



FIL-QORTI KRIMINALI

Onor. Imħallef Dr. Aaron M. Bugeja M.A. (Law), LL.D. (melit)

Ir-Repubblika ta' Malta
vs.
Matthew FARRUGIA

Att t'akkuza numru: 37/2022

Illum is-27 ta' Lulju 2023

Il-Qorti,

Rat l-att ta' akkuza migjuba fil-konfront **Matthew FARRUGIA** ta' 46 sena, iben Joseph u Mary nee' Fenech, imwield il-Pieta' Malta nhar is-27 ta' Ġunju tas-sena 1977, u residenti 'Marfrank', Triq Luqa Briffa, Gżira u detentur tal-karta tal-identita' bin-numru: 339177M li gie akkużat talli:

L-EWWEL (1) KAP

Assocjazzjoni għall-bejgħ jew traffikar tal-Cannabi

Il-fatti :-

Illi fl-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), u fil-ġimgħat ta' qabel din id-data, Matthew Farrugia (minn hawn il-quddiem f'dan l-Att ta' Akkuza msejjaħ "l-akkużat") iddeċieda li jassoċja ruħu ma' persuna jew persuni oħra f'dawn il-Gzejjer jew barra minn dawn il-Gzejjer sabiex

jimporta, ibiegħ jew jittraffika d-droga (pjanta tal-cannabis jew biċċa minnha) f'Malta.

Fil-fatt fiż-żminijiet hawn fuq imsemmija, l-akkuzat Matthew Farrugia kien ftiehem ma persuna jew persuni oħra fosthom ma' Jomic Calleja (akkuzat fi proċeduri separati) li bejniethom kellu jsir negozju tad-droga cannabis, u cioe' negozju ta' importazzjoni, tmexxija u traffikar ta' droga cannabis minn Sqallija għal ġewwa Malta sabiex sussegwentement din id-droga tiġi traffikata b'mod illeċitu ġewwa Malta.

Illi għal dan il-għan huma fasslu pjan ta' kif id-droga cannabis kellha titlaq minn Sqallija u ssib ruħha fis-suq Malti. Il-pjan kien illi l-cannabis tingieb Malta mill-akkuzat Matthew Farrugia permezz ta' groupage consignment sabiex din id-droga sussegwentement tingħata lil persuna jew persuni oħra sabiex tiġi mibjugħa u traffikata ġewwa pajjiżna. B'hekk l-akkuzat ftiehem u pjana ma persuna jew persuni oħra mhux biss in-natura tad-droga li kellha tiġi trasportata lejn Malta (cannabis) iżda wkoll il-mezz tat-trasport u r-rotta li permezz tagħhom din il-kunsinna tad-droga kellha tasal f'Malta sabiex eventwalment tkun tista' tiġi mqassma u traffikata hawn Malta.

Illi in eżekuzzjoni ta' dan il-pjan maħsub u pjanat minn qabel, l-akkuzat Matthew Farrugia mporta d-droga (pjanta cannabis) minn Sqallija għal ġewwa pajjiżna permezz ta' groupage consignment u ltaqa' ma terza persuna (ċertu David Lee Rogers, akkuzat fi proċeduri separati) sabiex jgħaddilu din id-droga.

Illi b'xorti tajba, il-Pulizija Maltija rċeviet informazzjoni dwar importazzjoni u traffikar ta' sustanza illeċita li kellha ssir fi xtutna. Illi għaldaqstant nhar l-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014) saret operazzjoni mill-Iskwadra ta' kontra d-droga, bl-iskop li tiġi nterċettata din id-droga. Illi fortunatament il-Pulizija rnexxilha tinterċetta din id-droga u arrestat lill-akkuzat Matthew Farrugia kif ukoll lil persuni oħra, fosthom lil David Lee Rogers u lil ċertu Angel Attard (akkuzati fi proċeduri separati).

Illi minn stħarriġ li sar wara minn espert maħtur mill-Qorti, rrizulta li din id-droga kienet tikkonsisti fl-ammont ta' sittax-il kilo u erba' mija u hamsa u

tmenin gramma (16.485 kg) tal-pjanta cannabis kollha jew biċċa minnha. Illi l-prezz li din id-droga kienet ġgħib fuq is-suq miftuħ kien ta' erba' mija u tnax-il elf u mija u ħamsa u għoxrin ewro (€ 412,125)

Illi d-droga cannabis hija msemmija fit-Taqsima 1 ta' l-Ewwel Skeda li tinsab ma' l-Ordinanza dwar il-Mediċini Perikolużi, Kapitolu 101 tal-Liġijiet ta' Malta.

Il-konsegwenzi :

Illi b'għemilu, l-akkuzat Matthew Farrugia sar ħati talli assoċja ruħu ma' xi persuna jew persuni oħra f'Malta jew barra minn Malta sabiex jimporta, ibiegħ jew jittraffika medicina f'Malta (il-pjanta cannabis kollha jew biċċa minnha) kontra d-disposizzjonijiet ta' l-Ordinanza dwar il-Mediċini Perikolużi, jew ippromwova, ikkostitwixxa, organizza jew iffinanzja din l-assoċjazzjoni.

L-akkuza :

Għaldaqstant l-Avukat Ġenerali f'isem ir-Repubblika ta' Malta, fl-isfond tal-fatti, ċirkostanzi, lok u żminijiet aktar il-fuq imsemmija f'dan l-att t'akkuza, jakkuza lill-imsemmi Matthew Farrugia, ħati talli fl-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), u fil-ġimgħat ta' qabel din id-data, assoċja ruħu ma' xi persuna jew persuni oħra f'Malta jew barra minn Malta sabiex jimporta, ibiegħ jew jittraffika medicina f'Malta (il-pjanta cannabis kollha jew biċċa minnha) kontra d-disposizzjonijiet ta' l-Ordinanza dwar il-Mediċini Perikolużi, Kapitolu 101 tal-Liġijiet ta' Malta jew ippromwova, ikkostitwixxa, organizza jew iffinanzja din l-assoċjazzjoni;

Il-piena mitluba :

Konsegwentement l-Avukat Ġenerali jitlob illi jingħamel skont il-Liġi kontra l-imsemmi akkużat Matthew Farrugia, u li jiġi kkundannat għal piena ta' prigunerija għal għomru u multa ta' mhux inqas minn elfejn tlett mija disgħa u għoxrin ewro u sebgħa u tletin ċentezmu (€2,329.37) izda mhux izjed minn mija u sittax-il elf erba' mija tmienja u sittin Euro u sebgħa u sittin

ċenteżmu (€116,468.67), u l-konfiska favur il-Gvern ta' Malta ta' l-oġġetti kollha li dwarhom sar ir-reat, u l-konfiska favur il-Gvern ta' Malta ta' kull flejjes jew propjeta' mobbli u immobbli oħra tal-persuna hekk misjuba ħatja, skond dak li hemm u jintqal fl-artikoli 2, 8(d)(e), 9, 10(1), 12, 15A, 22(1)(a)(f)(1A)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22A, 24A, u 26 ta' l-Ordinanza dwar il-Medicini Perikoluzi, Kapitolu 101 tal-Ligijiet ta' Malta, u r-regoli 4 u 9 tar-Regoli ta' l-1939 dwar il-Kontroll Intern ta' Medicini Perikoluzi (Avviż Legali 292/1939), u fl-artikoli 17, 23, 23A, 23B, 23Ċ u 533 tal-Kodiċi Kriminali, Kapitolu 9 tal-Ligijiet ta' Malta, jew għal kull piena oħra li tista' skond il-Ligi tingħata għall-ħtija ta' l-imsemmija akkużat.

IT-TIENI KAP

Importazzjoni ta' Cannabis

Il-fatti :-

Illi fiż-żmien u fiċ-ċirkostanzi ndikati fl-ewwel kap ta' dan l-att ta' akkuża, u cioe' fl-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), u fil-gimghat ta' qabel din id-data, l-akkużat Matthew Farrugia ddecieda li jimporta klandestinament f'Malta d-droga cannabis, sabiex din tigi mibjugħa u traffikata f'Malta.

Illi fil-fatt, in eżekuzzjoni ta' dan il-pjan maħsub minn qabel sabiex din id-droga tiddaħħal f'Malta, l-akkużat importa d-droga (pjanta cannabis) minn Sqallija għal ġewwa pajjizna permezz ta' groupage consignment.

Illi b'xorti tajba, nhar l-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014) saret operazzjoni mill-lskwadra ta' kontra d-droga fejn giet intercettata din id-droga ġewwa tas-Sliema u gie arrestat l-akkużat Matthew Farrugia kif ukoll persuni oħra (fosthom David Lee Rogers li hekk kif intqal iktar 'il fuq jinsab ukoll akkużat fi proceduri separati).

Illi minn stħarriġ li sar wara minn espert maħtur mill-Qorti, rrizulta li din id-droga kienet tikkonsisti fl-ammont ta' sittax-il kilo u erba' mija u ħamsa u tmenin gramma (16.485 kg) tal-pjanta cannabis kollha jew biċċa minnha. Illi l-prezz li din id-droga kienet ġgib fuq is-suq miftuħ kien ta' erba' mija u tnax-il elf u mija u ħamsa u għoxrin ewro (€ 412,125).

Illi li kieku ma kienx għall-intervent f'waqtu tal-Uffiċċjali tal-Pulizija, din id-droga kienet tispicċa fis-suq Malti.

Illi d-droga cannabis hija msemmija fit-Taqsima 1 ta' l-Ewwel Skeda li tinsab ma' l-Ordinanza dwar il-Medicini Perikolużi, Kapitolu 101 tal-Ligijiet ta' Malta. Illi l-akkużat Matthew Farrugia ma kellu ebda permess jew awtorizzazzjoni skond il-ligi sabiex ikun jista' jimporta din is-sustanza.

Il-konsegwenzi :-

Illi b'għemilu l-akkużat Matthew Farrugia sar ħati talli mporta, giegħel li tigi mportata jew għamel xi ħaġa sabiex tista' tigi mportata medicina perikoluża (il-pjanta cannabis kollha jew biċċa minnha) f'Malta bi ksur tad-disposizzjonijiet ta' l-Ordinanza dwar il-Medicini Perikolużi, Kapitolu 101 tal-Ligijiet ta' Malta, u dan meta ma kellux licenzja jew awtorizzazzjoni maħruġa taħt l-imsemmija Ordinanza li tawtorizza l-importazzjoni ta' dak l-oġġett.

L-akkuża :

Għaldaqstant l-Avukat Ġenerali, f'isem ir-Repubblika ta' Malta, jakkuża lill-imsemmi Matthew Farrugia ħati talli fl-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), u fil-gimghat ta' qabel din id-data, importa, giegħel li tigi mportata jew għamel xi ħaġa sabiex tista' tigi mportata medicina perikoluża (il-pjanta cannabis kollha jew biċċa minnha) f'Malta bi ksur tad-disposizzjonijiet ta' l-Ordinanza dwar il-Medicini Perikolużi, Kapitolu 101 tal-Ligijiet ta' Malta, u dan meta ma kellux licenzja jew awtorizzazzjoni maħruġa taħt l-imsemmija Ordinanza li tawtorizza l-importazzjoni ta' dak l-oġġett.

Il-piena mitluba :

Konsegwentement l-Avukat Ġenerali jitlob illi jingħamel skond il-Ligi kontra l-imsemmi akkużat Matthew Farrugia, u illi jiġi kkundannat għal piena ta' prigunerija għal għomru u multa ta' mhux inqas minn elfejn tlett mija disgħa u għoxrin Ewro u sebgha u tletin centezmu (€2,329.37) izda mhux izjed

minn mija u sittax-il elf erba' mija tmienja u sittin Euro u sebgħa u sittin centezmu (€116,468.67), u l-konfiska favur il-Gvern ta' Malta ta' l-oġġetti kollha li dwarhom sar ir-reat, u l-konfiska favur il-Gvern ta' Malta ta' kull flejjes jew propjeta' mobbli u immobbli oħra tal-persuna hekk misjuba ħatja, skond dak li hemm u jintqal fl-artikoli 2, 8(d)(e), 9, 10(1), 12, 14, 15, 15A, 20, 22(1)(a)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22A, 24A, u 26 ta' l-Ordinanza dwar il-Medicini Perikoluzi, Kapitolu 101 tal-Ligijiet ta' Malta, u r-regoli 4 u 9 tar-Regoli ta' l-1939 dwar il-Kontroll Intern ta' Medicini Perikoluzi (Avviż Legali 292/1939), u fl-artikoli 17, 23, 23A, 23B, 23C u 533 tal-Kodiċi Kriminali, Kapitolu 9 tal-Ligijiet ta' Malta, jew għal kull piena oħra li tista' skond il-Ligi tingħata għall-ħtija ta' l-imsemmi akkużat.

IT-TIELET KAP

Bejgħ jew traffikar ta' Cannabi

Il-fatti :-

Illi fiz-żmien u fiċ-ċirkostanzi ndikati fl-ewwel kap ta' dan l-att ta' akkuża, u cioe' fl-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), u fil-gingħat ta' qabel din id-data, l-akkużat Matthew Farrugia ddecieda li jibda jmexxi, ibiegħ, jipprokura, iforni u jittraffika fid-droga cannabis f'dawn il-Gzejjer.

Illi fil-fatt, l-akkużat importa d-droga (pjanta cannabis) minn Sqallija għal ġewwa pajizna permezz ta' groupage consignment u dan sabiex din id-droga tigi traffikata hawn Malta. Illi b'xorti tajba, nhar l-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014) saret operazzjoni tal-Iskwadra ta' kontra d-droga tal-Pulizija fejn giet intercettata din id-droga ġewwa tas-Sliema u gie arrestat l-akkużat Matthew Farrugia kif ukoll persuni oħra (fosthom David Lee Rogers li hekk kif intqal iktar 'il fuq jinsab ukoll akkużat fi proceduri separati).

Illi mill-investigazzjonijiet tal-Pulizija rrizulta li wara li l-akkużat Matthew Farrugia importa l-imsemmija droga minn Sqallija, huwa kien ser iforni u jittraffika din id-droga cannabis lil terzi persuni fosthom lil David Lee Rogers. Illi fil-fatt David Lee Rogers gie ukoll arrestat mill-Pulizija wara li

nhar l-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014) ġie osservat jagħmel kuntatt mal-akkużat Matthew Farrugia.

Illi minn sħarriġ li sar wara minn espert maħtur mill-Qorti, rrizulta li din id-droga kienet tikkonsisti fl-ammont ta' sittax-il kilo u erba' mija u ħamsa u tmenin gramma (16.485 kg) tal-pjanta cannabis kollha jew biċċa minnha. Illi l-prezz li din id-droga kienet ġġib fuq is-suq miftuħ kien ta' erba' mija u tnaħ-il elf u mija u ħamsa u għoxrin ewro (€ 412,125).

Illi d-droga cannabis hija msemmija fit-Taqsima 1 ta' l-Ewwel Skeda li tinsab ma' l-Ordinanza dwar il-Medicini Perikolużi, Kapitolu 101 tal-Liġijiet ta' Malta.

Illi ma kien hemm l-ebda licenzja jew awtorizzazzjoni maħruġa taħt l-Ordinanza dwar il-Medicini Perikolużi (Kapitolu 101 tal-Liġijiet ta' Malta) u mir-Regolamenti dwar il-Kontroll tal-Medicini (L.S.31.18) li tawtorizza lill-akkużat Matthew Farrugia sabiex iforni, jimporta, jesporta, jimmanifattura jew jipprokura id-droga perikoluża msemmija lil terzi.

Il-konsegwenzi :

Illi b'għemilu, l-akkużat Matthew Farrugia sar ħati talli nhar nhar l-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), u fil-ġimgħat ta' qabel din id-data, f'dawn il-gzejjer, biegh jew xort'oħra ttraffika fil-pjanta Cannabis kollha jew biċċa minnha, liema droga hija msemmija fit-Taqsima 1 ta' l-Ewwel Skeda li tinsab ma' l-Ordinanza dwar il-Medicini Perikolużi, Kapitolu 101 tal-Liġijiet ta' Malta, u dan bi ksur ta' l-istess Ordinanza.

L-akkuża :

Għaldaqstant l-Avukat Ġenerali, f'isem ir-Repubblika ta' Malta, jakkuża lill-imsemmi Matthew Farrugia ħati talli nhar l-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), u fil-ġimgħat ta' qabel din id-data, f'dawn il-gzejjer, biegh jew xort'oħra ttraffika fil-pjanta Cannabis kollha jew biċċa

minnha, bi ksur ta' l-Ordinanza dwar il-Medicini Perikolużi, Kapitolu 101 tal-Liġijiet ta' Malta.

Il-piena mitluba :

Konsegwentement l-Avukat Ġenerali jitlob illi jingħamel skond il-Liġi kontra l-imsemmi akkużat Matthew Farrugia, u illi huwa jiġi kkundannat għall-piena ta' prigunerija għal għomru u multa ta' mhux inqas minn elfejn tlett mija diġra u għoxrin Ewro u sebgħa u tletin ċenteżmu (€2,329.37) izda mhux iżjed minn mija u sittax-il elf erba' mija tmienja u sittin Euro u sebgħa u sittin ċenteżmu (€116,468.67), u l-konfiska favur il-Gvern ta' Malta ta' l-oġġetti kollha li dwarhom sar ir-reat, u l-konfiska favur il-Gvern ta' Malta ta' kull flejjes jew propjeta' mobbli u immobbli oħra ta' l-imsemmi Matthew Farrugia, skond dak li hemm u jintqal fl-artikoli 2, 8(d)(e), 9, 10(1), 12, 22(1)(a)(1B)(2)(a)(i)(3)(3A)(a)(b)(c)(d)(7), 22A, 24A u 26 ta' l-Ordinanza dwar il-Medicini Perikolużi, Kapitolu 101 tal-Liġijiet ta' Malta, u r-regoli 4 u 9 tar-Regoli ta' l-1939 dwar il-Kontroll Intern ta' Medicini Perikolużi (Avviż Legali 292/1939), u fl-artikoli 17, 23, 23A, 23B, 23Ċ u 533 tal-Kodiċi Kriminali, Kap. 9 tal-Liġijiet ta' Malta, jew għal kull piena oħra li tista' skond il-Liġi tingħata għall-ħtija ta' l-imsemmi akkużat.

IR-RABA' KAP

Pussess aggravat tal-pjanta Cannabis

Il-fatti :-

Illi fiz-żmien u fiċ-ċirkostanzi indikati fil-Kapi precedenti ta' dan l-att ta' l-akkuża, u cioè fl-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), u fil-ġimgħat ta' qabel din id-data, l-akkużat Matthew Farrugia kellu fil-pussess xjenti tiegħu kwantità kbira tal-pjanta cannabis.

Illi hekk kif narrat fil-Kapi precedenti ta' dan l-Att ta' Akkuża, nhar l-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), saret operazzjoni tal-Iskwadra ta' kontra d-droga tal-Pulizija fejn giet intercettata din id-droga ġewwa tas-Sliema u ġie arrestat l-akkużat Matthew Farrugia kif ukoll

persuni oħra (fosthom David Lee Rogers li hekk kif intqal iktar 'il fuq jinsab akkużat fi proceduri separati).

Illi minn stħarriġ li sar wara minn espert maħtur mill-Qorti, rrizulta li din id-droga kienet tikkonsisti fl-ammont ta' sittax-il kilo u erba' mija u ħamsa u tmenin gramma (16.485 kg) tal-pjanta cannabis kollha jew biċċa minnha. Illi l-prezz li din id-droga kienet ġġib fuq is-suq miftuħ kien ta' erba' mija u tnax-il elf u mija u ħamsa u għoxrin ewro (€ 412,125). Din id-droga ma kienetx intiza minn Matthew Farrugia sabiex jużaha jew jikkonsmaha personalment.

Illi d-droga cannabis hija msemmija fit-Taqsima I ta' l-Ewwel Skeda li tinsab ma' l-Ordinanza dwar il-Medicini Perikolużi, Kapitolu 101 tal-Liġijiet ta' Malta. Illi l-akkużat ma kienx awtorizzat jew b'xi mod ieħor liċenzjat b'xi liċenzja mogħtija mill-Ministru responsabbli għas-Saħħa u ma kienx awtorizzat bir-Regoli ta' l-1939 għall-Kontroll Intern fuq id-Drogi Perikolużi jew b'xi awtorità mogħtija mill-Ministru responsabbli għas-Saħħa li jkollu dik id-droga fil-pussess tiegħu.

Il-konsegwenzi :

Illi b'għemilu, l-imsemmi Matthew Farrugia sar ħati talli kellu fil-pussess tiegħu il-pjanta cannabis kollha jew biċċa minnha u dan meta ma kienx fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħruġ mit-Tabib Prinċipali tal-Gvern skond id-disposizzjonijiet tat-Taqsima VI ta' l-Ordinanza dwar il-Medicini Perikolużi, u meta ma kienx bil-liċenzja jew xort'oħra awtorizzat li jimmanifattura jew iforni d-droga msemmija, u ma kienx b'xi mod ieħor bil-liċenzja mogħtija mill-Ministru responsabbli għas-Saħħa u ma kienx awtorizzat bir-Regoli ta' l-1939 għall-Kontroll Intern fuq id-Drogi Perikolużi jew b'xi awtorità mogħtija mill-Ministru responsabbli għas-Saħħa li jkollu dik id-droga fil-pussess tiegħu, u dik id-droga ma gietx fornita lilu għall-użu tiegħu skond riċetta kif provdut fir-Regoli msemmija, u b'dan li r-reat sar taħt tali ċirkostanzi li juru li dak il-pussess ma kienx għall-użu esklussiv tiegħu.

