# QORTI CIVILI
# PRIM' AWLA
# (SEDE KOSTITUZZJONALI)

## ONOR. MHALLEF
## JACQUELINE PADOVANI GRIMA LL.D. LL.M. (IMLI)

**Seduta ta' nhar il-Hamis 29 t'Ottubru 2015**

**Kawza Numru : 3**
**Rikors Kostituzzjonali Numru : 23/2003/2 JPG**

**Noel Aquilina**

**VS**

**Avukat Generali u**
**l-Kummissarju tal-Pulizija**

## Il-Qorti :

Rat ir-rikors kostituzzjonali ta' Noel Aquilina tal-21 ta'Lulju 2003, li jaqra hekk:

*1 . "Illi r-rikorrent wara investigazzjoni mill-intimat kien gie mtella l-Qorti u quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali gie akkuzat b'diversi reati fl-ismijiet "Il-Puluzija (Spettur C. Magri) vs Noel Aquilina" (Awla 7);*

*2 . Illi inizjalment matul dawk il-proceduri r-rikorrent kien assistiet minn avukat ta' fiducja tieghu propjament fis-smiegh li sar fil-25 ta' Novembru 2002. Izda mill-bqija*

*tal-kontinwazzjoni tal-prosegwiment ta' dawk il-proceduri huwa dejjem deher mhux assistiet minn avukat jew prokuratur legali kif huwa ntitolat skond il-Kodici Kriminali (Kap 9) u l-Kostituzzjoni ta' Malta u l-Att Dwar il-Konvenzjoni Ewropea (Kap 319);*

*3 . Illi mill-inkartament ta' dawk il-proceduri minkejja li r-rikorrenti kien jkun presenti fl-awla qudiem dik l-Ewwel Qorti ghall-kontinwazzjoni tas-smiegh huwa dejjem deher mhux assistiet u mill-inkartament ta' dawk il-proceduri ma jidhirx li dik il-Qorti qatt hadet hsieb li tinnomina "ex officio" avukat tal-Ghajnuna Legali sabiex jassisti lir-rikorrenti. Illi lanqas ma jidher li r-rikorrenti qatt gie mitlub min dik l-Ewwel Qorti jekk ridx li jigi nnominat "ex officio" avukat tal-Ghajnuna Legali sabiex jassistih jew jekk ridx jaghzel li ma jkunx assistiet;*

*4 . Illi meta waqt is-smiegh ta' dawk il-proceduri kriminali gie ppresentat lill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali l-presentencing report li rrikomanda terminu ta' prigunerija, r-rikorrent rega ma kienx assistiet u lanqas ma' dik l-Onorabbli Qorti dehrila li tinnomina hija stess "ex-officio" avukat tal-Ghajnuna Legali halli jassisti lir-rikorrenti u jekk jkun hemm bzonn jitratta dak ir-rapport jew tal-anqas jkollu l-fakulta jistaqsi xi domandi lill-ufficjal li ghamel dak ir-rapport u dan mhux biss fl-interess tar-rikorrenti izda ukoll fl-interess tal-gustizzja;*

*5 . Illi minkejja dan in-nuqqas li permezz tieghu r-rikorrent ma kellu ebda assistenza legali kemm matul il-maggor parti ta' dawk il-proceduri izda aktar u aktar f'dak il-mument ferm importanti tal-proceduri kriminali meta kien r-rikorrenti kien jinghata d-dritt li jittratta l-kaz tieghu u l-pre sentencing report, dik l-Ewwel Qorti ma dehriliex li kellha tistaqsi lir-rikorrenti jekk jridx li jigi appuntat avukat tal-Ghajnuna Legali u lanqas ma jidher li gie mghajjat l-avukat ta' fiducja tieghu sabiex jkun presenti u jekk ikun l-kaz jittratta u jiddelibera l-kontenut tal-pre-sentencing report aktar u aktar minhabba l-konkluzzjonijiet ferm iebsa li gew rakkomandati. Lanqas ma jidher mill-inkartament ta' dawk il-proceduri li r-rikorrenti gie mistoqsi jekk huwa ridx li jibqa ma jkunx assistiet minn xi avukat jew prokuratur legali kif titlob il-Kodici Kriminali;*

