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

Illum 17 ta' Frar, 2021

Rikors Guramentat Nru: 101/2019 AF

Briegel Micallef

vs

Avukat Generali

Il-Qorti:

Rat ir-rikors ta’ Briegel Micallef li permezz tiegħu wara li ġie premess illi:

Mill-fatti li johorgu mill-atti tal-kawza huma illi fl-2006, ir-rikorrenti tressaq quddiem il-Qorti tal-Magistrati mixli b’reati marbutin mal-pussess u mat-traffikar ta’ droga mwettqin fil-5 ta’ Gunju ta’ dik is-sena jew fix-xhur ta’ qabel dakinhar.

B’sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta’ Gudikatura Kriminali fl-4 ta’ Frar, 2015 ir-rikorrenti instab hati tal-akkuzi mressqa kontrih minn liema sentenza l-esponent interpona umli appell. Dan l-appell ghadu pendenti quddiem il-Qorti tal-Appell Kriminali.

1) **Dritt tal-Assistenza Legali matul l-interrogazzjoni tieghu u tax-xhud principali u uniku Nicholas Abela Ayling**

Jigi rilevat illi l-kaz odjern gie msejjes fuq l-istqarrijiet illi gew rilaxxati mill-esponenti [l-akkuzat] u x-xhud Nicholas Abela Ayling, liema stqarrijiet inghataw mill-esponenti u mix-xhud minghajr ma inghatalhom id-dritt illi jkollhom l-avukat tal-fiducja taghhom prezenti waqt tali stqarrijiet peress illi l-ligi f’dak iz-zmien ma kienitx tippermetti dan.

Peress illi l-ligi fiz-zmien illi fih l-esponenti u x-xhud principali gew arrestati u investigati ma kienitx tipprovdi ghad-dritt tal-assistenza legali lill-arrestat matul tali stqarrijiet dan jikkostitwixxi ksur tad-dritt fundamentali tal-esponent ghal smiegh xieraq ai termini tal-Artikolu 39 tal-Kostituzzjoni ta’ Malta u Artiklu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem.

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

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

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

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

Inoltre jigi rilevat illi l-istqarrijiet [u kwalunkwe xhieda bil-gurament illi nghatat sussegwentement] ta' Nicholas Abela Ayling ghandhom jigu sfilzati mill-inkartament kriminali stante illi ma kellux il-fakultà illi jikkonsulta ma' avukat tal-fiducja tieghu qabel ma rrilaxxa tali stqarrija liema mbaghad stqarrija gie rinfaccjat biha fil-proceduri kriminali sussegwenti. Fil-fatt, mill-provi prodotti fil-proceduri odjerni rrizulta ampjament illi Nicholas Abela Ayling irrilaxxa tali stqarrija (inkluz dawk illi taw bil-gurament) minghajr ma inghata d-dritt illi jikkonsulta ma' avukat tal-fiducja tieghu u ghalhekk l-istess stqarrijiet u kull referenza ghalihom hija leziva ghad-drittijiet fundamentali tal-

esponenti stess kif sanciti fl-Artikoli 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem u tal-Artikolu 39 tal-Kostituzzjoni ta' Malta.

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

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

Intalbet din il-Qorti sabiex:

1. Tiddikjara illi minhabba l-fatt illi, l-esponenti u x-xhud principali fil-proceduri kriminali kontrih ma kellhomx l-assistenza legali waqt l-arrest u l-interrogazzjoni taghhom, gew lezi d-drittijiet fundamentali tal-esponenti ghal smigh xieraq kif sanciti fl-artikolu 39 tal-Kostituzzjoni ta' Malta u fl-Artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem;

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

Rat ir-risposta tal-Avukat Ġenerali, illum l-Avukat tal-Istat, li permezz tagħha eċċepixxa illi:

Il-lanjanza tar-rikorrenti tikkoncerna allegat ksur tad-dritt ghal smigh xieraq allegatament bi vjolazzjoni tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropeja u dan "*minhabba l-fatt illi, l-esponenti u x-xhud principali fil-proceduri kriminali kontrih ma kellhomx l-assistenza legali waqt l-arrest u l-interrogazzjoni taghhom".*

L-esponenti jikkontesta l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti stante li huma nfondati fil-fatt u fid-dritt għar-ragunijiet segwenti:

Preliminarjament, gialadarba l-azzjoni kostituzzjonali hija mibnija fuq allegata ksur tal-jedd ta' smigh xieraq, tali azzjoni kostituzzjonali hija wahda prematura. Dan qieghed jinghad stante li minkejja li nghatat is-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali, l-appell tar-rikorrenti quddiem il-Qorti tal-Appelli Kriminali ghadu pendenti bil-konsegwenza li f'dan l-istadju tal-proceduri mhuwiex indikattiv li proceduri kriminali jigu diskussi u trattati in *vacuo*.

Gie stabbilit b'mod kostanti fil-gurisprudenza kemm nostrana kif ukoll dik tal-Qorti Ewropeja li biex tinsab lezjoni tas-smigh xieraq kif imhares taht l-artikolu 6 tal-Konvenzjoni Ewropea u l-artikolu 39 tal-Kostituzzjoni, huwa mehtieg li l-process gudizzjarju jigi ezaminat fit-totalità tieghu. Bhala regola, sabiex jkun jista' jigi apprezzat jekk proceduri humiex xierqa jew le, wiehed m'ghandux ihares biss lejn xi nuqqasijiet procedurali li jokkorru izda irid ihares u jezamina jekk fl-assjem taghhom, il-proceduri jkunux jew le kondotti b'gustizzja fis-sustanza u fl-apparenza (ara *Perit Joseph Mallia vs Onor. Prim Ministru et* deciza mill-Qorti Kostituzzjonali fil-15 ta' Marzu 1996).

