Fil-Prim'Awla tal-Qorti Ċivili

(Sede Kostituzzjonali)

Onor Imhallef Miriam Hayman LL.D.

Referenza Kostituzzjonali Nru 66/2020MH

Fl-atti tal-Kumpilazzjoni Nru 737/2018NGS

Il-Pulizija(Spettur Mark Mercieca)

-vs-

Gaetano Campailla (Karta tal-identita`Taljana bin-numru AY 3699647)

Illum 17 ta' April, 2020

Il-Qorti

Rat ir-referenza b'digriet datata 25 ta' Marzu 2020, mibgħuta mill-Qorti tal-Magistrati bħala Qorti Istruttorja fejn l-istess Qorti qalet illi-:

" Rat illi l-imputat Gaetano Campailla ta' 52 sena, bin Giuseppe u Antonina nee` Zocco, imwieled Sirakuża ġewwa Sqallija, nhar it-3 ta' April 1966, mingħajr indirizz ġewwa Malta, u detentur tal-karta tal-identita` Taljana bin-numru AY 3699647, jinsab akkużat talli f'dawn il-Gżejjer fil-21 ta' Novembru 2018:

a) Importa jew ġiegħel li tiġi importata jew għamel xi ħaġa sabiex tiġi importata mediċina perikoluża (cannabis grass) f'Malta, bi ksur tad-disposizzjonijiet tal-Ordinanza dwar il-Mediċini Perikolużi, Kap. 101 tal-Liġijiet ta' Malta;

b) Kellu fil-pussess tiegħu l-pjanta cannabis kollha jew biċċa minnha bi ksur tal-Artikolu 8(d) tal-Kap. 101 tal-Liġijiet ta' Malta, liema droga instabet f'tali ċirkostanzi li juru li ma kinitx għall-użu esklussiv tiegħu.

Il-Qorti ġiet mitluba sabiex tissekwestra f'idejn terzi persuni b'mod ġenerali l-flejjes u l-proprjeta`mobbli jew immobbli kollha li jkunu dovuti lil jew ikunu jmissu lill-akkużat jew huma proprjeta` tiegħu, kif ukoll sabiex il-Qorti tipprojbixxi lill-akkużat milli jitrasferixxi jew xort'oħra jiddisponi minn xi proprjeta` mobbli jew immobbli, u dan ai termini tal-Artikolu 22A tal-Ordinanza dwar il-Mediċini Perikolużi, Kap. 101 tal-Liġijiet ta' Malta u tal-Artikolu 23A tal-Kodiċi Kriminali, Kap. 9 tal-Liġijiet ta' Malta.

F'każ ta' ħtija, il-Qorti ġiet mitluba sabiex tordna lill-imputat iħallas l-ispejjeż li għandhom x'jaqsmu mal-ħatra tal-esperti, skont l-Artikolu 533(1) tal-Kap. 9 tal-Liġijiet ta' Malta.

Rat ir-rikors tal-imputat Gaetano Campailla tal-5 ta' Marzu 2020;

Rat id-digriet tagħha tas-6 ta' Marzu 2020;

Rat ukoll ir-risposta tal-Avukat Ġenerali tal-10 ta' Marzu 2020;

Semgħet it-trattazzjoni tal-partijiet dwar l-istess rikors.

Ikkunsidrat:

Illi b'digriet tagħha tal-11 ta' April 2019, il-Qorti Kriminali laqgħet it-talba tal-imputat rikorrenti u kkonċedietlu l-ħelsien mill-arrest pendenti l-proċeduri

kriminali kontra tiegħu u dan taħt diversi kundizzjonijiet, fosthom illi "jaghmel tajjeb ghal dan il-beneficcju tal-helsien mill-arrest b'depozitu fir-registru ta' din il-Qorti fis-somma ta' ***hamsa w ghoxrin elf Ewro (€25,000.00) u*** *b'garanzija personali ta'* ***hamsa u ghoxrin elf euro (€25,000.00)*** *...";*[1]

Illi sussegwentement permezz ta' rikors tal-21 ta' Mejju 2019, l-imputat talab lill-Qorti Kriminali sabiex fid-dawl tas-sitwazzjoni finanzjarja tiegħu, tvarja d-digriet tal-ħelsien mill-arrest b'tali mod illi jiġi ridott id-depożitu mpost fuqu u dan sabiex huwa jkun jista' jibbenefika mill-ħelsien mill-arrest. In oltre permezz ta' nota tas-17 ta' Lulju 2019, l-istess imputat indika illi ommu, Antonia [Antonina] Zocco, kienet lesta li tiddepożita s-somma ta' ħamest elef ewro (€5,000) sabiex binha jkun jista' jibbenefika mill-ħelsien mill-arrest;

Illi permezz ta' digriet tas-17 ta' Settembru 2019, il-Qorti Kriminali ċaħdet din it-talba "Wara li qieset il-gravita` tar-reat, il-konnessjoni tal-imputat ma' dawn il-Gżejjer u l-possibilita` reali tal-ħarba fi ħdan il-piena applikabbli f'każ ta' sejbien ta' ħtija";[2]

Illi permezz ta' rikors ieħor tas-17 ta' Diċembru 2019, l-imputat reġa' ressaq it-talba tiegħu quddiem il-Qorti Kriminali, sabiex jiġi ridott id-depożitu impost fuqu bid-digriet tal-istess Qorti tal-11 ta' April 2019;

Illi b'digriet tagħha tal-20 ta' Diċembru 2019, il-Qorti Kriminali għal darb'oħra ċaħdet it-talba tal-imputat u dan "Stante li f'dan l-istadju tqis li jekk l-ammont ta' depożitu jiġi ridott, ma tibqax garanzija suffiċjenti biex jassigura li r-rikorrenti jaderixxi strettament mad-dettami tal-artikolu 575 tal-Kapitolu 9";[3]

Illi għal darb'oħra permezz ta' rikors tat-8 ta' Jannar 2020, l-istess imputat reġa' ressaq l-istess talba, din id-darba quddiem din il-Qorti kif presjeduta, liema talba

[1] Ara a fol. 411 sa 413 tal-proċess.
[2] Ara a fol. 834 tal-proċess.
[3] A fol. 875 tal-proċess.

ġiet miċħuda b'digriet tas-16 ta' Jannar 2020 u dan "Għall-istess raġunijiet mogħtija mill-Qorti Kriminali" fiż-żewġ digrieti tagħha preċedenti;[4]

Illi permezz tar-rikors odjern, l-imputat wara illi għamel referenza għall-Artikolu 576 tal-Kap. 9 tal-Liġijiet ta' Malta u ippremetta illi f'ċirkostanzi simili l-Qorti għandha teżamina l-ammont tal-garanzija fil-kuntest tal-introjtu finanzjarju tiegħu, kif ukoll illi minkejja li huwa talab, diversi drabi, it-tnaqqis tad-depożitu fid-dawl tas-sitwazzjoni finanzjarja tiegħu, it-talbiet tiegħu ġew miċħuda, b'dan għalhekk illi fil-fehma tiegħu, qed jiġu leżi d-drittijiet fundamentali tiegħu taħt l-Artikolu 5 tal-Konvenzjoni Ewropea u l-Artikolu 34 tal-Kostituzzjoni ta' Malta, talab lil din il-Qorti sabiex tirreferi din il-vertenza lill-Prim'Awla tal-Qorti Ċivili (sede Kostituzzjonali) ai termini tal-Artikolu 46(3) tal-Kostituzzjoni ta' Malta u l-Artikolu 4(3) tal-Kap. 319 tal-Liġijiet ta' Malta;

Illi permezz tar-risposta tiegħu, l-Avukat Ġenerali oġġezzjona għal din it-talba u dan primarjament stante illi skont l-istess Avukat Ġenerali, kien jispetta lill-imputat li juri illi l-ammont tad-depożitu huwa għoli wisq għalih tenut kont tal-mezzi tiegħu.

