



**QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)**

**ONOR. IMHALLEF
ABIGAIL LOFARO**

Seduta ta' l-4 ta' Novembru, 2010

Rikors Numru. 13/2010

**Peter Borg ID : 424861(M)
vs
Avukat Generali**

Il-Qorti:

Rat ir-rikors ipprezentat fis-17 ta' Frar, 2010, li *in forza* tieghu r-rikorrenti, wara li ppremetta :

Illi b'sentenza moghtija mill-Qorti tal-Appell Kriminali Inferjuri tat-18 ta' Gunju, 2009 (Appell Numru : 34/2009) fl-ismijiet "Il-Pulizija (Spettur C. Pulis) kontra Peter Borg" l-esponenti kien instab hati talli kiser il-kundizzjonijiet tal-licenzja. Il-fatti fil-qosor tal-kaz kollu jinstabu migbura fis-sentenza tal-Qorti tal-Appell Kriminali;

Minn pagna hdax fl-ahhar parti taghha jinghad illi d-dokument li gie esebit bhala licenzja kien ftehim ghad-distribuzzjoni tal-gass u kien ftehim milhuq f'Settembru,

1992 u kif qalet il-Qorti tal-Appell Kriminali huwa skrittura privata kummercjali bejn enti parastatali u l-agent taghha. Il-ftehim veru jikkontjeni klawnsoli u kundizzjonijiet dettaljati li ghandhom jirregolaw l-obbligu reciproci tal-partijiet u tal-appellant bhala agent u distributor tac-cilindri tal-gass. L-Avukat Generali stess iddeskriva l-ftehim bhala kuntratt.

Illi minkejja dan kollu l-Onorabbli Qorti tal-Appell per analogija qalet illi dak il-ftehim kien licenzja ghall-finijiet tal-akkuzi illi kienu migjuba kontra l-esponenti u l-ewwel Onorabbli Qorti bl-istess analogija qalet illi dik kienet licenzja **“bhal nghidu ahna dak li jissejjah manufacturing or producing under licence”**. Bir-rispett kollu, manufacturing or producing under licence tirreferi ghal copyright jew proprjeta' intellettuali jew industjali. Hija forma ta' kuntratt bejn zewg entitajiet, li wahda minnhom a bazi tal-kuntratt thalli lill-ohra li tuza dik il-copyright. Bl-istess mod isir ezami tal-ECDL (European Computer Driving Licence). Ifisser li min jghaddi mill-ezami ghandu driving licence Ewropea? Jista' jsuq karozza? Dik hi licenzja? F'dan il-kaz huwa manifest li l-kuntratt kien ta' **self employed salesman on commission basis**. Dan johrog car mill-kuntratt li wkoll jippostula l-procedura ghall-penalitajiet jekk ikun hemm ksur. Manifestament il-Qorti tal-Appell Kriminali strahet fuq analogija li ma kenitx l-anqas idonea. L-esponenti ma kellu permess jipproduci u jimmanifattura xejn, lqassam biss skond ftehim. Ghalhekk ma kienx hemm licenzja u ma setax ikun hemm ksur tal-licenzja.

Il-Qorti qalet illi ksur ta' kundizzjoni u obbligu fl-istess kuntratt kienu jaghmluh punibbli bhala reat. Flok gie processat internament minhabba l-ksur tal-ftehim kif jistipula l-istess ftehim, u dan b'rapprezentanza tieghu, gie processat penalment u **mmultat u x-xoghol tieghu sospiz**.

Dana jikkostitwixxi interpretazzjoni estensiva u per analogija tal-ligi. Talli ftehim qatt ma kien ezaminat minn Qrati ta' natura ta' gurdizzjoni kriminali u kien uniku.

Il-fatti ghalhekk, inkluza l-interpretazzjoni li tat il-Qorti tal-Appell Kriminali, kienet tivvjola l-Artikolu 7 tal-Konvenzjoni Ewropeja tad-drittijiet tal-bniedem illi fl-interpretazzjoni awtorevoli tal-Qorti ta' Strasburg ghamlitha cara illi l-interpretazzjoni per analogija jew b'mod estensiv mhux permessibli taht tali Artikolu.

Fis-sentenza Kafkaris v Cyprus (Qorti Ewropea Grand Chamber 12/2/2008) intqal hekk :

1. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, 22 November 1995, Series A no. 335-C, pp. 41-42, § 35, and pp. 68 and 69, §§ 33, respectively).

2. Accordingly, it embodies, in general terms, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 22, § 52). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (*Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; and *Achour*, cited above, § 41).

Ghaldaqstant l-esponenti jitlob bir-rispett illi din l-Onorabbloi Qorti jogghobha :

1. Tiddikjara illi mill-fatti hawn fuq esposti tirrizulta vjolazzjoni tal-Artikolu 7 tal-Konvenzjoni Ewropeja dwar id-drittijiet tal-bniedem ghal dak illi jirrigwarda s-sentenza

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finali moghtija mill-Qorti tal-Appell Kriminali tat-18 ta' Gunju, 2009, rigward il-ksur ta' licenzja u multa u sospenzjoni tal-licenzja jew xoghol ghal hames snin.

