MALTA

QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
ABIGAIL LOFARO

Seduta ta' l-14 ta' Ottubru, 2010

Rikors Numru. 21/2009

Morgan Ehi Egbomon
vs
AVUKAT GENERALI

Il-Qorti:

Rat ir-rikors ipprezentat fis-17 ta' April, 2009, li *in forza* tieghu r-rikorrenti, wara li ppremetta :

Illi dan ir-rikors promotorju huwa intiz halli jattakka l-kompatibilita' ta' ligijiet Maltin komparati mal-Konvenzjoni Ewropea.

L-esponenti jinsab akkuzat quddiem il-Qorti Kriminali bir-reat ta' money laundering (Att ta' Akkuza 16/2009) Huwa kien instab hiereg minn Malta bi flus li ma kienx iddikjara. Illi l-prosekuzzjoni anke fl-att tal-akkuza qed tghid li hu jrid jipprova li l-flus mhux gejjin minn reat.

L- Ilmenti:

A. Spostament tal-Piz tal-Prova u n-negazzjoni tal-presunzjoni tal-innocenza.

Il-Kapitolu 373 tat-Ligijiet ta' Malta huwa dwar il-money laundering, u fih barra d-diversi poteri li ghandu l-Avukat Generali, hemm inkluz l-Artikolu 3(3) li jghid testwalment hekk:

'Fi proceduri dwar reat ta' money laundering taht l-Att, id-Disposizzjonijiet ta' l-Artikolu 22(1C)(b) tal-Ordinanza dwar Medicini Perikoluzi, ghandhom ikunu mutatis mutandis japplikaw.'

Ghalhekk dak li wiehed ghandu jezamina l-iktar bir-reqqa huwa l-Artikolu 22(1C)(b) illi necessarjament irid jinqara ma' l-Artikolu 22(1C)(a).

Skond l-Artikolu 22(1C)(a) suppost illi l-Prosekuzzjoni jkollha l-piz fuqha li tipprova li persuna tuza, titrasferixxi, tibghat, tikkonsenja, takkwista, tircievi, izzomm, tittrasporta, ecc flus, proprjeta', jew xi rikavat minn dawk il-flus, jew minn dik il-proprjeta' bil-hsieb illi tahbi jew tikkonverti dawk il-flus jew dik il-proprjeta' u tkun taf jew ikollha suspett li dawk il-flus jew proprjeta' kollha jew parti minnhom, jew dak ir-rikavat kollu jew parti minnu, ikunu gew miksuba jew ricevuti, direttament jew indirettament bhala rizultat ta' reat.

Kieku l-posizzjoni waqfet hemmhekk, wiehed ma setax jaghmel l-ebda ilment Kostituzzjonali jew jghid li hemm spostament tal-piz tal-prova, u dan ghar-raguni li l-Prosekuzzjoni trid tipprova l-elementi tar-reat, u cioe' dak principalment kif ritenut fil-gurisdizzjonijiet kollha tal-Ewropa li l-ewwel irid ikollok ir-reat principali, jew kif anke spjegat fl-interpretazzjoni ta' dan il-Kap 373 tar-reat sottostanti, umbaghad wara minn hemmhekk johrog ir-reciklagg tal-flus jew tal-proprjeta'.

Skond l-Artikolu 22(1C)(a) il-Prosekuzzjoni trid tipprova reat sottostanti u x-xjenza jew ghall-inqas is-suspett fil-persuna Ii tindahal biex tirrecikla dawk il-flus, Ii tali flus gejjin minn reat. Fil-kaz tal-Kap 101 hija mid-droga, fiI-kaz tal-Kap 373 minn kwalunkwe reat iehor. Imma I-piz tal-prova skond dak I-Artikolu jibqa' fuq il-Prosekuzzjoni.

L-esponenti qieghed jaghmel referenza ghal sentenza tal-Qorti ta' l-Appell Kriminali tal-Ingilterra, sentenza moghtija fil-21 ta Lulju, 2006, Regina vs Amer Ramzan, u kopja taghha integrali qieghda tigi esebita, pero' l-iktar parti importanti huwa fejn tibda tigi spjegata fil-bidu nett il-legal history ta' kif gie ir-reat tal-money laundering fl-Ingilterra u l-interpretazzjoni tieghu.

<u>The legal history</u>

1. Money laundering offences have existed in English law since the Drug Trafficking Offences Act 1986. Putting to one side offences against the Prevention of Terrorism (Temporary Provisions) Act 1989, or the Terrorism Act 2000, with which we are not concerned, there existed prior to the enactment of the Proceeds of Crime Act 2002 two distinct groups of money laundering offences. Where the money was the proceeds of drug trafficking, they were contained in sections 49 -53 of the Drug Trafficking Act 1994 and derived either from the Drug Trafficking Offences Act 1986 or, in one case, from the Criminal Justice (International Co -operation) Act 1990. Where the money was the proceeds of other criminal conduct, they were contained in sections 93A -D of the Criminal Justice Act 1988 and had thus come into existence two years later. In most, although not every, respect, the two groups of offences were in similar terms. They did not, however, overlap; the illicit sources of the proceeds were in each case exclusive of the other. It is only since the enactment of the Proceeds of Crime Act, which takes effect from 24th February 2003, that a single group of money laundering offences has existed relating to all criminal property except for any alleged to relate to terrorism.

2. All the Defendants with whom we are concerned were convicted of conspiracy to commit such offences. Charges

of conspiracy were commonly preferred, prior to Saik, for a number of understandable reasons, even where it was the Crown's case that there had not simply been a conspiracy but that it had been carried out by the commission of substantive offences of money laundering. One reason was that it was often, perhaps usually, the case that there was a system in operation, with repetitive transactions of a similar kind, and one conspiracy charge was regarded as simpler and more representative of the overall criminality alleged than a number of substantive counts would have been.

3. Some such conspiracy counts charged agreements to commit offences against one only of the two relevant Acts of Parliament. We shall refer to them as single Act conspiracy counts".