Ikkunsidrat ukoll:

Illi l-Artikolu 46(3) tal-Kostituzzjoni ta' Malta, li a bażi tiegħu qegħda ssir din it-talba, jipprovdi illi "Jekk f'xi proċeduri f'xi qorti li ma tkunx il-Prim'Awla tal-Qorti Ċivili jew il-Qorti Kostituzzjonali tqum xi kwistjoni dwar il-ksur ta' xi waħda mid-disposizzjonijiet tal-imsemmija artikoli 33 sa 45 (magħdudin), dik il-qorti għandha tibgħat il-kwistjoni quddiem il-Prim'Awla tal-Qorti Ċivili kemm il-darba fil-fehma tagħha t-tqanqil tal-kwistjoni ma tkunx sempliċement frivola jew vessatorja ...". L-istess jingħad fl-Artikolu 4(3) tal-Kapitolu 319 dwar il-Konvenzjoni Ewropea.

[4] Ara a fol. 893 tal-proċess.

Isegwi għalhekk illi sabiex din il-Qorti tagħmel referenza kostituzzjonali, kif ġiet mitluba, hija trid tkun sodisfatta illi l-kwistjoni sollevata ma tkunx waħda sempliċement frivola jew vessatorja. Fis-sentenza fl-ismijiet ***Alan Mifsud et vs L-Avukat Generali*** *deċiża mill-Qorti Kostituzzjonali fit-23 ta' Novembru 1990, ġie ritenut illi:*

"Il-Qorti tifhem illi "frivola" riferibbilment ghall-kwistjoni Kostituzzjonali li tigi sollevata quddiem xi qorti – barra l-Qorti Kostituzzjonali jew il-Prim'Awla tal-Qorti Civili – tfisser li dik il-kwistjoni hija ta' ebda pregju jew valur, vana, nieqsa mis-serjeta`, manifestament nieqsa mis-sens, li ma jisthoqqilix attenzjoni; waqt li "vessatorja" tfisser li l-kwistjoni giet sollevata minghajr ragunijiet sufficjenti u bl-iskop li ddejjaq u tirrita lill-kontroparti".

Illi fis-sentenza mogħtija mill-Qorti Kostituzzjonali fl-10 ta' Mejju 1995, fl-ismijiet ***Joseph u Alexander Ciantar vs L-Onorevoli Prim Ministru****, ingħad ukoll illi l-fraži "semplicement frivola jew vessatorja" "tfisser li t-tqanqil tal-kwistjoni biex issir referenza ... ikunu, mal-ewwel jidhru li huma vani, nieqsa mis-serjeta`, manifestament nieqsa mis-sens, u ma jisthoqqilhomx attenzjoni ... u dan kollu b'mod tant car illi mhux ragonevolment possibbli li jigi kontestat, li dak it-tqanqil u dik it-talba huma effettivament frivoli. U l-istess ghandu jinghad ghall-konkluzjoni l-ohra ta' vessatorjeta` fejn tant ma jkunx hemm ragunijiet sufficjenti biex isostnu t-tqanqil jew it-talba, illi allura l-motivazzjoni li ghalihom sar tkun li ddejjaq u tirrita lill-kontro-parti".*

Illi l-imputat tressaq taħt arrest quddiem din il-Qorti, akkużat bl-imputazzjonijiet odjerni, nhar it-23 ta' Novembru 2018 u ngħata l-ħelsien mill-arrest mill-Qorti Kriminali nhar il-11 ta' April 2019, b'dan illi stante illi huwa baqa' ma ddepożitax l-ammont tal-garanzija ossia s-somma ta' ħamsa u għoxrin elf ewro (€25,000), kif impost fid-digriet tal-ħelsien mill-arrest, liema ammont

sussegwentement baqa' ma ġiex ridott minkejja d-diversi talbiet tiegħu, sal-lum huwa għadu miżmum taħt arrest preventiv.

Illi ai termini tal-Artikolu 576 tal-Kap. 9 tal-Liġijiet ta' Malta, "L-ammont tal-garanzija għandu jkun fil-limiti stabbiliti mil-liġi, skont il-kundizzjoni tal-imputat, ix-xorta u l-kwalita` tar-reat, u ż-żmien tal-piena li għaliha r-reat ikun suġġett."

Illi għalhekk għalkemm dan m'huwiex l-uniku fattur li jiddetermina l-ammont tal-garanzija, il-kundizzjoni tal-imputat hija waħda mill-kriterji li għandha tħares lejha l-Qorti sabiex tiddetermina dan l-ammont. F'dan il-kuntest, dak li għandu jiġi assikurat huwa li l-imputat jidher għal kull att tal-proċediment.

Illi kif ingħad fis-sentenza tal-Qorti Kostituzzjonali tas-7 ta' Jannar 2011, fl-ismijiet ***Maximilian Ciantar vs Avukat Ġenerali****:*

"Illi huwa stabilit li meta Qorti tiġi biex tqis jekk għandhiex teħles persuna mill-arrest, hija għandha tħares lejn dawk il-kundizzjonijiet li jistgħu jwasslu biex jiġi ffissat l-ammont xieraq tal-garanzija li dik il-persuna trid tagħti biex tkun tista' tinħeles. Għalhekk, meta l-liġi ssemmi bħala waħda mill-kriterji "il-kundizzjoni tal-imputat", mhijiex qegħda tfisser biss il-qagħda finanzjarja tiegħu. Jeħtieġ, għalhekk, li Qorti tqis kemm kriterji oġġettivi (marbuta max-xorta u l-għamla tar-reat u l-piena tiegħu) u kif ukoll dawk suġġettivi li jintrabtu mal-kundizzjoni tal-imputat (magħduda magħha, per eżempju, l-qagħda soċjali tiegħu, id-dipendenza tiegħu fuq ħaddieħor, u x-xogħol tiegħu jekk ikun il-każ).[5] *Minbarra dan, tqies ukoll li meta l-Qorti tiffissa garanziji f'somom ta' flus, hija trid tħares lejn il-mezzi finanzjarji tal-imputat u kif ukoll ta' dawk il-persuni li qegħdin joffru li jgħinuh billi jidħlu garanti, b'mod li eqreb ma jkunu dawk il-persuni mal-imputat, aktar*

[5] Hawnhekk il-Qorti rreferiet għas-sentenza tal-Qorti Kostituzzjonali tal-10 ta' Lulju 1990, fl-ismijiet **Mifsud et vs Prim Ministru et** (Kollez. Vol: LXXIV.i.127).

tkun tiswa l-garanzija billi l-imputat iħossu aktar obbligat li jħares il-kundizzjonijiet tal-ħelsien tiegħu mill-arrest[6]".

Illi fis-sentenza tagħha tad-19 ta' Frar 2010, fl-ismijiet ***Richard Grech vs Avukat Ġenerali****, fil-waqt illi rribadiet illi l-Qorti għandha tħares lejn il-mezzi finanzjarji tal-imputat u ta' dawk il-persuni li jistgħu joffru li jgħinuh meta tiġi ffissata l-garanzija pekunjarja, il-Prim'Awla tal-Qorti Ċivili (sede Kostituzzjonali) għamlet referenza għas-sentenza tal-Qorti Kostituzzjonali tal-10 ta' Lulju 1990, fl-ismijiet* ***Carmel Mifsud et vs Onorevoli Prim Ministru****, f'liema każ dik il-Qorti kkunsidrat il-prinċipji in materja:*

"(1) Jekk l-unika raguni ghala l-imputat qed ikompli jinzamm b'arrest preventiv, tkun il-biza li huwa jista jahrab u b'hekk jevita li joqghod ghal procediment kontrih, allura l-imputat ghandu jinghata l-liberta` jekk huwa jista jghati tali garanziji li jizguraw li huwa jidher ghal kull att tal-procediment.