L-akkuza :

Għaldaqstant l-Avukat Ġenerali f'isem ir-Repubblika ta' Malta, in bażi għall-fatti narrati fil-paragrafi preċedenti u għaċ-ċirkostanzi kollha aktar il-fuq imsemmija, jakkuza lill-imsemmi Matthew Farrugia, ħati talli fl-ewwel (1) ta' Settembru tas-sena elfejn u erbatax (2014), u fil-ġimgħat ta' qabel din id-data, kellu fil-pussess tiegħu l-pjanta cannabis kollha jew biċċa minnha u dan meta ma kienx fil-pussess ta' awtorizzazzjoni għall-importazzjoni jew għall-esportazzjoni maħruġ mit-Tabib Prinċipali tal-Gvern skond id-disposizzjonijiet tat-Taqsima VI ta' l-Ordinanza dwar il-Medicini Perikolużi, u meta ma kienx bil-licenzja jew xort'oħra awtorizzat li jimmanifattura jew iforni d-droga msemmija, u ma kienx b'xi mod ieħor bil-licenzja mogħtija mill-Ministru responsabbli għas-Saħħa u ma kienx awtorizzat bir-Regoli ta' l-1939 għall-Kontroll Intern fuq id-Drogi Perikolużi jew b'xi awtorità mogħtija mill-Ministru responsabbli għas-Saħħa li jkollu dik id-droga fil-pussess tiegħu, u dik id-droga ma gietx fornita lilu għall-użu tiegħu skond riċetta kif provdut fir-Regoli msemmija, u b'dan li r-reat sar taħt tali ċirkostanzi li juru li dak il-pussess ma kienx għall-użu esklussiv tiegħu.

Il-piena mitluba :

Konsegwentement l-Avukat Ġenerali jitlob illi jingħamel skond il-Ligi kontra l-imsemmi akkużat Matthew Farrugia, u illi kkundannat għal piena ta' prigunerija għal għomru u multa ta' mhux inqas minn elfejn tlett mija u disgħa u għoxrin euro u sebgħa u tletin ċenteżmu (€2329,37) izda mhux iżjed minn mija u sittax il-elf, erba' mija u tmienja u sittin euro u sebgħa u sittin ċenteżmu (€116,468,67) u l-konfiska favur il-Gvern ta' l-oġġetti kollha li dwarhom sar ir-reat u l-konfiska favur il-Gvern ta' kull flejjes jew propjeta' mobbli u immobbli oħra tal-persuni hekk misjuba ħatja, skond dak li hemm u jintqal fl-artikoli 2, 8(d) (e), 9, 10(1), 12, 15A, 22(1)(a)(1B)(2)(a)(i)(3A)(a)(b)(c)(d)(7), 22A, 24A u 26 ta' l-Ordinanza dwar il-Medicini Perikolużi, Kapitolu 101 tal-Ligijiet ta' Malta u r-regoli 2, 4, 9 u 16 tar-Regoli ta' l-1939 għall-Kontroll Intern fuq id-Drogi Perikolużi (N.G. 292 tal-1939), u fl-artikoli 17, 23, 23A, 23B, 23C u 533 tal-Kodiċi Kriminali jew għal kull piena oħra li tista' skond il-Ligi tingħata għal-ħtija tal-imsemmi akkużat.

Rat in-nota tal-eccezzjonijiet preliminari pprezentata mill-akkuzat FARRUGIA nhar it-28 ta' Dicembru 2022 fejn huwa eċċepixxa s-segwenti:

1. Illi l-eccipjenti qed jikkontesta l-akkuzi mahruġa kontra tiegħu fl-att tal-akkuza fl-ismijiet premissi fil-mertu u għalhekk il-jury odjern ser ikun wiehed kontestat in kwantu l-esponenti jirritjeni b'qawwa l- innocenza tiegħu;

2. Illi l-eccipjenti jikkontendi b'rispett li kull stqarrija minnu rilaxxjata għandha tigi sfilzata minn l-atti processwali u per konsegwenza ma' għandha ssir ebda referenza minn ebda xhud għal dak li kien intqal fl-imsemmija stqarrija 'n kwantu l-istess ma' kienitx rilaxxjata skond il- Ligi kif ser ikun espost waqt it-trattazzjoni ta' dawn l-eccezzjonijiet u anke 'n linea ma' guriprudenza kostanti tul dawn l-ahhar snin meta wiehed jiddibatti talbiet għal sfilz ta' stqarrijiet rilaxxjati minghajr assitenza kompleta ta' Avukat waqt it-tehid tal-istess stqarrija tul 1- istadju tal-investigazzjoni;

3. Illi għandu jigi dikjarat li Angel Attard, David Lee Rogers u Joseph Borg huma inammissibli bhala xhieda. Illi dawn il-persuni għandhom kazijiet pendenti relatati direttament ma' dan il-kaz u għalhekk huma ko-akkuzati u jew allegatament ko-awturi fl-akkuzi addebitati lilhom u lill-esponenti. Isegwi għalhekk li sal-mument li jkun se jigi ccelebrat il- jury tal-esponenti wiehed ikun irid jissindika jekk il-kazijiet ta' dawn l- individwi jkunux res judicata jew le. Illi fl-eventwalita li l-kazijiet tagħhom ikunu għandhom pendenti, allura l-esponenti jikkontendi b'rispett li apparti milli x-xhieda infushom ikunu inammissibli ma' tkunx tista ssir ebda referenza għal ebda verzjoni/evidenza/xhieda li taw dawn il-persuni waqt li jkun qed ikun ccelebrat dan il-jury. Illi għalhekk sa minn dan l-istadju, dina 1-Onor. Qorti għandha tipronuncja ruhha fis-sens li kull xhud [presumibilment Pulizija/fizzjali tal-Pulizija] li jkunu se jiehdu l-pedana tax-xhieda, jigu 'mwissija fl- assenza tal-gurati li ma' jkunux jistghu jagħmlu ebda referenza għal verzjonijiet ta' ko-akkuzati li jkun għad għandhom il-kaz tagħhom pendenti u li ma' jkunux ammissibli bhala xhieda skond il-Ligi;

4. B'riserva ta' eccezzjonijiet ohra permessi mill-Ligi skond il-kaz.

Semgħet it-trattazzjoni tal-partijiet relattivament għal dawn l-eccezzjonijiet preliminari;

Ikkunsidrat

Eċċezzjoni preliminari numru wieħed:

Il-Qorti rat li l-ewwel eċċezzjoni preliminari hija dikjarazzjoni ta' l-intent tal-akkużat li jikkontesta l-att tal-akkuża. Għaldaqstant filwaqt li tiegħu nota tar-rieda tal-akkużat li jikkontesta l-att tal-akkuża, liema posizzjoni tikkostitwixxi riflessjoni ta' stat ta' fatt, li strettament ma tikkostitwix eċċezzjoni preliminari skont il-Liġi, u li dwarha din il-Qorti ma tista' tgħaddi ebda ġudizzju għajr ħlief tirrispetta d-deċiżjoni tal-akkużat fil-parametri ta' dak li l-proċedura penali tipprevedi f'dan l-istadju u l-istadji suċċessivi, din il-Qorti tastjeni milli tiegħu konjizzjoni ulterjuri tal-istess.

Eċċezzjoni preliminari numru tnejn: l-inammissibilita' tal-istqarrija magħmula mingħajr id-dritt għall-assistenza legali prezenti fil-mument tar-rilaxx tal-istess.

1. Illi l-akkużat qiegħed jattakka l-ammissibilita' tal-istqarrija magħmula minnu nhar it-2 ta' Settembru 2014 minħabba li din kienet ġiet irrilaxxjata fi żmien meta l-akkużat FARRUGIA ma kellux aċċess għall-assistenza legali fil-mument tar-rilaxx tal-istqarrija waqt l-interrogazzjoni magħmula mill-Pulizija.
2. Meta l-akkużat irrilaxxja din l-istqarrija l-Liġi vigenti kienet dik li tikkonċedi lis-suspettat id-dritt li jikkonsulta ma' avukat jew prokuratur legali tal-fiducja tiegħu għal massimu ta' siegħa qabel l-interrogazzjoni tiegħu b'rabta mal-istess reat.
3. Din l-istqarrija ttieħdet ukoll fiż-żmien meta fil-Liġi kienet għadha tapplika r-regola tal-inferenza li kienet tiskatta mal-mument illi l-akkużat jew suspettat ta' reat li jkun għamel uzu mid-dritt li jikkonsulta ma' avukat għal massimu ta' siegħa qabel l-interrogazzjoni tiegħu b'rabta mal-istess reat meta imbagħad ikun ibbaża d-difiza tiegħu fil-proċess penali li jkun ingieb kontra tiegħu fuq xi fatt/i li ma jkunx/ikunux issemma'/isemmew minnu fl-interrogazzjoni. Din ir-regola, li kien jipprovdi għaliha l-Artikolu 355AU tal-Kodiċi Kriminali, ġiet abrogata fit-28 ta' Novembru 2016 meta daħal fis-seħħ l-Att LI tas-sena 2016, bl-Avviż Legali 401 tal-2016.

4. Qabel ma l-akkuzat irrilaxxa din l-istqarrija jirrizulta, minn dak li jidher f'pagna 15 u 31 tal-atti illi huwa kien gie mwissi mill-Ispettur Herman Mula fil-prezenza tal-Kuntistabbli 365 Malcolm Griscti li l-akkuzat ma kienx obligat li jtkellem sakemm ma jkunx jixtieq jtkellem, imma dak li kien se għid kien jista' jingieb bi prova.
5. Waħda mill-ewwel mistoqsijiet magħmula lill-akkuzat kienet jekk fehemx dik l-istqarrija, u għaliha wieġeb li kien fehemha.
6. Gie mistoqsi wkoll jikkonferma l-fatt li ma riedx li jieħu l-parir legali qabel l-interrogazzjoni. L-akkuzat wieġeb ukoll li kien qiegħed jikkonferma li ma kienx irid jieħu l-parir legali qabel l-interrogazzjoni. Konferma ta' dan imbagħad tinsab f'pagna 31 fejn hemm dikjarazzjoni ta' rifjut tal-jedd għall-parir legali u li giet iffirmita mill-akkuzat, l-Ispettur Mula, l-Ispettur Nikolai Sant u s-Surgent 839 Stephen Micallef. Huwa kien gie mwissi li kien arrestat in konnessjoni ma investigazzjoni dwar drogi kif ukoll li l-Ispettur Herman Mula kien infurmah li kellu l-jedd u d-dritt, jekk jitlob, li qabel ma ssirlu xi interrogazzjoni huwa jithalla kemm jista' jkun malajr jikkonsulta privatament ma avukat jew prokuratur legali, wiċċ imbwiċċ jew bit-telefon. L-akkuzat iddikjara li kien qiegħed jirrinunzja milli jeżerċita dak id-dritt.
7. L-akkuzat irrilaxxa stqarrija dettaljata. Fl-aħħar tal-istqarrija tiegħu, l-akkuzat iddikjara li huwa kien għamel dik l-istqarrija volontarjament, mingħajr theddid jew biza, wegħdiet jew twebbil ta' xi vantaġġi. Huwa ddikjara li dik kienet il-verita, u li wara li dik giet moqrija lill-Ispettur Mula, l-akkuzat zied li ma ried iżid jew inaqqas jew ibiddel xejn minnha. Wara li huwa irrilaxxa l-istqarrija, huwa għazel illi jiffirmaha.
8. Barra minn hekk imbagħad, f'pagna 724 et seq tal-atti jirrizulta wkoll li l-akkuzat kien, fit-3 ta' Settembru 2014 għazel li l-istqarrija li kien irrilaxxa l-gurnata ta' qabel lill-Pulizija, jikkonfermaha bil-gurament tiegħu quddiem Magistral Inkwirenti. F'pagna 729 u 731 jirrizulta li qabel ma l-akkuzat ikkonferma l-istqarrija tiegħu bil-gurament huwa gie mwissi wkoll mill-Magistral (għalkemm il-kontenut ta' din it-twissija ma jirrizultax mill-verbal redatt mill-Magistral Inkwirenti). Il-Magistral qratlu l-istqarrija li huwa kien irrilaxxa fil-gurnata ta' qabel. Wara li qra thielu, l-akkuzat ikkonfermaha bil-gurament tiegħu. Wara li kien gie muri ritratti ta' Jomic Calleja u ta' wiehed li kien jafu bhala

I-Ingliż iżda li ma kienx jaf ismu u għarafhom minn fuq photo ID, l-akkużat iddikjara li ma kellu xejn iżjed xi jżid.

9. Id-dritt għall-assistenza legali għal massimu ta' siegħa qabel l-interrogazzjoni kien ġie promulgat permezz ta' Att III tal-2002. Iżda dan id-dritt ġie mqiegħed fis-seħħ biss mill-10 ta' Frar 2010.
10. Qabel is-sena 2010, kienet teżisti projbizzjoni sistemika għall-aċċess għall-assistenza legali in kwantu l-Liġi Maltija ma kienetx tipprovdi b'mod esplicitu li suspettat kellu jedd li jikkonsulta ma avukat qabel ma jiġi interrogat.
11. Originarjament, il-Qrati ta' Ġustizzja Kriminali kienu jaċċettaw stqarrijiet magħmula minn persuni suspettati bħala provi ammissibbli fi proċedimenti kriminali. Il-linja tal-ħsieb dak iż-żmien kienet li l-Liġi penali Maltija ma kienetx tipprojbixxi lil persuna mill-liberta li tesprimi ruħha u li tagħmel "konfessjoni". F'dan is-sens allura kull ħaġa li suspettat, imputat jew akkużat ikun stqarr, sew bil-miktub kemm ukoll bil-fomm, setgħet tittieħed bi prova kontra min ikun stqarrha, kemm il-darba jinsab li dik il-konfessjoni tkun ġiet magħmula minnu volontarjament u ma tkunx ġiet imġiegħelha jew meħuda b'qerq, b'theddid, jew b'biza, jew b'wegħdiet jew bi twebbil ta' vantaġġi. Anzi anke konfessjonijiet oħra li jkunu saru bil-fomm, kemm qabel kif ukoll wara li tkun ingħatat konfessjoni setgħet tittieħed ukoll bi prova. Biss kwalunkwe tali konfessjoni kienet tagħmel biss prova kontra jew favur min ikun għamilha, u ma setgħetx titqies bħala ta' preġudizzju għal kwalunkwe persuna oħra.
12. Iżda wara li l-QEDB taħt il-Preżidenza ta' Nicolas Bratza kienet ħarġet bis-sentenza ċelebri **Salduz vs. Turkey** fis-27 ta' Novembru 2008, bil-mod il-mod, il-Qrati bdew jieħdu posizzjoni legali kemxejn differenti. Bdiet tikkonsolida ruħha posizzjoni li dawk l-istqarrijiet rilaxxjati qabel id-dħul fis-seħħ tal-jedd għal assistenza legali qabel l-interrogatorju ossija dawk l-istqarrijiet rilaxxjati qabel l-10 ta' Frar 2010 - indipendentement minn jekk il-kontenut ta' dawn l-istqarrijiet kienx inkriminanti għas-suspettat jew le – bdew jitqiesu bħala mhux ammissibbli bi prova fi proċedimenti kriminali. Kien hemm uħud minnhom fejn il-kwistjoni tal-volontarjeta kienet dibattuta, mentri oħrajn kienu jikkoncentraw fuq l-element tal-vulnerabilita' tad-dikjarant.

13. İzda kien hemm sentenzi oħra li kienu jishqu li n-nuqqas ta' assistenza legali fih innifsu ma kienx bizzejjed biex ikun jista' jingħad li jkun hemm ksur tal-jeddijiet ta' smiegħ xieraq. Anzi dawn il-każijiet kostituzzjonali bħal **Charles Steven Muscat vs. L-Avukat Ġenerali** tat-8 t'Ottubru 2012 jew **Ir-Repubblika ta' Malta vs. Carmel Camilleri** tat-22 ta' Frar 2013 saħqu li l-eżami li trid tagħmel il-Qorti ma kienx wieħed biss formali u tara jekk sempliciment stqarrija ingħatatx fl-assenza ta' assistenza legali, izda l-Qorti riedet tħares lejn il-proċediment penali b'mod sħiħ biex tkun tista' tasal tikkonkludi jekk ikunx seħħ ksur ta' jedd ta' smiegħ xieraq.

14. İzda maż-żmien mhux il-Qrati kollha ħadu dik il-linja. Beda jakkwista iżjed art l-argument iżjed formali fis-sens li l-fatt waħdu li tkun teżisti projbizzjoni sistemika għad-dritt tal-assistenza legali per se kien jammonta awtomatikament għal ksur tal-jedd għal smiegħ xieraq biex b'hekk kwalunkwe stqarrija mogħtija f'dak il-kuntest legali ma kienetx qed tithalla tittieħed bi prova.

15. Per eżempju fl-appell kriminali **Ir-Repubblika ta' Malta vs. Ronnie (Ronald) Azzopardi** deċiża mill-Qorti tal-Appell Kriminali (Superjuri) nhar id-29 ta' Mejju 2019, anke jekk fiz-żmien meta ingħatat dik is-sentenza kienu ġew registrati żviluppi kruċjali li sejrjn jiġu traċċjati iżjed l-isfel, dik il-Qorti kienet ċara li kwantu għal stqarrijiet rilaxxjati qabel l-2010 - u allura fi żmien meta d-dritt għall-assistenza legali kien kompletament ineżistenti (fil-kuntest Malti fis-sens li l-Liġi Maltija kienet siekta dwar dan il-jedd u allura la kien inkluż u l-anqas eskluż) - dik il-Qorti kkonkludiet li ma setgħax ħlief tiskarta l-istqarrijiet rilaxxjati mill-appellant meta tigi biex tagħmel l-evalwazzjoni mill-ġdid tal-provi miġbura f'dak il-każ. Saħqet hekk:

53. Illi l-appellant iqanqal f'dan l-istadju l-ecezzjoni dwar in-nuqqas ta' valur probatorju tal-istqarrijiet minnu rilaxxjati lill-pulizija a tempo vergine meta kien gie arrestat u interrogat. Jibda biex jingħad illi l-appellant qatt ma ammetta r-responsabbiltà tieghu għal dan l-event kriminuz u dejjem caħad l-involviment tieghu. Huwa ndubitat madanakollu illi fiz-żmien li kien gie mitkellem mill-pulizija, huwa ma kienx ingħata d-dritt li jikkonsulta ma' avukat tal-għażla tieghu billi l-ligi applikabbli f'dak iz-żmien dan il-jedd kienet tipprekludieh.

54. Illi l-appellant għandu ragun f'dan l-ilment minnu imqanqal u dan fid-dawl tal-iżviluppi legali kif ukoll ġurisprudenzjali in materja f'dawn l-aħħar snin. Illi sa ftit ilu din il-Qorti (kif diversament komposta) rega' saħqet il-principju ta' dritt illi stqarrija rilaxxjata mingħajr il-jedd tal-persuna suspettata

tikkonferixxi mal-avukat tal-fiducja taghha hija leziva tad-dritt tieghu ghal smigh xieraq u kwindi ghandha tigi skarata bhala prova in atti. Illi allura ghalkemm il-gurati fiz-zmien li kien celebrat il-guri inghataw direzzjoni mill-Imhalled sabiex jiehu kont tat-twegibiet moghtija fl- istqarrijiet rilaxxjati mill-appellant, madanakollu minn dak iz-zmien il-posizzjoni legali u guriprudenzjali inbidlet, in linea mad-decizjonijiet moghtija mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem b'uhud minn dawn id-decizjonijiet sahsitra inghataw fil-konfront ta' Malta:

“7. Brevement rakkontata is-sitwazzjoni qabel l-2002, fil-kwistjoni tal-istqarrija fil-pre trial stage, persuna arrestata ma kellha ebda jedd ghal 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 tghazel li ma tghamilx 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;

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; Illi ghalhekk l-evoluzzjoni tad-dritt ta' assistenza legali, kompriz allura l-enuncjazzjonijiet tal-Qorti Kostituzzjonali jista' jkun ekwiparat ma' bdil fil-ligi...’

55. Tenut kont tal-fatt illi l-istqarrijiet esebiti in atti gew rilaxxjati mill-appellant qabel l-2010, u allura fiz-zmien meta d-dritt ghall-assistenza legali kien kompletament inezistenti, din il-Qorti ma tistax hlief tiskarta l-istqarrijiet rilaxxjati mill-appellant meta tigi biex taghmel l-evalwazzjoni mill-gdid tal-provi fl-aggravju lilha devolut marbut mal-apprezzament tal-provi.

16. Din il-posizzjoni kienet issegwi l-linja tal-hsieb tas-sentenzi tal-QEDB fl-ismijiet **Dayanan vs. Turkey**¹ u **Boz vs. Turkey**² kif ukoll

¹ Decizjoni tas-Second Section tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem tat-13 t'Ottubru 2009.

² Decizjoni tas-Second Section tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem 9 ta' Frar 2010.

