MALTA

QORTI KOSTITUZZJONALI

**ONOR. IMHALLEF -- AGENT PRESIDENT
GEOFFREY VALENZIA**

**ONOR. IMHALLEF
GIANNINO CARUANA DEMAJO**

**ONOR. IMHALLEF
TONIO MALLIA**

Seduta tal-11 ta' April, 2011

Appell Civili Numru. 20/2009/1

Il-Pulizija (Spettur Victor Aquilina)

v.

Alvin Privitera

Il-Qorti:

<u>Preliminari</u>

Dan hu appell ad istanza tal-Kummissarju tal-Pulizija minn sentenza moghtija mill-Prim'Awla tal-Qorti Civili, Gurisdizzjoni Kostituzzjonali, fit-28 ta' Ottubru 2010 li ddecidiet li n-nuqqas ta' prezenza ta' avukat waqt l-

interrogazzjoni tieghu mill-pulizija, kienet leziva tad-drittijiet tal-istess rikorrent kif sancit bl-Artikolu 6 tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem u ordnat li l-proceduri kontra r-rikorrent jitmexxew konformament ma' dak deciz. Bl-ispejjez kollha kontra l-intimat.

Illi fil-kors tal-proceduri kriminali fl-ismijiet **Il-Pulizija v. Alvin Priviera,** quddiem il-Qorti tal-Magistrati kien sar verbal datat 2 ta' April 2009 fejn ir-rikorrent talab li, *ai termini* tal-Artikolu 46 tal-Kostituzzjoni, issir riferenza kostituzzjonali lill-Prim'Awla tal-Qorti Civili (Gurisdizzjoni Kostituzzjonali) biex jigi determinat jekk il-mankanza tad-dritt ghal prezenza ta' avukat waqt l-interrogatorju kienx leziv tad-dritt tieghu kif sancit fl-Artikoli 6(3)(c) tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem u l-Artikolu 39 tal-Kostituzzjoni.

Il-Qorti tal-Magistrati laqghet it-talba u ghamlet ir-referenza.

Il-Kummissarju tal-Pulizija kien wiegeb li:-

"(1) Illi t-talbiet tar-rikorrenti ghandhom jigu michuda peress li ma kien hemm l-ebda lezjoni tad-drittijiet tieghu kif sanciti fl-**Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6 tal-Konvenzjoni Ewropeja** u dan ghar-ragunijiet segwenti:-

"(a) Ir-rikorrent qieghed jallega li minhabba li ma kienx assistit minn avukat waqt li kienet qed tittiehed l-istqarrija tieghu d-drittijiet tieghu hekk kif sanciti mill-artikoli fuq imsemmija gew lezi;

"(b) In sostenn ta' tali allegazzjoni huwa jiccita zewg sentenzi tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem fl-ismijiet **"Salduz v. Turkey"**; kif ukoll, **"Panovits v. Cyprus".**

"(c) Illi l-esponenti jirrileva li l-fattispecie tal-kazijiet imsemmija mir-rikorrent huma ben differenti minn dawk tal-vertenza odjerna. F'dan l-istadju bizzejjed jigi rilevat li l-persuni involuti f'dawk il-proceduri kienu minuri

(a differenza tar-rikorrent li fil-mument tal-istqarrija kien maggorenni) u filwaqt li fil-kaz ta’ **Salduz** gie allegat li waqt l-istqarrija huwa gie maltrattat; fil-kaz ta' **Panovits** il-validita` tal-istqarrija giet ukoll attakkata u ghalhekk fiz-zewg kazijiet l-istqarrija ma inghatatx b'mod volontarju.

“(d) Illi fil-kaz odjern imkien ma gie allegat li r-rikorrent gie b'xi mod imgieghel jaghti l-istqarrija li ta. Huwa inghata t-twissija skont il-ligi senjatament li ma kienx obbligat li jitkellem sakemm ma kienx hekk jixtieq, izda li dak li kien se jghid seta' jingieb bi prova kontrih. Ir-rikorrent wara din it-twissija ghazel li jwiegeb il-mistoqsijiet li sarulu u mill-istqarrija nnifisha jirrizulta li l-istess rikorrent kien qieghed jifhem l-import tac-cirkostanza li kien jinsab fiha.

“(e) Illi tajjeb li jigi rilevat li l-gurisprudenza tal-Qorti Ewropeja ma taghtix bhala dritt assolut il-jedd li persuna tkun assistita minn avukat waqt li tkun qed tigi interrogata u waqt li tkun se taghmel l-istqarrija taghha.

“Illi tali allegazzjoni ma tistax tittiehed wahedha u cioe` barra mill-kuntest tai-proceduri kollha fit-totalita` u fl-interita` taghhom. Biex wiehed jasal ghall-konkluzjoni hekk hemmx lezjoni tad-dritt ghal smigh xieraq f'dan il-kaz jehtieg li jigu ezaminati l-istadji kollha tal-proceduri li ttiehdu kontra r-rikorrent. Infatti fis-sentenza citata mir-rikorrent stess fl-ismijiet **Panovtts v. Cyprus** inghad li:-

*““The manner in which **Article 6 (1) and (3) (f)** is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. 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 **(“Imbroscia v. Switzerland”).***

“Ghaldaqstant in vista tal-fatt li l-proceduri kontra r-rikorrent ghadhom lanqas biss gew konkluzi quddiem il-Qorti tal-Magistrati, din ir-referenza kostituzzjonali hija prematura u ghalhekk intempestiva.

"2. Salv Eccezzjonijiet ulterjuri."

Illi bis-sentenza tat-28 ta' Ottubru 2010, il-Prim'Awa laqghet it-talba tar-rikorrent, wara li kkunsidrat hekk:

"II. <u>KONSIDERAZZJONIJIET.</u>

"Illi din il-procedura odjerna tikkonsisti f'referenza kostituzzjonali li saret mill-Qorti tal-Magistrati (Malta) fil-kors tal-proceduri **"Il-Pulizija (Spettur Victor Aquilina) vs. Alvin Privitera"** fejn qieghed jigi allegat li gew lezi d-drittijiet fondamentali tal-imsemmi Alvin Privitera ghaliex huwa ma giex assistit minn avukat waqt l-interrogazzjoni u meta rrilaxxa stqarrija li giet iffirmata minnu fis-7 ta' April 2007. Ir-rikorrent jargumenta ukoll li l-arrest ma sarx skont il-ligi.

"Illi mill-atti processwali jirrizulta li r-rikorrent kien gie arrestat gewwa daru l-Fgura, fil-5 ta' April 2007 u l-interrogatorju beda minn meta gie arrestat u kompla fl-ufficcju tad-*Drug Squad* fuq id-Depot, Floriana. L-interrogatorju sar fuq medda ta' diversi sessjonijiet. Fil-fatt skont id-Dok. "VA 1" ir-rikorrent nhareg mil-*lock up* biex issir l-interrogazzjoni tieghu hames darbiet u darba biex hadulu l-*fingerprints.* Tul din l-interrogazzjoni r-rikorrent ma kienx assistit minn avukat. L-Ispettur Victor Aquilina fix-xhieda tieghu tas-17 ta' Gunju 2009 u fis-24 ta' Gunju 2010 jghid li ma jkunx hemm *recordings* ta' dawn is-sessjonijiet izda jkun hemm biss l-i*statement* tar-rikorrenti li fl-ahhar gie rilaxxat fis-7 ta' April 2007.

