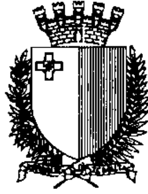

QORTI CIVILI
PRIM'AWLA
ONOR IMHALLEF ANNA FELICE
(SEDE KOSTITUZZJONALI)

Illum 19 ta' Frar, 2020

Rikors Guramentat Nru: 48/2019 AF

Keith Cremona

vs

Avukat Generali

Il-Qorti:

Rat ir-rikors ta' Keith Cremona, li permezz tieghu wara li ġie premess illi:

<u>Fatti:</u>

L-esponent qieghed jigi akkuzat fost l-ohrajn illi nhar l-ghoxrin (20) ta' Lulju tas-sena elfejn u hamsa (2005) flimkien ma' persuni ohra mhux maghrufa ddecidew illi jwettqu serqa fuq anzjana gewwa r-residenza taghha f'San Giljan.

Sussegwentement l-esponent qieghed taht Att t'Akkuza bin-numru 16/2017 fl-ismijiet **<u>Ir-Repubbblika ta' Malta vs Keith Cremona</u>**.

<u>Ilment Kostituzzjonali</u>

1) Dritt tal-Assistenza Legali matul l-interrogazzjoni tieghu

Jigi rilevat illi l-kaz odjern gie msejjes fost l-ohrajn fuq stqarrija illi huwa rrilaxxa datata tletin (30) ta' Mejju tas-sena elfejn u tnax (2012) liema stqarrija inghatat mill-esponenti minghajr ma inghatalu d-dritt illi jkollu l-avukat tal-fiducja tieghu prezenti waqt tali stqarrija peress illi l-ligi f'dak iz-zmien ma kienitx tippermetti dan.

Il-Ligi fiz-zmien illi fih l-esponent gie arrestat u investigat ma kienitx tipprovdi ghad-dritt tal-assistenza legali lill-arrestat matul tali stqarrija dan jikkostitwixxi ksur tad-dritt fundamentali tal-esponent ghal smigh xieraq ai termini tal-Artikolu 39 tal-Kostituzzjoni ta' Malta u Artiklu 6 tal-Kovenzjoni Ewropea ghad-Drittijiet tal-Bniedem.

L-eskluzjoni totali ta' avukat tal-fiducja tal-esponenti mill-istadju tal-investigazzjoni, partikolarment waqt it-tehid tal-istqarrija huwa leziv tad-drittijiet fundamentali tieghu ghal smigh xieraq u hija ta' pregudizzju kbir ghall-esponenti.

Id-dritt tal-assistenza legali ghall-persuni suspettati waqt l-investigazzjoni, bhala aspett tad-dritt fundamentali ghal smigh xieraq ai termini tal-Artikolu 39 tal-Kostituzzjoni u Artikolu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem gie stabbilit permezz ta' gurisprudenza kopjuza u kostanti tal-Qorti Ewropea tad-Drittijiet Fundamentali tal-Bniedem liema dritt gie ritenut illi jigi miksur anke jekk il-persuna suspettata u investigata tibqa' siekta tul il-kors kollu tal-arrest taghha (ara fost l-ohrajn: <u>Salduz vs. Turkey, Dayanan v. Turkey, Pischalnikov v. Russia, Plonka vs. Poland</u>, Brusco vs. France, Pavlenko vs. Russia, Boz vs Turkey, Demirkaya vs Turkey, Mario Borg vs Malta, A.T. vs Luxemborg).

F'Malta l-Qrati Nostrani wkoll sabu ksur tad-drittijiet fundamentali ta' smigh xieraq fis-sentenzi **Christopher Bartolo vs AG, il-Pulizija vs Aldo Pistella, il-Pulizija vs Claire Farrugia, il-Pulziija vs Alvin Privitera u Pulizija vs Esron Pullicino**.

Ghalhekk l-istqarrijiet moghtija mill-esponent inghataw fi zmien meta huwa ma setax ikollu lill-avukat tal-ghazla tieghu prezenti tul l-istqarrija u ghalhekk ma setax jigi spjegat lilu l-konsegwenzi ta' dak li qieghed jghid. Ghaldaqstant il-fatt illi l-istqarrijiet tal-esponent gew ammessi fil-proceduri, liema stqarrijiet skond gurisprudenza kopjuza kemm Ewropea kif ukoll dik Maltija ttiehdu b'mod leziv u jiksru d-dritt fundamentali ghal smigh xieraq, ikkundizzjona u jista' jikkundizzjona b'mod negattiv il-konkors tal-proceduri kriminali.