Sabiex jigu applikati l-elementi tal-artikolu 6 tal-Konvenzjoni Ewropea u tal-artikolu 39 tal-Kostituzzjoni jridu ta' bilfors jitqiesu l-fatturi processwali partikolari tal-kaz, b'mod illi biex wiehed jiddetermina jekk kienx hemm ksur tal-jedd ghal smigh xieraq, wiehed irid iqis il-process kollu kemm hu, maghduda maghhom l-imgieba tal-Qorti li tkun u kif ukoll ta' kif l-interessi tal-persuna mixlija kienu mressqa u mharsin mill-istess qorti (ara *Fenech vs Avukat Generali* deciza fl-4 ta' Awwissu 1999 - Vol. LXXXIII.i.213). Wiehed ma jistax u m'ghandux jiffoka fuq bicca biss mill-process shih gudizzjarju biex minnu, jekk isib xi nuqqas jew ghelt, jasal ghall-konkluzjoni li tabilfors sehh ksur tal-jedd tas-smigh xieraq (*Pullicino vs. Onor. Prim Ministru et* deciza fit-18 ta' Awwissu 1998 – Vol. LXXXII.i.158).

Ir-rikorrenti ma jistax jasal ghall-konkluzjoni li gie miksur id-dritt tieghu ta' smigh xieraq minhabba l-mod kif ittehdet l-istqarrija

tieghu u dik tax-xhud principali. Ladarba l-proceduri kriminali ghadhom pendenti, allura r-rikorrenti jgawdi mis-salvagwardji kollha tal-process gudizzjarju.

Ghalhekk il-fatt wahdu li r-rikorrenti rilaxxat stqarrija minghajr assistenza ta' avukat jew li x-xhud principali ma kellux avukat waqt li rrilaxxa l-istqarrija ma ssostnix l-ilment ta' ksur ta' dritt ta' smigh xieraq ghaliex dawn wahidhom mhumiex determinanti tal-kwistjoni minnu sollevata, b'dana li l-ilment huwa ghal kollox intempestiv u prematur. Jigi b'hekk li l-ilment ta' nuqqas ta' smigh xieraq jista' jigi ezaminat biss ladarba l-process kriminali taghha jigi konkjuz.

Subordinatament u minghajr pregudizzju ghas-suespost, l-esponenti jissottometti li l-artikolu 39 tal-Kostituzzjoni mhux applikabbli ghall-kwistjoni mqajjma mir-rikorrenti. Dan ghaliex dan l-artikolu jghodd biss fejn ikun inbeda procediment quddiem qorti (ara s-sentenza ghar-referenza kostituzzjonali fl-ismijiet *Repubblika ta' Malta vs Matthew-John Migneco* deciza fil-15 ta' Novembru 2011). F'dan il-kaz, l-ilment jinsab dirett fil-konfront ta' perjodu fejn kienet ghaddejja l-fazi tal-interrogazzjoni min-naha tal-Pulizija. Ghalhekk ladarba c-cirkostanzi kkontestati jmorru lura ghal grajjet li sehhew qabel ma kienu lahqu nbdew xi procedimenti, allura dan ifisser li l-ilment ma jistax jaqa' fl-ambitu tal-artikolu 39 tal-Kostituzzjoni. Ghalhekk isegwi li dan l-artikolu ma japplikax.

Dwar l-artikolu 6 tal-Konvenzjoni Ewropeja, l-esponenti jissottometti li bhala principju ma jezisti l-ebda dritt fundamentali ta' assistenza legali izda jezisti biss dritt fundamentali li persuna akkuzata b'reat kriminali jkollha proceduri li jinzammu bil-garanziji ta' smigh xieraq. Illi l-fatt fih innifsu li persuna ma tkunx thalliet tikseb parir legali qabel l-interrogatorju taghha ma jwassalx awtomatikament ghall-konkluzjoni gie lez id-dritt ghal smigh xieraq. Illi sabiex in-nuqqas ta' assistenza legali tkun tista' potenzjalment twassal ghal ksur tad-dritt ghal smigh xieraq irid jigi muri b'mod sodisfacenti li minhabba dak in-nuqqas inholoq perikolu illi persuna tinsab hatja meta ma ghandux ikun hekk.

Dak li jiggarantixxu l-artikolu 6 tal-Konvenzjoni u l-artikolu 39 tal-Kostituzzjoni huma dritt ghal smigh xieraq u mhux dritt ghall-ghajnuna ta' avukat qabel ma, jew waqt illi, tittiehed l-istqarrija. Illi marbut ma' dan, id-dritt ghal smigh xieraq irid jigi meqjus fil-kuntest tat-totalità tal-proceduri kollha u mhux fir-rigward ta' xi mument specifiku.

Wiehed ma jridx jinjora wkoll il-fatt illi r-rikorrenti bl-ebda mod ma kien imgieghel jaghti l-istqarrija li ta. Ir-rikorrenti inghata t-twissija skont il-ligi senjatament li ma kienx obbligat li jitkellem sakemm ma kienx hekk jixtieq izda li dak li kien ser jghid seta' jingieb bhala prova kontra tieghu. Illi l-istess rikorrenti kienet qed jifhem l-import tac-cirkostanza li kien tinsab fiha tant hu hekk li ffirma l-istqarrija tieghu. Illi r-rikorrenti ma sofra ebda pressjoni, theddid jew influwenza fit-tehid tal-istqarrija u lanqas jista' jigi kkunsidrat bhala persuna vulnerabbli u dan stante li meta giet rilaxxata l-istqarrija r-rikorrenti kellu wiehed u ghoxrin sena u kien ilu jahdem bhala bhala salesman u jaghmilha ma diversi nies. Illi aktar minn hekk l-istess rikorrenti xehed diversi drabi quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali fejn biddel il-verzjoni li kien ta fl-istqarrija li rrilaxxa lill-Pulizija.

