QORTI TAL-APPELL KRIMINALI (SEDE INFERJURI)

ONOR.IMHALLEF EDWINA GRIMA LL.D.

Seduta ta 3 ta' Lulju, 2020

Appell numru 259/2015

Il-Pulizija

(Assistent Kummissarju Norbert Ciappara)

Vs

Marouska Azzopardi

Il-Qorti,

Rat l-akkuzi dedotti kontra l-appellanti akkuzata quddiem il-Qorti tal-Magistrati (Malta) talli fit-22 ta' Ottubru 2004 u matul l-ahhar erba' gimghat qabel din id-data:

a) Forniet jew ipprokurat jew offriet li tforni jew li tipprokura d-droga erojina, specifikata fl-ewwel skeda tal-Ordinanza dwar il-Medicini Perikoluzi Kap. 101 tal-Ligijiet ta' Malta lill-persuna jew persuni jew ghall-uzu ta' persuna jew persuni minghajr ma kellha licenzja millPresident ta' Malta, u minghajr ma kienet awtorizzata bir-regoli tal-1939 ghall-Kontroll Intern tad-Drogi Perikoluzi (G.N. 292/1939), jew minn xi awtorita` moghtija mill-President ta' Malta, li tforni d-droga u minghajr ma kienet fil-pussess ta' awtorizzazzjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mit-Tabib

Principali tal-Gvern, skond id-disposizzjonijiet tas-sitt Taqsima tal-Ordinanza msemmija, u minghajr ma kellha licenzja jew kienet xort'ohra awtorizzata li timmanifattura jew tforni d-droga msemmija u minghajr ma kellha licenzja li tipprokura l-istess droga u dan bi ksur tar-regolament 4 tar-Regolamenti tal-1939 ghall-Kontroll Intern tad-Drogi Perikoluzi (GN 292/1939), kif sussegwentement emendati u bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi, Kap 101 tal-Ligijiet ta' Malta;

b) Kellha fil-pussess taghha d-droga erojina specifikata fl-ewwel skeda tal-Ordinanza dwar il-Medicini Perikoluzi Kap. 101 tal-Ligijiet ta' Malta lill-persuna jew persuni jew ghall-uzu ta' persuna jew persuni minghajr ma kellha licenzja mill-President ta' Malta, u minghajr ma kienet awtorizzata bir-regoli tal-1939 ghall-Kontroll Intern tad-Drogi Perikoluzi (G.N. 292/1939), jew minn xi awtorita` moghtija mill-President ta' Malta, li tforni d-droga u minghajr ma kienet fil-pussess ta' awtorizzazzjoni ghall-importazzjoni jew ghall-esportazzjoni mahrug mit-Tabib Principali talGvern, skond id-disposizzjonijiet tas-sitt Taqsima tal-Ordinanza msemmija, u minghajr ma kellha licenzja jew kienet xort'ohra awtorizzata li timmanifattura jew tforni d-droga msemmija u minghajr ma kellha licenzja li tipprokura l-istess droga u dan bi ksur tar-regolament 4 tar-Regolamenti tal-1939 ghall-Kontroll Intern tad-Drogi Perikoluzi (GN 292/1939), kif sussegwentement emendati u bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi, Kap 101 tal-Ligijiet ta' Malta, liema droga instabet f'tali cirkostanzi li juru li ma kinitx ghall-uzu esklussiv taghha;

c) Bhala persuna li m'hijiex ufficjal tal-habs jew persuna ohra mpjegata fil-habs, minghajr awtorita` legittima dahhlet jew ippruvat iddahhal f'xi parti mill-konfini tal-Habs oggett (droga) ikun li jkun, li huwa projbit skond xi regolamenti maghmula skond l-Att dwar il-Habs u dan bi ksur talArtikolu 7(1), (2) tal-Kap. 260 tal-Ligijiet ta' Malta.

Rat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali tal-15 ta' Mejju 2015 fejn wara li rat it-Taqsimiet IV u VI, l-Artikoli 22(1)(a), 22(2)(b)(i) u 29 tal-Kap. 101 tal-Ligijiet ta' Malta, ir-Regolamenti 4 u 9 tal-Legislazzjoni Sussidjarja 101.02, l-Artikolu 7(2) tal-Kap. 260 tal-Ligijiet ta' Malta u l-Artikolu 17(h) tal-Kap. 9, sabet lill-imputata hatja tal-imputazzjonijiet migjuba kontra taghha u kkundannatha ghal piena ta' seba' (7) xhur prigunerija effettiva u multa ta' sitt mitt Euro (€600) li, bl-applikazzjoni tal-Artikolu 14(2) tal-Kap. 9 tal-Ligijiet ta' Malta, tista' tithallas b'rati mensili u konsekuttivi ta' hamsin Euro (€50), bl-ewwel pagament isir fi zmien xahar

mid-data li fiha l-hatja tiskonta l-piena karcerarja li giet erogata bis-sentenza u ghal dan il-ghan, ir-Registratur ghandu jivverifika din id-data mal-awtoritajiet karcerarji. Pero` jekk il-hatja tonqos li thallas din is-somma jew parti minnha fiz-zmien lilha preskritt, il-bilanc jigi dovut minnufih u jigi konvertit fi prigunerija skond il-ligi. Il-Qorti ma kkundannatx lill-hatja ghall-hlas tal-ispejjez konnessi mar-relazzjoni tal-esperti ai termini tal-Artikolu 533 tal-Kap. 9 tal-Ligijiet ta' Malta, stante illi fl-ewwel lok, in kwantu jirrigwarda l-ispejjez tal-espert l-Ispizjar Mario Mifsud, l-istess espert kien gie nominat fl-istadju tal-inkjesta relevanti ghal dan il-kaz u r-reati in kwistjoni sehhew qabel id-dhul fis-sehh tal-Att XIII tal-2005, li emenda l-imsemmi artikolu billi fost ohrajn gew inkluzi wkoll l-ispejjez konnessi mal-esperti li jkunu gew mahtura fl-istadju tal-process verbal tal-inkjesta u fit-tieni lok, in kwantu jirrigwarda l-ispejjez konnessi mal-espert mahtur f'dawn il-proceduri, ossia David Scicluna, lanqas ma saret talba ghall-hlas ta' tali spejjez da parti tal-prosekuzzjoni, kif kienet trid il-ligi qabel l-emendi msemmija. Ordnat d-distruzzjoni tad-droga, esebita flimkien mar-relazzjoni tal-Ispizjar Mario Mifsud hekk kif din is-sentenza tghaddi in gudikat, u dan taht il-harsien tar-Registratur li ghandu jirredigi proces-verbal li jiddokumenta l-procedura tad-distruzzjoni, liema dokument ghandu jigi nserit fl-atti ta' din il-kawza mhux aktar tard minn hmistax-il jum minn tali distruzzjoni. Dan sakemm fi zmien hamest ijiem, l-Ufficjal Prosekutur ma jinformax lill-Qorti, permezz ta' nota, illi huwa necessarju illi din id-droga tigi prezervata ghal skop ta' xi proceduri ohrajn kontra terzi, b'dan illi f'dan il-kaz, ir-Registratur ghandu jirrapporta lill-Qorti, b'verbal, meta din id-droga tkun giet hekk distrutta.

