MALTA

QORTI KOSTITUZZJONALI

ONOR. IMHALLEF -- AGENT PRESIDENT
JOSEPH A. FILLETTI

ONOR. IMHALLEF
ALBERT J. MAGRI

ONOR. IMHALLEF
GEOFFREY VALENZIA

Seduta tat-12 ta' Jannar, 2011

Appell Civili Numru. 11/2009/1

Stephen Schembri

v.

L-Avukat Generali

Il-Qorti:

PRELIMINARI

1. Dan hu appell interpost mill-Avukat Generali minn decizjoni li nghatat mill-Prim’Awla tal-Qorti Civili (Gurisdizzjoni Kostituzzjonali) fit-28 ta’ Mejju 2009 fil-

kawza fl-ismijiet premessi, u li fiha gie ritenut u deciz hekk:

“**Il- Qorti:**

“Rat ir-rikors presentat fis-26 ta’ frar 2009 fejn ir-rikorrent qal hekk:-

“Illi l-esponent kien gie akkuzat quddiem il-Qorti tal-Magistrati talli nhar is-sitta ta’ Jannar elfejn u tnejn ikkommetta serq ta’ mera tal-vettura bin-numru ta’ registrazzjoni AAD 398, ghad-dannu ta’ certu Vincent Mifsud u talli xjentement laqa’ ghandu jew xtara hwejjeg misruqa mehuda b’qerq jew akkwistati b’reat jew xjentement, b’kull mod li jkun indahal sabiex ibiegh jew imexxi dawn l-oggetti, talli kiser il-kundizzjonijiet tal-Artikolu 5 tal-Att XII tal-1957 u talli sar recidiv permezz ta’ diversi sentenzi.

“Illi b’sentenza tas-sebgha ta’ Novembru elfejn u tmienja, huwa nstab hati tal-akkuza ta’ serq aggravat u talli kiser l-ordni tal-*probation* moghtija lilu b’sentenza tal-Qorti tal-Magistrati (Malta). Bhala Qorti ta’ Gudikatura Kriminali tal-hdax ta’ Marzu elfejn u wiehed, hu gie kkundannat seba’ xhur habs.

“Illi l-esponent hass ruhu aggravata minn din is-sentenza u kien interpona umli appell.

“Illi dik il-Qorti, pero’, laqghet il-pregudizzjali sollevata mill-Avukat Generali u ddikjarat l-appell irritu u null u astjeniet milli tkompli tiehu konjizzjoni ulterjuri tieghu.

“Illi l-vertenza procedurali kienet tinkludi l-kwistjoni ghall-fatt li ma nghatatx l-garanzija mehtiega mill-appellant skond l-Artikolu 416(1) tal-Kodici Kriminali, biex ikun jista’ jottjeni sospensjoni tal-esekuzzjoni tas-sentenza.

“Illi, pero’, *a foglio* 136 tal-process relattiv, insibu li attwalment hemm is-solita formula sterjo tipata tat-talba ghas-sospensjoni tal-esekuzzjoni tas-sentenza u tad-digriet relattiv, pero’, din, ghalkemm iggib il-firem tad-

deputat registratur u tal-appellant, ma tindikax l-ammont tal-garanzija personali.

“Illi, apparti li dan il-fatt wahdu ma jgibx in-nullita’ tas-sentenza minhabba f’dak li jipredisponi s-subinciz 5 tal-Artikolu 416 tal-Kodici Kriminali, fejn naraw li tali mankanza tfisser biss li l-esponent irid jinzamm taht arrest *a fin che* ma jgibx il-garanzija rikjesta, is-sentenza tal-Qorti ghandha wkoll indoli ta’ natura Kostituzzjonali li ghandhom jigu sindikati minn din il-Qorti.

“Illi mill-provi jidher bl-iktar mod car u lampanti li l-esponent ghamel dak kollu umanament possibbli u rikjest minnu sabiex ikun jista’ jappella. Dan jidher li talab is-sospensjoni tas-sentenza u kif soltu jsir, iffirma l-formola relattiva ghall-garanzija personali. Kif dejjem isir, din tigi ffirmata in bjank halli mbaghad, meta jidhrilha opportun, il-Qorti tiffissa l-garanzija hi, jew waqt il-*break* jew wara s-seduta. Ir-rikorrent m’ghandu l-ebda kontroll fuq meta l-Magistrat jew deputat registratur tieghu jimla l-parti fejn suppost jimla’ hu fuq l-istess formola.

“Illi ghalhekk jidher li l-uniku zball li sar, sar appuntu mill-Magistrat sedenti, ghal-liema zball m’ghandux ibati l-konsegwenzi l-esponent.

“Illi ghad li huwa koncess li d-dritt tas-smigh xieraq ma jiggarantix ukoll id-dritt t’appell, *stante* li fil-qafas legali taghna jezisti dan id-dritt, ifisser li l-garanziji ghas-smigh xieraq iridu jippersistu wkoll fis-*sede* t’appell.

“Illi l-esponent ihoss li d-decizjoni moghtija fil-konfront tieghu mill-Qorti tal-Appell Kriminali, hija leziva tad-dritt tieghu ghas-smigh xieraq kif sancit fl-Artikolu 6 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem u l-Artikolu 39 tal-Kostituzzjoni ta’ Malta u dan peress li minghajr htija tal-esponent, il-Qorti astjeniet milli tiehu konjizzjoni tal-appell tieghu.

“Ghaldaqstant l-esponent jitlob bir-rispett lil din l-Onorabbli Qorti joghgobha:-

“1. Tiddikjara li meta l-Qorti tal-Appell Kriminali astjeniet milli tiehu konjizzjoni tal-appell tieghu, gew lezi d-drittijiet tal-esponent ghas-smigh xieraq kif kontemplati fl-Artikoli 6 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem u l-Artikolu 39 tal-Kostituzzjoni taghna;

“2. Tannulla s-sentenza moghtija fil-konfront tieghu fit-tnax ta’ Frar 2009; u

“3. Taghti dawk id-direttivi li jidhrilha opportun u necessarji.”

“Rat ir-risposta tal-Avukat general tal-25 ta’ Marzu 2009 li tghid:-

““1. Preliminarjament illi r-rikorrent kellu rimedju iehor ghad-dispozizzjoni tieghu, konsistenti f’rikors lill-Qorti tal-Magistrati, okkorrendo b’urgenza, sabiex tiddisponi x’ghandhom ikunu l-kundizzjonijiet ghall-impozizzjoni tal-gazanzija u l-ghoti konsegwenti ta’ digriet fir-rigward tat-talba tieghu ghas-sospensjoni ta’ l-esekuzzjoni tas-sentenza tal-istess Qorti. Dan qed jinghad dejjem jekk mizuri ohrajn prattici li seta’ jiehu - konsistenti f’li jsegwi l-andament ta l-applikazzjoni tieghu u jara li l-process tal-formalitajiet tad-digriet u l-iffirmar tal-garanzija – jigu osservati, Galadarba bi traskuragni tieghu r-rikorrent naqas li jutilizza tali rimedju, huwa ndikat li din l-Onorabbli Qorti tiddeklina milli tesercita d-diskrezzjoni Kostituzzjonali taghha.

“2. Illi fl-ewwel lok ir-rikorrent qed ikun vag wisq fl-allegazzjonijiet tieghu u naqas milli jindika ghalfejn ezattament qed jilmenta min-nuqqas ta smigh xieraq. L-Artikolu 6 tal-Konvenzjoni Ewropea kif ukoll l-Artikolu 39 tal-Kostituzzjoni jikkontjenu diversi kapi u m’huwiex korrett proceduralment li l-allegazzjoni mressqa mir-rikorrent tithalla f’dan l-istat immaterjali.

“3. Illi *inoltre* l-Artikolu 6 tal-Konvenzjoni Ewropea u l-Artikolu 39 tal-Kostituzzjoni ma japplikawx ghac-cirkostanzi tar-rikors odjern *stante* li la l-Kostituzzjoni u lanqas il-Konvenzjoni ma jiggarantixxu d-dritt ta’ appell, kif

fil-fatt jammetti r-rikorrent stess. Id-dritt taht dawn iz-zewg artikoli huwa dritt ghal smigh xieraq u tali smigh jista' jkun kemm quddiem il-Qorti ta' Prim' Istanza kif ukoll dik tal-Appell. Pero' m'huwiex dritt sabiex wiehed jottjeni smigh. Fi kliem iehor, wiehed irid diga' jkun gie pprovdut smigh mil-ligi procedurali tal-Istat tieghu. L-awtoritajiet gudizzjarji ta' Stat m'humiex obbligati li jipprovdu smigh kull meta persuna jidhrilha li ghandha tinstema' fil-Qorti izda biss meta tali smigh ikun possibbli fl-ambitu` tal-qafas legali ta' dak l-Istat. Jekk ghal xi raguni il-ligi sostantiva jew dik procedurali ma tkunx tippermetti li jsir smigh allura l-Artikoli 39 u 6 rispettivament ma jidhlux fl-operat."

"Illi f'dan il-kaz il-ligi procedurali kienet tippermetti li jsir appell li, jekk il-proceduri kollha konnessi mieghu isiru b'mod validu, kellu jwassal ghal smigh quddiem il-Qorti tal-Appell. Izda r-rikorrent ma adempiex l-obbligi kollha li kienet timponi fuqu l-ligi kriminali procedurali sabiex jista' jigi meqjus li ghamel appell validu.

"Illli l-possibilita' li tipprovdi l-Kodici Kriminali, *cioe'* li ssir garanzija adegwata u tigi sospiza s-sentenza, qieghda hemm bhala koncessjoni lill-persuni misjuba hatja sabiex dawn ma jmorrux il-habs minkejja li diga' tkun inghatat sentenza fil-konfront taghhom. Il-garanzija hija rikjesta sabiex l-ewwel nett tassigura l-harsien tas-socjeta' minn persuni li nstabu hatja ta' reati, u fit-tieni lok sabiex tassigura li l-process ta' appell mhux jinbeda u jintelaq ghal rihu izda jkompli ghaddej bi speditezza. Anki kieku stess appellant li ma jkunx marbut b'garanzija ma jfittixx li jahrab mill-gustizzja, xorta jibqa' l-periklu li jtawwal il-proceduri fl-appell billi joqghod ma jitlax ghas-seduti.

"Illi ghalhekk kien jinkombi fuq ir-rikorrent odjern li jsegwi l-proceduri u jara l-Qorti tkunx taghtu jew le din il-possibilita', peress li mid-decizjoni tal-Qorti jiddependi jekk huwa jkunx jista' jibqa' fil-liberta' jew le u, aktar minn hekk, jekk huwa jkunx jista' jitqies jew le li qed jaccetta s-sentenza moghtija kontra tieghu mill-ewwel Qorti. Dan id-dmir ir-rikorrent u l-legali tieghu ma hadux hsiebu, ghax kieku kienu jistghu jagixxu sabiex timtela' applikazzjoni korretta bid-dettalji kollha u tmur quddiem il-Qorti tal-

Magistrati sad-data tas-seduta tal-appell. Ghalhekk galadarba huwa kolpevoli ta' dan in-nuqqas li jsegwi l-proceduri quddiem il-Qorti tal-Magistrati b'mod diligenti, kif kien fid-dover li jaghmel, ir-rikorrent ma jistax issa jilmenta li gie mcahhad minn xi dritt. Forsi in konnessjoni ma' dan il-punt huwa rilevanti wkoll dak li qalet l-ewwel Qorti ghar-rigward tal-kura li r-rikorrent kellu jiehu ghar-rigward tall-proceduri quddiemha:

""(Il-Qorti) Rat ukoll li Stephen Schembri nghata diversi opportunitajiet biex iressaq provi in difesa, fatt li **dan ghal snin ma sarx**: (enfasi tal-esponent)."