Dwar ir-rimedju mitlub minnu, l-esponenti jaghmel referenza *inter alia* ghad-decizjoni tal-Qorti Ewropea fl-ismijiet **Panovits vs Cipru**, deciza fil-11 ta' Dicembru, 2008, fejn il-Qorti qalet:

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

Intalbet din il-Qorti sabiex:

1. Tiddikjara illi minhabba l-fatt illi, l-esponenti ma kellux l-assistenza legali waqt l-arrest u l-interrogazzjoni tieghu, gew lezi d-drittijiet fundamentali tal-esponenti ghal smigh xieraq kif sanciti fl-artikolu 39 tal-Kostituzzjoni ta' Malta u fl-Artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem.

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

Rat ir-risposta tal-Avukat Ġenerali li permezz tagħha eċċepixxa illi:

Ir-rikorrent qed jilmenta li ma nghatax assistenza legali waqt l-interrogatorju u dan bi ksur tal-artikolu 6 tal-Konvenzjoni Ewropea u l-artikolu 39 tal-Kostituzzjoni.

Bħala punt ta' dritt taħt l-artikolu 6 tal-Konvenzjoni Ewropea nsibu l-jedd għal smigħ xieraq u mhux il-jedd għall-għajnuna ta' avukat qabel ma, jew waqt illi, tittieħed stqarrija. Ifisser dan, li jekk in-nuqqas ta' konsultazzjoni ma' avukat fil-mument tat-teħid tal-istqarrija ma ġġib l-ebda preġudizzju serju għall-akkużat fl-eżitu tal-proċeduri kriminali allura dan tal-aħħar ma jkollu l-ebda raġun jinvoka ksur tal-jedd ta' smigħ xieraq abbażi ta' dan in-nuqqas.

Il-Qorti Kostituzzjonali għamlitha ċara f'ħafna sentenzi illi ma huwiex il-każ illi n-nuqqas ta' għajnuna ta' avukat iwassal, għalhekk biss u *ipso facto*, għall-ksur tal-jedd għal smigħ xieraq (ara *inter alia* ***Ir-Repubbblika ta' Malta vs. Carmel Camilleri*** tat-22 ta' Frar 2013, ***Charles Stephen Muscat vs. Avukat Ġenerali*** tat-8 ta' Ottubru 2012 u ***Joseph Bugeja vs. Avukat Ġenerali*** tal-14 ta' Jannar 2013), iżda jrid ikun hemm ċirkostanzi oħra, illi jwasslu għall-konklużjoni illi minħabba n-nuqqas ta' aċċess għal avukat ma hemmx dik il-garanzija ta' leġittimità meħtieġa biex l-istqarrija titqies li ttieħdet bi ksur tal-jedd għal smigħ xieraq.

Marbut ma' dan l-istqarrija ma tistax tiġi iżolata waħidha mill-bqija tal-kumpless tal-proċeduri kriminali. Kif ħafna drabi ngħad f'dawn iċ-ċirkostanzi, id-dritt tas-smigħ xieraq irid jiġi meqjus fil-kuntest tat-totalità tal-proċeduri kollha u mhux fir-rigward ta' mument speċifiku. Tabilħaqq biex wieħed jiddetermina jekk kienx hemm ksur tal-jedd ta' smigħ xieraq, wieħed irid iqis il-proċess kollu kemm hu, magħduda magħhom l-imġieba tal-Qorti li tkun u kif ukoll ta' kif l-interessi tal-persuna mixlija kienu mressqa u mħarsin mill-istess qorti. Wieħed ma jistax u m'għandux jiffoka fuq biċċa biss mill-proċess sħiħ ġudizzjarju biex minnu, jekk isib xi nuqqas jew għelt, jasal għall-konklużjoni li ta' bilfors seħħ ksur tal-jedd tas-smigħ xieraq (ara fost oħrajn is-sentenzi ***Dr. Lawrence Pullicino vs. Onorevoli Prim***

Ministru et deċiża mill-Qorti Kostituzzjonali fit-18 ta' Awwissu 1998, ***Anthony Zarb et vs. Ministru tal-Ġustizzja et*** deċiża mill-Qorti Kostituzzjonali fis-16 ta' Ottubru 2002 u ***Gregorio sive Godwin Scicluna vs. Avukat Ġenerali et*** deċiża mill-Qorti Kostituzzjonali fil-15 ta' Ottubru 2003).

Fil-kuntest ta' Malta, il-Qorti Ewropeja kellha l-opportunità li tippronunzja ruhha fil-kawza fl-ismijiet **Dimech v. Malta** (applikazzjoni numru 34373/13) deciza fit-2 ta' April 2015 fejn gie osservat fil-paragrafu 48 tas-sentenza li « *48. The Court finds no reason to deem otherwise in this case. Without prejudice to the applicant's possibility of bringind 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 ».*

Gialadarba l-proceduri kriminali ghadhom pendenti in konfront tar-rikorrent l-azzjoni odjerna hija wahda prematura u intempestiva u din l-Onorabbli Qorti ghandha issegwi dak li gie deciz f'Dimech vs. Malta.