Rat ir-rikors tal-appell ta'l-imputata Marouska Azzopardi pprezentat fid-19 ta' Mejju 2015 fejn tallbet lil din il-Qorti tirriforma s-sentenza appellata billi tikkonferma dwar l-ewwel u t-tieni akkuza bl-assorbiment tat-tieni fl-ewwel kif deciz mill-Qorti tal-Magistrati, tirrevokaha ghat-tielet akkuza konsegwentement taghti dawk l-ordnijiet skond l-artikolu 8 tal-Kap.537 u fi kwalunkwe kaz tibdilha dwar il-piena billi taghti wahda illi aktar taghmel ghal kaz.

Rat il-verbal tas-seduta tat-08 ta' Mejju 2019 fejn gew imqanqla aggravji godda fil-mori tal-appell u cioe':

1. in-nuqqas ta' valur probatorju tal-istqarrija rilaxxjata mill-appellanti fit-22 ta' Ottubru 2004.

2. in-nuqqas ta' valur probatorju tal-i*strip search* li saret fuq l-appellanti billi din ma saritx in konformita' mal-ligi u dan fid-dawl ta' dak deciz fl-appell "Il-Pulizija vs Claire Farrugia" deciz fl-20 ta' Novembru 2018 minn din il-Qorti kif diversament ippresjeduta.

Rat il-verbal tas-seduta tat-18 ta' Settembru 2019 fejn l-appellanti tallbet illi l-Qorti tghaddi ghas-sentenza limitatament fuq l-ewwel aggravju kontenut fir-rikors ta'l-appell u l-aggravji l-godda mqanqla minnha kif inghad.

Rat l-atti u d-dokumenti kollha.

Rat il-fedina penali aggornata tal-appellanti esebita mill-prosekuzzjoni fuq ordni tal-Qorti.

Semghet trattazzjoni limitatament fuq dawn l-aggravji.

Rat il-verbal tas-seduta tat-28 ta' Frar 2020 fejn l-Qorti halliet l-appell ghas-sentenza fuq l-ewwel aggravju kontenut fir-rikors ta'l-appell u l-aggravji l-godda mqanqla mill-appellanti.

Ikkunsidrat,

Illi l-ewwel aggravju imqanqal fir-rikors tal-appell huwa marbut limitatament mat-tielet imputazzjoni migjuba kontra l-appellanti u li dwarha hija giet misjuba hatja. Dan ghaliex fil-fehma tal-appellanti ma hemmx prova in atti illi l-lok fejn hija giet mizmuma mill-gwardjani tal-habs fejn giet misjuba d-droga fuqha jifforma parti mill-bini tal-Facilita Korrettiva ta' Kordin u ghalhekk ma jinkwadrax ruhu fir-reat mahsub fl-artikolu 7(1)(2) tal-Kapitolu 260 tal-Ligijiet ta' Malta. Illi fil-mori tal-appell l-appellanti tqanqal ilment iehor meta ssostni illi l-i*strip search* li saret fuqha mill-ufficjali tal-habs kienet wahda illegali billi hija ma gietx moghtija twissija qabel ma saret it-tfittxija fuq il-persuna taghha u cioe' it-twissija illi hija kellha dritt tirrifjuta taghmel dak li kien qed jigi ordnat mill-ufficjali tal-habs. Illi dawn iz-zewg aggravji huma marbuta mat-talba kontenuta fir-rikors tal-appell ghar-revoka tas-sentenza appellata fejn din sabet lill-appellanti hatja tat-tielet imputazzjoni migjuba kontra taghha.

Illi l-Qorti *in primis* ser titratta dawn l-aggravji qabel ma tinoltra ruhha fl-aggravju ulterjuri imqanqal mill-appellanti dwar l-inammissibilita' ta'l-istqarrija minnha rilaxxjata lill-pulizija lura fis-sena 2004. Illi qabel xejn il-Qorti ma tistax ma tosservax illi dawn l-ilmenti ventilati mill-appellanti qatt ma ingiebu a konjizzjoni ta'l-Ewwel Qorti u kwindi lanqas biss jiffurmaw il-mertu tad-decizjoni appellata. Dan qed jinghad ghaliex gjaldarba din il-linja difensjonali qatt ma giet imqanqla in prim'istanza allura l-provi li hemm in atti fir-rigward ta' dak li sehh mill-mument li l-appellanti xirfet fuq l-ghatba tal-Facilita Korrettiva ta' Kordin ma humiex indirizzati sabiex jitrattaw dawn iz-zewg ilmenti. Fil-fatt anke fil-kors tas-sottomissjonijiet finali maghmula mid-difensur tal-appellanti quddiem l-Ewwel Qorti dawn jitrattaw biss il-*quantum* u n-natura tal-piena u xejn izjed. Dan qed jinghad ghaliex issa fi stadju ta' revizjoni il-Prosekuzzjoni tinsab fl-impossibilita' li tilqa' ghal din il-linja difensjonali billi l-provi issa huma maghluqa u ma jistghux jitressqu provi godda marbuta mal-istess.

Dan maghdud, il-Qorti xortawahda ezaminat mill-gdid l-atti tal-kawza bil-ghan li jigu trattati l-ilmenti mqanqla mill-appellanti u dan unikament sa fejn dawn jistghu jimpingu fuq id-dikjarazzjoni ta' htija ghat-tielet imputazzjoni.

