur tal-jedd ghal smigh xieraq, dak it-tribunal jew korp ma jkunx jista` jibda jwettaq id-dmirijiet tieghu qabel tinqata` dik il-kawza jekk il-Prim`Awla wisq facilment taghzel li tinqeda bis-setghat kostituzzjonali taghha flok tistenna li jintemmu l-proceduri quddiem dak it-tribunal jew korp biex tqis il-process fl-intier tieghu.

Madankollu, il-Qorti tifhem ukoll illi fic-cirkostanzi tal-kaz tal-lum ikun aktar xieraq illi l-aggravju dwar rimedju ordinarju ma jintlaqax, u illi l-appell jinstema` wkoll fil-meritu, partikolarment billi d-difett allegat fl-istruttura tat-Tribunal jibqa` jipperdura jkun xi jkun l-ezitu tal-proceduri quddiem it-Tribunal u wkoll ghax ma jkunx ghaqli illi jitkompla process meta hemm sentenza ta` qorti ta` gurisdizzjoni kostituzzjonali li tghid illi dak il-process huwa bi ksur ta` jeddijiet fondamentali. Dan l-aggravju huwa ghalhekk michud.

Fil-kaz ta` **<u>Dimech vs Malta</u>**, li kien deciz mill-ECtHR fit-2 ta` April 2015, il-Gvern Malti kien ghamel l-argument illi l-ilment kien prematur billi qal :-

The Government submitted that the applicant`s complaint was premature as the trial by jury had not yet taken place. It was thus possible that the applicant would not be found guilty, in which case he could not be considered a victim in terms of the Convention (they referred to Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010). The Government contended that examining the applicant`s complaint at this stage would not enable the Court to assess the basis of the applicant`s "conviction", which had not yet taken place. The Government further noted that the constitutional jurisdictions had not "opted" to take

cognisance of the case, but simply could not decline the exercise of jurisdiction given that the applicant`s referral request had been accepted by the Criminal Court.

L-ECtHR accettat it-tezi tal-Gvern Malti :-

The Court accepts the Government`s argument that the constitutional jurisdictions had no choice but to take cognisance of the case according to the functioning of the domestic system. However, the Court notes that those jurisdictions did not take cognisance of the case only to find later that the claim was inadmissible. In fact, the constitutional jurisdictions did not reject the case as being premature despite the fact that the proceedings were still pending. Nor did they reject it for non-exhaustion of ordinary remedies on the ground that the applicant had not asked for a lawyer (admittedly, as established in domestic case-law (see paragraph 31 above), there would have been little point in so doing given the inexistence of such a right in Maltese law at the time). On the contrary, the constitutional jurisdictions took cognisance of the case, opting to examine it on the merits and give judgment accordingly.

The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, X. v. Norway, Commission decision of 4 July 1978, Decisions and Reports (DR) 14, p. 228; Bricmont v. Belgium, 7 July 1989, Series A no. 158; Papadopoulos v. Greece, (dec.), no. 52848/99, 29 November 2001; Arrigo and Vella v. Malta (dec.), no.

6569/04, 10 May 2005 and Pace v. Malta (dec.), no. 30651/03, 8 December 2005). At the same time, the Convention organs have also consistently held that such an issue can only be determined by examining the proceedings as a whole, save where an event or particular aspect may have been so significant or important that it amounts to a decisive factor for the overall assessment of the proceedings as a whole – pointing out, however, that even in those cases it is on the basis of the proceedings as a whole that a ruling should be made as to whether there has been a fair hearing of the case (see, inter alia, X v. Switzerland, no. 9000/80, Commission decision of 11 March 1982, DR 28, p. 127; B v. Belgium, Commission decision of 3 October 1990, DR 66, p. 105; Cervero Carillo v. Spain, (dec.), no. 55788/00, 17 May 2001; Mitterrand v. France (dec.) no. 39344/04, 7 November 2006 and more recently, De Villepin v. France (dec.), no. 63249/09, 21 September 2010).