2. Konsegwentament taghtih ir-rimedju effettiv billi tithassar kull kundanna u piena kemm principali u kemm accessorja rizultanti mill-ksur tal-licenzja.

Bl-ispejjez kontra l-konvenut;

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

Illi l-lanzanji tar-rikorrenti fir-rikors promutur huma fis-sens illi d-decizjoni tal-Qorti ta' l-Appell Kriminali tat-18 ta' Gunju 2009 li sabet lir-rikorrenti hati ta' reat kontinwat ta' frodi innominata, fejn gie immultat u fejn gie ordnat l-iskwalifika tal-licenzja jew permess sabiex ir-rikorrenti jahdem ta' *distributor tal-liquid petroleum gas* ghal perijodu ta' hames snin mid-data tas-sentenza allegatament inghatat in vjolazzjoni ta' l-Artikolu 7 tal-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem.

Illi l-esponenti jikkontesta l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti bhala infondati fil-fatt u fid-dritt ghar-ragunijiet segwenti:

Ebda Ksur ta' l-Artikolu 7 tal-Konvenzjoni Ewropeja

L-esponenti jissottometti illi l-Artikolu 7 tal-Konvenzjoni Ewropeja jipprovdi bhala regola generali illi (a) huwa projbit li persuna tigi akkuzata b'reat meta fil-mument meta hija ikkommittiet l-att, dak l-att ma kienx jammonta ghal reat, u cioe' in-non reoattivita' ta' ligi kriminali; (b) persuna tista' tittressaq biss ghal reat illi kien jammonta ghal tali meta gie kommess l-att; (c) isegwi illi sabiex persuna tkun taf jekk azzjoni hijiex wahda kriminali jew le, jenhtieg li l-ligi li tikkostitwixxi dak ir-reat tkun accessibbli u cara, u cioe' ic-certezza legali.

L-esponenti jissottometti illi l-argument tar-rikorrenti huwa illi allegatament huwa ma kellux permess sabiex

jipproduci u jimmanifattura il-*liquid petroleum gas* izda kull ma kellu ftehim biex iqassam u ghalhekk ir-rikorrenti jargumenta illi ma setax ikun hemm ksur ta' licenzja. Ir-rikorrenti jargumenta illi l-Qrati ta' gurdizzjoni kriminali allegatament sabu illi l-ksur ta' kundizzjoni f'kuntratt da parti tar-rikorrenti kienet punibbli bhala reat.

L-esponenti jissottometti illi dak li r-rikorrenti jsejjahlu bhala 'ftehim' kien sar f'Settembru 1992 ai termini ta' l-Artikolu 38 (1) (b) ta' l-Att dwar l-EneMalta (Kap. 272 tal-Ligijiet ta' Malta) liema Att dahal fis-sehh fl-1 ta' Ottubru 1977. Dan l-Att gie sussegwentement emendat bid-dhul fis-sehh ta' l-Att XXV ta' l-2000, li, *inter alia* stabilixxa l-Awtorita' ta' Malta dwar ir-Rizorsi bhala l-Awtorita' kompetenti. L-esponenti jissottometti illi wiehed irid jirreferi ghad-disposizzjonijiet li kienu fis-sehh fil-perjodu meta r-rikorrent inghata l-licenzja mill-EneMalta u mhux id-disposizzjonijiet kif gew emendati wara d-dhul fis-sehh ta' l-Att XXV ta' l-2000.

L-esponenti jissottometti illi l-Artikolu 38 (1) (b) tal-Kap. 272 kien jipprovdi illi l-EneMalta setghet 'taghmel kull arrangement u taghmel kull ftehim ma' xi persuna ghal kull wiehed mill-imsemmija ghanijiet, jew xort'ohra dwar xi wahda mill-funzjonijiet taghha skond dan l-Att, kif jidhrilha xieraq jew spedjenti'. Illi dan il-'ftehim' effettivament huwa l-licenzja tar-rikorrenti tant hu hekk illi anke wara d-dhul fis-sehh ta' l-Att XXV ta' l-2000 u anke fil-perjodu ta' April 2008 meta r-rikorrenti wettaq ir-reati li taghhom instab hati huwa kien qieghed jopera abbazi ta' dan il-'ftehim' u dan peress illi l-Artikolu 37 (2) ta' l-Att dwar l-Awtorita' ta' Malta dwar ir-Rizorsi (Kap. 423 tal-Ligijiet ta' Malta) moqri mat-Tieni Skeda ta' l-istess Att jipprovdi illi 'kull licenza, permess, awtorita' jew ordni moghtija jew maghmula taht xi wahda mill-provvedimenti tal-ligijiet elenkati fit-Tieni Skeda, u li jkunu ghadhom fis-sehh minnufih qabel dik l-emenda, ghandhom jibqghu fis-sehh'.