"Illi l-istess Spettur jghid ukoll li mas-sitt siegha wara l-arrest ta' persuna huwa ried jiddeciedi jekk izzommx lill-imputat arrestat jew le u jekk iva jitlob permess lill-Magistrat tal-Ghassa ghall-*'go ahead'* biex jibqa' taht arrest. Huwa hekk ghamel f'dan il-kaz. F'dawk is-sitt sieghat l-arrestat jista' biss jinforma lill-familja tieghu li huwa taht l-arrest. Ir-rikorrent f'dan il-kaz ma ghamilx hekk hu izda l-familjari saru jafu li kien arrestat permezz ta' terza persuna.

“Illi l-**artikolu 6 tal-Konvenzjoni ghad-Drittijiet ta-Bniedem (Kap 319 tal-Ligijiet ta’ Malta)** jipprovdi li:-

““(1) Fid-decizjoni tad-drittijiet civili u ta’ l-obbligi tieghu jew ta’ xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b’ligi. Is-sentenza ghandha tinghata pubblikament izda l-istampa u l-pubbliku jista’ jigi eskluz mill-proceduri kollha jew minn parti minnhom fl-interess tal-morali, ta’ l-ordni pubbliku jew tas-sigurtà nazzjonali f’socjetà demokratika, meta l-interessi tal-minuri jew il-protezzjoni tal-hajja privata tal-partijiet hekk tehtieg, jew safejn ikun rigorozament mehtieg fil-fehma tal-qorti f’`irkostanzi spe`jali meta l-pubblicità tista’ tippregudika l-interessi tal-gustizzja.

“(2) Kull min ikun akkuzat b’reat kriminali ghandu jigi meqjus li jkun innocenti sakemm ma jigix pruvat hati skont il-ligi.

“(3) Kull min ikun akkuzat b’reat kriminali ghandu d-drittijiet minimi li gejjin:

“(a) li jkun infurmat minnufih, b’lingwa li jifhem u bid-dettal, dwar in-natura u r-ra[uni ta’ l-akkuza kontra tieghu;
“(b) li jkollu zmien u facilitajiet xierqa ghall-preparazzjoni tad-difiza tieghu;

“(c) li jiddefendi ruhu persunalment jew permezz ta’ assistenza legali maghzula minnu stess jew, jekk ma jkollux mezzi bizzejjed li jhallas l-assistenza legali, din ghandha tinghata lilu b’xejn meta l-interessi tal-gustizzja jehtiegu hekk;

“(d) li jezamina jew li jara li jigu ezaminati xhieda kontra tieghu u li jottjeni l-attendenza u l-ezami ta’ xhieda favur tieghu taht l-istess kundizzjonijiet bhax-xhieda kontra tieghu;

"(e) li jkollu assistenza b'xejn ta' interpretu jekk ma jkunx jifhem jew jitkellem il-lingwa uzata fil-qorti".

"Illi fil-kawza **"Panovits v. Cyprus"** (11 ta' Dicembru 2008) il-Qorti Ewropeja rribadiet principju stabbilit li l-**artikolu 6** ikopri anki l-fazi ta' *pre-trail* f'proceduri kriminali u b'hekk anki l-fazi tal-interrogazzjoni bhalma fil-kaz odjern. Fil-fatt hija qalet li:-

*""At the outset the Court observes that, even if the primary purpose of Article 6, as far as criminal matters are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its requirements (see **Öcalan v. Turkey** [GCh, no. 46221/99, § 131, ECHR 2005-IV, and **Imbrioscia v. Switzerland,** 24 November 1993, § 36, Series A no. 275)".*

"Illi skont l-awturi ***Ovey and White*** fil-ktieb **"Jacobs & White – The European Convention on Human Rights",** jinghad li *"the rights in Article 6 (3) (c) are capable of applying pre-trial, since absence of legal representation at this stage could in certain circumstances affect the fairness of the proceedings as a whole. In the Ocalan case the applicant, the leader of the Workers' Party of Kurdistan (PKK) was detained pending trail for numerous terrorist offences…the island was declared a military zone and access to it was strictly controlled. The applicant was denied contact with his lawyer for the first week of his detention, during which time he was extensively questioned and made a number of admissions…The overall effect of these difficulties so restricted the rights of the defence that the principle of a fair trial was contravened, giving rise to a violation of Article 6 (1), taken together with Article 6 (3) (b) and (c)".*

""The right to see a lawyer in the early stages of a police investigation is not absolute and where there is good

reason, can be subjected to restrictions…The Court has held that where the deprivation of liberty is at stake, the interests of justice in principle call for legal representation".

"Illi konsistenti ma' dan dwar l-applikazzjoni ghall-**artikolu 6 (1) u (3) (c) tal-Konvenzjoni** ghall-istadju preliminari tal-proceduri kriminali, din il-Qorti taghmel referenza ghas-sentenza tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem fil-kawza **"Imbroscia vs Svizzera"** deciza fl-24 ta' Novembru 1993 fejn intqal illi:-

""The manner in which article 6 (1) and 3 (c) is to be applied during the preliminary investigation depends on the special feature of the proceedings involved and on the circumstances of the case. 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."

"Illi fil-kawza imsemmija mir-rikorrent stess ta' **"Panovits v. Cyprus"** gie affermat li:-

""As regards the applicant's complaints which concern the lack of legal consultation at the pre-trial stage of the proceedings, the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The lack of legal assistance during an applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings".

"Illli il-Qorti Ewropeja f'din il-kawza dahlet fil-fond fic-cirkostanzi tal-kaz in ezami u sostniet li *"...the Court finds that the lack of provision of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant's defence rights. The Court moreover finds that neither the*

applicant nor his father acting on behalf of the applicant had waived the applicant's right to receive legal representation prior to his interrogation in an explicit and unequivocal manner". F'dan il-kaz fattur iehor determinati ghall-konkluzzjonijiet li waslet ghalihom il-Qorti Ewropeja, kien li l-istqarrija tal-akkuzat minorenni kienet, effettivament, il-prova deciziva li wasslet ghas-sejbien ta' htija tieghu.

"Illi apparti mill-kaz ta' **"Panovits vs. Cyprus"** ir-rikorrent odjern jiccita il-kaz ta' **"Salduz vs Turkija"** (App. No. 36391/2 datata 27 ta' Novembru 2008**)** fejn il-Qorti Ewropea tad-Drittijiet Fundamentali tal-Bniedem (EctHR) sahqet li:-

""The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial (Poitrimol v. France, 23 November 1993, § 34, Series A no. 277-A, and Demebukov v. Bulgaria, no. 68020/01, § 50, 28 February 2008). Nevertheless, Article 6 § 3 (c) does not specify the manner of exercising this right. 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. 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 counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (Imbrioscia, cited above, § 38)."