Illi minn ezami tal-atti ghandu jirrizulta illi fit-22 ta' Ottubru 2004, meta l-appellanti kienet diehla gewwa l-Facilita Korrettiva ta' Kordin sabiex taghmel vizta lil prigunier Jason Zammit hija giet mitluba tissottoponi ruhha ghal tfittxija (*strip search*) billi kien hemm suspett illi kienet ser idahhal xi droga gewwa l-Facilita'. Din it-tfittxija saret minn WCO1 Karen Grech u WCO28 Teresa Agius. PC477 Julian Saliba li kien inkarigat jissorvelja dawn il-vizti kien gie avzat mis-superjuri tieghu illi kien hemm suspett li l-appellanti kienet ser idahhal id-droga ghal prigunier Zammit li f'dak iz-zmien kien is-sieheb taghha.

Fil-fatt mit-tfittxija irrizulta illi l-appellanti kellha fil-pussess taghha 0.653 gramma erojina ta' purita' ta' 42% u dan kif stabbilit mill-espert mahtur fl-*in genere* l-Ispizjar Mario Mifsud. Illi WCO 28 Teresa Agius tghid li hija kienet ordnata taghmel *strip search* mis-superjuri taghha flimkien ma' WCO1 fuq Marouska Azzopardi, ghalkemm ma tindikax min taha din l-ordni. Tghid hekk fuq id-dinamika tat-tfittxija:

> *"Hekk kif wasalna fin-naha tal-parti ta' isfel taghha, ... jien tbaxxejt u deher li rajt xi haga fil-parti taghha. Ghiditilha biex tiftah saqajha u dak il-hin stess waqa' u kien hemm pakkett trab ta' lewn beige."*

Illi mill-verbal tas-seduta tas-27 ta' Mejju 2014 gie dikjarat hekk mid-difiza u dana wara li l-Prosekuzzjoni ghalqet mill-provi taghha u wara li l-istess Prosekuzzjoni ddikjarat illi l-appellanti ghandha tibbenfika mir-riduzjoni fil-piena kif mahsub fl-artikolu 29 tal-Kapitolu 101 tal-Ligijiet ta' Malta:

> *"Id-difiza tiddikjara li m'ghandhiex kontro-ezamijiet x'taghmel fir-rigward tax-xhieda tal-prosekuzzjoni u tixtieq tressaq biss provi ghal fini ta' piena"*

Illi imbaghad fil-kors tat-trattazzjoni finali li saret quddiem l-Ewwel Qorti fit-12 ta' Novembru 2014 id-difensur tal-appellanti llimita s-sottomissjonijiet tieghu ghal piena u ma jidhirx illi giet imqanqla xi linja difensjonali, u allura xi kontestazzjoni dwar il-mertu, b'mod specjali dwar l-illegalita' tat-tfittxija li saret fuq l-appellanti, il-lok fejn saret u minn fejn emaniet l-ordni sabiex issir l-istess, argumenti li kollha gew imqanqla biss issa fi stadju ta' revizjoni. Dan maghdud, il-Qorti xortawahda hija marbuta bit-talba kontenuta fir-rikors tal-appell fejn l-appellanti qieghda titlob il-konferma ghas-sejbien ta' htija dwar l-ewwel u t-tieni imputazzjonijiet izda biss r-revoka ghat-tielet imputazzjoni li titkellem dwar ir-reat mahsub fl-artikolu 7 tal-Kapitolu 260 tal-Ligijiet ta' Malta u dan jidher li sehh unikament sabiex il-Qorti tkun tista' tqies l-applikazzjoni tal-artikolu 8 tal-Kapitolu 537 meta tigi biex tikkunsidra l-aggravju dwar il-piena. Dan ifisser ghalhekk illi anke jekk *gratia argomenti* din il-Qorti kellha tilqa' dawn l-aggravji godda, madanakollu xortawahda ma tistax tbiddel id-decizjoni tal-Ewwel Qorti fejn din sabet lill-appellanti hatja tar-reat ta' traffikar u pussess aggravat tad-droga erojina billi l-appellanti qed titlob il-konferma ta' dik il-parti tas-sentenza appellata.

Illi mill-fatti probatorji jemergu s-segwenti punti:

1. Illi l-appellanti kienet dahhlet gewwa il-kumpless tal-Facilita Korrettiva ta' Kordin fejn hemmhekk hija ipprezentat ruhha sabiex taghmel vizta lil prigunier Jason Zammit.

2. Illi kien hemm suspett illi l-appellanti kienet ser iddahhal id-droga gewwa il-habs u dan minn kuntatti li l-ufficjali indunaw li kienet ghamlet ma' persuna ohra qabel ma kienet diehla.

3. Illi giet ordnata li ssir *strip search* fuq il-persuna tal-appellanti ghalkemm ma jigix indikat min ta din l-ordni. Dan il-fatt qatt ma gie kkontestat mill-appellanti.

4. Din it-tfittxija saret minn zewg gwardjani nisa fil-privat u cioe' minn WCO1 u WCO 28.

5. Illi dawn il-gwardjani fl-ebda hin ma ghamlu xi tfittxija interna billi lanqas biss intmesset il-persuna tal-appellanti li meta giet ordnata biex tiftah saqajha waqa' wahdu fl-art l-oggett li kellha fil-parti intima taghha.

6. Ma hemm l-ebda prova dwar x'diskors inghad lill-appellanti fil-hin li ippreceda t-tfittxija u cioe' jekk hija gietx avzata li setghet tirrifjuta toqghod ghal din it-tfittxija.

7. Illi s-suspett li kien hemm fuq il-persuna ta' Azzopardi kien fondat billi, kif inghad, instabet id-droga fuq il-persuna taghha kosnistenti fl-erojina.

Ikkunsidrat:

Issa l-appellanti tqies illi l-prova maghmula permezz tal-i*strip search* li saret fuq il-persuna taghha qabel ma dahhlet sabiex taghmel il-vizta gewwa il-Facilita tal-prigunier Jason Zammit hija prova inammissibbli billi saret kontra l-ligi. Issa hija prassi adottata mill-gurisprudenza illi prova ma titqiesx li hija inammissibbli sakemm ma jkunx hemm xi disposizzjoni espressa tal-ligi li tipprekludi l-ammissjoni ta' dik il-prova. Illi allura il-Qorti trid timxi b'cirkospezzjoni kbira sabiex tqies jekk il-prova li l-persuna akkuzata tkun qed tfittex li xxejjen tmurx kontra l-ispirtu tal-ligi li tirregola l-valur probatorju jew l-ammissibbilita` taghha.