Borg vs. Malta³ liema sentenza firxet it-triq għal numru ta' sentenzi oħra mogħtija mill-Qrati Maltin fejn stqarrijiet irrilaxxjati fl-assenza ta' Liġi li tippermetti aċċess għall-assistenza legali sa minn qabel l-interrogazzjoni mill-investigaturi kienet giet interpretata bħala li tqis awtomatikament leżiva tad-dritt tas-smiegħ xieraq biex b'hekk kwalunkwe stqarrija hekk rilaxxata mis-suspettat jew akkużat kienet tiġi sfilzata mill-atti. Fil-fatt, il-Qrati Maltin kienu qegħdin ikunu attenti għas-sentenzi li kienu qegħdin jiġu mogħtija mill-QEDB. Il-**Fact Sheet** tal-QEDB stess, imsejha **Police and Assistance of a Lawyer** pubblikata f'Jannar tal-2020⁴ tagħti stampa ċara tal-kriterja u r-raġunijiet fejn u għaliex dik il-Qorti sabet (jew ma sabetx) ksur tal-artikolu 6(3)(c) tal-Konvenzjoni Ewropea b'rabta mal-jedd għall-assistenza legali u l-konsegwenzi f'każ fejn dak il-jedd ma jkunx gie mogħti f'diversi każijiet li kienu sottomessi lilha. Hekk allura jingħad f'dan il-**Fact Sheet** tas-sentenzi l-iżjed rappreżentattivi mogħtija minn dik il-Qorti fuq dan is-sugġett:

Article 6 § 3 (c) (right to legal assistance) of the European Convention on Human Rights: "Everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." "Certainly the primary purpose of Article 6 [of the Convention] as far as criminal matters are concerned is to ensure a fair trial by a tribunal competent to determine any criminal charge, but it does not follow that the Article has no application to pre-trial proceedings." (*Imbriosca v. Switzerland*, judgment of 24 November 1993, § 36). « [I]n order for the right to a fair trial to remain sufficiently "practical and effective" ..., Article 6 § 1 [of the Convention] 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." (*Salduz v. Turkey*, Grand Chamber judgment of 27 November 2008, § 55).

Salduz v. Turkey 27 November 2008 (Grand Chamber)

Charged with, and subsequently convicted of, participation in an unauthorised demonstration in support of the PKK (the Workers' Party of

³ Deciżjoni tal-Fourth Section tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem 12 ta' Jannar 2016.

⁴ https://www.echr.coe.int/documents/fs_police_arrest_eng.pdf, aċċessat fid-9 ta' Diċembru 2021.

Kurdistan, an illegal organisation), the applicant, in the absence of a lawyer, made a statement while in police custody admitting his guilt. The European Court of Human Rights held that there had been a violation of Article 6 § 3 (c) (right to legal assistance) taken together with Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights. It found that even though the applicant had been able to contest the charges at his trial, the fact that he could not be assisted by a lawyer while in police custody had irretrievably affected his defence rights, especially as he was a minor.

Pishchalnikov v. Russia 24 September 2009

Arrested on suspicion of aggravated robbery, the applicant was interrogated – both on the day of his arrest and immediately on the following day – in the absence of a lawyer, although he had clearly indicated a defence counsel he wanted to represent him. During these interrogations he confessed to having taken part in the activities of a criminal group which included among others a murder and kidnapping, crimes for which he was later convicted. The Court held that there had been a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention. It found that the lack of legal assistance to the applicant at the initial stages of police questioning had affected irreversibly his defence rights and undermined the possibility of him receiving a fair trial.

Dayanan v. Turkey 13 October 2009

The applicant, who was charged with, and subsequently convicted of, being a Hezbollah member, did not have the assistance of a lawyer while he was in police custody. The Court held that there had been a violation of Article 6 § 3 (c) taken together with 6 § 1 of the Convention. It found that that restriction (which was systematic, as it was prescribed by the relevant provisions of Turkish law) of the right of an individual deprived of his liberty to have access to a lawyer was sufficient for it to be able to conclude that there had been a violation of Article 6 of the Convention, even though the applicant had remained silent while in police custody.

Yeşilkaya v. Turkey 8 December 2009

The applicant was refused access to a lawyer while in police custody, although he had denied any involvement in the offences imputed to him by the interviewing officers. The Court held that there had been a violation of Article 6 § 3 (c) taken together with Article 6 § 1 of the Convention on account of the lack of legal assistance to the applicant while in police custody.

Boz v. Turkey 9 February 2010

Arrested on suspicion of belonging to the PKK (Workers' Party of Kurdistan, an illegal organisation), the applicant was at the end of his trial sentenced to the death penalty for "membership of an armed gang", a sentence which was subsequently commuted to life imprisonment. He complained in

particular of the fact that he did not have access to a lawyer while in police custody. The Court reiterated that systematic restriction of access to a lawyer pursuant to the relevant legal provisions breached Article 6 of the Convention.

Brusco v. France 14 October 2010

The applicant, who was suspected of having masterminded an aggression, was taken into police custody and questioned as a witness, after being made to swear to tell the truth. The Court held that there had been a violation of Article 6 §§ 1 and 3 (right to remain silent and not to incriminate oneself) of the Convention. According to the Court, the applicant was not a mere witness but a person “charged with a criminal offence”, and as such should have had the right to remain silent and not to incriminate himself, guaranteed by Article 6 §§ 1 and 3 of the Convention. The situation was aggravated by the fact that the applicant was not assisted by a lawyer until his 20th hour in police custody. Had a lawyer been present, he would have been able to inform the applicant of his right to remain silent.

Nechiporuk and Yonkalo v. Ukraine 21 April 2011

The first applicant complained in particular about the unfairness of the proceedings against him, notably that his conviction for a number of offences, including premeditated murder for profit committed following a conspiracy with a group of persons, had been based on statements made without the assistance of a lawyer. The Court held that there had been a violation of Article 6 §§ 1 and 3 (c) of the Convention. It was undisputed by the parties that the applicant had not become legally represented until having spent three days in detention. The applicant had confessed several times to murder at the early stage of his interrogation when he was not assisted by counsel, and had undoubtedly been affected by the restrictions on his access to a lawyer in that his confessions to the police were used for his conviction.

Mader v. Croatia 21 June 2011

Serving a prison sentence for murder, the applicant complained in particular of having been beaten by the police during his questioning at the Zagreb Police Department, of having been forced to sit on a chair and having been deprived of sleep and food during the three days that he was questioned. He also complained that the criminal proceedings against him had been unfair, in particular as he had lacked legal assistance during the police questioning. The Court held that there had been a violation of Article 6 § 3 in conjunction with Article 6 § 1 of the Convention, on account of the lack of legal assistance afforded to the applicant during his questioning by the police. While it was not for the Court to speculate on the impact which access to a lawyer during police custody would have had on the ensuing proceedings, it was clear that neither the assistance provided subsequently by a lawyer nor the adversarial nature of the proceedings could counteract the defects which had occurred during his initial questioning. The applicant

had further not waived his right to legal assistance during his police questioning, as he had complained about the lack of that assistance from the initial stages of the proceedings. The Court also held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention both in respect of the applicant's treatment at the Zagreb Police Department and in respect of the failure to investigate his complaint.

Huseyn and Others v. Azerbaijan 26 July 2011

This case concerned the complaint by opposition activists about the unfairness of criminal proceedings brought against them for allegedly inciting demonstrators to violence. As to the applicants' legal assistance upon their arrest, the Court noted that three of them had been questioned without a lawyer, and without having expressly waived their right to legal assistance. Such a restriction had clearly infringed their defence rights at the initial stage of the proceedings, in violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention.

Bandaletov v. Ukraine 31 October 2013

The applicant was summoned to a police station with several others for questioning as a witness in connection with an investigation into a double murder committed in his home. He confessed to the offence. The following day he was arrested as a suspect and a lawyer was appointed to assist him. The applicant at all times thereafter confirmed his confession. He was sentenced to life imprisonment. The applicant complained that at the initial stage of the investigation he had not been assisted by a lawyer, and that the domestic courts had failed to mitigate his sentence even though he had voluntarily surrendered to the police and confessed to the crime. The Court held that there had been no violation of Article 6 §§ 1 and 3 of the Convention, finding that the criminal proceedings against the applicant had been fair overall. The domestic authorities had changed the applicant's status from witness to suspect and provided him with a lawyer as soon as they had plausible reasons to suspect him. At his first interview as a suspect the applicant was legally represented and no investigative measures were taken after his initial confession before he had been assigned a lawyer. The applicant had maintained his confession throughout the pre-trial investigation and judicial proceedings, during which he was represented by several different lawyers. His initial confession could hardly be regarded as having been used to convict him, as the trial court had relied exclusively on the investigative measures conducted afterwards, when the applicant already had legal assistance. Lastly, the applicant's request for mitigation of sentence on the ground of his voluntary surrender had been examined by the domestic courts.

Pakshayev v. Russia 13 March 2014

Convicted of murder and sentenced to ten years' imprisonment in January 2001 – the conviction being eventually upheld in October 2006 – the applicant complained that he had been denied access to a lawyer during

his questioning and first few days of police custody in May 1997. He submitted that during the questioning he had been threatened by the investigator that if he did not confess he would be raped by his cellmates. The applicant then confessed to the murder but retracted his confession during the trial when represented by a lawyer. Before the Court, he complained that he had not had any legal assistance during the initial stage of the criminal proceedings and that the confession he had made was then used to convict him. The Court held that there had been a violation of Article 6 §§ 1 and 3 of the Convention, finding that the use of his confession statement made without the benefit of legal advice for the applicant's conviction undermined the fairness of the proceedings as a whole.

Blaj v. Romania 8 April 2014

The applicant, who was suspected of accepting a bribe, had been placed under police surveillance. A third party who had been cooperating with the police came to meet him and left an envelope containing money on his desk. The police officers intervened immediately and caught the applicant red handed. In accordance with domestic law, they drew up a report of the offence. Later that day the applicant was informed of the charges against him and of the fact that he had a right to remain silent and to see a lawyer. Subsequently he had the assistance of a lawyer during questioning. The applicant complained in particular that he had not been informed of his right to silence and legal representation at the time when he was "caught in the act". The Court held that there had been no violation of Article 6 §§ 1 and 3 of the Convention in respect of the lack of assistance from a lawyer during the applicant's questioning by the police under the flagrante delicto procedure. Observing that under Romanian law where a person is "caught in the act" of committing an offence, the investigating authorities must confine themselves to questions about the material evidence found at the scene of the flagrante delicto and must not question the person about his involvement in a criminal offence, it found that the investigating authorities had not overstepped the mark in the applicant's case. It also noted that when the applicant had been questioned by the anti-corruption prosecutor about the offence he had had access to a lawyer. In all his statements, the applicant had maintained his innocence and had never contested the statements contained in the procès-verbal. The Court therefore found that the use of those statements at trial could not be said to have prejudiced the fairness of his trial. The Court also noted in conclusion that the applicant had never alleged that his very first statements recorded in the procès-verbal had been the result of duress or ill treatment.

Çarkçı (no. 2) v. Turkey 14 October 2014

Serving a life sentence for participating in an armed robbery of a jewellery shop during which the shop owner was shot dead, the applicant complained in particular that the criminal proceedings against him had been unfair. Notably, he alleged that the statements taken from him without the assistance of a legal representative and not even bearing his signature had been used as evidence to convict him. The Court held that there had been

a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention, on account of the lack of legal assistance afforded to the applicant while in the custody of the gendarmerie.

A.T. v. Luxembourg (no. 30460/13) 9 April 2015

This case concerned the failure to provide the applicant with effective legal assistance after he was arrested under a European Arrest Warrant, during both his police interview and his first appearance before the investigating judge the next day. The Court found in particular that, as regards the police interview, the statutory provisions then in force implicitly excluded the assistance of a lawyer for persons arrested under a European Arrest Warrant issued by Luxembourg. Since the domestic court had not remedied the consequences of that lack of assistance, by excluding from its reasoning the statements taken during that interview, the Court held that there had been a violation of Article 6 § 3 (c) taken together with Article 6 § 1 of the Convention on account of the failure to provide legal assistance during the police interview. As further regards the applicant's first appearance before the investigating judge, the Court found that the lack of access to the file prior to that hearing had not constituted a violation of Article 6 § 3 (c) taken together with Article 6 § 1, as Article 6 of the Convention did not guarantee unlimited access to the file prior to such an appearance. However, the Court held that the possibility for the applicant to consult his lawyer before that hearing was not sufficiently guaranteed by Luxembourg law. In so far as the applicant had not been able to converse with his lawyer before the hearing in question, the Court thus found a violation of Article 6 § 3 (c) taken together with Article 6 § 1 of the Convention.

Turbylev v. Russia 6 October 2015

This case concerned the applicant's complaint of having been ill-treated in police custody and of the unfairness of the criminal trial against him, in which his statement of "surrender and confession", made as a result of his ill-treatment and in the absence of a lawyer, was used as evidence. The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention, both on account of the applicant's ill-treatment and on account of the ineffective investigation into the related complaints. It also held that there had been a violation of Article 6 §§ 1 and 3 (c) of the Convention, finding that the admission of the statement of "surrender and confession" as evidence had rendered the applicant's trial unfair. The Court observed in particular that the absence of a requirement, under Russian law, of access to a lawyer for such a statement had been used to circumvent the applicant's right as a de facto suspect to legal assistance. This situation had resulted from the systematic application of legal provisions, as interpreted by the domestic courts. Moreover, in failing to conduct an independent careful assessment of the "quality" of the statement as evidence, and instead relying on the investigative authority's findings, the domestic courts had legalised the police officers' use of a statement of "surrender and confession" to

document the applicant's confession obtained as a result of his inhuman and degrading treatment after his apprehension on suspicion of having committed a crime.

Dvorski v. Croatia 20 October 2015 (Grand Chamber)

This case concerned the refusal by the police to allow a lawyer hired by the applicant's parents to represent him while he was being questioned at a police station on suspicion of multiple murder, armed robbery and arson. The applicant confessed to the offences after signing a power of attorney authorising another lawyer to represent him. The Court held that there had been a violation of Article 6 §§ 1 and 3 of the Convention. It found in particular that the police had not informed the applicant either of the availability of the lawyer hired by his family or of the lawyer's presence at the police station. During questioning the applicant had confessed to the offences with which he was charged, and his confession had been admitted in evidence at his trial. The Court observed that the national courts had not properly addressed that issue, and in particular had failed to take the necessary measures to ensure a fair trial.

Borg v. Malta 12 January 2016

This case mainly concerned the complaint by a convicted offender of not having had any legal assistance during questioning in police custody, resulting from the absence of any provisions under Maltese law in force at the time allowing for legal assistance during pre-trial investigation and questioning by the police. Furthermore, the applicant complained that the Maltese Constitutional Court had changed its interpretation of the European Court's case-law concerning the right to legal assistance in police custody, which he alleged ran counter to the principle of legal certainty and was in breach of Article 6 of the Convention. The Court held that there had been a violation of Article 6 § 3 in conjunction with Article 6 § 1 of the Convention, finding in particular that the applicant had been denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This fell short of the requirement under Article 6 that the right to assistance of a lawyer at the initial stages of police interrogation might only be subject to restrictions if there were compelling reasons. The Court further held that there had been no violation of Article 6 § 1 of the Convention in respect of an alleged lack of legal certainty concerning the constitutional proceedings.

17. **Borg vs. Malta** ħalliet impatt fuq il-mod kif il-Qrati Maltin kienu bdew iħarsu lejn din il-problematika tal-ksur tal-jedd għal smiegħ xieraq. Iżda anke f'dawk il-każijiet fejn il-Qrati Maltin qiesu li fi stadju qabel ma jkun instema' l-każ mhux neċessarjament ikun seħħ ksur tal-jedd ta' smiegħ xieraq, xorta waħda kien hemm propensità li stqarrijiet meħuda minn suspettati fi stadju fejn ma kienx hemm jedd għal assistenza legali sħiħa, kienu lesti li jordnaw l-isfilz ta' stqarrijiet

rilaxxjati minn suspettati f'dak il-kuntest b'hala mizura preventiva kontra potenzjali ksur ta' jedd ta' smiegħ xieraq.

18. F'dan is-sens il-kawza **Il-Pulizija vs. Clayton Azzopardi** deciza nhar it-13 ta' Frar 2017 mill-Qorti Kostituzzjonali fejn intqal hekk:

L-argument tal-Avukat Ġenerali huwa għalhekk loġiku u raġonevoli, u l-qorti taqbel illi f'dan l-istadju għadu ma seħħ ebda ksur tal-jedd għal smiegħ xieraq. Madankollu, kif osservat fil-każ ta' Malcolm Said, il-qorti xorta hija tal-fehma li ma jkunx għaqli li l-proċess kriminali jithalla jitkompla bil-produzzjoni tal-istqarrija tal-attur ukoll jekk, kif josserva l-Avukat Ġenerali, ma jidher li hemm xejn kompromettenti għall-attur fiha. Il-qorti tasal għal din il-konkluzjoni fid-dawl tal-posizzjoni li hadet il-Qorti Ewropea fil-każ ta' Borg. Għalhekk, għalkemm għadu ma seħħ ebda ksur tal-jedd għal smiegħ xieraq, fiċ-ċirkostanzi huwa xieraq illi, kif qalet l-ewwel qorti, ma jsir ebda uzu mill-istqarrija fil-proċess kriminali sabiex, meta l-proċess kriminali jintemm, ma jkunx tniġġes b'irregolarità li tista' twassal għal konsegwenzi bħal dawk fil-każ ta' Borg.

19. Wara s-sentenza **Borg vs. Malta**, il-kontroversja baqgħet għaddejja anke quddiem il-QEDB fejn dik il-Qorti kompliet tiżviluppa l-linja tal-ħsieb tagħha riflessa f'kazijiet bħal **Salduz vs. Turkey** u l-istess **Borg**. Anke l-QEDB bdiet tibgħat sinjali li setgħu deheru konfligġenti f'ċerti aspetti ta' din il-kwistjoni. Minn posizzjoni li xxaqleb lejn l-aspetti formalistiċi riflessi f'**Borg** u oħrajn fejn l-aspett tal-projbizzjoni sistemika jidher li kien ta' iżjed piż, il-QEDB ma nqatgħetx kompletament mill-ħsibijiet riflessi f'kazijiet oħra bħal **Ahmed Mete vs. Turkey** tal-25 t'April 2006 – allura każ li kien preċeda lil **Salduz vs. Turkey** u fejn fih allura gie ritenut li l-fatt li suspettat ma kienx mogħti d-dritt għal assistenza legali fi stadju bikri tal-proċeduri per se ma kienx necessarjament iwassal għal ksur tal-jedd għal smiegħ xieraq. Dan allura juri li anke l-QEDB kienet perjodikament tgħaddi minn bidla fl-enfazi u l-ħsieb tagħha.

20. Tant hu veru dan li l-QEDB bdiet titbiegħed mill-pożizzjoni li tikkonsidra b'hala ksur awtomatiku ta' dritt għal smiegħ xieraq tal-akkuzat f'każ fejn kienet teżisti ristrezzjoni sistemika għad-dritt għall-assistenza legali sa minn qabel l-interrogatorju sempliciment għaliex il-liġi domestika ma kienetx tippovdi dak id-dritt. Il-QEDB bdiet taddotta posizzjoni li kienet anqas formalistika u assolutista billi, reġgħet bdiet tagħmel iżjed enfazi fuq il-fatt li meta tigi biex tistharreġ jekk fil-każ konkret ikunx sar xi ksur għal jedd ta' smiegħ xieraq, il-

Qorti tkun trid tagħmel enfazi akbar fuq l-iskrutinju tal-fattispeċje u ċ-ċirkostanzi kollha tal-każ b'mod sħiħ. Din il-linja ta' ħsieb sabet rilessjoni f'sentenzi sussegwenti fosthom **Ibrahim and Others vs. United Kingdom**,⁵ **Simeonovi vs. Bulgaria**,⁶ **Beuze vs. Belgium**⁷ u **Farrugia vs. Malta**.⁸

21. Fil-fatt, jirrizulta mill-istess **Fact Book** maħruġ mill-QEDB aktar il-fuq imsemmi li l-ġurisprudenza ta' dik il-Qorti kompliet tevolvi billi issa kienu qed jiġu decizi sentenzi b'mod iżjed iffukat fuq il-kriterju doppju li jissodisfa t-test tal-“compelling reasons” fuq naħa u l-“overall fairness of the proceedings” fuq in-naħa l-oħra:

Ibrahim and Others v. the United Kingdom 13 September 2016 (Grand Chamber)

On 21 July 2005 four bombs were detonated on the London transport system but failed to explode. The perpetrators fled the scene and a police investigation immediately commenced. The first three applicants were arrested on suspicion of having detonated three of the bombs. The fourth applicant was initially interviewed as a witness in respect of the attacks but it subsequently became apparent that he had assisted one of the bombers after the failed attack and, after he had made a written statement, he was also arrested. All four applicants were later convicted of criminal offences. The case concerned the temporary delay in providing the applicants with access to a lawyer, in respect of the first three applicants, after their arrests, and, as regards the fourth applicant, after the police had begun to suspect him of involvement in a criminal offence but prior to his arrest; and the admission at their subsequent trials of statements made in the absence of lawyers. The Court held that there had been no violation of Article 6 §§ 1 and 3 (c) (right to a fair trial and right to legal assistance) of the Convention in respect of the three first applicants and that there had been a breach of those provisions in respect of the fourth applicant. In respect of the three first applicants the Court was convinced that, at the time of their initial police questioning, there had been an urgent need to avert serious adverse consequences for the life and physical integrity of the public, namely further suicide attacks. There had therefore been compelling reasons for the temporary restrictions on their right to legal advice. The Court was also satisfied that the proceedings as a whole in respect of each of the first three applicants had been fair. The position with regard to the fourth applicant, who also complained about the delay in access to a lawyer, was different.