"National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right has so far been considered capable of being subject to

restrictions for good cause. The question, in each case, has therefore been whether the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances (see John Murray, cited above, § 63; Brennan, cited above, § 45, and Magee, cited above, § 44)".

"Illi fl-istess sentenza il-Qorti tkompli tghid li *"the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" (see paragraph 51 above) 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 (see, mutatis mutandis, Magee, cited above, § 44). 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.'* (vide ukoll il-kaz **"Plonka vs Polonja"** (31 ta' Marzu 2009).

"Illi fil-kaz ta' **"Salduz vs Turkey"**, l-akkuzat ma inghatax il-fakolta' li jikkonsulta ma' avukat fuq bazi ta' artikolu tal-ligi li kien jipprojbixxi dan jekk l-allegat reat jaqa' taht certu gurisdizzjoni specjali. Izda l-Qorti qalet li l-Gvern ma gabx gustifikazzjoni ohra apparti l-applikazzjoni ta' dik il-ligi u allura n-nuqqas ta' access ghall-avukat anke f'dan l-istadju gie ritenut bhala leziv ghad-drittijiet tal-akkuzat ghal smigh xieraq. Il-Qorti mbaghad dahlet fil-mertu tal-kaz u kkonkludiet li *"in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody".* In oltre, fattur iehor determinati

ghall-konkluzjonijiet tal-Qorti Ewropeja, kien li l-istqarrija tal-akkuzat minorenni kienet, effettivament, il-prova deciziva li wasslet ghas-sejbien ta' htija tieghu.

"Illi kif inghad fis-sentenzi fl-ismijiet **"Il-Pulizija vs Mark Lombardi"** (P.A. (TM)– 9 ta' Ottubru 2009) u dik fl-ismijiet **"Il-Pulizija (Supretendent Norbert Ciappara) vs Esron Pullicino"** (P.A. (S.K.) (J.A.) – 24 ta' Frar 2010) il-Qorti sostniet li dan ifisser il-fatt li persuna ma tkunx assistita minn avukat ma jwassalx ghall-ksur tad-drittijiet fundamentali tieghu u biex ikun hemm ksur tal-**artikolu 6 tal-Konvenzjoni Ewropeja** jrid jigi kkunsidrat il-process gudizzjarju kollu u mhux jigu kkunsidrati l-istqarijiet *"in isolatio". "Jekk fi tmiem il-gbir tal-provi l-unika prova kontra l-akkuzat tkun l-istqarrija tieghu allura l-Qorti li trid tiddeciedi l-kaz, trid toqghod attenta ghax sejba ta' htija jistghu jwasslu lill-Qorti tal-Appell biex tqis dik is-sentenza 'unsafe'".*

"Illi din il-Qorti hija tal-fehma li ghalkemm huwa minnu li l-process irid jigi ezaminat fit-totalita' tieghu dan ma iffissirx li hemm bzonn li tistenna l-ezitu finali tieghu bilfors! Jekk hemm ragunijiet li jindikaw li d-dritt tas-smigh xieraq qieghed jigi jew se jigi pregudikat il-Qorti ghandha dmir tiddikjara li tali dritt ta' smigh qed jigi jew ser jigi miksur. Jinghad ukoll li huwa vitali li dan kollu ghandu jigi ezaminat fid-dawl tas-sitwazzjoni li kienet tezisti fiz-zmien meta sar l-arrest, anke dak mertu tal-kawza odjerna, u cjoe' l-assenza totali ta' ligi li b'xi mod tiffissa l-parametri dwar l-assistenza ta' avukat f'dawn is-sitwazzjonijiet, ghaliex hawn Malta qabel l-emenda msemmija ma kien hemm f'ebda cirkostanza l-ebda dritt ta' access ghall-avukat mill-mument li persuna tigi arrestata mill-pulizija.

"Illi huwa mportanti li jinghad ukoll li mill-gurisprudenza tal-Qorti Ewropeja d-dritt ghall-assistenza ta' avukat *"at pre-trail stages"* mhix ristretta biss ghall-persuni minorreni li jkun taht arrest. Hekk fil-kaz fl-ismijiet **"John Murray v. the United Kingdom"** (8 ta' Frar 1996), il-Qorti kkumentat dwar l-inferenzi li johrogu mill-agir ta' persuna li titqieghed taht arrest rizultat ta' Ligi fil-Renju Unit, senjatament ir-regolamenti taht *'the Criminal Evidence (Northern Ireland)*

Order 1988'. Hawnhekk l-akkuzat ma kienx minuri izda c-cirkostanzi tal-kaz kienu tali li l-Qorti ddecidiet li l-fatt li l-akkuzat ma kellux access ghall-avukat ghall-48 siegha shah kien jammonta ghall-ksur tad-drittijiet tieghu minhabba l-inferenzi li setghu hargu rizultat tal-agir tieghu meta kien taht arrest.

"Illi fil-fatt inghad testwalment li *"The Court is of the opinion that the scheme contained in the Order is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observes in this context that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him".*

"Under such conditions the concept of fairness enshrined in Article 6 (art. 6) requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6 (art. 6).' F'kawza ohra fl-ismijiet **"Averill v. the United Kingdom"** (6 ta' Gunju 2000) fejn gew ttrattati l-istess "orders", il-Qorti Ewropeja qalet li anki 24 siegha minghajr konsultazzjoni mal-avukat iledu d-drittijiet fundamentali tal-arrestat.

"Illi minn dawn is-sentenzi jidher li ghalhekk tista' tingibed il-konkluzjoni li l-posizzjoni hija li ghalkemm il-fatt wahdu li persuna ma tkunx assistita minn avukat mill-mument li tigi arrestata jista' ma jwassalx *ut sic* ghall-ksur tad-drittijiet fundamentali tieghu, dan xorta jista' fl-ahhar mill-ahhar

iwassal ghall-ksur tad-drittijiet fundamentali ta' smigh xieraq sanciti fl-**artikolu 6 tal-Konvenzjoni Ewropeja** meta dan jigi kkunsidrat fil-kuntest tal-process gudizzjarju kollu, u specjalment meta f'dan il-mument krucjali l-istess imputat minghajr tali assistenza legali jkun ghamel xi haga, inkoraggita u/jew indotta jew le, li tkun pregudikat is-sitwazzjoni tieghu, anke fid-dawl tal-prezunzjoni ta' innocenza li huwa ghandu jgawdi qabel u tul l-istess proceduri, li allura jaffettwaw b'mod serju d-dritt tieghu ghal smigh xieraq u dan partikolalment kif prottett taht l-**artikolu 6.**

"Illi din il-Qorti thoss li fid-dawl tal-gurisprudenza tal-Qorti Ewropea dan huwa ghal kollox vitali ghaliex jekk gja kemm il-darba f'dan l-istadju l-persuna tkun waslet sabiex ghamlet xi haga li ppregudikat il-posizzjoni rremedjabilment fid-dawl tad-drittijiet taghha ghal smigh xieraq skont l-istess artikolu, tali regoli u principji elenkati fl-imsemmi artikolu ma jkunu jfissru xejn u dan ghaliex l-istess rimedji u garanziji hemm indikati jkunu effettivament gew resi ineffettivi ghall-protezzjoni tal-persuna nkluza il-presunzjoni ta' innocenza. Kien ghalhekk li l-Qorti Ewropeja enfasizzat li hija ghandha tara li jkun hemm protezzjoni effettiva ta' dak li huma d-drittijiet fundamentali tal-bniedem u mhux biss enuncjazzjoni fl-astratt u dikjarazzjonijiet tal-istess biex fl-ahhar mill-ahhar dan ma jservu xejn ghall-persuna li suppost ghandha tircievi l-istess protezzjoni, u dan fuq kollox ghaliex tali drittijiet huma tant importanti li l-Qorti ghandha tara li bhala minimu l-persuna ghandha verament tgawdi minnhom, ghaliex jekk ma jkunx hekk il-bniedem jigi totalment sottomess ghal dak li huma l-poteri ta' min huwa hafna ikbar minnu.