Issa l-allegata illegalita' ta'l-i*strip search,* fil-fehma tal-appellanti, hija imsejsa fuq zewg nuqqasijiet, bl-ewwel wahda tkun dik li hija nieqsa l-prova li din giet ordnata mid-Direttur tal-Habs jew xi delegat tieghu u fit-tieni lok illi hija qatt ma giet imwissija li tista' taghzel tirrifjuta li tobdi dik l-ordni. Dak li qed timplika allura l-appellanti hija li din il-prova ittiehdet illegalment jew kontra l-ligi u tikkostitwixxi 'l hekk imsejjah *fruit from the poisonous tree*, regola li fid-dritt penali twassal ghall-eskluzjoni ta' evidenza mill-proceduri.

Illi mix-xhieda tal-ufficjali tal-Facilita Korettiva ta' Kordin jidher illi t-tfittxija li saret fuq il-persuna tal-appellanti sehhet qabel ma giet awtorizzata taghmel vizta lil prigunier, awtorizazzjoni li trid temani mid-Direttur tal-Habs. Dan ghaliex malli vizitatur jirfes l-ghatba tal-Facilita', u dan minn jeddu u b'mod volontarju bhala vizitatur, huwa jrid

joqghod ghall-awtorita tad-Direttur tal-Habs. Illi r-regolament 58 tal-Legislazzjoni sussidjarja 260.03 jiddisponi illi:

> **(1) Kull persuna li tkun waslet biex izzur prigunier ghandha tikxef l-identità taghha lill-ufficjal tal-habs responsabbli.**
> **(2) Id-Direttur jista' jordna li ssir tfittxija fuq kull persuna li tkun waslet biex izzur prigunier. Dik it-tfittxija ghandha ssir minn ufficjal tal-habs ta' l-istess sess bhall-vizitatur u ghandha tigi dokumentata fir-registru msemmi fir-regolament 52(9).**
> **(3) Kull persuna li tirrifjuta li tikxef l-identità taghha jew li toqghod ghal ordni tad-Direttur skond is-subregolament (2) ghandha tigi michuda permess biex taghmel iz-zjara.**
> **(4) Il-kazijiet kollha li fihom zjara tigi michuda taht is-subregolament ta' qabel dan ghandhom jigu dokumentati fir-registru msemmi fir-regolament 52(9)**

Illi ma huwiex kontestat illi hekk kif l-appellanti dahhlet gewwa l-Facilita' giet ordnata li issirilha *strip search*. Dan il-fatt qatt ma gie kkontestat quddiem l-Ewwel Qorti kif inghad. Jidher mix-xhieda tal-ufficjali tal-Facilita' li xehdu f'dawn il-procedura illi din l-i*strip search* giet ordnata li ssir billi kien hemm suspett illi l-appellanti kienet ser tipprova iddahhal xi oggetti pprojbiti gewwa l-habs. Illi l-ligi taghti s-setgha lil kull vizitatur li jirrifjuta kemm li jaghti l-identita' tieghu kif jigi mitlub illi jaghmel, kif ukoll li jirrifjuta joqghod ghat-tfittxija li tigi ordnata li ssir fuq il-persuna tieghu/taghha. Il-konsegwenza ta' tali rifjut hija illi dak il-vizitatur jigi mcahhad mid-Direttur li jaghmel dik il-vizta lil prigunier kif mitlub. Ma hemm l-ebda konsegwenza ohra ta' natura penali jew inkriminatorja. Dan ifisser illi l-i*strip search* li saret ma saritx b'xi mezzi kontra il-ligi, ghaliex il-ligi stess taghti s-setgha lid-Direttur tal-Habs illi jaghmel l-ispezzjonijiet li jidhirlu li huma mehtiega. Illi *di piu'* l-ligi lanqas ma tipprovdi dwar xi twissija li ghandha tinghata lil vizitatur qabel ma ssirlu din it-tfittxija u, allura, jekk il-vizitatur ikun jixtieq izur lil prigunier huwa jrid joqghod ghall-ordni lilu moghtija jew jigi mcahhad lilu l-jedd li jaghmel il-vizta. Illi *a contrario senso*, allura, din ir-regola tfisser illi kull vizitatur qatt ma jista' jigi mgieghel mill-awtoritajiet tal-Habs la li jikxef l-identita' tieghu u lanqas li joqghod ghal xi tftittixija li tista' tigi mitluba li ssirlu.

Illi kienu diversi d-decizjonijiet moghtija mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem dwar jekk tezistiex xi lezjoni ta' xi dritt fondamentali meta jsiru dawn it-tfittxijiet intimi, kemm fir-rigward tal-prigunier innifsu u anke fir-rigward tal-vizitatur. Illi fil-fatt abbazi ta' dawn id-decizjonijiet il-Kunsill tal-Ewropa harrget 'l hekk imsejha ***European***

Prison Rules (2006) (sussegwentement emendati) dwar fost ohrajn regoli li ghandhom jigu mharsa meta jsiru tfittxijiet fuq vizitaturi fejn hemm rakkomandat:

> ***"Searching and controls***
> **54.1 There shall be detailed procedures which staff have to follow when searching:**
> **…**
> **c. visitors and their possessions;**
> **54.2 The situations in which such searches are necessary and their nature shall be defined by national law.**
> **54.3 Staff shall be trained to carry out these searches in such a way as to detect and prevent any attempt to … hide contraband, while at the same time respecting the dignity of those being searched and their personal possessions.**
> **54.4 Persons being searched shall not be humiliated by the searching process.**
> **54.5 Persons shall only be searched by staff of the same gender.**
> **…**
> **54.7 An intimate examination related to a search may be conducted by a medical practitioner only.**
> **…**
> **54.9 The obligation to protect security and safety shall be balanced against the privacy of visitors.**
> **54.10 Procedures for controlling professional visitors, such as legal representatives, social workers and medical practitioners, etc., shall be the subject of consultation with their professional bodies to ensure a balance between security and safety, and the right of confidential professional access.**

Dawn ir-regoli gew moghtija din it-tifsira:

> **“This rule lays down that in each prison there should be a clearly understood set of procedures which describe in detail the circumstances in which searches should be carried out, the methods to be used and their frequency. These procedures must be designed to prevent escape and also to protect the dignity of prisoners and their visitors.**
>
> **There should be clearly defined procedures for making sure that visitors to prisoners do not attempt to breach reasonable security requirements, for example, by bringing into the prison articles that are not allowed. These procedures may include the right to search visitors in person while taking into consideration that visitors are not themselves prisoners and that the obligation to protect the security of the prison has to be balanced against the right of visitors to their personal privacy. The procedures for searching women and children need to be sensitive to their needs, for example, by ensuring that a sufficient proportion of staff carrying out**

searches is female. Personal searches should not be carried out in public view[1].