Illi apparti l-fatt illi l-imsemmi Artikolu 38 (1) tal-Kap. 272 kif kien japplika fiz-zmien meta ingarget il-licenzja fil-1992, kien jipprovdi wkoll espressament ghall-ghoti tal-licenzji mill-EneMalta, l-ewwel artikolu tad-dokument imsejjah 'ftehim' ta' l-1992 jghid espressament li:

'Il-Korporazzjoni qieghda tohrog licenzja f'isem id-distributur sabiex ikun jista' jaqdi l-interessi tal-Korporazzjoni kif ukoll tal-konsumatur skond il-provvedimenti ta' dan il-ftehim. Il-hlas annwali tal-licenzja huwa ta' Lm 10'.

Illi ghalhekk huwa car illi r-rikorrenti kien detentur ta' licenzja u mhux semplicement kuntrattur. Di piu', anke l-istess 'kuntratt' huwa minnu nnifsu fin-natura ta' licenzja peress illi huwa permess minn awtorita' pubblika sabiex terza persuna tipprovdi servizz pubbliku regolat b'ligi.

L-esponenti jissottometti illi l-Artikolu 7 tal-Konvenzjoni Ewropeja ma japplikax ghall-kaz odjern u dan peress illi certament illi l-ligi relattiva ghall-kaz odjern hija wahda cara u ghal kuntrarju ghal dak li qed jallega r-rikorrenti jeskludi kull lok ghal interpretazzjoni u dan in konformita' ma' l-Artikolu 7 tal-Konvenzjoni Ewropeja.

L-esponenti jirrileva illi l-posizzjoni tar-rikorrenti bl-ebda mod ma giet pregudikata jew aggravata miz-zmien meta hu allegatament ikkometta r-reat. L-esponenti jissottometti illi l-fatti lilu addebitati jirrizultaw pruvati u fiz-zmien meta kkommettihom kienu jikkostitwixxu reat, u daqstant iehor ghandhom ikunu hekk rikonoxxuti illum.

L-esponenti jirreferi ghad-decizjoni tal-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem fl-ismijiet CR v. UK deciza fit-2 ta' Novemberu 2005 illi osservat illi 'Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation form case to case, provided that the resulting development is consistent with the essence and could reasonable be foreseen'.

Illi in vista tas-suespost ma hemm l-ebda ksur ta' dan l-Artikolu.

Salv eccezzjonijiet ulterjuri.

Bl-Ispejjez;

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Semghet lix-xhieda illi tressqu, rat id-dokumenti illi gew esebiti, il-provi li gew prodotti u l-atti ta' dan il-procediment;

Rat in-nota ta' sottomissjonijiet tal-partijiet;

Rat illi ir-rikors kostituzzjonali thalla ghallum ghas-sentenza;

Ikkunsidrat :

Illi xehed l-Inginier Mario Magri, Head tal-Gas Division tal-Korporazzjoni EneMalta u dwar il-kaz odjern qal illi f'okkazzjoni minnhom kienu marru ghalih il-pulizija u qalulu illi kienu qabdu xi distributtur ikewwes fic-cilindri tal-gas. Ghalhekk hu mar maghhom fuq il-post u hemm hekk ra lir-rikorrenti odjern f'garaxx f'San Anard, Limiti ta' Haz-Zabbar. Huwa kellem lir-rikorrenti fil-garaxx u f'dan il-garaxx kien hemm trakkijiet tar-rikorrenti ipparkeggjati kif ukoll numru ta' cilindri tal-gas fuq xkaffa. Kien hemm ukoll tlett imwiezen u xi cilindri imdendlin u ohrajn imqabbdin maghhom taht dawn ic-cilindri tal-gas. L-Inginier Magri xehed illi ra illi kien qieghed jittiehed gas mic-cilindru ta' fuq ghac-cilindru ta' isfel ghaliex kienu imdendlin cilindri imqabbdin mac-cilindri ta' tahthom. L-Inginier Magri kompli jixhed illi ir-rikorrenti kellu iktar cilindri milli suppost, kien hemm madwar seba mitt cilindru tal-gas fil-garaxx meta suppost li r-rikorrenti kellu xi tlett mitt cilindru, umbaghad il-pulizija talbuh sabiex jizen ic-cilindri sabiex jaraw x'kien fihom nieqes u ghalhekk hadu ic-cilindri tal-gas fil-gas division tal-Korporazzjoni EneMalta fejn hemm mizien apposta. Huma hadu is-seba' mitt cilindri tal-gas kollha, inkluz tat-trakkijiet, u wiznuhom wiehed, wiehed fuq il-mizien appozitu, u dan kollu sar fil-prezenza tar-rikorrenti. Ix-xhud qal illi ir-rikorrenti kellu kuntratt ta' distribuzzjoni tac-cilindri tal-gas f'certu lokalita mal-Korporazzjoni EneMalta u dan il-kuntratt sar ghall-habta ta' l-1993 u kien sar fiz-zmien meta kienet il-korporazzjoni EneMalta li kienet tohrog il-licenzji, ghaliex sussegwentement dawn il-licenzji bdew johorgu mill-Malta Resources Authority.

