QORTI CIVILI
PRIM' AWLA
SEDE KOSTITUZZJONALI

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

Seduta ta' Nhar il-Hamis 14 ta' Jannar 2016

Rikors Numru : 74/2014 JPG
Kawza Numru : 2

Malcolm Said

VS

Avukat Generali
Kummissarju tal-Pulizija

Il-Qorti ,

Rat ir-rikors ta' Malcolm Said detentur tal-karta tal-identita 297679(M) tal-31 t'Ottubru 2014, (a fol.1 et seq) li jaqra hekk:

"Illi l-esponenti beda ghaddej proceduri kriminali quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali nhar is-sittax (16) ta' Settembru tas-sena elfejn u tlettax (2013) fl-ismijiet ***Il-Pulizija vs. Malcolm Said*** *dwar allegat reat ta' pussess ta' kokajina u dan bi ksur tar-regoli tal-1939 dwar il-kontroll intern tad-drogi Perikoluzi (GN. 292/1939) kif sussegwentement emendati u bi ksur tal-Ordinanza dwar il-Medicini Perikoluzi Kup 101 tat-Ligijiet ta' Malta, liema reati allegatament sehhew kwazi hames snin qabel u cioe' matul ix-xahar ta' Awwissu tas-sena elfejn u tmienja (2008) u fix-xhnr ta' qabel;*

Illi l-esponenti rrilaxxa stqarrija datata tlieta (3) ta' Awwissu tas-sena elfejn u tmienja (2008) fejn ammetta illi gieli abbuza mid-droga kokaina, liema stqarrija inghatat mill-esponenti minghajr ma kellu assistenza legali peress illi l-ligi dak iz-zmien ma kienetx tipprovdi ghad-dritt tal-assistenza legali lill-arrestat f'ebda hin tal-arrest, qabel jew matul l-interrogazzjoni.

1.) Dritt tal-Assistenza Legali

Peress illi l-Ligi fiz-zmien illi fih l-esponent gie arrestat u investigat ma kienetx tipprovdi ghad-dritt tal-assistenza legali lill-arrestat f'ebda hin tal-arrest, qabel jew matul l-interrogazzjoni kif ukoll ma kienetx tippermetti li l-persuna investigata access tal-file tal-Pulizija u dan jikkostitwixxi ksur tad-dritt fundamentali tal-esponent ghal smiegh xieraq ai termini tal-Artikolu 39 tal-Kostituzzjoni ta' Malta u Artiktu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem;

Illi l-eskluzjoni totali ta' avukat tal-fiducja tal-esponent mill-istadju tal-investigazzjoni, partikolarment waqt it-tehid tal-istqarrija huwa leziv tad-drittijijet fundamentali tieghu ghall-smiegh xieraq u hija ta' pregudizzju kbir ghall esponenti;

Illi d-dritt tal-assistenza legali ghall-persuni suspettati waqt l-investigazzjoni, bhala aspett tad-dritt fundamentali ghal smiegh xieraq ai termini tal-Artikolu 39 tal-Kostituzzjoni u Artikolu 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem gie stabbilit permezz ta' gurisprudenza kopjuza u kostanti tal-Qorti Ewropea tad-drittijiet fundamentali tal-bniedem liema dirtt gie ritenut illi jigi miksur anke jekk il-persuna suspettata u investigata tibqa' siekta tul il-kors kollu tal-arrest taghha;

Illi fil-fatt il-Qorti Ewropea tad-Drittijiet tal-Bniedem fll-kaz ***Dayanan v. Turkey (13.10.2009 (II))*** *irriteniet is-segwenti;*

> *"As emerges from the generally recognized international norms, which Court accepts and which complement its case-law, a suspect must afforded assistance by a lawyer as soon as he has been deprived of liberty, whether or not he is to undergo interrogations.*

> ...
>
> *The principle of fair trial requires that a* ***suspect be afforded the vast range of interventions that are inherent to legal advice. In this respect, the discussion of the case, the organization of the defence, the search for favourable evidence, preparation for interrogations, support of the suspect in distress and control of the conditions of detention are essential elements of the defence which the lawyer must be free to perform****. (§32,private translation; emphasis added)*
>
> ...
>
> *In the instant case it is not disputed that the applicant was not assisted by a lawyer when he was in custody, as such assistance was not allowed by the law in force at the relevant time. In itself, such a systematic restriction based on relevant statutory provisions warrants the conclusion that the requirements of Article 6 have not been met, irrespective of the fact that the applicant remained silent throughout his custody." (§ 33, non-official translation;)*

Illi inoltre il-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-sentenza ***Pischalnikov v. Russia*** *deciza fl-erbgha u ghoxrin (24) ta' Settembru tas-sena elfejn u, disgha (2009) spjegat fid-dettal il-funzjonijiet varji u teknici tal-avukat fl-istadju tal-investigazzjoni:*

> *"Having been denied legal assistance, the applicant was unable to make the correct assessment of the consequences his decision to confess would have on the outcome of the criminal case ...* ***In the absence of assistance by counsel. who could have provided legal advice and technical skills. the applicant could not make full and knowledgeable use of his rights afforded by the criminal procedural law.."***

Illi ghaldaqstant jirizulta car u inekwivoku mill-gurisprudenza kopiuza u kostanti tal-Qorti Ewropea tad-Drittijiet tal-Bniedem illi tali ksur jissussisti awtomatikament mccahda tal-access tal-assistenza legali lill-persuna suspettata u dan indipendentement mic-cirkostanzi, karattru, antecedenti, vulnerabbilita' o meno, tal-persuna investigata

(Salduz vs Turkey; Brusco vs. France, Panovits vs. Cyprus, Pischalnikov vs Russia, Dayanan vs Turkey, Plonka vs. Poland, Pavlenko vs. Russia). Illi di piu l-vulnerabbilita tal-persuna interrogata taggrava ulterjorment tali ksur.