Id-dritt ghall-assistenza legali fil-mument tal-interrogazzjoni giet imfissra u interpretata mill-Qorti Ewropeja f'diversi kazijiet fejn l-interpretazzjoni inbidlet kemmxejn mill-interpretazzjoni originali li kienet inghatat ghal certu perjodu ghal liema sentenzi jirreferi r-rikorrenti. F'dan il-kuntest, l-esponenti jirreferi ghad-decizjoni moghtija mill-Grand Chamber fl-ismijiet **Beuze v. Belgium** fejn gew elenkati numri ta' fatturi li kellhom jittiehdu in kunsiderazzjoni fil-kuntest tal-proceduri fit-totalità taghhom sabiex wiehed jista' jasal ghall-konkluzjoni jekk effettivament inkisirx id-dritt ghal smigh xieraq naxxenti mit-tehid ta' istqarrija minghajr assistenza legali. Illi wara li nghatat is-sentenza **Beuze v. Belgium** il-Qorti Ewropeja kellha l-opportunità li tevalwa s-sistema processwali kriminali nostrana sabiex tara jekk is-sistema taghna toffrix garanziji bizzejjed anke jekk id-dritt ta' avukat ikun ristrett b'mod sistematiku. In fatti, fil-kawza fl-ismijiet **Farrugia v. Malta** li nghatat fl-4 ta' Gunju 2019, il-Qorti Ewropeja sabet li l-fatt li l-persuna ma kinitx inghatat assistenza ta' avukat waqt l-interrogazzoni u dan peress li kien

hemm restrizzjoni sistematika dan fih innifsu ma jiksirx id-dritt ta' smigh xieraq stante li s-sistema nostrana toffri garanziji ta' smigh xieraq tul il-process kriminali li jinnewtralizzaw tali restrizzjoni.

Ghal dak li jirrigwarda l-istqarrija li giet rilaxxata mix-xhud principali, l-esponenti jissottometti li hi biss il-persuna li taghmel l-istqarrija li ghandha d-dritt li tilmenta li ma kellhiex access ghall-avukat u tinvoka ksur tal-artikolu 6 tal-Konvenzjoni Ewropeja u tal-Artikolu 39 tal-Kostituzzjoni ta' Malta. Illi dan japplika irrispettivament jekk it-terz li jkun irilaxxa l-istqarrija minghajr l-assistenza ta' avukat jittellax bhala xhud jew ikun ko-akkuzat fil-proceduri. Illi l-persuna li tittihdilha stqarrija ghandha kull dritt li tikkontesta tali stqarrija jekk fil-fehma taghha l-istqarrija tkun ittiehdet b'abbuz madanakollu fil-kaz odjern ma jidhirx li x-xhud ikkontesta l-istqarrijiet tieghu jew illamenta li tali stqarrijiet ittiehdu b'abbuz ghalkemm kellu kull fakulta' u access hieles ghall-qorti sabiex jaghmel hekk jekk hass il-htiega. Gialadarba x-xhud principali ma kkontestax l-istqarrija li huwa ta, tali stqarrija ghandha titqies bhala xhieda ammissibbli kif ukoll kull xhieda li nghatat u li saret referenza ghaliha waqt il-proceduri ghandha titqies bhala xhieda ammissibbli.

Maghdud mas-suespost, wiehed ma jridx jinjora l-fatt li l-istqarrijiet rilaxxati minn terzi jintuzaw biss biex jikkontrollaw lit-terz waqt ix-xhieda li jkun qieghed jaghti f'kaz li tali xhud ibiddel il-verzjoni tieghu. Illi fil-mument li xhud li jkun ta stqarrija jixhed viva voce quddiem qorti penali jiskattaw id-drittijiet tal-akkuzat inkluz dak li jikkontro-ezamina lix-xhud biex isostni l-ahjar mod id-difiza tieghu u b'liema kontro-ezami l-akkuzat ikun qieghed jezercita l-kontroll tieghu bhala difiza.

Id-dritt ta' smigh xieraq ma taghti l-ebda dritt lill-persuna akkuzata b'reat li ma titressaq ebda xhieda li tista' b'xi mod tkun ta' hsara ghalih, bhallikieku persuna akkuzata bi twettiq ta' reat ghandha dritt li f'kull kaz tinstab mhux hatja jew li l-principju tal-*equality of arms* tfisser li l-prosekuzzjoni tigi mcahhda mill-mezzi biex tipprova l-kaz taghha. Illi fil-fehma tal-esponenti, l-fatt wahdu li ssir stqarrija meta min jaghmilha ma jkollux l-ghajnuna ta' avukat ma huwiex *ipso facto* bi ksur tal-jedd ghal smigh

xieraq u dan japplika b'aktar forza meta minn jirrilaxxa l-istqarrija qatt ma jkun illamenta minn tali stqarrija.