4. In some cases, the Crown charged a conspiracy to launder money in terms which alleged that the agreement had been to launder money which was either the proceeds of drug trafficking or the proceeds of other criminal conduct. Such counts were held to be lawful in **Hussain and Bhatti** [2002] EWCA Crim 6; 2 Cr.App.R 26. We shall refer to them for convenience as "either/or conspiracy counts". Such counts were of obvious utility if the Crown case was that the money came from mixed illicit sources, some drugs, some other criminal conduct. They were also of value to the Crown when it was uncertain which the source was, but it was contended that it could properly be inferred that it must be one or the other.

5. The two statutes define the mens rea for the various money laundering offences in terms which vary somewhat from offence to offence. In several cases, however, it is defined as being knowledge or suspicion, or in some cases knowledge or reasonable grounds for suspicion, that the money represents the proceeds of the relevant type of crime. In **Saik**, the House of Lords has held that on proper interpretation, the sections which refer to reasonable grounds for suspicion import the necessity that actual suspicion by the Defendant must be proved.

So for the commission of many of these substantive offences, suspicion that the money represents the proceeds of the relevant type of crime is sufficient mens rea to establish the offence; knowledge that the money is illicit need not be proved.

6. It was established by the House of Lords in **Montila** [2004] UKHL 50; 1 WLR 3141 that although that is the mens rea, the actus reus of the offence is to launder money which is in fact the proceeds of the relevant type of crime. **That means that the Crown must prove in all such cases that the money was in fact such proceeds.** That had not universally previously been appreciated.
(enfasi tal-esponenti)

Hemm referenza wkoll ghal sentenza importanti tal-House of Lords, Montila, fejn jinghad illi hija l-Prosekuzzjoni Ii trid tipprova fil-kazijiet kollha Ii l-flus kienu ta' provenjenza llecita. Din is-sentenza kienet Ii kkjarifikat darba ghal dejjem il-posizzjoni Ngliza. Is-sentenza nghatat mill-House of Lords fil-25 ta' Novembru, 2004.

Fiha jinghad hekk:

38. Common to all three International instruments was the proposal that those third parties whose actions were to be criminalised were people who knew that the property which they were dealing with was the proceeds of drug trafficking or criminal conduct. Reasonable suspicion is not mentioned in any of them. It was of course open to the Legislature to find its own solutions to the problem in the domestic system. There is no doubt that the effectiveness of the measures that were being introduced was assisted by enabling prosecutions to be brought where there was no evidence of actual knowledge but reasonable grounds to suspect could be established. But to broaden the scope of the third party offences still further so as to bring cases within their reach where the Crown could not prove that the property that was being dealt with was the proceeds of drug trafficking or criminal conduct would have been a significant departure from what had been asked for by the international instruments. One would have expected some

indication of this to be given to Parliament, and there was none.

39. Two other points were mentioned in argument, but they carry little weight. First, there is the concession in R v El-Kurd [2001] Crim L R 234, in which the Crown accepted that it had to establish that the money had come from drug trafficking or other criminal conduct. That was a case where the defendants had been charged with four conspiracies, each of which was indicted as a conspiracy to commit offences under the 1994 Act on the one hand and under the 1988 Act on the other. As Latham LJ pointed out in para 26, the wording of each alternative depended upon whether the property was the proceeds of drug trafficking or criminal conduct. Secondly, there is the way the 2002 Act has dealt with the problem of money laundering.

40.All that need be said on the first point is that the concession, if that was what it was, could not have been held against the Crown if the interpretation for which it is now contending was the right one. There is some authority for the view that official statements by a government department which is responsible for administering an Act may be taken into account as persuasive authority as to what the Act means: Bennion, p 597. But the concession that was made in that case fell well short of being an official statement of that kind.

41 .As for the second, Parliament is of course free to restructure the offences that it creates in any way it likes. The language that it has chosen to use in the 2002 Act is different from that in the enactments which are in issue in this case. There is no room for any ambiguity. The property that is being dealt with in each case must be shown to have been criminal property. But it would be surprising if the intention was to reduce the scope of these offences. The problem of money laundering has not gone away. The fact that these offences have been designed on the assumption that proof that the property being dealt with was in fact criminal property fits into the pattern which was set by the international instruments and which the

wording of the subsections themselves, when properly construed in their context, indicates.

Jekk wiehed jaqbad il-Kodici Penali Taljan, 1-Artikolu 648 bis isib ukoll illi r-reat ta' money laundering jippersisti meta jkun hemm ir-reat antecedenti, u persuna ohra tidhol biex tirrecikla l-provenjenti minn dak ir-reat.

Pero bI-ebda mod ma jkun hemm spostatament tal-piz prova tal-elementi tar-reat ghal fuq id-Difiza.

Hija l-Prosekuzzjoni Ii trid tipprova **Ii l-flus huma mahmugin**. Umbaghad tista' tippersegwihom u ssegwihom dawk il-flus f'idejn terzi persuni Ii jkunu qeghdin jaghmluha ta' washing machine ta' l-istess flus.

Malta hadet I-ispinta Ii taghmel il-legislazzjoni kontestata mis-sorsi internazzjonali, izda mbaghad, bhas-soltu, rridu morru oltre u naqbzu kull limitu.

Appena wiehed jibda jezamina I-provvediment tal-ligi kontestata jinnota dan Ii gej:

L-ewwel ma jolqot l-ghajn huwa I-hsieb illi 'meta l-Prosekuzzjoni ggib prova li l-imputat jew l-akkuzat ma jkun ta ebda spjegazzjoni ragonevoli'. Kif inhu l-kliem tal-Ligi jfisser Ii l-imputat jew akkuzat fi stadju antecedenti jrid ikun ta spjegazzjoni ragonevoli Iill-Prosekuzzjoni.