⁵ Decizjoni tal-Grand Chamber tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem tat-13 ta' Settembru 2016.

⁶ Decizjoni tal-Grand Chamber tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem tat-12 ta' Mejju 2016.

⁷ Decizjoni tal-Grand Chamber tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem fid-9 ta' Novembru 2018 (applikazzjoni numru: 71409/10).

⁸ Decizjoni tal-Grand Chamber tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem fl-4 ta' Ġunju 2019 u reżja finali fis-7 ta' Ottubru 2019 (applikazzjoni numru: 63041/13).

He was initially interviewed as a witness, and therefore without legal advice. However, it emerged during questioning that he had assisted a fourth bomber following the failed attack. At that point, according to the applicable code of practice, he should have been cautioned and offered legal advice. However, this was not done. After he had made a written witness statement, he was arrested, charged with, and subsequently convicted of, assisting the fourth bomber and failing to disclose information after the attacks. In his case, the Court was not convinced that there had been compelling reasons for restricting his access to legal advice and for failing to inform him of his right to remain silent. It was significant that there was no basis in domestic law for the police to choose not to caution him at the point at which he had started to incriminate himself. The consequence was that he had been misled as to his procedural rights. Further, the police decision could not subsequently be reviewed as it had not been recorded and no evidence had been heard as to the reasons behind it. As there were no compelling reasons, it fell to the UK Government to show that the proceedings were nonetheless fair. In the Court's view they were unable to do this and it accordingly concluded that the overall fairness of the fourth applicant's trial had been prejudiced by the decision not to caution him and to restrict his access to legal advice.

Simeonovi v. Bulgaria 12 May 2017 (Grand Chamber)

The applicant, who is currently serving a sentence in Sofia Prison, alleged in particular that he had not been assisted by a lawyer during the first days of his detention. The Grand Chamber held that there had been no violation of Article 6 §§ 1 and 3 (c) (right to a fair trial and right to legal assistance) of the Convention, finding that the Bulgarian Government had presented relevant and sufficient evidence to demonstrate that they had not irremediably infringed the fairness of the criminal proceedings taken as a whole on account of the lack of legal assistance during the first three days of the applicant's police custody. In particular, the Court noted that no evidence capable of being used against the applicant had been obtained and included in the criminal file during that period; that the applicant, assisted by a lawyer of his own choosing, had voluntarily confessed two weeks after being charged, when he had been informed of his procedural rights, including the privilege against self-incrimination; that the applicant had actively participated in all stages of the criminal proceedings; that his conviction had not been based solely on his confession but also on a whole body of consistent evidence; that the case had been assessed at three judicial levels and that the domestic courts had provided adequate reasons for their decisions in both factual and legal terms and had properly examined the issue of respect for procedural rights.

Beuze v. Belgium 9 November 2018 (Grand Chamber)

The applicant, sentenced to life imprisonment for intentional homicide, complained that he had been denied access to a lawyer while in police

custody, had been insufficiently informed of his right to remain silent and not to incriminate himself, and had also been deprived of legal assistance when he was questioned, or subjected to other investigative acts, during the judicial pre-trial investigation. The Grand Chamber held that there had been a violation of Article 6 §§ 1 and 3 (c) (right to a fair trial and right to legal assistance) of the Convention. It found in particular that the criminal proceedings, when considered as a whole, had not remedied the procedural defects occurring at the pre-trial stage. The restrictions on the right of access to a lawyer had been particularly extensive and in those circumstances, without being sufficiently informed of his right to remain silent, the applicant had made detailed statements while in police custody. His statements had subsequently been included in the evidence before the Assize Court, which had failed to conduct an appropriate examination of how they had been obtained or to consider the impact of the lawyer's absence. The Court of Cassation had focused on the lack of legal assistance in police custody but had not assessed the consequences for the applicant's defence rights of the lawyer's absence during his subsequent police interviews, examinations by the investigating judge and other acts during the judicial investigation. In the Grand Chamber's view, the combination of these various factors had rendered the proceedings unfair as a whole.

Doyle v. Ireland 23 May 2019

This case concerned the applicant's complaint that his right of access to a solicitor was restricted during questioning on suspicion of murder. Although the applicant could consult with his solicitor prior to the first interview and thereafter, police practice at the time meant solicitors were not permitted to be present during police questioning. The Court held that there had been no violation of Article 6 §§ 1 and 3 (c) (right to a fair trial and right to legal assistance of own choosing) of the Convention. It noted in particular that very strict scrutiny had to be applied in cases where, as here, there had been no compelling reasons to justify restricting the applicant's right of access to a lawyer. However, when examining the proceedings as a whole, the Court found that the overall fairness of the trial had not been prejudiced.

Olivieri v. France and Bloise v. France 11 July 2019

Both cases concerned periods spent in police custody prior to the legislative reform of April 2011. The applicants alleged that their criminal convictions had been based on the confessions they made while in police custody, during which time they had not been notified of their right to remain silent and had not had the effective assistance of a lawyer. The Court held that there had been a violation of Article 6 §§ 1 (right to a fair trial) and 3 (c) (right to be assisted by a lawyer) of the Convention in the first case and no violation of Article 6 §§ 1 and 3 (c) in the second case. In the case of the first applicant, and with regard to his right not to incriminate himself, the Court noted in particular the existence of statements and answers given to

the investigators which had clearly affected his position in the proceedings. Firstly, he had been questioned by the police for around ten hours while in police custody, after which he had admitted responsibility. Secondly, there was nothing in the reasoning of the domestic decisions to suggest that other elements could be regarded as an integral and significant part of the evidence on which his conviction had been based. The Court therefore found that the criminal proceedings, considered as a whole, had not cured the procedural defects occurring during police custody. In the case of the second applicant the Court noted in particular that the trial and appeal courts had based their decisions on evidence other than the statements made in police custody, namely on the evidence established during the investigation, when the applicant had been assisted by a lawyer, on the hearings before the first-instance court, on the precise and detailed testimony of third parties directly connected with the applicant's activities, and on examination of the accounting and banking records. The Court found that in that case the criminal proceedings, considered as a whole, had cured the procedural defects occurring during police custody.

22. **F'Farrugia vs. Malta**, b'referenza għall-kriterji enuncjati f'**Beuze vs. Belgium**, il-QEDB stqarret hekk:

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.⁹ 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

⁹ Enfasi ta' din il-Qorti.

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 selfincrimination 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).'

118. However, the nature of the statements and their use is of particular relevance in the present case. The Court notes that they did not contain any confessions nor was their content self-incriminating. However, the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see, for example, *Schmid-Laffer v. Switzerland*, no. 41269/08, § 37, 16 June 2015). Indeed, the statements given by the applicant, at pre-trial stage in the absence of a lawyer, were relied on by the Court of Criminal Appeal in connection with the applicant's credibility. In particular, in its judgment the Court of Criminal Appeal had noted certain inconsistencies in his statements of 1 and 2 February 2002 (see paragraph 22 above) and it had considered that he was not reliable as the applicant had replied in an evasive and hesitant way to police questions concerning his business, profitability, rent, and profits of the previous year (see paragraph 26 above). Nevertheless, the Court cannot but note that the Court of Criminal Appeal had found that A.F.'s statements had been enough to determine the applicant's guilt. In consequence its assessment of the applicant's credibility on the basis of his pre-trial statements can be considered as having been made *ex abundanti cautela* (out of an abundance of caution). In the light of the Court of Criminal Appeal's finding concerning the sufficiency of A.F.'s statements, the Court considers that the use it made of the applicant's statements to assess his credibility cannot be considered as having substantially affected his position. (iii) Conclusion

119. In conclusion, while very strict scrutiny must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court, in the specific circumstances of the case, finds that having taken into account the combination of the various above-mentioned factors, despite the lack of procedural safeguards relevant to the instant case, the overall fairness of the

criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.

120. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.¹⁰

23. Din il-linja ġurisprudenzjali giet segwita mill-Qrati Maltin f'kazijiet fl-ismijiet **The Republic of Malta vs. Lamin Samura Seguba,¹¹ Ir-Repubblika ta' Malta vs. Kevin Gatt u Omissis,¹² Ir-Repubblika ta' Malta vs. Ahmed El Fadali Enan,¹³ Ir-Repubblika ta' Malta vs. Rosario Militello,¹⁴ Ir-Repubblika ta' Malta vs. Hassan Ali Mohammed Abdel Raouf Josephine Wadi.¹⁵**

24. Simili ghal dak li ġara f'dan il-kaz ta' Matthew FARRUGIA, fil-kawża **Ir-Repubblika ta' Malta vs. Martino Aiello¹⁶** kienet tressqet eċċezzjoni sabiex tigi dikjarata b'ħala inammissibbli l-istqarrija li l-akkuzat kien irrilaxxa mal-Pulizija fid-19 ta' Ottubru 2014. Il-Qorti Kriminali kienet adottat il-linja tal-ħsieb mistqarra f'**Borg** u iddeċidiet:

Illi t-tezi tar-rikorrenti hi semplici u lineari. Meta giet rilaxxata l-istqarrija dik il-persuna ma kellhiex id-dritt tal-prezenza ta' l-avukat. Il-konkluzjoni allura hi li tali stqarrija għandha tkun inammissibbli. Illi t-tezi tal-Avukat Generali hi daqstant lineari. Ir-rikorrenti gie mogħti d-dritt li jikkonsulta avukat ta' fiducja tiegħu. Hu rrifjuta tali dritt, ma kkonsulta lil hadd u liberament u volontarjament irrilaxxa l-istqarrija hawn fuq imsemmija. Illi din il-Qorti josserva li s-sentenza Borg v. Malta (hawn fuq citata) ma kinitx biss jtkellem fuq id-dritt li wiehed ikollu l-jedd li jikkonsulta ma avukat qabel tigi rilaxxat stqarrija. Dik is-sentenza tghid illi f'kull stadju ta' l-investigazzjoni l-persuna susspettata jew akkuzata jrid ikollha d-dritt ta' l-avukat. Kien għalhekk li gie promulgat l-Att numru LI ta' l-2016. Illi fil-fehma ta' din il-Qorti l-istess prinċipji li gew applikati fis-sentenzi hawn fuq imsemmija għandhom japplikaw f'dan il-kaz ukoll. Dan ifisser li anki jekk r-rikorrenti rrifjuta d-dritt li jikkonsulta avukat ma jfissirx li hu kien ser jirrifjuta l-prezenza ta' avukat fl-istess kamra ta' l-interrogatorju, tenut kont tal-fatt li l-artikolu fuq citat isemmi li l-avukat prezenti għallinterrogatorju "...jippartecipa b'mod effettiv fl-interrogazzjoni...". Kif wiehed jista' japprezza din hi sitwazzjoni kompletament differenti. Logikament, ma tistax tipenalizza persuna li għamel għazla fuq parametri kompletament differenti minn dawk li huma in vigore llum. Għaldaqstant, għal dawn ir-ragunijiet din il-Qorti tilqa l-eċċezzjoni tar-rikorrenti. Tiddikjara l-istqarrija tad-19 ta' Ottubru, 2014

¹⁰ Enfasi ta' din il-Qorti.

¹¹ Deciża nhar is-27 ta' Jannar 2021 mill-Qorti tal-Appell Kriminali (Sede Superjuri).

¹² Deciża mill-Qorti tal-Appell Kriminali (Sede Superjuri) nhar is-27 ta' Ottubru 2021.

¹³ Deciża mill-Qorti tal-Appell Kriminali (Sede Superjuri) nhar is-27 ta' Jannar 2021.

¹⁴ Deciża mill-Qorti tal-Appell Kriminali (Sede Superjuri) nhar is-27 ta' Jannar 2021

¹⁵ Deciża mill-Qorti tal-Appell Kriminali (Sede Superjuri) nhar is-27 ta' Jannar 2021.

¹⁶ Sentenza preliminari mogħtija nhar id-9 ta' Mejju 2017.

rilaxxat mir-rikorrenti bhala nammissibbli. Tali stqarrija ma tistax tigi prodotta waqt il-guri jew kopja taghha moghtija lill-gurati.'

25. Is-sentenza **Aiello** ghalhekk applikat il-principji enuncjati f'**Borg vs. Malta** anki f'sitwazzjoni fejn **Aiello** irrilaxxja l-istqarrija fis-sena 2014 meta allura ma fil-Ligi Maltija ma kienitx tezisti ristrezzjoni sistemika għad-dritt tal-aċċess għall-avukat izda tali dritt kien limitat għal mument ta' qabel ma tittiehed l-istqarrija mill-Pulizija kif ukoll f'kuntest fejn l-akkuzat kien għażel minn jeddu li l-anqas minn dak il-jedd ma jagħmel uzu. B'hekk il-Qorti Kriminali ddecidiet illi tikkunsidra bhala inammissibbli din l-istqarrija tal-akkuzat Aiello minkejja li huwa kien **volontarjament irrifjuta** d-dritt għall-assistenza legali fil-forma li kellu dak iż-żmien.

26. Izda din is-sentenza giet appellata mill-Avukat Ġenerali fejn il-Qorti tal-Appell Kriminali (Superjuri) irreferiet il-vertenza lill-Prim' Awla tal-Qorti Ċivili wara li stqarret is-segwenti:

'19. Illi gjaldarba l-kwistjoni imqanqla la hija wahda frivola u lanqas vessatorja, din il-Qorti, wara li rat l-artikolu 46(3) tal-Kostituzzjoni u l-artikolu 4(3) tal- Kapitolu 319 tal-Ligijiet ta' Malta, qed tibghat lil-Prim'Awla tal-Qorti Civili, l-kwistjoni dwar jekk bl-uzu fil-guri kontra l-akkuzat appellat Martino Aiello tal- istqarrija rilaxxjata minnu lill-pulizija fid-19 ta' Ottubru 2014 jigix lez id-dritt tal-istess Martino Aiello ghal smigh xieraq sancit bl-artikolu 39(1)(3) tal-Kostituzzjoni u l-artikolu 6(1)(3) tal-Konvenzjoni għall-Protezzjoni tad- Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali.

20. Tiddiferixxi dan l-appell sine die sakemm tigi deciza definittivament il-kwistjoni fuq riferita.'

27. Il-Prim' Awla tal-Qorti Ċivili (Sede Kostituzzjonali),¹⁷ iddecidiet dir-referenza Kostituzzjonali billi ddikjarat li fiċ-ċirkostanzi ma kienx sejjer jirrizulta ebda leżjoni tad-dritt fundamentali tal-akkuzat għal smiegħ xieraq kif sancit bl-Artikolu 39 tal-Kostituzzjoni ta' Malta u l-Artikolu 6 tal-Konvenzjoni Ewropeja għall-Protezzjoni tad-Drittijiet tal-Bniedem u dan wara li stqarret is-segwenti:

Qabel xejn, din il-Qorti tghid illi ma jirrizultax li kien hemm raġunijiet tajbin li jzommu lill-akkuzat milli jkollu avukat preżenti waqt l-interrogazzjoni u waqt li kien qiegħed jagħti listqarrija. L-uniku raġuni li Martino Aiello ma setax ikun mgħejjun minn avukat kienet li, dak iż-żmien, il-ligi ma kienitx tippermetti li l-akkuzat ikun hekk mgħejjun f'dak l-istadju imma seta' jikkonsulta ma' avukat

¹⁷ 17 ta' Ottubru 2019.

biss qabel l-interrogazzjoni, xi haġa li mhux kontestat li Martino Aiello rrifjuta li jagħmel.

Madanakollu, il-posizzjoni ġurisprudenzjali kurrenti turi li m'għadux il-każ li l-fatt waħdu li l-ligi ma kienitx tippermetti l-assistenza ta' avukat qabel jew waqt l-interrogazzjoni, awtomatikament iwassal sabiex jinstab li kien hemm ksur tad-dritt għal smiġh xieraq, kif qiegħed jippretendi l-akkużat, imma din il-Qorti għandha tqis diversi fatturi qabel tasal għall-konklużjoni tagħha.

Kif diġà ntqal, dan il-każ huwa kemmxejn differenti mill-każ ta' Aldo Pistella in kwantu li Martino Aiello kien fil-fatt irrinunzja għad-dritt tiegħu li jikkonsulta ma' avukat qabel ma ġie interrogat mill-Pulizija u assolutament ma ġiex muri li huwa xtaq li jkollu avukat preżenti waqt l-interrogazzjoni jew waqt li kien qiegħed jirrilaxxa l-istqarrija.

Propriu dwar ir-rinunzja,¹⁸ fil-każ ta' Paskal vs Ukraine, tal-15 ta' Settembru 2011, il-Qorti Ewropea qalet hekk:

“neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial, as long as a waiver of the right is given in an unequivocal manner and was attended by the minimum safeguards commensurate to its importance.”

L-akkużat naqas milli juri wkoll li huwa għandu jitqies bħala persuna vulnerabbli. Fil-fatt, meta xehed quddiem din il-Qorti, tista' tgħid li ma semma xejn dwar iċ-ċirkostanzi tal-arrest tiegħu flimkien ma' martu mal wasla tagħhom hawn Malta. Martino Aiello la kien minorenni u lanqas kien ibati minn xi forma oħra ta' vulnerabilità fiż-żmien in kwistjoni. Lanqas jirrizulta xi prova fis-sens li iċ-ċirkostanzi li fihom ittiedet l-istqarrija kienu għalih intimidanti. L-istqarrija nġhatat volontarjament, mingħajr theddid, wegħdi jew promessi ta' vantaġġi u wara li nġhata d-debita twissija skont il-ligi, u cioè li ma kienx obligat jtkellem sakemm ma kienx hekk jixtieq, iżda li dak li kien ser jgħid seta' jingieb bħala prova kontrih. Lanqas ma ġie muri li l-akkużat ma kienx qiegħed jifhem l-import ta' iċ-ċirkostanzi li kien jinsab fihom. Il-Qorti tinnota wkoll illi Martino Aiello ma qajjem l-ebda lment dwar l-istqarrija li kien irrilaxxa qabel ma ġie deċiż il-każ ta' Borg vs Malta imma huwa talab lill-Qorti Kriminali sabiex ikun jista' jressaq eċċezzjoni dwar l-inammissibilità tal-istqarrija biss minhabba dak deċiż mill-Qorti Ewropea fl-imsemmija każ. Imma kif rajna, din il-ġurisprudenza m'għadhiex applikabbli inkondizzjonatament safejn l-akkużat qiegħed jippretendi li l-istqarrija tiegħu mhijjex ammissibbli bħala prova abbażi tal-fatt waħdu li dak iż-żmien ma setax ikun assistit minn avukat waqt l-interrogazzjoni u waqt li kien qiegħed jirrilaxxa l-istqarrija. Anzi, għandhom jittiedu in konsiderazzjoni diversi fatturi li flimkien jagħmlu iċ-ċirkostanzi tal-każ.

¹⁸ Enfasi miżjuda.

Martino Aiello fl-ebda stadju ma kkontesta l-awtenticità tal-prova li gabet il-Prosekuzzjoni kontrih, liema prova mhijiex limitata għall-istqarrija in kwistjoni. Lanqas ma oppona għall-prezentata ta' dik l-evidenza. L-assjem tal-provi ser ikun evalwat minn l-imħallef u għalhekk, minn persuna b'għarfien għoli tal-proċedura legali u l-liġi Maltija. Finalment, il-Qorti tqis illi huwa indubbjament fl-interess pubbliku li jiġi investigat u imressaq sabiex jiġi għudikat mill-Qorti ta' għurisdizzjoni kriminali l-akkuzat li nqabad in flagrante jitttraffika d-droga f'Malta. Għaldaqstant, il-Qorti ssib li l-akkuzat Martino Aiello ma rnekkilux juri li tassew ser iġarrab ksur tad-dritt tiegħu għal smigh xieraq bl-użu fil-għurid kontra tiegħu tal-istqarrija li rrilaxxa fid-19 ta' Ottubru 2014.

28. Dik is-sentenza giet appellata u l-Qorti Kostituzzjonali¹⁹ caħdet l-appell ipprezentat minn **Aiello** għaliex irriteriet is-segwenti:

24. L-istqarrija ma ttieħditx bi ksur ta' xi dispozizzjoni ta' liġi u kien cħertament fl-interess pubbliku li kaz' dwar traffikar ta' drogi f'Malta, ikun investigat u jittieħdu proċeduri kriminali dwaru.

25. M'hemm l-ebda indizju li l-appellant gie mgħiegħel jagħmel dik l-istqarrija. Fl-ebda stadju m'allega xi theddid jew wegħda biex għamilha.