"Illi l-esponent izid jghid illi jhoss li ma jistax ikun aktar elokwenti mill-Qorti tal-Appell Kriminali nnifisha, li osservat b'mod inekwivoku illi:

""…l-appellant, li kien assistit minn difensur, kellu jara li l-formalitajiet soliti tad-digriet u ffirmar tal-garanzija kellhom jigu osservati. Hu biss fl-interess tal-appellant li jottjeni s-sospensjoni tal-esekuzzjoni tas-sentenza li tkun ser tigi appellata u hi zgur mansjoni tal-avukat difensur li jkun qed jassisti lill-appellant potenzjali li dak il-hin jassikura ruhu li dan isir u li jsir sew u ghalhekk stava ghad-difensur prezenti fl-awla li jara li d-digriet ikun debitament iffirmat mill-Magistrat, li jkun hem mil-kondizzjonijiet tal-garanzija u li l-appellant jottempera ruhu mal-accettazzjoni tal-kondizzjonijiet imposti mill-Ewwel Qorti fl-ghoti tal-garanzija rikjesta *ad validitatem* mil-ligi kif fuq intqal. Dan ma sarx mid-difensur dakinhar. Filwaqt li l-Qorti tifhem li jista' jkun hemm certa ghagla u certa konfuzjoni fl-awla kultant, u li jista' wkoll ikun hemm xi deputat registratur li ma jkunx ghall-altezza ta' dak mistenni minn xogholu, dan pero' ma jiskuzax ukoll in-nuqqas tad-difiza li taccerta ruhha – fl-interess tal-klijent taghha – u li tassikura li dak li ghandu jsir skond il-ligi, isir.

""Ghaldaqstant l-esponent jidhirlu li din l-Onorabbli Qorti joghgobha tirrespingi r-rikors odjern bhala nfondat fil-fatt u fid-dritt, bl-ispejjez kontra r-rikorrent."

"Rat id-dokumenti esebiti mir-rikorrent minn *fol*. 15 sa 23 tal-process.

"Rat in-noti ta' sottomissjonijiet skambjati bejn il-partijiet, dik tar-rikorrent minn *fol*. 12 sa 15 tal-process, u dik tal-intimat presentata fl-14 ta' April 2009.

"Semghet it-trattazzjoni ulterjuri bil-fomm li saret mid-difensuri tal-partijiet.

"Ikkunsidrat:-

"Is-sentenza tal-Qorti tal-Appell Kriminali

"1. Fis-sentenza taghha tat-12 ta' Frar 2009, fil-kawza fl-ismijiet Il-pulizija Spettur Kevin Farrugia vs Stephen Schembri (Nru: 327/2008), il-Qorti tal-Appell Kriminali laqghet il-pregudizzjali sollevata mill-Avukat generali u ddikjarat rritu u null l-appell tar-rikorrent u konsegwentement astjeniet milli tiehu konjizzjoni ulterjuri tieghu.

"2. Il-pregudizzjali tal-Avukat Generali kienet in-nullita' tar-rikors tal-appell ghax ma nghatatx il-garanzija mehtiega mill-appellant skond l-Artikolu 416 (1) tal-Kodici Kriminali biex ikun jista' jottjeni s-sospensjoni tal-esekuzzjoni tas-sentenza. Ghalhekk tali sospensjoni, jekk inghatat, kienet nulla u dak kien jammonta ghal akkwiexxenza.

"3. L-Artikolu 416 (1) tal-Kapitlu 9 jghid hekk:-

""Il-persuna misjuba hatja li ma tkunx taht arrest ghar-reat li tieghu tkun giet misjuba hatja tista', meta tiddikjara, imqar bil-fomm, li trid tappella mis-sentenza, taqla' mill-Qorti Inferjuri t-twaqqif tal-esekuzzjoni tas-sentenza, kemm-il darba taghti garanzija tajba, skond l-Artikolu 577(1), li tidher ghal kull att tal-kawza quddiem il-Qorti Superjuri kull darba li tigi msejha minn dik il-Qorti; u f'dan il-kaz ighoddu d-disposizzjonijiet tal-Artikoli 579, 581, 583, 585, 586 u 587."

”4. Fis-sentenza, il-Qorti tal-Appell Kriminali ghamlet dawn l-osservazzjonijiet:-

“(a) Is-solita formola sterjotipata tat-talba ghas-sospensjoni tal-esekuzzjoni tas-sentenza u tad-digriet relattiv, ghalkemm iggib il-firem tad-Deputat Registratur u tal-appellant, ma tindikax l-ammont tal-garanzija personali li thalla *blank*. Fil-post indikat ghall-firma tal-Magistrat imbaghad tnizzel in-numru tal-karta tal-identita’ tal-imputat. Lanqas ma hemm fil-process is-solita formola tal-garanzija ffirmata mill-appellant.

“(b) Jidher li l-Ewwel Qorti ma mponietx it-termini tal-garanzija tajba li hija mehtiega skond l-Artikolu 416(1) biex appellant jaqla’ mill-Qorti Inferjuri t-twaqqif tal-esekuzzjoni tas-sentenza.

“(c) It-twaqqif tal-esekuzzjoni jsir b’talba *ad hoc* li ssir lill-Ewwel Qorti u dik il-Qorti, meta tilqa’ t-talba timponi l-garanzija li hija kondizzjoni *sine qua non* ghat-twaqqif tal-esekuzzjoni tas-sentenza.

“(d) Il-mankanza tat-talba ghas-sospensjoni tal-esekuzzjoni tas-sentenza skond l-Artikolu 416 tal-Kodici Kriminali, kien parifikat fil-gurisprudenza mal-akkwiexxenza, liema akkwiexxenza hija in konflitt mal-volonta’ li wiehed jappella.

“(e) wahda mill-karatteristici tal-process penali fis-sistema taghna huwa, illi kif appena tinghata sentenza, hlief jekk ikun hemm previst mod iehor fl-istess sentenza jew x’imkien iehor fil-ligi, dik is-sentenza ghandha tigi esegwita mmedjatament.

“(f) Skond l-Art. 665 tal-Kap. 9:-

“Bla hsara tad-disposizzjonijiet tal-Artikolu 28A (li jirrigwardaw sentenzi ta’ prigunerija sospizi) u d-disposizzjonijiet ta’ dan il-Kodici dwar il-hlas ta’ pieni ta’ flus, KULL DECIZJONI GHANDHA TIGI ESEGWITA MINNUFIH LI TINGHATA.”

"(g) Biex it-talba ghas-sospensjoni tal-esekuzzjoni tas-sentenza tkun tista' tigi milqugha, jehtieg li tigi maghmula mmedjatament kif tkun giet moghtija s-sentenza u b'dan il-mod biss tista' tigi evitata l-esekuzzjoni mmedjata tas-sentenza.

"(h) L-appellant ma ottjeniex kif suppost is-sospensjoni tal-esekuzzjoni tas-sentenza li nghatat is-sentenza kellu jinghata bidu effettiv ghall-esekuzzjoni tas-sentenza mill-appellant.

"(i) Is-subartikolu 3A introdott ghall-Artikolu 416 tal-Kodici Kriminali bl-Att XVI tal-2006 japplika biss fejn il-persuna misjuba hatja tkun taht arrest li ma kienx il-kaz in esami.

"(j) F'dan il-kaz la jirrizulta d-digriet li akkorda s-sospensjoni tal-esekuzzjoni tas-sentenza (ghax ma hemmx il-firma tal-Magistrat u lanqas hemm fih il-kondizzjonijiet ghall-imposizzjoni tal-garanzija) u, lanqas u inqas l-ghoti tal-garanzija li hija kondizzjoni *sine qua non* biex tinkiseb is-sospensjoni tal-esekuzzjoni tas-sentenza.

"(k) Kienet respinta bhala nsostenibbli s-sottomissjoni tad-difiza li ladarba t-talba ghas-sospensjoni tal-esekuzzjoni tas-sentenza kienet saret, l-izball kien tal-Qorti u mhux tad-difiza li ma ntlietx il-formola tal-garanzija.

"Artikolu 39 tal-Kostituzzjoni ta' Malta

"Tajjeb josserva l-intimat fir-risposta tieghu li ghalkemm ir-rikorrent ighid li l-lanjanza tieghu ssib sostenn fl-Artikolu 39 tal-Kostituzzjoni, l-istess rikorrent ma jispecifikax kif dan huwa l-kaz.

"Din il-Qorti gharblet bir-reqqa l-istess Artikolu 39 u sabet li *prima facie* l-kwistjoni tista' tigi nkwadrata fis-subartikoli li gejjin tal-istess Artikolu 39:-

"Is-subartikolu (1):-

"Kull meta xi hadd ikun akkuzat b'reat kriminali huwa ghandu, kemm-il darba l-akkuza ma tigix irtirata, jigi moghti smigh xieraq gheluq iz-zmien ragonevoli minn qorti ndipendenti u mparzjali mwaqqfa b'ligi."

"(5) Kull min jigi akkuzat b'reat kriminali ghandu jigi meqjus li jkun innocenti sakemm jigi pruvat jew ikun wiegeb li huwa hati …"

"Artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem

"Dak diga' rilevat minn din il-Qorti dwar in-nuqqas ta' ndikazzjoni da parti tar-rikorrent fejn l-Artikolu 39 tal-Kostituzzjoni ta' Malta kien vjolat fil-konfront tieghu jghodd bl-istess mod ghall-Artikolu 6 tal-Konvenzjoni, u ghalhekk minn dak l-artikolu din il-Qorti qed tislet *prima facie* dawk id-disposizzjonijeit li jistghu jkunu rilevanti ghall-istanza tar-rikorrent:-

"*"(1) In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

(2) Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law."

"Gurisprudenza

"Il-gurisprudenza citata mir-rikorrent fin-nota ta' sottomissjonijiet tieghu (*fol*. 12 *et seq*) in sostenn tal-istanza tieghu kienet din:-

"1. Tefarra Besabe Berhe vs Kummissarju tal-Pulizija et (Rikors Nru: 27/2007) deciza minn din il-Qorti (diversament presjeduta) fl-20 ta' Gunju 2007.

"(a) F'dik il-kawza, ir-rikorrent talab lill-Qorti tiddikjara li z-zamma tieghu f'centru ta' detenzjoni tikser id-drittijiet fondamentali tieghu skond Artikoli 34 u 36 tal-Kostituzzjoni u Artikoli 3 u 5 tal-Konvenzjoni.

