



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

ONOR. IMHALLEF MARK CHETCUTI LL.D.

Illum il-Hamis, 30 ta' Gunju 2016

Numru 2

Referenza Kostituzzjonali Nru. 21/2016

Il-Pulizija

vs

Philip Borg

Il-Qorti,

Rat ir-referenza kostituzzjonali tas-27 ta' Jannar 2016 mibghuta mill-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali fejn dik il-qorti talbet stharrig tal-allegat lezjoni ai termini tal-artikolu 39 tal-Kostituzzjoni u l-artikolu 6(3) abbinat mal-artikolu 6(1) tal-Kap. 319 mqajma mill-akkuzat Philip Borg b'referenza ghal tehid ta' stqarrija mill-pulizija minghand Philip Borg fit-30 ta' Awwissu 2008 meta din l-istqarrija ttiehdet fi zmien meta l-ligi ma kinitx ttiprovdi ghal assistenza legali qabel l-interrogatorju mill-pulizija ta' persuna suspettata;

B'verbal tal-partijiet fil-21 ta' Marzu 2016, gie maqbul illi r-referenza tal-Qorti tal-Magistrati kienet fis-sens jekk l-istqarrija moghtija minn Philip Borg lil pulizija kinitx lesiva tad-dritt tieghu skond l-artikolu 39 tal-Kostituzzjoni u l-artikolu 6(1) u 6(3) tal-Konvenzjoni Ewropea;

Rat il-provai mressqa u noti ta' sottomissjonijiet;

Rat li r-referenza kostituzzjonali thalliet ghas-sentenza.

Ikkunsidrat

Bhala fatt jirrizulta illi Philip Borg ghamel stqarrija quddiem l-Ispettur Graziella Muscat fit-30 ta' Awwissu 2008 meta kien qed jigi interrogat u qabel ma gie mpoggi taht akkuza. Ma jidhirx li din l-istqarrija giet mehuda bi vjolenza jew theddid izda nghatat volontarjament. Hu car ukoll illi Philip Borg ma kienx assistit minn ghajnuna legali ghax f'dak iz-zmien dan id-dritt ma kienx moghti bil-ligi dometika izda ddahhal fis-sehh fl-10 ta' Frar 2010.

Waqt il-proceduri li prezentement qed jittiehdu kontra Philip Borg quddiem il-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali l-akkuzat qajjem il-kwistjoni dwar il-ksur ta' dritt tieghu ghal smigh xieraq tenut kont tal-mod kif ittiehdet l-istqarrija.

Jibda biex jinghad illi l-artikolu 39 tal-Kostituzzjoni ta' Malta mhux applikabbli ghal kaz billi dan l-artikolu jghodd biss fejn tkun inbeda procediment quddiem Qorti u tigi allegata vjolazzjoni ta' dritt fundamentali. Ara **Repubblika ta' Malta vs Migniw** (15/11/2011). F'dan il-kaz l-allegat ksur sehha waqt l-interrogazzjoni u qabel ma gie akkuzat Philip Borg. Ghalhekk dan l-artikolu ma japplikax u r-risposta ghar-referenza ghandha tkun li dan l-artikolu ma japplikax ghal kwezit maghmul.

Dan pero ma japplikax ghall-istess fatt meta jittiehed kont tal-artikolu 6(3) abbinat mal-artikolu 6(1) tal-Kap. 319. Dawn l-artikoli jstipulaw illi fid-determinazzjoni ta' akkuza kriminali kulhadd hu intitolat ghal smigh xieraq u kull persuna akkuzata ghandha s-segweni drittijiet minimi cioe li jiddefendi ruhu personalment jew permezz ta' assistenza legali tal-ghazla tieghu jew fin-nuqqas ta' finanzi, jinghata assistenza legali b'xejn.

Sentenza ricenti tal-Qorti Ewropea tad-Drittijiet tal-Bniedem hi dik ta' **Mario Borg vs Malta** deciza fit-12 ta' Jannar 2016 li trattat fost aggravji ohra dan id-dritt. Kif qalet il-Qorti f'dik il-kawza:

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).