Illi x-xhud qal illi l-Korporazzjoni EneMalta kienet dahlet fi ftehim ta' kuntratt ta' distribuzzjoni mar-rikorrenti, kif kienet ghamlet ukoll ma distributuri ohrajn.

Illi xehed ukoll Charles Buttigieg, Analist fid-Direttorat ta' L-Energija tal-Malta Resources Authority. Huwa xehed illi l-licenzja tar-rikorrenti sabiex jiddistribwixxi cilindri tal-gas kienet tinsab sospiza. Ix-xhud qal illi l-licenzja tar-rikorrenti kienet sospiza wara illi l-kawza tieghu giet deciza mill-Qorti Kriminali. Ix-xhud ikkonferma illi kull kuntratt illi kellha il-Korporazzjoni EneMalta mad-distributuri ta' cilindri tal-gas gie onerat mill-Malta Resources Authority meta din hadet din il-funzjoni f'idejha minghand il-Korporazzjoni EneMalta. Ix-xhud ikkonferma illi fiz- zmien in kwistjoni lanqas il-Korporazzjoni EneMalta ma kellha licenzja sabiex tibbottilja ic-cilindri tal-gas.

Ikkunsidrat :

Illi ir-rikorrenti xehed permezz ta' affidavit u qal x'qieghed jippretendi ghall-finijiet ta' kumpens dovut lilu u danni sofferti minnu ghas-sena ta' qabel l-2005, ghas-sena ta' qabel April 2006 u ghas-sena li taghlaq f'April 2007.

Ikkunsidrat :

Illi r-rikorrenti issottometta illi fis-sentenza taghha tat-18 ta' Gunju, 2009 fil-kawza kontra ir-rikorrenti, il-Qorti ta' l-Appell Kriminali qalet :

“Illi ghalkemm id-dokument CB1 jissejjah "FTEHIM" , fil-klawsola 1 (a) jinghad li b' dak il-ftehim "il-Korporazzjoni qieghda tohrog **licenzja** f' isem id-distributur ..." u jidher li hawnhekk il-kelma **licenzja** qed tintuza mhux fis-sens ta' licenzja governattiva jew amministrattiva imma wahda f' sens kummercjali.”

Ma danakollu il-Qorti ta' l-Appell Kriminali qieset illi kull ksur ta' l-kondizzjonijiet u obbligi stipulati f'dan il-ftehim, huwa punibbli bhala reat.

Illi r-rikorrenti isostni illi l-Qorti ta' l-Appell Kriminali accettat illi ir-rikorrenti la kellu licenza governattiva u lanqas wahda amministrattiva, izda kellu licenzja kummercjali u l-fatt illi giet ekwiparata ma "manufacturing or producing under licence" juri kemm il-Qorti ta' l-Appell Kriminali kienet qeghda iggebbed l-interpretazzjoni.

Illi r-rikorrenti isostni illi minkejja il-fatt illi anke l-Avukat Generali irrefera ghall-ftehim u kuntratt u mhux ghall-licenzja, kemm il-Qorti tal-Magistrati, kif ukoll il-Qorti ta' l-Appell Kriminali applikaw l-Artikolu 30 tal-Kodici Kriminali, fejn din giet meqjusa bhala licenzja mahruqa mill-Gvern, jew minn Awtorita Pubblika, u ghalhekk hemm kontradizzjoni dovut ghat-tigbid ta' interpretazzjoni illi tat il-Qorti ta' Appell Kriminali ghal dan il-ftehim.

Illi ir-rikorrenti issottometta illi l-ftehim fih innifsu kien jikkontempla il-konsegwenzi ta' min ma joqghodx ghal ghal dak il-ftehim, u il-procedura kienet ukoll stabbilita fis-sens illi jekk ikun hemm ksur ta' ftehim, id-distributur kellu jittressaq quddiem Bord fejn ikollu rapprezentant tieghu u dan bhala Bord ta' Dixxiplina jew Arbitragg, izda dan ma sarx.

Illi r-rikorrenti jissottometti illi l-ewwel Qorti kienet zvjata meta qalet illi jekk kienx kuntratt jew licenzja ir-rikorrenti kellu jitqies bhala illi kellu licenzja, u kienet zbaljata wkoll illi gebbdet l-interpretazzjoni meta qalet illi il-ligi stess qed tekwi para licenzji ma arrangamenti jew ftehim bejn l-EneMalta u terzi.

Illi huwa issottometta illi licenzja, arrangement u ftehim huma tlett kategoriji differenti u f'dan il-kaz dak li baqa rikonoxxut mill-Awtorita tar-Rizorsi kien il-ftehim.