Fi kwalunkwe kaz l-ilment tar-rikorrent huwa infondat fil-fatt u fid-dritt.

Ghalhekk il-lanjanza ghandha tigi michuda.

Semgħet ix-xhieda prodotti.

Rat in-nota ta' sottomissjonijiet tal-Avukat Ġenerali.

Semgħet it-trattazzjoni finali tal-partijiet.

Rat l-atti kollha.

Ikkunsidrat illi permezz ta' dawn il-proċeduri, r-rikorrent qiegħed jitlob lill-Qorti tiddikjara li seħħet leżjoni tad-dritt fundamentali tiegħu għal smigħ xieraq kif sanċit permezz tal-Artikolu 39 tal-

Kostituzzjoni u l-Artikolu 6 tal-Konvenzjoni Ewropea għaliex meta huwa rrilaxxa stqarrija lill-pulizija, l-liġi ma kienitx tippermetti li jkun assistit minn avukat tal-fiduċja tiegħu matul tali stqarrija.

Mill-provi prodotti jirriżulta li r-rikorrent jinsab akkużat illi huwa flimkien ma' oħrajn mhux magħrufa wettqu serqa fuq anzjana fir-residenza tagħha f'San Ġiljan. Huwa tqiegħed taħt Att t'Akkuża bin-numru 16/2017 fl-ismijiet **Ir-Repubblika ta' Malta vs Keith Cremona**. Dawn il-proċeduri għadhom pendenti.

Fit-30 ta' Mejju 2012 waqt li kien taħt arrest b'rabta mal-imsemmija serqa, r-rikorrent ġie interrogat mill-pulizija iżda għażel li ma jwieġeb l-ebda mistoqsija fl-istqarrija li ttieħditlu. Huwa rrifjuta li jiffirma kemm l-istqarrija kif ukoll id-Dikjarazzjoni ta' Rifjut tal-Jedd għal Parir Legali.

L-Artikolu 39(1) u (6)(ċ) tal-Kostituzzjoni jaqraw hekk:

> *"Kull meta xi ħadd ikun akkużat b'reat kriminali huwa għandu, kemm il-darba l-akkuża ma tiġi irtirata, jiġi mogħti smigħ xieraq għeluq żmien raġonevoli minn qorti indipendenti u imparzjali mwaqqfa b'liġi."*
>
> ....
>
> *"Kull min ikun akkużat b'reat kriminali -*
>
> *Għandu jitħalla jiddefendi ruħu personalment jew permezz ta' rappreżentant legali u min ma jkunx jista' jħallas għal rappreżentanza legali hekk kif tkun meħtieġa raġonevolment miċ-ċirkostanzi tal-każ tiegħu jkollu dritt li jkollu dik ir-rappreżentanza bi spejjeż pubbliċi;"*

Ir-rikorrent jinvoka wkoll l-Artikolu 6(1) u 6(3) tal-Konvenzjoni Ewropea li jaqraw hekk:

> *"(1) Fid-determinazzjoni tad-drittijiet ċivili u tal-obbligi tiegħu jew ta' xi akkuża kriminali kontra tiegħu, kullħadd huwa ntitolat għal smigħ imparzjali u pubbliku fi żmien*

raġonevoli minn tribunal indipendenti u imparzjali mwaqqaf b'liġi. Is-sentenza għandha tingħata pubblikament iżda l-istampa u l-pubbliku jistgħu jiġu esklużi mill-proċeduri kollha jew minn parti minnhom fl-interess tal-morali, tal-ordni pubbliku jew tas-sigurta nazzjonali f'soċjetà demokratika, meta l-interessi tal-minuri jew protezzjoni tal-ħajja privata tal-partijiet hekk teħtieġ, jew safejn ikun rigorożament meħtieġ fil-fehma tal-qorti f'ċirkostanzi speċjali meta l-pubbliċità tista' tippreġudika l-interessi tal-ġustizzja."

"(3) Kull min ikun akkużat b'reat kriminali għandu d-drittijiet minimi li ġejjin:

…

li jiddefendi ruħu personalment jew permezz ta' assistenza legali magħżula minnu stess jew, jekk ma jkollux mezzi biżżejjed li jħallas l-assistenza legali, din għandha tingħata lilu b'xejn meta l-interessi tal-ġustizzja jeħtieġu hekk;"

Preliminarjament, l-Avukat Ġenerali jeċċepixxi li r-rikors huwa intempestiv stante li l-proċeduri kriminali fil-konfront tar-rikorrenti għadhom *sub judice* u sabiex jiġi determinat kienx hemm ksur tad-dritt għal smigħ xieraq, wieħed irid iqis il-proċess kriminali kollu kemm hu.