Illi d-decizjonijiet moghtija mill-Qorti Ewropeja, jitrattaw kazijiet dwar vjolazzjoni tal-artikoli 3 u 8 tal-Konvenzjoni u huma konsoni fil-fehma illi it-tfittxija intima li issir permezz ta' *strip search* fil-konfront ta' prigunier, suspettat jew vizitatur fiha innifisha ma hijiex kontra l-ligi basta li jkun hemm l-element ta' proporzjonalita bejn is-sigurta' li t-tfittxija qed tfittex li thares u r-rispett lejn id-dinjita u d-dritt ghall-privatezza tal-individwu soggett ghal tali tfittxija. Dawn iridu isiru minghajr intimidazzjoni jew theddid, bit-tfittxija ssir minn mhux aktar minn zewg ufficjali tal-istess sess tal-persuna sottoposta ghat-tfittxija, u f'post privat. Imkien ma jirrizulta li ghandu jinghata xi jedd ulterjuri lil tali persuna fosthom il-jedd li tigi imwissija li hemm id-dritt ghar-rifjut fil-kaz tal-vizitatur. Dan ghaliex it-tfittxija trid tkun wahda necessitata mic-cirkostanzi li jfittxu, kif inghad, biex tithares is-sigurta tal-prigunieri u tan-nies kollha fil-habs.

Jinghad hekk fil-kaz **Milka vs il-Polonja** deciz fil-15 ta' Settembru 2015[2]

> ***"According to the settled case law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate pursued aim. The Court emphasized that whilst strip searches may be necessary on occasions to ensure prison security or to prevent disorder in prisons, they must be conducted in an appropriate manner."***

Ukoll fid-decizjoni **Frerot vs France**, iccitata mill-appellanti stess fin-nota ta' sottomissjonijiet, jinghad:

> ***"The Court considered that on the whole the above procedure, including visual inspection of the anus "in the specific case of a search for prohibited objects or substances", was appropriate, provided that such a measure was permitted only where absolutely necessary in the light of the special circumstances and where there were serious reasons to suspect that the prisoner was hiding such an object or substance in that part***

[1] https://rm.coe.int

[2] Fourth section 14322/12. ara ukoll Julin vs Estonia (2012); Ciupercescu vs Romania(2010), Wieser vs Austria (27/02/2007).

of the body. The Court accordingly took the view that that body-search procedure was not, generally speaking, inhuman or degrading[3].

Illi forsi l-aktar kaz li jattalja mal-fattispecje tal-kaz odjern huwa dak fl-ismijiet **Wainwright & Son vs The United Kingdom** li kien jikkoncerna *strip search* fuq omm u binha li kienu dehlin gewwa il-habs jaghmlu vizta lil prigunier li kien l-iben u hu l-vizitaturi:

"the Court considers that the searching of visitors may be considered as a legitimate preventive measure. It would emphasise nonetheless that the application of such a highly invasive and potentially debasing procedure to persons who are not convicted prisoners or under reasonable suspicion of having committed a criminal offence must be conducted with rigorous adherence to procedures and all due respect to their human dignity."

Esposti dawn il-principji gurisprudenzjali ewropej,u applikati ghal kaz in dizamina ghandu johrog illi kuntrarjament ghal dak allegat mill-appellanti ma hemm xejn illegali fl-i**strip search** li saritilha. Mhux biss jidher illi kien hemm ordni valida sabiex din issehh, gjaldarba din qatt ma giet ikkontestata u jixhdu dwarha l-ufficjali kollha tal-Habs, izda jidher illi din l-ordni harrget wara li kien hemm suspett ragjonevoli li l-appellanti kienet ser iddahhal id-droga gewwa il-Facilita', suspett li *del resto* kien wiehed ben fondat. Illi mhux biss, izda din it-tfittxija saret fil-privat minn zewg gwardjani tal-istess sess fejn l-oggett waqa' wahdu mal-art minghajr ma kien hemm xi ezami intern, u li minn dak il-mument l-appellanti giet moghtija d-drittijiet taghha skont il-ligi vigenti f'dak iz-zmien tant illi sahansitra ghazlet li tikkopera mal-pulizija fil-kors tal-investigazzjonijiet u anke ibbenefikat mill-applikazjoni tal-artikolu 29 tal-Kapitolu 101 tal-Ligijiet ta' Malta.

Illi d-Direttur tal-Habs ghandu s-setgha skont il-ligi jitlob li jsiru dawk it-tfittxijiet li huma mehtiega sabiex tithares is-sigurta' gewwa il-Facilita'. Fuq kollox il-ligi taghti il-jedd lil vizitatur li jirrifjuta kemm li jaghti l-identita' tieghu kif ukoll li joqghod ghat-tfittxija li tintalab li ssirlu minghajr ma l-ligi tinnecessita' illi dan ghandu jinghata twissija minn qabel li ghandu dritt li jirrifjuta jaghmel dan. Illi anke jekk *gratia argomenti* l-Qorti kellha taghti ragun lill-appellanti, il-fatt illi t-twissija ma tinghatax ma jirrendiex it-tfittxija li ssir

[3]70204/01 – chamber judgment 12/06/2007

sussegwentment bhala wahda illegali dment li jigu osservati d-drittijiet l-ohra tal-vizitatur kif hawn fuq elenkati.