Illi ir-rikorrenti issottometta illi l-Artikolu 7 tal-Konvenzjoni Ewropeja, illi fuqu huwa ibbazat ir-rikors tieghu, inkiteb ghaliex kien mahsub illi Gudikant illi jrid jiddeciedi dwar jekk persuna ikkommettietx reat jew le, ma jivvintax fejn jidhirlu reati li ma kienux jezistu, jew iggebbed l-interpretazzjoni anke permez ta' l-analogija, kif skond hu

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gara f'dan il-kaz, u b'dan il-mod il-procedura kienet wahda arbitrarja.

Illi ir-rikorrenti issottometta illi l-Qorti ta' l-Appell Kriminali rabet il-kaz ma l-Artikolu 38 tal-Kap. 272 illi ilu li gie approvat mis-sena 2000 permezz ta' l-Att XXV.

Ikkunsidrat :

Illi l-intimat Avukat Generali ghamel referenza ghall-akkuzi illi ingibu kontra ir-rikorrenti quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istrutturja.

Ikkunsidrat :

Illi l-Artikolu 7 ta' l-Konvenzjoni Ewropeja jghid hekk :

“(1) Hadd ma ghandu jitqies li jkun hati ta' reat kriminali minhabba f'xi att jew ommissjoni li ma kinux jikkostitwixxu reat kriminali skond ligi nazzjonali jew internazzjonali fil-hin meta jkun sar. Lanqas ma ghandha tinghata piena akbar minn dik li kienet applikabbli fiz-zmien meta r-reat kriminali jkun sar.

(2) Dan l-Artikolu ma ghandux jippregudika l-proceduri u l-applikazzjoni tal-piena ta' xi persuna ghal xi att jew ommissjoni li, fiz-zmien meta jkun sar, kien kriminali skond il-principji generali tal-ligi rikonoxxuti min-nazzjonijiet civilizzati.”

Ikkunsidrat :

Illi dwar l-allegat ksur tal-Artikolu 39 (8) tal-Kostituzzjoni ta' Malta u l-Artikolu 7 (1) tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali, l-artikolu 39(8) tal-Kostituzzjoni ta' Malta u l-artikolu 7(1) tal-Konvenzjoni Ewropea huma applikabbli ghall- kaz odjern, stante li dawn l-artikoli japplikaw u huma limitati ghall-kazijiet fejn persuna giet misjuba hatja (cioe' ikkundannata) ta' reati kriminali.

Illi dawn l-artikoli, fil-principju, joffru protezzjoni ghal-liberta' u ghas-sigurta' tal-persuna. Dawn l-artikoli

jipprovdu li hadd m'ghandu jigi ipprivat mil-liberta'tiegħu hlief, għal dak li hu rilevanti għall-fini ta' din il-kawza, "fuq suspett ragjonevoli li huwa jkun ikkommetta, jew ikun sejjer jikkommetti, reat kriminali". (artikolu 34(1)(f) tal-Kostituzzjoni ta' Malta), jew fil-kaz fejn:

"L-arrest jew detenzjoni skond il-ligi ta' persuna effettwata sabiex tigi migjuba quddiem l-awtorita' legali kompetenti fuq suspett ragjonevoli li tkun ikkommettiet reat jew meta jkun meqjus ragjonevolment mehtieg biex jigi evitat li tikkommetti reat jew li tahrab wara li tkun għamlet reat". (artikolu 5(1)(c) tal-Konvenzjoni Ewropea).

Illi fiz-zewg kazi, ic-cahda mil-liberta' hija gustifikata f'kaz ta' "suspett ragjonevoli" li dak li jkun wettaq jew sejjer iwettaq reat kriminali; il-Konvenzjoni Ewropea tesigi ulterjorment li c-cahda ta' liberta' tkun u tibqa' mehtiega sabiex il-persuna akkuzata tingieb quddiem l-awtorita' legali kompetenti.

Illi irrizulta illi ir-rikorrenti kien detentur tal-licenzja għad-distribuzzjoni ta' gass, li giet mahruġa skond, l-Artikolu 38 ta l-Att dwar l-Enemalta, Kap. 272 tal-Ligijiet ta' Malta.

Illi fis-sena 1992, l-ftehim ta' distribuzzjoni kien regolat permezz ta' l-Artikolu 38(1)(b) tal-Kap 272 tal-Ligijiet ta' Malta, liema artikolu jgħid li l-EneMalta kienet tagħti licenzja għall-importazzjoni, ksib, hazna ohra ta pitrolju .

Illi l-Artikolu 272 tal-Ligijiet ta' Malta kien ukoll jipprovdi espressament għall-ghoti tal-Licenzji u l-ewwel artikolu tal-imsejjah ftehim ta l-1992 jipprovdi illi : "il-korporazzjoni qieghda tohrog licenzja f'isem id-distributur sabiex ikun jista' jaqdi l-interessi tal-korporazzjoni kif ukoll tal-konsumatur skond il-provvedimenti ta' dan il-ftehim. Il-hlas annwali tal-licenzja huwa ta' Lm10."