Il-Qorti tirrileva li filwaqt illi huwa prinċipju assodat kemm fil-ġurisprudenza tal-Qorti Ewropea u kemm f'dik tal-Qrati tagħna li d-determinazzjoni tal-eżistenza o meno ta' leżjoni ta' dritt għal smigħ xieraq tinneċessità eżami tal-proċedura ġudizzjarja kollha kemm hi fit-totalità tagħha,[1] kif ingħad mill-Qorti Kostituzzjonali fil-każ fl-ismijiet Il-Pulizija vs Alvin Privitera, deċiż fil-11 ta' April 2011, jista' jiġri li episodju wieħed ikun determinanti għall-eżitu tal-proċess kollu u għalhekk ma jkunx il-każ illi l-Qorti tistenna sakemm jintemm il-każ.

Fir-referenza kostituzzjonali fl-ismijiet Il-Pulizija (Assistent Kummissarju Lawrence Cauchi) vs Carmel sive Charles Ellul

[1] **Darren Aquilina vs Onor Prim Ministru et**, deċiża mill-Qorti Kostituzzjonali fil-31 ta' Mejju 2013. Ara wkoll is-sentenza tal-Qorti Ewropea fl-ismijiet **Dimech vs Malta** deċiża fit-2 ta' April 2015 fost oħrajn.

Sullivan et, deċiża fil-25 ta' Settembru 2015, il-Qorti Kostituzzjonali qalet hekk:

> *"Huwa minnu li kemm din il-Qorti kif ukoll l-organi ta' Strasburgu kkonċedew li in linea eċċezzjonali xi fatturi partikolari tal-proċeduri jistgħu jkunu tant determinanti għad-dritt għal smigħ xieraq li ma jkunx meħtieġ li l-Qorti tistenna sa tmiem il-proċeduri sabiex tiddeċiedi jkunx hemm vjolazzjoni tad-dritt in kwistjoni...".*

Kif tikteb Karen Reid fil-ktieb 'A practitioner's Guide to the European Convention on Human Rights' (Tielet Edizzjoni) f'paġna 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."*

Fl-imsemmi każ Il-Pulizija vs Alvin Privitera, il-Qorti Kostituzzjonali rriteniet illi:

> "*...meta digà jkun hemm ragunijiet bizzejjed li fuqhom il-Qorti tkun tista' ssib li hemm lezjoni, m'ghandhiex toqghod tistenna sakemm jintemm il-kaz jew li jigi attwalment miksur id-dritt pretiz biex tiddeciedi jekk hemmx lezjoni jew le. Jista' jaghti l-kaz li jkun tard wisq jew dak li jkun imbaghad jibqa' minghajr rimedju."*

Fil-fehma tal-Qorti, u fid-dawl tal-ġurisprudenza konsiderevoli dwar is-suġġett, meta r-rikorrent ikun qiegħed jallega vjolazzjoni tad-dritt tiegħu għal smigħ xieraq minħabba li l-liġi ma kienitx tippermetti assistenza legali matul l-interogazzjoni u rilaxx ta' stqarrija, ma hemmx għalfejn li din il-Qorti tistenna li l-proċeduri kriminali jiġu konklużi, meta jista' jkun tard wisq, sabiex tasal għal deċiżjoni dwar jekk seħħx jew x'aktarx ser iseħħ ksur tad-dritt fundamentali tar-rikorrent għal smigħ xieraq. Din l-eċċezzjoni qiegħda għalhekk tiġi miċħuda.

Il-liġi li kienet applikabbli dak iż-żmien li sar l-arrest u ġiet meħuda l-istqarrija tar-rikorrent kienet ġiet introdotta bl-Att III tal-2002 fejn permezz tagħha ġie introdott is-segwenti artikolu (ta' relevanza għal każ odjern huwa l-ewwel subartikolu):

> *355AT. (1) Bla ħsara għad-disposizzjonijiet tas-subartikolu (3), persuna li tkun arrestata u qed tinżamm taħt il-kustodja tal-Pulizija f'xi Għassa jew f'xi post ieħor ta' detenzjoni awtorizzat għandha, jekk hija hekk titlob, titħalla kemm jista' jkun malajr tikkonsulta privatament ma' avukat jew prokuratur legali, wiċċ imb'wiċċ jew bit-telefon, għal mhux iktar minn siegħa żmien. Kemm jista' jkun malajr qabel ma tibda tiġi interrogata, l-persuna taħt kustodja għandha titgħarraf mill-Pulizija bid-drittijiet li għandha taħt dan is-subartikolu.*

Għaldaqstant, dak iż-żmien li ġie arrestat r-rikorrent, il-liġi kienet tagħti l-fakultà lil kull min jiġi arrestat jitkellem mal-avukat tal-fiduċja tiegħu qabel l-interrogazzjoni. Waqt l-interrogazzjoni l-avukat ma kienx ikun permess li jkun prezenti.