Dan johrog car ghaliex meta mbaghad hemm l-ispostament tal-prova, dan jigi quddiem il-Qorti meta jkunu qieghed jiddefendi lilu nnifsu. Mela l-kliem illi kellu jaghti mhux biss spjegazzjoni, imma dik I-ispjegazzjoni tkun ragonevoli, tmur kontra kull principju tad-dritt tas-silenzju. Jekk persuna taghzel Ii ma tirrispondi ghall-ebda mistoqsija tal-pulizija fil-fatt hija ma tkunx qieghda taghti l-ebda spjegazzjoni, ragonevoli jew le.

Mela persuna Ii tkun indizzjata u nvestigata fuq reciklagg hija obbliqata Ii taghti spjegazzjoni fI-ewwel lok, u fit-tieni lok illi dik I-ispjegazzjoni trid tkun ragonevoli.

B. Dritt tas-silenzju.

Hawn tidhol il-kwistjoni mportanti : ghal min trid tkun ragonevoli ? Mhux biss hemm ksur tad-dritt tas-silenzju, imma dik l-ispjegazzjoni trid tissoddisfa — u tissoddisfa lil min? Lill-Prosekuzzjoni naturalment. Jekk spjegazzjoni titqies ragonevoli o meno jigi li tiddependi mill-kriterji jew mid-decizjoni, anke soggettiva ta' min qieghed jinterroga. Jekk il-kaz ikun ghaddej naturalment kumpilazzjoni, dik l-ispjegazzjoni trid tikkonvinci lill-Avukat Generali. Pero' l-persuna mputata jew akkuzata ma tmurx titkellem ma' l-Avukat Generali biex tissoddisfah b'xi spjegazzjoni. Jekk huwa jkun imressaq il-Qorti, anke skond il-gurisprudenza tal-Qorti ta l-Appell Kriminali, Spettur tal-Pulizija u naturalment anke l-Avukat Generali, ma jistghux imorru jkellmu lill-persuna mressqa l-Qorti in konnessjoni ma' dak ir-reat. Mela fl-istadju tal-kumpilazzjoni din l-ispjegazzjoni ma tista' tinghata qatt, jew ifisser li jkun obblgiat li jixhed l-imputat. Ifisser biss li din l-ispjegazzjoni trid tinghata bil-fors waqt l-istadju ta' l-investigazzjoni mal-pulizija. Huma l-pulizija mbaghad jidhrilhomx illi l-ispjegazzjoni hija ragonevoli a meno.

Wara ghax il-Prosekuzzjoni tiddikjara li ma kellhiex spjegazzjoni ragonevoli u dak ikun bizzejjed illi tiddikjarah hi li ma hassitux ragonevoli, il-piz kollu tal-prova jghaddi fuq l-imputat jew l-akkuzat biex jipprova li kollox gej minn sorsi leciti. Kif inhi miktuba l-Ligi ndipendentement mir-reat principali li ggenera l-flus illi taghhom kien qieghed suppost isir il-hasil, l-imputat irid jaghti spjegazzjoni tal-flus illi jkollu f'idejh u kull centezmu jrid ikun gej minn sorsi leciti. Dan huwa piz sproporzjonat. Niehdu l-ezempju ta' wahda illi tkun akkuzata b'reciklagg ta' flus tad-droga, u l-prova li jkollha tkun illi l-flus ma gewx mid-droga imma ghaliex kienet ukoll konkubina ta' miljunarju. Jekk hija tghid dik li hija l-verita', ma tkunx qed taghti risposta ghall-akkuza li skond l-Artikolu 22(IC)(b) tal-Kapitolu 101 tal-Ligijiet ta' Malta, suppost jirreferi ghad-droga. La l-provenjenza mhix lecita ma tkunx waslet li tezonera ruhha mill-piz tal-prova mposta fuqha mil-Ligi.

Dan igib sitwazzjoni simili hafna ta' l-Artikolu 26(2) tal-Kapitolu 101 tal-Ligijiet ta' Malta li gie ddikkjarat mill-Qorti Kostituzzjonali bhala li jilledi l-principju tal-presunzjoni ta' l-innocenza u li jpoggi piz ta' prova fuq l-akkuzat li hija sproporzjonata. L-istess principji japplikaw hawnhekk.

Dan mhux kaz tad-Dipartiment tat-Taxxi Nterni fejn jekk persuna tinstab li ghandha fil-pussess taghha certi beni jistghu kollha jigi kkunsidrati bhala income u tohrog it-taxxa fuqhom mid-Dipartiment. Hawnhekk si tratta ta' akkuzi kriminali li ghandhom regoli li jridu jigu osservati ghall-protezzjoni tad-drittijiet individwali li huma wkoll parti mill-Amministrazzjoni tal-Gustizzja.

Rigward il-kwistjoni tal-presunzjoni ta' l-innocenza u l-ispostament tal-prova, l-esponenti qieghed jaghmel referenza l-iktar ghas-sentenza tal-Qorti Kostituzzjonali ta' Susan Jane Molyneux hawn fuq citata, fil-waqt illi ghall-kwistjoni tad-dritt tas-silenzju l-esponenti qieghed jaghmel referenza ghal sentenza ricentissima tal-Qorti Ewropea moghtija fl-10 ta' Marzu, 2009 fl-ismijiet Bykov vs Russia, u dan ghall-principji stabbiliti fil-paragrafu tnejn u disghin u tlieta u disghin ta' l-istess sentenza li jghid testwalment hekk:

1. As regards the privilege against self-incrimination or the right to remain silent, the Court reiterates that these are generally recognised international standards which lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper compulsion by the authorities and thus to avoid miscarriages of justice and secure the aims of Article 6 (see John Murray v. the United Kingdom, 8 February 1996, § 45, Reports 1996-I). The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seeks to prove the case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see Saunders v. the United Kingdom, 17 December 1996, § 68-69, Reports 1996-VI; Allan, cited above, § 44; Jalloh, cited above, §

94-117; and O'Halloran and Francis v. the United Kingdom (GC) nos. 15809/02 and 25624/02, § § 53-63, ECHR 2007-...). In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court must examine the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (see, for example, Heaney and McGuinness v. Ireland, no. 34720/97, § § 54-55, ECHR 2000-Xll, and J.B. v. Switzerland, no. 31827/96, ECHR 2001-lll).

2. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue. Public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see, mutatis mutandis, Heaney and McGuinness, cited above, § § 57-58).

Jekk wiehed japplika dawn il-principji ghal-ligi kontestata malajr isib li jekk wiehed ma jitkellimx u jaghti spjegazzjoni sodisfacenti, bil-piz tal-prova fuqu, jkun hati. Verament ghandu dritt jibqa' sieket, u jaghmel booking ghat-tul fil-Facilita' Korrettiva ta' Kordin.

C. Nuqqas ta' Dritt ta' avukat

F'dan l-istadju l-investigat l-anqas ghandu dritt ta' avukat biex jaghtih parir tal-konsegwenzi, u dan ukoll ghalhekk minhabba l-inferenza li tqum, jammonta ghall-ksur tad-drittijiet hawn lamentati. Jekk il-presenza ta' avukat mhix dejjem indispensabbli, imma meta jkun hemm effetti tas-silenzju tal-investigat, li minghalih ghandu dritt ghas-silenzju, imma mhux fil-kaz li qed jigi investigat, il-caution li jaghtuh il-pulizija li ghandu dritt ma jitkellimx hija dahka fil-wicc jekk mhux aghar. U minn jista' jaghtih parir indipendenti mill-pulizija? Il-gurisprudenza tal-Qorti Ewropea evolviet f'dan il-qasam, mill-Murray case 'il quddiem sas-Salduz vs Turkey.

D. Decizjoni tal-Avukat Generali

Illi bil-gudizzju li jaghmel l-Avukat Generali skond l-Artikolu 3(2A) tal-Kapitlu 373 tal-Ligijiet ta' Malta, u cioe' li jaghzel il-margini tal-piena u quddiem liema Qorti jibghat lill-akkuzat mhix essenzjalmenti il-funzjoni tieghu taht il-Kostituzzjoni, imma huwa bhala parti fil-kawza jkun qieghed jezercita gudizzju jew ahjar pre-gudizzju kontra l-akkuzat. Tali decizjoni mhix soggetta ghall-ebda Qorti. Dan stante li dak li jsir tul il-proceduri kriminali jaqa' wkoll taht l-Artikolu 6 tal-Konvenzjoni Ewropea.

Ghaldaqstant l-esponenti jitlob bir-rispett li din l-Onorabbli Qorti joghgobha :

(1) tiddikjara ghar-ragunijiet premessi li l-artiklu 3(3) u l-Artikolu 3 (3) (2A) tal-Kapitolu 373 tal-Ligijiet ta' Malta u l-artiklu 22(1C) (d) tal-kap 101 jilledu d-dritt tal-esponenti ghal fair trial u ghall-presunzjoni tal-innocenza u dan bi ksur tal-Artiklu 6(1) u (2) u (3) tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem (Kap 319) u
(2) taghti rimedju effettiv, inkluz li l-artikli msemmija m'ghandhomx japplikaw ghall-kaz tieghu, u anke bil-konsegwenti notifika tas-sentenza lill-ispeaker tal-Kamra tad-Deputati ghall-finijiet u effetti kollha tal-ligi;
(3) Taghti kumpens ghaz-zmien li ilu arrestat minhabba dan ir-reat;

Rat ir-risposta tal-intimat Avukat Generali li *in forza* taghha wiegbu illi:

Illi l-pretensjonijiet tar-rikorrenti huma fis-sens illi l-Artikolu 3 (3) ta' l-Att kontra Money Laundering (Kap. 373 tal-Ligijiet ta' Malta) u l-Artikolu 22 (1C) (a) ta' l-Att dwar il-Medicini Perikoluzi (Kap. 101 tal-Ligijiet ta' Malta) allegatament jivvjolaw id-drittijiet fundamentali tar-rikorrenti senjatament "ghal-fair trail u ghall-presunzjoni tal-innocenza u dan bi ksur tal-Artiklu 6 (1) u (2) u (3) tal-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem (Kap 319).

Illi l-esponenti jissottometti illi l-istess pretensjonijiet huma infondati fil-fatt u fid-dritt ghar-ragunijiet segwenti:

1. Preliminarjament ir-rikorrenti qieghed jabbuza mill-process kostituzzjonali stante illi huwa qieghed jadopera procedura straordinarja bhal ma hija l-procedura odjerna meta kellu a disposizzjoni tieghu rimedji ordinarji sabiex ihares id-drittijiet pretizi minnu. F'dan ir-rigward l-esponenti jaghmel riferenza ghall-proviso ta' l-Artikolu 4 (2) tal-Kapitolu 319 tal-Ligijiet ta' Malta.

Illi kif jirrizulta mir-rikors promutur, ir-rikorrenti jinsab akkuzat quddiem il-Qorti Kriminali, liema Qorti ghadha ma bdietx tisma' l-kaz ta' l-akkuzat. Illi huwa pacifiku li sabiex tkun tista' tigi deciza allegazzjoni ta' nuqqas ta' smiegh xieraq hu mehtieg illi jsir apprezzament tal-process kriminali fl-interezza tieghu. Dan jaghmel sens perfettament b' riferenza ghall-kaz odjern fejn wiehed mill-ilmenti tar-rikorrent huwa li fil-process se jkunu applikati fil-konfront tieghu certi prezunzjonijiet u se jinqaleb f' certi aspetti l-oneru tal-prova.