26. Fir-rigward ta' paragrafu (g) m'hemmx dubju li l-prosekuzzjoni trid li dik l-istqarrija tintuza bħala prova importanti tal-għurid li għad irid isir, u dan b'riferenza għal dak li għara f'Mejju u Ġunju, 2014 peress li fl-istqarrija Aiello ammetta li kien hemm darbtejn oħra f'dawk ix-xhur meta kien digā` importa droga f'Malta. Fatt li saret riferenza espressa għalih fl-att tal-akkuzā. Għalkemm il-għurid għadu ma sarx, hu evidenti li dik l-ammissjoni f-listqarrija għandha importanza fil-proċess kriminali tant li saret riferenza għaliha fl-att tal-akkuzā.

27. Inoltre, dwar dan il-kaz' għad irid isir il-għurid. Għalhekk huma l-għurati li ser jiddeciedu jekk l-appellant huwiex ħati tal-akkuzā li hemm kontrih. Madankollu, ser ikun l-imħallef li fl-indirizz li jrid jagħmel lill-għurati ser jigbor ix-xieħda tax- xieħda u l-provi li jkunu marbutin magħhom, kif ukoll ifisser ix-xorta u l-elementi tar-reati rilevanti għall-kaz'.

28. Hu l-imħallef li jagħmel "... kull osservazzjoni oħra li tiswa biex triegi u turi lill-għurid kif għandu jaqdi sewwa d-dmirijiet tiegħu" (Artikolu 465 tal-Kap. 9). Li hu zgur hu li f'dan il-kaz' l-appellant ingħata l-opportunitā` li jittkellem ma' avukat, bit-telefon jew wiċċ` imb'wiċċ, izda irrifjuta. B'dak il-mod l-appellant caħħad lilu nnifsu mill-opportunitā` li jkollu parir ta' avukat sabiex jipprepara ruħu għall-interrogazzjoni u sabiex jingħata tagħrif dwar il-vantaggi u zvantaggi li jittkellem jew jagħzel is-silenzju waqt l-interrogazzjoni. Dan meta kien jaf li waqt l-interrogazzjoni ma kienx ser ikollu l-assistenza ta' avukat prezenti. Dan apparti li kien infurmat b'mod cħar

¹⁹ Deciża nhar is-27 ta' Marzu 2020.

bil-jedd li jibqa' sieket u ma jwegibx izda xorta aghzel li jwiegeb liberament. Madankollu xorta aghzel li jwiegeb ghad-domandi li sarulu.'

29. Biex imbagħad, il-Qorti tal-Appell Kriminali (Sede Superjuri) fis-sentenza fl-ismijiet **Ir-Repubblika ta' Malta vs. Martino Aiello** deciza nhar is-27 ta' Jannar 2021, iddecidiet il-kwistjoni tal-ammissibilita' tal-istqarrija abbażi tal-kriterji enuncjati f'**Beuze** u f'**Farrugia** u stqarret:

12. Illi d-difiza madanakollu xorta waħda għadha qed tinsisti fuq l-ecc'ezzjoni minnha ventilata dwar l-inammissibilita' ta' l-istqarrija tal-akkużat billi tishaq illi din il-Qorti ta' kompetenza penali trid thares lejn il-kwistjoni taht ottika differenti minn dik tal-Qorti Kostituzzjonali, ukoll għaliex fl-istadju ta' celebrazzjoni tal-guri ma għandux jiggi rimess għal gudizzju tal-gurija popolari jekk il-kriterji mfassla fid-decizjoni **Beuze vs il-Belgju** deciza mill-Qorti Ewropea dwar id-Drittijiet tal-Bniedem ma gewx osservati. Jishaq illi għalkemm l-appellat inqabad f'okkazjoni waħda in flagrante jdaħħal id-droga g'ewwa Malta, madanakollu fl-istqarrija rilaxxata minnu lil pulizija huwa jammetti għal zewg okkazjonijiet oħra ta' importazzjoni liema fatt allura joħrog' biss minn din l-istqarrija u minn ebda prova oħra. Fil-fehma tad-difiza hija din il-Qorti f'dan listadju tal-proceduri li għandha tara jekk il-kriterji imfassal fid-decizjoni **Beuze** jirrizultaw u jekk humiex ser iwasslu sabiex jivvizjaw listqarrija rilaxxata mill-appellat.

13. Illi l-Qorti ma tistax taqbel ma din il-linja difenzjonali u dan għaliex kif diversi drabi affermat mill-qrati fir-rigward tal-principju regolatur dwarl-ammissibilita' ta' prova fil-process penali, hija prassi adottata mill-gurisprudenza illi prova ma titqiesx li hija inammissibbli sakemm ma jkunx hemm xi dispozizzjoni espressa tal-ligi li tipprekludi l-ammissjoni ta' dik il-prova. Illi għalkemm l-appellat jistieden lil din il-Qorti tqies l- ilment minnu ventilat mill-ottika tal-process gudizzjarju penali u mhux minn dak ta' natura kostituzzjonali, madanakollu imbagħad ma jinvoka ebda regola tal-ligi penali li teskludi l-producibilita' tal-istess stqarrija, izda jishaq unikament illi l-istqarrija hija nieqsa mill-valur probatorju tagħha għaliex meta interrogat huwa ma kellux avukat prezenti miegħu sabiex jassistieh u allura qiegħed issejjes din il-lanzanza fuq lezjoni potenzjali tal-jedd tiegħu għal smigh xieraq, kwistjoni li issa giet determinat finalment mill-Qorti Kostituzzjonali li sabet li ma kien hemm ebda lezjoni f'dan issens. (...)'

Fl-istess sentenza, fost kunsiderazzjonijiet oħra gie meqjus li:

'16. Magħmula dawn il-kunsiderazzjonijiet u billi d-difiza qed issejjes l-ecc'ezzjoni tagħha dwar l-inammissibilita' ta' l-istqarrija ta' l-akkużat mhux fuq xi regola penali tal- evidenza li teskludi dik il-prova, peress li l-istess stqarrija kienet konformi mal-ligi penali vigenti dak iz- zmien, izda fuq l-allegata lezjoni potenzjali tal-jedd tiegħu għal smigh xieraq taht l-artikolu 6 tal-Konvenzjoni Ewropea jekk isir użu minn dik l- istqarrija fil-guri, u peress

ukoll illi millpronunzjament tal-Qorti Kostituzzjonali tali lezjoni ma tirrizultax, f'dan l-istadju talproċeduri l-imsemmija prova m'għandhiex tiġi skartata billi mhux nieqes il-valur probatorju tagħha għaladarba ma hemm ebda regola li qed teskludi l-ammissjoni ta' l-istess.'

Sentenza ta' ċertu importanza hija dik mogħtija mill-Grand Chamber tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-sentenza 'Bueze vs Belgium'14 fejn għamlet enfazi fuq il-fatt li l-proċeduri iridu jiġu evalwati fl-intier tagħhom sabiex jiġi determinat jekk kien hemm vjolazzjoni tad-dritt għal smiegh xieraq. F'dik is-sentenza gie meqjus li:

'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, cited above, § 274, and Simeonovi, cited above, § 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.'

Fl-istess sentenza gie kkunsidrat li:

'193. In conclusion, re-emphasising the very strict scrutiny that must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court finds that the criminal proceedings brought against the applicant, when considered as a whole, did not cure the procedural defects occurring at the pre-trial stage, among which the following can be regarded as particularly significant:

- (a) The restrictions on the applicant's right of access to a lawyer were particularly extensive. He was questioned while in police custody without having been able to consult with a lawyer beforehand or to secure the presence of a lawyer, and in the course of the subsequent judicial investigation no lawyer attended his interviews or other investigative acts.
- (b) In those circumstances, and without having received sufficiently clear prior information as to his right to remain silent, the applicant gave detailed statements while in police custody. He subsequently presented different versions of the facts

and made statements which, even though they were not self-incriminating *stricto sensu*, substantially affected his position as regards, in particular, the charge of the attempted murder of C.L.

(c) All of the statements in question were admitted in evidence by the Assize Court without conducting an appropriate examination of the circumstances in which the statements had been given, or of the impact of the absence of a lawyer.

(d) While the Court of Cassation examined the admissibility of the prosecution case, also seeking to ascertain whether the right to a fair trial had been respected, it focused on the absence of a lawyer during the period in police custody without assessing the consequences for the applicant's defence rights of the lawyer's absence during his police interviews, examinations by the investigating judge and other acts performed in the course of the subsequent judicial investigation.

(e) The statements given by the applicant played an important role in the indictment and, as regards the count of the attempted murder of C.L., constituted an integral part of the evidence on which the applicant's conviction was based.

(f) In the trial before the Assize Court, the jurors did not receive any directions or guidance as to how the applicant's statements and their evidential value should be assessed.

194. The Court finds it important to emphasise, as it has done in other cases under Article 6 § 1 of the Convention in which an assessment of the overall fairness of the proceedings was at issue, that it is not for the Court to act as a court of fourth instance (see *Schatschaschwili*, cited above, § 124). In carrying out such an assessment, as required by Article 6 § 1, it must nevertheless carefully look at how the domestic proceedings were conducted, and very strict scrutiny is called for where the restriction on the right of access to a lawyer is not based on any compelling reasons. In the present case, it is the combination of the various abovementioned factors, and not each one taken separately, which rendered the proceedings unfair as a whole. (iv) General conclusion

195. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.'

30. Imbagħad, kif ingħad fl-appell kriminali superjuri **Azzopardi** permezz tal-Att LI tas-sena 2016, fost oħrajn, gie ntrodott wkoll l-Artikolu 355AUA fil-Kodiċi Kriminali, li jiffirma parti minn diversi disposizzjonijiet li ġew introdotti taħt is-Sub-titolu IX tat-Titolu I tat-Taqsima I fil-Kodiċi Kriminali li ġiet imfassla fuq id-Direttiva 2013/48/UE tal-Parlament Ewropew u tal-Kunsill tat-22 ta' Ottubru 2013 dwar id-dritt tal-aċċess għall-avukat fi proċeduri kriminali u fi proċeduri tal-mandat ta' arrest Ewropew. Din id-dispożizzjoni tal-Liġi taqra hekk:

(1) Il-persuna suspettata jew akkuzata għandu jkollha d-dritt ta' aċċess għal avukat fil-ħin u b'tali mod li jhalliha teżerċita d-drittijiet ta' difiża tagħha b'mod prattiku u effettiv.

(2) Il-persuna suspettata jew akkuzata għandu jkollha aċċess għal avukat mingħajr ebda dewmien. Fi kwalunkwe eventwalità, il-persuna suspettata jew akkuzata għandu jkollha aċċess għal avukat mill-mument li sseħħ l-ewwel waħda minn dawn il-ġrajjet:

(a) qabel ma tkun interrogata mill-Pulizija Eżekuttiva jew minn awtorità oħra għall-infurzar tal-liġi jew awtorità ġudizzjarja fir-rigward tat-tweqqig ta' reat kriminali;

(b) mat-twettiq minn awtoritajiet investigattivi jew awtoritajiet kompetenti oħra ta' xi att ta' natura investigattiva jew att ta' kollezzjoni ta' evidenza oħraskont is-subartikolu (8)(e);

(c) mingħajr ebda dewmien wara li tkun giet imcaħħda l-libertà;

(d) meta tkun giet imħarrka sabiex tidher quddiem qorti li għandha ġurisdizzjoni f'materji kriminali, f'qasir żmien qabel ma titressaq quddiem dik il-qorti.

31. Ġara però li iktar reċenti, u wara l-promulgazzjoni tal-Att LI tal-2016, kien hemm kazijiet fejn il-Qorti Kostituzzjonali kienet ħadet pożizzjoni li kienet tidher iżjed konsoni mal-linja ta' ħsieb ġia espressa mill-QEDB f'**Borg vs. Malta** aktar milli f'**Farrugia vs. Malta**. Din id-direzzjoni ħalliet l-influenza tagħha fuq il-ħsieb tal-Qrati ta' Ġustizzja Kriminali, b'mod li anke dawn bdew ukoll jaddottaw pożizzjoni iktar formalistika milli sostantiva bħal dawk il-kazijiet li mxew fuq il-linji gwida enunċjati mill-QEDB f'**Ibrahim and others, Simeonovi, f'Beuze** u f'**Farrugia**. F'dan is-sens allura ingħataw sentenzi bħal **Ir-Repubblika ta' Malta vs. Keith Cremona** deciza nhar il-15 ta' Diċembru 2022 mill-Qorti Kriminali; **Ir-Repubblika ta' Malta vs. Carl Caruana** deciza nhar deciza mill-Qorti Kriminali kif preseduta nhar is-6 ta' Diċembru 2022; **Ir-Repubblika ta' Malta vs. Andrew Mangion** deciza mill-Qorti tal-Appell Kriminali nhar l-4 ta' Mejju 2022; **Ir-Repubblika ta' Malta vs. Anthony Bugeja u Piero Di Bartolo** deciza mill-Qorti tal-Appell Kriminali (Sede Superjuri) nhar it-22 ta' Ġunju 2022.

32. Il-ħsieb wara din il-pożizzjoni kostituzzjonali kienet sabiex jiġu evitati lanjanzi dwar ksur sistemiku ta' drittijiet fundamentali tal-akkuzat. Fil-fatt il-Qorti Kostituzzjonali fil-kawża ta' **Morgan Onuorah vs. l-Avukat tal-Istat** deciza nhar is-27 ta' Jannar 2021 qalet hekk:

25. Fl-aħħar aggravju r-rikorrent argumenta dwar ir-rimedji. Isostni li:

“Illi jiġi rilevat illi jekk hemm ksur tad-drittijiet fundamentali tal-bniedem minħabba kemm l-operat tal-Pulizija Investigattiva u kemm mill-Avukat Generali, awtomatikament il-proċeduri sussegwenti fil-konfront tal-appellanti kienu monki u jilledu d-drittijiet fundamentali tal-bniedem peress li bdew u bbazati fuq ċirkostanzi leżivi għad-drittijiet fundamentali tal-bniedem. L-appellant jirriveva illi l-Qorti bħala Sede Kostituzzjonali għandha tiggarrantixxi il-korrettezza tal-proċeduri meħuda u s-sentenza infushom fis-sens illi għandhom jiġu garantiti l-ħarsien ta' ċertu principji proċedurali li huma indispensabbli għall-amministrazzjoni tajba tal- ġustizzja”.

26. Kif diga` issemma, il-fatt waħdu li saret l-interrogazzjoni mhux fil-presenza ta' avukat ta' fiduċja tal-attur m'huwiex biżżejjed sabiex jagħti lok għall-ksur tad-dritt fundamentali ta' smiġħ xieraq. Madankollu l-użu ta' dik l-istqarrija fil-proċeduri kriminali, li fiha l-attur ammetta għal uħud mir-reati li akkużat biha, taf twassal sabiex iseħħ dak il-ksur tal-jedd fundamentali. Dan iktar u iktar meta tikkunsidra l-gurisprudenza ampja tal-Qorti Ewropea tad-Drittijiet tal-Bniedem li issa ilha s-snin tirrepeti l- istess insenjament. Li s-suspettat jikkellem ma' avukat qabel l-interrogazzjoni, l- assistenza ta' avukat wara li tkun saret l-interrogazzjoni u n-natura adversarial tal-kawża kriminali sussegwenti, m'humix garanzija adegwata li jirrimedjaw għad-difett li s-suspett ma kienx assistit minn avukat waqt l-interrogazzjoni li saret meta kien taħt arrest. Fis-sentenza riċenti Mehmet Zeki Celebi v. Turkey (App. 27583/07) il-QEDB kompliet tişhaq: "57. The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. The Court also reiterates that it is only in very exceptional circumstances that it can conclude that a given trial has not been prejudiced by the restriction of an applicant's right of access to a lawyer (see Dimitar Mitev v. Bulgaria, no. 34779/08, 71, 8 March 2018)".

28. Irrispettivament taqbilx mar-ragunament ta' dik il-Qorti internazzjonali, jibqa' l-fatt li l-gurisprudenza kienet ċara meta ngħatat is- sentenza ta' Salduz f'Novembru 2008 fis-sens li n-nuqqas ta' assistenza ta' avukat waqt interrogazzjoni tal-pulizija kienet difett proċedurali. Dan għalkemm bis-sentenza Ibrahim and Others v. the United Kingdom tat- 13 ta' Settembru 2016, il-Grand Chamber għamlet enfazi fuq l-'overall fairness' tal-proċeduri kriminali u fis-sentenza Beuze v. Belgium l-istess qorti kompliet tiċċara kif kellu jigi applikat dak il- principju.

29. Fl-aħħar mill-aħħar il-qrati domestiċi ma jistgħux jippermettu li f'proċeduri kriminali li għadhom pendenti jithallew stqarrijiet li jkunu saru fl-assenza ta' avukat u li l-QEDB ilha tiddekrivih bħala difett proċedurali bil-periklu manifest li dak il-fatt jikkontamina l-proċess kriminali kollu.'

'30. Kien id-dmir tal-Gvernijiet differenti matul is-snin li jaggornaw ruħhom mas-sentenzi tal-Qorti Ewropea u ma jistennewx sal-2016 sabiex jintroduċu disposizzjoni fil-Kodiċi Kriminali li s-suspettat għandu jedd għall-assistenza ta' avukat waqt l-interrogazzjoni li ssir meta jkun fil- kustodja tal-pulizija. Emenda li saret sabiex tittrasponi d-disposizzjoni tad-Direttiva 2013/48/UE tal-Parlament Ewropew (ara Art. 355AT tal- Kodiċi Kriminali), li fost mizuri oħra assigurat iddritt tas-suspettat għall-assistenza ta' avukat waqt l-interrogazzjoni mill-pulizija. Għal dawn il-motivi tiċħad l-appell, b'dan li tagħti direzzjoni lill-Qorti Kriminali sabiex fil-proċeduri kriminali The Republic of Malta v. Izuchukwu Morgan Onourah (att ta' akkuża numru 11/2015) tippermettix l-użu bħala prova tal-istqarrija li l-appellant kien ta waqt li kien fil-kustodja tal- pulizija.

33. Linja simili tiegħdet mill-Qorti Kostituzzjonali fil-kawża **The Police vs. Alexander Hickey** deciza fl-istess ġurnata u **Clive Dimech vs. Avukat Ġenerali**.²⁰ Ukoll, fi **Christopher Bartolo vs. Avukat Ġenerali u Kummissarju tal-Pulizija**²¹ u sussegwentement fl-ismijiet **Christopher Bartolo vs. Avukat tal-Istat**²² il-Qorti Kostituzzjonali rriteniet is-segweni b'rabta ma' dawk l-istqarrijiet li l-ewwel kien irrilaxxa lill-Pulizija u sussegwentement dawk li huwa kien ikkonferma quddiem il-Maġistrat Inkwirenti taht ġurament.

34. Fil-każ **Bartolo vs. Avukat Ġenerali et** il-Qorti Kostituzzjonali kienet qalet hekk:

34. Fis-sentenza mogħtija fis-27 ta' Novembru, 2017 fl-ismijiet *Gordi Felice v. Avukat Ġenerali*¹³ din il-Qorti għamlet is-segweni osservazzjonijiet rilevanti għall-każ odjern:

"59. Fil-każ tallum, bhal fil-każ ta' Dimech¹⁴, il-proceduri għadhom ma ntemmex. Il-Qorti Ewropea fil-każ ta' Dimech, kienet qalet illi trid tqis il-proċess fl-intier tiegħu biex tara kienx hemm smiġh xieraq, u għalhekk, fejn il-proċess kriminali, bhal fil-każ tallum, għadu għaddej, trid tistenna li jintemm il-proċess biex tqisu fl-intier tiegħu biex tara kienx hemm smiġh xieraq. L-istess haġa qalet fis-sentenza aktar riċenti mogħtija fil-5 ta' Jannar 2016 fl-ismijiet *Tyrone Fenech et v. Malta*, fejn iċ-ċirkostanzi kienu jixbhu dawk tal-każ tallum.

"..... omissis

"60. L-argument tal-Avukat Ġenerali huwa għalhekk loġiku u raġonevoli, u l-qorti taqbel illi f'dan l-istadju għadu ma seħħ ebda ksur tal-jedd għal smiġh xieraq. Madankollu, kif osservat fil-każ ta' *Malcolm Said*¹⁵, il-qorti xorta hija tal-fehma li ma jkunx għaqli li l-proċess kriminali jithalla jitkompla bil-produzzjoni tal-istqarrija tal-attur ukoll jekk, kif josserva l-Avukat Ġenerali, ma jidher li hemm xejn kompromettenti għall-attur fiha. Il-qorti tasal għal din il-konkluzjoni fid-dawl tal-posizzjoni x'aktarx estrema li ħadet il-Qorti Ewropea fil-każ ta' *Borg* li xejn ma qieset jekk nuqqas ta' avukat jistax fiċ-ċirkostanzi jkun biss nuqqas formali li ma jista' jkollu ebda konsegwenza ta' preġudizzju għall-attur.

Għalhekk, għalkemm għadu ma seħħ ebda ksur tal-jedd għal smiġh xieraq, fiċ-ċirkostanzi huwa xieraq illi, kif qalet l-ewwel qorti, ma jsir ebda uzu mill-istqarrija fil-proċess kriminali sabiex, meta l-proċess kriminali jintemm, ma jkunx tnigges b'irregolarita` li tista' twassal għall-konsegweni bhal dawk fil-każ ta' *Borg*."

