



FIL-PRIM'AWLA TAL-QORTI CIVILI

Sede Kostituzzjonali

IMHALLEF

ONOR. GEOFFREY VALENZIA B.A., LL.D.

Seduta ta' nhar it-Tnejn, 14 ta' Jannar, 202.

Rikors Nru: 689/99

Numru 1

Doc. Nru. 189-02

**Francis maghruf bhala Mandy
Zammit**

vs

**L-Avukat Generali u d-Direttur
tar-Registru Pubbliku**

Il-Qorti,

PRELIMINARI

Rat ir-rikors li permezz tieghu gie premess illi l-esponent twieled fit-30 ta' Settembru, 1969 u gie rregistrat fic-certifikat tat-twelid bl-isem ta' Francis Zammit ta' sess maskili (Dok A);

Premess illi minn ckunitu, l-esponent kellu inklinazzjonijiet, atteggiamenti u orjentamenti femminili, kemm psikologikament kif ukoll esternament.

Premess illi biex jehles mill-konflitti interni ghar-rigward tal-personalitajiet tieghu, l-esponent issottometta ruhu ghall-operazzjoni kirurgika maghrufa bhala "*gender reassignment*" u b'hekk assumata s-sess femminili - (Dok B).

Premess illi ben konxju tal-fatt li illum, la darba l-istat civili tieghu ta' ragel ma jikkorrispondiex ghall-personalita' tieghu, effettivament, l-esponent talab lid-Direttur tar-Registru Pubbliku korrezzjoni fic-certifikat tat-twelied, izda din giet rnichuda.

Premess Illi dan ir-rifjut, flimkien mal-fatt li l-ligi Maltija ma tipprovdix ghall-ezigenzi tat-transesswali, tikkrea problemi kemm emozzjonali kif ukoll guridici lill-esponent, li jammontaw ghall-vjolazzjoni tad-drittijiet tieghu li ma jkunx assoggettati ghall-trattament degradanti u inuman, kif protett mill-Artikolu 36 tal-Kostituzzjoni ta' Malta, l-Artikolu 3 tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem u tad-dritt li jgawdi l-hajja privata tieghu protett mill-Artikolu 8 tal Konvenzjoni Ewropeja.

Ghaldaqstant, l-esponent talab lil din il-Qorti:

- (i) tiddikjara li c-cahda tad-Direttur tar-Registru Pubbliku li jaghmel il-korrezzjonijiet mitluba fic-certifikat tat-twelied tieghu, flimkien mal-fatt li l-ligi Maltija ma tipprovdix ghall-ezigenzi transesswali, jikkostitwixxi ksur ta' l-Artikolu 36 tal-Kostituzzjoni ta' Malta, l-Artikolu 3 tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem u l-Artikolu 8 tal-Konvenzjoni Ewropeja;
- (ii) taghtih dawk ir-rimedji li jidhrilha xierqa ghat-twettiq ta' dawn id-drittijiet fundamentali fuq imsemmija, fosthom li tordna li fic-certifikat tat-twelied tieghu jigi mibdul is-sess ta' l-esponent ghall-femminil u li ismu jigi rregistrat bhala Mandy minflok Francis.

Bl-ispejjes.

Rat ir-risposta ta' l-Avukat Generali u tad-Direttur tar-Registru Pubbliku a fol. 11 tal-process fejn esponew:

1. Illi t-talbiet tar-rikorrent ghandhom jigu michuda bhala nfondati ghas-segwenti motivi:

In kwantu huwa allegat ksur tal-Artikolu 36 tal-Kostituzzjoni u t-Artikolu 3 tat-Konvenzjoni l-ebda wiehed minn dawn l-artikoli m'huwa applikabbli ghall-kaz odjern.

L-Artikolu 36 tal-Kostituzzjoni jghid:

“(1) Hadd m'ghandu jkun assoggettat ghal piena jew trattament inuman jew degradanti.”