Huwa pacifiku illi fil-process penali, hemm certi inferenzi li jistghu joperaw f'certi cirkostanzi u f'certi limiti regolati mill-Ligi. Hemm ukoll sitwazzjonijiet fejn il-ligi penali tista taghti lok ghal holqien ta' sitwazzjonijiet fejn l-oneru ta' prova ta' fatt jigi spustjat fuq min jallega l-ezistenza ta' tali fatt – dejjem fl-ambitu ta' proceduri kriminali li jkun qed jigu mismugha. La darba f'dan il-kaz il-process kriminali ghadu ma giex mismugh u mitmum, ghadu mhux maghruf kif u taht liema cirkostanzi jistghu joperaw ir-regoli illi r-rikorrent qieghed jilmenta dwarhom. Huwa certament barra minn loku illi l-ilment *de quo* jigi diskuss f'dan l-istadju *in vacuo.* Apparti minn hekk l-ilment jekk tistax issir jew jekk saritx virtwalment xi lezjoni ta' drittijiet fondamentali f' dan l-istadju jwassal ghalhekk ghat-tieni eccezzjoni preliminari – u cioe' li l-ilment huwa wkoll intempestiv.

2. Peress illi l-proceduri kriminali ghadhom ma bdewx jinstemghu quddiem il-Qorti Kriminali u wisq anqas gew konkluzi u ghar-raguni diga' moghtija aktar il-fuq fis-sens

illli l-apprezzament ta’ allegazzjoni ta’ nuqqas ta’ smiegh xieraq tirrikjedi evalwazjoni tal-process penali fl-intier tieghu, l-azzjoni odjerna hija intempestiva u ghandha tigi dikjarata tali.

3. Illi subordinatament u minghajr pregudizzju ghas-suespost, l-esponenti jissottometti illi m’huwiex korrett dak li gie sottomess mir-rikorrent fis-sens illi l-Artikolu 3 (3) tal-Kap. 373 u l-Artikolu 22 (1C) (b) tal-Kap. 101 jirrikjedu l-i ‘*spostament tal-piz tal-prova’* ghalhekk allegatament jinnega l-presunzjoni ta’ l-innocenza ta’ l-imputat u dana peress:

(a) Kull ma jaghmlu dawn l-artikoli huwa illi **matul** il-kors tal-preceduri penali, **wara li l-prosekuzzjoni** ggib prova li l-imputat jew akkuzat ma jkun ta’ ebda spjegazzjoni ragjonevoli li turi li dawk il-flus, proprjeta jew rikavat ma kienux flus, proprjeta jew rikavat migjuba direttament jew indirettament minn reati kriminali, **jispustjaw l-oneru tal-prova ta’ dan il-fatt biss** (u cioe tal-prova tal-provenjenza lecita tal-flus, proprjeta’ jew rikavat) fuq l-imputat jew akkuzat;

(b) Apparti minn hekk l-istess Ligi tirrikjedi li tali mekkanizmu procedurali tal-qlib ta’ l-oneru tal-prova jibda jsehh matul il-kors ta’ procedimenti ta’ natura penali; b’ebda mod ma din il-Ligi tinnewtralizza l-presunzjoni ta’ l-innocenza ta’ l-imputat jew akkuzat matul l-istadji kollha tal-process penali;

(c) Ghalhekk in definittiva, l-aktar li l-artikolu 22(1C)(b) tal-Kapitolu 101 rez applikabbli bl-artikolu 3(3) tal-Kap 373 jaghmel huwa li f’dawn id-determinati sitwazzjonijiet hawn fuq imsemmija biss, u li huma marbuta mar-reat specjali ta’ hasil ta’ flus (*money laundering*), jaqleb l-oneru tal-prova ta’ fatt fuq l-imputat jew akkuzat fl-ambitu shih tal-process penali fejn l-imputat jew akkuzat ikun ghadu sa’ dak l-istadju, meqjuz ghall-finijiet u effetti kollha tal-Ligi, innocenti;

Tali artikoli ma johloqux xi presunzjoni *iuris et de iure* jew xi presunzjoni ohra li ma tistax tigi ribattuta mill-istess imputat jew akkuzat jew illi tivvjeta lill-Qorti milli tikkunsidra l-fatti partikolari ta' kull kaz biex tasal ghall-konkluzjoni dwar jekk l-imputat irnexxielux jiskarika l-oneru tal-prova rikjest minnu; anzi ghall-kuntrarju, l-istess Ligi filwaqt li tohloq din is-sitwazzjoni procedurali, taghti lok ampju lill-imputat jew akkuzat sabiex, matul l-istadji kollha legalment permissibbli tal-process penali, l-istess imputat jew akkuzat iressaq dawk il-provi kollha li jidhirlu xierqa biex juri l-provenjenza legali u lecita ta' l-istess flus, proprjeta jew rikavat; u b'hekk kwalunkwe presunzjoni ta' fatt li setghet tkun inholqot, tista tigi newtralizzata matul il-kors ta' l-istess process penali – li fil-kaz odjern ghad irid jinstema;

(d) Illi l-Kapitolu 319 jaghmilha cara fit-Tieni Skeda tieghu, illi tinkludi d-Dikjarazzjonijiet u r-Rizervi tal-Gvern ta' Malta meta rratifika l-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem illi:

"The Government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts".

L-esponenti jissottometti wkoll illi skond l-Artikolu 3 tal-Kapitolu 319, id-drittijiet fundamentali inkorporati fil-Konvenzjoni japplikaw bhala parti mill-Ligi ta' Malta bhala suggetti ghall-imsemmija dikjarazzjonijeit u rizervi.

4. Illi kull prezunzjoni illi jista' jigi ritenut illi joholqu l-Artikolu 3 (3) tal-Kap. 373 u l-Artikolu 22 (1C) (b) tal-Kap 101 ma tilledi l-ebda dritt tas-silenzju u dan stante illi hija wahda fil-limiti tar-ragjonevolezza illi tiehu kont tad-drittijiet tad-difiza u tal-principji tal-Konvenzjoni Eworpeja dwar il-prezunzjonijiet partikolarment kif dawk il-principji gew delinejati fis-sentenza tal-Qorti Ewropeja deciza fis-7 ta' Ottubru 1988 fl-ismiijiet "Salabaiku" (Series A no 141A, pp 15 – 18, paras 28 – 30).