35. Fil-każ odjern jirrizulta car li fl-istqarrijiet tiegħu r-rikorrent, minkejja li qabel ma irrilaxxa l-ewwel stqarrija, l-avukat tiegħu kien tah il-parir li f'dak l-istadju ma jghid xejn lill-pulizija, huwa xorta wahda iddecieda li jirrispondi għad-domandi waqt l-interrogazzjoni, bir-riżultat li stqarr certu fatti inkriminanti għalih in kwantu ammetta li kien jixtri l-blokkok tal-cannabis, kemm għall-konsum personali tiegħu kif ukoll sabiex ibiegh lil terzi. Fil-fatt stqarr li kien ibiegh minnha lill-barranin li kienu Ghawdex. B'dan il-mod huwa kien ammetta li kien jittraffika dik id-droga. L-istess ammissjoni kienet giet

²⁰ Deciza mill-Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali) fl-14 ta' Lulju, 2020)

²¹ Deciza mill-Qorti Kostituzzjonali fil-5 t'Ottubru 2018.

²² Deciza mill-Qorti Kostituzzjonali fis-26 t'April 2022.

ripetuta fit-tieni stqarrija fejn ir-rikorrent amplifika wkoll dwar minn ghand min kien jixtri d-droga.

36. Mill-premess jirrizulta manifest li l-istqarrijiet rilaxxjati mir-rikorrent ser ikollhom kif fil-fatt gja` kellhom quddiem il-Qorti Kriminali impatt fil-proceduri kriminali, mhux in kwantu ghall-ammissjonijiet, izda in kwantu l-kontenut taghhom kien ittiehed in konsiderazzjoni fil-quantum tal-piena imposta fuqu mill-Qorti Kriminali, u issa huwa car li anke l-Qorti tal-Appell Kriminali ser tiehu konsiderazzjoni tal-kontenut tal-istqarrijiet f'dan irrigward. Ghalhekk, ghalkemm il-proceduri kriminali ghadhom pendenti u ghalhekk ma jstax f'dan l-istadju jigi determinat jekk kienx hemm lezjoni ta' smigh xieraq f'dawk il-proceduri, jekk l-istqarrijiet jithallew fil-process tal-proceduri kriminali, dawn wisq probabbilment ser isir uzu minnhom mill-Qorti tal-Appell Kriminali bi pregudizzju jew vantagg ghall-akkuzat fil-kwantifikazzjoni tal-piena, kemm dik karcerarja kif ukoll ghal dak li tirrigwarda l-multa li tista' tigi imposta.

37. Fid-dawl tal-premess it-tehid tal-istqarrijiet zgur li ser ikollhom impatt fuq l-ezitu tal-process kriminali u, ladarba dan isir, x'aktarx ser isir ksur taddritt tal-rikorrent ghal smigh xieraq tenut kont tal-fatt li dawn gew rilaxxjati mir-rikorrent fl-assenza ta' avukat li jassistih. Ghalhekk huwa xieraq li, filwaqt li f'dan l-istadju ma jstax jinghad jekk kienx hemm lezjoni ta' dan iddritt fundamentali tar-rikorrent peress li l-proceduri kriminali ghadhom pendenti, dawn ma jithallewx jibqghu fl-inkartament tal-process kriminali.

38. Ghaldaqstant f'dan is-sens il-parti tal-aggravju hija fondata u qed tigi milqugha fil-limiti tal-konsiderazzjonijiet premissi.

35. Sussegwentement, f'**Bartolo vs. Avukat tal-Istat**, il-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) fis-sentenza taghha datata 22 ta' Ġunju 2021 kienet stqarret hekk:

74. Daqshekk huwa importanti li stqarrija tittiehed bil-garanziji kollha li jharsu d-drittijiet ta' min ikun qiegħed jirrilaxxa ghaliex l-ammissjoni hija wara kollox ir-regina. Di fatti Karen Reid fil-ktieb 'A practitioner's Guide to the European Convention on Human Rights' (Tielet Edizzjoni) f'pagna 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." Igifieri, prova waħda ottenuta kontra l-ligi, tista' waħedha tikkontamina l-process kollu. Ghaldaqstant il-Qorti kkonkludiet bis-segwenti:

79. Il-Qorti qed tipprova tirriconcilja l-fatt, fid-dawl ta' dak li ddecidiet il-Qorti Kostituzzjonali fil-5 ta' Ottubru 2018. Dik il-Qorti ordnat, li biex ma jseħx ksur tad-drittijiet tar-rikorrent ma jsirx aktar uzu fil-proceduri kriminali miz-zewg stqarrijiet rilaxxjati mir-rikorrent. Fid-dawl ta' din l-ordni, din il-Qorti ma tistax tifhem b'liema tigbid tal-immaginazzjoni tista' tasal ghall-konkluzjoni li l-konferma bil-gurament ta' dawk l-istqarrijiet quddiem il-Magistrat ma

għandhomx ukoll ikunu mwarrbin. Kwazi kwazi dan għandu xebħ mal-każ fejn dokument oriġinali jitwarrab izda mhux il-kopja tiegħu. Il-konferma bil-gurament hija unikament imsejsa fuq l-istqarrijiet u kwalunkwe ammissjoni kienet ukoll b'konsegwenza tal-istess.

36. Imbagħad il-Qorti Kostituzzjonali, fis-sentenza mogħtija minnha f'din l-istess kawża fuq appell li kien sar mill-Avukat tal-Istat kienet allura rriteniet illi:

27. Illi, qabel ma l-Qorti tgħaddi 'l quddiem u wkoll fid-dawl ta' dak li lappellant qal dwar it-tieni aggravju tiegħu (li għadu kemm intlaqa'), jidhrilha xieraq li tgħid li jekk inhu minnu li l-ammissjonijiet ripetuti li lappellat għamel qabel ma fetaħ l-ewwel kawża kostituzzjonali tiegħu ma kinux imgiegħla, dan xorta waħda jaf jolqot dak li gara bl-għoti tassentenza tas-27 ta' April, 2017, mill-Qorti Kriminali. Dik is-sentenza nġhatat wara li l-appellat kien ressaq l-ewwel kawża kostituzzjonali tiegħu, imma qabel ma nġhatat is-sentenza tal-ewwel Qorti fl-imsemmija kawża kostituzzjonali. Meta nġhatat is-sentenza ta' din il-Qorti fil-5 ta' Ottubru, 2018, il-każ kriminali kontra l-appellat kien fl-istadju tas-smiġħ tal-appell tiegħu mis-sentenza tal-2017, quddiem il-Qorti tal-Appell Kriminali, kif għadu sallum. Ladarba bis-sentenza tal-5 ta' Ottubru, 2018, fl-ewwel kawża kostituzzjonali, din il-Qorti ordnat "li ma jsirx aktar użu filproċeduri kriminali miż-żewġ stqarrijiet rilaxati mir-rikorrent", hekk ukoll m'għandux isir użu mill-istqarrija maħlufa li l-appellat għamel quddiem il-Magistrat Inkwirenti (ladarba l-appell tal-Avukat tal-Istat f'dan ir-rigward mhux qed jintlaqa');

28. Illi kif qalet din il-Qorti fis-sentenza tagħha tal-5 ta' Ottubru, 2018, huwa ċar li l-istqarrijiet li ta l-appellat lill-Pulizija se jkollhom u kellhom impatt fil-proċeduri kriminali u l-eżitu tagħhom²⁷. Mela dak li jgħodd għallimsemmija stqarrijiet u l-użu li seta' jsir minnhom f'dawk il-proċeduri, issa, bis-saħħa ta' dak li qiegħed ikun deċiż f'din is-sentenza, jgħodd ukoll għall-istqarrija maħlufa mill-appellat quddiem il-Magistrat Inkwirenti. Ukoll jekk l-imsemmi mpatt ma jolqotx l-ammissjonijiet li huwa għamel u tenna fuq medda ta' żmien matul il-proċeduri msemmija sa ma nħareġ l-Att tal-Akkuza (bit-tħaddim tad-dispożizzjonijiet tal-Artikolu 392B(1) u (4) tal-Kodiċi Kriminali), il-fatt li seta' jsir użu mill-istqarrija maħlufa kien jaf joħloq ħsara lill-appellat. Kemm hu hekk, joħroġ ċar minn qari mqar ħafif tas-sentenza mogħtija mill-Qorti Kriminali fis-27 ta' April, 2017, li ħafna mill-kunsiderazzjonijiet magħmulin minn dik il-Qorti hija u tkejjel il-piena li kellha tagħti lill-appellat akkużat, kienu jsemmu l-imsemmija stqarrijiet u dak li jingħad fihom;

²⁷ Ara §§ 36 – 7 tal-imsemmija sentenza Rik. Kost. 255/20/3

29. Illi għalhekk din il-Qorti tqis li, ladarba b'din is-sentenza se tagħti r-rimedju li lanqas ma jmissu jsir użu aktar tal-istqarrija maħlufa mirrikorrent appellat quddiem il-Magistrat Inkwirenti, hekk ukoll għandha tagħti rimedju għat-tħassir tas-sentenza mogħtija mill-Qorti Kriminali safejn jirrigwardaw il-

kunsiderazzjonijiet li saru fiha dwar dak li l-akkużat stqarr qabel ma irregistra għal aktar minn darba l-ammissjoni tiegħu għall-akkużi mressqa. Ladarba ngħad li hemm provi oħrajn li fuqhom il-Qorti Kriminali tista' tikkalibra l-piena li għandha tingħata lill-appellat, ikun xieraq u konformi ma' dak deciz minn din il-Qorti (kemm fis-sentenza talewwel kawża kostituzzjonali u kif ukoll f'din) li dak il-kejl isir fuq is-saħħa tal-provi l-oħrajn imsemmija, bla ma b'hekk jittiefes il-jedd tal-appellat għal smiġh xieraq minhabba l-istqarrijiet li huwa ta.

37. Fuq din il-linja ta' ħsieb allura ingħataw sentenzi mill-Qorti tal-Appell Kriminali (Superjuri) fosthom **Ir-Repubblika ta' Malta vs. Andrew Mangion**,²³ gie ritenut:

Illi għalkemm, kif ingħad, l-imsemmija prova mhijiex nieqsa mill-valur probatorju tagħha għaladarba ma hemm ebda regola ta' dritt penali li qed teskludi l-ammissjoni ta' l-istess, u għaladarba ukoll il-proċess għudizzjarju fl-intier tiegħu għadu ma seħħ, biex b'hekk lanqas jista' jiġi stabbilit f'dan l-istadju bikri jekk kienx hemm xi vjolazzjoni tal-persuna akkużata taddrittijiet kostituzzjonali tagħha, madanakollu l-Qorti ma tistax ma timxiex maddirezzjoni li qed tingħata mill-Qorti Kostituzzjonali billi jidher li din hija waħda kostanti, għalkemm, kif ingħad, il-proċess għudizzjarju għadu ma wasalx fit-tmiem tiegħu. Intqal hekk fl-aktar decizjoni reċenti mogħtija mill-Qorti Kostituzzjonali²⁴ : -

11. Illi dan ifisser ukoll li għalkemm jista' jkun li dik l-istqarrija maħlufa ma kisritx diga` l-jedd fundamentali tal-appellat għal smiġh xieraq (minhabba li l-proċess kontrih għadu mhux mitmum), x'aktarx iġġiblu ksur ta' dak il-jedd li kieku wieħed kellu jqis dak li tgħid fiha u jimxi fuqha.

15. Illi meta wieħed jiġi biex jifhem kif jithaddem kemm l-Artikolu 39 tal-Kostituzzjoni u kif ukoll l-Artikolu 6(1) tal-Konvenzjoni, iridu ta' bilfors jitqiesu l-fatturi proċesswali partikolari tal-każ, b'mod illi biex wieħed jiddetermina jekk kienx hemm ksur tal-jedd ta' smiġh xieraq, wieħed irid iqis il-proċess kollu kemm hu, magħduda magħhom l-imġiba tal-Qorti li tkun, u kif ukoll ta' kif l-interessi tal-persuna mixlija kienu mressqa u mharsin mill-istess qorti. Wieħed ma jistax u m'għandux jiffoka fuq biċċa biss mill-proċess sħiħ għudizzjarju biex minnu, jekk isib xi nuqqas jew għelt, jasal għall-konkluzjoni li ta' bilfors seħħ ksur tal-jedd tas-smiġh xieraq. F'ċirkostanza bħal din u safejn ma toħroġx prova ta' xi ħsara jew preġudizzju li ma jissewwiex, huwa ndikat u għaqli li l-istħarriġ dwar jekk wieħed ingħatax smiġh xieraq isir wara li jkun intemm il-proċediment li jkun u mhux qabel. Huwa minnu wkoll li wieħed ma jistax jeskludi minn qabel li jista' jkun hemm ċirkostanza proċedurali waħda matul il-proċess għudizzjarju li taf tkun serja u determinanti biżżejjed biex titlob l-istħarriġ tal-ilment ta' ksur tal-jedd għal smiġh xieraq, iżda r-regola tibqa' li jitqies l-iter proċedurali kollu. ...

Iżda finalment imbagħad gie hekk deciz:

²³ Deciza 22 ta' Ġunju 2022 mill-Qorti tal-Appell Kriminali (Sede Superjuri)

²⁴ Hawnhekk il-Qorti tal-Appell Kriminali kienet qegħda tirreferi għall-kawża deciza ftit jiem qabel fl-ismijiet **Christopher Bartolo vs. Avukat tal-Istat**, deciza fis-26 t'April 2022, imsemmija iżjed il-fuq.

Min-naħa l-oħra, bħalma din il-Qorti fis-sentenza tagħha fl-ewwel kawża kostituzzjonali sabet li kien jixraq li ma jsir l-ebda użu ieħor taż-żewġ stqarrijiet li r-rikorrent appellat ta lill-Pulizija, bla ma sabet li kien diġa` ġarrab ksur tal-jedd tiegħu għal smiġħ xieraq, hekk ukoll f'dan il-każ, il-fatt li din il-Qorti jidhrilha li ma għandu jsir l-ebda użu mill-istqarrija maħlufa li l-appellat għamel quddiem il-Maġistrat Inkwirenti, ma jfissirx li dan qiegħed isir għaliex huwa ġarrab ksur ta' dak il-jedd, imma sewwasew biex jitneħħa l-biżgħa li jista' jgarrab ksur bħal dak;

20. Illi l-Qorti allura trid neċessarjament timxi mad-direzzjoni li qed tingħata mill-Qorti Kostituzzjonali, u dan għalkemm f'dan l-istadju tal-proċeduri ma jistax jingħad illi l-prova magħmula permezz tal-istqarrija tal-akkuzat hija mittiefsa minn xi difett proċedurali li jirrendieha inammissibbli, kif tajjeb tikkonkludi l-Qorti Kriminali. Dan qed isir ukoll bil-għan li jkun hemm trattament ugwali bejn il-persuni kollha li jersqu quddiem il-qrati penali sabiex ikunu ġġudikati dwar reati allegatament minnhom kommessi u wkoll sabiex ikunu evitati proċeduri ulterjuri quddiem il-Qorti Kostituzzjonali, bil-proċess ġudizzjarju jitwal inutilment.

38. Imma jirrizulta li l-ħsieb tal-Qorti Kostituzzjonali kompli jevolvi bl-izjed pronunzjament riċenti li kien mogħti minn dik il-Qorti fuq din il-materja kien fil-31 ta' Mejju 2023 fl-appell fl-ismijiet **Emmanuele Spagnol vs. L-Avukat Ġenerali u Kummissarju tal-Pulizija** fejn ġie mistqarr hekk:

10. Il-Qorti tagħraf li kemm fil-ġurisprudenza ta' din il-Qorti u kif ukoll fil-ġurisprudenza tal-Qorti Ewropea, il-fatt waħdu li s-suspettat ma kellux il-possibilità li jkun assistit minn avukat waqt l-interrogazzjoni ma jfissirx awtomatikament li l-użu ta' dik l-istqarrija fil-proċeduri kriminali kontra tiegħu illeda, jew x'aktarx ser jilledi, id-dritt fundamentali tiegħu għal smiġħ xieraq. Dan fil-fatt jaċċettah l-attur stess.

11. Fil-każ odjern m'hemmx dubju li l-liġi kif kienet vigenti fiz-żmien rilevanti ma kinitx tippermetti li s-suspettat jiġi assistit minn avukat waqt li jkun qed jiġi interrogat mill-pulizija. Dak iż-żmien però l-liġi kienet tippermetti li s-suspettat jikkonsulta privatament ma' avukat, wiċċ imb'wiċċ jew bit-telefon, għal żmien ta' siegħa, qabel ma jiġi interrogat. Il-Qorti tosserva wkoll li l-attur kellu d-dritt li ma jirrispondix għad-domandi magħmula lilu waqt l-interrogazzjoni. Inolte, waqt il-proċeduri kriminali l-attur kellu d-dritt li jikkontesta l-ammissibilità tal-istqarrija, oltre li seta' jikkontesta l-kontenut tagħha permezz ta' kull prova li kien iħoss li kienet rilevanti, u fil-fatt jirrizulta li l-proċeduri kriminali ilhom fi stadju ta' provi tad-difiza għal żmien sostanzjali. Apparti minn hekk, l-appellant kellu kull dritt li jixhed u jagħti verżjoni differenti quddiem il-Qorti, dritt li jirrizulta li għamel użu estensiv minnu, tant illi d-depożizzjoni tiegħu giet maqsuma fuq żewġ seduti.

12. Dwar il-vulnerabbiltà o meno tal-attur, il-Qorti tosserva li minkejja li l-appellant xehed quddiem l-Ewwel Qorti li ma kienx jiftakar jekk qattx kien għadda minn xi proċeduri kriminali oħrajn barra dawk mertu ta' dawn il-

proċeduri, mis-sistema elettronika tal-Qorti jirrizulta li l-appellant kien involut f'diversi proċeduri kriminali, inkluż proċeduri li bdew kontra tiegħu fl-1996 u li fihom kien instab ħati u gie kkundannat għal piena ta' sentejn prigunerija sospizi għal erba' snin flimkien ma' interdizzjoni ġenerali u interdizzjoni milli jservi bħala xhud ħlief quddiem il-Qrati tal-Ġustizzja għal żmien ta' ħames snin. Għalhekk l-Ewwel Qorti kienet korretta meta sabet li din ma kinitx l-ewwel darba li l-appellant xellef difrejh mal-ġustizzja. Inoltre, għalkemm l-appellant isemmi li huwa kien jieħu ċertu medikazzjoni biex jikkontrolla z-zokkor, u li mingħajr din il-medikazzjoni u ikel kien iħossu dgħajfef, il-Qorti tosserva li mill-atti li ġew preżentati ma jirrizultax li l-appellant kien informa lill-Pulizija li huwa kellu bżonn jieħu xi medikazzjoni u fil-fatt fil-formola li timtela mill-ufficjal ta' detenzjoni gie mmarkat li l-appellant ma kien taħt l-ebda kura. F'dan ir-rigward relevanti wkoll li mix-xhieda jirrizulta illi li kieku l-appellant ma kellux il-medikazzjoni meħtieġa miegħu u lanqas il-preskrizzjoni għaliha, il-prassi kienet illi jittiehed il-poliklinika sabiex tkun tista' tinhareġ preskrizzjoni minn tabib biex b'hekk is-suspettat ikun jista' jingħata l-medikazzjoni li jkun jeħtieġ. Għalhekk jidher li jekk l-appellant baqa' nieqes minn xi medikazzjoni dan kien biss għaliex naqas milli jinforma lill-pulizija meta gie mistoqsi. Meħud in konsiderazzjoni dan kollu, flimkien mal-fatt li fiz-żmien relevanti l-attur kellu aktar minn ħamsin sena u li kien effettivament ikkonsulta ma' avukat tal-fiducja tiegħu qabel ma gie interrogat, il-Qorti tqis li ma jirrizulta l-ebda element ta' vulnerabbiltà.

13. Din il-Qorti reġgħet għarblet sew il-pozizzjoni tagħha fuq din it-tema ta' intempestività tal-ilment kostituzzjonali. Tagħmel riferenza għaż-żewġ sentenzi tal-Qorti Ewropea Għad-Drittijiet tal-Bniedem, **Martin Dimech v. Malta** tat-2 ta' April 2015 u **Tyrone Fenech et v. Malta** tal-5 ta' Jannar 2016, dwar ilmenti li jixxiebħu ħafna għal dawk tal-lum dwar it-tehid ta' stqarrija mingħajr konsultazzjoni minn qabel ma' avukat, għalkemm f'dan il-każ il-konsultazzjoni kienet waħda limitata.

14. F'dawk is-sentenzi l-ilment tas-smiġħ xieraq tressaq meta l-proċeduri kriminali kienu għadhom pendenti. Billi l-proċeduri kriminali kienu għadhom mexjin, il-Qorti Ewropea saħqet li kien kmieni biex jiġi deciz jekk kienx hemm smiġħ xieraq jew le. Fi kliem il-Qorti Ewropea:

*"applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, **Kesik v. Turkey**, (dec.), no. 18376/09, 24 August 2010 and **Simons v. Belgium** (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see **Bouglame v. Belgium** (dec.), no. 16147/08, 2 March 2010). The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicant's possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicant are currently pending before the domestic courts, the Court finds this complaint to be premature. Consequently, this part of the application must be rejected,*

pursuant to Article 35 I and 4 of the Convention, for non-exhaustion of domestic remedies”

15. Essenzjalment din id-difiża hija msejsa fuq il-premessa illi allegazzjoni ta' nuqqas smiġh xieraq teħtieġ li l-proċess li minnu jkun qed isir l-ilment jiġi eżaminat fit-totalità tiegħu u mhux jiġi maqsum u jsir enfasi fuq incident wieħed partikolari.