*6 . Illi minkejja dan in-nuqqas, il-Qorti Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali xorta wahda fid-9 ta' Mejju 2003 wara li rat il-pre sentencing*

*report li rrikomanda li r-rikorrenti jintbaghat terminu ta' prigunerija kkundannat lir-rikorrenti terminu ta' sentejn prigunerija.*

*7 . Illi r-rikorrenti umilment jhoss li huwa ma nghatax d-dritt ta' smiegh xieraq u dan fid-dawl tal-fatti kif elenkati u kif ser jigu dettaljatament mfissra quddiem dina l-Onorabbli Qorti u minhabba dan in-nuqqas id-drittijiet fundamentali tieghu gew lezi u miksura;*

*Ghaldaqstant l-esponenti umilment jitlob lil dina l-Onorabbli Qorti sabiex jigi dikjarat u deciz illi d-drittijiet fundamentali tar-rikorrenti gew lezi u miksura waqt il-proceduri fl-ismijiet "Il-Puluzija (Spettur C. Magri) vs Noel Aquilina" (Awla 7) li gew decizi fid-9 ta' Mejju 2003 u dan ai termini tal-Artikolu 39 tal-Kostituzzjonali ta' Malta u l-Att dwar il-Konvenzjoni Ewropea (Kap 319) minhabba tali vjolazzjoni l-proceduri kriminali fuq indikat huma null u minghajr effett u taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi ohra li tqis xierqa sabiex jiharsu d-drittijiet fundamentali tar-rikorrenti u tordna ukoll lill-intimati jew min minnhom li jhallsu lill-esponent tal-kumpens li hija tistabilixxi bhala xieraq u adegwat ghall-ksur ta' l-istess drittijiet umani u fundamentali bl-ispejjes."*

Rat id-digriet tat-22 ta' Lulju 2003 li bih gie appuntat ir-rikors ghas-smiegh ghal-Hamis 31 ta'Lulju 2003 fid-9:00am;

Rat illi l-atti tar-rikors promotur, digriet u l-avviz tas-smiegh gew debitament notifikati;

Rat ir-risposta guramentata tal- Avukat Generali, u tal-Kummissarju tal-Pulizija, tat-30 ta' Lulju 2003 , (a fol. 7 et seq.) illi taqra hekk:

*"Illi fl-ewwel lok, ir-rikorrent ma jghidx jekk ma appellax mis-sentenza moghtija mill-Qorti tal-Magistrati fil-Prim' Istanza. Jekk dan m'ghamlux, allura huwa ma jistax issa jippretendi li ghandu drittijiet tieghu li allegatament gew miksura meta huwa ma utilizzax il-mezzi ordinarji li kienet tipprovdilu l-ligi ghal dan l-iskop.*

*Illi fil-verita' inzammu ftit seduti - forsi tlieta b'kollox - quddiem l-Ewwel Onorabbli Qorti, u proprju fl-ewwel seduta, fejn ir-rikorrent certament li kien assistit mill-avukat precedenti tieghu Dottor Franco Debono, huwa ammetta l-akkuzi kontrih. Stranament, dan il-fatt ma jissemma mkien fir-rikors promotur.*

*Illi ghalhekk il-prezenza ta' avukat minn dak il-punt 'il quddiem ma kienetx daqstant relevanti ghall-htija o meno tar-rikorrent, billi l-procedura li kien fadal kienet tikkonsisti fis-sottomissjoni tas-sentencing report u l-ghoti tas-sentenza mill-Magistrat. Gialadarba r-rikorrenti kien ammetta l-akkuzi, ma kienx hemm xejn aktar x'isir mill-avukat tieghu u l-kawza setghet tipprocedi fl-assenza tieghu, kif kien jaf ben tajjeb il-Magistat.*

*Illi terga', hekk kif inghatat is-sentenza, l-ufficjal prosekutur l-Ispettur Carmel Magri minn jeddu nforma lir-rikorrent illi huwa seta' jekk ried, jitlob is-sospensjoni tas-sentenza u mbaghad jappella minnha, kif fil-fatt ir-rikorrent kien pront ghamel.*