L-Att LI tal-2016 bidel l-artikolu 355AT u l-artikolu 355AU meta introduċa fil-Kodiċi Kriminali d-dritt tal-assistenza legali kif maħsub fid-direttiva 2013/48/EU. Dawn l-emendi daħlu fis-seħħ permezz tal-Avviż Legali 401/2016. Għalhekk, illum il-ġurnata l-artikolu 355AT tal-Kap. 9 jistipula, *inter alia*, li l-persuna suspettata jew arrestata għandu jkollha '*dritt ta' aċċess għal avukat*' u allura dan ifisser li llum, il-persuna suspettata jew arrestata għandha d-dritt għal assistenza legali f'kull stadju tal-investigazzjoni tal-Pulizija.

Il-ġurisprudenza tal-Qrati tagħna u tal-Qorti Ewropea rigward id-dritt għall-assistenza legali fl-istadju bikri tal-investigazzjonijiet tal-Pulizija u ċioè fil-*pre-trial stage* hija vasta u wieħed jista' jgħid ukoll xi ftit jew wisq konfliġġenti. Din il-Qorti ser tagħmel referenza estensiva għall-ġurisprudenza l-aktar riċenti tal-Qorti Ewropea u tal-Qorti Kostituzzjonali dwar is-suġġett.

Deċiżjoni riċenti tal-Qorti Ewropea hija proprju fil-konfront ta' Malta fil-kawża ta' Farrugia v Malta, deċiża fl-4 ta' Ġunju 2019. Il-Qorti waslet għal konklużjoni li ma seħħet l-ebda leżjoni tad-

dritt għal smigħ xieraq tar-rikorrent u dan wara li għamlet is-segwenti kunsiderazzjonijiet:

"96. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see Salduz, cited above, § 51, and Ibrahim and Others v. the United Kingdom [GC], nos. 50541/08 and 3 others, § 255, 13 September 2016). 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 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 Beuze v. Belgium, [GC], no.71409/10, § 124, 9 November 2018 and Simeonovi v. Bulgaria [GC], no. 21980/04, §§ 111, 114 and 121, 12 May 2017).

97. In Beuze, drawing from its previous case-law the Court explained the aims pursued by the right of access to a lawyer (§§ 125-130) and elaborated on the content of the right of access to a lawyer reiterating, in particular, that 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 or even where there is no interview and 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 (§§ 133-134).

98. Prior to the recent Beuze judgment, in a number of cases, the Court 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 v. Turkey, no. 7377/03, § 33, 13 October 2009 and Boz v. Turkey, no. 2039/04, § 35, 9 February 2010). That same approach was followed by the Court in relation to the Maltese context in Borg (no. 37537/13, 12 January 2016).

99. Subsequently, being confronted with a certain divergence in the approach to be followed in cases dealing

with the right of access to a lawyer, the Court had occasion to further examine the matter in Ibrahim and Others, Simeonovi and more recently in Beuze, all cited above, where the Court departed from the principle set out in the preceding paragraph. In Beuze, the most recent authority on the matter, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness and provided further clarification as to each of those stages and the relationship between them, as explained below.

(i) Concept of compelling reasons

100. 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. 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. 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 Beuze, cited above, §§ 142-143).

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

101. 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 Beuze, cited above, § 145).

102. 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., § 146).

103. 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 (ibid., § 149).

(iii) Relevant factors for the overall fairness assessment

104. 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:
(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 (ibid., § 150)."

L-imsemmija kawża ta' Beuze v Belgium, tad-9 ta' Novembru 2018, ġiet diskussa wkoll fil-kawża riċenti tal-Qorti Kostituzzjonali fl-ismijiet Paul Anthony Caruana vs Avukat Ġenerali, tal-31 ta' Mejju 2019. F'dak il-każ, il-Qorti Kostituzzjonali wkoll sabet li r-rikorrent ma kien sofra l-ebda ksur tad-dritt tiegħu għal smigh xieraq. Il-Qorti Kostituzzjonali qalet hekk:

"*L-ewwel aggravju tal-attur huwa msejjes fuq l-argument illi:*

»... ... ... gie stabbilit illi l-fatt waħdu illi persuna li tkun instabet ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiducja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil-ligi 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«.