Minn naha l-ohra l-Artikolu 3 tal-Konvenzjoni jghid:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Iz-zewg artikoli citati huma identici hlief li l-Kostituzzjoni ma tuzax il-kelma tortura. Dan ma jfissirx li l-Kostituzzjoni tammetti t-tortura ghaliex jekk ma tammettix trattament inuman jew degradanti *a fortiori* ma tammettix it-tortura.

Il-Kummissjoni Ewropea fil-Greek case (Report 5.11.1979) qalet:

“The notion of inhuman treatment covers at least such treatment as

deliberately causes severe suffering mental or physical, which, in the particular situation, is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before or drives him to act against his will or conscience."

Fil-kaz "Tyreer" (25 ta' April 1978), il-Qorti Ewropeja qalet:

"The suffering occasioned must attain a particular level before a punishment can be classified as inhuman within the meaning of article 3."

P. van Dijk u G.J.H. van Hoof fil-ktieb taghhom "*Theory and Practice of the European Convention on Human Rights*" jikkummentaw hekk f'pagna 229 tal-ktieb:

"However, not every measure taken by a public authority that has emotional consequences of any kind for the individual falls within the scope of inhuman treatment but only such measures as "inflict severe mental or physical suffering on an individual."

U fil-footnote 78 fl-istess pagna jiccitaw l-Applikazzjoni 9554/81 "X vs Ireland" fejn jinghad:

"Emotional stress arising from the expropriation of one's home does not meet the requirements of Article 3"

Dawn l-artikoli diga' gew ezaminati niill-Qrati taghna fil-kazi "L-Onor. Debono Grech vs Albert Mizzi et" u "Tonio Vella vs Kummissarju tal-Putizija" (Vol

LXXV. 1.106).

Fid-dawl ta' din il-gurisprudenza, m'henm xejn allegat li huwa ta' severita' u estremita' tali li jista' jikkwalifika bhala trattament inuman u degradanti taht l-artiikoli msemmija.

2. In kwantu huwa allegat ksur tal-Artikolu 8 tal-Konvenzjoni:

L-Artikolu 8 tal-Konvenzjoni Ewropea jghid:

“1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

2.1. Illi l-Qorti Kostituzzjonali ta' Malta fl-14 ta' Lulju, 1995 fil-kaz “Lawrence sive Roxanne Cassar versus Onor. Prim Mimstru u d-Direttur tar-Registru Pubbliku”, wara li studjajt fit-fond il-fatti kollha u l-kazi tal-Qorti Ewropea kollha inkluz “B versus France”, ma sabet ebda vjolazzjoni tad-dritt tar-rikorrenti kif kontemplati fl-Artikolu 38 tal-Kostituzzjom u fl-Artikolu 8.

2.2. Kif inghad kienet saret riferenza ghall-kaz deciz mill-Qorti Ewropea “B versus France” fejn il-Qorti kienet sabet vjolazzjoni niill-gvern Franciz izda f'dan il-kaz il-Qorti Ewropea ddistingwiet bejn il-pozizzjoni legali ta' Franza u dik ta' l-Ingilterra.

Fil-paragrafu 52 tad-decizjoni “B vs France” (25 ta’ Marzu 1992) il-Qorti Ewropea qalet hekk:

“52. *The applicant considered the rejection of her request for rectification of her birth certificate to be all the more culpable since France could not claim, as the United Kingdom had done, that there were any major obstacles linked to the system in force.*

The Court had found, in connection with the English civil status system, that the purpose of the registers was not to define the present identity of an individual but to record a historic fact, and their public character would make the protection of private life illusory if it were possible to make subsequent corections or additions of this kind.”

u fil-paragrafu 63:

“63. *The Court thus reaches the conclusion, on the basis of the above-mentioned factors which distinguish the present case from the Rees and Cossey cases...”*