The Court observes 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 v. Monaco, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013; Brusco v. France, no. 1466/07, § 54, 14 October 2010; and Stojkovic v. France and Belgium, no. 25303/08, §§ 51-57, 27 October 2011). A systemic 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 v. Turkey, no. 7377/03 §§ 31-33, 13 October 2009; Yeşilkaya v. Turkey, no. 59780/00, 8 December 2009; and Fazli Kaya v. Turkey, no. 24820/05, 17 September 2013). The same situation appears to obtain in the present case.

Nevertheless, unlike in the above mentioned examples, the criminal proceedings in the present case have not come to an end. Thus, despite the peculiar interpretation of the

Court`s case-law by the Constitutional Court, and although it may be unlikely, it cannot be entirely excluded that the courts of criminal jurisdiction, before which the case is heard, hear the case in the same circumstances that would have existed had the right to legal assistance during pre-trial stage not been disregarded, namely by expunging from the records the relevant statements. The Court notes that, if, because of the limitations of the applicable criminal procedural law, it is not possible given the stage reached in the pending proceedings, to expunge from the records the relevant statements (whether at the request of the applicant or by the courts of criminal jurisdiction of their own motion), it cannot be excluded that the legislature take action to ensure that a procedure is made available at the earliest opportunity for this purpose.

Furthermore, even assuming that the above scenario would not come to be, the Court considers that it cannot be excluded that the applicant be eventually acquitted or that proceedings be discontinued.

The Court observes that applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, Kesik v. Turkey, (dec.), no. 18376/09, 24 August 2010 and Simons v. Belgium (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010).

The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicant`s possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicant are currently pending before the domestic courts, the Court finds this complaint to be premature. Consequently, this part of the application must be rejected, pursuant to Article

35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies.

Il-principju li johrog minn din il-gurisprudenza huwa li meta l-proceduri li fil-kuntest taghhom isir l-ilment ikunu ghadhom ma ntemmewx, u ma jkunx ghadu maghruf kif se jkun zvantaggjat ir-rikorrent, il-procediment kostituzzjonali jkun intempestiv.

Ilment waqt proceduri li jkunu pendenti jista` jinghata konsiderazzjoni jekk id-dritt lamentat ikun *x`aktarx* ser jigi vjolat u l-ksur ikun wiehed reali u imminenti.

Premess dan kollu, u riferibbilment ghall-ilment specifiku tar-rikorrent fejn si tratta tal-jedd ghal smigh xieraq, tajjeb jinghad illi huwa minnu illi l-Avukat Generali ghandu dritt ta` appell minn provvediment dwar l-ghoti ta` l-helsien mill-arrest, liema dritt mhuwiex disponibbli ghall-persuna arrestata.

Pero` dak li r-rikorrent naqas milli jirrileva huwa li f`kull kaz fejn il-qorti tichad it-talba ghall-helsien mill-arrest, dak il-provvediment mhuwiex finali ghaliex il-persuna arrestata jibqghalha d-dritt li tipprezenta talbiet ohra fi kwalunkwe stadju tal-procediment minghajr ebda limitazzjoni.

Specifikament dwar *equality of arms,* il-Qorti tirreferi ghal dak illi qalet **Karen Reid** fir-Raba` Edizzjoni (2011) ta` **A Practitioner`s Guide to the European Convention on Human Rights** (Sweet & Maxwell) :-

Equality of arms between the parties, or "a fair balance" must be achieved. This means that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent …

The accused, and in civil proceedings the parties, must be able to participate effectively in proceedings …

Measures taken in the conduct of a criminal trial must be reconcilable with an adequate and effective exercise of the rights of the defence. The importance of securing defence rights in criminal proceedings has been identified as a principle of democratic society and, in this respect, Art 6 must be interpreted to render them practical and effective rather than theoretical and illusory …

The proceedings are looked at as a whole and one restriction on the defence may be insufficient to render the proceedings as a whole unfair …

Fis-sentenza li tat l-ECtHR fis-26 ta` Lulju 2011 fil-kawza "**Huseyn and Others vs Azerbaijan**" inghad hekk :-