"(b) It-twegiba tal-intimati *in linea* preliminari kienet li r-rikorrent ma kienx esawrixxa r-rimedji ordinarji li seta' jiehu.

"(c) Bis-sentenza parzjali taghha din il-Qorti (diversament presjeduta) ppronunzjat ruhha dwar din l-eccezzjoni u ghar-ragunijiet indikati fis-sentenza cahdet l-eccezzjoni u kompliet tisma' l-kawza hi.

"Din il-Qorti pero' ma tarax ir-rilevanza tal-insenjament ta' dik is-sentenza ghall-kaz in esami ghaliex fil-kaz odjern l-intimat ma ressaq ebda eccezzjoni bhal dik li kienet trattata u deciza fis-sentenza ta' <u>Berhe vs Kummissarju tal-Pulizija et</u>. Il-konsiderazzjonijiet li ghamlet dik il-Qorti in partikolari fejn *si tratta* tal-esercizzju tad-diskrezzjoni tal-Qorti kienu cirkoskritti ghall-kwistjoni li dik il-Qorti kellha quddiemha u li kienet ghal kollox differenti minn dik odjerna.

"2. <u>Raymond Caruana vs Avukat Generali (36/2003)</u> deciza mill-Qorti Kostituzzjonali fid-29 ta' Novembru 2004.

"(a) Saru zewg appelli minn decizjoni tal-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali – wiehed tal-imputat (ir-rikorrent) u l-iehor tal-Avukat Generali.

"(b) Tal-akkuzat kien dikjarat dezert mill-Qorti tal-Appell Kriminali waqt li dak tal-Avukat Generali kien deciz. Tal-ewwel kien dikjarat dezert ghaliex l-akkuzat ma deherx meta ssejjah l-appell billi kien qed jistenna f'parti ohra tal-edificcju tal-Qorti.

"(c) Rikors ghal riappuntament kien respint mill-Qorti tal-Appell Kriminali ghar-raguni li dik il-Qorti kienet bid-decizjoni taghha ppronunzjat ruhha meta kkonfermat is-sentenza appellata fl-intier taghha.

"(d) Bil-fatt li l-Qorti tat sentenza dwar l-appell tal-Avukat Generali bla ma halliet zmien erbat ijiem biex isir rikors ghar-riappuntament mill-akkuzat, dan tal-ahhar ma nghata l-ebda possibilita' realit li jittratta l-appell tieghu.

"(e) Din il-Qorti (diversament presjeduta) ippronunzjat ruhha favur l-akkuzat u l-Qorti Kostituzzjonali kkonfermat dik is-sentenza billi sostniet li nholqot *procedural unfairness* in vjolazzjoni tad-dritt ghal smigh xieraq.

"Ghalkemm il-fattispeci ta' dak il-kaz huma ghal kollox differenti minn dak odjern, din il-Qorti se tislet il-principju tal-*procedural unfairness* imsemmi f'dik id-decizjoni biex tara huwiex applikabbli ghall-kaz odjern u allura jistax iwassal ghal ksur tad-dritt ghal smigh xieraq.

"3. Emanuel Gauci vs l-Avukat Generali (8/2006) deciza minn din il-Qorti (diversament presjeduta) fit-12 ta' Mejju 2006.

"(a) Ir-rikorrent kien appella minn decizjoni tal-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali. Il-Qorti tal-Appell Kriminali astjeniet milli tiehu konjizzjoni tal-appell tieghu ghax qalet li kien irritu u null *stante* li l-appell kien presentat b'*occhio* skorrett u b'isem l-appellant li ma kienx jikkorispondi ghall-isem indikat fis-sentenza (Emmanuel minflok Emanuel).

"(b) Din il-Qorti (diversament presjeduta) irriteniet li r-rikorrent sab ruhu f'sitwazzjoni maghrufa bhala "*a disproportionate hindrance***"** fl-esercizzju tad-drittijiet tieghu fil-process penali.

"(c) Il-Qorti ccitat mis-sentenza tal-Qorti Ewropea ta' Strasbourg tat-12 ta' Novembru 2002 fil-kawza fl-ismijiet Beles and others vs Czech Republic.

"(d) Qalet ukoll li fil-process penali l-akkuzat ghandu jkollu rimedju effettiv biex jiehu d-drittijiet tieghu. Ir-regoli procedurali u l-applikazzjoni taghhom m'ghandhomx jipprekludu lill-akkuzat li jara l-appell tieghu jigi trattat fil-mertu u b'hekk ikollu rimedju effettiv sabiex jigu salvagwardati d-drittijiet tieghu.

"(e) Ghalhekk il-Qorti ddecidiet favur ir-rikorrent.

"Applikati dawn l-insenjamenti ghall-kaz odjern, jekk il-fatt li l-Ewwel Qorti fil-kaz tar-rikorrent odjern ma stabbilitx il-garanzija ghall-appell jitqies bhala aspett procedurali mhux ta' sostanza ghall-validita' tal-appell, allura dawk l-insenjamenti ghandhom rilevanza ghall-fini ta' din l-istanza. Jekk il-kwistjoni mhix procedurali fis-sens li bid-decizjoni taghha li ma titrattax il-mertu l-Qorti tal-Appell Kriminali naqset lit hares id-dritt tar-rikorrent ghal smigh xieraq, allura dawk l-insenjamenti ma jistghux jigu applikati ghall-kaz in esami.

"4. Il-Pulizija vs Charles sive Carmelo Spiteri deciza mill-Qorti tal-Appell Kriminali fl-14 ta' Marzu 1983 (Vol. LXVII.V.490).

"F' dan il-kaz kien hemm nuqqas fl-*intier* stabbilit mil-ligi biex l-Avukat Generali jkun jista' jezercita d-dritt tieghu ta' appell billi l-attijiet gew trasmessi lilu gurnata *oltre* t-terminu mpost mill-ligi. L-appellat eccepixxa *in linea* preliminari illi l-appell sussegwentement interpost mill-Avukat Generali kien null *stante* li t-termini mposti bl-Artikolu 426 tal-Kodici Kriminali ma gewx rispettati. Il-Qorti tal-Appell Kriminali osservat li skond il-logika legali, dak li l-Qorti ghandha tikkunsidra primarjament hu jekk l-appellant ikunx osserva t-terminu legali impost fuqu mill-ligi. Galadarba li l-appellant ikun ghamel dak kollu li kellu jaghmel u *cioe'* talab u ottjena permess ghall-appell, ghamel it-talba permezz tal-pulizija *entro* erbat ijiem utili mis-sentenza u ppresenta r-rikors tal-appell *entro* tmint ijiem jew tnax-il gurnata utili (skond jekk hux Malta jew Ghawdex) minn mindu jkun ircieva l-attijiet mill-Qorti Inferjuri, l-appellant m'ghandux ibati ebda konsegwenza ghal dak li ma kienx proprju jiddependi minnu, imma mir-Registratur tal-Qrati Inferjuri li fuqu ma ghandu ebda kontroll f'din il-materja.

"Hija fehma ta' din il-Qorti li dak deciz mill-Qorti tal-Appell Kriminali ghandu rilevanza ghall-fini tal-kaz in esami.

"5. Beles and Others vs The Czech Republic (47273/99 deciza mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fit-12 ta' Novembru 2002.

"Din il-Qorti se taghmel riferenza ghat-test tas-sentenza bl-ilsien Ingliz kif jirrizulta mis-sit elettroniku ECHR-HUDOC:-

"(a) *The applicants were members of the Homeopathic Association which was itself a member of another association called the J.E. Purkyne Czech Medical Society. In December 1996 the Medical Society decided to strike the Homeopathic Assocation off its list of members. The applicants, who claimed that this damaged their association's reputation, lodged an application with the domestic courts to have the decision set aside. The Prague District Court and then the Municipal Court dismissed it on the ground that they had not lodged an administrative application. The Municipal Court further dismissed their application for leave to appeal on points of law. They appealed to the Constitutional Court which, on 12 August 1998, declared their appeal inadmissible since they had failed to exhaust remedies because they had not lodged an appeal on points of law.*

"*Relying on Article 6 § 1 (right to a fair trial), the applicants complained of the unfairness of the proceedings before the tribunals of fact. They submitted further that they had been deprived of the right of access to a court because their constitutional appeal was dismissed.*

"*The Court held that striking off the Homeopathic Association had infringed the applicants' right to practice medicine. Article 6 § 1 was therefore applicable.*

"*(b) Noting that the Medical Society was not an administrative authority and that the rule relied on by the applicants did not specify under which provision proceedings should be brought in the relevant courts, the Court considered that the applicants could not be held to have committed an error in basing their action on the provisions relied on. The courts' refusal to determine the merits of the case had been motivated by their particularly strict interpretation of a procedural rule, and had infringed*

the right to a court. Accordingly, the Court concluded unanimously that the disregard for the applicants' right to a fair trial had amounted to a breach of Article 6 § 1.

"*(c) The Court held that the application of the rules governing the admissibility of constitutional appeals was not conducive to ensuring the proper administration of justice because it prevented litigants from using an available remedy. It found that a procedural requirement had been construed in such a way as to prevent the applicants from having their application examined on the merits, which had resulted in a breach of the right to effective protection by the courts. Accordingly, the Court concluded unanimously that there had been a violation of Article 6 § 1 regarding access to a court.*

"(d) Il-Qorti Ewropea *inter alia* qalet hekk:-

"(i) "*48. The Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see García Ruiz v. Spain [GC], no. 30544/96, § 28, ECHR 1999-I). In the present case, the provisions of the Code of Civil Procedure referred to by the domestic courts only concern applications for the judicial review of administrative decisions and, consequently, do not appear to have been applicable, as the Medical Society is an independent professional association, not a State administrative authority. The Court notes that the applicants raised this point in the domestic proceedings, but neither the domestic courts nor the Government responded to it. It also notes that section 15(1) of the Citizens' Association Act does not specify under which provision of the Code of Civil Procedure the application to the relevant court must be made.*

"*49. The Court has already stated on a number of occasions that the right to a fair trial, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that*

all litigants should have an effective judicial remedy enabling them to assert their civil rights (see, among other authorities, Brumărescu v. Romania [GC], no. 28342/95, § 61, ECHR 1999-VII). It further reiterates that the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring the proper administration of justice and compliance, in particular, with the aforementioned principle of legal certainty. That being so, the rules in question, or the manner in which they are applied, should not prevent litigants from using an available remedy (see Miragall Escolano and Others v. Spain, nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41787/98 and 41509/98, §§ 33 and 36, ECHR 2000-I).