Il-Qorti Kostituzzjonali kellha l-opportunità li tippronunzja ruhha fuq dina l-kwistjoni fl-atti tar-referenza fl-ismijiet **Il-Pulizija (Spettur Malcolm Bondin) vs Clayton Azzopardi** deciza fit-13 ta' Frar 2017 fejn il-Qorti Kostituzzjonali ma sabet l-ebda ksur tal-jedd ta' smigh xieraq bit-tehid tal-istqarrija tax-xhud ewlieni meta tali xhud ma kienitx assistita minn avukat fil-mument tat-tehid tal-istqarrija. Fi kliem il-Qorti Kostituzzjonali stess fil-paragrafu 17 et seq. tas-sentenza taghha insibu illi *"Applikati dawn il-principji ghall-kaz tal-llum, din il-qorti hija tal-fehma li l-fatt wahdu li –istqarrija ta' Maria Assunta Vella li ttiehdet waqt l-interrogazzoni taghha ttiehdet minghajr ma kienet assistita minn avukat ma jfissirx, b'daqshekk, li kien hemm ksur tad-dritt tas-smiegh xieraq tal-attur. Fl-ewwel lok, ix-xhud Maria Assunta Vella li ghamlet l-istqarrija kellha kull fakolta li tikkontestaha izda mhux biss m'ghamlitx hekk anzi regghet tenniet dak li qalet f'xhieda hielsa quddiem il-qorti. La Maria Assunta Vella – il-persuna li ghamlet l-istqarrija – ma cahdithiex u ma kkontestathiex u ma lmentatx li ttiehdet bi ksur tal-jeddijiet fondamentali taghha – ghalkemm kellha kull fakolta li taghmel hekk b'access hieles ghall-qorti – dik l-istqarrija ghandha titqies bhala xhieda ammissibbli. Fit-tieni lok, fil-proceduri kriminali kontra tieghu l-attur ghandu l-fakoltajiet kollha li jaghtuh il-jedd ghal smigh xieraq, fosthom l-equality of arms; partikolarment, jista' jaghmel il-kontro-ezami lix-xhud Maria Assunta Vella biex b'hekk isostni bl-ahjar mod id-difiza tieghu".* Huwa car ghalhekk li l-Qorti Kostituzzjonali diga' stabbiliet il-principju li ma hemm l-ebda lezjoni ta' dritt ghal smigh xieraq naxxenti mit-tehid ta' stqarrija ta' terz li ma jkunx assistit minn avukat meta tittiehed l-istqarrija u liema terz ikun eventwalment imharrek bhala xhud fil-proceduri kriminali.

Isegwi ghalhekk li l-allegazzjonijiet u t-talbiet tar-rikorrenti ghandhom jigu michuda.

Salv u impregudikata kwalunkwe eccezzjoni ohra f'kaz ta' bzonn.

Bl-ispejjez kontra r-rikorrent.

Rat in-noti ta’ sottomissjonijiet tal-partijiet.

Rat l-atti kollha.

Rat li l-kawza thalliet ghas-sentenza.

Ikkunsidrat illi permezz ta’ dawn il-proċeduri, ir-rikorrent qiegħed jitlob lill-Qorti tiddikjara li seħħet leżjoni tad-dritt fundamentali tiegħu għal smigħ xieraq kif sanċit permezz tal-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni Ewropea għaliex dakinhar illi kemm hu, u kemm ix-xhud prinċipali tal-prosekuzzjoni fil-proċeduri kriminali li ttieħdu fil-konfront tiegħu, irrilaxxjaw stqarrija lill-pulizija mingħajr ma kienu assistiti minn avukat tal-fiduċja tagħhom għaliex dak iż-żmien, il-liġi ma kinetx tippermetti li jkunu hekk assistiti. Konsegwentement, qiegħed jitlob lill-Qorti takkorda dawk ir-rimedji xierqa u effettivi fiċ-ċirkostanzi.

Mill-provi prodotti jirriżulta li fil-5 ta’ Ġunju 2006 il-Pulizija qabdet li ċertu Nicholas Abela Ayling b’żewġ “sapuniet” tal-kannabis li kellhom piż ta’ madwar nofs kilo u valur ta’ madwar €3,155 li huwa qal lill-pulizija li kien għadu kemm xtara mingħand ir-rikorrent.

Dakinhar, il-Pulizija kienu osservaw li Abela Ayling ltaqa’ mar-rikorrent u li fil-fatt dan Abela Ayling ħareġ mill-garaxx tar-rikorrent b’xi ħaġa f’idejh. Wara li l-Pulizija interċettaw lil Abela Ayling bid-droga, huma marru jkellmu lir-rikorrent fir-residenza tiegħu fejn għalkemm ma nstabitx droga, instabu xi oġġetti oħra suspettużi bħal per eżempju karti li kienu jixbħu dawk il-karti li kienet imdawra fiha d-droga li sabu fil-pusess ta’ Abela Ayling. Kemm ir-rikorrent u kif ukoll Abela Ayling irrilaxxaw stqarrija. Fl-atti ta’ din il-kawża ġiet esibita biss l-istqarrija li rrilaxxja r-rikorrent u mhux dik illi rrilaxxa Abela Ayling. Dakinhar illi għamel din l-istqarrija, ir-rikorrent kellu 21 sena. Din l-istqarrija ir-rikorrent irrilaxxaha wara li ngħata d-debita twissija u għażel li jiffirmaha. Għalkemm ma tirriżultax mill-atti l-età tal-Abela Ayling, jidher li dan tal-aħħar huwa fil-fatt numru ta’ snin akbar mir-rikorrent.

Ftit taż-żmien wara, ir-rikorrent ġie mixli quddiem il-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali b'reati marbuta mat-traffikar u pussess tad-droga meħuda mill-pjanta tal-kannabis. Waqt dawk il-proċeduri xehdu għadd ta' persuni, fosthom ir-rikorrent stess u Nicholas Abela Ayling.

B'sentenza tal-4 ta' Frar 2015, ir-rikorrent instab ħati tal-akkużi miġjuba kontrih u ġie kkundannat għall-erba' snin u nofs ħabs u multa ta' €5,000. Huwa appella minn dik is-sentenza quddiem il-Qorti tal-Appell Kriminali, liema appell għadu pendenti.