Din hi l-pozizzjoni ezatta ta’ Malta fejn ir-registri ta’ l-istat civili huma pubblici u fejn id-dokumenti jirregistraw fatti storici bhal ma jsir fir-Renju Unit. Ghalhekk ghall-kaz ta’ Malta - bhal fil-kaz tar-Renju Unit - ghadhom u ghandhom jghoddu ddecizjonijiet moghtija mill-Istess Qorti Ewropea fl-ismijiet “Rees versus United Kingdom” u “Cossey versus United Kingdom” u ukoll dik aktar recenti fl-ismijiet “Sheffield and Horsham vs United Kingdom” (Qorti Ewropeja 30 ta’ Lulju, 1998).

2.3. Oltre dan ma kien hemm ebda att amministrattiv li b’xi mod

indahal fil-hajja privata tar-rikorrent. Anzi thalla jaghmel dawk l-interventi kirurgici kollha li xtaq jaghmel.

2.4. Il-Qorti Ewropea harsat sew lejn l-obbligi u l-interferenzi taht dan l-artikolu fil-kaz “Rees versus the United Kingdom” (decizjoni 17 ta’ Ottubru, 1986) fil-paragrafu 35, il-Qorti qalet hekk:

“The Court has already held on a number of occasions that, although the essential object of Article 8 is to protect the individual against the arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for private life, albeit subject to the State’s margin of appreciation.

In the present case it is the existence and scope of such “positive” obligations which have to be determined. The mere refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register cannot be considered as interferences.”

2.5 L-esponent jaghmlu ukoll referenza ghal dak li ddecidiet il-Qorti Ewropeja fil-kaz recenti ta’ “Sheffield and Horsham vs United Kingdom” (Qorti Ewropeja 30 ta’ Lutju, 1998) fis-sens li:

“59. Nor is the Court persuaded that the applicants’ case histories demonstrate that the failure of the authorities to recognise their new gender gives rise to detriment of sufficient seriousness as to override the respondent State’s margin of appreciation in this area. It cannot be denied that the incidents alluded to by Miss Sheffield were a source of embarrassment and distress to her and that Miss Horsham, if she were to return to the United Kingdom, would equally run the risk of having on occasions to identify herself in her pre-operative gender.

At the same time, it must be acknowledged that an individual may with justification be required on occasions to provide proof of gender as well as medical history. This is certainly the case of life assurance contracts which are uberrimae fidei. It may possibly be true of motor insurance where the insurer may need to have regard to the sex of the driver in order to make an actuarial assessment of the risk. Furthermore, it would appear appropriate for a court to run a check on whether a person has a criminal record, either under his or her present name or former name, before accepting that person as a surety for a defendant in criminal proceedings.”

2.5 Punt iehor importanti huwa illi fil-kaz ta' Sheffield and Horsham il-Qorti Ewropeja innotat illi f'dan il-qasam tad-drift ma jezistix il-*“common European approach”* bejn l-Istati membri li normalment issir referenza ghalih bhala li jiggiustificika lill-Qorfi biex tqis li l-kwistjoni tezorbita mill-*'margin of appreciation'* ta' l-Istat koncenat. Fuq dan l-aspeft tal-kwistjoni l-Qorti Ewropeja esprimiet ruha bil-mod segwenti:

“As to the legal developments in this area, the Court has examined the comparative study which has been transmitted by Liberty. However, the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her preoperative gender.

The Court is accordingly not persuaded that it should depart from its Rees and Cossey decisions and conclude that on the basis of scientific and legal developments alone the respondent State can no longer rely on a margin of appreciation to defend its continuing refusal to recognise in law a transsexual's post operative gender."

2.6 Ghaldaqstant anke jekk din l-Onorabbli Qorti ssib xi interferenza fid-drift ghall-hajja pnvata din hija ukoll gustifikata ghatiex:

- (i) Hija skond il-ligi; u
- (ii) hija mehtiega f'socjeta' demokratika fl-interess tal-protezzjoni tad-drittijiet u l-libertajiet ta' ohrajn.