Illi f'Malta l-Qorti Kostituzzjonali wkoll sabet ksur tad-dritt fundamentali ta' smigh xieraq fis-sentenzi ***Pulizija vs Alvin Privitera*** *u* ***Pulizija vs. Esron Pullicino****.*

Illi dwar ir-rimedju mitlub minnu, l-esponenti jaghmel referenza inter alia ghad-decizjoni tal-Qorti Ewropeja fl-ismijiet ***Panovits vs Cipru****. deciza fil-11 ta' Dicembru, 2008, fejn il-Qorti qalet:*

> *'It reiterates that when an applicant has been convicted despite an infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position that he would have been in, had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial de novo or the reopening of the proceedings.'*

2) Dewmien

Illi inoltre l-esponent fic-cirkostanzi sofra ksur tad-dritt tieghu ghall-smiegh xieraq fi zmien ragonevoli ai termini tal-Artikolu 39 tal-Kostituzzjoni u Artikolu 5 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem peress illi huwa gie mressaq il-Qorti nhar is-sittax (16) ta' Settembru tas-sena elfejn u tlettax (2013) permezz ta' att ta' citazzjoni registrat fil-Qorti nhar il-hamsa u ghoxrin (25) ta' Lulju tas-sena elfejn u tlettax (2013) u dan dwar fatti li allegatament sehhew circa hames (5) snin qabel u cioe' matul ix-xahar ta' Awwissu tas-sena elfejn u tmienja (2008) u fix-xhur ta' qabel;

Illi di fatti fis-sentenza fl-ismijiet ***Foti and others vs. Italy*** *gie ritenut:*

> *'In criminal matters, in order to assess whether the "reasonable time" requirement contained in Article 6 § 1 (art. 6-1) has been complied with, one must begin by ascertaining from which moment the person was "charged"; this may have occurred on a date prior to the case coming before the trial court (see, for example, the above-mentioned Deweer judgment, Series A no. 35,p.22, § 42),*

> *such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened (see the Wemhoff judgment of 27 June1968, Series A no. 7,pp. 26-27, § 19, the Neumeister judgment of the same date, Series A no. 8, p.47, S 18, and the above-mentioned Ringeisen judgment, Series A no. 13, p.45, S 110). Whilst "charge", for the purposes of Article 5 § 1 (art. 6-7), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (see, inter alia, the Eckle judgment of 15 July 1982, Series A no. 51, p.33, § 73).'*

Illi ghalhekk id-dritt fundamentali ta' l-individwu li jkollu l-kawza tieghu mibdija u finalizzata fi zmien ragonevoli, huwa dritt li jimponi tassattivament fuq l-iStat. Il-Qorti Ewropeja tad-Drittijiet tal-Bniedem dejjem ghallmet li l-Artikolu 6 tal-Konvenzjoni:

> *[I]mposes on the Contracting States the duty to organise their juridical system in such a way that the Courts can meet the requirements of this provision (Salesi vs. Italy). It wishes to reaffirm the importance of administering justice without delays which might prejudice its effectiveness and credibility (Katte Klitsche de la Grange vs. Italy.)*

Barra minn hekk l-esponenti jaghmel referenza ghas-sentenza fl-ismijiet ***Stogmuller vs. Austria (EHRR 1969)*** *fejn intqal illi l-process kriminali huwa:*

> *'Designed to avoid that a person charged should remain too long in a state of uncertainty about his faith.'*

Illi fil-kaz odjern dan id-dewmien jilledi id-drittijiet fundamentali tal-bniedem hekk kif sancit fl-artikolu 39 tal-Kostituzzjoni u fl-Artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem peress li tul dan il-perjodu, l-esponenti kien fi stat ta' incertezza dwar is-sitwazzjoni tieghu.

Ghaldaqstant l-esponent jitlob reverentement lil dina l-Onorabbli Qorti joghgobha :

1. *Tiddikjara illi minhabba c-cahda tal-assistenza legali waqt l-arrest u dewmien gew lezi d-drittijiet tal-esponenti ghal smigh xieraq kif sanciti fl-artikolu 39 tal-Kostituzzjoni ta' Malta u fl-Artikolu 6 tal-Konvenzjoni Ewropea tad- Drittijiet tal-Bniedem;*

2. *Takkorda dawk ir-rimedji effettivi u xierqa fic-cirkostanzi;"*

Rat id-digriet taghha tat-3 ta' Novembru 2014 illi bih appuntat ir-rikors ghas-smiegh ghall-udjenza tal-24 ta' Novembru 2014 fil-11:30am;

Rat illi l-atti tar-rikors, digriet u l-avviz tas-smiegh gew debitament notifikati lill-intimat skond il-ligi;

Rat ir-risposta tal-Avukat Generali tal-21 ta' Novembru 2014 (a fol. 7 et seq), li taqra hekk:

1. *"Illi l-ilment tar-rikorrent huwa li kien hemm ksur tad-drittijiet fundamentali tieghu minhabba li kemm qabel u kif ukoll waqt l-interrogazzjoni huwa ma inghatax id-dritt ghall-assistenza legali, gie imcahhad mill-access ghal-file tal-pulizija li jikkoncerna l-kaz u minhabba dewmien irragjonevoli tal-kawza tieghu.*

2. *Illi d-dritt moghti miil-artikolu 6 tal-Konvenzjoni u mill-artikolu 39 tal-Kostituzzjoni huwa d-dritt ghal smigh xieraq u mhux id-dritt ghal-ghajnuna ta' avukat qabel jew waqt illi tittiehed stqarrija. Dan ifisser, li jekk in-nuqqas ta' konsultazzjoni ma' avukat fil-mument tat-tehid tal-istqarrija ma gabet l-ebda pregudizzju serju ghall-akkuzat fl-ezitu tal-proceduri kriminali allura dan tal-ahhar ma jkollu l-ebda ragun li jinvoka ksur tas- smigh xieraq abbazi ta' dan in-nuqqas.*