"*50. The issue raised in the present case is legal certainty. The problem is not simply one of interpretation of substantive rules, but that a procedural rule has been construed in such a way as to prevent the applicants' action being examined on the merits, with the attendant risk that their right to the effective protection of the courts would be infringed (see, mutatis mutandis, Miragall Escolano and Others, cited above, § 37).*

"*51. In the light of the foregoing, the applicants cannot be said to have been at fault in relying on section 15 of Law no. 83/1990, taken together with Article 80 (c) of the Code of Civil Procedure, as their cause of action. Consequently, the Court finds that in deciding, on the basis of a particularly strict construction of a procedural rule, not to examine the merits of the case, the domestic courts undermined the very essence of the applicants' right to a court, which is part of their right to a fair trial guaranteed by Article 6 § 1 of the Convention.*

"*52. There has therefore been a violation of Article 6 § 1 of the Convention.*"

"(ii) "*60. The Court reiterates that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. Its role*

is limited to verifying whether the effects of such interpretation are compatible with the Convention. This applies in particular to the interpretation by courts of procedural rules such as time-limits for filing documents or lodging appeals (see, mutatis mutandis, Tejedor García v. Spain, judgment of 16 December 1997, Reports of Judgments and Decisions 1997-VIII, p. 2796, § 31). The rules on the procedure and time-limits for appeals are designed to ensure the proper administration of justice and, in particular, legal certainty. Litigants should normally expect those rules to be applied (see Miragall Escolano and Others, cited above, § 33).

"*61. Furthermore, the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see García Manibardo v. Spain, no. 38695/97, § 36, ECHR 2000-II, and Mortier v. France, no. 42195/98, § 33, 31 July 2001). Nonetheless, the limitations applied must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Furthermore, limitations will only be compatible with Article 6 § 1 if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued (see Guérin v. France, judgment of 29 July 1998, Reports 1998-V, p. 1867, § 37).*

"*62. The Court reiterates that "Article 6 does not ... compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6" (see Khalfaoui v. France, no. 34791/97, § 37, ECHR 1999-IX). In addition, the compatibility of the limitations permitted under domestic law with the right of access to a court set forth in that provision depends on the special features of the proceedings in issue, and it is necessary to take into*

account the whole of the trial conducted according to the rules of the domestic legal system and the role played in that trial by the highest court, since the conditions of admissibility of an appeal on points of law may be more rigorous than those for an ordinary appeal (ibid.)."

"(iii) "*69. Once again, the issue in the present case is not simply a problem of the interpretation of substantive rules, but of a procedural rule that has been construed in such a way as to prevent the applicants' action being examined on the merits, with the attendant risk that their right to the effective protection of the courts would be infringed (see, mutatis mutandis, Miragall Escolano and Others, cited above, § 37). Having regard to the circumstances taken as a whole, the Court finds that the Constitutional Court's decision deprived the applicants of the right of access to a court and, consequently, of their right to a fair trial, within the meaning of Article 6 § 1 of the Convention.*

"*70. Consequently, there has been a violation of Article 6 § 1 of the Convention.*"

"11. Min-naha tieghu, l-intimat illimita ruhu ghall-analizi tal-gurisprudenza citata mir-rikorrent, u fis-sottomissjonijiet afferma kif u ghaliex l-istess gurisprudenza ma kenitx taghmel stat ghall-kaz in esami. Iccita pero' favur tieghu d-decizjoni tal-Qorti Ewropea tad-Drittijiet tal-Bniedem tas-17 ta' Jannar 1970 fil-kawza fl-ismijiet Delcourt vs Belgium (2689/65). Din il-Qorti se taghmel referenza ghat-test tas-sentenza bl-ilsien Ingliz kif jirrizulta mis-sit elettroniku ECHR-HUDOC. *Inter alia* din is-sentenza tghid hekk:-

"*(a) Proceedings having been instituted against him for obtaining money by menaces, fraud and fraudulent conversion, the Applicant was charged with a number of offences.*

"*He was found guilty by the Bruges Court of Summary Jurisdiction and sentenced.*

"*The Court of Appeal in Ghent modified this judgment against which both Delcourt and the prosecution had appealed. It found all the charges to be established including those on which Delcourt had been acquitted at first instance, stressed the seriousness of the offences and referred to his previous convictions. It accordingly increased his principal sentence.*

"*The Applicant appealed to the Court of Cassation against the judgment of the Court of Appeal and against that of the Court at Bruges. In its judgment delivered the same day, after deliberations held in private the Court dismissed the two appeals.*

"*(b) In the Application which he lodged with the Commission Delcourt complained of the judgments. Protesting his innocence and alleging the violation of Articles 5, 6, 7 and 14 (art. 5, art. 6, art. 7, art. 14) of the Convention, he presented numerous complaints. The Commission accepted one complaint which related to the question whether the presence of a member of the Procureur général's department at the deliberations of the Court of Cassation was compatible with the principle of "equality of arms" and hence with Article 6 para. 1 (art. 6-1) of the Convention.*

"*In fact, the Advocat général, Mr. Dumon, was present at the Court's deliberations in accordance with Article 39 of the Prince Sovereign's Decree of 15th March 1815 which provides "... in cassation proceedings the Procureur général has the right to be present, without voting, when the Court retires to consider its decision".*

"*(c) A Sub-Commission ascertained the facts of the case.*

"*(d) Before the Commission and the Sub-Commassion, Delcourt did not criticise persons but rather the institution which gave an advantage to the Procureur général's department.*

"*(e) The Commission expressed the opinion that Article 6 para. 1 (art. 6-1) of the Convention was not violated in the present case.*

"*(f) The case was referred to the Court.*

"*(g) Judicial decisions always affect persons. In criminal matters, especially, accused persons do not disappear from the scene when the decision of the judges at first instance or appeal gives rise to an appeal in cassation. Although the judgment of the Court of Cassation can only confirm or quash such decision - and not reverse it or replace it - that judgment may rebound in different degrees on the position of the person concerned. He loses his status of a convicted person or, as the case may be, the benefit of his acquittal, at any rate provisionally, when a decision is set aside and the case is referred back to a trial court. A judgment in cassation sometimes has even more direct repercussions on the fate of an accused. If the highest court dismisses the appeal in cassation, the acquittal or conviction becomes final.*

"*(h) Article 6 para. 1 (art. 6-1) of the Convention does not, compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (art. 6).*

"*(i) In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision.*

"*(j) Even in the absence of a prosecuting party, a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage. A close examination of the legislation in issue as it is applied in practice does not, however, disclose any such result. The Procureur général's department at the Court of Cassation is, in a word, an adjunct and an adviser of the Court; it*

discharges a function of a quasi-judicial nature. By the opinions which it gives according to its legal conscience, it assists the Court to supervise the lawfulness of the decisions attacked and to ensure the uniformity of judicial precedent.

"*(k) Nor could the independence and impartiality of the Court of Cassation itself be adversely affected by the presence of a member of the Procureur général's department at its deliberations once it has been shown that the Procureur général himself is independent and impartial.*

"*(l) For these reasons, The Court holds unanimously, that in the present case there has been no breach of Article 6 para. 1 (art. 6-1) of the Convention.*

"Ghalkemm din il-Qorti irriportat dak li kien deciz fil-kawza Delcourt vs Belgium, ftit li xejn tista' tislet insenjamenti li huma direttament rilevanti ghall-mertu tal-kawza, naturalment apparti konsiderazzjonijiet ta' natura generali li jibqghu ta' interess mil-lat guridiku.

"Sottomissjonijiet tal-partijiet

"In aggunta ma' dak li qal fir-rikors tieghu u mal-gurisprudenza minnu citata, ir-rikorrent ghamel sottomissjonijet ohra li fil-qosor kienu dawn:-

"(a) Il-ligi tesigi li l-persuna misjuba hatja ghandha, f'kaz li tkun trid tappella, tiddikjara mqar bil-fomm, li effettivament, trid tappella mis-sentenza tal-Qorti tal-Magistrati. Tali dikjarazzjoni twaqqaf l-esekuzzjoni tas-sentenza. Dak kien id-dover tar-rikorrent skond il-ligi. "Ma kellu l-ebda dover li jivverifika li x-xoghol tal-Magistrat, u tal-addetti tieghu, ikun sar sew.

"(b) Bil-fatt li l-appell tieghu kien dikjarat null, ma nghatax l-opportunita' jiddefendi lilu nnifsu minhabba cirkostanza *estranea* mill-kontroll tieghu.

“(c) Ir-rikorrent ma kellux rimedju iehor effettiv, u ghalhekk il-Qorti ma tistax tiddeklina li tezercita l-poter kostituzzjonali taghha.

“Illi finalment jinghad li, anke jekk fl-ahjar ipotesi jezisti xi tip ta’ rimedju iehor, dan ma kienx ifisser li din il-Qorti trid bilfors tiddeklina li tezercita l-poteri Kostituzzjonali taghha. *A foglio* 4 tal-istess sentenza nsibu:-

“Huwa biss meta jew jekk jirrizulta lill-Qorti bhala fatt li (kien) jezisti rimedju effettiv iehor lir-rikorrent, li l-Qorti tista’ tiddelibera jekk ghandhiex twarrab milli tezercita s-setgha taghha li tisma’ l-ilment imressaq quddiemha.”

“(d) Ghalkemm dritt ta’ appell mhux garantit mill-Konvenzjoni Ewropea, *una volta* li fil-qafas legali taghna hemm dan id-dritt, allura d-dritt tas-smigh xieraq japplika wkoll quddiem il-Qorti tal-Appell.

“(e) L-atteggament tal-Qorti tal-Appelli Kriminali ta’ kif qed tiddisponi minn idoli ta’ natura procedurali, anke meta dawn ikunu ta’ ftit sinifikat, joskuraw bil-kbir il-principju kardinali ta’ l-*equality of arms*. Fil-fatt, il-Qorti tal-Appell Kriminali mhux l-istess timxi meta *si tratta* ta’ appell tal-Avukat Generali.

“Min-naha tieghu, *l-intimat* b’zieda mar-risposta tieghu u mal-gurisprudenza li rrefera ghalih, ressaq sottomissjonijiet li fil-qosor kienu dawn:-

“(a) *Ai termini* tal-Artikolu 416 hija mehtiega garanzija.

“(b) L-applikazzjoni ghall-garanzija lanqas biss kien fiha l-firma tal-Magistrat; allura ma tistax il-Qorti tinzamm b’xi mod formalment responsabbli talli bidet process u ma segwitux.

“(c) Hija wisq spikkata t-tendenza ta’ certi rikorrenti illi jaddossaw fuq il-Qorti attribuzzjonijiet ta’ negligenza meta fil-verita’ l-Qrati ma jistghux jahdmu jekk il-partijiet ma jiehdux interess fl-affarijiet taghhom u mhux jitilqu t-talbiet f’hogor il-Qorti kif gie gie izda jsegwuhom *a dovere*. Dan

ma sarx hawnhekk, u kieku sar ir-rikorrent kien jevita l-htiega tal-proceduri odjerni.

“(d) Ir-rimedju li kellu jsegwi r-rikorrent kien wiehed accessibbli, xieraq, effettiv u adegwat.

“(e) Hemm qbil li galadarba r-rikorrent ikun akkwista dritt t’appell, ghax fil-ligi tal-Istat tieghu tipprovdi ghal dan U ghax huwa jkun segwa b’mod diligenti d’disposizzjonijiet tal-istess ligi sabiex jappella, allura japplika l-Artikolu 6 anke ghall-proceduri quddiem l-appell. IZDA l-Artikolu 6 ma japplikax ghal dak il-perjodu fejn ikun ghadu ma sarx appell jew inkella jkun ghadu ma sarx appell validu, u dan ghax fl-assenza ta’ proceduri quddiem Qorti ma jidholx fl-operat l-artiklu msemmi.

“(f) Riferibbilmentt ghas-sentenza ta’ Beles, hemm kienu qed jilmentaw mhux li ma giex accettat l-appell taghhom f’dak li jirrigwarda l-formalitajiet li jridu jsiru qabel appell jista’ jitqies validu, izda minhabba li l-appell taghhom – ghalkemm gie accettat mill-Qorti bhala appell validu u nfatti kkunsidratu – fil-fehma tal-Qorti ma kienx jista’ jintlaqa’. Dan huwa kaz al kwantu differenti minn dak tar-rikorrenti fejn il-Qorti rritjeniet li l-appell kien null prattikament *ab initio*.

“(g) Ghalkemm il-Qorti Ewropea lesta tara li jekk fi stat membru jkunu jezistu proceduri ta’ appell dawn ghandhom jizvolgu minghajr restrizzjonijiet inkompatibbli ma’ *fair trial,* sabiex b’hekk ikun hemm access ghall-Qorti skond ma jirrikjedi l-Artikolu 6, hija pero’ ma tindahalx lill-Istati li jipprovdu bilfors possibilita’ ta’ appell, kif lanqas ma tindahlilhom b’liema modalita’ jaghtu l-possibilita’ ta’ appell. Li tara hu li fil-proceduri jkun hemm certezza legali, *cioe’* li wiehed ikun jaf liema regoli ghandhom japplikaw ghall-appell tieghu skond il-ligi, u li tali regoli fil-fatt jigu applikati b’mod korrett. Dan l-approcc tal-Qorti huwa logiku, ghax jekk huwa permissibbli li Stat ma jipprovdix possibilita’ ta’ appell taht il-Konvenzjoni, il-Qorti ma tistax imbaghad tindahal lil Stat li *di buona volonta* tieghu jipprovdi lok ghal appell u tiddettalu dwar x’tip ta’ procedura jadopera biex jippermetti appell. Mill-bqija hija

policy tal-Qorti li safejn ma jkunx assolutament necessarju ma tippruvax b'xi mod tbiddel is-sistema legali ta' stat membru.

"(h) Fil-kaz odjern, m'hawnx kwistjoni ta' appell li sar *fuori termine* izda ta' appell li addirittura qatt ma kien jezisti, ghax kienet karenti kundizzjoni sine qua non ghall-ezistenza tieghu – *cioe'* s-sospensjoni tas-sentenza.

"Konsiderazzjonijiet ta' din il-Qorti

"Fis-sistema penali taghna, fil-kaz ta' appell li jressaq akkuzat, mhux bizzejjed li jsir rikors tal-appell kif ighid l-Artikolu 419(1) tal-Kapitlu 9 u fiz-zmien li jghid l- Artikolu 417(1) tal-Kapitlu 9 izda jehtieg li r-rikors ikun precedut b'dak li jinghad fl- Artikolu 416(1) tal-Kapitlu 9.

"Il-pern tal-kwistjoni kollha li din il-Qorti trid tiddeciedi huwa jekk l-inosservanza ta' anke parti mill-procedura ndikata fl-Art.416(1) jirrendix l-appell tal-akkuzat kollu kemm hu rritu u null anke jekk id-disposizzjonijiet l-ohra u *cioe'* l-Artikolu 419(1) u l-Art.417(1) ikunu gew segwiti. U allura jekk l-effett ta' dik l-inosservanza huwa proprju li jirrendi l-appell tal-akkuzat kollu kemm hu rritu u null, dak jikkostitwix lezjoni tad-dritt tal-appellant ghal smigh xieraq skond l-Artikolu 39 tal-Kostituzzjoni ta' Malta (il-Kosituzzjoni) u l- Artikolu 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem tal-Libertajiet Fundamentali (Il-Konvenzjoni).

"Fil-kaz ta' appell minn sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali, hija l-ligi stess li fl- Artikolu 419(1) tghid li taht piena ta' nullita' ir-rikors ghandu jkun fih il-fatti fil-qosor, ir-ragunijiet tal-appell u t-talba ghat-tahsir jew ghat-tibdil tas-sentenza, kollha flimkien, minghajr eskluzjoni ta' ebda wahda minnhom. Ghalhekk is-sentenzi moghtija minn din il-Qorti (diversament presjeduta) fil-kawzi fl-ismijiet Norman Lowell vs Direttur Generali tal-Qrati tal-Gustizzja et deciza fis-27 ta' April 2009 u Richard Spiteri vs Avukat Generali et deciza fis-27 ta' Frar 2009 huma validi u gusti fil-kuntest tal-fatti u cirkostanzi ta' kull kaz.

"Fil-kaz in esami n-nullita' tal-att mhix espressament prevista mil-ligi. Ghad-differenza tan-nullita' kontemplata mil-ligi stess fl- Artikolu 419(1), l- Artikolu 416(1) huwa sieket ghal kollox fejn *si tratta* ta' nullita'. Mhux bhal fil-kaz fejn fir-rikors tal-appell, skond l- Artikolu 419(1) ikun nieqes minn imqar wahda mit-tliet kazi previsti fis-subparagrafi (a) sa (c). Veru li d-dritt ta' appell huwa regolat bl-iskop li l-procedura sservi l-ahjar interess tal-gustizzja. Meta akkuzat ma jindikax fil-qosor il-fatti meta jaf li hemm in-nullita' tal-att dak huwa nuqqas evidenti u li m'ghandux isib sostenn mill-Qorti mhux biss ghax hemm in-nullita' prevista mil-ligi stess izda ghax kull ma jkun gara ikun imputabbli biss u esklussivament tort tal-akkuzat wahdu u ta' hadd aktar. Ma jistax ikun hemm nullita' meta lanqas il-ligi stess ma tghid li f'cirkostanzi tax-xorta in esami ma hemm nullita'. Ghax nullita' tal-att izzomm it-trattazzjoni ta' appell fil-mertu, pronunzjament f'dak is-sens ghandu jsib il-konfort tal-ligi. Kull nuqqas iehor li l-ligi ma tghidx li jwassal ghal nullita' izda ghal inosservanza ta' procedura m'ghandux jimpedixxi s-smigh tat-trattazzjoni fil-mertu.

"Dak in esami huwa kaz ghal kollox differenti, fejn id-dritt soggett tal-iskrutinju odjern, ghalkemm jolqot aspett tal-procedura tal-appell minn sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali, jirrigwarda l- Artikolu 416(1) fejn il-ligi taghti direzzjoni x'ghandu jaghmel akkuzat li jkun misjub hati mill-Qorti Inferjuri izda li ma kienx taht arrest jekk jaghzel li jappella minn dik is-sentenza.

"Fil-kaz odjern din il-Qorti trid tassikura li jkun hemm proporzjonalita' bejn il-mezz adoperat u migbur fl- Artikolu 416(1) u l-ghan li jrid jilhaq. Fil-kaz in esami l-ghan tal-garanzija huwa intiz biss sabiex l-akkuzat jidher ghal kull att tal-kawza quddiem il-Qorti Superjuri kull darba li tigi msejha minn dik il-Qorti. Meta tizen l-effett tad-disposizzjoni fil-kuntest tad-dritt tal-akkuzat ghal smigh xieraq, huwa rilevanti hafna ghal din il-Qorti li tara jekk id-disgwid li nholoq fil-procedura sehhx htija tal-akkuzat jew

tal-Qorti Inferjuri jew tal-ufficjali taghha jew ta' kulhadd f'daqqa.

"Fil-ktieb "Cases and Materials on the European Convention on Human Rights" – Second Edition – Oxford – 2007 – Pag.387 – Alastair Mowbray jaghmel riferenza ghal fejn Artikolu 6(1) jirreferi ghal *the right to a court* – u jsostni hekk –

""*However this right is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore a limitation will not be comptabile with Article 6[1]) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved …*"

"Jekk l-appell kollu kemm hu se jitqies irritu u null ghar-raguni li ma kenitx kompletata l-procedura tal-garanzija kontemplata bl- Artikolu 416(1) ghal htija mhux tal-imputat, allura din il-Qorti trid tikkunsidra rimedju ghaliex mhux accettabbli li zball jew nuqqas ta' haddiehor l-akkuzat jispicca sokkombenti wara l-ewwel sentenza meta mhux biss iddikjara fil-pront li ried jappella izda ppresenta r-rikors tal-appell skond il-ligi.

"L-iskrutinju akkurat li trid taghmel din il-Qorti definittivament m'huwiex li tqis il-lanzjanzi tar-rikorrent bhallikieku dan kien appell tat-tielet grad li m'huwiex permess fis-sistema guridiku taghna, pero' huwa dmir ta' din il-Qorti li taccerta jekk dawk il-lanzjanzi tar-rikorrent kontra s-sentenza tal-Qorti tal-Appell Kriminali jwasslux sabiex jigi accertat ksur tad-dritt ghal smigh xieraq kif imhares mill-Kostituzzjoni u mill-Konvenzjoni.

“Fis-sentenza taghha, il-Qorti tal-Appell Kriminali tghid li skond l- Artikolu 416(1) it-twaqqif tal-esekuzzjoni ta’ sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta’ Gudikatura Kriminali jinqala’ b’talba *ad hoc* li ssir lill-Ewwel Qorti u dik il-Qorti meta tilqa’ t-talba timponi l-garanzija li hija kondizzjoni *sine qua non* ghat-twaqqif tas-sentenza. Jekk dik il-garanzija ma tinghatax, dik il-mankanza tekwivali ghal akkwiexxenza u l-akkwiexxenza hija in konflitt mal-volonta’ li wiehed jappella.

“Taht il-lenti anke ta’ din il-Qorti hemm il-formola *a fol.*16 tal-process. Fil-formola tirrizulta l-firma tal-imputat bhala konferma fl-ewwel lok li kien qed “jitlob is-sospensjoni tal-ezekuzzjoni tas-sentenza moghtija llum (7 ta’ Novembru 2008) *ai fini* tal-appell” u fit-tieni lok accettazzjoni tal-garanzija li tiffissa l-Qorti. L-izball m’huwiex tal-imputat ghaliex huwa ffirma proprju fil-post fejn kien indikat lilu. Veru li n-numru tal-karta tal-identita’ tieghu tpogga fil-post hazin u *cioe’* fejn suppost iffirmat l-Magistrat pero’ ma hemm ebda paragun man-nuqqas grossolan li sar mill-Ewwel Qorti jew mill-ufficjali taghha meta fl-ewwel lok ma kienx indikat l-ammont tal-garanzija u fit-tieni lok id-digriet ma kienx iffirmat mill-Magistrat. Mela n-nuqqas sostanzjali kien jinsab fil-parti tal-formola (inkluz id-digriet) li kien jispetta lill-Ewwel Qorti. Bis-sentenza tal-Qorti tal-Appell Kriminali kontabilita’ *da parti* ta’ dik il-Qorti ma kienx se jkun hemm xejn avolja l-konsegwenzi ghall-akkuzat kienu se jkun serji u gravi. Ghandu jitqies ukoll li l-akkuzat jibqa’ ritenut innocenti sakemm il-htija tieghu ma tkunx pruvata skond il-ligi b’mod definittiv b’sentenza li tghaddi in gudikat. U sentenza tghaddi in gudikat kif tipprefigi l-ligi mhux fuq il-presunzjoni ta’ akkwiexxenza li tikkontrasta kjarament mal-volonta’ espressa u inekwivoka tal-akkuzat.

“L-akkuzat iddikjara bil-fomm (u kkonferma bil-miktub) li ried jappella. Huwa mbaghad ippresenta r-rikors tal-appell fiz-zmien prefiss mil-ligi. Il-*quantum* tal-garanzija u d-digriet relattiv mhumiex responsabilita’ jew kompetenza tal-akkuzat. Ghalhekk l-obbligu ghall-osservanza kien tal-Qorti mhux tal-akkuzat. In-nuqqas tieghu ghax ma segwiex il-procedura mid-dikjarazzjoni li ried jappella ‘l

quddiem hija assolutament marginali u ma tinnewtralizzax in-nuqqas lampanti u serju tal-Qorti Inferjuri u tal-ufficjali taghha. Caqlieq tal-htija lejn l-akkuzat fir-realta' tal-kaz taht ezami jfisser biss li ll-akkuzat ikunu qed jigu addebitati obbligi jew htijiet li kienu responsabilita' tal-Ewwel Qorti u taghha biss. Jekk il-mankanza *de qua* se titqies bhala pregudizzjali ghall-prosegwiment tas-smigh tal-appell fil-mertu, allura din il-Qorti tghid li d-dritt tar-rikorrent ghal smigh xieraq kien vjolat propju ghaliex regola ta' procedura intiza sabiex tassikura li l-akkuzat jidher ghal kull att tal-kawza fil-Qorti Superjuri kull darba li jissejjah u li baqghet mankanti tort tal-Qorti Inferjuri thalliet tassumi rilevanza tali li xekklet ghal kollox kull access tar-rikorrent ghas-smigh tal-mertu propju f'sitwazzjoni fejn lanqas il-ligi stess ma tghid li mankanza ta' dik in-natura twassal ghan-nullita' ta' appell. Din il-Qorti ssostni li ma kienx l-imputat li ma tax il-garanzija izda kienet l-Ewwel Qorti ma mponietx il-garanzija.

"Dak in esami mhux kaz fejn negligenza cara mputabbli <u>unikament</u> ghal nuqqas tal-akkuzat li halla appell tieghu imur dezert skond Art. 422 tal-Kap.9 bla ma ghamel it-talba ghar-riappuntament tieghu fiz-zmien stabbilit mil-ligi kif gara fil-kawza <u>Simon Brincat vs l-Onorevoli Prim'Ministru et</u> deciza mill-Qorti Kostituzzjonali fis-27 ta' Gunju 1994 fejn gustament il-Qorti kienet affermat li d-dritt ghal smigh xieraq ma hux dritt minghajr ebda limitazzjoni imma huwa regolat ragonevolment bil-procedura. F'dik il-kawza kienet citata s-sentenza ohra tal-istess Qorti fil-kawza <u>Arnaldo Urso vs Paul Sammut et</u> deciza fit-13 ta' Ottubru 1993. Hemm l-appellant kien naqas li jaghmel dak li kien rikjest mil-ligi biex l-appell civili tieghu quddiem il-Qorti tal-Appell ma jmurx dezert skond l- Artikolu 906 tal-Kapitlu 12 u l-Qorti kienet spjegat li d-dritt ta' smigh xieraq ma kienx assolut fis-sens li s-smigh irid isir bilfors, dejjem u minghajr ebda regolamentazzjoni ragonevoli ghall-implimetazzjoni ta' dak id-dritt ghaliex hawn *si tratta* ta' dritt fundamentali u mhux ta' rikonoxximent ta' kapricc illimitat.

"Din il-Qorti hasbet fit-tul u hija tal-fehma li inikwita' bhal dik li garrab ir-rikorrent f'dan il-kaz tekwivali ghal ksur tad-

dritt tieghu ghal smigh xieraq. Kien hemm "*a strict construction of a procedural rule*" li wasslet biex ma jigix trattat il-mertu tal-kaz u konsegwentement "*undermines the very essence of the applicant's right to a court and consequently to the right to a fair trial*".

Huwa importanti ferm anke ghall-fini tal-kwistjoni li qed tigi trattata f'din il-kawza dak li kien deciz mill-Qorti tal-Appell Kriminali fil-kawza Il-Pulizija vs Charles sive' Carmelo Spiteri fl-14 ta' Marzu 1983 [Vol. LXVII.V.490] li kien appell din id-darba tal-Avukat Generali fejn il-Qorti qalet hekk –

"" … Illi ghar-rigward tat-terminu l-iehor pero' *cioe'* dak moghti lill-Qorti Inferjuri li taghti s-sentenza biex tittrasmetti lill-Avukat Generali s-sentenza u l-process, is-sitwazzjoni tidher li hija differenti. Dan it-terminu ta' tlett ijiem utili a differenza ta' l-iehor preskritt fl-Artikolu 429 tal-Kodici Kriminali mhux moghti lill-appellant Avukat Generali izda lill-istess Qorti Inferjuri li tkun ippronunzjat dik is-sentenza u lir-Registratur. Ghalhekk din il-Qorti thoss li jekk l-appellant ikun ghamel dak kollu li kellu jaghmel u *cioe'* li talab u ottjena permess ghall-appell, ghamel it-talba permezz tal-pulizija *entro* erbat ijiem mis-sentenza u pprezenta r-rikors ta' l-appell *entro* t-tmint jiem jew tnax-il gurnata utli (skond jekk hux Malta jew Ghawdex) minn mindu jkun ircieva l-attijiet mill-Qorti Inferjuri, l-appellant m'ghandux ibati ebda konsegwenza ghal dak li ma kienx propju jiddependi minnu imma mir-Registratur tal-Qrati Inferjuri li fuqu ma ghandu ebda kontroll f'din il-materja …"

"Din il-Qorti tqis bhala kontrosens ir-rimedju li l-Avukat Generali qed jghid li r-rikorrent kellu sabiex jirrimedja ghan-nuqqas li rrizultat fil-formola *a fol.*16. Dan qed jinghad ghax fl-ewwel lok ma jirrizultax skond liema artikolu tal-ligi seta' r-rikorrent jaghmel talba ta' dik ix-xorta. Fit-tieni lok ghax jekk se jkun accettat li hija kondizzjoni *sine qua non* li tinghata l-garanzija fl-istess waqt mat-talba ghas-sospensjoni tas-sentenza (kif afferma l-Qorti tal-Appell Kriminali) allura dak in-nuqqas ma jistax jigi rimedjat. Hija din l-interpretazzjoni restrittiva li tinsab taht il-lenti sabiex wiehed jara kienx hemm

volazzjoni tad-dritt ghal smigh xieraq. Din il-Qorti tghid li r-rikorrent ma kellux triq ohra ghajr it-talba ghal rimedju kostituzzjonali *una volta* mhux jirrizulta lil din il-Qorti li legalment seta' jirrikorri ghal xi ghamla ta' procedura korrettorja jew rettifikatorja.

"F'kuntest differenti din il-Qorti tqis bl-istess mod ir-riferenza li ghamel r-rikorrent ghas-subinciz (5). Dak is-subinciz evidentement jitlaq mill-premessa li saret il-garanzija izda l-akkuzat ma qaghdx ghaliha, u kwindi ghax jaghmel hekk, jigi arrestat. Irid jinghad li lanqas dak l-artikolu ma qed jimplika li l-appell isir null izda biss li jkun hemm arrest. Pero' dan l-artikolu citat mir-rikorrent ghandu rilevanza biss marginali ghall-kwistjoni fis-sens li dak is-subinciz jiskatta biss meta hemm l-garanzija diga' imposta li ma kienx il-kaz taht ezami. Fl-istess waqt jinghad li l-kontenut tal-istess subinciz huwa indikattiv (mhux espress) tal-hsieb tal-legislatur li f'kaz li garanzija moghtija ma tkunx osservata ma jgibx mieghu n-nullita' tal-appell izda l-arrest tal-akkuzat waqt li jkun pendenti l-appell tieghu.

"Fis-sentenza Escolano et vs Spain tal-25 ta' Jannar 2000, il-Qorti Ewropea rriteniet li l-interpretazzjoni ta' regola ta' procedura b'mod partikolarment strett ipprivat lill-applikanti mid-dritt ta' access lill-Qorti sabiex jinstemghu l-pretensjonijiet taghhom –

""*The domestic courts' particularly strict interpretation of procedural rule deprived the applicants of the right of access to a court*. (*mutatis mutandis* Perez de Rada Cavanilles vs Spain – 28th October 1998)"

"Fis-sentenza **"Manibardo vs Spain"** tal-15 ta' Frar 2000, il-Qorti Ewropea qalet hekk –

"*The applicant's appeal was declared inadmissible owing to he failure to deposit the requisite amount. She was thus deprived of a remedy which could have proved decisive for the outcome of the dispute. The Court finds that by obliging her to pay the amount, the Audenciua Provincial prevented the applicant from using an exisiting*

and avaliable remedy such that a disporportionate hindrance was put in the way of her right of access to a court. Consequently a violation of Section 6(1)."

"Mis-sentenza Beles and others vs Czech Republic li dwarha kkummentaw il-partijiet, din il-Qorti se tislet dawn il-brani li jidhrilha rilevanti (*b'sottolinear* li ghamlet din il-Qorti) –

""*The Court has already stated on a number of occasions that the right to a fair trial as guaranteed by Article 6(1) of the convention must be construed in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty enabling them to assert their civil rights …*

"*It further reiterates that the rules governing formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed ast ensuring the proper administration of justice and compliance, in particular, with the aforementioned principle of legal certainty. That being so, the rules in question or the manner in which they are applied should not prevent litigants from using an available remedy …*

"*A procedural rule has been construed in such a way as to prevent the applicants' action being examined on the merits, with the risk that their right to effective protection would be infringed …*

"*Consequently, the Court finds that in deciding, on the basis of a particularly strict construction of a procedural rule, not to examine the merits of the case, the domestic courts undermine the very essence of the applicants' right to a court, which is part of their right to a fair trial as guaranteed by Article 6(1) of the Convention. There has therefore been a violation of Article 6(1) of the Convention.*"

"Huwa importanti ghalhekk li kollox jigi nterpretat fid-dawl tal-principju tar-*rule of law*. Fil-process penali l-akkuzat ghandu jkollu rimedju effettiv sabiex jiehu d-drittijiet

tieghu. Huwa ghandu wkoll ikollu harsien effettiv tad-drittijiet tieghu. Aspetti procedurali huma ntizi biss biex tigi assikurata l-amministrazzjoni tajba tal-gustizzja. U l-garanzija skond l-Artikolu 416(1) hija proprju intiza ghal dak l-iskop. Jidhol l-Artikolu 416(5) propju sabiex jekk l-akkuzat jonqos, jigi arrestat u l-amministrazzjoni tal-gustizzja ma tkun intralcjata. Ir-regoli tal-procedura u l-applikazzjoni taghhom m'ghandhomx jipprekludu lill-akkuzat milli jara l-appell tieghu jigi trattat fil-mertu u b'hekk huwa jkollu rimedju effettiv sabiex jigu salvagwardjati d-drittijiet tieghu. Bid-decizjoni tal-Qorti tal-Appell Kriminali fil-kaz odjern li ma tippermettix li jigi trattat il-mertu tal-appell tal-akkuzat, kien hemm vjolazzjoni tad-dritt tar-rikorrent ghal smigh xieraq.