*Illi inoltre u bla pregudizzju ghas-suespost, l-esponenti jixtiequ jissottomettu illi sentenza ta' prigunerija ghal persuna li wettaq zewg reat wiehed ta' serq u l-iehor ta' ricettazzjoni, hija pjuttost lenient milli severa. Ghalhekk, altru milli l-Ewwel Qorti ivvjolatlu xi drittijiet fundamentali, ir-rikorrent ghandu jghodd ruhu ixxurtjat bis-sentenza moghtija lilu.*

*Ghaldaqstant l-esponent jitlob bir-rispett li din l-Onorabbli Qorti joghgobha tirrespingi r-rikors odjern bl-ispejjez."*

Semghet ix-xhieda bil-gurament ;

Rat il-verbal tat-12 ta' Marzu 2004 (a fol. 12) li permezz tieghu il-Qorti kif diversament preseduta halliet il-kawza Sine Die;

Rat id-digriet tal-5 ta' Mejju 2004 (a fol. 13) li bih il-Qorti kif diversament preseduta irriappuntat il-kawza ghas-smiegh;

Rat il-verbal tal-5 ta' Mejju 2006 (a fol. 166) li permezz tieghu il-Qorti kif diversament preseduta halliet il-kawza Sine Die;

Rat id-digriet tal-25 t' Ottubru 2006 (a fol. 167) li bih il-Qorti kif diversament preseduta irriappuntat il-kawza ghas-smiegh;

Rat il-verbal tal-20 t'Ottubru 2008 (a fol. 186) li permezz tieghu il-Qorti kif diversament preseduta halliet il-kawza Sine Die;

Rat id-digriet tat-18 ta' Marzu 2009 (a fol. 190) li bih il-Qorti kif diversament preseduta irriappuntat il-kawza ghas-smiegh;

Rat in-nota t'osservazzjonijiet tal-attur Noel Aquilina tas-19 ta'Jannar 2009 (a fol. 193 et seq.);

Rat in-nota ta' sottomissjonijiet tal-Avukat Generali tas-16 t'Ottubru 2009 (a fol. 204 et seq.);

Rat id-decizjoni tal-Qorti kif diversament preseduta tat-8 t'Ottubru 2010 (a fol. 1001 et seq);

Rat id-digriet tad-9 ta'Dicembru 2012 li bih il-Qorti kif diversament preseduta irriappuntat il-kawza ghas-smiegh (a fol.1);

Rat in-nota ta' sottomissjonijiet ta' Noel Aquilina tad-29 ta' Mejju 2013 (a fol. 84 et seq.);

Rat in-nota ta' sottomissjonijiet tal-Avukat Generali tal-10 t'Ottubru 2013 (a fol. 93 et seq.);

Illi b'digriet tal-S.T.O l-Prim Imhallef Dr. Silvio Camilleri, tat-22 ta' Settembru 2014 din il-kawza giet trasferita quddiem il-Qorti kif predesuta;

Rat id-decizjoni taghha tat-18 ta' Gunju 2015 (a fol. 127);

Rat id-dokumenti u l-atti kollha tal-kawza;

Semghet it-trattazzjoni tal-partijiet;

**Ikkonsidrat**

Mill-provi prodotti jirrizulta illi r-rikorrenti kien tressaq quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali fis-sena 2002 mixli li flimkien ma persuna ohra huwa kien wettaq diversi reati f'Marsaskala. **Din ma kinitx l-ewwel darba li r-rikorrenti kien qed jiffaccja proceduri kriminali.**

Fil-kors tal-imsemmija proceduri penali r-rikorrenti kien naqas li jidher fl-ewwel seduta izda fit-tieni seduta kien ammetta l-akkuzi kollha kif dedotti kontra tieghu, u dana minghajr il-prezenza u l-assistenza l-avukat ta' fiducja tieghu li ghalkemm kien fil-bini tal-Qorti, ma kienx fl-awla meta saru l-proceduri kontra r-rikorrenti. F'kull dehra sussegwentement ir-rikorrenti, ma kienx assistit minn avukat.