3. *Il-jedd ghal smigh xieraq ma jinghatax biex min hu hati jahrab il-konsegwenzi ta' ghemilu minhabba xi formalita' nieqsa minn konsegwenzi gravi u reali* ***(ara Joseph Bugeja vs. Avukat Generali, Qorti Kostituzzjonali, 14 ta' Jannar 2013).***

Biex in-nuqqas ta' assistenza legali jista' potenzjalment iwassal ghal ksur ta' smigh xieraq irid jigi muri b'mod sodisfacenti li minhabba dak in-nuqqas inholoq perikolu illi r-rikorrenti nstab hati meta ma kellhux jistab hati. Jekk in-nuqqas ta' konsultazzjoni ma' avukat fil-mument tat-tehid tal-istqarrija ma gabet l-ebda pregudizzju serju ghall-akkuat fl-ezitu tal-proceduri kriminali allura dan tal-ahhar ma jkollu l-ebda ragun jinvoka ksur tal-jedd ta' smigh xieraq abbazi ta' dan in-nuqqas. Marbut ma' dan, id-dritt tas-smigh xieraq irid jigi kkunsidrat fil-kuntest tat-totalita' tal-proceduri kollha u mhux fir-rigward ta' xi moment specifiku.

4. *Il-jedd ghal parir ta' avukat huwa intiz biex jitharsu persuni illi minhabba sitwazzjoni partikolari ta' vulnerabilita', djghufija jew biza', jaghmlu stqarrijiet li bis-sahha taghhom jinsabu hatja meta fis-sewwa hatja ma humiex. L-ghajnuna ta' avukat f'sitwazzjonijiet bhal dawn isservi biex teghleb dik il-vulnerabilita' u biex taghti garanzija kontra kull abbuz fit-tehid tal-istqarrija* ***(ara Il-Pulizija vs. Tyrone Fenech, Qorti Kostituzzjonali, 22 ta' Frar 2013****).*

5. *Illi fil- kaz in dizamina ir-rikorrenti kien gie interrogat mill-pulizija f'ambitu ta' investigazzjoni li wasslet lil pulizija tarresta u tinterroga numru ta' persuni in konnessjoni ma' reati ta' traffikar u pussess ta' droga kokajina. Ir-rikorrenti irrilaxxa l-istqarrija tieghu, wara li gie imwissi skond il-ligi, nhar it- 3 ta'Awwissu 2008 fejn spjega il-modus operandi ta' kif hu kien jixtri d-droga kokajina minghand certu Andre Francois Buhagiar. Sussegwentement fis-15 ta' Settembru 2013 huwa gie akkuzat quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali li ikkometta r-reat ta' pussess ta' droga kokaina bi ksur tal- Kap. 101 tal-Ligijiet ta' Malta.*

6. ***Illi ghalkemm huwa minnu li l-istqarrija ittiehdet minghajr assistenza legali, tajjeb li wiehed isemmi u jenfasizzali dan in-nuqqas gie eventwalment newtralizzat peress li r-rikorrenti minn jeddu ikkonferma l-istqarrija bil-gurament quddiem il-Magistrat tal-Ghassa Dr. Doreen Clarke****. Barra minn hekk ir-rikorrenti rega' ikkonferma l-kontenut tal-istqarrija fil-proceduri kriminali fil-kawza* ***Il-Pulizija vs. Andre Francois Buhagiar*** *quddiem il-Qorti tal-Magistrati (bhala Qorti Istruttorja). Imkien ma huwa imnizzel la fil-Kostituzzjoni u lanqas fil-Konvenzjoni Ewropea li l-interessi ta' persuna*

arrestata u interrogata huma mharsa biss u unikament bil-prezenza tal-avukat qabel u/jew waqt l-interogazzjoni tal-pulizija. Fil-gurisprudenza nostrana gie affermat li meta persuna tikkonferrna l-istqarrija ***bil-gurament u fil-presenza tal-Magistrat Inkwirenti*** *dan ikun ifisser li inghatawlha l-garanziji kollha skond il-ligi biex id-drittijiet taghha jkunu mharsa minn kull forma ta' abbuz* ***(qed terga issir referenza ghal dak deciz mill-Qorti Kostituzzjonali fis-sentenza fuq citata Il-Pulizija vs. Tyrone Fenech).***

Ghalhekk dan l-ilment imressaq mir-rikorrenti ghandu jigi michud minn din l-Onorabbli Qorti.

7. *Illi minghjar pregudizzju ghas-suespost, dwar l-ilment li r-rikorrent ma nghatax access ghall-file tal-pulizija dan huwa assolutament minghajr ebda fundament guridiku jekk mhux ukoll fieragh. Dan minhabba li ma jezisti l-ebda dritt taht il-Konvenzjoni Ewropeja jew taht l-Kostituzzjoni li akkuzat ghandu access ghall-file tal-pulizija. L-akkuzat jigi pprocessat u ggudikat fuq l-evidenza li titressaq il-Qorti u mhux fuq dak li jkun hemm fil-file tal-pulizija. Jigi b'hekk li anki dan l-ilment ghandi jigi michud.*