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

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

Ir-rikorrent jinvoka wkoll l-artikolu 6 tal-Konvenzjoni Ewropea. L-ewwel sub inċiż u t-tielet paragrafu tat-tielet sub inċiż jaqraw hekk:

> "(1) *Fid-determinazzjoni tad-drittijiet ċivili u tal-obbligi tiegħu jew ta' xi akkuża kriminali kontra tiegħu, kullħadd huwa ntitolat għal smigħ imparzjali u pubbliku fi żmien raġonevoli minn tribunal indipendenti u imparzjali mwaqqaf b' liġi. Is-sentenza għandha tingħata pubblikament iżda l-istampa u l-pubbliku jistgħu jiġu esklużi mill-proċeduri kollha jew minn parti minnhom fl-interess tal-morali, tal-ordni pubbliku jew tas-sigurta nazzjonali f'soċjeta demokratika, meta l-interessi tal-minuri jew protezzjoni tal-ħajja privata*

tal-partijiet hekk teħtieġ, jew safejn ikun rigorożament meħtieġ fil-fehma tal-qorti f'ċirkostanzi speċjali meta l-pubbliċita tista' tippreġudika l-interessi tal-ġustizzja.

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

….

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

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

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

Fir-referenza kostituzzjonali fl-ismijiet Il-Pulizija (Assistant Kummissarju Lawrence Cauchi) vs Carmel sive Charles Ellul Sullivan et, deċiża fil-25 ta' Settembru 2015, il-Qorti Kostituzzjonali qalet hekk:

"Huwa minnu li kemm din il-Qorti kif ukoll l-organi ta' Strasburgu kkonċedew li in linea eċċezzjonali xi fatturi partikolari tal-proċeduri jistgħu jkunu tant determinanti

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

għad-dritt għal smigħ xieraq li ma jkunx meħtieġ li l-Qorti tistenna sa tmiem il-proċeduri sabiex tiddeċiedi jkunx hemm vjolazzjoni tad-dritt in kwistjoni...".

Kif tikteb Karen Reid fil-ktieb 'A practitioner's Guide to the European Convention on Human Rights' (Tielet Edizzjoni) f'paġna 70:

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

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

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

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

L-Avukat tal-Istat imbagħad jeċċepixxi li l-artikolu 39 tal-Kostituzzjoni mhuwiex applikabbli għall-każ tal-lum għaliex filwaqt illi r-rikorrent qed jilmenta dwar dak li ġara fil-*pre trial stage*, dan l-artikolu japplika biss fejn ikun inbeda proċediment quddiem Qorti.

M'hemmx dubju li kif jgħid l-Avukat tal-Istat, iċ-ċirkostanzi li

fuqhom ir-rikorrent jibni l-każ tiegħu jirreferu għall-qagħda li kienet teżisti qabel ma huwa tressaq quddiem qorti biex iwieġeb għall-akkużi magħmula kontrih. F'każ bħal dak, id-dispożizzjonijiet tal-artikolu 39 tal-Kostituzzjoni ma jkunux għadhom bdew jgħoddu. Madankollu, in linea ma' dak li ngħad mill-Qorti Kostituzzjonali fis-sentenza fil-kawża Malcolm Said vs Avukat Ġenerali et, tat-30 ta' Ġunju 2016, ma jfissirx li dak li jkun sar qabel ma r-rikorrent ikun ġie akkużat ma jistax jolqot, bi preġudizzju għalih, dak li jiġri wara li jiġi akkużat. Għalhekk jekk it-teħid tal-istqarrija jkun sar bi ksur tad-drittijiet tar-rikorrent, il-vjolazzjoni ma sseħħx daqstant bil-fatt li tkun ittieħdet l-istqarrija meta l-attur kien għadu qed jiġi investigat, iżda bil-fatt li fil-kors tal-proċediment fejn ikun ġie akkużat isir użu mill-istqarrija kontra l-akkużat. Din l-eċċezzjoni qiegħda għalhekk ukoll tiġi miċħuda.

L-eċċezzjonijiet rimanenti tal-intimat ser jiġu indirizzati fil-konsiderazzjonijiet li ser tagħmel il-Qorti dwar il-mertu tal-każ.

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

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

Għalkemm bl-Att III tal-2002 ġie introdott id-dritt għall-assistenza legali fl-istadju ta' qabel il-proċeduri kriminali, kien biss fis-sena 2010 li ġiet fis-seħħ (ara Avviż Legali 35 tal-2010). Qabel dakinhar, il-liġi Maltija ma kinetx tipprovdi għad-dritt ta' assistenza ta' avukat fl-istadju ta' qabel il-proċeduri kriminali u ċioè waqt li ssir interrogazzjoni mill-Pulizija.

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

Il-ġurisprudenza tal-Qrati tagħna u tal-Qorti Ewropea rigward id-dritt għall-assistenza legali fl-istadju bikri tal-investigazzjonijiet tal-Pulizija u ċioè fil-*pre-trial stage* hija vasta. Huwa maghurf illi l-posizzjoni li ħadet il-Qorti Ewropea dwar dan is-suġġett inbidlet tul is-snin. Din il-Qorti ser tagħmel referenza estensiva għall-ġurisprudenza l-aktar riċenti tal-Qorti Ewropea u tal-Qorti Kostituzzjonali.