Illi għalhekk il-Qorti tara illi r-rikorrenti kien detentur ta licenzja.

Illi l-Qorti rat is-sentenza tagħha tat-28 ta' Marzu, 2008 (Referenza Kostituzzjonali Numru. 12/2007) fil-kawza fl-ismijiet Il-Pulizija vs Lorraine Falzon, fejn il-Qorti qalet :

“Article 7 embodies the general principle that offences must be based in law, and that an individual must be able to know from the wording of the relevant provisions, and if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him criminally liable. (Kokkinakis para 52).

‘It generally entails that the law must be adequately accessible – an individual must have an indication of the legal rules applicable in a given case – and he must be able to foresee the consequences of his actions, in particular, to be able to avoid incurring the sanction of the criminal law. (G v France para 25, where notwithstanding changes in legislation leading to reclassification of the sexual offences of which the applicant was accused, these fell within the scope of the Criminal Code provisions, which were accessible and foreseeable).

In terms of the standard of foreseeability, absolute certainty cannot be required, and indeed may be undesirable, entailing the risk of excessive rigidity, since the law has to be able to keep pace with changing circumstances. A standard of ‘reasonable foreseeability’ is sufficient. (Sunday Times para 49).

Kif qalet il-Qorti Ewropeja fil kaz S.W. u C.R. v United Kingdom, “judicial interpretation of criminal law provisions was a widespread and even necessary feature. Article 7 cannot be read as prohibiting the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, but the resultant development must be within the bounds of reasonable foreseeability and not alter the ‘essence’ of the offence. (Kokkinakis para 52 u G v France para 26).”

Ikkunsidrat :

Illi l-awturi Harris, O'Boyle & Warbrick fil-ktieb tagħhom Law of the European Convention on Human Rights, it-tieni edizzjoni, jgħidu hekk dwar l-Artikolu 7 tal-Konvenzjoni Ewropeja :

“Article 7 incorporates the principle of legality, by which, in the context of criminal law, a person should only be convicted and punished on a basis of law : “nulle crimen nulla poena sine lege”. The object and purpose of the guarantee in Article 7, ‘which is an essential element of the rule of law’, is ‘to provide effective safeguards against arbitrary prosecution, conviction and punishment’. The importance of the guarantee in Article 7 (1) is recognized by the fact that it cannot be derogated from in time of war or public emergency.

Given that Article 7 requires that national courts act on the basis of their national law and that they interpret and apply that law in accordance with Article 7, the Strasbourg Court may find itself reviewing the interpretation and application of national law by national courts. In accordance with the Court’s general approach whereby it does not question the interpretation and application of national law by national courts, this supervisory function is undertaken with caution, with the Court only exceptionally finding the interpretation and application of national law by the national courts to be in breach of Article 7.

Article 7(1) refers to criminal offences that have a basis in ‘law’. The term ‘law’ has the same autonomous meaning as it has elsewhere in the Convention, so that it includes, in terms of sources of law, judge-made law as well as legislation, whether primary or delegated. It does not include ‘state practice’ that is inconsistent with a state’s written or judge-made law and its international human rights obligations. This was ruled in *Streletz, Kessler and Krenz v Germany*. There the three applicants had been convicted by a German court of offences of incitement to commit intentional homicide and sentenced to five to seven years’ imprisonment under the criminal law of the German Democratic Republic (GDR), or East Germany that applied in the GDR when they committed their

offences and which the courts of the new Germany continued to apply). The cases concerned the deaths of a large number of individuals who had been killed by GDR border guards by shooting or by mines as they tried to cross the border to West Germany at the time of the Berlin war. The applicants occupied senior positions in the GDR government and party apparatus that was responsible for orders to border guards to arrest or, if necessary, 'annihilate' border violators and to protect the border 'at all costs'. Whereas the applicants were tried under the GDR criminal law that existed when the deaths occurred, they argued that GDR 'state practice' – by way of the orders to border guards referred to above for which they shared responsibility – had superseded that law and justified their acts. The Court held that this 'state practice' was not 'law' for the purposes of Article 7 as it was contrary to both the fundamental right provisions of the GDR constitution and other GDR laws and the GDR's international human rights obligations. Accordingly, it did not replace the GDR criminal law existing at the time, which met the requirements of Article 7 (1). The Court's judgement confirms that delegated legislation or administrative acts that are ultra vires in national law do not count as 'law' for the purposes of Article 7, whether to take away an otherwise valid legal basis for prosecution or to provide a basis for prosecution that otherwise does not exist. The case may also provide a basis for ruling that Article 7 is not complied with on the ground that a national 'law' which is valid within the national legal system is nonetheless contrary to the international human rights obligations of the state. In the companion case of *K-HW v Germany*, no breach of Article 7 was also found where a young GDR border guard who shot and killed a border violator was convicted by a German court of international homicide. In this case, while acknowledging the great difficulties the border guard would have faced if he had not followed orders, the Court stated that the GDR constitutional and criminal law under which he was later prosecuted were accessible to him and that 'even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human

rights, in particular the right to life, which is the supreme value in the hierarchy of human rights'. In support of this approach, it may be argued that the soldier's difficulties should be taken into account in sentencing rather than in determining guilt."