2.7. M'hemmx dubju li dak li qed isir qed isir skond il-ligi ghaliex dan huwa kollu konformi mal-Kodici Civili.

Dwar it-tieni parti tal-paragrafu precedenti wiehed irid izomm quddiem ghajnejh id-drittijiet li ghandhom ohrajn f'socjeta' demokratika. Jekk wiehed ser jizzewweg u xi hadd jiftahlu ghajnejh li l-partner kien bidel is-sess, ghandu dritt dan li jmur ir-Registru Pubbliku u jiccekkja ? Jew jispicca jizzewweg u wara jrid jitlob l-annullament taz-zwieg ?

Il-Qorti Ewropea wkoll irriflettiet dwar dan u fil-paragrafu 37 tad-decizjoni tas-17 ta' Ottubru, 1986 fl-ismijiet "Rees vs United Kingdom" fejn qalet hekk:

"In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention. In striking this balance

the aims mentioned in the second paragraph of Article 8 may be of certain relevance.”

L-istess *ratio* gie ukoll addottat fid-decizjoni tal-Kummissjoni Ewropeja fuq l-Applikazzjoni Numru 10622/83 fir-rapport taghha tal-15 ta' Dicembru, 1988 (1989 61 DR 37) addotat fil-15 ta' Gunju, 1989 mill-Kumitat tal-Ministri.

2.8. Fuq kollox it-transesswali qatt ma verament jibdel is-sess tieghu:

(i) *“Furthermore, the change so recorded could not mean the acquisition of all the biological characteristics of the other sex.” (Rees vs U.K. par.42)*

(ii) *“Transsexuals nevertheless kept their original chromosomal sex; only their appearance could be changed.” (B vs France: paragraph 47).*

2.9 Effetti negattivi fuq id-drittijiet ta' l-ohrajn

Dwar dawn issir referenza ghal dak li qal wiehed mill-Imhallin tal-Qorti Ewropea (Pinheiro Farinha):

“An illegitimate child wishes to start proceedings in respect of paternity, but after his birth the man who begot him has had a sex change operation and his civil status has been rectified; he is asking for a woman to be acknowledged as his father.

After rectification of civil status, a transsexual will be able to marry a person of his true sex (original sex); but the Court “finds that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purpose of marriage” and “in the Court’s opinion, the right to marry guaranteed by

Article 12 refers to the traditional marriage between persons of opposite biological sex.”

Ma' dawn nistghu nzidu ohrajn:

- ragel li jsir mara jiehu l-penzjoni qabel;
- f'attivitajiet sportivi kompeftivi jista' jkollu vantagg;
- skond l-artikolu 115 (2)(b) tat-Kodici Civiti jista' wkoll jaddofta tfajla ghaliex issa sar raget;
- f'mizuri ta' *positive discrimination* favur in-nisa, jista' jibda jgawdi minnhom;
- f'kaz li diga' mizzewweg jista' jhassar iz-zwieg.

Ghaldaqstant l-esponenti jissottomettu illi din l-Onorabbti Qorti ghandha tirispingi t-talbiet kollha tar-rikorrent bhala ghal kollox infondati fit-faft u fid-drift.

Rat l-atti kollha tar-rikors u d-dokumenti ezibiti;

Semghet ix-xhieda bil-gurament;

Rat in-noti tal-partijiet;

TALBA

Ir-rikorrenti qed titlob li din il-Qorti: tiddikjara li c-cahda tad-Direttur

tar-Registru Pubbliku li jaghmel il-korrezzjonijiet mitluba fic-certifikat tat-twelid tieghu, flimkien mal-fatt li l-ligi Maltija ma tipprovdiex ghall-ezigenzi transesswali, jikkostitwixxi ksur ta' l-artikolu 36 tal-Kostituzzjoni ta' Malta, l-artikolu 3 tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem u l-Artikolu 8 tal-Konvenzjoni Ewropeja; taghtih dawk ir-rimedji li jidhrilha xierqa ghat-twettiq ta' dawn id-drittijiet fundamentali fuq imsemmija, fosthom li tordna li fic-certifikat tat-twelid tieghu jigi mibdul is-sess ta' l-esponent ghall-femminil u li ismu jigi registrat bhala Mandy minflok Francis.