Deċiżjoni riċenti tal-Qorti Ewropea hija proprju Farrugia v Malta, deċiża fl-4 ta' Ġunju 2019. Il-Qorti waslet għall-konklużjoni li ma seħħet l-ebda leżjoni tad-dritt għal smigħ xieraq tar-rikorrent u dan wara li għamlet is-segwenti kunsiderazzjonijiet:

> "*96. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see Salduz, cited above, § 51, and Ibrahim and Others v. the United Kingdom [GC], nos. 50541/08 and 3 others, § 255, 13 September 2016). The right becomes applicable as soon as there is a "criminal charge" within the meaning given to that concept by the Court's case-law and, in particular, from the time of the suspect's arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period (see Beuze v. Belgium, [GC], no.71409/10, § 124, 9 November 2018 and Simeonovi v. Bulgaria [GC], no. 21980/04, §§ 111, 114 and 121, 12 May 2017).*
>
> *97. In Beuze, drawing from its previous case-law the Court explained the aims pursued by the right of access to a lawyer (§§ 125-130) and elaborated on the content of the right of*

access to a lawyer reiterating, in particular, that suspects must be able to enter into contact with a lawyer from the time when they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview or even where there is no interview and that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (§§ 133-134).

98. Prior to the recent Beuze judgment, in a number of cases, the Court found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention (see, in particular, Dayanan v. Turkey, no. 7377/03, § 33, 13 October 2009 and Boz v. Turkey, no. 2039/04, § 35, 9 February 2010). That same approach was followed by the Court in relation to the Maltese context in Borg (no. 37537/13, 12 January 2016).

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

(i) Concept of compelling reasons

100. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a

temporary nature and must be based on an individual assessment of the particular circumstances of the case. A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention (see Beuze, cited above, §§ 142-143).

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

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

102. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (ibid., § 146).

103. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3 (c) during police

custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case (ibid., § 149).

(iii) Relevant factors for the overall fairness assessment

104. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account:
(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;
(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;
(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;
(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice (ibid., § 150)."

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

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

»... ... ... ġie stabbilit illi l-fatt waħdu illi persuna li tkun instabet ħatja ma tkunx tħalliet tikkonsulta ma' avukat tal-fiduċja tagħha fil-mument tal-investigazzjoni u l-għotja ta' stqarrija lill-pulizija, minħabba restrizzjoni sistematika fil-liġi maltija, awtomatikament ikun ifisser illi saret vjolazzjoni tad-dritt fundamentali tas-smigħ xieraq ta' dik l-istess persuna taħt l-artikolu 6 tal-Konvenzjoni Ewropea«.

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

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

» ... in order for the right to a fair trial to remain sufficiently 'practical and effective' ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the

defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.«

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

»250. The right to a fair trial under Article 6 § 1 is an unqualified right. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see O'Halloran and Francis v. the United Kingdom [GC], nos. 15809/02 and 25624/02, § 53, ECHR 2007-III). The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, Taxquet v. Belgium [GC], no. 926/05, § 84, ECHR 2010; and Schatschaschwili v. Germany [GC], no. 9154/10, § 101, ECHR 2015).

»251. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings ... ...

»... ... ...

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

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

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

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

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

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

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

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

»62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see Salduz, cited above, §§ 52, 55 and 56).

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

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

»17. Għalkemm din il-qorti temmen u ttenni illi l-interpretazzjoni minnha mogħtija fil-każ ta' Charles Stephen

Muscat u sentenzi oħra mogħtija wara hija interpretazzjoni korretta u proporzjonata billi tilqa' għal abbuzi min-naħa tal-prosekuzzjoni u tħares id-drittijiet ta' persuna akkużata b'reat kriminali, jidher li din l-interpretazzjoni – għallinqas fejn il-proċess kriminali jkun intemm – illum ma għadhiex aktar tenibbli fid-dawl tas-sentenza fuq imsemmija ta' Borg v. Malta mogħtija dan l-aħħar mill-Qorti Ewropea.

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

Ir-raguni izda fl-aħħar mill-aħħar tegħleb. Fid-dawl tal-inkonsistenzi fis-sentenzi tal-Qorti Ewropea fl-interpretazzjoni tal-jedd għall-għajnuna ta' avukat fil-kuntest tal-jedd għal smigħ xieraq, il-Qorti Ewropea kienet imsejħa, fil-każ ta' Beuze v. il-Belgju, biex tippreciza aħjar x'inhi l-posizzjoni korretta. Tajjeb jingħad illi fil-każ ta' Beuze, bħal fil-każ tallum, il-ligi domestika fiz-zmien relevanti ma kinitx tippermetti li tingħata l-għajnuna ta' avukat waqt l-interrogazzjoni u ma kien hemm ebda raġuni impellenti għala ma tħallietx tingħata l-għajnuna ta' avukat. Fis-sentenza mogħtija mis-Sezzjonijiet Magħquda fid-9 ta' Novembru 2018 il-qorti qalet hekk:

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

»121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness

of the trial to be assessed at an earlier stage in the proceedings. ... ...

»... ... ...

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

»140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, ab initio, to a violation of the Convention ... ... Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form ... and sometimes in greater detail ...

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

.....

»144. In Ibrahim and Others the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see Ibrahim and Others, ... § 262).

That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer ... to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. However, as can be seen from the Ibrahim and Others judgment, followed by the Simeonovi judgment, the Court rejected the argument of the applicants in those cases that Salduz had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the Dayanan case and other judgments against Turkey.

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

»... ... ...

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

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

»... ... ...

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

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;
(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;
(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;
(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and
(j) other relevant procedural safeguards afforded by domestic law and practice.«

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

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

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

Dan il-prinċipju huwa dak segwit fl-aktar ġurisprudenza riċenti kemm tal-Qrati Kostituzzjonali kif ukoll tal-Qorti Ewropea. Kif proprju intqal fis-sentenza ta' Charles Kenneth Stephens v Malta, tal-14 ta' Jannar 2020:

"*72. Particularly relevant to the present case, the Court observes that in the recent Beuze judgment, the Grand Chamber departed from the approach taken in previous cases that systematic restrictions on the right of access to a lawyer led, ab initio, to a violation of the Convention (see, in particular,Dayanan v. Turkey, no. 7377/03, § 33, 13 October*

2009, Boz v. Turkey, no. 2039/04, § 35, 9 February 2010, and Borg, cited above, § 62). In Beuze, 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."