Dan, igħid l-attur, gie stabbilit f'dik li sejħilha "s-sentenza kjavi mogħtija mill-Qorti Ewropea fit-12 ta' Jannar 2016 kontra Malta fil-kawza Mario Borg v. Malta".

Qabel ma tikkummenta fuq il-kaz ta' Borg il-qorti tosserva illi s-Sezzjonijiet Magħquda (Grand Chamber) tal-Qorti Ewropea tad-Drittijiet tal-Bniedem kienet già qieset il-kwistjoni tad-dritt għall-għajnuna ta' avukat fil-kaz ta' Salduz v. It-Turkija u fil-parti relevanti qalet hekk:

» ... 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.«

Għalkemm din is-silta tista' tagħti x'tifhem illi huwa biss meta hemm "ragunijiet impellenti" ("compelling reasons") biex ma titħalliex tingħata l-għajnuna ta' avukat illi dan in-nuqqas ma jwassalx għal ksur tal-jedd għal smigħ xieraq, din hija biss regola generali ("as a rule"). Fil-fatt, ukoll fil-kaz ta' Salduz il-qorti, għalkemm sabet li ma kienx hemm ragunijiet impellenti biex il-persuna interrogata ma titħalliex tkellem avukat, madankollu xorta qieset jekk, meqjus kollox, il-process kienx wieħed gust, għalkemm fic-cirkostanzi partikolari tal-kaz sabet li ma kienx. Imbagħad, fil-kaz ta' ta' Ibrahim u oħrajn v. ir-Renju Unit il-Qorti Ewropeja fis-Sezzjonijiet Magħquda kompliet tfisser illi:

»250. The right to a fair trial under Article 6 § 1 is an unqualified right. 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

O'Halloran and Francis v. the United Kingdom [GC], nos. 15809/02 and 25624/02, § 53, ECHR 2007-III). The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, Taxquet v. Belgium [GC], no. 926/05, § 84, ECHR 2010; and Schatschaschwili v. Germany [GC], no. 9154/10, § 101, ECHR 2015).

»251. 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 excluded 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 ... ...

»... ... ...

»262. The Court accordingly reiterates that in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves. The absence of compelling reasons does not, therefore, lead in itself to a finding of a violation of Article 6 of the Convention.«

Effettivament, dan ifisser illi l-fatt waħdu li ma tkunx tħalliet tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni, ukoll jekk ma kienx hemm ragunijiet impellenti għal dan in-nuqqas, ma huwiex bizzejjed biex, ipso facto, jinsab ksur tal-jedd għal smigħ xieraq: trid tqis il-process fit-totalità tiegħu ("having regard to the development of the proceedings as a whole").

Il-Qorti Kostituzzjonali ta' Malta meta giet biex tinterpreta s-sentenza ta' Salduz kienet sa certu punt anticipat din il-precizazzjoni f'sentenza mogħtija fit-8 ta' Ottubru 2012 in re Charles Steven Muscat v. Avukat Ġenerali, meta osservat illi:

»14. ... ... Il-jedd għal smigħ xieraq jingħata kemm biex, wara process fi zmien ragonevoli u bil-garanziji xierqa, min ma huwiex ħati ma jeħilx bi ħtija, u biex jingħata l-mezzi kollha meħtiega għalhekk, u kemm biex min huwa tassew ħati ma jaħrabx il-konsegwenzi tal-ħtija tiegħu. ... ...

»15. Għalhekk, li trid tagħmel din il-qorti ma huwa la li tara jekk l-attur huwiex ħati jew le tal-akkuzi li ngiebu kontrieh u lanqas li tara biss jekk l-attur kellux l-għajnuna ta' avukat waqt l-interrogazzjoni u tieqaf hemm: li għandha tagħmel din il-qorti hu illi tara jekk dak in-nuqqas wassalx għall ksur tal-jedd għal smigħ xieraq u hekk inħoloqx il-perikolu illi l-attur jinstab ħati meta ma kellux jinstab ħati. Jekk ma hemmx dak il-perikolu, mela ma hemmx ksur.«

Fi kliem ieħor, trid tqis il-process fit-totalità tiegħu ("having regard to the development of the proceedings as a whole") u mhux biss il-fatt waħdu illi l-persuna interrogata ma tħallietx tkellem avukat.