Ir-rikorrenti jsostni li l-Qorti, qatt innominat avukat biex jassisti lir-rikorrenti; Li r-rikorrenti qatt ma talab lill-Qorti biex tinnomina avukat tal-Ghajnuna Legali biex tassistih; Li l-Qorti minn naha taghha, qatt ma staqsiet lir-rikorrenti jekk ridtx avukat jew jekk ried jiddefendi lilu nnifsu.

Ghalhekk skond ir-rikorrenti jirrizulta illi fl-istadju tal-proceduri li meta r-rikorrenti ammetta l-imputazzjonijiet u meta nghatat is-sentenza, r-rikorrenti ma kienx assistit minn avukat, ghalkemm ma jistax jigi eskluz li fis-seduta li qabel ma ametta l-akkuzi, r-rikorrenti kien kkonsulta mad-difensur tieghu.

Jirrizulta illi fil-mori tal-proceduri kriminali, *Probation Officer* kien ippresenta l-"pre-sentencing report" li rrakomanda t-terminu ta' prigunerija li dehrlu li kellha tigi imposta fuq ir-rikorrenti. Ir-rikorrenti f'dan l-istadju rega' ma kienx assistit u ebda

avukat ma gie nominat biex jiehu jissalvagwarda l-interessi tieghu. Ebda kontro-ezami ma gie ezegwiet fuq il-*Probation Officer*.

Ir-rikorrenti jsostni li jirrizulta ukoll mill-provi illi ebda trattazzjoni ghan-nom tar-rikorrenti ma saret dwar l-imputazzjonijiet migjuba kontra tieghu jew dwar l-piena.

Mill-atti jirrizulta li r-rikorrenti nstab hati u gie kundannat ghal terminu ta' sentejn prigunerija. Ir-rikorrenti appella minn din is-sentenza.

Ir-rikorrenti sostna li fl-isfond ta' dawn il-fatti, id-dritt tieghu ghas-smiegh xieraq gie lez, u dan ai termini tal- Artikolu 39 tal-Kostituzzjoni ta' Malta u tal-provedimenti relattivi tal-Att Dwar il-Konvenzjoni Ewropea (Kap 319). Illi ghaldaqstant ir-rikorrenti talab ukoll li jigi dikjarat li a kawza tal-istess lezjoni ta' drittijiet fundamentali tieghu, il-proceduri kriminali kienu nulli u bla effett. Ir-rikorrenti talab lill-Qorti taghti dawk l-ordnijiet u direttivi xierqa ghal harsien tad-drittijiet fundamentali tieghu u ghal kumpens xieraq.

Jirrizulta illi r-rikorrenti Aquilina kien interpona Appell mis-sentenza tal-Qorti tal-Magistrati u dan gie deciz fil-25 t'Ottubru 2012, b'konferma tas-sentenza tal-Qorti tal-Magistrati.

L-intimati kienu rtiraw l-eccezzjoni taghhom fis-sens li r-rikorrent ma utilizzax r-rimedji ordinarji moghtija lilu mill-ligi u kwindi l-Qorti mhux ser tiehu aktar konjizzjoni tal-istess sottomissjoni.

L-intimati sostnew li meta tenna l-ammissjoni tieghu ghall-akkuzi dedotti kontra tieghu r-rikorrenti kien assistit minn avukat ta' fiducja tieghu. In segwitu tal-ammissjoni, l-prezenza ta' avukat tar-rikorrenti ma kienitx necessarja ghas-sejbien tal-htija o meno wara il-produzzjoni tas- "sentencing report" kellha tinghata s-sentenza, li d-difensur tieghu ma kellu xejn aktar x'jaghmel, u l-kawza setghet tipprocedi fl-assenza ta' avukat difensur. Di piu' l-intimati jsostnu ukoll li sentenza ta' prigunerija ghal persuna li wettqet zewg reati ma tistax tkun konsidrata bhala severa, anzi li r-rikorrenti ghandu "jghodd ruhu ixxurtjat" bis-sentenza moghtija lilu.