5. L-esponenti jissottometti wkoll illi kif gie ripetutament deciz mill-Qorti Ewropeja, il-Konvenzjoni ma taghtix dritt assolut il-jedd illi l-persuna investigata tkun assistita minn avukat fl-istadju ta' l-investigazzjoni. Illi l-imputat inghata t-twissija skond il-ligi senjatament illi huwa ma kienx obbligat illi jitkellem sakemm ma kienx hekk jixtieq, izda li dak li kien se jghid seta' jingieb bi prova kontrih.

L-esponenti jissottometti illi r-rikorrenti jaghmel riferenza ghall-kawza Salduz v Turkey izda l-fattispecie ta' dak il-kaz huwa totalment differenti minn dawk tal-kawza odjerna u dan peress illi bizzejjed illi jigi rilevat illi l-persuna involuta f'dawk il-proceduri kienet minorenni u f'dak il-kaz kien hemm allegazzjoni ta' maltrattament fil-mument meta saret l-istqarrija. Mir-rikors promutur ma jirrizulta xejn min dan fil-kaz odjern.

6. Illi kemm ghar-ragunijiet fuq esposti kif ukoll ghal ragunijiet ohra li l-esponent jirrizerva li jgib, jekk ikun hemm bzonn, waqt it-trattazzjoni tal-kawza, it-talbiet tar-rikorrenti huma nfondati fil-fatt u fid-dritt u ghandhom jigu respinti bl-ispejjez kontra l-istess rikorrenti.

7. Salvi eccezzjonijiet ulterjuri permessi mill-Ligi.

Rat ir-risposta addizzjonali tal-intimat Avukat Generali li *in forza* taghha wiegbu illi:

This reply is being filed in terms of the court record of the 2nd June 2009 whereby the respondent was given the opportunity to file an additional reply following applicant's request to insert an additional premise and claim in the original application.

The respondent is filing his reply in the Maltese language since the respondent's reply to the applicant's application was filed in the Maltese language:

"Illi subordinatament u minghajr pregudizzju ghas-suespost, l-esponenti jissottometti illi mhuwiex korrett dak li gie sottomess mir-rikorrent fis-sens illi l-Artikolu 3 (2A)

tal-Kapitolu 373 jilledi d-drittijiet fundamentali tar-rikorrenti senjatament l-Artikolu 6 tal-Konvenzjoni Ewropeja.

Illi l-funzjoni ta' l-Avukat Generali illi tohrog mill-Artikolu 3 (2A) tal-Kapitolu 373 mhix sinonima mal-funzjoni ta' gudikant. Il-fatt illi dan l-artikolu jaghti diskrezzjoni lill-Avukat Generali fejn jista' jaghzel quddiem liema qorti jkun ser jisma' l-kaz ma jfissirx illi b'xi mod l-Avukat Generali jikkonverti ruhhu f'Imhallef jew Magistrat.

Il-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem f'diversi okkazzjonijiet ippronunzjat ruhha dwar it-tifsira ta' qorti indipendenti u imparzjali u fl-ebda okkazzjoni ma sabu illi l-funzjoni li minnha qieghed jilmenta r-rikorrenti hija in vjolazzjoni ta' l-Artikolu 6 tal-Konvenzjoni Ewropeja.

Illi l-Avukat Generali ma ghandu l-ebda poter jew kontroll fuq jekk akkuzat jinstabx hati jew le u dana peress illi tali decizjoni tittiehed mill-organu kompetenti illi hija l-Qorti. Diversa kienet tkun is-sitwazzjoni li kieku l-Avukat Generali kellu l-poter illi jiddetermina huwa stess il-htija o meno tar-rikorrenti.

In vista tas-suespost, it-talbiet tar-rikorrenti huma infondati fil-fatt u fid-dritt u ghandhom jigu respinti bl-ispejjez kontra tieghu".

Illi dan huwa rikors fejn qieghed jintalab illi l-Qorti tiddikjara illi l-Artikolu 3 (3) u l-Artikolu 3 (2A) tal-Kapitolu 373 tal-Ligijiet ta' Malta u l-Artikolu 22 (1C) tal-Kap. 101 jilledu d-dritt tal-esponenti ghal fair trial u ghall-presunzjoni tal-innocenza u dan bi ksur tal-Artiklu 6 (1) u (2) u (3) tal-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem (Kap. 319). Sussegwentement il-Qorti qeghda tintalab taghti rimedju effettiv u fit-tielet lok taghti kumpens ghaz-zmien illi ir-rikorrenti ilu arrestat minhabba dan ir-reat.

Ikkunsidrat :

Illi l-Qorti tirrimarka fl-ewwel lok illi ir-rikorrenti allega illi l-Artikolu 22 (1C) tal-Kap. 101 jilledi d-dritt tar-rikorrenti ghal fair trial bi ksur ta' l-Artikolu 6, izda ma specifikax jekk hux

il-paragrafu (b), jew inkella il-paragrafu (d) ta' l-Artikolu 22 (1C) tal-Kap. 101 Ii allegatament jikser l-imsemmi Artikolu 6 tal-Konvenzjoni Ewropea.

Illi effettivament fir-rikors tieghu tal-25 ta' Mejju 2009 ir-rikorrenti, meta talab korrezzjoni fir-rikors promotur tieghu, talab hekk "in the first claim there is a reference to Arikolu 22(1C)(a). It is evident that the reference is to 22 (1C) (b)" u ghalhekk l-applikant talab din il-korrezzjoni u talab ukoll korrezzjoni fl-ewwel talba tieghu "by substituting the letter (d) for letter (a) in the expression Artikolu 22(1C) (a) tal-Kapitolu 101 tal-Ligijiet ta' Malta."