Din kienet il-posizzjoni li baqgħet tigi segwita minn din il-qorti sakemm ingħatat is-sentenza ta' Borg imsemmija mill-attur, li kienet sentenza tar-Raba' Sezzjoni tal-Qorti Ewropea. Dik is-sentenza tgħid illi l-fatt waħdu li l-ligi ma kienitx tippermetti li tingħata l-għajnuna ta' avukat waqt jew qabel l-interrogazzjoni kien bizzejjed biex jinsab ksur tal-art. 6 tal-Konvenzjoni:

»61. ... ... indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).

»62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of

Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see Salduz, cited above, §§ 52, 55 and 56).

»63. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention «

Fid-dawl ta' din is-sentenza, il-Qorti Kostituzzjonali, għalkemm baqgħet temmen illi l-interpretazzjoni ta' Salduz li kienet adottat fil-kaz ta' Muscat kienet dik korretta u ta' buon sens, għarfet illi wara s-sentenza ta' Borg dik il-posizzjoni ma baqgħetx tenibbli u għalhekk bidlet il-posizzjoni tagħha. Hekk, fil-kaz ta' Malcolm Said v. L-Avukat Generali il-Qorti Kostituzzjonali qalet hekk:

»17. Għalkemm din il-qorti temmen u ttenni illi l-interpretazzjoni minnha mogħtija fil-kaz ta' Charles Stephen Muscat u sentenzi oħra mogħtija wara hija interpretazzjoni korretta u proporzjonata billi tilqa' għal abbuzi min-naħa tal-prosekuzzjoni u tħares id-drittijiet ta' persuna akkuzata b'reat kriminali, jidher li din l-interpretazzjoni – għallinqas fejn il-process kriminali jkun intemm – illum ma għadhiex aktar tenibbli fid-dawl tas-sentenza fuq imsemmija ta' Borg v. Malta mogħtija dan l-aħħar mill-Qorti Ewropea.

»18. Din il-qorti għalhekk illum hi tal-fehma li ma jkunx għaqli li tinsisti fuq l-interpretazzjoni li kienet tat fil-kaz ta' Muscat, għalkemm ittenni li għadha temmen illi hija interpretazzjoni korretta, proporzjonata u ta' buon sens.«

Ir-raguni izda fl-aħħar mill-aħħar tegħleb. Fid-dawl tal-inkonsistenzi fis-sentenzi tal-Qorti Ewropea fl-interpretazzjoni tal-jedd għall-għajnuna ta' avukat fil-kuntest tal-jedd għal smigħ xieraq, il-Qorti Ewropea kienet imsejħa, fil-kaz ta' Beuze v. il-Belgju, biex tippreciza aħjar x'inhi l-posizzjoni korretta. Tajjeb jingħad illi fil-kaz ta' Beuze, bħal fil-kaz tallum, il-ligi domestika fiz-zmien relevanti ma kienitx tippermetti li tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni u ma kien hemm ebda raguni

impellenti għala ma tħallietx tingħata l-għajnuna ta' avukat. Fis-sentenza mogħtija mis-Sezzjonijiet Magħquda fid-9 ta' Novembru 2018 il-qorti qalet hekk:

»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, ... § 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. ... ...

»... ... ...

»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 ... ... 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 ... and sometimes in greater detail ...

»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, ... §§ 257 and 258-62).

....

»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, ... § 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 ... 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.

»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, ... § 265).

»... ... ...

»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 ... ...

»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.

»... ... ...

»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, ... § 274, and Simeonovi, ... § 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.«

Din hija interpretazzjoni li hija eqreb mal-posizzjoni li kienet ħadet din il-qorti qabel is-sentenza ta' Borg milli mal-interpretazzjoni mogħtija mir-Raba' Sezzjoni f'Borg u effettivament tfisser li kellha raguni il-Qorti Kostituzzjonali ta' Malta fil-posizzjoni li kienet ħadet fil-kaz ta' Muscat u fis-sentenzi li segwew, qabel ma kienet kostretta tbiddel dik l-interpretazzjoni fid-dawl ta' Borg.

Uħud mill-imħallfin membri tal-qorti li tat is-sentenza ta' Beuze, f'opinjoni għalihom, ikkritikaw is-sentenza fejn qalet illi, f'kull kaz, trid tqis il-process fit-totalità tiegħu u mhux biss in-nuqqas ta' għajnuna ta' avukat, għax dehrilhom illi, izjed milli precizazzjoni tal-interpretazzjoni ta' Salduz fid-dawl ta' Ibrahim, is-sentenza ta' Beuze hija kapovolgiment ta' dik il-gurisprudenza. Hu x'inhu, hijiex precizazzjoni, elaborazzjoni, evoluzzjoni jew kapovolgiment, din hija sa issa l-aħħar kelma, u tagħti ragun lill-Qorti Kostituzzjonali ta' Malta fil-gurisprudenza li segwiet is-sentenza ta' Muscat.