**Ikkonsidrat:**

Illi l-provi li jirrizultaw mill-atti tal-process kriminali juri bic-car li minkejja dak illi jallega r-rikorrenti f'dawn il-proceduri, huwa kien assistit mill-Avukat Dr. F Debono fis-seduta tal-25 ta' Novembru 2002 , f'liema seduta huwa ammetta l-akkuzi kollha dedotti kontra tieghu. Illi di piu' wara li nghata zmien mill-Qorti tal-Magistrati, sabiex jirrikonsidra l-ammissjoni tieghu huwa rega ghazel li jtenni l-istess ammissjoni – Vide fol. 34 ta' dawn il-proceduri u fol 7 tal-proceduri quddiem il-Qorti tal-Magistrati.

Illi minn hemm l-quddiem, huwa car illi r-rikorrenti ma regax kien assistit mill-Avukat tal-ghazla tieghu, fis-seduta li fiha gie prezentat il-*pre sentencing report* ( vide fol. 108) cioe is-seduta tat-3 ta' Marzu 2003 u fis-seduta sussegwenti tad-9 ta' Mejju 2003 meta inghatat is-sentenza.

Din il-Qorti rat u ezaminat ukoll, l-akkuzi li gie bihom mixli r-rikorrenti: cioe' akkuza ta' serq aggravat bil-mezz u bil-valur; akkuza ta' hsara volontarja fuq proprjeta'; akkuza ta' ricettazzjoni; akkuza li kkommetta reat ta' serq waqt perjodu operattiv ta' sentenza ta' sentejn prigunerija sospiza ghal tlett snin; akkuza ta' ksur ta' Probation Order u akkuza ta' ricediva.

Il-Qorti rat u ezaminat il-pieni stabbiliti skond il-ligi ghal kull wahda minn dawn l-akkuzi.

Din il-Qorti rat u ezaminat li ghall-akkuzi dedotti kontra tieghu, r-rikorrenti nghata sentenza ta' sentejn prigunerija effettiva li minnha kellu jitnaqas iz-zmien li ghamel taht arrest preventiv u f'liema sentenza ukoll, il-Qorti rrekomandat lid-Direttur tal-Facilita' Korrettiva li l-imputat jinbaghat programm residenzjali ghal riabilitazzjoni mill-vizzju tad-droga.

Illi r-rikorrenti appella minn din is-sentenza, u l-Qorti Kriminali akkordat is-sentenza taghha fil-25 t'Ottubru 2012 – Vide fol. 74, liema sentenza ikkonfermat pienament is-sentenza tal-Qorti tal-Magistrati.

**Ikkonsidrat:**

Ir-rikorrenti qed jilmenta li gew lezi fil-konfront tieghu d-drittijiet fondamentali tieghu kif sanciti fl-Artikolu 39 tal- Kostituzzjoni ta' Malta u fl-artikolu 6 tal-ewwel skeda tal- Konvenzjoni Ewropea (Kap.319 tal-Ligijiet ta' Malta). Dawn iz-zewg artikoli jipprotegu d-dritt ta' kull cittadin li fi proceduri kriminali jissokta smiegh xieraq u imparzjali cioe' dak li jissejjah "a fair trial." F'dan ir-rigward ir-rikorrenti jsostni li rrispettivament mill-ammissjoni tieghu, fil-proceduri in kwistjoni, kellu jigi mfisser lilu d-drittijiet legali tieghu u kellu ukoll id-dritt li jkun assistit minn Avukat f'kull stadju tal-proceduri. Ir-rikorrenti fl-ebda hin ma ghazel espressament li jiddefendi lilu nnifsu.