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.

Il-Qorti Ewropea ghamlitha cara li n-nuqqas ta' assistenza legali anki fil-pre trail stage jikkostitwixxi vjolazzjoni tad-dritt sancit bl-artikolu 6.

Jinghad illi l-kawza Borg hi differenti mill-vertenza prezenti ghal fatt li l-proceduri kostituzzjonali fil-kaz Borg ittiehdu wara li ntemmu l-proceduri kriminali mentri fil-kaz prezenti r-referenza qed issir fil-mori tal-proceduri.

Il-Qorti ma taqbilx kompletament mal-pulizija li r-referenza hi intempestiva ghax jekk kienx hemm lezjoni jista' jigi determinat biss mill-assiem tal-provi u fatti kollha prodotti quddiem il-Qorti tal-Magistrati Sede Kriminali u mhux qabel ghax hu biss wara l-gabra tal-provi kollha jista' jigi determinat saritx lezjoni tad-drittijiet. Il-Qorti Kostituzzjonali mhix marbuta li ma taghtix pronunzjament qabel tmiem il-proceduri jekk tali proceduri jistghu jigu inkwinati jekk ma jigux salvagwardati d-drittijiet tal-persuna li qed tallega vjolazzjoni.

Il-Qorti tqis illi l-kaz Borg hu car bhala kejl in linea ta' principju. Kull stqarrija li ssir bla assistenza legali salv f'kazijiet eccezzjonali hi lesiva tal-artikolu 6. Il-Qorti mhix tghid f'dan l-istadju tal-proceduri kif inhi din il-kawza li dan il-fatt ghandu jwassal ghal waqfien jew it-tmiem tal-proceduri. Kull ma qed jinghad u kull ma gie mitlub bir-referenza hu jekk l-istqarrija hix lesiva tad-dritt ghal-smigh xieraq. Il-Qorti ghandha tqis li l-istqarrija li ttiehdet minghand Philip Borg fit-30 ta' Awwissu 2008 hi lesiva in principju tad-dritt tieghu ghal smigh xieraq b'dan pero li l-konsegwenzi li jinsorgu minn dik id-dikjarazzjoni ghandhom jithallew ghal gudizzju tal-Qorti tal-Magistrati Sede Kriminali peress li din il-Qorti ma ntalbietx ghal rimedju jew direzzjoni oltre d-dikjarazzjoni ta' ksur.

Il-Qorti hi konsapevoli li hemm sentenzi ohra cioe **Dimech vs Malta** deciza fit-2 ta' Lulju 2015 li prima facie tikkontrasta mal-kawza Borg, fejn fil-kawza Dimech il-proceduri kienu ghadhom fl-istadju pendente lite u mhux wara sentenza li ghaddiet in gudikat. Pero l-Qorti hi tal-fehma illi s-sentenza Borg ma thallix lok ghal interpretazzjoni rigward ksur ta' dritt ghal smigh xieraq meta stqarrija tinghata bla dritt ghal assistenza legali. Kif inghad ir-rimedju ghal tali lezjoni mhux il-kompitu ta' din il-Qorti li tidhol fih ghax mhux mitlub.

Decide

Din hi ghalhekk ir-risposta ta' din il-Qorti ghal kwezit maghmul b'din ir-referenza billi tiddikjara li l-istqarrija mehuda minghand Philip Borg fit-30 ta' Awwissu 2008 hi lesiva in principju tad-dritt tieghu ta' smigh xieraq a bazi tal-artikolu 6(3) abbinat mal-artikolu 6(1) tal-Kap. 319 u qed turrinvija l-atti lura lil Qorti tal-Magistrati bhala Gudikatura Kriminali biex il-kawza titkompli skond kif kunsidrat u deciz u kopja ta' din id-decizjoni tigi inserita fl-istess atti.

Onor. Mark Chetcuti LL.D.

Imhalled

Anne Xuereb

Deputat Registratur