Illi l-appellanti ma tistax tqabbel dan il-jedd ghat-twissija dwar ir-rifjut ma' dak li jinghata qabel ma jsir it-test tan-nifs fil-ligijiet dwar it-traffiku, kif qed tippretendi, ghaliex f'dik il-ligi ir-rifjut awtomatikament jissarraf f'reat, haga li ma jirrizultax f'dan il-kaz billi l-uniku konsegwenza li jimporta r-rifjut, kif inghad, huwa li l-vizitatur jigi imcahhad mil-vizta lil prigunier u xejn izjed. Dan ifisser allura illi lanqas ma tinsorgi l-lezjoni tad-dritt kontra l-awto-inkriminazzjoni kif jikkontendi l-abbli difensur tal-appellanti.

Illi fid-decizjoni tal-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem fl-ismijiet **Saunders vs the United Kingdom** jinghad hekk:

> ***68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention (art. 6), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6) (see the above-mentioned John Murray judgment, p. 49, para. 45, and the above-mentioned Funke judgment, p. 22, para. 44). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (art. 6-2).***
>
> ***69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing[4]."***
> (sottolinjar tal-Qorti)

Ghaldaqstant dan l-aggravju qed jigi michud b'dan ghalhekk illi it-tfittxija li saret fuq il-persuna tal-appellanti kienet wahda li saret skont il-ligi.

[4] 17/12/1996 – 19187/91 Grand Chamber

Ikkunsidrat:

Illi lanqas m'ghandha ragun l-appellanti fl-ewwel aggravju minnha intentat meta tishaq illi l-post fejn hija giet mizmuma ma jifformax parti mill-konfini tal-Habs. Tikkoncedi izda li l-lok fejn giet ezaminata tikkonsisti f'bini li jinsab fil-Facilita Korrettiva ta' Kordin, izda ma kienx jikkonsisti fil-lok fejn jigu mizmuma l-prigunieri u allura kien ghad ma hemmx il-possibilita li jsir il-kuntatt mal-prigunier. Illi il-Qorti mal-ewwel tistqarr illi dan l-aggravju jirrazenta l-fieragh gjaldarba l-appellanti stess tikkoncedi illi hija kienet tinsab fil-konfini tal-Facilita Korrettiva ta' Kordin.

Illi l-artikolu 2 tal-Kapitolu 260 jaghti definizzjoni tal-kelma "habs" bhala li tfisser "il-Ħabs ta' Kordin u tinkludi kull post jew bini ieħor li hu dikjarat jew li jitqies li hu ħabs skont id-disposizzjonijiet tal-artikolu 3", biex b'hekk l-ambjenti kollha gewwa il-Facilita Korrettiva ta' Kordin ghandhom jitqiesu bhala parti mill-konfini tal-habs. Illi anke jekk *gratia argomenti* il-Qorti kellha tikkoncedi illi l-appellanti ghandha ragun, il-htija ghar-reat mahsub fl-artikolu 7 tal-Kapitolu 260 jippostula c-cirkostanza mhux biss meta l-oggett ipprojbit jiddahhal gewwa il-habs, izda ukoll meta isir attentat biex dan isehh, kif fil-fatt gara f'dan il-kaz.

> **"Meta xi persuna, li ma tkunx uffiċjal tal-ħabs jew persuna oħra mpjegata fil-ħabs, mingħajr l-awtorità leġittima, iddaħħal <u>jew tipprova ddaħħal f'xi parti tal-konfini ta' ħabs</u> xi oġġett ikun li jkun li hu pprojbit ...." (**sottolinjar tal-Qorti)

Kwindi anke dan l-aggravju qed jigi michud.

Ikkunsidrat:

Illi l-appellanti f'aggravju iehor imqanqal fil-mori tal-appell tistieden lil Qorti tiskarta l-istqarrija minnha rilaxxjata lill-pulizija meta hija giet interrogata lura fit-22 ta' Ottubru 2004 bhala prova in atti billi ma kienx inghata lilha l-jedd li tkun assistita minn avukat jew inkella li tiehu parir legali qabel ma giet interrogata. Illi l-Ewwel Qorti madanakollu qieset dina l-istqarrija bhala prova in atti meta kienet tal-fehma illi l-appellanti ma kenitx persuna vulnerabbli, ma kenitx l-ewwel darba li giet arrestata u interrogata u anke ghazlet li ma twegibx ghal xi mistoqsijiet li sarulha sabiex b'hekk kien jidher car illi

fhiemet it-twissija li kienet giet moghtija u cioe' li kellha d-dritt ma twegibx ghal dawk il-mistoqsijiet li setghu jinkriminawha.

Issa din il-Qorti, kif ippresjeduta kellha diga' okkazjoni tesprimi ruhha fir-rigward u dan referribilment ghal dawk l-istqarrijiet rilaxxjati qabel Frar tas-sena 2010, billi l-ligi dak iz-zmien kienet tipprekludi lil persuna arrestata milli tiehu parir legali qabel ma tigi interrogata bil-konsegwenza allura li kien hemm il-perikolu li tinkrimina ruhha ghaliex l-istqarrija kienet titqies bhala prova regina fil-proceduri penali li jigu istitwiti sussegwentement. Illi tali fehma kienet imsejsa fuq il-linja mehuda mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem fil-kaz "**Borg vs Malta**" fejn sa dak iz-zmien d-decizjonijiet kienu kollha konsoni fil-konkluzjoni taghhom illi jkun hemm vjolazzjoni ta'l-artikolu 6(3)(c) tal-Konvenzjoni kull meta persuna arrestata u interrogata ma tkunx inghatat assistenza legali qabel ma tigi assoggettata ghall-interrogazzjoni fejn tista' tinkrimina ruhha u dan meta l-ligi tal-pajjiz kienet teskludi b'mod sistematiku tali jedd.

> "**60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, *Salduz*, cited above, § 56; *Navone and Others v. Monaco,* 24 October 2013; *Brusco v. France*, October 2010; and *Stojkovic v. France and Belgium*, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, *Dayanan v. Turkey*, no. 7377/03 §§ 31-33, 13 October 2009; *Yeşilkaya v. Turkey*, no. 59780/00, 8 December 2009; and *Fazli Kaya v. Turkey*, no. 24820/05, 17 September 2013).**
>
> **61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see *Salduz*, cited above, § 59); 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**."