Applikati dawn il-prinċipji għall-każ odjern, isegwi li l-argument tar-rikorrent li hemm ksur tad-dritt tiegħu għal smigħ xieraq b'mod awtomatiku għaliex l-istqarrija ttieħdet mingħajr ma huwa kellu dritt għall-assistenza ta' avukat, huwa wieħed żbaljat. Kif sewwa jissottometti l-Avukat tal-Istat, mhuwiex il-każ illi n-nuqqas ta' għajnuna ta' avukat iwassal, għalhekk biss u *ipso facto*, għall-ksur tal-jedd għall-smigħ xieraq.

Il-Qorti tqis illi bl-ebda mod ma ġie muri li ġie leż jew x'aktarx ser jiġi leż d-dritt fundamentali tar-rikorrent minħabba l-fatt illi ma setax ikun assistit minn avukat meta ttieħditlu l-istqarrija. Ir-rikorrent naqas milli juri li dik l-istqarrija kkompromettiet serjament id-difiża u l-qagħda tiegħu matul il-proċeduri kriminali.

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

Ir-rikorrent naqas milli juri wkoll li huwa għandu jitqies bħala persuna vulnerabbli. Huwa minnu li kellu biss 21 sena u li din kienet l-ewwel darba li r-rikorrent xellef difrejh mal-ġustizzja, imma ma tirriżultax xi prova fis-sens li ċ-ċirkostanzi li fihom sarulu l-mistoqsijiet kienu għalih intimidanti jew li ma kienx qiegħed jifhem l-import taċ-ċirkostanzi li kien jinsab fihom. Huwa għażel li jwieġeb volontarjament, mingħajr theddid,

wegħdi jew promessi ta' vantaġġi u wara li ngħata d-debita twissija skont il-liġi, u ċioè li ma kienx obbligat jitkellem sakemm ma kienx hekk jixtieq, iżda li dak li kien ser jgħid seta' jinġieb bħala prova kontrih. Tant ir-rikorrent kien qiegħed jifhem l-import tas-sitwazzjoni li kien fiha meta rrilaxxja l-istqarrija, li huwa rrifjuta li jixkef il-fornitur li kien provdielu d-droga. Dawn il-fatturi kollha ġew meqjusa mill-Qorti tal-Maġistrati meta kienet qiegħda tiddeċiedi l-kawża tar-rikorrent.

Mis-sentenza tal-Qorti tal-Maġistrati jirriżulta li l-pulizija kellhom evidenza biżżejjed kontra r-rikorrent. Din l-evidenza ġiet evalwata minn Maġistrat u in kwantu li r-rikorrent appella mid-deċiżjoni tal-Ewwel Qorti, ser terġa tiġi evalwata minn Imħallef, u għalhekk, minn persuni b'għarfien għoli tal-proċedura legali u l-liġi Maltija.

Din il-Qorti qiegħda tqis ukoll li jirriżulta mid-deċiżjoni tal-Qorti tal-Maġistrati li r-rikorrent, meta xehed *viva voce* quddiem dik il-Qorti, skarta kompletament dik il-verżjoni li kien ta lill-Pulizija meta rrilaxxja l-istqarrija tiegħu b'dan illi xorta waħda ammetta li d-droga li nstabet fil-pussess ta' Abela Ayling kien tahielu hu. Il-Qorti fil-fatt osservat li '*viva voce xorta jammetti – jekk wieħed jagħżel illi jemmen din it-tieni verżjoni, illi huwa attwalment mar jiġbor id-droga għal Abela Ayling, dan dejjem fil-kuntest ta' kif il-Liġi tagħna tiddefinixxi t-traffikar.*'

Il-Qorti kompliet billi qalet hekk:

> "*Bla dubju ta' xejn l-azzjoni tal-imputat, anke kieku biss kellha temmnu – illi huwa mar jagħmel pjaċir lil sieħbu Abela Ayling għax ġie hekk mitlub minnu, tinkwadra f'din id-definizzjoni. Illi verament tiġbor droga għal ħaddieħor mhi xejn ħlief forma oħra ta' distribuzzjoni tagħha, la fil-fatt taha lil ħaddieħor. Għalhekk l-azzjoni u l-verżjoni mressqa mill-imputat bħala difiża xorta taqa' taħt id-definizzjoni ta' traffikar hemm ċitata.*"

Il-Qorti tal-Maġistrati ma kellhiex għalfejn tistrieh fuq l-istqarrija li kien irrilaxxja r-rikorrent sabiex tasal għad-deċiżjoni tagħha dwar il-ħtija tar-rikorrent, għaliex meta xehed *viva voce*, ir-rikorrent ma ċaħadx illi kien hu li ta d-droga lil Abela Ayling, anzi

ammetta li hekk ġara. Huwa indubbjament fl-interess pubbliku li r-rikorrent jiġi investigat u imressaq sabiex jiġi ġudikat mill-Qrati ta' ġurisdizzjoni kriminali in konnessjoni ma traffikar u pussess ta' droga.

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

Ir-rikorrent jallega wkoll li ġie leż id-dritt fundamentali tiegħu għal smigħ xieraq peress illi anke l-imsemmi Mark Abela Ayling kien irrilaxxja stqarrija lill-pulizija mingħajr ma seta' jkun assistit minn avukat tal-għażla tiegħu.