(2) Id-dritt li wiehed jinghata l-liberta` jezisti biss jekk jista' jigi zgurat li l-garanzija hi sufficjenti sabiex tassigura li l-imputat ma jahrabx peress li jista' jitlef l-ammont tal-istess garanzija.

(3) L-ghan tal-garanzija mhux li taghmel tajjeb ghad-dannu li sar bir-reat, izda biex jigi assigurat li l-imputat jidher ghal procediment.

(4) L-ammont tal-garanzija ghalhekk ghandu jigi fissat b'referenza ghal mezzi u ghac-cirkostanzi tal-persuna koncernata.

(5) L-ammont tal-garanzija m'ghandux ikun eccessiv b'referenza ghar-raguni ghala l-garanzija qed tigi imposta u cioe` sabiex jigi zgurat li l-imputat jidher dejjem ghal procediment.

[6] Hawnhekk il-Qorti rreferiet għas-sentenza tal-Prim'Awla tal-Qorti Ċivili (sede Kostituzzjonali) tal-1 ta' Lulju 1999 fl-ismijiet **Mario Pollacco vs Kummissarju tal-Pulizija et** (mhux ippubblikata).

(6) Il-garanzija m'ghandhiex tigi esklusivament fissata b'referenza ghas-serjeta` tal-imputazzjonijiet.

(7) Jekk l-imputat ma jistax jigi mehlus minhabba l-garanziji mitluba huma eccessivi, id-detenzjoni tista' tkun illegali jew irregolari ai termini tal-artikolu in kwistjoni tal-Konvenzjoni Ewropeja.

(8) Id-detenzjoni hi permissibbli biss jekk il-garanziji jassiguraw li l-imputat jidher ghal procediment. Dawn il-garanziji, pero`, ma jistghux ikunu aktar minn dak li hu strettament necessarju.

(9) Il-kwistjoni tal-quantum tal-garanziji f'kull kaz trid tigi konsidrata b'referenza ghall-persuna tal-imputat jew l-akkuzat, il-mezzi tieghu u r-relazzjoni tieghu ma' minn jista' jghati l-garanziji ghalih u cioe` jekk hemmx deterrent sufficjenti biex ixejjen kull disposizzjoni tieghu li jahrab.

(10) Jekk ma jidhirx li l-procediment jista jsir fi zmien ragionevoli, l-imputat ghandu jinghata l-liberta` provisorja. Il-liberta` provizorja ma tistax tigi in effett rifjutata billi jigu imposti kundizzjonijiet li huma oneruzi zzejjed, f'dan ir-rigward trid ukoll tigi esminata l-kwistjoni jekk setax kien hemm xi abbuz."

F'dak il-każ, l-ammont tal-garanzija impost fuq ir-rikorrenti Grech għall-għoti tal-ħelsien mill-arrest kien fis-somma ta' ħamsin elf ewro (€50,000), liema somma ma kienx possibbli għalih li jiddepożitaha fid-dawl tal-mezzi finanzjarji tiegħu jew aħjar, tan-nuqqas tagħhom. F'dan ir-rigward, il-Qorti kompliet hekk:

"Fic-cirkostanzi kollha tal-kaz jidher li gew lesi d-drittijiet fundamentali tar-rikorrenti u dan meta giet imposta l-kundizzjoni in kwistjoni tad-depositu u meta gew michuda t-talbiet tieghu biex titbiddel l-istess kondizzjoni. Jirrizulta ghalhekk li gew lesi d-drittijiet fundamentali tar-rikorrenti sanciti bl-Artikolu 6

tal-Konvenzjoni Ewropeja b'mod partikolari bl-Artikolu 5(3) tal-istess Konvenzjoni.

Inoltre mill-ezami tad-digriet tal-Qorti Kriminali tal-4 ta Marzu 2009 ma jirrizultax li l-posizzjoni finanzjarja tar-rikorrenti gie esaminata qabel ma nghata l-istess digriet. In effett, din il-posizzjoni finanzjarja lanqas ma jirruzulta li giet mehuda in konsiderazzjoni meta nghataw id-diversi digrieti l-ohra li kienu wkoll konnessi mal-meritu ta' dan ir-rikors. Jidher ghalhekk li l-Qorti Kriminali ma kelliex quddiemha provi dwar il-mezzi finanzjarji tar-rikorrenti meta imponiet il-kondizzjoni pekunjarja in kwistjoni."

Illi l-istess Qorti mbagħad kompliet hekk, fil-waqt illi għamlet referenza wkoll għas-sentenza tal-Qorti Kostituzzjonali fil-kawża fl-ismijiet ***Mario Pollacco vs Kummissarju tal-Pulizija et*** *tas-6 ta' Ottubru 1999:*

"Il-kriterji li l-Qorti ghanda timxi fuqhom meta qed tistabilixxi l-kundizzjonijiet xierqa marbuta mal-liberta` provizorja, una volta li gie stabbilit li l-istess liberta` provizorja setghet tigi akkordata lir-rikorrenti, huma l-mezzi finanzjarji ghad-disposizzjoni tar-rikorrenti b'referenza wkoll ghall-persuna tal-istess rikorrenti. Fl-imsemmija kawza ta' Pollacco intqal ukoll li "certament l-akkuzat kellu l-obbligu illi jipproduci l-provi mehtiega biex jigi stabbilit x'kien dak il-minimu ta' depozitu li l-Qorti kellha tiddetermina ghall-helsien provizorju tieghu u dan fl-interess tieghu, u ghal dan il-fini l-Qorti kienet obbligata taghtih direzzjoni, u kien ukoll jinkombi fuq il-Qorti li, irrispettivament minn dak li ghogbu jissottomettilha l-akkuzat taghmel sa fejn hu possibli l-ezercizju mehtieg biex il-gudizzju taghha f'dan ir-rigward jkun wiehed oggettiv u realistiku." Intqal ukoll li "il-punt li qed tenfasizza l-Qorti f'dan l-istadju hu, illi l-liberta` ta' persuna hi prezzjuza wisq biex tigi mcahhda leggerment minghajr debita riflessjoni u bla ma jsir sforz biex jigi stabbilit taht liema kundizzjonijiet minimi kellha tigi akkordata u dan, tenut kont, illi l-iskop tal-plegg ma kienx biex jaghmel tajjeb ghad-danni provokati bir-

rejat imma biss biex jassigura li l-persuna suspettata tipprezenta ruhha ghas-smiegh tal-kaz kontra taghha."

Fil-kaz taht ezami ma jirrizultax li ngiebu xi provi dwar il-mezzi tar-rikorrent quddiem il-Qorti Kriminali meta in effett kien obbligu ta' dik il-Qrati li qabel ma tiehu d-decizjoni kellhom jigu verifikati l-mezzi tal-akkuzat jew ta' dawk il-persuni li setghu jghinuh biex jipprovdi l-garanzija mehtiega u dan kif irriteniet il-Qorti dejjem fl-imsemmi kaz ta' Pollacco."