Din il-Qorti tqis illi idealment in segwitu tal-ammissjoni tieghu, kien mistenni li r-rikorrenti jkun assistit minn avukat. Dana mhux biss ghaliex kellu jigi ezaminat il-"pre-sentencing report" u l-konkluzzjonijiet raggunti fih izda, izda sabiex jitwettaq trattazzjoni finali mid-difensur tieghu dwar l-imputazzjonijiet u b'modd specjali ghar-rigward il-piena. Din il-Qorti tinnota ukoll li ma jirrizultax li r-rikorrenti gie avzat mill-Qorti tal-Magistrati li huwa seta jaghzel li jigi nominat ghalih avukat tal-ghajnuna legali, jew li seta' jiddefendi lilu nnifsu.

L-Artikolu 6(3) tal-Konvenzjoni Ewropea, li gie citat mir-rikorrenti in sostenn tal-allegazzjonijiet tieghu, specifikament jipprovdi

> ***"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 proved guilty according to law.***

> ***3.Everyone charged with a criminal offence has the following minimum rights:***
>
> ***...***
>
> ***(c)to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;***

Is-sinjifikat ta’ dan l-Artikolu huwa min akkuzat b’offiza kriminali ghandu d-dritt li jiddefendi lilu nnifsu jew li jaghzel id-difensur ta’ fiducja tieghu u jekk m’ghandux il-mezzi tinghatalu assistenza legali b’xejn. L-imsemmi Artikolu huwa mahsub biex jassigura li l-akkuzat jigi difiz effettivament u adegwatament jew billi jaghmel id-difiza tieghu stess jew billi jkollu Avukat difensur biex jassistih. Dan kollu huwa rifless fid-dettami tal-Artikolu 39 tal-Kostituzzjoni ta’ Malta.

Il-Qorti tghaddi biex tezamina l-insenjamenti tal-Qorti Ewropea f’dan ir-rigward, u jekk kemm-il darba d-dritt t’assistenza legali huwa dritt assolut li ma jammettiex limitazzjonijiet.

Fis-sentenza **Ettore Artico vs Italy** App. No 6694/74 deciza fit-**13 ta’Mejju 1980** il-Qorti Ewropeea rriteniet:

> ***“In any event, here the interests of justice did require the provision of effective assistance.”***Vide Ibid para. 34
>
> ***“Admittedly, a State cannot be held responsible for every shortcomingon the part of a lawyer appointed for legal aid purposes but, in the particular circumstances, it was for the competent Italian authorities to take steps to ensure that the applicant enjoyed effectively the right to which they had recognised he was entitled.Two courses were open to the authorities: either to replace Mr. Della Rocca or, if appropriate, to cause him to fulfil his obligations (see***

> ***paragraph 33 above).They chose a third course- remaining passive -, whereas compliance with the Convention called for positive action on their part (see the above-mentioned Aireyjudgment, p. 14, par. 25 in fine).”*** Vide Ibid para. 36

Fis-sentenza **Pakelli vs Germany** deciza fit-**25 t'April 1983** para 31: ***"It is true that Article 6 para. 3 (c) (art. 6-3-c) entitles "everyone charged with a criminal offence" to be defended by counsel of his own choosing."***

Fis-sentenza **Croissant vs Germany** deciza fit-**25 ta'Settembru 1992** gie ritenut:

> ***''Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, <u>this right cannot be considered to be absolute</u>.It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes; indeed, German law contemplates such a course (Article 142 of the Code of Criminal Procedure; see paragraph 20 above).However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.''***(Enfasi ta' din il-Qorti)

**Imbrioscia vs Swizerland** App No. 13972/88 deciza fil-**24 ta' Novembru 1993** gie ritenut:

> ***38.While it confers on everyone charged with a criminal offence the right to "defend himself in person or through legal assistance ...", <u>Article 6 para. 3 (c) (art. 6-3-c) does not specify the manner of exercising this right</u>. It thus leaves to the Contracting States the choice of the means of ensuring that it***

> ***is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see the Quaranta judgment previously cited, Series A no. 205, p. 16, para. 30).In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see the Artico judgment previously cited, Series A no. 37, p. 16, para. 33).*** (Enfasi ta' din il-Qorti) Vide Ibid para 38
>
> ***41.However that may be, the applicant did not at the outset have the necessary legal support, but "a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes" (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 33, para. 65) or chosen by the accused. Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; under <u>Article 6 para. 3 (c) (art. 6-3-c) the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention (ibid.).</u>*** (Enfasi ta' din il-Qorti)Vide Ibid para 41