"Illi ghalhekk jidher li ghalkemm id-dritt li persuna jkollha s-servizzi jew l-assistenza ta' avukat wara li jkun arrestat ma huwiex wiehed assolut, izda jidher li wkoll li meta dan ma jinghatax irid ikun cirkostanzi partikolari u impellenti sabiex jiggustifika tali agir minn naha ta' l-Istat u dan ifisser li allura sabiex jigi kkonstat jekk dan huwiex lesiv tad-dritt ta' kull persuna ghas-smigh xieraq, huwa necessarju u essenzjali li dan jittiehed fil-kuntest tal-

process kollu u dan b’hekk ifisser li ghandhom jigu ezaminati l-fatti partikolari tal-kaz.

“Illi tenut kont li f’dan il-pajjiz kien l-**Avviz Legali 35 tal-2010,** meta l-Onorevoli Ministru tal-Gustizzja u l-Intern stabbilixxa d-data tal-10 ta’ Frar, 2010 bhala dik meta d-disposizzjonijiet tal-**artikoli 355AT u 355AU tal-Kap. 9** (introdotti fl-**artikolu 74 tal-Att III tal-2002** li jemenda l-**Kodici Kriminali)** kellhom jidhlu fis-sehh, meta dawn l-artikoli ghall-ewwel darba espressament jaghtu dritt ghall-access ghall-avukat lill-persuna li tigi arrestata taht il-premessi hemm indikati, ghalhekk jirrizulta li l-istess artikoli gew fis-sehh ghal dak li huwa l-kaz odjern biss wara d-data tal-arrest tar-rikorrent li b’hekk dak iz-zmien r-rikorrenti ma kellu ebda dritt fil-ligi li jikkonsulta ma’ avukat mill-mument meta gie arrestat.

“Illi bl-emendi proposti jirrizulta li skont id-disposizzjonijiet **tas-subartikolu (1) ta' l-artikolu 355AT** hemm provdut li persuna li hija arrestata, jekk hija hekk titlob, tithalla kemm jista’ jkun malajr tikkonsulta privatament ma’ avukat jew prokuratur legali, wicc imb’wicc jew bit-telefon, ghal mhux iktar minn siegha zmien. Kemm jista’ jkun malajr qabel ma tibda tigi interrogata, l-persuna taht kustodja ghandha titgharraf mill-Pulizija bid-drittijiet li ghandha taht dan is-subartikolu. **Is-subartikolu (5)** jaghti lista ta’ ragunijiet li jiggustifikaw d-dewmien tal-ghoti ta’ dan id-dritt f’kazijiet partikolari.

“Illi l-**artikolu 355AU** jitkellem dwar l-inferenzi li jistghu jsiru minhabba li ma jissemmewx xi fatti ta’ parti tal-akkuzat.

“(1) Meta fi proceduri kontra persuna ghal xi reat tinghata xiehda li l-akkuzat - a) f’kull waqt qabel ma jkun gie akkuzat bir-reat, meta jkun qed jigi interrogat mill-Pulizija li jkunu qed jippruvaw jikxfu jekk ir-reat ikunx sar u min ikun ghamlu, jkun naqas milli jsemmi xi fatt li huwa jserrah fuqu fid-difiza tieghu f’dawk il-proceduri; jew (b) meta jkun qed jigi akkuzat bir-reat jew ikun qed jigi ufficjalment mgharraf li jista’ jigi mharrek dwaru, jkun naqas milli jsemmi dak il-fatt, li jkun fatt li fic-cirkostanzi li

jkunu jezistu f'dak il-waqt l- imputat seta' ragonevolment jkun mistenni li jsemmi meta jkun gie hekk interrogat, akkuzat jew mgharraf, skont il-kaz, ghandu japplika is-subartikolu (2) jekk jintwera li l-imputat kien ircieva parir legali qabel ma jkun gie interrogat, akkuzat jew mgharraf kif hawn aktar qabel imsemmi".

"(2) Meta dan is-subartikolu jkun japplika –

"(a) Qorti tal-Magistrati bhala qorti istruttorja li tkun qed taghmel decizjoni taht l-artikolu 401 (2);

"(b) il-qorti jew il-guri, meta jkunu qed jiddeciedu jekk persuna akkuzata jew imputata tkunx]atja tar-reat li bih tkun giet akkuzata, tista' tag]mel dawk l-inferenzi minn dan in-nuqqas bhalma jidhru xierqa, liema inferenzi ma jistghux wa]edhom jitqiesu bhala prova ta' htija izda jistghu jitqies u bhala li jammontaw ghal korroborazzjoni ta' kull xiehda ta' htija tal-persuna akkuzata jew imputata".

"Illi fil-kaz in ezami huwa car li fiz-zmien tal-arrest tar-rikorrenti kien hemm in-nuqqas totali ta' legislazzjoni li tipprovdi ghall-assistenza ta' avukat fl-istadju qabel ma persuna tigi akkuzata formalment quddiem il-Qorti. Dan iffisser li lanqas biss kien hemm parametri fejn l-Istat seta' jew ma setghax jaghmel restrizzjoni ta' dan id-dritt ghall-assistenza legali u dan qed jinghad fid-dawl tal-gurisprudenza fuq citata tal-Qorti Ewropea. B'hekk ir-restrizzjoni ghall-access ghall-avukat lill-persuna arrestata kien wahda totali u f'dan l-isfond din il-Qorti thoss li dan imur kontra l-obbligi posittivi li ghandu l-Istat sabiex jimplimenta kif suppost l-**artikolu 6 tal-Konvenzjoni Ewropeja,** u dan ghaliex bin-nuqqas ta' l-istess, l-istess drittijiet hemm stabilment sanciti u espressi jista' jkun li tali drittijiet hemm espressament sanciti jigu ghal kollox vanifikati.