Illi sussegwentement, permezz tas-sentenza tagħha fl-istess ismijiet, tat-28 ta' Mejju 2010, il-Qorti Kostituzzjonali għaddiet biex tikkonferma s-sentenza fuq ċitata in kwantu din sabet leżjoni tad-dritt fundamentali tar-rikorrenti kif sanċit bl-Artikolu 5(3) tal-Konvenzjoni Ewropea. In oltre il-Qorti Kostituzzjonali ordnat ukoll illi t-talba tar-rikorrenti għal-liberta` proviżorja tiġi deċiża mill-Qorti Kriminali fid-dawl tal-prinċipji elenkati, senjatament billi jittieħed kont tas-sitwazzjoni finanzjarja tar-rikorrent u dan wara li dik il-Qorti teżamina l-provi li saru quddiem l-ewwel Qorti u kwalunkwe provi oħra li jkunu xierqa u opportuni biex dik il-Qorti tasal għad-deċiżjoni tagħha.

*Illi in oltre fil-każ **Gafa` vs. Malta** deċiż mill-Qorti Ewropea dwar id-Drittijiet tal-Bniedem nhar it-8 ta' Ottubru 2018, li għalih tagħmel referenza d-difiża fit-trattazzjoni tagħha, f'liema każ l-imputat ingħata l-liberta` proviżorja, iżda baqa' arrestat stante illi ma kienx f'posizzjoni finanzjarja li jagħmel id-depożitu rikjest, sakemm finalment ommu daħlet bħala garanti bi proprjeta` li wirtet ma' terzi, dik il-Qorti sabet leżjoni tal-Artikolu 5(3) tal-Konvenzjoni u dan wara li kkunsidrat illi:*

"75. All those requests were rejected on the basis of the seriousness of the crime and the fear of tampering with evidence, despite the fact that bail had already been granted. Further, none of those decisions explained how the amount of bail

had been set by reference to the applicant's assets and his means. Nor did any of those decisions assess the applicant's capacity to pay the sum required. Neither did the court delivering those decisions consider that the applicant had failed to prove his financial situation … The Court observes that, despite the continued detention following the granting of bail subject to the contested financial conditions as a result of his inability to pay, at no stage – throughout a period of slightly under a year during which the applicant filed several requests – did the courts consider it adequate to decrease the amount of deposit allowing him a real possibility to benefit from bail. No relevant or sufficient reasons connected to the applicant's financial situation have been put forward for such a course of action by the domestic courts."

Illi fiċ-ċirkostanzi tal-każ odjern u fid-dawl tal-ġurisprudenza fuq ċitata, din il-Qorti ma tqisx illi l-kwistjoni sollevata mill-imputat rikorrenti hija waħda sempliċiment frivola jew vessatorja.

Konklużjoni

Għaldaqstant, il-Qorti qegħda tilqa' t-talba tar-rikorrenti u fit-termini tal-Artikolu 46(3) tal-Kostituzzjoni ta' Malta u l-Artikolu 4(3) tal-Kap. 319 tal-Liġijiet ta' Malta tirreferi l-kwistjoni sollevata mill-istess rikorrenti lill-Prim'Awla tal-Qorti Ċivili (sede Kostituzzjonali) sabiex din tiddeċiedi jekk il-fatt li ġew imposti fuq l-istess imputat rikorrenti kundizzjonijiet għall-ħelsien mill-arrest li qed jipprekluduh milli jibbenefika minn tali ħelsien mill-arrest jiksirx id-drittijiet fundamentali tiegħu taħt l-Artikolu 5(3) tal-Konvenzjoni Ewropea u l-Artikolu 34 tal-Kostituzzjoni ta' Malta."[7]

[7] Folio 17.

Rat id-digriet tagħha datat 25 ta' Marz, 2020 fejn il-Qorti ordnat in-notifika ta' l-istess referenza lil Avukat Generali *recte* Avukat ta' l-Istat biex jintavola d-debita risposta tiegħu.

Rat li l-istess Avukat ta' l-Istat presenta t-tweġiba tiegħu fit-2 ta' April, 2020.

Rat li din ir-referenza ġiet iffissata għas-smiegħ fid-digriet tagħha imsemmi[8].

Tramite d-deputat registratur tagħha l-Qorti ġiet anke infurmata u laqgħet it-talba fir-rigward, illi l-partijiet xtaqu illi fis-seduta ffisata għas-smiegħ wara l-itess smiegħ tal-provi l-partijiet jgħaddu għat-trattazzjoni finali.

Hekk sar.

Semgħet għalhekk fis-seduta appuntata x-xhieda ta' l-istess rikorrenti ukoll lill-uffiċċjal prosektur li qed imexxi l-atti tal-Istruttorja quddiem il-Qorti tal-Magistrati hekk adita.

Semgħet u rat il-provi kollha kif ukoll it-trattazzjonijiet.

Rat ukoll in-nota' tad-deputat registratur tal-Magistrat Natasha Galea Sciberras li tat spjegazzjoni tad-diskrepanza li kienet tirriżulta fin-numerazzjoni tal-Atti Istruttorji wara li tali diskrepanza ġiet imgħarfa lil din il-Qorti fis-seduta tas-6 ta' April, 2020[9].

Ikkonsidrat

[8] Ibid.
[9] Folio 24 atti tar-Referenza.

Illi l-*iter* ta' dak li okkorra fl-għoti tad-digriet tal-liberta' provisorja u d-digrieti li segwew l-istess digriet huwa ben elenkat fir-referenza Kostituzzjonali riprodotta. B'żieda ma dan huwa pertinenti li l-Qorti tieħu konjizzjoni ukoll ta' ċertu xhieda li nġabet kemm mill-prosekuzzjoni ukoll mid-difiża ukoll fl-atti kriminali u dan b'mod partikolari fejn si rigwarda l-assi tar-rikorrenti. Dana huwa eżerċizzju neċessarju biex fil-fatt jiġi eżaminat jekk fil-fatt hemmx provi fir-rigward u jekk il-Qrati tagħna ħadux in konsiderazzjoni ta' l-istess biex stabbiliew il-kundizzjonijiet imposti fid-digriet tal-liberta' provisorja. Jibqa pero saljenti jekk fil-fatt il-Qorti li tat il-liberta' provisorja kellhiex l-obbligu li fil-fatt teżamina dawn il-provi. Dana kollu se jsir fid-dawl ta' dak li tablet il-Qorti riferenti.

Għall-iskop ta' din ir-referenza fl-ewwel lok il-Qorti se tagħti ħarsa lejn dak li qalu l-Qrati nostrana u dawk tal-Qorti Ewropeja għad-Drittijiet tal-Bniedem dwar l-istess tematika.

Bla dubbju ta' xejn *miles stone decision* fir-rigward kienet dik li llum hija ċitata tista tgħid fil-maġġor parti ta' deċizzjonijet tal-Qorti Ewropeja fir-rigward ; **Neumeister kontra l-Awstria**[10] li ġia mis-sena 1968 kienet stabbilit is-segwenti prinċipji

"*This concern to fix the amount of the guarantee to be furnished by a detained person soley in relation to the amount of the loss imputed to him does not seem to be in conformity with Article 5(3) of the Convention. The guarantee provided for by that Article is designe to ensure not the reparation of loss but rather the presence of the accused at the hearing. Its amount must therefore be assessed principally by reference to him, his assets and his relationship with the persons*

[10] Application 1936/63: 27 ta' Gunju, 1968

whoe are to provide the security, in other words to the degree of confidence tat is possible that the prospect of loss of security or of an action against the guarantors in case of his non-appearance at the trial will act as asuffiecient deterrent to dispel any wish on his part to abscond.".

Ġia mis-sena 1990, il-Qorti Kostituzzjonali tagħna fis-sentenza riferuta mill-abbli difensuri tar-rikorrenti dik fl-ismijiet **Carmel Mifsud et. vs L-Onerevoli Prim Ministru ta' Malta et**. kellha dan xi tgħid fir-rigward meta ċċitat lil awttur Fawcett[11]:

"Since if it appears that the trial of a detainee cannot be had in a reasonable time, he must be released pending trial, it must follow that release must not be in effect denied by being hedged round too many onerous guarantees" ukoll "But the amount would be outside the purview of the Commission unless there appeared an element of abuse" .