Illi ghalhekk il-Qorti tara illi meta talab il-korrezzjonijiet a fol 67 tal-process, ir-rikorrenti ghamel zball peress illi l-ewwel talab illi ir-referenza tkun ghal Artikolu 22 (1C)(b) u sussegwentement talab illi il-korrezzjoni tkun fis-sens illi minflok "22(1C)(a)" ghandhom jidhlu il-kliem "22(1C)(d)", kif ukoll jirrizulta a fol. 67 tal-process.

Ghalhekk, in rikapitilazzjoni, ir-rikorrenti qieghed jallega illi l-Artikolu 3 (3) u l-Artikolu 3 (3) (2A) tal-Kap. 373 u l-Artikolu 22 (1C) jiksru d-drittijiet fondamentali tieghu, izda ma kienx car jekk il-paragrafu (b) jew (d) tal-Kap. 101 allegatament jiksru id-dritt tieghu ghal "fair trial" ai termini tal-Artikolu 6 tal-Konvenzjoni Ewropeja Dwar id-Drittijiet tal-Bniedem.

Ikkunsidrat :

Illi il-Qorti sejra tezamina l-ewwel zewg eccezzjonijiet tal-intimat Avukat Generali, fis-sens illi preliminarjament ir-rikorrenti qieghed jabbuza minn process kostituzzjonali peress illi huwa qieghed jadopera procedura straordinarja bhal ma hija l-procedura odjerna meta kellu a disposizzjoni tieghu rimedji ordinarji sabiex ihares id-drittijiet pretizi minnu, u f'dan ir-rigward l-intimat irrefera ghall-proviso ta' l-Artikolu 4 (2) tal-Kapitolu 319 tal-Ligijiet ta' Malta.

Illi t-tieni eccezzjoni hija fis-sens illi peress illi l-proceduri kriminali ghadhom ma bdewx jinstemghu quddiem il-Qorti

Kriminali u wisq anqas gew konkluzi, l-apprezzament ta' allegazzjoni ta' nuqqas ta' smiegh xieraq tirrikjedi evalwazjoni tal-process penali fl-intier tieghu u ghalhekk l-azzjoni odjerna hija intempestiva u ghandha tigi dikjarata tali.

Illi preliminarjament, il-Qorti tiddikjara illi din is-sentenza qeghda tinghata fil-lingwa Maltija minkejja il-fatt illi il-proceduri instemghu bil-lingwa Ingliza peress illi ir-rikorrenti ma jifhimx bil-lingwa Maltija peress illi ir-rikorrenti ma hax hsieb illi ir-rikors promotur tieghu jigi tradott fil-lingwa Ingliza. Konsegwentement lanqas ma ha hsieb sabiex jara illi jigu tradotti l-atti kollha ta' dan il-procediment fil-lingwa Ingliza. Ghalhekk il-Qorti ghandha rikors promotur bil-lingwa Maltija, risposta ta' l-Avukat Generali ukoll fil-lingwa Maltija u risposta addizzjonali ta' l-Avukat Generali tad-9 ta' Gunju 2009 ukoll fil-lingwa Maltija u il-Qorti tara illi ghalhekk jixraq illi s-sentenza taghha tkun ukoll fil-lingwa Maltija.

Ikkunsidrat :

Illi l-intimat ghamel referenza ghall-Artikolu 4 (2) tal-Kap. 319 tal-Ligijiet ta' Malta. Illi dan l-Artikolu jghid hekk :

"The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of subarticle (1), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, of the Human Rights and Fundamental Freedoms to the enjoyment of which the person concerned is entitled: Provided that the court may if it considers it desirable so to do, decline to exercise its powers under this subarticle in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other ordinary law."

Ikkunsidrat :

Illi f'dan ir-rigward il-Qorti tirreferi ghall-Artikolu 35 (1) tal-Konvenzjoni Ewropea illi jghid hekk :

"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law".

Illi kif jghidu l-awturi Harris, O'Boyle u Warbrick fil-ktieb taghhom "Law of the European Convention on Human Rights" f'pagna 766 : "Article 35 (1) also operates with some deference to national procedural law, in that it normally requires compliance in the formal requirements and time limits laid down in domestic law for exhausting remedies. In one sense, this has the same justification as the Courts' own six-month time limit in fostering legal certainty. Thus in ordinary legal proceedings where there are no special circumstances justifying a failure to abide by national procedures, the Court will frequentely reject cases for non-exhaustion where the applicant had clearly sought to exhaust a remedy but through his own negligence failed to observe the requirements of domestic law."

Ikkunsidrat :

Illi ir-rikors promotur gie ippprezentat mir-rikorrenti fis-17 ta' April 2009 u ghalhekk huwa ovvju illi huwa ipprezenta dan ir-rikors meta kien rinfaccjat bl-att ta' akkuza Nru 16 tal-2009 ipprezentata fir-Registru tal-Qorti Kriminali fit-13 ta' April 2009.

Illi l-Qorti tirrileva illi, kif jirrizulta mill-istqarrija illi ir-rikorrenti irrilaxxja lill-pulizija, huwa gie arrestat mill-pulizija u irrilaxxalhom stqarrija fis-7 ta' Gunju ta' l-2007. Sussegwentement, ir-rikorrenti ghadda ukoll proceduri ta' kumpilazzjoni. Madanakollu kien biss meta inhareg l-att ta' akkuza u gie ipprezentat fil-Qorti Kriminali illi ir-rikorrenti hass illi kellu jipprezenta ir-rikors promotur.

Ikkunsidrat :

Illi l-Artikolu 46 (2) tal-Kostituzzjoni jghid hekk :

“Izda l-Qorti tista’, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skond dan is-subartikolu f’kull kaz meta tkun sodisfatta li mezzi xierqa ta’ rimedju ghall-ksur allegat huma jew kienu disponibbli favur dik il-persuna skond xi ligi ohra.”