8. *Illi minghajr hsara ghal fuq espost, ilment l-iehor tar-rikorenti huwa dwar dewmien. Jidher li l-argument tar-rikorrent mhuwiex li qed ikun hemm dewmien fil-kawza* ***Il-Pulizija (Spettur Robert Vella) vs. Malcolm Said*** *izda dewmien fis-sens li l-fatti tal-kaz graw fis- sena 2008 izda il-pulzija mexxew kontrih biss fis-16 ta' Settembru 2008. Anki hawn hekk l-esponent huwa tal-umli fehma li dan l-ilment huwa fallacci ghall-ahhar. Dan qed jinghad ghaliex hija fid-diskrezzjoni assoluta tal-pulizija ezekuttiva li jiddeciedu z-zmien meta persuna ghandha titressaq il-Qorti dment ovvjament li jitharsu r-regoli li jirrigwardaw il-preskrizzjoni ta' reat. Ir-rikorrent mhux qed jallega li r-reat in kwistjoni huwa preskritt allura dan ifisser li l-pulzija kellhom kull dritt iressqu lir-rikorrenti f'dik id-data partiklari u anzi jigi sottomess li huma imxew korretement mal-ligi u skond il-parametri permessi mil-ligi. Jigi b'hekk li anki dan l-ilment ghandu jigi michud.*

9. *Salv eccezzjonijiet ulterjuri.*

10. *Ghaldaqstant fid-dawl tas-suespost l-esponent umilment jitlob lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrenti bl-ispejjez kontra tieghu"*

Semghet ix-xhieda bil-gurament;

Rat in-nota t'osservazzjonijiet ta' Malcolm Said tal-20 ta' Lulju 2015 (a fol. 41 et seq.);

Rat in-nota ta'sottomissjonijiet tas-17 t'Awwissu 2015 tal-Avukat Generali u tal-Kummissarju tal-Pulizija (a fol. 55 et seq.);

Rat id–dokumenti u l-atti kollha ezebiti;

Rat il-verbal tal-21 t'Ottubru 2015 (a fol. 64) li fih l-Avukati difensuri strahu fuq in-nota t'osservazzjonijiet rispettivi u ma kellhomx xi jziedu fi trattazzjoni;

Ikkonsidrat:

<u>Assistenza Legali</u>

Illi l-Qorti tibda billi tirrileva illi a kuntrarju ta' dak sottomess mill-intimati fin-nota ta' sottomissjonijiet taghhom fis-sens illi jezisti dritt ghal smiegh xieraq izda mhux ghal assistenza legali, **d-dritt ghall-assistenza legali huwa wiehed mill-garanziji minimi ta' smiegh xieraq,** u d-dritt ghal tali assistenza johrog **b'mod car u esplicitu mill-Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6(3)(c) tal-Konvenzjoni Ewropeja**. Dan id-dritt ghall-assistenza legali fi proceduri kriminali huwa rikonoxxut u protett fil-maggior parti tal-pajjizi fil-komunita internazzjonali u huwa sancit f'kull strument internazzjonali ta' drittijiet umani, inter alia, l-Konvenzjoni Ewropeja ghad-Drittijiet Umani, il-Konvenzjoni Inter-Amerikana ghad-Drittijiet Umani, il-Konvenzjoni Afrikana ghad-Drittijiet Umani u tal-Popli u l-Konvenzjoni Internazzjonali tad-Drittijiet Civili u Politici, fejn id-dritt tal-**assistenza legali huwa meqjus bhala element essenzjali tad-**

dritt ta' smiegh xieraq.[1] Anke skont l-Artikolu 1 tal-United Nations Resolution on Basic Principles on the Role of Lawyers, 'all persons are entitled to receive legal assistance of a lawyer of their choice in order to protect and establish their rights and to defend them in all stages of criminal proceedings.' Ghalhekk huwa insostenibbli l-argument tal-Avukat Generali illi ma jezistix dritt ghal assistenza legali, tant illi l-Artikolu 6 (3) (c) tal-Konvenzjoni jghid b'mod espress illi:-

> *Everyone charged with a criminal offence has the following **<u>minimum rights:</u>***
>
> *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.*

Permezz ta' zviluppi fil-gurisprudenza tal-Qorti Ewropeja dwar id-Drittijiet Umani rigward id-dritt ghall-assistenza legali qabel l-interogazzjoni ta' suspettat, gie rikonoxxut illi individwu ghandhu dritt illi jikkonsulta ma' avukat **qabel** ma' jigi interrogat mill-pulizija. Fis-sentenza moghtija fil-kaz ta'Salduz, il-Qorti ta' Strasbourg irriteniet illi: '

> ***[t]he rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.'***[2]

Din il-Qorti hija konxja tal-fatt illi l-gurisprudenza tal-Qorti Ewropeja dwar id-Drittijiet Umani tghid illi f'dawn it-tip ta' kazijiet m'hemmx bzonn li jsir ezami tal-proceduri fl-intier taghhom **jekk jirrizulta li kien hemm restrizzjoni sistematika ghad-dritt tal-assistenza legali,**[3] kif citati mir-rikorrenti fin-nota ta' sottomissjonijiet tieghu. Pero il-posizzjoni li dejjem hadu il-Qrati nostrana kienet illi sabiex persuna tirnexxi f'din i-tip

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1Vide inter alia, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, The African Commission on Human and People's Rights.

2**Salduz v. Turkey**, ECHR Grand Chamber, Applikazzjoni Numru 36391/02, deciza fis-27 ta' Novembru 2008 §55.

3**Dayanan v. Turkey**, ECHR Applikazzjoni Numru 7377/03, deciza fit-13 ta' Ottubru 2009 §33; **Pavlenko v. Russia**, ECHR, Applikazzjoni Numru 42371/02, deciza fl-1 ta' April 2010 §118; Pischalnikov v. Russia, ECHR 7025/04 deciza fl-24 ta' Settembru 2009.

ta' azzjoni trid tipprova illi kienet taht l-eta, jew ghal xi raguni ohra, kienet persuna vulnerabbli, jew li giet b'xi mod mhedda jew imgieghla taghti l-istqarrija u li l-gudikant kellu jezamina l-proceduri f'intirita' taghhom. Ir-rikorrenti naqas milli jipproduci provi ta' xi vulnerabilita' u pproduca biss kopja tal-istqarrija u l-inkartament tal-proceduri kriminali.