"Illi jidher li huwa tal-istess opinjoni l-***Professur Kevin Aquilina*** fl-esposizzjoni tieghu intitolata **"The Right to Legal Advice During Police Detention"** (16 ta' Awwissu 2009) fejn fid-dawl anke tal-emendi proposti u fuq citati, li

llum gew *in vigore*, izda li ma humiex applikabbli ghall-kaz odjern u fil-kuntest tad-decizjonijiet tal-Qorti Ewropea, inkluz l-kazi ta' **"Airey vs Ireland"** fejn inghad li *"the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective",* b'dan li fil-kaz **"John Murray vs The United Kingdom"** gie affermat li *"Article 6 especially paragraph 3 – may be relevant before a case is sent to trial and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions (art.6-3) and the manner in which Article 6 para. 3 (c) is to be applied during preliminary investigations depends on the special features of the proceedings involved and the circumstances of the case. ...The right* (of access to a lawyer) .....*may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing".* L-istess inghad fil-kaz **"Magee vs The United Kingdom"** tant li gie espressament affermat li *"to deny access to a lawyer for such a long period of time and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such a denial – incompatible with the rights of the accused under Article 6".*

"Illi fl-istess bran hawn citat saret naturalment riferenza ghall-kaz **"Salduz vs Turkey"** u fid-dawl ta' dan kollu l-istess awtur sostna li *"bearing in mind the case-law of the European Court of Human Rights, ...the provisions in the Criminal Code relating to the right of legal advice during police detention should be brought into force with immediate effect as their non-implimentation renders Article 6 paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms unpractical and ineffective. Hence the position at law appears to be that there is in Malta a continuing breach of Article 6, paragraph 1, of the Concention; and such breach will continue up till the day that the right to legal advice during police detention is brought into force in Malta. Indeed it is unacceptable that the Government should postpone Parliament's will to introduce the right to legal advice*

during police detention by a period of seven years......the Strasbourg Court has been clear in identifying the right to legal advice during police detention as forming part of the right of fair trial.....One may argue that if this right is brought into force, the number of convictions will reduce as that argument has its obvious pitfalls: it is an argument in favour of throwing overboard all the human rights and fundamental freedoms of the individual as contained in the Constitution of Malta, it the European Convention Act and in other Maltese Law, as all these rights – in one way or another – contribute overall to obtaining less convictions. Justice is however not about obtaining the biggest record of convictions: it is about ensuring that human rights and fundamental freedoms are upheld, and in this particukar case, that every accused person is meted out a fair trial".

"Illi kif inghad din il-Qorti taqbel perfettament ma` dan ghaliex altrimenti jkun ifisser li d-drittijiet fundamentali tal-bniedem jistghu facilment jigu eluzi u fuq kollox din il-Qorti hija tal-fehma li fic-cirkostanzi odjerni l-intimat odjern ma gab l-ebda gustifikazzjoni ghaliex ghandu jkun hemm xi restrizzjoni ghall-access tar-rikorrenti ghall-avukat hlief li l-ligi kif kienet ma kienitx tipprovdi ghal tali dritt favur persuna arrestata, u dan f'ghajnejn il-Qorti huwa iktar serju fid-dawl tal-kazi ccitati u ezaminati mill-Qorti Ewropeja fejn fil-pajjizi relattivi kien jezisti almenu tali dritt izda b'restrizzjonijiet ghall-kazijiet specifici li l-Qorti Ewropea fil-kazijiet partikolari hasset li kienu mhux sufficjenti; *multo magis* f'dan il-kaz meta qabel l-emendi msemmija ma kien jezisti l-ebda dritt ta' access ghall-avukat ghal xejn u allura s-sitwazzjoni kienet izjed serja u pregudikanti ghal kull persuna li tkun arrestata, u f'dan il-kaz hekk huwa tenut kont tal-fatt li ghalkemm ir-rikorrenti ma kienx taht l-eta', meta gie nterrogat, huwa kellu biss tmintax (18)-il sena u erba' (4) xhur, u allura l-istess eta' tenera tieghu u l-fatt li huwa ma kienx midhla ta' tali sitwazzjoniijiet simili, huwa ragonevoli li wiehed jikkonkludi li persuna bhal dik tkun intimidata mill-istess prezenza tal-pulizija, iktar u iktar meta tkun taht arrest, u meta tigi nterrogata ghal diversi hin, u f'hinijiet differenti, u

dan indipendentement jekk ma jkunx hemm allegazzjoni ta' maltrattament jew le.

“Illi huwa interessanti li f'dan il-kaz jirrizulta ukoll li kienet saret *strip search* fuq ir-rikorrent gewwa d-dar tieghu fil-presenza tal-diversi pulizija, u dan jidher li kien impressjona sew lir-rikorrent tant li jidher li ghalhekk li ghamel l-isqarrija li ghamel; fil-fatt, jigi rribadit li f'dan il-kaz dan kien l-ewwel darba li r-rikorrenti kellu x’jaqsam mal-pulizija. Mbaghad meta l-pulizija hadu r-rikorrent fid-depot huma hallew 17-il siegha jghaddu qabel ma nterrogawh l-ewwel darba (mill-4.00.p.m tal-5 ta’ April 2007 sad-9.30am tas-6 ta’ April 2007) u tul il-jumejn li kien arrestat huwa ma kellem lil hadd hlief il-pulizija. Jirrizulta ukoll li r-rikorrent ma inghatax spjegazzjoni xierqa ta’ ghalfejn gie arrestat u konsegwentament ma kellux stampa cara tal-gravita’ tal-akkuzi li setghu jingiebu kontra tieghu. Fin-nuqqas ta’ taghrif li inghata r-rikorrent ma hija xejn straordinarja l-konkluzjoni li huwa seta` haseb li jekk jaghti stqarrija b’certu mod huwa kien se jkun liberu li jitlaq minn gewwa l-Depot, u din il-Qorti thoss li tali versjoni hija fil-fatt mill-iktar verosimili, tenut kont tas-serjeta' tas-sitwazzjoni li kull persuna thoss li tkun fiha meta tigi mizmuma u arrestata mill-pulizija, anke jekk legalment, ghal kull ammont ta' hin.

“Illi l-Qorti thoss li dan il-process kollu, mill-mument meta gie arrestat sal-mument meta l-istess rikorrenti ta l-istqarrija, u dan meta qatt ir-rikorrenti ma kellu qatt access ghall-avukat tieghu, ghaliex il-ligi tal-pajjiz lanqas biss kienet tipprovdilu tali dritt, certament li halla effett negattiv fuq ir-rikorrenti, u f'dan id-dawl ghandha tigi kkunsidrata l-istqarrija finali li tar-rikorrenti fis-7 ta’ April 2007. Din l-istqarrija ghandha mportanza vitali ghall-prosegwiment tal-kawza, u fil-verita' lanqas jista' jkun mod iehor.