Illi inkwantu ghar-rilevanza ghall-kaz odjern huwa is-segwenti :

"Article 7 also extends to the situation in which the scope of existing law is extended to acts or omissions that were previously not criminal, and lays down the principle that the 'criminal law must not be extensively construed to the accused's detriment'. The application of the existing law may be extended to new conduct by the courts by way of interpretation where its meaning has previously been unclear or is given a changed meaning by the courts in the applicant's case. It will only be in exceptional cases that the Strasbourg Court will find a violation on either of these bases. As stated by the Court in *CR v UK*, 'there will always be a need for elucidation of doubtful points and for adaptation to changed circumstances. Indeed ... progressive development of the criminal law through judicial-lawmaking is a well entrenched and necessary part of legal tradition' in Convention states, so that Article 7 'cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretations from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'. As to clarity of meaning, the Court has in several cases not found a breach of Article 7 despite some very generally worded or obscurely drafted laws. This has been either because the national courts have already given it more precise meaning in their case law, or because they have given it a meaning when the point is ruled upon for the first time in the applicant's case that is both foreseeable and consistent with the essence of the offence."

Ikkunsidrat :

Illi ir-rikorrenti issottometta illi l-Artikolu 7 tal-Konvenzjoni Ewropeja jipprovdi bhala regola generali illi huwa projbit illi persuna tigi akkuzata b'reat meta fil-mument meta ikkommittiet ir-reat dak l-att ma kienx jammonta ghal reat. Persuna tista titressaq biss ghal reat illi kien jammonta ghal tali meta gie kommess l-att u isegwi illi sabiex persuna tkun taf jekk azzjoni hijiex kriminali jew le jehtieg illi l-Ligi li tikkostitwixxi dak ir-reat tkun accessibbli u cara, u cioe' ic-certezza legali.

Illi r-rikorrenti allega illi huwa kellu biss ftehim biex iqassam ic-cilindri tal-gas u ghalhekk ma setghax ikun hemm ksur ta' licenzja fil-kaz tieghu peress li ma kellux permess biex jipproduci u jimmanifattura il-liquid petroleum gas.

Illi l-Qorti rat illi l-Att dwar l-EneMalta il-Kapitolu 272 tal-Ligijiet ta' Malta jaghti lill-Korporazzjoni EneMalta poteri u drittijiet u dan l-Att gie emendat diversi drabi.

Illi l-Qorti tara illi l-Ligi illi kellha tapplika fil-kaz tar-rikorrenti kienet dik applikabli meta ir-rikorrenti inghata il-licenzja mill-Korporazzjoni EneMalta u ma tistax tigi applikata il-Ligi kif giet emendata wara id-dhul fis-sehh ta' l-Att XXV tas-sena 2000.

Illi irrizulta mix-xhieda ta' Charles Buttigieg illi l-kuntratt bejn il-Korporazzjoni EneMalta u ir-rikorrenti kien iffirmit f'Settembru 1992 u ghalhekk isegwi illi l-Ligi illi kellha tapplika ghall-kaz tieghu kienet dik vigenti f'Settembru 1992.

Illi f'dak il-perjodu, jigifieri fl-1992 il-ftehim ta' distribuzzjoni illi kellu ir-rikorrenti mal-Korporazzjoni EneMalta kien regolat bl-Artikolu 38 (1) (b) tal-Kap. 272; liema artikolu kien jghid hekk :

“38 (1) L-EneMalta tista fid-diskrezzjoni taghha u taht dawk il-pattijiet u kundizzjonijiet li jidhrilha xierqa taghti licenzja lil kull persuna –

(b) ghall-importazzjoni, ksib u manifattura, hazna, tqassim, bejgh esportazzjoni, jew tnehhija ohra ta pitrolju,

jew ghal xi attivita wahda minn dawk jew ghal aktar, mghaduda, izda bi hsara ghall-generalita ta' dak li intqal qabel, il-kostruzzjoni jew il-bini ta' tankijiet jew strutturi ohra, jew pompi u apparat mekkaniku iehor, ghall-hazna, bejgh jew provista ta' pitrolju; u tista wkoll taghmel kull arrangement u taghmel kull ftehim ma xi persuna ghal kull wiehed mill-imsemmija ghanijiet, jew xort'ohra dwar xi wahda mill-funzjonijiet taghha skond dan l-att, kif jidhrilha xieraq jew espedjenti.”

Illi ghalhekk il-ftehim illi iffirma ir-rikorrenti mal-Korporazzjoni EneMalta f'Settembru 1992 kien regolat b'dan l-artikolu, u dan kien qabel ma dahal fis-sehh l-Att XXV tas-sena 2000 li stabbilixxa l-Awtorita ta' Malta dwar ir-Rizorsi bhala l-Awtortita kompetenti.