16. Naturalment ladarba f'dan il-każ il-proċess kriminali għadu ma ġiex mitmum, għadu mhux magħruf kif u taħt liema ċirkostanzi l-appellant ser jiġi żvantagġjat. Huwa ċertament barra minn loku illi l-ilment de quo agitur jiġu diskussi f'dan l-istadju in vacuo. Il-Qorti Kriminali għadha trid tevalwa l-istqarrijiet li saru u jekk saru jkunx hemm vjolazzjoni tad-dritt ta' smiġh xieraq minhabba l-mod kif ittiegħdu tenut kont iċ-ċirkostanzi partikolari tal-każ li jvarjaw minn każ għall-ieħor. Hemmx leżjoni tad-dritt għalhekk ser jiddependi mill-mod kif il-Qorti Kriminali tkun trattat l-istqarrijiet u l-piż mogħtija lilhom fl-assjem tal-provi kollha. Għal dak li jiswa jista' jkun il-każ li l-Qorti Kriminali fl-aħħar mill-aħħar ma ssibux ħati u għalhekk ħafna mill-preokkupazzjonijiet tiegħu dwar l-istqarrijiet jisfaw fix-xejn. Dan biex ma jingħadx ukoll li anke wara s-sentenza tal-Qorti Kriminali hemm il-possibbiltà li jsir appell quddiem il-Qorti tal-Appell Kriminali, li għandha s-setgħa li ddawwar l-affarijiet. Jiġi b'hekk, li l-ilment jekk seħħx virtwalment xi ksur ta' drittijiet fundamentali f'dan l-istadju huwa għal kollox prematur.

17. L-appellant ma jistax jagħmilha bħala fatta li huwa mhuwiex sejjer ikollu smiġh xieraq minhabba l-mod ta' kif ittiegħdet l-istqarrija tiegħu. Ladarba l-proċeduri kriminali għadhom mexjin, allura huwa jgawdi mill-preżunzjoni tal-innoċenza. Tassew il-prosekuzzjoni għad trid tipprowa l-akkuzi tagħha kontra tiegħu u l-istess akkuzat għad għandu kull opportunità li jiddefendi lilu nnifsu.

18. Għalhekk il-fatt waħdu li saru stqarrijiet ma ssostnix l-ilment ta' ksur ta' jedd ta' smiġh xieraq għaliex din waħidha mhijiex determinanti tal-kwistjoni minnu sollevata, b'dana li l-ilment huwa għal kollox intempestiv u prematur.

19. Il-Qorti tirreferi hawnhekk l-aktar sentenzi ricenti fuq is-sugġett, viz. *Beuze v. Il-Belġju* deciza mill-Grand Chamber fid-9 ta' Novembru 2018 u s-sentenza **Carmel Joseph Farrugia v. Malta** deciza mill-Qorti Ewropea Għad-Drittijiet tal-Bniedem fl-4 ta' Ġunju 2019.

20. Dawn iż-żewġ sentenzi ħolqu numru ta' kriterji mhux tassattivi li wieħed għandu jqis biex jara jekk in-nuqqas ta' assistenza legali fl-istadju tat-teħid tal-istqarrija jwassalx għall-ksur tal-jedd ta' smiġh xieraq. Dawn il-kriterji jistgħu jiġu determinati biss wara li jintemm il-proċess kriminali.

21. Hija għalhekk il-fehma meqjusa ta' din il-Qorti meta jittieħed kont ta' kif il-Qorti Ewropea issa qed tindirizza l-kwistjoni mhuwiex floku li l-Qrati Kostituzzjonali joqogħdu jindaħlu f'temi li jmissu mas-siwi tal-evidenza.

Bhalma sewwa qalet il-Qorti Ewropea fil-każ **Carmel Camilleri v. Malta** deciz fis-16 ta' Marzu 2000 li kienet dwar is-siwi ta' stqarrija mogħtija minn terzi:

«The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see the Doorson v. the Netherlands judgment of 26 March 1996, Reports of Judgments and Decisions 1996-11, p. 470, S 67; the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, 34). Furthermore, the Court cannot hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict (see the above-mentioned Doorson judgment, p. 472, §78) »

22. L-għaqal li din il-Qorti tieħu din id-deciżjoni dwar l-ilqugh tal-eccēzzjoni tal-intempestività, jinsab imsaħħaħ ukoll minn dak li ġara fl-aħħar sentenza **Roderick Castillo v. Avukat Generali** et deciza mill-Qorti Kostituzzjonali fl-20 ta' Lulju 2020. F'din is-sentenza ġara li waqt li kienu mexjin il-proceduri kostituzzjonali, ġew mitmuma l-proceduri kriminali u Roderick Castillo gie meħlus mill-akkuzi miġjuba kontriħ. Minħabba din il-ġrajja, il-Qorti Kostituzzjonali qalet li:

“*Bis-sentenza tal-Qorti tal-Appell Kriminali l-appellat ingħata rimedju definittiv u effettiv. B'hekk minkejja dak li ġara fl-istadju meta l-appellat tal-istqarrija, xorta 'on the whole' kellu smiġħ xieraq b'dak li ġara fl-istadju tal-appell*”

23. Għalhekk l-aggravju qed jiġi miċħud.

39. Fl-istess jum, fil-31 ta' Mejju 2023 ingħatat ukoll is-sentenza **Jean Marc Dalli vs. Kummissarju tal-Pulizija, Avukat Ġenerali u Avukat tal-Istat** mill-istess Qorti Kostituzzjonali fejn ġie ribadit:

Konsiderazzjonijiet

10. Il-ġurisprudenza hi ċara li l-fatt li persuna suspettata li kkommettiet reat tagħmel stqarrija mingħajr l-assistenza ta' avukat ma jwassalx bilfors għal ksur fil-jedd fundamentali għal smiġħ xieraq fil-proceduri kriminali li jittieħdu kontra dik il-persuna.¹

11. F'sentenza riċenti² tal-QEDB, Lalik v. Poland (Application no. 47834/19) ġie mtenni:

“64. The Court reiterates that it is necessary to view the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves (Ibrahim and Others, cited above, §§ 250-51). In consequence, despite the fact that the applicant did not explicitly cite Article 6 § 1, the Court will examine whether the proceedings as a whole were fair, considering that the need for such an examination derives from the well-established case law on that matter (see Beuze, cited above, §§ 147-48). The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the fact that the applicant was not properly informed of his rights (see, mutatis mutandis, Ibrahim and Others, cited above, § 265).

65. The Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory. In this context, the Court recalls that Article 6 § 3 (c) of the Convention must be interpreted as safeguarding the right of persons charged with an offence to be informed immediately of their defence rights, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing (see Beuze, cited above, § 129).

66. In its analysis of the overall fairness of the proceedings, the Court will examine, to the extent that they are relevant in the present case, the various factors deriving from its case-law as set out in the Beuze judgment (cited above, § 150).”

1 Beuze v. il-Belġju (71409/2010) tad-9 ta' Novembru 2018 u Stephens v. Malta (35989/14) tal-14 ta' Ottubru 2020
2 11 ta' Mejju 2023

12. Għalhekk il-Qorti trid tistharreġ l-overall fairness skont il-varji kriterji (mhux tassattivi) li jissemmew fis-sentenzi Beuze v. Il-Belġju deciza mill-Grand Chamber fid-9 ta' Novembru 2018 u s-sentenza Carmel Joseph Farrugia v. Malta deciza mill-QEDB fl-4 ta' Ġunju 2019. Fl-eżercizzju jispetta lill-intimat li iressaq prova li l-fatt li r-rikorrent ma kellux il-possibilità li jkun assistit minn avukat waqt l-interrogazzjoni ma ppreġudikax irrimedjabbilment il-każ tiegħu.

13. Il-liġi kif kienet vigenti fiz-zmien meta r-rikorrent odjern ta l-istqarrija tiegħu, ma kinitx tippermetti li s-suspettat jiġi assistit minn avukat waqt li jkun qed jiġi interrogat mill-pulizija. Kienet madanakollu tippermetti li s-suspettat jikkonsulta privatament ma' avukat, wiċċ imb'wiċċ jew bit-telefon, għal żmien ta' siegħa, qabel ma jiġi interrogat.

14. Hu fatt li meta r-rikorrent ta l-istqarrija lill-pulizija kien għadu ser jagħlaq dsatax-il sena u ma jirrizultax li kellu xi esperjenzi preċedenti simili mal-pulizija jew il-qrati.

15. Min-naħa l-oħra jirrizulta li qabel ta l-istqarrija r-rikorrent tkellem ma' avukat ta' fiduċja tiegħu, kif kellu jedd li jagħmel.

16. Ir-rikorrent inghata wkoll twissija ċara li kellu dritt li ma jwegibx għad-domandi, u dak li jgħid kien ser jitniżżel bil-miktub u jista' jingieb bi prova. Saħansitra kien ikkonferma l-istess stqarrija quddiem il-Magistrat Inkwirenti wara li qal li *".... jiena tkellimt ma' avukat u kien għalhekk li rrilaxxajt din l-istqarrija"*.

17. Minn meta tressaq il-qorti dejjem kien assistit minn avukat ta' fiduċja tiegħu u tul il-proċess quddiem il-Qorti tal-Magistrati (Malta) altru milli kellu kull opportunità li jikkontesta l-awtenticità ta' dak li hemm miktub li qal lill-pulizija u lill-Magistrat Inkwirenti.

18. Kontra r-rikorrent tressqu provi oħra. Tant hu hekk li l-Qorti tal-Magistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali strahet fuq provi oħra tal-prosekuzzjoni (PS 1220 u r-rapport tal-espert Godwin Sammut) sabiex sabet htija. Fil-fatt dik il-Qorti ddeskriviet id-deposizzjoni ta' PS 1220 Chris Baldacchino bħala l-prova principali. Fis-sentenza l-Qorti għamlitha ċara li l-istqarrija tal-imputat ma kinitx *".... dik il-prova eskussiva jew determinanti li fuqha qiegħda tistrieħ il-htija tal-imputat"*. Saħansitra dik il-Qorti kkunsidrat ukoll il-ġurisprudenza tal-QEDB u tal-qrati Maltin f'kazijiet dwar stqarrijiet li jittieħdu fi stadju qabel is-suspettat jitressaq il-qorti u mis-sentenza hu evidenti li ma qisitx l-istqarrija u xhieda quddiem il-Magistrat Inkwirenti bħala l-provi determinati sabiex sabitu ħati ta' traffikar u pussess ta' ecstasy bejn it-8 u 9 ta' Settembru 2013.

19. Kien biss fit-trattazzjoni li r-rikorrent argumenta li l-istqarrija u x-xhieda li ta quddiem il-Magistrat, ma tistax tintuża għaliex ma kienx preżenti avukat ta' fiduċja tiegħu. Dan kien tmien snin wara li tressaq il-qorti.

20. Waqt is-smiġh tal-kawża quddiem il-Qorti tal-Magistrati (Malta) ir-rikorrent lanqas ma rtira l-istqarrija jew biddel dak li qal lill-pulizija. Saħansitra kkonfermaha bil-ġurament quddiem Magistrat Inkwirenti, persuna indipendenti mill-pulizija, u tenna li kien għamel l-istqarrija b'mod volontarju wara li ngħata twissija u tkellem ma' avukat.

21. Saħansitra, fis-seduta tat-22 ta' Frar 2017 l-avukat li ddefendih iddikjara li l-imputat, *".... qed jeżenta lill-prosekuzzjoni milli ttella' bħala xhud tal-volontarjeta tal-istqarrija tal-imputat u tal-identita tiegħu lil PS 168 Stephen Monreal"*.

22. Saħansitra r-rikorrent ħa benefiċċju mill-fatt li kien ikkopera mal-pulizija waqt l-investigazzjoni, għaliex dan ġie rifless fil-piena (ara dik il-parti tas-sentenza tal-Qorti tal-Magistrati (Malta) bit-titlu *"konsiderazzjonijiet dwar il-piena"*).³

23. Inoltre, ir-rikorrent għad għandu appell pendenti quddiem il-Qorti tal-Appell Kriminali, fejn ġudikant ieħor ser jistharreg l-ilmenti kollha tiegħu u

jagħmel l-apprezzament tal-provi mill-ġdid biex finalment jiddetermina jekk humiex ġustifikati.

24. Sal-lum l-unika ċertezza hi li s-sentenza tal-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali tas-27 ta' Jannar 2021, li għadha sub judice, sabet lir-rikorrent ħati ndipendentement mill-istqarrija tiegħu. Għal din il-Qorti hu ċar kristall li s'issa m'hemm xejn x'jindika li r-rikorrent ma kellux smiġh xieraq jew x'aktarx li mhux ser ikollu smiġh xieraq quddiem il-Qorti tal-Appell Kriminali, u għalhekk ma soffra l-ebda preġudizzju. Anzi l-ilment tiegħu serva biss sabiex ikompli jitwalu l-proċeduri kriminali bla bżonn.

3 Skont Art. 29 tal-Kap. 101.

40. Din il-pożizzjoni kienet simili għal dik li kienet adottata minn din il-Qorti fis-sentenza preliminari tagħha fl-ismijiet **Ir-Repubblika ta' Malta vs. Francis Xerri** tal-15 ta' Diċembru 2021 fejn kien sar stharrig tal-pożizzjoni legali naxxenti fejn persuna suspettata tkun giet mogħtija l-jedd għall-assistenza legali skont dik il-modalita li kienet viġenti fiz-żmien partikolari meta l-persuna suspettata tkun qegħda tiġi interrogata – kemm fejn dik il-persuna tkun irrikorriet għal dik l-assistenza u kif ukoll fejn dik il-persuna ma tkunx irrikorriet għal dik l-istess assistenza. Hija pożizzjoni iżjed konsoni ma' diversi principji li kienu mistqarri fil-ġurisprudenza Maltija f'kazijiet bħal **Charles Steven Muscat vs. L-Avukat Ġenerali** tat-8 t'Ottubru 2012 jew **Ir-Repubblika ta' Malta vs. Carmel Camilleri** tat-22 ta' Frar 2013.
41. Issa f'dan l-istadju tal-proċeduri, fejn il-proċess penali għadu fil-fazi tas-smieġh u tad-determinazzjoni tal-eċċezzjonijiet preliminari li ressaq l-akkużat skont id-dispożizzjonijiet tal-Artikolu 449(1) tal-Kodiċi Kriminali, għadu prematur biex issir determinazzjoni tat-test tal-“overall fairness of the proceedings” in kwantu dan l-istadju għadu biss wieħed mill-istadji preliminari tal-proċeduri kriminali kontra l-akkużat. Biss f'dan l-istadju hemm evidenza ġja migbura fil-proċess li titfa' dawl fuq il-kuntest li fiha giet rilaxxata dik l-istqarrija tal-akkużat u l-effett li din jista' jkollha fuq il-jedd ta' smieġh xieraq tiegħu.
42. Qabel xejn filwaqt li huwa minnu li l-akkużat ma kellux il-konfort ta' Ligi pożittiva li kienet tipprovdi l-assistenza legali matul l-interrogatorju, mill-banda l-oħra kellu għad-dispożizzjoni tiegħu Ligi penali li kienet tippermettilu l-assistenza legali privata u kunfidenzjali

kemm jista' jkun malajr iżda mhux iżjed minn siegħa qabel ma jkun gie interrogat. Huwa kellu l-għażla li jekk irid jagħmel użu minn dak il-jedd jew jirrinunzja għalih. Kif ingħad f'dak iż-żmien fil-każ li kien jagħmel użu minn dak il-jedd għal assistenza legali imbagħad kienet tiskatta r-regola tal-inferenza, li sussegwentement giet abrogata bl-Att LI tal-2016. F'dan il-każ l-akkużat għazel minn jeddu li ma jagħmilx użu mid-dritt li huwa kellu u ingħatalu li jkellem avukat jew prokuratur legali qabel ma jiġi interrogat. L-akkużat qatt ma gie mcaħhad mid-dritt għall-assistenza legali fil-forma u fil-kwalita li kienet disponibbli għalih f'dak iż-żmien meta huwa gie biex jirrilaxxja l-istqarrija tiegħu. Huwa gie mwissi bid-dritt li jikkonsulta ma' avukat wiċċ'imb wiċċ jew bit-telefon sa siegħa qabel ma ttieħditlu l-istqarrija, iżda huwa volontarjament irrifjuta li jirrikorri għal tali assistenza.

43. Apparti minn hekk l-Ispettur Mula wissa' wkoll lill-akkużat bid-dritt tiegħu li jibqa' sieket u li dak kollu li jistqarr jista' jintuza' bi prova.
44. Meta gie biex jirrilaxxja l-istqarrija ma jirrizultax li l-akkużat kellu xi bidla fil-ħsieb tiegħu. Anzi huwa mhux biss talli rrilaxxja l-istqarrija tiegħu fejn, fuq mistoqija speċifika tal-Ispettur Mula l-akkużat wieġeb li ma kienx irid jużufriwixxi ruħu mid-dritt li jikkonsulta ma' avukat tal-fiducja tiegħu, talli huwa ta' deskrezzjoni dettaljata ta' dak li kien ġara u kif huwa spicċa involut f'dan il-każ.
45. Apparti minn hekk, l-għada li rrilaxxja dik l-istqarrija, huwa għazel ukoll li jmur pass oltre u li jikkonferma l-kontenut ta' dik l-istqarrija quddiem il-Magistrati Inkwirenti bil-ġurament tiegħu. Muri ritratti ta' tnejn minn nies fuq Photo ID parade ossija Jomic Calleja u David Lee Rogers – li l-akkużat kien jafu bħala "l-Ingliż" huwa pozzittivament għarafhom minn wiċċhom.
46. Ma hemmx xi indikazzjoni li l-akkużat kien f'xi stat ta' vulnerabbilita' fil-mument illi ttieħdet din l-istqarrija; daqskemm ma hemmx prova li huwa ma kienx qiegħed jifhem l-import taċ-ċirkostanzi tal-każ tiegħu u taċ-ċirkostanzi li fihom kienet qegħda tittieħed dik l-istqarrija. Jekk xejn il-kontenut tal-istqarrija u t-twegibiet tiegħu fil-bidu nett juru li kien qiegħed jifhem sewwa l-kuntest, iċ-ċirkostanzi, il-mistoqsijiet u r-raġunijiet għaliex kien qiegħed jiġi mistoqsi dwarhom.

47. Apparti minn hekk jirrizulta wkoll li l-akkużat ma kienx xi persuna minorenni, u wisq anqas bniedem incensurat. Fil-fatt mill-fedina penali tiegħu jirrizulta kif kien xellef difrejh mal-ġustizzja diversi drabi qabel ma ttieħditlu din l-istqarrija – għalkemm l-infrazzjonijiet li għandu huma fil-maġġor parti tagħhom marbuta ma ksur tal-Liġi tal-VAT.
48. Ma ngiebet l-ebda prova li din l-istqarrija ttieħdet b'xi intimidazzjoni jew b'wegħdiet ta' favuri u vantaġġi. Jekk xejn id-dikjarazzjoni tiegħu magħmula wara li rrilaxxa l-istqarrija tixhed li huwa ddikjara li dik kienet il-verita, u li wara li dik giet moqrija lilu mill-Ispettur Mula, l-akkużat zied li ma ried iżid jew inaqqas jew ibiddel xejn minnha. Din id-dikjarazzjoni reġgħet giet imtennija l-għada li saret quddiem il-Maġistrati Inkwirenti u, b'hal kumpliment tal-istqarrija li kien irrilaxxa, ikkonfermaha bil-ġurament tiegħu.
49. Apparti minn hekk, jirrizulta wkoll li fl-istqarrija dettaljata tiegħu l-akkużat ma rrilaxxa l-ebda dikjarazzjoni inkriminanti stante li huwa qatt ma ammetta l-involviment tiegħu ma' Jomic Calleja jew implika li martu fir-reati li gie akkużat bihom fl-Att tal-Akkuża in dizamina. Jekk xejn huwa jikkontendi li spicċa vittma ta' trama maħduma minn Calleja biex b'hekk allura jipprovdi spjegazzjoni għaliex sab ruħu f'dik is-sitwazzjoni meta gie mwaqqaf mill-Pulizija.
50. Minbarra din l-istqarrija, l-atti processwali jixhdu li din l-istqarrija mhix il-prova waħdanija li fuqha l-Prosekuzzjoni qegħda sserraħ il-każ tagħha. Fl-atti ingabru provi oħra li jidher li l-Prosekuzzjoni sejra tressaq fl-istadju ta' celebrazzjoni tal-ġuri u li jmorru lil hinn mill-istqarrija.
51. Apparti minn hekk l-akkużat qatt ma lmenta minn din l-istqarrija li huwa rrilaxxa qabel dan l-istadju, minkejja li huwa jirrizulta li kien debitament assistit minn avukat tal-fiducja tiegħu f'kull stadju ta' dawn il-proċeduri.
52. B'hekk in linja ma' dak deciz fil-kawzi **Dalli** u **Spagnol** imsemmija iżjed il-fuq, il-pożizzjoni ġurisprudenzjali l-iktar riċenti issa trid li:

- a. fejn si tratta ta' stqarrijiet rilaxxati bejn l-10 ta' Frar 2010²⁵ u t-28 ta' Novembru 2016²⁶ u
- b. fejn ikun gie amministrat lis-suspettat id-dritt għall-assistenza legali qabel l-interrogazzjoni (izda mhux ukoll waqt l-interrogazzjoni, u irrispettivament jekk is-suspettat ikunx ukoll irrinunzja għal dak id-dritt li huwa kellu),

ma jitqiesx li tapplika regola tal-eskluzjoni awtomatika tal-istess stqarrijiet rilaxxati mis-suspettat jew akkużat in bażi għal ksur awtomatiku tal-jedd tas-smiegħ xieraq. Izda biex wiehed ikun jista' jqis jekk u safejn ir-rilaxx ta' tali stqarrija jkunx jista' jkollha impatt fuq id-dritt ta' smiegħ xieraq ta' dak li jkun, tkun trid issir evalwazzjoni tal-proċess penali fl-intier tiegħu skont il-kriterji mfassla f'**Beuze** u l-kazijiet l-oħra msemmija.