Fis-sentenza **Lagerblom vs Sweden** deciza mill-Qorti Ewropea fl-**14 ta' Jannar 2003** gie ritenut:

> ***1. It is true that Article 6 § 3 (c) entitles an accused to be defended by counsel "of his own choosing". Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations***

***where free legal aid is concerned. When appointing defence counsel the courts must certainly have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see the Croissant v. Germany judgment cited above, p. 33, § 29).***

***2. Similarly, Article 6 § 3 (c) cannot be interpreted as securing a right to have public defence counsel replaced (see, among other authorities, Östergren v. Sweden, application no. 13572/88, Commission decision of 1 March 1991, Decisions and Reports 69, p. 198, at p. 204, and Erdem v. Germany (dec.), no. 38321/97, 9 December 1999, unreported).***

***3. However, the appointment of defence counsel does not necessarily settle the issue of compliance with the requirements of Article 6 § 3 (c). Although the conduct of the defence is essentially a matter between the accused and his counsel, the competent national authorities are required to intervene if a failure by public defence counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way. Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes (see, among other authorities, the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 33, § 65, and the Daud v. Portugal judgment of 21 April 1998, Reports 1998-II, pp. 749-50, § 38).***

***4. Moreover, there is no evidence in the case that the applicant, before the Swedish courts, claimed that H., for any reason, was unable to provide him with effective legal assistance or that he lacked confidence in H., nor is there any indication of a manifest failure on the part of H. which should have led the courts to intervene of its own motion. "***

> ***""The manner in which article 6(1) and 3(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. <u>In order to determine whether the aim of Article 6 - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case</u>"***
> (Enfasi ta' din il-Qorti)
>
> **Vide Imbroscia vs Switzerland Ibid**

**Ikkonsidrat:**

Mill-assjem ta' fatti fuq prodotti, u kuntrarjament ta' dak allegat mir-rikorrenti, huwa evidenti li r-rikorrenti fil-proceduri quddiem il-Qorti tal-Magistrati kien pienament assistit minn Avukat tal-ghazla tieghu, u ghazel li jammetti ghall-akkuzi dedotti kontra tieghu wara li kien ha l-parir tal-Avukat tieghu, liema ammissjoni saret fil-prezenza tal-istess Avukat tal-ghazla tieghu. Apparti dana kollu, l-Qorti tal-Magistrati akkordat zmien ghal ripensament ta' kif wiegeb ghall-akkuzi. In segwitu ta' dan iz-zmien u dejjem fil-prezenza tal-Avukat tal-ghazla tieghu, r-rikorrenti rega' ghazel li jsostni l-ammissjoni tieghu – Vide fol. 34 ta' dawn l-atti u fol 7 tal-atti quddiem il-Qorti tal-Magistrati.

Fiz-zewg seduti sussegwenti (Vide fol. 107 u 108 ta' dawn l-atti u 78 u 79 tal-atti quddiem il-Qorti tal-Magistrati) li kienet mhejjija sabiex Probation Officer jipprezenta *pre sentencing report* r-rikorrenti ma kienx assistit, ma lmentax dwar in-nuqqas ta' prezenza tal-Avukat tal-ghazla tieghu u ma talbx li jigi nominat Avukat iehor. Minn naha taghha, l-Qorti tal-Magistrati ma jidhirx illi kellha tistaqsi lir-rikorrenti jekk riedtx li jkun assistit b'Avukat iehor imqarr wiehed tal-ghajnuna legali.

Fl-ahhar seduta li fih inghatat is-sentenza (Vide fol. 109 ta' dawn l-atti u 80 tal-atti quddiem il-Qorti tal-Magistrati) ghal darb ohra r-rikorrenti ma kienx assistit mill-Avukat tal-ghazla tieghu, ma talabx ghall-assistenza legali jew ghal nomina t'Avukat iehor. Ghal darb ohra l-Qorti ma dehriliex li kellha tistaqsi lir-rikorrenti riedtx li jigi nominat Avukat difensur iehor ghalih.