L-argument tar-rikorrent m'għandux mis-sewwa. Ilment dwar ksur tad-dritt fundamentali għal smigħ xieraq minħabba stqarrija li tkun ġiet irrilaxxjata lill-Pulizija jista' jsir biss minn dik il-persuna li tkun għamlet dik l-istqarrija u ħadd aktar.

Mhux hekk biss imma r-rikorrent m'għandux raġun jilmenta li huwa ser jiġi preġudikat għaliex fil-proċeduri kriminali li ttieħdu fil-konfront tiegħu saret użu minn din l-istqarrija.

Skont l-artikolu 661 tal-Kapitolu 9 tal-Liġijiet ta' Malta, konfessjoni ma tagħmilx prova ħlief kontra min jagħmilha, u mhix ta' preġudizzju għall-ebda persuna oħra. Il-fatt li Abela Ayling għamel stqarrija mal-Pulizija mingħajr assistenza ta' avukat ma jista' jkun tal-ebda dannu għar-rikorrent.

Huwa minnu li skont l-artikolu 30A tal-Kap. 101, dikjarazzjonijiet ta' terzi jistgħu jingiebu bħala prova kontra persuna mixlija b'reat li għandu x'jaqsam mad-droga, imma l-istess artikolu jkompli billi jgħid li dik id-dikarazzjoni jkollha valur probatorju biss jekk tiġi kkonfermata bil-ġurament. Jiġifieri l-istqarrija waħeda, jekk mhux maħlufa, ma tistax tkun ta' preġudizzju għar-rikorrent.

F'każ illi r-rikorrent qed jilmenta mill-fatt li din l-istqarrija ta' Nicholas Abela Ayling ġiet ikkonfermata bil-ġurament, jgħodd dak li qalet il-Qorti Kostituzzjonali fil-każ Il-Pulizija (Spettur

Norbert Ciappara) vs Renald Baldacchino, tas-6 ta' Frar 2015:

> "*Il-fatt illi l-istqarrija tiġi mwettqa bil-ġurament quddiem maġistrat, uffiċjal ġudizzjarju imparzjali u indipendenti, hija garanzija biżżejjed ta' kontroll u legalità, u, kontra dak li jgħid l-imputat, il-fatt illi għandu dritt ampju ta' kontro-eżami jagħtih ukoll equality of arms mal-prosekuzzjoni.*"

Fl-imsemmi każ ta' Stephens v Malta, il-Qorti Ewropea qalet proprju hekk:

> "*75. As to whether the rights of defence were respected, the Court notes that the applicant had all the opportunity to challenge G.R.E.'s statements in adversarial proceedings (see, mutatis mutandis, Khan, cited above, § 35), and he did cross-examine the witness in front of the jurors. Further, he did not object to the distribution to the jurors of the statements by G.R.E.*
>
> *76. As to the quality of that evidence, as noted above, it has not been shown that G.R.E. had been pressured into giving his statement, therefore it has not been established that he had not given his statements "freely"(compare, Perliński, cited above, § 38 and Huseyn and Others v. Azerbaijan, nos. 35485/05 and 3 others, § 210, 26 July 2011). On the contrary, the Court notes that the statement given by G.R.E. to the police on 12 August 2003 corresponded to the statement given before the magistrate the day after, on 13 August 2003. Such circumstances lend some credence to their reliability or accuracy, despite the fact that such statements were later retracted. It is true that the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness's testimony given at the trial hearing than to a record of his or her pre-trial questioning produced by the prosecution, unless there are good reasons to find otherwise (ibid. § 211). When dealing with complaints concerning this issue, although it is not the Court's task to verify whether the domestic courts made any substantive errors in that assessment, it is nevertheless required to review whether the courts gave reasons for their decisions*

in respect of any objections concerning the evidence produced (ibid.). However, the Convention does not require jurors to give reasons for their decisions (see Moreira Ferreira v. Portugal (no. 2) [GC], no. 19867/12, § 84, 11 July 2017) and, in so far as relevant in the present case, as noted in the preceding paragraph the applicant's objections, if any, were limited.

77. Additionally, the statements made by G.R.E. before the trial, to which the jury decided to give a greater evidential value as opposed to his later statements, were supported by other material in favour of the applicant's conviction. In particular, in its judgment the Court of Criminal Appeal also relied on the testimony of V.S. given during the proceedings and that of the applicant himself. It also explained in detail how the testimony of each witness corroborated that of the other (see paragraphs 26-27 above). The Court reiterates that a higher degree of scrutiny should be applied to assessment of statements by co-defendants, because the position in which co-defendants find themselves when testifying is different from that of ordinary witnesses (see Pichugin v. Russia, no. 38623/03, § 199, 23 October 2012). The same can be said to apply to accomplices tried in different proceedings. Thus, while it is true that the testimony of G.R.E. and V.S. as accomplices had to be approached with caution, the Constitutional Court considered that the trial judge had explained the law to the jurors and he had stated in clear terms that the prosecution's request to find guilt on the basis of G.R.E.'s sworn statement was legally correct whilst factually it depended on whether the jurors accepted that statement as the truth. In the Constitutional Court's view the judge had been careful not to influence the jurors, and, the Court of Criminal Appeal had already rejected the applicant's grievance (see paragraph 46 above). As to V.S., the Court notes that the applicant had not taken issue with that testimony neither during the criminal proceedings nor during the constitutional redress proceedings, and there is nothing in the case-file which could lead the Court to consider that the testimony given by V.S. – the crux of which referred to the identification of the applicant as Mark Stephens – had not

been considered with caution."

Il-Qorti taqbel ma' din il-linja ġurisprudenzjali u ma tarax li hemm lok li żżid aktar mal-prinċipji suesposti li tabbraċċja u tagħmilhom tagħha.

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

IMHALLEF

DEP/REG