Illi s-sentenza fl-ismijiet "ir-Repubblika ta' Malta vs Rio Micallef et" deciza mil-Qorti tal-Appell Kriminali Superjuri traccat l-izvilupp gurisprudenjzali kemm lokali kif ukoll tal-Qorti Ewropeja f'din il-materja:

> **"7. Brevement rakkontata is-sitwazzjoni qabel l-2002, fil-kwistjoni tal-istqarrija fil-pre trial stage, persuna arrestata ma kellha ebda jedd ghall-xi forma ta' assistenza legali sakemm iddum arrestata inkluz waqt l-interrogatorju. L-Att III tal-2002 imbaghad introduca fis-sistema legali taghna forma ta' dritt ta' assistenza legali billi ta il-jedd li persuna arrestata tkun intitolata titkellem wicc imm'wicc jew bit-telefon ma' avukat jew prokuratur legali ghal mhux aktar minn siegha zmien ex artikolu 355 AT tal-Kap 9. Dan il-jedd ma dahalx fis-sistema legali taghna minghajr skossi ghaliex l-artikolu 355 AU imbaghad holoq id-dritt tal-inferenza, igifieri, li f'kaz fejn l-arrestat ikun utilizza d-dritt li jikkonsulta mal-legali tieghu, ikun naqas milli jsemmi fatti li ragonevolment ikun mistenni li jsemmi, l-Qorti, allura fi stadju wara l-pre trial stage, "tista taghmel dawk l-inferenzi minn dan in-nuqqas bhala jidhru xierqa, liema inferenzi ma jistghux wahedhom jitqiesu bhala prova ta' htija izda jistghu jitqiesu bhala li jammontaw ghal korroborazzjoni ta' kull xhieda ta' htija tal-persuna akkuzata jew imputata". Dan kien ifisser illi ma tistghax issir tali inferenza f'dak il-kaz li l-persuna arrestata taghzel li ma taghmilx uzu mill-jedd ghall-assistenza legali. Mqabbla dawn il-provvedimenti mad-Direttiva numru 2013/48/EU tal-Parlament Ewropew u tal-Kunsill dwar id-dritt ghall-assistenza legali waqt l-arrest, kien hemm lok ghal-dibattitu dwar kemm il-provvedimenti tal-Kap 9 jirrispekkjaw d-dritt ghall-assistenza legali moghti lill-arrestat tenut kont ukoll illi dan id-dritt, kif ezistenti dakinhar taht il-ligi taghna, kien ristrett ghal siegha qabel l-interrogatorju u b'hekk kien jeskludi l-jedd tal-presenza tal-avukat waqt l-istess interrogatorju. F'dak l-istadju l-arrestat kien soggett ghal-mistoqsijiet diretti u suggestivi bir-risposti taghhom, anke jekk jghazel li ma jwegibx, bit-traskrizzjoni tieghu tkun eventwalment esebita fil-proceduri kontrih fejn ikun meqjus innocenti sakemm pruvat mod iehor. Tajjeb li jkun rilevat ukoll illi l-Att III tal-2002 ma dahalx fis-sehh qabel is-sena 2010;**
>
> **8. Gara, izda, illi l-Att LI tal-2017 biddel l-Artikolu 355AT u l-Artikoliu 355 AU meta dahal fil-kodici id-dritt tal-assistenza legali kif postulat fid-Direttiva 2013/48 EU. Dawn l-emendi dahlu fis-sehh permezz tal-Avviz Legali 401/2016, igifieri ferm wara l-ghoti tal-ewwel sentenza. Tajjeb li jinghad ukoll illi bis-sahha tal-Avviz Legali 102/2017 maghmulha taht il-Kodici Kriminali, kienu introdotti fis-sistema legali taghna ir-Regolamenti dwar il-procedura waqt l-interogazzjoni ta' persuni suspettati u persuni akkuzati; [5]"**

[5] Repubblika ta' Malta vs Rio Micallef, David Tabone u Darren James Vella – Appell 14/2013/1 deċiża mill-Qorti tal-Appell Kriminali Superjuri, deċiża nhar it-3 ta' April 2019.

Illi sfortunatament din is-"saga" dwar l-ammissibilita' o meno bhala prova ta'l-istqarrija rilaxxjata mill-persuna akkuzata meta din ma tkunx giet assistita minn avukat ghadha ma ratx it-tmiem taghha, bil-qrati taghna issa rinfaccjati b'decizjonijiet godda mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem li fil-fehma ta' din il-Qorti, imorru lura ghall-*istatus quo ante* d-decizjoni "Borg vs Malta". U ghalkemm f'din id-decizjoni kienet saret kritika lejn il-qrati Maltin u dan ghaliex d-decizjonijiet ma kenux qed jimxu kollha b'mod konformi, issa din l-istess Qorti wasslet hi stess biex qed timxi b'nuqqas ta' konformita' l-aktar bid-decizjonijiet recenti li inghataw u cioe' Beuze vs Belgium (decizjoni Grand Chamber), Doyle vs Ireland (Court 5th Section) u dik li laqtet lil pajjizna "Farrugia vs Malta" deciza fl-04 ta' Gunju 2019 (Court 3rd Section) fejn il-Qorti strahet fuq il-konsiderazzjonijiet minnha maghmula fil-kawza "Beuze vs Belgium[6]" meta holqot test imsejjes fuq zewg binarji li l-qorti trid taghmel f'kull kaz ghalih meta qalet:

> **"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.**

[6] Deciza mill-Grand Chamber fid-09 ta' Novembru 2018

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) duringpolice 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."

Illi din id-decizjoni wasslet ghalhekk ghal ezami gdid li ghandu isir f'kull kaz ghalih sabiex titqies l-ammissibilita' o meno tal-istqarrija bhala prova in atti. Id-*dissenting opinions* ghal din id-decizjoni ta'l-Imhallfin Serghides u Pinto de Albuquerque jaghtu stampa tal-*iter* li hadu id-decizjonijiet tal-Qorti Ewropeja fuq dan il-punt u jikkritikaw din id-decizjoni billi fil-fehma taghhom tmur kontra il-principju tas-smigh xieraq kif imhaddan fil-Konvenzjoni:

I. Two approaches to the right to a lawyer

2. There are two basic Grand Chamber case-law approaches regarding the interpretation and application of Article 6 § 3 (c). The first approach (henceforth referred to as such) is that of *John Murray v. the United Kingdom*[1] and *Salduz v. Turkey*[2]. Under this approach, evaluation of the overall fairness of a trial (stage two) is required only when there were compelling reasons justifying the restriction on the right to a lawyer (stage one): "the question, in each case, has therefore been whether the restriction was justified *and if so*, whether in the light of the entirety of the proceedings it has not deprived the accused from a fair hearing"[3]. Hence, according to this approach, there should be no stage two if at stage one it is found that there were not compelling reasons for the restriction.