Imkien fix-xhieda kontenuta fl-atti tal-proceduri kriminali annessi, ma jirizulta li r-rikorrent kien persuna vulnerabbli, jew li kien taht l-eta. Lanqas ma jirrizulta illi r-rikorrent ghamel xi lment dwar il-volontarjeta' o meno tal-isqarrijiet tieghu jew li tefa' xi dell li dawn ittiehdu permezz ta' theddid, pressjoni mhux flokha jew weghdi ta' vantaggi. Lanqas ma ghamel xi lment fis-sens li ma giex moghti t-twissija li ghandu d-dritt ma jwiegibx ghal domandi li jistghu jinkrimnawh, u li dak li se jghid jista' jingieb bhala prova kontra tieghu.

Illi l-gurisprudenza l-aktar ricenti tal-Qorti Ewropea **pero'**, f'sentenza li giet pronunzjata ftit tal-granet ilu , cioe' fit-12 ta' Jannar 2016 fl-ismijiet **Mario Borg vs Malta** ECHR App No: 37537/13 irriteniet:

> ***"(i) General principles***
>
> ***56. Early access to a lawyer is one of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see Salduz v. Turkey [GC], no. 36391/02, § 54, ECHR 2008).***
>
> ***57. The Court reiterates that in order for the right to a fair trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless***

it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see Salduz, cited above, § 55).

58. Denying the applicant access to a lawyer because this was provided for on a systematic basis by the relevant legal provisions already falls short of the requirements of Article 6 (ibid., § 56).

(ii) Application to the present case

59. The Court observes that the post-Salduz case-law referred to by the Government (paragraph 53 in fine) does not concern situations where the lack of legal assistance at the pre-trial stage stemmed either from a lack of legal provisions allowing for such assistance or from an explicit ban in domestic law.

60. The Court notes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, Salduz, cited above, § 56; Navone and Others v. Monaco, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013; Brusco v. France, no. 1466/07, § 54, 14 October 2010; and Stojkovic v. France and Belgium, no. 25303/08, §§ 51-57, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory

provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, Dayanan v. Turkey, no. 7377/03 §§ 31-33, 13 October 2009; Yeşilkaya v. Turkey, no. 59780/00, 8 December 2009; and Fazli Kaya v. Turkey, no. 24820/05, 17 September 2013).

61. In respect of the present case, the Court observes that no reliance can be placed on the assertion that the applicant had been reminded of his right to remain silent (see Salduz, cited above, § 59); indeed, it is not disputed that the applicant did not waive the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in domestic law. In this connection, the Court notes that the Government have not contested that there existed a general ban in the domestic system on all accused persons seeking the assistance of a lawyer at the pre-trial stage (in the Maltese context, the stage before arraignment).

62. It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see Salduz, cited above, §§ 52, 55 and 56).

63. There has accordingly been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention."

Applikat dan l-insenjament ghal kaz in ezami, u fin-nuqqas ta' provi dwar xi ragunijiet impellanti ghar-ristrezzjoni ta' dritt t'assistenza t'avukat, din il-Qorti tqis illi r-rikorrenti soffra lezju tad-dritt tieghu ghas-smiegh xieraq in vista tal-fatt li ma kienx assistit minn avukat qabel ma rrelaxxa l-istqarrija tieghu. Il-Qorti tqis ukoll li ghandha tapplika l-

istess ammont ta' Danni li akkordat fil-lodo taghha il-Qorti Ewropea fil-kaz fuq citat u cioe elfejn u hames mitt Ewro (€2,500).

Il-Qorti hadet nota ukoll tal-konkluzjoni u censura kontenuta fil-*Concurring and Dissenting Opinion* tal-Imhallef tal-Qorti Ewropea Pinto de Albuquerque , li tinsab a fol. 43 tas-sentenza **Borg vs Malta** Ibid.

<u>Dewmien</u>

Ir-rikorrent qieghed jilmenta illi gie miksur il-jedd tieghu ghal zmien ragonevoli peress illi huwa gie interrogat mill-pulizija fit-3 ta' Awwissu 2008, u fl-2014, cioe meta gew intavolati dawn il-proceduri, huwa kien ghadu ghaddej minn proceduri kriminali peress illi huwa kien finalment tressaq quddiem il-Qorti tal-Magistrat bhala Qorti ta' Gudikatura Kriminali fis-16 ta' Settembru 2013. L-intimati minn naha taghhom jikkontendu illi dan l-ilment huwa monk, jekk mhux fieragh u vessatorju, ghaliex meta persuna tigi nterrogata mill-pulizija jkunu ghadhom ma bdewx il-proceduri gudizzjarji u ghalhekk l-ilment tad-dewmien mhux applikabbli f'dawn ic-cirkostanzi.

Illi l-ewwel punt krucjali li ghandha tiddetermina din il-Qorti ghalhekk huwa ghar-rigward t'idenfikazzjoni **tal-perjodu relevanti** li ghandu jittiehed in konsiderazzjoni sabiex jigi stabbilit jekk kienx hemm ksur tad-dritt ghal smiegh xieraq fiz-zmien ragonevoli.