Il-Qorti kompliet hekk wara din iċ-ċitazzjoni:-

"Jidher minn eżami tal-proċess li għalkemm saru diversi sottomissjonijiet quddiem il-Qorti Kriminali tal-Magistrati in konnessjoni mat-talba għal-liberta' provvisorja, eppure ma nġiebu l-ebda provi dwar il-mezzi ta' min kien qed jitlob il-liberta' provvisorja. Għalhekk ċertament ma jistax jingħad li kien hemm xi element ta' abbuz;

[11] The Application of the European Convention on Human Rights" paġna 116

l-eżami tal-proċess preżenti jkompli li dawn il-provi dwar il-mezzi saru biss f'dawn il-proċeduri kostituzzjonali quddiem il-Prim'Awla ta' l-Onorabbli Qorti Ċivili. Il-Qorti li kellha l-funzjoni li tiddeċidi t-talba dwar l-liberta' provisorja, ċjoe l-Qorti Kriminali tal-Magistrati ma kellhiex quddiema l-provi (billi ma nġabux) biex tista' tasal għall-konklussjonijiet tagħha"

Fil-fatt il-Qorti għaddiet biex tiddisponi mill-appell billi fil-mertu qalet li kienet il-Qorti tal-Magistrati jew dik Kriminali li kellha tiddeċidi it-talba tal-liberta' provisorja fid-dawl tal-provi mressaq, oħrajn li jistgħu jkunu opportuni u l-prinċipji elenkati.

Ġia din id-deċizzjoni stabbilit kjarament li bla dubbju l-imputat/akkużat kellu l-onu li jressaq provi li jwasslu biex il-Qorti tkun tista tiddettermina l-garanzija ġusta, ukoll id-depositu, li kontra tiegħu kellu jingħata l-liberta' provisorja. Pero ukoll li kien jinkombi fuq il-Qorti adita bit-talba għal ħelsien mill-arrest li tagħmel analiżi diliġenti u appropja biex skont il-mezzi tar-rikorrenti tistabilixxi onu pekunjarju li jippermetti lir-rikorrenti/imputat jew akkużat li jibbenefika b'mod reali mill-għoti tal-ħelsien mill-arrest.

L-istess prinċipji ġew elenkati fil-każ **Iwanczuk vs Poland**[12] intqal illi:-

"*The Court recalls that according to its case-law, the amount of the bail must be "assessed principally in relation to the person concerned, his assets ... in other words to the degree of confidence that is possible that the prospect of loss of security.. in the event of his non-appearance at a trial will act as a sufficient deterrent to dispel any wish on his part to abscond" (see the Neumeister v. Austria judgment of 27 June 1968, Series A, p. 40 § 14).* ***The accused whom the judicial***

[12] Application no. 2519999996/94 deċiża fil-15 ta' Novembru, 2001.

authorities declare themselves prepared to release on bail must faithfully furnish sufficient information, that can be checked if need be, about the amount of bail to be fixed. As the fundamental right to liberty as guaranteed by Article 5 of the Convention is at stake, the authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention is indispensable (European Commission HR, no. 8339/78, Rap. 11.12.80, DR 23, p. 137)." (enfasi ta' din il-qorti)."

Din il-Qorti ġia għamlet referenza għal dak li stabbilit żmien ilu il Qorti Ewropeja fid-deċizzjoni ta' Neumeister.

L-istess prinċipji ġew riflessi f'kawza li kienet tolqot lil pajjiżna li għalija saret referenza mid-difiża.

Għalhekk f'**Gafa kontra Malta**[13] l-Qorti Ewropeja għad-Drittijiet tal-Bniedem kellha dan xi tgħid fuq l-istess tematika u cioe' l-kundizzjonijiet pekunjarji marbuta mall-liberta' provisorja.

"75. All those requests were rejected on the basis of the seriousness of the crime and the fear of tampering with evidence, despite the fact that bail had already been granted. Further, none of those decisions explained how the amount of bail had been set by reference to the applicant's assets and his means. Nor did any of those decisions assess the applicant's capacity to pay the sum required. Neither did the court delivering those decisions consider that the applicant had failed to

[13] Application no. 54335/14: 22/05/2018

prove his financial situation, an argument assumed by the Constitutional Court (see paragraph 34 above) ex post facto and without finding substantiation in the refusal decisions. The Court observes that, despite the continued detention following the granting of bail subject to the contested financial conditions as a result of his inability to pay, at no stage - throughout a period of slightly under a year during which the applicant filed several requests - did the courts consider it adequate to decrease the amount of deposit allowing him a real possibility to benefit from bail. No relevant or sufficient reasons connected to the applicant's financial situation have been put forward for such a course of action by the domestic courts.

76. In conclusion, the Court considers that in the present case there has been a violation of Article 5 § 3 of the Convention."

Li-istess ħsieb hu rifless fid-deċiżżjoni ta' l-istess Qorti fl-ismijet **Affaire Georgieva vs Bulgarie**[14]:-

*"30. La Cour constate de surcroît que même après la modification de la mesure de contrôle judiciaire, le 31 janvier 2002, la requérante est restée détenue faute de pouvoir payer la caution imposée (paragraphe 15 ci-dessus). Elle rappelle que le montant d'une caution doit être apprécié principalement par rapport à la situation personnelle de l'intéressé et à ses ressources (Hristova c. Bulgarie, no 60859/00, § 110, 7 décembre 2006). Or, bien que la requérante eût déclaré qu'elle était au chômage et ne disposait pas de revenus stables, le tribunal lui a imposé un cautionnement de 1 500 BGN (soit environ 750 EUR**). **La Cour note que le tribunal régional n'a pas exposé d'arguments afin de justifier son choix du montant de la caution. Ainsi, les organes de l'Etat n'ont pas démontré qu'ils***

[14] Requête (Application) no 16085/02: 03/07/2008.

avaient fixé le montant de la caution en fonction des revenus et de la situation particulière de la requérante. *(enfasi tal-Qorti).*

31. En conclusion, la Cour estime que la durée de la détention de la requérante n'a pas été raisonnable, notamment en raison du fait que l'enquête pénale n'a pas été menée avec la diligence requise et faute d'arguments justifiant le montant de la caution imposée. Partant, il y a eu violation de l'article 5 § 3 de la Convention."

Naraw għalhekk illi l-Qorti qieset illi d-detenzjoni tar-rikorrrenti ma kienetx waħda ragonevoli tenut kont lil Qorti ma qiesetx il-meżżi tagħha meta ġiet biex tistabilixxi l-ammont tal-hekk imsejjħa "*caution"* ċioe' garanzija bil-konsegwenza lir-rikorrenti baqgħet taħt arrest preventiv.

Fil-fatt fl-imsemmija deċiżżjoni **Toshev vs Bulguria**[15] jingħad li:-

"69. In the present case, on 3 August 1998 the Sofia City Court decided to release the applicant on bail of BGL 500,000 (DEM 500 at the relevant time; see paragraph 33 above). In setting the amount, the court did not make an assessment of the applicant's wealth or assets at the time nor did it seek any information or evidence as to whether he could provide recognizance (see paragraph 33 above). The applicant did not have the financial ability to pay his bail and remained in detention for a further year and twenty-one days (see paragraphs 35-42 above).