> *The issue of the adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case. …*
>
> *188. The Court reiterates that the principle of equality of arms, as one of the fundamental elements of the broader concept of a fair trial, requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent (see **Nideröst-Huber v. Switzerland**, 18 February 1997, § 23, Reports 1997-I). That right means, inter alia, the opportunity for the parties to a trial to present their own legal assessment of the case and to comment on the observations made by the other party, with a view to influencing the court`s decision (see, mutatis mutandis, **Lobo Machado v. Portugal**, 20*

*February 1996, § 31, Reports 1996-I, with further references). The requirement of equality of arms, in the sense of a "fair balance" between the parties, applies in principle to both criminal and civil cases ; in criminal cases a lesser degree of latitude is allowed for any deviations from that requirement (see **Dombo Beheer B.V. v. the Netherlands**, 27 October 1993, §§ 32-33, Series A no. 274). …*

…

200. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicants were given the opportunity to challenge the authenticity of the evidence and to oppose its use."

Fil-kaz ta` "**Klimentyev vs Russia**" li kienet deciza mill-ECtHR fis-16 ta` Novembru 2006 inghad hekk :-

*95. The Court recalls that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see e.g. **Jespers v. Belgium**, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61; **Foucher v. France**, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, § 34; **Bulut v. Austria**, judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, p. 380-381, § 47)."*

Fil-kaz ta` **C.B v Austria** li kien deciz fl-4 ta` April 2013, l-ECtHR qalet hekk fil-para 37 tad-decizjoni :-

"The Court reiterates that the principle of equality of arms – which is one of the elements of the broader concept of fair trial – requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent." (see, among other authorities, ***GB v. France****, no.44069/98, ECHR 2001-X)".*

Fil-kitba "**The principle of equality of arms – part of the right to a fair trial**", **Elisa Toma** (Criminal Law Master – Faculty of Law – University of Bucharest) tghid hekk :-

1.3. In terms of European law, equality of arms involves giving each part the reasonable possibility to present its cause, in those conditions that will not put this part in disadvantage against its opponent. Therefore, the principle of equality of arms allows penalizing all inequalities in communicating certain documents to part (example: sending only to the prosecutor and not also to the defense the police reports)).

1.4. Hence, the parts must have the possibility to present in an equal manner all the evidence they hold. As a consequence, a difference in treatment as far as the witness interrogation is concerned may violate the principle of equality of arms, any disparity in documents communication may be sanctioned in the name of this principle. As well, it is mandatory to respect the principle of equality of arms during the appeals.

1.5. The Court affirmed that, as the other guarantees provided by art. 6 par. 1 in the Convention, the principle of equality of arms applies to any proceedings be it contentious or gracious. When it is verified if the

principle of equality of arms is respected by the national courts, during a concrete procedure, the Court doesn`t not have as purpose to rule on the case, no matter the object (criminal prosecution or complaint concerning the civil rights and obligations).

Meqjus b`reqqa l-premess fil-kuntest kollu tieghu, din il-Qorti ma tqisx li huwa fondat it-tieni lment tar-rikorrent peress li ma sehhet l-ebda in*equality of arms* hekk kif qed jigi allegat mir-rikorrent. Dan qed jinghad ghaliex filwaqt illi l-Avukat Generali ghandu dritt ta` appell fil-kaz biss ta` provvediment dwar helsien mill-arrest, l-akkuzat ghandu dritt aktar wiesa` ghaliex xhin u meta jrid fil-kors tal-procediment istitwit kontra tieghu jista` jitlob il-helsien mill-arrest. L-imputat ghandu favur tieghu partecipazzjoni attiva fil-process kollu li jkun istitwit kontra tieghu, ghaliex anke jekk isir appell mill-Avukat Generali, l-imputat dejjem jibqaghlu dritt tas-smigh. Ghalhekk l-ordinament guridiku taghna joffri bilanc, u allura harsien, favur il-persuna arrestata.

Anke dan l-ilment qieghed jigi michud.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-Qorti taqta` u tiddeciedi din il-kawza billi :-

Tilqa` l-eccezzjonijiet kollha tal-intimat Avukat Generali.

Tichad it-talbiet kollha tar-rikorrent.

Tordna lir-rikorrent sabiex ihallas l-ispejjez kollha ta` din il-kawza.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur