MALTA

QORTI CIVILI

PRIM' AWLA

(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF

TONIO MALLIA

Seduta tas-16 ta' Mejju, 2014

Rikors Numru. 103/2013

Repubblika ta’ Malta

vs

Rafal Zelbert

Il-Qorti:

Din hija referenza kostituzzjonali maghmula mill-Qorti Kriminali fis-17 ta’ Dicembru 2013, fl-att tal-akkuza numru 21/2013. L-akkuzat Rafal Zelbert talab li ssir referenza fuq id-diskrezzjoni tal-Avukat Generali li jressaq persuni akkuzati bi traffikar jew pussess ta’ droga biex jinstemghu jew mill-Qorti tal-Magistrati jew mill-Qorti Kriminali. F’dan il-kaz, ta’ l-imsemmi akkuzat, dan tressaq biex il-kaz tieghu jinstema’ mill-Qorti Kriminali. Il-Qorti Kriminali, bid-digriet fuq imsemmi, iddecidiet hekk:

Ir-rikorrent jinsab akkuzat bi tliet kapi tal-akkuza. L-Ewwel Kap huwa dwar li assocja ruhu ma’ nies ohrajn sabiex jibda jimporta u jittraffika d-droga herojina u kokajina f’Malta. It-tieni kap huwa dwar li r-rikorrent importa klandestinament 443.68 grammi ta’ Diazepam. It-tielet Kap huwa dwar li r-rikorrent kellu fil-pussess tieghu s-sustanza Diazepam f’cirkostanzi li juru li dak il-pussess ma kienx ghall-uzu esklussiv tieghu.

Waqt is-seduta tat-28 ta’ Novembru, 2013, ir-rikorrent, waqt li kien qed jaghmel is-sottomoissjonijiet tieghu dwar it-tieni eccezzjoni preliminari tieghu, talab lill-Qorti taghmel referenza kostituzzjonali minhabba li d-diskrezzjoni tal-Avukat Generali moghtija lilu permezz tal-Kap 31 qatt ma kellha tkun ezercitata fid-dawl tad-decizjoni tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem moghtija fit-22 ta’ Jannar 2013.

Il-Qorti talbet lill-Prosekuzzjoni u lid-difiza jaghmlu nota ta’ sottomissjonijiet liema noti kienu ntavolati fl-4 ta’ Dicembru, 2013 u fit-12 ta’ Dicembru 2013 rispettivament.

Fil-qosor, il-Prosekuzzjoni nsistiet dwar is-serjetà tal-Ewwel Kap ghaliex dan huwa dwar l-allegata assocjazzjoni tar-rikorrent ma’ terzi sabiex ikunu importati f’Malta kemm l-Herojina kif ukoll il-

Kokaina. Il-Prosekuzzjoni nsistiet ukoll li l-Avukat Generali juza d-diskrezzjoni tieghu billi jistudja l-kaz fil-fond u mhux bl-addocc. Sostna wkoll li dan mhux kaz fejn inbidlet il-ligi f'dik li hija kwalità ta' piena. Fuq kollox, ir-rikorrent kien jaf f'liema Qorti ser ikun ipprocessat mill-bidunett tal-kumpilazzjoni.

Id-difiza ssottomettiet li ma jidhirx li ttiehdet xi decizjoni fil-mertu jekk id-diskrezzjoni tal-avukat generali taht l-artikolu 22(1) tal-Kap 101 tilledix id-drittijiet tal-individwu skond l-artikoli 6 u 7 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem. Ir-rikorrent irrefera ghas-sentenza tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem tat-22 ta' Jannar 2013 (b'mod partikolari ghall-paragrafu 43) u ssottometta wkoll li l-Avukat Generali qed jinjora prassi li l-Avukat Generali johrog konto-ordni u l-kaz ikun deciz sommarjament. Ir-rikorrent ma qabilx mal-Avukat Generali dwar x'ghamlet ezatt il-Qorti Ewropea in konnessjoni mal-artikolu 6 tal-Konvenzjoni.

Konsiderazzjonijiet tal-Qorti

Il-Qorti qeghda l-ewwelnett tikkwota estensivament mit-tliet sentenzi li huma relevanti ghal dan il-kaz. Dawn huma 'Camilleri vs Malta' (Qorti Ewropea); Joseph Camilleri vs Avukat Generali (Qorti Kostituzzjonali) 1 ta' Lulju 2012; u Mario Camilleri vs Avukat Generali (Prim'Awla tal-Qorti Civili 9 ta' Lulju 2013).

A. CASE OF CAMILLERI v. MALTA

Merits

1. The parties' submissions

(a) The applicant

22. The applicant submitted that the discretion of the public prosecutor to decide in which court an accused could be brought to trial and consequently which punishment would be applicable was contrary to the impartiality requirement of Article 6 as the accused was effectively prejudged by a decision made by one of the parties to the trial. He noted, in particular, that the relevant law giving such discretion to an Attorney General precluded the application of Article 21 of the Criminal Code (see "Relevant Domestic Law") to the offences with which the applicant was charged. Thus, this decision was irrevocable with no right of appeal and was not subject to any judicial review. Therefore, the ability of the Attorney General (in his role as public prosecutor) and also as one of the parties in the trial to make a binding decision regarding the trial created an imbalance which could not be rectified by the courts.

23. In the present case the applicant submitted that the Constituional Court was wrong to hold that he had not suffered any prejudice since he had been punished with a sentence of fifteen years' imprisonment and a fine of approximately EUR35,000, while if he had appeared before the Court of Magistrates the maximum punishment for a verdict of guilt would have been ten years' imprisonment and a lower fine (with a statutory reduction for an early admission of guilt).

24. As to the case-law cited by the Government, the applicant noted that it was based on a 1990 judgement which had been delivered prior to the enactment of section 120 A (7) of the Medical and Kindred Professions Ordinance which precluded the application of Article 21 of the Criminal Code to those offences with which the applicant had been charged. He considered that any assumption to the contrary would be in contrast with the

wording of the law. Indeed in the case of *The Republic of Malta v. Stanley Chircop* (decided by the Criminal Court on 11 January 2008) the court had held that, as the law stood, it could only give effect to the recommendation of clemency made by the jury by imposing the minimum sentence established by law for the Criminal Court, but it could not impose a sentence below the minimum. The judge had gone on to question whether it had been at all wise for the Attorney General to choose to prosecute the accused before the Criminal Court rather than the Court of Magistrates.

25. Morevoer, there were no guidelines to which the Attorney General had recourse. The applicant observed that there was uncertainty of the law since the discretion of the Attorney General had not been exercised on the basis of objective criteria established by law. Any criteria used by the Attorney General in arriving at his decision were, in any event, not published, and therefore such discretion was absolute. For example, the applicant made reference to a domestic case whereby two persons (M. And G.) had been charged with possession of the same quantity of drugs with intention to supply. Following the decision of the Attorney General, M. had been tried before the Court of Magistrates, where he had been sentenced to fifteen month's imprisonment. G., however, had been tried before the Criminal Court, where he had eventually been given a twenty-year prison sentence which was reduced on appeal to nine years (*The Republic of Malta v Godfrey Ellul*, decided by the Court of Criminal Appeal (Superior) on 17 March 2005). In that case the Court of Criminal Appeal had noted that "While the difference in the punishment existed, there was little to be said about it – the Court of Magistrates had considered, according to its discretion, fifteen months as a fair punishment, indeed the parameters of punishment of that court were much lower".

26. The applicant noted that even the Constitutional Court had suggested that the Attorney General should draw up criteria on which to base a decision. However, in the applicant's view, such criteria would remain subjective to each successive Attorney General. The applicant made reference to the considerations of the Court in this regard in the case of *Kafkaris v. Cyprus* ([GC], no. 21906/04, ECHR 2008). He further noted that the exercise of fair treatment could not be limited to the trial but should include the pre-trial period as in the case of *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008), and also made particular reference to *Imbrioscia v. Switzerland* (24 November 1993, § 36, Series A no. 275).

(b) The Government

27. The Government observed that the decision about which court should be used for the trial was made at the pre-trial stage, following the police investigation, at the point when the Attorney General gave his consent to prosecute and therefore before he assumed the role of prosecutor. If the decision was that the accused should be tried in the Criminal Court, the inquiry (before the Court of Criminal Inquiry) was carried out by the Executive Police, under the supervision of the Attorney General, to ensure that all the evidence was produced. If the Court of Criminal Inquiry decided that there was sufficient evidence, the Attorney General issued a bill of indictment. At that stage, taking account of the evidence, the Attorney General could also send the case back to be tried by the Court of Magistrates instead of the Criminal Court if this appeared to be more suitable. Thus, his decision could be subject to change on the basis of the inquiry. However, once the accused had been charged, the Attorney General could only issue counter-orders to the benefit of the accused, but not to his or her prejudice. Therefore, in order for an accused to be tried before the Criminal Court, The Court of Criminal Inquiry must have issued an Article 6-compliant decision

to commit for trial in respect of which the Attorney General had no say.

28. In the Government's submission, the ensuing trial would be in no way influenced by the Attorney General's decision – as this did not constitute the determination of a criminal charge. While acknowledging that the Attorney General had links with the executive, the Government argued that he was not a member of the tribunal and could not therefore participate in any finding of guilt or innocence and therefore there could be no breach of the independence or impartiality requirement. Indeed the Attorney General did not undertake the investigation of the crime, nor did he have the power to issue a detention order (with reference to *Huber v. Switzerland*, 23 October 1990, Series A no. 188), or have any other judicial function, but exclusively performed the function of prosecutor. They contended that the Attorney General enjoyed independence from the executive in his functions as a prosecutor as laid down in the Constitution (see "Relevant Domestic Law"). The Government compared the impugned decision to that which a prosecutor made in his or her administrative capacity in respect of the offences with which the accused was to be charged. They argued that this discretion was necessary given that the circumstances which enabled the identification of more serious drug-related crimes varied considerably and could not be exhaustively listed *a priori*. Therefore, the system allowed for the examination of cases on an individual basis rather than providing for pre-established categories. This discretion served a legitimate and proportionate aim given the difference between the cost to society of ordinary drug-related crimes and more serious large-scale drug dealing.

29. The Government also made reference to domestic case-law (*Godfrey Ellul v. Attorney General*, decided by the First Hall of the Civil Court in its constitutional jurisdiction on 5 July 2005 –

referring to *The Republic of Malta v. Grech*, decided by the Constitutional Court on 27 September 1990) finding that such a discretion (although in relation to section 22 of the Dangerous Drugs Ordinance – but still comparable to the one at issue) did not impair the fairness of the proceedings. They further pointed out that according to unspecified case-law of the Civil Court in its constitutional jurisdiction and the case of *The Republic of Malta v. Mario Camilleri* (decided on 23 January 2001 by the Criminal Court), the Criminal Court retained the power to impose sentences below the minimum established by law and to apply Article 21 of the Criminal Code (see "Relevant Domestic Law") on constitutional grounds where it found that the Attorney General had abused his power when he referred the case to the Criminal Court. This was so, despite the exclusion of the application of this Article to cases of drug trafficking under the ordinary law, particulary in view of the proviso to that exception (see "Relevant Domestic Law"). In the Government's submission, it was therefore a possibility that the minimum punishment before the Criminal Court would not be handed down. The Government further referred to the case of *Claudio Porsenna v. The Attorney General* (decided by the First Hall of the Civil Court in its constitutional jurisdiction on 6 April 2011) whereby in relation to the discretion arising from section 22 of the Dangerous Drugs Ordinance, the court held that such discretion, when exercised in a reasonable manner, would not be exercised during the pendency of the criminal proceedings and therefore fell outside the scope of the relevant provisions dealing with a fair trial. Things would be different if any discretion were exercised during the proceedings, even during the proceedings before the Court of Criminal Inquiry, in which case the exericse of that discretion would have to be scrutinised and examined from the point of view of both the Constitution and the Convention.

30. The Government submitted that the Attorney General exercised his discretion to determine in which court an accused could be charged on the basis of objective criteria, after having

considered the gravity and the circumstances of the case. In particular, in deciding whether the crime constituted an ordinary drug offence (to be tried before the Court of Magistrates) or a serious drug offence (to be tried before the Criminal Court) the relevant considerations included the quantity of the illicit substance involved and other relevant circumstances. In the present case, the decision to try the applicant before the Criminal Court had been based on the large quantity of drugs seized as well as the fact that these had been discovered concealed in a quarry, and the lack of co-operation by the applicant with the police which pointed to a serious crime involving drug dealing on a large scale.

31. The Government highlighted that the Attorney General's decision based on his discretion was exercised at the pre-trial stage and therefore upon the charges being issued the applicant became aware of the punishment applicable. It followed that the applicant's complaint under Article 7 was clearly unfounded.

32. Subsequently, the Government submitted that the offence with which the applicant had been charged and of which he had eventually been found guilty and the relevant punishment were clearly defined in the law, sufficiently accessible and forseebale from the outset. They considered that there was no uncertainty surrounding the law and the manner in which the Attorney General's discretion was exercised had been forseeable. They contended that the Attorney General's power under section 120A was adequately circumscribed and that an accused would be aware not only of the two ranges of punishment applicable but also to which particular range of punishment he would be subjected in view of the seriousness of the crime committed, without needing to take legal adivce. Morevoer, according to Convention case-law, a law would still be forseeable even if the individual needed to take the appropriate legal advice to assess

the consequences a given action might entail. Thus, according to the Government the applicant's complaint under Article 7 was unfounded.

2. The Courts' assessment

33. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case (see Guerra and Others v. Italy, 19 February 1998, § 44, Reports of Judgments and Decisions 1998–I). In this light it considers that the interests of justice would be better served if the Court examined this complaint firstly under Article 7 of the Convention.

(a) Article 7

(i). General Principles

34. The guarantee enshrined in Article 7 should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safguards against arbitrary prosecution, convinction and punishment (see *S.W. v. The United Kingdom and C.R. v. The United Kingdom*, 22 November 1995, §34 and § 32 respectively, Series A nos. 335-B and 335-C, and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 137, ECHR 2008). Article 7 § 1 of the Convention sets forth the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, §§ 93-94, 17 September 2009).

35. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (see *Cantoni v. France*, 15 November 1996, § 29, Reports 1996-V, *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII, § 145, and E.K. v. *Turkey*, no. *28496/95*, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see *Kafkaris*, cited above, § 140). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed for the act and/or omission committed (see, among other authorities, *Cantoni*, cited above, § 29).

36. In consequence of the principle that laws must be of general application, the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on practive. Consequently, in any system of law, however clearly drafted a legal provision may be, including a criminal law provision, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Scoppola (no. 2)*, cited above § 100).

37. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see *Kafkaris*, cited above, § 141). Morevoer, it is a firmly established part of the legal tradition of the States partly to the Convention that case-law, as one of the sources of the law, necessarily contributes to the gradual development of the criminal law (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of the criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50. ECHR 2001-II).

38. Foreseeability depends to a considerable degree on the content of the law concerned, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Achour v. France* [GC], no. 67335/01, §54, ECHR 2006-IV and *Sud Fondi srl and Others v. Italy*, no. 75909/01, § 110, 20 January 2009).

(ii). Application to the present case

39. The issue before the Court is whether the principle that only the law can define a crime and prescribe a penalty was observed. The Court must, in particular, ascertain whether in the present case the text of law was sufficiently clear and satisfied the requirements of accessibility and forseeability at the material time.

40. The Court finds that the provision in question does not give rise to any ambiguity or lack of clarity as to its content in respect of what actions were criminal and constituted the relevant offence. The Court further notes that there is no doubt that section 120A (2) of the Medical and Kindred Professions Ordinance provided for the punishment applicable in respect of the offence with which the applicant was charged. In fact, it provided for two different possible punishments, namely a punishment of four years to life imprisonment in the event that the applicant was tried before the Criminal Court, or six months to ten years if he was tried before the Court of Magistrates. While it is clear that the punishment imposed was established by law and did not exceed the limits fixed by section 120A (2) of the above-mentioned Ordinance, it remains to be determined whether the Ordinance's qualitative requirements, particularly that of forseeability, were satisfied, regard being had to the manner of choice of jurisdiction, as this reflected on the penalty that the offence in question carried.

41. The Court observes that the law did not make it possible for the applicant to know which of the two punishment brackets would apply to him. As acknowledged by the Government (see paragraph 31 above), the applicant became aware of the punishment bracket applied to him only when he was charged, namely after the decision of the Attorney General determining the court where he was to be tried.

42. The Court considers relevant the cases of G. And M. mentioned by the applicant (see paragraph 25 above). It observes that although these cases were not totally analogous (in that G., unlike M., was a recidivist), they were based on the same facts, offences in relation to which guilt was found, and a similar quantity of drugs. However, G. was tried before the Criminal

Court and eventually sentenced to nine years' imprisonment whereas M. was tried before the Court of Magistrates and sentenced to fifteen months' imprisonment. More generally, the domestic case-law presented to this Court seems to indicate that such decisions were at times unpredictable. It would therefore appear that the applicant would not have been able to know the punishment applicable to him even if he had obtained legal advice on the matter, as the decision was solely dependent on the prosecutor's discretion to determine the trial court.

43. While it may well be true that the Attorney General gave weight to a number of criteria before taking his decision, it is also true that any such criteria were not specified in any legislative text or made the subject of judicial clarification over the years. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one (based on enumerated factors and criteria). The Constitutional Court (see paragraph 14 above) noted that there existed no guidelines which would aid the Attorney General in taking such a decision. Thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. An insoluble problem was posed by fixing different minimum penalties. The Attorney General had in effect an unfettered discretion to decide which minimum penalty would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particulary given the lack of procedural safeguards. Neither could such a decision be seen or mainly in terms of abuse of power, even if, as the Government suggested without however substantiating their view, this might be subject to constitutional control (see paragraph 29 above). The Court is not persuaded by the Government's argument to the effect that it was possible that the minimum punishment before the Criminal Court would not be handed down. The Court considers that the domestic courts were bound by the Attorney General's decision as to which court would have been competent to try the accused. The Court observes

that Article 21 of the Criminal Code provides for the passing of sentences below the prescribed minimum on the basis of special and exceptional reasons. However, section 120A of the Medical and Kindred Professions Ordinance, which provides for the offence with which the applicant was charged, specifically states in its subsection (7) that Article 21 of the Criminal Code shall not be applicable in respect of any person convicted of the offence at issue. On an examination of the provision, the Court finds that it would not be possible to interpret the wording of that provision otherwise. Morevoer, this interpretation has been confirmed by the domestic courts, the most recent decision being that of 2008 in the above-mentioned case of *The Republic of Malta v. Stanley Chircop*, in which the Criminal Court considered that the application of Article 21 to the relevant offences was excluded and therefore the court could not impose a sentence below the minimum established by law. Furthermore, the Government have not provided any examples of decisions showing that a domestic court had actually done so. Thus, a lesser sentence could not be imposed despite any concerns the judge might have had as to the use of the prosecutor's discretion (*ibid.*).

44. In the light of the above considerations, the Court concludes that the relevant legal provision failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7.

45. It follows that there has been a violation of Article 7 of the Convention.

(b) Article 6

46. Having regard to the finding relating to Article 7 above, the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 6.

B. Qorti Kostituzzjonali Joseph Camilleri vs Avukat Generali 1 ta' Lulju 2013.

'Ghalhekk il-process tas-smigh tal-guri mhux per se jmur kontra d-drittijiet tal-bniedem, anke taht ic-cirkostanzi lamentati mir-rikorrent, dejjem jekk jitmexxa b'mod gust u jaghti lill-akkuzat smigh xieraq. Ir-rimedju f'kaz ta' sejbien ta' ksur mhux it-twaqqif jew it-thassir tal-process kriminali, cioe', ta' dak li jkun sar bl-ezercizzju tad-diskrezzjoni tal-Avukat Generali, u kwindi l-guri f'dan il-kaz m'ghandux jitwaqqaf. Il-Qorti Ewropeja ghamlitha cara illi dak li sabet kien biss nuqqas ta' forseeabililty prevvist mill-Artikolu 7 tal-Konvenzjoni Ewropeja, liema nuqqas certament ma jfissirx li l-process kriminali ghandu jieqaf u ma ghandux iservi sabiex igib bhala konsegwenza l-paralizi tas-sistema gudizzjarja. Il-fatt li, skond il-Qorti Ewropeja, l-akkuzat li allegatament wettaq ir-reat seta' ma kienx jaf il-massimu tal-piena li seta' jkun soggett ghalih jekk jinqabad u jinstab hati, ma ghandux izomm is-smigh innifsu tal-kaz, li hija haga indipendenti mill-prevedibbilità o meno tal-piena. Il-piena hi dik stabbilita fil-ligi fil-mument li allegatament twettaq ir-reat, u n-nuqqas ta' forseeability jista jaghti lok ghal xi rimedju iehor, izda mhux li jitwaqqaf il-process.'

C. Prim'Awla tal-Qorti Civili – sede Kostituzzjonali 9 ta' Lulju 2013 Mario Camilleri versus Avukat Generali.

F'din id-decizjoni, il-Prim'Awla tal-Qorti Civili ma sabet ebda lezjoni tal-artikolu 6 tal-Konvenzjoni Ewropea izda sabet li l-artikolu 22(1) tal-Kap 101 (li ghandu l-istess diskrezzjoni moghtija lill-Avukat Generali taht il-Kap 31)

iwassal ghal-lezjoni tal-artikolu 7 tal-Konvenzjoni Ewropea.[1]

'Gie ritenut ukoll mill-Qorti Kostituzzjonali fil-kawza "Claudio Porsenna vs. Avukat Generali" (deciza mill-Qorti Kostituzzjonali fis-16 ta' Marzu 2012): "Inghad li l-artikolu tal-ligi li jaghti diskrezzjoni lill-Avukat Generali jirreferi ghall-'pre-trial stage', filwaqt li l-Artikolu 6 tal-Konvenzjoni "jirregola l-mod kif jitmexxa l-process quddiem il-qorti, u mhux il-mod kif jingieb quddiem il-qorti....."

L-ordni tal-Avukat Generali tinhareg qabel ma jinbeda l-process gudizzjarju proprju, u ma jolqotx il-process innifsu la tal-interrogazzjoni u lanqas tas-smigh li jrid dejjem isir fl-ambitu ta' smigh xieraq kif trid il-ligi. F'kull kaz, tinghata meta tinghata tali ordni, din ma taffettwax il-htija tal-persuna akkuzata, u tipprexindi minn kull deliberazzjoni li twassal ghas-sejbien ta' htija jew liberazzjoni tieghu. Wiehed irid jenfasizza wkoll hawnhekk li l-ordni tal-Avukat Generali tolqot biss decizjoni dwar quddiem liema Qorti jinstema' l-kaz ta' persuna già akkuzata. Li l-persuna jkollha kaz ghalxiex twiegeb ikun già gie deciz, u dak li jiddeciedi l-Avukat Generali hu biss is-sede li fih isir il-gudizzju."

Fid-dawl tal-fuq espost insenjament, li din il-Qorti tikkondividi, ma jistax, fil-fehma ta' din il-Qorti, jitqies li r-rikorrenti ser isofri xi lezjoni tal-jedd fundamentali tieghu ghal smiegh xieraq kif protett bl-Art. 6 tal-Konvenzjoni Ewropea.'

Art. 7 tal-Konvenzjoni

[1] Minhabba li r-rikorrent lahaq miet ma jirrizultax li hemm decizjoni finali mill-Qorti Kostituzzjonali dwar il-punti mqajmin mir-rikorrent fir-rikors Kostituzzjonali tieghu.

Permezz ta’ dan l-Artiklu, il-Konvenzjoni Ewropea tikkristalizza l-principji illi hija biss ligi li tista’ validament tiddefinixxi reat u timponi l-kastig (nullum crimen sine lege). Minn dan jirrizulta illi r-reati u l-konsegwenzi taghhom ghandhom ikunu stabbiliti bil-ligi b’mod illi dak li jkun jaf mill-kliem tal-ligi innifisha dak li tipprojbixxi l-ligi (ara “Scoppola vs Italy”).

Kif irriteniet il-Qorti Ewropea fil-kaz “Cantoni vs France” (deciza fil-15 ta’ Novembru 1996), mill-kliem stess tal-ligi, l-individwu ghandu jkun jaf, x’azzjonijiet jikkostitwixxu reat u x’piena tigi inflitta f’kaz ta’ kommissjoni tar-reat l-element ta’ accessibilità u prevedibilità. Id-diskrezzjoni tal-Avukat Generali li jaghzel quddiem liema Qorti ghandu jigi processat l-akkuzat giet ezaminata fid-dawl tal-Art. 7 f’diversi proceduri quddiem dawn il-Qrati.

Fis-sentenza “John Camilleri vs Avukat Generali” (deciza fit-12 ta’ Frar 2010), il-Qorti Kostituzzjonali rriteniet illi:

“Illi fil-kaz in ezami l-Artikolu 7 ma japplikax billi dan jirrigwarda l-kaz fejn persuna tinstab hatja ta’ att jew omissjoni li ma kienux jikkostitwixxu reat kriminali fil-hin meta dan ikun sar, jew ghall-ghoti ta’ piena akbar minn dik li kienet applikabbli meta r-reat kriminali jkun sar.”

L-Avukat Generali fil-kawza odjerna isostni inoltre illi:

“Bl-ezercizzju tad-diskrezzjoni moghtija lilu, l-Avukat Generali ma jkunx qieghed b’xi mod jaghti xi decizjoni fuq il-mertu tal-akkuzi. Li jsir huwa li jigi stradat il-kaz billi tigi ezaminata l-gravità

Omissis

"In the light of the above considerations, the Court concludes that the relevant legal provision failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7."

Din il-Qorti tikkondividi pjenament dan ir-ragunament tal-Qorti Ewropea u ghaldaqstant issib illi fic-cirkostanzi, l-Art.22(2) tal-Kap. 101 jivvjola l-Art. 7 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem.'

7. Minn din ir-rassenja dettaljata jirrizulta li l-Qrati Maltin ezaminaw jekk l-artikoli 120(A)(2) tal-Kap 31 u l-artikolu 22(2) tal-Kap 101 jiksrux id-drittijiet tal-Bniedem elenkati fl-artikolu 39 tal-Kostituzzjoni u fl-artikolu 6 tal-Konvenzjoni Ewropea ghal safejn huwa involut il-kuncett ta' process gust. S'issa, lanqas fl-aktar sentenza recenti – dik tad-9 ta' Lulju 2013 – qatt ma nstab xi ksur tad-dritt ta' smigh xieraq minhabba d-diskrezzjoni tal-Avukat Generali skond iz-zewg artikoli msemmija.

8. Jidher ukoll li fil-passat il-Kummissjoni Ewropea dwar id-Drittijiet tal-Bniedem ukoll ezaminat dawn l-artikoli f'zewg kazi li ma tantx issemmew ghaliex dak iz-zmien kienu johorgu decizjonijiet ta' ftit linji li bihom jghidu li l-kaz mhux ammissibbli. Tant li lanqas il-gvernijiet ma kienu jkunu mitluba jaghmlu xi sottomissjonijiet u mhux l-ewwel darba li lanqas kienu jkunu jafu bihom.

9. Din il-Qorti ghalhekk ma jidhrilhiex li ghandha tilqa' t-talba tar-rikorrent dwar iz-zewg artikoli msemmija fil-paragrafu 7 ta'

dan id-digriet jilledux id-drittijiet tar-rikorrent taht l-artikolu 6 tal-Konvenzjoni Ewropea u /jew taht l-artikolu 39 tal-Kostituzzjoni ta' Malta ghal dak li hu smigh xieraq.

10. Dwar it-talba l-ohra dwar jekk l-istess artikoli msemmija fil-paragrafu 7 jilledux id-drittijiet tar-rikorrent fl-artikolu 7 tal-Konvenzjoni Ewropea u l-artikolu 39(8) tal-Kostituzzjoni, il-Qorti qed tqis li din il-kwistjoni mhix wahda frivola u / jew vessatorja galadarba tikkonsidra dak li kien deciz mill-Qorti Ewropea dwar l-istess kwistjoni fit-22 ta' Jannar 2013 u dak li kien deciz mill-Prim'Awla tal-Qorti Civili fid-9 ta' Lulju 2013. Minn naha l-ohra Qorti Kostituzzjnali ddecidiet li tali allegazzjonijiet ta' ksur tad-Drittijiet tal-Bniedem m'ghandhomx iwaqqfu l-proceduri.

Referenza Kostituzzjonali

11. Ghaldaqstant il-Qorti qed tichad li taghmel xi riferenza kostituzzjonali sa fejn l-artikoli msemmijin fil-paragrafu 7 ta' dan id-digriet jilledu xi dritt ta' smigh xieraq taht l-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni Ewropea.

12. Izda qed tirreferi l-kwistjoni jekk l-artikoli 120A(2) tal-Kap 31 u l-artikolu 22(2) tal-Kap 101[2] jilledux jew le xi dritt tar-rikorrent skond l-artikoli 39(8) tal-Kostituzzjoni u l-artikolu 7 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.

[2] L-ewwel kap tal-Att tal-akkuza huwa dwar il-Kap 101 waqt li t-tieni u t-tielet kap tal-akkuza huma dwar il-kap 31.

Din il-Qorti, ghalhekk, trid tistharreg u tiddeciedi biss fuq il-kwistjoni tad-diskrezzjoni tal-Avukat Generali taht il-Kap. 101 u/jew Kap. 31 tal-Ligijiet ta' Malta.

Rafal Zelbert gie arrestat fit-30 ta' Jannar, 2011 u qed jigi akkuzat bi tlett akkuzi relatati mal-importazzjoni u pussess tad-droga erojina u/kew kokajina. Hekk kif is-Sur Zelbert tressaq quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja, l-Avukat Generali, b'nota tad-29 ta' Jannar, 2011, ta l-kunsens tieghu biex dan jitressaq quddiem il-Qorti Kriminali. Is-Sur Zelbert issa qed jilmenta mid-diskrezzjoni li ghandu l-Avukat Generali.

Din il-Qorti tibda biex tghid li hawn mhux il-forum adettat fejn isir stharrig tal-uzu tad-diskrezzjoni f'dan il-kaz. L-uzu tad-diskrezzjoni huwa ezercizzju amministrattiv li, bhal kull decizjoni amministrattiva, jista' jkun sindakabbli mill-qrati ordinarji bis-sahha tal-poteri generali taghhom ta' stharrig gudizzjarju tal-ghemil tal-gvern. Din il-Qorti la hija kompetenti u lanqas ma giet mitluba mill-Qorti tal-Kriminali li tissindika d-diskrezzjoni uzata mill-Avukat Generali fil-konfront ta' Rafel Zelbert, izda trid tara biss jekk id-diskrezzjoni moghtija bil-ligi lill-Avukat Generali jilledix id-dritt tar-rikorrent skont l-artikolu 7 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.

Din il-materja giet diskussa mill-Qorti Ewropea dwar id-Drittijiet tal-Bniedem fil-kawza "Camilleri vs Malta", deciza fit-22 ta' Jannar 2013, u anke mill-Qorti Kostituzzjonali fil-kaz "Camilleri vs Avukat Generali", u dan fid-decizjoni fuq talba preliminari li tat fl-1 ta' Lulju 2013. F'dan l-ahhar kaz, il-Qorti Kostituzzjonali ghamlet dawn l-osservazzjonijiet in materja.

"*Wiehed ifakkar li ilment simili, in kwantu bazat fuq l-Artikolu 6 (dritt ghal smiegh xieraq), ma kienx gie accettat mill-Qorti Ewropeja, u l-ilment gie accettat taht l-Artikolu 7, in kwantu din id-diskrezzjoni tal-Avukat Generali setghet thalli f'mohh l-akkuzat incertezza dwar il-piena li seta' jehel. Kif, pero`, osservat il-Qorti Ewropeja fid-decizjoni taghha* ***Camilleri v. Malta***.

"Further, the Court cannot speculate as to the tribunal to which the applicant would have been committed for trial had the law satisfied the requirement of foreseeability. Indeed, the present case does not concern the imposition of a heavier sentence than that which was applicable at the time of the commission of the criminal offence or the denial of the benefit of a provision prescribing a more lenient penalty which came into force after the commission of the offence (see, inter alia, Alimucaj v. Albania, no. 20134/05, 7 February 2012; Scoppola (no. 2), cited above, and K v. Germany, no. 61827/09, 7 June 2012) and therefore the Court does not consider it necessary to indicate any specific measure".

Ghalhekk, il-process tas-smiegh tal-guri mhux per se jmur kontra d-drittijiet tal-bniedem, anke taht ic-cirkostanzi lamentati mir-rikorrent, dejjem jekk jitmexxa b'mod gust u jaghti lill-akkuzat smiegh xieraq. Ir-rimedju f'kaz ta' sejbien ta' ksur mhux it-twaqqif jew it-thassir tal-process kriminali, cioe`, ta' dak li jkun sar bl-ezercizzju tad-diskrezzjoni tal-Avukat Generali, u kwindi l-guri f'dan il-kaz m'ghandux jitwaqqaf. Il-Qorti Ewropeja ghamlitha cara illi dak li sabet kien biss nuqqas ta' forseeability prevvist mill-Artikolu 7 tal-Konvenzjoni Ewropeja, liema nuqqas certament ma jfissirx li l-process kriminali ghandu jieqaf u ma ghandux iservi sabiex igib bhala konsegwenza l-paralizi tas-sistema gudizzjarja. Il-fatt li, skont il-Qorti Ewropeja (b'dissenting opinion tal-Imhallef Malti), l-akkuzat li allegatament wettaq ir-reat seta' ma kienx jaf il-massimu tal-piena li seta' jkun soggett ghalih jekk jinqabad u jinstab hati, ma ghandux izomm is-smiegh innifsu tal-kaz, li hija haga indipendenti mill-

prevedibbilita` o meno tal-piena. Il-piena hi dik stabbilita fil-ligi fil-mument li allegatament twettaq ir-reat, u n-nuqqas ta' forseeability jista' jaghti lok ghal xi rimedju iehor, izda mhux li jitwaqqaf il-process gudizzjarju fil-konfront tal-persuna implikata."

Din il-Qorti taqbel ma' dan il-pronunzjament, pero', ma tistax u mhux se taghti xi forma ta' rimedju ghax dan ma jidholx fil-kompetenza taghha. Kif qalet il-Qorti Kostituzzjonali fil-kawza "Massa et vs Id-Direttur ghall-Akkomodazzjoni Socjali et", deciza fit-30 ta' April 2012:

"*12. Ghandu jigi rilevat li bhala regola meta ssir riferenza ta' kwistjoni kostituzzjonali kif previst fl-artikolu 46(3) tal-Kostituzzjoni l-funzjoni tal-Qorti li lilha ssir ir-riferenza hija arginata bit-termini tar-riferenza u ghalhekk dik il-Qorti ghandha tillimita ruhha filli twiegeb ghall-kweziti riferuti lilha. Il-kwezit riferut lill-ewwel Qorti kien limitat sabiex jigi determinat jekk l-ordni ta' rekwizizzjoni tal-fond 51, Mdina Road, Naxxar permezz tar-Requisition Order tal-10 ta' Gunju 1980 (R.O. 22312) u l-effetti kontinwati tal-istess ordni, humiex bi ksur tad-dispozizzjonijiet tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem kif ukoll tal-artikolu 37 tal-Kostituzzjoni. L-ewwel Qorti kellha twiegeb ghal dak il-kwezit u tieqaf hemm. Minflok marret oltre u ssoktat taghti rimedju li ma kienx parti mill-kweziti riferuti lilha billi ghaddiet sabiex tillikwida u tordna l-pagament ta' kumpens pekunjarju favur Carmelo sive Charles u Josephine konjugi Massa meta dawn ma kienux il-partijiet riferenti peress li r-riferenza hi tal-Qorti li ghamlitha.*"

Hekk ukoll, l-istess Qorti Kostituzzjonali fil-kawza "The Police vs Arias", deciza fit-28 ta' Settembru 2012, qalet illi:

"***55.*** *In respect of this issue this Court points out that as a rule whenever a constitutional reference is made to the First Hall Civil Court under Article 46(3) of the Constitution that Court's function is circumscribed by the terms of the reference made to it and that Court is required to limit itself to giving its replies to the questions referred to it by the referring Court. The terms of the reference made to the first Court did not extend to the liquidation and order of payment of compensation to the defendant Arias Nelson who was not the person making the reference since the referring authority was the Court of Magistrates. When, therefore, the first Court liquidated the sum of €1,500 by way of compensation in favour of the defendant it went beyond the limits of its competence as delineated by the terms of the reference and this is sufficient to lead to the revocation of this part of the judgment without there being any need to consider the other aspects raised by the appellants in connection with this issue.*"

Kwindi, din il-Qorti, ghar-ragunijiet premessi, twiegeb il-kwezit tal-Qorti Kriminali fis-sens li ssib li l-Artikolu 22(2) tal-Kap. 101 u l-Artikolu 120A(2) tal-Kap. 31 (li jaghtu diskrezzjoni lill-Avukat Generali jiddeciedi jekk akkuzat ghandux jidher quddiem il-Qorti Kriminali jew quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' gudikatura kriminali) jivvjolaw f'dan il-kaz l-Artikolu 7 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.

Il-Qorti tordna li kopja ta' din is-sentenza tintbaghat lill-Qorti Kriminali biex tigi inserita fl-atti tal-Att tal-Akkuza numru 21/2013.

Spejjez marbuta ma' din id-decizjoni jibqghu bla taxxa bejn il-partijiet.

< Sentenza Finali >

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