Risposta

Fir-risposta tagghom l-intimati rrispondew li l-Qorti ghandha tirrispingi t-talbiet tar-rikorrent bhala nfondati fil-fatt u fid-dritt.

Fatti

Ir-rikorrent ezebixxa certifikat (a fol. 5) fejn hemm indikat li hu ghamel "*gender reassignment surgery*" fl-10 ta' Ottubru, 1992 "*and that she is now physically female*".

Il-Qorti kienet ukoll nominat espert li kkonferma li mill-aspett psikologiku, hlief ghal fatt li ma tistax tippokreja, l-unika haga li qed tfixkel lir-rikorrent emozzjonalment u jzommha milli tkompli tintegra fil-rwol feminili, hija d-dokumentazzjoni li baqghet tqisha bhala ragel mill-aspett legali (fol 30).

Mill-provi prodotti l-Qorti hi sodisfatta li s-sess li llum apparentement assumu r-rikorrent hu irriversibbli u li l-kaz tieghu jidher li hu wiehed genwin.

KONSIDERAZZJONIJIET

Rispett tal-hajja privata kif protett bl-Artikolu 8 (1) tal-Konvenzjoni Ewropea.

Il-Qorti taghmel riferenza ghall-kawza fl-ismijiet "Raymond Gilford maghruf bhala Rachel Gilford vs Direttur tar-Registru Pubbliku" (Rikors Kostituzzjonali Numru 455/93) liema kawza kienet tittratta mertu identiku kemm f'dawk li huma provi fattwali kif ukoll dawk li huma konsiderazzjonijiet ta' dritt applikabbili ghalihom. Dik il-kawza giet deciza b'sentenza tad-9 ta' Ottubru, 2001. Din il-Qorti ezaminat l-atti ta' dik il-kawza, (u l-kawza ta' Tracy Ellul) kif ukoll ta' din il-kawza fid-dawl tal-konsiderandi maghmula mill-Qorti Kostituzzjonali fil-kawza l-ohra. Issib li dawn il-konsiderandi japplikaw *mutatis mutandis* ghal kaz taht ezami u hi tal-fehma illi ghandhom jigu addottati bhala konsiderandi ghall-prezenti sentenza minghajr il-htiega ta' elucidazzjoni ulterjuri.

Fir-rigward tad-dikjarazzjoni ta' l-ezistenza tal-lezjoni tal-jedd fundamentali tar-rikorrenti in kwantu gie dikjarat illi l-fatt li l-ligi Maltija ma tipprovdiex ghall-esigenzi tat-transesswali jikkostitwixxi vjolazzjoni da parti tal-Gvern ta' Malta tad-dritt tar-rikorrent ghar-rispett tal-hajja privata taghha kif protett bl-Artikolu 8 (1) tal-Konvenzjoni Ewropea, dik id-dikjarazzjoni giet konfermata mill-Qorti fil-kawza "Gilford". Il-lezjoni hi dovuta ghaliex il-ligi ma tipprovdiex ghall-esigenzi ta' individwu transesswali u ghalhekk tpoggih f'posizzjoni ta' inferjorita' ma individwi ohra u tesponih ghac-cirkostanzi li fihom ma jkunx jista' jgawdi b'mod shih il-hajja privata tieghu. Sitwazzjoni din li m'hiex biss rizultat ta' xi nuqqas ta' rispett da parti ta' l-istat meta ma bidilx ic-certifikat tat-twelid biex jirrifletti s-sess apparenti tar-rikorrent illum.