Illi kif qal Charles Buttigieg, l-Awtorita ta' Malta Dwar ir-Rizorsi baqghet tqis dawk il-licenzji bhala validi fil-Ligi u ghalhekk huma baqghu mexjin fuq il-ftehim illi kellha il-Korporazzjoni EneMalta mar-rikorrenti Peter Borg.

Illi jirrizulta illi meta ir-rikorrenti wettaq ir-reati in kwistjoni, illi taghhom huwa gie misjub hati, kien qieghed joppera a bazi tal-ftehim imsemmi u dana peress illi l-Artikolu 37 (2) tal-Kap. 423 tal-Ligijiet ta' Malta moqri mat-tieni skeda ta' l-istess att jghid kif gej :

“37 (2) Kull licenzja, permess, awtorita' jew ordni moghtija jew maghmula taht xi wahda mill-provvedimenti tal-ligijiet elenkati fit-Tieni Skeda, u li jkunu ghadhom fis-sehh minnufih qabel dik l-emenda, ghandhom jibqghu fis-sehh wara li ssir bhallikieku kienu xi licenzja, permess, awtorita' jew ordni moghtija jew maghmula taht provvediment korrispondenti ta' dan l-Att, u kull licenzja, permess, awtorita' jew ordni bhal dawk hawn aktar qabel imsemmija ghandhom jigu ttrattati u jsir minnhom skond hekk”.

Illi t-Tieni Skeda tal-Kapitolu 423 tal-Ligijiet ta' Malta, filwaqt li taghmel riferenza ghall-Artikolu 37, tirrprovdi (sottolinear ta' din il-Qorti).

Kopja Informali ta' Sentenza

“Ordinanza dwar l-Importazzjoni, Magazzinagg u bejgh ta' Petroleum, Kap. 25,

Att dwar l-Enemalta, Kap. 272.

Att dwar il-Korporazzjoni ghas-Servizzi ta' l-Ilma, Kap. 355.

Att dwar it-Taxxa fuq Bunkering taz-Zjut, Kap. 381”.

Ikkunsidrat :

Illi wkoll l-Artikolu 38 (1) tal-Kapitolu 272 tal-Ligijiet ta' Malta, kif kien japplika fiz-zmien meta inharget il-licenzja lir-rikorrenti fil-1992, kien jipprovdi wkoll espressament ghall-ghoti tal-licenzji mill-EneMalta. In fatti l-ewwel artikolu tad-dokument imsejjah 'ftehim' ta' l-1992 jipprovdi espressament illi :

“Il-Korporazzjoni qieghda tohrog licenzja f'isem id-disributor sabiex ikun jista jaqdi l-interessi tal-Korporazzjoni kif ukoll tal-konsumatur skond il-provvedimenti ta' dan il-ftehim. Il-hlas annwali tal-licenzja huwa ta' LM10”.

Ikkunsidrat :

Illi l-Qorti tara illi l-Artikolu 7 tal-Konvenzjoni Ewropeja ma japplikax fil-kaz odjern, peress illi l-Ligi applikabbli ghar-rikorrenti kienet wahda cara u kienet teskludi kull possibbilta ta' interpretazzjoni.

Illi wkoll, kif intqal fis-sentenzi tal-Qorti tas-Strasburgu fil-kaz Kokkinakis paragraph 52 u G v France paragraph 26 :

“Judicial interpretation of criminal law provisions was a widespread and even necessary feature. Article 7 cannot be read as prohibiting the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, but the resultant development must be within the bounds of reasonable foreseeability and not alter the 'essence' of the offence.”

Kopja Informali ta' Sentenza

Illi irrizulta car fil-kaz odjern illi meta ir-rikorrenti ikkommetta ir-reat in kwistjoni, dawn ir-reati kienu meqjusa bhala tali fiz-zmien in kwistjoni.

Illi fiz-zmien in kwistjoni ir-rikorrenti kellu licenzja valida moghtija lilu mill-Korporazzjoni EneMalta, liema licenzja baqghet valida anke wara id-dhul fis-sehh ta' l-Att XXV tas-sena 2000, u baqghet ukoll hekk valida f'April 2008, fil-perjodu meta ir-rikorrenti iwettaq ir-reati illi taghhom gie misjub hati kemm mill-Qorti tal-Magistrati, kif ukoll mill-Qorti ta' l-Appell Kriminali, u ghalhekk il-Qorti ma taqbilx mar-rikorrenti illi kien hemm xi interpretazzjoni mill-Qorti b'analogija fis-sens illi ir-rikorrenti kellu licenzja.

Ghaldaqstant u ghar-ragunijiet kollha fuq imsemmija il-Qorti filwaqt illi tiddikjara illi ma kien hemm l-ebda ksur ta' l-Artikolu 7 tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem, qeghda tichad it-talbiet kollha tar-rikorrenti; Bl-ispejjez kontra tieghu.

< Sentenza Finali >

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