70. Admittedly, in 1993 he had been able to provide recognizance of BGL 10,000 (approximately DEM 545 at the relevant time), but that had not been paid by him but by friends of his (see paragraph 29 above). However, that had been five years

[15] Application no. 56308/00: 10 August 2006

prior to the decision of the Sofia City Court of 3 August 1998 and the applicant had been in detention for most of the subsequent years. His financial situation had undoubtedly changed over the given period, which required a reassessment by the authorities of the applicant's wealth and assets in order to determine the amount of recognizance he could provide. As noted above, however, such an assessment was not undertaken by the Sofia City Court.

71. In this respect, it should also be noted that the Sofia District Prosecutor's Office, in its decision of 3 December 1998, assessed that the applicant did not have the ability to provide the aforementioned recognizance set by the Sofia City Court and reduced the bail to BGL 50,000 (DEM 50 at the relevant time), an amount which the applicant provided almost immediately but was not released due to a misunderstanding under which case he was being held (see paragraphs 37-38 above). In any event, this decision was subsequently quashed because it was found that the Prosecutor's Office could not amend the bail set by the Sofia City Court and the applicant's detention continued (see paragraph 39 above).

72. Finally, the Court considers that remand in custody lasting almost six years on charges of non-violent offences may be construed incompatible as such with Article 5 of the Convention.

73. In view of the above, the Court finds that there has been a violation of Article 5 § 3 of the Convention on account of the authorities' failure to justify the applicant's continued detention and the domestic court's failure to assess the applicant's ability to provide recognizance."

F'deċiżżjoni oħra li ngħatat fil-konfront ta' pajjiżna fl-ismijiet **Kolakovic v. Malta** ġie stabbilt illi**:-**

"*73. The Court observes that none of the domestic courts' initial decisions refers to any inability to make a balanced and reasoned decision on account of a lack of documentation. In point of fact, those decisions seem to have been taken on the basis that – according to the information available – the applicant owned property worth a substantial amount. Further, the Court observes that it appears likely that by July 2011 (see paragraph 17 above) the applicant's financial position had become sufficiently clear. On 22 July 2011 the Court of Magistrates nevertheless refused to reduce the amount of bail, despite the fact that the applicant had already been in detention for six months after having been first granted bail. In any event, by 21 September 2011 the applicant's real financial position had surely become sufficiently clear and thereinafter none of the domestic courts doubted the applicant's wife's testimony or the apparent conclusions about the applicant's financial position. In fact, the applicant's deposit was subsequently reduced to EUR 7,000 on 14 March 2012 and again to EUR 5,000, on 23 April 2012, a sum he was finally able to pay. However, the Court notes that up until that final reduction which allowed him to be released on bail, the applicant had spent at least seven months more in detention after his financial position had been clarified. It has not been explained why the Court of Magistrates took nearly nine months (from 26 July 2011 until 14 March 2012, and then until 23 April 2012) to come to a decision on the applicant's request for a review of bail. It is possible that it chose to wait for the Constitutional Court judgment, but those proceedings did not prevent the Court of Magistrates from carrying out its own examination of the bail conditions (including the amount of the bail bond) in the interim (as occurred during the first set of proceedings). Neither did the decision of 14 March 2012 explain why the amounts thereby established were adequate in the*

circumstances as apparent to the court at that stage. In consequence the Court finds no justification for the applicant's seven-month detention following clarification of his financial situation (from, at the latest, September 2011 until April 2012), and after it had been decided more than a year earlier that there were no longer any grounds to continue his detention provided he complied with the bail conditions (compare Iwańczuk v. Poland, no. 25196/94, § 66, 15 November 2001 and Bojilov v. Bulgaria, no. 45114/98, § 60, 22 December 2004, concerning post-bail detention periods of four months).

74. Moreover, the Court reiterates that even where domestic courts' decisions refusing bail are based on "relevant" and "sufficient" reasons, the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see Yankov v. Bulgaria, no. 39084/97, § 55, ECHR 2003-XII (extracts); Filipov v. Bulgaria, no. 40495/04, § 22, 10 June 2010; and Ilijkov v. Bulgaria, no. 33977/96, § 77, 26 July 2001). The Court considers that this criterion must be of some relevance even in respect of decisions concerning the fixing of bail conditions – including the amount of the bail bond – after bail is formally granted if the individual remains in detention as a result of his inability to pay. In the present case, after four years of inquiry – two and a half of which he spent in detention – the bill of indictment in his regard has still not been filed. The time-line of the proceedings reveals repeated hearings where only one witness was heard and others where nothing substantial happened, as well as repeated adjournments. It is thus apparent that in the present case the authorities also failed to conduct the proceedings with the requisite diligence, and no steps were taken to speed up the proceedings despite the applicant's continued detention following the granting of bail.

75. Taking into account the length of the bail proceedings after the applicant's financial position had become clear – during which the applicant remained in detention despite a decision taken fifteen months earlier granting bail and another decision already finding a violation of Article 5 § 3 of the Convention for other reasons – and the fact that no adequate reasons were put forward by the authorities to justify this delay or the basis for the decision of 14 March 2012 (which was in fact reviewed a little over one month later), together with the authorities' failure to exercise the requisite diligence in pursuing the proceedings while the applicant was in detention, the Court finds that there has been a violation of Article 5 § 3 of the Convention."

F'**Mikalauskas vs Malta**[16] deċiża fit-23 ta' Ottubru, 2013 il-Qorti Ewropeja msemmija kellha s-segwenti xi tgħid:-

"16. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see Yankov v. Bulgaria, no. 39084/97, § 55, ECHR 2003-XII (extracts), Filipov v. Bulgaria, no. 40495/04, § 22, 10 June 2010 and Ilijkov, cited above, § 77).

117. The burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons

[16] Applcation No. 4458**/10**

warranting his release (ibid, § 85 and). Justification for any period of detention, no matter how short, must be demonstrated by the authorities convincingly (see Sarban, cited above §§ 95 and 97, and Castravet v. Moldova, no. 23393/05, §§ 32-33, 13 March 2007). Quasi-automatic prolongation of detention contravenes the guarantees set forth in Article 5 § 3 (see Kalashnikov v. Russia, no. 47095/99, §§ 116-118, ECHR 2002-VI and Tase v. Romania, no. 29761/02, § 40, 10 June 2008).

118. Where the only remaining reasons for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance (see Wemhoff v. Germany, 27 June 1968, § 15, Series A no. 7 and Letellier v. France, 26 June 1991, § 46, Series A no. 207).

119. According to the Court's case-law, the guarantee provided for by Article 5 § 3 of the Convention is designed to ensure the presence of the accused at the hearing (see Mangouras v. Spain [GC], no. 12050/04, § 78, ECHR 2010). Therefore, the amount of bail must be set by reference to the detainees' assets, and with due regard to the extent to which the prospect of its loss will be a sufficient deterrent to dispel any wish on their part to abscond (see Neumeister v. Austria, 27 June 1968, § 14, Series A no. 8). Since the issue at stake is the fundamental right to liberty guaranteed by Article 5, the authorities must take as much care in fixing appropriate bail as in deciding whether or not continued detention is indispensable. Furthermore, the amount set for bail must be duly justified in the decision fixing bail and must take into account the accused's means (see Mangouras, cited above, § 79). The domestic courts' failure to assess the applicant's capacity to pay the sum required may lead the Court to find a

violation. However, the accused whom the judicial authorities declare themselves prepared to release on bail must faithfully submit sufficient information, that can be checked if need be, about the amount of bail to be fixed (see Toshev v. Bulgaria, no. 56308/00, § 68, 10 August 2006).