“Illi fil-fatt din il-Qorti thoss li hija ghandha tasal ghall-istess konkluzjoni li waslet ghaliha l-Qorti fil-kaz imsemmi fl-ismijiet **“Il-Pulizija (Supretendent Norbert Ciappara) vs Erson Pullicino”** (P.A. (JA) – 24 ta’ Frar 2010), fejn jirrizulta li fic-cirkostanzi tal-kaz, ir-rikorrenti ma kienx ghal xejn imdorri f’dawn is-sitwazzjonijiet li jkun migbur mill-

Pulizija, iktar u iktar bil-mod kif sehh dan l-arrest, u naturali li wiehed jahseb li kull persuna f'dawn ic-cirkostanzi, thoss ruhha intimidata, iktar u iktar meta arrestata u tkun tinsab fil-presenza ta' numru ta' pulizija f'ambjent minnu nnifsu stramb u aljen ghalih, u dan iktar u iktar meta jkun wahdu, isolat u ma jkollu hadd minn jghinnu u li fih jista' jafda. Din il-Qorti tafferma dak li nghad fl-istess sentenza li mhux gust li jigi interrrogat, anke jekk dan isir bl-aktar mod delikat, minghajr ma jkollu tali assistenza, u ghalhekk din il-Qorti thoss li meta r-rikorrenti ma kellux u ma nghatax l-assistenza ta' avukat wara li huwa gie arrestat, dan kien jammonta ghall-ksur fundamentali tal-bniedem kif sancit fl-**artikolu 6 tal-Konvenzjoni Ewropea**, u la darba taht dawn ic-cirkostanzi ttiehdet l-istqarrija mir-rikorrenti, din l-istess stqarrija ghandha tigi kkunsidrata bhala nulla u bla effett ghall-finijiet u effetti kollha tal-ligi u dan anke fil-proceduri li l-istess rikorrenti jinsab ghaddej bihom fil-Qorti tal-Magistrati (Malta).

"III. <u>KONKLUZJONI.</u>

"Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi,** billi filwaqt li tichad l-eccezzjonijiet kollha tal-intimat kontenuti fir-risposta tieghu datata 22 ta' April 2009 u dan inkwantu l-istess hija nkonsistenti ma' dak hawn deciz, **tilqa' it-talba tar-rikorrenti** fis-sens hawn deciz b'dan illi:-

"(1) Tiddikjara u tqis li n-nuqqas ta' prezenza ta' avukat waqt l-interrogazzjoni tieghu fil-kaz in ezami, kienet u hija lesiva tad-drittijiet tal-istess rikorrenti kif sancit bl-**artikolu 6 tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem** u tordna li l-proceduri kontra r-rikorrenti jitmexxew konformament ma' dak hawn deciz, b'dan li konsegwentement tordna li kopja ta' din id-decizjoni tintbaghat lill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali li quddiemha qed jitmexxa l-kaz kontra r-rikorrent biex jekk ikun il-kaz, din tkompli tinstema' u tigi deciza skont il-ligi.

"Bl-ispejjez kollha kontra l-intimat."

Rikors tal-appell tal-Kummissarju tal-Pulizija

L-appellant hassu aggravat bis-sentenza surriferita tal-ewwel Qorti u interpona appell minnha b'rikors prezentat fid-9 ta' Novembru 2010.

Fir-rikors tieghu l-appellant sostanzjalment issolleva zewg aggravji ewlenin.

1. L-ewwel aggravju tal-appellant huwa li l-ewwel Onorabbli Qorti bbazat ruhha fuq il-fatt li fil-mument illi r-rikorrent kien arrestat kien hemm nuqqas totali ta' legislazzjoni li tipprovdi ghall-assistenza ta' avukat fl-istadju ta' qabel ma persuna tigi akkuzata formalment quddiem il-Qorti allura dan imur kontra l-obbligi posittivi li ghandu l-Istat biex jimplimenta l-Artikolu 6 tal-Konvenzjoni Ewropeja. Dan l-aggravju, l-appellant ifittex li jsostnieh b'diversi konsiderazzjonijiet li jistghu in succint jigu sintesizzati hekk:

- Bhala principju ma jezisti l-ebda dritt fundamentali ta' assistenza legali, imma biss dritt ghal smigh xieraq meta persuna tkun akkuzata b'reat kriminali.

- Id-dritt ta' smigh xieraq irid ikun evalwat fir-rigward tat-totalita` tal-procedura u mhux fir-rigward ta' mument partikolari f'dawk il-proceduri.

- Fl-ebda waqt tal-proceduri kriminali l-appellat ma attakka l-validita` jew il-volontarjeta` tal-istqarrija tieghu, hlief meta l-prosekuzzjoni ghalqet il-provi taghha.

- Imkien ma jirrizulta li l-appellat kien b'xi mod gie mgieghel jaghti l-istqarrija. Jirrizulta li huwa nghata s-solita twissija u wiegeb certi domandi u ohrajn le. Ghalhekk kien jaf x'qed jaghmel.

- Nonostante l-Artikolu 335AT tal-Kodici Kriminali, l-appellat fl-ebda hin ma staqsa jekk kellux dritt ghall-assistenza legali.

- L-istqarrija ma nghatatx bhala konsegwenza tal-i*strip search* li saret fuq l-appellat.

- Il-fatti tal-kazijiet li ghamel riferenza ghalihom l-appellat, huma differenti mill-kaz odjern. L-appellat la huwa minorreni u lanqas gie trattat hazin.

2. Fit-tieni aggravju l-appellant issottometta li r-rimedju moghti mill-ewwel Qorti m'huwiex gust. Skontu, id-dikjarazzjoni ta' lezjoni *ai termini* tal-Artikolu 6 tal-Konvenzjoni tikkostitwixxi *just satisfaction* u ghandha titqies bhala rimedju gust. L-appellant ma jaqbilx li l-ewwel Qorti kellha tiddikjara l-istqarrija bhala nulla u bla effett[1], imma kellha thalli f'idejn il-Qorti ta' gurisdizzjoni penali biex hi tevalwa l-validita` u l-ammissibilita` tal-provi migjuba quddiemha fil-kawza kriminali.

Ghal dawn ir-ragunijiet, l-appellant talab ir-revoka tas-sentenza moghtija mill-ewwel Qorti u minflok tiddeciedi illi l-punti mqanqla fir-referenza kostituzzjonali huma nfondati u tichadhom bl-ispejjez taz-zewg istanzi kontra l-appellat li pprovoka l-istess referenza.

<u>Risposta tar-rikorrent appellat</u>

L-appellat wiegeb ghar-rikors tal-appell billi sostna li s-sentenza appellata hija wahda gusta u timmerita konferma u li l-appell interpost ghandu jigi respint u michud bl-ispejjez kontra l-appellant filwaqt li rribadixxa r-ragunament tal-ewwel Qorti fis-sentenza taghha.

<u>Konsiderazzjonijiet ta' din il-Qorti</u>

L-aggravju tal-appellant fil-mertu huwa li bhala principju ma jezisti l-ebda dritt fundamentali ta' assistenza legali, imma biss dritt ghal smigh xieraq meta persuna tkun akkuzata b'reat kriminali. Skontu, il-Qorti Ewropeja ma

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[1] Din id-dikjarazzjoni m'hijiex qieghdha fil-parti dispositiva tas-sentenza izda fil-korp tal-istess sentenza. Fid-decide l-Qorti ddikjarat biss li n-nuqqas ta' prezenza ta' avukat waqt l-interrogazzjoni tieghu kienet leziva tad-drittijiet tieghu kif sancit bl-Artikolu 6 tal-Konvenzjoni.

qalitx li jekk persuna ma tkunx assistita minn avukat waqt l-interrogazzjoni allura awtomatikament dik il-persuna sofriet ksur ta' dritt ghall-smigh xieraq.