Fl-ambitu ta' proceduri kriminali, l-Artikolu 6 jiggarantixxi id-dritt ghal smiegh xieraq fi zmien ragonevoli ***'in the determination of a charge***.' Peress illi l-Artikolu 6 jipprezupponi l-ezistenza ta' 'charge' jew 'akkuza', il-perjodu li ghandu jittiehed in konsiderazzjoni jibda dik il-gurnata minn meta persuna tigi 'charged' jew 'akkuzata.'[4]

Pero, it-terminu 'charge' jew 'akkuza' jigi interpretat b'mod awtonomu, u cioe mhux neccessarjament skond kif inhu interpretat mill-ligi penali, izda l-interpretazzjoni ta'

4 **Neumeister v. Austria**, ECHR 1936/63 deciza fis-27 ta' Gunju 1968 par. 18; **Eckle v. Germany**, ECHR 8130/78 deciza fil-15 July 1982 par. 73.

'charge' jew 'akkuza' trid issir fil-kuntest u ghall-iskop tal-Konvenzjoni.[5] Il-Qorti Ewropeja dwar id-Drittijiet Umani irrilevat illi:

> *"the prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a substantive rather than a formal conception of the charge contemplated by article 6 para 1."*[6]

Fis-sentenza **Deewer v. Belgium**, il-Qorti Ewropeja dwar id-Drittijiet Umani ghalhekk irriteniet illi d-definizzjoni tal-kelma 'charge' ghal fini tal-Artikolu 6 hija ***"an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."***[7] F'din is-sentenza il-Qorti hadet in konsiderazzjoni l-fatt illi l-Kommissjoni applikat test simili f'diversi decizjonijiet u opinjonijiet u cioe **"*whether the situation of the [suspect] has been substantially affected*."**[8]

Fil-gurisprudenza sussegwenti taghha, l-Qorti Ewropeja ghad-Drittijiet Umani wessghat din id-definizjoni billi nehhiet ir-rekwizit tan-notifika ufficjali rigward l-allegazzjoni ta' kommissjoni ta' reat. Fis-sentenza **Foti and others v. Italy**, il-Qorti Ewropeja ghad-Drittijiet Umani kienet tal-fehma illi 'charge' jew 'akkuza' ***"may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect."***[9]

A bazi ta' dan ikkonkludiet illi l-perjodu li ghandu jittiehed in konsiderazzjoni f'kawzi bhal dawn jista' jigi meqjus illi jkun beda meta:

- **Issir tfittxija fid-dar tar-rikorrent;**[10]
- **Meta r-rikorrent jigi maghrraf mill-pulizija bl-akkuzi kontra tieghu;**[11]
- **Meta jigi arrestat,**[12]

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5 **Adolf v. Austria**, ECHR8269/78 deciza fis-26 ta' Marzu 1982 par. 30; **Deewer v. Belgium**, ECHR 6903/75 deciza fis-27 ta' Frar 1980 par.42.
6 **Deewer v. Belgium**, ECHR 6903/75 deciza fis-27 ta' Frar 1980 par. 44; **Adolf v. Austria** ECHR8269/78 deciza fis-26 ta' Marzu 1982 par. 30.
7 **Deewer v. Belgium**, ECHR 6903/75 deciza fis-27 ta' Frar 1980 par. 46.
8 Idem.
9 **Foti and others v. Italy**, ECHR 7604/76 deciza fl-10 ta' Dicembru 1982.
10 **Ommer v. Germany**, ECHR 26073/03 (judgement no. 2 ta' 13 ta' Novembru 2008) par. 69.
11 **Ommer v. Germany**, ECHR 10597/03 (judgement no. 1 ta' 13 ta' Novembru 2008) par. 54.

- **Meta bdiet l-investigazzjoni preliminari;**[13]
- **Meta l-pulizija tissottometti rikjesta biex tigi mnehhija l-immunita tar-rikorrent;**[14] **jew**
- **Meta l-awtoritajiet tat-taxxa jabbozzaw audit report li jkun jinkludi obbligazzjoni biex jithallsu tax surcharges.**[15]

Il-posizzjoni kostanti tal-Qorti Ewropeja ghad-Drittijiet Umani ghal ghexieren ta' snin f'dan ir-rigward hija illi:

> ***[w]hilst "charge", for the purposes of Article 6 § 1 (art. 6-1), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (see, inter alia, the Eckle judgment of 15 July 1982, Series A no. 51, p. 33, § 73).***[16]

Huwa ghal kollox insostenibbli ukoll l-argument tal-intimati illi l-pulizija ghandha diskrezzjoni assoluta biex tiddeciedi **meta** tressaq persuna quddiem il-Qorti. Dan it-tip ta' argument ma jaghmel gieh lil hadd. Id-diskrezzjoni tal-pulizija ma tista' qatt tkun assoluta, ghaliex din id-diskrezzjoni tista' tkun ezercitata biss fil-limiti tal-ligi u tar-ragonevolezza. Zgur illi m'hemmx bzonn jigi mfakkar illi d-dritt ghal smiegh xieraq fi zmien ragonevoli huwa protett espressament mill-ligi, anzi mill-oghla ligi tal-pajjiz, u cioe il-Kostituzzjoni ta' Malta. Sakemm l-intimati m'humiex qieghdin jargumentaw illi l-Pulizija ghandha setgha aktar mill-Kostituzzjoni, zgur ma jistax iregi argument illi l-Pulizija m'ghandha l-ebda obbligu li tizgura illi tressaq il-Qorti lil dak li jkun fi zmien ragonevoli wara li jigi nterrogat, u mhux thallieh imdendel ghal snin shah, jahseb u jinkwieta fuq x'ser ikun l-ezitu tal-interogazzjoni tieghu.