53. Il-posizzjoni tal-Qorti Kostituzzjonali f'**Dalli** u fi **Spagnol** għalhekk iddipartiet b'mod ferm mill-principji enuncjati f'**BORG vs. Malta** u kazijiet analogi. Fl-assenza ta' xi regola jew ligi tad-dritt penali Malti li teskludi l-producibilita' ta' din l-istqarrija bħala prova, din il-Qorti ma tistax issa tiddikjara (anke preventivament) tali prova inammissibbli.
54. Imbagħad il-valur probatorju tal-istess stqarrija hija kwistjoni li titthalla għall-istharrig u l-analizi tal-imħallfin tal-fatt ossija l-Ġurati fl-istadju tal-Ġuri. Dwar dan il-punt, fl-appell kriminali fl-ismijiet **Ir-Repubblika ta' Malta vs. Anthony Bugeja u Piero Di Bartolo**²⁷ fejn ingħad:

Illi fir-rigward tal-principju regolatur dwar l-ammissibilita' ta' prova fil-proċess penali, prova ma titqiesx li hija inammissibbli sakemm ma jkunx hemm xi dispozizzjoni espressa tal-ligi li tipprekludi l-ammissjoni ta' dik il-prova. Illi f'dawn il-kazijiet li l-Qorti qed issib f'ħogorha li jittrattaw il-valur probatorju ta' stqarrijiet rilaxxati mill-persuna akkużata li ma ngħatatx l-assistenza legali la qabel u wisq anqas waqt it-tehid ta' dik l-istqarrija, hija qed tiġi imsejha tqies l-ilment mill-ottika ta' dritt kostituzzjonali iktar milli fl-ambitu ta' proċess ġudizzjarju penali. Dan għaliex mhux qed tiġi invokata ebda regola tal-ligi penali li teskludi l-producibilita' tal-istess stqarrijiet fejn allura jiġi mfittex r-rimedju ordinarju għal lanjanza purament ta' natura kostituzzjonali.

²⁵ Data tal-bidu fis-seħħ tal-Att III tas-sena 2002.

²⁶ Data tal-bidu fis-seħħ tal-Att LI tas-sena 2016.

²⁷ Deciża nhar it-22 ta' Ġunju 2022.

55. Bl-istess mod intqal mill-Qorti Kriminali fil-kawża **Ir-Repubblika ta' Malta vs. Keith Cremona** deciza nhar il-15 ta' Diċembru 2022 fejn saret referenza a sua volta għad-deċizzjoni fl-ismijiet **Ir-Repubblika ta' Malta vs Martino Aiello**²⁸ in kwantu gie rilevat is-segwent:

12. Illi d-difiza madanakollu xorta waħda għadha qed tinsisti fuq l-eċċezzjoni minnha ventilata dwar l-inammissibilita' ta' l-istqarrija tal-akkuzat billi tishaq illi din il-Qorti ta' kompetenza penali trid thares lejn il-kwistjoni taht ottika differenti minn dik tal-Qorti Kostituzzjonali, ukoll għaliex flistadju taċ-ċelebrazzjoni tal-guri ma għandux jiġi rimess għal għudizzju tal-gurija popolari jekk il-kriterji mfasla fiddecizjoni *Beuze vs il-Belġju* deciza mill-Qorti Ewropea dwar id-Drittijiet tal-Bniedem ma gewx osservati. Jishaq illi għalkemm l-appellat inqabad f'okkazjoni waħda in flagrante jdaħhal id-droga għewwa Malta, madanakollu fl-istqarrija rilaxxata minnu lil pulizija huwa jammetti għal żewġ okkazzjonijiet oħra ta' importazzjoni liema fatt allura johrog biss minn din l-istqarrija u minn ebda prova oħra. Fil-fehma tad-difiza hija din il-Qorti f'dan l-istadju tal-proċeduri li għandha tara jekk il-kriterji imfassal fid-deċizzjoni *Beuze* jirrizultaw u jekk humiex ser iwasslu sabiex jivvizjaw listqarrija rilaxxata mill-appellat.

13. Illi l-Qorti ma tistax taqbel ma din il-linja difenzjonali u dan għaliex kif diversi drabi affermat mill-qorti fir-rigward tal-principju regolatur dwar l-ammissibilita' ta' prova filproċess penali, hija prassi adottata mill-gurisprudenza illi prova ma titqies li hija inammissibbli sakemm ma jkunx hemm xi dispozizzjoni espressa tal-ligi li tipprekludi lammissjoni ta' dik il-prova. Illi għalkemm l-appellat jistieden lil din il-Qorti tqies l- ilment minnu ventilat mill-ottika talproċess għudizzjarju penali u mhux minn dak ta' natura kostituzzjonali, madanakollu imbagħad ma jinvoka ebda regola tal-ligi penali li teskludi l-producibilita' tal-istess stqarrija, izda jishaq unikament illi l-istqarrija hija nieqsa mill-valur probatorju tagħha għaliex meta interrogat huwa ma kellux avukat prezenti miegħu sabiex jassistieh u allura qiegħed issejjes din il-lanzanza fuq lezjoni potenzjali tal-jedd tiegħu għal smigh xieraq, kwistjoni li issa giet determinat finalment mill-Qorti Kostituzzjonali li sabet li ma kien hemm ebda lezjoni f'dan is-sens. (...)

56. B'hekk l-istqarrija tal-akkuzat ma tistax tiġi sfilzata u għandha tibqa' parti mill-provi migbura f'dan il-każ.

Għal dawn ir-raġunijiet, it-tieni eċċezzjoni qiegħda tiġi miċhuda.

²⁸ Deciza nhar is-27 ta' Jannar 2021.

Ikkunsidrat

57. Illi t-tielet eċċezzjoni tal-akkużat FARRUGIA titratta n-nuqqas ta' ammissibilita' bħala xhieda ta' Angel Attard, David Lee Rogers u Joseph Borg in kwantu dawn il-persuni għandhom kazijiet pendenti relatati direttament mal-kaz in diżamina u għalhekk huma ko-akkużati jew allegatament ko-awturi fl-akkużi addebitati lil FARRUGIA.
58. Illi jirriżulta li x-xhieda li l-akkużat qiegħed jattakka l-ammissibilita' tagħha hija dik mogħtija minn persuni li huma meqjusa bħala ko-akkużati f'dawn il-proċeduri in kwantu lkoll huma implikati fil-qabda ta' droga li saret nhar l-1 ta' Settembru 2014 u li minnha bdew serje ta' operazzjonijiet ta' konsenja kontrollata li waslet għal qabda ta' ċirku ta' nies fosthom il-persuni ndikati mill-akkużat f'din it-tielet eċċezzjoni tiegħu.
59. L-akkużat ma jinkludix ix-xhieda gumentata mogħtija minn Jomic Calleja a tenur tal-Artikolu 30A tal-Kapitolu 101 tal-Liġijiet ta' Malta izda jllimita l-ilment tiegħu għax-xhieda ta' Angel Attard, David Lee Rogers u Joseph Borg.
60. L-akkużat għandu raġun illi jindika lil dawn ix-xhieda bħala ko-akkużati. Ir-regola kardinali fil-liġi proċedurali penali trid li ko-akkużat ma jkunx jista' jiddeponi fil-proċeduri kontra ko-akkużat jew komplici ieħor sakemm il-kaz tiegħu ma jkunx gie deciz definittivament. Din ir-regola toħroġ mill-interpretazzjoni li l-gurisprudenza tal-Qrati Maltin taw matul iż-żmien tar-regola sancita fl-Artikolu 636(b) tal-Kodiċi Kriminali applikata a contrario sensu.
61. Fl-appell kriminali **Il-Pulizija vs. Omissis u Saada Sammut**,²⁹ gie rilevati is-segwenti:

Hekk di fatti kien gie ritenut mill-Qorti Kriminali b'Digriet tat-22 ta' Dicembru, 1998 fil-kawza "Ir-Repubblika ta' Malta vs. Ian Farrugia". Dik il-Qorti, f'dak id-Digriet, wara li għamlet riferenza għall-gurisprudenza hemm citata, rriteniet li persuna li tkun akkużata, kemm bħala komplici kif ukoll bħala ko-awtur, bl-istess reat migjub kontra dak l-akkużat liehor ma tistax tingieb bħala xhud favur jew kontra dak l-akkużat l-iehor sakemm il-kaz tagħha ma jkunx gie definittivament deciz u li dan il-principju japplika sija jekk dik il-

²⁹ Deciza nhar is-16 ta' Novembru 2006.

persuna tkun giet akkuzata fl-istess kawza tal-akkuzat l-iehor – b’ mod li jkun hemm “koakkuzati” fil-veru sens tal-kelma – u sija jekk tkun akkuzata fi proceduri separati. Il-bazi ta’ dan il-principju hu l-argument “a contrario sensu” li jitnissel mill-paragrafu (b) tal-Artikolu 636 tal-Kodici Kriminali. Konsegwentement dik il-Qorti kienet iddecidiet li dak ix-xhud li kien akkuzat bhala ko-awtur bl-istess reat li bih l-akkuzat kien jinsab akkuzat, ma hux kompetenti li jixhed, qabel ma l-kaz tieghu jghaddi in gudikat. (Ara ukoll fl-istess sens Digriet tal-Qorti Kriminali fil-kawza “Ir-Repubblika ta’ Malta vs. Brian Vella” [4.2.2004] u ohrajn.). L-unika eccezzjoni ghal dir-regola hi proprju dik kontenuta fl-art. 636 (b) li tirrendi tali xhud kompetenti biex jixhed ghalkemm ikun imputat tal-istess reat li fuqu tkun mehtiega x-xhieda tieghu, meta l-Gvern ikun wegħdu jew tah l-impunita’ sabiex hekk ikun jista’ jixhed.

62. L-istess intqal fl-appell kriminali superjuri **Ir-Repubblika ta’ Malta vs. Domenic Zammit, Martin Zammit, Joseph Fenech, Lawrence Azzopardi u Gino Calleja:**³⁰

Kwantu għal dawn ix-xhieda li qed jintalbu mill-ko-akkuzati, il-gurisprudenza, ibbażata fuq il-ligi kif ukoll fuq il-buon sens, hi ċara. Persuna li tkun akkuzata, kemm bhala komplici kif ukoll bhala ko-awtur, bl-istess reat migjub kontra akkuzat ieħor ma tistax tingieb bhala xhud favur jew kontra dak l-akkuzat sakemm il-kaz tagħha ma jkunx gie definittivament deċiż. Dan il-principju japplika sia jekk il-persuna tkun akkuzata fl-istess kawza tal-akkuzat l-ieħor b’mod li jkun hemm ko-akkuzat fil-veru sens tal-kelma-u sia jekk tkun giet akkuzata fi proceduri separati.

63. Issa, mill-atti processwali jirrizulta li x-xhieda indikati mill-akkuzat FARRUGIA, ġew indikati mill-Avukat Generali fir-rinviji maħruga ai termini tal-Artikolu 405(1) tal-Kodici Kriminali u bl-istess mod ġew indikati bhala xhieda fin-nota tax-xhieda annessa mal-Att tal-Akkuza datata 24 ta’ Novembru 2022. Lanqas ma jirrizulta li l-Avukat Ġenerali qatt irrinunzjat għax-xhieda tal-imsemmija persuni.

64. Jirrizulta wkoll li x-xhieda, fil-mori tal-kawza quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istrutturja, ħadu l-pedana tax-xhieda u kif kellhom kull dritt illi jagħmlu bil-Ligi sabiex jevitaw li jinkriminaw ruħhom stante li l-proceduri fil-konfront tagħhom kienu għadhom sub-iudice, irrifjutaw li jagħtu d-depożizzjoni tagħhom. Dan però ma jfissirx li iżjed il-quddiem, fl-istadju tal-Ġuri, kemm-il darba l-proceduri fil-konfront tiegħu jkunu hekk għaddew in gudikat, huma jkunu jistgħu jibqgħu ma jixhdux. F’dak il-punt u f’dik l-eventwalita huma jkunu jitqiesu bhala a competent and compellable witness u jkollhom jixhdu. Irid jingħad ukoll li kemm Jomic Calleja kif ukoll

³⁰ Deciża nhar il-31 ta’ Lulju 1998.

Angel Attard, bhall-akkuzat, irrilaxxjaw stqarrija ġuramentata u li għaliha japplika l-artikolu 30A tal-Kapitolu 101 tal-Ligijiet ta' Malta.

65. Kif inghad minn din il-Qorti diversament presjeduta fil-kawza **Ir-Repubblika ta' Malta vs. Charles Paul MUSCAT** deciza nhar is- 6 ta' Lulju 2016:

Premess dan allura "... bhala regola, min ikun ghamel tali stqarrija ġuramentata ghandu jingieb il-qorti għall-fini ta' kontroll da parti tal-akkuzat jew imputat. F'dan is-sens ukoll esprimiet ruhha l-Qorti Ewropea fil-kawza Kostovski v. Netherlands (20 ta' Novembru, 1989) meta qalet li d-dritt ta' akkuzat li jikkonfronta xhud migjub kontra tieghu does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage in the proceedings"

Illi allura din id-disposizzjoni tal-ligi holqot eccezzjoni biss għar-regola stabbilita fl-artikolu 661 tal-Kodici Kriminali li jiddisponi illi l-konfessjoni ta' persuna ghandha tiswa għalih biss u ma tistax tintuza la favur u lanqas kontra l-ko-akkuzat. Il-ligi ma tohloq l-ebda eccezzjoni ohra u allura għas-salvagwardji li jipprovdi l-Artikolu 639(3) tal-Kapitolu 9 tal-Ligijiet ta' Malta u cioe: "Meta l-unika xhud kontra l-akkuzat dwar xi reat fi process li jinstema' quddiem il-gurati tkun persuna komplici, il-Qorti ghandha taghti direttivi lill-gurati biex jiznu x-xhieda li dak ix-xhud jaghti b'kawtela qabel ma jserrhu fuqha u jaslu biex isibu hati lill-akkuzat."

Issa allura dan ifisser illi ai termini ta' l-artikolu 30A tal-Kapitolu 101 Marlon Apap u Brian Godfrey Bartolo ghandhom jitqiesu illi huma 'a competent witness' fil-konfront ta' l-akkuzat għalkemm fiz-zmien meta huma offrew id-deposizzjoni tagħhom kienu għadhom jitqiesu bhala ko-akkuzati billi l-proceduri kriminali fil-konfront tagħhom dwar l-istess fatti addebitati lill-akkuzat odjern kienu għadhom ma gewx konkluzi. **Li hu certu huwa illi sakemm il-kaz tagħhom jigi deciz dawn iz-zewg xhieda ma humiex 'a compellable witness' u cioe' ma jistghux jigu imgieghla jaghtu id-deposizzjoni tagħhom billi għandhom id-dritt sancit mill-Kostituzzjoni u il-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem illi ma iwiegbu għall-ebda mistoqsija li tista' b'xi mod tinkriminhom. Fil-fatt meta huma offrew id-deposizzjoni tagħhom matul il-kumpilazzjoni għazlu li juzufuwixxu minn dan il-jedd u ma xehdux.**

66. Għaldaqstant, din il-Qorti għar-raġunijiet mistqarra aktar 'il fuq tqis li jkun prematur f'dan l-istadju li tali stqarrija u xhieda tiġi dikjarata inammissibbli. Kemm -il darba mbagħad fl-istadju taç-

ċelebrazzjoni tal-ġuri dawn ix-xhieda jibqgħu ma jistgħux jagħtu d-depożizzjoni tagħhom għaliex ikunu għadhom meqjusa bħala ko-akkużat fid-definizzjoni tal-Artikolu 636(b) tal-Kodiċi Kriminali, din il-Qorti tirrizerva li tindirizza lill-ġurati bil-mod opportun sabiex iwiežnu il-valur probatorju ta' kwalunkwe xiehda, inkluż dik ġuramentata li tkun setgħet giet mogħtija minn Attard, Lee Rogers u Borg rispettivament. Dan kien l-insenjament tal-Qorti Kriminali fil-kawża **MUSCAT** imsemmija:

Izda jekk f'dak l-istadju huma jiddikjaraw li ser jagħzlu li ma jixhdux biex ma jinkrimnawx rwiehom fil-process penali li ikun għadu pendenti fil-konfront tagħhom, imbagħad f'dak l-istadju il-ġurati għandhom jigu iggwidati meta jigu biex jiznu il-valur probatorju tal-istqarrijiet ġuramentata u dan għaliex "The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency."

Dan għaliex kif gie deciz fil-kaz Luca v Italy [(2003) 36 EHRR 46], inghad mill-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem:-

"As the court has stated on a number of occasions . . . it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular where the witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6.1 and 3(d). The corollary of that, however, is that where the conviction is both solely or to a decisive degree based on depositions that had been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6."

Dan ifisser allura illi hemm erba kriterji li iridu jigu ikkunsidrati:

1. Illi x-xhieda bhala regola trid tinghata viva voce fil-qorti fejn l-akkużat ikollu kull opportunita li jikkontrolla dak li ighid ix-xhud.
2. il-fatt illi x-xhieda ma jixhdux madanakollu ma għandux iwassal għall-inammissibilita ta' l-istqarrija minnhom rilaxxjata fl-istadju tal-investigazzjonijiet jew fil-pre-trial stage u dan għaliex irid jittiehed in konsiderazzjoni l-fatturi kollha tal-kaz, bhal per eżempju fil-kaz meta xhud ma jistax jingieb jixhed għax ikun miet.
3. L-affidabbilita ta' dik l-istqarrija u tax-xhud li ikun irrilaxxjaha.
4. Finalment jekk dik ix-xhieda ġuramentata wahedha hijiex l-unika prova inkriminati u decisiva fil-konfront tal-persuna akkużata.

Illi fil-kawża Saidi v France (1993 - 17 EHRR 251) inghad :- "The court reiterates that the taking of evidence is governed primarily by the rules of domestic law, and that it is in principle for the national courts to assess the evidence before them. The court's task under the Convention is to ascertain whether the proceedings in their entirety, including the way in which

evidence was taken, were fair. All the evidence must normally be produced in the presence of the accused at a public hearing, with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of the police enquiry and judicial investigation is not in itself inconsistent with Article 6(3)(d) and (1) provided that the right to the defence had been respected.." (sottolinjar tal-Qorti).

Dan ifisser allura illi tali prova ma tista' qatt titqies li hija inammissibbli semplicement ghaliex ix-xhieda li ikunu offrew dik l-istqarrija fl-istadju tal-investigazzjonijiet ma ikunux xehdu quddiem il-Qorti viva voce ghaliex din wahedha ma tistax twassal ghal inammissibilita ta' prova li l-ligi tqies bhala wahda legalment valida. Madanakollu min hu imsejjah biex jiggudika irid jimxi b'kawtela kbira sabiex jigi zgurat illi d-dritt sagrosant sancit mill-Kostituzzjoni u il-Konvenzjoni ghal smiegh xieraq f'kull process penali ma jigiex mittiefes.

Ghal dawn ir-ragunijiet,³¹ f'dan l-istadju it-tielet u l-aħħar eċċezzjoni qiegħda tiġi miċhuda fis-sens li din il-Qorti, kif diġa nqal, tirrizerva li kwantu għal dawk li diġà taw xiehda ġuramentata tagħti l-opportuni kawteli lill-ġurati kemm -il darba huma jibqgħu ma jistgħux jagħtu x-xhieda tagħhom viva voce fl-istadju taċ-ċelebrazzjoni tal-ġuri kontra l-akkużat FARRUGIA.

Il-kawza qed tiġi differita "sine die" sakemm ikun deċiż xi appell eventwali u/jew sakemm imissha t-turn tagħha biex tinstema' quddiem din il-Qorti bil-ġurati, skond jekk isirx appell minnha jew le.

Sadattant l-akkużat jibqa' jgawdi mill-istess kondizzjonijiet għal dak li jirrigwarda l-ħelsien mill-arrest.

**Aaron M. Bugeja,
Imħallef**

³¹ u salv għal dak li ntqal iżjed il-fuq fir-rigward tax-xiehda li jkunu għadhom ko-akkużati fl-istadju tal-ġuri minħabba li l-kazijiet kontra tagħhom ma jkunux għadhom ġew konklużi b'mod definittiv u finali u li ma jkunux irrilaxxaw stqarrijiet ġuramentati skont il-Liġi