""*The principle constantly reiterated by the Court is that the Convention is a living instrument which must be interpreted in the light of present-day conditions, that its intention is to guarantee rights that are not theoretical or iollusory, but practical and effective and in accordance with the "principle that the applicant should as far as possible be put in the position he would have been in had the requirements of the Convention not been disregarded" : "When Judges Dissent – Separate Opinions of Judge Giovanni Bonello at the European Court of Human Rights" - Pg 230.*

"Ghal dawn ir-ragunijiet, din il-Qorti qieghda taqta' u tiddeciedi din il-kawza billi –

"Tiddikjara li s-sentenza tal-Qorti tal-Appell Kriminali tat-12 ta' Frar 2009 fil-kawza fl-ismijiet Il-Pulizija (Spettur Kevin Farrugia) vs Stephen Schembri tikkostitwixxi lezjoni tad-drittijiet fondamentali tar-rikorrent kif protetti u sanciti fl-Artikolu 6(1) tal-Konvenzjoni u tal-Ewwel Skeda tal-Kapitolu 319 tal-Ligijiet ta' Malta u fl-Artikolu 39(1) tal-Kostituzzjoni ta' Malta.

"Tirrevoka u thassar is-sentenza tal-Qorti tal-Appell Kriminali tat-12 ta' Frar 2009 fil-kawza fl-ismijiet Il-Pulizija (Spettur Kevin Farrugia) vs Stephen Schembri fuq riferita.

“Tordna li r-rikorrent jitqieghed fil-posizzjoni li kien fiha qabel it-12 ta’ Frar 2009.

“Tordna l-prosegwiment tas-smigh tal-appell mis-sentenza tal-Qorti tal-Magistrati (Malta) bhala Qorti ta’ Gudikatura Kriminali tas-7 ta’ Novembru 2008 fil-kawza fl-ismijiet Il-Pulizija (Spettur Kevin Farrugia) vs Stephen Farrugia.

“Skond l- Artikolu 46(2) tal-Kostituzzjoni, tordna li r-rikorrent jaghti garanzija personali fl-ammont ta’ elf Ewro (€1,000) li jidher ghal kull att tal-kawza quddiem il-Qorti tal-Appell Kriminali u kull darba li jkun imsejjah sabiex jidher.

“Tordna li l-ispejjes tal-kawza jibqghu bla taxxa tenut kont tan-natura tal-kaz.”

L-APPELL TAL-AVUKAT GENERALI

2.2. L-Avukat Generali hassu aggravat bis-sentenza surreferita u ghalhekk huwa interpona appell minnha fejn talab li din il-Qorti

“… … … joghgobha tirrevoka, thassar u tannulla s-sentenza appellata u subordinatament, f’kaz li tiddeciedi li ma tilqax tali talba,

“1) tipprovdi illi l-garanzija idoneja ghandha tigi ffissata mill-Qorti tal-Magistrati illi tat is-sentenza li minnha r-rikorrent appellat qed jinghata d-dritt li jappella, u dan f’ammont decizament akbar minn elf ewro, jew alternattivament, jekk hekk jidhrilha xieraq, (2) fl-ahjar interess tas-socjeta` tiffissa hi stess garanzija aktar idoneja.

“Bl-ispejjez taz-zewg istanzi kontra r-rikorrent appellat.”

L-AGGRAVJI TAL-INTIMAT AVUKAT GENERALI

3. L-aggravji tal-intimat Avukat Generali jistghu fil-qosor jingabru taht il-kapi li gejjin:-

(i) Illi meta l-Qorti tal-Appell Kriminali (u mhux il-Qorti tal-Magistrati kif gie erronjament hemm indikat fir-rikors ta’ appell) iddikkjarat l-appell interpost mill-appellat Schembri

bhala wiehed null "hija kienet qed timxi in konformita` ma' dak li tiddetta l-ligi fl-Artikolu 416(1) tal-Kodici Kriminali u ghalhekk id-decizjoni taghha kienet qed issegwi l-indikazzjonijiet cari kontenuti fil-ligi kriminali procedurali tal-pajjiz".

Kulma sehh kien biss skont kif hemm provdut fil-ligijiet kriminali ta' Malta, u ghalhekk "il-Qorti Ewropea ma tinterferixxix fit-tip ta' legislazzjoni li Stat jaghzel li jaddotta". Fil-fatt, il-Qorti tal-Appell Kriminali interpretat il-ligi lokali b'mod korrett u ma kien hemm ebda lezjoni ta' indole Konvenzjonali.

(ii) illi bla pregudizzju ghall-ewwel aggravju, f'kull kaz, l-ewwel Qorti ma kellhiex tiffissa hi l-ammont ta' garanzija li kellha tithallas mill-appellat sabiex tigi sospiza l-ezekuzzjoni tas-sentenza u b'hekk ukoll huwa seta' jappella.

L-ammont tal-garanzija seta' thalla f'idejn il-Qorti tal-Magistrati li minnha l-appellat xtaq jappella – haga din li taqa' fil-mansjonijiet ta' dik il-Qorti.

Fi kwalunkwe kaz, l-ammont ta' garanzija li gie ffissat huwa baxx wisq tenut kont tac-cirkostanzi u m'huwiex wiehed adegwat, trattandosi hawn ta' akkuza ta' serq aggravat bl-aggunta tar-recediva.

<u>IR-RISPOSTA TAL-APPELLAT</u>

4. L-appellat Stephen Schembri wiegeb li, bil-maqlub ta' dak li gie sottomess mill-appellant, il-punt ta' tluq kellu jkun dak li l-Qorti tal-Appell Kriminali "kienet erronea ghal kollox" meta ma haditx konjizzjoni tal-appell a bazi ta' nullita` procedurali, meta dan ma kienx zgur il-kaz u meta l-izbalji li jirrizultaw li saru fl-*iter* tal-process ma kienux certament imputabbli lill-appellat odjern.

Barra minn dan hija fid-diskrezzjoni (u <u>mhux</u> 'deskrizzjoni' kif hemm zbaljatament indikat fir-risposta tal-appellat) tal-Qorti li tipprovdi hi kull rimedju li jidhrilha li jkun xieraq u opportun, kif, wara kollox hemm provdut fil-ligi stess.

Ghalhekk is-sentenza appellata hija gusta u timmerita konferma.

KONSIDERAZZJONIJIET TA' DIN IL-QORTI

5. Biex wiehed jifhem ahjar dak li wassal ghall-odjern appell, hu utli li jsir accenn, imqar in succint, ghal dak li sehh in precedenza fil-kaz in ezami. L-appellat Stephen Schembri kien gie akkuzat b'reati ta' natura kriminali u b'sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali fis-7 ta' Novembru 2008, huwa gie misjub hati ta' serq aggravat u talli kiser l-ordni tal-'probation' imposta fuqu b'sentenza ohra precedenti. Huwa gie kkundannat seba' (7) xhur habs. L-appellat ghadda biex appella minn dik is-sentenza izda l-appell tieghu gie ddikjarat null fuq punt tekniku ta' indole procedurali mill-Qorti tal-Appell Kriminali (Sede Inferjuri) moghtija fit-12 ta' Frar, 2009. F'dik il-procedura, jigifieri l-kawza fl-ismijiet: **Il-Pulizija (Spettur Kevin Farrugia) v. Stephen Schembri** (Kawza Numru 327/2008), Il-Qorti tal-Appell Kriminali fil-fatt laqghet il-pregudizzjal sollevat mill-Avukat Generali u ddikjarat irritu u null l-appell tar-rikorrent u, konsegwentement, astjeniet milli tiehu konjizzjoni ulterjuri tal-appell ta' Stephen Schembri.

Il-pregudizzjal surreferit kien ibbazat principalment fuq l-Artikolu 416(1) tal-Kodici Kriminali rigwardanti l-ghoti ta' garanzija minn min ikun ser jappella, bhal fil-kaz ta' Schembri. Dan l-Artikolu jghid hekk:

"Il-persuna misjuba hatja li ma tkunx taht arrest ghar-reat li tieghu tkun giet misjuba hatja tista', meta tiddikjara, imqar bil-fomm, li trid tappella mis-sentenza, taqla' mill-Qorti Inferjuri t-twaqqif tal-ezekuzzjoni tas-sentenza, kemm-il darba taghti garanzija tajba, skont l-Artikolu 577(1), li tidher ghal kull att tal-kawza quddiem il-Qorti Superjuri kull darba li tigi msejha minn dik il-Qorti, u f'dan il-kaz jghoddu d-dispozizzjonijiet tal-Artikoli 579, 581, 583, 585, 586 u 587."

6. Minn ezami akkurat ta' dak li sehh fil-proceduri kriminali – indagni maghmula b'mod mill-aktar approfondit

mill-Qorti tal-ewwel grad – jirrizulta pacifiku li r-raguni ewlenija li waslet lill-Qorti tal-Appell Kriminali biex tirrigetta l-appell ta’ Stephen Schembri kienet gejja mill-konsiderazzjoni (ta’ dik il-Qorti) li kien hemm mankanzi f’dik li suppost kellha tkun il-formula ta’ garanzija indikanti li gie intavolat appell mill-persuna akkuzata (nuqqas ta’ firem, tal-ammont li kellu jitqieghed bhala garanzija personali li thalla vojt u nuqqasijiet simili) u dan in-nuqqas allura gie interpretat bhallikieku l-ezekuzzjoni tas-sentenza moghtija ma gietx imwaqqfa formalment u li allura din kienet tfisser ukoll li kien hemm akkwixxenza da parti tal-akkuzat liema akkwixxenza kienet in konflitt mal-volonta` li wiehed jappella. Jizdied jinghad li skont il-Kodici penali domestiku, in mankanza ta’ talba ghall-fini ta’ sospensjoni tal-ezekuzzjoni tas-sentenza, kull decizjoni ta’ din ix-xorta tigi esegwita <u>minnufih</u> hekk kif tinghata (hekk ara l-Artikolu 665 tal-Kap. 9 tal-Ligijiet ta’ Malta).