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12 **Wenhoff v. Germany**, ECHR 2122/64 deciza fis-27 ta' Gunju 1968 par. 19; Cevicovic v. Germany, ECHR 49746/99 deciza fid-29 ta' Lulju 2004 par. 59.
13 **Wenhoff v. Germany**, ECHR 2122/64 deciza fis-27 ta' Gunju 1968 par. 19.
14 **Frau v. Italy**, ECHR 12147/86 deciza fl-24 ta' Jannar 1991 par. 15.
15 **Janosevic v. Sweden**, ECHR 34619/97 deciza fit-23 ta' Lulju 2002 par. 92.
16 **Foti and others v. Italy**, ECHR 7604/76 deciza fl-10 ta' Dicembru 1982 par. 52.

Ghalhekk huwa car illi l-intimati m'ghandhomx ragun meta jargumentaw illi l-ilment ta' dewmien taht l-Artikolu 6 m'huwiex applikabbli fil-kaz li ghandha quddiema l-Qorti ghaliex d-dewmien ilmentat jirrigwarda l-perjodu ta' investigazzjoni. Jidher car mill-gurisprudenza hawn fuq citata illi l-ilment tar-rikorrent jaqa' sew fil-parametri tal-garanzija ghal smiegh xieraq fi zmien ragonevoli.

Skont il-gurisprudenza kostanti tal-Qrati Maltin, li tirrifletti dik tal-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem, sabiex jigi stabbilit il-qies tad-dewmien fil-proceduri, il-Qorti trid tiehu qies ta' tliet konsiderazzjonijiet, u cioe:

1. Il-komplessita tal-kaz;
2. L-imgieba ta' min ikun qed iressaq l-ilment; u
3. Is-sehem tal-awtorijiet koncernati fid-dewmien.[17]

Dan ghaliex **“il-fattur taz-zmien m'ghandux jigi determinat fl-astratt imma fid-dawl tac-cirkostanzi partikolari tal-kaz [ara Applik Nru 1103/6 kontra l-Belgju].”[18]**

Ghalkemm ma tezisti l-ebda lista komprensiva li tista' twassal lil Qorti sabiex tiddetermina illi rikorrent ikun sofra lezjoni tad-dritt tieghu ghal smiegh xieraq minhabba dewmien irragonevoli, jinsab assodat kemm fil-gurisprudenza tal-Qrati taghna, kif ukoll dik Ewropeja, illi il-komplessita` tal-kaz li kien qed jigi deciz, kif gab ruhu r-rikorrenti fil-kors tal-proceduri li huwa qed jilmenta minnhom, kif imxew il-qrati fil-kors tal-istess process u x’kellu x’jitlef bhala konsegwenza tal-istess proceduri, oltre, ovvjament, kemm effettivament dam biex il-kaz jigi deciz b’mod finali huma fatturi krucjali illi ghandhom jigu kkonsidrati mill-Qorti.[19]

Fir-rigward tat-tifsira tal-kuncett “zmien ragonevoli”, il-Qrati taghna wkoll esprimew ruhhom u sostnew illi t-terminu fih innifsu ghandu element qawwi ta’ diskrezzjonalita` li jhalli f’idejn il-gudikant jiddetermina jekk fic-cirkostanzi partikolari tal-kaz, iz-zmien

17 Vide inter alia **Sydney Ellul Sullivan vs Il-Kummissarju tal-Pulizija et**, Qorti Kostituzzjonali deciza fit-28 ta' Jannar 2013.
18 **Anthony Camilleri et vs L-Avukat Generali et**, Qorti Kostituzzjonali deciza fit-28 ta' Settembru 2012.
19 **Zakkarija Calleja vs L-Avukat Generali**, Qorti Kostituzzjonali deciza fil-15 ta' Dicembru 2015.

perkors sakemm il-kawza waslet ghal gudizzju kienx ta' tul tali, li jeccedi dak li hu jew ghandu jkun normalment accettabbli f'socjeta` demokratika. Dan ifisser illi kull kaz ghandu jigi ezaminat fid-dawl tac-cirkostanzi specjali tieghu.[20]

Fil-kaz de quo, ir-rikorrent kien gie interrogat mill-Pulizija in konessjoni ma' xiri ta' droga kokaina fit-3 ta' Awissu 2008. Il-Magistrat Inkwirenti kienet giet informata dwar din l-istqarrija rilaxxata mir-rikorrent fit-2 ta' Settembru 2008, u kienet ittiehdet stqarrija guramentata mir-rikorrent dakinhar stess. Fil-5 ta' Settembru 2008, il-Kummisarju tal-Pulizija talab lil Magistrat Inkwirenti sabiex taghlaq l-inkjesta stante li kien ser jitressaq persuna l-Qorti in konnessjoni mar-reat investigat. Ghalhekk il-proces verbal gie redat mill-**Magistrat Inkwirenti fit-12 ta' Settembru 2008** b'ordni li jintbghat l-inkartament kollu lill-Avukat Generali. Sakemm ir-rikorrent tressaq il-Qorti akkuzat wahdu b'pussess ta' kokaina imbaghad lahqu ghaddew hames snin shah.

Il-Qorti tqis illi d-dewmien ta' hames snin, sakemm ir-rikorrent tressaq quddiem il-Qorti akkuzat wahdu b'pussess ta' kokaina, huwa ezagerat. Minn dak li hemm fl-atti, ma jidhirx illi l-kaz tar-rikorrent kien tant kompless illi l-awtoritajiet responsabbli kellhom bzonn hames snin shah jahsbuha qabel ma jressqu lir-rikorrent quddiem il-Qorti sabiex tigi maqtugha darba ghal dejjem l-akkuza kontra tieghu. Il-Qorti tqis li perjodu ta' hames huma zmien twil wisq ghal persuna biex tithalla tinwkieta fuq meta u taht liema akkuzi ser titressaq quddiem il-Qorti. Illi jrid jigi precizat li l-hames snin jinkludu biss iz-zmien illi r-rikorrent dam sakemm semplicement tressaq quddiem il-Qorti. Fil-fatt, sakemm ir-rikorrent intavola dawn il-proceduri kienet diga ghaddiet **iktar minn sena** minn meta bdiet il-kawza kriminali kontra tieghu, u din il-kawza kienet ghada ma gietx deciza. Il-Qorti qieset ukoll li dawn il-fatturi iridu jigu konsidrati fid-dawl t'akkuzat wiehed, b'akkuza wahda ta' pussess ta' droga, kif jirrizulta mill-ewwel paragrafu tar-rikors promotur u l-paragrafu hamsa tar-risposta tal-intimati.