Illi f’dan ir-rigward il-Qorti rat sentenza taghha Sede Kostituzzjonali tad-29 ta’ Ottubru, 1993 fil-kawza fl-ismijiet Martin Gaffarena vs Kummissarju tal-Pulizija et fejn intqal hekk :

“Maghmula dawn l-osservazzjonijiet, il-Qorti ser tidhol fil-meritu ta’ l-eccezzjoni, u tibda biex tghid, kif persistentement minnha dikjarat u sostnut, illi, bhala regola, meta si tratta ta’ kawza ta’ din ix-xorta, il-Qorti ghandha tidderigi ruhha lejn ir-rifjut tal-ezercizzju tas-setghat taghha taht l-artikolu 46 tal-Kostituzzjoni ta’ Malta, mhux biss meta ma jistax isir mod iehor ghaliex ir-rimedju jkun essenzjalment residenti quddiem Qorti ohra, imma anke, per ezempju, meta l-indagini gudizzjarja u r-rimedju ghall-ilment ikunu sostanzjalment duplikati fiz-zewg mezzi miftuha ghal min ikun qieghed iressaq l-ilment.”

Illi fis-sentenza taghha fil-kawza fl-ismijiet Lawrence Cuschieri vs L-Onorevoli Prim Ministru tas-6 ta’ April, 1995, il-Qorti Kostituzzjonali qalet hekk :

“Hu veru li kull persuna tista' tirrikorri lill-Prim'Awla ghal rimedju ta' indole kostituzzjonali, imma l-ewwel subinciz ta' dak l-artikolu 46 irid jigi moqri mal-proviso tat-tieni subinciz tieghu li jipprovdi li l-Qorti tista', jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skond dak l-artikolu f'kull kaz meta tkun sodisfatta li mezzi xierqa ta' rimedju ghall-ksur allegat "huma jew kienu disponibbli favur dik il-persuna skond xi ligi ohra". Hu veru wkoll illi din il-fakolta' hija diskrezzjonali ghall-Qorti imma hu car li l-ezercizzju ta' tali diskrezzjoni ma jistax ikun wiehed kapriccuz jew legger. Sakemm tibqa' l-possibilita' li l-lezjoni tad-dritt fondamentali setghet kienet jew ghad tista' tigi rettifikata bil-proceduri u mezzi provduti bil-ligi, ikun generalment il-kaz li l-Qorti tiddeklina milli tezercita s-setghat kostituzzjonali taghha”.

Dawn l-istess principji kienu applikati f'sentenzi tal-Prim' Awla tal-Qorti Civili (Sede Kostituzzjonali) fis-27 ta' Lulju, 1995 fil-kawza fl-ismijiet "Paul Makay vs Kummissarju tal-Pulizija" u fil-kawza fl-ismijiet "Anton Scicluna pro et noe vs Prim Ministru" deciza fil-21 ta' April, 1995.

Illi ghalhekk ma huwiex indikat illi l-ewwel Qorti tezercita s-setghat taghha sakemm kienu, jew huma jew ghadhom miftuhin ghar-rikorrent rimedji ohra adegwati fil-parametri tal-ordinament gudizzjarju, kemm dawk ordinarji permezz ta' appell kif ukoll dawk straordinarji permezz ta' ritrattazzjoni.

Illi kif tajjeb issottometta l-intimat Avukat Generali, kif jirrizulta mill-istess rikors promotur, ir-rikorrenti jinsab akkuzat quddiem il-Qorti Kriminali u il-Qorti Kriminali ghadha sal-lum ma bdietx tista il-kaz tieghu.

Illi l-Qorti tara illi sabiex tista tiddeciedi dwar allegazzjoni ta' nuqqas ta' smigh xieraq hemm bzonn illi taghmel apprezzament tal-process kriminali kollu. Il-Qorti tosserva illi ir-rikorrenti lanqas biss ma esebixxa kopja legali tal-proceduri tal-kumpilazzjoni illi huwa ghadda minnhom u kull ma ressaq bhala prova kienu biss l-att ta' l-akkuza u l-istqarrija illi huwa irrilaxxja lill-pulizija.

Illi ghalhekk il-Qorti ma ghandha l-ebda mezz sabiex tara xi provi tressqu matul il-kumpilazzjoni u kif giet kondotta id-difiza tar-rikorrenti matul il-kumpilazzjoni. Ghalhekk certament ma tafx jekk kienux applikati fil-konfront tieghu certi presunzjonijiet u jekk u kif inqaleb f'certu aspetti l-oneru tal-prova.

Illi kif inhu risaput, fi process kriminali hemm inferenzi li jistghu joperaw f'certi cirkostanzi u f'certi limiti skond il-ligi.

Illi jezistu wkoll sitwazzjonijiet fil-Ligi Kriminali fejn l-oneru tal-prova jigi spustat fuq min jallega l-ezistenza ta' fatt.

Ili kif diga intqal, il-Qorti ma tafx kif gew kondotti il-proceduri matul il-kumpilazzjoni u wisq anqas ma taf kif

ser jigu kondotti il-proceduri quddiem il-Qorti Kriminali, peress illi l-process kriminali ghadu lanqas biss inbeda quddiem dik il-Qorti u ghalhekk il-Qorti ma tistax tiddetermina kif u taht liema cirkostanza operaw, jew setghu joperaw ir-regoli illi ir-rikorrenti qieghed jilmenta dwarhom.

Ghalhekk il-Qorti tara illi huwa certament prematur illi tistharreg il-lanjanzi tar-rikorrenti f'dan l-istadju u dan l-argument jghodd aktar u aktar ghall-allegazzjoni tar-rikorrenti illi huwa ma ghadux prezunt innocenti.

Ghaldaqstant u ghar-ragunijiet kollha fuq imsemmija, il-Qorti qeghda taqta' u tiddeciedi dan ir-rikors kostituzzjonali billi filwaqt illi tilqa l-ewwel zewg eccezzjonijiet tal-intimat Avukat Generali, tichad it-talbiet kollha tar-rikorrenti; Bl-ispejjez kontra tieghu.

< Sentenza Finali >

----------TMIEM----------