7. Issa, maghdud is-suespost, u kkonsidrat fid-dawl tal-lanjanzi tal-appellant, ghandu jigi mill-ewwel rilevat li proprjament l-appellat ma talabx dikjarazzjoni ta’ ksur ta’ natura Kostituzzjonali (l-Artikolu 39) u tal-Konvenzjoni Ewropeja dwar id-Drittijiet Fundamentali (l-artikolu 6) ghax hemm xi haga intrinsikament leziva fl-Artikolu 416 tal-Kap. 9 li fuqha giet ibbazata s-sentenza moghtija mill-Qorti tal-Appell Kriminali u lanqas ma huwa kaz – kif seta’ wkoll jaghti x’ wiehed jifhem l-appellant fir-rikors ta’ appell – li l-Qorti domestika m’ghandux jigi akkordat lilha dak li hu maghruf bhala margni diskrezzjonali fil-motivazzjonijiet u deliberazzjonijiet taghha. Il-lanjanza kienet invece dik li bil-mod u bir-ragunijiet li hija tat biex dik il-Qorti astjeniet u ddikjarat null ir-rikors ta’ appell tal-akkuzat Schembri, tali operat kien leziv tal-artikoli surreferiti kemm tal-Kostituzzjoni kemm ukoll tal-Konvenzjoni. Issa taht dan l-aspett, ghandu jinghad (ghax gie anke espress) illi l-ewwel Qorti qaghdet attenta li ma sservix bhala xi forma ta’ Qorti addizzjonali li fis-sistema patriju illum ma tezistix. Di fatti, fis-sentenza appellata *inter alia* nsibu hekk:
“L-iskrutinju akkurat li trid taghmel din il-Qorti definittivament m’huwiex li tqis il-lanjanzi bhallikieku dan kien appell tat-tielet grad li m’huwiex permess fis-sistema guridika taghna… … …!”

Minflok, dik il-Qorti wara li kkostatat li kollox kien jindika li kienet l-intenzjoni u r-rieda tal-akkuzat Schembri li jinterponi appell, l-appell tieghu spicca biex gie ddikjarat null minhabba li l-Qorti tal-Appell Kriminali, fuq pregudizzjal sollevat mill-Avukat Generali, irriskontrat difetti u mankanzi serji fil-garanzija li trid timtela' quddiem il-Qorti tal-Magistrati fejn tkun inghatat is-sentenza. Issa ghalkemm kien minnu li mankanzi tassew kien hemm f'dik li huwa mili u ffirmar tal-imsemmija formula ta' garanzija pero` il-fatti emergenti mill-provi prodotti kienu juru kjarament li dawn in-nuqqasijiet sehhew, jekk mhux kollha imma *in parte* sew minnhom, minhabba nuqqasijiet imputabbli lill-istess Qorti tal-Magistrati kif rapprezentata u servuta mill-ufficjali taghha. Kwindi, kif allura tajjeb gie ritenut mill-ewwel Qorti: Kif seta' jinghad li l-Appell tal-imsemmi Stephen Schembri kien wiehed null ghax dan naqas milli joffri garanzija idoneja u, aghar minn hekk, kellu sahansitra jitqies bhala li kien akkwiexxa ghas-sentenza ta' habs li giet inflitta fuqu? M'huwiex il-kaz li din il-Qorti terga' tispjega l-*iter* shih ta' kif mexa' proceduralment l-akkuzat hekk kif gie misjub hati sabiex huwa juri li ried jappella. Dan gie spjegat dettaljatament fis-sentenza appellata u m'hemmx x'wiehed izid mieghu jew joqghod jirrepeti kollox mill-gdid. A differenza ta' kazi ohrajn li gieli jitfaccaw quddiem il-Qorti tal-Appell Kriminali, dan mhux wiehed mill-kazi fejn irrizultat negligenza imputabbli unikament jew maggorment fuq l-appellat – xejn minn dan. Anzi, kif tajjeb osservat l-ewwel Qorti, f'dan il-kaz
"… … … ma kienx l-imputat li ma tax il-garanzija izda kienet l-ewwel Qorti (li) ma mponietx il-garanzija."

Kif intqal mill-awtrici, Karen Reid: (A Practitioner's Guide to the European Convention on Human Rights. Sweet & Maxwell) 3rd Ed; ma' liema din il-Qorti hija konkordi:
"strict or arbitrary interpretation of procedural rules in rejecting claims, in particular for errors for which the applicants are not to blame, has also disclosed a disproportionate hindrance on access to court" (pag.89).

x x x omissis x x x

“Where appeal lies however, procedural rules should not operate or be interpreted so strictly so as to block effective access. An overly-formalistic approach which prevents the substance of the applicant’s Convention complaints being examined may also be incompatible with fairness requirements” (pag. 103).

Ara wkoll sentenza **Sotiris and Nikos Koutras v. Greece, 16 ta’ Novembru, 2000, ECHR**.

8. Din il-Qorti tifhem li l-Avukat Generali, l-odjern appellant, ghandu fost id-dmirijiet tieghu dak li jkun il-gwardjan tal-osservanza tal-ligijiet tal-pajjiz, u li ghandu jara ghalhekk li dawn ma jigux mittiefsa darba li huma fis-sehh. Izda, min-naha l-ohra, meta c-cirkostanzi ta’ fatt ikunu tali li jistghu jwasslu biex issir ingustizzja manifesta (bhalma kien ser jigri proprju fil-kaz in dizamina), huwa ghandu jkun ghaqli bizzejjed biex jara li haga bhal din ma ssirx u mhux jibqa’ jinsisti fuq binarju li jkun evidentement zbaljat u b’konsegwenzi evidentement hziena. Dan kollu naturalment qieghed jinghad bla ma tinxtehet xi farka ta’ riflessjoni fuq il-htija o meno tal-appellat viz-a`-viz l-akkuzi li bihom jinsab akkuzat – mertu dan tal-appell interpost minnu li ghad irid jigi trattat u deciz quddiem il-qorti kompetenti.

9. Mill-bqija din il-Qorti taghmel taghha dak kollu li b’mod mill-izjed elokwenti gie ribadit mill-Qorti tal-ewwel grad in gustifikazzjoni tad-decizjoni taghha favur is-sejbien ta’ lezjoni kemm kostituzzjonali kemm ukoll konvenzjonali u tieqaf hemm.

Ghal dawn ir-ragunijiet l-ewwel aggravju qieghed jigi respint billi jirrizulta li huwa wiehed infondat.

10. It-tieni u t-tielet aggravji, li gew avanzati bla pregudizzju u *in subsidium* ghall-ewwel aggravju (f’kaz li dan kellu jigi respint, kif fil-fatt gie), huma t-tnejn relatati mal-ordni moghtija mill-ewwel Qorti li biha, wara li invokat l-artikolu 46(2) tal-Kostituzzjoni, ordnat lir-rikorrent appellat biex dan jaghti garanzija personali fl-ammont ta’

elf Euro (€1,000) u li jidher ghal kull att tal-kawza quddiem il-Qorti kompetenti ghal fini tas-smigh tal-appell tieghu u biex jibqa' hekk jidher kull darba li jissejjah ghal dan l-iskop.

11. Skont l-appellant, apparti li fil-fehma tieghu l-garanzija imposta kienet wahda baxxa u, kwindi mhux adegwata idoneja ghall-kaz, il-modalita` u l-konsiderazzjonijiet tal-garanzija kellhom jithallew fid-diskrezzjoni tal-Qorti Kriminali kompetenti u mhux jigu ffissati u stabbiliti mill-ewwel Qorti kif jirrizulta li sar. Alternattivament, ikompli l-appellant, jekk tali rakkomandazzjoni ma tintlaqax, allura din il-Qorti giet invitata biex tiffissa hi l-istess garanzija, basta pero` f'ammont aktar sostanzjali, tenut kont tal-gravita` tal-att tal-akkuza migjub kontra l-appellat Schembri.

Din il-Qorti ghalkemm jidhrilha li dak li qieghed jigi sottomess mill-appellant, ghalkemm huwa possibbli li jsir u ghandu certu grad ta' validita` u gieli anke sar hekk, xorta wahda ma thossx li ghandha takkordah. Il-punt kollu involut huwa dan: setghet l-ewwel Qorti *per via* ta' rimedju tiffissa hi stess l-ammont li kellu jinghata bhala garanzija personali mill-akkuzat Schembri? Fil-fehma ta' din il-Qorti, it-twegiba hija fl-affermattiv u ghalhekk mhux il-kaz li tithassar din il-parti tas-sentenza biex jinghata, minflok, provvediment differenti. Huwa minnu li kien hemm diversi kazi fejn, trattandosi ta' proceduri ta' indole kriiminali, u anke tenut kont tal-fatt li l-appell tal-akkuzat ma jkunx ovvjament ser jinstema' quddiem il-Prim'Awla tal-Qorti Civili, il-garanzija dovuta thalliet f'idejn il-Qorti tal-Magistrati imma dan m'huwiex bilfors hekk. Sakemm jidher li l-provvediment relattiv ghall-garanzija kif stabbilit mill-ewwel Qorti qieghed fil-parametri tal-ligi, ma hemm ebda htiega ghal diin il-Qorti biex tintrometti ruhha u tiddisponi mod iehor, kif gie suggerit mill-appellant.

12. Fl-istess waqt pero` din il-Qorti jidhrilha li jekk il-Prim'Awla tal-Qorti Civili ghazlet li tiffissa hi l-ammont tal-garanzija personali, kellha allura d-dover li tara li l-ammont impost ikun wiehed li jirrifletti l-proceduri kriminali "in corso". Hija ghalhekk il-fehma ta' din il-Qorti li l-

ammont ta' elf Ewro (€1,000), tenut kont tac-cirkostanzi kollha relattivi ghall-kaz, kien wiehed baxx wisq u, konsegwentement qeghda tvarja din il-parti tas-sentenza appellata, billi tiffissa l-imsemmija garanzija fl-ammont oghla ta' elfejn u hames mitt ewro (€2,500).

Ghalhekk dik il-parti tal-aggravju dwar id-diskrezzjoni ezercitata mill-ewwel Qorti qeghda tigi respinta in kwantu l-ewwel Qorti kellha s-setgha li tiffissa hi l-ammont tal-garanzija personali ghall-fini indikat *supra*, pero` fl-istess waqt qeghda tilqa' dik il-parti rigwardanti l-lanjanza sussidjarja li l-ammont impost kien wiehed baxx u ma jirriflettix il-gravita` tal-procedura kriminali.

Ghal dawn il-motivi tiddeciedi billi tilqa' biss l-appell tal-appellant Avukat Generali limitatament ghall-aggravju li l-ammont tal-garanzija personali huwa baxx u, minflok, qeghdha tawmentah ghall-ammont globali ta' elfejn u hames mitt ewro (€2,500) u, filwaqt li qeghdha tirriforma u tvarja s-sentenza appellata f'dan is-sens, tikkonfermaha fil-bqija billi tichad l-aggravji l-ohra kollha tal-appellant.

Fic-cirkostanzi, l-ispejjez kollha taz-zewg istanzi ghandhom jigu sopportati kwantu ghal tlett kwarti ($^{3}/_{4}$) mill-appellant u r-rimanenti kwarta parti ($^{1}/_{4}$) mill-appellat.

< Sentenza Finali >

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