Ghalkemm l-intimati jargumentaw illi id-dewmien kien ghal raguni valida, u cioe ghaliex il-Pulizija kienu ghadhom qed jinvestigaw il-kaz, huma naqsu milli jgibu imqar prova wahda li tikkorobora l-argument tieghu. Filfatt l-intimati ghazlu li ma jressqu l-

20 **Emanuela Brincat vs L-Avukat Generali**, Qorti Kostituzzjonali deciza fil-21 ta' Frar 1996, citata b'approvazzjoni anke fil-kuntest ta' proceduri civili fis-sentenza **Zakkarija Calleja vs L-Avukat Generali,** Qorti Kostituzzjonali deciza fil-15 ta' Dicembru 2015.

ebda provi f'dawn il-proceduri. Il-Qorti ma tistax tiddeciedi illi kien hemm raguni valida ghad-dewmien ilmentat mir-rikorrenti, meta l-intimati naqsu milli jipproduci provi illi b'xi mod jikkoroboraw l-argumenti taghhom, ghaliex *quod non est in acti, non est in mundo.*

Ikkunsidrat dan kollu, u fid-dawl tan-nuqqas tal-intimati illi jipproducu provi sabiex jiggustifika d-dewmien fil-proceduri penali kontra r-rikorrent, il-Qorti ssib illi r-rikorrent sofra lezjoni tad-dritt tieghu ghal smiegh xieraq.

Ghal dak li jirrigwarda kumpens, il-Qorti Kostituzzjonali rriteniet illi "[m]*adankollu din il-qorti hi tal-fehma li f'każijiet bħal dawn fejn jirrigwarda dewmien, il-Qorti Kostituzzjonali ġeneralment ma takkordax danni materjali biex ikopru danni allegatament sofferti imma tagħti kumpens bħala danni morali biex jagħmel tajjeb għal leżjoni kostituzzjonali. Il-Qorti Kostituzzjonali ma takkordax danni ċivili.*"[21]

Il-Qorti Ewropeja dwar id-Drittijiet Umani tat indikazzjonijiet specifici f'dak li ghandu x'jaqsam ma likwidazzjoni ekwa tad-danni sofferti kagun ta' dewmien ezagerat fi proceduri gudizzjarji. Giet stabilita s-somma ta' bejn elf Ewro u elf u hames mitt Ewro ghal kull sena li damu ghaddejin il-proceduri, minn meta gew intavolati sal-gurnata li gew rizolti b'sentenza finali bhala l-figura basi ghal kalkolu relevanti.[22]

Il-figura bazika mbaghad tigi ridotta skont in-numru ta' Qrati li trattaw il-kawza, il-kondotta tar-rikorrenti – in partikolari in-numru ta' xhur jew snin ta' differimenti li ghalihom ir-rikorrenti huma responsabbli – u wkoll skont il-livell ta' ghejxien tal-pajjiz koncernat.

Applikati dawn il-principji, is-somma bazika li ghaliha huwa ntitolat r-rikorrent bhala kumpens ghal-lezjoni sofferta minnu hija ta' sitt elef Ewro (€6,000), somma li tkopri l-perjodu bejn Awissu 2008 u Ottubru 2014, u cioe meta giet intavolata din il-kawza, peress illi ma tressqet l-ebda prova rigward meta, jew jekk gewx decizi l-proceduri kontra r-rikorrenti fil-mori ta' dawn il-proceduri. **Dan l-ammont ghandu pero**

21 **Said vs L-Avukat Generali**, Qorti Kostituzzjonali deciza fil-11 ta' Novembru 2011.
22 **Pizzatti v. Italy**, ECHR 62361/00 deciza fil-10 ta' Novembru 2004.

jitnaqqas biex jirrifletti l-livell t'ghejxien tal-pajjiz. Fl-isfond ta' dawn ic-cirkostanzi l-Qorti taghraf li l-kumpens xieraq ghandu jkun ta' elf Ewro (€1,000).

Ghal dawn il-motivi, l-Qorti, taqta' u tiddeciedi billi tichad l-eccezzjonijiet tal-intimati u tilqa' t-talbiet tar-rikorrenti billi:

1. Tiddikjara illi minhabba c-cahda tal-assistenza legali waqt l-arrest u dewmien gew lezi d-drittijiet tar-rikorrenti ghal smiegh xieraq kif sanciti fl-Artikolu 39 tal-Kostituzzjoni ta' Malta u fl-Artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem;

2. Tilqa t-tieni talba tar-rikorrenti billi:

   (a) Tikkundanna lill-intimati sabiex ihallsu s-somma ta' tlett elef u hames mitt Ewro (€3,500) bhala kumpens ghall-lezjonijiet sofferti mir-rikorrent tad-dritt tieghu ghal smiegh xieraq kif fuq spjegat;

   (b) Tidderigi lil Qorti tal-Magistrati tisfilza l-istqarrija tar-rikorrenti fil-proceduri kriminali indikati fir-rikors promotur.

Bl-ispejjez kontra l-intimati.

Tordna li kopja ta' din is-sentenza tigi notifikata lil Qorti tal-Magistrati.

Moqrija

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

Lorraine Dalli
Deputat Registratur