Fil-kaz odjern l-appellat kien ibbaza l-lanjanza fir-referenza kostituzzjonali tieghu fuq l-Artikolu 6(3)(C) tal-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem u l-Artikolu 39 tal-Kostituzzjoni[2]. L-Artikolu 6 tal-Konvenzjoni jghid hekk:

"(1) Fid-decizjoni tad-drittijiet civili u tal-obbligi tieghu jew ta' xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien ragjonevoli minn tribunal indipendenti u imparzjali mwaqqaf b'ligi.

"(3) Kull min ikun akkuzat b'reat kriminali ghandu d-drittijiet minimi li gejjin:

"(c) li jiddefendi ruhu personalment jew permezz ta' assistenza legali maghzula minnu stess jew, jekk ma jkollux mezzi bizzejjed li jhallas l-assistenza legali, din ghandha tinghatha lilu b'xejn meta l-interessi tal-gustizzja jehtiegu hekk."

Il-Qorti Ewropeja tad-Drittijiet tal-Bniedem iddecidiet diversi drabi li d-dritt li persuna tiddefendi lilha nnifisha personalment jew permezz ta' assistenza legali huwa element fundamentali tad-dritt ghall-*fair trial*. Insibu f'dawn id-decizjonijiet li:

"The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial"

(**Poitrimol v. France**, 23 November 1993, § 34, Series A no. 277-A, and **Demebukov v. Bulgaria** no. 68020/01, § 50, 28 February 2008).

[2] Art. 39 tal-Kostituzzjoni huwa simili ghal Artikolu 6 tal-Konvenzjoni ghalkemm dan tal-ahhar huwa aktar estensiv..

Illi din il-Qorti, a skans ta’ ripetizzjoni tirreferi ghall-gurisprudenza ta’ Qorti ta’ Strasbourg li l-ewwel Qorti ghamlet referenza ghaliha, u b’mod partikolari ghal kaz **Salduz** li bhala sentenza tal-Grand Chamber u anke in vista ta’ sentenzi ohra sussegwenti fl-istess vena, din il-Qorti thoss li l-principju fil-kaz Salduz ghandu jigi sewgit. Il-Qorti qalet hekk:

“*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.*

“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”. **Salduz** [para 55].*”*

Illi bhala fatti fil-kaz in ezami jirrizulta li l-appellat kien gie arrestat in segwitu` ghal mewt b’*overdose* ta’ certu Ivan Psaila wara li kien instab in-numru tat-telefon tal-appellat fuq il-*mobile* ta’ Psaila. L-appellat gie arrestat fid-dar fejn kien joqghod, saret *strip search* fuqu hemmhekk, imbaghad ittiehdet id-*depot* fejn thalla fil-*lock-up* sakemm l-ghada gie interrogat mill-ufficjal investigattiv. Waqt l-interrogazzjoni l-appellat kien cahad li hu kien biegh eroina lill-Psaila (li wasslet ghal mewt tieghu), izda ammetta li xi zmien qabel kien bieghlu cannabis. Sussegwentement l-appellat beda jsostni li hu gie ndott jammetti anke dan il-fatt mill-ufficjali investigattiv, li, da parti tieghu, cahad li kien ghamel hekk. Din hi l-unika prova li ghandha l-prosekuzzjoni kontra l-appellat, u cioe` ammissjoni f’stqarrija rilaxxjata minnhu. Fuq din l-ammissjoni, il-prosekuzzjoni ressqet l-appellat akkuzat b’pussess u traffikar ta’ droga. Il-piena ghall din l-akkuza f’certi kazijiet tista’ twassal ghall-ghomor prigunerija, ghalkemm gie dikjarat f’dak il-kaz, li l-piena mhux ser tkun

ta' ghomor prigunerija imma inqas. Meta l-appellat gie arrestat, ghalkemm huwa ma kienx ghadu minorenni, hu kien qabez it-tmintax-il sena bi ftit xhur.

Illi l-appellant isostni li d-dritt ghal smigh xieraq ghandu jigi evalwat fir-rigward tat-totalita` tal-procedura u mhux fir-rigward ta' xi mument partikolari ta' dawk il-proceduri.

Ghalkemm din il-Qorti taqbel ma' dan il-principju, hija tal-fehma pero` li meta diga` jkun hemm ragunijiet bizzejjed li fuqhom il-Qorti tkun tista' ssib li hemm lezjoni, m'ghandhiex toqghod tistenna sakemm jintemm il-kaz jew li jigi attwalment miksur id-dritt pretiz biex tiddeciedi jekk hemmx lezjoni jew le. Jista' jaghti l-kaz li jkun tard wisq jew dak li jkun imbaghad jibqa' minghajr rimedju. Kif tikteb **Karen Reid**, **"A Practitioner's Guide to the European Convention on Human Rights",** [3rd Edition page 70] *"While the conformity of a trial with the requirements of Article 6 must be assessed on the basis of the trial as a whole, a particular incident may assume such importance as to constitute a decisive factor in the general appraisal of the trial overall".* Fil-fehma ta' din il-Qorti n-nuqqas ta' assistenza ta' avukat fl-istadju ta' investigazzjoni hu wiehed minn dawn ic-cirkostanzi li jistghu jippregudikaw id-dritt ta' persuna akkuzata irrimedjabbilment.

L-appellant jillanja li waqt il-proceduri kriminali l-appellat m'attakkax il-validita` jew il-volontarjeta` tal-istqarrija tieghu hlief meta l-prosekuzzjoni ghalqet il-provi taghha. Dwar dan l-aggravju, din il-Qorti hi tal-fehma li l-appellat ma kellu ebda terminu biex iressaq il-lanjanza kostituzzjonali tieghu. F'dan il-kaz ma nghatat ebda eccezzjoni li l-lanjanza kostituzzjonali kienet preskritta. L-appellat ma jopponix il-produzzjoni tal-istqarrija diment li din ma kienitx vjetata mill-Kap. 9 jew mill-Kap. 12 fejn dan japplika. L-appellat ma kkontestax il-fatt li hu rrilaxxja stqarrija imma biss il-fatt li meta rrilaxxjaha hu ma kienx assistit minn avukat.

L-appellant isostni wkoll li mkien ma jirrizulta li l-appellat gie b'xi mod mgieghel jirrilaxxja l-istqarrija. Jirrizulta li huwa nghata s-solita twissija u ghal xi domandi huwa

wiegeb u ghal ohrajn le. L-appellant jinsisti li l-appellat ma giex trattat hazin u l-i*strip search* li saret kienet necessarja u parti mill-procedura.
Illi din il-Qorti thoss li l-gurisprudenza *ormai* stabbilita tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem (ara **Salduz** fuq riferita) ghandha f'dan il-kaz tigi segwita.