Illi apparti li l-Qorti tal-Appell Kriminali affermat pienament u b'retitudni kbira d-decizjoni tal-Qorti tal-Magistrati, din il-Qorti ma tistghax ma tasseriex il-fatt illi l-piena ta' sentejn prigunerija inflitta fuq Aquilina kienet wahda li fil-fatt tirrispekkja **biss wahda** minn sitt akkuzi u cioe' l-akkuza ta' ksur ta' sentenza sospiza li kienet akkordat sentejn ta' prigunerija ghal perjodu ta' tlett snin, minghajr ma gew konsidrati l-pieni, (anke fil-minimu taghhom) tal-hames akkuzi ohra dedotti kontra tieghu.

In effett, legalment, il-Qorti tal-Magistrati, rinfaccjata bi ksur ta' Probation Order, bi ksur ta' sentenza sospiza, ma setghetx tikkonsidera piena altru minn wahda kalcerarja fil-minimu ta' sentejn.

Illi fid-dawl ta' dana kollu, u applikati l-linji gwida tal-gurisprudenza tal-Qorti Ewropea fuq citati, l-Qorti hija tal-fehma li minkejja li f'dinja ideali kien ikun siewi li l-Qorti tal-Magistrati talbet lir-rikorrenti jekk riedx l-assistenza t' Avukat iehor, din il-Qorti taghraf illi l-Istat ma jistghax jinzamm responsabbli ghal kwalunkwe nuqqas tal-Avukat tal-ghazla tar-rikorrenti, aktar u aktar meta dan l-Avukat ma kienx wiehed nominat permezz tas-sistema t'assistenza legali.

Lanqas ma kienu jikkombacaw ic-cirkostanzi fil-kaz in ezami fejn kien jinkombi lil Qorti tinnomina Avukat tal-ghajnuna legali biex jassisti lir-rikorrenti.

Dan qieghed jinghad 'l ghaliex Noel Aquilina ma kienx finanzjarjament kandidat ghal legal aid, u lanqas talab meta ma tfaccax l-Avukat tieghu li jigi assistit minn Avukat iehor, jew talab ghal differiment sabiex ikun jista' jingagga Avukat iehor.

Madanakollu illi kien ikun f'waqtu li l-Qorti tal-Magistrati tistaqsi lir-rikorrenti jekk riedtx Avukat iehor.

Pero, fl-isfond ta' dawn il-fatturi kollha u mifhum li legalment, ir-rikorrenti ma setghax jinghata piena aktar lieta minn sentejn prigunerija effettiva, u mifhum illi d-dritt ta' smiegh xieraq irid jigi evalwat wara analizi tal-interita' tal-proceduri domestici, u maghmul tali analizi, din il-Qorti ma taghraf kif, r-rikorrenti jista' jsostni li d-dritt ta' smiegh xieraq tieghu gie lez.

Ghal dawn il-mottivi l-Qorti taqta' u tiddeciedi billi tastieni mill-tiehu konjizzjoni ulterjuri tal-ewwel eccezzjoni tal-intimati in vista tar-rinunzja tal-istess fil-mori tal-kawza; tilqa' l-eccezzjonijiet l-ohra tal-intimati; tichad it-talba tar-rikorrenti u tiddikjara li d-drittijiet fundamentali tar-rikorrenti Aquilina ma gewx lezi u miksura waqt il-proceduri fl-ismijiet "Il-Puluzija (Spettur C. Magri) vs Noel Aquilina" (Awla 7) li gew decizi fid-9 ta' Mejju 2003 ai termini tal-Artikolu 39 tal-Kostituzzjonali ta' Malta u l-Att dwar il-Konvenzjoni Ewropea (Kap 319).

Fl-isfond tac-cirkostanzi tal-kaz il-Qorti tqis li jkun gust u ghaqli li l-ispejjez jibqghu bla taxxa bejn il-partijiet.

**Moqrija.**

**Mhallef Jacqueline Padovani Grima LL.D. LL.M. (IMLI)**

**Lorraine Dalli**
**Deputat Registratur**