(b) Application to the present case

120. Turning to the instant case, the Court observes that the applicant spent ten-and-a-half months in detention before he was, in theory, granted bail. During this period, the courts examined his application for release at least six times. After the first three months of detention, the applicant's applications were refused by two decisions in December 2009 which the Court considers had given relevant and sufficient reasons justifying his detention, at least at those initial stages of the proceedings. However, despite the Criminal Court's warning of 28 December 2009 that its decision would be subject to review at a later date and its instruction that the proceedings should be continued with speed and diligence (see paragraph 16 above), the subsequent decisions over the following seven months refused the applicant's applications using the same formula. They each referred to the previous decisions refusing bail and failed to give details either of the grounds for the decision in view of the developing situation or of whether the original grounds remained valid despite the passage of time.

121. Moreover, the original decisions were based on the risk of the applicant absconding and potentially obstructing the course of justice by interfering with witnesses. The Court, however, observes that the flight risk posed by an accused necessarily decreases with the passage of time spent in detention (Neumeister, cited above, § 10). Similarly, the risk of pressure being brought to bear on witnesses can be accepted at the initial stages of the proceedings (see Jarzyński v. Poland, no. 15479/02, § 43, 4 October 2005). In the long term, however, the

requirements of the investigation do not suffice to justify the detention of a suspect, as in the normal course of events the risks alleged diminish over time as inquiries are effected, statements are taken and verifications are carried out (see Clooth v. Belgium, 12 December 1991, § 44, Series A no. 225.) Moreover, the risk of the accused hindering the proper conduct of the proceedings cannot be relied upon in abstracto; it has to be supported by factual evidence (see Becciev v. Moldova, no. 9190/03, § 59, 4 October 2005). In the present case, neither the domestic courts nor the Government have substantiated any such risk. It follows that the repeated extension of the applicant's detention pending trial cannot be said to have been based on relevant and sufficient reasons.

122. Following those decisions, on 16 July 2010 the applicant was granted bail subject to conditions, including a deposit of EUR 50,000 and a personal guarantee of EUR 15,000. Following two unsuccessful requests to have these sums lowered, upon his third request, on 22 February 2011 the deposit was reduced to EUR 40,000, but the personal guarantee increased to EUR 60,000. It took another two months (April 2011) for the deposit to be reduced to EUR 30,000 and the personal guarantee to EUR 15,000. The applicant finally managed to satisfy that condition and was eventually released only on 7 July 2011. The Court considers the fact that the applicant remained in custody for another twelve months after being granted bail as a strong indication that the domestic courts had not taken the necessary care in fixing appropriate bail. The Court, moreover, observes that none of the domestic courts' judgments refer to an inability to make a balanced decision on account of a lack of documentation.

123. Lastly, the Court finds it useful to highlight that had the applicant's pre-trial detention been based on relevant and sufficient reasons, the authorities would still have been required to display "special diligence" in the conduct of the

proceedings. The Court observes that after three and a half years of inquiry, two of which he spent in detention, the bill of indictment in respect of the applicant has not yet been filed, despite the warnings by the domestic courts to the prosecution to proceed with speed and diligence (see paragraphs 16 and 17 above). This has to be seen against the background of the domestic system, which provides that an inquiry shall be concluded within a month, and that such a period can be extended for two further periods of one month, upon good cause being shown. The time-line of the proceedings (at paragraph 28 above) reveals repeated hearings where only one witness was heard and repeated adjournments. It thus transpires that in the present case the authorities also failed to conduct the proceedings with the requisite diligence.

124. Accordingly, the Court considers that in the present case there has been a violation of Article 5 § 3 of the Convention."

Is-suċċint tal-prinċipji stabbiliti fil-ġurisprudenza esposta huma elenkati fil **Guide on Article 5 of the Eurpoean Convention on Human Rights: Right to Liberty and Security**[17]:-

*"**7. Bail***

222. The guarantee provided for by Article 5 § 3 of the Convention is designed to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing. Its amount must therefore be assessed principally "by reference to [the accused], his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his

[17] European Court of Human Rights: updated 31 December 2019, page 39.

non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond" (Gafà v. Malta, § 70; Mangouras v. Spain [GC], § 78; Neumeister v. Austria, § 14).".

"223 ...The authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention is indispensable (Piotr Osuch v. Poland, § 39; Bojilov v. Bulgaria, § 60; Skrobol v. Poland, § 57).

224. Furthermore, the amount set for bail must be duly justified in the decision fixing bail (Georgieva v. Bulgaria, §§ 15 and 30-31) and must take into account the accused's means (Gafà v. Malta, § 70; Hristova v. Bulgaria, § 111) and his capacity to pay (Toshev v. Bulgaria, §§ 69-73). In certain circumstances it may not be unreasonable to take into account also the amount of the loss imputed to him (Mangouras v. Spain [GC], §§ 81 and 92)."

Ikkonsidrat ulterjorment.

Illi kif ben jirrizulta kemm mir-referenza ukoll mit-trattazzjoni mressqa da parti u għar-rikorrenti l-bażi tal-lanjanza tiegħu mhux msejjsa fuq l-għoti tal-liberrta' provisorja imma marbuta mall-kundizzjonijiet imposta fl-istess digriet li skontu jagħmluha impossibbli għalih jipprevalixxi ruħhu mill-istess benefiċċju minħabba l-imposizzjoni onoruża tad-depositu personali ta' ħamsa u għoxrin elf ewro (€25,000) bir-riżultat illi r-rikorrenti baqa taħt detenzzjoni preventiva stante li huwa priv mill-flejjes hekk mitluba bħala depositu.

Jilmenta ukoll ir-rikorrenti illi nonostante varji talbiet mressqa minnu lill-Qorti kemm tal-Magistrati bħala waħda Istruttorja ukoll dik Kriminali biex jiġi ridott id-depositu mpost, anke b'offerta ta' garanzija ta' terz idoneju, l-Qorti baqgħet inadempjenti f'dan ċioe' nonostante li kellha biżżejjed provi tal-fatt li hu ma seta' qatt jasal għad-depositu mitlub. Jilmenta illi baqgħet dejjem issejjes id-digriet tagħha fuq serjeta' tar-reat u l-fatt li ma kellux irbit mall-gżejjer tagħna a kontrarju ta' obbligu li kellha li tieħu n konsiderazzjoni l-mezzi tiegħu biex tistabilixxi dak l-ammont ta' depositu jew garanzija li kienet tippermettielu jonora l-istess.

Rat illi fil-fatt l-imputat Gaetano Campailla fil-kors ta' l-Istruttorja ressaq diversi provi in sostenn tal-mezzi tiegħu biex joffri garanzija[18] għal għoti tal-liberta provisorja. Anke xhieda tal-prosekuzzjoni[19] taw dawl dwar l-istat finanzjarju ta' l-imputat bħal ammont ta' flejjes misjuba fuqu u fuq it-tfalja tiegħu. Oltre hekk sa qabel ma saret ir-referenza odjerna, korretement kif insistit id-difiza ta' l-istess Campailla, ġie presentat l-elenku dettaljat ta' dawk li kienu l-assi kollha ta' l-imputat, 'l hekk imsejjaħ Recovery Asset Report[20]

Rat ukoll id-diversi talbiet li l-istess Campailla ressaq kemm lil Qorti tal-Magistrati bħala Qorti Istruttorja ukoll lil Qorti Kriminali biex jiġi varjat id-digriet ta' l-għoti ta' liberta' provisorja n kwantu huwa ma setgħax jipprevalixxi ruħu mill-istess inkwantu ma kellux il-flejjes mituba in depositu.

Dawna dejjem ġew miċħuda.

[18] **Żijuħ** Max Genova
[19] **Maria Pristayovich u Galina Pristayovich**
[20] A fol 422 et. seq.