Ir-regola hi li l-Artikolu 6(1) jitlob li jkun hemm dritt ta' avukat fl-istadju tal-investigazzjoni mill-pulizija, sakemm ma jigix pruvat li hemm ragunijiet impellenti ghaliex dan id-dritt ghandu jigi ristrett. Id-dritt ghall-avukat hi r-regola, ir-restrizzjonijiet huma l-eccezzjoni.

Izda anke jekk ikun hemm ragunijiet impellenti ghal xi restrizzjonijiet, tkun xi tkun ir-raguni, dawn ir-restrizzjonijiet ukoll m'ghandhomx jippregudikaw id-drittijiet tal-akkuzat taht l-Artikolu 6.

Dan id-dritt tal-akkuzat ikun irremedjabbilment pregudikat meta hu jirrilaxxa stqarrijiet waqt l-interrogazzjoni maghmula meta ma jkunx assistit minn avukat u dawn l-istqarrijiet jintuzaw kontra tieghu.

Illi f'dan il-kaz l-unika prova li hemm kontra l-appellat hija l-istqarrija li hu rrilaxxja meta ma kienx assistit minn avukat u se tintuza ghall *conviction* tieghu.

Ir-raguni tal-insistenza tal-Qorti Ewropeja dwar dan id-dritt ghall-assistenza legali fl-istadju inizjali tal-investigazzjoni hija minhabba l-principju li hadd m'ghandu jinkrimina ruhu kif ukoll biex jinzamm bilanc bejn id-drittijiet tal-akkuzat u dawk tal-prosekuzzjoni. L-argument li altrimenti jkun difficli li l-pulizija tottjeni *conviction* mhux fattur li ghandu jittiehed in konsiderazzjoni fit-thaddim ta' dan il-bilanc. Il-Pulizija ghandha ssib il-mezzi biex issolvi l-kazijiet li jkollha u mhux tiddependi fuq is-soluzzjoni facili ta' ammissjoni minn persuna investigata minghajr l-assistenza ta' avukat.

Kif qalet il-Qorti fil-kaz **Salduz:**

"These principles, outlined in paragraph 52 above, are also in line with the generally recognised international human rights standards (see paragraphs 37-42 above) which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused. ***[53]***

"At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings…. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself". ***[54]***

Jigi rilevat f'dan l-istadju li fil-kaz Salduz il-kwistjoni li l-applikant kien ghadu minorenni ma kienx fattur determinanti biex il-Qorti ddecidiet li kien hemm lezjoni. Dak il-fatt kien ikkunsidrat biss biex isahhah l-argument tal-Qorti.

Ghar-rigward tal-argument tal-appellant li nonostante l-Artikolu 335AT tal-Kap. 9, l-appellat fl-ebda hin ma staqsa jekk kellux dritt ghall-assistenza legali, din il-Qorti tirrileva li l-artikolu in kwistjoni gie in vigore fl-10 ta' Frar 2010 mentri l-appellat kien gie investigat u rrilaxxja l-istqarrija fl-2007. L-appellant rrilaxxja l-istqarrija, ghalhekk meta l-istess artikolu tal-ligi ma kienx ghadu dahal *in vigore* fid-data tal-arrest tieghu. Lanqas ma huwa l-kaz li din il-Qorti tezamina jekk kienx hemm ragunijiet impellenti l-ghala d-dritt ghal avukat gie ristrett jew jekk dik ir-restrizzjoni ppregudikatx il-process gudizzjaru tieghu, billi l-appellant f'dan il-kaz ma kellu ebda dritt ghal avukat u kien inutili li jistaqsi ghal wiehed.

Minn ezami tal-fatti kif jemergu f'dan il-kaz, jirrizulta sufficjentement pruvat li l-Artikolu 6 tal-Konvenzjoni, u dan

ukoll fuq l-iskorta tal-gurisprudenza tal-Qorti ta’ Strasbourg, gie vvjolat kemm fuq bazi oggettiva kemm ukoll mill-aspett ta’ *“self-incriminating evidence”*. Fil-mument li gie interrogat l-appellat u meta rrilaxxja l-istqarrija mal-ufficjal koncernat kienet tipprevali *“a systematic restriction of access to a lawyer pursuant to the relevant legal provisions”*. (**Boz v. Turkey 9.02.2010**, u **Dayanan v. Turkey 13.10.2009)**.

Il-Qorti tikkonkludi li fil-kaz odjern kien hemm lezjoni tad-dritt tal-appellant ghal smigh xieraq kif sancit fl-Artikolu 6(3)(c) konguntivament mal-Artikolu 6(1) tal-Konvenzjoni Ewropeja meta huwa ma nghatax l-assistenza legali. Din il-Qorti hi tal-fehma li d-dritt li persuna arrestata tigi assistita minn avukat ghandu jinghata fil-bidunett tal-investigazzjoni u qabel ma dik il-persuna tirrilaxxja stqarrija izda mhux li tkun assistita waqt l-interrogatorju mill-pulizija.

Ghaldaqstant din il-Qorti ssib li l-aggravju tal-appellant mhux gustifikat u qed jigi michud.

L-appellant ressaq aggravju dwar ir-rimedju li tat l-ewwel Qorti. Hu jissottometti li d-dikjarazzjoni ta’ lezjoni *ai termini* tal-Artikolu 6 tal-Konvenzjoni kellha tikkostitwixxi *just satisfaction* bizzejjed u ma kellhiex tiddikjara wkoll l-istqarrija bhala nulla u bla effett, imma kellha thalli f’idejn il-Qorti ta’ gurisdizzjoni penali biex hi tevalwa l-validita` u l-ammissibilita` tal-provi migjuba quddiemha fil-kawza kriminali.

Jigi rilevat li fil-parti dispositiva tas-sentenza, l-ewwel Qorti ddikjarat biss li n-nuqqas ta’ prezenza ta’ avukat waqt l-interrogazzjoni kienet leziva tad-drittijiet tieghu kif sancit bl-Artikolu 6 tal-Konvenzjoni. Inoltre fit-trattazzjoni quddiem din il-Qorti l-avukat difensur tal-appellat ma sabx oggezzjoni li tkun il-Qorti ta’ gurisdizzjoni penali li tevalwa l-validita` u l-ammissibilita` tal-provi migjuba quddiemha fid-dawl tad-dikjarazzjoni ta’ din il-Qorti ta’ lezjoni *ai termini* tal-Artikolu 6 tal-Konvenzjoni.

Decide

Ghal dawn il-motivi, tiddeciedi billi tichad l-appell u tikkonferma s-sentenza appellata inkwantu konsistenti ma' dak hawn deciz, u tiddikjara li gew lezi d-drittijiet tal-appellat ghall-smigh xieraq kif sancit fl-Artikolu 6(3)(c) konguntivament mal-Artikolu 6(1) tal-Konvenzjoni Ewropeja.

Fic-cirkostanzi tal-kaz l-ispejjez kollha tal-kawza jibqghu bla taxxa.

Tordna li l-proceduri kontra r-rikorrent jitkomplew konformament ma' dak hawn deciz, u kopja ta' din id-decizjoni tintbaghat lill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali li quddiemha qed jitmexxa l-kaz ghall-prosegwiment skont il-ligi.

< Sentenza Finali >

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