Drittijiet fundamentali kif protetti bl-Artikolu 3 tal-Konvenzjoni

Ewropeja u l-Artikolu 36 tal-Kostituzzjoni

Kwantu ghat-talba tar-rikorrent biex jigi dikjarat li l-fatti li fuqhom hu bbazat ir-rikors tieghu jikkostitwixxu trattament degradanti w inuman u allura jivvjolaw id-drittijiet fundamentali tieghu kif protetti bl-Artikolu 3 tal-Konvenzjoni Ewropeja u l-Artikolu 36 tal-Kostituzzjoni l-Qorti tiddecidi li dan l-ilment ma jirrizultax pruvat in kwantu l-lanjanzi tar-rikorrent fir-rigward ta' l-inkonvenjenzi u frustrazzjonijiet li hu certament isofri f'certi cirkostanzi ma jikkwalifikawx bhala trattament inuman u degradanti kif interpretati fil-gurisprudenza nostrana u fil-gurisprudenza tal-Qorti u tal-Kummissjoni Ewropeja.

Rimedju xieraq u adegwat biex tigi rettifikata din il-lezjoni tal-jedd fundamentali

Dan stabbilit irid jigi deciz x'ghandu jkun ir-rimedju xieraq u adegwat biex tigi rettifikata din il-lezjoni tal-jedd fundamentali. Din il-Qorti ser tadotta r-rimedju li dik il-Qorti identifikat u ordnat fil-kawza "Gilford" u ghalhekk l-istess ser tiddegreta f'din il-kawza. (ghalkemm dina l-Qorti ghandha riservi dwar kemm jista' jitmiss dokument storiku bhal ma hu certifikat ta' twelid) Dan qed isir minhabba l-uniformita' w ic-certezza tal-gudikat. Bhal rimedju ordnat mill-Qorti Kostituzzjonali fil-kawza "Gilford" dina l-Qorti qed tordna lill-intimat Direttur tar-Registru Pubbliku biex fl-att tat-twelid tar-rikorrent (li jgib in-numru progressiv f'dan il-kaz 4272/69) fil-kolonna "Jekk tifel jew tifla" - "Sex" il-kelma "Boy" tigi sostitwita bil-kelma "Girl" u fil-kolonna "Ismijiet moghtijin" - "Names given" l-ismijiet "Francis, Joseph, Emanuel" jigu sostitwiti bl-isem ta' "Mandy" u tordnalu wkoll li jaghmel l-annotazzjoni mehtiega f'dak ic-certifikat biex jigi registrat li dan it-tibdil kien qed isir in forza ta' din is-sentenza.

DECIZJONI

Ghal dawn il-motivi l-Qorti tiddeciedi billi tilqa' l-ewwel talba tar-rikorrent billi tiddikjara li l-fatt li l-ligi Maltija ma tipprovdiex ghall-ezigenzi transesswali, jikkostitwixxi ksur ta' l-Artikolu 8 tal-Konvenzjoni Ewropeja izda tichad il-kumpliment tat-talba tar-rikorrent; u tordna lill-intimat Direttur tar-Registru Pubbliku biex fl-att tat-twelid tar-rikorrent (li jgib in-numru progressiv f'dan il-kaz 4272/69) fil-kolonna "Jekk tifel jew tifla" - "Sex" il-kelma "Boy" tigi sostitwita bil-kelma "Girl" u fil-kolonna "Ismijiet moghtijin" - "Names given" l-ismijiet "Francis, Joseph, Emanuel" jigu sostitwiti bl-isem "Mandy" u tordnalu wkoll li jaghmel l-annotazzjoni mehtiega f'dan ic-certifikat biex jigi registrat li dan it-tibdil kien qed isir in forza ta' din is-sentenza.

Spejjez bin-nofs bejn il-partijiet.

ONOR. IMHALLEF GEOFFREY VALENZIA B.A., LL.D.

Frankie Mercieca
DEPUTAT REGISTRATUR