Iż-żewġ Qrati mxew fuq il-premess, in linea ma l-oġġezzjoni ta' l-Avukat Ġenerali, illi d-depositu mpost kien konsonanti mas-serjeta' tar-reat bil-piena maġġuri li kien iġġor miegħu u nuqqas ta' irbit li Campailla kellu ma pajjiżna. Kien biss aktar tard li sar tentattiv mill-Qorti Kriminali li jiġi rivedut dan l-ammont ta' depositu wara risposta oħra ta' l-Avukat Ġenerali għar-rikors appositu ta' l-istess imputat, fejn l-istess Avukat Ġenerali issa ikkonċeda li kien r-rikorrent li kellu juri is-somma li kien dispost jiddeposita għal għoti tal-ħelsien mill-arrest u **senjatament juri l-provenjenza ta' dan id-depositu**.[21] In vista ta' tali risposta l-Qorti Kriminali ħadet l-ispunt u ordnat li l-istess imputat jirrispondi għal kweżit ta' l-Avukat Generali kif indikat.[22] Għal dan Campailla presenta nota fejn indika li ommu Antonia Zocca kienet lesta tiddeposita s-somma ta' €5000 u ta' dan presenta il-kont bankarju ta' ommu.[23] Sussegwentement għal dan l-Avukat Ġenerali talab ċertezza li l-omm kienet tifhem l-effetti tal-pleġġ jekk ir-rikorrenti binha kien jikser xi kundizzjoni imposta fuqu. Il-Qorti Kriminali aderixxit ma dan ir-rekwisit u konsegwenza ta' hekk b'nota oħra[24] Campailla presenta dikjarazzjoni magħmula minn ommu biex juri li hija kienet qed tifhem il-konsegwenzi u obbligazzjonijiet naxxenti minn pleġġ marbut ma kundizzjonijiet ta' liberta' provisorja.[25] Għal dan l-Avukat Ġenerali rrisponda illi ġialadarba il-Qorti baqgħet inkonsapevoli tal-provenjenza tal-flejjes indikati minnn omm Campailla u ġialarba l-omm ma nġabetx għal kontro eżami[26], huwa baqa' joġġezzjona għat-talba ta' l-istess. Finalment il-Qorti Kriminali iddekretat t-talba billi qalet illi a kawża tal-gravita' tar-reat, il-konnessjoni ta' l-imputat ma dawn il-gżejjer, (jew aħjar in-nuqqas ta' l-istess) u l-possibilta' ta' ħarba in kwantu għal gravita' tal-piena, kienet qed terġa tiċħad it-talba għar riduzzjoni tad-depositu. **Imkien f'dan**

[21] Folio 822
[22]Folio823.
[23] Folio 824 et seq.
[24] Folio 829
[25] Folio 830.
[26] Pero minn imkien ma jidher li l-istess Avukat Generali talab dan il-kontro-eżami.

id-digriet ma sar xi referenza għal ammont ta' depositu kif mitlub fir-rikors mressaq pero l-Qorti għamlet referenza għal aħħar risposta ta' l-Avukat Ġenerali ġia suriferita.[27] L-imputat reġa' ttanta li jottjeni riduzzjoni tad-depositu għal darb'oħra quddiem il-Qorti tal-Magistrati, din il-Qorti wara li għamlet referenza għad-diversi digrieti tal-Qorti Kriminali kkonkludiet illi tiċħad l-istess talba. Din l-aħħar Qorti straħet dejjem fuq id-digrieti tal-Qorti Kriminali tas-17 ta' Settembru, 2019 u ta' Diċembru, 2019 [28] li kienu dejjem ritenenti l-gravita' tar-reat, nuqqas ta' konnessjoni ma dawn il-gżejjer ukoll il-possibilta' ta' ħarba u li jekk jiġi ridott l-ammont ta' depositu ma kienx jibqa biżżejjed garanzija biex l-imputat jaderixxi mad-dettami ta' l-artikolu 575 tal-kap 9 tal-Ligijiet ta' Malta.

Ikkonsidrat

Illi il-Qorti tagħmel ampja referenza għad-deċizzjonijiet hawn fuq indikati nkluż dawk li semmiet il-Qorti tal-Maġistrati fir-referenza in eżami. Huwa ċar u inkonfondibbli illi l-Qrati Ewropej, insenjament ukoll riflessi f'deċizzjonijiet tal-qrati nostrali, jimponu fuq Qorti adita b'talba ta' liberta' provisorja lli ma fatturi oħra għandha tikkonsidra l-mezzi tar-rikorrenti meta tiġi biex tiffissa d-depositu. Il-Qorti hija mitluba teżerċita' diliġenza biex tassigura l-għoti effettiv ta' liberta' provisorja. Dan l-eżami huwa impost biex l-għoti tal-ħelsien minn arrest preventiv ikun wieħed effettiv u fatibbli. Ma jservi xejn li Qorti tilqa talba għal ħelsien mill-arrest b'imposizzjoni fuq l-imputat ta' depositu għalih irraġunġibbli għaliex l-effett huwa wieħed identiku ta' negazzjoni tal-ħelsien mill-arrest preventiv. Ir-rizultat, bħal fil-każ in eżami, jkun ż-żamma ta' l-imputat f'detenzjoni. Pero daqstant ieħor jinkombi fuq ir-rikorrenti li meta javvanza tali talba lli jforni lil Qorti b'kull prova li tagħti stampa ċara ta' dak il-piż finanzjarju

[27] Folio 834
[28] Folio 834 u 875 rispettivament

li jista jservi biex għalih jkun ta' deterrent vera li ma jonorax il-kundizzjonijiet fuqu imposti fid-digriet appositu. Bla tlaqliq il-Qorti tara li Campailla naqas f'dan l-obbligu. Għalkemm debitament ressaq lil ommu biex toffri pleġġ fis-somma ta' ħamest'elef ewro u presenta dikjarazzjoni tagħha li hi kienet qed tifhem il-konsegwenzi legali ta' tali pleġġ, pero għar-raguni injota baqa ma ressaq ebda prova li ġiet lilu mitluba tal-provenjenza tal-flejjes offruti. Din kienet prova li kienet biss tinkombi fuqu u darba li ġiet mitluba lilu l-Qorti ma kellhiex għalfejn terga tfakkru fl-istess. Fil-fatt bl-aġir tiegħu huwa fixkel lil Qorti milli tagħmel *"a balanced decision"*[29] fil-konfront tat-talba tiegħu. Isib fjakk ir-risposta mogħtija lilha fit-trattazzjoni, wara domanda speċifika fir-rigward tal-Qorti, illi tali prova ta' provenjenza ma tresseqtx għaliex kien ċar li l-omm kienet tiperċepixxi biss pensjoni. U dan jingħad aktar u aktar fid-dawl li din il-persuna ma nġabet qatt biex tisottometti ruħha għal kontro-eżami.

Pero fid-dawl ta' dana kollu suespost u wara li rat id-dgrieti li bihom ġiet miċħuda it-talba għar-riduzzjoni tad-depositu impost, l-Qorti tiddisponi mir-referenza billi ssib illi l-kundizzjonijiet imposti fuq l-imputat Gaetano Campailla in kwantu għad-depositu onoruz ta' €25,000 huwa tali li pprekludih u qed jipprekludih milli jibbenefika mill-ħellsien mill-arrest u dan bi ksur ta' l-artikolu 5(3) tal-Konvenzjoni Ewropea ukoll ta' l-artikolu 34 tal-Kostituzzjoni ta' Malta.

Tordna li l-atti jintbghatu lura lill-Qorti referenti sabiex tiehu konjizzjoni tal-istess.

Bl-ispejjez għal Avukat Generali.

[29] Mikalauskas ibid.

Onor. Miriam Hayman

Imhallef

Victor Deguara

Deputat Registratur