3. The second approach (henceforth referred to as such) is that of *Ibrahim and Others v. the United Kingdom*[4], *Simeonovi v. Bulgaria*[5] and *Beuze v. Belgium*[6].Pursuant to this approach, an evaluation of the overall fairness of the trial is always required, even if there were not compelling reasons which justified the restriction. Hence, under this approach there is a compulsory two-stage test in every case.

Fil-fehma taghhom gjaldarba ma tezisti l-ebda raguni impellenti 'il ghala l-persuna suspettata tkun giet imcahhda mid-dritt ghall-assistenza legali, allura f'dak il-kaz tinsorgi awtomatikament il-lezjoni fit-termini tal-artikolu 6(3)(c) tal-Konvenzjoni minghajr il-htiega li l-Qorti tezamina l-proceduri penali fl-intier taghhom sabiex tqies jekk tkunx saret ingustizzja mal-persuna akkuzata. Ikomplu hekk jikkritikaw din id-decizjoni:

" The second approach interpreted the Article 6 § 3 (c) right in a manner contrary to its wording, object and purpose, and diminished its importance to the extent that its core is seriously, if not mortally, affected. Thus, we do not consider it an advancement or further realisation[10], but a retrogression of the relevant human right. Such a result could have been avoided if the Court had never lost sight of the principle of effectiveness in the interpretation and application of the right to a lawyer."

U jikkonkludu hekk wara li jezaminaw l-argumenti imressqa mil-maggoranza tal-Imhallfin li wasslu ghal konkluzjoni li ma kienx hemm ebda vjolazzjoni tal-artikolu 6 fil-kaz ta' Farrugia, li kien gie imcahhad mid-dritt ghall-assistenza legali qabel ma gie interrogat, gie illiberat mill-Ewwel Qorti izda misjub hati mill-Qorti ta'l-Appell fejn ghalkemm dik il-qorti strahet fuq evidenza ohra li kien hemm fl-atti, madanakollu qieset illi Farrugia ma kienx kredibbli fl-istqarrijiet minnu rilaxxjati sabiex b'hekk tat iktar piz lill-provi l-ohra li kien hemm kontrieh:

"This is a truly Kafkaesque case, in which an already acquitted defendant ultimately finds himself convicted on the basis of shaky testimony from one single prosecution witness and the appellate judges' doubts regarding the credibility of the defendant's replies to police questions concerning facts unrelated to the imputed offence. We were already persuaded that, under the first approach, his conviction should not stand. It is clear from the above analysis that all the arguments used by the majority in applying the second approach are unfounded. After concluding this analysis, we are further strengthened in our firm

conviction that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in the present case. Having found such a violation, we would obviously award the applicant a sum in respect of non-pecuniary damage."

Illi l-Qorti taqbel ma' din il-fehma ghaliex gjaldarba ma hemm ebda raguni impellenti li abbazi taghha l-persuna suspettata tkun giet mcahhda mill-jedd ghall-assistenza legali, anke jekk wahda minima, allura kwalunkwe dikjarazzjoni hekk rilaxxjata tpoggi lil dik il-persuna sussegwentement akkuzata fi zvantagg, meta dak dikjarat minnha fi stadju investigattiv, anke jekk mhux inkriminatorja, tingieb imbaghad bhala prova kontra tieghu/taghha fil-process penali tant ghalhekk illi jkun hemm lezjoni tad-dritt tieghu/taghha ghal smigh xieraq. Dan minghajr il-htiega li jigi ezaminat jekk tali stqarrija kenitx determinanti o meno fil-gudizzju finali u li allura jigu ezaminati "*the overall fairness of the proceedings*", it-tieni kriterju stabbilit fit-test gdid imfassal mill-Qorti Ewropeja. Il-Qorti tirrileva illi qed thaddan din il-fehma biss fir-rigward ta' dawk l-istqarrijiet rilaxxjati qabel Frar tas-sena 2010 u allura fiz-zmien meta kien hemm projbizzjoni assoluta ghal persuna suspettata li tikseb parir legali jew li tkun assistita minn avukat u allura meta ma kien hemm ebda raguni impellenti 'il ghala l-persuna suspettata kellha tigi imcahhda mill-assistenza legali.

Maghmula dawn il-konsiderazzjoni, ghalhekk u applikati ghal kaz in dizamina, il-Qorti tqies illi f'dan il-kaz ma kien hemm l-ebda raguni impellenti 'il ghala l-appellanti kellha tigi imcahhda mill-jedd li jkollha l-assistenza legali qabel ma rrilaxxjat l-istqarrija inkriminatorja taghha. Dan ifisser illi tali stqarrija hija inammisibbli bhala prova ghaliex leziva tad-dritt taghha ghal smigh xieraq ghalkemm, kif inghad, f'dan il-kaz l-appellanti ma hijiex qed titlob revizjoni tad-decizjoni tal-Ewwel Qorti fejn giet misjuba hatja tar-reati ta' traffikar u pussess aggravat ta' droga u ghalkemm ukoll ma jidhirx illi din kienet l-unika prova determinanti fil-konfront taghha f'dawn il-proceduri penali istitwiti kontra taghha billi hija inqabbdet *de facto* bid-droga fuq il-persuna taghha diehla gewwa il-Habs biex tghaddieha lil prigunier.

Ghal dawn il-motivi, il-Qorti taqta' u tiddeciedi billi tichad l-ewwel aggravju kontenut fir-rikors ta'l-appell u l-aggravju marbut mal-legalita' o meno tal-i*strip search* li sar fuq il-persuna taghha, izda tilqa' l-aggravju marbut mal-istqarrija rilaxxjata minnha lura fis-

sena 2004 u tordna li l-istess tigi sfilzata mill-atti.

Tordna il-kontinwazzjoni tas-smigh tal-appell fuq l-aggravji rimanenti.

Edwina Grima
Imhallef