Fid-dawl ta' dawn il-konsiderazzjoniiet, l-aggravju tal-attur – safejn jgħid illi "l-fatt waħdu illi persuna li tkun instabet

ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiducja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil-ligi 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 ħazin u huwa micħud."

Applikati dawn il-prinċipji għall-kawża odjerna, din il-Qorti tqis illi bl-ebda mod ma ġie muri li ġew leżi jew x'aktarx ser jiġu leżi d-drittijiet fondamentali tar-rikorrent minħabba l-fatt illi ma setax ikun assistit minn avukat meta ttieħditlu l-istqarrija.

Ir-rikorrent għażel li ma jixhedx f'dawn il-proċeduri iżda preżenta kopja ta' din l-istqarrija, minn fejn jirriżulta li huwa ma weġibx għall-mistoqsijiet li sarulu u rrifjuta li jiffirma l-imsemmi dokument, kif irrifjuta wkoll li jiffirma d-dikjarazzjoni tar-rifjut tal-jedd għall-parir legali qabel l-interrogazzjoni. Ċertament mhuwiex il-kaz illi b'xi mod inkrimina ruħu u naturalment, il-pulizija ma tista' tagħmel l-ebda użu minn din l-istqarrija fil-proċeduri kriminali pendenti fil-konfront tiegħu.

Filwaqt illi l-Avukat Ġenerali naqas milli juri li kien hemm raġunijiet tajbin sabiex iżommu lir-rikorrent milli jkollu avukat preżenti waqt l-interrogazzjoni u waqt li ttieħditlu l-istqarrija, il-posizzjoni ġurisprudenzjali kurrenti turi li m'għadux il-każ li l-fatt waħdu li l-liġi ma kinitx tippermetti l-assistenza ta' avukat qabel jew waqt l-interrogazzjoni, awtomatikament iwassal sabiex jinstab li kien hemm ksur tad-dritt għal smigħ xieraq, kif qiegħed jippretendi r-rikorrent, imma din il-Qorti għandha tqis diversi fatturi qabel tasal għall-konklużjoni tagħha.

F'dan il-każ, ir-rikorrent irrinunzja għad-dritt tiegħu li jikkonsulta ma' avukat qabel ma ġie interrogat mill-Pulizija u assolutament ma ġiex muri li huwa xtaq li jkollu avukat preżenti waqt l-interogazzjoni jew waqt li ttieħditlu l-istqarrija.

Ir-rikorrent naqas milli juri wkoll li huwa għandu jitqies bħala persuna vulnerabbli. Jirriżulta li din ma kienitx l-ewwel darba li r-rikorrent xellef difrejh mal-ġustizzja. Lanqas ma tirriżulta xi prova fis-sens li ċ-ċirkostanzi li fihom sarulu l-mistoqsijiet kienu

għalih intimidanti jew li ma kienx qiegħed jifhem l-import taċ-ċirkostanzi li kien jinsab fihom. Huwa għażel li ma jweġibx volontarjament, mingħajr theddid, wegħdi jew promessi ta' vantaġġi u wara li ngħata d-debita twissija skont il-liġi, u ċioè li ma kienx obbligat jitkellem sakemm ma kienx hekk jixtieq, iżda li dak li kien ser jgħid seta' jinġieb bħala prova kontrih.

Fuq kollox, jirriżulta li l-pulizija għandhom prova ohra li tista' tkun biżżejjed u ghalhekk illi pproċedew kontra r-rikorrent. Din l-evidenza ser tkun evalwata minn Imħallef u għalhekk, minn persuna b'għarfien għoli tal-proċedura legali u l-liġi Maltija.

Finalment, il-Qorti tgħid illi huwa indubbjament fl-interess pubbliku li r-rikorrent jiġi investigat u imressaq sabiex jiġi ġudikat mill-Qrati ta' ġurisdizzjoni kriminali in konnessjoni ma serqa vjolenti fuq persuna vulnerabbli.

Għaldaqstant, il-Qorti ssib li r-rikorrent ma rnexxilux juri li tassew ser iġarrab ksur tad-dritt tiegħu għal smigħ xieraq bil-fatt biss illi meta huwa ġie interrogat u ttieħditlu stqarrija il-liġi ma kinetx tippermetti li jkun megħjun minn avukat.

Għalhekk u għal dawn ir-ragunijiet, din il-Qorti qiegħda taqta' u tiddeċiedi l-kawża billi tiċħad it-talbiet tar-rikorrent bl-ispejjeż kontra tiegħu.

IMHALLEF

DEP/REG